[Unofficial English Translation]
The Petroleum Fund Advisory Commission on International Law

Oslo 22.03.2002

Memorandum to the Ministry of Finance

Question of whether an investment through the Petroleum Fund can constitute a human rights violation for Norway

Approaches and conclusion

Reference is made to a letter from the Ministry of Finance dated 7 January 2001, where the Ministry of Finance requests the Petroleum Fund Advisory Commission on International Law (the Advisory Commission) to *"consider whether an investment through the Petroleum Fund could imply a violation of international obligations as concerns human rights."*

In the following, the Advisory Commission will discuss the content of the state's legal obligations according to human rights conventions in general, as well as undertaking a consideration of concrete provisions in different human rights conventions. The Advisory Commission will thus, delimit this memorandum against other parts of international law, such as conventions in the area of international humanitarian law.

The Advisory Commission concludes that the general point of departure is that states only have responsibility for human rights fulfilments where they have jurisdiction. The concept of jurisdiction is basically territorial. The states, therefore, have no obligations according to the human rights conventions to contribute to the implementation of human rights in other states. Nor do the obligations, according to human rights conventions, imply that states are obliged to avoid becoming accessory to other states' human rights violations.

In the instances where there are specific provisions on obligations to engage in international activities there could, however be weighty reasons, also of a legal character, to prevent or withdraw investments which are contrary to the content of the activity obligation in question.

The Human Rights Concept

The historic point of departure for the idea of human rights was that one *should protect the citizens against indiscriminate or unreasonable infringements from the state's or the authorities' side*. This is still the core area. In the time after World War II, such rights were codified in international agreements with which the states agreed to comply. The UN's Universal Declaration of Human Rights of 1948 laid the groundwork for the two subsequent UN conventions on civil and political rights and on economic, social and cultural rights which were adopted in 1966. Europe had its own European Convention on Human Rights already in 1950.

The main rule is that *states* are the subjects of obligations with respect to the human rights conventions. That is to say, only states can *ensure* human rights. All human rights conventions have provisions which say that states are obliged to ensure the rights that are encompassed in the convention to all individuals within the jurisdiction of the state. The state is responsible for all of its organs and persons who act on the state's behalf, from legislator, government and courts of law, down to the individual bureaucrat, soldier or policeman. As a point of departure, this also means that only states can *violate* the human rights. A company can operate factories with inhumane conditions and slave contracts without themselves violating international human rights. However, the state which allows or does not take effective measures to prevent such conditions, would be responsible for the human rights violations that such conditions would imply.

The protection, according to the human rights conventions, applies to all individuals who are citizens of or are within the territory of states that have become a party to the human rights conventions. In addition, it can be claimed that many of the central human rights have evolved to constitute what is considered international customary

law, which means that the rules also are applicable for states which have not become party to the conventions.

Norway's Obligations

Norway is party to the great majority of international human rights conventions of significance. The convention which perhaps has the greatest practical significance in Norway is the European Convention on Human Rights (ECHR), inter alia, because it has a monitoring mechanism that is more comprehensive than most of the other conventions; the European Court of Human Rights. Norway is obliged to follow any decisions from this court. Norway is also party to the central UN conventions, such as the UN conventions on civil and political rights, on economic, social and cultural rights, on racial discrimination, on discrimination against women, on torture, and on the rights of children. Furthermore, Norway is party to several ILO conventions, inter alia, on labour laws, child labour, and indigenous peoples' rights. Norway is also party to several other conventions in the human rights area, but giving an exhaustive enumeration of these is not considered necessary here. These conventions have scarcely particular relevance for the question on whether investments can be contrary to human rights obligations beyond what is discussed below.

The human rights conventions are, to a large extent, drafted according to the same model. Mutual to all of them is that the states parties oblige themselves to ensure everyone under their jurisdiction the rights which are contained in the relevant convention. Thereafter follow the rights themselves – relatively brief and generally formulated. Finally there are provisions about implementation, monitoring mechanisms, entry into force, etc..

This system implies that Norway, as the main rule, is only obliged to ensure the human rights of those individuals who are under Norwegian jurisdiction. The Ministry of Finance's question as to whether investments through the Petroleum Fund can result in a violation of Norway's human rights obligations therefore depends on what the term 'jurisdiction' implies.

Jurisdiction

The term jurisdiction is normally divided into three sub-categories: namely legislative jurisdiction, judicial jurisdiction and enforcement jurisdiction. On its own territory, the state has all three forms of jurisdiction fully. A separate set of rules exists on what kind of jurisdiction coastal states have in different zones beyond their coasts, but there is no reason to discuss this here. What is interesting for this account is to what degree states can have jurisdiction *outside* their own territories. This is crucial to the question on whether states can ensure or violate human rights in other states.

States have as a point of departure neither judicial nor enforcement jurisdiction outside of their own territories. With regard to *legislative jurisdiction* however, a state may decide that some actions which are undertaken abroad shall be punishable, both for nationals as well as for foreign citizens. But states can not apprehend, sentence or imprison someone outside their territory without a special agreement with the state where the suspect finds himself/herself. If a person with residence in Norway has committed an act which is defined as punishable, even though it is perpetrated abroad, (see Section 12 of the Norwegian Penal Code), the state can normally not undertake judicial steps against the person concerned before he or she returns to Norway.

It has been alleged that when states use enforcement power outside of their territory, independent of whether a use of force is legitimate or not, this can entail that they exercise an *actual jurisdiction* which can give them responsibility for violations of human rights outside their own territory. In an application to the European Court of Human Rights, dated 20 October 1999, [1] a group of Serbian citizens claimed that their human rights had been violated through NATO's bombing of the headquarters of Radio Television Serbia the 23rd of April the same year. The main argument was that when one state bombs another, the attacking state is responsible for exercise of actual jurisdiction with regard to inter alia an individuals' rights life in the attacked state. The Court found the complaint not admissible, arguing inter alia that the jurisdiction of the parties to the Convention first and foremost must be understood to be territorial. Military or other acts of enforcement character outside of one's own territory did not lead to responsibility for human rights for a state, with the exception of special circumstances where the act was committed against persons with a special connection

[1] Application no. 52207/99, Bankovic and Others

to the state which is conducting the acts. The court explicitly stated that, *"[T] he Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States."* [2]

It must be presumed that the same legal point of departure will also apply to the other human rights conventions to which Norway is a party. The main assumption therefore will be that Norway largely is only obliged to ensure the human rights of persons within Norwegian territory. Persons who work in, or in other ways are affected by businesses in which the Petroleum Fund has invested outside of Norway are therefore, as the main rule, not under Norwegian jurisdiction. There is no immediate obligation to ensure human rights in other countries. Possible indirect financing of other states' human rights violations via the Petroleum Fund therefore does not imply a violation of human rights conventions from the Norwegians state's side.

The way the Petroleum Fund's investment mandate is formulated, this does not explicitly exclude the fund from making investments in companies that have activities in Norway. If such activity leads to violations of human rights in Norway, this is of course the full responsibility of the Norwegian state, independent of the fund's investing in the company.

The "Activity Obligations"

The above-mentioned main rule that human rights obligations are limited to one's own jurisdiction can, in certain instances, be somewhat modified. Certain human rights conventions contain particular provisions which say that the states' obligations extend further than the main rule normally would imply. These can be provisions which oblige the states to contribute to international cooperation to combat, for example, sexual exploitation of children (UN Convention on the Rights of the Child, 20 November 1989, article 34), or child labour (ILO Convention No. 182, 17 June 1999 on the prohibition of and immediate measures for abolishing the worst forms of child labour, article 8). When states are obliged to participate in international cooperation to prevent a certain activity, it could be claimed that this obligation is not honoured if the same state provides financial support to companies which are

[2] The inhabitants in the Federal Yugoslav Republic, Serbia and Montenegro (FRY) nevertheless fell outside of the legal protection in the convention because FRY was not a state party to the convention.

involved in the kind of production or other activity that the state has undertaken to combat. In order to decide whether such possible undermining of international cooperation can constitute a violation of international law, it is necessary to consider the concrete provisions which can be relevant.

The Advisory Commission has considered the six above-mentioned UN conventions and the conventions of the Council of Europe and ILO conventions that are presumed to be relevant in this consideration. The provisions that contain an international activity obligation which could have significance in this context are discussed below.

The Convention on the Rights of the Child - Articles 34 and 35

As mentioned above, the Convention on the Rights of the Child does not contain a general obligation for states parties to avoid contributing to other states' human rights violations. The question is whether the above mentioned "activity obligations" can constitute an exception to this main rule.

Article 34 of the Convention on the Rights of the Child has the following wording:

"States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;
(b) The exploitative use of children in prostitution or other unlawful sexual practices;
(c) The exploitative use of children in pornographic performances and materials."

Article 35 contains a corresponding formulation on multilateral measures to prevent "the abduction of, the sale of or traffic in children for any purpose or in any form."

What separates these provisions from the other provisions in the Convention is the obligation to take not only national, but also bilateral and multilateral measures. Multilateral measures, in this connection, must be presumed to mean international interstate cooperation for combating and preventing, among other things, all forms of sexual exploitation of children. The parties also have an international legal obligation

to “take measures”, which constitutes an activity obligation. According to the wording, passivity in this regard could theoretically be seen as a violation of the convention. In reality it would, however, be very difficult to assert concrete violations of the activity obligation because this in itself is so unclear. The convention specifies that the states shall take “all *necessary* national, bilateral and multilateral measures” to prevent sexual exploitation of children in different areas. (Emphasis added). It must be presumed that, to a large extent, it is up to the states themselves to determine what national measures to combat child prostitution, etc. are *necessary* or most appropriate at any given point in time. This also apply to the different forms of multilateral cooperation referred to in the provision. There are no directives as to what this cooperation should entail. When the activity obligation is this unclear, it will be difficult to point to concrete violations of these provisions. As far as the Advisory Commission knows, the monitoring body of the Convention on the Rights of the Child (the Committee on the Rights of the Child) has so far not claimed any violations of these activity provisions.

The legal point of departure is nevertheless that *absolute passivity* from the states parties *could* constitute violation of articles 34 and 35. Actual efforts that are contrary to the purpose of the convention, inter alia, investments in companies that are involved in production of child pornography or similar activities, could therefore be claimed to be inconsistent with these provisions. The question is whether such lack of consistency could constitute a violation of the convention. According to article 31 of the Vienna Convention on the Law of Treaties, a treaty should be interpreted according to its wording. One should therefore be very careful with extensive interpretations. The fact that *passivity* on the multilateral level could be considered as prohibited, does not necessarily mean that one may conclude that certain forms of *activity* undermining the convention abroad also must be considered prohibited.

One should, however, according to the same provision in the Vienna Convention, also interpret treaties according to their *object and purpose*. This could imply that one might understand the activity obligation as an obligation not to actively undermine the purpose of the convention through profiting on violations of the convention abroad. It is doubtful whether such considerations of the object and purpose alone can lead to ascertainment of violation when there is no objective violation of a specific

convention obligation. It should, however, be pointed out that this activity provision is meant to be more than a sole statement of purpose.

Even though the fund can only own 3% of the shares in any company, such investments could be alleged to contribute to enabling the company to conduct its activities. Investments in companies that are responsible for acts mentioned in article 34 a), b) or c) and article 35 of the Convention on the Rights of the Child *should therefore be avoided* in order to avoid allegations of conduct in violation of the purpose of the Convention. In practice, this could be of significance for investments in companies producing child pornography and hotels or other institutions engaged in child prostitution or other forms of sexual exploitation of children. In this connection, it is not relevant how the ownership of the company is divided.

On this basis the Advisory Commission finds it unlikely that investments through the Petroleum Fund can lead to the assertion of violations of articles 34 or 35 of the Convention on the Rights of the Child. As mentioned, the Convention does not state anything to the effect that the state parties have an obligation to avoid possible contribution to other states' human rights violations. Still, it is difficult to categorically reject that financing of activities contrary to the purpose of the activity obligation could be alleged to be in violation of the convention. It is not inconceivable that the Committee on the Rights of the Child *could* make statements to the effect of claiming violation of articles 34 or 35 if it was established that a state in reality contributed to financing of, for example, child pornography.

Even if an investment does not necessarily constitute an outright violation of the Convention, investments contrary to the purpose of the activity obligation can be said to constitute a disloyal way of implementing the Convention. Such considerations could constitute also a legal argument against undertaking investments in companies that conduct activities leading to sexual exploitation of children. The provision on international cooperation taken together with the purpose of the convention should therefore be taken into consideration by the Ministry of Finance, in a comprehensive assessment of whether certain investment objects should be withdrawn from the investment universe of the Petroleum Fund.

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography

In the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography of 25 May 2000, there is also a provision on international cooperation. Here it is stated (in article 10) that

"States Parties shall take all necessary steps to strengthen international cooperation by multilateral, regional and bilateral arrangements for the prevention, detection, investigation, prosecution and punishment of those responsible for acts involving the sale of children, child prostitution, child pornography and child sex tourism."

Furthermore, it is said that, inter alia, the states parties shall promote a stronger international cooperation to combat the root causes that contribute to such exploitation of children. Article 10 (4) says that states parties "in a position to do so shall provide financial, technical or other assistance through existing multilateral, regional, bilateral or other programmes."

It is doubtful that this provision goes further than that what is already provided for in article 34 of the Convention on the Rights of the Child. Taking into account that the provision's operative terms are "promote" and "strengthen" (the states parties' international cooperation), this can appear to be weaker formulations than article those of article 34 which imposes concretely that the states "take measures to prevent exploitation."

It could be questioned whether the obligation to give financial or other assistance according to article 10 (4) constitutes an activity obligation which goes further than the other activity obligation, since it provides for concrete measures. The obligation is, however, directed towards an unspecified group of states ("states in a position to do so"), and cannot be read as an obligation to reach a certain result, such as to contribute with specific amounts. The provision should rather be read as a directive that those states which feel obliged should contribute with financial or other assistance through existing programmes.

Beyond this, the discussion of whether investments by the Petroleum Fund will be in violation of this provision would have to be rather similar to the discussion

concerning articles 34 and 35 of the Convention on the Rights of the Child. Even though an investment does not necessarily consist of a violation of the convention, legally speaking, investments that run contrary to the purpose of the activity obligation could also here be said to constitute disloyalty in the implementation of the obligations in the convention, and should thus be considered in the same way as articles 34 and 35 of the Convention on the Rights of the Child.

ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour

Article 8 in this convention states that

"Members shall take appropriate steps to assist one another in giving effect to the provisions of this Convention through enhanced international cooperation and/or assistance including support for social and economic development, poverty eradication programmes and universal education."

Article 1 states that the parties oblige themselves to prohibit and prevent the worst forms of child labour. "[T]he worst forms of child labour" are defined in article 3 of the convention as

- all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

Also here one could argue that investments in activities which are conducted with the help of "the worst forms of child labour" can be contrary to the objectives of the convention. The question is whether such investments could constitute a violation of the activity obligation in article 8.

Similarly as under the preceding discussions, it must be seen as a point of departure that investments by the Petroleum Fund which contribute to violations of the convention in other states will harmonize poorly with the activity obligation and the purpose of the Convention, even though they do not necessarily constitute violation of Norway's obligations according to the wording of the Convention. In the same way as under the discussions of articles 34 and 35 of the Convention on the Rights of the Child, considerations of the purpose could also here imply that investments contrary to the purpose of the convention must be considered as disloyal in the implementation of the obligations of the convention.

Purpose Clauses

A series of conventions have clauses stating their purpose of ensuring various types of human rights for various groups in various areas. As a point of departure, investments abroad will not legally be contrary to such purposes clauses, because the states' legal obligations are limited to what they do within their own jurisdictions. A loyal implementation of a Convention's purpose nevertheless suggest that one tries to act in accordance with the purpose of the Convention, both on its own as well as other states' territories.

Conclusion

The Petroleum Fund Advisory Commission on International Law will, according to these discussions, conclude that the general point of departure is that the states only have responsibility for human rights fulfilment where they have jurisdiction. The term jurisdiction is basically territorial. The states therefore do not have an obligation under the human rights conventions to contribute to the implementation of human rights in other states. The obligations under the human rights conventions do not imply that states have the obligation to avoid contributing to other states' human rights violations. Investments by the Petroleum Fund in foreign companies will therefore, as a point of departure, not constitute violations of the obligations under human rights conventions.

Some conventions contain special provisions on activity obligations regarding international cooperation in order to promote the purpose of the convention. There are

few indications that investments in foreign companies which contribute to activities against the purpose of the convention would be classified as violations of the activity obligation. It cannot, however, be ruled out that for example international monitoring bodies in specific cases could come to such a conclusion. In the cases where there are specific provisions on international activity obligations, there may be claimed to be weighty reasons, also of legal character, for avoiding or withdrawing investments that obviously are contrary to the content of the activity obligation.