



# Third World Network

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18 April, 2008

Mr. Erik A. Underland  
Ministry of Trade and Industry  
Norway

Dear Mr. Underland,

On behalf of Third World Network (TWN), I thank you for the opportunity to convey our concerns and preliminary views regarding the Norwegian draft model bilateral investment agreement (BIT).

TWN is an international non-governmental organisation with its international secretariat in Malaysia. We have been working on trade, environment and development issues for more than 20 years. A priority area for TWN is the current trend of bilateral investment, trade and economic partnership agreements.

Our primary concern is that currently BITs and investment chapters in bilateral trade/economic partnership agreements are essentially about expanding the definition of “investment” and hence investor’s privileges, creating new investor’s rights such as the right to directly sue a host government, and increasing investor protection to the point of jeopardising the balance between investors’ interests and the development needs of the host state. This shift in balance drastically reduces policy space for national governments to manage foreign investment for national sustainable development, with even worse impacts for developing countries. Such expansion of investor’s rights and protection had failed at the World Trade Organisation and the attempted OECD Multilateral Agreement on Investment, but is being entrenched in several bilateral agreements, especially those between developed and developing countries.

Civil society organisations in many countries continue to reject such investment provisions, as do many developing countries’ governments. However there are tremendous pressures on developing countries to accept these provisions in a number of “comprehensive” bilateral trade agreements or investment agreements with some developed countries.

Unfortunately, the Norwegian draft BIT follows the same pattern even though there are some mitigating provisions.

**We therefore strongly urge the Norwegian government to withdraw the proposal for a model BIT and also to not include similar investment provisions in bilateral economic partnership agreements.**

Our reasons are as follows:

#### Policy space is necessary to regulate investments and investors

The ability of a national government to retain policy space to regulate investment and investors is vital, both for developing and developed countries. For developing countries that are host to foreign investments, policies and measures are required to ensure that such investments meet the socio-economic needs of the host country. For developed countries, the frequency of corporate and financial crises (many of which increasingly have cross-border impacts) reaffirms the need for home country vigilance and regulation.

The draft BIT would reduce, even eliminate, policy space in many basic areas of investment regulation for development. Of key concern to TWN are: an unacceptably broad definition of investment; inclusion of investments made prior to the entry into force of the BIT; pre-establishment rights; negative list approach; requirement of “full protection and security” by a host state; severe restrictions (almost elimination) of performance requirements; severe restrictions on regulating financial flows which means that there cannot be any or adequate capital controls needed for preventing or managing a financial crisis; investor-state dispute settlement. The regulatory safeguard in Article 12 is also highly inadequate, and again limits policy space of the governments concerned.

It would be very unfortunate indeed that the provisions that have been consistently rejected at the multilateral level are promoted bilaterally.

#### Fundamental flaws and gaps in the draft BIT

The entire BIT is drafted on the false assumption that Norway and its partners under the BIT are equally developed. There is no special and differential treatment for developing or even least-developed countries in the entire BIT. Unless this BIT is only for use with developed countries, it does not reflect the different economic and social situations in developing countries at all.

In its current form and used with developing countries, this BIT could undermine years of progress in the countries concerned and much of the development assistance contributed by Norway in the past.

As you are aware, in order to fully benefit from any foreign direct investment and minimize the negative effects, governments need to regulate investments. For example, due to its particular features, foreign investment can have the tendency towards adverse effects or trends that require careful management. These include:

- (a) possible contribution to financial fragility due to the movements of funds into and out of the country, and to some types of financially destabilizing activities;
- (b) possible effects on balance of payments (especially increased imports and outflow of investment income, which has to be balanced by export earnings and new capital inflows; if the balance is not attained naturally, it may have to be attained or attempted through regulation);
- (c) possible effects on the competitiveness and viability of local enterprises;
- (d) possible effects on balance between local and foreign ownership and participation in the economy, such balance being crucial for many developing countries;
- (e) possible effect on the balance of ownership and participation among local communities in the society, where internal equity is a policy goal.

The experience of countries that have succeeded in benefiting long term from foreign direct investment shows that governments have traditionally made use of a wide range of policy

instruments in the formulation of investment policy and in the management of investment. It is crucial that developing countries continue to have the policy space and flexibility to exercise their right to such policies and policy instruments. As stated above, the draft BIT would negate or undermine this right.

In addition, some key issues that are absent in the proposed BIT include:

- Special and differential treatment for developing countries, especially least developed countries;
- Investor obligations;
- Post-establishment obligations;
- Corporate governance and accountability;
- Home state obligations;
- Redress in the home state for negative impact and injury/damage caused by the investor in the host state.

We believe that sound regulation of foreign investment to meet the goals of sustainable development can, and should, be conducted under national law in host and home countries, with appropriate international cooperation to deal with the cross-border dimensions. We are very concerned that the draft BIT is essentially promoting a set of obligations for host states that would not fulfill those goals and therefore we hope that the Norwegian government will not promote the BIT.

Thank you again for your consideration of TWN's preliminary comment regarding the draft BIT, and we hope to have the opportunity to share with your our concerns in a more detailed manner.

Yours sincerely,



Legal Advisor  
Third World Network