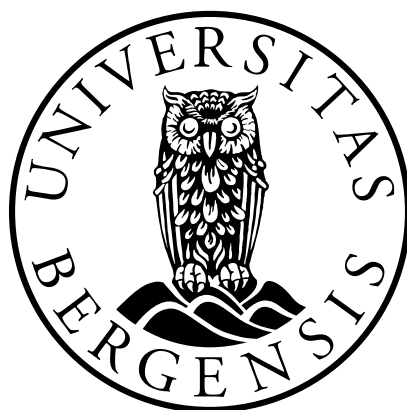


International investment agreements, Constitution and Political Autonomy

*An analysis of the protection of investments in
the Norwegian Constitution Section 97 compared
to the current Norwegian model investment
agreement*

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1. Introduction

1.1. Scope and background

In this thesis I will analyse and compare the regulation of future political decisions and legislation in the Norwegian model investment treaty of 2015 (hereafter NMBIT), with investment protection based on the Norwegian Constitution. I will analyse whether the NMBIT Article 5, provides a stronger protection of investors than Section 97 of the Norwegian Constitution, and thus also restricts the Norwegian authorities further than what would be the case after Norwegian law.

Although the beneficial economic implications of international investment are disputed¹, the question of international investment law is important. Especially in states without necessary capital to invest in their own development, foreign investment is necessary and fundamental. Investment always implies a certain economic risk. When investing in another country, especially in countries with an unstable political situation and poorly developed legal systems, potential political changes and insecurity related to securing rights represents an additional risk. Security and protection is thus an important prerequisite. This is why there is a need to establish mutual standards between the states through treaties. Such treaties' aim is to enhance foreign investments by limiting the state's right to interfere by new legislation in a manner that might influence the investment.

Protection of investors towards new legislation might interfere with the state's ability to take care of other interests, such as environment, human rights, financial stability, etc. States need to be able to develop their laws according to the development in society. For example new findings in environmental science happen continuously, and economic development is hard to predict. At times such challenges may call for measures that nobody had predicted.

The risk entailed in investing abroad is the background for a wide range of bilateral and multilateral investment agreements. Today there are more than 3000 International Investment

¹ Ivar Alvik, *Contracting with Sovereignty, The Structure of Commitment in International Investment Arbitration*, Oslo 2006, p. 24.

Agreements in the world². The vast majority of these are Bilateral Investment Treaties (BITs), and the others are regional or multilateral agreements. Furthermore, a recent trend is to include regulation of foreign investment in mega-regional trade agreements, turning them into a sort of hybrids between investment- and trade-agreements.

With a potential regulatory freeze, there is a concern that mega-regionals such as the TTP and the TTIP will have implications on the political autonomy of states to take care of public interests. Many argue there is a price too high to pay in comparison to the advantages gained. This has sparked discussions about the international investment regime. It is therefore necessary to ensure a balance between the investor's right to protection and the interests of authorities to maintain national and public interests when establishing investment agreements. This thesis is meant as a contribution to the ongoing debate on the international level.

Norway has a long tradition in facilitating for investors in natural resource projects and in other areas, while developing the society and meeting economic, social and environmental development with new legal measures. This experience might be of interest in the discussion of how to regulate international investment treaties. It is in this connection of certain interest to notice that Norway in later years has declined to enter into investment treaties and for example has not ratified the Energy Charter Treaty, which is regulating investments in energy projects.

The Norwegian society has in many ways been a success story in regards to the positive effects international investment may have on a country in development. Foreign investment is one of the reasons why the Norwegian state provides a high living standard for its citizens today. The Norwegian industries of mining, hydro-electricity and petroleum, have been developed mainly by foreign investment. The Norwegian success is based on the way in which these investments have been managed. An analysis of Norwegian law may therefore be a helpful contribution to the ongoing discussion on the international arena regarding international investment.

² According to UNCTAD's official database, <http://investmentpolicyhub.unctad.org/IIA>.

The foreign investors in Norway have had the same protection against public interference as Norwegian investors, mainly the prohibition against regulation with retroactive effect in the Constitution Section 97, and the protection against expropriation in Section 105. Norwegian authorities are entitled to give legislation according to the Norwegian Constitution, but the established position of an investor may be protected from certain decisions directly intervening in his project. Part of this thesis is about establishing the content of this protection.

The core content of Section 97, namely the prohibition against retroactive legislation of previously committed actions, falls outside of the scope of this thesis. The domestic legal protection of a party's legitimate expectations related to a specific decision by the administrative authorities is regulated by administrative law. This will also not be a part of the thesis, although case law related to such questions may be referred to as illustration. Furthermore, for the scope of this thesis, the cases of pure or hidden expropriation, which are regulated by The Constitution Section 105, will not be analyzed.

In order to illustrate similarities and differences between Norwegian law and international investment in relation to the above outlined questions, this thesis will include an analysis of the 'fair and equitable treatment-standard' in the NMBIT, Article 5. International investment agreements have evolved over time, partly because states have started to become aware of the problems with the traditional wordings. It therefore makes sense to use a recent document as a point of reference.

The analysis will be focused on the substantive legal question of the content of the protection that is provided in the model investment treaty. The question is whether companies who invested for example in the production of certain goods are protected when the state wants to impose new regulations in order to limit pollution, health or other societal concerns.

A widely debated problem in relations to international investment, namely the Investor-State Dispute Settlement (ISDS) system, will not be covered in this thesis. ISDS is one of the most important elements in most international investment agreements, as it provides investors with the opportunity to plead their case in front of an international tribunal rather than the domestic courts of the host state. Simultaneously, this is one of the more controversial aspects of

international investment, as the competence to interpret and develop the law is taken outside of the states' control.³ ISDS case law will nevertheless be analyzed in relation to establishing the content of article 5 of the NMBIT. Thus, the consequences of the ISDS system in relation to the substantive content of the protection will be elaborated on. Questions of competence, regarding the entering into such treaties, falls outside of the scope of this thesis.

I will in this thesis compare the investment protection based on the Norwegian Section 97 and the NMBIT Article 5. The question is whether foreign investors will have stronger protection based on the NMBIT than by the Constitution. The thesis will illustrate the different interpretative traditions in domestic and international law and how this may influence the outcome. There will be a problematization of what happens if there is a conflict between the constitution and an international investment treaty. These findings will shed some light on how to create functional and balanced international investment agreements, as the balance that has developed in the Norwegian legal tradition can serve as a benchmark for how far the agreements should go in restricting the states' right to regulate.

1.2. Thesis and structure

The main topics of this thesis will be assessed in chapters 3, 4 and 5. Chapter 2 is dedicated to a brief presentation of the background, characteristics and interpretation of the Norwegian Constitution and the NMBIT.

Chapter 3 is dedicated to the content of the protection of investors according to Section 97 of the Constitution. This chapter will demonstrate the development of assessment norms through case law and legal literature, with specific focus on the legal standing of investors. The specific assessment criteria related to a dispute between the state and investors, in addition to how specific facts can affect the outcome, will be assessed according to recent case law.

³ Ivar Alvik, «Investor-stat tvisteløsning (ISDS) i internasjonale investeringstraktater», *Lov og Rett*, vol. 54, 10, 2015, s. 581-601, quotes the famous Finnish public law jurist Martti Konkenniemi on p. 582: «a transfer of power from public authorities to an arbitration body, where a handful of people would be able to rule whether a country can enact a law or not and how the law must be interpreted», Interview in Helsinki Times, 15th of December 2013.

Chapter 4 provides a comparison of the protection provided to investors according to the NMBIT Article 5 to Section 97. Similar to the previous chapter, this part will contain a presentation of how the assessment norms have developed through ISDS case law and literature, as well as an overview of the further specific criteria developed in recent practice and how specific circumstances have affected the cases.

Based on the findings of the differences between these two provisions, chapter 5 will debate which solution is better. Some thoughts about what the consequences might be if an investment agreement was entered into with another state and there was a conflict with the Constitution will be offered.

Chapter 6 contains some general thoughts on the international investment regime, and reasonable future developments within the field. This chapter will also contain a presentation of what aspects of Norwegian law may provide useful solutions to the international debate in international investment treaties.

2. Legal basis and definitions

2.1. The Norwegian Constitution and Section 97

The Constitution of the Kingdom of Norway, given by the National Assembly at Eidsvoll on 17th of May 1814 is the highest form of legal source in Norway. The Constitution was created within the historical context that Norway had regained its independence. The Norwegian people had won sovereignty⁴. Inspired by other Constitutions of those times, it was built on the fundamental principles of popular sovereignty, the separation of powers, and fundamental civil rights⁵. Especially based on the view that all legitimate state authority derives from the people through an elected assembly, one can characterize the Norwegian Constitution as a type of contract between the people and those who execute the powers of the state⁶.

The Norwegian Constitution is the second oldest Constitution in the world that is still in use. It is meant to function through time and for all members of society, and thus the taciturn wording needs a dynamic interpretation.⁷ Different from the interpretation of other Norwegian laws, the actual text of the provisions, preparatory works and original aim of the legislator are dedicated less weight. Legitimate considerations such as public interests, general values or developmental concerns are given equally greater weight.⁸ In Norwegian law, an interpretative factor of its own, «consideration of the facts» called «reelle hensyn», can be given considerable weight in certain cases.⁹ «Reelle hensyn» can be explained as universal core values or fundamental legal principles and arguments related to the specific facts of a case.

Section 97 of the Norwegian Constitution states «No law must be given retroactive effect». This provision was included in the original version, and had already been recognized long

⁴ <https://www.stortinget.no/no/Stortinget-og-demokratiet/Grunnloven/Eidsvoll-og-grunnloven-1814/>

⁵ <https://snl.no/Grunnloven>

⁶ https://www.stortinget.no/no/Stortinget-og-demokratiet/Grunnloven/om_grunnloven/

⁷ Høgberg, 2010, p. 27.

⁸ *Ibid*, p. 27-28.

⁹ Carl August Fleischer, «Prinsipper for grunnlovsfortolkning», *Lov og Rett* 1969, s. 433-452, p. 440-441.

before as applicable to all legal fields.¹⁰ The immediate natural meaning of the words seems to be that it is forbidden to affect any already existing situation with a new law, but it is clear from customary constitutional law that the prohibition only refers to negative consequences¹¹.

There is also wide consent within Norwegian legal literature that the prohibition against retroactive legislation is not absolute with regards to all negative consequences.¹² It must be seen in relation to the other provisions of the Constitution. Other fundamental principles and provisions, such as the division of powers, the popular sovereignty and the provisions of the Parliament's legislative powers; Sections 49 and 75a, imply that Section 97 does not mean to preclude later legislation to change previous legislation. Section 97 protects rather against more direct interventions or abuse.

Section 97 must also be interpreted in light of the changes in society. An example in Norwegian law is how the development of a welfare state has led to an enhanced amount of rights and an increase in regulation at the same time.¹³ For example activity carried out in relations to business has been given further restrictions in the field of environment, labor law and public access to outdoor life.

Which retroactive legislation of established rights is qualified to breach Section 97 is not solved from an interpretation of the wording of the article in itself. In order to find out one must carry out an interpretation and harmonization of the other relevant sources.

Case law has played an important role in interpreting the content of Section 97. The Norwegian Supreme Court has operated with a broad approach, including interests, considerations, arguments and factors into an overall assessment. One must nevertheless be cautious when drawing conclusions, as the case law in this field has had a tendency to change and be unpredictable.¹⁴ This can give more legal weight to legal literature and «reelle hensyn».¹⁵ EEA-law and the European Convention on Human Rights have been adopted as

¹⁰ Høgberg, 2010, s. 21.

¹¹ Fleischer, «Grunnloven § 97», *Jussens Vener*, 1975, s. 183-251, p. 185-186.

¹² Benedikte Moltumyr Høgberg, «Grunnloven § 97 etter plenumsdommen i Rt. 2010 s. 143 (Rederiskattesaken)», *Tidsskrift for rettsvitenskap*, vol. 123 4 og 5/2010, s. 694-744, p. 697.

¹³ See Høgberg, 2010, p. 15-16, Fleischer, 1969, p. 439.

¹⁴ See Høgberg, 2010, p. 62-63, particularly footnote 218.

¹⁵ *Ibid*, p. 63-64.

superior to regular Norwegian laws, and are presumed to be in accordance with customary international law.

There are many reasons why the specific content of the provision is unpredictable.¹⁶ The general wording gives a wide applicability. It also raises questions related to fundamental values and how one views society. It is a paradox that the constitutional provision that is supposed to grant predictability is so unpredictable.¹⁷ Nevertheless, the richness of Norwegian legal literature and case law on the subject provides many useful interpretational tools for the assessment. The theory of this thesis is that these tools are valuable also in regards to find a good balance between investors' rights to protection and the states' rights to regulate in an international level as well.

2.2. The NMBIT and Article 5

International Investment agreements (IIAs) could be described as a sort of contracts between sovereign states about investment within each others' territory. A party who failed to live up to the obligations assumed, could be held liable under international law.¹⁸

The NMBIT was published for consultation during the summer of 2015¹⁹ The official webpage of the Norwegian government provides that there has been no such agreements negotiated since the mid 1990's, and that it is the priority of the current government resume the use of such agreements. The current model builds on a previous version that was abandoned in 2008.²⁰ The main aim is to protect investments. Other aims are maintaining the states' right to legitimate regulation and possibility adapt to international developments. The agreement should also contribute positively to developing countries.

¹⁶ See Høgberg, 2010 s. 16.

¹⁷ *Ibid*, p. 18.

¹⁸ VCLT, preamble

¹⁹ <https://www.regjeringen.no/no/dokumenter/horing---modell-for-investeringsavtaler/id2411615/>

²⁰ Royal Norwegian Ministry of Trade, Industry and Fisheries, Consultation letter, model investment agreement, 2015, <https://www.regjeringen.no/contentassets/e47326b61f424d4c9c3d470896492623/consultation-letter.pdf>.

There were some positive reactions from the consultation, especially from different actors within the industry and business sector. There was also quite a lot of opposition, especially from civil society groups. The lack of consensus is similar to the situation that led to the abandonment of the previous model in 2009. The industrial sector wants more rights for the investors, while the civil society groups wants public interests and state authority to be better protected.

One standard that is often invoked in ISDS proceedings, in relation to the protection of investors against state activity, is the obligation to accord fair and equitable treatment (FET).²¹ The NMBIT's Article 5 has the following wording: «Each Party shall accord to investors of the other Party, and their investments treatment *in accordance with customary international law*, including *fair and equitable treatment* and full protection and security.» As I will get back to in chapter 4, the ordinary meaning does not provide for an understanding of the content of Article 5.²² The notion of «full protection and security» will not be elaborated on.

ISDS tribunals are not formally bound by previous case law, but such practice can contribute to a predictable legal environment, and is thus generally considered by such tribunals.²³ Contrary to the Norwegian legal tradition, preparatory documents are only to be referred to when the interpretation according to VCLT art. 31 leaves an ambiguous meaning or when the result is manifestly unreasonable.²⁴

Finally, it should be pointed out that the NMBIT is meant as a basis for the position of the Norwegian government when entering into negotiations. Adaptations may occur because of characteristics of the other party or their demands, or because of international development within the field. The website of the government states that the decision of whether to proceed with this model will be taken by the government after the consultation.

²¹ UNCTAD Series on Issues in International Investment Agreements II, *Fair and equitable treatment*, Geneva 2012, xiii.

²² Vienna Convention on the Law of the Treaties, art. 31.

²³ Tarciso Gazzini, *Interpretation of International Investment Treaties*, Oxford, 2016. p. 18.

²⁴ VCLT, art. 32.

3. Protection of investors according to Section 97 of the Constitution

3.1. The assessment norms developed through case law and legal literature

This chapter will be concentrated on case law and legal literature relevant for determining the correct assessment norms in cases of disputes between investors and the state in Norwegian law. Over the years there have been many different interpretations of the content of Section 97, both offered by legal experts and by the judges of the Supreme Court. In the following, I will present the main theories that have developed over time in Norwegian law, with emphasis on the circumstances related to a potential investor-state conflict.

An interpretative factor that has played an important role when choosing the assessment norm from early on, is the distinction between actions and rights, in Norwegian law often referred to as actual and not actual retroactivity.²⁵ Both categories were originally protected against state intervention, but this has changed over time. It is the protection of rights, or not actual retroactivity, that is of interest in this chapter, but the distinction may sometimes be difficult.²⁶

Early doctrines were the Theory of Rights and the Legal Rule Theory.²⁷ The Theory of Rights essentially argued that some rights were «velervervede», that is, established or strengthened by custom, and could not be affected through following legislation. A problem with this theory was that it hindered societal development. When this theory was continued by other authors it changed more into an analysis of the developments in the specific legal fields; the Legal Rule Theory.²⁸

The Norwegian Supreme Court has also developed a theory of distinction between provisions regulating economic rights, and provisions regulating personal freedom and security. The

²⁵ Høgberg, 2010, p. 265.

²⁶ See as an example Rt. 2005 s. 855 («Allseas»), about whether a regulation from 1997 could be used for settling tax that should have been reported in 1992 and 1993. The situation in question could be characterized as a grey area between action and right.

²⁷ See Høgberg, 2010, p. 254 et seq.

²⁸ *Ibid*, p. 256.

latter group of regulation has a stronger protection against new regulation than pure economic rights.²⁹ This distinction has been applied in later case law, becoming gradually more nuanced.³⁰ For the situation of an investor-state conflict, one would usually be within the area of economic rights, and thus, the intensity of the assessment would be moderate according to this approach.

Yet another theory for the assessment of retroactivity according to Section 97 is the Standard Theory, presented by Knoph in 1939.³¹ The Standard Theory is built on the ideas of fairness, reasonableness and equality, with a focus on the legislator and his competence. It provides for a broader assessment than a rule which is built on prerequisite and result.

Later case law has adopted the Standard Theory and a mix of other assessment of retroactivity, adding more specific assessment criteria, such as «clearly unreasonable or unfair» or «strong societal considerations».³²

The Rt. 2005 s. 855 «Allseas» case concerned allocation of deductions and determining tax rate for a Swiss company operating on the Norwegian Continental Shelf. The question relevant to Section 97 was whether a regulation from 1997 could be used for tax settlement of the years 1992 and 1993.³³ In this case the Supreme Court rejected the previously used criteria of «clearly unreasonable or unfair» and rather carried out what can be characterized as a weighing of interest or an analysis of proportionality.³⁴ Although the state claimed that the aims were strictly practical, the Supreme Court saw the regulation as a sort of sanction for not reporting accurately, which brought the case more within the core of the prohibition of retroactivity.³⁵ The outcome was also found to be arbitrary, as other companies in the same situation would not be evaluated according to the new regulation.³⁶

²⁹ Rt. 1976 s. 1 (Kløfta)

³⁰ See as examples Rt. 2006 s. 293 (Arves Trafikkskole) and Rt. 2007 s. 1281 (Ullern Terrasse).

³¹ See Høgberg, 2010, p. 283 et seq.

³² See Høgberg, 2010, subchapters 6.6.4. and 6.6.5.

³³ Rt. 2005 s. 855, para 64 et seq.

³⁴ *Ibid*, para 68 et seq, Høgberg, 2010, p. 318.

³⁵ Rt 2005 s. 855, para 68.

³⁶ *Ibid*, para 70.

Case law that indicates an assessment of interests is more in line with the development of case law in the European Court of Human Rights, with the notion of proportionality.³⁷ Several legal authors have argued in favor of such a pro et contra assessment.³⁸

Another important and recent case concerning the general assessment of Section 97 in the area of economic rights is the judgement Rt. 2010 s. 143 on taxation of ship owners. The dispute was about the termination of an especially favorable tax scheme of which the ship owners themselves had been the driving force. The question was whether the new transitional rules for taxation imposed new tax burdens that were in conflict with Section 97.³⁹ The case received a lot of attention. It was an important case for both parties, and concerned a significant sum.⁴⁰ There was a strong dissent in this case (six to five judges), and several of the permanent judges of the court did not participate for various reasons.⁴¹ The dissenting opinions differ on most of the significant issues.

The differing opinions are due to the fact that the two fractions interpreted the first step of the assessment differently, namely what comprised the retroactive element and the actual damage.⁴² The majority saw the retroactive element as a «transitional form» between linking burdensome effects to committed acts and to lay down rules on how an already established position should be exercised.⁴³ They thus considered the correct assessment norm to be whether the retroactive element could be justified by «strong societal considerations».⁴⁴ The minority viewed the retroactive element as a case of false retroactivity, and thus considered the assessment norm to be whether the retroactive element caused the companies «clearly unreasonable or unfair» consequences.⁴⁵ This led to dissenting opinions on each of the following steps of the analysis. This makes the contribution of this judgment to the content of Section 97 in the area of economic rights uncertain.

³⁷ Høgberg, 2010 p. s. 310 et seq.

³⁸ *Ibid*, p. 299.

³⁹ Rt. 2010 s. 143, para 1.

⁴⁰ Høgberg, «Grunnloven § 97 etter plenumsdommen i Rt. 2010 s. 143 (Rederiskattesaken)», p. 694

⁴¹ *Ibid*, p. 735-736.

⁴² *Ibid*, p. 713

⁴³ Rt. 2010 s. 258, para 153.

⁴⁴ *Ibid*, para 154.

⁴⁵ *Ibid*, para 209.

Rt. 2013 s. 1345 is another recent and relevant case. The main question was whether a regulation that made fishing quotas restricted in a specific amount of years was a breach of the prohibition of retroactivity in Section 97.⁴⁶ The quotas had been made unrestricted two years earlier. In determining which assessment norm should be applied, the majority quoted the judgement about the shipping industry (Rt. 2010 s. 143), and their distinction between actual and not actual retroactivity⁴⁷. They went on to conclude that for situations of actual retroactivity, the criteria «strong societal considerations» applies, and thus a relatively narrow access for the legislative authorities to give retroactive laws. In case of interventions in established legal positions, the criteria of «clearly unreasonable or unfair» consequences applies, with a considerable wider access for regulation.⁴⁸ Important differences between the two versions of retroactivity are pointed out. It is possible to adjust when faced with interventions in an established position, and there is a bigger need for regulating ongoing business, compared to already terminated activity.⁴⁹ This, in turn, makes the threshold to reject retroactivity higher.

It is interesting that the majority in this case claims that the criteria «*especially* unreasonable or unfair» contains an assessment of proportionality.⁵⁰ It could be asked if this is a sign that Norwegian case law is taking steps in order to become more in line with international development. They also pointed out that this criteria is flexible and discretionary.⁵¹ Studies of case law have on the contrary demonstrated that no civilian has won a case against the state in court where this criteria «*clearly* unfair or unreasonable» has been applied.⁵²

As is clear from the analysis above, it is difficult to outline a clear picture of the rule of law on this field as of today. The very recent case law that has been presented above may illustrate a slight development in making the assessment more predictable. It seems that in cases of actual retroactivity, the burden to prove a need for retroactive legislation is pushed more towards the legislator, as the assessment criteria seems to be «strong societal considerations».

⁴⁶ Rt. 2013 s. 1345.

⁴⁷ *Ibid*, para 81.

⁴⁸ *Ibid*, para 93 and 94.

⁴⁹ *Ibid*, para 97.

⁵⁰ *Ibid*, para 99.

⁵¹ *Ibid*.

⁵² See Høgberg, 2010, p. 316, and Eivind Smith, «Grunnloven § 96: En eller to hovedregler?», *Lov og Rett*, 2013, s. 488-499, p. 491-492.

In situations of not actual retroactivity, the criteria «unfair or unreasonable», is used. Depending on what adjective future judges will choose to apply together with these terms, «clearly», «especially» or something else, this assessment may give room for a broader, more balanced evaluation, perhaps of proportionality, in line with international development. Also when there is a sort of «transitional form». This does not help if the facts lead different fractions in a trial to interpret the retroactive element differently, as in the Rt. 2010 s. 143.

3.2 Relevant criteria within the general assessment

3.2.1. The fact-specific aspects

An analysis of recent case law provides a list of fact-specific considerations relevant to the further assessment of whether a retroactive act is in breach of the protection of established rights according to Section 97. I will thus analyze the following aspects: legitimate expectations, contractual relations, how restrictive the measure is, and the aim of the legislator.⁵³

One discussion regarding the specific assessment of a case has been whether this assessment should be done with an individual or a general perspective. Recent case law and literature can be interpreted in the direction of an assessment which contains both perspectives.⁵⁴ As an example, in the judgement of Rt. 2013 s. 1345, the majority considers both individual aspects of the damage and general consequences of the regulation in question.⁵⁵

3.3.4. Legitimate expectations

The aspect of legitimate expectations can be explained as the predictability the individual can expect from the legislation.⁵⁶ It is not the subjective idea of what can be expected that is

⁵³ Høgberg, 2010, p. 325, see also the often quoted Borthen-Case in Rt. 1996 s. 1415, page 1430.

⁵⁴ *Ibid*, p. 329-330.

⁵⁵ Rt. 2013 1345, point 110 and 117. See also Rt-1957-522 (Glomfjord), where weight was put on the party's especially difficult situation, at the same time as this was not seen as sufficient to establish a breach of article 97. p. 527.

⁵⁶ Høgberg, 2010, p. 342.

relevant, but what can objectively and reasonably be expected.⁵⁷ Apart from legislation in itself, conduct by the authorities can affect what can be reasonably expected.

An important factor in assessing whether the investor had legitimate expectations is whether she could foresee the changes. In the rule of law tradition this is called *fair warning*.⁵⁸ Fair warning can derive from the history of the legal field or ongoing legislative processes.⁵⁹ However, there must be a threshold for the demanded activity of change, so as not to make every change of law a fair warning. The changes need to be comprehensive and frequent.⁶⁰ An example can be found in Rt. 2013 s. 1345 about the fishery industry. As this was an area of active political exercise of authority and political autonomy, the companies had reason to expect changes.⁶¹

Another aspect is to which extent the individual has committed some sort of action or omitted to, in compliance with the previous legal situation.⁶² Examples are investing time or money, or omitting to apply for funds, in the belief that the law will remain the same. In Rt. 2010 s. 143 the companies had concluded several actions in the belief that the rules would remain until new rules would be made for the future.⁶³ One cannot avoid retroactive legislation by knowingly committing actions that makes it look like one has had legitimate expectations, the actions have to be cautious.⁶⁴

Regarding expectations towards decisions by the public authorities, a scenario can be that the area in which the investor carries out her business was previously unregulated, and the investor may thus have an expectation for that situation to remain. It is considered certain in Norwegian law that the state is entitled to start regulating an area which has previously been unregulated.⁶⁵ Another scenario could be where the investor has expectations that the

⁵⁷ *Ibid*, p. 343.

⁵⁸ *Ibid*, p. 347.

⁵⁹ See as an example Rt. 2007 s. 1281 (Ullern Terrasse), para 106.

⁶⁰ Høgberg, 2010, p. 347.

⁶¹ Rt. 2013 s. 1345, para 131.

⁶² See Høgberg, 2010, p. 350 et seq.

⁶³ Rt. 2010 s. 258, para 160-164.

⁶⁴ Høgberg, 2010, p. 352.

⁶⁵ See Rt. 1992 s. 1511, p. 1519.

prerequisites for being entitled to a permission will remain the same. According to Norwegian administrative law, such prerequisites must be objectively justifiable and proportionate.⁶⁶

3.3.6. Contractual relations

Contractual relations between the state and an investor are complicated matters, as it is a mix of public and private law. Legislation of conditions such as the environment, tax, state funds, etc., can cause a dislocation in the world of business, where there is a fundamental need to trust that agreements will be complied with. This is a fundamental principle in Norwegian law.⁶⁷ Parties will often have a strong expectation that the authorities will not intervene in the contractual relationships through changes of the legal situation.⁶⁸ On the other hand, the powers of the legislator can not be bound by such agreements in all situations, as the state would otherwise be kept from developing according to the needs of society. Therefore it is necessary to find a balance between these two considerations.

Although there has been reluctance in Norwegian law with regards to intervening in agreements with changes to the content, there has been a development in the last 30-40 years, with a bigger acceptance of such interventions.⁶⁹ This might be related to the change of the general opinion with regards to the functions of the state. Either way, the principle of *pacta sunt servanda* is still fundamental, especially in the area of business. The legislator needs to be cautious with intervening, and heavily weighted societal concerns need to comprise the other scale. The more the parties are affected by the change, the more reasons are needed. Here, both practical and economic considerations are valid.

A judgement with quite special circumstances is Rt. 1962 s. 369, which concerned the fulfillment of old state loans. The background was the difficult economic situation in Norway in the interwar period. A law had been given in 1923 which established that contractual obligations did not have to be fulfilled in the value of gold, as long as the Norwegian Bank was not obligated to cash out banknotes in gold. This obligation towards the Norwegian Bank

⁶⁶ Høgberg, 2010, p. 356.

⁶⁷ Kong Christian Den Femtis Norske Lov 1687 - NL 5-1-2.

⁶⁸ Høgberg, 2010, p. 416.

⁶⁹ *Ibid*, p. 417.

was suspended in 1931. French bondholders claimed repayment of their bonds according to a clause in the contracts prescribing fulfillment in the value of gold in 1958. One of their claims were that the law from 1923 was in breach of Section 97.⁷⁰ It was pointed out that the gold clauses were included after the negotiations, which weakened the parties' expectations.⁷¹ The Supreme Court pointed out that the assessment had to be general, as the law applied to all gold clauses, not only in relation to bonds.⁷² Although there was a specific agreement, the Supreme Court did not consider it as a breach of Section 97, as vital societal interests were at stake.⁷³ Fulfillment according to the gold clause could potentially alter the financial stability of the Norwegian monetary system. The bondholders still got their fulfillment, just not in the value of gold. This case also indicates that the longer the agreement is meant to last, the less legitimate are the expectations that everything will remain the same.

Contractual relations between the state and a private party can be divided into situations where the agreement is strictly commercial and situations where public authority is a factor. In the first instances, the assumption is that an eventual change of the contractual relationship is only accepted within the frame of what is allowed by Norwegian contract law, and the doctrine of flawed assumptions.⁷⁴ I will not elaborate in this, as it does not fall within the scope of this thesis.

In regards to agreements concerning public authority, there have been a lot of different views in Norwegian legal literature about how these situations should be solved.⁷⁵ The question of whether the state was legitimated to commit to such an agreement will be an important factor, as this is also related to how legitimate the expectations of the counterpart could be. This debate is well illustrated by the vivid discussions that took place in Norway in the 1970s about the raise of tax on oil industries because of the unexpected considerable increase of the value of petroleum on the international market.⁷⁶

⁷⁰ Høgberg, 2010, p. 313 and Rt. 1962 s. 369, p. 381-383.

⁷¹ Rt. 1962 s. 369, p. 372.

⁷² *Ibid*, p. 384.

⁷³ *Ibid*, p. 385.

⁷⁴ Høgberg, 2010, p. 422-423.

⁷⁵ See Høgberg's presentation of the views of other legal authors (such as Brækhus, Eckhoff, Smith, Bernt, AP Høgberg and Graver), p. 426-427.

⁷⁶ See Ot. prp. nr. 26 (1974-1975), Chapter 2.

A clear divide in academic views developed on the special petroleum tax. The Norwegian professor Sjur Brækhus on the one hand, looked at the situation from a clear contractual perspective, and argued in favor of commercial contractual interpretation.⁷⁷ He argued that it is crucial for the states to be able to engage in agreements with companies, and thus fundamental principles of contract law, such as predictability, should be emphasized, and societal considerations had to be very strong if they should prevail.⁷⁸ He meant to find support for this in previous case law.⁷⁹ Jan Fridthjof Bernt has later pointed out that the tendency of the courts to apply such interpretation is due to their hesitation regarding the correct approach as this field of law is uncertain.⁸⁰ Carl August Fleischer with his public law perspective on the other hand, claimed that Parliament's competence to legislate on the tax issues could not be bound by concessions for petroleum exploration granted to private companies.⁸¹ Even if the companies had been asked by the state authorities to sign that they accepted the conditions for the concessions, this could not be seen as a contract.⁸² Although the immediate outcome of these discussions was a balanced approach by the legislative department, the public legal aspect has been dominating in later case law, with contractual aspects being brought in as criteria in the general assessment.⁸³

3.3.3. How restrictive the intervention is

The more serious, strong and broad a retroactive regulation is, the less likely that other considerations can weigh up for it.⁸⁴ This scale stretches from smaller interventions that influence the business only moderately, to restrictions so comprehensive that it in reality puts

⁷⁷ Sjur Brækhus, *Rettslig vurdering av hittil meddelte Tillatelser til utvinning på den norske del av kontinentalsokkelen*, Oslo, 1975, pages 12-13, 15-16, 18-19, 39, 68-69 and 78.

⁷⁸ *Ibid*, p. 15-19 and p. 39.

⁷⁹ *Ibid*, p. 22, 26-27, 29.

⁸⁰ Jan Fridthjof Bernt, *Avtaler med stat og kommune*, Universitetsforlaget, 1981, p. 78. This could explain why the the Supreme Court refrained from assessing Section 97 when this dispute was later brought to court, Rt. 1985 s. 1355, p. 1379.

⁸¹ Fleischer, 1976, «Statsrett, oljeskatt og juridiske mistak», *Lov og Rett*, 1976, s. 399-409, p. 401-402.

⁸² *ibid*, p. 400 and 403-404.

⁸³ Høgberg, 2010, p.430.

⁸⁴ *Ibid*, p. 333.

the company out of business. The assessment will also depend on how absolute and final the intervention is.⁸⁵

A quantitative element has been considered relevant in economic legal disputes where the state as one of the parties has certain powers that may alter the relationship.⁸⁶ In Rt. 2005 s. 855 «Allseas», the amount was thought to be considerable, but this was especially relevant because the intervention from the state had a sanctioning character.⁸⁷ Another example can be found in Rt. 2006 s. 293 about a driving school, where the Supreme Court pointed out that 40 000 NOK was not a modest amount for a sole proprietorship.⁸⁸ This case shows that the assessment of how considerable the amount is established to be depends on the situation and means of the investor.⁸⁹ Whether the opposite scenario, namely that the amount is insignificant, leads to less demands towards the states' commitment, is not clear. This aspect is often not mentioned in case law when the amount is insignificant, but many such cases has led to the conclusion that there had not been a breach.⁹⁰

When it comes to the seriousness of the interventions, one needs to carry out an analysis of the difference with and without the legislative change.⁹¹ An issue in regards to such an analysis can be found in the decision on ship owner taxation in Rt. 2010 s. 143. The judges asked whether the consequences of the retroactivity had to be seen in connection to the advantages that came with the new system. The majority did not agree that one had to consider the advantages for the field of business as a whole.⁹² The different opinion of the minority may be due to the diverging opinion about the retroactive element (as mentioned above). In Rt. 2013 s. 1345 the general advantages of the sector was admitted in the analysis of the seriousness of the intervention.⁹³ It was also weighed that there were measures in place in order to make the transition easier on the company.⁹⁴

⁸⁵ See Høgberg, 2010, p. 333, interpreting the Rt. 1996 s. 1415 (Borthen) case, p. 1430.

⁸⁶ Høgberg, 2010 p. 333, and Rt. 2006 s. 293, Rt. 1996 s. 1415 and Rt. 1957 s. 522.

⁸⁷ Rt. 2005 s. 855, para 66.

⁸⁸ Rt. 2006 s. 293, para 76.

⁸⁹ Høgberg, 2010, p. 337.

⁹⁰ *Ibid*, p. 340-341.

⁹¹ Høgberg, 2010, p. 336. See for example in Rt-1957-522 (Glomfjord) p. 528.

⁹² Rt. 2010 s. 258, para 167 et seq.

⁹³ Rt. 2013 s. 1345, para 110 and 117.

⁹⁴ *Ibid*, para 118.

3.3.5. The aim of the regulation

It is generally agreed in Norwegian law that current governments cannot bind future governments, as it would be too great of a restriction of political autonomy. Nevertheless, there is a need for protection of the interests of the individuals, and this is where the prohibition of retroactivity comes in as a limit. As pointed out recently by the Supreme Court, it is important to find the balance between stability in the framework and the need for political autonomy.⁹⁵ Through the aim of the law and the will of the legislator, we are presented with what societal considerations are sought to be protected. The aim of the law can explain the reasons for the legislation in general, as well as the reasons for the retroactive element.

There are several aspects that influence how the aim is considered in the assessment of retroactivity.⁹⁶ The aim has to be objectively justifiable, in other words suitable and necessary in order to realize the aim. The assessment will also depend on which societal considerations the aim is meant to protect. Public health and security weighs heavier in the general assessment than practical and fiscal considerations. In Rt. 2013 s. 1345, the authorities had mentioned several societal considerations that were deemed legitimate as the Parliament enjoyed a lot of autonomy in the field of taxes, and it was concluded that how much weight such considerations were given was a prerogative of the Parliament.⁹⁷ In «Allseas», technical improvements was not considered a good enough reason for retroactivity, especially as the retroactive element bore a similarity to an economic penalty.⁹⁸ Finally, the assessment will depend on how clearly the aim is presented in the law and the preparatory works, whether it is well justified and predictable. In Rt. 1991 s. 1439 («Norsk Hydro») new legislation intervened in an agreement that gave founders of a company certain advantages by establishing that only the shareholders could have such advantages. The judges came to the conclusion that the law should not apply to the agreement, as the question of retroactivity had not even been considered in the preparatory works of the new law.⁹⁹

⁹⁵ Rt. 2013 s. 1345, para 129.

⁹⁶ See Høgberg, 2010 p. 368 et seq.

⁹⁷ Rt. 2013 s. 1345, para 134 and 166. Also in Rt. 1962 s. 369 the societal considerations (the general economy of the Norwegian state) was considered legitimate.

⁹⁸ Rt. 2005 s. 855, para 68.

⁹⁹ Rt. 1991 s. 1439, p. 1448. Same arguments can be found in Rt. 1992 s. 1511.

Some societal considerations have gradually gained more momentum together with the development of societies. Welfare has already been mentioned, and environmental concerns are getting ever more relevant on both a national and global scale because of new knowledge about the implications. It has been pointed out that the environmental provision in Section 112 of the Constitution can serve as a counter-weight to the stronger protection of property rights emanating from international law.¹⁰⁰ International practice also shows a wider margin of appreciation in cases of environmental considerations, although this is relative to the degree of intervention.¹⁰¹ Environmental considerations are more relevant than ever with the ratification of the Paris Agreement. Gradually larger interventions in ownership and other established rights may be necessary in order to face the environmental challenges.

The economic toll on the society can also be a relevant factor, according to case law.¹⁰² Such considerations have also been considered to be relevant in international case law. For example in the Icesave case, it was found that Iceland did not have to pay back the British and Dutch governments for not honouring deposit guarantees for savers in failed online banking operation Icesave.¹⁰³ Similar cases have also been brought to the ISDS system, such as in relation to the financial crisis in Greece, and it will be interesting to see the outcome.¹⁰⁴

¹⁰⁰ See Høgberg, 2010, p. 379 referring to Fauchald who was writing about the previous version Section 110 b.

¹⁰¹ *Ibid*, p. 380.

¹⁰² Rt. 1962 s. 369, p 386. As presented above.

¹⁰³ Case E-16/11, EFTA Surveillance Authority v. Iceland (Icesave), 28 January 2013

¹⁰⁴ UNCTAD, Latest Developments in Investor State Dispute Settlement, IIA Issues Note, n. 1 April 2014, (www.unctad.org/diae), p. 5-6.

4. Protection of investors according to the NMBIT article 5

4.1 The assessment norms developed through case law and legal literature

In this chapter, a comparison will be given of case law and legal literature relevant for determining the content of investors' protection according to the NMBIT Article 5 and the findings above regarding Section 97. As with Section 97, the broad wording included in FET standards, has over the years been interpreted differently by tribunals and authors of international investment law. This subchapter presents the development of the content of FET standards in international case law and legal literature, with emphasis on the wording of Article 5. With the large amount of case law on this field, it is not the ambition of this thesis to give a thorough disposition of all cases, but rather to point out some trends in order to compare with Norwegian law.

It is hardly necessary to point out that there are some differences emanating from the different wordings of the two provisions. Section 97 is as it reads a prohibition of retroactive legislation, and thus not all the same assessment criteria have been deduced from Article 5. From case law related to Section 97, four necessary, but not sufficient, terms seem to have been agreed upon.¹⁰⁵ The retroactivity must derive from a law that includes retroactive elements, and there needs to be damage and causality between the damage and the retroactivity. The FET standards lacks such concrete necessary criteria, and builds rather on a general assessment with a number of optional elements, as I will get back to in the next subchapter. Another obvious difference is that there is no distinction between actions and rights or actual and not actual retroactivity in relation to the FET standards.

According to the VCLT Article 31 the starting point of the exercise of determining the meaning of an article in an international treaty is, as with Norwegian law, the ordinary meaning of the text.¹⁰⁶ However, as with Section 97, it is hard to say something about the

¹⁰⁵ Høgberg, 2010 p. 146.

¹⁰⁶ Gazzini, 2016, p. 64-65.

ordinary meaning of «*fair and equitable*» that isn't equally vague, when the provision is broad and imprecise.¹⁰⁷ FET provisions are purposely flexible, and the determination of the content will 'depend on the facts of the particular case'.¹⁰⁸ Although Section 97 is quite strict with regards to cases within the core of the provision, protection of previous actions against new legislation in cases of established rights has also developed into a flexible provision that requires an assessment of the specific facts of the case.

Proper interpretation of FET standards also depends on its context, the object and purpose of the treaty.¹⁰⁹ With regards to interpreting the meaning of the NMBIT Article 5 specifically, it is logical to start by interpreting other provisions that may be relevant. As illustrated with the analysis of Section 97, the protection of the investors interests must be balanced with other provisions giving the legislator autonomy to legislate and make general political decisions.¹¹⁰

The NMBIT contains a specific provision regarding the right to regulate in article 12. This article provides that the states have a right to adopt measures in order to ensure sensitivity towards health, safety, human rights, labour rights, resource management or environmental concerns. This could be interpreted as a discretion of the states to intervene in investors' interests with regards to these specific considerations, but such measures can only be applied as long as they are «otherwise consistent with» the agreement. This seems to bring us back to the content of the FET standard, or at least it gives no clear answer as to whether some considerations are at the sole discretion of the states to regulate without regards to established positions. The scope of this thesis does not permit a further analysis of this provision.

Article 28 provides that nothing in the treaty «shall affect the imposition, enforcement or collection of direct or indirect taxes imposed by a Party». Furthermore it provides in paragraph 3 and 4 that taxation issues are excluded from the dispute settlement provisions, and are to be determined by national courts. Only if the competent authority finds that it is rather a question of expropriation the dispute would be covered by the dispute settlement

¹⁰⁷ Gazzini, 2016, 91-93.

¹⁰⁸ *Ibid*, p. 93, *Mondev International Ltd v United States*, above Ch 3, n 85, Award, para 118.

¹⁰⁹ VCLT art. 31.

¹¹⁰ See this analysis under point 2.1.

provisions. Many of the ISDS cases have been related to taxation, and it will be interesting to see if this provision will prevail.

Without assessing the provisions 25 of prudential regulations, 26 of security measures and 27 for cultural exceptions in detail, it can be said generally that all provisions contain only specifically outlined areas of societal considerations where it gives the state a larger discretion. Thus, if the FET standard provides greater protection to investors than the Norwegian Constitution, it might seem that the NMBIT entails greater restrictions on political autonomy and legislative decisions.

In *Electrabel v Hungary*, it was noted that it is “well-established that the host State is entitled to maintain a reasonable degree of regulatory flexibility to respond to changing circumstances in the public interest” and that, therefore, “the requirement of fairness must not be understood as the immutability of the legal framework, but as implying that subsequent changes should be made fairly, consistently and predictably”.¹¹¹ Thus, as a general point of departure, the FET standard does not preclude later legislation from changing previous laws. The question is whether the threshold for breaching the certain standard of protection according to this standard is lower than what follows from Section 97.

There is a reference to «customary international law» in the Article 5, which could give a further indication of the content of this particular FET standard. The wording («including») indicates that this FET standard is to be seen as the standard that emanates from customary international law. When such the wording includes a reference to customary international law, but not «minimum standard», it could indicate that the FET standard is autonomous, meaning that it is seen as something higher than the minimum standard of treatment according to international law.¹¹²

There are no indications in the preamble of the model agreement as to how the included FET standard should be interpreted. There is however some information to be found of the

¹¹¹ *Electrabel S.A. v Republic of Hungary* (ICSID Case No. ARB/07/19), Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para 7.78 and 7.77.

¹¹² UNCTAD, *Report on Recent development in Investor State Dispute Settlement (ISDS)*, n. 1 April 2014, (www.unctad.org/diae), p. 18: The MST is considered to be the «floor», below which treatment of aliens must not fall.

intention of the Norwegian government in the preparatory documents. The comments document provides a specification, which reads «The right of investors to fair and equitable treatment (...) is based on the international minimum standard under customary international law, which specifies the lowest threshold for the treatment of foreign nationals».¹¹³ Moreover, it is pointed out that in the assessment of whether the standard has been breached, one must respect the states' right to regulate within its own territory. Finally it claims that the deciding factor will be whether the actions can be concluded to be *clearly improper* by reference to an international standard. It is then concluded that the threshold of breaching this international standard is high. The intention of including the reference to international law thus seems to be to underline that the meaning of this particular FET standard is lower than what could be assumed if no such reference had been made.¹¹⁴

ISDS case law seems to differ in the opinion of whether an FET standard can be interpreted this way, when it includes a reference to international customary law, but not the *minimum standard*. As an example, in the case *Crystallex v Venezuela*, the tribunal established that it could not interpret the formulation «in accordance with the principles of international law» to be equated with the «international minimum standard of treatment», but saw it rather as an autonomous standard.¹¹⁵

It should be pointed out that compared to Norwegian law such sources have less importance in international law, as indicated previously. Thus, if it is the intention of the drafters to a high threshold for the FET standard to be applied, it might be a better idea for it to be included in the wording itself, as the negotiating documents could be ambiguous.

Other recent cases, on the other hand, have claimed that the distinction does not make a lot of difference. For example in *Deutsche Bank v. Sri Lanka*, the tribunal held that the actual

¹¹³ Royal Norwegian Ministry of Trade, Industry and Fisheries, Consultation letter, model investment agreement, 2015, page 6, see also the comments document referred to above, page 8, both documents to be found here: <https://www.regjeringen.no/no/dokumenter/horing---modell-for-investeringsavtaler/id2411615/>.

¹¹⁴ In the case of a real dispute, provided that the Norwegian government had entered into an agreement with this wording, the relevant documents for the interpretation of this wording would be the negotiations between the parties, and not this comments letter.

¹¹⁵ *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, para 530, see also similar opinions in *Vivendi v Argentina*, para 7.4.6.

content of the Treaty standard of fair and equitable treatment was not materially different from the content of the minimum standard of treatment in customary international law, and pointed out that this was recognized by numerous arbitral tribunals and commentators.¹¹⁶

In either case, the normative content of the standard needs to be determined through further means. Compared to Norwegian law, investment tribunals are not bound by previous case law, but should nevertheless pay respect to the general developed theories of the content of common provisions.¹¹⁷

There is evidently no case law specifically related to this Article 5, as it is only a model, but an analysis of the interpretation carried out for similar provisions in case law can give an idea of how this article would play out in practice, should it become binding with its current content in a bilateral agreement with another state.

4.2. Relevant criteria within the general assessment

The traditional starting point of an analysis of the FET standard is the notion of ‘egregious or outrageous conduct’ in 1926 *Neer* (US v Mexico) case of the US -Mexico General Claims Commission.¹¹⁸ The understanding of this standard has since then evolved, and it is necessary to analyse contemporary case law.¹¹⁹ An FET standard which was very similar to article 5 in the Norwegian model agreement was interpreted in *Gold Reserve v. Venezuela*.¹²⁰ The tribunal noted that “public international law principles have evolved since the *Neer* case and that the

¹¹⁶ *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2), Award, 31 October 2012, paras. 418-419.

¹¹⁷ Gazzini, 2016, p. 97.

¹¹⁸ UNCTAD Series on Issues in International Investment Agreements II, *Fair and equitable treatment*, Geneva 2012, p. 45, *LFH Neer and Pauline Neer v Mexico* (US v Mexico) (1926) 4 RIAA 60, p. 61-62.

¹¹⁹ UNCTAD Series on Issues in International Investment Agreements II, *Fair and equitable treatment*, Geneva 2012, p. 46-47.

¹²⁰ In *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, the tribunal had to interpret Article II(2) of the Canada-Venezuela BIT which reads as follows: “Each Contracting Party shall, in accordance with the principles of international law, accord investments or returns of investors of the other Contracting Party fair and equitable treatment [...]”

standard today *is broader than that defined in the Neer case (...)*.¹²¹ One can in other words detect a more lenient practice in favor of the investors.

As proclaimed in *Total SA v Argentina*, ‘tribunals have endeavored to pinpoint some typical obligations that may be included in the standard, as well as types of conduct that would breach the standard, in order to be guided in their analysis of the issue before them’.¹²² Lists of more specific criteria can be found in a number of other cases with some variation. It is not within the scope of this thesis to give a presentation of all the various ways to formulate the specific criteria. With this adequately representative list mentioned above, recent case law will in the following be analyzed with the specifics of certain cases relevant to the topic of this paper: the State must act in a transparent manner, the State is obliged to act in good faith, the State’s conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process, and the State must respect the investor’s reasonable and legitimate expectations.¹²³

4.2.1. Legitimate expectations

As with Section 97, legitimate expectations connected to changes made by a state that causes adverse effects for the investors is a relevant criteria.¹²⁴ ISDS case law illustrates diverging trends regarding what expectations can be considered legitimate. In *Tecmed v Mexico* the tribunal established: «The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.»¹²⁵

This view has been followed in a few later cases such as *CMS v. Argentina* and *Enron v. Argentina*, where the tribunals relied on the preamble of the applicable Argentina-United

¹²¹ *Ibid*, para 567, upheld in *Philip Morris*, para 319.

¹²² *Total SA v Argentina*, ICSID ARB/04/01), Liability, 27 December 2010, para 109.

¹²³ *Rumeli v Kazakhstan*, above Ch3, n 39, Award, 29 July 2008, para 109, later cited in *Paushok v Mongolia*, Award on Jurisdiction and Liability, 28 April 2011, para 253.

¹²⁴ UNCTAD Series on Issues in International Investment Agreements II, *Fair and equitable treatment*, Geneva 2012, p. 63.

¹²⁵ *Tecmed v Mexico*, ICSID Case No ARB (AF)/00/2, Award, 29 May 2003, para 154.

States BIT, which established that “fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment”.¹²⁶ It is worth noticing in this regard that there is also a reference to «a stable framework» in the preamble of the NMBIT. As mentioned above, the further reservations regarding the threshold of the FET standard in Article 5 are found in the preparatory documents. The preamble has a higher status in regards to interpretations according to international law. This could lead some tribunals to interpret the FET standard in the NMBIT in the same way as in the above mentioned cases. The tribunal in *Enron v Argentina* held that the emergency measures taken by Argentina were in breach of the FET standard. It was found that the stable framework for investment had been undermined, as Argentina had dismantled the regime of tariff guarantees that had originally induced the investor to invest.¹²⁷ It is worth noticing that Argentina was facing a financial crisis.

As held by several, this standard is nearly impossible to achieve, and is unjustified, as it would prevent the host states from introducing any legitimate regulatory change.¹²⁸ This view has led some tribunals to require further qualifying elements to the notion of legitimate expectations, establishing that they must be grounded in reality, experience and context.¹²⁹ This approach is more in line with Norwegian law, as presented in 3.2.1.

A recent case that also dealt with the FET standard and investors’ legitimate expectations is the *Phillip Morris v Uruguay*. A tobacco company had brought claims towards the state for tobacco-control measures they claimed violated the protection of their trademarks, according to the BIT.¹³⁰ The measures included an increase in the size of graphic health warnings appearing on cigarette packages. The tribunal stated initially that legislative changes are not prevented by an FET standard if they do not exceed the normal regulatory power in pursuance

¹²⁶ *CMS v. Argentina*, Award of 12 May 2005, para. 274; *Enron v. Argentina*, Award of 22 May 2007, paras. 259–260.

¹²⁷ *Ibid*, paras 264-268.

¹²⁸ UNCTAD Series on Issues in International Investment Agreements II, *Fair and equitable treatment*, Geneva 2012, p. 65 and 67.

¹²⁹ *Ibid*.

¹³⁰ *Philip Morris Brands SÀRL, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, (ICSID Case No. ARB/10/7), Award, 8 July 2016.

of a public interest, and do not modify regulatory framework relied upon by investors «outside of the acceptable margin of change».¹³¹

Referring to previous case law, the tribunal rejected the overly- broad and unqualified formulation which virtually freezes legal regulation of economic activities. They then went on to support the view of previous tribunals that «legitimate expectations depend on specific undertakings and representations made by the host State to induce investors to make an investment. Provisions of general legislation applicable to a plurality of persons or of a category of persons, do not create legitimate expectations that there will be no change in the law.»¹³² This seems to be in line with Norwegian law.

Nevertheless, when looking at the further interpretation of state conduct in ISDS case law, it deviates somewhat from the Norwegian approach. In *Micula v. Romania*, the claimant held that a repeal of certain investment incentives breached the FET standard.¹³³ According to the tribunal, it was irrelevant whether the state actually wished to commit itself. They concluded that the purpose behind the incentives, the legal norms, a permanent investor certificate and the states conduct, Romania had created a legitimate expectation that the incentives would remain the same for the given period of years.¹³⁴ Although the will of the state is not always the deciding argument in Section 97 assessments of whether the state had committed itself, it is not considered irrelevant.

As mentioned in relation to the analysis of contractual relations under Norwegian law in chapter 3, time is a relevant aspect. The longer an agreement lasts, the less legitimate are the expectations that everything will remain the same. Also an analysis of ISDS case law seems to show that the more long-term investment are being made, the more reason does the investor have to expect that the regulations will change with the development of society.

¹³¹ *Ibid*, para 423.

¹³² *Ibid*, para 426.

¹³³ *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania* (ICSID Case No. ARB/05/20), Final Award, 11 December 2013.

¹³⁴ *Ibid*, para 667.

In the recent case, *Copper Mesa v Ecuador*, it was established that the claimant was taking the risk of changes in the legal and regulatory regime, upon long-term investments.¹³⁵ References are made to *AES v Hungary*: “... any reasonably informed business person or investor knows that laws can evolve in accordance with the perceived political or policy dictates of the times”; and “the fact that an issue becomes a political matter, ... does not mean that the existence of a rational policy is erased.”¹³⁶

4.2.2. Contractual Relations

ISDS case law often establishes that unless there is a “stability agreement” or a “promise by the host State”, the State will be able to modify the legal framework.¹³⁷ The questions that arises in comparison to the protection of investors according to Section 97 are what qualifies as an agreement between the parties, and if the threshold for breaching such agreements is the same.

In *Minnotte and Lewis v. Poland*, the tribunal confirmed that there is a «general expectation that States will observe basic standards such as reasonable consistency and transparency», but held that «more specific expectations must be specifically created and proved».¹³⁸ This seems to be in line with Fleischer’s opinion, quoted in chapter 3, which has been dominating in later case law. The tribunal also rejected the claim as the claimants failed to provide any documentary, or specific evidential support for their alleged expectation.

In relations to Norwegian case law, an important difference is that it has been established for a long time that the courts can assess whether the state had the authority to commit to certain obligations, and this becomes an element in the assessment of legitimate expectations. A tribunal does not have more authority than what is given to them according to the treaty, and thus will apply an interpretation of the contract.

¹³⁵ *Copper Mesa Mining Corporation v The Republic of Ecuador*, (PCA Case No. 2012-2), Award, 15 March 2016, para 6.61.

¹³⁶ *Ibid.*

¹³⁷ See for example *Ulysseas Inc v The Republic of Ecuador* (UNCITRAL), Final Award, 12 June 2012, paras. 248-249.

¹³⁸ *David Minnotte & Robert Lewis v Republic of Poland* (ICSID Case No. ARB(AF)/10/1), Award, 16 May 2014, para. 193.

The case *Duke Energy v Ecuador*, was about alleged breaches of several agreements entered into between the parties for electrical power generation and supply to a city.¹³⁹ As stated in the Norwegian case about the fishery industry, Rt. 2013 s. 1345, *Duke Energy v Ecuador* stated that the investor must be aware of the regulatory environment of the host country and their expectations must be balanced against legitimate regulatory activities of host countries.¹⁴⁰ It is also stated that legitimate expectations may only arise from a state's specific commitments on which the latter has relied, as in the shipping industry-case, Rt. 2010 s. 143, mentioned under chapter 3.

In *Electrabel v. Hungary* (referred to above), after the economic changes that followed with Hungary's accession to the EU, it was not legitimate that the claimant expected the pricing under long-term power purchase agreements to be fixed in accordance with factors established at the time of privatization.¹⁴¹

In *Perenco v Ecuador*, regarding windfall profit taxes at 50 and 99 per cent, there was a discussion about how the state's contractual obligations should be maintained when there is a new government, even when there is no stability clause.¹⁴² It was established that because capital-intensive investments with substantial 'up-front' costs generally require a longer period of operations in order to be able to generate a reasonable return, and thus must be able to withstand deviations in governmental policy.¹⁴³ This did not mean, however, that the new government was not able to make any changes. The tribunal made an assessment of the severity of the measures taken, which I will get back to in the next chapter.

Total S.A. v. Argentina contains some statements regarding the effect a BIT has on the relationship between the investor and the state.¹⁴⁴ It was said that there is no guarantee of

¹³⁹ *Duke Energy v Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008.

¹⁴⁰ UNCTAD Series on Issues in International Investment Agreements II, *Fair and equitable treatment*, Geneva 2012, p. 68.

¹⁴¹ *Electrabel v. Hungary*, para 7.140.

¹⁴² *Perenco Ecuador Ltd. v The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/08/6), Decision on Remaining Issues of Jurisdiction and Liability, 12 September 2014, para. 560-562.

¹⁴³ *Ibid*, para 564.

¹⁴⁴ *Total S.A. v. Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010.

stability in the legal regime just because a BIT has been entered into.¹⁴⁵ However this case also contains statements that seems to establish that a concession is a specific legal obligation for such stability.¹⁴⁶ Although concessions are not within the scope of this thesis, it should be pointed out that it has been operated with concessions towards foreign investors in Norway, and these are not seen as stability promises in Norwegian law.

4.2.6. Arbitrariness

This criteria can to a certain extent be compared to some of the elements within the criteria of how restrictive the intervention is in relations to Section 97, but not entirely, as it is more focused on the conduct of the state and not on the implications for the investor.

The case *Elettronica Sicula SpA (ELSI)* by the International Court of Justice is the leading modern case on the obligation of non-arbitrariness within the field of foreign investment.¹⁴⁷ Arbitrariness was here described as «a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety».

In *Perenco v Ecuador*, the tribunal stated that states must seek to act consistently and not willfully repudiate long term commercial relationships.¹⁴⁸ The conclusion was that the 99 per cent tax was in breach of the FET standard.¹⁴⁹ This undoubtedly have been the same result after Section 97. A 99 per cent tax is essentially hindering a profitable running of a business, and would thus clearly have been seen as a breach of several standards protecting ownership, such as Section 105.

In *Impregilo v. Argentina*, the tribunal pointed out that the state is especially legitimated to make changes in times of crisis, but that investors should be protected from unreasonable modifications.¹⁵⁰ The tribunal concluded that Argentina had breached the FET standard by

¹⁴⁵ *Ibid*, para. 117.

¹⁴⁶ *Ibid*.

¹⁴⁷ Martins Paparinskis, *Fair and equitable treatment*, Encyclopedia of international Economic Law, Nadakavukaren Schefer and Cottier (eds), 2016, p. 4 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2713914).

¹⁴⁸ *Perenco v. Ecuador*, para 564.

¹⁴⁹ *ibid*, para 591 and 606-607.

¹⁵⁰ *Impregilo S.p.A v. Argentina*, Award, 21 June 2011, para. 291.

failing to restore a reasonable equilibrium in the concession.¹⁵¹ This could be compared to the assessment in Norwegian law regarding measures taken by the authorities to help companies manage the legal changes.

4.2.7. Societal Considerations

Most case law also establishes quite a considerable margin for states to make changes in their regulations as long as it is done in a reasonable manner and especially in cases where other societal considerations are involved.

An example can be found in the recent case *Murphy v Ecuador*, which, similar to cases in Norway, was regarding the government increase of taxation on oil industries after the unexpected increase of value on the international market.¹⁵² The Tribunal pointed out the increase foreseen by either party, and that it dramatically changed the dynamics in the oil industry all over the world.¹⁵³ It held that Ecuador was within its sovereign right to react, and that the investors had to expect this, especially because they knew the interests of the state was a key factor. The view of the tribunal is practically the same as Flesicher and the legal department in Norway in the 1970s, as referred to in Chapter 3.

Also in *Mamidoil v. Albania*, where a series of measures ultimately led to a prohibition on the landing of petroleum at a port, the tribunal gave observations on the aspect of societal considerations.¹⁵⁴ It stated that although the FET standard is “oriented to predictability of the legal system and to due process”, it did not mean that such aims were “meant to favor the investors’ interests over other economic and social interests”.¹⁵⁵ It went on to establish that such considerations are dynamic and states need to adapt.¹⁵⁶ This is similar to the statement of the Supreme Court in Rt. 2013 s. 1345 about the balance between stability in the framework and the need for political autonomy, as mentioned in chapter 3.

¹⁵¹ *Ibid*, para 330.

¹⁵² *Murphy Exploration & Production Company v The Republic of Ecuador*, Partial final Award, 6 May 2016.

¹⁵³ *Ibid*, para 276.

¹⁵⁴ *Mamidoil Jetoil Greek Petroleum Products Society Anonyme S.A. v Republic of Albania* (ICSID Case No. ARB/11/24), Award, 30 March 2015.

¹⁵⁵ *Ibid* para 613.

¹⁵⁶ *Ibid* para 617.

In *Al Tamimi v. Oman*, where the claimant complained amongst other things about the termination of a quarry lease agreement for environmental purposes, the tribunal found it relevant that the FTA contained specific provisions indicating the high value placed by the parties on environmental protection.¹⁵⁷ This is a logical consequence of the fact that the interpretation of an individual provision must be done in light of the other provisions in the same treaty. Similarly, as mentioned in chapter 3, protection of the environment has its own Section in the Norwegian Constitution, which is an invitation to the courts to weigh such concerns in a Section 97 assessment heavily.

There are several articles in the agreement that refer to specific societal considerations as legitimate, as well as regulate legitimate actions by the state. First of all there is a separate chapter for specific exceptions where the state has been given exclusive rights to regulate. Article 24 provides that the state can adopt and enforce measures related to certain public interests, such as health and environment. Such measures are however only applicable if they are not applied in an «arbitrary or unjustifiable discrimination» between investors or constitute disguised restrictions, which brings us back to similar assessments as for the FET standard.

Another factor according to Section 97 is how the state evaluated the need for the retroactive law. In ISDS, the competence of the arbitrators derives from the BIT, and they only interpret what the states have agreed, not what they were competent to agree to. In the above mentioned *Copper Mesa v Ecuador*, when establishing whether the state acted with due process or in an arbitrary manner, the tribunal noted that it was not their mandate to decide what comprises national interests, and referred to the Respondent's sovereign right, as regulator.¹⁵⁸ This tribunal also held «Under this FET standard, there is a balancing exercise permitted to the host State, weighing the legitimate interests of the foreign investor with the legitimate interests of the host State and others, including (especially) its own citizens and local residents.»¹⁵⁹

¹⁵⁷ *Adel A Hamadi Al Tamimi v Sultanate of Oman* (ICSID Case No. ARB/11/33), Award, 3 November 2015, para 387

¹⁵⁸ *Copper Mesa Mining Corporation v The Republic of Ecuador*, (PCA Case No. 2012-2), Award, 15 March 2016, 6.63.

¹⁵⁹ *Ibid.* 6.81

In *Philip Morris v. Uruguay*, given that this specific case dealt with regulation for the protection of public health, the investors had no expectation that new regulations would be imposed, and Uruguay had not given any specific commitment to Philip Morris. In such circumstances the investors should rather expect such legislation, and the government was not precluded from advancing international practice, as long as the new rules had some rational basis and were not discriminatory.¹⁶⁰

¹⁶⁰ *Philip Morris*, para 430.

5. Comparative analysis of the Constitution and the NMBIT

5.1. Which provision gives a better solution?

Some of the explanations for why there is a lack of predictability with regards to the protection of investors' interests are similar for the two provisions compared in this thesis. One reason is that the wording is short and broad. Another reason is that the respective case law, although the rules of interpretation differ, apply broad approaches, and thus the results may diverge. Furthermore, the mix of private and public law makes it hard for the interpreter not to be influenced in some way by his or her legal field of expertise, if not fundamental values. Examples of such dilemmas are how much of a positivistic view one should take, which sources should prevail, what should be the role of the state, and which principle is more important; predictability or fairness.

The analysis has shown there is a need for such provisions to be flexible and allow for more general assessments depending on the specific circumstances of each case. Nevertheless, it might help increase the level of predictability somewhat if the provisions were a little more specific. In the case of Section 97 one cannot even read the protection of established interests out of the wording, while in Article 5, it is hard to give an explanation of the wording that isn't equally broad and vague. In regards to international investment treaties, some countries have tried to tackle this issue by sustaining the FET standard with certain components that have been developed in case law, such as denial of justice and manifestly abusive treatment.¹⁶¹

Although the assessment norms are formulated differently, one can also detect many similarities between the notions «clearly unreasonable or unfair» and «strong societal considerations» in Norwegian case law, and «arbitrary, grossly unfair, unjust» etc. and the way societal considerations also count in ISDS case law. Both also seem to develop towards

¹⁶¹ Singh, Kavaljit, and Ilge, Burghard (Eds), *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices*, New Delhi, 2016, p. 77 on the case of India, and p. 124 on the case of Indonesia

an assessment of proportionality.¹⁶² As pointed out previously, this would be more in line with the development in European Human Rights law.

One important difference that can be detected from the analysis above, is that in Norwegian case law, one distinguishes between actions and rights, or as is often said in Norwegian theory and practice; actual and not actual retroactivity. Retroactivity towards committed actions is as a general rule not permitted, while for established rights the general rule is the opposite. This in turn changes how strict the applied assessment norm should be. As previously pointed out in this thesis, the Norwegian Supreme Court has provided good arguments for why such a distinction is legitimate.¹⁶³ With interventions in legal positions it is possible to adjust, and there is a bigger need for regulating ongoing business, compared to already terminated activity.

Also ISDS tribunals seem hesitant to bind states to obligations which, because of abrupt changes in the development of things, it is not likely that they meant to commit to. However, given the system of ISDS, the ad hoc appointed judges may influence a specific case in both directions. Although it is advised and generally practiced to take previous case law into consideration, the arbitrators are not bound by it. Finally, case law also demonstrates that the arbitrators are hesitant to intervene into a relation that is agreed upon or in other ways stabilized between the parties. Thus, one should take care that none of the provisions in the NMBIT or in a contract between an investor and the state could be interpreted as a stabilization clause. For example the reference to «otherwise consistent with this Agreement» in article 12 could here use a further analysis.

5.2. What document would prevail in a potential conflict?

In this subchapter, the scenario is that an agreement has been entered into between the Norwegian state and another, based on the content of the NMBIT. All the rules regarding competences and the procedural prerequisites have been complied with, and thus the treaty is

¹⁶² *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11), Award, 5 October 2012, para. 404: «the obligation for fair and equitable treatment has on several occasions been interpreted to import an obligation of proportionality».

¹⁶³ See subchapter 3.1.

considered binding between the parties. The question is what rule will prevail if the treaty provides more rights to the investors than what is prescribed by Section 97 of the Norwegian Constitution. More rights to the investors than what is prescribed by domestic law also signifies a wider restraint on the public authorities. The question is thus what will happen if an investment treaty between the Norwegian state and another country applies limits to the public authorities that are broader than what is prescribed by the Constitution. For example if Norwegian state gives a regulation that is in line with Section 97, but breaches an international investment treaty, and that an investor objects.

It is assumed that the states are autonomous, and a result of this is that they also have the authority to bind themselves to obligations through treaties. The law of treaties is regulated by the VCLT, which establishes in its' preamble that international law should prevail in such cases. The applicable law for the arbitrators in order to decide whether the investor has been wronged is the treaty, not Norwegian law. The state could hardly argue that the measure was legitimate according to the Norwegian Constitution in front of an ISDS tribunal, as it would have no authority to try such questions. As previously established, preparatory works have less importance in the interpretation of international law compared to Norwegian law. The arbitrators are more likely to give weight to the wording of the treaty provisions and the preamble, than to what intentions can be derived from other sources.

If the breach will have an actual impact in the shape of counteracts from the other party or the international community as a whole would of course in turn depend on many circumstances. Nevertheless, a characteristic feature of the international investment treaties is the possibility to enforce awards also within other countries.¹⁶⁴ This is a result of the aim of such treaties being to secure actual security for the investors abroad. An option for the state could be to demand a termination of the treaty. However, the NMBIT, as many other such treaties, contains a clause deciding that the treaty shall last for another 15 years from the moment when the state declares that it wants termination in article 34.

¹⁶⁴ Alvik, 2015, p. 598.

It is true that the interpreter must consider the consequences the parties to the treaty must reasonably and legitimately have envisaged when accepting their treaty obligations.¹⁶⁵ The value of this principle is on the other hand disputed. In the end, good faith would hardly prevail over a clear wording or undermine the pursuing of the object and purpose as declared in the preamble.¹⁶⁶ Furthermore such an issue could depend on the composition of the tribunal.

¹⁶⁵ Gazzini, 2016, p. 60.

¹⁶⁶ *Ibid*, p. 61-63.

6. Conclusions

Some of the issues with the ISDS mechanism have been illustrated in regards to the interpretation of the FET standard. Partly due to the fragmented system of ISDS, the exact content of this standard is still very unpredictable. The arbitrators are appointed ad hoc, they are not obliged to follow previous case law, their loyalty lies with the content of the treaty from which they draw their authority, and there is no system in place for an appeal.¹⁶⁷ This calls for a more permanent, consistent solution. One such solution was attempted in the negotiations of the TTIP which is not likely to go through given recent events in society. Whether the permanent court presented in relation to this treaty would be a good solution is questionable. The TTIP is an agreement between two strong actors on the international arena. Contrary to the system in the WTO, mega regionals are not negotiated multilaterally. Still, other countries may have to adhere to that system eventually if it goes through, as it would be the greatest trade- and investment area in the world. Whether it is possible to establish a multilateral agreement on this subject remains unlikely, given that there has been a deadlock in the WTO for many years because of the divide between developed and developing countries on numerous issues related to international trade and investment.

It is a general problem in the global society of today that there is no international tribunal for the breach of human rights and environmental crimes committed by companies from one state in another state. Through a specific need for protection of investments across borders, the international investment regime has developed in response, giving investors the opportunity to invoke protection under international law. Putting it bluntly, one could say that trade and investment has been globalized; justice not yet. Without an ideal solution of this problem in sight, one must attempt to develop the existing systems in order to improve the situation.

Since international investment law is a field that combines many different legal spheres, such as public law, private law, contract law and conventional commitments, there is a need for a broader point of view than the simple relationship between an investor and the host state, based on a BIT. Other interests may be involved, and should be taken into consideration. One cannot simply deduct this relationship from the general functions of a legal system. Some

¹⁶⁷ Alvik, 2015, p. 589

states have already started to change the way they adopt such treaties and how they are worded. While certain states have decided to terminate their international investment agreements all together, other states have decided to exclude clauses that limit their authority, such as FET and ISDS clauses.¹⁶⁸

As declared in the introduction, this thesis is meant as a contribution to the ongoing discussion on the international level about the balance between protection of investors' interests and state's political autonomy and right to regulation. The success story of the Norwegian state in regards to FDI proves that a general assessment where both public and private aspects are considered is a good approach for finding such a balance. Although both sides in the dispute regarding petroleum taxes in the 1970s presented good arguments in favor of their approach, we can conclude that the assessment chosen was reasonable. Increasing the taxes did not scare foreign investors away, as with the extraordinary price increase, all parties ended up gaining more than they had expected. The well developed legal system in Norway seems to provide foreign investors with sufficient security with the approach it applies to protection of investors, as the likeliness of abuse is small. In addition, the petroleum tax benefited the Norwegian society as a whole.

Although the statistics have changed slightly over the past few years, reports show that a large amount of the ISDS cases are between investors from developed countries and developing countries.¹⁶⁹ Furthermore statistics in the same reports show that around one third of ISDS cases are decided in favor of the state, one third in favor of the investor and one third is settled. Settled cases can mean large sums to investors. Furthermore, these numbers must be compared to how these statistics would look if the cases were pleaded in domestic courts. There is no question why there is a need for protection of investors, especially in states where the public framework is weak and biased. Nevertheless, developing countries must be provided with sufficient room to improve their legal systems and fundamental standards. If developing countries are continuously brought to pay large sums to foreign investors for the

¹⁶⁸ Gazzini, 2016, p. 101 on the case of India. See also Kavaljit Singh and Burghard Ilge (Eds), *Rethinking Bilateral Investment Treaties: Critical Issues and Policy Choices*, New Delhi, 2016, especially the chapters concerning South Africa, India and Brazil. See also on p. 5 about Bolivia, Ecuador and Venezuela denouncing the ICSID convention, and similarly for many other countries reviewing or terminating their BITs on p. 6.

¹⁶⁹ See for example statistics on <http://investmentpolicyhub.unctad.org/ISDS>

fact that their systems are less developed, this is not exactly contributing to a better situation for other public interests in a country where economic funds are already strained. Therefore, what qualifies as legitimate expectations of an investor should be closely linked to the specific situation in the state he chooses to invest in. If he chooses to invest in a country with weak legal institutions, he should expect the system to develop and improve, and this might also lead to some further restrictions on his business for the sake of public interests.¹⁷⁰

Once again, this stands to show how important the wording of a BIT is. The loyalty of the arbitrators is directed primarily towards the parties of the dispute, and not broader societal concerns.¹⁷¹ States can potentially bind their political autonomy and authority to regulate in favor of public interests by entering into investment treaties. Thus, public interests should be heard on what commitments the state binds itself to. When entering into international investment treaties it would be ideal to carry out a thorough, preferably public, analysis of what such a treaty should and should not include.

Investment always implies a certain economic risk. It cannot be expected that with international investment agreements, all risks should be shifted to the states. Put differently, the aim should not be to create a system of socializing losses and privatizing gains. If states had to apply a more strictly commercial approach in treaties, contracts, incentives and other conduct with investors, they would have to come up with very strict frameworks for such engagements, given their role as protectors of other public interests. Such an approach would not benefit anyone. Therefore it is better to keep a general approach with the opportunity to include all relevant aspects, including public considerations.

¹⁷⁰ Such arguments can also be found in ISDS case law, for example in *Mamidoil v. Albania* (cited above), para 634: “[a]n investor may have been entitled to rely on Albania’s efforts to live up to its obligations under international treaties, but that investor was not entitled to believe that these efforts would generate the same results of stability as in Great Britain, USA or Japan”.

¹⁷¹ *Ibid*, p. 589.

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