

## **Comments on the Norway Draft Model Investment Agreement**

### **Introduction:**

The Norway Draft Model Investment Agreement includes articles from the traditional BITs model that promote mainly investor rights; but it also contains very progressive articles. This paper will address the gaps which should be addressed to ensure that this agreement supports sustainable development. If these proposals are taken on board, Norway can adopt this model BIT to guide her negotiations with 3<sup>rd</sup> parties.

### **The Preamble:**

The introduction provides the spirit of the agreement by referring to the promotion of sustainable development, combating of corruption, and the protection of environmental , health, safety and labour rights in accordance to relevant internationally recognized standards and principles set out in the United Nations Charter and the Universal Declaration of Human Rights. However, reference to these rights in the introduction does not create any substantive obligations for investors. They should again be expressly referred to in the main text.

### **Treatment and protection of investors and investments:**

This provision includes National Treatment (NT), Most Favored Nation Treatment (MFN) and Fair and Equitable Treatment (FET). Regarding NT, there should not be blanket coverage instead there should be a provision to address the scope and coverage of NT and to cater for exceptions. The MFN provision should be excluded from the agreement as it allows for the multilateralization of a basically bilateral agreement. The FET provision should also be deleted from the agreement due to the lack of certainty as to what constitutes “fair” and “equitable” treatment. These terms have been a subject of very expansive interpretations in arbitral decisions; and have been regularly invoked by claimants in investor-State dispute settlement (ISDS) proceedings.

### **Expropriation:**

The Draft agreement provides for “.....a measure or series of measures, other than nationalizing or expropriating, by a Party has an effect equivalent to expropriation”. Investors have frequently used this indirect ‘expropriation’ provisions to challenge government regulatory measures and policies, including those regulations that are apparently made for the protection of the environment. Since this section ( on indirect expropriation ) is bracketed, it should be deleted.

### **Performance requirements (PRs):**

Imposition of PRs i.e. (sourcing of inputs locally, transfer of technology, performing of Research and Development, promotion of joint ventures, employing and training of local employees ...) should be a right of host countries to ensure beneficial outcomes of investments for the host

economies and peoples.

### **Transfers**

The uncontrolled outflows of profit and other investment income have a negative effect on the balance of payment of the host country. The agreement should provide for exceptions and safeguards whereby the Parties may temporarily restrict transfers in the event of serious balance-of-payments difficulties or if movements of capital cause or threaten to cause serious difficulties for macroeconomic management.

### **Investor-State Dispute Settlement:**

This provision grants investors the right to sue a host state in international arbitration processes in case of alleged violation of its obligations under the Treaty. This article empowers individual foreign corporations to avoid domestic courts for international courts. This article should be deleted as it only increases likelihood of legal challenges but also the process is most often flawed.

### **Duration and termination:**

This article should also provide for the renewal of the treaty with clear procedures and joint reviews and assessment of impact. The Agreement provides for 15 year's continuation after the termination of the Treaty for covered investments. Although this clause provides legal security and certainty for investments especially the long term projects, it limits the host states' ability to regulate their economies in line with new emerging realities and dynamics. A balance should be reached by providing for a shorter survival clause period.

### **The Agreement should also include the following articles:**

#### **The right of entry and establishment:**

It is important to have this specific article in the Agreement as it enables the host government to retain the freedom and right to regulate the entry and conditions of establishment by deciding whether or not to accept a potential investor or investment and the right to impose conditions on the investment if it decides to allow entry. This helps host governments to control the quantity and quality of foreign investment in order to generate spin-offs for and linkages to the national economy, in so doing, boosting inclusive growth and sustainable development.

#### **Environmental and Social Impact Assessment:**

This article is also essential as it impels investors to undertake environmental and social impact assessments. Investors should make their environmental and social impact assessments public, including via the Internet, and accessible to the local communities and other relevant stakeholders. This should be done in a timely manner to allow stakeholders' input prior to a decision being taken regarding the establishment of the investment.

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