Protection of investors against expropriation – Norway's obligations under investment treaties

By Associate Professor dr. juris Ole Kristian Fauchald and Associate Lawyer Kjersti Schiøtz Thorud

1 Introduction

Until a decade ago, Norway regarded bilateral investment treaties as instruments to protect Norwegian investors abroad. This perception changed during the negotiation of the Energy Charter Treaty (1994), a treaty that Norway has signed but not yet ratified, and the Multilateral Agreement on Investment in the context of the OECD, and with the increasing recognition that Norway was in the process of becoming subject to substantial foreign investments in a number of significant sectors. The last traditional investment protection agreement accepted by Norway was the agreement with Russia in 1995. This was the 16th such agreement accepted by Norway, not a particularly high number when compared to other countries.[1]

Since 1995, there has been a significant change in Norwegian policy concerning investment treaties. Investment issues have been moved from a bilateral context to a multilateral context, in particular to the WTO,[2] the OECD,[3] and the European Free Trade Association (EFTA).[4] Norway currently negotiates its investment treaties through the EFTA and in the form of broad agreements on economic co-operation.[5] The extent to which these agreements regulate in-

1 As an example, Germany had, as of June 1, 2005, signed 132 bilateral investment treaties.

2 Investment issues are covered by the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Investment Measures (TRIMS), and were (unsuccessfully) promoted, *inter alia* by Norway, as an issue to be addressed during the current round of Multilateral Trade Negotiations.

3 In addition to the negotiations of the Multilateral Agreement on Investment, the OECD undertook a major revision of its Guidelines on Multinational Enterprises in 2000.

4 Investment is regulated under the EFTA Convention (2001) mainly through regulation of the right of establishment, cf. Chapter IX of the EFTA Convention.

5 The agreements are reproduced on http://secretariat.efta.int/Web/legaldocuments/.

vestment varies significantly, from provisions merely indicating willingness to consider future negotiations,[6] to investment chapters containing those provisions that would generally be found in traditional investment protection treaties.[7] Negotiation of such treaties through the EFTA means that Norway has coordinated her policies on international investment issues closely with her EFTA partners, in particular Switzerland and Iceland.

We may distinguish between two perspectives from which we may approach investment agreements. One is to focus on the extent to which such agreements protect the interests of Norwegian investors in other countries. The other approach is to focus on the effects of such agreements on Norway's regulatory freedom. As Carl August Fleischer has demonstrated a significant interest in the maintenance of regulatory freedom for public authorities, in particular with a view to protecting the environment, we have chosen the latter perspective as the focus of this article. This article may be of practical interest to those who are concerned that the regulatory freedom of public authorities may be inappropriately limited by the agreements, and who seek information about the possibilities for avoiding such effects. It will also be of interest to lawyers who seek ways to challenge measures taken by public authorities on behalf of foreign investors or who advice investors. Our experience with public authorities, academia and law firms, indicates that there is little awareness of the possible implications of investment treaties for Norway's regulatory freedom.

There are a number of issues that could have been addressed in the context of investment agreements, ranging from general rules on fair and equitable treatment of investors to specific rules on movement of key personnel. The reason why we have chosen to focus on expropriation in this article is that Carl August Fleischer has worked extensively on this issue, both as an academic,[8] as advisor to the Ministry of Foreign Affairs,[9] and as member of a committee proposing amendments to the Planning and Building Act.[10]

---

6 See, *inter alia*, Article 28 of the Agreement with Jordan (2001).

7 See chapter IV of the Agreement with Singapore (2002).

8 See, *inter alia*, Fleischer, Regulering og ekspropriasjon, in *Lov og rett* (1995) p. 215.

9 He has been heading an inter-ministerial committee that has been looking into issues concerning expropriation clauses in trade and investment agreements. The results of these deliberations have not been made public.

10 See NOU 2003: 29 on Land Planning and Compensation for Expropriation (in Norwegian), where his dissenting opinion runs over pp. 137–273.

Protection of property against interferences from public authorities was initially undertaken through diplomatic protection on the basis of rules of customary international law.[11] More recently, some human rights instruments have included provisions aiming at protection of the right to property. However, such provisions have been controversial, and have thus not received universal acceptance.[12] Foreign investors have not been satisfied by the protection they enjoy for three reasons: not all countries have accepted human rights treaties protecting the right to property, the customary rule on expropriation has been unclear and controversial, and there have been few and weak mechanisms for ensuring compliance with the rules. It is of interest to note that while Article 1110 of the North American Free Trade Agreement contains a detailed and highly operative provision on expropriation,[13] similar provisions have not been included in the Agreement establishing the European Communities, the Agreement establishing the European Economic Area, or the EFTA Agreement. This is the background against which most countries, including Norway, have been negotiating investment protection agreements containing both expropriation clauses and mechanisms for investor-state dispute settlement.

A number of the bilateral treaties on general economic cooperation to

11 For a discussion of the development of a norm of customary international law, see, *inter alia*, Ian Brownlie, *Principles of Public International Law*, Sixth Edition (2003), pp. 509–512. See also Restatement (third) of Foreign Relations Law of the United States § 712 (1987), which states that: "A State is responsible under international law for injury resulting from: (1) a taking by the state of the property of a national of another state that: (a) is not for a public purpose, or (b) is discriminatory, or (c) is not accompanied by provision for just compensation."

12 See, in particular, Article 17 of the Universal Declaration of Human Rights (1948), and Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

13 Maurizio Brunetti, Recurring Themes. Indirect Expropriation in International Law, in *International Law Forum*, vol. 5 (2003) p. 150 observes "that affording foreign investors access to investor-state arbitration mechanisms that allow them to challenge, as 'expropriations' or 'measures tantamount to expropriation', regulatory measures will lead to a wave of litigation and will result in states' unwillingness or unability to regulate areas of public concern, such as health and the environment. With respect to NAFTA itself, critics assert that the dispute-resolution mechanism available under its Chapter 11 has been hijacked by private corporations seeking to broaden the definition of expropriation under international law and force State Parties to settle claims for huge amounts. Others argue, by contrast, that the inclusion of takings clauses in investment treaties and the availability of investor-state arbitration mechanisms ensure a non-discriminatory and fair treatment of foreign investors and consequently are necessary to create a favorable investment environment that benefits everyone".

which Norway is a party do not contain any provision on expropriation.[14] In the following, we shall only focus on those treaties containing expropriation clauses, even if other provisions, such as provisions on transfer, may be of interest in cases of expropriation.

The following main issues are of interest in the context of expropriation provisions contained in investment protection agreements, and will be discussed in the following: the scope of application of the provisions including the extent to which indirect expropriation fall within the scope of protection (section 3), conditions that must be fulfilled in order to be able to expropriate (section 4), requirements concerning the level of compensation (section 5), and requirements concerning procedures to be followed in cases of expropriation (section 6). In the concluding part of the article (section 7), we will identify relevant properties of investment agreements and the potential impact of these for the application of expropriation clauses. But before addressing these issues, it may be useful to take a closer look at the methodology to be applied when interpreting the agreements.

14 Article 27 of the Agreement with Turkey (1991) and Article 29 of the Agreement with Bulgaria (1993) only contain a clause opening for subsequent negotiations in undefined areas; Article 29 of the Agreement with Israel (1992) states that: "They will endeavour to accord treatment no less favourable than that accorded to domestic and foreign operators in their territories on condition that a balance of rights and obligations exists between the Parties"; Article 28 of the Agreement with Morocco (1997), Article 25 of the Agreement with Palestinian Authority (1998), Article 27 of the Agreement with Macedonia (2000) and Article 28 of the Agreement with Jordan (2001) provide for future cooperation with the aim of promoting investment; the Chapter on investment in the Agreement with Mexico (2000) is limited to transfers and promotion of investment; Article 16 of the Agreement with Croatia (2001) is limited to an obligation to enter into negotiations if a subsequent agreement provides for "better treatment with respect to any measure affecting ... investors and their investments than the treatment granted to another Party"; Article 26 of the Agreement with Lebanon (2004) calls for the establishment of a "legal framework conducive to investments between the Parties, through the conclusion by Lebanon and the EFTA States of investment promotion and protection agreements", and contains a provision on transfers in Article 27; Articles 24, 25, 27 and 28 of the Agreement with Tunisia (2004) contain provisions on fair and equitable treatment, future cooperation with a view to establishing investment agreements, and transfers. The European Free Trade Agreement (as revised in 2001) contains provisions on the right of establishment in Article 23.1, MFN treatment in Articles 23.5 and 26.3, national treatment in Article 24, and transfers in Articles 28 and 38.

2 Interpreting BITs

Since the Vienna Convention on the Law of Treaties represents a codification of customary international law regarding interpretation of treaties, the expropriation provisions in investment treaties must, in the absence of other specified rules of interpretation, be interpreted in the manner prescribed by Articles 31 and 32.[15] The wording of the clauses of investment treaties varies substantially. This raises the issue of the importance to be attributed to the specific wording of the provisions. In decisions of arbitral courts, one has paid some attention to the wording of provisions, but in general there seems to be a tendency of weighting the wording against the intention of parties and traditions of interpretation in the context of dispute settlement. Moreover, whether the wording chosen is part of a long term and consistent policy of one of the parties will also be an essential factor.[16] In addition, the wording must be addressed against the background of customary international law. It can also be noted that a number of the substantive treaty provisions have their origin in national law, and that the translation of domestic legislation into treaty provisions is a difficult process that may confuse the meaning of the provisions.[17] Hence, it seems that the clear wording of a provision of an agreement is not necessarily considered decisive when confronted with other interpretative arguments.

Another issue is which importance should be attributed to the preparatory works. The preparatory works is generally not attributed much weight as interpretative argument in international law.[18] It can be argued that in the context of bilateral agreements, for which reciprocity between the parties is of importance, one should pay more attention to the preparatory works than in cases of multilateral treaties. On the other hand, the facts that the treaties concern the rights of private parties, that preparatory works in general is unavailable,[19] and the need for predictability when investors are making investment decisions, are important arguments against attributing much weight to the preparatory

15 Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Reports, vol. 5, p. 387 at 401.

16 Emilio Agustín Maffezini v. Kingdom of Spain, ICSID Reports, vol. 5, p. 387 at 408.

17 UNCTAD, *International Investment Agreements: Key Issues*, Vol. 1 (2004), p. 236.

18 Preparatory works is classified as a "supplementary means of interpretation" according to Article 32 of the Vienna Convention on the Law of Treaties.

19 In the context of Norwegian bilateral agreements, no records of the negotiations are publicly available, and issues addressed during negotiations are rarely addressed in documents to the parliament in the context of ratification of the treaties.

works. In case law, we find some attention being paid to preparatory works, but in general they play a secondary role as interpretative arguments. Hence, there does not seem to be reasons to deviate from the general approach to the role of preparatory works taken in international law. It should be noted that the purpose has been emphasized in case law as a significant factor when interpreting investment agreements, and that the preparatory works may be significant in this context.

Finally, there is a need to clarify the role of case law when interpreting the agreements. As has been indicated above, there are a number of international rules regulating expropriation. Moreover, this is an area in which a broad range of courts and arbitral tribunals have been active. In the context of customary international law, we find cases before international arbitral tribunals and before the Iran-US Claims tribunal.[20] In the context of human rights treaties, a number of cases have been decided by the European Court on Human Rights. In the context of regional trade agreements, we find some cases having been resolved by arbitral tribunals under ICSID[21] in the context of the North American Free Trade Agreement (NAFTA). Moreover, there have been a number of disputes related to bilateral investment agreements before arbitral tribunals. These disputes have been brought before a variety of tribunals, ranging from tribunals established under the rules of ICSID to tribunals established according to agreement between the parties to the dispute, and many of the decisions remain unpublished or confidential. In addition, some domestic court decisions take into account obligations under international law, and it has been argued that general principles developed in domestic case law may be taken into account when interpreting the provisions of bilateral investment

20 The decisions of this tribunal are based on the Claims Settlement Declaration by the Government of the USA and the Government of the Islamic Republic of Iran (1981). However, this Declaration does not set clear rules on how to deal with expropriation cases, and thus leaves the tribunal a broad freedom to base its decisions on customary international law. It can be noted that Iran and the U.S. had entered into a Treaty of Amity, Economic Relations and Consular Rights (1955) containing expropriation clauses. This treaty was, however, not directly applicable in the cases considered by the Tribunal. See George H. Aldrich, What Constitutes a Compensable Taking of Property? The Decisions of the Iran-United States Tribunal, in *American Journal of International Law*, vol. 88 (1994) p. 585, who noted that the Tribunal's jurisprudence is particularly useful as it is a contemporary body of law that is committed to adhering to precedent and comprised of distinguished jurists, arbitrators, and experts in international law.

21 The International Center for the Settlement of Investment Disputes was founded by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States in 1965.

agreements.[22] We thus have a diverse range of case law from which interpretative arguments can be derived. Which categories of interpretative materials can be taken into account in a specific case and the weight to be attributed to them when interpreting expropriation clauses in bilateral investment agreements remain somewhat unclear and controversial. This issue must in general be determined on the basis of an assessment of the facts and rules of relevance to the cases in question. One example of the role of case law can be found in the Myers Case, where the tribunal assumed that the provision on expropriation in Article 1110 of the NAFTA was to be interpreted "in light of the whole body of state practice, treaties and judicial interpretations of the term 'expropriation' in international law cases".[23] In general, it seems that tribunals feel free to draw extensively on case law related to other agreements containing similar clauses.[24]

---

22 See, *inter alia*, Thomas Waelde and Abbe Kolo, Environmental Regulation, Investment Protection and "Regulatory Taking" in International Law, in *International and Comparative Law Quarterly*, vol. 50 (2001), p. 811. In this context, it is worth noting that the practice of national courts regarding expropriation provisions is influenced by the prevailing ideology and political and economic development in each country.

23 S.D. Myers v. Canada, Partial Award, 121 I.L.R. p. 72. Other examples of interest to the topic of this article include the Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA case (6 Iran-U.S. C.T.R. p. 219 at 225) where the tribunal concluded that "the Claimant is entitled under international law to compensation for the full value of the property of which it has deprived" while referring to conclusions in the Chorzòw Factory Case (P.C.I.J. Ser. A, No. 17, 1928) and in the Norwegian Shipowners Claims case (UNRIAA, vol. 1, 1922); the SPP(ME) LTD and SPP LTD v. Egypt case (ICSID Reports, vol. 3, p. 101 at 229) where the tribunal established that "it has long been recognized that contractual rights may be indirectly expropriated" with a reference to the Certain German Interests in Polish Upper Silesia case (P.C.I.J. Ser. A, No. 7, 1926), Amoco Int'l Finance Corp v. Iran case (15 Iran-U.S. C.T.R, p. 89) and Phillips Petroleum Co Iran v. Iran case (21 Iran-U.S. C.T.R, p. 79); and the Metalclad v. Mexico case (ICSID Reports, vol. 5, p. 209, at 230–231), where the tribunal referred to the Biloune et al. v. Ghana Investment Centre case (95 I.L.R. p. 183 at 207–210) when concluding that "measures, taken together with the representations of the Mexican Federeal Government, on which Metalcald relied, and the absence of a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit, amount to an indirect expropriation."

24 In the Sea-Land Service. Inc. v. Iran case (6 Iran-U.S. C.T.R. p. 149 at 163) the conclusions of the Oscar Chinn case (P.C.I.J. Ser. A/B No. 63 (1934)) is regarded as decisive for its conclusion to reject Sea-Land's argument that the State's actions had "violated Sea-Land's lawfully rights to use the Bandar Abbas and Teheran facilities and thus given rise to a claim for damages". Thomas Waelde and Abbe Kolo, Environmental Regulation, Investment Protection and "Regulatory Taking" in International Law, *International and Comparative Law Quarterly*, vol. 50 (2001), p. 811 emphasize the role of case law. In this area, there seems to be a significant difference between the approach of authors with a common law background and authors with a civil law background.

3 The scope of protection

3.1 GENERAL ISSUES

Bilateral investment treaties contain broad definitions of the term "investment".[25] A recent example is the definition contained in Article 37(b) of the agreement with Singapore (2002):

> "any kind of asset and particularly: (i) movable and immovable property as well as any other rights in rem, such as mortgages, liens, and pledges; (ii) shares, bonds and debentures or any other forms of participation in a company; (iii) claims to money or to any performance associated with a company having an economic value; (iv) intellectual property rights, technical know-how and goodwill; (v) business concessions conferred by law or under contract, including any concession to search for, cultivate, extract or exploit natural resources."

Similar definitions can be found in almost all agreements of interest here. It is generally recognized under customary law that investment protection "extend to any right which can be the object of a commercial transaction, i.e., freely sold and bought, and thus has a monetary value".[26] It is generally recognized that the protection extends to contractual rights.[27] One question that can be raised is whether it would be a condition for an investment to be protected that it can be subject to a commercial transaction. For many permits or concessions, such transactions will not be possible. There seems to be no clear distinction drawn between transferable and non-transferable permits in case law, and both the wording of the agreements and case law confirm that protection may be extended to non-transferable permits.[28]

Against this background, it can be asked whether and to what extent protec-

25 Tax matters are generally exempted from the agreements, mainly on the ground that tax issues are or should be regulated under separate bilateral agreements.

26 Cf. Amoco International Financial Corporation v. Islamic Republic of Iran, 15 Iran-U.S. C.T.R., p. 189 at 220.

27 See the Norwegian Shipowners' Claims case, UNRIAA, vol 1. 1922, p. 307 at 325; and SPP(ME) LTD and SPP LTD v. Egypt, ICSID Reports, vol. 3, p. 101, at 226 and 228.

28 Cf. *inter alia* Article 1(1)(v) of the Agreement with Malaysia (1984) which extends protection to "business concessions under public law including concessions to search for, cultivate, extract or exploit natural resources, as give to their holder a legal position of some duration", and Robert Azinian, Kenneth Davitian and Ellen Baca v. the United Mexican States (ICSID Reports vol. 5, p. 269) in which a "concession contract" to carry out collection and treatment of wastes was considered as falling within the scope of NAFTA Chapter 11.

tion against expropriation extends to investments that cannot be subject to commercial transactions. One definition of expropriation states that it is "a compulsory transfer of property rights".[29] This seems to be a generally recognized definition, and could arguably be regarded as indicating that protection should only extend to commercially transferable rights. However, clauses on expropriation in investment agreements generally refer to "investments" and not to property rights. Hence, these clauses must be regarded as referring to all forms of investments covered by the agreements regardless of whether the investment can be subject to a commercial transaction.

3.2 INDIRECT EXPROPRIATION

The question to be addressed here is to which extent expropriation clauses extend protection beyond ordinary expropriation, defined as a "compulsory transfer" of the investment. There is no universal agreement on whether customary international law extends protection beyond ordinary expropriation, to what will be labelled in the following as "indirect expropriation".[30] Arbitral tribunals have concluded that investment is protected against certain forms of indirect expropriation under customary international law. The U.S.-Iran Claims Tribunal has made significant contributions by awarding compensation to investors in cases of indirect expropriation.[31]

If we take a look at the expropriation clauses of Norway's bilateral agreements, we find the following wording related to indirect expropriation: "de-

29 Amoco International Financial Corporation v. Islamic Republic of Iran, 15 Iran-U.S.C.T.R. p. 189 at 220.

30 Other concepts used are "de facto expropriation", "regulatory takings", "measures tantamount to expropriation", "creeping expropriation", etc. For a discussion of some key concepts and the relationship between them, see UNCTAD, *International Investment Agreements: Key Issues*, Vol. 1 (2004), p. 238.

31 It can be discussed whether these cases are based on customary international law or the Claims Settlement Declaration by the Government of the USA and the Government of the Islamic Republic of Iran (1981), which in Art. II:1 defines indirect expropriation as "other measures affecting property rights". See, *inter alia*, International Technical Product Corporation v. Islamic Republic of Iran (9 Iran-U.S. C.T.R. p. 206 at 240–41): "Where the alleged expropriation is carried out by way of a series of interferences in the enjoyment of the property ... The point at which interference ripens into a taking depends on the circumstances of the case and does not require that legal title has been transferred."

See also Veijo Heiskanen, The Contribution of the Iran-United States Claims Tribunal to the Development of the Doctrine of Indirect Expropriation, in *International Law Forum*, vol. 5 (2003) p. 176.

priving",[32] "other measures having same effect",[33] "either *de jure* or *de facto*, measures of expropriation or nationalisation",[34] "depriving, directly or indirectly",[35] "similar measures",[36] and "other measures having a similar effect"[37]. The wording of these clauses indicate that the degree to which the provisions extend protection to indirect expropriation varies. It can be argued that there is a major difference between measures having the *same* effect as expropriation and measures having *similar* effects, and between "depriving" and "depriving, directly or indirectly". The question remains, however, whether the differences in wording will be attributed much weight in specific cases. The general impression from case law is that tribunals start out by asking whether indirect expropriation is covered by the clause in question. Here, the wording of the provision would be an essential factor. However, once it is concluded that indirect expropriation is covered, little attention is paid to the wording but rather to general considerations concerning the effect of the public measure and the general approach taken in cases of indirect expropriation under international law.[38] The wording of the provisions leaves little doubt that indirect expropriation falls within the scope of protection of the provisions.

Against this background, two doctrines have emerged on the basis of case law; one that favors the interest of foreign investors, the "sole effect" doctrine, and one that favors the right of the state to regulate, the "police powers" doctrine. According to the sole effect doctrine, the crucial factor in determining

32 Article 6 of the Agreement with Sri Lanka (1985).

33 Article VI of the Agreement with Poland (1990) and Article IV of the Agreement with Romania (1991).

34 Article 42 of the Agreement with Singapore (2002).

35 Article 6 of the Agreement with Malaysia (1984); Article VI of the Agreement with Madagaskar (1966) – this Agreement exists only in a French version: "toutes measures de dépossession directes ou indirectes"; and Article 6 of the Agreement with Chile (1993).

36 Article V of the Agreement with China (1984).

37 Article VI of the Agreement with Hungary (1991); Article V of the Agreements with the Czech and Slovak Republics (1991); Article VI of the Agreement with Indonesia (1991, no longer in force), Article VI of the Agreement with Estonia (1992); Article VI of the Agreement with Latvia (1992), Article VI of the Agreement with Lithuania (1992); Article 6 of the Agreement with Peru (1995); and Article 6 of the Agreement with Russia (1995).

38 In the Harza Engineering Co. v. Iran case (1 Iran-U.S. C.T.R. p. 499 at 504) the Iran-US Claims Tribunal used the wording as a starting point, but referred to the broad meaning the phrase was given under international law. This approach can be found throughout the practice of the Iran-US Claims Tribunal, cf., *inter alia*, American International Group. Inc v. Iran (4 Iran-U.S. C.T.R. p. 96 at 101); Sea-Land Service. Inc. v. Iran (6 Iran-U.S. C.T.R. p. 149 at 168); and Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA (6 Iran-U.S. C.T.R. p. 219 at 223, 225).

whether an indirect expropriation has occurred is the effect of the governmental measures for the property owner. The "police powers" doctrine, on the other hand, also considers the purpose and the context of the measure.[39]

The clauses cited above can all be interpreted to refer to the effects of the contested measure, even if this is not made explicit in most of the provisions.[40] The question of the effect of the measure can be seen from at least three perspectives, namely from the perspective of the person suffering the measure, from the perspective of the beneficiary of the measure, and from the perspective of public authorities.

It is clear from case law that the first perspective is relevant and should be attributed considerable weight when determining whether a measure is covered by the clauses.[41] In cases where the effect of the measure is the effective

39 See Maurizio Brunetti, Recurring Themes. Indirect Expropriation in International Law, in *International Law Forum*, vol. 5 (2003) pp. 150–151, who concludes that "neither of the two doctrines can be characterized as dominant or as representing the mainstream of international thinking, though the more recent jurisprudence of arbitral tribunals seems to shift the focus of the analysis away from the context and the purpose to the effect on the owner".

40 In the S.D. Myers Inc. v. Canada case (121 I.L.R. p. 72 at 123, para. 285) the tribunal stressed that "the real interest involved and the purpose and effect of the government measure" rather than "technical or facial considerations" should be decisive. See also Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA, 6 Iran-U.S. C.T.R. p. 219 at 225–226: "While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact."

41 Cf., *inter alia*, Harza Engineering Co. v. Iran case (1 Iran-U.S. C.T.R. p. 499 at 504) where the tribunal noted that: "The Claimant is correct in asserting that a taking of property may occur under international law, even in the absence of a formal nationaliazion or expropriation, if a government has interfered unreasonably with the use of property"; Starrett Housing Corporation v. Iran (4 Iran-U.S. C.T.R. p. 122 at 154): "... measures taken by a state can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the state does not purport to have expropriated them and the legal title to the property formally remains with the original owner"; the Metalclad v. Mexico case (ICSID Reports, vol. 5, p. 209 at 230): "Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of the title in favor of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State". For a discussion of the Metalclad-award and its legal and political implications, see Alain Prujiner, L'expropriation, l'ALENA et l'affaire Metalclad, in *International Law Forum*, vol. 5 (2003) p. 205.

elimination of the value of the investment to the investor, tribunals are likely to come to the conclusion that compensation shall be paid.[42] Moreover, impacts of the measure on investors' control over or return from the investment have in many cases led Iran-U.S. Claims Tribunal to the conclusion that compensation should be paid.[43] In this context, it can also be asked whether the legitimate expectations of the investor can be taken into account. Case law seems to indicate that where the investor had legitimate expectations that the investment was protected against the measure in question, this is a significant argument in favor of concluding that there is indirect expropriation.[44] This approach seems to be based on the reasoning that there exists some kind of "contractual" relationship between the host state and the investor, whereby the state has given the investor legitimate expectations through a range of general or individual acts. Moreover, the predictability of the measure for the investor is an issue of relevance.[45]

Whether the two other perspectives can be taken into account and the weight to attribute to them is far less clear. In relation to the second perspective, the question would in particular be whether one can take into account the extent to which the rights related to the investment have been transferred to the beneficiary of the measure (who may or may not be public authorities). In this context, one could argue that both direct and formal transfer of rights, and the extent to which the measure indirectly and informally forces the inves-

42 See Foremost Teheran Inc v. Iran (10 Iran-U.S. C.T.R. p. 230, at 243–253) where the Tribunal found that the Government, by stating that no payments of declared dividends to foreign shareholder could be made, had taken Foremosts' property.

43 See ITT Industries v. Islamic Republic of Iran (2 Iran-U.S. C.T.R. p. 348 at 352) where the tribunal held in that when Iran ousted existing members of a board of directors elected by shareholders and appointed a new board, it sufficiently deprived an American corporation's ownership in the company as to amount to an expropriation. See also Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA (6 Iran-U.S. C.T.R. p. 219); Sedco. Inc. v. Iran (9 Iran-U.S. C.T.R. p. 248 at 277–278): "The appointment of conservators, managers or inspectors, often has been regarded as a highly significant indication of expropriation because of the attendant denial of the owner's right to manage the enterprise."; and Payne v. Iran (12 Iran-U.S. C.T.R. p. 3 at 7–11).

44 See Francisco Orrego Victùna, Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual under International Law in a Global Society, in *International Law Forum*, vol. 5 (2003) p. 188.

45 In the Metalclad v. Mexico case (ICSID Reports, vol. 5, p. 209 at 230) it was made clear by the tribunal that "these measures, taken together with the representations of the Mexican federal government, on which Metalclad relied, and the absence of a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit, amount to an indirect expropriation." See also Starrett Housing Corporation v. Iran (4 Iran-U.S. C.T.R. p. 122 at 154).

tor to transfer the whole investment or parts of it to the beneficiary may be of relevance.

If we look at the wording of the provisions, it can be argued that in relation to clauses which require the effect of the measure to be equivalent to that of ordinary expropriation, one should take into account the effects of the contested measures for beneficiaries. This would in particular be the case for provisions concerning measures having the "same effect" as expropriation. Moreover, it could be argued that references to "de facto expropriation" and measures having "similar effects" to expropriation should be interpreted to cover these perspectives, although the margin of discretion for the tribunal may be regarded as broader. On the other hand, provisions referring to "depriving" or "depriving, directly or indirectly" seem to indicate that the measure should primarily, or perhaps solely, be considered from the perspective of the person subject to expropriation.

The next question is whether such approaches find support in case law or among theorists. The general impression is that a main and possibly exclusive focus has been on the effects of the contested measure for the investor and not for the beneficiary.[46] This seems to be a consequence of the fact that case law mainly has focused on the wording of provisions in the context of determining whether indirect expropriation is covered, and that the wording has not been regarded as important when determining whether the investor enjoyed protection in the specific case. It may also be a result of the fact that cases have generally considered a limited range of expropriation clauses containing approximately the same wording. However, if the perspective of the beneficiary or public authorities is not considered relevant under clauses referring to "directly or indirectly ... expropriate" and "measure tantamount to ... expropriation", cf. Article 1110 of the NAFTA, it can be argued that it would be unlikely to be considered relevant under the provisions contained in Norwegian bilateral agreements.

The third perspective, i.e. the effects for public authorities, concerns the role that can be attributed to the purpose for which the contested measure has been taken. The question is whether there is room for taking into account the purpose of the measure when determining whether the measure should be re-

46 See, *inter alia*, Michael G. Parisi: Moving toward transparency? An examination of regulatory takings in international law, *Emory International Law Review*, vol. 19 (2005), p. 389, who emphasizes the "factual inquiry regarding the level of interference caused by government action".

garded as indirect expropriation. Expropriation is generally done for the purpose of transferring the investment to a person who will fulfill a public interest when disposing of the investment. Questions of indirect expropriation come up where public authorities force investors to manage their investments in accordance with public interests.

It can be argued that there is a fundamental difference between those expropriation clauses that balance the right to compensation against a right to regulate, and expropriation clauses that contain no such balancing clause. We do in general not find clauses on the right to regulate in bilateral investment agreements of relevance to Norway,[47] but we find such a clause in the Article 1 of the First Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). Against this background, it can be argued that, contrary to the European Human Rights Convention, the expropriation clauses of bilateral agreements do not establish the possibility of weighting the effects of a measure for the investor against the public purposes for which the measure is taken. On the other hand, it can be argued that the real underlying issue in cases of indirect expropriation is to find a balance between the rights of an investor to be compensated and the freedom to regulate that may be regarded as a precondition for a well functioning society.[48] According to this latter approach, it can be argued that one should balance arguments in favor of placing the costs of the measure on the investor against arguments in favor of placing the costs on public authorities. Moreover, it can be argued that regulatory freedom in relation to investments belong to the core of states' sovereignty, and it can be observed that this has had an impact how one has approached the issue of indirect expropriation under customary international law in case law.[49] However, case law expressly indicates that less weight should be given to the purpose of the measure than to the effects of the measure for the investor.[50]

Against this background, it can be concluded that the wording of the expropriation clauses points in the direction of emphasizing the first two perspectives, i.e. the effects of the measure for the investor and the beneficiary. The

47 The closest we get to a "right to regulate" provision is Article 43 of the Agreement with Singapore, which states that: "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure consistent with this Chapter that is in the public interest, such as measures to meet health, safety or environmental concerns."

48 See Maurizio Brunetti, Recurring Themes. Indirect Expropriation in International Law, in *International Law Forum*, vol. 5 (2003) p. 150.

wording thus indicates that little room is left for taking into account effects for public authorities, and this seems to be confirmed by case law.[51] Moreover, we may conclude that the determination of whether the measure amounts to indirect expropriation should be based on an overall assessment of the measure and on a case-by-case basis. It can also be observed that the measure in question must be attributable to the state or public authorities.[52]

The S.D. Meyers Inc. v. Canada case,[53] which is regarded as a case supporting the "police power" doctrine, may serve to illustrate the case-by-case approach and the distinction between indirect expropriation and measures that do not generate a right of compensation. The question was whether a Canadian export prohibition of PCB could be regarded as an act of expropriation. The measure prevented S.D. Meyers from disposing of its PCB in its factories in the U.S. The tribunal emphasized the fact that Canada did not gain any economic advantage, that no transfer of property rights existed, and that the prohibition was temporary. Moreover, it found that "the general body of precedent usually does not treat regulatory action as amounting to expropriation", and concluded that:

> "Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference. The distinction between expropriation and regulations screens out most potential cases of complaints concerning economic intervention by a State and

49 See Michael G. Parisi: Moving toward transparency? An examination of regulatory takings in international law, *Emory International Law Review*, vol. 19 (2005), pp. 398–99: "In sum, the international regulatory takings paradigm does not seem to provide any substantial protection for claimants seeking compensation. This is attributable to the overriding role of the doctrine of State sovereignty. The standard derived from international takings jurisprudence may be similar to U.S. takings law, as 'international courts and tribunals have demonstrated a propensity to deny expropriation claims once a legitimate state interest has been proven, regardless of the loss that was incurred by the claimant.'" See also J. Martin Wagner, International Investment, Expropriation and Environmental Protection, *Golden Gate University Law Review*, vol. 29 (1999), p. 465.

50 See, *inter alia*, Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA (6 Iran-U.S. C.T.R. p. 219 at 224–25): "The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact."

51 Thomas Waelde and Abbe Kolo, Environmental Regulation, Investment Protection and "Regulatory Taking" in International Law, *International and Comparative Law Quarterly*, vol. 50 (2001), p. 811, come to a different conclusion. They propose, on the basis of case law from a broad range of sources, including U.S. courts, that the issue should be addressed on a case-by-case basis as a question of finding a balance between legitimate expectations of the investor and the legitimate interests of public authorities in being able to regulate freely within the area.

52 Cf. International Technical Products Corp. v. Iran (9 Iran-U.S. C.T.R. p. 206 at 238–239).

53 121 I.L.R. p. 72 at 123, para. 285.

reduces the risk that governments will be subject to claims as they go about their business of managing public affairs."

Hence, the measure did not amount to a measure "tantamount to expropriation", cf. Art. 1110 of NAFTA.[54]

Against this background, it may be asked to what extent the expropriation clauses under the bilateral agreements afford protection in cases where protection would not be afforded under Norwegian law. The protection of investors under Norwegian law follows from Section 105 of the Constitution which is limited to cases of ordinary expropriation, Article 1 of the First Additional Protocol to the European Human Rights Convention which has been incorporated as Norwegian law through Act no. 30 of 1999, domestic customary law extending the right to compensation to a limited range of cases of indirect expropriation,[55] and certain laws in specific areas extending protection to other cases of indirect expropriation.[56] Nevertheless, it must be concluded that the protection offered to investors under BITs extends to more cases of indirect expropriation than under Norwegian law.

4 Conditions for deciding to expropriate

The bilateral agreements entered into by Norway contain the following conditions that must be fulfilled before public authorities take a measure of expropriation: the expropriation shall be done for the "public interest"[57] or "public or national interest",[58] it shall "not be discriminatory",[59] and it shall be made against compensation.[60] The latter of these requirements will be addressed

54 See also the Azinian v. Mexico case (ICSID Reports, vol. 5, p. 269 at 293–294) which concerned the annulment of a "concession contract" to establish a landfill by municipal authorities, and where compensation was not awarded under Art. 1110 of the NAFTA; and the Sedco Inc, v. Iran case (9 Iran-U.S. C.T.R. p. 248, at 276–279) where the Tribunal noted that it was "an accepted principle in international law that a State is not liable for economic injury which is a consequence of bona fide 'regulation' within the accepted police powers of states".

55 An overview of the current status of case law of relevance can be found in Frode Innjord: Erstatning for rådighetsreguleringer etter naturvernloven, in *NOU 2004: 28 Annex 6*, pp. 718–745.

56 For example in relation to nature reserves, Section 20 of the Nature Protection Act, no. 63 of 1970.

57 The agreements with Madagaskar ("intérêts publics"), Malaysia, China, Sri Lanka, Poland, Hungary, the Czech and Slovak Republics, Romania, Indonesia (no longer in force), Estonia, Latvia, Lithuania, Peru, Russia, and Singapore.

58 The Agreement with Chile.

separately in section 5. The public interest and non-discrimination requirements are generally regarded as basic requirements under customary international law, and there seems to be no reason to assume that any of the clauses of Norway's bilateral treaties should be interpreted as going beyond the requirements under customary international law.

As to the requirement that the expropriation shall be done for the public interest, the question is whether the authorities' freedom to expropriate to the benefit of private parties or to the benefit of commercial interests of public institutions is restricted beyond what is allowed under Norwegian legislation.[61] In general, a host country's determination of whether a measure is in the public interest is respected.[62] Hence, we may assume that this is not a requirement that will create problems for Norwegian authorities.

As to the requirement that expropriation shall not be discriminatory, the main questions are which investors should be compared and which factors should be taken into account when determining whether the relevant investors have been subject to discriminatory treatment. These are complex questions that cannot be extensively addressed in the context of this article.[63] Moreover, the agreements generally contain several non-discrimination clauses, and the relationship between these clauses is an unresolved issue. Finally, there have

59 The agreements with Madagaskar, Malaysia, China, Sri Lanka, Poland, Hungary, the Czech and Slovak Republics, Romania, Indonesia (no longer in force), Estonia, Latvia, Lithuania, Chile, Peru, Russia, and Singapore.

60 In addition, Article VI of the Agreement with Madagaskar contains a somewhat peculiar provision, stating that measures of expropriation shall not be "contraires à un engagement spécifique". The term "engagement" refers to a contractual relationship, presumably between the investor and the host State. This provision thus prohibits expropriation in cases where the government through a contractual obligation has promised not to expropriate the investment. Whether such protection may extend beyond clear contractual obligations is unclear, but the reference to a specific contractual relationship indicates that one may only extend the protection in exceptional cases.

61 See the Act of 23 October 1959 on Expropriation, which, for example, opens for expropriation for the purpose of building hotels or developing aquaculture.

62 See UNCTAD, *International Investment Agreements: Key Issues*, Vol. 1 (2004), pp. 239 and 243.

63 See UNCTAD, *International Investment Agreements: Key Issues*, Vol. 1 (2004), p. 239: "Progressively however, as the issue of regulatory takings becomes prominent, any taking that is pursuant to discriminatory or arbitrary action, or any action that is without legitimate justification, is considered to be contrary to the non-discrimination requirement, even absent any singling-out on the basis of nationality." For a general analysis of non-discrimination issues in the context of international economic law, see Ole Kristian Fauchald, Flexibility and Predictability Under the World Trade Organization's Non-Discrimination Clauses, in *Journal of World Trade*, vol. 37 (2003), p. 443.

been few cases discussing non-discrimination in investment disputes, and the standards to be applied are consequently unclear and open to debate. For these reasons, we have come to the conclusion that the issue of non-discrimination cannot be addressed properly within the scope of this article.

5 Issues related to compensation

5.1 GENERAL INTRODUCTION

There are four main issues related to compensation: determining the level of compensation, requirements concerning timing of the payment of compensation, determining interest rates, and securing freedom to transfer the compensation out of the country. The emphasis in the following will be on the level of compensation, as this is the most interesting issue in relation to Norwegian legislation. Requirements concerning interest rates are unlikely to create any problems, and will therefore not be addressed.[64] The rules on the timing of payment of compensation and the freedom of transfer will be briefly addressed in Sections 4.3 and 4.4 respectively.

Many of the agreements make use of the general formula "prompt, adequate and effective compensation",[65] or as it is generally referred to, the "Hull Formula".[66] This formula, which has been promoted by a number of western

64 The agreements with Madagaskar, Malaysia and Singapore do not contain any clause on interest rates. Of the agreements that contain such clauses, most agreements refer to the London Inter-Bank Offered Rate (LIBOR) for the appropriate currency (agreements with Poland, the Czech and Slovak Republics, Hungary, Romania, Estonia, Latvia, Lithuania), some agreements contain a reference to the "commercial rate" (agreements with Sri Lanka, Indonesia (no longer in force), Chile, Peru, and Russia), while the Agreement with China does not specify the rate of interest. For most agreements, the calculation of interest shall generally start at the date of expropriation (agreements with the Czech and Slovak Republics, Indonesia (no longer in force), Estonia, Latvia, Lithuania, Chile, and Peru). However, the Agreement with Russia extends the deadline to two months from the date of expropriation, and the Agreement with Poland extends the deadline to "the first day following [a period as normally required for the completion of transfer formalities, in any case not exceeding three months]". The cut-off date is the date of payment.

65 The agreements with Malaysia, Sri Lanka, Romania, Estonia, Latvia, Lithuania, Chile, Peru, and Russia. See also Article VI of the Agreement with Madagaskar which uses a somewhat different formula: "effective et adéquate conformément au droit des gens".

66 The formula, hereinafter referred to as the Hull Formula, got its name from the use of the formula in a letter by a former Secretary of States of the U.S. sent to the Government of Mexico, cf. J. Kunz, The Mexican Expropriations, in *New York University Law Quarterly Review*, vol. 17 (1940) p. 327.

countries, can be regarded as a reference to the general standard established in customary international law. However, this standard is subject to a certain controversy, and is in particular contested by certain developing countries.[67] The formula as such is fairly flexible and does not clearly indicate the level of compensation. The requirements that the compensation be "prompt, adequate and effective" have in general been specified in the expropriation clauses of the agreements. Hence these elements of the formula will only be examined to the extent that they have not been specified.

5.2 Level of compensation

We may distinguish between three main questions that arise in the context of determining the level of compensation; the basis for determining the value of the investment, whether there is a basis for reducing the value of the investment (for example for value added due to public investment), and at what time should the value be determined (for example at the date of expropriation or at the date when the plans to expropriate became public knowledge). As to the first question, one may distinguish between a wide range of starting points for determining the value of an investment, e.g., market value, exploitation value, value based on current use, value based on costs of replacement, and value based on investment costs. Those agreements that specify the value to be used refer to the "market value" of the investment. This is the case for most of the Norwegian bilateral agreements.[68] Most of the other agreements refer to the "value" of the investment.[69] The Agreement with Singapore merely refers to "compensation", and the Agreement with Romania contains a more elaborate provision.[70]

Against this background, it seems appropriate to assume that the general starting point for assessing the value of the investment should be the market value. Under agreements where there only is a reference to market value, we may assume that there will be a strong presumption in favor of basing the compensation on the market value. This does also seem to be the case for the

67 See, *inter alia*, UNCTAD, *International Investment Agreements: Key Issues*, Vol. 1 (2004), pp. 239–240.

68 The agreements with Poland, Hungary, the Czech and Slovak Republics, Indonesia (no longer in force), Estonia, Latvia, Lithuania, and Chile.

69 The agreements with Madagaskar, Malaysia, China, Sri Lanka, Peru, and Russia.

70 "... in accordance with recognized principles of valuation, such as the market value of the investment ... In case that the market value cannot be ascertained, the compensation shall be determined on the basis of equitable principles taking into account, *inter alia*, the capital invested, its appreciation or depreciation, current return, replacements value and other relevant factors."

Agreement with Romania quoted above. Under agreements only referring to the value of the investment, we may assume that there may be more flexibility and that the presumption in favor of market value is less strong. It is worth mentioning that all these agreements, except for the agreements with China and Singapore, use the Hull Formula, and thus that case law on the basis of this Formula is essential for determining states' flexibility to deviate from market value. The agreements with China and Singapore might possibly provide the states with a broader margin of appreciation. Here, it remains more unclear which weight will be attributed to case law based on the Hull Formula.

A similar reasoning may be applied to the question concerning to what extent and on which grounds the level of compensation may be reduced. Issues that may arise are for example increase in value after plans to expropriate became public knowledge or value that is dependent on recent public investment in the area. As above, the agreements referring to market value must be regarded as allowing deduction only in cases in which particularly strong arguments can be advanced in favor of reducing or increasing the compensation, for example if the investor contributed to increase the value of the investment in a speculative manner and against the interests of the expropriator. Although it can be assumed that the flexibility is somewhat broader under the agreements that merely refer to the value of the investment, the possibility of reducing the compensation must be regarded as limited also under these agreements. It is likely that the clause will be construed in a way that emphasizes the value that the investment has to the investor, and this will normally not allow for deducting value added due to public investment in the area. The Agreement with Singapore will thus most likely be the only agreement under which authorities enjoy a broad freedom to reduce the compensation to be paid.

Against this background, it is of interest to take a closer look at how the determination of the value of investments has been approached in case law.[71] Initially, it can be mentioned that the general starting point is that "any award to the claimant should, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would in all probability have existed if that act had not been committed (the Status Quo ante)".[72]

71 See also Yves Nouvel, L'indemnisation d'une expropriation indirecte, in *International Law Forum*, vol. 5 (2003) p. 198.

72 The Chorsòw Factory case (Claim for Indemnity, Merits), Germany v. Poland, PCIJ Series A, No. 17 (1928) at p. 47.

The Iran-U.S. Claims Tribunal has relied extensively on the marked value of the property to the extent that it has been possible to establish a market value. It stated in the INA Corporation v. Iran case that:[73]

> "In the event of such large-scale nationalizations of a lawful character, international law has undergone a gradual reappraisal, the effect of which may be to undermine the doctrinal value of any 'full' or 'adequate' (when used as identical to 'full') compensation standard as proposed in this case. However, the Tribunal is of the opinion that in a case such as the present, involving an investment of a rather small amount shortly before the nationalization, international law admits compensation in an amount equal to the fair market value of the investment."

The Tribunal went on to define "fair marked value" as "the amount which a willing buyer would have paid a willing seller for the shares of a going concern, disregarding any diminution of value due to the nationalization itself or the anticipation thereof, and excluding consideration of events thereafter that might have increased or decreased the value of the shares".[74]

---

73 8 Iran-U.S. C.T.R. p. 373 at 378.

74 8 Iran-U.S. C.T.R. p. 373 at 375–383. It should be noted that Art. IV of the Treaty of Amity between the U.S. and Iran (1955) was attributed significant weight in many of the cases, even if it was not directly applicable, cf. footnote 20 above. See also the Sedco. Inc. v. NIOC case (10 Iran-U.S. C.T.R. p. 180 at 184–189), where the Tribunal undertook a thorough assessment of the present state of customary international law regarding the level of compensation, and concluded that the "Claimant must receive compensation for the full value of its expropriated interest in SEDIRAN, as claimed, whether viewed as an application of the Treaty of Amity or, independently, of customary international law, and regardless of whether or not the expropriation was otherwise lawful". In the Phelps Dodge Corp. v. Iran case (10 Iran-U.S. C.T.R. p. 121 at 130–131) the Tribunal held according to article IV of the Treaty of Amity, that "it is clear that the taking of Phelps Dodge's property, that is its ownership rights in SICAB, required the prompt payment of 'just compensation', which must represent the 'full equivalent' of the property taken". After "taking into account all relevant evidence, the Tribunal concludes that the value of Phelps Dodge's ownership ... was equal to its investment". In the American International Group, Inc. v. Iran (4 Iran-U.S. C.T.R. p. 96 at 379) the Tribunal stated that "the appropriate method is to value the company as a going concern, taking into account not only the net book value of its assets but also such elements as good will and likely future profitability, had the company been allowed to continue its business under its former management". In the Payne v. Iran case (12 Iran-U.S. C.T.R. p. 7 at 11–16) the Tribunal held that "the companies were both going concerns at the time of the taking and decides that it must value the Claimant's interests on the basis of the fair marked value of his shares taking into account the debts of the companies including tax liabilities. In arriving at a figure representing what the Tribunal consider to be the fair marked value of the Claimant's interest in both companies at the time of the taking, the Tribunal considers it necessary to consider the effects of the revolution prior to the taking, which certainly caused a significant decrease in the volume of sales, and thus the income from commissions".

Also various ICSID tribunals have based their decisions on the market value. In the SPP(ME) LTD and SPP LTD v. Egypt case[75] the tribunal found that the Claimants were "entitled to receive fair compensation", and used the following standard for the valuation of an asset:

> "... the purchase and sale of an asset between a willing buyer and a willing seller should, in principle, be the best indication of the value of the asset. This is certainly true in the case of a perfectly competitive marked having many buyers and sellers in which there are no external controls or internal monopolistic arrangements."

Moreover, the tribunal emphasized that "[o]ne of the best settled rules of the law on international responsibility of States is that no reparation for speculative or uncertain damage can be awarded".[76] It also observed that if the Claimant's activities were in conflict with the UNESCO Convention, "any profits that might have resulted from such activities are consequently non-compensable". Moreover, it was the tribunal's view that time and money spent on negotiating, planning, implementing the project, construction and marketing, detailed engineering design and infrastructure, and the completion of a golf course, all were a "part of the fair compensation to which the Claimants are entitled". This was also the case for the capital contributions, loans and properly documented development cost.

If we take a look at Norwegian legislation concerning the starting point for determining the value of an investment, Act no. 17 of 1984 on Compensation in Cases of Expropriation, we see that the starting point is the market value. The market value shall be based on the current use of the investment or other usage that may reasonably be anticipated. Section 5 of the Act opens for reducing the market value on the basis of changes in value because of the expropri-

75 ICSID Reports, vol. 3, p. 101 at 232. The tribunal attributed significant weight to the findings of the Iran-U.S. Claims Tribunal in the Amoco case (15 Iran-U.S. C.T.R., p. 189 at 262). See also the Metalclad v. Mexico case (ICSID Reports, vol. 5, p. 209 at 231–235), where the tribunal found, when applying NAFTA, Article 1110(2), that: "Normally, the fair marked value of a going concern which has a history of profitable operation may be based on an estimate of future profits subject to a discounted cash flow analysis." Since the landfill in this case never was operative, the tribunal concluded that "any award based on future profits would be wholly speculative" and that "the fair marked value is best arrived at in this case by reference to Metalclad's actual investment in the project".

76 See also the Chorzòw Factory case, P.C.I.J. Ser. A. No. 17 (1928) p. 51 stating that "possible but contingent and undeterminate damage which, in accordance with the jurisprudence of arbitral tribunals, cannot be taken into account".

ation or plans or investments made in the context of the expropriation. Moreover, changes in value due to investments made by the expropriator during the last ten years shall be disregarded. The same goes for plans for future investments. In this context, all public investments would be relevant if the expropriator is a public authority. Against this background, the investment protection offered by the investment agreements seems to go beyond the protection offered by the Norwegian Act.

The final issue to be discussed in this context is at which point in time the value of the investment should be determined. The general starting point is that compensation should be determined on the basis of the value of the investment at the time of the decision to expropriate. This has been set out in most of the expropriation clauses, as they refer to the value of the investment "immediately before the ... expropriation".[77] An alternative starting point can be found in the Agreement with Chile, which provides for the value "immediately before the measure became public knowledge". Only two agreements seem to leave it to the public authorities to decide on the issue of timing. The Agreement with Romania states that the value should be determined "immediately before the expropriation or before the pending expropriation became public knowledge", and the Agreement with Singapore does not address the issue. The fact that negotiators in most cases have made a clear choice between two main options indicates that it is likely that the clauses will be interpreted in accordance with the choices made. It thus indicate that countries can expect that exceptions will be accepted only in cases where particularly strong arguments can be advanced. This may possibly be the case where the investor, after the plans to expropriate became public knowledge, acts in a way that increases the value of the investment against the interests of the expropriator. Case law related to customary international law may possibly be taken into account when tribunals determine the extent to which they can accept that countries deviate from the rules of the agreements. A problem occurs as public authorities may be suspected of exploiting the rules to their benefit by publicizing upcoming measures in cases where they will lead to reduced value and keeping them secret in cases where they will lead to increased value.

It can be asked whether the preference in favor of the time that the measure became public knowledge should be interpreted in the same way as the agree-

77 The agreements with Madagaskar, Malaysia, China, Sri Lanka, Poland, Hungary, the Czech and Slovak Republics, Indonesia (no longer in force), Estonia, Latvia, Lithuania, Peru, and Russia.

ments providing for the date of expropriation. As noted above there is a strong presumption in favor of the date of expropriation. Moreover, in many cases it will be difficult to determine the value according to the date of knowledge, since knowledge about the measure may have existed for a long period of time and the property may have been transferred to the current owner after the measure became public knowledge. There are thus strong arguments in favor of accepting deviations from this rule. However, it is unclear whether such arguments will be accepted by tribunals.

The clauses of the agreements with Romania and Singapore must be regarded as indicating a broad margin of appreciation. It can be expected that tribunals will take into account case law related to customary international law and to agreements not specifying any preference when applying these clauses. The Iran-U.S. Claims Tribunal based its decisions on the value of the investment on the date when the investor lost effective control over the investment.[78] There is thus a presumption in favor of the time of expropriation, at least in the case of the Agreement with Singapore, which leaves the question open, but less so with regard to the Agreement with Romania, which explicitly indicate tat the parties should have a freedom to choose.

According to Section 10 of the Norwegian Act on Compensation in Cases of Expropriation, the compensation shall be determined in accordance with the value on the date of expropriation. Hence, the Act is rather inflexible with regard to the date for determining the compensation, but opens for a broad freedom to deviate from the value of the investment on this date. Hence, Norway may face problems in relation to those agreements that provides for the date when the expropriation become public knowledge. Moreover, the more flexible approach in case law indicates that investors may possibly invoke more advantageous compensation clauses under the agreements than are available under the Norwegian Act.

5.3 THE TIMING OF THE COMPENSATION

A fundamental question in the context of the timing of the payment of compensation is whether the starting point for the deadline for paying compensa-

78 See the Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA case (6 Iran-U.S. C.T.R. p. 219 at 226) where the Tribunal based the valuation on the moment the Claimant irrevocably lost the control of the investment. In the Payne v. Iran case (12 Iran-U.S. C.T.R. p. 7 at 11–16) the Tribunal concluded that since the taking took place after the effects of the Revolution were manifest, it could not rely on "past performance as an indicator of likely future profitability and the value of their goodwill".

tion to the investor shall be the date of the formal decision to expropriate, or an earlier date, for example when the expropriation procedure started or the date when the plans to expropriate became public knowledge. The expropriation clauses may be divided into two main categories; those that indicate the starting point to be the formal decision to expropriate, and those that indicate an overall assessment where in particular the procedures leading up to the expropriation may be taken into account. It can be argued that those clauses that specifically refer to the payment of the compensation fall into the former category. This would be the case for the clauses requiring the compensation to be "paid without delay",[79] "paid without undue delay within such a period as normally required for the completion of transfer formalities, in any case not exceeding three months",[80] "versé sans retard injustifié à l'ayant-droit",[81] and "promptly paid to the investor".[82] The clause that seems to point in the direction of an overall assessment of the procedures is the one calling for "prompt, adequate and effective" compensation.[83] The fact that this clause has been included together with clauses requiring compensation to be paid without delay,[84] indicate that such an interpretation is likely to prevail.

Norwegian public authorities must be presumed to have no problem complying with requirements that payment shall take place without delay after the formal decision to expropriate has been made. However, requirements that payment shall be made within a certain time from the date when the expropriation proceedings started or the plans to expropriate became public knowledge may easily constitute problems for Norwegian authorities.[85]

79 The agreements with Hungary, the Czech and Slovak Republics, Indonesia (no longer in force), Estonia, Latvia, Lithuania, Peru, Russia, and Singapore.

80 The Agreement with Poland.

81 The Agreement with Madagaskar.

82 The Agreement with Romania.

83 The agreements with Malaysia, Sri Lanka, Romania, Estonia, Latvia, Lithuania, Chile, Peru, and Russia. See also the Agreement with Madagaskar which uses a somewhat different formula: "effective et adéquate conformément au droit des gens".

84 We find a combination of the clauses in the agreements with Estonia, Latvia, Lithuania, Peru, and Russia.

85 For example, in cases concerning establishment of nature protection areas, up to 15–20 years may pass between the time when the plans became public knowledge and the final decision, cf. NOU 2004: 38 on an Act on the Protection of the Natural Environment, Landscape and Biological Diversity (in Norwegian), p. 345.

5.4 TRANSFERABILITY

The interest of this issue is related to the possible need for restricting the transfer of compensation out of Norway in order to protect public or private interests. This may be of particular interest in relation to potential obligations to clean up hazardous waste sites, compensation for long term effects of polluting activities, or to secure payment of amounts due to employees or creditors. There are two groups of provisions aiming at ensuring transferability of capital out of host countries.

The first group is the general provisions on "transfers" in investment treaties, which aim at regulating the extent to which States are allowed to restrict transfer of investments out of the country. Such general provisions are found in all agreements considered in this article, and they take as their starting point that restrictions on transfers are prohibited. Some of the provisions explicitly state that they apply to compensation paid in cases of expropriation,[86] and those provisions that do not contain such an explicit reference, contain broad wording indicating that they would apply in cases of compensation for direct and indirect expropriation.

The general provisions differ considerably with regard to the exceptions they open for. The broadest exceptions state that the right to transfers only applies "to the extent permitted by [the host State's] laws and regulations".[87] Under these provisions, States enjoy a broad margin of appreciation provided that restrictions are applied according to domestic rules. A second group of provisions is more unclear, as they state that the right to transfers is "subject to" national laws and regulations.[88] These provisions serve to underline the regulatory freedom of host countries, but cannot be regarded as giving them full freedom to introduce restrictions on transfers. The difference between the wording of these provisions and those quoted above indicate that the States have agreed to maintain a broader margin of appreciation in some agreements than in others. However, the extent to which and for which grounds States are free to restrict transfers under the latter provisions remain unclear. It can be argued that it must be determined on a case-by-case basis, weighting the States' legitimate interests of restricting the transfer against the legitimate expectations

86 The agreements with Romania, Chile, and Peru.

87 The agreements with Poland (Art.VII), the Czech and Slovak Republics (Art.VI), and Indonesia (no longer in force, Art.VII).

88 The agreements with China (Art.VI), Malaysia (Art. 7), Sri Lanka (Art. 7), Romania (Art.VI), Hungary (Art.VII), Latvia (Art.VII), and Estonia (Art.VII).

of the investor. A third group of provisions is those that contain specific exceptions. The exceptions contained vary widely, from provisions only excepting tax law[89] to elaborate exceptions contained in more recent agreements, such as the one in Article 44(4) of the Agreement with Singapore:[90]

> "It is understood that paragraphs 1 to 3 above are without prejudice to the equitable, non-discriminatory and good faith application of laws relating to: (a) bankruptcy, insolvency or the protection of the rights of creditors; (b) the issuing, trading or dealing in securities; (c) criminal or penal offences, and the recovery of proceeds of crimes; (d) ensuring the satisfaction of judgments in adjudicatory proceedings."

Only one agreement, the Agreement with Madagaskar, contains a provision giving investors an unconditional right to transfer.[91] In this context it is of interest to note that many agreements contain specific most favored nation clauses in their transfers provisions.[92] This is remarkable given the widely diverging exemptions included in the provisions.

The second group of provisions can be found in the expropriation clauses. These clauses contain two main elements, a requirement concerning the currency in which the payment shall be made,[93] and that the compensation shall be transferable out of Norway. As Norwegian currency is a convertible currency, the former issue is of no interest here. All the provisions giving a right to transfer the compensation out of Norway contain unqualified rights.[94]

---

89 The agreements with Romania (Art.VI), Lithuania (Art.VII), Peru (Art. 7), and Russia (Art. 6).

90 A provision in between can be found in the Article 5(4) of the Agreement with Chile: "Equity capital can only be transferred one year after it has entered the territory of the Contracting Party unless its legislation provides for a more favourable treatment."

91 Art. VI, para. 2: "Chaque Etat Contractant garantit aux ressortissants, fondations, associations ou sociétés de l'autre Etat Contractant le transfert du capital investi et du produit de ce capital et, en cas de liquidation, du produit de celle-ci."

92 The agreements with China, Malaysia, Sri Lanka, Latvia, and Estonia.

93 This is generally ensured by requiring the payment to be made in a "convertible currency" (see the agreements with the Czech and Slovak Republics, Romania, and Singapore), or to be "effectively realizable" (see the agreements with Hungary, the Czech and Slovak Republics, Estonia, Latvia, Lithuania, and Peru).

94 The wording of the provisions differ somewhat. Most provisions state that the compensation shall be "freely transferable", cf. the agreements with Malaysia, China, Sri Lanka, Hungary, the Czech and Slovak Republics, Estonia, Latvia, and Lithuania. See also the Agreement with Madagaskar. The Agreement with Romania provides for a "right to transfer these amounts without delay" and the Agreement with Singapore provides for a right to transfer "without regard to its residence or domicile".

Against this background, it can be concluded that the right to transfer compensation for expropriation out of the host country varies widely between the agreements, both with regard to the general provisions on transfers and with regard to the specific provisions in expropriation clauses. It can be argued that the freedom to transfer is of little concern to Norwegian authorities in cases of expropriation. The main practical significance would be in cases where the authorities want to withhold parts of the compensation because of suspicion that there are hidden liabilities that have not been taken into account when determining the level of compensation. It must be assumed that this will be a problem only in exceptional cases, for example in the context of obligations to clean up hazardous wastes or compensation for long term effects of pollution.[95]

6 Formal requirements

In addition to the rules concerning timing of payment as related to the expropriation decision, cf. section 5.3 above, there are certain provisions in the agreements concerning formal requirements in the context of expropriation decisions. One such formal requirement is that the expropriation decision must have its basis in national legislation. This is a general requirement that can be found in all expropriation clauses and that also form part of the basic requirements set out in customary international law. As there is a basic requirement in the Norwegian legal system that expropriation decisions must have basis in law, it is not necessary to enter into a discussion of this issue.

Moreover, some of the agreements contain a requirement that the expropriation decision shall be taken under "due process of law".[96] Such a requirement includes elements that go beyond the requirement of a basis in legislation. In Norwegian law, such a requirement is partly covered by general rules in administrative law, more specific rules concerning procedures to be followed in cases of expropriation, and general rules concerning access to justice under Article 6 of the European Human Rights Convention, which is part of Norwegian legislation cf. Law no. 30 of 1999.[97] Hence, there is no reason to undertake any general examination of this issue here. However, it should be

95 See, for example, Section 63 of the Pollution Control Act, no. 6 of 1981.

96 The agreements with Malaysia, Sri Lanka, Hungary, Romania, Chile, Peru, and Singapore.

97 The term "civil rights" in Article 6 has been interpreted to extend to cases concerning expropriation, see, *inter alia*, the Sporrong Lönnroth case, series A no. 52.

mentioned that Article 6 of the Agreement with Chile states that: "There shall be legal provision giving an investor concerned a right to prompt review of the legality of the measure taken against the investment and of their valuation in accordance with the principles set out in this paragraph by due process of law in the territory of the Contracting Party making the expropriation." Given the time it usually takes to get a civil case decided by a Norwegian court, it seems appropriate to conclude that clauses of this kind pose a challenge to the Norwegian legal system, and that it is not unlikely that an investor may claim violation of the provision in a given case.

7 The nature of investment agreements

7.1 INTRODUCTION

The above analysis of Norway's obligations under bilateral investment agreements shows that investors may enjoy significantly better protection under the agreements with respect to indirect expropriation than under Norwegian law. Moreover, in some cases investors may enjoy somewhat better protection under the agreements with respect to the level of compensation. Finally, the agreements may give the investor more rights to get their cases finalized more speedily than under Norwegian legislation. In the following, we will discuss aspects of the agreements that are essential when assessing the real impact of these differences.

Many of the agreements are between Norway and countries from which we may expect significant investment. Examples of particular significance are China, Russia, Singapore, Poland, Hungary, the Czech Republic, Chile and the Baltic States. We must also take into account the extent to which it will be easy for an enterprise to secure protection under one of the agreements. This depends on the requirements of the agreements concerning the link that must be established between the source country and the investor before the agreement can be invoked, and on the *de facto* ability of investors to establish companies in other countries. As to the latter issue, it can be observed that investors enjoy great freedom to choose the country from which to make an investment, and that investors, including small and medium size enterprises, increasingly make use of this possibility.

As to the requirements concerning links between the source country and the investor under the bilateral agreements, we find a wide variety of approaches under the Norwegian agreements. Only the Agreement with Madagaskar avoids the issue altogether. The agreement with the lowest threshold is the agreement with Malaysia, which extends protection to an enterprise that is "incorporated in the territory of Malaysia, or has a predominating Malaysian interest", cf. Article I:4(ii). The majority of the agreements require the enterprise to be incorporated or constituted under the law in force in the territory of the source country.[98] Hence, for the above mentioned agreements, it will generally suffice if the enterprise has been lawfully registered in the source country for it to enjoy protection under the agreements. However, one may possibly argue that exceptions should apply in cases where the establishment is merely pro forma. An argument against allowing such exceptions is that a number of other agreements contain requirements that there be some additional link between the enterprise and the source country. These requirements vary from having the "head office" in the county,[99] and having a "seat in its territory",[100] to having "real economic activities"[101] or "carrying out substantial business activities"[102] in the source country. Since the strictness of the requirements vary significantly, we may assume that the wording of the provisions is essential and in most cases decisive when determining how far the protection of the agreements extend. It may thus be observed that the agreements, with a few exceptions, make it easy for investors to fulfill the conditions for obtaining protection under the agreements.

Against this background, it is of interest to raise four main questions towards the end of this article. What is the relationship between the agreements – can the provisions of one agreement influence the rights and duties under other agreements (section 7.2)? How likely is it that cases will be brought against Norwegian authorities before international arbitration tribunals (section 7.3)? How likely is it that Norwegian courts will take into account the agreements when dealing with cases concerning expropriation of investments (section

98 The agreements with China (Art. I:4(i)), Sri Lanka (Art. I:1(d)), Hungary (Art. I:3(b)), Indonesia (no longer in force, Art. I:3), Estonia (Art. I:3(b)), Latvia (Art. I:3(b)), Lithuania (Art. I:3(b)), Peru (Art. I:2(b)), and Russia (Art. I:2(b)).

99 Art. I:2(b) of the Agreement with Romania.

100 The agreements with Poland (Art. I:3(b)), and the Czech and Slovak Republics (Art. I:3(b)).

101 Art. I:1(a) of the Agreement with Chile.

102 Art. 3(d)(ii) of the Agreement with Singapore.

7.4)? Which are the possibilities for Norwegian authorities to get free from the obligations under the agreements (section 7.5)?

7.2 THE RELATIONSHIP BETWEEN THE AGREEMENTS

The starting point in international law is that treaties only regulate the relationship between the states parties, cf. Articles 30:4(b) and 34 of the Vienna Convention on the Law of Treaties (1969). However, as indicated in Article 36 of the Vienna Convention, third states may enjoy rights set out in a treaty to which it is not a party, as long as there is no indication that it does not assent to enjoying the right. Where a treaty includes a "most favored nation" provision, the parties intend to enjoy rights established under other treaties.[103] Such provisions have been corner stones in the multilateral agreements established after the Second World War to regulate international trade,[104] and have been included in a number of regional and bilateral agreements. In the following, we will examine to which extent most favored nation (MFN) clauses have been included in the Norwegian bilateral agreements, and the effects of including such provisions.

Only Article VI of the Agreement with Madagaskar includes an unqualified MFN clause. Of the other agreements, all include exceptions for customs unions, free trade areas and agreements on taxation.[105] Article VI of the Agreement with China (1984) extends the exception to agreements on trade in border areas, and Article IV of the Agreement with Poland (1990) extends the exception to agreements concerning aid to developing countries. Hence, all agreements of interest to this article include an MFN clause, and the exceptions from MFN treatment vary somewhat. However, the exceptions are not of interest when examining the effect of the MFN clauses for the rights that

103 For a short introduction to the historic background of most favored nation clauses, see Ole Kristian Fauchald, *Environmental Taxes and Trade Discrimination*, Kluwer Law International (1998), pp. 49–50. For a discussion of decisions relating to the most favored nation clause, the writings of authors and the work of the International Law Commission on the subject, see *Yearbook of the International Law Commission* 1970 vol. II p. 199; 1973 vol. II p. 97; 1978 vol. II Part One p. 1; 1978 vol. II Part Two p. 7.

104 See, in particular, Article I of the GATT and Article II of the GATS.

105 The agreements with Malaysia (Art. 4 and 5), China (Art. IV), Sri Lanka (Art. 4 and 5), Poland (Art. IV), Hungary (Art. IV), the Czech and Slovak Republics (Art. III), Romania (Art. III), Indonesia (no longer in force, Art. IV), Estonia (Art. IV), Latvia (Art. IV), Lithuania (Art. IV), Chile (Art. 4), Peru (Art. 4), Russia (Art. 3), and Singapore (Art. 40 and 41).

can be invoked under the expropriation clauses examined above, since neither the EFTA Agreement nor the EEA Agreement contain clauses protecting investors against expropriation.

The starting point is thus that any state party to a bilateral agreement with Norway may invoke the most extensive protection of investors that can be found under any of the agreements. For example, in relation to protection against indirect expropriation, all countries can invoke the provision that goes furthest in protecting various forms of indirect expropriation. Against this background, the actual wording used in the various provisions of the agreements does not matter. As long as the agreements includes MFN clauses, all investors in all countries with which we have investment agreements may invoke the wording of the agreement that is most beneficial to them. The same goes for the provisions setting out rules on the level of compensation – all investors can invoke the provision that goes furthest in protecting the interests of the investor.

It can be asked whether such effects of the MFN clauses were intended by the parties to the agreements, and whether it would not be contrary to the principle that treaties should be interpreted in a way that gives meaning to all the provisions of the treaties. However, given the explicit wording of the MFN clauses and the fact that countries have had a longstanding experience with the use of such clauses in a variety of treaties, we must assume that tribunals will not be convinced by such arguments.

Moreover, it can be asked whether the MFN clauses are restricted to the substantive rights enjoyed under the agreements or whether they also extend to questions concerning the scope of the agreements, in particular which investors enjoy protection under the agreements, cf. the issues addressed under section 7.1 above. The question is whether an investor registered in Singapore but not having any business activity there can invoke the MFN clause of the Agreement and argue that it should at least have the same protection of its investment as an investor registered in Russia, for which only a registration is required. Moreover, it can be asked whether the MFN clauses extend the procedural rights enjoyed by investors under some of the agreements, e.g. the right of investors to bring cases against states directly before arbitral tribunals, cf. section 7.3 below. The question here is whether an arbitration tribunal would accept to hear a case brought by an investor from Singapore on the basis of the argument that the MFN clause of the Agreement with Singapore (which does

not provide for mandatory investor-state dispute settlement) means that the investor shall enjoy at least the same possibility to bring a case before international arbitration as an investor from Russia.

The wording of the Norwegian MFN clauses does not indicate that there should be any distinction between substantive and procedural rights under the agreements. A starting point for discussing the MFN clauses can be found in the *Ambatielos case,* in which the Commission of Arbitration affirmed that[106] "the most-favored-nation clause can only attract matters belonging to the same category of subject as that to which the clause itself relates". However, the Commission went on to define the scope of the MFN clause in broad terms:

> "It is true that the 'administration of justice', when viewed in isolation, is a subject-matter other than 'commerce and navigation', but this is not necessarily so when it is viewed in connection with the protection of the rights of traders. Protection of the rights of traders naturally finds a place among the matters dealt with by treaties of commerce and navigation. Therefore it cannot be said that the administration of justice, in so far as it is concerned with the protection of these rights, must necessarily be excluded from the field of application of the most-favored-nation clause, when the latter includes 'all matters relating to commerce and navigation'. The question can only be determined in accordance with the intention of the Contracting Parties as deduced from a reasonable interpretation of the Treaty."

The Commission thus accepted the extension of the clause to questions concerning the administration of justice. Another case of interest is Emilio Agustín Maffezini v. Kingdom of Spain. In the case, the question was "whether the provisions on dispute settlement contained in a third-party treaty can be considered to be reasonably related to the fair and equitable treatment to which the most favored nation clause applies under basic treaties on commerce, navigation or investments and, hence, whether they can be regarded as a subject matter covered by the clause".[107] When addressing this issue, the tribunal observed that the wording and approach used in Spanish treaties varied widely from explicitly defining their scope, to containing broad wording, and to not indicating any specific scope. The tribunal observed that:[108]

106 United Nations, *Reports of International Arbitral Awards,* 1963, p. 107.
107 ICSID Reports, vol. 5, p. 387 at para. 46.
108 ICSID Reports, vol. 5, p. 387 at para. 56.

> "if a thirdparty treaty contains provisions for the settlement of disputes that are more favorable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favored nation clause as they are fully compatible with the *ejusdem generis* principle. Of course, the third-party treaty has to relate to the same subject matter as the basic treaty, be it the protection of foreign investments or the promotion of trade, since the dispute settlement provisions will operate in the context of these matters; otherwise there would be a contravention of that principle."

The tribunal went on to state that some exceptions from this basic rule must be accepted:[109]

> "As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as will often be the case. The scope of the clause might thus be narrower than it appears at first sight. ... a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand."

Against this background, we may assume that a tribunal will be likely to conclude that an investor not fulfilling the requirement to carry out "substantial business activities" in Art. 37(d)(ii) of the Singapore Agreement can invoke the MFN clause of the Agreement[110] and obtain the same protection as a Russian investor, for whom there is no such requirement. On the other hand, it seems that a tribunal is unlikely to accept to extend the right to bring up investor-state cases under agreements that only provide for state-state dispute settle-

109 ICSID Reports, vol. 5, p. 387 at paras. 62–63. The following examples were mentioned as cases where the MFN clause would not be applied: consent to arbitration is conditioned on the exhaustion of local remedies, choice between submission to domestic courts or to international arbitration and where the choice once made becomes final ("fork in the road"), the agreement provides for a particular arbitration forum, and a highly institutionalized system of arbitration that incorporates precise rules of procedure.

110 The MFN clause in Article 40 of the Agreement with Singapore is broadly phrased: "Each Party shall accord to investors and investments of investors of another Party, in relation to the establishment, acquisition, expansion, management, conduct, operation and disposal of investments, treatment that is no less favourable than that which it accords in like situations to ... investors and their investments of any other State ..."

ment. Hence, a Singaporean investor cannot invoke the MFN clause and the Agreement with Russia as a basis for bringing a case against Norway, cf. Art. 48(2) of the Agreement with Singapore. The main reasons are that the parties to the Agreement with Singapore clearly intended not to extend such rights to investors, and that Norway in recent years has followed a consistent policy of not accepting investor-state dispute settlement in its investment agreements.

7.3 Is Norway likely to be sued?

The agreements addressed in this article were primarily entered into with a view to protect the interests of Norwegian investors abroad. Norway has the last decades to a large extent been a net capital exporter, and this seems to have influenced the attitude of Norwegian negotiators. However, subsequent development in a number of the countries with which Norway has concluded agreements has greatly increased the likelihood that investment may flow from these countries to Norway. Moreover, investors from third countries or even from Norway may channel their investments through such countries.

All the agreements examined in this article contain provisions on mandatory state-state dispute settlement,[111] and all except for the agreements with Madagaskar, China and Singapore provide for mandatory investor-state dispute settlement.[112] It should also be noted that three of the agreements contain additional conditions that must be fulfilled for an investor to be allowed to submit a case to arbitration. These agreements refer to Article 25(2)(b) of the ICSID Convention,[113] which states that:

> "'National of another Contracting State' means: ... any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on

111 The agreements with Madagaskar (Art. VII), Malaysia (Art. 10), China (Art. VIII), Sri Lanka (Art. 10), Poland (Art. IX), Hungary (Art. X), the Czech and Slovak Republics (Art. IX), Romania (Art. IX), Indonesia (no longer in force, Art. X), Estonia (Art. X), Latvia (Art. X), Lithuania (Art. X), Chile (Art. 9), Peru (Art. 10), Russia (Art. 10), and Singapore (Chapter IX).

112 The agreements with Malaysia (Art. 9), Sri Lanka (Art. 9), Poland (Art. X), Hungary (Art. XI), the Czech and Slovak Republics (Art. VIII), Romania (Art. VIII), Indonesia (no longer in force, Art. IX), Estonia (Art. IX), Latvia (Art. IX), Lithuania (Art. IX), Chile (Art. 8), Peru (Art. 9), and Russia (Art. 8). The agreements with the Czech and Slovak Republics, Chile, Peru and Russia state that a dispute "may" be submitted for arbitration. The word "may" cannot be read to give the host country the possibility of refusing to accept arbitration.

113 The agreements with Malaysia (Art. 9), Sri Lanka (Art. 9), and Chile (Art. 8).

> which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

The likelihood that a case will be brought against Norway before an international arbitral tribunal depends partly on enterprises and relevant authorities of States being informed about the possibilities of raising a case, on an assessment of costs and benefits of a case, and on Norwegian authorities' willingness to reach a settlement out of court. There has until recently been little focus on bilateral investment treaties among Norwegian lawyers. Moreover, given the political, administrative and economic costs of a potential case, it is likely that the parties will make every possible effort to settle it out of court. Hence, it is highly unlikely that cases will go before international tribunals. However, Norway must be prepared that Norwegian authorities will be met with claims invoking protection under the agreements and that they will have to enter into negotiations with investors on the basis of their rights under the agreements.

7.4 ARE NORWEGIAN COURTS LIKELY TO TAKE THE AGREEMENTS INTO ACCOUNT?

Norway has a dualist legal system, and has not taken measures to implement the expropriation clauses of the agreements into its legal system. Hence, the starting point is that Norwegian courts are unlikely to take into account the agreements when determining expropriation cases. However, there is a high number of cases concerning direct and indirect expropriation before Norwegian courts, and the courts enjoy a broad margin of appreciation in these cases. Moreover, Norwegian courts are expected to take into account Norway's obligations under international agreements when interpreting and applying domestic legislation. Increased knowledge among Norwegian lawyers about international law in general and investment agreements in particular makes it increasingly likely that arguments will be presented to Norwegian courts. Finally, courts may take into account the possibility that a case may subsequently be brought to arbitration. Against this background, it is not unlikely that Norwegian courts may explicitly or implicitly take into account Norway's obligations under the agreements.

7.5 CAN NORWAY GET OUT OF THE AGREEMENTS?

All the agreements contain rules on their termination. These rules concern two main elements, the date from which the termination of the agreement may take effect, and the continued effect of the agreement after it has been terminated. All the agreements contain rules allowing unilateral termination, including rules determining when the termination takes effect. In general, termination takes effect between three and twelve months after notification of termination has been communicated to the other party. However, the agreements contain highly differing rules on when states may submit such notifications of termination, varying between no restriction,[114] termination unavailable for a period of two, 15 or 20 years[115] from the date of conclusion of the agreement, or termination of the agreements is unavailable for a period of 10 or 15 years extended tacitly for further periods of 10 or 15 years respectively.[116]

All the agreements, except the agreements with Romania and Singapore, contain rules extending the effect of the agreements for an additional period after the termination has taken effect. The effect of the agreements continues 10, 15 or 20 years[117] after termination for investments undertaken before the Agreement was terminated.

To take one example: If Norway decides to terminate the agreement with Russia today, the termination of the agreement cannot take effect before 2010, and the agreement continues to have effect until 2025 for investments made before 2010. The political costs of terminating the agreements are likely to be high, since such an act is likely to be regarded as unfriendly by the other party.[118]

---

114 The agreements with Hungary (Art. XIII), and Singapore (Art. 71).

115 Two years: Article X of the Agreement with Madagaskar. Fifteen years: the agreements with Malaysia (Art. 11), China (Art. IX), Sri Lanka (Art. 13), Poland (Art. XIII), Chile (Art. 11), Peru (Art. 14), and Russia (Art. 14). Twenty years: Article XIII of the Agreement with Estonia.

116 Ten years: The agreements with the Czech and Slovak Republics (Art. XII), Indonesia (no longer in force, Art. XIV), Latvia (Art. XIII), and Lithuania (Art. XIV). Fifteen years: Article XII of the Agreement with Romania.

117 Ten years: the agreements with Madagaskar, Sri Lanka, Poland, Hungary, the Czech and Slovak Republics, Indonesia (no longer in force), Latvia, and Lithuania. Fifteen years: the agreements with Malaysia, China, Chile, Peru, and Russia. Twenty years: the Agreement with Estonia.

118 Against this background, it would be interesting to examine the background for the termination of the Agreement with Indonesia. This Agreement was terminated through a decision by the Ministry of Foreign Affairs of March 31, 2004.