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Investor’s Legitimate Expectations Under the Fair and Equitable Standard. Should They Be Protected?
Legal and Practical Obstacles

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INVESTOR'S LEGITIMATE EXPECTATIONS UNDER THE FAIR AND EQUITABLE STANDARD
SHOULD THEY BE PROTECTED?
LEGAL AND PRACTICAL OBSTACLES

Introduction

Arbitral tribunals are undeniably relying on the investor's legitimate expectations when deciding whether the host state's alleged violations can constitute a treaty breach or not.\(^1\)

It has now become rare to see an arbitral award in an investor-state cases where the tribunal found the state liable for breaching the Fair and Equitable Treatment (FET) clause without relying to a certain extent on the violation of the legitimate expectations of the investor in relation with that state.\(^2\) However, most of these tribunals prefer not to examine the legal basis and the limitation of this concept, and whether it is truly an international law concept or not. This led some practitioners to criticize and question the legality of its application.\(^3\)

The doctrine was initially developed in order to preserve consistency and predictability in the international investment law. However, most of the arbitral tribunals have failed to show the legal basis of using this notion.\(^4\) In other words, first tribunals which dealt with this issue did not show in deep analysis why an arbitral tribunal which should apply international law rules, may use such a


\(^2\) For example, in *British Caribbean Bank Limited v. The Government of Belize – Award of 19 December 2014* at para. 283 " fair and equitable treatment is generally linked to the concept of an investor’s legitimate expectations"; and *CME v Czech Republic*, Partial award, 2001, 9 ICSID Reports 121 the Tribunal held that "The Media Council breached its obligations of fair and equitable treatment by evisceration of the arrangements in reliance upon which the foreign investor was induced to invest."


doctrine. While most of the following tribunals only referred to the previous decisions to justify their reliance on this concept.

A thorough study to this concept is therefore vital in order to understand how arbitral tribunals are dealing with the concept and what are its basis from their perspective, to reach an answer to the questions whether the doctrine is justified or not, and whether it can constitute one of the general principles of law or not, and what are the risks that may result when it is widely applied. This study will focus mainly on the adoption of the legitimate expectation concept as part of the fair and equitable treatment standard, since it is the most invoked factor when FET claims are raised in investment arbitration.

The first tribunal that dealt with this matter in the current legal framework was *Tecmed* which derived the doctrine from the good faith principle, as part of the international law. However, whether the applicable treaty or the international law allow such extraction remains unanswered. Indeed, many questions that followed adopting this doctrine remain unanswered. Thus, this paper will try to explain and illustrate some of these questions in pursuit of resolving this issue.

In order to do so, this paper will analyze first the current legal framework of the doctrine, to see how different tribunals viewed it and how it was developed as part of the Fair and Equitable Treatment standard, also to examine how and to what extent it was applied, this will be made in section II. Then another examination will be discussed for the treaties interpretations made by different tribunals to the mentioned standard, in their attempt to derive the so-called investor's legitimate expectations protection. This will take place under section III, seeking to find an answer for a question if the bilateral treaties wording may allow tribunals to reach their finding of allowing the legitimate expectation doctrine to be part of the fair and equitable treatment standard.

This will be followed in section IV by analyzing the basis and justification of the doctrine, and reaching an answer for the question whether legitimate expectations doctrine can qualify as a general principle of law, hence being a part of the public international law.

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5 *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2.
In section V potential and actual problems in the arbitration and political realm will be discussed, to show how applying the doctrine, in the way most arbitral tribunals follow currently, may have serious results on the efficiency of the investment arbitration and might affect tendency of the states to accept their partial sovereignty waiver, in favor of having an open global market and encouraging investments. The main problems to be discussed are the problem of framing the boundaries the concept and its potential effect on the risk factor that constitutes part of any investment. Moreover, the problem of the potential effects of the doctrine on the policy and hence the sovereignty of the host states when they practice their right to regulate.

These points and questions will be discussed before the final conclusion that will include the author's view for the issue and how legitimate expectations of an investor can be protected.

**Methodology**

This paper will analyze the legitimate expectation doctrine in investment arbitration under the Fair and Equitable Treatment standard. It is to be discussed how arbitral tribunals have dealt with this topic in the current legal framework, and how they weighed its importance in formulating the wide protection that investors currently enjoy. Thus, a legal method will take place to identify the potential and current problems arising from it’s the adopted application.

A critical analysis will be used to evaluate the doctrine and examine its legal basis through studying case law, and how different tribunals reasoned and justified the covered points. Questioning the basis of the doctrine and identifying its origin in domestic and international forums will take place, to establish what the author is arguing in this regard that no enough grounds have been presented by the tribunals to justify the general acceptance of the doctrine existence.

Thus, the current approach of weighing the importance of the investor’s legitimate expectations will be criticized, based on lake of enough legal basis, and other legal and practical considerations, which are inconsistent with the notion adoption, before showing the author's view for a specific approach of the doctrine that can be used, in pursuit of reaching a novel view of the doctrine against the applicable norms.
Section II: The current legal framework for legitimate expectations doctrine under Fair and Equitable treatment standard

The use of this doctrine has developed in the arbitration practice from nonexistence to the full adoption in less than 10 years. As previously mentioned, the Tecmed tribunal was the first to import the doctrine from the national legal systems into the international law realm. However, before that the tribunal in SPP case dealt with the matter, but out of the context of studying it as part of FET protection. The tribunal in this case considered the concept of protecting the investor’s expectations as being a principle of international law by stating that

“Whether legal under Egyptian law or not, the acts in question were the acts of Egyptian authorities, including the highest executive authority of the Government. These acts, which are now alleged to have been in violation of the Egyptian municipal legal system, created expectations protected by established principles of international law.”

Nevertheless, examining the approach taken by the previous tribunal is not within the focus point of this study, but its finding will be refuted as part of Section IV.

Back to the previous point of the Tecmed case, which dealt with the subject of the examined notion as part of the FET. The tribunal considered the FET clause in the Spain-Mexico Bilateral Treaty as part of the good faith principle adopted under international law, then it recognized the bona fide principle to include the protection of the expectations of the investors by stating that:

"The Arbitral Tribunal considers that this provision of the Agreement-FET-, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into

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8 Dolzer R. Supra note 1.
account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation."

The approach adopted by this tribunal was novel at the time it was issued, since it allowed with its analysis the beginning of the doctrine in question in the arbitration practice. It put the boundaries to what an investor can expect when entering a new market in the host state, and concluded that these expectations should be protected by the state. According to the tribunal’s finding, it put much of the burden on the host state to protect a wide scope of the investors' expectations, including the basic expectations of the investor. This was heavily criticized and was described as "the most far reaching exposition of the principle underlying the developing notion of legitimate expectations as applied to fair and equitable treatment in investment law."\footnote{11}

\footnote{10 \textit{Tecmed v. Mexico}, supra note 5, para. 154.}
Professor Zachary Douglas as well criticized heavily that approach by saying: "the Tecmed ‘standard’ is actually not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain."\(^1^2\)

It was even criticized by other tribunals, as described by the *MTD v Chile* Annulment Committee.\(^1^3\)

Although heavily criticized, some tribunals relied on the *Tecmed* interpretation for the level of expectations that the Host State shall protect, based on that standard the tribunals found the respondents liable.\(^1^4\)

However, the criticism encouraged most of the tribunals when dealt with the same issue after *Tecmed* tribunal to rephrase the doctrine by turning from protecting the investor's "basic" expectations to the "legitimate" expectations, to the extent it became the cornerstone or the most important element of the fair and equitable standard.\(^1^5\)

The difference between the standard adopted in *Tecmed* and some of the later ones that described the investor's expectations as "legitimate" or "reasonable" can be seen from the author's view more theoretical than practical. This can be proven through elaborating other decisions.

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\(^{1^3}\) See *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case. No. ARB/01/7, Decision on Annulment, 21 March 2007, para. 67 "The obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly."

\(^{1^4}\) See *Eureka BV v. Poland* (Partial Award) para. 235; *Occidental Exploration and Production Corporation v. Republic of Ecuador* (Final Award) para. 185; and *MTD v. Chile*, *Ibid*, para. 114.

\(^{1^5}\) Dolzer R., Fair and Equitable Treatment: Today’s Contours, Santa Clara Journal of International Law, vol. 12, 2014. He described it by saying that "The protection of legitimate expectations by the FET standard will today properly be considered as the central pillar in the understanding and application of the FET standard."; and, *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 7.75 (Nov. 30, 2012) "It is widely accepted that the most important function of the fair and equitable treatment standard is the protection of the investor’s reasonable and legitimate expectations."
In *CME v Czech Republic*, the tribunal held that "the Media Council breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon which the foreign investor was induced to invest". In *waste Management* case, the tribunal adopted a similar approach when decided that "In applying this standard it is relevant that the treatment is in breach of representations made by the host state which were reasonably relied on by the claimant." A similar approach was taken by many tribunals in the Argentinian cases.

From the foregoing, the author concludes that different tribunals, despite using different wording in describing the doctrine, they all applied it in the same broad meaning, requiring the host state when dealing with the investor to keep a high standard of stability in its own legislation or regulations, if not by such, they practically require a total stability as will discussed later on this paper. What is criticized here is that they reached this result not with a direct clause in the treaty, but only by using the general interpretation method of treaties as will be discussed in the next part.

**Section III: Interpretation of the treaty and legitimate expectation**

International investment treaties were initially made for the purpose of attracting foreign investments and investors, a result that could be reached through enhancing security and by creating stable environment for them. This environment cannot be viewed only through the investor's eyes. A balanced view when interpreting is vital. Otherwise, states may refrain from including fair and equitable standard from bilateral treaties.

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16 *CME v Czech Republic*, Partial Award, 13 September 2001, para 611.

17 *Waste Management v. Mexico*, Final Award, 30 April 2004, para 98.

18 For example, see *Sempra Energy v Argentina*, Award, 28 September 2007, para 303, where the tribunal decided that "The measures in question in this case have beyond any doubt substantially changed the legal and business framework under which the investment was decided and implemented. Where there was business certainty and stability, there is now the opposite".

The main question raised here is whether the parties of any bilateral treaty when they signed it had any intention for such a broad interpretation. Did they foresee how the protection standards are going to be applied to the extent that covers the investor's legitimate expectation? In other words, is it appropriate when interpreting different BITs to always favor the investor side, so the scope of protection might be expanded to reach the level of protecting the investor's expectation?

Arbitral tribunals repeatedly used the fair and equitable treatment standard to widen the scope of protection that investors enjoy. It is argued by the author that this growing jurisprudence in investment arbitration towards giving investors substantive protection based on their legitimate expectations can be considered as misinterpretation of the international law.\(^\text{20}\)

Despite the nonuniformity of the fair and equitable standard clauses between different treaties, as different wording is used, but the interpretation of them has been usually similar among tribunals. This is mainly due to the vagueness of the used phrases.\(^\text{21}\) The major debate between tribunals in this interpretation process was whether the standard is related to the minimum standard under customary international law, or it is considered a self-contained principle.\(^\text{22}\) Accordingly, none of these treaties included in its FET clauses or generally in its text any reference to the protection of investor’s legitimate expectations.

When interpreting a treaty text, tribunals are invited to follow the rules of interpretation stipulated in Vienna Convention on the Law of Treaties.\(^\text{23}\) Based on Articles 31 and 32 of this treaty tribunals should interpret the treaty in question


\(^\text{21}\) See for example the USA Model BIT 2012 “Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment.”; the Swiss-Egypt BIT “Investments and returns of investors of each Contracting Party shall at all times be accorded fair and equitable treatment”; while the Argentina-USA FET clause reads as “Investment shall at all times be accorded fair and equitable treatment.”


\(^\text{23}\) Dolzer & Schreuer, supra note 1, p. 31.; Article 31 of the VCLT states: ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’
and in our research the FET standard in accordance with 4 elements. These elements are the ordinary meaning of the phrases or the words in question, taking into account the full context, the optimum purpose of the treaty and the good faith. From the author’s view, none of the previous basis of interpretation allow the legitimate expectations doctrine from being considered part of the FET standard. Neither the words fair and equitable in its ordinary meaning can justify this outcome, nor the context of the standard refer in any way to it. Same applies to the other two elements, the purpose of the treaty, even if it was signed solely for the aim of protecting investments, since this aim does not in any way insure the full security for the investment and does not indicate the existence of an implicit stabilization clause which deprive states from its right to regulate, unless otherwise agreed by the parties. Moreover, the good faith requirement should direct the tribunal to consider the intentions of the parties when they signed the treaty in question, a factor that if taken into account can change any tribunal’s view as will be shown afterwards.

This same position was observed by the dissenting opinion in Suez case, as he stated that: “The assertion that fair and equitable treatment includes an obligation to satisfy or not to frustrate the legitimate expectations of the investor at the time of his/her investment does not correspond, in any language, to the ordinary meaning to be given to the terms (fair and equitable). Therefore, prima facie, such a conception of fair and equitable treatment is at odds with the rule of interpretation of international customary law expressed in Article 31.1 of the Vienna Convention on the Law of Treaties (VCLT).”

On the contrary, the majority of tribunals did not follow the foregoing approach. In occidental case, the tribunal held that "The stability of the legal and business framework is thus an essential element of fair and equitable treatment" and accordingly concluded that "there is certainly an obligation not to alter the legal and business environment in which the investment has been made.”

24 Suez, Sociedad General de Aguas de Barcelona, S.A.and Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Dissenting opinion of Arbitrator Pedro Nikken, para. 3.
25 Occidental v Ecuador, supra note 14, para. 183.
26 Ibid para. 191.
Same approach in interpretation was taken in CMS v. Argentina case, where the tribunal dealt with the FET standard as "stabilization clause" by stating that "stable legal and business environment is an essential element of fair and equitable treatment".27 This tribunal’s approach was followed by other tribunals in some Argentinian cases. For instance, in LG&E case the tribunal found that "the stability of the legal and business framework in the State party is an essential element in the standard of what is fair and equitable treatment. As such, the Tribunal considers this interpretation to be an emerging standard of fair and equitable treatment in international law."28

Such interpretation for the fair and equitable standard and the doctrine of legitimate expectations in its core led to unpleasant consequences, as it affected the stability and the attractiveness of the international investment law. For instance, in the 2012 Southern Africa Development Community (SADC) Model investment treaty included different wording standard which is "fair administrative treatment" rather than opting only for the traditional FET standard option29. That standard as explained by the drafting committee was justified by the desire to narrow the usual broad interpretations of the FET standard. The committee believed "that this would still provide useful protection for investors, while limiting the risks of the expansive rulings associated with the FET standard in a number of arbitral awards."30

27 CMS Gas Transmission Company v Argentine Republic (Award 12 May 2005) para 274.
28 LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, Para 125.; see also Enron v. Argentina, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 260, where the tribunal concluded that "a key element of fair and equitable treatment is the requirement of a 'stable framework for the investment', which has been prescribed by a number of decisions. Indeed, this interpretation has been considered ‘an emerging standard of fair and equitable treatment in international law.’"
29 Yenkong Ngangjoh Hodu, supra note 19.
Moreover, some states started to withdraw from ICSID convention, namely Bolivia, Venezuela and Ecuador, as a result to what they believe a more investors favorable dispute resolution mechanism.\textsuperscript{31}

Additionally, due to such unprecedented scope of interpretation, Argentina for more than 7 years between 2006 and 2013 refused to comply with several arbitral awards rendered under ICSID.\textsuperscript{32} Such dissatisfaction encouraged the Argentinian government to take unusual measures violating the ICSID convention by seeking the national court review to more than 30 awards rendered against them, to make sure that they did not “disturb public order because they are unconstitutional, illegal or unreasonable or if they were handed down in violation of the terms and conditions undertaken by the parties.”\textsuperscript{33} A procedure that prevented the investors in these cases from enforcing the awards for many years, and indirectly affected, as a consequence, the efficiency of investment arbitration as a whole. These Argentinian cases and generally the tendency of some arbitrators to interpret the investment treaties in a way that favors the investor and hence their failure to deal with the social and economic changes in the host states made the legitimacy of the system itself at stake.\textsuperscript{34}

All these consequences should make all the practitioners to question the original intention of states when they signed bilateral investment treaties. Even if Articles 31 and 32 of Vienna convention on the law of treaties did not include the intention of the states as a factor in the interpretation of treaties, this should not prevent arbitrators to take into consideration the initial purpose of the states when they

\textsuperscript{31} Nicolas Boeglin, ICSID and Latin America: Criticism, withdrawal and the search for alternatives, 2013.
\textsuperscript{33} Argentina Economy: Ministry Denies Foreign Investors Discrimination, EIU ViewsWire, October 26, 2004. Argentina was a respondent in 35 ICSID cases as of June 1, 2005.
\textsuperscript{34} For a thorough discussion about this see Leonhardsen, E. M. ‘Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration’, Journal of International Dispute Settlement, vol. 3/no. 1, (2012), pp. 108-109as he noted that “It is difficult to prove empirically, but I agree ... that the outcome of these cases (many of which are still ongoing) contributed to a perceived lack of legitimacy of the regime, and that this was likely a key reason for the moves by States to exit it ... A balancing approach by treaty tribunals might help mitigate this legitimacy deficit”; see also Jose’ E Alvarez and Kathryn Khamsi, ‘The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime’ in Karl P Sauvant (ed), Yearbook on International Investment Law & Policy, 2008–2009 (OUP 2009).
decided to sign the treaty at issue. Is it possible that any state would have foreseen the effect of some clauses, particularly the FET clause?

This same approach was observed by many scholars, as Sornarajah noted “expansionary views taken by arbitrators who have accepted the expansionary litigation theories of lawyers who are seemingly taking the law in investment treaties beyond what the parties had originally intended”\textsuperscript{35} adding that this took the states' commitments beyond what the treaties words originally allow\textsuperscript{36}. To the same view Muchlinski noted that “the current regime of IIAs contains a bias toward the imposition of obligations on host countries.”\textsuperscript{37}

Indeed, states when signed those treaties did not treat the words with due care, and so did not anticipate the massive consequences resulting from the general clauses of the BITs, this situation was best described by professor Schreuer when he said that “[M]any times, in fact in the majority of times, BITs are among clauses of treaties that are not properly negotiated. BITs are very often pulled out of a drawer, often on the basis of some sort of model, and are put forward on the occasion of state visits when the heads of states need something to sign and the typical two candidates in a situation like that are Bilateral Investment Treaties, and treaties for cultural cooperation. In other words, they are very often not negotiated at all, they are just being put on the table, and I have heard several representatives who have actually been active in this Treaty-making process, if you can call it that, say that, ‘We had no idea that this would have real consequences in the real world’”\textsuperscript{38}

Thus, in order to reach a balanced arbitration system, a more balanced interpretation between the interests of investors and sovereignty and rights of


\textsuperscript{36} Ibid, 41, 55–73.


\textsuperscript{38} Prof. Christopher Schreuer, oral testimony on behalf of the Claimant, \textit{Wintershall Aktiengesellschaft v. Argentina}, ICSID Case No. ARB/04/14, Award (8 Dec. 2008), at 85.
states should be considered. The more investor right approach dominates the rapid the system will face more objections and obstacles. Van Harten has described the current system as it: “treats investor protection as the dominant aim of the system and, in doing so, discards the ongoing need to accommodate democratic choice and governmental discretion.”

Section IV: The source and justification of the doctrine, is it an international law principles?

Most of the arbitral tribunals when relying on the legitimate expectations of the investor, they usually indicate that it applies because it constitutes part of the FET standard. With no further legal basis explanation, the applicability of this concept remains controversial. This leads to question the source of legitimate expectations doctrine in investment arbitration. Why a host state should respect these expectations if they are not a written or explicit commitment from the state? According to some tribunals, legitimate expectations protection in international law is considered one of the general principles of law as part of the good faith principle, which is a legal norm subject to Article 38(1) c of the ICJ statute, and they justify the scope of application of the doctrine by referring to the main aim of bilateral treaties, as previously discussed.

However, only few tribunals indeed talked about this source in international law. It is seen to be a crucial point to be discussed, especially under some BITs that limit the FET standard to be governed by “the principles of international law”. Thus, analyzing the legitimate expectation source to define whether it can constitute part of the international law principles or not will be made.

Two main justifications will be elaborated in this paper, which are the basic two arguments in this regard in the author's try to refute them. The first is the Good Faith argument, while the second was an attempt from some other scholars who

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41 See e.g. Article IV(1) of the Spain-Argentina BIT; Article 2 of the United Kingdom-Argentina BIT.
argued that the doctrine is part of other international principles such as the binding effect of state's unilateral acts, decided in the *Nuclear Tests* case\(^\text{42}\). however, the author argues that all these principles do not justify the basis of the legitimate expectations concept as an international law one.

### iii. Good faith

Starting with *Tecmed* tribunal, it justified protecting these expectations as part of the good faith principle which is a general principle of law, thus it is a binding source of international law as stipulated in Article 38(1) c of the Statute of the International Court of Justice as well as one of the recognized elements in Article 31 of the Vienna Convention on the Law of Treaties which is used in interpreting an international treaty. It was clearly described by *El Paso* tribunal when stated that "it has become clear that the basic touchstone of fair and equitable treatment is to be found in the legitimate and reasonable expectations of the parties, which derive from the obligation of good faith."\(^\text{43}\) The same perspective was taken in *Sempra* case, the tribunal described the good faith principle as it "permeates the whole approach" of protecting investors, especially the fair and equitable treatment.\(^\text{44}\)

It is not contended here that the good faith as part of the general principles of law is not applicable in international investment law, but what is argued is that such principle does not allow to justify the broad applicability of the legitimate expectations doctrine in question.

It was argued that the good faith is the basis of this scope of protection since the nature of investment and business requires so. This nature that allows the investor to make its business calculations according to the laws and regulations available at the time of the investment start and to what is presented or promised by the host state officials. This requires a certain amount of predictability and assumptions to


\(^{44}\) *Sempra Energy International* v. *The Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶ 297 (Sept. 28, 2007) "The principle of good faith is thus relied on as the common guiding beacon that will orient the understanding and interpretation of obligations, just as happens under civil codes."
the returns of the investment. These factors that were taken into consideration when the investor decided to start his business could have been different if the circumstances changed. This as well would not affect the host state sovereignty, because the applicable legal order would be that chosen by the state itself when it admitted the investment.\textsuperscript{45} Moreover, the state has a duty to present a clear and transparent legal framework for the investors, so if this predictability for the legal order is breached then the FET standard would be violated. This same approach was described by another tribunal as "roller-coaster" policy, where it found that continuous legislative changes can set a ground for the breach of FET.\textsuperscript{46}

Notwithstanding the foregoing, does this justification mean that where a good faith principle applies, legitimate expectation of any investor shall be protected? In other words, if the legitimate expectations of investors are to be protected as part of the general principles of law, should not this same justification apply on the local investors, since the general principles of law are to be recognized through the national legal systems of the civilized nations?

If the answer is yes, then this should take us to the scope of legitimate expectation protection in different jurisdictions in some of the civilized nations to examine if it applies in the same scope or not. This result was observed by the \textit{Gold Reserve} tribunal, as they pointed out that:

"With particular regard to the legal sources of one of the standards for respect of the fair and equitable treatment principle, i.e. the protection of “legitimate expectations”, these sources are to be found in the comparative analysis of many domestic legal systems. This has been succinctly stated recently by other ICSID tribunals, for example in \textit{Total v. Argentina} and in \textit{Toto Construzioni Generali SpA v Republic of Lebanon}. Based on converging considerations of good faith and legal security, the concept of legitimate expectations is found in different legal traditions according to

\textsuperscript{45} Rudolf Dolzer, \textit{Fair and Equitable Treatment: Today’s Contours}, published at Santa Clara Journal of International Law, p. 17.

\textsuperscript{46} See \textit{PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elec\texttt{tr}ik \texttt{U}\texttt{ret}im \texttt{ve Ticaret Limited \texttt{S}irketi v. Republic of Turkey – Award}, 19th Jan. 2007, para 250, it found that: the fair and equitable treatment obligation was seriously breached by what has been described above as the “roller-coaster” effect of the continuing legislative changes.
which some expectations may be reasonably or legitimately created for a private person by the constant behavior and/or promises of its legal partner, in particular when this partner is the public administration on which this private person is dependent. In particular, in German law, protection of legitimate expectations is connected with the principle of Vertrauensschutz (protection of trust) a notion which deeply influenced the development of European Union Law, pointing to precise and specific assurances given by the administration. The same notion finds equivalents in other European countries such as France in the concept of confiance légitime. The substantive (as opposed to procedural) protection of legitimate expectations is now also to be found in English law, although it was not recognized until the last decade.47

Based on these observations, an examination for the mentioned national jurisdictions will be made. although that an argument can be raised that the existence of a certain concept in a number of states, does not automatically indicate that it became a general international principle, specially that no review was made by these tribunals for the legal system in other key players states in international investment, such as Russia or China.48

However, even if the tribunal's view for a comparative analysis is accepted, the scope of protection within these jurisdictions is quite different, specifically when dealing with legitimate expectations protection as a substantive right. In many national legal systems, legitimate expectations protection can only be a procedural standard.49

In United Kingdom, the general rule is that an investor’s expectations are not legitimate if they are based on the stability of a certain law or policy, but its protection scope is only regarding the administrative process of the policy making.50 Thus, the doctrine was initially applied as a procedural right only.

47 Gold Reserve Inc. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB (AF)/09/1), Award, Sep. 22, 2014 ¶ 576.
48 Nikhil Teggi, supra note 3, p. 69.
49 Nikhil Teggi, Ibid.
However, it was developed in a later stage to include some substantive rights under specific conditions. This position was described by JH Jans "The doctrine of legitimate expectations has long existed in English law, at least in relation to procedural legitimate expectations. Under the doctrine, some legal weight is accorded to policy practices and promises of the administration, though a public authority may depart from such practices and promises, provided it gives adequate reasons for its departure and hears interested parties beforehand. However, until recently — as late as the end of the previous century — it was not recognized that practices and promises could also create substantive legitimate expectations". In the judgment of case Nadarajah & Abdi that was described by Ashley Underwood QC as "an important development and gives clarification to the principle of legitimate expectation", the Court of Appeal has ruled that when an administrative authority gives a promise regarding a certain issue, the law requires that this promise must be given unless the administration has a good reason not to grant it. It added that changing the policy does not infringe the individual legitimate expectation as long as the new policy is "disproportionate".

In the case *R v Independent Assessor*, the court ruled that "The mere existence of a discretionary scheme for compensation to the victims of miscarriages of justice did not create the conditions necessary to establish a legitimate expectation that the scheme would be continued, so that the Secretary of State was entitled to withdraw it without notice or consultation." Accordingly, what can be concluded in this regard is that the administrative body has the right to change the governing policies and regulations, unless the new policy is disproportionate, i.e. the rule is that the administration has the authority to change, while the protection of the legitimate expectation is the exception to the

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51 TREVOR ZEYL, Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law, P. 211 & 212.
55 *R (Bhatt Murphy (a firm) and others) v Independent Assessor; R (Niazi and others) v Secretary of State for the Home Department* [2008] EWCA Civ 755; [2008] WLR (D) 233.
rule. This is obviously narrower scope of protection than the scope described previously by the arbitral tribunals in *Occidental, CMS* and *LG&E* cases.

In Canada, the Supreme Court in *Mount Sinai* case excluded the substantive protection from the scope of the doctrine of legitimate expectations, as it only applies on procedural matters by stating that "substantive relief is not available under this doctrine."56

Same approach is adopted in Australia, where the High Court decided that "Whatever may be the current utility or status of the doctrine of "legitimate expectation" ... that on no view can it give rise to substantive rights rather than to procedural rights."57

On the contrary, the only state that give considerable amount of substantive protection for the doctrine is Germany.58 Despite this scope of protection remains arguably less than the recognized scope in investment arbitration, but assumingly they are similar, does this fulfill the requirement to be a general concept recognized by civilized nations? Does the implementation of a doctrine by one state can raise it to be an international binding doctrine? What if this one state was for instance, Russia, China, India, or Brazil, would the same recognition take place?

The answer to all these questions is and should be negative. Generally International Court of Justice dealt with this provision with extreme caution, as it expressly addressed it only in four occasions since its establishment in 1922.59

Indeed, in the Lotus case, the Permanent Court of Justice had a totally different approach to the general principles of law as a source of International Law when it disregarded its weight when stated that: "the words “principles of international law”, as ordinarily used, can only mean international law as it is applied between all nations belonging to the community of States"60, so according to this case the

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56 *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 SCR 281, 2001 SCC 41 (CanLII), para 38.

57 Re Minister for Immigration and Multicultural Affairs; Ex parte Lam [2003] HCA 6, para 148

58 Zeyl, supra note 51, p. 215.


60 S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J, Series A, No. 10, p. 16.
court practically limited the sources of international law to international conventions and customary international law.\textsuperscript{61} i.e. the principles of law that was developed in \textit{foro domestico} cannot constitute part of the international law principles and hence part of the international law that govern international investment disputes.

Even if this interpretation is underestimated and the principles recognized in \textit{foro domestico} are to be recognized, the \textit{travaux} of the ICJ Statute shows that this should be a general recognition by "all" states as stated by Lord Phillimore, the author of the final version of the statute when said ‘the general principles referred to in point 3 were these which were accepted by all nations in \textit{foro domestico}, such as certain principles of procedure, the principle of good faith, and the principle of res judicata, etc.’\textsuperscript{62}

Accordingly, these principles in order to form part of the international law should be accepted by all nations. As far as the author researched, no tribunal to date has analyzed the doctrine of legitimate expectations from the view of all the nation's legal systems, to make sure that it is recognized at least in the majority of them. The requirement that such recognition is enough to be made by "civilized nations" has no actual effect nowadays, as all the states now should be considered as civilized nations.\textsuperscript{63}

This shows, from the author’s view, that the doctrine of legitimate expectation has no enough ground to be applied as an international law principle as part of the good faith principle, from lacking enough recognition by all, or even the majority of national jurisdictions, which is a binding requirement to be considered as part of the international law if tribunals want to apply it as part of the "general principles of law".

iv. the binding effect of state's unilateral acts

Another ground that was argued to be the basis of the legitimate expectation doctrine in the investment law is the binding effect of the host state's unilateral

\begin{itemize}
\item \textsuperscript{61} Zimmermann A. supra note 59, p. 796.
\item \textsuperscript{62} Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920), Annex No. 3, p. 335, referred to at Zimmermann A., Ibid.
\item \textsuperscript{63} Zimmermann A. Ibid, p. 798.; in Procès-Verbaux, Ibid, Annex No. 3, p. 335 Lapradelle described the phrase from the beginning to be ‘superfluous, because law implies civilization’.
\end{itemize}
act. When a state made a unilateral promise or declaration, it is internationally bound by it. A concept that was formulated by the ICJ in the Nuclear Tests case. Despite not being invoked by any tribunal to date, but it was used by some scholars.64

In this case, the court found that "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations … The binding character of the undertaking results from the terms of the act and is based on good faith interested States are entitled to require that the obligation be respected."65

These findings gave the indication that a state shall be responsible for its promises and previous regulations against foreign investors. Though the court's findings were under urges to be narrowly interpreted in reflection of its own merits and circumstances66, the analogy used here remains not entirely correct.

First, even if there is an obligation on the state by its unilateral act, the ones who are entitled to require the respect of such obligations are the states not a private person. Further, this responsibility would create a separate claim, and not a part of the Fair and Equitable Treatment or any other provision in a treaty, since the source of obligation is different.67

Accordingly, the author views that there are no enough foundations for the legitimate expectation doctrine existence in international law under the foregoing basis. It is for the tribunals and parties' advocates to try to legalize the doctrine based on different principles of law or any other sources. Otherwise, the same critics and dilemma of the concept may remain.

64 For this argument see Wolfrum R, 1941. Developments of international law in treaty making. Berlin; Heidelberg; New York; Springer; 2005, p. 191.
66 For more about this see Brown C., A Comparative and Critical Assessment of Estoppel in International Law; University of Miami Law Review, 1996. P. 408-412.
67 Nikhil Teggi, supra note 3.
Section V: Problems facing the application of the doctrine in practice

Being a controversial concept, this section will include the main problems that may face arbitral tribunals when apply the doctrine of legitimate expectations and some other practical obstacles for its applicability. This demonstrates how the Arif tribunal described it, since it "remains problematic". It is to be argued that its application may create more inconsistency in arbitration, in addition to its potential contradiction with other principles and concepts of international investment law, and its conflict with other practical considerations.

E. Legitimate expectation and the risk of investment

The definition of investments is a wide subject, to determine what falls under an investment and what does not qualify for this definition is not this study's covered area. However, it is widely accepted that an investment to be covered and protected by the scope of protection under Bilateral Treaty, certain amount of risk needs to be taken.

It is argued that this risk may differ from country to another and according to the kind of activity the investor is investing in. It is contended by arbitrators and scholars that the socio-economic factors must play a role in deciding and determining the amount of legitimacy and reasonableness in investors’ expectations.

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68 Franck Charles Arif V Republic of Moldova, ICSID Case No. ARB/11/23, Award April 8, 2013 para 533.
69 For more about this see Salini et al v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, para 52 (Jul. 23, 2001); joy Mining Mach. Ltd. v. Egypt, ICSID Case No. ARB/03/11, Decision on Jurisdiction, para 53 (Jul. 23, 2001); Jan de Nul N.V. v. Egypt, ICSID Case No. ARB/04/13, Decision on Jurisdiction, 91 (un. 16, 2006); Saba Fakes v. Turkey, ICSID Case No. ARB/07/20, Award, T 110 (Jul. 14, 2010); Victor Pey Casado and President Allende Found. v. Republic of Chile, ICSID Case No. ARB/98/2, Award, 232 (May 8, 2008); LESI S.p.A. et Astaldi S.p.A. v. People’s Democratic Republic of Algeria., ICSID Case No. ARB/05/3, Decision on Jurisdiction, 172 (Jul. 12, 2006).
Nevertheless, in practice these socio-economic factors did not play much role in this regard. In other words, tribunal’s efforts to differentiate between different host states conditions have failed to draw the line or specific indications on what can distinguish these factors.\(^71\) It cannot be accepted, from the author’s view that the investor would have the same legitimate expectations in every host state, whether it was USA, India, Russia, Laos or Congo. This is what some arbitrators and scholars argue, but as mentioned earlier, this is easier said than applied.

Most of the tribunals tend to use similar factors in determining the scope of protected expectations regardless of the host state financial, social or political aspects. The Argentinian cases are good examples for this. The Argentinian economy has started it down inclination since the early 90s to reach it peak by the end of that decade. A deterioration that put the economy and the whole social life at stake. However, this did not prevent most of the tribunals who dealt with the case to find that the investor's legitimate expectations have been infringed.\(^72\)

Accordingly, if this approach for the scope of protection is to be applied on all investors during different circumstances and even when applied on states during their economic distress, which were partially known to the investor, should not this affect the level of risk the investors bear when they establish their investments? Indeed, it should. Otherwise the FET clause will play the role of an insurance clause, which is obviously not the aim of it or the treaty as a whole.

The protection offered by the host state should not be considered as one direction relationship. It is a level of security given in return of what foreign investors give to the host state from benefits and flow of money. That is why some tribunals in their definition for the investment required certain amount of development to the host state to be fulfilled by the investor, in order to enjoy the protection given by the treaty.

Thus, if the investor seeking the protection for its legitimate expectations failed to foresee or evaluate the assessment of the host state economically, socially and politically, this should be its own responsibility, as this is part of the investors

\(^{71}\)Robert Ginsburg, Ibid.

\(^{72}\) For example, see CMS v Argentina, supra note 27, para 277.; Enron v. Argentina, supra note 28, para 259.; National Grid plc v. The Argentine Republic, UNCITRAL, Award 3 November 2008, para 170.
duty before engaging in any investment. This position was analyzed thoroughly in *Parkerings* case, where the tribunal examined the doctrine by saying that:

"The expectation is legitimate if the investor received an explicit promise or guarantee from the host state, or if implicitly, the host state made assurances or representation that the investor took into account in making the investment.

Finally, in the situation where the host state made no assurance or representation, the circumstances surrounding the conclusion of the agreement are decisive to determine if the expectations of the investor are legitimate. In order to determine the legitimate expectation of an investor, it is also necessary to analyze the conduct of the state at the time of the investment.

It is each state’s undeniable right and privilege to exercise its sovereign legislative power. A state has the right to enact, modify or cancel a law at its own discretion. Save for the existence of an agreement, in the form of a stabilization clause or otherwise, there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a state to act unfairly, unreasonably or inequitably in the exercise of its legislative power.

In principle, an investor has a right to a certain stability and predictability of the legal environment of the investment. The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances.

Consequently, an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment."\(^{73}\)

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\(^{73}\) Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award 11 September 2007, para 331-333.; same was decided in *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award 8 October 2009 para 217 "The idea that legitimate expectations, and
On the other hand, the situation might be different if investors entered in a host state that enjoys long term stable economic, social and political environment. Since the investor cannot foresee the sudden risk or change in the regulations. This raises the question about the recent Brexit situation. United Kingdom is considered one of the main hubs for investments all over the globe, since it provides its investors with a steady investment environment. It allows them as well with multiple incentives in the European market. Suddenly, and more importantly with unprecedented move, the state decided to end these incentives as a result to the Brexit effect. Which is expected to change the economic value of the investments located in the state.\(^{74}\) Could this give the investors the right to seek compensation based on the changes in the market?

If the answer is negative, then this shows the reverse situation, where the risk is to the minimum, and no investor could have anticipated the situation, they are not protected while they are protected when they could have foreseen and expected the risks and threats surrounding the Argentinian cases.

If the answer is positive, then the investors may seek their claims relying only on the infringement of their legitimate expectations, which will provide them with a level of protection similar if not lesser than the level accorded to the investors in the other cases. Which will thus show that tribunals do not pay much attention to the socio-economic factors in the host-states when dealing with the protection of the investor's legitimate expectations, since they provided the same level of protection in both cases.

F. What is a “legitimate” expectation?

There is no specific definition for what can constitute a legitimate expectation for any investor under public international law. Especially that this notion was developed by the arbitral practice and not grounded directly or indirectly by the language and wording of the BITs. Generally, the term legitimate expectations can mean a wide and unclearly defined concept which could include unprecedented expectations. This encouraged arbitrators and scholar to put different definitions and explanations for the its boundaries, since this notion may create endless expectations from the investors. As in Thunderbird case where the tribunal explained it by saying that “the concept of “legitimate expectations” relates, within the context of the NAFTA framework, to a situation where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honor those expectations could cause the investor (or investment) to suffer damages.” In occidental the tribunal referred to the legitimate expectations as an “obligation not to alter the legal and business environment in which the investment has been made”. From his side, Waibel suggested that the notion protects investors since “governmental acts need to conform to international standards of transparency, non-arbitrariness, due process, and proportionality to the policy.”

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77 International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, Award 26 January 2006, para 147.
78 Occidental v Ecuador, supra note 14, para. 191.
79 See M. Waibel, Opening Pandora’s Box: Sovereign Bonds in International Arbitration, 101 American Journal of International Law (2007) 711, 750.; see also F. Dupuy & P. M. Dupuy, supra note 76, as they explained their view by distinguishing the expectations of the investors depending on many different factors “expectations must be assessed by reference to standards accepted by society as a whole, or by reference to professional standards accepted in a given industry. In the context of international investment law, which by definition involves different cultures and practices, this means identifying values and standards that are sufficiently universal to be considered as shared by all, or at least by the parties to a specific dispute. Therefore, some
These loose definitions and explanations, from the author’s view, do not help much in analyzing what may constitute a legitimate expectation and what may not. From a pragmatic perspective, these general words cannot serve the aim of framing the boundaries and the contours of the “legitimate” expectations. As Brown noted “It is a trite, yet pertinent, truism that a term which means everything ultimately means nothing”. So, using general concepts like “transparency”, “reasonable” or “justifiable” to define what is already a general concept, shows the legal uncertainty that was created by adopting this doctrine. Thus, unnecessary broad interpretation can lead (and truly led as discussed in Section III) to contradicting and unstable results.

The adoption of any specific legal concept should serve the stability and consistency of the legal framework. however, the adoption of this doctrine and after many years of its implementation in the investment arbitration, neither the tribunals nor jurisprudence could make a uniform rule for indicating the limits of investors’ expectations to be protected. On the contrary, all these attempts created more inconsistency and instability than it served. An outcome which shaped a dissatisfaction condition about the current arbitration regime between concerned states. Thus, recently more states have “entered into a phase of evaluating the costs and benefits of International Investment Agreements [IIAs] and reflecting on their future objectives and strategies as regards these treaties.”

This discontent by the states reflects the vague environment that can be created through implementing such indefinite norms and concepts which are not rooted in the public or the investment international law.

80 Brown C. supra note 66.
82 Nikhil Teggi, supra note 3.
G. Legitimate expectations and the host state’s right to regulate their political, environmental and health interests.

The relation between any investor and the host state will usually suffer from some discords due to the lack of harmony between their interests. While the former is looking solely for its economic interest, the latter may have to deal with more considerations other than mere financial interests i.e. the environmental, social, health and public safety purposes.

This difference in interests leads to different expectations from each party. Thus, while the investor is expecting the state to accord its investment with regulations that do not affect the investment, the host states expect that its regulations and measures, including its domestic and international obligations, to serve wider scope of purposes. This was reflected for instance, by the United States step to amend its model BIT in 2004 to “constrain the expansive interpretations of NAFTA tribunals, including the addition of noneconomic objectives such as "health, safety, environment, and the promotion of internationally recognized labor rights" to the preamble.”

Same was made by other states including Norway, as it added a new part to its Model BIT in the preamble to ensure that the objective of encouraging investments must be “consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights.”

Almost the same sort of amendment was made by the Canadian government in the Canadian Model BIT. In Australia, the Government announced in 2011 that they “does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses. Nor will the Government support provisions that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses. The

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Government has not and will not accept provisions that limit its capacity to put health warnings or plain packaging requirements on tobacco products or its ability to continue the Pharmaceutical Benefits Scheme.”

This shows an important observation, that these taken steps towards changing and developing the international investment law is guided by developed countries. Which are noticeably benefiting from the current investment and arbitration regime either because of its wide investors protection scope, or by being not harmed with it due to the limited engagement in investment disputes. This demonstrates that the current regime has not fulfilled the expectations of the international community, and affected the states sovereign rights to regulate and change the regulations and legislations according to the changes in the surrounding circumstances, even if it may affect investor’s rights, as long as the new regulations serve another public purpose.

On the contrary, when tribunals take into account the expectations of the investors without viewing the development in the international law field, towards limiting the expansive scope of protection accorded to investors, and the states tendency to balance the conflicted interests, this might result in enlarging the gap between the states aims and expectations from attracting investments and the investors’ expectations.

**H. Legitimate Expectation and the host state conduct**

Assuming that the host state is bound by an obligation to protect the investor’s legitimate expectations, what are the precautions that the host state should follow in order to avoid the frustration of the foreign investor? Arbitral tribunals had

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87 See United Nations Conference on Trade and Development, 'Fair and Equitable Treatment', Anonymous Translator (New York & Geneva, United Nations, 2012) p. xiii.; Also, according to the Investment Policy Hub, UNCTAD, as in May 2017, United States had been the respondent state in 16 cases, none of them were ruled against the state, while its citizens were the investor claimant in 148 cases, many of them were ruled in favor of the investor. Norway was never a respondent state, while its citizens had been the claimants in 5 cases. Canada was respondent state in 26 cases while its citizens were engaged in cases as claimants in 44 cases, the vast majority of these cases were between its citizens and United States or vice versa. Australia was a respondent state in only one case that was ruled in favor of the state, while its citizens were only claimants in 3 cases.
usually refrained from answering this question. In *Micula* case\(^{88}\), the tribunal when examined the alleged breach of legitimate expectations specified that it is not for the tribunal to say what should have done by the state in order to avoid liability.\(^{89}\) Therefore, the question remained unanswered.

However, protecting the investor’s legitimate expectations requires, for a state to evade liability, that the host state treat every investor based on its expectations. Indeed, this would create sort of discrimination between investors treated in the same host state, knowing that every investor could have different level of expectations. A result that is highly rejected in international law, since most of the treaties include provisions on the prohibition of discrimination, whether explicitly, or as being part of the FET standard.

Moreover, such discriminations would give rise to other investors in that state to seek compensation, based on the violation of the MFN or the FET clauses. As a result, the outcome would be that all investors in this state would be qualified for the treatment accorded to the investor who has the highest legitimate expectations, even if the former investor does not have the same level of protected expectations.

Therefore, by applying this concept in international arbitration, which as previously discussed neither part of the international law principles nor the treaties text, may lead to infringement of other protection standards in the treaty. This shows that tribunal’s tendency of protecting legitimate expectations of investors is incompatible with treaties harmony.


\(^{89}\) Ibid, para. 826-827, the tribunal in its analysis found that “It is not for this Tribunal to say what would have been the right decision (i.e., possibly shortening the period or diminishing in other ways the obligations imposed upon the investors), but it was not reasonable for Romania to maintain as a whole the investors’ obligations while at the same time eliminating virtually all of their benefits {...} As a result, Romania’s actions, although for the most part appropriately and narrowly tailored in pursuit of a rational policy, were unfair or inequitable vis-à-vis the Claimants.”
Section VI: Conclusion

It is concluded that the notion of protecting the investors legitimate expectations as part of the fair and equitable treatment standard, does not have enough foundation in international investment law. Arbitral tribunals have considered it the main element under the FET, without enough investigation to the legal roots of the concept. The mere reference to previous arbitral awards does not create a legal basis for the concept, unless such concept is initially enjoying solid basis.

The overwhelming majority of treaties do not include any explicit reference to the protection of investor’s legitimate expectations in their texts. Moreover, the interpretation methods relied on by arbitral tribunals to conclude the applicability of such concept through interpreting the FET standard phrases were inappropriate, as they were unduly expansive and continuously disregarded the intention and objectives of the states when concluded the treaty in question.

Additionally, the legitimate expectations notion cannot be applied in investment arbitration as a general principle of law. The scope of protection it secures in domestic jurisdictions is narrower than how it is recognized as a concept in the current international arbitration approach, besides the fact that in domestic jurisdictions it is not recognized in most of the civil law legal systems, cannot promote it to the level of a general principle of law.

Furthermore, from a practical perspective, the doctrine has multiple obstacles. Drawing the line which defines what constitutes a legitimate expectation, and the contradiction between preserving the investor’s right to seek compensation for frustrating its expectations while the investor needs to bear certain amount of risk for its investment to be qualified as a protected investment remain unsolved issue for the tribunals that applied the doctrine.

From the author’s view, for an expectation to be protected and considered “legitimate”, it should be based on either an explicit guarantee from the host state in the investment contract or through any other agreement forms, or based on a stabilization clause. No informal assurance or representation can give the right for the investor to seek compensation based on the infringement of this violation, same applies for the expectations which are founded on the change of the legal framework adopted in the host state.
Reasonable investors are supposed to be wise and discreet enough to follow all the precautions before initiating their investments in a foreign state, therefore, any assurances or representations that are forming the investors’ expectations shall be confirmed by explicit agreement in order to enjoy legal protection. Hence, any breach for these “expectations” from the host state, can make it liable for this breach. In this latter case, the source of liability will not be the protection of the investor’s legitimate expectations, but rather the contract or the agreement itself. This view was seldom applied in investment arbitration. No arbitral tribunal can invent new source of liability on states, other than what was agreed in the treaty or what is included in international law rules, as described by Campbell “The body of arbitral jurisprudence can perhaps offer constructive guidance as to reasoning but it cannot create law.”

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90 One of the few implementations for this view was taken by the tribunal in EnCana Corporation v. Republic of Ecuador, LCIA Case No. UN3481, UNCITRAL, Award 3 February 2006 ¶ 173, as the tribunal found that "In the absence of a specific commitment from the host State, the foreign investor has neither the right nor any legitimate expectation that the tax regime will not change, perhaps to its disadvantage, during the period of the investment".