COMMENTS ON THE MODEL FOR FUTURE INVESTMENT AGREEMENTS
English translation[1]

[1] Where this translation differs in meaning from the original Norwegian text, the original Norwegian text prevails.

1. INTRODUCTION

Norway has not concluded any bilateral investment treaties (BITs) since the middle of the 1990s. This is particularly owing to issues associated with the relationship between the Norwegian Constitution and the agreements' provisions concerning investor-state arbitration[2] and compensation for expropriation. In order to look after the interests of of Norwegian enterprises' potential to compete abroad on the same terms as other countries' enterprises, and owing to enquiries from countries that wish to enter into investment agreements with Norway and the other EFTA states, it is desirable that the Norwegian positions are clarified.

In May 2006, the Government therefore set up a State Secretary Committee with representatives from the Ministry of Trade and Industry (chair), the Ministry of Foreign Affairs, the Ministry of Petroleum and Energy, the Ministry of Justice, the Ministry of Finance and the Ministry of the Environment. The purpose of the committee's work was to define Norwegian positions and to have drafted a model agreement clarifying the limits for how far Norway will go in negotiations concerning individual (strictly bilateral) investment agreements and agreements concluded in connection with EFTA trade agreements. The committee's mandate was to assess the advantages and disadvantages of investment protection agreements and submit a draft model agreement to the Government.

The meetings of the State Secretary Committee were prepared by an Interministerial Group of Senior Officials with representation from the same ministries. The mandate of the Group of Senior Officials was to attempt to clarify the constitutional, legal and taxation issues raised by such agreements.

1.1 Background

The purpose of traditional *bilateral investment treaties* (BITs) is to provide investor protection when the investment is made, particularly by ensuring that an investor receives treatment equal to that received by other national and international investors and is given the right to submit any disputes with the host country to international arbitration rather than bringing them before the local courts. These agreements do not regulate *the access* to investment in the host country. Norway is currently a party to 14 BITs. In addition, Norway is a party to the EFTA trade agreement with Singapore of 2002[3], which provides certain rules regarding investment protection.

The other Nordic countries have concluded, and continue to conclude, agreements that are in all important respects equivalent to the agreements previously used by Norway.[4]

Another form of investment agreement ensures that investors receive both *market access and investment protection.* These are agreements that, in addition to protecting investments made, also secure investors' right to make investments within the whole or parts of the economy of

[2] The agreements enable foreign investors to bring claims against Norway directly before an international arbitration tribunal.
[3] The agreement was signed on 26 June 2002 and entered into force on 1 January 2003.
[4] Denmark has 46 agreements, Finland 52, Sweden 60 (Agreements in force on 1 June 2006. The figures are derived from UNCTAD's "Investment Instruments Online" 6 December 2007 http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1

the host country. Such agreements may be sectoral agreements (a typical example is the Energy Charter Treaty (ECT)) or have general application. Such agreements normally provide the same elements of protection as a BIT. At the same time, lists are provided of the sectors included in[5] or excepted from[6] market access. Such agreements are a more recent phenomenon than BITs, and are not nearly as prevalent, but there is a growing trend in the direction of this type of agreement. The draft model agreement contains provisions concerning both market access and investment protection.

It is possible to conclude pure *market access agreements*, which give an investor certain rights with regard to establishment in the other state that is party to the agreement, but which do not – or only to a small extent – protect investments made.

Investment agreements can be concluded as independent agreements or be incorporated in trade agreements. Today, most modern trade agreements to which industrialized countries are party have chapters covering investment access both within and outside the service sector.[7] This is based on a desire to include investment access as part of a process of economic integration with the partner country. The EEA Agreement is the most comprehensive agreement covering investment access to which Norway is party. Norway has also concluded agreements concerning market access for investments as part of EFTA's trade agreements.[8] The extent of the rights to market access and the obligations on the host country vary from agreement to agreement.

According to a World Bank report from 2006, there were 2495 BITs and 232 other international agreements containing provisions concerning investments by the end of 2005. Most of these agreements were concluded by industrialized countries with developing countries, but there is an increasing trend towards the conclusion of such agreements also between developing countries.

[5] So-called "positive list".
[6] So-called "negative list".
[7] Services are regulated in separate chapters of trade agreements, while the investment chapter normally regulates investments in other sectors. Free trade in services must comply with certain provisions of the GATS agreement unless the rights automatically apply to all countries that are members of the WTO, which entails that the right to commercial presence (establishment) cannot be excepted when including the service sector in the free trade agreements.
[8] See for example the trade agreement with Chile. The agreement was signed on 26 June 2003, and entered into force on 1 December 2004.

1.2 Model agreement - scope and approach

In negotiations concerning investment agreements, each of the parties (the states) usually submits its initial position to the other party. It is this first draft that is referred to as a "model agreement". The model agreement is essentially the same, regardless of which country one intends to negotiate with. It is a complete proposal for the text of all provisions that the respective countries consider should be included in investment agreements.

In the negotiations, it will usually be necessary to deviate from some of the provisions of the model agreement in order to be able to reach agreement between the parties. This memorandum states what Norwegian offensive and defensive interests it is necessary to safeguard in negotiations. For each individual negotiation, instructions that indicate the room for negotiation will be drafted. The final result of the negotiations may deviate to some extent from the model agreement, but any negotiated agreement must satisfactorily safeguard both the offensive and the defensive considerations arrived at during work on the model agreement.

In the EFTA group of countries, it has previously been difficult to reach agreement on the investment provisions. An objective of the work on a draft model agreement has been that the Norwegian positions should also be able to form the basis of joint EFTA positions, and it is intended that the assessments made in this memorandum shall apply both to future bilateral agreements concerning investments and to provisions in the form of a chapter of EFTA trade agreements.

A point of departure for the work on the model agreement has been that the agreements concluded by Norway in the future shall both ensure that Norwegian investors actually gain access to invest in the partner country and receive protection of the investments made, and that the draft covers elements that it is natural to include in such agreements. When referring to the model agreement, the term "investment agreement" is therefore used (rather than "investment protection agreement" or "bilateral investment treaty (BIT)").

Owing to the focus on market access it is relevant to review offensive and defensive sectoral interests in connection with foreign investments. Future agreements are required to fall within Norwegian legislation. There will therefore be a need to except from investment agreements areas where Norwegian legislation discriminates between foreign investors and Norwegian nationals and companies. For example, Norway may need to make exceptions in the fishery sector and in the energy sector, and from the right to own recreational and agricultural property. More exceptions are necessary in agreements that include both market access and protection of existing investments than in agreements that only provide protection of existing investments. This has not yet been reviewed in detail, but will be further investigated while the matter is being circulated for public review. For more information on exceptions, see chapter 4, part 5.

1.3 What is the purpose of the model agreement?

Traditionally, investment protection agreements have primarily been directed towards countries with weakly developed administrative and legal traditions and a low level of legal protection. One of the industrialized countries' primary objectives of such agreements is to ensure the existence of as clear and sound framework conditions as possible for their own investors.

The deliberations made in the work on the model agreement concern the conclusion of agreements with developing countries and countries with economies in transition. If concluding investment agreements with industrialized countries comes into question, other considerations will come into play.

The mandate for drafting a model agreement has not included an assessing which specific countries to negotiate with. The Government will consider this question when it has been clarified whether Norway shall once more enter into investment agreements.

Nor have questions associated with Norwegian ratification of the Energy Charter Treaty (ECT) been considered in the work on the model agreement. Such ratification raises legal and political questions that must, if appropriate, be subjected to a separate and thorough consideration.

1.4 The relationship between the MAI agreement and the Norwegian model agreement for investments

Between 1995 and 1998, an attempt was made to negotiate a Multilateral Agreement on Investment (MAI) between the OECD countries. The background was the desire of the then 29 OECD member states for an agreement that could regulate investments between member states and between member states and third countries in a manner that was uniform, transparent and enforceable. The negotiations were greeted with scepticism by a number of organizations that feared that the investors' rights were to be protected at the expense of the right of states to exercise their authority and of the (public) interests of the population. Concerns relating to the surrender of national sovereignty were the main reason for France's withdrawal from the negotiations in 1998. Several other countries followed France's decision, and the negotiations for a multilateral investment agreement under the auspices of the OECD foundered.

Most of the elements of the proposed MAI agreement conform to what is normally included in investment agreements, and which are also proposed in the model agreement. Comparison of the MAI agreement with the Norwegian model agreement nevertheless reveals more differences than similarities. This is due both to the parties to the agreement and to the scope and wording of the individual provisions.

The MAI agreement was negotiated between the OECD countries. It was planned that more countries, including developing countries, would be able to accede to the negotiated agreement. A number of countries in Latin America, Asia and the former Eastern Europe showed interest in the agreement, and several of these also participated as observers in the negotiations.

The model agreement is a better point of departure for genuine negotiations with developing countries and countries with economies in transition. In any future negotiations based on the model agreement, both parties will negotiate on an equal footing, with the same potential for influencing the result. Neither of the parties will be pressed into accepting a final result that they find undesirable.

One of Norway's areas of focus during the negotiations was that the MAI agreement should not affect obligations under other international agreements (e.g. the Law of the Sea Treaty). Nor should the MAI agreement place constraints on the potential for the continued application of Norwegian legislation and practice in the petroleum sector. Questions associated with environmental and labour standards were also an important part of the negotiations for Norway.[9] These areas have been carefully assessed and taken into consideration in the work on the model agreement.

The wording and scope of the individual provisions of the model agreement also differ greatly from those of the MAI agreement. An example of this is the article concerning expropriation. Thorough consideration was also given to issues associated with the dispute settlement provision, and a number of elements in this provision differ from the dispute settlement mechanism adopted in the MAI agreement.

During the MAI negotiations it was pointed out that it was regrettable that the negotiations were held in camera with little access to information by the public or by civil society. The Norwegian model agreement has been subjected to a round of ministerial consultations and will be subjected to broad public consultations before any decision can be made as to whether Norway shall be able to negotiate new investment agreements on the basis of the model. New investment agreements negotiated by Norway shall be subject to ratification by the Storting (Norwegian parliament).

[9] See for example Foreign Minister Knut Vollebæk's reply to an interpellation in the Norwegian Storting from the member Øystein Djupedal concerning the MAI negotiations, 24 March 1998.

2. CONSIDERATIONS TAKEN INTO ACCOUNT IN THE DRAFTING OF THE MODEL AGREEMENT

2.1 The trade and industry policy perspective

The Government aims to ensure predictable and sound framework conditions for Norwegian commerce and industry. This is clearly expressed in the Soria Moria Declaration.

Norway is a major capital exporter, and Norwegian direct investments abroad more than doubled between 1998 and 2004. It is desirable to ensure that these investments and the investors who make them are provided with predictable framework conditions and protection from unreasonable interventions by host countries. One way that the Norwegian government can ensure this is by entering into investment agreements.

There is a large number of investment agreements worldwide, and in many places Norwegian investors enjoy lower levels of protection than competitors from other countries against unreasonable interventions by host countries. One example of unreasonable interventions is that the authorities of the host country may suddenly and arbitrarily decide to withdraw a foreign investor's concession. Other examples are expropriation and nationalization without compensation and unreasonable discriminatory treatment compared with national or other countries' investors.

It is a fundamental objective of Norwegian trade policy to ensure that Norwegian players receive equal treatment to their competitors. In the case of a small, open economy like that of Norway, this objective will primarily be achievable through multilateral cooperation in the WTO. In all WTO trade agreements the most-favoured-nation principle and the principle of national treatment have a central place. As regards ensuring equal treatment for the foreign investments of Norwegian enterprises, there is no multilateral alternative.[10] The competitive advantage over Norwegian enterprises provided by an investment agreement to foreign enterprises may thus only be equalized by entering into investment agreements with the country concerned. A prerequisite for this is that Norwegian investment agreements are designed to provide Norwegian enterprises with the same level of protection as the competitors. In international commerce and industry, investment agreements are regarded as necessary to the achievement of investments in countries where the political risk would otherwise be too great. This fact is reflected in other OECD countries' practical policy through the conclusion of investment agreements with a number of countries.

Investment protection is also important in connection with EFTA. The other EFTA states wish to conclude investment protection agreements in connection with trade agreements. In connection with the trade agreement with Korea, the other EFTA states concluded an agreement concerning investments to which Norway is not party.

[10] The MAI negotiations failed and were terminated in 1998 (see separate item on this above). In the WTO, an attempt was made to introduce a multilateral investment agreement during the ministerial meeting in Cancún in 2003. However, the attempt had to be abandoned following protests from 20 developing countries (G-20). They were not willing to discuss any of the "the Singapore topics" (*trade and competition policy*, *trade and investments*, *transparency in public procurements* and *simplification of trade procedures*) unless the rich countries were more willing to cut agricultural subsidies and improve market access for agricultural products from developing countries. Investments are no longer a topic in the Doha round of the WTO.

Providing for Norwegian foreign investments is important for future Norwegian wealth creation. The yield from Norwegian foreign investments is derived both from the access they provide to specialization and distribution of labour and from the access to knowledge environments and industrial clusters abroad. Providing Norwegian companies with investment access and protection on equal terms with their international competitors may promote the development of Norwegian commerce and industry, and a Norwegian model agreement may be an effective instrument for both commercial and innovation policy.

2.2 Development policy perspectives

In research reports and international organizations different views are expressed regarding the effect of investment agreements. Some maintain that these agreements have not resulted in increased foreign investments, while others claim that it is precisely this that has been the result. The effect of the agreements seems to vary from country to country.

The primary view is that investment agreements may be one of a number of instruments for increasing investments between developing countries and developed countries. For many developing countries, it is important to signal a friendly attitude towards investments by concluding investment agreements. There is an increasing trend for developing countries to conclude investment agreements between themselves, which underlines that the developing countries themselves regard such agreements as being in their interest.

The Government has emphasized its focus on commercial and industrial development in the Soria Moria Declaration. This has also been focused on both in the Strategy for Private Sector Development in the South and in Report No. 35 to the Storting (2003-2004) “Joint Campaign against Poverty”. Development cannot depend on public funding alone, although this is an important condition. Development is also greatly dependent on private investments, as we have seen in countries such as Korea, India and China, where private investments have contributed to the achievement of considerable growth. The involvement of Norwegian enterprises in developing countries is therefore both positive and important. The Government wishes to facilitate increased investment, a greater number of establishments and more trade in our partner countries. Unless jobs are created in the private sector in developing countries, it will be difficult to deal with poverty. Efforts to create framework conditions and infrastructure to provide for economic growth and social development must be strengthened. The need for strong and binding international cooperation and clear guidelines is increasingly important for meeting the challenges created by globalization. It is also important to ensure that developing countries are not marginalized when the investment decisions take on a global dimension.

It is probable that many BITs have been concluded without a genuine assessment of the agreement’s development policy aspects. Traditional BITs emphasize the responsibility and obligations of a host country towards an investor. Developing countries’ need to implement important reforms is not emphasized to the same extent. It is important that the long-term development policy consequences are assessed in connection with negotiations on investment agreements with developing countries..

2.3 The legislative policy perspective

Traditional BITs are drawn up in order to prevent countries with limited legal protection from treating foreign investments and investors in a manner that conflicts with what western countries perceive as minimum standards (e.g. that compensation is provided in connection with expropriation). The essential political dilemma is that precisely the same formulations may also result in national legislation in a given case involving liability to pay compensation to a foreign investor. These considerations were an important part of the deliberations on new Norwegian positions.

A number of the provisions in investment agreements may limit the exercise of national authority, which over time may affect the nation state's control of its own developments in law. This is because decisions on specific questions that also have consequences for other players or for the relevant area of law in general may be taken outside national jurisdiction.

It is particularly the discrimination and expropriation provisions that may involve limitation of the regulative potential of the state. Norway is a regulative state with a high level of protection. It is not a given that the prevailing regulative practice or future regulations that are lawful according to Norwegian law will comply with the investment agreements. It is therefore important that both the discrimination provision and the expropriation provision are clear and predictable, and that they do not go beyond Norwegian law. There is also reason to emphasize the fundamental principle that Norwegian exercise of authority shall be reviewed by Norwegian courts and not by international arbitration tribunals.

This does not rule out the conclusion of investment protection agreements. If Norway concludes investment agreements, it will be possible for us to lead the development from one-sided agreements that only safeguard the interests of the investor to comprehensive agreements that safeguard the regulative needs of both developed and developing countries, making investors accountable while ensuring them predictability and protection. Future investment agreements should address the totality of international legal agreements by referring to agreements of relevance to the regulatory authority of the states as regards, for example, sovereignty over resources and environmental regulations.

2.4 Environmental perspectives

The Norwegian government's Soria Moria Declaration establishes that it is Government policy to "work to promote an international trade regime in which decisive importance must be attached to the environment, vocational and social rights, food security and development in poor countries". As regards further trade liberalization, the Government has made it a condition that this "should only take place within a framework under which fair distribution, fundamental social standards, the environment and national food security are taken into consideration".

In order to be able to pursue a satisfactory environmental protection policy, it is essential that national governments are able to employ effective measures pertinent to the environmental problems at any given time. It is important that there is freedom of action and flexibility in the use of instruments over time. From an environmental point of view, a primary consideration involves ensuring that investment agreements are designed so as not to reduce the range of national instruments for protection of the external environment currently available to the Norwegian environmental protection authorities. Firstly, this is of importance for the wording of *core provisions* of the agreement concerning expropriation, treatment of investors and settlement of disputes between the investor and the state. These must be worded in such a way that they will not unintentionally affect legitimate environmental decisions and measures. Secondly, it is important to ensure that the agreements maintain a *balance* between the protection of investors' legitimate interests and the regulative needs of the host country. Thirdly, it may be important to *highlight or refer to* environmental considerations at certain points of the agreement.

Moreover, environmental perspectives coincide to a large extent with general *legislative policy* perspectives, cf. the above point.

Safeguarding *developmental considerations* and giving due regard to the variations in the maturity of developing countries' national systems of government also has an environmental perspective. Where government institutions and policy (including environmental protection policy) are poorly developed, and are perhaps in a developmental phase, a country will be particularly vulnerable to international obligations that tie up political freedom of action and the exercise of authority, and take conflicts out of the national jurisdiction. In the Norwegian Government's Soria Moria Declaration, the Government emphasizes the right of developing countries to govern themselves and their need to retain and develop the government instruments that were important for us in developing our own society to a welfare state. This is stated in the context of the WTO, but the consideration should be regarded as generally relevant. Good governance is a fundamental requirement for solving environmental problems. Capacity building at government level aimed at good governance is a key element of helping to raise environmental standards and ensuring implementation of environmental protection agreements, etc. in other countries. From an environmental point of view, reducing developing countries' potential to build sustainable environmental protection administration and policy in their own country might have the opposite effect of multilateral and bilateral measures to support "good governance" for the environment. It is increasingly important that developing countries are empowered to solve their own environmental problems and to accede to international agreements aimed at solving the major global environmental problems (climate change, dispersion of environmentally hazardous substances, loss of biological diversity) – not only in global terms, but to an increasing degree of direct significance to the state of the environment in Norway.

2.5 The social responsibility of investors

Whether, and how, future investment agreements will regulate investors' social responsibility has been subject to discussion during the development of the draft model agreement. The argument in favour of such regulation has been to balance the rights gained by investors through the investment agreements by imposing certain obligations on them. It is not *irresponsible* Norwegian investments that are the target group for the protection to be afforded by future investment agreements.

The social responsibility of investors is now included by means of an article providing that the parties to the agreement shall strive to ensure that their investors comply with the OECD guidelines for multilateral companies and that they become members of the UN Global Compact.

In addition, the agreement contains several points that seek to safeguard important social considerations. The agreement prohibits the host country from reducing important standards in order to attract investments, and provisions in the preamble that refer to a number of fundamental principles that are normally included in CSR guidelines. Compliance with national legislation is also a requirement.

It has furthermore been agreed that the Joint Committee shall have the authority to consider issues associated with investors' social responsibility, etc. The purpose is to establish an institutional framework that can contribute to increased transparency concerning the investments made in connection with the investment agreement and to equip the parties to the agreement with a flexible and practical instrument for following up specific questions concerning the actions of the investors, the host country or the country of origin. Introduction and accentuation of such a possibility may be an important measure for creating a balanced investment agreement, not least in order to ensure that implementation of the agreement takes place in accordance with the purposes. The parties may decide to grant the Joint Committee authority to function as an appeal body or an ethical council, for example by allowing various organizations to bring the activities of individual investors before the committee.

3. PRIMARY ISSUES AND FUNDAMENTAL CONSIDERATIONS IN THE DRAFTING OF THE MODEL AGREEMENT

Investment agreements are based on an assumption of reciprocity of the rights and obligations of the parties to the agreement. It is the effect of this reciprocity internally in Norway that has been viewed as problematical in relation to the conclusion of new agreements of this kind.

The two main questions that have been raised are:

- the relationship to the Norwegian Constitution and
- the relationship to the regulatory authority of the public authorities

3.1 The relationship to the Norwegian Constitution

As regards the relationship to the Norwegian Constitution, discussion has mainly revolved around the right of foreign investors to bring claims against Norway through international arbitration (settlement of disputes). In the work on the model agreement, it has been concluded that the Norwegian Constitution provides a certain freedom of action in this area. This is a central provision for the investor, and the model agreement therefore contains provisions concerning investor-state arbitration within the framework of the Norwegian Constitution (for further information, see chapter 4).

In connection with the model agreement, one has assessed the extent to which international agreements, which assign international *ad hoc* arbitration tribunals the authority to settle disputes between Norway and investors with binding effect in Norway, can be concluded using the procedure involving a simple majority in accordance with article 26, second paragraph, of the Norwegian Constitution. The limits for the transfer of authority with the consent of the Storting, pursuant to article 26, second paragraph, of the Norwegian Constitution, are not clear in this connection. However, the doubts concerning the Constitution are reduced by diminishing the *extent* of the transfer of authority and the risk that the investment agreement may give rise to *unexpected negative effects* on the exercise of Norwegian governmental authority, which pursuant to the Norwegian Constitution lies with Norwegian government bodies. An agreement that makes it possible to correct an undesirable development in law, and which can be amended and/or terminated, will in principle be preferable to an agreement that transfers authority for an unlimited period. The range of action provided by the Norwegian Constitution prescribes that, as far as possible, one avoids discretionary provisions in the agreement text, which to an unnecessary extent involve the transfer of Norwegian governmental authority. For example, the extent of the authorities' obligations under international law to refrain from regulations should be defined as clearly as possible. These guidelines are reflected in the model agreement that is now available.

3.2 The relationship to the regulatory authority of the public authorities

Traditional BITs are, as previously mentioned, designed in order to prevent countries with limited legal protection from treating foreign investments and investors in a manner that conflicts with what western countries perceive as a minimum standard (e.g. that compensation is provided in connection with expropriation). The essential political dilemma is that precisely the same formulations may also result in national legislation in a given case involving liability to pay compensation in relation to a foreign investor. These considerations have been an important part of the deliberations in the work on new Norwegian positions.

3.3 Fundamental considerations for the work on defining positions for future investment agreements

The main condition on concluding investment agreements is that the agreements shall be able to fulfil their economic and political functions without intervening unnecessarily in Norwegian exercise of authority. The investment agreements Norway aims to conclude shall be international instruments that shall satisfy the need for protection of Norwegian foreign investments while at the same time contributing to development in developing countries. A prerequisite for Norway on concluding investment agreements must be that the agreements do not intervene in the state's legitimate exercise of authority where major public interests are affected. The agreements must furthermore comply with international law.

In order to meet the need, both of Norway and of the countries with which it is appropriate to enter into agreements, to be able to make useful social regulations, investment agreements must contain balancing clauses that emphasize the legitimacy of the states' general legislative authority, exercise of authority and political freedom of action on their own territory. Introductory paragraphs stating the intentions underlying the agreements and the purpose of the agreements should also emphasize such considerations.

4. FURTHER INFORMATION CONCERNING THE INDIVIDUAL PROVISIONS OF THE MODEL AGREEMENT

4.1 PART I – Scope and application

4.1.1 Preamble

The preamble to the agreement can be described as the parties' statements of motives, purposes and circumstances enabling the agreement to be viewed in the correct perspective. It often contains relevant political, economic, historical or cultural considerations that have guided the parties in their negotiations and wording of the agreement. The preamble is not intended to create binding obligations, but has a legal significance as a basis for interpreting the agreement.

The preamble of the model agreement states that the parties wish to develop the economic cooperation between them and establish favourable, stable, equitable and transparent conditions for the other party's investors and their investments.

Emphasis is placed on ensuring that due regard is paid to health, safety and the environment and internationally recognized labour rights in connection with the goals for increased investments. Importance is also attached to the need for sustainable investments and the significance of these for the development of national and global economy and for the goal of sustainable development. The parties confirm that they recognize the fundamental principles of transparency, accountability and legitimacy, and that they will be determined to prevent and combat corruption. The parties further confirm their obligations under the United Nations Charter and the Universal Declaration of Human Rights. Particular emphasis is placed on the significance of corporate social responsibility. This is also reflected in the provision concerning the Joint Committee and the social responsibility of investors. For further information, see the descriptions of these provisions below. The preamble also states that the provisions of the agreement and of international agreements relating to the environment are to be interpreted in a mutually supportive manner.

4.1.2 Scope

The provision specifies the material and geographical area covered by the agreement.

Material scope
The agreement applies to both/all parties' investors and to their investments regardless of whether the investments were made before or after the agreement's entry into force. However, the agreement provides no protection against *government measures* implemented prior to the agreement's entry into force. The agreement thus has no retroactive effect for government measures that conflict with the agreement if they were implemented before the agreement entered into force. It is also made clear by the provision that investor-state arbitration[11] may only apply to matters that arise after the investment agreement has entered into force.

[11] The article concerning "non-retroactive application".

The agreement applies to investments in all sectors including the service sector unless special exceptions are laid down (either from the agreement as a whole or from individual provisions).[12] This is further dealt with below under the comments on Article 2 ("Definitions") and in the descriptions of the various excepting provisions.

The agreement applies to all government measures of significance to investors and their investments in the host country.

Geographical scope
This provision defines the agreement's geographical extent as the land territory, internal waters and territorial sea of the parties and the airspace over the territory. Svalbard is excepted from the agreement's scope owing to the Svalbard Treaty. In connection with any future negotiations, and on the basis of a specific need, it may nevertheless be appropriate to consider the geographical scope.

4.1.3 Definitions

"Investor"
The agreements shall provide protection to both natural and legal persons. A fundamental consideration for the wording of the provision has been to ensure that the possibility of invoking investment agreements concluded by Norway in disputes with the Norwegian authorities is limited to investors with genuine links with the countries with which we have concluded agreements.

In order to be protected by the agreement, a *natural person* must be a national of or have permanent residence in the country of origin in accordance with the law of that country[13], and be able to derive substantive and procedural rights under that law if he or she invests in the other party to the agreement. In many ways, permanent residence is an even stronger link to Norway than citizenship. An investor may be a Norwegian citizen and have lived abroad for many years. Inclusion of persons with permanent residence entails that they in some cases may have rights pursuant to two agreements – both investment agreements concluded by the country of which they are citizens and agreements concluded by countries of which they are residents. In our view, this is a limited problem. It is more difficult to justify that an investor who has resided for a long time in Norway but is not a Norwegian citizen shall not benefit from the protection afforded by the agreement.

Requirements vary as regards links to a country in order to be protected by the agreement for *legal persons*. One alternative is the country of registration, another is the location of the head office.[14] According to the current wording of the provision, the entity must be established in the country of origin and be a legal person according to the country's legal provisions. It is furthermore required that the entity shall have genuine business operations in the country of

[12] In EFTA trade agreements, services will be regulated in a separate chapter.
[13] By "country of origin" is meant the country where the investor is based. "The host country" is the country where the investment is made. The bilateral investment treaty on which the investor bases his rights is concluded between the country of origin and the host country.
[14] Pursuant to Norwegian law, these will be the same, cf. section 1-2 of the Act relating to the register of business enterprises *(Norwegian and foreign enterprises)* "For the purposes of this Act, Norwegian enterprises shall mean any enterprise with a head office in Norway or on the Norwegian continental shelf. Other enterprises are foreign." Norwegian enterprises are subject to a registration obligation in Norway.

origin. This condition has been included in order to prevent “postbox companies” from receiving protection under the agreement.

The Norwegian state is not protected by the agreement in respect of direct investments in the other state that is party to the agreement. The state’s investments must in such case be channelled through a legal person as defined by the agreement.

“Investment”
The definition of “investment” is “every kind of asset”. The definition is broad because one wishes in principle to motivate investment in all areas. The provision contains a “non-exhaustive” list of assets regarded as investments. This list may provide a basis for interpretation, and it is very usual for investment agreements to contain such a list.

Among the elements included under “investment” are equity participation in enterprises, shares, loans and bonds, intangible rights, concessions, licences and the like. The provision thus covers both direct and indirect investments. Investments in all economic sectors are covered, including investments in production of goods and in the service sector.

The final paragraph of the definition contains a qualification that limits the extent of the definition of investments to “genuine investments”. However, it is not required that one intends to earn money on the investment. Investment, for example, in recreational property for one’s own use would also be included in the definition.

4.1.4 Regional and Local Government

It follows from this provision that each party is responsible for regional and local authorities and for bodies that carry out tasks on behalf of these authorities. This is consistent with general international law. In negotiations with federal states, where the federal authorities according to their national law may not obligate the federal states, one must ensure that the agreement is ratified so that it is also binding for the federal states (and that the state can also be held liable for the actions of these entities).

4.2 PART 2 – Treatment and Protection of Investors and Investments

The obligation regarding non-discrimination (national treatment and most favoured nation treatment) is the very basis of investment agreements, and is of decisive importance for Norwegian investors abroad. Future agreements should therefore contain a clear and comprehensive provision concerning this.

4.2.1 National Treatment (NT)

According to the provision concerning national treatment, the parties are obliged to accord each others' investors and their investments treatment no less favourable than that accorded to its national investors and their investments.

The purpose of the provision is to combat arbitrary and unfair discrimination. Comparable investors shall be treated equally unless there are genuine and legitimate grounds for treating a foreign investor differently from a national investor. An investor in one sector can not automatically demand the same treatment as an investor in another sector or demand the treatment given during a previous period before the entry into force of new regulations. The main purpose of the provision is to prevent discrimination between investors on the basis of nationality.

The provision covers both lawful and "de facto" or "indirect" discriminatory treatment. This is not specifically laid down in the text, but follows from the reference to "treatment" and practice in relation to corresponding provisions.

According to Norwegian law, the Norwegian authorities have the competence to adopt general provisions and make individual decisions involving discriminatory treatment. However, discriminatory treatment that lacks any objective justification, is disproportionate or appears to be unreasonable is prohibited. It is also this type of intervention the non-discrimination provision in the model agreement aims to combat.

The scope of the provision, as it is now worded, will probably not be greater than what the Norwegian authorities have already committed themselves to through Norwegian law and the general principles of administrative law associated with equal treatment and prohibition of unfair discriminatory treatment. There may be a need to conduct regulation that is in practice less favourable for a foreign investor than for a Norwegian investor on the basis of important social considerations. There may also be differences arising out of specific discretionary judgments, more stringent requirements over time and local variations. If the state can document that there are objective grounds for discriminatory treatment, this is not in conflict with the provision. The Norwegian authorities' right and obligation to regulate important sectors of society on the basis of rational variations will probably be retained in full.

In the area of non-discrimination, there is no norm under international law that can be used as a basis, as, for example, in the case of the "general treatment" provision. Legal usage in this area also varies somewhat, but recent trends have been moving in the direction of arbitration tribunals showing more reservation in reviewing the discretionary judgments of the authorities regarding the grounds for discriminatory treatment. An explanatory footnote is proposed based on interpretation of the provision in accordance with the most recent development in practice. Such a solution balances the need of offensive interests for clear non-discriminatory provisions with the need for somewhat greater security with regard to future interpretation and application of the non-discrimination provision out of regard for national regulatory interests, and provides an appropriate expression of the desired result.

The provision concerning national treatment will apply to establishment, for example in connection with the granting of a licence or concession[15] and when the investment is made. It is usual that the investment phase is covered in investment agreements, but not in the traditional bilateral investment treaties (BITs).

The EEA Agreement is based on equal treatment in all economic sectors except the sectors where specific exceptions are made. In the case of Norway this particularly applies to recreational property and fishing boats. The technical term for this approach, where all sectors are included unless specifically excepted, is "negative listing". The opposite approach, where national treatment is only given in the sectors specifically listed, is referred to as "positive listing". This is the approach adopted in GATS (the WTO General Agreement on Trade in Services).

EFTA's most recent trade agreements also cover market access for investments. In these agreements, it is usual to employ "negative listing" for investments in general. The service sector is dealt with in a separate chapter of trade agreements. In the case of this sector, "positive listing" is usually employed. The services chapter covers not only investments in the host country but also the supply of services across national borders,[16] supply of services abroad and personal supply of services in the host country, and it has been concluded that the listing of obligations in the service area should adopt the same model for all four "modes of supply".[17]

In the model agreement, negative listing has been adopted. The principle is thus that all investment shall be included provided no special exceptions have been made. In connection with "negative listing", country-specific lists must be drawn up of sectors that are to be wholly or partly excepted. These annexes are provided for in the second paragraph of the provision. The exceptions will be primarily associated with the right of establishment itself, i.e. market access provisions. Inclusion of market access provisions would make the agreements more complex than pure protection agreements. This is because there would be a need for extensive lists of exceptions for both states party to the agreement specifying the sectors where national treatment is not offered for foreign establishments. In investment agreements concluded in the form of a chapter of EFTA trade agreements, the service sector will be covered by the trade agreement's services chapter. Independent investment agreements, on the other hand, will also cover investments in the service sector and the need for exceptions will therefore be greater. The parties will except all existing discriminatory regulation, and provisions are being made to enable exceptions to be made for future regulation.

The exceptions from the provision concerning national treatment will be provided in annex A to the agreement, which will also provide rules for amendments to the country-specific lists. The provisions allow removal or limitation of access to investment in a sector that was

[15] cf. the terms "establishment, acquisition, expansion".
[16] i.e. that the service is supplied directly from abroad, for example that foreign ships transport to and from Norway.
[17] In GATS, referred to as the supply mode ("mode") 1, 2, 3 and 4.

originally open to foreign investments, but it is then required that the host country opens other sectors in order to secure the balance of the agreement. It is also laid down that such “closure” of a sector shall not entail that investors who have invested in a sector on the basis of the agreement may be forced to sell the investment.

On concluding investment agreements in the future, an assessment should be made of the exceptions it is necessary to make from the provision concerning national treatment for regulation with special provisions for Norwegian natural or legal persons or for persons within the EEA area, for example for establishment of new activities, ownership restrictions, etc. It is required that future agreements shall not be in conflict with Norwegian legislation. There will therefore be a need to except from investment agreements areas where discriminatory treatment of foreign investors and Norwegian nationals and companies follow from Norwegian legislation. This applies for example to investments in the fishery sector. The cultural sector is excepted from the model agreement.

4.2.2 Most Favoured Nation Treatment (MFN)

The provision concerning most favoured nation treatment obliges the parties to provide each others’ investors and their investments with treatment no less favourable than that accorded to investors and investments of any other state in otherwise like circumstances.

The same proviso for like circumstances, etc. that applies to national treatment applies here too.

The second paragraph of the MFN provision is a so-called REIO clause.[18] This entails that obligations laid down in other trade agreements, etc. do not entail rights of investors/investments regulated in this agreement. However, the other party to the agreement shall on so requesting be given the opportunity to renegotiate the current investment agreement with a view to attaining corresponding rights.

The exceptions from the MFN provision will be listed in annex B to the agreement.

In the fourth paragraph of the draft, it is made clear that the MFN provision shall not apply to dispute settlement provisions. Today, a large number of agreements have investor-state dispute settlement mechanisms of varying content. Internationally, it is disputed whether the MFN clause also covers the right to employ a specific dispute settlement mechanism or the special terms allowing for the institution of international arbitration (“procedural rights”) or whether only substantive rights associated with market access and treatment of investors are included. Some arbitration awards have found dispute settlement mechanisms to be included on certain terms, while others have arrived at the opposite conclusion. The purpose of the proposed clause is to establish that the MFN clause in this model agreement shall not be regarded as including the right to a separate dispute settlement mechanism so that no doubts concerning this question arise in the event of a dispute.

4.2.3 General Treatment and Protection

[18] Regional Economic Integration Organisation

Pursuant to this provision, the parties are obliged to protect each others' investors and to accord them fair and equitable treatment. Investors' right to fair and equitable treatment and full protection and security is based on the international minimum standard of customary public international law, which specifies the lowest threshold for treatment of foreigners. As opposed to non-discriminatory provisions, the standard applies regardless of how the host country treats its own nationals and enterprises. It is usual that investment agreements contain such a provision. The "fair and equitable treatment" formulation has been taken into consideration in a large number of arbitral awards during the last six–seven years. It is primarily the relationship between the "fair and equitable treatment" provision and the minimum standard of customary public international law that has been under discussion.

Assessment of whether the standard has been breached must be made in the light of the fact that it is the prerogative of the host country to regulate on its own territory. It is furthermore clear that the provision shall not entail that the Tribunal becomes an appeal body. The decisive factor regarding assessment of national judicial decisions is, for example, not whether the court has misinterpreted the law or the facts, but whether the court's actions can be assessed as clearly unwarranted in relation to an international standard. These considerations indicate a high threshold for finding acts of authority to be in conflict with the standard.

If the provision does not contain a clear reference to the international minimum standard, there may be a risk of interpreting the provision as an autonomous standard and not as the standard of customary public international law. The most extreme consequence of this may be that it is perceived as a fairness provision, i.e. an invitation to pure *ex aequo et bono* assessment). There have been tendencies to make such an interpretation in arbitration practice, but recent practice is more restrictive, even without reference to international law/customary public international law. In order to avoid uncertainty concerning this, a reference to customary public international law is included in the model agreement.

4.2.4 Expropriation

The expropriation provision must provide effective and intentional investor protection, while safeguarding the regulatory freedom of the state. The aim of an expropriation provision is to protect established investments from open or camouflaged expropriation. The provision must at the same time safeguard the state's right to implement general regulations and administrative decisions without incurring liability to pay compensation. The challenge involves finding the correct point of intersection between regulation/intervention by the authorities that is deemed to be expropriation (and thus gives rise to claims for compensation) and the measures that fall outside this category.

According to customary public international law, expropriation does not only occur when the property right is taken by force (nationalization/expropriation), but also if major and long-term limitations are placed on the property right (indirect expropriation). Such measures must moreover be taken in accordance with national law, be in the public interest, be non-discriminatory and involve payment of compensation.

In the drafting of the expropriation provision of the model agreement, emphasis was placed on the following fundamental considerations:

1) Expropriation protection shall not intervene in current Norwegian legislation and practice in the area of expropriation law.

2) An expropriation provision shall not move the boundaries for what is deemed expropriation pursuant to the general provisions of international law.

3) An expropriation provision shall contain an item referring to and safeguarding the general regulatory freedom of the state on its own territory.

4) An expropriation provision must not provide for extended state liability to pay compensation in relation to regulations not deemed to be expropriation or camouflaged expropriation. (The same must apply to the possibility for extended state liability to pay compensation in relation to loss suffered by an investor during war, armed conflict or other emergency situations in the territory).

5) A foreign investor shall not attain better expropriation protection in Norway than the country's own inhabitants.

The expropriation provision in the model agreement is primarily derived from protocol 1, article 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The parties shall not expropriate or nationalize the investments of each others' investors unless this is in the public interest and subject to conditions provided for by law and by the general principles of international law.

The Convention has been implemented in Norwegian law by section 2 of the Human Rights Act, and takes precedence over provisions of other legislation, cf. section 3 of the Act.

It is important to note that the provision refers to the general principles of international law. This entails that Norway is obliged to respect private property not only under international law – the international law has been implemented in Norwegian law by the Human Rights Act.

Although the European Human Rights Convention only applies within Europe, the obligation applies regardless of the property owner's (investor's) nationality.

The Human Rights Convention and general international law provide appropriate and satisfactory protection of property. These are standards that Norway is already obliged to comply with, both under international law through the European Human Rights Convention and pursuant to customary public international law as well as Norwegian law through the Human Rights Act. These are also standards that are well known through the case law of the European Court of Human Rights and associated legal literature, and through the implementation of the standard in Norwegian law. Deviation from these standards may create uncertainty in that the wording must be reinterpreted and in that precisely the deviation from these more general standards may be understood to indicate a wish to regulate the protection differently.

It is usual that the expropriation provision in investment agreements provides that compensation shall be paid in connection with expropriation. The formulation often used is the so-called "Hull formula" ("prompt, adequate and effective" compensation). Some agreements go further in specifying how compensation shall be assessed, see, for example, NAFTA.[19]

There are several reasons why these formulations have not been used in the model agreement. Firstly, there are many different formulations in BITs. Many of the formulations go further than what we perceive to be current international law, and probably provide greater protection to investors than has been assessed as appropriate in Norway. These formulations are also unpredictable in the sense that the limits for protection are only to a small extent decided by practice. Tribunals must thus to a large extent determine the protection on the basis of the text alone. In our view, it is therefore more satisfactory to use the formulation in the European Human Rights Convention as a basis. Most case law and literature by far is associated with the international protection of property. The Tribunals receive adequate guidance from the case law and literature. The European Human Rights Convention also refers to protection of property provided by general international law. It is useful to agree on common international standards. By giving particular emphasis to the European Human Rights Conventions and the standard provided by international law, Norway supports this.

4.2.5 Compensation for Losses

The provision "Compensation for losses" regulates situations where an investor suffers losses in the host country owing to armed conflict or civil strife.

The point of departure in international law is that the host country is not liable to pay compensation in relation to a foreign investor for losses owing to war, armed conflict, etc. This bears a relation to the principle of "due diligence" in the minimum standard for treatment of foreigners, but it is highly unlikely that the host country would be regarded as obliged to pay compensation according to this principle in the situations referred to here.

The purpose of the first paragraph of the provision is to emphasize that the principles of national treatment (NT) and most favoured nation treatment (MFN) apply if the host country nevertheless decides to pay compensation to its own nationals or to foreign investors who are affected. The provision is thus only applicable if failure to pay would involve discrimination compared with the country's own investors or other foreign investors.

The second paragraph imposes on the host country a liability to pay compensation if the country's armed forces have requisitioned or destroyed the investor's property in excess of what was necessary in the situation. While the first paragraph confirms the "no-liability principle", the proposed second paragraph describes certain narrow exceptions involving a liability to pay compensation, and can be regarded as a provision incorporating and clarifying the general "due diligence" principle of international law in relation to war and civil strife situations.

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[19] Article 1110: Expropriation and Compensation
[…]
2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

The corresponding text was proposed in the MAI negotiations, and has, for example, been used in the Danish, Swedish and Icelandic model agreements. The proposed provision only covers losses in connection with “armed conflict” or “civil strife”. In investment agreements, the provision is commonly given a broader scope, which, for example, covers “losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection, or riot”. [20] In order to avoid lack of clarity concerning the relationship to civil rights such as the right to strike, etc., these formulations have been omitted.

This provision may be appropriate for inclusion in negotiations with certain countries.

4.2.6 Performance Requirements

In international investment agreements, it is customary to include provisions prohibiting the host country from imposing performance requirements. Prohibition of performance requirements is not included in Norway’s existing investment agreements, but is included in some of our free trade agreements. In the WTO, prohibition of certain performance requirements has been included in the TRIMS agreement (for the product sector) and in the GATS agreement (for services). In the case of GATS, it will be possible to regard performance requirements as restrictions of market access as regards commercial presence (“supply mode 3”). If a WTO country undertakes obligations in a sector and wishes to maintain performance requirements, these must be included in the so-called binding list. In the WTO service negotiations, Norway has demanded of several countries that they shall oblige themselves to refrain from making performance requirements. In connection with negotiations concerning bilateral investment treaties, it is important that Norway acts in a manner consistent with our requirements in connection with the WTO.

Typical performance requirements imposed in connection with foreign investments are requirements regarding national co-ownership, purchase of intermediate goods and services in the host country, employment of local manpower and various forms of transfer of authority. Such requirements may involve trade distortion in relation to intermediate products or other ineffective overriding of operational decisions that make the investment less profitable than it would otherwise have been. In the case of Norwegian enterprises that invest abroad, performance requirements may be problematical if they are unclear or disproportionate, if there is a lack of transparency concerning what requirements can be imposed when, or if they are imposed in an arbitrary or discriminatory manner. From the point of view of competition, it is undesirable that the host country should impose different performance requirements dependent on the investor’s country of origin.

Developmental considerations may in certain connections indicate that developing countries should be able to impose performance requirements where this is appropriate. Developing countries often point out that performance requirements have frequently been used by developed countries in connection with their own industrialization and that the same instrument should also be available to developing countries. Such views were part of the reason why, in connection with the final communiqué of the WTO ministerial meeting in Hong Kong in 2005, it was agreed that the least developed countries (LDC) should have the right to impose performance requirements in conflict with the TRIMS agreement until 2020. However, a number of economic analyses have shown that performance requirements are

[20] See for example the Danish model agreement.

often ineffective from a socio-economic and development policy point of view. A clearly negative effect of inappropriate performance requirements may be that foreign investors refrain from investing, in conflict with the main interests of the host country in attracting foreign investments. From both the host country's and the investor's point of view performance requirements may thus constitute a disadvantage.

Performance requirement is not an unambiguous term, and the explanation and content often vary from sector to sector. Entirely different considerations may for example apply to performance requirements in connection with investments in primary production than in a service sector. In connection with both WTO negotiations and any future conclusion of investment agreements, there is reason to make specific assessments of the relevant performance requirements a country wishes to impose, with a view to both the economic and development policy situation and Norwegian investors' interests.

There are alternative approaches to regulation of performance requirements in an investment agreement. Extremes involve general prohibition or explicit acceptance of performance requirements or omission to regulate the issue.

Assuming that the Norwegian model agreement is primarily intended to form the basis of agreements with developing countries or countries with economies in transition, an interim solution has been prepared that should be able to meet a number of different needs. The principle should be that the model agreement prohibits performance requirements consistent with the other party's WTO obligations and any claims brought by Norway in a WTO context, and that further prohibition is differentiated on the basis of the specific needs that prevail for the other party to the agreement and Norwegian investors respectively.

In the model agreement's provision concerning performance requirements, this is indicated by placing all of the performance requirements in the provision in square brackets. The prohibitions in question can be removed according to how the specific economic and legal needs are assessed.

In assessing the need for further prohibition of performance requirements, it will be particularly relevant to take into account any investment agreements that the other party to the agreement has concluded with other industrialized countries that are competitors of Norwegian commerce and industry. If during the negotiations a developing country makes it clear that it is desirable to maintain certain performance requirements, Norway should in principle be open to complying with this after a concrete assessment of the appropriateness.

In the case of LDC countries, it is natural to take as one's point of departure the above-mentioned WTO final communiqué as regards performance requirements regulated in the TRIMS agreement, i.e. to permit such performance requirements in accordance with the final communiqué, and to regulate other prohibitions on the basis of specific investor needs and the specific development policy situation of the other party.

It follows moreover from the model agreement's provision concerning performance requirements that such requirements may only be imposed on the basis of social considerations, that any such requirements must be known and be laid down in the host country's legislation, and that they must be applied in an open, objective and non-discriminatory manner.

4.2.7 Transfer

This article lays down the principle that all transfers of capital made in connection with investments shall take place freely. However, in cases of liquidation, insolvency, protection of the rights of creditors, criminal offences, remedying of environmental damage, penalties for environmental offences and accrued enforcement charges pursuant to the Pollution Control Act and the Product Control Act or in connection with execution of a judgment, restrictions may be made on the free flow of capital. Nor shall the article prevent the carrying out of obligations deriving from tax legislation or in connection with welfare policy and pension schemes.

4.2.8 Key Personnel

In accordance with national legislation, the parties shall provide each others' investors and their key personnel with temporary residence and work permits in connection with the investment activity.

The parties shall permit each others' investors to employ the key persons they wish regardless of nationality, provided that the persons concerned hold residence and work permits granted by the other party.

The parties are also encouraged to provide corresponding residence permits to the spouses and children of investors and key persons.

4.2.9 Not lowering standards

This provision states that it is not regarded as acceptable that one of the parties to the agreement grants exceptions from current requirements regarding health, safety, environmental or labour rights in order to attract investments from investors of the other party to the agreement. The purpose of the provision is to ensure that a state does not receive rewards in the form of increased investments for omitting to make socially beneficial regulations.

The provision applies where the host country wishes to grant a specific investor exceptions from the general legislation of that country, but does not apply to the country's potential for generally amending national statutes and regulations. If a country employs such exceptions as investment incentives, the other party may request consultations in the Joint Committee.

The provision originated in the NAFTA agreement between Canada, Mexico and the USA (Article 1114), but has gradually been included in other countries' agreements.

4.2.10 Right to regulate

A major consideration in the work of the Group of Senior Officials has been to ensure that the state's right to make legitimate regulations of the actions of investors is not restricted by an investment agreement. However, the right to regulate must be balanced against the investors' wish for predictability, legal safeguards, minimum requirements regarding the actions of the state and compensation in the event of expropriation, etc.

The article must be viewed in the context of such provisions as those concerning national treatment, the right to compensation in the event of expropriation, security exceptions and general exceptions. The provision signals that the parties have national regulatory needs associated with health, environment and safety that are legitimate and must be respected. It does not give the state the right to derogate from the protection provisions of the agreement, cf. the words “otherwise consistent with this Agreement”. From a legal point of view, the main significance of the provision is as an additional interpretive factor for the scope of the protection provisions of the agreement.

A corresponding provision is found in many investment agreements.

4.3 PART 3 – Dispute Settlement Provisions

4.3.1 Non-Retroactive Application

It follows from this provision that the dispute settlement provisions of the agreement do not apply to events that take place before the agreement enters into force.

4.3.2 Governing Law

This provision applies both to investor-state and state-state dispute settlement.

Pursuant to article 42 of the ICSID Convention, a dispute brought before an ICSID tribunal shall be settled according to the legal provisions decided by the parties.[21] If this is not agreed, it is the legal provisions of the host country (including provisions concerning choice of law) that will apply, together with applicable provisions of international law.

In future Norwegian agreements, the states' prior consent to dispute settlement will be limited to claims based on the provisions in the agreement concerned. A claim by an investor may thus not be based on violation of national law or on the principles of international law/customary public international law. It will be necessary to *interpret the provisions of the agreement* and it will be necessary to consider *the underlying legal situation*. In this situation, both other international law (outside the agreements) and national law may be relevant.

Pursuant to the agreement, it shall be possible for the Joint Committee to interpret the provisions of the agreement. This has been done in order to ensure the possibility of correcting a development in law that is not consistent with the parties' intentions on conclusion of the agreement. See further information concerning this under the description of the provision concerning the Joint Committee.

The relationship to other international law
The Arbitration Tribunal shall only interpret and apply the current agreement. This means that alleged breaches of other obligations of international law may not be the basis for legal actions pursuant to the dispute settlement provisions of the agreement.

The agreement will be interpreted on the basis of the generally accepted principles of international law (codified by the Vienna Convention,[22] cf. particularly articles 31-32). The principle is that the agreements shall be interpreted in good faith in accordance with the general meanings of the words viewed in their context and in the light of the purpose of the agreement. The Tribunal will seek to determine what the parties (the states) wished to commit themselves to by concluding the agreement. If this is not clearly stated in the wording, considerable importance will be attached to documents that may provide an indication of the intentions of the states (minutes from negotiations, etc.).

Articles 31-32 of the Vienna Convention provide only a limited potential for including other agreements between the parties and general principles of international law in the

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[21] International Centre for Settlement of Investment Disputes (ICSID), see further information on the ICSID under "Disputes between a party and an investor of the other party", paragraph "Different tribunals/arbitration tribunals".
[22] 1969 Vienna Convention on Law of Treaties

interpretation of an agreement. To the extent permitted by the Vienna Convention, other parts of international law may thus be included, but then only as interpretive elements.

The Arbitration Tribunal will not be able to attach importance to pure *ex aequo et bono* considerations, cf. article 42 (3) of the ICSID Convention.

The relationship to the national law of the host country
The Arbitration Tribunal cannot judge on the basis of violations of national law, which is therefore not applicable law. On the other hand, national law constitutes evidence for the Arbitration Tribunal, which must consider whether national law is contrary to the agreement as such or as applied in the current case.

Breach of treaty versus breach of contract ("umbrella clause")
Investment agreements often contain clauses concerning adherence by the parties to their previous obligations to investors of the other party (including contracts already entered into). Another usual formulation is that *any* dispute between a party and an investor from one of the parties may be settled pursuant to the arbitration provision of the investment agreement. These clauses are referred to as umbrella clauses, and entail that disputes in contract law are elevated to disputes in international law.

The point of departure for the work on a new model agreement has been that the Arbitration Tribunal shall only be able to consider alleged breaches of the standards in the interstate investment agreement. Therefore, no right is laid down in the model agreement for an investor to use the same arbitration tribunal to settle disputes arising out of a contractual relationship between an investor (or his investment) and the host country. The breach of agreement referred to in the model agreement as the subject for arbitration, and which thereby sets the mandate for the Arbitration Tribunal, must thus be a breach of the investment agreement.

Contracts between the host country and the investor may nevertheless be used as evidence/arguments during the dispute settlement, and breach of a contract *may* in some cases entail a breach of the investment agreement concerned.

4.3.3 Disputes between a Party and an Investor of the other Party

An important question is how disputes concerning investment agreements are to be settled. The question concerning dispute settlement mechanisms must be viewed in connection with the remaining provisions of the agreement.[23]

BITs entered into by Norway prior to 1996 give the investor the unconditional right to bring a dispute against the host country before an international arbitration tribunal (e.g. the ICSID[24], the ICC[25] or an *ad hoc* tribunal). That the right is unconditional means that it is not dependent on the individual consent of the host country.

[23] The issues raised by investor-state dispute settlements in relation to the Norwegian Constitution are discussed in chapter 3, above.
[24] International Centre for Settlement of Investment Disputes (under the World Bank)
[25] International Chamber of Commerce

In the work on the model agreement, a thorough assessment has been made of the question of dispute settlement, which concluded that future investment agreements should admit investors to investor-state arbitration as a general rule, i.e. without requiring the specific consent of the host country. The assessment has been based specifically on the investor's needs, the risk of future legal actions and the arbitration tribunals' practice.

An agreement without provisions concerning investor-state dispute settlement has little economic or functional value to the investors. On the other hand, investor-state arbitration is questionable from a legal policy perspective. This indicates limitation of the right to bring cases before such tribunals.

In order to safeguard the above-mentioned considerations associated respectively with effective investor protection and the state's administrative and regulatory freedom, the following elements have been used as a basis for the work on the model agreement:

1) The dispute settlement mechanism is based on access to ICSID arbitration in accordance with general procedures under the ICSID, in any case as an alternative for the individual investor.

2) Arbitration jurisdiction is limited to compensation claims based on the standards laid down in the individual investment agreement.

3) The agreement must contain genuine potential for correcting an undesirable development in law, for example by appointment of a commission to interpret the agreement with binding effect.

4) Legal action instituted by investors originating in third countries must be precluded by means of provisions in the agreement excluding companies and persons without a genuine link to the party to the agreement.

The provision regulates disputes between an investor (see the article concerning definition) from state A on the one hand and state B that is invested in, i.e. "the host country", on the other. Only the investor and not "the investment" can institute legal action pursuant to this provision. This is of practical importance in relation to "joint ventures" with local partners, where the company is registered locally and where the foreign investor may be a minority partner.

The provision does not give the host country the right to institute legal action against the investor.

Individual investors should be able to waive the right to institute international arbitration through prior arrangement with the authorities, but this is not specified in the model agreement.

The right to investor-state dispute settlement is laid down in article 15 of the model agreement, which states that this applies to legal disputes between a party (the host country) and an investor of the other party (the country of origin). The dispute must arise directly out of an investment made by the investor that falls under the host country's jurisdiction. The dispute must be based on a claim that the host country has breached an obligation under the agreement, and that the investor has incurred loss or damage.

The principle is that disputes shall, if possible, be settled amicably, and the investor and host country shall initially seek to resolve the dispute through consultation.

In connection with the drafting of the model agreement's provision concerning dispute settlement, beyond the fundamental question of whether the investor should have the right to bring action against the states directly (investor-state dispute settlement), a number of central questions were discussed, such as:

- Should an investor have the right to bring action against the states directly (investor-state dispute settlement)?
- Should exhaustion of national legal remedies be a precondition for an investor's access to international arbitration?
- Should the agreement provide the right to select different international tribunals in connection with dispute settlement?
- Should the agreement provide for compulsory consolidation of claims?
- And, not least; how can transparency and participation be ensured in connection with the dispute settlement process?

The considerations underlying the chosen solutions in these areas are given below.

Exhaustion of national legal remedies
An important question is whether the investor must have sought national administration and courts before being able to bring the matter before the international arbitration tribunal (the requirement regarding exhaustion of national legal remedies).

It is usual that investment agreements, including those concluded by our EFTA partners, give the right to direct legal action. The agreements do not normally contain a requirement regarding exhaustion of national legal remedies. The principle in investment agreements employing dispute settlement based on the ICSID Convention is that a requirement regarding exhaustion of national legal remedies must be explicitly stated in the investment agreement.[26]

The model agreement contains a requirement regarding exhaustion of national legal remedies. Application of the requirement is limited to a three-year period. If the investor has not reached a settlement pursuant to national law within three years, he can institute international dispute settlement.

There are several reasons for requiring exhaustion of national legal remedies. The requirement regarding exhaustion of national legal remedies is consistent with the fundamental principles of international law. Entities other than states may not in principle act pursuant to international law. Giving private individuals a *direct* capacity to act under international law is an exception from the principle that international law is an arena reserved for interaction between states.[27]

An important function of the requirement regarding exhaustion of national legal remedies is that it gives nation-states the opportunity to correct mistakes. It is not to be avoided that national administrative authorities or subordinate judicial bodies make mistakes. Nor is it necessary to raise the issue to the international level if it can be resolved at the national level. For Norwegian administration and legislators, it would be problematical if decisions were to be brought directly before international arbitration tribunals and not Norwegian administration and courts. The international arbitration tribunal might then appear to be an *alternative* legal remedy rather than a safety valve. The path of litigation is shorter and the possibility of succeeding greater when following the international route than when keeping to the traditional route of the Norwegian courts.

There is also an important systemic argument in favour of a requirement regarding exhaustion of national legal remedies. In Norway, as in a number of other democratic states, the courts are entitled to review and set aside the decisions of the administration, and also to a certain extent to assess and interpret legislation in relation to our international obligations. Unconditional access to international legal action weakens the functional distribution and dialogue between the three branches of government that balance the relationship between them. Without a requirement regarding exhaustion of national legal remedies, the national courts are not given the opportunity to consider the exercise of authority by the legislators or the administration. A large proportion of the cases involving review of the authorities'

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[26] The ICSID Convention, article 26:
"Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."
[27] As regards international conventions on human rights certain exceptions have been made from this. Pursuant to the European Convention for the Protection of Human Rights and Fundamental Freedoms, complaints from private individuals may be submitted to the European Court of Human Rights *after* exhaustion of national legal remedies.

decisions are precisely cases concerning economic rights, and such cases will increasingly involve the rights of foreigners. In other words, without a requirement regarding exhaustion of national legal remedies, a proportion of the cases previously included in the dialogue between the three branches of government would be considered by an international judicial body without the national courts being given the opportunity to consider the matter first. Another important factor relating to this is the interaction between the national courts and the international tribunals. If national legal remedies must be exhausted first, the international tribunals will to a greater extent be required to address national views as stated in national judgments. National courts are conscious of the fact that their judgments will be reviewed internationally, and will then probably be heedful of signals given by international tribunals.

The principal argument for enabling international arbitration is that many developing countries and economies in transition fail to provide investors with the necessary protection owing to weak, nonexistent or biased legal institutions. The development of strong institutions takes place in collaboration with other branches of government and in connection with cases brought before the court. Legal institutions do not develop of their own accord but in response to external requirements regarding functional legal remedies. By requiring exhaustion of national legal remedies it is thus possible to contribute to strengthening of the institutions.

There are also a number of arguments relating to the *cost of proceedings* that favour a requirement regarding exhaustion of national legal remedies. A national court may review all claims on the basis of both national law and the treaty. This also helps to avoid the existence of parallel cases based on the same factual basis. A requirement regarding exhaustion may also serve to clear away the obvious claims and the obviously groundless claims. A requirement regarding exhaustion of national legal remedies may also be cost-effective for the international arbitration system by helping to ensure that the cases sent to international arbitration are fewer and better prepared.

There are also several arguments against a requirement regarding exhaustion of national legal remedies. In several of the countries with which it is appropriate to conclude investment agreements, the investor is at the mercy of legal remedies that do not function. The courts and administration may be nonexistent, unreliable, influenced by national groups or notoriously slow-moving. In such a situation, it may be a meaningless exercise for an investor to go through a costly and time-consuming national process, which in any case will not succeed before he is able to bring his case before the international tribunal for a proper hearing.

Since most investment agreements do not contain a requirement regarding exhaustion of national legal remedies, Norwegian investors will be treated less favourably than other foreign investors with regard to the effectiveness of the legal remedy. Where the foreign investor is able to proceed directly to international dispute settlement, Norwegian investors must first go through national procedures. The result of this may be that the political risk associated with investing in a country is assessed as being higher for a Norwegian investor than for an investor from another country.

This is why the model agreement does not contain an absolute requirement regarding exhaustion of national legal remedies. A period of three years is stipulated for exhaustion of national legal remedies. The period runs from the date the investor challenges the decision or the law in the national courts. In addition it is made clear that inappropriate legal remedies need not be exhausted. A point of departure here is the general standard of international law, but it is appropriate to attempt to aim somewhat lower than is usual in the precedents of international law. The limited exhaustion period and the clear exception for inappropriate legal remedies will reduce the risk of delay and clearly biased decisions since such precedents will constitute a basis for dispensation from the exhaustion requirement. It is also probable that national authorities will be less prone to use unacceptable instruments when an international legal action may be relatively imminent.

The draft dispute settlement provision (article 15) is structured in such a way as to provide the investor with three alternative routes for international dispute settlement:
Alternative 1: The investor has exhausted national legal remedies – there is thus a legally enforceable judgment from the host country, cf. article 15 (i).
Alternative 2: The investor has exhausted national means of administrative appeal, brought legal action against the host country and three years has elapsed since the action was brought, cf. article 15 (i)
Alternative 3: There are no reasonable legal remedies available to the investor, cf. article 15 (ii).

In article 15 (iii) (in square brackets), an additional condition has been inserted that the investor waive any further right to pursue national legal remedies when the matter is brought before an international arbitration tribunal, a so-called "fork in the road" clause. The purpose of the provision is to prevent the case from being simultaneously brought before an international arbitration tribunal and a national court. The reason it has been placed in square brackets is that we are unsure as to whether such a provision may give rise to greater difficulties than it resolves. The question must be assessed more closely.

Different tribunals/arbitration rules
During work on the model agreement, it was concluded that the ICSID (International Centre for Settlement of Investment Disputes) would be the most suitable alternative for dispute settlement under an investment agreement. The ICSID was established under the "Convention on the Settlement of Investment Disputes between States and Nationals of Other States"[28] and is an autonomous international organization with strong ties to the World Bank. The ICSID was established precisely in order to deal with this type of dispute, and has the advantages that follow from an "institutional" structure, such as a permanent secretariat and sound and detailed procedural rules. Moreover, an ICSID decision will be the most effective basis for execution (direct ground for enforcement). The question here is whether there is a need for other tribunals than the ICSID.

The ICSID will only be applicable if both countries party to the agreement are also party to the Convention. Norway has acceded to the Convention, and it has been implemented in the Act of 8 June 1967 relating to the implementation of the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of other States. If the other party has not ratified the Convention, it will be most appropriate to employ the ICSID Additional Facility[29], which was adopted in 1978 precisely in order to provide for such cases. It is usual that investment agreements also contain this alternative. The procedural rules under the Additional Facility are primarily the same as those that apply to ordinary ICSID arbitration. In these cases too, the ICSID will provide institutional support and expertise. However, a decision under these provisions may not be implemented equally effectively, and

[28] Entered into force 14 October 1966.
[29] These provisions are not applicable if the ICSID has jurisdiction, cf. Article 25 of the ICSID Convention (if both parties to the investment agreement are parties to the ICSID Convention).

it is stated in the provisions that the dispute settlement must take place in a country that is a party to the New York Convention.

Other appropriate alternatives are arrangements initially established in order to resolve purely commercial disputes. Examples are the International Court of Arbitration of the International Chamber of Commerce (ICC), the Stockholm Chamber of Commerce and the London Court of International Arbitration (LCIA). These alternatives also provide institutional support, but their decisions are not direct grounds for enforcement.

Another alternative is to employ *ad hoc* solutions. These are normally based on UNCITRAL's Arbitration Rules. These are flexible solutions, but their disadvantage is that they do not provide institutional support. Nor are their decisions direct grounds for enforcement.

Internationally, investment agreements commonly contain alternative solutions. Countries such as Denmark and Sweden include this in their model agreements.

In the model agreement, dispute settlement through the ICSID (or the ICSID Additional Facility) is nevertheless in principle provided as the only alternative. The reason for this is, as stated above, that the ICSID is particularly well suited and was established precisely for this type of dispute, and the decisions of a tribunal based on the ICSID Convention are more effective than decisions based on other legislation. The centre also provides good predictability in relation to procedural costs, access to previous decisions, the possibility of public participation, etc. (see below for further information on the provision concerning transparency in the dispute settlement process).

Consolidation of claims

A topic that has been discussed in connection with the ICSID Convention is the possibility of compulsory consolidation of claims submitted. In the model agreement, there is no provision for such a solution. Such consolidation is desirable in order to reduce costs, make dispute settlement more effective and avoid contradictory decisions. However, during work on the model agreement, it was concluded that a consolidation requirement contrary to the wishes of the parties would involve problems associated with party autonomy, the right to elect members of the arbitration tribunal, confidentiality and legal protection of investors. Compulsory consolidation raises a number of issues, for example, if the claims are associated with the same interventions but are based on different investment agreements. It is also uncertain whether it would really reduce contradictory decisions. Consolidation of the claims would, for example, require that they were submitted at the same time. A better way of ensuring uniformity of decisions is by supporting the development of legal usage that attaches importance to precedents. However, we encourage consolidation based on agreement between the parties (see also article 16 "Additional Procedural Issues").

Transparency and participation in the dispute settlement process

The provisions that regulate transparency and participation in the proceedings are primarily article 18 ("Participation in the Proceedings") and article 19 ("Transparency of Proceedings"), which are discussed in separate sections below.

However, a major point of departure for ensuring the safeguarding of these considerations is found in the final paragraph of article 15. This states that the request for dispute settlement must contain sufficient information for the parties and the public to be able to familiarize themselves with the issues raised in the dispute. All requests for dispute settlement shall be made publicly available by the defendant (the host country) and the ICSID.

4.3.4 Additional Procedural Issues

Article 16 primarily serves an informational function. It points out that the same investor should not be able to apply to an arbitration tribunal several times concerning the same case. Arbitration tribunals may preclude such legal action by means of well-known legal instruments such as *res judicata* and *lis pendens*. The provision further points out that, if two or more investors submit claims against a host country on the basis of the same circumstances, the cases may be merged if so agreed by all.

4.3.5 The Award

The decision of the Arbitration Tribunal shall be final and binding on the parties. There is no right of appeal concerning decisions made under the ICSID Convention, but the decisions may in some cases be annulled, for example if the Tribunal was not properly constituted or the Tribunal has manifestly exceeded its powers, see article 52 of the ICSID Convention.

It is emphasized in the provision that all major and minor decisions made by the Tribunal shall be publicly available.

The Arbitration Tribunal shall only be able to impose a liability to pay monetary damages, not restitution or the like. The decisions of the Tribunal may thus only oblige the host country to pay a specific amount in compensation to the investor if it finds that the country has breached one or more of its obligations under the agreement. Thus, the Tribunal may not disallow the validity of administrative decisions or the like. This is a very important point as regards the degree of intervention involved by the transfer of authority on conclusion of investment agreements (see the item concerning the relationship to the Norwegian Constitution, above).

Standard for calculating compensation
Investment agreements normally contain a standard for calculating compensation for expropriation and similar interventions (see above, under the provision concerning expropriation). Creation of this type of constraint for other provisions concerning treatment of investors (fair and equitable/full protection and security, MFN and NT) is not usual and may be difficult, since these provisions are more general and affect a different and more indefinite type of intervention.

The norm for compensation for these provisions is therefore not qualified in the model agreement. Without such a qualification, the tribunals will under international law follow recognized principles for calculating compensation, and this should be sufficient to ensure a satisfactory and predictable treatment. Too precise regulation of this may also have undesirable consequences, since it is difficult to foresee all possible cases.

Procedural costs
The general rule at the ICSID is that distribution of the costs is decided on the discretion of the Tribunal, and there are no uniform precedents. It appears that it is often decided that the parties each bear their own costs if the investor's claim does not succeed, but that the host

country must bear the investor's costs if he wins. However, the costs may be distributed differently.

Dispute settlement by the ICSID is expensive, and may involve considerable expenses for countries with limited economic resources. To date, it appears that the tribunals show considerable reservation in imposing costs on the losing party. In drafting the model agreement, this was regarded as inexpedient. If the winning party must bear the costs of the case itself, regardless of the hopelessness of the claims they have defended themselves against, the threat of legal action will be a strong and possibly decisive bargaining card. It is therefore made clear in the model agreement that the main principle is that the losing party is to bear the costs of the case. However, it lies at the discretion of the Tribunal to distribute of the costs in a different way. The provision is based with some adjustments on article 40 (1) of UNCITRAL's dispute settlement rules.

4.3.6 Participation in the Proceedings

One aim of the agreement is to achieve transparency in the dispute settlement process. As a stage in this, it is provided that the country of origin and other stakeholders shall be allowed to participate in the proceedings and be given access to the pleadings of the parties. In the draft it is provided that the country of origin shall be able to participate as a "third party", as is possible in the WTO and at the EC and EFTA courts (not as a strong or weak intervener pursuant to Norwegian law).

In article 44 of the ICSID Convention, it is provided that the parties must agree on intervention. Beyond this the Convention does not in principle provide for such participation. If this is to be safeguarded as a right, it should be regulated in the agreement. In the work on the model agreement, it was concluded that it would be in Norway's interest to ensure access to such intervention, out of regard both for reaching the best possible decisions and for achieving the general Norwegian aim of ensuring the possibility of influencing developments in law. If this right is to be effective, the ICSID or the state complained against must be obliged to submit the whole request to the country of origin. A final date should be fixed for intervention, out of regard for the organization of the Tribunal and in order to realize the right of the parties to comment on pleadings by others.

Pursuant to the fourth paragraph of the provision, it is also provided that other persons than the parties may submit written input, so-called *amicus curiae* submissions. It lies within general Norwegian transparency policy as well as within the new rules for *"Partshjelp"* (modified intervention) and the right to provide "*written pleadings for elucidation of public interests"* in the new Dispute Act (see chapter 15 of the Act), to have rules that permit such participation. We also see examples in other international agreements of provisions concerning the possibility of participation by the public in court cases (for example the Århus Convention).

4.3.7 Transparency of Proceedings

A transparent arbitration process is essential to ensure the necessary legitimacy of the dispute settlement process. It is nevertheless important to meet the need both the investor and the involved state may have for confidentiality, and transparency provisions must not result in significant lengthening of and increase in the cost of the arbitration process.

Pursuant to the proposed provision concerning transparency in disputes between a party and an investor of a state, there shall be transparency concerning institution of the proceedings, and the case documents and the decisions of the arbitration tribunal shall be made publicly available. Provisions concerning public hearings have also been included, i.e. the right of the public to attend the hearings.

Matters relating to sensitive information (commercial or state secrets) are separately regulated by the second and third paragraphs of the provision. It must be assumed that a number of the cases may involve a wish by the investor or a state party to submit information to the Tribunal that contains commercial secrets and that the investor or other legal or natural persons wish to be excepted from public disclosure. In certain cases, this may also concern information that a state party regards as confidential.

While laying down the principle that all decisions shall be public, the provision must at the same time provide sufficient protection for such information. This applies to publication of written pleadings, public hearings and decisions. One can draw on examples found in both Norwegian and international practice.

However, the right to make exceptions gives rise to certain problems. For example, if a party wishes the exception of information that is “clearly” not sensitive, it may be necessary for the Tribunal to refuse to treat the information as sensitive. In the provision, it is therefore proposed that the Tribunal shall consider whether the information shall be excepted if the other party objects to this. If the Tribunal concludes that the information shall not be excepted from public disclosure, the party shall be able to choose between (i) making the information available to the public or (ii) withdrawing the information.

Pursuant to the fourth paragraph of the provision, the hearings shall be open. While the general rule for international and national courts is that hearings be held in public, the general rule for arbitration is that hearings be held in camera. This may be decided by the Tribunal on its own initiative since the procedural rules of the ICSID (see article 32 (2)) preclude participation during hearings without the approval of the parties. Public hearings may be held by providing places for spectators, by providing separate auditoriums, by televising the hearings, by means of webcasting, etc. The most appropriate methods will vary from case to case and from location to location, and the logistics are therefore to be clarified by the Tribunal in consultation with the parties.

4.3.8 Disputes between the Parties

In the draft, it is proposed that arbitration between two states be based on “the Permanent Court of Arbitration” (PCA). The PCA’s rules for arbitration between two states in all essentials adopt the UNCITRAL Arbitration Rules, and therefore do not cover transparency to a greater extent than the latter provisions. However, the principle that the parties can agree on the arrangements as they wish is laid down, for example, in article 25 (4) concerning hearings and in article 32 (5) concerning awards.

The central questions are associated with *amicus curiae* submissions, public hearings and public awards. It is assumed that awards shall be public, but with exceptions for classified information.

During PCA arbitration, hearings are not automatically held, but the need for hearings is decided by the Arbitration Tribunal. However, we assume that there will normally be hearings and not only written proceedings. We also consider that Norway's position must be that there shall be public hearings. The EFTA court[30], the International Court of Human Rights (ECHR)[31], the International Court of Justice (ICJ) and the International Tribunal for the Law of the Sea (ITLOS)[32] all hold public hearings unless otherwise decided. The WTO, takes the opposite view, but public hearings before the panel can be agreed between the parties. The question of classified information must be regulated when public hearings are to be held.

As regards the need for notification in order that the country of origin shall be aware of the dispute, the considerations that apply in disputes between investor and host country do not apply in disputes between the states. If however it is desirable to provide for *amicus curiae* submissions in disputes between states, the same elements as proposed for arbitration between investor and host country must be included.

Amicus curiae submissions are not usual in arbitration between states. There is provision for this at the WTO, but not at the ICJ, the ITLOS, the ECHR or the EFTA court. The developments that have occurred in ICSID arbitration have not resulted in corresponding provisions in arbitration between states. It is therefore pertinent to consider whether it is appropriate for Norway to take a lead on this point or whether to leave developments in law to the Arbitration Tribunal or to agreement between the parties in the individual case. In view of the proposal to provide explicitly for *amicus curiae* submissions in disputes between investor and host country, it may seem unnatural to propose that this shall be less applicable to arbitration between states. The group of persons who would wish to make *amicus curiae* submissions in disputes between investor and host country is probably not so very different from the group appropriate for such submissions in arbitration between states.

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[30] ODA, article 27.

[31] Procedural rule 63 of ECHR. The court may hold the whole or parts of the hearing in camera.

[32] Article 26 (2) of the ITLOS statutes which was previously developed in article 74 of the procedural rules. The Tribunal itself, or following a joint request from the parties, may decide that the whole or parts of the hearing shall be held in camera.

4.3.9 Subrogation

The provision provides that anyone providing insurance against non-commercial risks may take over the investor's claims, and that the host country must recognize such a subrogation.

The insurance provider may in this connection be the investor's country of origin or a subordinate entity, or a private player from a state that is not party to the investment agreement. Such insurance providers will not satisfy the terms of article 25 of the ICSID Convention[33], and dispute settlement in accordance with the model agreement's general system is therefore not applicable. In order to avoid a situation whereby this type of insurance provider may only use the national courts, a separate arbitration arrangement must be established. An annex to the model agreement has therefore been drafted, giving the right to dispute settlement according to UNCITRAL Arbitration Rules. This shall not involve amendments to the dispute settlement arrangement beyond what is necessary, and the provisions of the agreement that apply to dispute settlement between investor and host country shall apply *mutatis mutandis*.[34] The principle is that the difference between ICSID disputes and disputes based on this provision shall be as little as possible.

However, decisions pursuant to the UNCITRAL provisions are not grounds for enforcement and the provision must therefore refer to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

[33] States, "state agencies" and international organizations have no "legal standing"/*Ratione Personae* under the ICSID Convention.

[34] "Mutatis Mutandis" means "with the necessary changes".

4.4 PART 4 – Institutional provisions

4.4.1 The Joint Committee

"The Joint Committee" shall supervise the implementation of the agreement and, where appropriate, suggest adjustments to this, including the study of measures for further promotion of the investments. The Joint Committee may also suggest measures to the parties.

The Joint Committee may adopt statements of interpretation for provisions of the agreement. These statements of interpretation will be binding for subsequent dispute settlement based on the provision concerned (see the provision concerning dispute settlement between a party and an investor of the other part). This is important, since it will enable the follow-up of relevant developments in law occurring in connection with arbitration cases associated with this and other agreements, while correcting a development that countries party to the agreement perceive as problematical. A major issue in this connection is the effect of the statement of interpretation for existing investments and, not least, for current disputes. The principle must be that a statement of interpretation establishes what is already stated in the provision. It is only a matter of *interpreting* and not *amending* the agreement, and it is therefore not deemed to have retroactive effect. Statements of interpretation may thus apply to all legal matters under the agreement from its adoption. Exceptions should nevertheless mainly apply to current disputes, since they may give rise to uncertainty regarding legal matters concerning the parties and the authority of the Tribunal and since the interests of the parties to the agreement may regardless be safeguarded through written and oral pleadings during the arbitration between the investor and the host country. In order to avoid creating an undesirable narrowing of the Tribunal's authority over a period of years, in view of the time it normally takes to reach an ICSID decision, it should however be made possible for the Joint Committee to submit statements of interpretation concerning legal matters associated with current disputes.

The Joint Committee shall be the body to which proposed amendments to the agreement shall be submitted. This means that amendments to the agreement are to be considered by the Joint Committee, which may then adopt them and recommend acceptance/approval/ratification by the parties. There will thus be no signing of the amendment to the agreement, but a decision by the Joint Committee requiring that participants in the decision are authorized in the usual way for conclusion of agreements.[35]

In (i) it is proposed that the Joint Committee shall have an explicit authority to consider issues associated with investors' social responsibility, etc. in addition to the authority granted in (e) [the Joint Committee shall... "review investments covered by this Agreement"]. The purpose is to establish an institutional framework that can contribute to increased transparency and records concerning the investments made in connection with the investment agreement and to equip the parties to the agreement with a flexible and practical instrument for following up specific questions concerning the actions of the investors, the host country or the country of origin. Introduction and documentation of such a possibility may be an important measure for creating a balanced investment agreement, not least in order to ensure that implementation of the agreement takes place in accordance with the purposes. The parties may decide to grant the Joint Committee authority to function as an appeal body or an ethical council, for example by allowing various organizations to bring the activities of individual investors before the committee. At the same time, it is important to have realistic expectations regarding what

[35] Corresponding provisions are found in EFTA trade agreements.

tasks can in practice be carried out by the Joint Committee, owing to both the question of resources and the political implications. This indicates the use of flexible formulations that do not “tie up” the Joint Committee too much. It should also be possible here to “make the road by walking it”, in step with the international development of norms and with perceptions of social responsibility. The primary purpose of the investment agreement is to continue promoting investments, and there are a number of other – and more important – arenas where work is being done on promoting social responsibility.

This provision is only aimed at bilateral agreements. The EFTA agreements have separate provisions concerning a joint committee, which cover the whole agreement. While, in the context of a free trade agreement, annual or biennial meetings may be natural, this will often not be necessary in an investment agreement. The provision must therefore provide for a flexible meeting frequency, i.e. that meetings are held as necessary. The level of the participants is a question of protocol that should not be resolved in the agreement.

4.5 PART 5 – Exceptions

A number of exceptions are necessitated by the fact that an investment agreement based on the model agreement will regulate investments in the service sector. If the text is to be used in an EFTA trade agreement, services will probably be excepted because these are handled in a separate chapter, and a number of the exceptions can be removed. Many of the exceptions will also be superfluous if it is decided that future investment agreements shall not regulate market access (the establishment phase), but only apply to existing investments.

4.5.1 General Exceptions

The provision is based on article XIV of the General Agreement on Trade in Services (GATS). Certain terminological adjustments have been made in order to adapt the text to investment agreements (primarily inspired by the exceptions provision of Canada's model agreement).

The formulation "conservation of living or non-living exhaustible natural resources" in GATS has been replaced by "protection of the environment" in (v).
The formulations derived from the exceptions provisions in GATT and GATS concerning health, environment and natural resources, which – with a number of variations – are often also used in bilateral and regional trade agreements, employ a terminology that does not directly refer to environmental protection considerations, as would have been natural if these texts had been drafted today. However, the original formulations in a number of agreement contexts implied a general reservation regarding environmental considerations. The formulations in the model agreement are therefore clear, and use the term "protection of the environment". This entails that the considerations/areas with associated measures that are now naturally regarded as part of national environmental protection policy and international environmental cooperation are relevant. But this also avoids interpretive issues that may give rise to the unintended consequence that areas that certainly fall under environmental protection policy might on purely terminological grounds be regarded as falling outside, for example new approaches, such as ecosystem-based administration or maintenance of biological diversity, which are perhaps not fully covered by the term "conservation".

4.5.2 Prudential regulation

The provision is based on article 2 (a) of the GATS Annex on Financial Services with some adjustments. The exception has been inserted in order to ensure that measures aimed at ensuring stability and effectiveness in financial markets are not covered by the agreement. Such exceptions are usual in international investment agreements which also cover the right of establishment.

4.5.3 Security exceptions

The provision makes certain exceptions from the agreement for measures implemented on the basis of necessary security measures. The formulations are derived from article XIV *bis* of GATS, except that the term "military sector" from GATS is replaced by the more wide-ranging term "defence and security sector[s]" in the model agreement. This term reflects the provision's purposes more precisely, while clarifying the increasingly unclear distinction between defence interests and security interests.

4.5.4 Cultural exceptions

The provision makes exceptions for the parties' statutes and measures whose purpose is to protect and promote linguistic and cultural diversity and policy associated with the cultural sector and the audiovisual sector. The purpose of the provision is to ensure freedom of action in the area of culture and media. It is also important that investment agreements do not affect the rights and obligations of the parties pursuant to international rules or national legislation or arrangements associated with copyright and related rights.

The principle is that it must be possible to maintain cultural policy, including copyright arrangements. The content of the copyright protection must not be affected, and the exception therefore includes both the obligations that directly follow from international agreements and national arrangements associated with copyright and related rights. It is also necessary that freedom of action associated with future measures, for example owing to the EEA Agreement or national cultural policy assessments, can be maintained.

In the cultural sector and the audiovisual sector, it is Norwegian policy to ensure the possibility of implementing measures in the future, and not go further than what follows from our obligations in GATS/WTO. "Audiovisual policy" is therefore expressly included in the exception. There is some uncertainty internationally as to how certain digital services are to be classified. It will therefore be of importance to cultural policy that cultural exceptions are not worded too narrowly.

4.5.5 Taxation

As regards questions concerning taxation, the point of departure for the work of the group of senior officials has been that investment agreements shall not aim to regulate taxation, and that future agreements must not place constraints on Norwegian taxation policy. What is usually referred to as "direct and indirect taxation" should therefore be excepted from the agreements.

The investor will to a great extent be secured against discrimination in the taxation area by means of taxation agreements. The problem associated with taxation is primarily the risk that the host country in reality implements measures involving covert expropriation, and avoids responsibility to the investor by calling it taxation.

In paragraph 1 of the model agreement's taxation provision, imposition, enforcement and collection of direct and indirect taxes are excepted from the agreement ("carve-out provision"). Further guidelines on the content of the term "taxation" can be found in the OECD's Model Taxation Agreement with comments and in the provisions of national law.

Paragraph 2 of the taxation provision clarifies the relationship to double taxation agreements. The purpose of the provision is to prevent investors from unintentionally invoking advantages that follow from taxation agreements concluded with third countries through the other state's taxation agreements.

Disputes associated with taxation questions may in principle only be dealt with by national courts. If there is agreement between the authorities of the parties to the agreement that a measure falls under the carve-out provisions laid down in paragraph 1, the investor is excepted from submitting the question to arbitration, cf. paragraph 3. If the investor's country of origin adopts the standpoint that a measure in the host country does not fall under the carve-out provision but entails expropriation, this provides a basis for arbitration on this question, cf. paragraph 4. In both cases, the exchange of views between the parties takes place through the procedures of the Joint Committee. It may be relevant for the Joint Committee to prepare separate procedures for this type of issue.

This provision harmonizes well with the taxation agreements' dispute settlement mechanisms. The provision closely resembles the USA's BIT model, but imposes somewhat more stringent requirements for submitting a dispute for arbitration.

4.6 PART 6 – Final provisions

4.6.1 Relationship to other International Agreements

This provision lays down that the agreement shall not conflict with obligations the parties may already have pursuant to other international agreements.

4.6.2 Transparency

Pursuant to this provision, countries party to the agreement shall publish statutes, regulations and administrative decision of general application, as well as international agreements that may have significance for the application of the investment agreement. Countries party to the agreement shall promptly reply to questions from each other regarding this type of legislation and decision.

The purpose of the provision is to ensure that the investor is able to familiarize himself with legislation that may be of significance to him or to his investment. Transparency of such legislation will help to ensure more secure investments and a sounder investment environment in the host country. It is usual that investment agreements contain a provision concerning transparency, and a similar provision for the service sector is found in article III of GATS.

In some arbitration awards, the requirement regarding transparency of legislation is inferred from the provision concerning “fair and equitable treatment” (in the provision concerning a minimum level of treatment and protection). Transparency of legislation, etc. may have considerable significance for the assessment of whether the host country treats the investor and the investment satisfactorily.

In the work on the model agreement, other elements of the general transparency provision have been discussed, for example whether it is necessary to include provisions obliging national authorities to secure access to investor information. Various forms of obligations and rights of, respectively, the host country and the country of origin have been discussed, but it has been concluded that this is most appropriately regulated by national legislation according to the decision of the individual country party to the agreement.

4.6.3 Corporate Social Responsibility

The provision lays down that the parties to the agreement shall make efforts to ensure that their investors comply with the OECD guidelines for multilateral companies and that they become members of the United Nations Global Compact. The obligation to comply with the OECD guidelines applies primarily to countries outside the OECD area since all OECD members as well as Argentina, Chile, Brazil and Slovakia have committed themselves to making such efforts. Norway has committed itself to making the guidelines known in Norwegian commerce and industry and to establishing a point of contact for review of complaints in connection with allegations of breaches of these guidelines by Norwegian companies.

4.6.4 Amendments

Decisions to amend the agreement shall be taken by the Joint Committee and then be submitted to the parties to the agreement for approval or ratification in accordance with the requirements of national law concerning this. Amendments enter into force on the first day of the third month after the last notification from a party to the agreement that the requirements of national law concerning amendments have been satisfied.

4.6.5 Entry into Force

It is proposed that the Agreement shall enter into force three months after the final ratification.

4.6.6 Duration and Termination

A question that has been discussed during the drafting of the model agreement is whether there is a need for the Agreement to be in force for a certain minimum period, so that potential investors are able to assume that an investment agreement will apply throughout the establishment phase and after the investment has taken place. This may also carry a political element, in that the developing countries concerned wish to show potential investors that they can look forward to stable framework conditions for their investments. Traditionally, BITs have operated with two relatively long periods, first a period during which the agreement may not be terminated, followed by a “residual period” for investments made (10–15 years’ continued validity for investments made from the date the agreement is terminated). The relationship to the Norwegian Constitution obstructs the adoption of such long validity periods. The relationship to the Norwegian Constitution indicates careful regulation of the time limit for notice of termination and the possibility of rapidly terminating the agreement. This indicates that termination may be carried out at any time. In weighing these considerations it has been found that the relationship to the Norwegian Constitution must be given precedence, so that the agreement may be terminated at any time. On the other hand, in deciding the *length* of the time limit for notice of termination, regard should be paid to meet the investor’s genuine need for predictability during the planning phase. The regard for existing investments also indicates a certain “residual protection”. A period of 15 years is therefore proposed for this.

Another issue arises when amendments are made to the agreement while the agreement is still in force, and where the question is whether amendments to the detriment of the investor shall involve the same residual protection as mentioned above. Here too we consider that the regard for the states’ freedom of action must take precedence, and that the principle must be that the investor must accept amendments to the agreement during the agreement’s period of validity. However, we do not exclude the possibility that amendments to the agreement may be so wide-ranging that the result is equivalent to termination or in other ways departs fundamentally from the remaining provisions of the agreement. The parties may agree on special arrangements where this is found desirable.

The question of the depository for the agreement is regulated by the model agreement. It is assumed that it is a bilateral agreement and that agreements under the auspices of EFTA use the standard depository provisions.