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Kurdish Human Rights Project, The Cornerhouse, Platform
Kurdistan Regional Government Ministry Of Trade

Investment Agreements And Human Rights

A TRAINING FOR GOVERNMENT OFFICIALS AND CIVIL SOCIETY

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THE
CORNER
HOUSE

Kurdish Human Rights Project
KHRP
Celebrating 15 Years 1992-2007

Potential benefits of international investment

- Economic development
- Technology transfer
- Improved quality of products & services
- New export opportunities



Investment and human rights

- Potential conflict between investment agreements and state's international human rights obligations
- Human rights increasingly featuring in investment legal cases
- Most progressive states now considering rights at time of negotiating investment agreements



EXAMPLE: Right to water?

- Foreign investors granted concession to supply water to Buenos Aires
- Argentina freezes water prices following economic crisis
- Investors take Argentina to international investment tribunal, arguing breach of “fair and equitable treatment” under investment treaties
- Case still pending



EXAMPLE: Correcting the legacy of discrimination

- South Africa's black Economic Empowerment Act 2003: measures to promote increased black ownership and management of companies
- Challenged by Italian mining companies as a form of expropriation, at international investment tribunal
- Case still pending



“Investor rights”

- People have intrinsic rights – universal and inalienable
- Business enterprises do not have intrinsic rights: rights are granted through investment agreements
- ALL of these rights are to be negotiated: nothing is “standard”



At the negotiating table

- Investor-state agreements set out rights, duties and flow of revenues to both parties
- An effective agreement is one that is considered fair by both sides over its entire duration: 20 or more years
- There is a balance between stability (predictability) and flexibility (reflecting changing circumstances)



Potential conflicts

INVESTOR INTERESTS

- Minimum regulation – set their own standards of operation.
- No new laws or regulations – “predictable framework”
- Unrestricted access to water, land, electricity
- Mechanisms to protect and enforce investment agreements

STATE DUTIES

- PROTECT human rights: environmental, labour laws & regulations
- Progressive realisation of human rights; comply with evolving international standards
- RESPECT rights to health, property, good standard of living
- FULFILL rights: provide access to justice and redress; equal treatment under the law



Stabilisation clauses

Article 36 of 2003 International Project Agreement (IPA) between Benin, Ghana, Nigeria and Togo and the West African Gas Pipeline Company:

If regulatory change (including legislation, court decisions and ratification of international treaties) “causes the benefits derived by the Company from the Project [...] or the value of the Company to the shareholders to materially decrease”; then the state must “restore” the Company to an economically equivalent position it was in prior to such change. In default, it must pay “prompt, adequate and effective compensation”.



Stabilisation clauses and human rights

- Labour laws – necessary to protect the rights of workers;
- Environment laws – necessary to protect local people's rights to health, property, livelihood;
- Anti-discrimination laws – all people have equal access to rights;
- Economic policies – necessary to fulfil the rights of all citizens (to education, social security, health etc).



Stabilisation clauses – best practice

- Some investment agreements exclude certain laws from stabilisation (eg in Kazakhstan's North Caspian PSA, environmental, health and safety laws)
- Others only apply to new laws which are discriminatory to a particular investor, or designed to increase government revenues rather than genuinely regulate.
- In OECD countries, only limited stabilisation clauses are generally used



Stabilisation clauses – recommendations

- OECD: Stabilisation should not grant blanket exemptions or rights to compensation, but should be restricted to clearly specified legislation, with clearly specified compensation terms
- UNCITRAL: “All business organizations... are subject to changes in law and generally have to deal with the consequences that such changes may have for business . . . General changes in law may be regarded as an ordinary business risk”. Compensation should only be paid where investor could not reasonably have taken changes in law into account
- UNCTAD: A balance should be struck “between the legitimate commercial expectations of the investor party and the right of the host country party to oversee the evolution of the resulting relationship in a manner that is consistent with national development priorities”



Lowering operational standards

- Some agreements remove requirement to comply with national or international standards
- Sometimes replace hard law with soft industry standards
- May remove regulatory functions – eg no opportunity for state to approve or amend; ruling out punitive damages; sometimes state has a DUTY to provide permits within a specified timeframe



EXAMPLE: Baku-Tbilisi-Ceyhan pipeline, Georgia

- Oil companies wanted to build the pipeline through an ecologically and economically important national park
- Minister of the Environment objected that the project would violate Georgian law
- That law was made irrelevant by the pipeline agreements, which over-rode any higher standards
- The Minister was forced to sign her approval of the construction permit regardless of her concerns.



Rights to water and essential resources

- Some agreements state that investor may freely use water, electricity and other natural resources, without restriction according to local people's needs or government regulation
- This can result in large quantities taken from the system, putting a strain on capacity, and reducing the amount available for people.



International arbitration

- Disputes heard in international investment tribunals
- eg London Centre for International Arbitration, Stockholm Chamber of Commerce, International Centre for Settlement of Investment Disputes (ICSID)
- Enforceable by seizure of assets under New York Convention – Iraq being pressed to sign



International arbitration and human rights

- Whereas domestic courts may consider public interest, domestic law and international human rights law, investment tribunals consider only commercial issues
- Rulings by tribunals are generally binding, often secretive, and give no right of appeal
- People can be deprived of their right to an effective remedy if their other rights are compromised
- May also violate right to equal treatment under the law



International arbitration – best practice

- Iraq's model PSA contract of 1995: specified Iraq as the 'country place of arbitration'.
- China's 1982 (revised in 2001) offshore oil regulations: specify disputes resolved by an arbitration body of the People's Republic of China
- Venezuela's Organic Law of Hydrocarbons (2002) states that 'All disputes shall be decided by the competent courts of the Republic, and no foreign claims shall arise for any reason'.



Transparency and human rights

- People need to know and understand what their rights are, and how to defend them
- Right of access to information in Article 19 of the International Covenant on Civil and Political Rights
- Publication of contracts allows citizens to check that there is no corruption, and that public funds are being used well



Transparency – best practice

- Oil investment agreements are publicly available in Azerbaijan, Timor Leste and Ghana.
- International Monetary Fund recommends full publication of contracts
- US Treasury Department calls for “ex ante presumption of disclosure of such documents as Host Government Agreements, Concession Agreements, and bidding documents”



Transparency – why not?

- For investor: demonstrate high standards; fairness and contract stability
- For state: government strengthens its bargaining power in negotiation
- For both: remove any suspicion of corruption, or that public funds misused



Commercial confidentiality?

- IMF: In practice, contract terms widely known within the industry
- Eg Barrows Basic Oil Laws and Concession Contracts
\$67,000 per year



Human rights and investment agreements – best practice

- Specific clause: nothing in the agreement should be taken as limiting the state's duties under international human rights agreements, and in cases of conflict the human rights obligations should take precedence
- UN Commission on Human Rights (2003): investment agreements should include among their objectives “the promotion and protection of human rights”



Conclusions

- In investment agreements, everything is negotiable; nothing is standard
- The state has obligations under international human rights agreements
- Investment agreements should be carefully scrutinised for their human rights impacts, before signing



Pay attention to:

- Stabilisation clauses
- Standards of environmental/social protection
- Rights to water, land, electricity etc
- Arbitration mechanisms
- Transparency of agreements
- Inclusion of human rights clause

