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Model For Investment Agreements - General Review

Introduction

In January 2008, the Minister of Trade and Industry published the Consultation Paper *Model for investment agreements – general review* which contains a draft new Norwegian model for agreements on promotion and protection of investments and a commentary setting out the background for the model agreement and its individual provisions. The deadline for responses to the consultation has been extended to 18 April 2008.

This is the response by the Norwegian Centre for Human Rights. The Centre is Norway's National Human Rights Institution, according to Royal Decree of 21 September 2001 and based on the Paris principles. As a National Institution, the Centre shall help promoting the implementation of human rights in Norway, including Norwegian activities abroad. One of its core activities is commenting draft legislation, white papers and other policy documents.

This document has been sent by email as requested in the consultation document to postmottak@nhd.dep.no with a copy to Margrethe R. Norum (mir@nhd.dep.no) and Tanja Dannevig (tad@nhd.dep.no).

Human rights and the evolution of BITS

Bilateral Investment Treaties (BITs) and related trade agreements between developed and developing States regularly raise human rights concerns. These particularly relate to the ability of host States to respect, protect and fulfil economic and social rights and rights to equality, environmental health and freedom of expression. The international dispute mechanisms that are made available to foreign investors are largely non-transparent, and there is no clear obligation for arbitrators to ensure that their decisions are consistent with international human rights law. While the provisions of the Draft Model Agreement make some positive steps in this area, we will point out a number of conflicts with international human rights obligations.

BITs represent a mechanism to protect investments from different forms of regulatory intervention. This protection limits the host country's freedom of action, and can limit its ability to implement international human rights obligation or pursue legitimate policies. The first generations of BITs provide excessive protection for foreign investment, and were often entered into without the representatives of the developing countries realising the wide-ranging effects. Due to the reciprocal rights to investors from the developing country, we have also seen that the limitations on the authorities of the developed country go further than what has been foreseen. The present BITs tend to be based on a less imbalanced model, but in practice still place inequitable and disproportionate restrictions on the developing country, in many instances in violation of other international law obligations.

The background for the BITs are the risks to foreign investment presented by expropriation, for instance to provide war reparations or to secure national or state ownership of certain industries. The wide provisions of these treaties typically provide protection against a much wider range of regulatory interventions. The foreign investor benefits from this protection. The justification for the BITs from the perspective of the developing country is its potential to attract foreign investment, and the protection is only justified when such a benefit exceeds the cost of restricting regulatory intervention.

General Comment

From a Norwegian perspective, the other policy objectives may conflict with the traditional aims of investment protection. This certainly applies in the area of human rights and international development and environmental policies of the Norwegian government. It is particularly problematic that a State enters bilateral treaties which may violate other international obligations, or limit capacity of other states, particularly developing countries, to comply with such obligations. When a dispute settlement procedure insulates the investment treaty regime from other international obligations, this problem is only further compounded.

Bilateral agreements provide particular possibilities for abuse due to the uneven relationship between a developed and a developing country. Since the emergence of a multilateral investment regime seems unrealistic, the challenge is for the Norwegian government to find the right balance in protecting investment and human rights, including rights relating to development and the environment.

The consultation document provides a discussion of some of these issues, but it may not explore fully the conflict between human rights obligations and the provisions of the Draft Model Agreement. Indeed, the Draft Model Agreement could prohibit developing countries from making use of models that have been particularly important in the development of the Norwegian economy and society, for instance in relation to petroleum and other natural resources.

Positive aspects of the new draft

The model draft provides a number of welcome elements:

- The scope for State expropriation can be undertaken in the "public interest" and the clause is largely identical to Article1, Protocol 1, European Convention on Human Rights (Article 6).

- The level of compensation for losses is equivalent to that provided for national investors, or investors from other States, as opposed to market value compensation (Article 7). This should take account of constitutions like South Africa's, where compensation is to be 'just and equitable', and where factors such as the history of the acquisition and use of the property are taken into account.

- The restrictions on performance requirements are square bracketed in order to indicate that there is room for negotiation over these matters (Article 8).

- Domestic health, safety, environmental measures and core labour standards cannot be lowered in order to attract investment (Article 11).

- The right of States to regulate on various subjects is explicitly recognised (Articles 12, 24 and 27).

- Investors or States must exhaust local remedies before submitting a dispute to international arbitration under the International Convention on the Settlement of Investment disputes and Nationals of Other States (ICSID convention (Article 15).

- Arbitration panels have the authority to accept amicus curiae submissions and all documents submitted to the Tribunal shall be made public available unless a party can successfully claim confidentiality (Articles 18 and 19).

- The treaty is to be without prejudice to obligations of Parties in other international agreements (Article 29).

- Investors are to be 'encouraged' to comply with the OECD Guidelines for Multinational Enterprises.

However, we have a number of specific comments and recommendations on the Draft Model Agreement and believe amendments are necessary to ensure compliance with the obligations of Norway and other States under international human rights treaties.

The right to regulate and international human rights law

Throughout the Draft Model Agreement, various domains are listed as areas in which the State can or should legitimately regulate or not lower its standards. These include:

> "protection of public health, safety and the environment" (Article 4)
>
> "health, safety, or environmental requirements" (Article 8.2)
>
> "domestic health, safety or environmental measures or core labour standards" (Article 11) 'health, safety or environmental concerns" (Article 12)
>
> "public morals", "public order", "human, animal or plant life or health", "laws and regulations that are not inconsistent with the provisions of this Agreement", "national treasures of artistic, historic or archaeological value" and "environment"(Article 24)
>
> "linguistic and cultural diversity, cultural and audiovisual policy", "rights and obligations of the Parties under international agreements and national laws and measures relating to copyright and related rights"

The areas which are listed (not always consistently) are narrow in focus. While the preamble to the Draft Model Agreement contains a "commitment" to human rights in accordance with "international law, including the principles set out in UN Charter and Universal Declaration of Human Rights", the ability of the State to regulate under the Draft Model Agreement is largely restricted to only health, safety and environment. This is occasionally supplemented by labour rights, but only in relation to the "core labour standards", and some aspects of cultural rights.

However, Norway, and the overwhelming majority of States, have ratified six major international human rights treaties which extend beyond the areas of 'health, safety and environment'.[1] These treaties are set out below with the numbers of ratifications in brackets:

- International Covenant on Economic, Social and Cultural Rights (157 States)
- International Covenant on Civil and Political Rights (161 States)
- International Convention on the Elimination of All Forms of Racial Discrimination (173 Parties)
- Convention on the Elimination of All Forms of Discrimination against Women (185 States)
- Convention against Torture (145 States)
- Convention on the Rights of the Child (193 States).

In addition, a number of these treaties carry extra-territorial obligations. These require Norway to assist in the realisation of human rights in other States. For

[1] Norway and 125 other countries have also signed the recently concluded Convention on the Rights of Persons with Disabilities.

example, Article 2(1), International Covenant on Economic Social and Cultural Rights requires States to take steps through "international assistance and co-operation", within their maximum available resources, to help progressively achieve the realization of the economic, social and cultural rights of everyone. In order to comply with this obligation, the Draft Model Agreement should not be structured in such a way as to frustrate the ability of other States to realise the rights under those treaties. Indeed, the Commentary to the Draft Model Agreement notes in a number of places that Norway regulates in many of the areas covered by these human rights treaties.

The importance of recognising States' human rights obligations beyond 'health, safety and environment', is concretely demonstrated in the first international BITs arbitral decision to admit *amicus curiae* submissions in a case concerning public services. In *Suez and Others v. The Argentine Republic* (ICSID Case No ARB/03/19), involving a challenge to a freezing of price increases for water services following the collapse of the currency and Argentina's worst recession, the Panel stated that water and sanitation 'systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations.' See further, M. Langford, 'Tragedy or Triumph of the Commons: Human Rights and the World Water Crises', Human Rights 2006: The Year in Review (Melbourne: Castan Centre for Human Rights Law, University of Monash, 2007), pp. 9-39.

The Draft Model Agreement contains a saving clause that would cover international human rights treaties. Article 29 states that the model agreement is without prejudice to obligations of Parties in other international agreements. However, this *residual approach* risks significant disputes over interpretation. This risk is amplified by the wording of the preamble which only explicitly recognises four exceptions (health, safety, environment and labour rights) while other human rights are only affirmed.

We make the following recommendations:

1. 'Human rights' be expressly included as one of the listed exceptions in Article 4, Article 8.2, Article 11, Article 12 and Article 24 and in the preamble.

2. Consideration be given to including more detail on Host States rights as well as obligations and rights in relation to investors, for example as set out in the IISD Model International Agreement.[2] See Articles 25-28.

Article 3 (and Article 2.2.) - National Treatment

National treatment raises many difficult issues and we believe it is inappropriate to include a "negative listing" approach in Article 2.2, where negotiating States must explicitly exclude sectors from the reach of the agreement.

[2] http://www.iisd.org/pdf/2005/investment_model_int_agreement.pdf

The General Agreement on Trade in Services requires a positive listing of all sectors to be covered. This is more appropriate in the international context. The EEA may have a negative listing approach but this was developed in the European context, in which levels of economic development are more uniform and settled. Developing countries are still establishing and testing their economic models for various sectors of the economy. The establishment of a negative list can severely restrict their future ability to develop alternative economic models. If Norway had signed such a Bilateral Investment Treaty in the 1950s or 1960s (an early stage of modern development), it might have risked foreign investor claims to exploitation of oil reserves when these were discovered and exploited by State-owned Norwegian companies. Article 3 also essentially extends investment rights into the area of trade as national treatment covers the "establishment, acquisition, expansion" of investment making the reach of the agreement remarkably wide.

However, adopting a positive listing approach by itself is not sufficient. Negotiations over which sectors are to be included are usually asymmetric. The procedure for the process and drafting of such treaties needs to explicitly take account of imbalances in the relative strength of the negotiating parties (their power relations). We would also recommend that the Norwegian model agreement include 'Home states obligations', as set out in the IISD draft, which partly addresses some of the power imbalances after an agreement is signed.

An additional issue is the manner in which legitimate policy objectives behind direct or indirect discrimination of investors will be interpreted. The objectives in footnote 2 to Article 3 are narrowly limited to public health, safety and environment. As noted above, human rights considerations beyond these areas may also justify treatment that makes distinctions between national and foreign investors. One example could be the case of subsidies provided to public utilities that serve poorer and remote areas of a country, areas in which multinational companies have generally shown little interest. The Draft Model Agreement may allow investors to claim equal levels of subsidies in wealthier urban areas. There are further concerns around GATS which have not been addressed in the Consultation Paper.

We make the following recommendations:

3. Amend Article 2.2 to include a negative listing approach.

4. Ensure the instruction manual for negotiations explicitly looks at asymmetric power relationships in bargaining and consider including Articles 29-32 of the IISD Model Agreement.

5. Include human rights in legitimate policy objectives for discrimination in the footnote to Article 3.

Article 6 – Expropriation

The inclusion of an expropriation provision that mirrors Article 1 of Protocol 1 of the European Convention on Human Rights (ECHR) is largely welcome subject to the following comments. First, the Article makes no reference to the connection to the ECHR (unlike the Commentary). This raises the question of whether an arbitral panel or a local court would interpret the Model Agreement in a similar fashion.

For instance, the European Court of Human Rights has developed a doctrine of margin of appreciation allowing States a right to regulate if it achieves a legitimate objective. In the case of Article 1, Protocol 1, this margin of appreciation has been interpreted more widely than the other rights under the Convention.[3] Will an arbitral panel adopt this approach? The use of such a margin of appreciation doctrine would not be questionable here as it would not limit investors' human rights, either under international or domestic law, but only limit the particular protection mechanism that is offered by BITs. In this case, it would be in favour of developing countries party, so there should be no objections to the inclusion of a standard in this case from the European system. Moreover, how will an arbitral panel interpret public interest? Will it include obligations under international law, including human rights, environment and corruption treaties?

There is the more general question of the use of a human rights approach to expropriation, and whether it may imply corporations have rights. Under the ECHR, companies have been able to exercise some rights (property, freedom of expression and protection of home) as the treaty extends the rights to legal persons in some instances. This is not without controversy. Other regional human rights treaties, which recognise the right to property, do not permit such corporate claims. At the same time, others have argued that transnational companies should be forced to use the human rights system in order to ensure a parity of rights – currently transnational corporations enjoy greater and stronger international justiciable property rights than the nationals of most host countries. This is an ongoing debate but for our purpose here the principle remains that transnational corporations should not be able to exercise property rights to a greater degree than individuals and this should be reflected in either the terms of the legal provision or the forum in which claims are submitted.

We make the following recommendation:

6. Article 6 should be amended so that it requires the panel to ensure its decisions are coherent with the jurisprudence of the European Court of Human Rights. The public interest should also explicitly includes obligations under international law, including human rights, environment and corruption treaties.

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[3] See M. Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford: Oxford University Press), pp. 190-3.

Article 8 - Performance Requirements

While the square bracketing of performance requirements is welcome there is the danger that asymmetric negotiations with developing countries close off potential future policy options. A good example of such a dilemma is the Black Economic Empowerment (BEE) provisions that have been included in South African legislation. A certain proportion of shareholders, managers or employees in certain sectors must be historically disadvantaged South Africans. However, in BITs signed by South Africa with mostly Western countries in the 1990s, no exception was made for these requirements. It was only BITS signed after 2000 with mostly Eastern European and other States that an exception was made. Thus, in 2007, Italian granite companies operating in South Africa filed a claim for international arbitration. In a compensation claim for more than 2 billion Norwegian Kroner, they claim that making mining licenses dependent on fulfilment of BEE criteria discriminated against foreign investors. The claim is greater than the annual budget of the Ministry of Mines and Energy Affairs, and there are fears it is a test case that will lead to other claims from the mining industry and beyond.

At a minimum, Article 8.2 should be extended to include human rights as an exception. See Recommendation 1 above.

Article 32 - Corporate Social Responsibility

The insertion of this clause in Article 32 is welcome, but its content and scope is disappointing. The Parties are only obliged to "encourage" investors to comply with the OECD Guidelines for Multinational Enterprises and to participate in the United Nations Global Compact. Therefore, under the Draft Model Agreement, States Parties accept numerous obligations (with limited recognition of their rights), while investors are accorded significant rights with only an encouragement to comply with the OECD Guidelines. The OECD Guidelines contains standards loosely based on human rights and adopted by an organisation representing the most developed and wealthy nations. It is not uncommon for international treaties to place obligations on non-State actors (for example the Additional Protocol II to the Geneva Conventions and Articles 27-29, African Charter on Human and Peoples' Rights).

We make the following recommendations:

7. Investors should be required to comply with the ILO Tripartite Declaration on Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises and respect the human rights contained in international human rights treaties ratified by the States parties as well as the Universal Declaration of Human Rights.

8. The section on Obligation and Duties of Investors and Investments in the ISSD Model Agreement should be considered for inclusion (see Articles 11-18). This

includes general obligations, pre-establishment assessment impact, anti-corruption, post-establishment obligations, corporate governance and practices, corporate social responsibility and investor liability.

9. The State should be able to raise violations by transnational corporations in the context of a dispute with an investor. See the ISSD Model Agreement for one example of how this could occur.

We hope these suggestions will be useful in guiding the finalisation of the Model Agreement. Please do not hesitate to contact the Norwegian Centre for Human Rights for elaboration of arguments.

Yours sincerely

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