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Risky Business?

A study of how Norfund protect investments abroad against political and regulatory risk

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Abstract

This thesis examines how Norwegian companies protect foreign investments against political and regulatory risk. It does so by looking at how the Norwegian Investment Fund for Developing Countries (Norfund) protects its investments in Africa; particularly in countries where Norway has no bilateral or multilateral investment treaties (BITs). According to the Norfund Act, Norfund's purpose is to provide equity capital and other risk capital in order to assist in developing sustainable businesses and industry in developing countries. Historically, when investors from developed countries such as Norway invest in developing countries in Africa, one of the main challenges is how to protect their investments against potential changes in local regulations and politics that might affect the value of their investments. Investors have relied on, inter alia, investment agreements between their home government and the host country for guarantee of enforceable rights in the event of a potential expropriation of their property. In the case of Norfund, Norway has not signed many BITs or investment agreements with the African countries where Norfund invests. To understand what a lack of a guaranteed enforceable rights mean for Norfund, I examine three previously concluded investment disputes; *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*; *Parkerings - Compagniet AS v. Republic of Lithuania*; and *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana*. I relate these cases to similar situations in which Norfund can find themselves in the course of their operations in Africa.

This thesis concludes that: Norfund as a long-term investor in Africa may not need the protections of enforceable rights guaranteed by BITs and investment promotion acts because Norfund has a different mandate than a private investor, which is to help those African countries build their industries. As such, Norfund does not need guarantees of enforceable rights before making long-term investments. The current investments protection regime does not fall into its interest. Norfund does not need to protect its investments because it does not have a profit motive.

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List of abbreviations

ASEAN	Association of Southeast Asian Nations
BIT	Bilateral investment treaty
DAWASA	Dar es Salaam Water and Sewerage Authority
ECT	Energy Charter Treaty
EEA	European Economic Area
EFTA	European Free Trade Association
EU	European Union
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
GATT	General Agreement on Tariffs and Trade
Ghc	Ghanaian Cedi
GIC	Ghana investment promotion council
GIEK	Norwegian Export Credit Guarantee Agency
GTDC	Ghana Tourist Development Company
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IPP	Independent Power Project
MAI	multilateral Agreement on Investment
MDCL	Bilounend Marine Drive Complex Ltd
MFA	Ministry of Foreign Affairs
MIGA	Multilateral Investment Guarantee Agency
NAFTA	North American Free Trade Agreement
NAM	Nonaligned movement
NORFUND	Norwegian Investment Fund for Developing Countries
OECD	Organization for Economic Co-operation and Development
PPPs	Public Private Partnerships
PSA	Production Sharing Agreements
TRIMS	Agreement on trade related investment measures
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
US	United States
USAID	United States Agency for International Development
WTO	World Trade Organization

1 Chapter 1: Introduction

This thesis examines how the Norwegian Investment Fund for Developing Countries (Norfund) protects its investments in Africa against political and regulatory risk; particularly in countries where Norway has no bilateral or multilateral investment treaties (BITs). Norfund was established as a limited liability company in 1997 by an act of parliament (the Norfund Act).[1] According to the Norfund Act, Norfund's purpose is to provide equity capital and other risk capital in order to assist in developing sustainable businesses and industry in developing countries. Currently, all of Norfund's capital of 15, 2 billion Norwegian kroner (NOK) is provided by the Norwegian state through its development aid budget under the Norwegian Ministry of Foreign Affairs.[2] Protection of transnational flows of capital or foreign direct investment (FDI) has a long history in international law.[3] Traditionally, FDI has been a potent source of capital for least developed countries, of which developed countries have remained the principal exporter of such capital.[4] Today, many developed countries, such as the United States (US), European Union (EU), Japan, Norway; and developing countries such as Brazil, Russia, India, China and South Africa (BRICS) are both exporters and importers of foreign capital.

Historically, when investors from developed countries invest in developing countries with fragile and/or volatile political systems, the biggest concern of such investors was "expropriation risk".[5] The possibility that a public agency of the host state will seize foreign-owned private property for a purpose deemed to be in the interest of their public. Today, it is believed that this risk has largely disappeared.[6] Domestic growth in developing countries, combined with stronger international laws, reduced asset seizures to nearly zero during the 1980s.[7] However, as investors interest in developing countries grew, some host governments learned, "that more value can be extracted from foreign enterprises through the more subtle

[1] The Storting, ACT No. 26 of 9 May 1997: Act relating to the Norwegian Investment Fund for Developing Countries (1997).

[2] Om Norfund, Norfund (2016), http://www.norfund.no/om-norfund/category272.html (last visited Oct 5, 2016).

[3] José E Alvarez et al., The evolving international investment regime 49 - 55 (2011).

[4] ibid

[5] See Witold J. Henisz & Bennet A. Zelner, Harvard business review on thriving in emerging markets 5 (2011).

[6] ibid

[7] ibid

instrument of regulatory control rather than outright seizures".[8] That is, the probability that a host government will discriminatorily change its laws, regulations, or contract terms governing an investment or refuse to enforce them in a way that reduces a foreign investor's returns on their investments. This new (regulatory) risk is the main concern of today's investors.

One way that investors from developed countries, such as Norway, who invest in developing countries in Africa, protect their investments against potential changes in local regulations and politics is through investment agreements between their home government and the host country, which provides for the guarantee of enforceable rights in the event of a potential expropriation of their property. In the case of Norwegian companies, Norway has traditionally BITs as instruments to protect Norwegians investors abroad.[9] However, Norway has not signed many BITs or other types of investment agreements. The last BIT signed by Norway was in 1995.[10] Currently, Norway has only 15 BITs in force[11], a relatively low number compared with many other countries.[12] One of the reasons why Norway has not singed any BITs since 1995 is that investment issues in Norway have been moved from a bilateral context to a multilateral context, such as the WTO,[13] the OECD and the European Free Trade Association (EFTA).[14] Today, Norway mostly negotiates its investments treaties through the EFTA.[15] Negotiation of treaties through EFTA means that Norway has coordinated its policies on international investment issues closely with other EFTA members. However, as of 2016, EFTA has a free trade agreement with only nine of the fifty-four Africa countries in which Norwegian companies, including Norfund, have invested.[16] The nature and the duration of foreign

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[8] Quotation cited from Witold J. Henisz & Bennet A. Zelner, Harvard business review on thriving in emerging markets 5 (2011).

[9] For a detail examination see, Ole Kristian Fauchald & Kjersti Schiøtz Thorud, Protection of Investors against Expropriation (Universitetsforlaget) (2006)

[10] Norway - Russian Federation BIT (1995)

[11] See Norway - Bilateral Investment Treaties (BITs) Investmentpolicyhub.unctad.org, http://investmentpolicyhub.unctad.org/IIA/CountryBits/157 (last visited Sep 1, 2016)

[12] For instance, Sweden had of August, 2016 signed 69 bilateral investments treaties, Denmark had 55, Finland 77 and Germany 135 bilateral investments treaties.

[13]Under the WTO, issues concerning investments are covered by the General Agreement on Trade and Services (GATS) and the Agreement on Trade-Related Investment Measures (TRIMS)

[14] Investments issues are regulated under EFTA convention (2001)

[15] Ole Kristian Fauchald & Kjersti Schiøtz Thorud, Protection of Investors against Expropriation (Universitetsforlaget) (2006)

[16] EFAT has a free trade agreement with the Southern African Customs Union (Southern Africa: Botswana, Lesotho, Namibia, South Africa and Swaziland), Morocco, Tunisia, and Egypt. (for details, See *Free Trade*

investments, together with the special risk involved in investing in developing countries in sub-Saharan Africa makes stability and predictability particularly important for Norwegian companies interested in investing in Africa. Since Norway does not have a BIT with any of the African countries that Norfund invests in, this thesis seeks to explore how Norfund protects their investments in Africa against potential regulatory and political risk in the absence of BIT protection.

1.1 Rationale, Scope and Research Question

To understand the importance of this research topic and its potential contribution to the literature on the role of BITs in protecting investments in Africa, it is important to consider how a lack of a credible and stable legal and political mechanism affects the contracting incentives of governments in their dealings with foreign investors.[17] For instance, during negotiations, when Norfund or any Norwegian company invest in a fragile state in Africa, the host government which is in need of investors to create employment, bring in foreign technology etc., may encourage the investor to invest. The host government may ''agree'' to offer certain tax advantages to the investor, agree to allow a full repatriation of profits, and even waive certain import restrictions. The investors, on the other hand, wishing to make the highest possible return on their investments as possible will invest in the country.[18] However, once the investment is made, the host government will no longer have incentives to offer benefits sufficient to attract the investment. Knowing that once the investment has been made the investor cannot disinvest fully.[19] The host country can take advantage of this situation, and extract additional value from the investment outside the pre-investment agreement by, for example, increasing the tax rate beyond the level that was agreed during the pre-investment stage. Alternatively, in the case of Norfund, a host government can refuse to pay the agreed power purchased price or put a freeze on price increase on electricity.[20] Had there been investment treaty, or any form of enforceable rights to the investors, the government might have

Agreements, European Free Trade Association Efta.int, http://www.efta.int/free-trade/free-trade-agreements (last visited Sep 1, 2016)

[17] For a detail analysis and example of how the lack one lack of a credible and stable legal and political mechanism affects the contracting incentives of government in their dealings with (some) foreign investor See Andrew Kerner, Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties, 53 International Studies Quarterly 73-102 (2009).

[18] The investor will be hoping to safe on the promised low or no taxes

[19] ibid

[20] See page 23 for an overview of Norfund operations model

acted differently. This is because a breach of such an agreements would be a violation of international treaty. As such, this thesis focuses on what Norfund does to protect its investments in Africa in the absence of BIT protections. Specifically it focuses on the countries where Norway has no BITs. The motivation for investing in these countries, the risk appetite and mitigation techniques used by Norfund are examined in this thesis. It is important to mention here that, companies do not only invest in countries where their home state have BITs, and as such, BITs are not a key predictor of foreign direct investments into a country.[21] Therefore, this thesis seeks to answer the following research question: how does Norfund protect its investment against political and regulatory risk in the absence of BITs without looking at whether BIT drive investment decisions?

To answer this research question, in chapter one and two, I provide an overview of investment protection in Africa through a brief historical analysis. Chapter three focuses on the case company, Norfund, and its investments in Africa. I examine Norfund's investment portfolio as well as Norfund's relationship with the Norwegian government. Chapter four and chapter five are devoted to the analysis and conclusion.

[21]ibid

2 Chapter 2: Foreign Investments Protection in Africa

Since colonial times, the protections afforded to foreign investors in Africa has not just been determined by national law or exclusively by domestic jurisdictions. Although, customary international law does not require countries to admit foreign enterprises, it does insist on a certain level of minimum treatment once foreigners are permitted to operate in a host country. Under customary international law, foreign aliens (including alien investors) needed to be treated in accordance with what is called the international minimum standard."[22] Historically, violation of these standards could lead to the diplomatic exposure of the alien claim by his or her home state, which sometimes could lead to serious tensions between developed and developing states alike. This sometimes led to threats by wealthy states to engage in gunboat diplomacy on behalf of their nationals whenever their properties were expropriated abroad.

Today, the treatment of FDI have undergone tremendous legalization. The emergent of bilateral and multilateral treaties has replaced the old gunboat diplomacy and the threat to use force has been replaced with the rule of law.[23] In general, that is, the movement to law has proceeded along three dimensions: an increase in the number of legal obligations, in the precisions of these rules and in the extent to which states have agreed to delegate certain powers to resolve investment disputes through investment treaty arbitration. FDI is subjected to much more than the international minimum standard of treatment. It is now the subject of a wide number of legal rules. While the majority of legal regulations still remain at the national level and consist of local laws and administrative practices, there is considerably more treaty law, customary international law, general principles of law as well as institutionally generated forms of regulation to safeguard the property of aliens in the host states.

However, investment treaty laws only protect the interest of a citizen of the country or the group of countries who are parties to that treaty.

2.1 Regulation of Foreign Investors in Africa - historical overview

Contrarily to popular belief, African states have long regulated foreign investors within their territories. African countries regulation of foreign investment spans generations and can be traced back even before colonialism. Numerous scholars have demonstrated that, be-

[22] Anastasios Gourgourinis, Equity and equitable principles in the World Trade Organization (2013)
[23] ibid

fore colonial period, African states participated in commercial activities within Africa, established diplomatic links and concluded both intra-Africa treaties and international agreements.[24] That is, African states had sophisticated kingdoms that enjoyed and conducted trade, diplomatic and other forms of contact within African states and the outside world: including in Asia, the Middle East and European states.[25] In a detailed book documenting Africa regulation of trade and investments Stanley Ross et al claimed that traditional African chiefs and kings were highly respected during the execution of diplomatic, trade and international treaties, implying that for all intents and purposes African states operated with full sovereignty.[26] The universality of commercial activities, together with the fact that African states operated with full sovereignty and concluded numerous international treaties clearly shows that there existed mechanisms to regulate investments activities in Africa before colonialism.[27] This is to say that, indigenous African chiefs and kings operated international commercial treaties on behalf of their states.

However, during colonialism, sovereignty of African states that were colonized,[28] were substituted with that of their European colonial masters. This substitution of African states sovereignty with European sovereignty led to the collapse of the historic modes of international relations between African indigenous states and the outside world.[29] During the colonial era, Africa's social, economic and legal fabric was replaced with European rulers who controlled all external relations involving African states such as boundary, diplomatic engagements and commercial agreements. This is evident is the 1884-1885 Conference of Berlin on political partitioning of Africa[30], which not a single African country or representative was present. There was a de-facto suspension of African sovereignty.

[24] See for example Stanley Ross et al., Africa and the Development of International Law, 21 The American Journal of Comparative Law 604 (1973)

[25] NS Rembe, Africa and the International Law of the Sea (Sijthoff & Noordhoff Publishers 1980) 5.

[26] Stanley Ross et al., Africa and the Development of International Law, 21 The American Journal of Comparative Law 604 (1973)

[27] ibid

[28] Note that not all African countries were colonised by European powers. Ethiopia for example was not colonized as well as Liberia.

[29] Ibid 17

[30] For details of the 1884-1885 Conference of Berlin on political partitioning of Africa read Dierk Schmidt & Lotte Arndt, The division of the earth (2010).

2.1.1 Regulation of Foreign Investors during the Colonial Era

During the colonial period, foreign investments made in Africa were made mainly in the context of colonial expansion. This means that those foreign investors required minimal or to some extent no extra protection in the host states. Foreign investors did not have to worry about sufficient protection because the prevailing legal system in colonized states was similar to that of their home State.[31] For example, within the British colonies in Africa, the colonized population was also subjected to English Common law[32] and by extension, accorded Britain total control over the prevailing trade and investment regime.[33] Investors investing in the colonized states received adequate protection both at the pre-establishment and the post-establishment stage.[34] Since the colonial system was designed with the ulterior motives of economic exploitation by serving the interests of foreign powers at the expense of the locals, the system excluded the participation of African states from ownership, control and operation of foreign investment enterprises.[35] During colonial times, foreign investors entering colonized African states acquired exclusive and plenary rights over natural resources, which effectively accorded those investors the right to absolute ownership and control.[36] The right to exclusive ownership was protected through expansive imperial laws applicable to foreign controlled assets.

2.2 Regulation of Foreign Investors in the post-colonial era

The protection of foreign investments in Africa took a different turn after most African countries gained their independence. That happened after the end of World War II. After World War II, a common theme among African nationalist in the newly independent countries emerged. That was the notion that African states should primarily seek political freedoms as a pre-requisite for economic realignment.[37] Influential African nationalists such as Kwame Nkrumah of Ghana pushed for the nationalization of natural resources in the newly independ-

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[31] See M Sornarajah, The international law on foreign investment (Cambridge University Press) (2004).

[32] Even today, most formal British colonies follow the common law tradition.

[33] ibid

[34] According to Sornarajah the legal system in colonized countries were changed to accommodate European notions of individual property rights and freedom of contract. See M Sornarajah, The international law on foreign investment (Cambridge University Press) (2004).

[35] See Samuel K. B. Asante, Stability of contractual relations in the transnational investment process, 28 Int Comp Law Q 401-423 (1979).

[36] ibid

[37] Michael Barratt Brown, Models in political economy (L. Rienner Publishers) (1995)

ent countries.[38] With the aim of securing equitable distribution of wealth and economic freedom over natural resources within their countries, the newly independent African countries launched a series of expropriation without according the internationally required level of compensation.[39] For instance, Tanzania terminated almost all concessions as well as commercial treaties concluded during the colonial period immediately after gaining independence on the premise that such concessions and treaties had been concluded with British interests in mind rather than Tanzanian interests.[40] Not surprisingly, this practice of expropriation without adequate compensation was met with protest from Western investors who insisted on the existence of an international minimum standard for ‘‘duly acquired property rights’’. The newly independent countries argued against the existence of such a standard.[41]

Some of the newly independent countries even rejected the existence of binding customary international law at all. Developed countries and their nationals who had invested in these now independent countries insisted on the existence of an international standard for compensation for expropriating their property rights while the host nations argued against the existence of such a standard.[42] Specifically, the newly independent host states argued that state practice did not conform to the ‘‘*Hull formula*’’ and as such, the so-called standard lacked a broader support required for rules to become customarily binding.[43] It is important to mention here that, the notion of property rights and international law standards promoted by developed countries received widespread condemnation from almost all newly independent countries at the time.[44] This almost led to a universal rejection of foreign investment rules by the newly independent states.[45]

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[38] ibid

[39] M Sornarajah, The international law on foreign investment (Cambridge University Press) (2004).

[40] See Earle Seaton & Sosthenes T Maliti, Tanzania treaty practice (Oxford University Press) (1973)

[41]For a detailed analysis, see Jeswald W Salacuse, BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries, 20 The International Lawye 659-661 (1990)

[42] Jeswald W Salacuse, BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries, 20 The International Lawyer 659-661 (1990)

[43] The Hull formula states emerged out a diplomatic note addressed by the then US Secretary of State Cordell Hull to his Mexican counterpart 1938. He stated that ‘‘the Government of the United States merely adverts to a self-evident fact when it notes that the applicable and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment therefore.’’

[44] Fath el Rahman Abdalla El Sheikh, The legal regime of foreign private investment in the Sudan and Saudi Arabia (Cambridge University Press in association with Khartoum University Press) (1984)

[45] ibid

The formation of the nonaligned movement (NAM), which was born out of the struggle between the East and the West, with most newly independent African states joining the NAM further deepened the divide and the mistrust for the rules on the protection of international investments. The NAM became the main mouthpiece exerting pressure on Western countries to ensure that formal colonized states acquired complete sovereignty over their natural resources and attained economic independence.[46] This received widespread support from ideological opponents of formal colonial countries in the West such as China and the Soviet Union. China and the Soviet Union encouraged the newly independent states to reject capitalism pushed on them by Western countries who colonized and exploited them.[47] To the newly independent African countries, economic independence over their natural resources and wealth was as an important step to acquiring other state rights including the right to self-determination, sovereignty, exploration, exploitation, use and marketing of their natural resources.[48] The movement for permanent sovereignty over natural resources further complicated matters for international law and protection of property rights in the newly independent countries. Not surprisingly, Western countries rallied behind the idea for the existence of an international minimum standard. The pursuit of sovereignty combined with the nationalization stance by newly independent countries precipitated the birth of a declaration of permanent sovereignty over natural resources.[49] The adoption of General Assembly Resolution 523(VI) postulated that developed and developing countries are allowed to enter into commercial contracts provided the contracts do not contain economic or political conditions violating sovereign rights including the right to determine plans for economic development.[50]

2.3 Sources of modern international investment law

It is difficult to imagine a country with proper economic, social and environmental development without foreign investments. In most developing countries in Africa, one of the

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[46] ibid

[47] Michael Barratt Brown, Models in political economy (L. Rienner Publishers) (1995)

[48] Nina M Eejima, Sustainable Development and the Search for a Better Environment, a Better World: A Work in Progress, 18 UCLA Journal of Environmental Law & Policy 99-100 (1999)

[49] ibid

[50] See General Assembly Resolution on Permanent Sovereignty over Natural Resources 523 (VI) 1952. This is further elaborated and captured in GA Resolution 626 (VII), which articulated the doctrine of economic self-determination

major sources of development capital is FDI[51]. FDI provides the capital for the much-needed infrastructure development, technology transfers, capacity building and more in these countries. It is documented that, due to the benefits that can flow from FDI, all countries, both developing and developed wish to attract investment into their countries.[52] Traditionally, the flow of foreign capital into the domestic economy has been a potent source of foreign capital for least developed countries of which developed countries has remained the principal exporters of such capital[53]. To this effect, the rules on the protection of foreign investments were mainly by the capital exporting countries to protect the properties of their citizen abroad.[54]

Today, many developed and developing countries as such are active exporters and importers of foreign capital. Most governments of today acknowledge that they need foreign capital to thrive. However, to investors a key concern is the predictability and stability of legal conditions during the lifetime of their investments. This is because investment from foreigners are potentially exposed to different types of risk compared to those encountered by an investor in his/her domestic country; and thus predictability of the rules governing such investments are very important. The worst-case scenario is a host government changing rules that adversely affect the value of the investment or the legitimate expectation of the investor concerning his/her investment. In some cases, investors must abandon the investment due to a manifestation of any of the above-mentioned risks. Investors therefore need to protect themselves again potential expropriation of their property. States offers different mechanisms to protect investors. These include investment legislation, investment contracts, BITs, and multilateral investment treaties. In addition, some investors are relying on other forms of protections such as private (political risk) insurance and government backed investment guarantees. What follows is a general overview of the above-mentioned sources of investment law.

2.3.1 Bilateral investment treaties

BITs are considered the most important sources of contemporary international investment law.[55] BITs are entered into by countries. The first country to start entering into BITs

[51]See Nathalie Bernasconi-Osterwalder & Lise Johnson, Investment Law and Sustainable. Development. Key cases from 2000–2010 (The International Institute for Sustainable Development (IISD) 1) (2010), http://www.iisd.org/pdf/2011/int_investment_law_and_sd_key_cases_2010.pdf (last visited Sep 8, 2016)

[52] ibid

[53] ibid

[54] Rudolf Dolzer & Christoph Schreuer, Principles of international investment law 13 (2 ed. 2012).

[55] Rudolf Dolzer & Christoph Schreuer, Principles of international investment law 13 (2 ed. 2012).

was Germany in 1959. This was closely followed by Switzerland in 1961. Many other countries followed suit. Today, it is estimated there are about 3500 BITs in existence.[56] BITs work by providing guarantees for the investment of investors from one of the contracting states in the other contracting state. Currently, countries with particularly active BIT programs are Germany (135 treaties (132 in force), China 129 treaties (110 in force), Switzerland 114 treaties (112 in force), the United Kingdom 106 treaties, (96 in force) France 104 treaties (96 in force) and Egypt 100 treaties (73 in force).[57] Apart from Egypt, other African states have negotiated an increasing amount of BITs both with developed countries and among themselves.

BITs are typically structured in three parts. The first part typically deals with definitions of key concepts such as who is an investor and what is an investment in the sense of the BIT.[58] The second part generally deals with the substantive standards for the protection of investment and investors. Typically, they contain a provision on the admission of investment; a guarantee of fair and equitable treatment (FET); a guarantee for full protection and security as well as guarantee against arbitrary and discriminatory treatment; national treatment and national treatment principles, most favored nation clauses, and guarantees in case of expropriation. The third part of BITs typically includes provisions for the settlement of disputes between the contracting states and most importantly, for the settlement of disputes between the host state and investor, which often include the possibility for arbitration or conciliation. . It is important to mention here that, although many BITs display similarities, all BITs are by no means the same, they do display significant differences, and therefore each BIT must be examined in its own right.

2.3.2 Multilateral Investment treaties

In addition to BITs, there has been several attempts to create a multilateral agreement to protect investments to and from different nations. The first effort to create a truly multilateral treaty protecting foreign investments can be traced back to the 1920, most notably the League of Nations draft convention, the Abs-Shawcross Draft Convention in the 1950s and the Organization for Economic Cooperation and Development (OECD) initiative to launch a

[56] Ibid

[57] For a detailed list, see International Investment Agreements by Economy, Investmentpolicyhub.unctad.org (2016), http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu (last visited Sep 10, 2016).

[58] Rudolf Dolzer & Christoph Schreuer, Principles of international investment law 13 (2 ed. 2012).

multilateral Agreement on Investment (MAI)[59] in the 1990s are also later efforts. An effort within the framework of the World Trade Organization was started in 1996 but was ultimately dropped in 2004.[60] Today, the most successful multilateral investment treaties exist at the regional level. These include the North American Free Trade Agreement (NAFTA) signed by Canada, Mexico, and the United States.[61] the EFTA consisting of the Iceland, Liechtenstein, Norway, and Switzerland;[62] and the Energy Charter Treaty (ECT)[63], which was designed to cover the corporation of EU and Russian as well as all the new states in Eastern Europe and Central Asia in the energy sector. Other regional agreements that cover investments protection include the Association of Southeast Asian Nations (ASEAN), the Protocol of Colonia for the Promotion and Reciprocal Protection of Investments within (MERCOSUR). Multilateral investment treaties also exist in specialized areas of investment law. These include the International Centre for Settlement of Investment Disputes (ICSID). ICSID provide a framework for the settlement of disputes between host countries and foreign investors through arbitration and conciliation. Finally, the convention establishing the multilateral investment guarantee agency (MIGA) created an international framework for political risk insurance. The agreement on trade related investment measures ('TRIMS') of 1994 also regulates certain aspects of foreign investment.

2.3.3 Investment legislation and unilateral statements

In addition to bilateral and multilateral agreements, many African countries such a, inter alia, Nigeria[64], Kenya[65], and Ghana[66], have enacted legislations to guarantee protection for foreign investors. In international investment law, the legal effect of these unilateral actions

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[59] The OECD effort broke down because of among other things opposition from by NGOs and the desire by France to protect ''French culture''. For a detail analysis, see Christoph Schreuer, Investments: International Protection, Max Planck Encyclopedia of Public International Law Online, (48) (last visited Sep 10, 2016)

[60] According to Christoph Schreuer, the main reason was fear of developing countries that a multilateral treaty might unduly narrow their regulatory space.

[61] It is important to note that, NAFTA has two supplements: the North American Agreement on Environmental Cooperation (NAAEC) and the North American Agreement on Labor Cooperation (NAALC).

[62] See William Rossier, EFTA Free Trade Relations 3 (1 ed. 2006), http://www.efta.int/sites/default/files/publications/bulletins/EFTA_Free_Trade_Relations_July-August_2006.pdf (last visited Sep 10, 2016).

[63] The ECT is inforce since 1998

[64] For details Nigerian Investment Promotion Commission Act, Nigeria-law.org (2016), http://www.nigeria-law.org/Nigerian Investment Promotion Commission Act.htm (last visited Sep 10, 2016).

[65] The Attorney-General, Investment Promotion Act 120 (2004).

[66] Ghana Investment Promotion Centre, Ghana Investment Promotion Centre Act 2013 3 (2013).

and the conditions under which these actions may be considered binding have played a prominent role in the case law; especially within the context of the guarantee of FET.[67] It is important to mention here that, the International Court of Justice (ICJ) has recognized that unilateral actions will be binding if the circumstances and/or the wording of the statement are such that the addressee are entitled to rely on them.[68] The legality of unilateral actions has further been strengthened by the international law commission adoption of guiding principles applicable to unilateral declaration of states capable of creating legal obligations. Arbitral tribunals have also upheld the validity of unilateral statements. For instance in *Waste Management v. Mexico,* the tribunal in apply the FET standard found that ''it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant''.[69] The legal basis of unilateral acts, statements and conducts by States having a binding effect under international law appeal to be only in part related to the concept of ''estoppel''.[70]

2.3.4 Investment contracts

Another way investors seeks to protect their investments is through investment contracts between investors and host states. Investment contracts are agreements signed directly between a host government and a foreign investor. Investment contracts create the key legal underpinnings for an investment. Investment contracts define the legal right and obligations of the government and the investor. Investment contracts can be drafted in a way that permits the application of already existing and future domestic law, or can be made so as to override otherwise applicable domestic law.

The use of an investment contract as a guarantee for foreign investments is an old and persistent phenomenon. Indication shows that the use of investment contracts by government with foreign and domestic contracts are on the increase in the developing world.[71] This is driven by governments' need for cash and technology to deliver the needs of their population

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[67] For detailed analysis, see Rudolf Dolzer & Christoph Schreuer, Principles of international investment law 13 (2 ed. 2012).

[68] See *Legal status of Eastern Greenland (Denmark v. Norway),* 5 April 1933 PCIJ, series A/B 53,22,69; ICJ, *Nuclear Tests Cases (Australia/New Zealand v. France),* 20 December 1974, ICJ reports (1974) 253, 268.

[69] *Waste Management v Mexico,* Final award, 30 April 2004, para 98

[70] Christoph Schreuer, Investments: International Protection, Max Planck Encyclopedia of Public International Law Online, (48) (last visited Sep 10, 2016)

[71] See David W. Gaffey, Outsourcing Infrastructure: Expanding the Use of Public-Private Partnerships in the United States, 39 Pub. Cont. L. J. 351, 352-53 (Winter, 2010).

and private investor’s quest to expand their business opportunities. Investment contracts are often long term. With some deals having a lifespan of 10 to 30 years. They are frequent in industries that have traditionally been considered ‘‘public services’’ such as the provision of electricity. Examples of foreign investment contracts include Concession Agreements, Production Sharing Agreements (PSA), and Build-Operate-and-Transfer (BOT) Agreements.

2.4 Investor-State Dispute Settlement system

To begin with, it is important to mention here that, the legal protection of international investments under public international law today is guaranteed by a network of more than 3500 BITs, multilateral investment treaties, and a number of Free Trade Agreements such as NAFTA containing a chapter on investment protection. In addition to increasing FDI flow, one of the main purposes of BITs is to guarantee enforceable rights for foreign investors. That is, the ability to institute arbitral proceedings in case of dispute. Almost all modern BITs have investor-state dispute settlement (ISDS) mechanisms that permit investors of one member state[72] to bring claims directly against the host government before an international arbitral tribunal. However, this trend may be changing. For example, the Transatlantic Trade and Investment Partnership (TTIP) currently under negotiation between the EU and the US is expected to provide a dispute settlement mechanism that differs significantly from those provided in most BITs. The TTIP commission wants to introduce a system of investment protection and a way for settling disputes between private investors and host governments through the establishment of a permanent investment court.[73] Under NAFTA rules for example, investors are not required to exhaust local remedies before filing Chapter 11 claims.[74] Section 3 of the 2015 Norwegian model treaty also permit investors to submit a dispute for resolution under international law, without a requirement to exhaust [75] That is, states which sign BITs seems to understand that, treaties, to be meaningful, must also be enforceable. Hence, they provide for a mechanism for settling disputes between the investor and the host state when such disputes do arise without a pre-condition to exhaust local remedies or going through local courts.

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[72] Removed from the most recent Norwegian model

[73] See Peter H. Chase, TTIP, investor–state dispute settlement and the rule of law, 14 European View 217-229 (2015)

[74] NAFTA Article 1121 waives the local remedies rule see

[75] See Draft Agreement between the Kingdom of Norway and . . . for the Promotion and Protection of Investments, May 2015, https://www.regjeringen.no/contentassets/e47326b61f424d4c9c3d470896492623/draft-model-agreement-english.pdf.

3 Chapter 3: Norway’s BIT Program – Present and Future

3.1 The Norwegian model BIT

As stated earlier, Norway has not signed many BITs or investment agreements. Currently, Norway has only 15 BITs in force.[76] One of the reasons why Norway does not sign many BITs is that, investment issues in Norway have been moved from a bilateral context to a multilateral context, such as the WTO,[77] the OECD and the EFTA.[78] Norway mostly negotiates its investments treaties through the EFTA.[79] In 2015, Norway produced a Draft model BIT.[80] Although it is beyond the scope of this thesis to dwell on the historical development of the model BIT, it is very important to give an overview of the draft Model BIT. Because it sets the stage for clarifying whether Norfund is an investor or not and to what extent projects Norfund has invested in within Africa can be considered ‘‘investments’’. The 2015 Model BIT builds on Norway’s previous Model BIT, which was introduced in 2007.[81]The 2015 draft text of Norway’s model BIT, released to the public in May 2015, received a better reception than the previous model in 2007, which was largely criticized by the public.[82]The 2015 Model BIT feature a number of innovations over previous Norwegian BITs. For instance, the 2015 Draft Model BIT gives the state powers to take measure or a series of measures to safeguard public interests, such as measures to meet health, human rights, resource management, safety or environmental concerns.[83] The draft Model explicitly preserves the states’ right to regulate in these fields and precludes states from waiving or derogating from such measures in order to encourage investment. Stating that it will be inappropriate for states to encourage investment by relaxing domestic health, human rights, safety or environmental measures or labor stand-

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[76] See Norway - Bilateral Investment Treaties (BITs) Investmentpolicyhub.unctad.org, http://investmentpolicyhub.unctad.org/IIA/CountryBits/157 (last visited Sep 1, 2016)

[77]Under the WTO, issues concerning investments are covered by the General Agreement on Trade and Services (GATS) and the Agreement on Trade-Related Investment Measures (TRIMS)

[78] Investments issues are regulated under EFTA convention (2001)

[79] Ole Kristian Fauchald & Kjersti Schiøtz Thorud, Protection of Investors against Expropriation (Universitetsforlaget) (2006)

[80] Norwegian Draft Model BIT (Draft Version 130515)

[81] Norwegian Draft Model BIT (2007)

[82] Damon Vis-Dunbar, Norway shelves its draft model bilateral investment treaty | Investment Treaty News Iisd.org (2009), https://www.iisd.org/itn/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty/ (last visited Oct 3, 2016).

[83] See article 16 para. 8 Norwegian Draft Model BIT (Draft Version 130515)

ards.[84] The importance of these social issues are also emphasized in the preamble of the 2015 Draft Model BIT. They provide the basis for states to deviate from other substantive obligations found in the treaty. For instance, the 2015 Model BIT clarifies that governmental measures that are intended to protect these interests and that may have a differential effect on foreign investors or their investments are not inconsistent with National Treatment (NT) or Most Favored Nations (MFN) standards of protection.[85] The 2015 Draft Model BIT also update the 2007 dispute settlement mechanism. The 2015 Draft Model grant investors access to international dispute settlement mechanisms as well as promote transparency in the dispute settlement. For instance, the Draft model does not contain a requirement for the exhaustion of local remedies as it was in the 2007 version. This new Draft model is not in effect with any of the African countries in which Norfund invest, however, it present an important contribution to this thesis on the status of Norfund as a private investor or otherwise.

3.1.1 Investor

The draft model defines BIT ''investor'' as:

i. *a Party*

ii. *a natural person having the nationality of, or permanent residence in, a party in accordance with its applicable law; or*

iii. *any entity established in accordance with, and recognised as a legal person by the law of a Party, and engaged in substantive business operations in the territory of that Party, irrespective of whether their liabilities are limited and whether or not their activities are directed at profit that seeks to make, is making or has made an investment in the other Party*

This definition covers any entity established in accordance with, and recognized as a legal person by the law of a Party. This means that Norfund incorporated by act of parliament but registered as a private company; qualify as an investor per this definition. By making this broad definition of an investor, had Norway entered into a BIT with an African government, Norfund would be considered an investor from Norway per the definition given in the BIT.

3.1.2 Investment

The model BIT also defines investment as:

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[84] Id. Art. 11

[85] See footnote to Art. 3

Every kind of asset owned or controlled, directly or indirectly, by an investor of a party, including, but not limited to:

I. *any entity established in accordance with, and recognized as a legal person by the law of a Party, whether or not their activities are directed at profit;*
II. *shares, stocks or other forms of equity participation in an enterprise, and rights derived therefrom;*
III. *bonds, debentures, loans and other forms of debt, and rights derived therefrom*
IV. *rights under contracts, including turnkey, construction, management, production or revenue-sharing;*
V. *contracts;*
VI. *claims to money and claims to performance*
VII. *intellectual property rights*
VIII. *rights conferred pursuant to law or contract such as concessions, licenses, authorizations, and permits;*
IX. *any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges*

It further states that, ‘‘in order to qualify as an investment under this agreement, an asset must have the characteristics of an investment, such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk’’.[86]

As discussed below, Norfund invest risk capital in private companies in developing countries in the form of equity participation. By this, the model BIT would offer Norfund enforceable rights. Norfund would have also benefited from the guarantees and protects that the BIT offers should it run into any investment related dispute in the course of its operation in that country. Therefore, by the definitions of the model BIT, Norfund is an *investor* making *investments* in Africa because it owns or controlled, directly or indirectly those operating companies in for example all the Independent Power Projects (IPP) it participate.

3.1.3 Development policy perspectives of the Model BIT

Historically, investment protection agreements have mostly been directed towards countries with fragile administrative capabilities or weak rule of law traditions.[87] The aim has been to ensure the home states of the foreign investor are given a sound framework and conditions for investing in those fragile states. Even though the mandate for drafting the model agreement did not give a specific instructions as to which countries to negotiate with, the Norwegian draft model, the deliberations made in the work on the model agreement con-

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[86] Norwegian model BIT (2007

[87] Comments received on the Norwegian Draft Model BIT, http://www.uio.no/studier/emner/jus/jus/JUR5850/tekster/norway_draft_model_bit_comments.pdf (last visited Nov 14, 2016)

cerned mainly the conclusion of agreements with developing countries and countries with economies in transition.[88] This was mainly because in research reports and international organizations, different views have been expressed regarding the effect of investment agreements.[89] That is, some maintain that investment agreements do not result in increased foreign investments, while others claim the opposite.[90] Although, the effect of the agreements seems to vary from country to country. To the Norwegian government, investment agreements are only one of a number of instruments for increasing investments between developing countries and Norway. This is evident in the Soria Moria Declaration[91], where the Norwegian government emphasized its focus on commercial and industrial development. It was repeated both in the *Strategy for Private Sector development in the South*[92] and in Report No. 35 to the Storting 2003-2004 "Joint Campaign against Poverty".[93] The Norwegian government believes that development cannot depend on public funding alone. Even though public funding serves as an important condition, development to some extent must dependent on private investments. The establishment of entities such as Norfund to invest in private enterprises in developing countries is considered by the Norwegian government as both positive and important.[94] By it model BIT, the Government wishes to facilitate increased investment in developing countries on the believe that it will be difficult to deal with poverty, unless jobs are created in the private sector in developing countries. Institutions like Norfund is the government's effort to create a framework for conditions and infrastructure to provide for economic growth and social development in those countries. What this means is that enforceability rights is not the main concern of Norfund.

3.2 Norfund Investments in Africa

Norfund invests in the establishment and development of sustainable enterprises in developing countries. The Norwegian Parliament established Norfund in 1997 as the Norwegian government's main instrument for combatting poverty through private sector development and Norfund's objective is to contribute to sustainable commercial businesses in devel-

[88] ibid

[89] Norwegian Ministry of Trade, Industry and Fisheries, Comments on the model for future investment agreements (2015).

[90] ibid

[91] See Soria Moria declaration on international policy (Norway), https://snl.no/Soria_Moria-erklæringen (last visited Nov 14, 2016)

[92] See Strategy for Norwegian support of private sector development in developing countries Government.no, https://www.regjeringen.no/no/dokumenter/Strategy-for-Norwegian-support-of-private-sector-development-in-developing-countries/id420023/ (last visited Nov 14, 2016)

[93] Report No. 35 to the Storting (2003-2004) - Fighting Poverty Together A Comprehensive Development Policy Government.no, https://www.regjeringen.no/no/dokumenter/report_no-35_to_the_storting_2003-2004/id208536/ (last visited Nov 14, 2016)

[94] ibid

oping countries. Norfund provide funding through capital allocations from Norway's development assistance budget. The Norwegian government considers Norfund as an instrument for combating poverty.[95] This means that in the eyes of the government, Norfund is not a profit seeking entity but purely an aid instrument of the ministry of foreign affairs.[96] Norfund provides equity, risk capital, and loans to companies in selected countries and sectors where Norfund believes businesses lack access to sufficient capital to develop and grow. Norfund invests in clean energy, financial institutions and agribusiness, in addition to small and medium sized companies through investment funds. Norfund's main investment regions are Southern and Eastern Africa, South-East Asia and Central America. As of end of year 2015, Norfund had a portfolio of about US dollars (USD) 1,8 billion (NOK 15,2 billion) and 70 employees.

3.2.1 Norfund Portfolio and investment strategy

Norfund invests with other companies, in a capacity as a private investor. These investment partner companies could be both Norwegian and non-Norwegian[97]. By co-investing with others, Norfund leverages additional capital and can ensure the industrial and local knowledge needed for each investment. Norfund is set up to serve as an instrument for Public Private Partnerships (PPPs). Norfund's investments are in Africa, Asia and South America. Representing 59,6% and 35% respective (See table 1 below).

Table 1 Norfund Investments by region

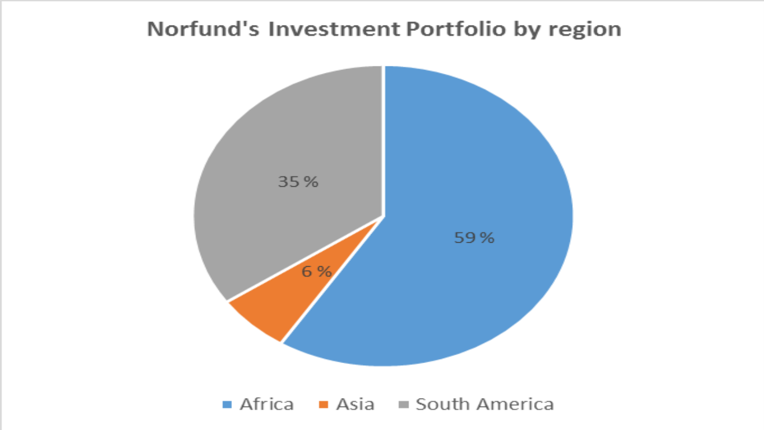
Region	Committed amount (MNOK)	Share of investment
Africa	8 823	59 %
Asia	946	6 %
South America	5 176	35 %
Sum	**14 945**	100 %

Source: Norfund Investing for development report 2015

[95] See section 1 of Norfund Act.

[96] This is equivalent to the CDC Group plc (Commonwealth Development Corporation, previous the Colonial Development Corporation) by the UK government or the United States Agency for International Development (USAID) by the United States Government.

[97] Interview with Norfund Directors



Source: Norfund Investing for development report 2015

Africa is the largest portfolio region for Norfund. Within Africa, Norfund's investments are in Eastern Africa (Kenya, Tanzania, Uganda, Burundi, Rwanda and South Sudan. Regional office in Nairobi, Kenya) and southern Africa (Angola, Namibia, South Africa, Lesotho, Swaziland, Mozambique, Zimbabwe, Zambia, Madagascar and Malawi. Regional office in Johannesburg, South Africa and Maputo, Mozambique). Norfund is in the beginning stages of investing in West Africa, using Ghana as a springboard.[98] In Central America Norfund has portfolio in Guatemala, El Salvador, Nicaragua, Honduras, Panama and Costa Rica. Regional office in San José, Costa Rica. In Southeast and South Asia, its portfolios are in Bangladesh, Vietnam, Laos, Cambodia and Myanmar. Regional office in Bangkok, Thailand.

Table 2 Norfund Portfolio in Africa

Portfolio in Africa	Committed Amount (MNOK)	number of Projects
Angola	65	2
Kenya	2 040	8
Mozambique	249	3
Namibia	64	1
Nicaragua	95	3
Rwanda	53	2
South Africa	508	5
South Sudan	90	3
Other Southern Africa	1841	2

[98] Interview with Norfund Directors

Tanzania	504	9
Tanzania, Mozambique	57	1
Uganda	139	6
Zambia	187	4
Zimbabwe	91	2
Other Africa	2841	15
Grand Total	**8 823**	**66**

Source: Norfund Investing for development report 2015

Currently, Norfund has invested close to 9 billion NOK in Africa. However, as discussed previously, Norway does not have investments treaties with any of the countries with which Norfund has invested. The question then becomes, how does Norfund protect these investments against a potential political and regulatory uncertainties, a breach of contract by the host government, restrictions on the transfer of profits, civil disturbance or a host government failure to honor guarantees? In 2000, the consulting firm PriceWaterhouseCoopers study concluded that an opaque policy-making environment is equivalent to at least a 33% increase in taxation. In 2004, the World Bank group published that about 15% to 30% of infrastructure contracts covering 371 billion USD investment in the 1990s were subject to government-initiated renegotiations or disputes.

3.3 Norfund relationship with the Norwegian government

Norfund is a state-owned company with limited liability, established by a special Act of the Norwegian Parliament. The Ministry of Foreign Affairs (MFA) owns Norfund on behalf of the Norwegian government. The MFA has constitutional responsibility for the organization and the King in Council appoints Norfund's Board of Directors.[99] Norfund's relationship with the Norwegian government is clear; the government is the owner. However, Norfund operates independently from the government and enjoys no better privileges from the government compare to other private investors.[100] Norfund's investments are made with private partners both in Norway and abroad, to mobilizing capital that would not otherwise have been available for commercial investments in poor countries. For instance, from Norway,

[99] In Norway, King in Council means the Executive branch of the Government
[100] Interview with Investment Directors at Norfund

Norfund invests in partnership with the life insurance company KLP in microfinance, renewable energy and banking sector in developing countries.[101]

A question that comes to mind is about what the Norwegian government may do for Norfund through its political influences in case of a dispute concerning one of Norfund's investments in Africa. In my interview with the Norfund managers, it was made clear that, ''the Norwegian government does not involve itself in the day to day operations'' and hence any challenges Norfund faces in the course of its investments are dealt with as by Norfund and the project partners as private entities. Like any other private entity from Norway, if in trouble abroad, Norfund receive a lot of support from the Norwegian embassy involved.[102] One can speculate why the government will not use it soft power to give Norfund extra privileges above what a privately owned private investor may enjoy. A possible explanation is the fact that, as stated above, the Norwegian government is not suing Norfund for profit seeking. Norfund is an aid instrument of the foreign ministry, an instrument for combating poverty. This means that part of the development aid budget invested into Norfund and investment made by Norfund are a de facto aid. This is equivalent to the United States Agency for International Development (USAID) by US government, which has an annual budget of 35, 6 billion USD as of 2015. One can say that, the government is not in any way aggressively expecting returns on its aid budget and hence not from Norfund. This could also explain partially why Norfund does not concern itself with investment protections. Norfund does not need the enforceable rights that investment agreements provide. Because from the owners of Norfund's perspective, Norfund is another element of the aid policy.

In the next chapter, I examine Norfund in detail: its operations model and provide examples of investments Norfund has completed. I also look at examples of investor- state disputes in the developing world and examines how Norfund could been affected had it been Norfund involved in those disputes.

[101] Example of such investments is the Norwegian Microfinance Initiative (NMI), which invest in microfinance institution around the world. It is owned by Norfund together with Ferd Capital, KLP and DNB Bank

[102] Interview with Norfund directors

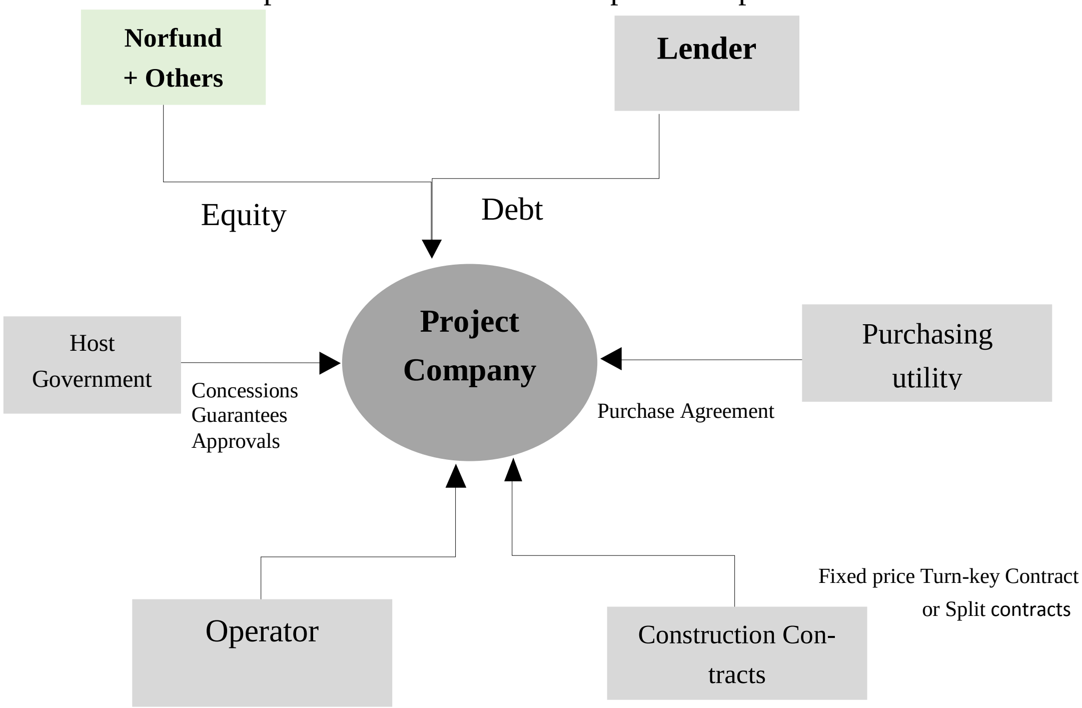
4 Chapter 4: Analysis

4.1 Norfund operation model

Norfund provides equity, other risk capital, and loans to companies in selected countries and sectors where businesses lack access to sufficient capital to develop and grow. Norfund identifies inadequate infrastructure as a key constraint to investment and growth, therefore, investing in infrastructure will boost economic growth in these developing countries: a major aspiration of the Norwegian government. Norfund believes that, there is a positive correlation between infrastructure expenditure and GDP growth.[103] It sees an opportunity for high economic returns to investment in infrastructure. Although these investments require large sums in risk capital and a predictable policy and regulatory framework. Below is an illustration of how Norfund set up its investment projects.

4.1.1 Independent Power Project (IPP) structure

Table 3 Example of Norfund investment partnership structure



Source: Norfund

[103] Interview with Norfund directors

Today, investments into infrastructure sectors are dominated by public sector; however, there is a strong shift towards private sector through PPPs. Norfund's large investments are structured using an Independent Power Project (IPP) model (see above).

Norfund invests together with other private companies and through partnership with governments. According to its IPP model, Norfund involves both private sector investors and host government as partners. For instance, suppose a new hydropower production plant is initiated in Rwanda. Norfund and the partners provide investment in the form of equity. A project company is then established in the host country (Rwanda in this case). This company then borrows from a traditional lender (i.e. a Bank). Since in most developing countries, electric power distribution is still controlled by the government, the project company signs a concession guarantee agreement with the host government for a period, usually 15 to 30 years. Depending on the project, the project company then signs a power purchasing agreement with the national electricity distribution company. After the project is completed, a management company (the operator) is established or hired to manage the day-to-day running of the facility. This means that, legally, Norfund becomes a foreign shareholder.

This structure together with the traditional market risk, network risk, force majeure etc., comes with an additional political and regulatory risk. An unstable host government may increase corporate taxes on the specific sector, intervene on pricing and tariffs or may even outright nationalize the facility over time. The purchasing utility company may fail to enforce the agreed price. The host government may decide to amend market rules or enact new technical and environmental regulations among others. This make Norfund's investment vulnerable and therefore increases the risk associated with the investment.

4.1.2 Political and regulatory risk mitigation – Norfund approach

The involvement of private investors in sectors traditionally reserved for governments in the provision of public services, such as the provision of electricity, has led to many investment disputes. For instance, on July 24, 2008, a panel of arbitrators rendered an award in the case of *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania (Biwater Gauff).*[104] The Anglo- German consortium filed a claim against Tanzania by relying on the UK-Tanzania BIT. The main outcome of the Biwater Gauff decision, endorsed by the majority, is that while Tanzania's actions may have constituted violations of certain provisions of the UK-

[104] Biwater Gauff (Tanzania) Ltd. (U.K.) v. United Republic of Tanzania ICSID (W. Bank) ARB/05/22 (Award) (24 July 2008).

Tanzania BIT, they did not cause compensable damage to the claimant's venture. In the subsequent sections, I examine the *Biwater Gauff* case in detail in additional to two previously concluded investment related cases; *Parkerings-Compagniet AS v. Republic of Lithuania (Parkerings)*; and *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana (Biloune)*. I relate these cases to similar situations in which Norfund can find themselves in the course of their operations in Africa. I suggest ways by which Norfund can protect its investments against the above mentioned risks in the future.

4.1.2.1 Case example 1: Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania

Case type: *Treaty*

Applicable treaty: *United Kingdom–Tanzania Bilateral Investment Treaty (BIT)*

4.1.2.1.1 Summary of the Dispute

Dar es Salaam, the capital of Tanzania had been experiencing difficulties in managing and ensuring efficient distribution of water to all regions of the capital. As the tariffs charged per usage of water were too low to fund the necessary capital expenditures, the sewerage situation was getting worse. In 2003, the Tanzania obtained a 140 million USD loan from the World Bank Group, the African Development Bank and European Investment Bank to repair, upgrade and expand the Dar es Salaam water and sewerage infrastructure.[105] The funding came with a conditionality that Tanzania must have a private operator manage and operate the water and sewerage system.[106] Tanzania announced an international tender, only Biwater Gauff (a joint venture of two European companies, from England, Wales and Germany) submitted a tender. It won the bid. In the terms of the tender, Biwater Gauff was required to establish a local operating company, with a minimum number of shares owned by a Tanzanian national or company. The operating company was established: City Water Services Limited (CWC). CWC entered into three contracts with the Dar es Salaam Water and Sewerage Authority (DAWASA). One of the contracts was the Water and Sewerage Lease Contract. It required CWC to provide water and sewerage services for a ten-year period in a designated area as

[105] For technical details of the project see presentation by the African Development Bank see The African Development Bank, Tanzania - Dar es Salaam Water Supply and Sanitation Project (2004), http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/PCR_DWSSP_1_.pdf (last visited Oct 1, 2016).

[106] Biwater Gauff (Tanzania) Ltd. (U.K.) v. United Republic of Tanzania ICSID (W. Bank) ARB/05/22 (Award) (24 July 2008). Para.96

well as implement certain capital works associated with the modernization project. In the contract, CWC was to pay rental fees to DAWASA. The main source of income to CWC was the collection of operator tariff, which it would use to fund its operations. CWC also collected lessor tariff for DAWASA and a first-time connection tariff to fund low-income customer's connection charges. CWC commenced operation on 1 August 2003. In the course of the operation, CWC faced several unanticipated challenges in addition to the infrastructure problems; it found it difficult to bill and collect payments from customers, both because it faced unauthorized competitors and because many residents resisted rates increases.[107] CWC underestimated the difficulty of the project and failed to allocate sufficient resources to it. CWC requested an increase in the operator tariff, however, Tanzania objected to such an increase, because an auditor's report had suggested that such an increase was unwarranted. The relationship between the government of Tanzania and the Biwater Gauff group continued to deteriorate. They even tried renegotiating the contracts under a mediator but the mediation failed. After mediation failed, the government took matter in its own hands. Between 13 May 2005 and 1 June 2005, DAWASA together with other government bodies repudiated the lease contract and occupied CWC's offices, in effect taking over the management of CWC and deporting CWCs expatriate managers.

Biwater Gauff brought a case before ICSID under the UK-Tanzania BIT, alleging expropriation of its property and unreasonable and discriminatory treatment. Biwater Gauff also claimed that Tanzania had violated its obligation to provide FET and full protection and security and to permit the repatriation of investment funds. Biwater Gauff requested damages in the range of 19 to 20 million USD. It was held that Tanzania's actions may constituted violations of certain provisions of the UK-Tanzania BIT; however, they did not cause injury to Biwater Gauff's business. Therefore, Biwater Gauff was not entitled to compensation.

4.1.2.1.2 Discussion

Two issues in particular are worth highlighting within this complex factual and legal issues raised in the *Biwater Gauff* dispute, which can be related to Norfund. Norfund operates in countries throughout Africa, Asia and South America. These countries have similar challenges and relatively fragile institutions like in Tanzania. In most of Norfund operations, Norfund and their co-investors set up an operating company[108], which are partly held by local

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[107] Id. para. 160.

[108] See page 39 for details about Norfund operating model

nationals or companies. The operating company sign agreements, i.e in the case of Norfund, power-purchasing agreements with the national electricity distributor. The first key question that comes to mind is: what would have happened if CWC was a Norfund operating company? In such a circumstance, would/could Norfund have brought a similar type of case against Tanzania? Secondly, is Norfund an investor under the traditional treaty definition of an investor? Norway does not have an investment treaty with Tanzania. This means that in the absence of an explicit investment contract, Norfund could not bring an ISCID dispute against Tanzania. Norfund would not have an enforceable right in practice. This is a major risk.

4.1.2.2 Case example 2: Parkerings - Compagniet AS v. Republic of Lithuania

Case type: *Treaty*

Applicable treaty: *Norway–Lithuania Bilateral Investment Treaty (BIT)*

4.1.2.2.1 Summary of the Dispute

The *Parkerings*[109] case arose out of an alleged repudiation by the Lithuanian municipality of Vilnius of an agreement entered into with Norwegian investors concerning a public parking system. On 30[t] December 1999, the authorities of the city of Vilnius in Lithuania entered into an agreement with a consortium of companies (the Egapris Consortium) for the Egapris Consortium to design, build and operate a "modern, integrated parking system" in the City of Vilnius. The agreement required Egapris Consortium to develop and secure the city of Vilnius approval of a public parking plan; design, construct and operate multiple multi-story car parks as well as collect parking fees and penalties. A portion of the parking fees and penalties was to be transferred in addition to a separate fixed fee to the city government of Vilnius. In return, the agreement required the city of Vilnius to among other things, assign Egapris Consortium the right to collect local charges and penalties for parking and provide the Egapris Consortium with information necessary to prepare the parking plan.[110] However, before the agreement could be implemented, multiple developments impaired the performance, including: (a) the national government of Lithuania successfully challenged aspects of the agreement in local court on the grounds that allowing the Egapris Consortium to collect and retain a portion of the parking fees violated Lithuania's national law;[111] (b) the Lithuanian national government enacted a decree restricting all municipal authorities to enforce parking viola-

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[109] ICSID Case No. ARB/05/8

[110] para 94-97

[111] para 123–126, 180

tions;[112] and (c) the Lithuanian parliament passed legislation limiting municipal authorities across the country's power to contract with private entities. In addition, several government agencies objected to the Egapris Consortium's proposed development of parking stations in the city of Vilnius's historic old town.[113] Due to those issues, the parties (the city of Vilnius and the Egapris Consortium) attempted to renegotiate the agreement.[114] However, after more than a year of negotiating, renegotiations were not successful. On 21 January 2004, the city of Vilnius decided to terminate the agreement with the Egapris Consortium.[115] Parkerings-Compagniet initiated ICSID proceedings on the grounds, that, in terminating the agreement, Lithuania, through its central and municipal authorities has breached its obligations under the Lithuania-Norway BIT.[116] Parkerings - Compagniet argued that Lithuania violated its obligations under the BIT to: (a) grant the investment equitable and reasonable treatment,; (b) protect the investment; (c) treat the investor no less favorably than it treated investors from third states; and (d) pay compensation for indirectly expropriating the investor's property. Although, the tribunal rejected all of Parkerings-Compagniet four claims, it ruled that it had jurisdiction over the dispute. This case also illustrates how developing countries host governments may consider social environmental cultural concerns in distinguishing between foreign investors even when it is a contract-based investor. The Lithuanian government objected to building a packing place in the old city for cultural reasons.

4.1.2.2.2 Discussion

The *Parkerings* case has several notable implications for Norfund. In particular, the fact that Parkerings-Compagniet was able to institute proceeding under international law, the tribunals ruling that it had jurisdiction over the dispute all have an implication for Norfund. Issues of the federal government enacting legislation that could adversely affect the investment of Norfund is not unthinkable. For instance, Norfund has indicated its desire to expand to West Africa. Nigeria for example (Africa's largest economy) has a federal system of government, which means that agreements signed by Norfund with state officials can be challenged by the federal government in local Nigerian courts, just as the national government of Lithua-

[112] Paras 130–132, 178, 192

[113] The Old town was an area designated as a World Heritage site by the United Nations Educational, Scientific and Cultural Organization (UNESCO)

[114] para. 172–187

[115] para. 188

[116] Lithuania and Norway BIT (1) (2016), http://investmentpolicyhub.unctad.org/Download/TreatyFile/1917 (last visited Oct 20, 2016)

nia did in the *Parkerings* case. Should this happen to Norfund, as of today, Norfund could not institute an international ISCID proceedings as Parkerings - Compagniet was able to due to the lack of an underlying governing BIT. Unless Norfund signs an investment contract with government of Nigeria which with a provision for ISCID arbitration in case of dispute.

4.1.2.3 Case example 3: Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and the Government of Ghana

Case type: *Contract*

Applicable treaty: *Ghana investment promotion Act*

4.1.2.3.1 Summary of the Dispute

This dispute arose out of business activities in Ghana of the claimants Mr. Antoine and his company, Biloune and Marine Drive Complex Ltd (MDCL). Mr. Antoine Biloune, a Syrian national, he held a 60% equity interest in MDCL, a company incorporated in Ghana. On 5 November 1985, MDCL and the Ghana Tourist Development Company (GTDC) concluded a lease agreement providing for a ten-year lease to MDCL of a 2,95 acres of land and a restaurant complex, with a five-year renewal option, at a rate of Ghanaian Cedi (Ghc) 30,000 per month. Under the lease agreement, Mr. Antoine Biloune and MDCL was to renovate and manage the restaurant. Mr. Antoine Biloune and MDCL began remodeling, and accomplished a substantial part of the remodeling and construction. However, the Accra City Council (the city Authorities) issued an order to stop the remodeling and construction work, citing lack of a building permit by MDCL. The Accra city authorities went further to demolished part of the construction project. In addition, Mr. Biloune, and other investment partners on the project were subjected to financial scrutiny by the authorities. Afterwards, Mr. Biloune was arrested, and held in custody for 13 days without charge, and subsequently deported from Ghana. The Accra city authorities then closed the site of the project and barred Mr. Biloune from returning to Ghana. MDCL was also banned from carrying out the reminder of the construction project.

Based on an arbitration clause contained in the lease Agreement, Mr. Biloune initiated arbitration proceedings under UNCITRAL rules against the Ghana investment promotion council (GIC) and the Government of Ghana. Claiming that the GIC and the Government of Ghana has interfered with his investment in MDCL and by various means including arresting and deportation, Ghana has effectively expropriated MDCL's assets and his interest in MDCL and that Ghana must pay compensation. The Ghanaian authorities denied any wrongdoing. They argued that Ghana has not expropriated or unreasonably interfered in Mr. Biloune's investments in MDCL. They argued among other things that, the arrest and deportation of Mr. Biloune's was of reasons unrelated to the investment and that those reasons were justified under Ghanaian law.

The UNCITRAL Tribunal held that the Government of Ghana expropriated MDCL's assets and Mr. Biloune's interest in MDCL and that Ghana must pay compensation to Mr. Biloune and MDCL.

4.1.2.3.2 Discussion

I chose the *Biloune* case because of its similarity to investments that Norfund are making in Africa. For instance, Norfund since 2013 has invested over 30,8 million NOK in *Equatoria Tower*, an office complex construction project in Juba, South Sudan.[117] As stated earlier, most African governments have legislations on investment promotion.[118] Almost all the reviewed investment promotion acts have a provision on dispute settlement. In *Biloune*, the Government of Ghana was made to compensation to the investor. The question that comes to mind is; could Norfund have brought a case as MDCL did under the provision of the investment promotion act in Ghana? The answer is probably negative. Norfund as stated earlier sees itself as being in Africa for the ‘‘long term’’, this in addition to the fact that Norfund owners (the Norwegian government) sees Norfund as part of the aid budget, Norfund may not see the need to institute an international proceedings against the host government that it is trying to help. This makes Norfund different from a normal private investor.

The above three cases also show that, Norfund as a matter of fact might not need the protections of enforceable rights guaranteed by BITs and investment promotion acts, because Norfund is what I will in this thesis call a charity investor, an investor who considers profit as a secondary motive. Norfund does not need guarantees of enforceable rights before making long-term investments. It is easy to conclude that, to Norfund, the current invest protection regime does not fall into Norfund interest.

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[117] See Equatoria Tower Norfund, http://www.norfund.no/eastern-africa/equatoria-tower-article984-319.html (last visited Oct 21, 2016)

[118] Ghana Investment Promotion Centre Act (1) (2013), https://s3.amazonaws.com/ndpc-static/CACHES/NEWS/2015/07/22//GIPC+Act+2013+Act+865.pdf (last visited Oct 21, 2016)

Mauritius: The Investment Promotion Act 2000 (Government of Mauritius 1) (2000), http://www.investmauritius.com/media/267191/Investment-Promotion-Act_-2015.pdf (last visited Oct 21, 2016)

Kenya Investment Promotion Act 120 (The Attorney-General 1) (2012), https://kenya.eregulations.org/media/InvestmentPromotionAct6of2004.pdf (last visited Oct 21, 2016)

4.2 Lessons from the previous cases to Norfund

What we can learn from the three cases above is that, the existence of enforceable rights is pertinent to any investor investing in fragile states. However, this might not necessarily apply to Norfund. As Norfund is the Norwegians government's main instrument for combatting poverty through private sector development,[119] its's objective is to contribute to sustainable commercial businesses in developing countries. The Ministry of Foreign Affairs (MFA) owns Norfund. Even though Norfund operates as a private company[120], it is unlike most private equity companies; and Norfund does not have a target return on equity as its focus and therefore invest in so called ''high-risk'' countries and regions. Although in its investment decisions, long-term return on equity is a major part of the decision and it carefully invests in certain specific areas; food and agriculture, renewable energy and financial institutions, Norfund is not profit seeking. Considering the case of *Biloune,* one can confidently state that the solution would have been different if Biloune and Marine Drive Complex Ltd were a Norfund company. The reason is that, Norfund is a long-term investor, the owners (Norwegian government) considers its investments through Norfund as development aid activity.[121] Institutions like Norfund is the government's effort to create a framework conditions and infrastructure to provide for economic growth and social development in those countries.[122] Unless it is a matter of principle, it is difficult to imagine Norfund bringing an arbitration in the same way that Mr. Biloune did in the case with the Ghanaian authorities. For Mr. Biloune, as a private investor, the economic interest was more important than the social good. This is in direct opposite of what Norfund look for when investing in Africa.

4.3 What avenues does Norfund have to protect its investments?

As mentioned earlier, Norway is a country that does not sign many bilateral or multilateral investment treaties. In the case of Norfund, there exist a number of possibilities to make sure it has internationally enforceable rights in the countries it invest across the developing world. In the next section of the thesis, I examine a number of possible these possibilities for Norfund.

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[119] Norfund Annual Report 2015, 11 (2015), http://www.norfund.no/getfile.php/137816/Pictures/Norfund%20%C3%85rsrapport%20ENG%281%29.pdf (last visited Oct 1, 2016).

[120] See Norfund Act

[121] See Soria Moria declaration on international policy (Norway), https://snl.no/Soria_Moria-erklæringen (last visited Nov 14, 2016)

[122] ibid

4.3.1 Legal contracts

Traditionally, firms investing in international business often use some combination of legal contracts, insurance, and trade in financial instruments to protect the income streams from investments against currency or price swings.[123] Particularly so for firms investing in so called ‘‘high-risk’’ countries. However, legal contracts are useful only if they are enforced. This means that investors investing in countries where there are regular changes in the laws and regulations cannot expect to have full proof protection for their investments based on local contracts. For instance, immediately after independence, many newly formed countries in Africa wooing private investors offered contracts that insulated investors from risks related to lower-than expected demand, exchange rates, currency conversions, regulations, and political force majeure. As most countries began democratization process, opposition to favorable treatment grew and the demand for nationalization became the order of the day. Politicians were faced with a choice between honoring the contracts as is at the risk of compromising their own popular support, or renegotiating them in order to maintain support. In the end, in South Africa for example, politicians chose to renegotiate or cancel many of their investment contracts in responds to pressure to push Black Economic Empowerment.[124] It is important to mention here that even when contracts are legally enforceable; it can be circumvented through several means than changing local laws or negotiating of contracts. A widely cited example is the case of AES Corporation and their investments in Georgia. In 1998, AES Corporation acquired Telas, a Georgian electricity distribution company. AES-Telasi entered into a contract with the Republic of Georgia. Among the provisions was that the costs of policy and other risks be passed to the Georgian consumers in a form of adjusted price. According to analysts, AES was guaranteed a 20% return on its investment.[125] However, the Georgian government inaction, for instance, failure to terminate supply to nonpaying industrial consumers, failure to supply fuel to AES-Telasi, and failure to keep the government’s own account current combined with the government’s demand for tax payments on electricity, led to AES losing a total of 300 million USD on that contract. This shows that investment contracts in fragile states are still vulnerable.

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[123] Witold J Henisz & Bennet A Zelner, The Hidden Risks in Emerging Markets Harvard Business Review (2010), https://hbr.org/2010/04/the-hidden-risks-in-emerging-markets (last visited Oct 1, 2016).

[124] See Roger Tangri & Roger Southall, The Politics of Black Economic Empowerment in South Africa, 34 Journal of Southern African Studies 699-716 (2008).

[125] Peter J Buckley & Pervez N Ghauri, International business strategy 36-40 (2015).

4.3.2 Insurance

Norfund for example can buy insurance through the Norwegian Export Credit Guarantee Agency (GIEK) and other investment guarantee agencies such as MIGA to protect investments abroad. GIEK is a public enterprise under the Ministry of Trade, Industry and Fisheries that issues guarantees on behalf of the Norwegian state. GIEK’s mandate is to promote Norwegian exports, ensure Norwegian value creation and serve as financial partner and adviser for Norwegian exporters by issuing guarantees on behalf of the state. MIGA and GIEK both offer political risk insurance and credit enhancement guarantees. The guarantees aim to help investors protect foreign direct investments against political and non-commercial risks in developing countries. Today, Norfund pays a premium of 2,5% of the investment value as the price of the insurance. Aside it being expensive[126], such insurance offers limited protection against regulatory y risk. This is because a firm’s exposure is determined by its own ability to manage the policy-making process.[127] In addition, relying on insurance means that money that could have be invested for additional benefits is instead given to the insurer. It is important to mention here that in my discussions with Norfund, I was made aware that Norfund does not buy guarantee insurance for most of their projects, only in few cases. This could be for several reasons; Norfund being in essence a development aid agency with no pressure for return, sees its investment in a longer-term perspective. This also means that, Norfund is able to absorb risk for a longer time than most private investors making the need for a year-on-year insurance largely irrelevant.

4.4 Invest in goodwill

In addition to insurance and contract, there are a couple of things Norfund can do in the long term to ensure that its investments are protected. For instance, it can lobby its owners (the Norwegian government through the Ministry of foreign Affairs) to reconsider its investment treaty policy. The presence of a BIT built on the 2007 model will grant Norfund access to all the benefits that comes with investing in a country where Norway has a BIT. A BIT will ensure commercial predictability considering the fact that diplomatic protection is the state’s

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[126] For an investment of 1 billion dollars, Norfund will be asked to pay 25 million dollars as premium

[127] See The Hidden Risks in Emerging Markets, Harvard Business Review (2016), https://hbr.org/2010/04/the-hidden-risks-in-emerging-markets (last visited Nov 21, 2016).

right and decision, not that of the individual investor. Norwegian investors will mostly benefit from a BIT, not diplomatic espousal.

However, since Norfund is not profit driven, Norfund needs to invest in goodwill in the host country. For instance, in Brazil, a country known for not signing BITs, in 1998 when the central bank of Brazil decided to devalue the local currency to boast export. Many foreign investors in Brazil decided to freeze or exit their investments form Brazil. Eni, the Italian company instead of exiting, announced a 500 million USD additional investment in Brazil. By this, Eni built a long-term goodwill with the Brazilian authorities. In the process, Eni became the main cooperating partner for the State owned Petrobras Brazil.[128] The Brazilian government saw Eni as taking an interest in Brazil's future than only seeking profit. That is, protecting foreign investment against political and regulatory risks in the absence of investment treaty require investment in goodwill. Today, Norfund enjoys no guaranteed enforceable rights in the African countries it invests in. However, Norfund as a long-term investor in Africa can invest in building goodwill with its host government in addition to investment contracts and insurance. This will ensure that, Norfund will not need guarantees of enforceable rights before making long-term investments and will not resort to the local courts when disputes arise.

[128] This example was cited from Harvard Business Review (2004) see The Hidden Risks in Emerging Markets, Harvard Business Review (2004)

5 Chapter 5: Conclusion

From the analysis and interviews with Norfund executives, one thing is clear: Norfund's investments in Africa, legally speaking, are not protected against potential changes in regulation or politics in the host country that may affect its economic value. Norfund invests in so-called high risk countries. In these countries, Norway has no investment treaties. Today, Norfund relies on contracts with host government as well as investment insurance as the main form of protection. Investment insurance premiums are expensive and offers limited protection against policy risk. In addition, relying on insurance means that money that could have been invested for additional benefits is instead given to the insurer. Most of Norfund's investment contract are subjected to laws outside the local countries with robust arbitration clauses. However, in the case of a dispute, most of Norfund contract in Africa require that domestic remedies must be exhausted for taking to international arbitration or conciliation. This means that in the end these contract may end up be only enforceable in local courts.

As a long-term investor and due to the political sensitivity of most of the projects that Norfund invest, Norfund is forced to not initiate proceedings even if it is certain it could win in local courts or arbitration. For instance, in Cameroon, Norfund invest together with Globeleq[129], a developer and operator of electricity generation. In 2014, Globeleq acquired majority control of Songas Tanzania limited, an electricity generating company in Tanzania. One year later (2015), Globeleq and Songas proposed an increase in the tariffs for electricity to be able to cover its cost of operations. The year 2015 being an election year in Tanzania, the government opposed the proposed price increase. After long negotiations with the government, Songas abandoned the proposal. Under the investment contract, the government cannot interfere in the tariffs, however, Norfund and Globeleq did not bring any claim. It is easy to see that, the government of Tanzania can argue the interference was in the interest of the state and that it serves a public purpose. However, in jurisprudence, "the pursuit of public purpose did not immunize a governmental measure from a claim of expropriation" (*Vivendi v Argentina*). This price increase could have meant a substantial increase in revenue for the investors. In jurisprudence, it is stated that an expropriation will be assumed in the event of "substantial deprivation" of an investment (*Société Générale v Dominican Republic, Projectholding v Ukraine*). No case was perused, even though the investment partner in this case, Globeleq is a British company and Britain has a BIT with Tanzania.

[129] See Globeleq | Home, Globeleq.com (2016), http://www.globeleq.com/ (last visited Oct 9, 2016). For more information

Norfund is adamant, this is because as a long-term investor in Africa with a mandate to help fight poverty, Norfund does not need to ensure profit every time and hence does not need the protections of enforceable rights guaranteed by BITs and investment promotion acts. This means that the current investments protection regime does portend into Norfund's interest.

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