The Norwegian National Contact Point
for the OECD Guidelines for Multinational Enterprises

Final Statement of the Norwegian OECD National Contact Point (NCP): Mediated Outcome between the Norwegian Support Committee for Western Sahara and Sjøvik AS

3 JULY 2013

EXECUTIVE SUMMARY

Following a successful mediation process with the outcome of a joint statement by the parties, the Norwegian NCP closes the complaint from the Norwegian Support Committee for Western Sahara (NSCWS) against Sjøvik AS. As a consequence of the joint statement, the complaint dated 5 December 2011 is withdrawn.

As the parties have agreed on a mediated solution, the NCP has not examined the merits of the claim. It is therefore sufficient to underscore on a general basis that there is a heightened due diligence requirement for business in relation to human rights violations when operating in or from areas in conflict, in this case the disputed Non-Self-Governing Territory of Western Sahara. [1]

The Norwegian NCP congratulates all parties on reaching a mutually acceptable outcome and for constructively engaging in discussions to reach this agreement. The involvement of the respective parties' CEOs/managing directors and boards was particularly positive.

The parties reached their joint statement on 14 June 2013 following mediation by the independently contracted former Supreme Court Judge Lars Oftedal Broch, assisted by the Secretariat. The official signing took place under the auspices of the mediator, the Norwegian NCP and the Norwegian NCP secretariat in Molde on 2 July 2013. All parties have agreed to publish the full text of the agreement.[2] Since the OECD Guidelines for responsible business conduct are not legally binding, the agreement is not appropriate for litigation purposes.

The NCP notes that the parties did not succeed in agreeing upon how to find local, independent experts that the company could consult about their human rights due diligence. [3] The NCP encourages the company to draw on human rights expertise on how

[1] This sets special requirements for responsible business conduct in the territory, see Joint Statement dated 14 June 2013 section 2a and b.

[2] See annex 1.

[3] The parties reported to the NCP that they have considered trying to establish an independent body of local individuals or organisations that could assist in the implementation of the Guidelines, but they agree that this is not possible in the current situation. The NCP notes that the UN Universal Periodic Review of Morocco points to difficulties with local registration of Sahrawi organisations, and that activities of unregistered organisations may be deemed illegal (http://www.ohchr.org/EN/HRBodies/UPR/Pages/masession1.aspx).
The NCP notes that OHCHR and the UN Special Rapporteur on Torture have expressed concern over the use of military courts to try civilians, and these concerns are shared by the UN Secretary-General. See "Report to the UN Security Council dated 8 April 2013" S/2013/220: http://www.un.org/ga/search/view_doc.asp?symbol=S/2013/220.

to conduct the human rights impact assessment for Sjøvik's activities in Western Sahara.[4]

The Norwegian NCP strongly recommends that the parties proceed with the dialogue established during the mediation process, especially if issues arise related to implementation of the joint statement. The NCP invites both parties to a follow-up meeting in May 2014. Two months prior to the meeting the parties will be invited to report to the NCP about their respective implementation of the joint statement. The company will report on their human rights due diligence and on their grievance mechanism.

THE NORWEGIAN NCP PROCEDURE IN THIS SPECIFIC INSTANCE

On 5 December 2011 the NCP received a complaint against the Norwegian enterprise group Sjøvik AS from the Norwegian Support Committee for Western Sahara (NSCWS).

The secretariat of the NCP notified the company on 6 December 2011 and invited their comments by 15 January 2012. The company disputed the allegations on 16 January 2012. The NCP invited the company to hear their views on 31 January 2012. The NCP issued its Initial Assessment on 9 March 2012, where it decided that it would accept to consider the merits of the complaint. The secretariat of the NCP sent a list of questions to each of the parties to be answered by 18 April 2012, and both responded. Some questions were answered inadequately. Due to travels, both by the company and the complainant, it was difficult to find time for the parties to meet in April. The NCP met both parties on 23 May 2012 to offer good offices to facilitate dialogue and if possible mediate with the goal to achieve a joint statement. Both parties rejected the offer.

Both parties reverted on 27 May to accept the offer of mediation. The NCP secretariat thus conducted stakeholder analysis (in accordance with the NCP Mediation Manual) during August and drafted the framework for mediation. The parties agreed upon the framework and terms of reference for the mediation in a meeting with the secretariat in Molde 13 September. Since Head of NCP was unable to conduct the mediation (due to prior commitments latter end of 2012,) the parties agreed on a list of mediators to be included in a tender in accordance with public procurement regulation. The NCP hired Lars Oftedal Broch, without any expenses accrued for any party involved. A consultant was also hired after a tender in accordance with public procurement regulation. The consultants' task was to support the Secretariat in providing guidance to parties involved in the mediation process in line with the Norwegian Public Administration Act

[4] The OECD Guidelines Chapter IV (Human Rights) according to Commentary 36 "draws upon the United Nations Framework for Business and Human Rights 'Protect, Respect and Remedy' and is in line with the Guiding Principles for its Implementation". In this context, UN Guiding Principle 18 is of particular relevance and states that "In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationship. This process should (a) Draw on internal and/or independent external human rights expertise and (b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.

§ 11 on the general duty of public offices to provide guidance to parties. Both parties were consulted before the NCP selected a consultant. Both parties were invited to use the consultant, but since the company had a team of lawyers, it was assumed that the NGO would use the consultant more. The NCP appreciated the necessity to ensure equity and balance out the inequality of negotiating power between the parties by providing extra assistance to the NGO. The company had some reservations to the arrangement, and requested that the NCP paid for their lawyer, with reference to the scheme which was initiated by NCP. However, this was rejected by the NCP, with reference to the Norwegian Public Administration Act, which also does not provide complaint admissibility in such instances.

Mediation took place between October 2012 and June 2013. Both parties participated positively and constructively. The NCP particularly appreciates the involvement of Daniel Sjøvik, Deputy Managing Director & Business Development Director, Olav Sjøvik, Managing Director, the company lawyer Hugo P. Matre, Director of NSCWS Erik Hagen and NSCWS board member Siri Luthen. Agreement on a joint statement was successfully reached on 14 June 2013 and officially signed on 2 July in Molde. For details of the Norwegian NCP process in this specific instance please see Annex 2.

List of annexes:

1. Joint Statement between Sjøvik AS and the Norwegian Support Committee for Western Sahara (NSCWS)
2. Summary of the specific instance from the Norwegian NCP (including summary of the complaint, the company's response and the Norwegian NCP process)
3. Procedures according to the OECD Guidelines

ANNEX 1

JOINT STATEMENT BETWEEN THE NORWEGIAN SUPPORT COMMITTEE FOR WESTERN SAHARA AND SJØVIK AS (2 JULY 2013)

BACKGROUND

On 5 December 2011 the Norwegian Support Committee for Western Sahara (hereinafter referred to as NSCWS) brought a complaint against Sjøvik AS under the OECD Guidelines for Multinational Enterprises relating to the company's fishery activities in Western Sahara.

The Norwegian National Contact Point (NCP) offered to mediate between NSCWS and Sjøvik AS (hereinafter referred to as the Parties), which both Parties accepted. On the basis of a public tender, the NCP appointed former Supreme Court Judge Lars Oftedal Broch as mediator. The Parties met on 11 October 2012, 9 November 2012 and 31 May 2013 for mediation led by Mr. Broch. Written proceedings have also taken place. During mediation Mr. Broch referred to relevant provisions of the OECD Guidelines, UN resolutions on Western Sahara, statements from the Norwegian authorities on Norwegian business operation in the area and information provided by the Parties. The Parties agreed as follows:

THE PARTIES' POSITIONS

a) **NSCWS** pointed out that Morocco does not exercise internationally recognised sovereignty over Western Sahara and that Morocco's claim to this territory has been rejected by the International Court of Justice in The Hague. NSCWS also referred to the UN's statements that the Saharawis' rights, wishes and interests must be respected,[5] and is of the view that the activities of Sjøvik AS are in violation of the Saharawis' right to control their own natural resources, and must therefore be discontinued. NSCWS emphasised that, since no state has responsibility for the administration of this territory in accordance with Article 73 of the UN Charter, the Saharawis are in a particularly vulnerable situation.

b) **Sjøvik** supports and respects the protection of internationally recognised human rights. The company has not taken a position on the views expressed by NSCWS, as this would be incompatible with its presence in the territory. However, Sjøvik maintains that its investments in the Moroccan company concerned are focused on the management of renewable resources and create jobs and promote development to the benefit of the local population, including the Saharawis. It also maintains that, among other things, it is contributing to better infrastructure and to exchange of expertise, which benefits the Saharawis. Sjøvik does not consider itself a political actor and does not wish to take a position on the status of the territory in relation to Article 73 of the UN Charter.[6]

[5] Letter from UN Legal Counsel Hans Corell to the Security Council (S/2002/161), and the annual UN resolutions on « Economic and other activities which affect the interests of the peoples of the Non-Self-Governing Territories»; see A/RES/66/83.

[6] Charter of the United Nations, Chapter XI Declaration Regarding Non-Self-Governing Territories, Article 73: « Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories.»

c) Despite their divergent starting points, the Parties agree, on the basis of the mediation process facilitated by the Norwegian NCP following a complaint brought by NSCWS under the OECD Guidelines,[7] that:

3. RECOMMENDATION TO THE NORWEGIAN AUTHORITIES

a) According to the UN Guiding Principles on Business and Human Rights, states should clearly express their expectations that businesses are to respect human rights in all their operations.[8]

   The Norwegian authorities have advised Norwegian companies on the particular situation in Western Sahara. However, the advice given has varied. [9]

b) The Parties request the Norwegian authorities to give unambiguous advice to businesses operating in conflict areas. The Parties interpret the information on Western Sahara published on the Government's website differently.[10] The Parties request the Ministry of Foreign Affairs to clarify what type of activities are included in the Government's advice and why. If the Government's view is that no business activities should be carried out in Western Sahara at all, the Parties request that this is expressed more clearly.

4. RISK AND ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENTS

a) The Parties agree that the recently endorsed UN Guiding Principles and the new chapter on human rights in the OECD Guidelines provide a good platform for efforts relating to human rights and the environment. If the *de facto* authorities for any reason or at any time are prevented due to practical or legal concerns to fulfil their responsibility to protect, companies bear a particular responsibility for complying with international norms on the exploitation of resources and respect for human rights. Under the OECD Guidelines, companies are required to carry out risk and environmental and social impact assessments / due diligence, so that they can be sure and can document that they are not violating, or aiding and abetting other actors in the violation of, human rights or environmental norms.[11]
b) Sjøvik will carry out an environmental and social impact assessment for its activities based on the principles set out in the OECD Guidelines and the recently enacted UN

[7] 45 countries adhere to the OECD Guidelines, including Morocco and Norway.

[8] The UN Guiding Principles on Business and Human Rights were adopted by consensus of all the UN member states, including Morocco and Norway, on 16 July 2011 (A/HRC/17/31).

[9] For example in bilateral talks with individual companies (as referred to, for example, in an interview with P.C. Rieber on 2 March 2012 in the weekly management journal «*Ukeavisen Ledelse*»), and more general statements, for example in chapter 4.1 of Report No. 10 (2008–2009) to the Storting, and the Foreign Minister's response to an interpellation on the matter in the Storting on 4 May 2010, www.stortinget.no/no/Saker-og-publikasjoner/Publikasjoner/referater/Stortinget/2009-2010/100504/3/ (Norwegian only) and the article on Western Sahara published on the Government's website on 12 September 2007, http://www.regjeringen.no/nb/dep/ud/tema/naeringslivsamarbeid_samfunnsansvar/naeringslivssamarbeid/vest-sahara.html?id=480822. (Norwegian only).

[10] See, for example, the article in the Norwegian newspaper *Aftenposten* on 12 October 2011, http://www.aftenposten.no/nyheter/iriks/article4148359.ece compared with the response to *Written question no. 181* of 15 November 2007, http://www.stortinget.no/no/Saker-og-publikasjoner/Sporsmal/Skriftlige-sporsmal-og-svar/Skriftlig-sporsmal/?qid=38485. (BothNorwegian only).

[11] The OECD Guidelines Chapter II (10 and 11) and chapter IV, for instance Commentary 45: «Paragraph 5 recommends that enterprises carry out human rights due diligence. The process entails assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses as well as communicating how impacts are addressed» and chapter II of UNGP «The Corporate Responsibility to Respect Human Rights».

Guiding Principles on Business and Human Rights.[12]

c) The impact assessment report is to be published in accordance with chapter III of the OECD Guidelines.[13]

d) When assessing what is material information concerning activities in Western Sahara, special account must be taken of the status and vulnerability of the territory. [14]

e) Sjøvik will publish "codes of conduct", including requirements for partners and suppliers, particularly those relating to human rights and the environment.

5. FOLLOW-UP

a) Sjøvik will maintain an internal grievance mechanism for dealing with both internal and external concerns and suggestions for improvements.

b) Sjøvik will ensure that the grievance mechanism is to meet the requirements set out in the OECD Guidelines.[15] The mechanism is to be scaled in proportion to the size of the company and designed so that it is able to receive notifications from anyone affected by the company's activities.[16]

Notifications of matters of concern via the grievance mechanism are to be dealt with by the company's internal audit system. Every attempt should be made to resolve complaints through dialogue. If it is deemed appropriate to involve an independent third party, this should be agreed specifically in each individual case on the basis of what is needed in the particular situation for Sjøvik to seek to resolve the matter.[17]

c) The mechanism is to be in place by the end of 2013. Everyone who works for Sjøvik including its employees is to be informed about the mechanism and how it works, and

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[12] See in particular chapter II A 14: Enterprises should: «Engage with relevant stakeholders in order to provide meaningful opportunities to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.» See also commentary 14: «For the purposes of the *Guidelines,* due diligence is understood as the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems», and chapter VI 2 b on the inclusion of stakeholders in environmental issues.

[13] See the disclosure requirements set out in the OECD Guidelines chapter III . Also UNGP chapter II A.11, Commentary: «The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfill their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.» In Chapter II B.21, Commentary: «The responsibility to respect human rights requires that business enterprises have in place policies and processes through which they can both know and show that they respect human rights in practice. Showing involves communication, providing a measure of transparency and accountability to individuals or groups who may be impacted and to other relevant stakeholders, including investors. (…) Formal reporting by enterprises is expected where risks of severe human rights impacts exist, whether this is due to the nature of the business operations or operating contexts.»

[14] "Material Information" is defined in Commentary 30 of the Guidelines as «information whose omission or misstatement could influence the economic decisions taken by users of information.». Also see Commentary 33

[15] See chapter IV (e.g. 5 and 6) and commentary 46 of the OECD Guidelines. This chapter is based on UN Guiding Principles 29–31. See also the International Finance Corporation Performance Standards (IFC PS) recommendation on the establishment of grievance mechanisms, especially IFC PS 1 and 7, and IFC Good Practice Note: Addressing Grievances from Project-Affected Communities. Guidance for Projects and Companies on Designing Grievance Mechanisms. September 2009:7, p. 6.

[16] The grievance mechanism should be able to reject complaints that do not relate to the company's operations.

[17] See commentary 8 on General Policies in the OECD Guidelines: «The Principles call on the board of the parent entity to ensure the strategic guidance of the enterprise, the effective monitoring of management and to be accountable to the enterprise and to the shareholders, while taking into account the interests of stakeholders.» Sjøvik will maintain its current routines whereby the board deals with complaints and notifications of issues of serious concern that relate to both Sjøvik AS and its subsidiaries.

information on how to use the mechanism is to be published on the company's external website as soon as it has been set up.

6. SIGNING

a) The chair of the board of each Party will sign the joint declaration.

b) Upon the signing of this joint declaration, NSCWS will withdraw its complaint against Sjøvik of 5 December 2011.

ANNEX 2

THE COMPLAINT

On 5 December 2011 the NCP received a complaint against the Norwegian enterprise group Sjøvik AS submitted by The Norwegian Support Committee for Western Sahara (NSCWS). Sjøvik AS, through its subsidiaries, is alleged to be in breach of the OECD Guidelines by operating a fishing vessel and running a fish-processing plant in the Non-Self-Governing Territory of Western Sahara. The projects are conducted with permission and licences from Moroccan authorities, and the activities take place under Moroccan Flag. NSCWS cite protests by the Saharawi against economic activities in Western Sahara in general and against the company in particular. [18]

The company is accused of breaching the Guidelines Chapter IV; Human Rights, no. 1 by having failed to respect the Saharawi right to self-determination and rights to consent to and benefit from their natural resources. The Saharawi right to self-determination is based on UN human rights conventions and Resolution III annexed to the Convention on the Law of the Sea (UNCLOS). Several resolutions from the UN General Assembly and the UN Security Council specifically concern the Saharawi right to self-determination.

NSCWS request i) That the company withdraw from Western Sahara; ii) That the company recognises the status of Western Sahara as a Non-Self-Governing Territory where the people of the territory have the right to self-determination over their natural resources; and iii) That the company maintains dialogue with the NSCWS.

RESPONSE FROM THE COMPANY

Upon request by the Norwegian NCP, the company confirmed its activities in Western Sahara and responded in an e-mail of 16 January 2012 that these activities are legally and morally defensible.

[18] According to the complaint to the OECD NCP Norway dated 5 December 2011, Saharawi protesters have stated that the company does not consider their interests and wishes. The President-in-exile and Secretary General of Frente Polisario has declared, "the Norwegian company must withdraw and cease their investments." Aminatou Haidar, leader of the Collectif des Défenseurs Sahraouis des Droits de l'Homme (CODESA) has called the company's activities "theft of Western Saharan resources." In May 2009, Saharawi refugees demonstrated on the dock of Las Palmas against the Sjøvik vessel that was in for repair: "Pirates, don't steal from us!". In November 2011, the former laureate of the Rafto Prize for Human Rights, Sidi Mohammad Daddach, wrote to Sjøvik AS and pointed to never having heard that Sjøvik had consulted the Saharawi about the fishing activities, and that further fishing should not take place.

In a meeting with the NCP on 30 January and an e-mail dated 12 February 2012, the company explained that they partnered with a Moroccan company in 2002/2003 following a Moroccan initiative to attract foreign investments and expertise. The company shares a joint venture 50/50 with a Moroccan company. The joint venture, Sjovik Morocco SA, has fishing licenses outside Western Sahara. These fishing licences had, according to the company, already been granted locally and were transferred to Sjovik Morocco SA through a joint venture agreement given that certain criteria were met.[19] The company applied for export credit and guarantees, and reports to have received positive signals from the Norwegian government and export credit agency (GIEK) until the application was rejected in January 2005. At that time the company was officially informed that the Norwegian government would not support commercial activities in Western Sahara financially, because such support could be interpreted as Norway de facto taking sides in the on-going dispute. At this point, Sjøvik states, the company had already committed to further investments in Western Sahara, and decided to find alternative funding.

The company claims that these investments are in the interests of the local population and that parts of the local population have been consulted. [20] Sjøvik points to that their investments are in a Moroccan company that harvests a renewable resource, which preserves the resource base and contributes to finances to the benefit of the local population, including Moroccans, Saharawi and Berbers. According to the company, the investments benefit an area in great need of employment and development. In addition to employment, Sjøvik AS emphasises that their company has several agreements with the Saharawi; that the company fishes on Saharawi quotas and delivers to Saharawi factories. Furthermore, Sjøvik argues that their investments contribute to the transfer of knowledge critical to the development of the Dakhla region. According to the company, no payments are made to the Moroccan government for the fish quota. However, the project finances services offered by the authorities in Dakhla, such as roads to ports and a factory, the construction of port facilities, schools, hospitals and an airport.

THE COMPLAINANT

The NSCWS is a Norwegian membership organisation that has worked in solidarity with the Saharawi people and for the realization of their right to self-determination, in line with relevant UN resolutions, since 1993. The organisation has extensive contact with Saharawi civil society and with Popular Front for the Liberation of Saguia el Hamra and Rio del Oro (Frente Polisario) as representative for the Saharawi people. They claim to have good knowledge of the aspirations and interests of the Saharawi people, both in Western Sahara, in refugee camps in Algeria, and the diaspora in Europe.

THE COMPANY

The Sjøvik Group operates an international fishing enterprise based in Midsund, Norway. The Sjøvik Group comprises Sjøvik AS and Sjøvik Afrika AS. Sjøvik AS owns 100 per cent of Sjøvik Africa AS. Sjøvik Afrika AS owns 49, 99982 per cent and the Moroccan company Pelagic Holding SA own 50, 00018 per cent of the joint venture Sjovik Morocco SA. Sjovik Morocco SA has fishing licenses outside Western Sahara, operates a fish vessel and runs a fish processing plant in Western Sahara.[21]

[19] Such as the acquisition of a fish vessel.

[20] Such as the local governor and local employees, as well as collaboration in various fora, including industry specific interest groups, fish licensees, local authorities etc.

[21] The activities take place under Moroccan flag.