

COMMENTS ON THE INDIVIDUAL PROVISIONS OF THE MODEL AGREEMENT

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1. SCOPE

1.1 Preamble

The preamble to the agreement can be described as a declaration by the parties on motives, objectives and circumstances which allow the agreement to be put in its correct context. Preambles often list relevant political, economic, historical and other factors which have guided the parties in their negotiations and in finalising the formulations included in the agreement. The preamble is not meant to create binding commitments, but does have legal significance as a source of interpretive guidance on the agreement.

The preamble to 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 investors of the other party and their investments.

Emphasis is also given to the need to take account of health, safety and environment standards and internationally recognised labour rights in connection with the objective of promoting investment. Further, emphasis is placed on the need for sustainable investments and their significance to the development of national and global economies and the objective of sustainable development. The parties affirm their recognition of the basic principles of transparency, accountability and legitimacy, and that they will seek to prevent and combat corruption. The parties also affirm their commitments under the United Nations Charter and the Universal Declaration of Human Rights. Particular emphasis is given to the importance of corporate social responsibility. This is also reflected in the provision on the Joint Committee and the social responsibility of investors. Moreover, the preamble states that the provisions of the agreement and international agreements relating to the environment shall be interpreted in a mutually supportive manner.

1.2 Scope

This provision specifies the material and geographical scope of the agreement.

Material scope

The agreement applies to the investors of both/all parties, and their investments, irrespective of whether the investments are made before or after the agreement enters into force. However, the agreement provides no protection against measures adopted before the agreement enters into force. In other words, the agreement does not have retrospective effect with regard to measures which are in conflict with the agreement if they were adopted before the agreement entered into force. The provision also clarifies that dispute settlement may only apply to events that occur after the investment agreement has entered into force.

The agreement applies to investments in all sectors, including the service sector, unless special exceptions are made (either from the agreement as a whole or in respect of individual provisions).¹ This is discussed further below, in the section on Article 2 (Definitions) and in the description of the individual exception provisions.

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

Geographical scope

This provision defines the geographical scope of the agreement as each party's land territory, internal waters and the territorial sea, and the airspace above the territory. Svalbard is excluded from the scope of the agreement. Based on a concrete needs assessment, the continental shelf and/or economic zone in the geographical scope may be included in future negotiations.

1.3 Definitions

“Investor”

The agreement is designed to protect both natural and legal persons (including the state) who are seeking to make, are in the process of making, or have made an investment. One of the guiding principles for the drafting of the provision was to ensure that the right to invoke investment agreements concluded by Norway in disputes with the Norwegian authorities is limited to investors with a real connection with the countries with which Norway has concluded agreements.

A *natural person* must be a national or permanent resident under the laws of the home state² to enjoy protection under the agreement, and be entitled to assert material and procedural rights under the agreement if investing in the other party. In many respects, permanent residence represents an even stronger connection with Norway than nationality. An investor may be a Norwegian national but have lived abroad for many years. The inclusion of persons with permanent residence may in some cases entail that persons have rights under two agreements – both investment agreements concluded by the country of which they are a national and agreements concluded by the country in which they live. In our view, this is a limited problem. It is more difficult to justify that an investor who has lived in Norway for some time but is not a Norwegian national should not benefit from the protection afforded by the agreement.

There are various requirements regarding *legal persons'* connection with a country in order for these to enjoy protection under the agreement. The country of registration is

¹ In EFTA free trade agreements, services will be regulated in a separate chapter.

² The “home state” means the country in which the investor is based. The “host state” is the country in which the investment is made. The bilateral investment agreement from which the investor derives his/her rights is concluded between the home state and the host state.

one alternative, and the location of the head office another.³ The current wording of the provision states that the entity must be established in the home state and be recognised as a legal person under its laws. Further, substantive business operations in the home state are required. This condition has been included to prevent “letterbox companies” from receiving protection under the agreement.

“Investment”

The definition of “investment” is “every kind of asset”. The definition is broad due to the basic aim of stimulating investment in all areas. The provision includes a non-exhaustive list of different assets considered to constitute investments. Such lists are commonly found in investment agreements, and may be an aid in interpretation.

The term “investment” encompasses equity participation in businesses, shares, loans and bonds, intellectual property rights, rights under concessions and licences, etc. The provision thus covers both direct and indirect investments. Investments in all economic sectors are covered, including investments in the production of goods and in the service sector.

The final paragraph of the definition contains a qualification which limits the scope of the investment definition to “real” investments. However, there is no requirement that an investment must be made with the aim of making money. The definition thus includes, for example, an investment in a holiday property for personal use.

³ Under Norwegian law, these two alternatives are coterminous; see section 1-2 (*Norwegian and foreign enterprises*) of the Register of Business Enterprises Act. In this Act, “Norwegian enterprise” means any enterprise which has its head office in Norway or on the Norwegian continental shelf. Other enterprises are foreign. Norwegian enterprises are required to be registered in Norway.

2. TREATMENT AND PROTECTION OF INVESTORS AND INVESTMENTS

The duty of non-discrimination (national treatment and most-favoured-nation treatment) is a key principle in investment agreements, and is of crucial importance to Norwegian investors abroad. Future agreements should therefore contain a clear and comprehensive provision in this regard.

2.1 National treatment (NT)

The provision on national treatment states that the parties are obliged to grant each other's investors, and their investments, treatment no less favourable than the treatment granted to national investors and their investments.

The aim of the provision is to prevent arbitrary and unjustifiable discrimination. Comparable investors shall be treated equally unless there are real, legitimate grounds for treating the foreign investor differently from the national investor. However, an investor in one sector cannot automatically claim the same treatment as an investor in another sector, or demand the same treatment as granted in an earlier period before new regulations were implemented. The fundamental principle underpinning the provision is that no distinction shall be made between investors on the basis of nationality.

The provision covers both legal and actual (also referred to as "*de facto*" or "indirect") differential treatment. This is not expressly stated in the text, but follows from the reference to "treatment" and case law on similar provisions.

Under Norwegian law, the authorities are authorised to adopt general rules and make individual decisions that entail differential treatment. However, differential treatment which lacks a justifiable basis, is disproportionate or has a highly unreasonable effect is prohibited. It is this kind of intervention the non-discrimination provision in the model agreement has been designed for.

In its present form, the provision is unlikely to go beyond the Norwegian authorities' obligations under Norwegian law and general administrative law principles regarding equal treatment and the prohibition of unjustifiable differential treatment. In pursuance of important public interests, there may be a need to adopt regulations which in practice have a more unfavourable effect on a foreign investor than a Norwegian investor. There may also be differences linked to specific discretionary decisions, stricter requirements over time and local inequalities. There will be no breach of the provision if the state can document that there are objective grounds for the differential treatment.

Unlike in the “general treatment” provision, for example, there is no international law standard which can be applied in the area of non-discrimination. Although the case law relating to this area varies somewhat, in newer cases arbitration tribunals are showing greater reluctance to review discretionary decisions by the authorities regarding the grounds for differential treatment. An explanatory footnote has been proposed which assumes that the provision should be interpreted in accordance with this development in the case law. This solution balances the need of offensive interests for clear non-discrimination provisions with the need for greater certainty regarding future interpretation and the use of the non-discrimination provision to protect national regulatory interests, and provides a complete statement of the desired result.

The provision on national treatment will apply in connection with establishment, for example when licences or concessions are awarded,⁴ and once an investment has been made. The inclusion of the “investment phase” is commonplace in investment agreements, but not in traditional bilateral investment treaties (BITs).

The agreement is based on equal treatment in all economic sectors, apart from sectors for which express exceptions are made. This approach, where the starting point is that all sectors are included unless specifically excepted, is referred to as “negative listing” in the relevant terminology. The opposite approach, where national treatment is granted only in sectors which are specifically listed, is referred to as “positive listing”. The latter approach has been adopted in the WTO’s General Agreement on Trade in Services (GATS).

Most newer EFTA free trade agreements also cover market access for investments. These agreements commonly employ negative listing for investments in general. Positive listing is normally used for the service sector, which is dealt with in a separate chapter in the agreements. The service chapter covers not only investments in the host state, but also the delivery of services across national borders,⁵ service provision abroad and personal service provision in the host state, and it has been concluded that the same model should be used for all four delivery “modes”⁶ when listing obligations in the service area.

In principle, therefore, all investments are included unless an express exception is made. When negative listing is used, country-specific lists must be prepared showing the sectors which are to be fully or partially exempted. Such annexes are mandated by the second paragraph of the provision. The exceptions will primarily relate to the right of establishment itself, i.e. market access provisions. The inclusion of market access provisions renders the agreements more complicated than pure investment protection treaties. This is because there will be a need for comprehensive lists of exceptions from

⁴ See the terms “establishment, acquisition, expansion”.

⁵ In other words, that the service is delivered directly from abroad, for example when foreign ships undertake transportation to and from Norway.

⁶ Referred to as modes 1, 2, 3 and 4 in GATS.

both states party to the agreement detailing the sectors in which national treatment is not offered to foreign establishment. Any investment agreements concluded in the form of a chapter in an EFTA free trade agreement will have to specify whether investments in the service sector will remain covered by the free trade agreement's service chapter. Standalone investment agreements will cover investments in the service sector. The parties will exempt all existing discriminatory regulations, and have the possibility to include or exempt future regulations.

The exceptions to the national treatment provision will be set out in Annex A to the agreement, which will also contain the rules on changes to country-specific lists. The provisions permit the elimination or restriction of the right to invest in sectors originally open to foreign investment, although the host state is then required to open other sectors to ensure that the agreement remains balanced. The agreement also contains provisions stating that such "closing" of a sector may not force investors who have invested in a sector on the basis of the agreement to sell their investment.

When future investment agreements are concluded, consideration will have to be given to what exceptions from the national treatment provision are required in respect of regulations containing special provisions applicable to Norwegian natural or legal persons or persons in the EEA, for example in connection with the establishment of new undertakings, ownership limitations, etc. Future agreements may not conflict with Norwegian law. Accordingly, areas in which Norwegian law permits differential treatment of foreign investors and Norwegian nationals and companies will have to be excluded from investment agreements. This applies, for example, to investments in the fisheries sector. The cultural sector is excluded from the model agreement.

2.2 Most-favoured-nation treatment (MFN)

The provision on most-favoured-nation treatment establishes that the parties are obliged to grant each other's investors, and their investments, treatment no less favourable than the treatment granted to the investors of other states, and their investments, in otherwise like situations.

The reservations in respect of comparable situations, etc. which apply in the context of national treatment also apply in this context.

The second paragraph of the MFN provision is a so-called REIO clause.⁷ It provides that rights under other free trade agreements, customs unions, social security coordination instruments, etc. do not apply to investors/investments regulated by the model agreement. However, upon request the other party to an investment agreement shall be given an opportunity to renegotiate the existing investment agreement with the aim of securing corresponding rights.

⁷ Regional Economic Integration Organisation.

Exceptions to the MFN provision will be specified in Annex B to the agreement.

The third paragraph of the draft provision clarifies that the MFN provision does not apply to dispute settlement clauses. There are numerous agreements containing various kinds of investor-state dispute settlement mechanisms. Internationally, there is disagreement as to whether an MFN clause also encompasses the right to invoke a special dispute settlement mechanism or the special conditions for initiating international arbitration proceedings (so-called “procedural rights”), or whether only substantive rights relating to market access and the treatment of investors are covered. Some arbitration awards have concluded that dispute settlement mechanisms are covered, subject to certain terms, while others have concluded the opposite. The purpose of the proposed clause is to establish that the MFN clause in the model agreement does not include the right to invoke any special dispute settlement mechanism, in order to eliminate any doubt regarding this issue in the event of any dispute.

2.3 General treatment and protection

Under this provision, the parties undertake to protect each other’s investors and to grant them fair and equitable treatment. The right of investors to fair and equitable treatment and full protection and security is based on the international minimum standard under customary international law, which specifies the minimum threshold for the treatment of foreign nationals. Unlike the non-discrimination provisions, the standard is unrelated to how the host state treats its own nationals and enterprises. Investment agreements commonly contain such a provision. The phrase “fair and equitable treatment” has been considered in a significant number of arbitration awards in recent years. The primary topic of discussion has been the relationship between the “fair and equitable treatment” provision and the international minimum standard under customary law.

The assessment of whether the standard has been breached must respect that it is up to the host state to issue regulations in its own territory. It is also clear that the provision is not intended to turn the tribunal into an appellate body. For example, in the assessment of national legal rulings the deciding factor will not be whether the court has correctly interpreted the law or the facts, but rather whether the court’s actions can be concluded to be clearly improper by reference to an international standard. These principles illustrate that the threshold for concluding that official actions contravene the standard is high.

If the provision does not contain a clear reference to customary international law, there is a risk that the provision may be interpreted as an autonomous standard, rather than as the applicable standard under customary law. Ultimately, it may be regarded as a reasonableness provision, i.e. as an invitation to engage in a pure reasonableness

evaluation (an *ex aequo et bono* assessment). Although a tendency towards such an interpretation has been seen in arbitration case law, a more restrictive approach has been adopted in more recent cases, including instances where there are no references to international law/international customary law. A reference to customary international law has been included in the model agreement to eliminate any doubt in this regard.

2.4 Expropriation

The expropriation provision must provide effective, intentional investor protection while also safeguarding the state's regulatory freedom. The objective of an expropriation provision is to protect established investments against both overt and covert expropriation. The provision must simultaneously protect the state's right to implement general regulations and administrative decisions without incurring liability in damages. The challenge is to correctly distinguish regulation/official intervention which is deemed to constitute expropriation (and which thus triggers an entitlement to compensation), from the measures which fall outside this category.

Under customary international law, expropriation occurs not only when ownership is assumed by force (nationalisation/expropriation), but also when substantial, prolonged restrictions are placed on ownership (indirect expropriation). Moreover, such measures must be implemented in accordance with national law, be in the public interest, be non-discriminatory and entail the payment of compensation.

A guiding principle in the drafting of the model agreement has been that an international investor should not achieve better protection against expropriation in Norway than is afforded to residents in Norway.

The draft expropriation provision regulates in detail when expropriation may occur, the procedure to be followed, the scale of expropriation compensation, and the procedure for determining the amount of compensation. The provision has been drafted to reflect the level of protection available under Norwegian law.

Norwegian law draws a clear line between expropriation and restrictions on use/disposal with regard to the entitlement of persons affected by such measures to compensation. Whereas persons affected by expropriation have an unconditional right to full compensation, restrictions on use/disposal do not generally trigger entitlement to compensation. The proposed provision therefore contains a narrower delimitation of the types of decision that confer a right to compensation than is found in more traditional bilateral investment protection agreements.⁸ Paragraph 8 of the provision aims to protect against and confer a right to compensation for interventions with the

⁸ Several countries have decided to introduce a far narrower right to compensation than is customary in traditional investment agreements. One example is the recent agreement between Canada and the EU (CETA); see Article X.11 of the agreement and Annex X.11 on expropriation.

same effect as expropriation, unless the measure(s) in question is/are implemented to safeguard public interests.

2.5 Compensation for losses

The “compensation for losses” provision governs situations where an investor suffers a loss in the host state as a result of armed conflict or civil strife.

The applicable principle under international law is that the host state is not liable in damages to a foreign investor for losses caused by 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 emphasise that the principles of national treatment (NT) and most favoured nation treatment (MFN) apply if the host state nevertheless decides to pay compensation to its own nationals or other foreign investors who are affected. In other words, the provision only applies if a failure to pay will constitute discrimination compared with the country’s own investors or other foreign investors.

The second paragraph requires the host state to pay compensation if the country’s armed forces have requisitioned or destroyed an investor’s property to an extent which was not required in the situation. In other words, whereas the first paragraph affirms the “no-liability principle”, the proposed second paragraph sets out some narrow exceptions that do trigger liability in damages, and may thus be regarded as a provision which clarifies the general due diligence principle under customary international law and applies it to situations of war and civil strife.

A corresponding text was proposed during the MAI negotiations,⁹ and has been included in, for example, the Danish, Swedish and Icelandic model agreements. The proposed provision only covers losses linked to armed conflict or civil strife. Investment agreements often give the provision a wider scope, for example to cover “losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection, or riot”.¹⁰ This wording has been omitted to avoid a lack of clarity with respect to civil rights such as the right to strike, etc.

⁹ Negotiations on a Multilateral Agreement on Investment (MAI) were initiated by the OECD in 1995, but were unsuccessful.

¹⁰ See, for example, the Danish model agreement.

2.6 Performance requirements

International investment agreements frequently include provisions prohibiting the host state from imposing performance requirements. Although none of Norway's existing investment agreements feature a prohibition against performance requirements, some of Norway's free trade agreements do include such a provision. In the WTO context, a ban on certain performance requirements has been incorporated into TRIMS, the Agreement on Trade-Related Investment Measures (relating to the goods sector), and the GATS agreement (for services). In the GATS context, performance requirements may be deemed restrictions on market access with respect to commercial presence ("mode 3"). If a WTO country assumes obligations in a sector and wishes to maintain performance requirements, these must be entered in the so-called binding list. During WTO service negotiations, Norway has asked several countries to undertake to waive performance requirements. In connection with negotiations on bilateral investment agreements, it is important that Norway acts in a manner that is consistent with its requests in the WTO context.

Typical performance requirements imposed in connection with foreign investments are requirements regarding national co-ownership, the purchase of intermediate goods and services in the host state, the employment of local manpower and various forms of knowledge transfer. 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 could otherwise have been. For Norwegian businesses investing abroad, performance requirements may be problematic if they are unclear or disproportionate, if there is a lack of transparency about what requirements can be imposed (and when), or if the requirements are imposed in an arbitrary or discriminatory manner. From a competition perspective, it is unfortunate if the host state imposes different performance requirements depending on the investor's home state.

In certain circumstances, development considerations may indicate that developing countries should be permitted 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 industrialisation, 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 often ineffective from a socio-economic and development policy point of view. One potential and clearly negative effect of inappropriate performance requirements is that foreign investors may refrain from investing, contrary to the overarching interest of the host state in attracting foreign investments. Performance requirements may thus be disadvantageous from the perspective of both the host state and the investor.

“Performance requirement” is not an unambiguous term, and the justification and content often vary from sector to sector. Entirely different considerations may, for example, apply to performance requirements linked to investments in primary production than in a service sector. Specific assessments of the relevant performance requirements a country wishes to impose should be conducted in connection with both WTO negotiations and any future investment agreements, with a view to the economic and development policy situation, and to the interests of Norwegian investors.

There are alternative approaches to the regulation of performance requirements in an investment agreement. The most radical positions involve laying down a general prohibition, including an explicit acceptance, or omitting to regulate the issue.

The proposed model agreement sets out a middle way – a solution designed to meet multiple needs. The starting point should be that the model agreement prohibits performance requirements in accordance with the other party’s WTO obligations and any requests made by Norway in the WTO context, and that further prohibitions are differentiated on the basis of the specific needs of the other party and Norwegian investors, respectively.

In the model agreement’s provision on performance requirements, this is indicated by placing all of the performance requirements in the provision in brackets. The prohibitions in question may be removed following a concrete assessment of specific economic and legal needs.

In assessing the need for further prohibitions against performance requirements, it will be particularly relevant to take into account any investment agreements the other party to the agreement has concluded with other industrialised countries which compete with Norwegian businesses. If a developing country makes it clear during the negotiations that it wishes to maintain certain performance requirements, Norway should in principle be open to meeting this request following a concrete assessment of its appropriateness.

In the case of LDC countries, the WTO final communiqué mentioned above is the natural starting point with respect to performance requirements regulated in the TRIMS agreement. In other words, such performance requirements should be permitted in accordance with the final communiqué, and other prohibitions should be regulated on the basis of specific investor needs and the particular development policy situation of the other party.

Moreover, it follows from the model agreement’s provision on performance requirements that such requirements may only be imposed on the basis of social considerations, that any requirements must be known and be set out in the host state’s legislation, and that requirements must be applied in an open, objective and non-discriminatory manner.

2.7 Transfer

This provision establishes the principle that capital must be permitted to flow freely in connection with investments. However, restrictions may be placed on the free flow of capital in connection with bankruptcy, insolvency, the protection of creditors' rights, criminal offences, the enforcement of liability for the remediation 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. The provision is also not intended to prevent the performance of obligations under tax legislation or in connection with welfare policy and pension schemes.

2.8 Key personnel

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

The parties shall permit each other's 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 grant corresponding residence permits to the spouses and children of investors and key persons.

2.9 Not lowering standards

This provision states that it is deemed unacceptable for a party to the agreement to grant exceptions from applicable requirements regarding environment, health and safety, human rights or labour rights in order to attract investment from investors of the other party to the agreement. The purpose of the provision is to ensure that a state does not benefit – in the form of increased investment – from omitting to adopt socially beneficial regulations.

The provision applies where the host state wishes to grant a specific investor exceptions from its general rules, but does not restrict the state's general power to amend national laws and regulations. If a state uses such exceptions as investment incentives, the other party may request consultations in the Joint Committee.

The provision originated in the North American Free Trade Agreement (NAFTA) between Canada, Mexico and the USA (Article 1114), but has gradually also been included in other countries' agreements.

2.10 Right to regulate

A key consideration in the development of the model agreement has been to ensure that the state's right to engage in legitimate regulation of investor conduct is not restricted by an investment agreement. However, the right to regulate must be balanced against investors' desire for predictability, legal safeguards, minimum requirements regarding the actions of the state and compensation in the event of expropriation, etc.

In many respects, the paragraph on the state's right to regulate is a headline provision which must be read in conjunction with such provisions as those concerning national treatment, the right to compensation in the event of expropriation, the security exception and the general exceptions provision. The provision signals that the parties have national regulatory needs linked to health, safety and environment that are legitimate and must be respected. It does not give the state the right to derogate from the protection provisions of the agreement; see the words "otherwise consistent with this Agreement". From a legal perspective, the main significance of the provision is as an additional interpretive factor in determining the scope of the agreement's protection provisions.

Corresponding provisions are found in many investment agreements.

3. DISPUTE SETTLEMENT

3.1 Applicable law and rules of interpretation

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 must be resolved in accordance with the legal provisions decided by the parties.¹¹ If this is not agreed, it is the legislation of the host state (including choice-of-law rules) 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 in question. A claim by an investor may thus not be based on breaches of national law or on the principles of international law/customary international law. It will be necessary to *interpret the provisions of the agreement*, and to consider *the underlying legal situation*. In this context, both other international law (outside the agreements), and national law may be relevant.

The agreement provides that the Joint Committee may interpret its provisions. This has been done to protect the possibility of correcting a development in law that is inconsistent with the parties' intentions at the time the agreement was concluded. See also further discussion of this topic in the section below describing the provision concerning the Joint Committee.

Relationship to other international law

An arbitration tribunal shall only interpret and apply the concluded agreement. Accordingly, alleged breaches of other obligations under international law cannot constitute a 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 in the Vienna Convention,¹² see particularly Articles 31–32). In principle, the agreements shall be interpreted in good faith in accordance with the ordinary meanings of the words viewed in their context and in light of the purpose of the agreement. A tribunal will seek to determine what the parties (the states) wished to commit themselves to by concluding the agreement. If this is not apparent from the wording, great emphasis will be given to documents that may provide an indication of the intentions of the states (negotiation minutes, etc.).

¹¹ The International Centre for Settlement of Investment Disputes (ICSID). See further details on ICSID under the heading "Disputes between a party and an investor of the other party", in the paragraph on "Different tribunals/arbitration tribunals".

¹² 1969 Vienna Convention on the Law of Treaties.

Articles 31–32 of the Vienna Convention provide only a limited opportunity to include other agreements between the parties and general principles of international law in the interpretation of an agreement. Other parts of international law may thus be included to the extent permitted by the Vienna Convention, but only as interpretive elements.

An arbitration tribunal may not give weight to pure reasonableness (*ex aequo et bono*) considerations; see Article 42(3) of the ICSID Convention.

Relationship with the national law of the host state

An arbitration tribunal may not make an award based on violations of national law, and national law is thus excluded from its jurisdiction (applicable law). On the other hand, national law constitutes evidence for the arbitration tribunal, which must decide whether national law is contrary to the agreement as such or as applied in the current case.

3.2 Disputes between a party and an investor of the other party

The provision governs disputes between an investor from state A (the home state) on the one hand and state B (the host state, in which the investment is made) on the other. The dispute must relate directly to an investment made by an investor which falls within the host state's jurisdiction. The dispute must be based on a claim that the host state has breached an obligation under the agreement and that this breach has caused the investor loss or damage.

In principle, an investor may institute proceedings for breach of the agreement irrespective of the investment stage, i.e. both in connection with establishment, acquisition, etc. – referred to as the market access provisions – and in connection with operation, disposal, etc. of an investment. If the text in brackets (“made by”) is included, the provision will restrict the right to initiate arbitration proceedings to disputes concerning existing investments.

Only the investor, not the “investment”, may institute proceedings under this provision. In practice, this is important with respect to joint ventures with local partners, where the company is locally registered and the foreign investor may be a minority partner.

The provision does not grant the host state the right to institute proceedings against the investor.

The underlying principle is that efforts should be made to resolve disputes amicably. The provision clarifies that any disputes may be settled out of court. This possibility should be voluntary and flexible, as the provision emphasises by specifying that it concerns non-binding procedures. The phrase “good offices, conciliation or mediation” is taken from the WTO Understanding on rules and procedures governing the settlement of disputes (Article 5), and our free trade agreements.

An investor who invokes a breach of the agreement must submit a written request for consultations to the host state, and the consultations must begin within a specified number of days.¹³ If the dispute is not settled within a specified number of months¹⁴ after the host state has received the request for consultations, the investor may submit the matter to ICSID (the International Centre for Settlement of Investment Disputes) for arbitration.

Different tribunals/arbitration rules

Internationally, it is common for investment agreements to permit alternative tribunals/arbitration rules. However, the model agreement provides that dispute settlement through ICSID (or the ICSID Additional Facility), should in principle be the only alternative. The reason for this is that ICSID is particularly well-suited and was established precisely for this type of dispute, and that tribunal decisions based on the ICSID Convention can be implemented more effectively than decisions based on other rules. The centre also offers predictability with respect to procedural costs, an overview of previous decisions, the opportunity for public participation, etc.

ICSID was established under the “Convention on the Settlement of Investment Disputes between States and Nationals of Other States”,¹⁵ and is an autonomous international organisation with strong ties to the World Bank. ICSID was established precisely to deal with this type of disputes, 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 constitute the most effective basis for implementation (direct ground for enforcement).

ICSID will only be applicable if both countries party to the agreement are party to the ICSID Convention. Norway has acceded to the ICSID Convention, which 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 ICSID Convention, it will be most appropriate to employ the ICSID Additional Facility,¹⁶ which was adopted in 1978 precisely to provide for such cases. It is usual for investment agreements also to contain this alternative. The procedural rules for the Additional Facility are largely identical to those applicable to ordinary ICSID arbitration. ICSID also provides institutional support and expertise in such cases. However, a decision under these provisions may not be implemented equally effectively, and it is stated in the provisions that dispute settlement must take place in a country that is a party to the New York Convention.

¹³ The draft model agreement proposes 60 days. This is taken from the EU-Canada trade agreement (CETA).

¹⁴ The draft model agreement proposes six months. This is taken from the EU-Canada trade agreement (CETA).

¹⁵ Entered into force 14 October 1966.

¹⁶ These provisions are not applicable if ICSID has jurisdiction; see Article 25 of the ICSID Convention (if both parties to the investment agreement are parties to the ICSID Convention).

Other appropriate alternatives are arrangements initially established to resolve purely commercial disputes. Examples include 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 do not constitute direct grounds for enforcement.

Another alternative is to employ *ad hoc* solutions. These are normally based on the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). Although such solutions are flexible, their disadvantage is that they do not provide institutional support. Nor do their decisions constitute direct grounds for enforcement.

The fourth paragraph states that an investor may not submit a dispute for arbitration if more than 10 years have passed since the investor gained or should have gained knowledge of the events giving rise to the claim. This type of provision is not uncommon in investment agreements. If the investor has known of the background to the claims for 10 years but chosen not to pursue it, both considerations regarding evidence (when a long time has passed, it will often be difficult to establish what actually happened) and regarding the possibility to make alternative arrangements, will indicate that the claim should no longer be enforceable.

The fifth paragraph provides that an investor may not submit an arbitration claim if the investment was made through fraudulent misrepresentation, corruption, etc.

The primary provisions governing transparency and participation in the process are Article [18] (Participation in the Proceedings) and Article [19] (Transparency of Proceedings), which are discussed separately below. However, a key principle in ensuring that these considerations are taken into account is found in the sixth paragraph of Article [14] (Disputes between a Party and an Investor of the other Party). This states that requests for consultations and dispute settlement must contain sufficient information to enable the parties and the public administration to familiarise themselves with the issues raised in the dispute. All requests for dispute settlement must be published by the respondent (the host state) and ICSID. An arbitration request may not expand the scope of the case or alter the essence of the complaint compared to the request for consultations.

The seventh paragraph includes special rules on cases where the host state invokes prudential measures relating to the financial markets as a defence in a case an investor has submitted for dispute settlement. This is linked to the provision on prudential regulation (Article 25) and the provision on the Joint Committee (Article 23).

3.3 Conflict of interest and code of conduct

This provision contains requirements applicable to the members of an arbitration tribunal. Reference is made to the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration and to any code of conduct adopted by the Joint Committee pursuant to Article 23 (fifth paragraph). The International Bar Association's guidelines specify, for example, that tribunal members must be impartial and independent from the time of appointment and throughout the arbitration process, and contain rules on resignation in the event of doubt as to the above and on the submission of information about matters that could raise such doubt. The guidelines also include lists of specific situations that will trigger the submission of information or the disqualification of a tribunal member.

The aim is to help ensure that tribunal members are truly impartial and independent, and that all information which raises doubts in this regard is submitted. The ICSID Convention contains rules on the impartiality and independence of tribunal members, but these are far less detailed than the said guidelines.

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 in respect of the same matter. Arbitration tribunals may preclude such legal actions by means of well-known legal instruments such as *res judicata* and *lis pendens*. The provision further points out that, if several investors submit claims against a host state on the basis of the same circumstances, the cases may be merged if all parties agree.

3.5 The award

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

An arbitration tribunal may only impose liability in damages, not restitution or the like. A tribunal may thus only order the host state 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. The tribunal may not disallow the validity of administrative decisions or the like. The provision clearly states that the amount of compensation may not exceed the investor's loss, and that it must be reduced by any prior compensation awarded to the investor. This provision has been included to ensure that the investor is not over-compensated (for example if the investor pursues proceedings relating to the

measure in question through the national courts or under other investment agreements).

It is emphasised in the third paragraph of the provision that all tribunal awards and important tribunal decisions must be made publicly available.

The general rule in ICSID proceedings is that the distribution of costs is determined at the tribunal's discretion, and practice is not consistent. The model agreement makes it clear that the losing party should normally pay all costs. However, the tribunal may allocate the costs differently if specific circumstances indicate that this would be appropriate. This provision is based on the UNCITRAL Arbitration Rules, with some adjustments.

3.6 Participation in the proceedings

The model agreement aims to achieve transparency in the dispute settlement process. The agreement therefore provides that the home state shall be allowed to participate in the proceedings and be given access to the pleadings of the parties, other documents and minutes/transcripts of tribunal hearings, if available. According to the draft the home state shall be able to participate as a "third party", as is possible in the WTO and under EFTA free trade agreements. Other stakeholders are permitted to make written submissions on the proceedings (*amicus curiae*). The tribunal's decision must reflect such submissions.

3.7 Transparency of proceedings

Pursuant to the proposed provision on transparency in disputes between a party and an investor of a state, there shall be transparency about the institution of the proceedings, and the case documents and the decisions of the arbitration tribunal, as well as any minutes/transcripts of hearings, shall be made publicly available. Provisions on public hearings have also been included, i.e. the right of the public to follow the proceedings.

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, in some cases, an investor or state party may wish to submit information to the tribunal that incorporates commercial secrets and that the investor or other legal or natural persons wish to be exempted from public disclosure. In certain cases, the information in question may also be deemed confidential by a state party.

The rule that all decisions shall be public must also provide sufficient protection for such information. This applies to the publication of written pleadings, public hearings and the publication of decisions. Examples which can be drawn upon can be found in both Norwegian and international practice.

The third paragraph of the provision states that the tribunal shall consider whether the information should be excepted if the other party objects to this. If the tribunal concludes that the information should not be exempted from public disclosure, the party will have to choose between (i) making the information available to the public or (ii) withdrawing the information.

Pursuant to the fourth paragraph of the provision, hearings shall be public unless there are specific grounds for limiting this rule. Hearings may be made public by providing places for spectators, by providing separate auditoriums, by televising hearings, by means of webcasting, etc. The most appropriate method will vary from case to case and location to location, and the logistics therefore have to be clarified by the tribunal in consultation with the parties.

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 principle that the parties may agree such arrangements as they see fit is laid down in the rules of the PCA, for example, in Article 25(4) on hearings and Article 32(5) on awards.

Hearings are not automatically held during PCA arbitration, but the need for hearings will be decided by the arbitration tribunal. However, we take as basis that there will normally be hearings, not only written proceedings. The same transparency rules apply in the context of dispute settlement as in investor-state disputes. Hearings will therefore be public, and all case documents and decisions will be published.

It is also proposed that *amicus curiae* submissions be permitted in disputes between the parties. This is not common in inter-state arbitration. The option exists in the WTO context, but not before the ICJ, ITLOS, ECHR or EFTA Court.

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 state must recognise such subrogation.

In such cases, the insurance provider may be the investor's home state or a subordinate entity, or a private stakeholder from a state that is not party to the investment agreement. Such insurance providers will not satisfy the terms of Article 25¹⁷ of the ICSID Convention, and dispute settlement in accordance with the model agreement's

¹⁷ States, state agencies and international organisations have no legal standing/*Ratione Personae* under the ICSID Convention.

general system is therefore inapplicable. 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 which confers a right to dispute settlement in accordance with the UNCITRAL Arbitration Rules. The annex is not intended to make any changes to the dispute settlement arrangement beyond what is necessary, and the provisions of the agreement applicable to dispute settlement between the investor and the host state shall apply *mutatis mutandis*.¹⁸ The underlying principle is that the difference between ICSID disputes and disputes based on this provision should be as small as possible.

However, decisions under the UNCITRAL provisions do not constitute grounds for enforcement, and the provision therefore has to refer to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

¹⁸ *Mutatis mutandis* means “with the necessary changes”.

4. INSTITUTIONAL PROVISIONS

4.1 The Joint Committee

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

The Joint Committee may adopt statements of interpretation relating to provisions of the agreement. These statements of interpretation will be binding in subsequent dispute settlement concerning the provision in question (see the provision on dispute settlement between a party and an investor of the other part). The guiding principle must be that a statement of interpretation establishes what is already stated in the provision, i.e. it is only a matter of *interpreting* and not *amending* the agreement. Accordingly, such statements are deemed not to have retroactive effect. Statements of interpretation may thus apply to all legal matters under the agreement from its adoption. Exceptions should nevertheless primarily apply to current disputes, since they may give rise to uncertainty about legal matters concerning the parties to the dispute and the jurisdiction of the tribunal, and since the interests of the parties to the agreement may in any event be protected through written and oral pleadings during the arbitration proceedings between the investor and the host state. In view of the time it normally takes to reach an ICSID decision, and to avoid an undesirable narrowing of the tribunal's jurisdiction during this period (which may last several years), the Joint Committee should have the power to issue statements of interpretation on legal matters raised by ongoing disputes.

The Joint Committee shall be the body to which proposed amendments to the agreement shall be submitted. In other words, amendments to the agreement are to be considered by the Joint Committee, which then adopts them and recommends acceptance/approval/ratification by the parties. There will thus be no actual signing of the amendment to the agreement, but rather a decision by the Joint Committee. Those making the decision must have the usual authority to conclude agreements.¹⁹

Sub-paragraph 3(viii) proposes that the Joint Committee should have explicit authority to consider issues relating to investors' social responsibility, etc. This is additional to the authority granted in sub-paragraph 3(v) [the Joint Committee shall... "review investments covered by this Agreement"]. The purpose is to establish an institutional framework capable of promoting greater transparency and the notoriety of 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 state or the home state. The

¹⁹ Corresponding provisions are found in EFTA trade agreements.

introduction and visibility of such a possibility may be an important measure for creating a balanced investment agreement, and not least for ensuring that the agreement is implemented in accordance with its objectives. The parties may decide to grant the Joint Committee authority to function as an appellate body or an ethical council, for example by allowing different organisations to bring the activities of individual investors before the committee. At the same time, it is important to have realistic expectations regarding what tasks the Joint Committee can perform in practice, given the resource-related and political implications. This suggests the use of flexible formulations that do not “tie up” the Joint Committee too much. In this context, it should also be possible to “make the road by walking it”, in step with international developments in norms and perceptions of corporate social responsibility. The primary purpose of the investment agreement remains investment promotion, and there are a number of other – more important – arenas in which work is being done on promoting corporate social responsibility.

This provision is only aimed at bilateral agreements. The EFTA agreements contain separate provisions on a joint committee covering the whole agreement. While annual or biennial meetings may be appropriate in the context of a free trade agreement, such arrangements will often be unnecessary in the case of an investment agreement. The provision must therefore provide for a flexible meeting frequency, i.e. that meetings are held as necessary. The seniority of the participants is a question of protocol, and should not be specified in the agreement.

5. EXCEPTIONS AND RESERVATIONS

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 they are dealt with 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 should not regulate market access (the establishment phase), but only apply to existing investments.

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 to adapt the text to investment agreements (primarily inspired by the exceptions provision in Canada's model agreement).

The phrase "conservation of living or non-living exhaustible natural resources" in GATS has been replaced by "protection of the environment" in sub-paragraph (v). The formulations used in the exception 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, in various agreements, a general reservation regarding environmental considerations has been interpreted into the original formulations. The formulations in the model agreement are therefore clear, and use the term "protection of the environment". This entails that the considerations/areas – and their associated measures – which are now naturally regarded as covered by national environmental protection policy and international environmental cooperation are relevant. This also avoids interpretive issues that may give rise to the unintended consequence that areas which undoubtedly fall under environmental protection policy may be regarded as falling outside on purely terminological grounds, for example new approaches which are perhaps not fully covered by the term "conservation", such as ecosystem-based administration or maintenance of biological diversity.

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 to make sure that the agreement does not cover measures to ensure stability and efficiency in the financial markets. Such exceptions are common in international investment agreements which also cover the right of establishment.

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 GATS Article XIV bis, except that the term “military sector” from GATS has been replaced by the broader term “defence and security sector[s]” in the model agreement. This term reflects the provision’s purpose more precisely, while also clarifying the increasingly unclear distinction between defence interests and security interests.

5.4 Cultural exceptions

The provision makes exceptions for the parties’ laws and measures which 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 guiding principle is that it must be possible to maintain cultural policy, including copyright arrangements. The content of copyright protection must not be affected, and the exception therefore includes not only the obligations that follow directly from international agreements but also national arrangements relating to copyright and related rights. It is also necessary to maintain freedom of action in connection with future measures, for example occasioned by the EEA Agreement or national cultural policy assessments.

In the cultural sector and the audiovisual sector, Norway’s policy is to protect the possibility of implementing measures in the future, and not to go further than what follows from its GATS/WTO obligations. “Audiovisual policy” has therefore been expressly included in the exception. Internationally, there is some uncertainty as to how certain digital services should be classified. Ensuring that any cultural exception is not worded too narrowly is therefore of cultural policy importance.

5.5 Taxation

As regards taxation questions, the starting point is that investment agreements should not aim to regulate direct and indirect taxation, and that future agreements must not place constraints on Norwegian taxation policy. Direct and indirect taxation should therefore be exempted from the agreements.

The investor is largely protected against discrimination in the area of taxation through tax treaties. The primary problem associated with exempting taxation is the potential risk that a host state may in practice implement measures constituting covert expropriation and avoid liability to the investor by calling the move taxation.

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

Paragraph 2 of the taxation provision clarifies the relationship with agreements for the avoidance of double taxation. The purpose of the provision is to prevent investors from unintentionally invoking benefits under taxation treaties concluded with third countries through the other state's taxation treaties.

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 in paragraph 1, an investor will be barred from submitting the issue for arbitration; see paragraph 3. If the investor's home state adopts the express position that a measure in the host state does not fall under the carve-out provision but entails expropriation, arbitration on the issue is permitted; see paragraph 4. In both cases, the exchange of views between the parties takes place through the procedures of the Joint Committee. The Joint Committee may develop special procedures for this type of issue.

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

6. FINAL PROVISIONS

6.1 Regional and local government

The provision states that each party is responsible for its regional and local authorities, and for bodies that perform tasks on behalf of these authorities. This is consistent with general international law. In negotiations with federal states, where the federal authorities have no power under national law to bind individual states, efforts must be made to ensure that the agreement is ratified in such a way as to bind the individual states (and that the federal state can also be held accountable for the actions of the individual states).

6.2 Transparency

Pursuant to this provision, countries party to the agreement shall publish laws, regulations and administrative rulings 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 decisions.

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

In some arbitration awards, the requirement for transparency about legislation is inferred from the “fair and equitable treatment” provision (in the provision on general treatment and protection). Transparency concerning legislation, etc. may carry considerable weight in the assessment of whether the host state treats the investor and the investment in a satisfactory manner.

In the work done 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. Although various forms of obligations and rights of, respectively, the host state and the home state were discussed, the conclusion was that these are most appropriately regulated by national legislation as formulated by the individual country party to the agreement.

6.3 Corporate social responsibility

This provision establishes that the parties to the agreement shall seek to ensure that their investors comply with the OECD Guidelines for Multinational Enterprises, and participate in 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 doing so. Norway has committed itself to making the guidelines known among Norwegian businesses and to establishing a point of contact for the review of complaints concerning alleged breaches of these guidelines by Norwegian companies.

6.4 Amendments

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

6.5 Entry into force

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

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 can assume that an investment agreement will apply throughout the establishment phase and after the investment has been made. This question may also have a political aspect, since host countries wish to show potential investors that they can look forward to stable framework conditions. 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 existing investments from the date the agreement is terminated). Constitutional concerns suggest that such long validity periods should not be adopted. This indicates a need for careful regulation of the time limit for notice of termination, and that it should be possible to terminate the agreement rapidly. This in turn suggests that termination should be possible at any time. After weighing these considerations, the conclusion was that the constitutional concerns must be given precedence, so that the agreement may be terminated at any time. On the other hand, the *length* of the time limit for notice of termination should be designed to meet

investors' genuine need for predictability during the planning phase. The safeguarding of existing investments also entails a need for some degree of "residual protection". A period of 15 years has therefore been proposed in this regard.

A further issue arises when amendments are made to the agreement while the agreement remains in force, and where the question is whether amendments to the detriment of the investor should trigger the same residual protection as mentioned above. Here too, the conclusion is that regard for states' freedom of action must take precedence, and that the guiding principle must be that investors have to accept amendments to the agreement during the agreement's period of validity. However, this does not exclude the possibility that amendments to the agreement may be so wide-ranging that the result is equivalent to termination or otherwise departs fundamentally from the remaining provisions of the agreement. The parties may agree special arrangements where this is deemed desirable.

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

7. THE MODEL AGREEMENT AS PART OF A FREE TRADE AGREEMENT

If investment promotion and protection become relevant topics in the context of negotiating a free trade agreement, certain changes will be required (reformulation or deletion). This applies particularly to the preamble and Article 1 (Scope), Section 3.B. (Disputes between the parties), Section 4 (Institutional provisions), Article 33 (Amendments), Article 34 (Entry into force) and Article 35 (Duration and termination). In addition, references to “this Agreement” will normally have to be changed to “this Chapter”. Other technical adjustments may also be required (for example, if incorporated in an EFTA free trade agreement, “another Party” will be used instead of “the other Party”). It is also possible that other provisions will have to be amended to fit into the framework of a free trade agreement.