Comments on Norway's Draft Model Bilateral Investment Treaty (BIT): Potentially Diminishing the Development Policy Space of Developing Country Partners

15 April 2008

Geneva, Switzerland

Table of Contents

Comments on Norway's Draft Model Bilateral Investment Treaty (BIT): Potentially Diminishing the Development Policy Space of Developing Country Partners

These comments on Norway's draft model BIT are being submitted by the South Centre, as an intergovernmental thinktank of developing countries, as its contribution in response to the call for public comments with respect to how the model BIT would function in developing countries and whether such model BIT would be supportive of the development of developing countries.

I. GENERAL COMMENTS ON THE MODEL BIT

The Norwegian Model BIT may have the potential to diminish the development policy space of developing countries that might wish to sign the BIT with Norway.

It reflects the standard BIT objectives of promoting and protecting investmentsmoverseas. Should Norway agree on a BIT with a developing country, the potential is high that what would be promoted and protected effectively would be Norwegian investments into the developing country rather than vice-versa as a result of the greater investment capacity and economic strength of Norwegian companies as compared to their developing country counterparts.

The model BIT, unless substantially changed, could have the effect of locking in Norway's developing country treaty partners into a relationship of economic inequality and dependence – akin to a new form of colonialism – vis-à-vis Norway, as the BIT's provisions could prevent the developing country partners from engaging in more active industrial development policy that might require at various stages certain levels of discriminatory treatment against foreign investors in order to develop and to create more competitive domestic industries.

Furthermore, it envisions an architecture that establishes equal levels of treaty obligations on both Norway and its developing country partners. There is no provision at all in the model BIT that provides for special and differential treatment for the developing country partner in terms of the level or extent of obligations to investors and investments, thereby disregarding the fact that the economic development status of many developing countries may make it more difficult for them to comply with the BIT's obligations.

II. SPECIFIC COMMENTS ON THE MODEL BIT

A. AMBIGUITY AND THE NEED FOR DIFFERENTIAL TREATMENT IN DEFINING AN INVESTOR – ARTICLE [2]

The model BIT seeks to ensure that portfolio, speculative equity, or paper-only investments would not fall under scope of the treaty by clarifying that an investor would, inter alia, be those entities which are "engaged in substantive business operations."[1] This is a positive approach to limiting the ability of speculative Norwegian investors in a developing country from invoking the protections of the treaty. However, because the treaty does not define what constitutes "substantive business operations," a level of ambiguity continues to exist that might become a loophole in terms of determining whether a particular entity would be an investor or not under the treaty.

Additionally, depending on the definition of "substantive business operations", a developing country company wishing to invest in a company in Norway might find it difficult to get protection under the treaty if its investment in the Norwegian enterprise falls below the "substantive business operations" threshold. Perhaps what should be added would be for a more differentiated approach between Norway and its developing country partner in terms of which entities can invoke the protections of the treaty, with the bar being set higher for Norwegian companies and lower for developing country companies.

B. PRE-ESTABLISHMENT RIGHTS TO NATIONAL TREATMENT AND MFN – ARTICLES [3] AND [4]

The Norwegian model BIT follows the precedent set by other BITs in applying national treatment and MFN to an investor even before the investment has been established in the host country – i.e. the model BIT extends "pre-establishment" rights to non-discrimination.[2] Traditionally, BITs have extended protection to investments only once they have been established according to national law. Such pre-establishment rights to national treatment on the part of the investor effectively enhance their ability to secure market access in the potential host country. Given the differing capacity to invest of Norwegian and most developing country companies, it is highly likely that such pre-establishment rights to national treatment, and the increased market access opportunities that they provide, would be enjoyed more by Norwegian companies than their developing country counterparts.

1. Negative List Approach to Non-Discrimination: Diminishing Policy Space

The national treatment provision in Art. [3]:2 and the MFN provision in Art. [4]:1 take a negative list approach, which would effectively reduce policy space for the developing country partner -- i.e. national treatment applies to all investments except to those which have been specifically reserved (see Art. [3]:2and [4]:1). This negative list approach

[1] Art. [2]:1(ii).
[2] Art. [3]:1 and [4]:1.

makes national treatment and MFN the general rule, with the reservations serving as the exception.

As such, the rules of treaty and statutory interpretation would mean that the reservations would be construed narrowly rather than broadly. This negative list approach increases the burden on the developing country partner, if it wishes to retain as much flexibility as possible in terms of its reservations under Annex [A] and [B], to ensure that its reservations clearly identify a priori as many investment areas to which it does not wish to have national treatment be applied. If the developing country partner fails to include an investment area in its reservations to national treatment, it will be more difficult for it later to add such investment area if it discovers that it needs to provide preferential treatment to domestic as opposed to Norwegian investors in such area in order to spur domestic industrial development.

A better approach that provides more flexibility and policy space to the developing country partner would be for the national treatment provision to be subject to a positive list approach. That is, for the developing country partner, its application of national treatment and MFN will be the exception rather than the rule.

This can be done by amending the relevant provisions as follows:

Article [3]

National Treatment

1. Subject to paragraph 2 of this Article, each Party shall accord to investors of the other Party and to their investments, treatment no less favourable than the treatment it accords in like circumstances to its own investors and their investments, in relation to the acquisition, expansion, management, conduct, operation and disposal of investments.

2. Norway shall not apply national treatment with respect to the reservations set out in Annex [A.1]. [Developing country] shall apply national treatment only in accordance with the national treatment schedule set out in Annex [A.2].

Article [4]

Most-Favoured-Nation

1. Norway shall accord to investors of the other Party and to their investments, treatment no less favourable than the treatment it accords in like circumstances to investors and their investments of any other State, subject to the country-specific reservations set out in Annex [B.1], in relation to the acquisition, expansion, management, conduct, operation and disposal of investments. [Developing country] shall accord such treatment to the investors of the other Party and to their investments only in accordance with the MFN schedule set out in Annex [B.2].

2. Policy Space for the Public Interest: Expanding Footnote 2 to Article [3] and [4]

Footnote 2 to Art. [3], which is also applicable to Art. [4] due to footnote 3, while providing for a public interest exception to the application of national treatment and MFN, still does not provide sufficient policy space for developing country partners. The current language of footnote 2 requires that two conditions be first met before such exception can be availed of, i.e.: (i) that the measure is applied "in pursuance of legitimate policy objectives of public interest"; and (ii) that the measure is justified "by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investment."

As currently drafted, therefore, footnote 2 would prevent the Parties, including the developing country partner, from using the public interest exception to apply a measure that gives preference to domestic as opposed to foreign owned investment. In a developing country context where giving preferential treatment to domestic investors might in fact become necessary in order to promote domestic industrial development, the application of footnote 2 would therefore be a restriction of policy space. In this regard, footnote 2 should therefore be amended by deleting the second condition – i.e. deleting the phrase "when justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investment."

In addition to the deletion suggested above, for footnote 2 to increase policy space for developing countries, it should also include in its indicative enumeration of legitimate policy objectives of public interest – i.e. "protection of public health, safety and the environment" – other policy objectives which are crucial to developing countries such as "industrial development, infrastructure development, supply-side capacity enhancement, promotion of full employment."

C. FAIR AND EQUITABLE TREATMENT STANDARD: ART. [5]

The model BIT provides a greater degree of certainty with respect to the standard to be used in terms of State treatment of investors and investments by stressing that such treatment should be in accordance with customary international law, thereby providing parameters for the interpretation of the fair and equitable treatment and full protection and security clause and thereby providing for less leeway for discretion in how such clause is to be applied.

D. COMPENSATION FOR LOSSES: ART. [7]

Art. [7]:1 extends the principles of national treatment and MFN to compensation for losses that may be suffered by investors as a result of armed conflict or civil strife. The second paragraph extends such principles by requiring the payment of compensation or of restitution in the event of the seizure or destruction of an investment or part thereof by the forces or authorities of a Party that is undergoing civil strife or armed conflict, although

the inclusion of the second paragraph, as indicated in footnote 5 to Art. [7]:2, would be "subject to negotiations with individual countries."

The current structure of Art. 7 poses a problem with respect to developing country partners because it is again much more likely that the conflict or civil strife situations contemplated by the Article would more likely occur in developing countries than in Norway. As such, the inclusion of Art. [7]:2 – i.e. requiring compensation or restitution for losses arising from acts done by the developing country's forces or authorities – as the initial starting point for the model BIT with respect to compensation could create a situation in which a developing country proposal to delete Art. [7]:2 would need to be "compensated" for elsewhere in the BIT by a negotiating concession that could effectively add more obligations to the developing countries – i.e. by decreasing the number of reservations for example under Art. [3] and [4]. Finally, the inclusion of Art. [7]:2 in the model BIT extends the level of protection to Norwegian investors, especially, beyond what is commercially required because it effectively guarantees them with State-provided and treaty-mandated protection and compensation from political risks that may be associated with investing in developing countries. Such level of protection is not required because companies can obtain political risk coverage from commercial insurance agencies or even from the World Bank Group's Multilateral Investment Guarantee Agency (MIGA) – provision such political risk insurance is in fact MIGA's primary mandate.

E. GOING BEYOND THE WTO AGREEMENT ON TRADE-RELATED INVESTMENT MEASURES (TRIMS): ART. [8]

While Art. [8] on performance requirements places brackets – i.e. subject to negotiations – on all of the performance requirements listed under Art. [8]:1, the mere fact that such a listing of performance requirements would serve as the initial starting point for negotiations would imply that a trade-off in other parts of the BIT might be needed for a developing country partner to be able to get one or more of such performance requirements off the list.

The performance requirements indicated in Art. [8]:1 go beyond the illustrative list of prohibited performance requirements under the Annex to the WTO TRIMS Agreement – i.e. the model BIT takes a "TRIMS-plus" approach to performance requirements, due to the following:

(i) Art. [8]:1(i), (ii), and (v) are TRIMS-plus because they would also cover performance requirements with respect to services. The TRIMS Agreement refer only to performance requirements with respect to goods. These provisions in the model BIT would effectively restrict policy space by denying to developing countries the ability to use such performance requirements to support the development of competitive domestic industries;

(ii) Art. [8]:1(iv) is TRIMS-plus because its wording is couched in much more broad and ambiguous language than paragraphs 1(b) and 2(b) of the Annex to the TRIMS Agreement;

(iii) Art. [8]:1(vi), by introducing a prohibition on performance requirements with respect to the transfer of technology or other proprietary knowledge, is TRIMS-plus because the TRIMS Agreement (under Art. 1 thereof) applies only to trade in goods and therefore performance requirements with respect to technology or other proprietary knowledge fall outside the scope of the TRIMS Agreement;

(iv) Art. [8]1(vii) to (xi) are all TRIMS-plus. They do not fall within the scope of the TRIMS Agreement.

In addition to being TRIMS-plus in nature, the performance requirements being targeted for prohibition under Art. [8]:1 of the model BIT, if included in the final treaty text, would all serve to diminish the developing country partner's development policy space even more than does the TRIMS Agreement. Such performance requirements may be required by the developing country at various stages of its development process in order to promote the development of more competitive domestic industries.

To really ensure the maintenance of whatever existing policy space may be available under the WTO TRIMS Agreement for the developing country partner, the model BIT should not incorporate provisions that would prohibit performance requirements beyond what the TRIMS Agreement would already prohibit.

In fact, the Norwegian Government should note that in the context of the Doha Round in the WTO, many developing countries have specifically included the removal of the TRIMS Agreement's prohibitions on performance requirements as a negotiating item as part of the Implementation Issues arising from the Uruguay Round agreements.

Furthermore, Art. [8]:2's drafting might prove to be too restrictive in terms of allowing a developing country to put in place a technology-specific performance requirement. This paragraph basically allows the Party to require the "use of a technology to meet generally applicable health, safety or environmental requirements." By specifying only "health, safety or environmental requirements", the paragraph implicitly denies to the developing country partner the right to have such a technology-specific performance requirement for the purpose of promoting industrial development or competitive domestic industries pursuant to a generally applicable industrial promotion policy.

Art. [8]:3's last sentence requires that all performance requirements be applied "against all investors and their investments in a non-discriminatory, transparent and objective manner." This provision basically would require the developing country partner, as well as Norway, not to discriminate on a national treatment or MFN basis with respect to the application of the performance requirement. This would restrict policy space. Again in a developing country context, there might be instances where such discrimination might be required in order for the developing country to be able to promote the development of domestic industrial capacity and competitiveness on the basis of domestic investments. This same comment would be applicable with respect to the last phrase of Art. [8]:4.

To take into account the comments above, Art. [8] could be redrafted as follows:

Article[8]

Performance Requirements

1. No Party may impose or enforce a requirement that is not consistent with the provisions of the Agreement on Trade-Related Investment Measures of the World Trade Organization.

2. A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements or to promote compliance with a generally applicable industrial development policy shall not be construed as inconsistent with paragraph 1.

3. Performance requirements, other than those referred to in paragraph 1, shall only be applied in the public interest and shall be set forth in the national legislation of the Party imposing the requirement and published in the official gazette or otherwise be publicly available according to Article [Transparency] so that investors may become acquainted with them before the investment decision is made.

4. A Party may not apply new performance requirements to existing investments, or amend existing performance requirements in a manner restricting the commercial freedom of the investor, except where such requirements are required to meet generally applicable health, safety or environmental requirements or to promote compliance with a generally applicable industrial development policy.

F. THE NEED TO INCREASE FINANCE POLICY SPACE – TRANSFERS: ARTICLE [9]

Art. [9]:3(ii) could be further improved by adding a new item that could allow developing country partners to impose regulatory controls on financial transfers out of the host country associated with an investment when such controls are needed in the public interest to avert or address financial crises or balance of payments problems.

G. NOT ENOUGH POLICY SPACE – THE RIGHT TO REGULATE: ARTICLE [12]

The wording of Art. [12] does not provide policy space for the developing country partner. It basically states that any regulatory measure a Party may wish to undertake under Art. [12] still has to be "consistent with this Agreement" – i.e. the right to regulate extends only as far as such regulations do not violate the BIT. Additionally, the right to regulate under Art. [12] can be availed of only to the extent that the Party considers the regulation to be appropriate in order to ensure that the investment activity "is undertaken in a manner sensitive to health, safety or environmental concerns." Taken together, these elements of Art. [12] limit policy space especially for the developing country partner.

A positive element in the current formulation of Art. [12] though is that it does not impose a "necessity" test to the right to regulate since it uses "appropriate" instead, which could be interpreted more broadly than the "necessity" test.

Art. [12] could be amended as follows in order for it to provide for increased policy space:

Article [12]

Right to Regulate

> Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure inconsistent with this Agreement that it considers appropriate to ensure that the investment activity is undertaken in a manner sensitive to health, safety or environmental concerns, or the promotion of the development objectives of [developing country].

H. GIVING PRIVATE PARTIES THE RIGHT TO SUE STATES – INVESTOR-STATE DISPUTE SETTLEMENT: ARTICLES [15] TO [19]

Many developing countries have already expressed concerns about the use of the ICSID Convention as the basis for investor-state dispute settlement. Such concerns have already led some developing countries to withdraw (such as Bolivia) or are planning to withdraw (such as Venezuela and Nicaragua) from ICSID. However, the model BIT in Art. [15]:3 expressly authorizes recourse to the ICSID process in the event of the failure of local courts to settle the dispute within 36 months or if there are no local remedies available.

Recourse to ICSID, or any other international commercial arbitration tribunal (such as UNCITRAL or the ICC) which effectively places the private sector investor on an equal footing with governments and allows the former to directly sue the latter, should not be a dispute settlement option in the model BIT. Judicial redress for disputes between an investor and a Party must be had only through the domestic remedies available in the host country where the investment that incurred the loss or damage is located and where the rights of the investor have been violated. This would comply with the general rule in international law of the exhaustion of domestic remedies, and furthermore would help enhance the development of domestic adjudicatory institutions in developing countries.

Disputes relating to the implementation by a Party of its obligations under the BIT should be handled at the State-to-State level, since the treaty obligations in the BIT pertain to the Parties rather than to the private sector investor. Breach-of-contract suits (for contracts entered into directly by a Party and the other Party's investor), or suits arising from expropriation proceedings in a Party may be brought before the local courts of the Party in which the cause of action arose.

In view of the above, Arts. [15] to [19] insofar as they pertain to the use of ICSID as the venue for international investor-state dispute settlement should be amended to delete the

use of such international venues. This would mean, for example, that Art. [15]:3 would have to be amended to read as follows:

> 3. If any such dispute should arise, the parties to the dispute shall submit the dispute to a local court for the purpose of pursuing local judicial remedies, after having exhausted all applicable and appropriate administrative remedies. The parties should avail of all remedies for legal redress available under the laws of the Party in which the dispute arose.

Assuming that Art. [15]:3 is amended as above, then Arts. [16] to [18] should be deleted. Art. [19] on transparency of the proceedings should then be amended mutatis mutandis to allow the parties to make public all documents submitted to the local courts in connection with the dispute unless doing so would be inconsistent with the *sub judice* rule or the information would be confidential in nature.

I. INNOVATIVE PROVISIONS ON PARTICIPATION AND TRANSPARENCY – ARTICLES [18] AND [19]

Assuming that recourse to an international tribunal for investor-state dispute settlement is retained under Art/ [15]:3, then the participation and transparency provisions contained in Art. [18] and [19] are innovative and progressive, going beyond what many other BITs currently provide.

J. A VEHICLE FOR FURTHER INVESTMENT LIBERALIZATION – THE JOINT COMMITTEE: ARTICLE [23]

Art. [23]:3(iii) mandates the Joint Committee to "review the possibility of further removal of barriers to investment." This establishes a built-in mechanism in the model BIT through which developing country partners could be requested to continually increased the level of investment liberalization that they undertake pursuant to the BIT. This particular sub-paragraph should be deleted.

K. THE NEED FOR A GENERAL EXCEPTION FOR INDUSTRIAL POLICY – GENERAL EXCEPTIONS: ARTICLE [24]

An additional general exception under Art. [24] that would be applicable only for the developing country Party, should be incorporated to allow the developing country Party to adopt or enforce measures which are necessary:

(i) for the promotion of domestic industrial and/or supply-side capacity development;
(ii) to promote the global competitiveness of domestic industries.

L. WEAK LANGUAGE ON CORPORATE SOCIAL RESPONSIBILITY: ARTICLE [32]

The text on corporate social responsibility should be further strengthened to mandate compliance by Norwegian investors with not only the OECD Guidelines for Multinational Enterprises but also with the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. This Article on corporate social responsibility should also require Norwegian investors to:

- respect the national sovereignty of host developing countries and the right of each host developing country government to regulate and monitor their activities;
- non-interference in internal affairs of the host country and in its determination of its economic and other priorities;
- adherence to economic goals and development objectives, policies and priorities of host countries, and working seriously towards making a positive contribution to the achievement of the host countries' economic goals, developmental policies and objectives;
- adherence to socio-cultural objectives and values, and avoiding practices, products or services that may have detrimental effects;
- contribute to the strengthening of the scientific and technological capacities of its developing country partners;
- comply with host country policies and regulations intended to safeguard and promote the developing country's balance of payments of position;
- provide sufficient autonomy to their subsidiaries in the host countries as well as to respect and adhere to policies of host countries relating to local ownership and participation;
- respect the rights of consumers in host countries and pay due regard to effective consumer protection and ensure the safety and quality of the goods and services they provide and not to produce, market or advertise potentially harmful products;
- adhere to environmental and safety practices and requirements to ensure that the health, safety and environment of people in the host countries are properly protected;
- take steps to protect the environment and to rehabilitate the environment when there is damage caused by the investor;
- be transparent in in terms of disclosure and accounting in relation to their operations not only within the host country but with reference to all of their other transactions which may impact in some way or another on the host countries' operations.

M. A LINGERING DEATH – DURATION AND TERMINATION: ARTICLE [35]

Art. [35]:2 states that even after the BIT is terminated, investments made prior to such termination will continue to be protected by the BIT's provisions "for a further period of fifteen years" from the date of termination. Such a period of continued BIT applicability post-termination might be too long for developing countries who might have terminated the BIT because they wish to regain policy space. This period should be shortened substantially – perhaps to three to five years after termination – which period should be

sufficient for the investor to decide whether to continue with the investment or not in the absence of the BIT.

III. SUGGESTIONS ON IMPROVING THE BALANCE: INVESTOR AND HOME COUNTRY OBLIGATIONS -- ESTABLISHING DIFFERENTIAL OBLIGATIONS ON NORWAY AND NORWEGIAN INVESTORS WITHIN THE MODEL BIT

The model BIT is focused on building an architecture of treaty obligations on the host country without balancing such obligations with corresponding obligations on the investor as well as the investor's home country. In this regard, some developing countries, including China, Cuba, India, Kenya, Pakistan and Zimbabwe in late 2002, had put forward in the WTO some ideas on how to provide for a more balanced architecture with respect to investment agreements.[3] These countries have suggested that rights to protection and promotion that may be accorded to investors, in particular multinational enterprises (MNEs), should be balanced with a set of obligations that such MNE investors and their home countries should also observe.

A. INVESTOR OBLIGATIONS TO THE HOST COUNTRY

In the context of the model BIT, it is much more likely that investments would be from Norwegian investors to developing countries rather than vice-versa because of the differing economic strengths and situation of these countries. Hence, investor and home country obligations that could be incorporated into the model BIT with respect to Norwegian investors and investments in developing countries should reflect the following:[4]

- foreign investors would respect the national sovereignty of host member and the right of each member government to regulate and monitor their activities;
- non-interference in internal affairs of the host country and in its determination of its economic and other priorities;
- adherence to economic goals and development objectives, policies and priorities of host countries, and working seriously towards making a positive contribution to the achievement of the host countries' economic goals, developmental policies and objectives;
- adherence to socio-cultural objectives and values, and avoiding practices, products or services that may have detrimental effects.

1. On Restrictive Business Practices (RBPs)

The provisions of the UNCTAD's Set of Multilaterally Agreed Principles on RBPs should be incorporated in the model BIT. These principles require that enterprises refrain

[3] See e.g. WTO: China, Cuba, India, Kenya, Pakistan and Zimbabwe, Investors' and Home Governments' Obligations, WT/WGTI/W/152, 19 November 2002.
[4] The subsequent text draws upon the submission WT/WGTI/W/152 above.

from RBPs defined to include price fixing, collusive tendering, market or customer allocation arrangements, allocation of sales or production quota, concerted refusal to deal or supply to potential importers, collective denial to access to an arrangement. The MNEs are also required to refrain from abuse of market power in the form of predatory behaviour, discriminatory pricing or terms, joint ventures, M&As, and refusal to deal, among other provisions. Although the UNCTAD's Set exists, it is currently not a legally binding instrument and hence is not enforceable. Inclusion of its provisions into legally binding investors' obligations with corresponding obligations on the part of home countries to share information would help in their effective enforcement.

2. On Technology Transfer

Norwegian investors should be required to aim to contribute to the strengthening of the scientific and technological capacities of its developing country partners in general, and be required in particular to:

- contribute to technical and managerial training of citizens of host countries;
- restrain from imposing restrictive clauses in technology transfer contracts with their affiliates and licensees that prevent absorption and assimilation of technology transferred.

As a pre-requisite for all countries, especially the developing ones, to assess, select, develop and utilize technologies, international exchange on technical information and relevant guidance and training should be promoted and increased (especially concerning data on availability of substitute technologies). Hence, Norwegian investors overseas in developing countries should provide data on various aspects of the technologies to be transferred, such as provisions of information needed for technical, institutional and financial assessment of the transactions, so that appropriate arrangement can be made in the host countries to ensure that the technology transfer is meaningful and on most appropriate terms and so that inappropriate transfer or unnecessary turn-key transfers are avoided.

3. On Balance of Payments

The operations of foreign enterprises are likely to affect the balance of payments of their host countries in several ways *vis-à-vis* imports of equipment, raw materials, by exports of output and by remittances of dividends, royalty and other fees. Host country governments should be entitled to institute, as necessary, policies and measures to guard against the adverse effects on the balance of payments and to promote positive effects, resulting from foreign investment. Norwegian investors overseas should therefore be obliged to follow the policies and contribute towards this goal. In light of this, there should be investor obligations relating to balance of payments issues, including to:

- adhere to policies and measures instituted by the host country governments aimed at safeguarding the balance-of-payments and at strengthening the balance-of-payments position;
- contribute to promotion and diversification of exports and to increased utilization of goods, services and other resources available locally;
- cooperate with the host governments in periods of balance-of-payments crisis by delaying remittances of profits and by phasing out divestment proceeds;
- desist from engaging in short-term financial operations or intra-corporate transfers in a manner that would increase currency instability and balance-of-payments difficulties
- apply fair pricing policies in intra-corporate trade and curb transfer pricing manipulations.

4. On Ownership and Control

Norwegian investors overseas under the model BIT should give appropriate attention to the developmental needs of host developing countries through the provision of sufficient autonomy to their subsidiaries in the host countries as well as to respect and adhere to policies of host countries relating to local ownership and participation. To be specific, among other things, these investors should:

- delegate as much as possible the power of decision making to their entities, so that the latter can contribute positively to the economic and social development of the host countries;
- should work together with the governments and citizens of host countries to realize the national objectives of local equity participation and effective exercise of control by local partners in accordance with contractual terms of equity or non-equity arrangements or with the terms of control as established by the laws of those countries concerned;
- exercise their personnel policies in light of host country national policies, laws and regulations to the effect that priority is given to local nationals in recruitment, training and promotion to posts of managerial and leading nature so as to enhance the effective participation of local citizens in the process of decision-making.

5. On Consumer and Environmental Protection

To avert the possibility that investors would follow double standards with respect to consumer protection, environmental and employment practices in their home and host countries, Norwegian investors overseas should be required to:

- respect the rights of consumers in host developing countries and pay due regard to effective consumer protection and ensure the safety and quality of the goods and services they provide and not to produce, market or advertise potentially harmful products;

- adhere to environmental and safety practices and requirements to ensure that the health, safety and environment of people in the host countries are properly protected;
- take steps to protect the environment and to rehabilitate the environment when there is damage caused by the investor;
- respect the right of the host country population to know the names and types of dangerous chemicals used in the production process and size of their inventory, the undesirable effects resulting from their use and their accidental consumption and possible remedial measures to be taken in the event of an accident.

6. On Disclosure and Accounting

The model BIT should contain investor obligations in terms of disclosure and accounting in relation to operations not only within the host country but with reference to all other transactions of the Norwegian investor overseas which may impact in some way or another on host developing countries' economies. This could include:

- acceptance to provide a disclosure on the financial as well as non-financial information on the structure, policies and activities of the investor as a whole, as well as that of the local affiliate;
- providing details of transactions with the affiliated parties such as parent or other group companies outside or inside the host country;
- transparency with regard to transactions in financial markets that have a speculative effect on the currency or financial markets of the host country.

B. NORWAY'S HOME COUNTRY OBLIGATIONS WITH RESPECT TO NORWEGIAN INVESTORS AND INVESTMENTS IN DEVELOPING COUNTRIES

The policies of Norway as the home country of Norwegian investors overseas do have authority and influence over the behaviour of these investors in relation to their overseas operations. In this context, with respect to the operations of Norway's investors overeas under the model BIT, Norway should undertake treaty obligations under the BIT to:

- refrain from policies or measures that influence Norwegian investors overseas to have operations or behaviour in the host developing country that are adverse to the interests of the host country;
- institute measures that influence and oblige Norwegian investors overseas to behave and operate with full corporate responsibility and accountability in their operations in host developing countries, and to fulfil their obligations to the host country and government, in accordance with the objectives and policies of the latter;
- ensure that the behaviour and practices of the Norwegian investor overseas are in line with and contribute to the interests, development policies and objectives of the host member;

- enact legislation, if such legislation is not already enacted, prohibiting foreign corrupt practices of Norwegian corporations and requiring them to follow in their overseas operations proper norms of consumer protection and environmental protection;
- provide information regarding the involvement of Norwegian investors overseas in any questionable dealings and other information on their background that may be useful for the host government at the time of approval of the investment as well as subsequently;
- cooperate with the host developing country governments in controlling RBPs, transfer-pricing manipulation, financial speculation and other unethical, irresponsible or unaccountable practices of Norwegian investors overseas, and in recovery of the liabilities of such investors resulting from their misconduct in host developing countries;
- refrain from measures and policies that oblige or influence Norwegian investors in their overseas activities to behave or operate in a manner that is detrimental to the interests of the host country;
- institute measures and policies that oblige Norwegian investors overseas to meet their obligations to behave in a responsible and accountable manner in the host developing country, and that oblige their corporations to contribute to fulfilling the needs and development objectives of the host members;
- refrain from policies and measures to restrict Norwegian investors overseas on transfer or diffusion of technologies to their partners in the host countries, including on the pretext of security reasons.