

**THE APPLICATION OF THE AGREEMENT BETWEEN THE GOVERNMENT OF  
THE KINGDOM OF NORWAY AND THE GOVERNMENT OF THE RUSSIAN  
FEDERATION ON PROMOTION AND MUTUAL PROTECTION OF INVESTMENTS**



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Candidate number:

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Submission deadline:

15 May 2014

Word count:

**17 904**

06.06.2014

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## **List of Abbreviations and Acronyms**

BIT	Bilateral Investment Treaty
ECT	Energy Charter Treaty
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ILC	UN's International Law Commission
ISDS	investor-State Dispute Settlement
MFN	most favoured nation
MIGA	Multilateral Investment Guarantee Agency
NAFTA	North American Free Trade Agreement
NT	national treatment
OECD	Organisation for Economic Co-operation and Development
PRC	People's Republic of China
TRIMs	Agreement on Trade-Related Investment Measures
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

# 1 Introduction

## 1.1 General Remarks

In this thesis I focus on the analysis of the bilateral Agreement between the Russian Federation and the Kingdom of Norway regarding Promotion and Mutual Protection of Investments, dated 4 October 1995(Norwegian/Russian BIT).

First, I give a review of how traditional international law pertaining to protection of foreign investments have gradually changed over the last hundred years or so, and how the Norwegian/Russian BIT fits into that picture, and, in particular how this BIT compares with similar BITs and other bilateral and regional treaty regimes for similar purposes entered into by the same parties.

Second, I focus on the respective substantive and adjective provisions of the Norwegian/Russian BIT, in particular, on (i) treatment of foreign investments, (ii) expropriation and similar measures by the host state<sup>1</sup> and (iii) settlement of investment disputes between the host state and the foreign investor. In this context I attempt to analyze the legislation of the Russian Federation with regard to expropriation and the consequences of the Yukos case.

Taking into account the current crises in the Ukraine and the situation around Crimea, the role of the Russian Federation in the escalation of the process and the worldwide sanctions against the latter, the flow of investment in and out of the country has significantly decrease and at present it is rather complicated to foresee how the situation with foreign investment will continue to develop. It is quite possible that the Russian Federation will have to focus on the development of its internal resources, i.e. to develop various profound programs of investment development within its own territory. In case the sanctions against the Russian Federation intensify, the issue of foreign investments is likely to loose its significance and turn out to be inapplicable. However, the Russian Federation continues to be a part of the international community and thus the country has to comply, perhaps sometimes not very successfully, with the regulations of the international law. Such compliance is revealed not only through incorporation of relevant international law regulations in the legislation of the Russian Federation but also in regional agreements concluded by the latter.

The other issue that interests me is how the Norwegian/Russian BIT fits within the realm of environment protection. Unlike the modern trends in BIT development, when provisions on

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<sup>1</sup> Hereunder the term 'host state' is used with reference to the state, in the territory of which the investments are made.

environment protection can be included in the treaty itself, the Norwegian/Russian BIT says nothing on the topic. So I consider it important to analyse how the Norwegian/Russian BIT fits within the issue of environmental protection and the application of the related environmental regulations of the host state.

The general purpose of this thesis is not to resolve some theoretical issues but to use the existing theoretical and instrumental realm to dwell on the understanding and analysis of the provisions of the Norwegian/Russian BIT.

The key research question thus is the place of the Norwegian/Russian BIT within the existing international and national investment and environmental law and the interaction thereof.

## ***1.2 The structure of the Thesis***

The first chapter is the introductory one.

In the second chapter I am going to analyze the international regime for promotion and protection of foreign investment, to observe how the treaty base international law for mutual promotion and protection of investments has developed.

The third chapter is devoted to the analysis of the background for the Norwegian/Russian BIT.

In the fourth chapter I am going to analyse the provisions on the Norwegian/Russian BIT against the general BIT practice and national legislation of the contracting states as well as in comparison with other BITs concluded by the Russian Federation.

In the final chapter I am going to dwell on the peculiarities of the national environmental regulations to be kept in mind when making investments into the territories of Norway and Russia.

## ***1.3 Methodology and Sources***

The key sources analysed are the international conventions related to investment and treaty law, i.e. the VCLT, the ICSID Convention, the New York Convention, the ECT, the NAFTA treaty, international customs and evidence of general practice accepted as law, the generally recognized principles of law, judicial decisions, teachings of the most qualified and prominent publicists, as well as the applicable provisions of national law. The key method is comparative analysis.

## ***1.4 Significance of the research***

On the one hand, the carried out research is important for the development of investments between the Kingdom of Norway and the Russian Federation (i.e., conducive to the stimulation of business initiative) as it dwells on the key regulations governing such investments.

On the other hand, the research might be used by scholars to carry out further research.

## **2 The international regime for promotion and protection of foreign investments**

### ***2.1 The traditional rule for diplomatic protection***

It is common knowledge that the rule for diplomatic protection used to be the key instrument of protection for investors and traditional method for settlement of investment disputes for quite a long period of time. As it is stated in ‘Law and Practice of Investment Treaties’<sup>2</sup>, “[t]he exercise of diplomatic protection can be traced back to the Middle Ages, if not earlier”. The origin of the rule for diplomatic protection derives from the international law principle that a State is entitled to protect its subjects if injured by unlawful activities of another State. Thus, when no other means of protection were available for individuals or corporations under traditional international law, they were able to turn to their home State for diplomatic protection. Under the rule for diplomatic protection the State at its own discretion decides whether to pursue the claim in its own name<sup>3</sup>.

Despite the overall positive purpose of this rule, many disadvantages are generally outlined both with regard to the state and the investor.

As far as investors are concerned:

- it does not suffice for an investor to be a national of the protecting state; the bond of nationality must exist continuously from the time of the injury until the claim is presented or settled;
- the local remedies available in the host State must be exhausted before an investor may turn for diplomatic protection;
- the investor’s host state may refuse, at any time discontinue the diplomatic protection or agree to a reduced settlement as it is not the investor’s right but the discretion of the state.

For the state the disadvantage lies in the political consequences of the act of diplomatic protection. It can seriously disrupt the international relations between states and result in protracted disputes<sup>4</sup>.

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<sup>2</sup> 15 (the number corresponds to the numbers in Bibliography), p. 5.

<sup>3</sup> 5, p.211.

<sup>4</sup> 5, p. 212. The most famous Norwegian case based on diplomatic protection was the Hannevig case, which had its roots in US policies in respect of WW1 and which found its solution nearly half a century later in the 1960’ties.

The development of treaty law and, in particular, various regional and bilateral investment treaties have provided investors with effective direct means of international dispute settlement besides diplomatic protection<sup>5</sup>. However, the remnants of diplomatic protection can still be observed<sup>6</sup>, for example, with regard to the following:

- in case of non-compliance by a state with an award rendered in an investor-State dispute<sup>7</sup>;
- in case a dispute arises out of a treaty interpretation and the investor's home state being a non-disputing state party to a treaty wishes to provide a statement of its view with regard to the treaty's interpretation;
- provision on diplomatic protection as an inseparable part of a BIT.

## ***2.2 The contemporary regime of individual rights***

Gradual extinction of the rule for diplomatic protection is bound to the development of the individual rights of the subjects of international law. I believe, the development of the contemporary regime of individual rights is closely related to the proliferation of regional multilateral and bilateral investment treaties as well as to the decisions of the first investment arbitrations like *Asian Agricultural Products Ltd. v. the Democratic Socialist Republic of Sri Lanka*<sup>8</sup>.

Both the regional multilateral and bilateral investment treaties contain provisions on settlement of disputes between the investors of one contracting party and the other contracting party through international arbitration, either ad hoc or based on the rules of a relevant international institution. Thus, an investor, either an individual or a legal entity is provided with the right to raise claims against the host state in case a breach of rules set out in an agreement has taken place. The possibility to bring a claim against an infringing state, as well as other protection guaranteed by regional multilateral and bilateral investment treaties through such instruments as national and most-favoured-nation treatment, protection from expropriation without prompt and due compensation, contribute significantly to the development of the regime of individual rights.

What is considered to be particularly important is that being a party to a regional multilateral treaty suffices to bring a claim against an infringing state-party to such a regional multilateral treaty even if no particular investment agreement has been concluded between the parties but the

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<sup>5</sup> ILC has prepared a draft convention on diplomatic protection. This draft is to a great extent expression of customary international law.

<sup>6</sup> *Id.*, pp. 345-358.

<sup>7</sup> ICSID Convention Article 27(1).

<sup>8</sup> 38

activities carried out by an individual/legal entity qualify as investments in accordance with the definitions of the regional multilateral treaty.

As compared to the traditional rule of diplomatic protection, investors acting in compliance with regional multilateral or bilateral treaties are free to opt for international arbitration to resolve their disputes as opposed to the host state's courts, which are more likely to act in the interests of the host state. Moreover, in accordance with the 1958 Convention on the Resolution and Enforcement of Foreign Arbitral Awards, the New York Convention, the international arbitration awards are to be recognised not only in the territory of the host state, but also in the territory of the other states – parties to the New York Convention provided there is the property of the respondent host state, which can be resorted against.

### ***2.3 The development of treaty based international law for mutual protection and promotion of investment***

The grounds for the development of the treaty law are believed to be laid down by the first commercial treaties concluded between the states as early as the end of the XVIIIth century. The first rules on foreign investment have been traced back to 1778 commercial treaty between the United States and France<sup>9</sup>. The period from that time and up to the Second World War has been characterised by the conclusion of a series of agreements 'on Friendship, Commerce and Navigation'. The investments are known to have been carried out either in the form of loans or concessions in former colonies given to develop the natural resources<sup>10</sup>. The relations with foreign investments were mainly regulated by national law. The international law was used to regulate such issues as the status of foreign citizens, international responsibility of states, diplomatic protection<sup>11</sup>.

The period after the Second World War and up to the 1970s was marked by the developing countries to have achieved their sovereignty and launched nationalisation of their natural resources. The direct investments are known to have prevailed and new legal structures to have been introduced, like joint enterprises (for example, between the National Iranian Oil Company and AGIP S.p.A., the Italian state company) and production sharing agreement (such as between Pertamina, an Indonesian state company, and Kobayashi, a Japanese consortium)<sup>12</sup>. The 1960s

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<sup>9</sup> 5, p.17.

<sup>10</sup> 12, p.10.

<sup>11</sup> 10

<sup>12</sup> 13, p.8.



were characterised by the conclusion of the service agreements in Iran, Venezuela, Brazil and several other countries.

The evolvement of the investment relations led to the development of the first multilateral instrument aimed to encourage international flow of investment and mitigate non-commercial risks, i.e. the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention). As of March 2014 the ICSID Convention has 158 member states to have signed it with 8 member states out of the overall number not having ratified it. The Russian Federation is one of those states that have not ratified the ICSID Convention yet<sup>13</sup>.

The 1960s were also the time of creation of the European Economic Community, a regional international organisation aimed at bringing about the economic integration characterised by free movement of goods, services, people and capital. The four principles mentioned turned out to be the key criteria behind the establishment of the European Union in 1992, a political and economic union of 28 member states (as of March 2014).

The first bilateral investment treaty is known to have been signed in November 1959 between Pakistan and Germany.

The 1970s were marked by the development of the national investment law with regard to various aspects of foreign investments and the use of natural resources.

The 1980s and 1990s were characterised by the creation of regional institutions and enforcement of regional instruments to further develop the protection and promotion of investments. This was also the period of the rise in the number of bilateral investment treaties concluded with regard to the protection and promotion of investments.

The Multilateral Investment Guarantee Agency (MIGA) was established in 1988 as an international financial institution to protect foreign investments against political and non-commercial risks in developing countries. The MIGA is a member of the World Bank Group and it states its mission as promotion of foreign direct investment into developing countries to help support economic growth, reduce poverty, and improve people's lives<sup>14</sup>. According to the information contained on the MIGA web-site, as of March 2014, the number of MIGA members amounted to 180, out of which 155 were developing countries and 25 – industrialised countries.

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<sup>13</sup> Norway has ratified the ICSID Convention, but there has been a discussion among Norwegian scholars and civil servants as to whether this ratification is sufficient in light of the authority that is delegated to the respective ICSID tribunal. The existence of this discussion, which has to do with the interpretation of the Norwegian Constitution, has in fact acted as a damper on Norwegian appetite to enter into new BITs. However, the new government which took office after the 2013 election has announced that Norway may change its course back to entering into new BITs again after an intermission of nearly a quarter of a century.

<sup>14</sup> [www.miga.org/whoweare/index.cfm?stid=1786](http://www.miga.org/whoweare/index.cfm?stid=1786) [last visited on 01 May 2014]

The North America Free Trade Agreement (NAFTA) came into force in January 1994, creating the largest free trade area, providing with the free trade regulations and dispute settlement facilities.

In 1992 the World Bank issued the Guidelines on the Treatment of Foreign Direct Investment, which set out the policy for and legal framework governing foreign direct investment. The given Guidelines are characterised as a collection of non-binding generally acceptable international standards. The Guidelines identify a set of practices on admission, treatment, expropriation, contracts, the prevention and control of corrupt business practices, the promotion of accountability and transparency o in dealings with foreign investors, and settlement of disputes<sup>15</sup>.

The World Trade Organisation was established in 1994 under the Marrakech Agreement with most of the countries worldwide being its members. Among the agreements, which constitute an inseparable part of the WTO agreements, binding on all WTO members and containing provisions on investment regulation, one can outline the GATT, GATS, TRIMS and TRIPS. This agreements not only dwell on the peculiarities of investment protection in the form of national and most-favoured-nation treatment, but enumerate related restrictions and provide for the possibilities of exemption from state obligations under the treaties mentioned, provided certain conditions, outlined in the agreements, are fulfilled.

The Energy Charter Treaty (ECT) was signed in 1994. This binding legal instrument is known to contain provisions on protection of direct foreign investments with regard to the energy sector, like those against discrimination (article 10), expropriation (article 13), nationalisation (article 12), breach of contract (articles 26), damages due to war (article 12), etc.

The end of the 1990s is notable for the attempts undertaken by the Organisation for Economic Co-operation and Development (OECD) to draft a multilateral agreement on investment. The objective was to provide a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures, open to non-OECD countries. Negotiations were discontinued in April 1998 and will not be resumed<sup>16</sup>.

There are arguments in the literature on jurisprudence of both for and against drafting a multilateral agreement on investment. The adherers to the concept of such an agreement argue that in the globalised world characterised by interdependence and interconnections in all spheres of life including national economies, there is a need for universal legal regulations and, thus,

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<sup>15</sup> 15, p.49.

<sup>16</sup> <http://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm> [last visited on 01 May 2014]

related legal instruments. Liberalisation of international investment activities and drafting corresponding international investment regulations could lead to the decrease in transactional discrepancies and raise the efficient functioning of world economy<sup>17</sup>. Those who are against a multilateral agreement on investment believe that investment relations should better be regulated on bilateral or regional level, in national legislation and investment contracts with investors<sup>18</sup>.

As we can see from the analysis above, the development of the treaty based international law for mutual promotion and protection of investment can be observed through the appearance and gradual development of the early bilateral commercial treaties into BITs that lay the grounds to the regulation of investment relations, on the one hand. On the other hand, we can observe the development of various legal instruments in support of those BITs. These legal instruments in their turn can be divided into agreements and regulations of regional organisations, like MIGA and NAFTA, multilateral treaties governing the relations, including the investment ones, in a particular sphere, like the ECT, multilateral instruments, which deal with the resolution of investment disputes, like the New York Convention, the ICSID Convention, etc. Thus, we can conclude to have been facing the parallel development of BITs and the supporting legal environment. The legal framework thus developed represents the balancing between the preservation of the rights of the sovereign states on the one hand, and of investors, on the other.

### **3 Background for the Norwegian/Russian BIT**

#### ***3.1 Russian Portfolio of BITs***

The BITs concluded by the Russian Federation represent, on the one hand, important source of international investment regulations. On the other hand, such BITs should always comply with the requirements of the domestic regulations of the states-parties to BITs and should not contradict international agreements to which the contracting states are parties.

According to the analytical survey carried out at the order of the State Duma Legal Department (State Duma report)<sup>19</sup>, the history of bilateral investment treaties to which the Russian Federation is currently a party can be traced back to the end of the 1980s, when the transition to the market economy was initiated. Among the first partners of the former Soviet Union are Finland, United Kingdom, Federal Republic of Germany, Canada and Italy.

In the State Duma report mentioned above the period of 1989-1990 is characterised as the initial period in the development of the investment relations with other states. At that time the BITs

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<sup>17</sup> 23, pp. 1-30.

<sup>18</sup> 18, pp. 131-137.

<sup>19</sup> 11

were concluded to help Russia integrate into the global economic processes, on the one hand, and to compensate the lack of domestic investment legislation, on the other hand. Such multiple tasks resulted in the BITs concluded at that period to be specifically versatile, characterised by diversity in titles, structure and content<sup>20</sup>.

It should be noted that the Russian Federation adheres to bilateral treaties on protection of foreign investments as a successor to the Soviet Union. Under the Agreement on the establishment of the Commonwealth of Independent States signed in Minsk in December 1991, the Russian Federation assumes the rights and obligations under the international treaties concluded by the Soviet Union. The RF Ministry of Foreign Relations signed a corresponding Note in December 1991 confirming the succession with regard to the bilateral investment treaties signed by the former Soviet Union.

In 1992-1993 the Russian Federation concluded its first BITs in its capacity as a new state. Investment treaties were signed and entered into, inter alia, with the USA, Cuba, Bulgaria, and Greece. This period is characterised by an attempt to achieve some uniformity in the treaty format<sup>21</sup>. Thus, a draft model agreement was approved by the Decision of the Government of the Russian Federation No 395 of June 11, 1992 on the Conclusion of Agreements between the Government of the Russian Federation and the Governments of Foreign States on the Encouragement and Mutual Protection of Capital Investments. The standard treaty draft has been numerous times revised since that time. The version approved by the Decision of the Government of the Russian Federation No 456 of June 9, 2001 on Agreements Concluded between the Government of the Russian Federation and Governments of Foreign States on the Encouragement and Mutual Protection of Capital Investments is currently in use.

At present the Russian Federation is a party to 75 treaties with foreign states on the promotion and mutual protection of investment<sup>22</sup>. In 14 out of these treaties the Russian Federation Functions acts as a successor to the former Soviet Union<sup>23</sup>.

### ***3.2 The Russian Federation and ECT***

The Energy Charter Treaty (the ECT) is an important multilateral treaty in the field of protection and encouragement of foreign energy investments. It establishes a legal framework for the promotion of long-term cooperation in the energy sector and foreign direct investment in the

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<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> 9

<sup>23</sup> 11

energy market by affording to investors and investments the protection of international law<sup>24</sup>. The ECT contains a clause on its provisional application for those signatories who have not ratified it and on termination and opting out of provisional application.

Both the Russian Federation and Norway were among the few states that signed but not ratified the ECT. The application of ECT Article 45 on Provisional Application of the ECT resulted in the provisional application of the treaty by all signatory states before its entry into force in April 1998, “unless a member state expressly declared that it was unable to apply the ECT provisionally”<sup>25</sup>. After April 1998, the provisional application was restricted to those signatory states which had not yet ratified the treaty. In the Russian Federation the ratification was postponed several times. When signing the ECT in 1994, the Russian Federation did not register a declaration of non-application according to ECT Article 45(2).

To understand the essence of provisional application of a treaty, we may first turn to the basic treaty used to interpret a treaty, i.e. 1969 Vienna Convention on the Law of Treaties (VCLT). VCLT contains several articles, which are particularly applicable in this regard: article 18 on the “obligation of states not to defeat the object and purpose of a treaty prior to its entry into force” and article 24 on provisional application of treaties.

VCLT Article 18 imposes the obligation on a state to refrain from acts which would defeat the object and purpose of a treaty when the treaty has been signed, or when the state has expressed its consent to be bound by the treaty pending its entry into force. VCLT Article 25 provides that a “treaty or a part of a treaty is applied provisionally pending its entry into force if: (a) the treaty itself so provides; (b) the negotiating states have in some manner so agreed”.

The first paragraph of ECT article 45 further provides that ‘each state agrees to apply the treaty provisionally [...] to the extent that such provisional application is not inconsistent with its constitution, laws or regulations’.

As far as the Russian Federation is concerned, the Constitution of the Russian Federation in Article 15 paragraph 4 determines that ‘[u]niversally recognized principles and norms of international law as well as international agreements of the Russian Federation’ are ‘an integral part of its legal system’. The Constitution further establishes that in case of difference in the rules established by an international agreement of the Russian Federation and by law, ‘the rules of the international agreement shall be applied’.

The concept of provisional application of international treaties within the Russian Federation is dealt with in the 1995 Federal Law on International Treaties of the Russian Federation. Article

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<sup>24</sup> 17, pp. 191-209.

<sup>25</sup> 8, pp. 153-190.

23 paragraph 1 reads that ‘[a]n international treaty or part of a treaty may, before its entry into force, be applied by the Russian Federation provisionally if such an application has been provided for in the treaty [...].’ Article 23 paragraph 3 continues that ‘[u]nless provided otherwise in an international treaty or the respective States agree otherwise, the provisional application by the Russian Federation of a treaty or part thereof shall terminate upon informing the other States which provisionally are applying the treaty of the intention of the Russian Federation not to become a participant of the treaty’. Thus, the Russian Federation generally acknowledges the provisional application of treaties.

The ECT foresees the possibility to terminate or opt out of its provisional application.

According to ECT Article 45(2) ‘any signatory may [...] deliver [...] a declaration that it is not able to accept provisional application’ of the ECT. In such a case neither the signatory nor its investor may claim the benefits of provisional application. Australia, Iceland and Norway made such declarations when signing the ECT, while the Russian Federation did not.

According to ECT Article 45(3)(a), any signatory may terminate its provisional application by written notification of its intention not to become a contracting party to the treaty. On 20 August 2009, the Russian Federation officially informed the depository of the treaty (the Government of Portugal) that it did not intend to become a contracting party to the treaty terminating the provisional application of the ECT starting from 18 October 2009. However, according to ECT Article 45(3)(b) in the event of terminating the ECT provisional application, the obligation of the signatory to apply Parts III and V of the ECT – the sections relating to protection of previous investment – to any Investments made during the provisional application remains in effect for twenty years following the effective date of termination.

Thus, though the ECT provisional application was terminated, the obligation of the Russian Federation to comply with Parts III and V of the ECT remains in force till October 18, 2029. The important question arising in this respect is how private parties could make use of the former provisional application of the ECT and ECT Parts III and V, which are operating in the territory of the Russian Federation till October 18, 2029.

The approximate answer can be found out in the decision of the Tribunal of the Permanent Court of Arbitration (PCA) on the provisional application of the ECT as it is seen in the Yukos Dispute related to the expropriation of a former top oil producer in the Russian Federation, i.e. Yukos<sup>26</sup>.

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<sup>26</sup> 51.

The PCA used a three-step analysis to prove that Russia is under an obligation to protect the investments as it would have under the ECT<sup>27</sup>. As a preliminary matter, the Tribunal noted that the parties agreed to certain facts:

- first, that Russia signed the ECT on December 17, 1994 and that it was never ratified;
- second, that Russia notified the ECT countries of its intention not to become a party on August 20, 2009, terminating its provisional application on October 18, 2009; and
- third, that Russia was still bound until October 18, 2029 by ECT Article 45(3)(b) to give provisional application of Parts III and V of the ECT to any investments made in Russia before the date of termination of provisional application<sup>28</sup>.

In summary, the PCA Tribunal determined that the Russian Federation was subject to provisional application of the entire ECT and of Parts III and V until October 19, 2029 for any investments made prior to the date of termination of provisional application. The PCA asserted this decision as the basis for its jurisdiction over the arbitration, and finally concluded that Russia would be precluded from making arguments based on the inapplicability of certain ECT provisions<sup>29</sup>.

## **4 Substantive provisions of the Norwegian/Russian BIT**

The analysis of the Norwegian/Russian BIT is based on the study ‘Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking’ carried out by the United Nations Conference on Trade and Development (UNCTAD report)<sup>30</sup>. The structure and analysis proposed by UNCTAD seem very thorough and helpful in understanding the peculiarities of BIT making and BIT interpretation. Comparative analysis with the provisions of some of the other BITs concluded by the Russian Federation is carried out. Such a comparison helps to understand the pretext lying behind a BIT provision, on the one hand. On the other hand, by application of the MFN clause the benefits granted to nationals of third states can be extended to Contracting Parties, thus, expanding the possibilities behind the Norwegian/Russian BIT provisions.

### **4.1 Preamble**

In parallel with most BITs, the Norwegian/Russian BIT is prefaced with a preamble, in which the contracting parties state their intentions and objectives when concluding the agreement. The preamble does not establish legally binding rights and obligations. But in accordance with the

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<sup>27</sup> 7

<sup>28</sup> 51

<sup>29</sup> 51, para. 393-98

<sup>30</sup> 2, p.7.

‘general rule of treaty interpretation’<sup>31</sup> stated in the VCLT, the preamble is relevant for the interpretation of the treaty constituting an inseparable part of the context of the agreement. The wording used in the preamble might play a significant role in the interpretation of the BIT in case of, for example, investor-State dispute.

The preamble is considered important from a political perspective as it demonstrates to the national and international communities the willingness of the Contracting Parties to adhere to fostering economic cooperation and promoting favourable conditions for reciprocal investments. The Agreement having been signed in the mid 90<sup>th</sup> of the XXth century, the preamble does not contain any additional elements, like ‘the importance of technology transfer and human resource development’<sup>32</sup> or the need to respect other key public policy objectives, not to promote and protect investment at the expense of other key values such as health, safety, labour protection and the environment<sup>33</sup>. According to UNCTAD report, the trend to include such provisions into BITs has developed later on the eve of the XXIst century.

Having studied the portfolio of the BITs of the Russian Federation, I have noticed that none of the BITs refers to the necessity to protect the environment<sup>34</sup>. The key aspects usually mentioned in the preambles are the following:

- creation of favourable conditions for the development of economic cooperation;
- promotion and reciprocal protection of investments;
- stimulation of business initiative; and
- increase of prosperity of the contracting parties.

The preamble to the USA/Russian BIT is peculiar in this respect as in addition to the mentioned above provisions it highlights the contribution that can be made to the well-being of the peoples by the development of economic and business ties, and dwells on the meaning of ‘economic freedom for individuals’, determining this notion as ‘the right to freely to own, buy, sell and otherwise use property’<sup>35</sup>.

I would like to note that if we turn to the definition of the word prosperity in Longman Exams Dictionary 2006, we will see that prosperity is defined as follows: ‘when people have money and

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<sup>31</sup> 35, Article 31.

<sup>32</sup> 24.

<sup>33</sup> 29.

<sup>34</sup> In the Norwegian standard BIT from 2008 environmental protection is dealt with, inter alia, under the provision “general exceptions”: “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international [trade or] investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary [...] for the protection of the environment”

<sup>35</sup> 28.



everything that is needed for a good life'. 'Everything that is needed for a good life' is evident to refer to environment conditions appropriate for living.

The other important indication present in every BIT concluded by the Russian Federation is that the investments and related activities, like treatment of investments, should comply with the requirements set out by the legislation of the host state, the Norwegian/Russian BIT is not an exclusion. Thus, though the environment protection is not explicitly regulated in the Norwegian/Russian BIT, the requirement to comply with the laws and regulations of the host state numerous referred to in the Norwegian/Russian BIT evidently implies compliance with the environment regulations of the host state as well.

Peculiarities of the environment regulations of both Norway and Russian will be dealt with separately in Part 5.

#### ***4.2 Scope of Application***

The Norwegian/Russian BIT does not contain a specific clause on the scope of the agreement or the application of the agreement. The various issues that might be addressed in such a clause, as the UNCTAD report illustrates, like the subject matter to which the agreement applies, the geographical scope of coverage of the agreement, the temporal scope of application of the BIT, various considerations of legal drafting, for example, emphasise on one particular key aspect, i.e. the temporal application of the BIT, are dealt with in various articles of the Norwegian/Russian BIT and in the separate Article on Definitions, in particular, while the duration of the Norwegian/Russian BIT is clarified in the final Article on Duration and Termination of the Norwegian/Russian BIT.

Most of the BITs concluded by the Russian Federation do not have a separate article on the scope of application dealing with the related aspects in other BIT articles. Interestingly, the BIT concluded by the Kingdom of Norway with the People's Republic of China contains a separate article on the scope of the BIT application of a very general meaning saying that the BIT is '[a]pplicable to investments [] in accordance with the laws and regulations of the host state, both before and after the entry into force of the agreement'<sup>36</sup>.

#### ***4.3 Definition of terms***

The object of the Norwegian/Russian BIT is not set out in a separate clause. It is determined through article 1 on definitions. To those terms set out in Definitions the rules of the Norwegian/Russian BIT apply. As a BIT is typically aimed at the protection of the investments

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<sup>36</sup> 26.

made by investors of one contracting party in the territory of the other contracting party, the key terms important for the functioning of a BIT are considered to be 'investment' and 'investor'.

#### 4.3.1 Investment

According to UNCTAD report, three kinds of definitions with regard to an investment are generally outlined in BITs<sup>37</sup>:

- asset-based - the most commonly used and broad definition;
- tautological or circular - focuses on the features of an investment rather than conceptualising it; and
- closed-list -excludes certain assets and transactions from the definition.

The Norwegian/Russian BIT falls within the scope of an asset-based definition of investment, i.e. the definition of investment covers 'any kind of asset', accompanied by a list of examples, which includes movable and immovable property, related property rights such as mortgages as well as leases, various types of interests in companies, such as shares, stocks, bonds, any other form of participation in companies or enterprises, claims to money and claims under a contract having or creating an economic value, intellectual property rights, and business concessions, i.e. rights conferred by law or under the contract. Most of the BITs concluded by the Russian Federation, i.e. with China, USA, UK, Japan, UAE, etc., have the asset-based definition of investment. Of particular interest is the phrase 'a change in the form in which assets are invested does not affect their character as investments' included in the definition of investment in the BITs with the above mentioned countries.

As we can see from the definition above, an asset-base definition is aimed at guarantying protection to as many forms of investment as possible. And the addition with regard to the change in the form of assets that does not affect the character of investments contributes to such understanding.

The definition of investment in the Norwegian/Russian BIT contains a certain limitation on the scope of the investment covered: any kind of asset in the territory of one Contracting Party in accordance with its laws and regulations. The purpose of such a limitation is evidently two-fold:

- to limit the protection granted by the Norwegian/Russian BIT to those investments made in the territory of the contracting states; and
- to cover only those investments, consistent with the host country's domestic legislation.

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<sup>37</sup> 2, p.7.

## **4.3.2 Investor**

BITs apply to investments made by investors of one contracting party in the territory of the other contracting party. As a rule, the definition of an investor covers both natural and legal persons<sup>38</sup>. One of the important factors with regard to an investor is the attribution to the contracting party and the sufficiency of such an attribution to justify the investment protection under the agreement<sup>39</sup>. Such an attribution differs, depending on whether the investor is a natural person or legal entity, and results in two related categories of investors to be defined separately.

### **4.3.2.1 Natural persons**

As far as a natural person is concerned, the Norwegian/Russian BIT protects persons who have the citizenship of one of the Contracting Parties. To have such citizenship it should be granted in accordance with the legislation of a related Contracting Party. The Norwegian/Russian BIT says nothing about individuals, who qualify as permanent residents under domestic law and does not cover the issue of natural persons having dual nationality.

### **4.3.2.2 Legal entities**

The issue with defining the nationality of a legal entity is considered to be more complicated than with regard to natural persons. The key criteria usually used when defining the nationality of a legal entity are the place of incorporation, the location of the company's seat, or the nationality of ownership or control<sup>40</sup>.

The Norwegian/Russian BIT uses the place of incorporation or constitution as the sole criterion. Thus, the scope of application is rather broad. The Norwegian/Russian BIT does not address the criteria of the company's seat or the ownership or control. The Norwegian/Russian BIT does not clarify how to deal with companies having interests in both parties to a BIT, or what legal effects might be caused by changes in the nationality of an investor during the duration of a BIT.

But the Norwegian/Russian BIT contains a helpful clarification with regard to establishing the link between the investment and the investor and to resolving the issues mentioned, which are not directly addressed in the Norwegian/Russian BIT. This clarification reads: a natural person or legal entity 'entitled in accordance with the legislation of that Contracting Party to make investments in the territory of the other contracting party'. There is no other clarification regarding the ownership to the assets invested and the investors concerned. Generally speaking,

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<sup>38</sup> 33, Article 25; 31, Article 1, etc.

<sup>39</sup> 2, p.13.

<sup>40</sup> 33, Article 25; 31, Article 1, etc.

according to UNCTAD report, there are several important related factors that should be kept in mind<sup>41</sup>:

- a foreign investor may exercise the right of ownership in a direct or indirect manner;
- foreign investment is often carried out through a complex mechanism of multiple layers of ownership;
- shareholders may be co-owners of multinational enterprises with a vertical structure extending over several countries.

According to the ICJ decision in the Barcelona Traction Case<sup>42</sup>, notion of control in a BIT as the link between the investor and the investment might help resolve complications related to the mentioned above schemes. In the Barcelona Traction Case the ICJ holds that a company has the nationality of the country in which it is incorporated. Only the country of incorporation has the right of diplomatic intervention on behalf of the enterprise. Thus, the Belgian Government was not entitled to protect the Spanish interests of a company incorporated in Canada but principally owned by the Belgians. So the diplomatic protection of shareholders whose nationality is different from that of the country of incorporation is not permitted. To avoid such consequences the notion of control is recommended to be incorporated into the definitions of investment and investor<sup>43</sup>.

According to Vandeveld<sup>44</sup>, indicating that control or ownership may be direct or indirect allows the possibility of diplomatic protection to be exercised by more than one home country.

According to UNCTAD report, the other important factor with regard to the definition of an investment is the difference in the notions of ownership and control. The definition provided in GATS might turn out be helpful. According to GATS Article XXVII, a juridical person is owned by persons of a Member (State) if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member, it is controlled by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions<sup>45</sup>. Thus, the difference between the notions of control and ownership is said to be in the sphere of quantity and quality. The UNCTAC report provides with helpful related explanation, indicating that control generally does not require majority or any specific quantity of ownership. It is not necessary for an investor to exercise the actual control. The decision in *Aguas del Tunari v.*

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<sup>41</sup> 2, pp.16-17.

<sup>42</sup> 39.

<sup>43</sup> 2, p. 7.

<sup>44</sup> 21

<sup>45</sup> GATS Article XXVII (n).

Republic of Bolivia, ICSID Case No.ARB/02/3 confirms that it is sufficient for an investor to have the power to legally conduct or direct the business of the company<sup>46</sup>.

The Japan/Russia BIT contains a clarification with regard to ‘business activities in connection with the investment’. Such a clarification might be particularly helpful to understand what activities fall within the scope of investment activities. According to the wording of the provision mentioned the list is non-exhaustive but descriptive and includes:

- the maintenance of branches, agencies, offices, factories and other establishments appropriate to the conduct of business activities;
- the control and management of companies established or acquired by investors;
- the employment of accountants and other technical experts, executive personnel, attorneys, agents and other specialists;
- the making and performance of contracts; and
- the use, enjoyment or disposal, in relation to the conduct of business activities, of investments and returns.

#### **4.3.3 Definition of territory/ geographical application**

Definition of the territory in a BIT is important from the territorial point of investment protection. According to UNCTAD report, the definition of territory may

- include clarifications with regard to the status of maritime areas beyond the boundaries of the territorial waters;
- reference to those areas over which contracting parties exercise sovereign rights or jurisdiction under international law<sup>47</sup>.

The Norwegian/Russian BIT enumerates the land territory, internal waters, the territorial sea, the continental shelf over which the state concerned exercises in accordance with international law sovereign rights and jurisdiction for the purpose of exploring it and exploiting its natural resources<sup>48</sup>. The definition indicates that the areas mentioned should be understood in accordance with the meaning of the terms under international law<sup>49</sup>.

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<sup>46</sup> 37

<sup>47</sup> 2, pp.17-18

<sup>48</sup> 26, Article 1.

<sup>49</sup> Traditionally Norwegian BITs have excluded the continental shelf, and thereby the offshore petroleum industry, from the regime of mutual protection. The reason has been that Norwegian policymakers have been quite reluctant to let foreign tribunals in on Norwegian petroleum administration. Notwithstanding, in relation to some countries the potential interests of Norwegian oil companies investing abroad have outweighed the concerns for the absolute sovereignty on the Norwegian continental shelf. When the Norwegian/Russian BIT was entered into Norwegian oil

The other important clarification to be kept in mind is with regard to the purpose of the use of territory - for the purpose of exploring and exploiting the natural resources. The text of the Norwegian/Russian BIT explicitly indicates that the “territory” should be used to explore and exploit the natural resources. Thus, we may conclude that the scope of investments is corresponding limited to exploring and exploiting of natural resources, hence, excluding any other investment from the coverage of The Norwegian/Russian BIT.

### **Application in time**

In accordance with the UNCTAD report, two issues are generally considered to be important with regard to the application of BITs in time:

1. extension of the BIT protection to investments made before the entry into force of the BIT;
2. determination of the period of application of the BIT, i.e. duration and termination including the period of time after the treaty termination.

### **Application to existing investments**

Following the provisions of VCLT Article 28, BITs like any other treaties do not generally have retroactive effect ‘unless a different intention appears from the treaty or is otherwise established’. The rights and obligations derived from a BIT apply after the treaty’s entry into force and with respect to acts or facts occurring thereafter.

According to UNCTAD report, the prevailing practical approach is to provide protection to both future investments and investments already established at the date of the entry into force of the BIT. The Norwegian/Russian BIT specifically indicates that it applies to all investments made ‘[...] after 1 January 1960 [...] and in respect of Arkticugol company the BIT shall be applied as of 1 January 1925’<sup>50</sup>.

#### **4.3.4 ‘Laws and Regulations of the Contracting Party’**

The Norwegian/Russian BIT contains numerous references to the laws and regulations of the Contracting Party, for example, in the definition of ‘investor’, in the article on Promotion and Mutual Protection of Investment, Treatment of Investments, etc. However, the meaning of this notion is not specified.

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companies like Norsk Hydro and Statoil had expressed their interest in the Russian continental shelf, in particular with respect to the Stockmann field in the Barents Sea, but as the time has elapsed, today there are far bigger Russian investments on the Norwegian continental shelf than the other way around. Therefore, in today’s political picture there are some Norwegian policy-makers who want to terminate the Norwegian/Russian BIT as soon as possible.

<sup>50</sup> 26 Article 11.

In this regard the definition of this notion as it is given in the China/Russian BIT might be very useful. The definition reads: ‘the laws and regulations of the Russian Federation or the laws and regulations of the People’s Republic of China’. Thus, with regard to Norwegian/Russian BIT, we can state that those would be the laws and regulations of the Kingdom of Norway and the Russian Federation.

#### ***4.4 Duration and termination***

According to UNCTAD report, this section is important as it establishes a predictable and stable legal environment for the investors to protect their business<sup>51</sup>. According to the analysis carried out by UNCTAD, two key approaches are distinguished with regard to the duration and termination of BITs:

- fixed-term approach; and
- indefinite approach.

The Norwegian/Russian BIT states that the initial period for the BIT to be in force is 15 years. After the initial fixed period has terminated, each party may terminate the treaty with one year’s written notice. Thus, the Norwegian/Russian BIT continues to be in force indefinitely after the expiration of the fixed-term period unless it is terminated in written with a prior notice<sup>52</sup>. Thus, we can see the entwinement of the fixed-time approach with the indefinite one.

It has been discussed recently that the Norwegian/Russian BIT may be terminated by unilateral action, and the question is whether the text is particularly unpopular with one of the parties so this party may force a termination. There are no leakages from either administration indicating that this should be the case, and I believe that the only reason for an early termination of this treaty is that the parties find that it is better served as an integral part of a much wider trade treaty. Russia and Norway are in fact engaged in negotiations of a trade agreement these days (although the progress is put on halt due to the Crimea situation), and it may be that we at the end of the day will see that the parties at the same time have decided to scrap the BIT and rather create a new chapter in the emerging trade treaty for mutual investment protection. However, whether this realistically will be the outcome is too early to tell at this juncture.

#### ***4.5 Admission and establishment of investment***

As it is specified in UNCTAD report, admission and establishment refer to the entry of investments into the territory of another contracting party. According to customary international law, countries have the right to regulate admission of foreign investments in their territories.

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<sup>51</sup> 2, p. 20.

<sup>52</sup> 26, Article 14.

There exist three approaches used when drafting BITs<sup>53</sup>:

1. admission and establishment subject to the domestic laws of the host country (the admission clause model);
2. the right of establishment is granted in a non-absolute manner (the right of establishment model); and
3. with regards to a service sector the GATS has adopted an intermediate approach, that provides for the establishment of a commercial presence provided the relevant host country has undertaken a specific commitment in this respect<sup>54</sup>.

As it is indicated in UNCTAD report, BITs do not generally provide foreign investors with a right of establishment, but impose a duty on the contracting parties to admit foreign investment in accordance with their national legislation.

According to article 2 of the Norwegian/Russian BIT, the investments shall be promoted and admitted only if they conform to the host country's legislation, i.e. the admission clause model is used. Under such an approach, as the UNCTAD report specifies, the host country can apply certain admission and screening mechanism for foreign investment, thus determining the conditions on which foreign investment is allowed to enter the country. One of the implications of such an approach is that there is no obligation on the part of the host country to eliminate any discriminatory legislation affecting the establishment of foreign investment<sup>55</sup>.

In the *Aguas del Tunari v. Republic of Bolivia*, ICSID Case No.ARB/02/3<sup>56</sup> the issue was raised whether the reference to the domestic laws and regulations in the admission clause allows the host country to condition the basis on which a foreign investment enters the market, in particular, whether the investment could be considered to have been placed within the exclusive jurisdiction of the host country. The arbitration tribunal rejected such an interpretation stating that it would defeat the purpose of the BIT with regard to establishing a neutral and independent forum for dispute resolution.

#### **4.5.1 Right of establishment**

The Norwegian/Russian BIT contains the admission provisions, as it was mentioned above, but says nothing with respect to the establishment, i.e. no special or particular treatment is guaranteed at the stage of investing under the Norwegian/Russian BIT.

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<sup>53</sup> 2, p. 21-26.

<sup>54</sup> GATS Article 1.2(d).

<sup>55</sup> 2, pp. 21-26.

<sup>56</sup> 37



## **4.6 Investment promotion**

Like most BITs, the Norwegian/Russian BIT does not specify any promotional activities that should be undertaken by the Contracting Parties. The Parties agree to undertake promotional activities in accordance with their legislation as well as to guarantee protection of the investments made in accordance with their legislation<sup>57</sup>. Thus, the national legislation turns out to be the key determinant with regard to both promotion and protection of investments.

### **4.6.1 General standards of treatment**

According to Vandeveld<sup>58</sup>, one can distinguish general and specific treatment standards. The general relates to all aspects of the existence of a foreign investment in a host country. The specific one deals with particular issues.

Walker further divides general standards of treatment into absolute standards, non-contingent, i.e. the treatment accorded to investments without referring to the manner in which other investments are treated, and relative ones, i.e. treatment granted to investments by reference to the treatment, accorded to other investment<sup>59</sup>. Provisions on fair and equitable treatment, full protection and security, transfer of funds are usually mentioned as the examples of the absolute standard. National treatment and the MFN treatment are the examples of relative standard.

#### **4.6.1.1 Absolute standards**

As it is indicated in UNCTAD report, fair and equitable treatment is one of the most widespread and commonly used examples of absolute standards. It is specified in UNCTAD report that fair and equitable treatment is considered to be detached from the country's national law. The exact meaning of this standard is not clear. Some scholars consider fair and equitable treatment to be synonymous to the obligation to treat the investment in accordance with the minimum standard, which, being part of customary international law, comprises several international legal principles<sup>60</sup>. Others consider fair and equitable treatment to be different from the international minimum standard and used to ensure the prudent and just application of legal rules<sup>61</sup>.

A Note of Interpretation issued by the NAFTA Free Trade Commission (composed of the trade ministers of the three contracting parties, i.e. US, Mexico and Canada) on July 31, 2001 might turn out to be helpful in understanding the meaning of fair and equitable treatment. The Note

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<sup>57</sup> 26, Article 2.

<sup>58</sup> 21

<sup>59</sup> 22, pp. 805-824.

<sup>60</sup> 6

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states that, inter alia, the fair and equitable treatment standard as set out in NAFTA's Article 1105 does not entail any treatment beyond that established by customary international law<sup>62</sup>.

According to Article 3 of the Norwegian/Russian BIT, fair and equitable treatment shall be no less favourable than national and MFN treatment granted to the investment or the investor concerned. Such a merger of an absolute standard of protection – fair and equitable treatment - and relative standards of treatment – the national treatment and MFN treatment – is usually understood as the intention of the parties not to limit the fair and equitable treatment standard to the international minimum standard as it follows from UNCTAD report. No other specification or clarification is provided in the Norwegian/Russian BIT apart from connecting the fair and equitable standard to the national and MFN treatment. It might be supposed that the absolute and relative standards are connected in the Norwegian/Russian BIT to narrow the possibility to invoke in investor- State disputes the breach of the fair and equitable standard to abuse of national or MFN treatment.

#### **4.6.1.2 Relative standards: Most-favoured-nation and national treatment**

##### **National treatment**

Generally, the national treatment means the obligation of contracting parties to grant the investors of the other contracting party treatment not less favourable than the treatment they grant to investments of their own investors<sup>63</sup>. The key criteria to draw attention in this regard are the scope of the national treatment standard and its application in practice.

##### **Scope of the national treatment standard**

Like the majority of BITs, the Contracting Parties of the Norwegian/Russian BIT limit the national treatment coverage to established investments only. Thus, the non-discriminatory treatment is granted only after the investment has been admitted into the host country according to the latter's domestic law and regulations. According to the wording of the Norwegian/Russian BIT, the standard applies only to investments and does not apply to investors.

##### **Application of the national treatment standard**

As it flows from UNCTAD report, the application of the national treatment standard is closely related to the corresponding host state's legislation as in different jurisdictions investors might be treated differently.

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<sup>62</sup> 16

<sup>63</sup> 14

It is worth mentioning that the difference in treatment and consequently discrimination might exist de jure, i.e. be provided for in a law or regulation, or de facto, i.e. resulting from an initially non-discriminatory measure<sup>64</sup>.

The UNCTAD report indicates, that the national treatment standard is a contingent standard as its content is determined in relation to the treatment granted to domestic investments. According to the worldwide practice, the treatment of domestic and foreign investments is not analysed for being identical, but no less favourable. Although the Norwegian/Russian BIT does not specifically dwell on the meaning of ‘no less favourable’ criterion, generally it is analysed in relation to ‘like circumstances’ and with regard to ‘like goods’.

The process and production methods used to create a product, the impact on the environment, are usually not taken into consideration when determining whether the compared products are ‘like products’<sup>65</sup>. In case of inward foreign investment in production facilities within the jurisdiction of the same host country, the nature of production and business processes are likely to attract attention because of the impact on the host country<sup>66</sup>.

In accordance with the content of VCLT Article 29, a BIT is binding upon each party in respect of its entire territory. As it is interestingly noted in UNCTAD report on investment rulemaking, this means that the obligations arising from a BIT, inter alia, the national treatment standard, should be applied on a sub-national level irrespective of the political structure existing in the country<sup>67</sup>. In countries with federal systems of government, like the Russian Federation, for example, laws and regulations may be enacted at a sub-national level (subjects of the Russian Federation) granting preferential treatment to investments or investors of that particular subject of the Russian Federation. Thus, it might not be clear, what treatment should be awarded to foreign investments or investors, i.e. ‘no less favourable than in a particular subject’ or ‘no less favourable in a country on a general basis, i.e. out of that particular subject’. The 2004 Canadian model BIT and the BIT between the United State and Uruguay (2005), for example, adhere to the national treatment on an ‘out-of-State’ basis. The Russian Federation is a state with a federal system of government and the inclusion of the phrase ‘unless other treatment is required by its legislation’ into the paragraph on national treatment might be understood as the application of treatment ‘no less favourable in a country on a general basis’.

### **Most-favoured-nation treatment**

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<sup>64</sup> 2, pp. 36-38.

<sup>65</sup> 50

<sup>66</sup> 42.

<sup>67</sup> 2, pp. 36-38.

It is common knowledge that the general meaning of the standard is to provide the investments or investors of one contracting party with no less favourable treatment than that offered to investments and investors of any other third country<sup>68</sup>. Under the MFN standard the investments and investors of contracting parties to a BIT may be said to be granted the best treatment that each of the contracting parties has granted to the investments or investors of any other third country, provided there are no provisions / restrictions in a BIT to the contrary, as was the issue in *Telenor v Hungary* case<sup>69</sup>. In this case the Tribunal ruled against the application under the MFN clause of wider dispute resolution provision in BITs between Hungary and other countries to the relations resulting from the BIT between Norway and Hungary because of the limitation clause in the latter.

When analysing the scope of the MFN standard in the Norwegian/Russian BIT, we can say that the BIT guarantees such treatment only once the investment has been admitted into the host country, i.e. in the post-establishment phase. The other important factor is that the MFN treatment, according to the BIT, is granted to all investments of investors but for some importance exclusions. Such exclusions cover the benefits deriving from a group of agreements that can be characterised as regional cooperation, i.e. the MFN treatment does not apply to benefits resulting in connection with the participation in a free trade area, customs or economic union, by virtue of the agreements in the field of economic cooperation with the states – former Soviet Union Republics, and on the basis of the agreements to avoid double taxation<sup>70</sup>. Similar restrictions can be found in the China/Russian BIT.

A very important clarification is added at the end of Article 3 on Treatment of investments, saying that the related provision also apply to the returns derived from investments. The term ‘returns’ is defined in Article 1 of the Norwegian/Russian BIT to include, in particular, profit, capital gains, interests, dividends, royalties and other fees.

### **The MFN standard in relation to dispute settlement**

The application of the MFN standard with regard to the settlement of disputes is considered to be a controversial issue. There are several major cases dealing with the applicability of the MFN to dispute settlement before ICSID. The *Maffezini* and *Siemens* cases are generally in favour of such an approach. The *Salini* and *Plama* cases focus on the intention of the parties as the decisive factor, indicating that the incorporation of dispute settlement provisions from other treaties via

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<sup>68</sup> ILC has prepared a set of model MFN provisions, mainly based on customary international law.

<sup>69</sup> 49

<sup>70</sup> 26, Article 3.

the MFN clause is only possible if the parties of the BIT have a clear and unambiguous intention to do so<sup>71</sup>.

The Norwegian/Russian BIT does not contain explicit reference to the provisions to which MFN treatment applies, elucidating only those situations, where the application of the MFN treatment is inapplicable<sup>72</sup>. Thus, the MFN treatment apart from the exclusions indicated in Article 3 is considered to be applicable to covered investments in general. But unlike the Maffezini case, where the applicable BIT indicated that the MFN standard applied to all matters covered by the agreement, in the Norwegian/Russian BIT the MFN clause does not contain such a qualification. Taking into account the fact that there are strong arguments both for and against applying the MFN clause to dispute settlement, it is not quite clear whether the MFN clause as it is given in the Norwegian/Russian BIT could be applied in the manner similar to that in the Maffezini case.

The other important issues that should be kept in mind with regard to MFN treatment are the 'ejusdem generis principle' (only those issues are covered that belong to the same subject matter or the same category of subject matter to which the clause relates) and the impossibility of the MFN treatment to override public policy considerations.

To sum it all up, we can say that the Norwegian/Russian BIT covers the absolute standard of protection dwelling on the principle of fair and equitable treatment and promotion of investments and the relative protection standards of national treatment and MFN treatment. All the principles are granted in the so-called post-establishment phase, do not extend to investors, are closely dependent on the domestic legislation of the Contracting Parties, and do not cover the benefits resulting from regional cooperation agreements.

## **4.7 Expropriation**

### **Definition**

Traditionally BITs recognise the right of the host country to expropriate or nationalise foreign private property under certain conditions. According to the UNCTAD report, the clauses on expropriation and nationalisation avoid either defining these terms or clarifying the distinction between the two terms: expropriation and nationalisation<sup>73</sup>. Generally, the distinction between the two terms is considered to lie in the political background or its entire absence, i.e. while nationalisation is undertaken for political purposes and may affect the entire sector of the economy, expropriation is usually limited to one specific case and does not have a political background.

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<sup>71</sup> 41; 46; 48; 43.

<sup>72</sup> 26; Article 3.

<sup>73</sup> 2, pp. 44-52.

Like most expropriation clauses, Article 5 of the Norwegian/Russian BIT does not define the terms expropriation or nationalisation or establish any criteria to define measures having ‘a similar effect’. The Article does not include any reference to indirect expropriation, thus, it is not clear, whether under such a provision an investor can invoke treaty protection in the case of an indirect expropriation. Although, it could be argued that the plural form of ‘measures having a similar effect’ could be considered to include both direct and indirect expropriation. The Article does not contain any guidance as to what level of interference with the investment could be considered to constitute expropriation. Thus, the clause is very general and broad prohibiting the host country from expropriation or nationalisation in general and from any measure having a similar effect. With regard to the latter clarification it might be interesting to take into consideration the decisions of several arbitration tribunals. The decisions (Pope&Talbot and S.D. Myers<sup>74</sup>) were made within the context of Chapter 11 of NAFTA as it specifically refers to measures tantamount to expropriation, i.e. to measures having a similar effect. Such a reference to measures tantamount to expropriation in BITs is considered by the tribunals not to expand beyond what is considered an indirect expropriation. However, neither Norway nor Russian are NAFTA member-parties, thus, the conclusions reached in the decisions mentioned should be dealt with special caution.

### **Conditions for lawful expropriation**

According to recognised rules of international law, the prerequisites for lawful expropriation are generally considered to comprise four conditions:

- for a public purpose;
- on a non-discriminatory bases;
- under due process of law; and
- upon the payment of prompt, adequate and effective compensation.

Like most agreements, the Norwegian/Russian BIT simply enumerates the four substantive requirements mentioned as the prerequisites of lawful expropriation. No explanation of the meaning of the concept of due process, for example, or non-discrimination basis, is provided. By comparison it might be interesting to turn to the BIT between the Russian Federation and United Arab Emirates (UAE) (2010), which in article 1 on Definitions defines the term ‘without delay’ as ‘a period normally required to fulfil the necessary formalities for the transfer of payments. Such period commences on the day which the request for transfer has been submitted and does not exceed 5 working days’. The BIT between the Russian Federation and Thailand (2002) in

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<sup>74</sup> 44; 47

Article 4.1 refers to the principle of legality of expropriation, requiring that the expropriation procedure complies with domestic legislation of each Contracting Party. According to the overwhelming point of view, the due process of law is understood as denying the host Government total discretion in determining whether an expropriation may be undertaken or in choosing the applicable procedure<sup>75</sup>.

In case disputes arise out of expropriation and possible consequences, the Norwegian/Russian BIT does not specify whether such disputes should be settled separately or fall within the scope of article 8 on the resolution of Disputes between an investor of one Contracting Party and the other Contracting Party. As the Norwegian/Russian BIT article on expropriation does not specify the venue for the resolution of related disputes and keeping in mind the general wording of the article on dispute resolution, i.e. '[d]isputes between an investor of one Contracting Party and the other Contracting Party arising in connection with an investment in its territory and concerning the consequences of the non-implementation, or of the incorrect implementation of the obligations under this Agreement', disputes arising with regard to expropriation may be considered to fall within the scope of article 8.

If we turn to other BITs concluded by the Russian Federation for clarification, we will find out that some BITs, like the USA/Russian BIT in its article III, set out that 'national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any compensation therefor, conforms to the principles of international law, and to decide all other matters relating thereto'. The inclusion of such an article into a BIT might be helpful with regard to the resolution of disputes arising with regard to expropriation. On the other hand, the provision is rather confusing, as it turns the host state represented by its judicial and administrative authorities into a judge of its own cases, which might turn out not to be complimentary on the part of the investor.

Other BITs go even further. Thus, article 5 of the UAE/Russia BIT on Expropriation entitles the investor concerned having fulfilled the obligation to turn to judicial and administrative authorities and in case the dispute over expropriation and its consequences has not been resolved to use the possibilities of article 9 of the UAE/Russia BIT on the Settlement of Disputes between a Contracting Party and an Investor of the other Contracting Party. Thus an investor affected may turn to 'competent court or arbitration court of the Contracting Party in the territory of which the investments were made, or an ad hoc arbitration court in accordance with the

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<sup>75</sup> 2, pp. 47-52.

Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) []’.

### **Compensation**

The Norwegian/Russian BIT indicates that the compensation shall amount to the value of the investment immediately before the date of expropriation. Apart from the fact that the compensation should be adequate, no reference is made to whether the values should be market, fair or genuine value of the taken assets. However, the compensation clause of the Norwegian/Russian BIT contains certain specificity with regard to compensation issues, i.e. the clause specifies from which time (after two months from the date of expropriation) the compensation should include the interest and certain criteria to determine the interest. No reference is made with regard to the currency or the risk of devaluation.<sup>76</sup>

### **The period for payment of compensation**

The compensation clause of the Norwegian/Russian BIT indicates that the compensation should be paid without delay, no further clarification is provided in this regard.

### **Applicable interest**

Expropriation is a complicated administrative procedure that may take some time to be completed. The Norwegian/Russian BIT indicates the possibility to include interests within the compensation but only when there is a time lag of more than two months from the date of expropriation until the date of payment. The complication of such an approach derives from the fact that it may be difficult to determine the exact date of expropriation, as that might be the date of the enactment of the expropriation decree, or the date of the actual implementation of the decree, or the date on which the investor is dispossessed of the investment.

With regard to calculation of interests the Norwegian/Russian BIT indicates that the interests should be calculated at a commercial rate established on a market basis.

### **Currency in which compensation has to be paid**

The Norwegian/Russian BIT does not specify which currency to use for the purpose of payment of compensation. On the one hand, under such conditions the contracting party is considered to

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<sup>76</sup> Since the termination of WWII and the growing international consciousness in respect of indigenous natural resources, in particular with respect to developing countries, it has been a constant topic of discussion on the international agenda whether there in international law should exist, or actually does exist, a special minimum level of compensation for expropriation unrelated to the national law of the expropriating state. In recent policy statements, the Norwegian government has gone quite far in its support of the national law ceiling for international expropriation. In the Norwegian model BIT the so-called Hull-doctrine is done away with, and a reference to national law is put in juxtaposition with the concept of international law., indicating that international law is not the only source that may be applied.



be free to pay in whichever currency it considers appropriate. On the other hand, we may turn for clarification to other BITs. Article 5 of the BIT concluded by the Russian Federation with UAE might be helpful in determining the currency to pay compensation in cases of expropriation, stating that that should be ‘the market value of investment prior to the date when the expropriation has become officially known, or equitable principles if the market value cannot be ascertained’. The BITs concluded by the Russian Federation with the USA and Japan adhere to similar specification adding that the market value should be ‘fair’<sup>77</sup> or ‘normal’<sup>78</sup>.

### **War and civil disturbance**

Unlike expropriation under ordinary circumstances, under which the customary international law obliges the host country to pay compensation, losses and damage incurred by war, civil strife and similar circumstances, in accordance with customary international law do not fall within the realm of compensation on the part of the host state. As such losses are usually excluded from the coverage of insurance contracts concluded by investors, the contracting parties often agree to provide related protection in BITs<sup>79</sup>.

Article 4 of the Norwegian/Russian BIT on Compensation for Losses relates mainly to violence attributable to mankind. The damage caused by natural disasters is not covered explicitly, although one may argue that a state of national emergency or other similar events may result from a natural disaster, thus extending the BIT coverage to natural disasters.

The Norwegian/Russian BIT grants MFN treatment with respect to a compensation given by the host country for losses caused by ‘war, other armed conflict, state of national emergency or other similar events’<sup>80</sup>. As the MFN treatment is a relative standard of protection, the host state is not obliged to compensate but is free to decide whether it wants to compensate or not<sup>81</sup>.

The Norwegian/Russian BIT does not explicitly include any parameters regarding the applicable compensation making reference to restitution, indemnification, compensation or other settlement.

### **Transfer of funds**

Clauses on transfer of funds are considered to be important for several reasons<sup>82</sup>:

- timely transfer of profits, capital and other payments are a key condition for the proper operation of investments;

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<sup>77</sup> 27, article III.

<sup>78</sup> 25, article 5.

<sup>79</sup> 2, pp. 38-42.

<sup>80</sup> 26, Article 4.

<sup>81</sup> 2, pp. 38-42.

<sup>82</sup> 2, pp. 56-59.

- based on the clause, investors operate investment-related transfer of funds;
- host countries can administer their monetary and financial policies based on the clause.

Article 6 of the Norwegian/Russian BIT on Transfer of Payments in Connection with Investments covers only transfers of funds out of the host country. No reference is made with regard to inbound transfers.

Article 6 of the Norwegian/Russian BIT contains a list of funds in connection with investments that may be freely transferred abroad. The wording of Article 6 does not limit the transfer right to those specific funds included in the list but allows to suggest that the clause provides an open-end illustrative list of payments with regard to an investment saying ‘free transfer abroad of payments in connection with investments, and in particular...’. Thus, one may argue that Article 6 provides for the possibility to cover new kinds of funds which may develop in the future.

Judging from the wording of Article 6, the guarantee to transfer payments is dependent on the fulfilment of all tax obligations, i.e. the transfer of payments is inexplicitly subjected to the fulfilment of the tax obligations in accordance with the domestic legislation of the host country.

According to the UNCTAD report, one of the issues of importance with regard to the transfer of payments in connection with investments is the type of currency in which the transfers are allowed<sup>83</sup>. It is explained in the UNCTAD report that the importance of the type of currency is revealed in two ways:

- affects the degree of protection provided to the investor, and
- influences the amount of discretion of the host country to fulfil its transfer obligations.

Article 6 of the Norwegian/Russian BIT accords wide freedom to investors saying that the transfer can be made (i) in free convertible currency in which the investment has been made or (ii) in any other free convertible currency by the investor’s choice. Thus, an investor remains significantly independent of the host state’s discretion.

The other related issue of importance, according to the UNCTAD report, is the exchange rate to be applied for the conversion of domestic currency<sup>84</sup>. Article 6 of the Norwegian/Russian BIT does not specify whether transfers shall be made on the basis of official or market rates of exchange. The criteria provided by BIT Article 6 to the rate of exchange are the following:

- applicable on the date of transfer;
- pursuant to the exchange regulations in force of the Contracting Party in whose territory

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<sup>83</sup> Ibid, pp. 56-59.

<sup>84</sup> Ibid, pp. 56-59.

the investment has been made.

Thus, the applicable exchange rate for the purposes of transfers is determined by the domestic legislation of the host country. As it is noted in the UNCTAD report, if the host country has an overvalued or undervalued official exchange rate, investors would be favoured or disfavoured, as they would receive a higher/lower amount than under a market rate.

Norwegian/Russian BIT Article 6 contains an obligation on the part of the host country to permit the transfer ‘without delay’, although the meaning of this term is not specified, i.e. the issue may be said to be subject to the host state legislation.

### **Russian law in respect of expropriation**

Judging from the above analysis of expropriation and related issues, and as far as BITs are concerned, it might be concluded that there is close entwinement of BIT provisions with the host state legislation. Thus, it might be interesting to see how the issue of expropriation is resolved, for example, in the Russian Federation.

The Constitution of the Russian Federation sets out in article 35 under item 2 that ‘everyone shall have the right to have property, possess, use and dispose of it both personally and jointly with other people.’ Item 3 article 35 further proceeds that ‘no one may be deprived of property other than by a court decision. Forced confiscation of property for state needs may be carried out only under the condition of preliminary and complete compensation.’ Judging by the conditions set out in the RF Constitution, confiscation of property is legal provided:

- there is a corresponding court decision; or
- state needs require the property to be confiscated.

In the Russian Federation several legislative acts dwell on the possibility of the state to confiscate the property owned by individuals and legal entities. One can outline the following regulations (through the list is not exhaustive):

- the Civil Code of the Russian Federation: articles 235, 242 and 243;
- the Land Code of the Russian Federation: articles 9-11, 50, 51 and 55;
- Federal Law No.160-FZ of July 09, 1999 on Foreign Investment in the Russian Federation (RF Law on Foreign Investment): articles 8.

It should be noted that the term ‘expropriation’ is not set out or defined anyhow in the Russian legislation. On the contrary, several other notions are used, like, for example, requisition of

property, nationalization, confiscation, etc. The definition and scope of application of the notions mentioned in various legislative acts intersect to a certain degree.

Thus, in accordance with item 1 article 242 on Requisition of the RF Civil Code, ‘in case of the natural calamities, the accidents, the epidemics or the epizootics, and under the other circumstances of an extraordinary nature, the property may be, in the interest of society and by the decision of the state bodies, withdrawn from the owner in accordance with the procedure and on the terms, laid down by the law, with the cost of the requisitioned property paid out to him (the requisition).’ A similar definition is set out in item 1 article 51 of the RF Land Code.

In item 1 article 243 of the RF Civil Code, ‘confiscation is defined as the possibility to withdraw the property from the owner without any compensation in accordance with the court decision as a sanction, inflicted for his committing a crime or another violation of the law, in the law-stipulated cases’. A similar definition can be found in article 50 of the RF Land Code, which sets out that ‘a plot of land may be taken from its owner without compensation by decision of a court in the form of penalty for committing a crime.’

The notion of nationalization is set out in item 2 article 235 of the RF Civil Code as the forcible withdrawal of the property from the owner on the law-stipulated grounds. Such ‘turning into the state ownership of the property, which is in the ownership of the citizens and of the legal entities (the nationalization), shall be effected on the ground of the law with the recompensing of the cost of this property and of the other losses in conformity with the procedure, laid down by article 305 the RF Civil Code’. The latter article foresees that ‘if the Russian Federation passes the law, terminating the right of ownership, the losses, inflicted upon the owner as a result of the adoption of this act, including the cost of the property, shall be recompensed by the state. The disputes on the compensation for the losses shall be resolved by the court.’ However, it should be noted that the law terminating the right of ownership has never been effected in the Russian Federation.

The payment of compensation in case of expropriation has become a customary law standard. The traditional definition of compensation, which includes such important criteria as prompt, adequate and effective, is known to have been introduced by Mr C. Hull, the US Secretary of State, and is called the Hull formula. This formula has found its basis in the Russian legislation as well.

In accordance with item 3 article 35 of the RF Constitution ‘forced confiscation of property for state needs may be carried out only with the condition of preliminary and complete compensation’. The condition of preliminary and complete compensation is further clarified in RF Civil Code article 15, RF Land Code article item 1 article 57, RF Law on Foreign Investment article item 2 article 8 as the full recovery of the losses incurred by the person, whose rights have

been violated in the cause of state confiscation of his property, ‘the loss or the damage done to his [person’s] property (the compensatory damage), and also the undeceived profits, which this person would have derived under the ordinary conditions of the civil turnover, if his right were not violated (the missed profit).

In accordance with article 7 of Federal Law No. 135-FZ of July 29, 1998 on Valuation Activities in the Russian Federation, the preliminary and complete compensation thus defined as the full recovery of the losses incurred, should be calculated on the ‘market value’ of the object confiscated, provided ‘a legal act which makes it obligatory to conduct an appraisal of the object in question, or where the contract to appraise the object does not specify a particular type of value to be set on the object undergoing evaluation’.

The given provision has been confirmed by Decision 11 of March 24, 2005 of the Plenum of the Supreme Court of the Russian Federation on Some Issues of Application of Land Legislation. Under paragraph 28 of the Decision it is set out that ‘adequate compensation should be understood as the purchase price of a land plot, which in accordance with item 2 article 281 of the RF Civil Code and item 4 article 63 of the RF Land Code, comprises the market value of the land plot confiscated and the real estate located therein, as well as all losses inflicted on the land owner by the land plot confiscation including the losses, which this person will incur because of early termination of his obligations to third parties, as well as the missed profit’.

In accordance with several other decisions of the national courts of the Russian Federation, provided the claimant is not able to prove the amount of the missed profit to be paid, there are no grounds to pay such profit<sup>85</sup>.

Thus, the calculation of the compensation to be paid is a controversial issue depending on multiple circumstances determined on a case by case basis.

#### ***4.8 Other specific rules***

##### **Performance requirements**

Performance requirements are known to characterise conditions imposed by host countries on investors in connections with the establishment and operation of investments. According to UNCTAD report, the most commonly used form of a performance requirement clause in BITs is considered to be an article on ‘application of other rules’. In the Norwegian/Russian BIT that is Article 12. The key essence of this article is to ensure that the host country provides the investor with the most-favoured treatment resulting from the application of the domestic laws or international obligations. Thus, for example, both Norway and Russian are parties to WTO and

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<sup>85</sup> For example, 45.

have to observe their rights deriving, inter alia, from their membership in the TRIMs Agreement. This agreement prohibits requirements inconsistent with two main GATT obligations, i.e. the obligation of national treatment and the obligation to eliminate quantitative restrictions<sup>86</sup>. An illustrative list of inconsistent performance requirements is contained in the annex to TRIMs Agreement. It should be kept in mind that the TRIMs Agreement applies only to the goods sector. In accordance with the general meaning of Article 12 of the Norwegian/Russian BIT, the provisions of the TRIMs Agreement would prevail over the BIT to the extent that they are more favourable for the covered investors.

The issue whether an investor is entitled to enforce the rights derived from the TRIMs Agreement through the investor-State dispute settlement provision in the BIT remains open as there are arguments of both in favour and against this possibility<sup>87</sup>.

The issues related to performance requirements, such as the entry of foreign nationals or the possibilities to employ foreign nationals to top managerial positions are not anyhow touched upon or raised in the Norwegian/Russian BIT, which leaves us with the possibility to conclude that such issues should be resolved on a case-by-case basis depending on the requirements of the host state legislation and international law.

The Norwegian/Russian BIT contains no provisions on transparency. Hence, the issue is regulated by the applicable host state legislation and international law.

The Norwegian/Russian BIT contains no elicited exceptions or references to such issues as essential security and public order, protection of health and natural resources, prudential measures of financial services, protection of labour standards. However, numerous references in the Norwegian/Russian BIT to the necessity to comply with the legislation of the host state allow to understand that all those issues not touched upon in the BIT should be resolved in accordance with the legislation of the host state.

#### ***4.9 Dispute resolution***

As it is stated in UNCTAD report, articles on dispute resolution are important from the following points of view:

- serve as a certain guarantee to investors that their rights under BITs and the obligations of the host states will be ensured, thus somehow diminishing the risk of investing into the territory of another state;
- establish certain parameters that govern the investment relationship between the host

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<sup>86</sup> WTO TRIMS Article 2.

<sup>87</sup> 2, p. 80.

country and the investor or between the contracting parties.

#### **4.9.1 Investor-State dispute settlement**

According to UNCTAD series on dispute settlement, provisions on Investor-State dispute settlement are a common feature of most BITs<sup>88</sup>. Such articles provide the investors with the mechanism to defend their rights under BITs without depending on diplomatic protection of their home countries.

Like most BITs, the Norwegian/Russian BIT contains a relatively general provision on investor-State dispute settlement, relying on other international institutions, like the UN Commission in International Trade Law or the Institute of Arbitration of the Chamber of Commerce in Stockholm, to deal with specific procedural aspects.

##### **Scope of investor-State dispute settlement procedures**

The first abstract of Norwegian/Russian BIT Article 8 defines that the article applies to disputes arising between an investor of one party and the other contracting party. The abstract further specifies that a dispute has to meet certain conditions for the possibility to apply the provisions of BIT Article 8 to it, i.e. a dispute shall:

- be in connection with an investment in the host state's territory;
- concern the non-implementation or incorrect implementation of the obligations under the Norwegian/Russian BIT.

All the other investor-State disputes that do not meet the criteria mentioned above do not fall within the scope of BIT Article 8 and have to be resolved pursuant to the requirements of the host state legislation and international law based on a case-by-case basis.

The first stage of the investor-State dispute settlement mechanism according to BIT Article 8 is amicable negotiations. Once the Contracting Parties have failed to resolve the dispute amicably within a period of six months, two possibilities are available to them:

- ad hoc arbitration tribunal established under the arbitration rules of UNCITRAL; and
- the Institute of Arbitration of the Chamber of Commerce in Stockholm.

##### **Legal standing**

The procedures foreseen by BIT Article 8 are accessible to investors of one contracting party that have invested in the territory of the other contracting party. Thus, a foreign subsidiary incorporated under the laws of a host country would be considered a company of the host

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country rather than a foreign investor, and is unlikely to have access to investor-State dispute settlement procedures, but if such a possibility is explicitly foreseen in a BIT, which is not the case with the Norwegian/Russian BIT. However, if applying the conditions of the MFN treatment, the provisions of the BIT between Japan and the Russian Federation can be invoked, which read that a company established under the laws of country A could submit a dispute against the same country A if the enterprise is owned or controlled by investor of country B<sup>89</sup>.

The possibility to consider a local company as a foreign entity owing to the foreign nationality of the shareholders is also followed in the ICSID Convention. Article 25(2) of the ICSID Convention foresees that the disputing parties may agree that, for the purposes of ICSID arbitration, a company shall be considered to be a company of one contracting party if, immediately prior to the action giving rise to the dispute, nationals of that party owned or controlled it.

### **Prerequisites for activating the dispute settlement mechanism**

The Norwegian/Russian BIT requires that before submitting a dispute to any legal adjudication, consultations shall be held between the disputing parties to settle the dispute amicably. BIT Article 8 provides for a consultation period of six months.

In case the Contracting Parties fail to settle the dispute amicably, it can be submitted for resolution to an arbitration. It should be kept in mind that arbitration is available only once the investor and the host country have consented to the resolution of their dispute through arbitration voluntarily. Consent is considered to have been provided in advance by including in the BIT a related clause. BIT Article 8 indicates that a dispute may be submitted by either party to the dispute to one type of the arbitration indicated in the Article 8 if no amicable settlement has been reached within six months. The approach undertaken in BIT Article 8 generally coincides with the requirements imposed by the ICSID Convention, which requires the unambiguous intention of the disputing parties to submit their quarrel to ICSID<sup>90</sup>. The requirement is considered fulfilled if the disputing host country allows the foreign investor to submit the case to arbitration. BIT Article 8 phrase ‘may be submitted by either party’ explicitly implies such a possibility.

### **Exhaustion of local remedies**

Historically, exhaustion of local remedies was considered an obligatory step before submitting a dispute to international arbitration. Thus, most BITs made international arbitration conditional on prior submission of the dispute to a local court<sup>91</sup>. The situation has changed over the past 10

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<sup>89</sup> 25, Article 11.

<sup>90</sup> 33, Article 25.

<sup>91</sup> 20



years and most recent BITs do not require exhaustion of local remedies and do not indicate such a condition<sup>92</sup>. The Norwegian/Russian BIT belongs to the latter category of BITs, as it says nothing about the exhaustion of local remedies. Neither the Norwegian/Russian BIT enumerates any other possible procedural steps to be followed by an investor to initiate arbitration<sup>93</sup>.

### **The arbitration forum**

As mentioned earlier, the Norwegian/Russian BIT enumerates two possible venues for the resolution of disputes:

- ad hoc arbitration tribunal established under the arbitration rules of UNCITRAL; and
- the Institute of Arbitration of the Chamber of Commerce in Stockholm.

As the Norwegian/Russian BIT contains no specific indications to the contrary and following the wording of the article, the investor is considered to be allowed to choose the forum for the dispute resolution.

The other issue which may arise in connection with the options indicated in the article is whether the list is exhaustive or open. Again, according to the prevailing trend, as it is stated in the UNCTAD report, and provided there is no indication in a BIT to the contrary, as is the case with the Norwegian/Russian BIT, the list is considered exhaustive.

As far as the selection of arbitrators is concerned, especially if an investor chooses to submit a dispute to an ad hoc arbitration, the Norwegian/Russian BIT indicates that the procedures to be followed are the arbitration rules of UNCITRAL.

### **Governing law**

The Norwegian/Russian BIT does not contain any provision indicating what law should be used to govern the disputes, at least in Article 8 on Disputes between an Investor of One Contracting Party and the Other Contracting Party. However, Article 10 on Disputes between the Contracting Parties sets out that '[t]he arbitral tribunal reaches its decision on the basis of the provisions of this Agreement as well as on the principles and norms of international law'. Thus, based on the fundamental principle of party autonomy in international arbitration, the parties should be considered to have chosen the law applicable to their dispute. The conclusion is in line with article 33(1) of the UNCITRAL Arbitration Rules, which states that '[t]he arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute' and article

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<sup>92</sup> 2, p. 122.

<sup>93</sup> Norwegian scholars and civil servants in opposition to the standard BITs have used the "local remedies" argument for what its worth. In the Norwegian BIT form it is suggested a compromise to the effect that no unilateral action by the investor against the host state before any arbitral tribunal shall be allowed unless 36 months have elapsed for unsuccessful use of local remedies.

22(1) of the Arbitration Rules of the Stockholm Chamber of Commerce, which provides that '[t]he Arbitral Tribunal shall decide the merits of the dispute on the basis of the law or rules of law agreed upon by the parties'.

A very interesting question is raised in this regard by Yas Banifatemi, professor of Pantheon-Sorbonne University in Paris, in Chapter 9 on the Law Applicable in Investment Treaty Arbitration<sup>94</sup>. First, based on the available case materials (AAPL v. Sri Lanka, Wena v. Egypt, ADC v. Hungary), Yas Banifatemi concludes that the indications in BITs of applicable law (similar to the one in the Norwegian/Russian BIT) are regarded by arbitral tribunals being 'lex specialis' and international or domestic legal relevant rules 'as a supplementary source' by virtue of the provisions of the treaty itself<sup>95</sup>. Secondly, Yas Banifatemi asks whether the provisions of BITs should be treated as the applicable law or as the provisions containing the respective rights and obligations of the parties to the dispute on the basis of which the claim is lodged. I consider the conclusion she reaches important in understanding the implication behind the treaty provisions. She states that 'the treaty's provisions would normally constitute the standards against which the parties' conduct is assessed by the tribunal, whereas the rules of international law would constitute the law applicable to the determination of the creation, scope, modification, extinction, interpretation and operation of such provisions, for example the rules on State responsibility which determine whether an international obligation has been breached and attach specific consequences to such breach [...]'<sup>96</sup>.

The other important factor to keep in mind when Investor-State disputes are concerned is whether there has been a breach of the BIT or a breach of investment contract. As in the first case the applicable law will be the international law, while in the latter – the proper law of the contract, i.e. 'the legal system in which the contract finds its validity'<sup>97</sup>. The decision reached by Ad Hoc Committee in *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* is determinative in this regard stating that the state of Argentina is internationally responsible for the acts of its provisional authorities. By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucuman, which possesses separate legal personality under its own law and is responsible for the performance of its own contract<sup>98</sup>.

Based on the above, we can conclude that as far as the merits and interpretation of a BIT are concerned or the rights and obligations of the contracting states, the governing law will be the

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<sup>94</sup> 1.

<sup>95</sup> 1, p.194.

<sup>96</sup> 1, pp.207-208.

<sup>97</sup> 1, p.207.

<sup>98</sup> 40, paras. 95–96.

applicable international law. While when dealing with investment disputes arising out of a particular investment contract the applicable law has to be determined separately on a case by case basis and is likely to involve the provisions of the BIT together with the relevant provisions of the national law of the host state.

### **Enforcement of Awards**

The Norwegian/Russian BIT sets out that the arbitral awards with regard to Investor-State disputes shall be recognized and enforced in accordance with the NY Convention. According to the NY Convention, the condition on the recognition and enforcement of arbitral awards applies if

- the award has been made in the territory of a country other than the country where the recognition and enforcement of the award is sought; and
- the award not considered as domestic in the country where the recognition and enforcement is sought<sup>99</sup>.

NY Convention Article III says that ‘each contracting party shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon’. Countries - parties to the NY Convention - are obliged to recognize and enforce foreign arbitral awards but for the conditions mentioned in NY Convention Article V or following the conditions derived from NY Convention Article I, i.e. if an award has been issued in the territory of another country which has not subscribe to the NY Convention or an award adjudicating a dispute which does not arise out of a legal commercial relationship.

#### **4.9.2 State-state dispute resolution**

In the Norwegian/Russian BIT a whole article is devoted to the resolution of disputes between the contracting parties, i.e. Article 10. The BIT highlights that the dispute settlement provisions of Article 10 shall apply to disputes with regard to the interpretation or application of the BIT. The initial step in the resolution of a dispute is holding consultations and negotiations. The prescribed period for holding consultations is six months. BIT Article 10 specifies that in case of failure of negotiations, an ad hoc arbitration shall be established for each individual case. The Article mentioned also dwells on the appointment of the arbitrators and the costs of the arbitration. Thus, each party to the BIT is entitled to select one arbitrator, and the two selected arbitrators are authorized to appoint the chairman upon the approval of the Contracting parties. The whole period for the selection of the first two arbitrators and the appointment of the chairman constitutes 5 (five) months. If upon the expiry of this period the parties fail with the

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<sup>99</sup> 34, Article 1.

appointment, each of them may invite, first, the President of the International Court of Justice to make the necessary appointments, provided the President is not a national of either Contracting Party. Otherwise, the next member of the ICJ in seniority is authorized to make the appointments provided this member is not a national of either contracting party.

The Norwegian/Russian BIT authorises the tribunal to reach its decision based on the provisions of the BIT and on the principles and norms of international law.

The decision shall be reached by a majority vote. The decision is deemed to be final and binding.

The procedural issues are left by the BIT to be decided by the arbitral tribunal.

The BIT prescribes each Contracting Party to bear its own costs. The costs of the chairman and the remaining costs shall be borne in equal parts by the Contracting Parties.

## **5 Investments and protection of environment**

The kingdom of Norway is known to be quite particular when the environment and climate are concerned, especially with regard to petroleum activities. The peculiarities of the Norwegian environment and climate regulations with regard to petroleum activities are dealt with in the brochure ‘FACTS 2012. The Norwegian Petroleum Sector’<sup>100</sup> prepared by the Norwegian Petroleum Directorate (Brochure). The Brochure reads that special policy instruments have been developed to safeguard environment and climate considerations in all phases of the petroleum activities, from licensing rounds to exploration, development, operation and cessation activities. Emissions and discharges from the Norwegian petroleum activities are regulated through several acts, including the Petroleum Act, the CO2 Tax Act, the Sales Tax Act, the Greenhouse Gas Emission Trading Act and the Pollution Control Act. Onshore facilities or facilities with the baseline are subject to the requirements of the Planning and Building Act.

Apart from the fact that Norway was one of the first counties in the world to introduce a CO2 tax in 1991<sup>101</sup>, what impressed me most of all and what I consider vitally important to be taken into consideration by the other states is the establishment of an ‘Environmental Web’, a joint database for reporting emissions to air and discharges to sea from the petroleum activities. As it is indicated in the Brochure, all operators on the Norwegian continental shelf report emissions and discharge data directly into the database<sup>102</sup>.

As far as the Russian Federation is concerned, the environmental protection is regulate by numerous federal laws, governmental decrees and regulations of state agencies, laws enacted by

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<sup>100</sup> 3.

<sup>101</sup> 3, p.52.

<sup>102</sup> 3, p.52.

the subjects of the Russian Federation.

With regard to the subsoil use the following sources of environmental regulation can be outlined:

- The Constitution of the Russian Federation;
- Federal Law No.7-FZ of January 10, 2002 on Protection of Environment (FL on Protection of Environment);
- Federal Law No.2395-1 of February 21, 1992 on Subsoil, etc.

Article 58 of the Constitution of the Russian Federation Prescribes that '[e]veryone shall be obliged to preserve nature and the environment, carefully treat the natural wealth'.

The FL on Protection of Environment in its article 4 enumerates subsoil among the objection of protection. The following environment protection regulations are generally set out by the FL on Protection of Environment:

- Economic regulations (chapter IV);
- Emissions targets (chapter V);
- Ecological expertise (chapter VI).

Article 46 of the FL on Protection of Environment sets out the special requirements to be observed as far as the construction, reconstruction, and operation of oil and gas production, processing facilities, transportation, storage and sale of oil, gas and refined products are concerned.

In the sphere of foreign investments the key instruments containing key references with regard to environmental protection are considered to be the following:

- Federal Law No.160-FZ of July 09, 1999 on Foreign Investment in the Russian Federation;
- Law of the RSFSR of June 26, 1991 on Investment Activity in the RSFSR, etc.

Unfortunately, because of the word limit imposed on Master Thesis, there is no possibility to study the provisions of the above mentioned regulations in details. However, we can generally outline that the investment activity should be in compliance with the RF ecological, sanitary-hygienic and other regulations aimed at the protection of rights and interests of citizens and the state and that in case the continuation activity causes damage, it is terminated or suspended. Article 17 of the RSFSR law on investment activity further provides that the damage should be reimbursed in accordance with the requirements set out by the RF legislation.

The precautionary principle is considered to be the basis of the environmental regulation of the Russian Federation. Hence, the main measures foreseen by the legal instruments mentioned above and in compliance with the precautionary principle are the following:

- Environmental standardisation;
- Evaluation of effects on the environment; and
- State environment expertise.

The RF legislation foresees payment for the negative effect on the environment. The general payment requirements are set out in article 16 of the FL on environmental protection.

The most important aspects to be kept in mind with regard to environmental protection in the Russian Federation as far as the investment activities in the subsoil are concerned are the requirements to investment projects at the stage of making investments and strict liability for violation of environmental regulations at the stage of functioning of investment project.

## 6 Conclusion

The development of the treaty based international law for mutual promotion and protection of investment can be observed through the appearance and gradual development of the early bilateral commercial treaties into BITs that lay the grounds to the regulation of investment relations, on the one hand. On the other hand, we can observe the development of various legal instruments in support of those BITs. These legal instruments in their turn can be divided into agreements and regulations of regional organisations, like MIGA and NAFTA, multilateral treaties governing the relations, including the investment ones, in a particular sphere, like the ECT, multilateral instruments, which deal with the resolution of investment disputes, like the New York Convention, the ICSID Convention, etc. Thus, we can conclude to have been facing the parallel development of BITs and the supporting legal environment. The legal framework thus developed represents the balancing between the preservation of the rights of the sovereign states on the one hand, and of investors, on the other.

The rule for diplomatic protection used to be the key instrument of protection for investors and traditional method for settlement of investment disputes for quite a long period of time. The development of treaty law and, in particular, various regional and bilateral investment treaties have provided investors with effective direct means of international dispute settlement besides diplomatic protection.

BITs being designed particularly to regulate the investment relations between the states on a bilateral level, the Norwegian/Russian BIT sets out the key conditions to be kept in mind when making investment in the territories of the two states limiting the treaty application to exploring and exploiting the natural resources of the contracting parties.

These key conditions include:

- Asset-based definition of investment;
- Provision of protection to investments, not to investors;
- Protection of investments after they have been made but not at the establishment phase;
- Dispute-resolution options.

In case a dispute arises, the resolution possibilities depend on whether that is an investor/host state dispute or a dispute between the contracting parties. In both case the dispute is bound to be dealt with by the arbitration. In the former case, in accordance with the UNCITRAL arbitration rules or the Institute of Arbitration of the Chamber of Commerce in Stockholm. In the latter case, the arbitral tribunal should be 'ad hoc'. It should be kept in mind that the applicable law will

differ depending on the character of the dispute. As far as the merits and interpretation of the BIT are concerned or the rights and obligations of the contracting states, the governing law will be the applicable international law. While when dealing with investment disputes arising out of a particular investment contract the applicable law has to be determined separately on a case by case basis and is likely to involve the provisions of the BIT together with the relevant provisions of the national law of the host state.

Although the issues of environmental protection are not anyhow regulated or touched upon in the Norwegian/Russian BIT, the national legislation of the contracting states contain certain requirements obligatory to company with at the stage of making investments and strict liability for violation of environmental regulations at the stage of functioning of investment projects.



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## 8 List of tables

TABLE 1.

Interestingly, unlike the Russian Federation with its 75 BITs<sup>103</sup>, Norway has concluded only 15 BITs<sup>104</sup>. Both countries, Russian and Norway, have concluded agreements with regard to the following countries: Hungary, Indonesia, Lithuania, and China. Below I provide with the details of the BITs concluded by Russian and Norway with PRC (People's Republic of China). I consider this BIT much helpful with regard to better understanding and interpretation of the Norwegian/Russian BIT as the BIT with China contains several clarifications with regard to BIT terms and conditions not contained in the Norwegian/Russian BIT, like, for example, definition of the laws and regulations of the Contracting Party, understanding of the scope of the BIT, peculiarities of MFN Treatment, the possibility of using the local relief channels/domestic administrative review procedures specified by the laws and regulations of that Contracting Party in case of dispute between the investor and Contracting Party.

		Russia	Norway
PRC (People's Republic of China)	Preamble	To stimulate business initiatives of the investors and increase prosperity in both States <sup>105</sup> ;  To intensify the cooperation of both States on the basis of equality and mutual benefits	To develop economic cooperation [] on the basis of equality and mutual benefits, encourage investment by the nationals and companies of one contracting party in the territory of the other [], and create favourable conditions for this purpose.
	Definitions	Non-exhaustive list of investments;  Investor is defined as the natural person or legal entities in accordance with the laws and regulations of either contracting parties; clarification with regard to companies: having their seats in the territory of that Contracting Party;  A very important addition to the definition of	Investing means assets permitted by either contracting party in accordance with its laws and regulations (with non-exhaustive list);  No definition of 'investor' but 'national': defined in respect of natural persons and companies with regard to PRC and Norway separately, i.e. in respect of PCR: economic bodies incorporated and

<sup>103</sup> According to the information in the Russian online legal base 'Consultant' at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=126895;dst=0;ts=5FE7C580F2C36BEC684A200E2982A466;rnd=0.9517609406160268>; UNCTAD Online Investment Instrument indicates that Russian has concluded 71 BITs.

<sup>104</sup> As it is indicated in UNCTAD Online Investment Instrument at

<http://www.unctadxi.org/templates/DocSearch.aspx?id=779&PageIndex=2&TextWord=%27Russian%20Federation%27,%20%27%27%20,1&CategoryBrowsing=False&year=>

<sup>105</sup> Please be advised that the text provided in the tables hereunder represents the reference to some of the conditions mentioned in the related BITs.

	<p>investment: ‘a change in the form in which assets are invested does not affect their character as investments’;</p> <p>Definition of territory;</p> <p>Definition of ‘laws and regulations of the Contracting Party’, i.e. ‘the laws and other regulations of the Russian Federation or the laws and other regulations of the People's Republic of China’.</p>	<p>domiciled in the territory of the PRC in accordance with its laws; in respect of Norway, judicial persona, sole proprietors domiciled in the territory of Norway, companies and associations, regardless of whether or not the liabilities of its partners, members or constituents are limited, regardless of whether their activities are profit-oriented.</p>
Scope of application	No separate article	Applicable to investments [] in accordance with the laws and regulations of the host state, both before and after the entry into force of the agreement
MFN Treatment	<p>No separate article, part of article 3 on treatment of investments, which contains restrictions with regard to preferences accorded by</p> <ul style="list-style-type: none"> <li>• agreements establishing free trade area, customs unions, economic unions, monetary unions or similar institutions;</li> <li>• international agreements or international arrangements relating to taxation;</li> <li>• agreements between the Russian Federation and the states, which had earlier formed part of the Union of Soviet Socialist Republics, related to the investment in term of this Agreement.</li> </ul>	<p>Contains restriction, is not application to preferences</p> <ul style="list-style-type: none"> <li>• accorded to nationals/companies of any third country by the other contracting party in any existing or future customs union, free trade area, economic community, or international agreement and domestic legislation relating to taxation;</li> <li>• accorded to nationals or companies of any third country for the facilitation of frontier trade.</li> </ul>
Expropriation	Conditioned on domestic legal procedure, non-discrimination, and compensation.	Conditioned on public purposes, non-discrimination and compensation.
Dispute Resolution	<p>Separate articles</p> <p>on the settlement of disputes between the</p>	General article on the settlement of disputes between the contracting parties

		<p>national/company of one party and the other the other contracting party;</p> <p>on the settlement of disputes between the contracting parties</p>	
	Additional Protocol to BIT	<p>the Russian Federation considers the WTO General Agreement on Trade in Services falling within the scope of multilateral arrangements concerning the treatment of investments;</p> <p>the Contracting Party involved in the dispute may require the investor concerned to go through domestic administrative review procedures specified by the laws and regulations of that Contracting Party:</p> <ul style="list-style-type: none"> <li>• applied on the most favoured nation treatment basis;</li> <li>• not in any case take a period of more than 90 days from the date when the administrative review body accepts the investor's application for administrative review procedures;</li> <li>• not prevent the investor from submitting the dispute for resolution to the Centre or ad hoc arbitration court.</li> </ul>	<p>Adds, inter alia,</p> <ul style="list-style-type: none"> <li>• The definition of investments;</li> <li>• Specifies conditions of dispute resolution in case of expropriation;</li> <li>• Adds conditions on the resolution of disputes between the national/company of one party and the other the other contracting party; the possibility of using the local relief channels is allowed besides the options provided by the article on dispute resolution of the BIT.</li> </ul>

TABLE 2.

Key provisions of the BITs concluded by the Russian Federation with UK, USA, Japan and UAE, which might turn out to be helpful in understanding and interpreting the Norwegian/Russian BIT. The choice of the countries for the analysis of concluded BITs is random, on the one hand. On the other hand, such a choice is based on the fact that the BITs analyses are more thorough and detailed than the Norwegian/Russian BIT. Thus, the comparative analysis may help better understand the provisions of a more general Norwegian/Russian BIT.

Country	Key Provisions	
UK	Preamble	To create favourable conditions for greater investment; To stimulate business initiative; To contribute to the development of economic relations
	Definitions	Non-exhaustive list of investments; addition that ‘a change in the form in which assets are invested does not affect their character as investments’  Investor is defined through natural persons and corporations in accordance with the laws of the contracting party with an interesting clarification that such investor should be competent to make investments in the territory of the other Contracting Party
	Scope of Application	No separate article
	MFN Treatment	No separate article. Part of Article 3.
	Expropriation	Allowed only for <ul style="list-style-type: none"> <li>• a public purpose</li> <li>• non-discriminatory</li> <li>• against the payment (without delay, adequate and effective)</li> </ul> Definition of compensation: <ul style="list-style-type: none"> <li>• Amount to the real value of the investment expropriated before the expropriation or before the impending</li> </ul>

		<p>expropriation became public knowledge, whichever is the earlier</p> <ul style="list-style-type: none"> <li>• Made within two months of the date of expropriation; after interest at a normal commercial rate accrue until the date of payment,</li> <li>• Effectively realizable and freely transferable;</li> </ul> <p>The affected investor is entitled, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of its case and of the valuation of its investment in accordance with the principles set out in the paragraph on expropriation.</p> <p>Conditions on expropriation apply to the assets of a company or enterprise, incorporated/constituted under the law in force in any part of the host state territory, in which investor of the other Contracting Party have a shareholding</p>
	Dispute Resolution <sup>106</sup>	<p>Article on disputes between an investor and host contracting party:</p> <p>Period for amicable resolution of disputes is three months from written notification of a claim;</p> <p>Entitled to refer to international arbitration through Institute of Arbitration of the Chamber of Commerce of Stockholm, or ad hoc arbitration tribunal appointed by a special agreement or established under the Arbitration Rules of the UNCITRAL.</p>
USA	Preamble	<p>To promote greater economic cooperation in the sphere of investments;</p> <p>To stimulate the flow of capital and the economic development of the Contracting Parties;</p> <p>To agree on fair and equitable treatment of investment to maintain a stable framework for investment and maximum effective utilisation of economic resources;</p> <p>Recognising that the development of economic and business ties can contribute to the well-being of the peoples;</p> <p>Convinced that the growth and performance of market economy rely on the freedom of individual enterprise;</p> <p>Believing that the economic freedom for the individual included the right freely to own, buy, sell and otherwise use property.</p>

<sup>106</sup> From hereon only articles related to the settlement of disputes between a contracting party and an investor of the other contracting party are analysed.



Definitions	<p>Company of a Party: any kind of organisation, whether or not organised for pecuniary gain, or privately or governmentally owned;</p> <p>National of a Party: a national under applicable law;</p> <p>Investment: non-exhaustive list;</p> <p>Associated activities;</p> <p>Investment agreement;</p> <p>Non-discriminatory treatment;</p> <p>National treatment;</p> <p>MFN treatment;</p> <p>Provision setting out that any alteration of the form in which assets are invested or reinvested does not affect their character as investment;</p> <p>Provision entitling each Party to deny a company of the other Party the advantages of the BIT.</p>
Scope of Application	No separate article
MFN Treatment	<p>Definition is given in the preamble;</p> <p>Article II entitle the Parties to make exceptions to non-discriminatory treatment within one of the sectors or matters listed in the Annex to the BIT. Article II sets out the MFN Treatment to be consistent with the norms and principles of international law;</p> <p>Article IX specifically highlights the possibility to use more favourable treatment than that provided in the BIT when such treatment derives from laws, regulations, international obligations of the parties, and investment agreements/authorisations.</p>
Expropriation	<p>Prohibited;</p> <p>Allowed for public purpose, upon prompt, adequate and effective compensation, in accordance with due process of law and the general principles of treatment provided for in article II Of the BIT.</p> <p>Compensation is set out to be equivalent to the fair market value of the expropriated investment;</p>

		<p>Interest is included from the date of expropriation at a commercial rate established on a market basis;</p> <p>Compensation is said to be fully realisable and freely transferrable;</p> <p>The party subject to expropriation has the right to turn to judicial or administrative authorities of the other party to determine whether expropriation has occurred and if so, whether any compensation conforms to the principles of international law, etc.</p>
	Dispute Resolution	<p>Definition of an ‘investment dispute’ is provided in article VI as involving</p> <p>The interpretation or application of an investment agreement;</p> <p>The interpretation or application of any authorisation granted by a Party’s foreign investment authority;</p> <p>The existence and consequences of a breach of any right conferred by the BIT with respect to an investment.</p> <p>In case of failure of consultation and negotiation, the dispute is to be submitted for settlement in accordance with previously agreed dispute-settlement procedures;</p> <p>The possible options for dispute resolution enlisted in the BIT:</p> <p>ICSID Additional Facility</p> <p>Arbitration rules of any arbitral institution mutually agreed between the parties to the dispute.</p>
Japan	Preamble	<p>To strengthen economic cooperation between the two parties;</p> <p>To create favourable conditions;</p> <p>To stimulate the flow of capital and technology between the two countries.</p>
	Definitions	<p>Investments: traditional non-exhaustive list, an interesting addition like in the agreement with China and UK that ‘a change in the form in which assets are invested does not affect their character as investments’;</p> <p>An important definition of ‘business activities in connection with the investment’</p>
	Scope of Application	No separate article
	MFN Treatment	<p>No separate article, part of articles 2, 3, 12;</p> <p>Article 4 sets out no less favourable treatment with regard to the access to the courts of justice and</p>

		<p>administrative tribunals and agencies in all degrees of jurisdiction both in pursuit and in defence of their rights;</p> <p>The Protocol to the BIT further adds that the benefits resulting from agreements of the Russian Federation with the former Soviet Republics do not extend to Japanese investors.</p>
	Expropriation	<p>For a public purpose, under due process of law, on a non-discriminatory basis, taken against prompt, adequate and effective compensation;</p> <p>Compensation is set out to be equivalent of the normal market value of the investments and returns affected at the time of expropriation/nationalisation or any other measure tantamount to expropriation/nationalisation;</p> <p>Payment is to be effectively realisable, freely convertible and freely transferrable.</p>
	Applicable law/ Derogations	<p>Article 10 defines that nothing in the BIT could be construed to derogate from</p> <ul style="list-style-type: none"> <li>• Laws, regulations and administrative practices of either Contracting Party;</li> <li>• Obligations under the international agreement in force between the contracting parties;</li> <li>• Obligations deriving from an agreement of either Contracting Party with regard to investments/investors of another Contracting Party</li> </ul> <p>that entitles investments, returns or business activities related to investments to treatment more favourable than that provided by the current BIT.</p>
	Dispute Resolution	<p>Investors are entitled to seek for administrative or judicial settlement within the territory of the host state in case of dispute;</p> <p>In case of seeking administrative or judicial settlement or arbitral decision in accordance with the previously agreed dispute-settlement procedures, such dispute shall not be submitted to arbitration referred to in item 2 of article 11 of the BIT;</p> <p>Provision on attribution of the claimant company in a dispute to the other Contracting Party for the purpose of dispute resolution.</p>
UAE	Preamble	<p>To develop favourable conditions for the development of economic cooperation;</p> <p>To stimulate business initiative and increase prosperity in the states of the Contracting Parties.</p>

Definitions	<p>Asset-based definition of investment, non-exhaustive list;</p> <p>Investor as natural persons and legal entities in accordance with the legislation of each Contracting Party;</p> <p>Legislation of the Contracting Party as the laws and regulations;</p> <p>Term ‘without delay’ as a period normally required to fulfil the necessary formalities for the transfer of payments. Such period commences on the day which the request for transfer has been submitted and does not exceed 5 working days.</p>
Scope of Application	No separate article
MFN Treatment	<p>No separate article, part of articles on Promotion and Reciprocal Protection of Investments and Treatment of Investments.</p> <p>Explained in correlation with fair and equitable treatment and national treatment.</p> <p>Article 11 allows each Contracting Party to take advantage of whichever rules are more favourable for the investor.</p>
Expropriation	<p>For a public purpose, under due process of law, on a non-discriminatory basis, taken against prompt, adequate and effective compensation;</p> <p>Investor is entitled to turn to administrative bodies of the host state to assess whether expropriation has been made in accordance with the principles of the BIT.</p> <p>Compensation shall be computed on the basis of the market value of investment prior to the date when the expropriation has become officially known, or equitable principles if the market value cannot be ascertained.</p> <p>Compensation is set out to be paid in freely convertible and freely transferrable currency.</p> <p>Compensation is subject to accrued interest at a commercial rate established on a market basis from the date of expropriation to the moment of payment.</p> <p>Disputes on expropriation are also subject to the article on dispute resolution between an investor and the Contracting Party.</p>
Dispute Resolution	Sets out that applies to disputes in connection with an investment, including disputes relating to the amount,

		<p>conditions and procedure of payment, and transfer of payment.</p> <p>The period for negotiations is 6 months.</p> <p>An interim stage regarding the submission of the dispute to an administrative body under the procedures established by the legislation of the Contracting Party.</p> <p>The investor is provided with the following choices:</p> <ul style="list-style-type: none"><li>• A competent court or arbitration court of the Contracting Party in the territory of which the investments have been made;</li><li>• An ad hoc arbitration governed by UNCITRAL rules; or</li><li>• An ad hoc arbitration established in accordance with the ICSID Additional Facility Rules.</li></ul>
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