ROYAL NORWEGIAN MINISTRY OF
TRADE, INDUSTRY AND FISHERIES

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Model investment agreement – public consultation

The Norwegian government's political platform states that the government will increase the use of bilateral investment agreements (also referred to as bilateral investment treaties, BITs), where appropriate. Norway has not concluded any BITs since the mid-1990s, and a new mandate for future negotiations is therefore required. A draft of a new Norwegian model agreement for the promotion and protection of investments (investment agreements), as well as a document describing the individual provisions in the draft, are enclosed.

The starting point for the development of the mandate is the draft model investment agreement which was the subject of public consultation in 2008. That draft was prepared by an inter-ministerial group comprising officials from the Ministry of Trade and Industry (chair), the Ministry of Foreign Affairs, the Ministry of Justice, the Ministry of Petroleum and Energy, the Ministry of the Environment and the Ministry of Finance. The new draft model agreement incorporates solutions designed to address important objections to the 2008 version and reflect international developments in the area, while also safeguarding states' right to regulate.

One aim when revising the model agreement is for Norway's positions to provide a starting point for the definition of shared EFTA positions in a separate chapter in future EFTA free trade agreements. However, this is dependent upon agreement with the other EFTA states.

Background
The primary purpose of concluding investment agreements is to protect Norwegian investments abroad, particularly in countries with unstable political and economic

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situations, and to ensure that Norwegian businesses can compete on equal terms with businesses from other countries. An important consideration is that such agreements should promote investment, and thus economic development, in developing countries. The agreements are bilateral, meaning that foreign investors in Norway will also be protected by the material and procedural provisions.

An important basis for our work on investment agreements is that such agreements may not limit the power of the authorities to engage in legitimate regulation. The agreements are designed to protect investors against *illegitimate* regulation, not against official regulation as such. A further important principle is that the treaties must be considered useful by Norwegian investors. The overarching difficulty in drafting the model agreement is thus to find solutions which meet the business sector's need for investment protection without intervening unnecessarily in the exercise of official power in Norway and other countries.

The model agreement – a general starting point
The model agreement will reflect Norway's general starting position for negotiations. The text of the model agreement will indicate Norway's general, desired negotiation outcome at the time the draft is finalised. Clearly, adjustments will need to be considered in individual cases. For example, there will be little point in Norway including its continental shelf in an agreement with a country without a coastline. It is also sensible to maintain some flexibility to permit amendment of the model agreement in line with international developments in the area. Further, other countries will naturally have expectations regarding the content of such agreements, and the negotiated result is thus unlikely to be identical to Norway's starting position.

Nevertheless, the content of the model agreement is important, since it forms the starting point for the mandate and negotiations on each individual investment agreement. Although the Ministry of Trade, Industry and Fisheries has primary responsibility for such negotiations, it liaises with affected ministries.

Candidate countries for negotiations will be assessed by reference to a range of criteria reflecting the objectives of the model agreement. While the Ministry of Trade, Industry and Fisheries will propose priority countries, the government will decide whether to request or initiate investment agreement negotiations with a given country.

EU – investment agreements
The European Commission has long had a mandate to negotiate provisions on market access in the investment context (corresponding to the EFTA arrangement). The Treaty of Lisbon, which entered into force in December 2009, additionally mandated the Commission to negotiate investment protection on behalf of the EU Member States, both as part of free trade agreements and in the form of standalone agreements. The EU has not developed its own model agreement. As at 2009, the EU Member States

were parties to approximately 1,400 BITs. Although these agreements remain in force, they are to be replaced by EU agreements in the longer term.[1]

In response to widespread public interest in the investment protection and dispute settlement aspects of the negotiations on a future trade and investment agreement between the EU and the USA (TTIP), the EU conducted a public consultation on proposed investment protection and investor-to-state dispute settlement (ISDS) provisions at the end of March 2014. The consultation concluded in July 2014, and EU Trade Commissioner Malmström presented the Commission's report on 13 January of this year. The Commission is currently evaluating the feedback received, and has highlighted four particular areas in which further improvements should be explored. These are the right to regulate, the establishment and functioning of arbitral tribunals, the relationship between domestic judicial systems and ISDS, and an appellate mechanism for ISDS decisions. The Commission plans to conclude its work on recommended positions on investment protection and ISDS in connection with the TTIP negotiations in the spring. The EU consultation documents and Commission report can be found here: http://europa.eu/rapid/press-release_IP-15-3201_en.htm?locale=en.

Further, in September 2014 the EU announced the results of the free trade agreement negotiations between the EU and Canada (CETA). The agreement includes a chapter on the promotion and protection of investments. The full agreement text can be found here: http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

The EU has also concluded negotiations on the inclusion of an investment protection chapter in its free trade agreement with Singapore. The agreement text can be found here: http://trade.ec.europa.eu/doclib/press/index.cfm?id=961.

Moreover, the EU is negotiating the inclusion of investment protection provisions in new free trade agreements with countries such as Vietnam, Malaysia and Thailand. The EU is also negotiating a standalone investment agreement with China.

Both the EU's proposed investment protection provisions in the TTIP context and the published investment chapter in CETA have been taken into account in the drafting of Norway's new model agreement. The EU has made extensive use of excerpts from the CETA text in the TTIP consultation on investment protection and ISDS, and it is therefore logical to emphasise the complete investment chapter in CETA. Norway will continue to monitor the EU's positions on investment protection and dispute settlement.

[1] The EU may permit members states to negotiate BITs on their own behalf in certain circumstances.

Further discussion of the 2008 model agreement
The inter-ministerial group that drafted the model agreement in the period 2006–2008 invested considerable effort in discussing a range of difficult issues. The draft agreement was the subject of a broad public consultation in January 2008. Replies were received from 50 respondents, with 34 parties submitting detailed comments. The consultation feedback was highly divergent, and many replies were framed in very general terms.

The consultation feedback included numerous positive responses, with many of the consulted parties praising the innovative features of the model agreement (for example the provisions on transparency in the dispute settlement process). In their consultation feedback, commercial entities and trade associations were very positive about the initiative taken to enable Norway to resume concluding investment agreements. However, the general view was that the model agreement went too far in enabling the host country to regulate at the expense of investors' need for protection. The material and procedural protection afforded by the agreement was criticised. Particular criticisms were that the agreement gave insufficient protection against expropriation, and that the dispute settlement mechanism was too weak. A further criticism was that the model agreement deviated too much from the common form of such agreements.

Many civil society organisations were highly critical of the draft model agreement, and generally negative towards the conclusion of any kind of investment agreement. These organisations commented particularly critically on certain aspects of the agreement, such as the ISDS provisions and performance requirements.

The new draft model agreement
The revised draft model agreement is based on the work done in 2006–2008. Efforts have been made to find solutions to address important objections to the 2008 version. The most important changes from the 2008 version are accounted for below, although some changes have also been made that are not described in the letter.[2] The new model agreement is an independent and separate document.

The draft model agreement has been designed to meet the needs of the business sector by affording investors the best possible protection and incentivising increased investment. A concurrent aim is to ensure that these measures do not undermine the legitimate right of the parties to regulate in their jurisdictions. The revised version also reflects developments in the international investment regime, where investment agreements are increasingly taking sustainable development objectives into account and promoting greater transparency in the ISDS context. This is both positive and important.

[2] For example, certain provisions have been removed ("Non-retroactive application" and "Relationship to other International Agreements"), while supplementary elements have been added to other provisions (such as human rights in the footnotes under the articles on national treatment and most-favoured-nation treatment).

To safeguard the authorities' need to regulate, the draft model agreement contains provisions affirming the general legislative competence, exercise of power and political freedom of states in their own jurisdictions. The exception provisions and preamble[3] also emphasise these considerations. It is important for the model agreement to be formulated to avoid conflicts between restrictions based on legitimate considerations, such as public health and the environment, and potential future investment agreements based on the draft model agreement. A specific example in this regard is restrictions on tobacco packaging based on public health considerations, where concrete legal disputes have illustrated the need and resulted in an international debate.[4] The new version also contains a number of specifications and clarifications to reduce discretionary leeway, as exemplified by the changes made to the model agreement's expropriation provisions.

The draft model agreement contains provisions on investor *access* to markets (for example that investors must be granted national treatment in connection with establishment), and *protection* once an investment has been made (for example against expropriation without compensation). The traditional bilateral investment protection agreements (BITs) did not include provisions on market access. The draft model agreement covers investments in both the service and non-service sectors.

The draft model agreement has also been designed with the principle in mind that any investment agreements concluded by Norway should be international instruments with the potential to support development in developing countries while also meeting the protection needs of Norwegian investors abroad. A study by UNCTAD (2009)[5] has indicated that investment agreements have a positive effect on investment decisions in a country. Moreover, many developing countries consider it important to signal openness to investment by concluding investment agreements. The fact is that developing countries and transitional economies continue to conclude such agreements both with one another and with industrialised countries, and that various developing countries have requested investment agreements with Norway. The absence of investment agreements may also deter Norwegian businesses from investing in countries associated with high political risk, and thus block contributions to value creation and infrastructure development in countries which would welcome Norwegian investment. This is unfortunate from a development policy perspective. In its *World Investment*

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[3] Among other things, the preamble describes the intentions behind the agreement.

[4] Philip Morris has brought proceedings against Australia and Uruguay based on investment agreements in connection with restrictions on tobacco packaging: *Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12* and *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay)*. The cases are ongoing.

[5] UNCTAD (2009), "The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries", *UNCTAD Series on International Investment Policies for Development* http://unctad.org/en/docs/diaeia20095_en.pdf.

Report 2014[6], UNCTAD has emphasised that increased private investment will be absolutely crucial in the years ahead if the UN's new post-2015 sustainable development goals are to be met, particularly in the developing countries with the greatest needs.

The draft model agreement takes into account the EU's proposed provisions on investor protection and ISDS in the context of the TTIP consultation and the investment chapter in CETA. The EU has sought to balance the same interests as Norway faces. Since there are many similarities between Norway and a number of EU Member States, the solutions adopted by the EU are relevant considerations in the definition of Norway's positions.

The most important changes compared to the 2008 draft model agreement are the proposed changes to the expropriation provision, the removal of the requirement to exhaust national legal remedies and various other changes to the provisions on ISDS.

Key provisions

- *Non-discrimination*

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

The draft model agreement permits both countries to include provisos with regard to the non-discrimination provisions (national treatment and most-favoured-nation treatment). This will be particularly relevant in the market access context.

- *General Treatment and Protection*

This provision obliges the parties 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 species the lowest threshold for the treatment of foreign nationals. Unlike the non-discrimination provisions, the standard applies irrespective of how the host country treats its own nationals and businesses. It is customary for investment agreements to contain a provision of this kind.

- *Expropriation*

The expropriation provision was one of the 2008 model agreement's most widely criticised provisions during the public consultation. The primary criticisms were that the provision was too narrow and that it was unclear how it should be interpreted. The provision deviated significantly from the expropriation clause normally included in investment agreements.

[6] http://unctad.org/en/publicationslibrary/wir2014_en.pdf.

The expropriation provision in the current draft model agreement is inspired by the expropriation provision proposed by the EU in connection with the public consultation conducted in connection with the negotiations on a trade and investment agreement with the USA (TTIP).[7]

An important principle in drafting the model agreement has been that an international investor should not achieve better expropriation protection in Norway than is granted to Norwegian residents.

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 clearly distinguishes 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, see Article 105 of the Norwegian Constitution, restrictions on use/disposal do not generally trigger entitlement to compensation. Expropriation involves the surrender of property or other rights to the public authorities or private entities. Restrictions on use/disposal do not involve a surrender of property or other rights, but rather the imposition of limitations on the exercise of such rights, for example regulations stating that no industrial activities may be pursued on a given piece of land. Compensation is payable to persons affected by certain types of restrictions on use/disposal pursuant to special statutory rules.[8] In the case of other restrictions on use/disposal, the clear general rule is that no right to compensation exists, even if the restrictions on use/disposal constitute a material intervention.[9]

Traditional investment protection agreements grant a right to compensation in the case of "indirect expropriation". It can be claimed that this also covers restrictions on use/disposal, and that the traditional wording thus goes further than Norwegian law as regards granting a right to compensation for this type of measure. The proposed provision therefore contains a narrower delimitation of the types of decision that confer

[7] The EU has also employed corresponding provisions in its free trade agreements with Canada (CETA) and Singapore. Neither agreement has entered into force.
[8] See section 15-3 of the Norwegian Planning and Building Act and section 50 of the Norwegian Nature Diversity Act.
[9] In some cases, restrictions on use/disposal may trigger a right to compensation based on the principle in Article 105 of the Norwegian Constitution, but it is difficult to identify the instances in which this may apply. However, it is clear that the threshold is very high, and that the payment of compensation will only be relevant in exceptional cases.

right to compensation than is found in more traditional investment protection agreements.[10]

Under Norwegian law, the true circumstances will always be evaluated when assessing whether expropriation has occurred and whether this triggers a right to compensation, even if the decision is formally expressed as something other than an expropriation decision. If an interventionary regulatory decision is made that affects an enterprise, and the regulation does not protect a public interest, the regulatory decision may under general administrative law rules be set aside as invalid on the grounds of an abuse of public authority. In such cases, there will usually also be grounds for the payment of compensation under general administrative law rules.[11] This is not the situation in all countries. Accordingly, paragraph eight of the expropriation provision aims to ensure that Norwegian investors abroad are protected against/entitled to compensation for interventions with the same effect as expropriation, unless the measure or measures have been implemented to protect a public interest.

- *Investor-State dispute settlement (ISDS)*

It is common for investment agreements to grant investors access to international dispute settlement mechanisms in the event of a dispute with the host country. ISDS helps to ensure that investors' need for effective legal safeguards is met, and is a key element in investment agreements.

In principle, an investor may institute legal proceedings for breach of the agreement irrespective of the investment stage, i.e. in connection with establishment, acquisition, etc. – referred to as the market access provisions – or in connection with management, disposal, etc. of a completed investment. In some negotiations, it may be appropriate to restrict the right to institute arbitration proceedings to disputes concerning completed investments.

The principle adopted in the model agreement is that only lawful investments qualify for ISDS. It is therefore stated that arbitration proceedings may not be instituted in the case of investments made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.

<u>Exhaustion of national legal remedies</u>

Investment agreements do not normally contain a requirement that a case must first have been heard by the national courts (exhaustion of national legal remedies). However, the 2008 draft model agreement did contain such a requirement.[12] The

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

[11] This does not apply if the legislature has made the decision. In principle, the legislature is not bound by the (non-statutory) rules on abuse of authority.

[12] Limited to a three-year period.

requirement to exhaust national legal remedies before a dispute qualifies for ISDS was strongly criticised by the business sector in its consultation feedback. The exhaustion requirement has been excluded from the present draft model agreement to ensure better protection of the considerations the power to submit a matter to an international arbitration tribunal is designed to safeguard.[13] Instead, the draft model agreement contains a "cooling-off period" – a common feature of investment agreements. The aim is to require the parties to seek resolution through consultations and non-judicial dispute settlement before submitting the dispute for arbitration.

Under the provision, an investor must request consultations with the host country, and these must begin within a specified period.[14] If the consultations do not succeed within a specified period[15], both parties accept the submission of the matter to an international arbitration tribunal. The provision clearly states that investors may not expand the scope of the dispute in the request for arbitration. This has been included to ensure that investors do not raise important new matters at the arbitration stage with which the host country was not made aware through the request for consultation.

Breach of agreement (treaty) v. breach of contract ("umbrella clause")

A further element criticised during the general consultation in 2008 was that the draft model agreement did not contain provisions facilitating the settlement of *all* disputes between the investor and the host country through investor-state arbitration under the investment agreement. Such provisions are also referred to as "umbrella clauses", and are often included in investment agreements.

The new version of the model agreement also excludes such provisions. The reason for this is that the arbitration tribunal should only be authorised to deal with alleged breaches of the standards laid down in the inter-state investment agreement. The model agreement is designed to protect against breaches of fundamental international law principles, and it is undesirable to elevate contractual disputes to the level of disputes under international law.[16]

Transparency and third-party access

The draft new model agreement attaches importance to ensuring an open and legitimate dispute settlement process, with the possibility of third-party participation. All requests for arbitration shall be made publicly available. Documents and decisions

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[13] The real value of the investment agreements may be materially weakened by an exhaustion requirement, not least because such a requirement may cause major delays and offer opportunities for delay by the host country. The courts of the host country will not always be independent, and national law may in some cases limit the impact of obligations under international law. Trade policy considerations and competition considerations also indicate that no exhaustion requirement should be included.

[14] The draft proposes 60 days as a general rule.

[15] The draft proposes six months as a general rule.

[16] Contracts between the host country and the investor may nevertheless be cited as evidence/an argument during the dispute settlement proceedings, and breach of a contract *may* in some instances constitute breach of the relevant investment agreement.

of the Tribunal, and minutes of hearings, shall in principle be made publicly available. Provisions on open hearings have also been included, i.e. the public can follow the proceedings. The home country is authorised to participate in the process and is entitled to disclosure of the parties' pleadings, other documents and minutes of tribunal hearings. Further, amicus curiae submissions – written submissions by non-parties to the dispute – are permitted.

The UNCITRAL[17] Rules on Transparency in Agreement-based Investor-State Arbitration, which entered into force on 1 April 2014, were reviewed in connection with the revision of the model agreement. There is a large degree of concurrence between the model agreement and the UNCITRAL Rules. Where substantive differences exist, these are due to the model agreement going further to promote transparency than the UNCITRAL Rules.

Ethical rules

It is important to ensure that tribunal decisions are made by independent and impartial arbitrators. This is of crucial importance both in individual cases, which may concern important principles and large compensation claims, and to the integrity of the system as a whole. The draft model agreement therefore contains a provision in this regard which refers to the International Bar Association Guidelines on Conflicts of Interest in International Arbitration and any relevant Code of Conduct adopted by the Joint Committee for the agreement.

The decision of the arbitration tribunal

The arbitration tribunal may only make an award of compensation, and may not order restitution or similar measures. Unlike national courts, the tribunal thus has *no* authority to declare administrative decisions invalid. In principle, the losing party must bear the costs of the case. The draft model agreement 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.

The provisions of the model agreement are further described in the enclosed document.

In light of the above, the enclosed draft model for future investment agreements is being circulated by way of public consultation, for feedback and comments. Two

[17] United Nations Commission on International Trade Law. http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf.

versions of the draft agreement are enclosed: an English version and an unofficial Norwegian translation.

Following the consultation, the government will decide whether Norway should negotiate investment agreements based on the model agreement (potentially amended in response to consultation feedback).

The deadline for the submission of comments is 13 August 2015. Please use the digital solution for submitting consultation comments, by clicking on "Send inn høringssvar" (submit consultation reply). Please note that all consultation comments will be published on the Ministry's website.

Yours sincerely

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This document has been signed electronically, and therefore does not contain handwritten signatures.