

## English Translation<sup>1</sup>

See address list

Your ref.

Our ref.  
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### **Model for investment agreements – general review**

Please find enclosed a draft new Norwegian model for agreements on promotion and protection of investments (investment agreements), with a document describing the background for the work on the model agreement and the individual provisions of the draft.

The main reason for concluding investment agreements is to protect Norwegian investments abroad, particularly in countries where the political and economic situation is unstable, and to ensure that Norwegian enterprises are able to compete on an equal footing with enterprises from other countries. It is also an important consideration that the agreements are meant to promote investments in developing countries, thereby contributing to economic development in these countries.

Norway has not concluded this kind of agreement since the middle of the 1990s, because such agreements also provide protection to foreign investments in Norway, and there has been uncertainty concerning the potential effects in Norway of concluding new such agreements.

The consequence of Norway not concluding investment agreements is that in many places Norwegian investors enjoy lower levels of protection than competitors from other countries against unreasonable interventions by host countries. The lack of agreements may also entail that Norwegian enterprises are reluctant to invest in countries with a high political risk, and therefore do not contribute to wealth creation and development of infrastructure, etc. in countries that welcome Norwegian investments. This is undesirable from a development policy perspective. For many developing countries, it is important to signal a friendly attitude towards investments by concluding investment agreements, and a number of developing countries have requested bilateral investment protection treaties with Norway. Investment protection is also important in the EFTA context. The other EFTA states wish to conclude agreements concerning investment protection in connection with trade agreements.

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<sup>1</sup> Where this translation differs in meaning from the original Norwegian text, the original Norwegian text prevails.

The Government has appointed a Committee of State Secretaries in order to clarify the freedom of action for the conclusion of investment agreements. The committee has assessed advantages and disadvantages of investment protection agreements and has had the enclosed draft model agreement for future investment agreements prepared.

A model agreement is an initial position for negotiations, and remains essentially unchanged, regardless of which country one intends to negotiate with. The enclosed model agreement has been drafted with a view to negotiations with developing countries and countries with economies in transition.

Investment agreements can be concluded as independent agreements or as investment chapters in trade agreements. The model agreement has been prepared to form the basis of both bilateral investment treaties and the investment chapter of EFTA trade agreements (and any bilateral trade agreements negotiated externally to the EFTA cooperation).

A traditional bilateral investment treaty (BIT) may provide the potential for a development in law where the state is deemed to have tied its regulatory authority on its own territory. The right of states to exercise legitimate authority has therefore been a central factor in the work on a new Norwegian model agreement. In order to meet the authorities' need to regulate, the draft model agreement contains provisions that emphasize the legitimacy of states' general legislative authority, exercise of authority and political freedom of action in their own territory. Introductory paragraphs describing the intentions underlying the agreements and their purposes also emphasize such considerations. Furthermore, the draft model agreement gives both states the opportunity to make reservations from the provisions concerning non-discrimination (national treatment and most favoured nation treatment), and the model agreement thus allows for national legislation involving discrimination of foreign investors and their investments. Norway will need to make such reservations, for example in the fishery sector and the energy sector.

Ensuring that investors receive the best possible protection has naturally been an important consideration in drafting the agreement. This consideration is not always compatible with the regard for the host country's freedom to regulate. Any impairment of investment protection in relation to the traditional agreements may make the agreements less significant to Norwegian investors wanting protection in the other country. In connection with this, economic interests have been weighed against a number of other important social considerations, including resource administration and the environment, in a collective assessment of advantages and disadvantages for Norway of concluding new investment agreements. In order to conduct a satisfactory environmental protection policy, it is of decisive importance that national authorities have a right to employ effective instruments relevant to meet the needs dictated by environmental problems at any given time. Freedom of action and flexibility in the use of instruments are important over time. For the Government, it has therefore been a primary consideration to ensure that investment agreements are drafted in such a way that they do not limit the freedom of action of the environmental protection authorities in providing national instruments for protection of the external environment.

The question of corporate social responsibility (CSR) has also been discussed in connection with the drafting of the model agreement. The draft contains an article providing that the parties to the agreement shall make efforts to ensure that their investors comply with the OECD guidelines for multinational companies and that they become members of the UN Global Compact. On several other points, the agreement seeks to safeguard important social considerations. The agreement includes a prohibition against the host country's reduction of important standards in order to attract investments and includes provisions in the preamble referring to a number of basic principles normally included in CSR guidelines. Compliance with national legislation is also a requirement. There is furthermore agreement that the Joint Committee shall have the authority to consider questions associated with the social responsibility of investors, etc. Moreover, the Government is working on a plan of action on corporate social responsibility, and the result of this work will also be taken into consideration in the formulation of future investment agreements.

In drafting the model agreement, particular consideration has been given to the intention that any investment agreements concluded by Norway shall be international instruments that contribute to development in developing countries at the same time as they meet the needs of Norwegian foreign investors for protection. Development is to a large extent dependent on private investments, as we have seen in countries such as Korea, India and China, where private investments have contributed to the achievement of considerable growth. The involvement of Norwegian enterprises in developing countries is therefore both positive and important. The Government wishes to facilitate increased investment, a greater number of establishments and more trade in our partner countries.

An important question is how disputes under investment agreements shall be resolved. The model agreement contains provisions on dispute settlement between parties to the agreement (the investor's country of origin and the host country), so-called state-state dispute settlement. In addition, the draft provides the investor with the unconditional right to bring any dispute with the host country before an international arbitration tribunal. That this right is unconditional means that it is not dependent on the individual consent of the host country. The right to investor-state dispute settlement has been given thorough consideration in the work on the model agreement. The topics that have particularly been focused on in this assessment are investors' needs, risk of future legal action and the practice of the arbitration tribunals. An agreement without provisions concerning investor-state dispute settlement has little economic or functional value to the investors.

We particularly invite commenting bodies representing commerce and industry to provide feedback concerning what, if any, significance these agreements have for localization of investments. Will the presence of an investment agreement be an argument when considering investment in another country (developing countries or countries with economies in transition)? In such case, how much significance will this have? Another topic is the channelling of investments. Would, for example, channelling investments through subsidiary companies in countries with investment agreements be considered if Norway does not have such agreements? Are investment agreements viewed as providing genuine protection against political risk in connection with foreign investments? Is the model agreement considered to be a suitable instrument for whatever needs commerce and industry have? We would also

appreciate feedback if there are specific countries with which it would be seen as desirable for Norway to conclude investment agreements.

The draft model agreement contains provisions concerning investor's *market access* (for example that investors shall be given national treatment on establishment) and *protection* when the investments have been made (for example against expropriation without compensation). The traditional bilateral investment treaties (BITs) did not contain provisions concerning market access. Agreements that include both elements are a more recent phenomenon with relatively little prevalence. It is uncertain whether this type of provision will result in any real improvements in investors' market access; the lists of exceptions will reflect the level of liberalization on conclusion of agreements, and provision is made for introducing exceptions to future regulation (for more information concerning this, see the annex to the agreement). The market access provisions will involve considerable and complex efforts by the administrations of countries party to the agreement, and these provisions may give rise to unintended consequences if necessary exceptions are forgotten when drawing up the lists of exceptions. The exceptions may moreover result in more limited protection of investors after investments have been made, because the host country may have excepted entire sectors. We therefore particularly ask commenting bodies representing commerce and industry to consider whether there will be a need for provisions concerning market access in future Norwegian agreements.

We also ask the commenting bodies with special competence in issues regarding developing countries to provide feedback on whether they consider the model agreement as capable of being a suitable instrument for increasing investments between developing countries and developed countries.

We ask in general that feedback be as specific as possible.

The draft has been through a round of ministerial consultations, and input from the ministries has been taken into account.

After the consultations, the Government will consider whether Norway is to negotiate investment agreements on the basis of the model agreement with any amendments deriving from input from the consultations.

The enclosed model agreement is in English. The request for comments and other annexes are in Norwegian, but will be published in English on the Ministry's website as soon as the translation is available. The model agreement will be translated into Norwegian and made available as soon as the translation is available.

We request that comments be submitted **by Friday 28 March 2008** to the Ministry's e-mail address ([postmottak@nhd.dep.no](mailto:postmottak@nhd.dep.no)) with copies to Margrethe R. Norum ([mir@nhd.dep.no](mailto:mir@nhd.dep.no)) and Tanja Dannevig ([tad@nhd.dep.no](mailto:tad@nhd.dep.no)).

Yours sincerely

Morten Berg (by authority)  
Director General

Erik A. Underland  
Acting Deputy Director General

## **Address list**

Ministry of Labour and Social Inclusion  
Ministry of Children and Equality  
Ministry of Finance  
Ministry of Fisheries and Coastal Affairs  
Ministry of Government Administration and Reform  
Ministry of Defence  
Ministry of Health and Care Services  
Ministry of Justice  
Ministry of Local Government and Regional Development  
Ministry of Culture and Church Affairs  
Ministry of Education and Research  
Ministry of Agriculture and Food  
Ministry of the Environment  
Ministry of Petroleum and Energy  
Ministry of Transport and Communications  
Office of the Minister  
Ministry of Foreign Affairs

A/S Norske Shell  
Abelia – Association of Norwegian ICT and Knowledge-based Enterprises  
Advokat Per Christian Nordtømme  
Aker ASA  
Aker Kværner ASA  
Aker Yards ASA  
Amnesty International Norway  
AON Grieg AS  
Attac Norway  
Bedriftsforbundet (Federation of small and medium-sized enterprises)  
Brønnøysund Register Centre  
Central Union of Marine Underwriters – CEFOR  
Centre for European Law, Faculty of Law, University of Oslo  
Confederation of Norwegian Business and Industry  
Confederation of Norwegian Commercial and Service Enterprises  
Confederation of Vocational Unions  
ConocoPhillips Norge  
Coop Norge AS  
Department of Private Law, Faculty of Law, University of Oslo  
Department of Public and International Law, Faculty of Law, University of Oslo  
Det Norske Veritas  
Directorate of Customs and Excise  
DNB NOR ASA  
Eksportfinans ASA  
Elkem AS  
ENI Norge AS  
Esso Norge AS  
Faculty of Law, University of Bergen  
Faculty of Law, University of Tromsø

Federation of Norwegian Coastal Shipping  
Federation of Norwegian Industries  
Federation of Norwegian Professional Associations  
Felleskjøpet Agri  
Forum for Environment and Development  
Fridtjof Nansen Institute  
GE Money Bank  
GIEK  
Handelskampanjen (the Trade Campaign)  
ICC Norway; International Chamber of Commerce  
ICT Norway  
Innovation Norway  
Institute of Applied Social Science (FAFO)  
INTSOK - Norwegian Oil and Gas Partners  
Jotun A/S  
Kommunal landspensjonskasse (mutual fund owned by Norwegian municipalities)  
Kredittilsynet (Financial Supervisory Authority of Norway)  
Leif Høegh & Co Shipping A/S  
Lidl Norge NUF  
Lindorff AS  
MENON Business Economics  
NORAD  
NORFUND  
Norges Bank  
Norsk Hydro ASA  
Norsk investorforum  
Norske pensjonskassers forening (Association of Independent Norwegian Pension Funds)  
Norske Skogindustrier ASA  
Norsk-indisk handelskammer (Norwegian-Indian Chamber of Commerce)  
Norsk-kinesisk handelskammer (Norwegian-Chinese Chamber of Commerce)  
NORWATCH c/o The Future in Our Hands  
Norwegian Association of Lawyers  
Norwegian Association of Local and Regional Authorities (KS)  
Norwegian Bar Association  
Norwegian Centre for Human Rights  
Norwegian Competition Authority  
Norwegian Confederation of Trade Unions  
Norwegian Consumer Council  
Norwegian Directorate for Health and Social Welfare  
Norwegian Farmers' Union  
Norwegian Financial Services Association (FNH)  
Norwegian Fishermen's Association  
Norwegian Fruit and Vegetable Wholesalers' Association  
**Norwegian Government Pension Fund - Global c/o Norges Bank**  
Norwegian Hospitality Association  
Norwegian Institute for International Affairs  
Norwegian Maritime Directorate  
Norwegian Mutual Fund Association  
Norwegian Oil Industry Association

Norwegian Patent Office  
Norwegian Petroleum Directorate  
Norwegian School of Economics and Business Administration  
Norwegian School of Management, BI  
Norwegian Seafood Export Council  
Norwegian Seafood Federation  
Norwegian Shareholders Association  
Norwegian Shipowners' Association  
Norwegian Society of Investment Analysts  
Norwegian Stockbrokers' Association  
Norwegian Tax Payers' Association  
Norwegian Wholesale Grocers' Association  
Odfjell SE – Odfjell Seachem AS  
Office of the Attorney-General  
Oslo Børs ASA  
Oslo Chamber of Commerce  
Petro AS  
Petroleum Tax Office  
Reitangruppen AS  
Scandinavian Institute of Maritime Law  
Seadrill Norge AS  
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The Development Fund  
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The law firm Haavind Vislie  
The law firm Thommesen Krefting Greve Lund AS  
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Union of Norwegian Farmers and Smallholders  
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