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Fair and Equitable Treatment and Legitimate Expectations in Investment Disputes

Master's Thesis

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Podpis

Poděkování

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Introduction

When asked whether in his opinion two sovereign States will negotiate, sign and ratify a bilateral investment treaty ("**BIT**") without caring to consider what was put in it, an acclaimed international law expert Professor Christoph Schreuer gave the following statement:

> "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'."[1]

It has been described as practice that BITs "are very often pulled out of a drawer, often on the basis of some sort of a model, and are put forward on the occasion of [S]tate visits when the heads of [S]tates need something to sign"[2] or "provide photo opportunities with visiting dignitaries."[3]

As a matter of fact, BITs can have profound and far reaching consequences. The scope of international investment treaties covers essentially all economic activities of foreign investors, thus affecting nearly every aspect of the host State's legal system and subjecting it to international review.[4] Consequently, BITs not unfrequently give rise to arduous, lengthy and costly[5] arbitration proceedings which may significantly burden

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[1] *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 December 2008, para. 85.
[2] *Ibid*.
[3] SORNARAJAH, M. (2010). *The International Law on Foreign Investment* (3rd edition). Cambridge University Press, pg. 173 [SORNARAJAH]; SHARPE, J. K. *Representing a Respondent State in Investment Arbitration*. *In* (eds.) GIORGETTI, Ch. (2014) *Litigating international investment disputes: a practitioner's guide* [online]. Martinus Nijhoff | Koninklijke Brill, Leiden, Netherlands, pg. 41 [accessed on 9 March 2015]. Accessible on <https://books.google.com/books?id=jWAMBAAAQBAJ&pg=PA41&lpg=PA41&dq=pakistan+investment+claims+foreign+reserves&source=bl&ots=tC1e_D2DEI&sig=7mrtrniCzDrB1JmOFee0mGNkRnQ&hl=cs&sa=X&ei=ccn9VMjgEsO0ggS1gYPwAw&ved=0CC0Q6AEwAg#v=onepage&q&f=false>.
[4] DOLZER, R. (2005). *The Impact of International Investment Treaties on Domestic Administrative Law* [online]. N.Y.U. Journal of International Law & Politics, Vol. 37, pg. 956 [accessed on 19 March 2015]. Accessible on <http://iilj.org/gal/documents/THEIMPACTOFINTERNATIONALINVESTMENT.pdf>.
[5] The average costs of arbitration based on a recent study by Matthew Hodgson of Allen & Overy Prague were quite similar, at USD 4,437,000 for claimants and USD 4,559,000 for respondents. *Counting the costs of investment treaty arbitration* [online]. Global Arbitration Review, 24 March 2014 [accessed on 2 March 2015]. Accessible on <http://www.allenovery.com/SiteCollectionDocuments/Counting_the_costs_of_investment_treaty.pdf>.

the host States. As one commentator stated, a typical claim might involve an investor demanding over USD 300 million from a host State;[6] however, damages awarded to the investor may even exceed the national foreign exchange reserve.[7] Such 'real consequences in the real world' led to disagreements as to the legitimacy of investment arbitration itself. As a consequence, several countries have decided to denounce the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**"[8]), facilitating access to one of the most frequently used forums for resolution of investment disputes.[9] In a similar fashion, the Bolivian president Evo Morales expressed his bitterness towards the ICSID stating that "the developing countries in Latin America never win the cases. The transnationals always win."[10]

The concept of legitimate expectations may be found in many domestic law systems. In investment arbitration case law, legitimate expectations have been employed as early as in the *Aminoil*[11] case in 1982; however, it is only in the past roughly 15 years[12] that they have come to the spotlight primarily as a part of the fair and equitable treatment standard (the "**FET standard**") and are now firmly rooted in arbitral practice.[13] Generally speaking, the concept of legitimate expectations, under certain conditions, allows a foreign investor to claim compensation in situations where the conduct of a host State creates a legitimate and reasonable expectation that the investor may rely on such conduct, and consequently the host State fails to fulfill those expectations, causing damages to the investor.[14]

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[6] FRANCK, S. D. (2009). *Development and Outcomes of Investment Treaty Arbitration* [online]. Harvard International Law Review, Vol. 50, pg. 435 [accessed on 22 March 2015]. Accessible on <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1406714> [FRANCK].

[7] SORNARAJAH, pg. 179.

[8] *Convention on the Settlement of Investment Disputes between States and Nationals of the Other Party* [online, accessed on 10 March 2015]. Accessible on <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA.htm>.

[9] Those countries include the Plurinational State of Bolivia in 2007, Ecuador in 2009 and the Bolivarian Republic of Venezuela in 2012.

[10] FRANCK, pg. 436.

[11] *The American Independent Oil Company (Aminoil) v. The Government of the State of Kuwait*, Ad hoc arbitral tribunal, Award, 24 March 1982.

[12] DOLZER, R., SCHREUER, C. H. (2008). *Principles of International Investment Law*. Oxford University Press, pg. 119 [DOLZER, SCHREUER 2008].

[13] MEJIA, S. (2014). *The protection of legitimate expectations and regulatory change: the Spanish case* [online]. Spain Arbitration Review | Revista del Club Español del Arbitraje (© Club Español del Arbitraje); Wolters Kluwer España, Vol. 2014, Issue 21, pgs. 113-132 [accessed on 6 March 2015]. Accessible on <www.kluwerarbitration.com>.

[14] *International Thunderbird Gaming Corporation v. The United Mexican States*, NAFTA/UNCITRAL, Award, 26 January 2006, para. 147 [*Thunderbird Gaming*, Award].

The scope of interpretation of the concept of legitimate expectations plays a considerable role. The broader the interpretation, the higher the chance it may give rise to successful claims by investors and *vice versa*. There has been an ongoing debate whether tribunals have been leaning toward a more extensive interpretation of the concept of legitimate expectations and thus affording investors protection under the BITs even in cases which are not worthy of such protection.

Accordingly, two main propositions are laid out at the outset which this thesis will attempt to confirm or refute. The first proposition suggests that the principle of protection of legitimate expectations is an established principle of investment law with traceable origins in both domestic and general international law. The first part of this thesis thus presents a theoretical examination of the concept of legitimate expectations, its roots and evolution, justifying its application in investment law. Do legitimate expectations hold a rightful position in investment law or has there been a misapplication of the concept?

Secondly, this thesis addresses the increasing warning voices drawing attention to the fact that invocation of legitimate expectations in investment disputes has become the keystone of investors' claims in investment disputes in general with tribunals adopting increasingly extensive interpretation of the concept. Does the concept of legitimate expectations due to its vagueness provide unjustifiably broad protection to investors? The second proposition will be addressed in the second part of this thesis providing an analysis of the utilization of the principle in investment disputes based on relevant investment case law. The presented case law is analyzed within two substantive provisions of investment treaties, in relation to which the frustration of legitimate expectations is most frequently claimed – expropriation and, foremost, the FET standard.

Legitimate expectations are the prime focus of this thesis; the FET standard is rather approached as the most frequent provision under which legitimate expectations are employed. The spotlight is dedicated to legitimate expectations intentionally, because based on my research much more has been written about the FET standard than about the concept of legitimate expectations and the latter has been in my opinion somewhat left behind.

The chosen topic is highly relevant with regard to practice of arbitral tribunals in investment disputes as legitimate expectations have been denominated as the "dominant element"[15], "one of the major components"[16], "the essential element"[17] or the "most important function"[18] of the FET standard,[19] the most frequently invoked standard of treatment in investment disputes.[20] Yet despite its omnipresent appearance in investment claims, the concept of protection of legitimate expectations remains nebulous as to its content, and so does the FET standard. It is this uncertainty and potential that drives both academia and jurisprudence into further exploration and utilization of the two concepts.

Accordingly, this thesis is divided into four major chapters. The first chapter provides an introduction into the specific field of investment law, its brief historical evolution and generally introduces the concept of legitimate expectations and sets out its place in investment law. It outlines the problematic issues connected with the concept of legitimate expectations that will be further touched upon. The second chapter covers the theoretical roots of the concept of legitimate expectations. It is divided into two sub-chapters based on the two most prevalent views related to the origins of the concept – that is firstly understanding of legitimate expectations as a general principle of law and secondly as part of the good faith principle. General principles of law are adopted into investment law by tribunals based on their employment by prevailing number of domestic law systems, the first sub-chapter therefore aims to provide a survey of legal systems of a number of countries that recognize the principle of protection of legitimate expectations. The second sub-chapter discusses the connection to the good faith principle.

The third and the fourth chapter focus on practical application of the concept of legitimate expectations in investment claims. The third chapter discusses expropriation and its connection with legitimate expectations, providing a brief introduction into the

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[15] *Saluka Investments B.V. (The Netherlands) v. Czech Republic,* UNCITRAL, Partial Award. 17 March 2006, para. 302 [*Saluka*].
[16] *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, para. 216 [*EDF*].
[17] *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Final Award, 12 June 2012, para. 240 [*Ulysseas*].
[18] *Electrabel S.A. v. Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para 7.75 [*Electrabel*].
[19] POTÈSTA, M. (2013). *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*. ICSID Review Vol. 28, Issue 1, pg. 103 [POTÈSTA].
[20] DOLZER, SCHREUER 2008, pg. 119.

concept of expropriation and analysis of relevant case law. Finally, the last chapter addresses the concept of the FET standard. The FET standard as one of the most frequently invoked provisions in investment disputes in general is analyzed in greater detail in the first sub-chapter, addressing the origins of the term, issues regarding the lack of clarity as to its content and two major opinions regarding its relationship to customary international law. The second sub-chapter outlines the relationship between legitimate expectations and the FET standard. Lastly, the third sub-chapter provides an analysis of three typified sets of circumstances found to arouse legitimate expectations. Each of the categories is firstly described in general and subsequently supplemented with relevant case law. The substantive part of the thesis is completed with a conclusion which provides an overview of the reached outcomes and offers opinions as to future development and application of the FET standard and the concept of legitimate expectations.

This thesis uses as a primary type of utilized sources investment case law, formulated both by institutional and *ad hoc* tribunals. The case law covers both the "evergreen" pivotal cases, which cannot be missing in any analysis, but also maps more recent awards which is one of the contributions of this thesis. Secondary sources employed in research for this thesis include academic literature embracing all the set out topics, including treatises, commentaries, law journal articles, etc. With regard to both propositions, the aim of this thesis is to either confirm or refute the given statements are formulate a general conclusion which is best achieved through evaluation of the current status and preceding historical evolution. Accordingly, I will employ the analytic and synthetic method as the most suitable approaches. The second part of this thesis partially employs diachronic comparison addressing the evolution of interpretation of the concept of legitimate expectations by arbitral tribunals.

This thesis does not aim to provide an all-embracing study of this broad issue; such a voluminous work would certainly exceed the prescribed range of this thesis and provide enough material for a multi-volume publication. Rather, this thesis focuses on selected case law identified by the academia as fundamental and pivotal for the concept of legitimate expectations. Therefore, in an effort to evade superficial analysis, I have employed the old "less is more" rule and reserve further more in-depth research for future possible academic works.

In a brief remark, it should be made clear from the outset what kind of legitimate expectations constitute the focus of this thesis. The term legitimate expectations is also sometimes used in connection with the international community and its legal certainty with regard to consistency of case law. If for example several tribunals consecutively endorse a certain interpretation, subsequent tribunals may feel the (possibly justified) need to follow the same approach in order to create coherent and consistent jurisprudence, even if arbitral precedent is not legally binding. Such expectations are not the focus of this paper; rather, it is the investors' expectations that are formed in connection with making an investment, their protection and extent.

Finally, it is apposite to make the reader acquainted with the motives that have led me to choose legitimate expectations as the topic of my thesis. In the second half of the year 2014, I have had the opportunity to participate in the Foreign Direct Investment Moot Court as a member of the team representing my alma mater, the Charles University in Prague. The 2014 case revolved around sovereign default of a fictional country; however, traces of inspiration clearly led to the events in Argentina. As fate would have it, I was assigned research on the issue of fair and equitable treatment within our team. The legitimate expectations, although not necessarily the primary focus of our argument, always somehow found a way and surfaced. Simply put, the more I researched it, the more intrigued and fascinated I became.

1. Legitimate expectations and their place in investment law

After the Second World War, many States of the world with devastated economies have engaged in active efforts to attract foreign capital, create investor friendly environment and thus bring wealth and economic opportunities for its inhabitants. Foreign investment gained momentum as an increasingly significant international economic activity and nations sought a definite legal framework that would govern such activities. These efforts materialized into 3268 investment treaties that have been entered into between States as of the end of the year 2014.[21] The aim of these treaties is to promote and protect investment – to get foreign investors to bring capital to an alien, unknown and inherently risky environment and consequently to provide protection to investors from such risks via guarantees included in investment treaties.[22] Accordingly, host States make commitments to other States with respect to treatment that they will accord to foreign investors and investments and agree on a mechanism for enforcement of those commitments.[23]

This prodigious process of "treatification"[24] over the past roughly 70 years gave rise to three basic types of investment treaties:

1. Bilateral Investment Treaties – with 2923 concluded by 2014,[25] the BITs constitute the most widely used type of investment treaties. As one commentator put it, the BITs are "an agreed set of rules that serve to attract foreign investment by reducing the space for unprincipled and arbitrary actions of the host [S]tate and thus contribute to good governance, which is

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[21] *Recent Trends in International Investment Agreements and Investor-State Dispute Settlement,* UNCTAD [online], February 2015, pg. 2 [accessed on 6 March 2015]. Accessible on <http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf> [UNCTAD Recent Trends 2015].

[22] Whether BITs actually promote foreign investment or not has been questioned and subjected to academic scrutiny. See for example SALACUSE, J. W., SULLIVAN, N. P. (2005). *Do BITs really work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain* [online]. 46 Harvard International Law Journal 67, pg. 78 [accessed on 9 March 2015]. Accessible on <www.lexisnexis.com> [SALACUSE, SULLIVAN 2005].

[23] SALACUSE, J. W. (2010). *The Emerging Global Regime for Investment* [online]. Harvard International Law Journal Vol. 51, No. 2, pg. 428 [accessed on 6 March 2015]. Accessible on: < http://www.harvardilj.org/wp-content/uploads/2010/09/HILJ_51-2_Salacuse.pdf> [SALACUSE 2010].

[24] Term used in SALACUSE, J. W. (2007). *The Treatification of International Investment Law* [online]. 13 Law and Business Review of the Americas 55 [accessed on 6 March 2015]. Accessible on <www.lexisnexis.com>.

[25] UNCTAD Recent Trends 2015, pg. 2.

a necessary condition for the achievement of economic progress in the host state."[26]

2. Other bilateral economic agreements with chapters on investment – far less abundant (counting only about 254), such agreements include for example free trade agreements pursued by the United States or economic partnership and cooperation agreements advanced by Japan.[27]
3. Multilateral investment treaties – the multiplicity of parties inherently imposes a more complex negotiation process upon conclusion of multilateral investment treaties.[28] Indeed, in 1995, the Organization for Economic Cooperation and Development attempted to negotiate a comprehensive Multilateral Agreement on Investment, nevertheless unsuccessfully.[29] As a result, once concluded, multilateral investment treaties represent important instruments of international law, the most famous ones including the Energy Charter Treaty[30] (ECT) or North American Free Trade Agreement[31] (NAFTA).

With BITs being the most numerous instrument of investment law and also most relevant for the topic of this thesis, the focus of this thesis is set primarily on them. Besides, using the expression coined by Reisman and Sloan, today we live in the BIT generation.[32]

Even if BITs constitute separate and distinct legal instruments binding only on the parties that have concluded it, similar, if not sometimes even identical structure and language may be found in a great portion of them.[33] Salacuse identifies nine topics that

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[26] DOLZER, R. (2005). *The Impact of International Investment Treaties on Domestic Administrative Law* [online]. N.Y.U. Journal of International Law & Politics, Vol. 37, pg. 953 [accessed on 19 March 2015]. Accessible on <http://iilj.org/gal/documents/THEIMPACTOFINTERNATIONALINVESTMENT.pdf>.
[27] SALACUSE 2010, pg. 428.
[28] SALACUSE, SULLIVAN, pg. 77.
[29] *Ibid.*
[30] *The Energy Charter Treaty* [online, accessed on 11 March 2015]. Accessible on <http://www.encharter.org/fileadmin/user_upload/document/Treaty_texts/Consolidated_Treaty_and_related_documents.pdf>.
[31] *North American Free Trade Agreement* [online, accessed on 11 March 2015]. Accessible on <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement>.
[32] REISMAN, M. W., SLOANE, R. D. (2004). *Indirect Takings and its Valuations in the BIT Generation* [online]. Faculty Scholarship Series, Paper 1002 [accessed on 10 March 2015]. Accessible on < http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2043&context=fss_papers>.
[33] However, although the outer shell may appear similar, a deeper examination would indicate that the contents of the treaties vary so greatly that each must be considered a carefully balanced accommodation reached after negotiation between the parties. SORNARAJAH, pg. 176.

are covered in almost all international investment agreements,[34] one of which are the general standards for the treatment of foreign investors and investments.

The standard of fair and equitable treatment as a standard for the treatment of foreign investors and investments is to be found in the majority of BITs and other investment treaties[35] and is certainly the broadest substantive standard.[36] The United Nations Commission on Trade and Development ("**UNCTAD**") published a survey in 1999, in which it found with respect to the FET standard used in BITs that "there is little authority on its application."[37] However, there has ever since been a significant growth in its utilization and the FET standard has advanced from a rather neglected and only subordinately used standard to the most frequently invoked standard in investment disputes today.[38]

Finally, the concept of legitimate expectations has found its most frequent application within the interpretation and application of the FET standard.[39] The rationale in providing protection to investors' legitimate expectations is to invigorate foreign investment based on certain legal mechanisms, representations and commitments made by the other contracting party. Wälde supports this position and states that "the principle of protection of legitimate expectations has evolved from an earlier function as a subsidiary interpretative principle to reinforce a particular interpretative approach chosen, to its current role as a self-standing subcategory and independent basis for a

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[34] Those topics are: (1) definitions and scope of application; (2) investment promotion and conditions for the entry of foreign investments and investors; (3) general standards for the treatment of foreign investors and investments; (4) monetary transfers; (5) expropriation and dispossession; (6) operational and other conditions; (7) losses from armed conflict or internal disorder; (8) treaty exceptions, modifications, and terminations; and (9) dispute settlement. SALACUSE 2010, pg. 432.

[35] DOLZER, SCHREUER 2008, pg. 119; *El Paso Energy International Company v. The Argentine Republic,* ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 227 [*El Paso*]; SCHREUER, C. (2005). *Fair and Equitable Treatment in Arbitral Practice* [online]. Journal of World Investment & Trade, Vol. 6, pg. 357 [accessed on 19 March 2015]. Accessible on <http://www.univie.ac.at/intlaw/pdf/77.pdf> [SCHREUER, *Fair and Equitable Treatment in Arbitral Practice*].

[36] DOLZER, R (2014). *Fair and Equitable Treatment: Today's Contours* [online]. Santa Clara Journal of International Law, Vol. 7, pg. 10 [accessed on 8 June 2015]. Accessible on <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1147&context=scujil> [DOLZER, *Fair and Equitable Treatment: Today's Contours*].

[37] *Bilateral Investment Treaties in the Mid-1990s,* UNCTAD (1998), pg. 54.

[38] DOLZER, SCHREUER 2008, pg. 119.

[39] VON WALTER, A. (2009). *The Investor's Expectations in International Investment Arbitration.* Transnational Dispute Management, Vol. 6, Issue 1 [accessed on 6 March 2015] Accessible on <www.transnational-dispute-management.com> [VON WALTER]; SCHREUER, C. H., KRIEBAUM, U. *At What Times Must Legitimate Expectations exist? In* (eds.) WERNER, J., ALI, A. H. (2010). *A Liber Amicorum: Thomas Wälde Law Beyond Conventional Thought*. Cameron May, London.

claim under the 'fair and equitable standard'."[40] In fact, it would be unusual for an investor not to claim breach of legitimate expectations in a contemporary investment dispute.[41] However, legitimate expectations have also been brought in the context of an expropriation analysis,[42] determination whether there is an investment within the meaning of the BIT[43] or consideration of a claim under umbrella clause.[44]

Yet, despite the increasing recourse to the concept of legitimate expectations, arbitral tribunals have been criticized for shying away from providing "a systematic and rigorous framework for the consideration of such expectations in investment treaty arbitration."[45] This is especially important since BITs and investment treaties in general provide broad standards rather than specific rules and must be interpreted before they can be applied. Arbitral tribunals therefore play a major role when interpreting the BITs, thus developing investment treaty law.[46]

Consequently, the concept of legitimate expectations is sometimes perceived as a nebulous term with blurry boundaries providing an incentive for investors to invoke protection before international investment tribunals relying on unlimited expectations due to the unclear contours of the principle. This negative perception is further supported by the fact that reasoning of arbitral tribunals in many cases "resembles a house of cards built largely by reference to other tribunal awards and academic opinions",[47] thus creating sort of a cascade effect.

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[40] *International Thunderbird Gaming Corporation v. The United Mexican States*, NAFTA/UNCITRAL, Separate Opinion of Thomas Wälde, 26 January 2006, para. 37 [*Thunderbird Gaming,* Separate Opinion].

[41] VON WALTER, pg. 14.

[42] REINISCH, A. *Expropriation. In* (eds.) MUCHLINSKI, P., ORTINO, F., SCHREUER, C. H. (2008). *The Oxford Handbook of International Investment Law.* Oxford University Press, New York, pg. 448. The relationship between the fair and equitable treatment, expropriation and legitimate expectations will be discussed more in detail below.

[43] *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Final Award, 9 September 2003, para. 326 ('Although [the investor] may have been encouraged by various remarks from Ministers or Government officials or by the general interest they demonstrated in his plans, this was not sufficient, in the Arbitral Tribunal's view, to raise his prospects based on the Cooperation Agreement to the level of a "legitimate expectation" with a financial value.')

[44] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile,* ICSID Case No. ARB/01/7, Award, 25 May 2004, para. 189 [*MTD* Award].

[45] POTÈSTA, pg. 88.

[46] ROBERTS, A. (2010). *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States* [online]. American Journal of International Law, Vol. 104, pg. 179 [accessed on 10 March 2015]. Accessible on < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1514410> [ROBERTS]

[47] ROBERTS, pg. 179.

Furthermore, the stressing of the notion of protection of legitimate expectations in investment case law[48] suggests a move away from protection of 'legal' rights towards 'legitimate' expectations and thus implies increased subjectivity in decision making.[49] Decision on what is legitimate may partly be influenced by arbitrators' different cultural background and subjective belief, thus increasing the margin of appreciation of arbitral tribunals[50] and lowering legal certainty.

[48] SORNARAJAH, pg. 354.
[49] VON WALTER, pg. 34.
[50] *Ibid*.

2. Roots of the concept of legitimate expectations

In order to justify the application and bring credibility to the role of legitimate expectations within international investment law, one must inquire into the origins and legal basis that lie beneath the concept. However, arbitral awards tend to lack a buttress for its use (an exception that proves the rule would be for example the dissenting opinion of Thomas Wälde to the *Thunderbird Gaming* award).[51] Resort to precedent that the tribunals frequently employ cannot serve as a substitute for analysis.

This position may appear surprising to the reader considering the fact that the notion of legitimate expectations in majority of cases does not have an explicit anchoring in the text of applicable investment treaties.[52] The question therefore presents itself – where do legitimate expectations emanate from? Several alternatives have been suggested by commentators and are presented below. As Potèsta put it, it is a "search of a justification beyond arbitral precedent."[53]

2.1 Protection of legitimate expectations as a general principle of law

One explanation of application of the concept of protection of legitimate expectations in investment law stems out of the fact that the same principle is employed in many domestic legal systems, usually as a part of administrative law.[54] The principle is present in a number of both common and civil law countries, all of which embody certain commonalities. Consequently, it follows that the principle of legitimate expectations might be a suitable candidate to be categorized as a general principle of law.

International law is exposed to the influence of such general legal principles that are developed in national legal orders. They are consequently imported into international law by the tribunals who "extract principles applicable to investment

[51] Or rather an exception that affirms the rule, since it is 'merely' a dissenting opinion.

[52] An exception may be found for example in the draft of the Free Trade Agreement between the European Union and the Republic of Singapore, which in its Chapter 9.4 specifies a breach of the fair and equitable treatment standard as "a breach of the legitimate expectations of an investor arising from specific or unambiguous representations from a Party so as to induce the investment and which are reasonably relied upon by the investor."; or the U.S. Model BIT of 2012, which in its Annex B(4)(a)(ii) requires for a finding of indirect expropriation consideration of 'the extent to which the government action interferes with distinct, reasonable investment-backed expectations'.

[53] POTÈSTA, pg. 90.

[54] *Ibid.*

contracts"[55] and have a significant influence on its formation.[56] The trend of adoption of domestic administrative legal principles into international law has been described as global administrative law, attempting to improve accountability in transnational and international context.[57] General principles of law play an important role in the relationship between States and foreign investors, since these principles have emerged in domestic systems in a similarly asymmetric relationship, i.e. where at least one party is a natural or legal person.[58] According to Potèsta, the rationale and purpose behind identifying legitimate expectations as a general principle of law is twofold.[59]

Firstly, general principles constitute part of the applicable law. A generally accepted definition of sources of public international law is provided in Article 38 of the Statute of the International Court of Justice[60] (the "**ICJ Statute**") which lists as one of the sources "the general principles of law recognized by civilized nations."[61] It is understood from the record of the meetings of the Advisory Committee of Jurists which met in 1920 to draft the Statute of the Permanent Court of International Justice that the concept of general principles of law in Article 38 of the ICJ Statute refers to the existence of general principles which are applicable in domestic legal orders, such as duty to act in good faith or the rule that both sides have to be heard in a judicial proceeding.[62] Therefore, an investor seeking protection of its legitimate expectations may effectively avail itself of the practice of domestic courts and use it as an applicable source of law in investment arbitration. This is for example the case for arbitrations under the ICSID Convention,[63] NAFTA[64] or ECT[65], the language of which "is to be

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[55] SORNARAJAH, pg. 86.
[56] GAZZINI, T. (2009). *General Principles of Law in the Field of Foreign Investment* [online]. Journal of World Investment and Trade, Vol. 10, No. 1, pgs. 104-105 [accessed on 11 March 2015]. Accessible on < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1763365> [GAZZINI].
[57] MEYERS, Z. (2014). *Adapting Legitimate Expectations to International Investment Law: A Defence of Arbitral Tribunals' Approach* [online]. Transnational Dispute Management, Vol. 11, Issue 3, pg. 1 [accessed on 19 March 2015] Accessible on <www.transnational-dispute-management.com> [MEYERS].
[58] GAZZINI, pg. 109.
[59] POTÈSTA, pg. 92
[60] *Statute of the International Court of Justice* [online, accessed on 11 March 2015]. Accessible on < http://www.icj-cij.org/documents/?p1=4&p2=2#CHAPTER_II> [ICJ Statute].
[61] *Ibid.*
[62] BROWN, C. (2009). *The Protection of Legitimate Expectations As A 'General Principle of Law': Some Preliminary Thoughts* [online]. Transnational Dispute Management, Vol. 6, Issue 1, pg. 6 [accessed on 11 March 2015] Accessible on <www.transnational-dispute-management.com> [BROWN].
[63] The ICSID Convention in its Article 42 refers to 'such rules of international law as may be applicable'.
[64] NAFTA in its Article 1131 refers to 'applicable rules of international law'.
[65] ECT in its Article 26(6) refers to 'applicable rules and principles of international law'.

read as including all sources referred to in Article 38 of the ICJ Statute."[66] Similarly, in arbitrations under BITs containing a clause on applicable law, such clause would often refer to international law (in various wording). Such reference is understood to include general principles of law in the sense of Article 38 of the ICJ Statute.

Secondly, general principles of law may provide guidance for the interpretation or application of investment protection standard, especially the vaguely worded FET standard.[67] Support may be found in academic work[68], certain awards[69] and investment treaties themselves[70].

Accordingly, it is necessary to firstly determine whether the principle of protection of legitimate expectations as utilized in domestic courts can be described as a general principle of law. The content of a general principle of law is determined by comparison of domestic legal practices and extracting standards common to all (or most) systems. Therefore, in order to determine the existence of this general principle, it is constructive to clearly identify what the rule is supposed to be by examining several particular legal systems. Indeed, the ad hoc annulment committee in the *Klöckner v. Cameroon* decision on annulment criticized the arbitral tribunal for introducing and applying a purported general principle of French law (duty to full disclosure to a partner in a contract), yet failing to provide any examination of other States' practice.[71] However, no consistent answer has been provided as to the methodological question of how many systems are to be examined and how similar must the standards be.

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[66] GAZZINI, pg. 112.

[67] POTÈSTA, pg. 93.

[68] ORREGO-VICUÑA, F. (2005). *Foreign Investment Law: How Customary is Custom?* American Society of International Law Proceedings, Vol. 99, pgs. 99-100 ('[…] in the light of a number of recent decisions, "fair and equitable treatment" is not really different from the legitimate expectations doctrine as developed, for example, by the English courts and also recently by the World Bank Administrative Tribunal. International law is not unaware of major domestic legal developments, particularly when the rights of citizens are entangled in promises made by their governments and the citizens have in good faith relied upon them. Whether this standard may be developed beyond foreign investments or international administrative law is just a question of time. The common standard thus continues to evolve.')

[69] *Total S.A. v. Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 111 [*Total*] ('a comparative analysis of what is considered generally fair or unfair conduct by domestic public authorities in respect of private firms and investors in domestic law may also be relevant to identify the legal standards under BITs'); *Toto Construzioni Generali S.p.A. v. Lebanon*, ICSID Case No. ARB/07/1 2, Award, 7 June 2012, para. 166 ('[t]he fair and equitable treatment standard of international law does not depend on the perception of the frustrated investor, but should use public international law and comparative domestic public law as a benchmark') [*Toto*].

[70] The U.S. Model BIT of 2012, Art. 5(2)(a) defines fair and equitable treatment as including 'the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world'.

[71] *Klöckner Industrie-Anlagen GmbH v. Republic of Cameroon,* ICSID Case No. ARB/81/2, Decision on Annulment, 3 May 1985, paras. 75-79.

2.1.1 Domestic legal systems

In general, the scrutinized principle may be defined as "the legal protection of an individual from harm caused by a public authority resiling from a previous publicly stated position, whether that be in the form of a formal decision or in the form of a representation."[72] Under domestic law, protection of legitimate expectations is usually subsumed either under the reliance theory, where an individual suffers harm as a consequence of disappointment of an expectation created by the decision-maker where the individual relied on its fulfillment, or under the legal certainty principle, which constitutes a part of the law of rule theory.[73] The rule of law requires "that individuals should be able to rely on decisions and representations of public authorities, and should arguably be entitled to a form of redress if their expectations are disappointed."[74]

As previously stated, the principle of protection of legitimate expectations is prevalent in a number of legal systems, both in the common law and civil law.

In common law countries, the approach is not unified. Ever since from its introduction into English public law in the *Schmidt v. Secretary of State for Home Affairs* decision 1969,[75] legitimate expectations have been traditionally recognized only in relation with procedural rights,[76] in other words allowing a hearing or adequate notice to an individual whose expectations have been defeated by administrative conduct.[77] However, it is now settled that even substantive protection is granted to legitimate expectations in specific circumstances.[78] In *Coughlan*, a woman living under the care of local health area authority was promised that the specific care would continue and was later denied the continuance of the arrangement. In deciding whether her legitimate expectations were breached, the English Court of Appeal articulated the following ruling regarding substantive protection of legitimate expectations:

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[72] BROWN, pg. 2.
[73] POTÈSTA, pg. 95.
[74] BROWN, pg. 4.
[75] *Schmidt v. Secretary of State for Home Affairs*, Court of Appeals of England and Waler, 1969, 2 Ch 149.
[76] ZEYL, T. (2011). *Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law.* Alberta Law Review, Vol. 49, Issue 1, pg. 217 [ZEYL]
[77] POTÈSTA, pg. 97.
[78] FIETTA, S. (2006). *Expropriation and the "Fair and Equitable" Standard: The Developing Role of Investors' "Expectations" in International Investment Arbitration* [online]. Journal of International Arbitration (© Kluwer Law International), Vol. 23, Issue 5, pg. 376 [accessed on 11 March 2015]. Accessible on <www.kluwerarbitration.com> [FIETTA]; BROWN, pg. 5.

> "Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy."[79]

The landmark *Coughlan* decision was adopted as good law by following case law, yet at the same time it has been subject to criticism for fundamental questions about the judicial role on the application for judicial review, which the post-*Coughlan* case law has sought to balance with emphasizing the deference that the judiciary is required to show to legislature.[80]

On the contrary, other common law countries such as Canada and Australia have resisted such development and refrain from protecting substantive expectations, providing protection only to expectations about the exercise of administrative powers that may only give rise to procedural rights.[81] The Supreme Court of Canada has clearly distanced itself from the English position taken in the *Coughlan* decision stating that:

> "In Canada, the courts have taken the view that it is generally the Minister who determines whether the public interest justified frustrating a substantive legitimate expectation."[82]

Similarly, in Australia, the High Court has concluded that protection of substantive legitimate expectations "would undermine the deference courts must show

[79] *R v. North and East Devon Health Authority, ex parte Coughlan,* 2001, QB 213.
[80] ZEYL, pg. 218.
[81] POTÈSTA, pg. 99.
[82] *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2 S.C.R. 281, 2001, para. 63.

the legislature, as well as offend the Australian Constitution,"[83] which in essence prevents the judiciary from protecting substantive legitimate expectations.[84]

In the United States, a slightly different concept is employed. The Fifth Amendment to the United States Constitution offers claimants a cause of action based on the concept of investment-backed expectations.[85] Under this concept, utilized most frequently in the context of property deprivation, general expectations that an investor has when entering into investment based upon all of the circumstances of the investment are provided protection.[86] The concept of investment-backed expectations has infiltrated the reasoning of arbitral tribunals in cases operating both under NAFTA and BITs in determining whether expropriation has occurred.[87]

Even civil law jurisdictions do not stand unified. On one hand, under German law, protection of legitimate expectations (*Vertrauensschutz* or protection of trust) has a wide-reaching scope[88] and constitutes a core principle of the German Constitution.[89] German law fully recognizes protection of substantive legitimate expectations[90] and even allows protection of legitimate expectations to override legislative measures.[91] Another example, together with Germany, where legitimate expectations find "its clearest expression", is the Dutch law.[92]

On the other hand however, other European countries adopt a more reserved approach. Italy for example allows legitimate expectations to be protected merely in situations where the administration concludes private law contracts and France refuses to recognize the principle at all (nevertheless, it has been argued that the same protection is achieved through other legal principles, such as the right to be heard, the protection of vested rights, and by direct application of the principle of legal certainty).[93]

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[83] ZEYL, pg. 220.
[84] *Ibid*, pg. 221
[85] FIETTA, pg. 377.
[86] *Ibid.*
[87] *Ibid.*
[88] POTÈSTA, pg. 95.
[89] *Ibid.*
[90] ZEYL, pg. 222.
[91] BROWN, pg. 5.
[92] *Ibid.*
[93] *Ibid.*

In Latin American countries, recognition of the principle of protection of legitimate expectations "appears to be at its infancy", and it is in particular employed to limit the revocation of formal administrative decisions that granted benefits upon a private party.[94]

2.1.2 EU law and international tribunals

Contrary to the disunity in attitudes of domestic legal systems, the European Union as a supra-national entity recognizes the principle of protection of legitimate expectations as a general principle of the EU law "common to the laws of the member states"[95].[96] The principle has been utilized to review the conduct of member states, even if there is no mention of it in the EC Treaty.[97] In addition, the European Court of Justice (the "**ECJ**") found the principle of protection of legitimate expectations to constitute a key principle of the relation between the State and individuals.[98] It has been suggested that the principle is derived from German law.[99] The motive underlying application of the principle in the EU law is to achieve balance between enhancing trust and certainty in governmental decision making on one hand, and recognition that public interest may, within the confines of proportionality, override individual expectations on the other hand. The core rationale is to safeguard good governance on both an individual and more general level.

The basis for protection has been found in representations, assurances or government conduct of the administrative institutions that may give rise to legitimate expectations, especially in connection with an investment.[100] Once such expectations have been created, a public authority must take its prior actions into account when planning to reverse its course with a detrimental effect on the affected individual.[101] However, such representations must be of a precise and express nature.[102] Accordingly,

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[94] POTÈSTA, pg. 99.
[95] *Mulder v. Minister van Landbouw en Visserij*, C-120/86, 19 May 1992, 1988, ECR 2321, para. 12.
[96] *Vereniging voor Energie, Milieu en Water and Others v Directeur van de Dienst uitvoering en toezicht energie,* Case C-17/03, European Court of Justice, 7 June 2005, para. 73 ("The principle of the protection of legitimate expectations is unquestionably one of the fundamental principles of the Community."); POTÈSTA, pg. 96.
[97] ZEYL, pg. 223.
[98] *Thunderbird Gaming,* Separate Opinion, para. 27.
[99] ZEYL, pg. 223.
[100] *Thunderbird Gaming,* Separate Opinion, para. 27; POTÈSTA, pg. 96.
[101] *Thunderbird Gaming,* Separate Opinion, para. 27.
[102] *Kyowa Hakko v. Commission*, Case T-223/00, ECR II-2553, 9 July 2003, para. 38 ("a person may not plead infringement of the principle [of legitimate expectations] unless he has been given precise

applicants carry a burden of proof to demonstrate sufficient specificity in order to prove an infringement. Generally, the EU courts are rather reserved in finding a breach.[103]

In contrast, it has been held that an individual cannot base its legitimate expectations on stability of the regulatory system at a given time. The ECJ has ruled that "traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained."[104] Similarly, a company cannot claim "a vested right to the maintenance of an advantage which it obtained from the establishment of the common organization of the market and which it enjoyed at a given time."[105]

The principle of legitimate expectations has also been recognized in the case law of the European Court of Human Rights (ECHR). Legitimate expectations in ECHR jurisprudence are covered in the context of protection of proprietary rights under Article 1 of Protocol 1 of the European Convention on Human Rights, which provides that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions."[106] A relevant question is how to define possession, since an individual may only allege a violation of legally acquired rights to its possessions. The ECHR has adopted a broad interpretation of the term, stating that:

> "Possessions can be either 'existing possessions' or assets, including claims, in respect of which the applicant can argue that he or she has at least a 'legitimate expectation' of obtaining effective enjoyment of a property right."[107]

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assurances by the administration") [*Kyowa*]; *Van den Bergh v. Commission*, Case T-65/98, ECR II-4653, 23 October 2003, para. 161 ("…the right to rely on the principle of the protection of legitimate expectations, which is one of the fundamental principles of the European Union, extends to any individual in a situation in which it is clear that the European Union authorities, by giving him precise assurances, have caused him to entertain legitimate expectations. Such assurances, in whatever form they are given, are precise, unconditional and consistent information from authorised and reliable sources. However, a person may not plead breach of the principle unless he has been given precise assurances by the authorities.")

[103] POTÈSTA, pg. 96.

[104] *Kyowa*, para. 39.

[105] POTÈSTA, pg. 96.

[106] *European Convention on Human Rights, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13* [online, accessed on 17 March 2015]. Accessible on <http://www.echr.coe.int/Documents/Convention_ENG.pdf>.

[107] *Von Maltzan and Others v. Germany* (dec.) [GC], nos. 71916/01, 71917/01 and 10260/02, ECHR 2005-V, para. 74 (c).

At the same time, the ECHR added that mere hope of recognition of a property right, nor a conditional claim which lapses as a result of the non-fulfillment of the condition may constitute basis for the formation of legitimate expectations.[108]

The ECHR has further adopted a more investor-favorable approach when it comes to a breach of a contract. In *Stretch v. the United Kingdom*, the applicant and local authority had entered into a lease contract for 22 years with an annual renewal option.[109] After 1 year, the applicant, having already erected administrative buildings on the premises, was denied further term of 21 years of the lease on the ground that the renewal option granted by the local authority was beyond the scope of its powers in the first place, thus void. Subsequently, the ECHR found that "the applicant had to be regarded as having at least a 'legitimate expectation' of exercising the option to renew the lease."[110]

2.1.3 Misapplication of the domestic principle in international investment law?

With respect to the brief survey of a sample of domestic legal systems above, one may ask whether in fact the differences in application within different systems do not outweigh the commonalities between them and thus effectively bar the concept of legitimate expectations from becoming a general principle of law.

Brown argues that "even though there are differences from one legal system to another, the fact that a principle is applied differently should not necessarily prevent its acceptance as a general principle of law within the meaning of Article 38(1)(c) of the ICJ Statute."[111] Complete symmetry between national systems is unlikely and even unrealistic. Rather, from a more functionalistic perspective, Snodgrass argues that what matters is that there is demonstrable congruence between the principles and outcomes served by the rules, not between the rules themselves.[112] This is supported by an

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[108] *Von Maltzan and Others v. Germany,* European Court of Human Rights, Decision, 71916/01, 71917/01 and 10260/02, 2 March 2005, para. 74 (c).

[109] *Stretch v. the United Kingdom*, European Court of Human Rights, Judgement, 44277/98, 35, 24 June 2003.

[110] DAUJOTAS, R., AUDZEVIČIUS, R. (2012). *The Concept of Legitimate Expectation in Investor-State Arbitration and the European Court of Human Rights* [online]. Bulletin of the International Commercial Arbitration, Vol. 6, No. 2, pg. 11 (accessed on 17 March 2015). Accessible on <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2197157>.

[111] BROWN, pg. 6.

[112] SNODGRASS, E. (2006). *Protecting Investors' Legitimate Expectations: Recognizing and Delimiting a General Principle.* ICSID Review: Foreign Investment Law Journal, Vol. 21, pg. 22.

analogical comparison with *res judicata*, which also embodies differences in its use between common law and civil law countries (even within the civil law system itself),[113] yet there is little dispute as to its characterization as a general principle of law.[114] Furthermore, one may observe certain similarities between the analysis of claimants' legitimate expectations by investment tribunals and approach taken by domestic courts which are illustrative of an expanding influence of domestic legal concepts on the field of international investment law.[115]

On the other hand, there has been criticism as to the way the arbitral tribunals have adopted the domestic legal principle into the international investment area. Sornarajah strongly argues against extensive use of the concept, claiming that "it is an error to state that there is a general principle of law that violations of legitimate expectations give rise to substantive remedies," because of the fact that States tend to give assurance as to policies on taxation, agriculture and other areas and administration would become difficult if the State was to pay damages to affected parties with each change of its policy.[116]

An interesting argument has been made with regard to the misapplication of the concept of legitimate expectations. The core of the argument lies in comparison of the principles underlying domestic administrative law and international investment law. Whereas domestic administrative law is more concerned with objectives such as broader policy values connected with good governance, protection of rights or parliamentary sovereignty, international investment law is predominantly focused on protection of investment.[117] Meyers draws an analogy between domestic administrative law and the FET standard, both of which embody the rule of law principle.[118] As the influential definition of the rule of law principle by Hayek states:

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[113] BROWN, pg. 6; *Interim Report: 'Res Judicata' and Arbitration* (2004). International Law Association, Berlin Conference, pgs. 6-18.
[114] *Interim Report: 'Res Judicata' and Arbitration* (2004). International Law Association, Berlin Conference, pg. 18-19
[115] FIETTA, pg. 375.
[116] SORNARAJAH, pg. 355.
[117] MEYERS, pg. 20.
[118] DOLZER, R. (2005). *The Impact of International Investment Treaties on Domestic Administrative Law* [online]. N.Y.U. Journal of International Law & Politics, Vol. 37, pg. 954 [accessed on 19 March 2015]. Accessible on <http://iilj.org/gal/documents/THEIMPACTOFINTERNATIONALINVESTMENT.pdf>; MEYERS, pg. 5.

> "Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand— rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."[119]

Accordingly, legitimate expectations constitute basis for legal certainty which in turn forms a central part of the rule of law principle.[120] As suggested by Schill, the rule of law principle, embodied in legitimate expectations, protects, among other, legal certainty, stability, predictability and transparency.[121] Accordingly, an environment where legitimate expectations are protected naturally encourages foreign investment and investors' confidence in making an investment.[122]

However, the rule of law principle comprises of more elements than only legal certainty; a crucial backbone of the principle is the need for accountability of the State.[123] In domestic administrative law, this is achieved by separation of powers with its inner system of checks and balances which enable public acts to be subject to scrutiny of courts. In international investment law, however, Meyers suggests that the element of legal certainty is favored over other elements without appropriate counterbalance.[124] For instance, in the *Tecmed* award, the first award to expressly recognize legitimate expectations as a part of the FET standard,[125] the tribunal held:

> "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."[126]

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[119] HAYEK, F. A. (2005). *The Road to Serfdom.* The Institute of Economic Affairs, Great Britain, London, pg. 57.
[120] POTÈSTA, pg. 95.
[121] MEYERS, pg. 6.
[122] *Ibid.*
[123] *Ibid*, pg. 7.
[124] Meyers goes as far as to say that "legal predictability often seems to be the only relevant rule of law consideration." *Ibid*, pg. 6.
[125] POTÈSTA, pg. 101.
[126] *Técnicas Medioambientales Tecmed, SA v. United Mexican States*. ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 154 [*Tecmed*].

In other words, in the pursuit of predictability and certainty, any organ of a State is to be bound by the expectations created by any other organ of the state. Such approach is consistent with international law's principles on state attribution requiring that a State is to be treated as a unified entity.[127] Nevertheless, it has the potential to create a system which undermines separation of powers and existing accountability mechanisms.[128] Consequently, since there is an apparent difference in the roles and purpose that the principle of legitimate expectations plays in domestic administrative law and international investment law, one may question the way international investment law has adopted the principle of rule of law. Whether as a multi layered legal principle as applied in domestic administrative law (including a system of checks and balances and a broader focus on state policy), or rather a principle putting emphasis on legal certainty and predictability with limited capacity to appreciate the role of domestic checks and balances, which ultimately stems from its inherent purpose to provide protection to foreign investment rather than focus on good governance for its own sake.[129] Meyers further argues that applying it in the same form would frustrate the promoted objectives of international investment law.[130] Accordingly, Meyers concludes that legitimate expectations have their rightful place in international investment law, however they must be employed carefully with appropriate adaptations.[131]

[127] ILC, Draft Articles on State Responsibility as contained in ILC, Report of the International Law Commission on the Work of its 52nd Session, UN Doc A/55/10 (2000) ('Draft Articles') art 7 ("The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.")

[128] MEYERS, pg. 7.

[129] DOLZER, R. (2005). *The Impact of International Investment Treaties on Domestic Administrative Law* [online]. N.Y.U. Journal of International Law & Politics, Vol. 37, pg. 953 [accessed on 19 March 2015]. Accessible on <http://iilj.org/gal/documents/THEIMPACTOFINTERNATIONALINVESTMENT.pdf>; MEYERS, pg. 19.

[130] *Ibid*, pg. 39.

[131] Meyers suggests three areas where arbitral tribunals may better align the application by balancing interests – remedies, legitimacy of investors' expectations as to performed due diligence, legitimacy of investors' expectations as to the specificity of representations based on which the expectations are formed. *Ibid*, pgs. 20-40.

2.2 Protection of legitimate expectations as a part of the good faith principle

It has been suggested that the principle of protection of legitimate expectations stems out of the good faith principle. Good faith constitutes a general principle of law and is "rooted in natural law conception of customary international law."[132] The principle of good faith has been said to "permeate the whole approach to the protection granted under treaties and contracts,"[133] as well as lie "at the heart of the FET [standard]"[134] and function as a "guiding beacon that will orient the understanding and interpretation of obligations."[135] Furthermore, it is explicitly endorsed in the Article 31 of the Vienna Convention on the Law of Treaties[136] (the "**VCLT**") which supports its normative weight and enhances its position as a significant interpretative tool.

In the famous *Nuclear Tests* case, decided by ICJ, the tribunal explicitly linked the principle of good faith with the binding character of unilateral representations, i.e. the concept of legitimate expectations. It held:

> "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. […] Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected."[137]

This position was enhanced by several tribunals. For instance, the tribunal in the *Thunderbird* award indicated that formulation of the concept of legitimate expectations

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[132] D'AMATO, A. *Good Faith. In* (eds.) BERNHARDT, R. (1992). *Encyclopedia of Public International Law* [online]. Amsterdam: Elsevier Science Publishers, Vol. I, pg. 600 [accessed on 31 March 2015]. Accessible on <http://anthonydamato.law.northwestern.edu/encyclopedia/good-faith.pdf>; *Thunderbird Gaming,* Separate Opinion, para. 25; *Cave v. Mills*, in Edwin Tyrrell Hurlstone and John Paxton Norman,The Exchequer Reports: Reports of Cases Argued and Determined in the Courts of Exchequer & Exchequer Chamber (1862), pg. 927; VON WALTER, pg. 29.

[133] *Sempra Energy International v. Argentina,* ICSID Case No. ARB/02/13, Award, 28 September 2007, para. 299 [*Sempra*].

[134] *Ibid*, para. 298.

[135] *Ibid,* para. 297.

[136] *Vienna Convention on the Law of Treaties,* 23 May 1969.

[137] *Nuclear Tests (New Zealand v. France),* ICJ, Judgement, 20 December 1974, paras. 46, 49.

was informed by the "good faith principle of international customary law."[138] Wälde in his separate opinion agreed and added that the good faith principle is a guiding principle for application of the FET standard.[139] Similarly, the *Tecmed* award has connected the FET standard with the good faith principle and articulated a frequently followed definition of the FET standard which requires the contracting parties "in light of the good faith principle established by international law [...] to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment."[140] The tribunals, however, did not endeavor to establish a more precise relationship between good faith and legitimate expectations.

Rather unsurprisingly, the relationship between legitimate expectations and good faith principle has been criticized for its lack of connection. Thus the *Tecmed* award, despite being so widely cited, has been subject to criticism precisely because of its lack of authority that would provide justification for linking the two principles together. Potèsta claims that the tribunal has provided "no authority which would support the inclusion of protection of 'basic expectations' in the fair and equitable treatment standard."[141]

It must be remembered that the good faith principle, even if it is a general principle of law and "one of the basic principles governing the creation and performance of legal obligations,"[142] cannot itself insert legal obligations where they would otherwise not exist.[143] Therefore, if the protection of legitimate expectations were to be a part of the obligation to act in good faith, frustration of legitimate expectations should not in theory lead to liability of the State as long as it acts in good faith.[144] Yet, several arbitral awards have held States liable for breach of investors' expectations under an FET claim

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[138] *Thunderbird Gaming,* Award, para. 147.
[139] *Thunderbird Gaming,* Separate Opinion, para. 25.
[140] *Tecmed*, para. 154.
[141] POTÈSTA, pg. 93.
[142] *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, ICJ, Judgement, 20 December 1988, para. 94; similarly *Nuclear Tests (New Zealand v. France),* ICJ, Judgement, 20 December 1974, paras. 46, 49 ("The principle of good faith is, as the Court has observed, "one of the basic principles governing the creation and performance of legal obligations").
[143] *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, ICJ, Judgement, 20 December 1988, para. 105.
[144] VON WALTER, pg. 29.

despite the fact that the State acted in good faith.[145] As a solution, von Walter suggests that rather than deriving the duty to protect legitimate expectations from the good faith principle, one should "see the good faith rule as a guiding interpretative principle which helps in the application of the legal rule of fair and equitable treatment, which contains, in itself, the duty to protect the investor's expectations."[146]

Lastly, the principle of good faith manifests itself in the rule of estoppel, a concept closely related to legitimate expectations. Under the doctrine of estoppel, a party is barred from benefiting from its own inconsistency to the detriment of another party that has relied in good faith on the representations of the former party.[147] In an authoritative statement, one commentator presented an explanation for the relationship between good faith and the common law legal institute of estoppel:

> "Representations … may be made expressly or impliedly where, upon a reasonable construction of a party's conduct, the conduct presupposed a certain state of act to exist. Assuming that another party to whom the statement is made acts to its detriment in reliance upon that statement or from that statement the party making the statement secures some advantage, the principle of good faith requires that the party adhere to its statement whether it be true or not. It is possible to construe the estoppel as resting upon a responsibility incurred by the party making the statement for having created an appearance of act, or as a necessary assumption of the risk of another party acting upon the statement."[148]

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[145] *Tecmed*, para. 153; *Occidental Exploration and Production Company v. The Republic of Ecuador*, UNCITRAL, Award, 1 July 2004, para. 186 [*Occidental*]; *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. 12 9 [*LG&E]*; *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, paras. 245, 255, 256 [*PSEG*].

[146] VON WALTER, pg. 30.

[147] BOWETT, D. W. (1957). *Estoppel before international tribunals and its relation to acquiescence*. British Yearbook of International Law, Vol. 33, pg. 176 [BOWETT].

[148] BOWETT, pgs. 183, 184.

The ICJ has ruled with regard to the estoppel rule that "a man shall not be allowed to blow hot and cold – to affirm at one time and deny another… Such a principle has its basis in common sense and justice, and whether it is called 'estoppel', or by any other name, it is one which Courts have in modern times most usefully adopted."[149]

2.3 Conclusion

Accordingly, the first proposition of this thesis has been confirmed in the sense that the above performed research presented persuasive data as to why the concept of protection of legitimate expectations should be considered a general principle of law. Even if there certainly are slight differences in the application of the principle within each domestic system, the core and the desired outcome shares commonalities that confirm a universal acceptance of the principle. Consequently, I am of the opinion that the use of the concept of legitimate expectations is justified in international investment law.

The principle of protection of legitimate expectations may also be understood to constitute a part of the good faith. However, in that case it merely serves as an interpretative tool for assessing violation of investors' rights due to breach of other substantive provisions.

[149] *Cave v. Mills*, in Edwin Tyrrell Hurlstone and John Paxton Norman,The Exchequer Reports: Reports of Cases Argued and Determined in the Courts of Exchequer & Exchequer Chamber (1862), pg. 927.

3. Legitimate expectations in cases of indirect expropriation

As was previously stated, legitimate expectations have been invoked in cases where claimants have alleged that their investment was indirectly expropriated. Expropriation[150] represents the most serious infringement of private property rights and at the same time a manifest exercise of State sovereignty.[151] In the most general way, expropriation is understood as a governmental taking of property for which compensation is required.[152] It is a universally recognized rule that each State has the power and right to expropriate, provided that the expropriation measure is not discriminatory in nature, is undertaken in the public interest, complies with due process principles and the investor is promptly, adequately and effectively compensated for its losses.[153]

3.1 Direct and indirect expropriation

Theory recognizes two types of expropriation, direct and indirect. Direct expropriation is usually articulated in a national decree or statute and has been defined by tribunals without much controversy as formal withdrawal of property rights for the benefit of the State or for private persons designated by the State and/or outright physical seizure of the property.[154] While direct and overt expropriations have become rare for its negative public perception connected with lowered reputation as to its investment climate, indirect expropriation, although not a new concept, has in recent

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[150] *UNCTAD Series on Issues in International Investment Agreements II: Expropriation* [online]. United Nations, 2012, pg. 5 [accessed on 29 March 2015]. Accessible on <http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf> [UNCTAD Expropriation] ("The IIA terminology on takings is not fully consistent. Different terms, such as expropriation, taking, nationalization, deprivation and dispossession, can be encountered. These terms are often used interchangeably; their use typically depends on legal tradition and translation.")

[151] NIKIÈMA, S. H. (2012). *Best Practices Indirect Expropriation* [online]. Best Practices Series, International Institute for Sustainable Development, pg. 1 [accessed on 25 March 2015]. Accessible on <http://www.iisd.org/pdf/2012/best_practice_indirect_expropriation.pdf> [NIKIÈMA].

[152] ISAKOFF, P. D. (2013). *Defining the Scope of Indirect Expropriation for International Investments* [online]. Global Business Law Review, Vol. 3, pg. 196 [accessed on 25 March 2015]. Accessible on <http://engagedscholarship.csuohio.edu/gblr/vol3/iss2/4> [ISAKOFF].

[153] ISAKOFF, pg. 190; NIKIÈMA, pg. 3; SCHREUER, C. H. (2005). *The Concept of Expropriation under the ETC and other Investment Protection Treaties* [online]. Transnational Dispute Management, Vol. 5, pg. 1 [accessed on 29 March 2015] Accessible on <http://www.univie.ac.at/intlaw/pdf/csunpublpaper_3.pdf> [SCHREUER Expropriation].

[154] UNCTAD Expropriation, pg. 6; *Sempra*, para. 280; *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, ICSID Case No.ARB/01/3, Award, 22 May 2007, para. 243 [*Enron*].

times found “unprecedented fertile ground”[155] and is nowadays the typical form in which expropriation takes place.[156]

A definition of indirect expropriation nevertheless remains inherently more nebulous. In general, indirect expropriation was characterized as “some measures short of physical takings [that] may amount to takings in that they permanently destroy the economic value of the investment or deprive the owner of its ability to manage, use or control its property in a meaningful way.”[157] The problematic issue is to determine the circumstances under which measures that a State undertakes to regulate economic activities within its territory are to be considered tantamount to expropriation of an investment and not only legitimate State regulation.[158] Indeed, not all regulatory measures can be deemed as indirect expropriation even if they are harmful to the investment.[159] Accordingly, the issue is how to delineate between non-compensable regulation and compensable indirect expropriation.[160] The question is very delicate and has been subject of many academic discussions.

An investment may be indirectly expropriated even under perfectly legitimate circumstances.[161] Moreover, an investment may be expropriated if a regulatory measure adopted by a State is not directly targeted at it, gradually or in stages over a longer period of time as so called creeping expropriation[162] or in cases where “a State may attempt to ‘hide’ its intention to harm an investment behind a measure that is, on the surface, legitimate and seemingly innocuous.”[163] Indeed, indirect expropriation does not require “arbitrariness, bad faith, lack of proportionality or other improprieties”[164] to occur. On the other hand, investment treaties provide a vast array of substantive protection to investment and extensive interpretation of indirect protection may be

[155] UNCTAD Expropriation, pg. 1.
[156] SCHREUER Expropriation, pg. 3.
[157] UNCTAD Expropriation, pg. 6.
[158] NIKIÈMA, pg. 1.
[159] *Tecmed*, para. 119.
[160] ISAKOFF, pg. 193; *UNCTAD Series on Issues in International Investment Agreements II: Expropriation* [online]. United Nations, 2012, pg. 1 [accessed on 29 March 2015]. Accessible on <http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf>.
[161] SCHREUER Expropriation, pg. 2.
[162] Creeping expropriation has been described as coming „with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State over a period of time culminate in the expropriatory taking of such property.“ *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, para. 20.22.
[163] NIKIÈMA, pg. 2.
[164] SCHREUER Expropriation, pg. 2.

perceived to effectively limit regulatory and policy powers of States. Indeed, a State "might decide not to take action in the public interest if it fears that such measures may qualify as indirect expropriation and, as such, require the State to pay substantial compensation."[165]

3.2 Relevance of legitimate expectations for indirect expropriation

Due to the fact that "State measures that can potentially impact upon an investor's rights in its investment are too varied to fit into a neat formula,"[166] it has been suggested that a case-by-case, fact based, flexible inquiry is necessary in order to assess whether a State measure constitutes an indirect expropriation.[167] Tribunals have identified several indicative criteria (some of them appearing directly in provisions of investment treaties in connection with indirect expropriation) that help clarify whether indirect expropriation has occurred.[168]

Finally, expectations on the part of investors that a certain type of act or measure will not be taken by the host State represent one of the guiding factors that tribunals consider.[169] Paulsson and Douglas state the following:

> "The prohibition against indirect expropriation should protect legitimate expectations of the investor based on specific undertaking or representations by the host State upon which the investor has reasonably relied. This is by no means an exclusive test to be applied to all types of alleged indirect expropriations in isolation of other relevant factors. It is, nonetheless, a useful guiding principle that appears to cover many of the situations that have come before modern investment treaty tribunals."[170]

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[165] NIKIÈMA, pg. 2.
[166] PAULSSON, J., DOUGLAS, Z. *Indirect Expropriation in Investment Treaty Arbitration. In* (eds.) KRÖLL, S. M., HORN, N. (2004). *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects*. Kluwer Law International, The Hague, The Netherlands, pg. 146. [PAULSSON, DOUGLAS].
[167] PAULSSON, DOUGLAS, pg. 146; UNCTAD Expropriation, pg. 57; *Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Award, 3 September 2001, para. 200.
[168] According to Nikièma, the three main criteria are the detrimental effect, proportionality and legitimate public interest. NIKIÈMA, pg. 13.
[169] UNCTAD Expropriation, pg. 73.
[170] PAULSSON, DOUGLAS, pg. 157.

Similarly, Perkams supports the importance of legitimate expectations as a clarifying factor and concludes that "one important factor for the court's assessment [of an expropriation claim] is whether the individual has some form of legitimate expectation that his or her rights will not be regulated or restricted in a certain way."[171] Furthermore, investors' expectations appear explicitly in the language of some investment treaties as a guiding criteria to ascertain whether indirect expropriation has taken place. For instance, the China-Colombia BIT in its Article 4 reads:

> "[…] b) The determination of whether a measure or series of measures of a Contracting Party constitute indirect expropriation requires a case-by-case, fact-based inquiry considering:
>
> […] ii) The scope of the measure or series of measures and their interference on the reasonable and distinguishable expectations concerning the investment; […]."[172]

Another example is the Australia-Chile FTA, which in its Annex 10-B: Expropriation states:

> "[…] 3(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
>
> […] (ii) The extent to which the measure or series of measures interfere with distinct, reasonable, investment-backed expectations; […]."[173]

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[171] PERKAMS, M. *The concept of indirect expropriation in comparative public law – searching for light in the dark. In* (eds.) SCHILL, S. W. (2010). *International Investment Law and Comparative Public Law*. Oxford University Press, Oxford, pg. 149.
[172] *Bilateral Agreement for the Promotion and Protection of Investments between the Government of the Republic of Colombia and the Government of the People's Republic of China*, dated 22 November 2008 [online, accessed on 29 March 2015]. Accessible on <http://investmentpolicyhub.unctad.org/Download/TreatyFile/720>.
[173] *Australia-Chile Free Trade Agreement*, dated 30 July 2008 [online, accessed 29 March 2015]. Accessible on <http://www.dfat.gov.au/trade/agreements/aclfta/Documents/Australia-Chile-Free-Trade-Agreement.pdf>.

3.3 Case law

In cases where the investors alleged expropriation, tribunals have employed a high threshold with regard to frustration of investors' expectations.[174] Rather than implicit, unspecific or unofficial assurances, it is primarily the specific and explicit undertakings, representations or commitments of the host State that are recognized by tribunals as a basis for investors' expectations.[175]

In *Metalclad,*[176] the investor, a US corporation operating through its Mexican subsidiary, alleged that Mexico has, among other, wrongfully interfered with the development and operation of its hazardous waste landfill and thus breached Articles 1105 and 1110 of NAFTA. Both the federal government of Mexico and the government of the State of San Luis Potosti, where the landfill was to be constructed, issued a construction and operating permit to the investor.[177] Representatives of Mexico on the federal level further assured the investor that no further permits were required to undertake the investment and the investor, relying on these representations, proceeded with the construction.[178] However, opposition arose from the municipal and state government, apparently due to "the usual NIMBY (not in my back yard) concerns,[179] and 5 months after the construction began, the Municipality of Guadalcazar denied to grant the investor a municipal construction permit which it required in order to deem the construction lawful and thus effectively prevented operation of the by then completed landfill.[180] Subsequently, the municipality issued an Ecological Decree which declared a protected natural area including the area of the landfill and thus permanently barring the facility from operating.[181]

With regard to the investor's expropriation claim, the tribunal has ruled that the municipality having denied issuance of a municipal construction permit "taken together

[174] UNCTAD Expropriation, pg. 75.
[175] UNCTAD Expropriation, pg. 75; *Grand River Enterprises Six Nations, Ltd. v. United States of America*, NAFTA, Award, 12 January 2011, para. 141 ("Ordinarily, reasonable or legitimate expectations of the kind protected by NAFTA are those that arise through targeted representations or assurances made explicitly or implicitly by a state party.")
[176] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 [*Metalclad*].
[177] *Ibid,* paras. 29, 31.
[178] *Ibid,* paras. 40-43.
[179] *Marvin Roy Feldman Karpa v. United Mexican States,* ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 144 [*Feldman*].
[180] *Metalclad,* para. 50.
[181] *Ibid,* para. 59.

with the representations of the Mexican federal government, on which Metalclad relied, and the absence of a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit, amount to an indirect expropriation."[182] The tribunal further stated that the issuance of the Ecological Decree would by itself suffice for a finding of expropriation.[183] The award was later reviewed by the British Columbia Supreme Court which vacated the first part of the tribunal's finding regarding expropriation responding to a challenge by the government of Mexico; however, it upheld the tribunal's decision on the basis of expropriation resulting from the Ecological Decree. A key feature in the case at bar was that the investment was effectively neutralized as a result of breaches of specific assurances given to the investor by the responsible Mexican authorities upon which the investor relied when making its investment.[184]

In *Tecmed*, the tribunal allowed the investor's expropriation claim under BIT between Spain and Mexico based on a very different reasoning. The Spanish investor purchased a hazardous industrial waste landfill in a public auction with "… expectation of a long-term investment relying on the recovery of its investment and the estimated return through the operation of the landfill during its entire useful time."[185] Consequently, when the Mexican authorities denied the investor an application for renewal of the necessary operating license two years after the investment had been made, the tribunal agreed with the investor and stated that the denial had fully and irrevocably destroyed the investment's economic and commercial operations in the landfill, since the site could not be utilized for different purposes due to the accumulated hazardous waste.[186]

What distinguishes the expropriation claim in *Tecmed* from *Metalclad* is the basis upon which the claims were built. In *Tecmed*, it is worthy of particular note that the legitimacy of the investor's expectations were based on its long-term nature and arose from objective investment characteristics that the investor considered when deciding whether to pursue the investment at the outset.[187] Unlike in *Metalclad*, they

[182] *Ibid,* para. 107.
[183] *Ibid,* para. 111.
[184] FIETTA, pg. 379.
[185] *Tecmed*, para. 149.
[186] *Ibid*, para. 117.
[187] FIETTA, pg. 381.

were not led by or dependent on any act or representation attributable to the host State.[188]

As Fietta points out, mere "breaches of the expectations of an investor may mean little in the context of an indirect expropriation claim in the absence of some form of accompanying destruction of neutralization."[189] In the case of *Waste Management*[190], the tribunal has concluded that in case of even a serious breach of a contract by a governmental counterparty, a mere "loss of benefits or expectations is not a sufficient criterion of an expropriation, even if it is a necessary one."[191] In *CMS*[192], the tribunal found that the investor has retained "full ownership and control of the investment"[193] which sufficed to refute an expropriation claim.

The above stated examples show that for an expropriation claim to succeed, a substantial interference with the investment must be present. Assurances from the host State may play a role; however, unsuccessful investments "cannot form the basis of an indirect expropriation claim if they are in any sense over-optimistic or fail to take into account the inherent commercial risks associated with an investment."[194]

3.4 Conclusion

The following conclusions may be drawn. The attitude of the tribunals with regard to claims of indirect expropriation appears to be rather reserved. The only case where expectations are granted protection is when the investment itself is effectively neutralized or substantially interfered with. It must be pointed out that protection against expropriation points at only a specifically outlined set of detrimental conduct on behalf of the State and not all breaching conduct worth compensation falls within its ambit. A failure to recognize the investors' expectations as 'legitimate enough' to found a basis for an expropriation claim does not necessarily shut the investors' door to redress. Firstly, they may give rise to a cause of action in certain public domestic law system.[195]

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[188] FIETTA, pg. 381.
[189] *Ibid*, pg. 383.
[190] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 [*Waste Management*].
[191] *Waste Management*, para. 159.
[192] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005 [*CMS*].
[193] *CMS,* para. 263.
[194] FIETTA, pg. 384.
[195] *Ibid*.

Secondly, such failures may often provide the basis for a claim under international investment law that there has been a breach of the FET standard. In fact, the tribunal in *El Paso* observed that:

> "There is not always a clear distinction between indirect expropriation and violation of legitimate expectations […]. According to this Tribunal, the violation of a legitimate expectation should rather be protected by the fair and equitable treatment standard."[196]

Another possible explanation may lie in the fact that the FET standard is a more flexible tool of protection as compared to the more drastic determination and remedy inherent in concept of regulatory expropriation.[197] The following chapter provides a more detailed analysis.

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[196] *El Paso*, para. 227.

[197] *Thunderbird Gaming*, Separate Opinion, para. 37; *PSEG,* para. 238 ('This is particularly the case when the facts of the dispute do not clearly support the claim for direct expropriation, but when there are notwithstanding events that need to be assessed under a different standard to provide redress in the event that the rights of the investor have been breached.')

4. Legitimate expectations in cases of violation of the fair and equitable treatment standard

The fair and equitable treatment standard of protection has become a cornerstone of the evolving standard of treatment in investment treaty law, providing protection to investors against damage from arbitrary, discriminatory or abusive state action.[198] The FET standard has acquired a near ubiquitous presence in investment treaties and litigation.[199] Dolzer even observes that "the invocation [of the FET standard] is deemed necessary by claimant's lawyer […] to present a certain flair of an offense to basic notions of justice to its cause."[200]

It is under the FET standard that legitimate expectations are most frequently invoked and enjoy "a safer chance of success."[201] In order to understand the role of legitimate expectations within the FET standard, it is necessary to briefly examine the FET standard itself.

4.1 The fair and equitable treatment standard

Much has been written about the FET standard, yet it still provides room for heated discussions. The origins of the term point to the Havana Charter for an International Trade Organization of 1948,[202] yet the first case to apply the standard was the *Maffezzini*[203] case 50 years afterwards.[204] Nowadays, the standard, formulated in identical or similar terms, appears in an absolute majority of BITs as well as in major

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[198] CAMPBELL, Ch. (2013). *House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law* [online]. Journal of International Arbitration (© Kluwer Law International) Vol. 30, Issue 4, pg. 361 [accessed on 25 March 2015]. Accessible on <www.kluwerarbitration.com>.

[199] DOLZER, R. (2005). *Fair and Equitable Treatment: A Key Standard in Investment Treaties.* The International Lawyer, Vol. 39, No. 1, pg. 87 [DOLZER, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*]

[200] DOLZER, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, pg. 87.

[201] POTÈSTA, pg. 103.

[202] The Havana Charter for International Trade Organization used the terms "just and equitable treatment." SCHREUER, *Fair and Equitable Treatment in Arbitral Practice*, pg. 357; DOLZER, *Fair and Equitable Treatment: A Key Standard in Investment Treaties,* pg. 89.

[203] *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000.

[204] DOLZER, *Fair and Equitable Treatment: Today's Contours*, pg. 10.

multilateral investment treaties[205] and it is the most frequently raised standard in investment disputes.[206]

Despite of its widespread presence, there is no united definition as to the content of the FET standard since it is not "amenable to all-embracing definitions that [would] cover all conceivable cases."[207] Generally it may be stated that the FET standard provides "a basic standard, detached from the host [State's] domestic law, against which the behaviour of the host country *vis-à-vis* foreign investments can be assessed."[208] A recent case commented on the function of the FET standard as follows:

> "[T]he [FET] standard basically ensures that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances, and that it is a means to guarantee justice to foreign investors."[209]

Only a few tribunals have attempted to provide a comprehensive definition; rather, the jurisprudence has set out casuistic sub-categories of acts either breaching the standard or contrarily emanating the desired outcomes, and has clarified some of the individual aspects of the FET standard.[210] Other parts, however, remain vague. One opinion suggests that the vagueness of the phrase is intentional as to give arbitrators the possibility to articulate the range of diverse manifestations of the standard necessary to provide sufficient protection to investors and to address manifold types of deterring governmental conduct that more specific rules cannot comprise.[211] Dolzer goes as far as to describe the FET standard as the "heart of investment arbitration because of the vastness of factual situations pertaining to host state actions affecting the rights and

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[205] HIRSCH, M. (2011). *Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law* [online]. The Journal of World Investment & Trade, Vol. 12, pg. 8 [accessed on 31 May 2015]. Accessible on http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2272952> [HIRSCH].

[206] DOLZER, SCHREUER 2008, pg. 119.

[207] DOLZER, *Fair and Equitable Treatment: Today's Contours*, pg. 11.

[208] *UNCTAD Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* [online]. United Nations, 2007, pg. 28 [accessed on 31 May 2015]. Accessible on <http://unctad.org/en/Docs/iteiia20065_en.pdf>.

[209] *Swisslion DOO Skopje v. Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, para. 273.

[210] DOLZER, *Fair and Equitable Treatment: Today's Contours*, pg. 14.

[211] DOLZER, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, pg. 90; *International Investment Law: A Changing Landscape: A Companion Volume to International Investment Perspectives: Fair and Equitable Treatment Standard in International Investment Law*. OECD Publishing, 2006, pg. 75.

interests of the investor."[212] Like other broad principles of law such as the due process of law, "it is susceptible of specification through judicial practice."[213]

In absolute majority of the cases, the FET standard is formulated as a separate substantive provision. However, some BITs merely contain a reference to the FET standard in the preamble which in such cases creates doubts as to its binding nature. Accordingly the tribunal in *Bayindir*[214] refused to recognize the binding character stating:

> "[I]t is doubtful that, in the absence of a specific provision in the BIT itself, the sole text of the preamble constitutes a sufficient basis for a self-standing fair and equitable treatment obligation under the BIT."[215]

4.1.1 The two approaches

The FET standard appears in investment treaties in varying forms. It may be present as a separate provision,[216] combined with obligation not to discriminate,[217] together with most-favored nation or national treatment,[218] in conjunction to provide protection and security,[219] or finally with reference to customary international law or general international[220]. It is the last two categories that have stirred up a debate

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[212] DOLZER, *Fair and Equitable Treatment: Today's Contours*, pg. 10.
[213] SCHREUER, *Fair and Equitable Treatment in Arbitral Practice,* pg. 365.
[214] *Bayindir Insaat Turizm Ticaret Ve Sanayi A. Ş. v. Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005 [*Bayindir – Decision on Jurisdiction*].
[215] *Bayindir – Decision on Jurisdiction*, para. 230.
[216] *Agreement between the Belgium-Luxembourg Economic Union and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investment*, dated 6 June 2005, Article 2, para. 2 [online, accessed on 8 June 2015]. Accessible on <http://investmentpolicyhub.unctad.org/Download/TreatyFile/338>.
[217] *Agreement between the Republic of Lebanon and the Republic of Hungary for the Promotion and Reciprocal Protection of Investments*, dated 22 June 2001, Article 2, para. 2 [online, accessed on 8 June 2015]. Accessible on < http://investmentpolicyhub.unctad.org/Download/TreatyFile/1531>.
[218] *Agreement between the Government of Malaysia and the Government of the Republic of Chile Concerning Promotion and Protection of Investments*, dated 11 November 1992, Article 3, para.1 [online, accessed on 29 March 2015]. Accessible on <http://investmentpolicyhub.unctad.org/Download/TreatyFile/690>.
[219] *Agreement between the Government of the Kingdom of Cambodia and the Government of the Republic of Cuba Concerning Promotion and Protection of Investments*, dated 26 September 2001, Article 2, para. 2 [online, accessed on 29 March 2015]. Accessible on <http://investmentpolicyhub.unctad.org/Download/TreatyFile/573>.
[220] *Agreement between the Government of the Republic of France and the Government of the United Mexican States on the Reciprocal Promotion and Protection of Investments*, dated 12 November 1998, Article 4, para. 1 [online, accessed on 8 June 2015]. Accessible on < http://investmentpolicyhub.unctad.org/Download/TreatyFile/1253>.

regarding the relationship between the FET standard and customary international law and international law in general. In the midst of uncertainty as to the content of the standard, two major opinions have crystalized.

4.1.1.1 The minimum treatment standard

The first of these opinions understands the FET standard as a mere reflection of the collection of legal principles that comprises the international minimum standard of treatment of aliens, as contained in customary international law (the "**minimum treatment standard approach**"). The applied threshold of liability is generally high – the minimum standard of treatment represents the lowest common denominator and only the very serious acts of maladministration of the host State can be found to violate it.[221]

Two illustrative documents are often presented as support for following the minimum treatment standard approach. Firstly, the Notes and Comments to the OECD Draft Convention on the Protection of Foreign Property of 1967 clearly equal the FET standard to "standard set by international law for the treatment due by each State with regard to the property of foreign nationals."[222] Secondly, the NAFTA Free Trade Commission issued an authoritative and binding Note of Interpretation stating that the FET standard as expressed in Article 1105 of NAFTA does not entail treatment in addition to or beyond that which is required by the customary international law.[223] Since the interpretative note was of a binding character, this approach was followed by NAFTA tribunals as well as by the United States[224] in its BIT drafting practice.[225] The

[221] *UNCTAD Series on Issues in International Investment Agreement II: Fair and Equitable Treatment* [online]. United Nations, 2012, pg. 13 [accessed on 7 June 2015]. Accessible on <http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf>.

[222] Notes and Comments to the OECD Draft Convention on the Protection of Foreign Property. OECD, 1967, pg. 9. <http://www.oecd.org/investment/internationalinvestmentagreements/39286571.pdf>.

[223] DOLZER, SCHREUER 2008, pg. 125.

[224] Free Trade Agreement between the United States and Chile, dated 6 June 2003 [online, accessed 31 May 2015]. Accessible on <https://ustr.gov/trade-agreements/free-trade-agreements/chile-fta/final-text>, Art. 10.4; Treaty between the United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, dated 7 September 2004 [online, accessed on 31 May 2015]. Accessible on <https://ustr.gov/archive/assets/World_Regions/Americas/South_America/Uruguay_BIT/asset_upload_file582_6728.pdf>, Art. 5.

[225] An interesting argument has been made as to the scope of the FET standard as set out in the BITs with regard to a stereotypical idea of division of the world to capital exporting developed north advocating a broad approach and developing south preferring a narrower one. However, this generalization seems flawed. In fact, the USA has been the most prominent follower of a narrow approach concerned about defending investment claims as Respondents, whereas China has adopted the widest possible scope,

authority of this practice, however, is of limited relevance for interpretation of FET clauses in general. This is caused by the fact that Article 1105 of NAFTA refers to the "Minimum Standard of Treatment" in its heading, whereas other treaties more often than not do not contain such language.[226] Followers of the minimum standard approach warn against the extreme vagueness connected with the autonomous interpretation and uncertainty as to the extent of the standard.[227]

4.1.1.2 The autonomous standard

On the contrary, the second opinion interprets the FET standard as an autonomous standard that is additional and separate from general international law (the "**autonomous standard approach**").[228] The terms "fair and equitable" are to be interpreted in accordance with Article 31 of the VCLT - that is in good faith in accordance with the ordinary meaning of the terms of the treaty in their context and in the light of the object and purpose of the treaty. The tribunal in *Saluka* however quite justly pointed out that the ordinary meaning of the FET standard can only be defined by "terms of almost equal vagueness",[229] such as "just", "even-handed", "unbiased" or "legitimate".[230] Ultimate, the teleological interpretation of the FET standard suggests that whether the investor has been treated unfairly and inequitably is to be assessed on a case-by-case basis[231] in the light of the object and purpose of the treaty discerned from its preamble.[232] Applying a purely textual interpretation, it "seems implausible that a treaty would refer to a well-known concept like the 'minimum standard of treatment in customary international law' by using the expressions 'fair and equitable treatment'."[233] There are numerous advocates for the autonomous standard approach, both from the academic sphere[234] and case law[235] field. Perhaps the most prominent supporter of the autonomous standard approach, Mann has observed:

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acting as a strong investor actively seeking protection for its investors abroad. DOLZER, *Fair and Equitable Treatment: Today's Contours,* pg. 13.

[226] DOLZER, SCHREUER 2008, pg. 126.

[227] SORNARAJAH, pg. 356.

[228] DOLZER, SCHREUER 2008, pg. 124.

[229] *Saluka*, para. 297.

[230] *MTD* Award, para. 113.

[231] DOLZER, SCHREUER 2008, pg. 128.

[232] *Saluka*, para. 299.

[233] DOLZER, SCHREUER 2008, pg. 124.

[234] DOLZER, R., STEVENS, M. (1995). *Bilateral Investment Treaties*. Kluwer Academic Publishers Group, pg. 60.

[235] *Saluka*, para. 294; *Azurix*, para. 361; *Occidental*, para. 192.

> "The terms 'fair and equitable treatment' envisage conduct that goes far beyond the minimum standard and afford protection to a greater extent and according to a much more objective standard than any previously employed form of words. […]The terms are to be understood and applied independently and autonomously."[236]

Both of the two interpretative approaches have been applied by various tribunals.[237] However, some interpreters conclude that with regard to the development of customary international law, both views more or less aim at the same regulatory mischief.[238] The tribunal in *Saluka* has disregarded the distinction between the two and argued that the difference "when applied to the specific facts of a case, may well be more apparent than real."[239] It is however beyond the scope of this thesis to pursue deeper analysis of the two concepts.

4.1.2 Attempts at defining the FET standard and its recognized components

When faced with the difficult task of construing the FET standard, tribunals have sought inspiration from various sources. While mostly NAFTA tribunals have been inclined to measure the standard against a historical-evolutionary background and interpret it as synonymous to customary law minimum standard treatment, other tribunals approached the task from a more contemporary perspective and found it to be an autonomous standard.[240] While some tribunals have focused on describing the positive treatment the host State is obligated to provide,[241] others have by contrast

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[236] DOLZER, SCHREUER 2008, pg. 124.
[237] The autonomous standard approach was adopted for instance in *Tecmed*, paras. 155, 156; *MTD* Award, para. 258; *PSEG*, para. 239. The minimum standard approach was adopted by tribunals in for example *Occidental,* paras. 189-190; *CMS*, paras. 282-284; *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, para. 291.
[238] BANDALI, Sabrina A. *Understanding FET: The Case for Protecting Contract-based Legitimate Expectations. In* (eds.) LAIRD, Ian A., SABAHI, Borzu, SOURGENS, Frédéric G., WEILER, Todd J. (2014). *Investment Treaty Arbitration and International Law - Volume 7*. JurisNet LLC, pg. 139 [BANDALI].
[239] *Saluka*, paras. 291-292.
[240] DOLZER, SCHREUER 2008, pg. 128.
[241] *S. D. Myers*, para. 134 ("… requirements of due process, economic rights, obligations of good faith and natural justice").

pointed out the negative treatment that would violate the FET standard.[242] Some tribunals have elected a teleological approach as to the purpose of the FET standard and its intended consequences[243]. In any way, as stated by the tribunal in *Mondev*, "[a] judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case."[244]

4.1.2.1 Historical approach

For the first group, inspiration from the history often points to the 1926 landmark *Neer*[245] case. In this case, there was no investment involved, but a citizen of the United States was murdered in Mexico. Mexican authorities were charged with lack of diligence in investigation and prosecution of the crime which was contended to have violated the minimum standard of treatment of aliens recognized under customary international law. The case is famous for setting a high threshold for finding of a violating conduct, stating:

> "[…] the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[246]

Mexico was not found liable and the claim was dismissed.

[242] *Genin*, para. 367 (‚Acts that would violate this minimum standard would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith').
[243] *MTD* Award, para. 113 ('In their ordinary meaning, the terms "fair" and "equitable" used in Article 3(1)62 of the BIT mean "just", "even-handed", "unbiased", "legitimate". These terms are also used in Article 2(2) of the BIT entitled "Promotion and Protection of Investments"64. As regards the object and purpose of the BIT, the Tribunal refers to its Preamble where the parties state their desire "to create favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party", and the recognition of "the need to protect investments by investors of both Contracting Parties and to stimulate the flow of investments and individual business initiative with a view to the economic prosperity of both Contracting Parties"').
[244] *Mondev*, para. 118.
[245] *Neer v. Mexico*, US-Mexico General Claims Commission, Opinion, 15 October 1926.
[246] DOLZER, SCHREUER 2008, pg. 129.

Another often cited historical case is the *ELSI*[247] case decided by the International Court of Justice. This case concerned an intervention in the bankruptcy proceedings and a temporary confiscation of an industrial enterprise indirectly owned by US shareholders by a mayor of the Italian city of Palermo. The ICJ was asked to interpret the "arbitrary and discriminatory" standard, which was formulated in the applicable treaty between United States and Italy. The ICJ has observed:

> "[Arbitrariness] is not so much something opposed to a rule of law, as something opposed to the rule of law. […]. It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety."[248]

The ICJ did not hold Italy liable. Some of the subsequent tribunals have rejected the very high threshold set out in *Neer* and embraced the more lenient approach in *ELSI*, emphasizing the evolving nature of the concept.[249]

4.1.2.2 Contemporary approach

As was stated earlier, not all tribunals sought inspiration from the history, but rather attempted to construct their own definitions or descriptions of the FET standard. The most frequently cited one[250] is the comprehensive definition construed by the tribunal in *Tecmed.* The tribunal has been said to provide "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"[251], which has also been met with considerable criticism.[252] The broad definition was formulated as follows:

[247] *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, ICJ, Judgement, 20 July 1989 [*ELSI*].
[248] *ELSI*, para. 128.
[249] *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits, 10 April 2001, para. 118; *Mondev International, Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, para. 127 [*Mondev*]; *Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Award, 15 November 2004, para. 95; *ADF Group Inc. v. United States of America,* ICSID Case No. ARB (AF)/00/1, Award, 9 January 2003, para. 179.
[250] DOLZER, *Fair and Equitable Treatment: Today's Contours*, pg. 14. Tribunals that have followed this definition include for instance *LG&E*, para. 127, *CMS*, para. 279, *Occidental*, para. 185, *MTD* Award, para. 114.
[251] POTÈSTA, pg. 102.
[252] DOUGLAS, Z. (2006). *Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex.* [online]. Arbitration International, Vol. 22, No. 1 [accessed on 1 June 2015]. Accessible on <http://arbitration.oxfordjournals.org/content/22/1/27> ('[t]he *Tecmed* 'standard' is actually not a

> "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. […] 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."[253]

While it is beyond the scope of this thesis to present or the numerous definitions of the FET standard laid out by various tribunals, one may identify a set of repeating sub-categories. The evolving jurisprudence has pointed out the host States' duty to undertake administrative decision-making in a transparent manner, in good faith, obligation to refrain from arbitrary or discriminatory conduct, coercion, harassment and bad faith.[254] Last but not least, among the principles that tribunals have used to shed light on the content of the FET standard is the obligation of the host States to respect investors' legitimate expectation.

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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. But in the aftermath of the tribunal's correct finding of liability in Tecmed, the quoted obiter dictum in that award, unsupported by any authority, is now frequently cited by tribunals as the only and therefore definitive authority for the requirements of fair and equitable treatment'); *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Final Award, 30 November 2011, para. 10.3.5 (the tribunal referred to the *Tecmed* statement as having been 'subject to what it considers to be valid criticism'); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case. No. ARB/01/7, Decision on Annulment, 21 March 2007, paras. 66-78 (the tribunal noted that 'the *Tecmed* tribunal's apparent reliance on the foreign investor's expectations as the source of the host State's obligations (such as the obligation to compensate for expropriation) is questionable').

[253] *Tecmed*, para. 154.

[254] HIRSCH, pg. 8.

4.2 Legitimate expectations as part of the FET standard

Explicit incorporation of a reference to legitimate expectations in the FET standard provision is rare.[255] However, tribunals have consistently found protection of legitimate expectations to be a part of the FET standard. In fact, the protection of legitimate expectations has risen to become considered as the "dominant element"[256], "one of the major components"[257], "the essential element"[258] or the "most important function"[259] of the FET standard.[260] The tribunal in *Rompetrol* considered legitimate expectations along with the host State's treatment towards the investor as "the two general elements that other tribunals have found come into play in connection with claims to fair and equitable treatment."[261] Even in cases governed by NAFTA, legitimate expectations were found to fall within the FET standard.[262] However, it must be noted that as Brown warns "just because the term 'legitimate expectation' has been applied to certain situations does not necessarily mean that the same principle is being discussed."[263]

Tribunals have linked the protection of legitimate expectations to the FET standard both implicitly[264] and explicitly[265]. The *Tecmed* tribunal was the first one to clearly include protection of investors' legitimate expectations within the FET standard,[266] requiring the host State to respect legitimate expectations of the investors at the time of the investment without revoking any decision, in an arbitrary manner, upon which the investor relied when making the investment.[267] While some tribunals have followed the *Tecmed* definition particularly putting emphasis on stability of the legal

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[255] BANDALI, pg. 142.
[256] *Saluka*, para. 302.
[257] *EDF*, para. 216.
[258] *Ulysseas,* para. 240.
[259] *Electrabel*, para 7.75.
[260] POTÈSTA, pg. 103.
[261] *The Rompetrol Group NV v. Romania*, ICSID Case No. ARB/06/3, Award, 6 May 2013, paras. 195-197.
[262] *Glamis Gold, Ltd. v. United States of America*, NAFTA/UNCITRAL, Award, 8 June 2009, para. 620 ('Merely not living up to expectations cannot be sufficient to find a breach of Article 1105 of the NAFTA. Instead, Article 1105(1) requires the evaluation of whether the State made any specific assurance or commitment to the investor so as to induce its expectations.') [*Glamis Gold*]; *Thunderbird Gaming* – Award, paras. 147, 148.
[263] BROWN, pg. 2.
[264] *Merrill & Ring Forestry L.P. v. The Government of Canada*, UNCITRAL, ICSID Administered Case, Award, 31 March 2010, para. 242.
[265] *Enron,* para. 262; *MTD* Award, paras. 114-115; *Ulysseas*, para. 240.
[266] POTÈSTA, pg. 101.
[267] *Tecmed*, para. 159.

environment,[268] other have gradually adopted a more restrictive approach, warning about the potential consequences of overly broad formulations, such as effective preclusion of introduction any regulatory change by the host State.[269]

A breach of investor's expectation does not *ipso facto* amount to a breach of the FET standard; some expectations may simply be too minor for this end.[270] In order for an expectation to reach protection by the investment treaty, it must be rise to the level of legitimacy and reasonableness in light of the circumstances[271] and all circumstances must be taken into account.[272] It follows that the protected legitimate expectations arise out of objective conduct of the host State and not out of subjective postulates of the investors.[273] The rationale for protecting only objective based expectations seems reasonable – while it is true that the investor makes its investment in the light of the given situation in the host State and its profits will depend on stability and predictability of the framework, the expectation cannot be "fanciful or result of misplaced optimism",[274] but rather must be based on a realistic estimation of the circumstances. With regard to the objectivity of the expectations, the tribunals must inquire into many facts and circumstances surrounding the investment, such as the investor's own conduct prior to making the investment, including its due diligence and awareness of the host State's circumstances and framework, or the State's role as a sovereign.[275]

According to *Arif*, the host State has not only the duty to respect the investor's legitimate expectations, but also a secondary obligation to remedy or ameliorate its inability to fulfill the expectations in case of frustration of the expectations.[276] Thus the tribunal found the host State's "inertia in the face of the paralyses and then destruction of an investment" as a breach of the FET standard, specifically its inactivity, the fact that the State behaved as a "powerless bystander" and the manner in which the State

[268] For instance *CMS*, paras. 274-279; *PSEG*, paras. 253-255; *Enron*, paras. 259-261.
[269] BANDALI, pg. 147.
[270] *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, para. 536 [*Arif*].
[271] *Saluka*, para. 304.
[272] *Electrabel*, para. 7.78.
[273] DOLZER, *Fair and Equitable Treatment: Today's Contours*, pg. 16.
[274] *Arif*, para. 532.
[275] BANDALI, pg. 147.
[276] *Arif*, para. 547.

branch “washed it own hands of the consequences of the illegality, the last one describing as the most reprehensible element of the host State’s conduct.”[277]

4.3 Typified circumstances laying ground for legitimate expectations

Distinct types of conduct of the host State have been identified to lay ground for legitimate expectations of the investors. The conduct may be categorized into the following three main groups:

1) general legal and regulatory framework of the host State;
2) contractual or quasicontractual relationship between the host State and the investor;
3) individual assurances/representations from the host State that the investor relied on when making its investment.

Each of the groups will be described in the following paragraphs, presenting a sample of case law, illustrating the kind of conduct that has been found to constitute a breach of the FET standard in relation to frustration of the investors’ legitimate expectations.

4.3.1 General legal and regulatory framework

The first set of circumstances that provide basis for the investors’ expectations is the general legislative and regulatory framework of the host State that was in force at the time the investor made its investment. The legal framework that the investor relies on typically includes legislation, treaties, decrees, regulations or other administrative provisions.

Both jurisprudence[278] and academia[279] are unified in that the legitimate expectations of the investor must be grounded in the framework as it stands at the time

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[277] *Ibid*.
[278] *LG&E*, para. 130 (‘[expectations] are based on the conditions offered by the host State at the time of the investment’); *Duke Energy Electroquil Partners and Electroquil SA v. Ecuador*, ICSID Case No. ARB/04/19, Award, 12 August 2008, para. 340 (‘expectations must be legitimate and reasonable at the time when the investor makes the investment’); *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 259 (rejecting the existence of legitimate expectations based on general legislative ‘assurances’ because the investor had entered the host state before those assurances were made); *National Grid P.L.C. v. Argentina*, UNCITRAL, Award, 3 November 2008, para. 173; *Bayindir Insaat Turizm Ticaret Ve Sanayi A. Ş. v. Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 190.

the investment is being made, even if treaty provisions provide no indication as to at what time expectations must exist in order to be worthy of protection.[280] It is from that moment that the legitimacy of the expectations is subsequently assessed.[281] The tribunal in *GAMI* categorically stated that "[NAFTA] arbitrators have no mandate to evaluate laws and regulations that predate the decision of a foreign investor to invest."[282] This view embraces both the host State's sovereign power to regulate and recognizes the investor's concern for planning and stability based on the framework at the time of the investment.[283]

4.3.1.1 Stability and consistency vs. regulatory flexibility

Protection of legitimate expectations is closely intertwined with the requirement of transparency and stability,[284] together constituting aspects of two competing interests – legal predictability and regulatory flexibility.[285] The States' power to regulate operates within the limits of rights conferred upon the investors.[286] While it is true that the host State has a legitimate right to regulate domestic matters in the public interest,[287] the FET standard still requires that the host State respects the legitimate expectations insofar as the investor should be treated with an appropriate degree of due process and, if possible, the State should seek to ameliorate the effects of the change of policy on the investor.[288]

It is precisely the question of finding a balance between investors' interest in stability, predictability and consistency on one hand, and host States' sovereign right to regulate and amend its legal framework on the other hand that constitutes the essence of the discussions regarding *inter alia* the FET standard itself. On this topic, Dolzer argues that BITs are generally drafter in a one-sided manner with the purpose of creating a hospitable investment environment and suggests that in the context of a BIT due to its

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[279] DOLZER, SCHREUER 2008, pg. 134; POTÈSTA, pg. 115.
[280] SCHREUER, C. H., KRIEBAUM, U. *At What Times Must Legitimate Expectations exist? In* (eds.) WERNER, J., ALI, A. H. (2010), pg. 266. *A Liber Amicorum: Thomas Wälde Law Beyond Conventional Thought*. Cameron May, London.
[281] POTÈSTA, pg. 115.
[282] *Gami Investments, Inc. v. The Government of the United Mexican States*, UNCITRAL, Award, 15 November 2004, para. 93.
[283] DOLZER, SCHREUER 2008, pg. 134.
[284] *Ibid*, pg. 133.
[285] HIRSCH, pg. 8.
[286] DOLZER, *Fair and Equitable Treatment: Today's Contours*, pg. 21.
[287] *Saluka*, para. 305.
[288] *Arif,* para. 537.

special nature, the host State's interest should not have the same weight as the investor's legitimate expectations.[289]

The difficult task of reconciling the opposing principles has been approached differently by different tribunals. A question presents itself – what degree of stability can the investors legitimately expect from the set out framework? Or as Potèsta puts it – "to what extent is the investor legitimately entitled to expect that such law is not going to change after it has performed its investment?"[290] Generally tribunals employ a balancing test between the antagonistic principles, which may also be described with reference to the proportionality principle.[291] While some tribunals have emphasized the need for a stable, legal and predictable environment and have maintained that host State's regulatory framework may create legitimate expectations for the investors, others were rather unfavorable towards the investors and stressed the host State's sovereign power to regulate conduct within its territory. As the tribunal in *Total* put it, it is the tribunals' task "'to determine whether the legislation, regulation and provisions invoked by [investor] constitute a set of promises and commitments […] whose unilateral modifications entail a breach of the legitimate expectations […]."[292]

Stability is desired for proper planning of the investment and lack of which is not conducive to investment-friendly climate.[293] Major investments generally tend to have a longer time span, often more than twenty years. The willingness of investors to make an investment in the respective location is determined partially with respect to the expected stability of the environment and thus generates legitimate expectations on behalf of the investors.[294]

However, not only stability of the host State's conduct, but also consistency is required under the FET standard. Thus the tribunal in *MTD* found that inconsistent treatment of an investment by two branches of the government of Chile , where the Foreign Investment Commission approved an investment that was contrary to the urban policy of the government, was found to be a breach of the obligation to treat an investor

[289] DOLZER, *Fair and Equitable Treatment: Today's Contours*, pg. 28.
[290] POTÈSTA, pg. 115.
[291] BANDALI, pg. 148.
[292] *Total*, para. 99.
[293] DOLZER, *Fair and Equitable Treatment: Today's Contours*, pg. 20.
[294] *Ibid,* pg. 23.

fairly and equitably.[295] Similarly in *Arif,* the FET standard was breached by inconsistent attitudes of the Moldavian state authorities. While the Airport State Enterprise and the State Administration of Civil Aviation endorsed and encouraged the investment, the courts found the same investment to be illegal.[296]

In order for the legal framework to be apparent to the investor, the host State is obliged to act in a transparent manner so that the investor may familiarize itself with the host State's conduct affecting the investment in a sufficiently advanced time frame and accordingly adjust its operations. A subsequent change of the framework that gave basis for the legitimate expectations performed in an untransparent manner will violate the FET standard. However, it is difficult to set the line as to what kind of change constitutes a breach of the FET standard considering the fact, that the "investor's expectations are rooted in regulation of a normative and administrative nature that is not specifically addressed to the relevant investor."[297]

4.3.1.2 Case law adopting duty to maintain stability as part of the FET standard

Nevertheless, certain tribunals have found basis for legitimate expectations rooted in the legal framework *per se*, extending the obligations under the FET standard as to cover the host State's duty to maintain a stable and predictable legal framework. The support for including this component into the FET standard was found in the preamble of the BITs which would often refer to stability as one of the goals of the treaty. The preamble, while not binding, serves as an interpretative tool that sheds light on the meaning of the words of the treaty.[298]

The tribunal in *Occidental* found that "stability of the legal and business framework is […] an essential element of fair and equitable treatment"[299] and that "there is certainly an obligation not to alter the legal and business environment in which the investment has been made."[300] It follows that a unilateral change of the legal and

[295] *MTD* Award, paras. 165-166.
[296] *Arif,* para. 547.
[297] *Total*, para 122.
[298] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, para. 264 ('[w]ords used in treaties must be interpreted through their context. The context of Article II.3 is to be found in the Preamble of the BIT, in which the contracting parties state "that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment…") [*Lemire* Decision on Jurisdiction].
[299] *Occidental,* para. 183.
[300] *Ibid*, para. 191.

contractual framework present at the time of the investment would frustrate the investors' expectations and thus violate the FET standard.

Similarly, the tribunals of the first generation of the Argentina cases[301] have followed this approach. However, as Potèsta points out, one must bear in mind that the investors in the Argentina cases were not relying solely on the regulatory framework, but also on more specific, individualized representations (granted by a governmental decree) that could not be revoked without the investor's consent.[302] It is therefore the subject of discussions as to what role did the regulatory framework play when evaluating whether Argentina has breached the FET standard. Nevertheless, all three tribunals in *CMS*, *LG&E* and *Enron* have connected the element of stability of the legal and business framework with the FET standard[303] and found a breach of the FET standard caused by substantial alteration of the framework present at the time the investment was made.[304]

Possibly the most extensive approach was adopted by the tribunal in *Lemire*[305], concerning an investment in the radio sector. The tribunal ruled that the protection granted under the FET standard included "the common level of legal comfort which any protected foreign investor in the radio sector could expect."[306]

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[301] Potèsta classifies as the first generation the *CMS* case, the *LG&E* case and the *Enron* case.
[302] POTÈSTA, pg. 116.
[303] *CMS*, para. 274 ('stable legal and business environment is an essential element of fair and equitable treatment'); *LG&E*, para. 125 ('an emerging standard of fair and equitable treatment in international law'), para. 131 (the FET standard contains the host State's 'obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor'); *Enron*, para. 260 ('key element of fair and equitable treatment is the requirement of a "stable framework for the investment'), para. 262 (protection of legitimate expectations was also identified as 'a facet of the [FET] standard').
[304] *CMS*, para. 275-281 (observing that the complained of measures did 'in fact entirely transform and alter the legal and business framework under which the investment was decided and made' and concluding that 'the measures adopted resulted in the objective breach of the [FET] standard'); *LG&E*, para. 132-139 (observing that Argentina 'completely dismantl[ed] the very legal framework constructed to attract investors' and therefore breached the fair and equitable treatment standard); *Enron*, para. 264 ('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. Argentina […] constructed a regulatory framework […] containing specific guarantees to attract foreign capital […].'), para. 265 ('The Tribunal observes that it was in reliance upon the conditions established by the Respondent in the regulatory framework for the gas sector that Enron embarked on its investment […] Enron had reasonable grounds to rely on such conditions.', concluding that the complained of measure caused a violation of the FET standard).
[305] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2001 [*Lemire,* Award].
[306] *Lemire*, Award, para. 70.

However, it must be noted that this approach was met with criticism by some. For instance, the tribunal in *El Paso* distanced itself from the implication that the FET standard contains the component of a stable legal and business framework, because "[e]conomic and legal life is by nature evolutionary."[307] On the same note, Sornarajah observes that such a broad interpretation effectively inserts a stabilization clause in the investment treaty and protects the content of the foreign investment contracts which goes "well beyond the intention of the parties."[308] Similarly, the tribunal in *Paushok* found that the investor without having negotiated a stability agreement could not legitimately expect that it would not be subject to modification of taxation levels.[309]

4.3.1.3 Case law favoring States' sovereign power to regulate over stability

On the contrary, other tribunals have favored the State's sovereign power to regulate within its territory that cannot be limited by existence of BITs.

In *Saluka,* the case revolved around an investment materialized in the form of a bank that was put under forced administration and subsequently taken over by a domestic bank. It is interesting to note that even though the tribunal considered legitimate expectations of the investors as "dominant element of [FET] standard"[310], at the same time it distanced itself from a literal interpretation of the stability requirement stating that:

> "[The requirement of stability] would impose upon host States' obligations which would be inappropriate and unrealistic. […] [The investors'] expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances. No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged."[311]

[307] *El Paso*, para. 352.
[308] SORNARAJAH, pg. 355.
[309] *Sergei Paushok, Cjsc Golden East Company, Cjsc Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011, para. 302.
[310] *Saluka*, para. 302.
[311] *Ibid*, para. 304, 305.

At the same time, the tribunal held that the investor can nevertheless expect the host State's treatment towards the investment will be fair and equitable as the investor's decision to invest is based on "an assessment of the state of the law and the totality of the business environment at the time of the investment."[312]

Similarly, the tribunal in *S. D. Myers*[313], when assessing the necessary degree of breaching conducting to violate the FET standard, stated that "determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders."[314]

The tribunal in *Continental* made a clear statement defending the host State's regulatory power and identified reliance on requirement of stability by the investors as unreasonable. It stated:

> "It would be unconscionable for a country to promise not to change its legislation as time and needs change, or even more to tie its hands by such a kind of stipulation in case a crisis of any type or origin arose. Such an implication as to stability in the BIT's Preamble would be contrary to an effective interpretation of the Treaty; reliance on such an implication by a foreign investor would be misplaced and, indeed, unreasonable."[315]

On the same note, the tribunal in *Total* commented that "regulation [of a normative and administrative nature that is not specifically addressed to the relevant investor] is not shielded from subsequent changes under the applicable law", [316] by which the tribunal effectively excluded grounding legitimate expectations in the general regulatory framework. However, the tribunal consequently recognized a possibility that "a claim to stability can be based on the inherently prospective nature of the regulation

[312] *Saluka*, paras 301, 305.
[313] *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000 [*S. D. Myers*].
[314] *S. D. Myers*, para. 263.
[315] *Continental*, para. 258.
[316] *Total*, para. 122.

at issue aimed at providing a defined framework for future operations."[317] The key word here is the prospective nature of the regulation, which the tribunal considered present in frameworks for long-term investments and/or regimes providing for "fall backs" or rights contingent on certain triggers.[318] Dolzer opined that the tribunal failed to firstly satisfactorily define prospective regulations and secondly provide a plausible explanation as to why only prospective regulations would found legitimate expectations, and regarded the award as not persuasive.[319]

There is no clear answer as to what kind of change of the framework already represents a breach of the FET standard and what does not. The performed tests by various tribunal differ, ranging from assessing the gravity of change[320] to the way the change occurs[321] or the discriminatory effect[322] or unreasonable nature[323] of such a change.[324]

4.3.2 Contractual or quasicontractual relationship

The second set of circumstances laying ground for legitimate expectations is a contractual or quasicontractual commitment that the investor and the host State have created between them. Contractual agreements in general constitute a tool for enhancing legal certainty, stability and predictability throughout all legal systems.[325] As Crawford remarks, "no issue in the field of investment arbitration is more fundamental, or more disputed, than the distinction between treaty and contract."[326]

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[317] *Ibid.*
[318] *Ibid.*
[319] DOLZER, *Fair and Equitable Treatment: Today's Contours*, pg. 24.
[320] *CMS, Enron, El Paso, LG&E.*
[321] *PSEG*, para. 254 ('stability cannot exist in a situation where the law kept changing continuously and endlessly, as did its interpretation and implementation').
[322] *Toto*, para. 244 ('[…] changes in the regulatory framework would be considered as breaches of the duty to grant full protection and fair and equitable treatment only in case of a drastic or discriminatory change in the essential features of the transaction').
[323] *Impregilo S.p.A. v. Argentina*, ICSID Case No. ARB/07/17, Final Award, 21 June 2011, para. 291 ('The legitimate expectations of foreign investors cannot be that the State will never modify the legal framework, especially in times of crisis, but certainly investors must be protected from unreasonable modifications of that legal framework.') [*Impregilo v. Argentina*].
[324] POTÈSTA, pg. 123.
[325] DOLZER, SCHREUER 2008, pg. 140; POTÈSTA, pg. 104.
[326] CRAWFORD, J. (2008). *Treaty and Contract in Investment Arbitration.* Arbitration International, vol. 24, pg. 351 [CRAWFORD].

Some tribunals have regarded expectations arising from contracts as somewhat more worthy of protection. The tribunal in *Continental* stated that "unilateral modification of contractual undertakings by governments […] deserve clearly more scrutiny [if compared to political statements and general legislative assurances], in the light of the context, reasons, effects, since they generate as a rule legal rights and therefore expectations of compliance."[327] This view is in accordance with the very nature of contracts – its content typically represents "the carefully negotiated balance achieved by opposing parties and could be said to crystallize the parties' expectations."[328] Crawford explicitly states that especially the doctrine of legitimate expectations should not be used as a substitute for actual negotiated contractual arrangements or serve as a license to arbitral tribunals to overwrite the contract itself.[329]

4.3.2.1 Distinction between contractual and treaty expectations

A distinction must be made between "purely contractual expectations" of fulfillment of a contract, and "treaty expectations", frustration of which causes a breach of the FET standard.[330] Total stability for contractual commitment is secured only when a so-called umbrella clause is present in the BIT; however, a widely accepted premise states that an outright repudiation of a contract by the host State would violate the investors' rights under the minimum standard of treatment of international - that is irrespective of any investment treaty.[331] Jurisprudence has not been uniform in its approach to the two views – as will be demonstrated below, some tribunals deem *pacta sunt servanda* as part of the FET standard and thus consider a mere breach of a contract as capable of violating the FET standard, whereas other tribunals have adopted a more restrictive approach. The tribunal in *Hamester* explicitly separated the two approaches when it held that "that the existence of legitimate expectations and the existence of contractual rights are two separate issues."[332] Ultimately, a similar set of facts could give rise to claims both for breach of contract and breach of treaty.[333]

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[327] *Continental,* para. 261.
[328] POTÈSTA, pg. 106.
[329] CRAWFORD, pg. 373.
[330] DOLZER, SCHREUER 2008, pg. 141.
[331] DOLZER, *Fair and Equitable Treatment: Today's Contours*, pg. 25.
[332] *Gustav F W Hamester GmbH & Co KG v. Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2008, para. 335.
[333] *Impregilo v. Pakistan*, para. 258 ('Hence, contrary to Pakistan's approach in this case, the fact that a breach may give rise to a contract claim does not mean that it cannot also – and separately – give rise to a

4.3.2.2 Case law equaling breach of contract as breach of the FET standard

The following cases demonstrate the more extensive approach adopted by some tribunals. For instance, the tribunal in *Mondev* held:

> "[…] a governmental prerogative to violate investment contracts would appear to be inconsistent with the principles embodied in Article 1105 and with contemporary standards of national and international law concerning governmental liability for contractual performance."[334]

In *SGS*[335], the tribunal opined that "an unjustified refusal to pay sums admittedly payable under an award or a contract at least raises arguable issues"[336] under the FET standard. Likewise, in *Rumeli*[337], the tribunal found the termination of the investment contract to have frustrated investor's legitimate expectations.[338] More broadly, the tribunal in *Toto* stated that legitimate expectations "may follow from explicit or implicit representations by the host state, or from its contractual commitments."[339] Similarly, the tribunal in *Noble Ventures* observed with regard to the FET standard the following:

> "[O]ne can consider [the FET standard] to be a more general standard which finds its specific application in inter alia the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures and the obligation to observe contractual obligations towards the investor."[340]

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treaty claim. Even if the two perfectly coincide, they remain analytically distinct, and necessarily require different enquiries.')

[334] *Mondev*, para. 134.

[335] *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 [*SGS*].

[336] *SGS*, para. 162.

[337] *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008 [*Rumeli*].

[338] *Rumeli*, para. 615.

[339] *Toto*, 159.

[340] *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, para. 182 [*Noble Ventures*].

However, this approach has been subject to criticism. Firstly, a breach of contract by a State is not *per se* considered a breach of international law,[341] although at the same time there is no presumption that a contract breach cannot also be a treaty breach.[342] Secondly, advocates for the restrictive approach also point out that such interpretation would effectively mean that "invocation of legitimate expectations would turn the fair and equitable treatment standard into a general umbrella clause."[343]

4.3.2.3 Case law requiring an aggravating factor for treaty breach

The following case law demonstrates tribunals that have chosen the restrictive approach and found that a simple breach of contract by the host State does not violate the FET standard. It is suggested that "something further", an aggravating factor, must be present in order for the contractual breach to violate the investment treaty.[344] In *Glamis Gold*, the tribunal consistently observed that:

> "A mere contract breach, without something further such as denial of justice or discrimination, normally will not suffice to establish a breach of Article 1105 [minimum standard or treatment]. Merely not living up to expectations cannot be sufficient to find a breach of Article 1105 of the NAFTA."[345]

[341] *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001). Yearbook of the International Law Commission, vol. II, Part Two. Report of the International Law Commission on the Work of its 53rd Session, UN Doc A/56/10, pg. 41 ('The breach by a State of a contract clearly does not as such entail a breach of international law. Something further is required before international law becomes relevant, e.g. a denial of justice by the courts of the State in proceedings brought by the other contracting party. But the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it may amount to an internationally wrongful act.'); CRAWFORD, pg. 358 (Exception from this would be a State's commitment 'by a treaty to comply with a contract, in which case a failure to do so is (subject to circumstance precluding wrongfulness) also a breach of an international obligation. Responsibility for breach of treaty is conceptually distinct from responsibility for breach of contract – but the latter may, depending on the context, entail or imply the former'.)

[342] BANDALI, pg. 149.

[343] POTÈSTA, pg. 104.

[344] *Ibid*, pg. 105.

[345] *Glamis Gold,* para. 620. Correspondingly *Azinian v. United Mexican States*, ICSID Case No. ARB/(AF)/97/2, Award, 1 November 1999, para. 87 ('NAFTA does not, however, allow investors to seek international arbitration for mere contractual breaches. Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes.')

The aggravating factor may materialize in various forms. Based on case law, Potèsta creates three categories:

1) the host State's excess of its capacity to act as an ordinary contractual party and exercise of public authority (*puissance publique*);
2) an outright repudiation of the contract where the host State does not act as an equal party, but rather abuses its superior position mandated by its sovereign nature; or
3) a substantial breach of the contract under certain limited conditions.

The following case law presents examples of the first category, that is the States' exercise of public authority.

In *Consortium RFCC*[346], the tribunal held with regard to a breach contract for motorway construction that only acts of the host State performed in its sovereign capacity would be capable of breaching the FET standard. Breaching conduct of the host State as an ordinary contractual partner does not rise to the necessary degree to violate the investment treaty.[347] In *Duke,* the tribunal observed that "it is now a well-established principle that in and of itself the violation of a contract does not amount to the violation of a treaty."[348] In *Impregilo v. Pakistan*, the investor engaged with Pakistan in a project related to a hydroelectric facility. The investor claimed a breach of the FET standard based on the host State's alleged failure to perform under the investment contract. The tribunal ruled as follows:

> "In order that the alleged breach of contract may constitute a violation of the BIT, it must be the result of behaviour going beyond that which an ordinary contracting party could adopt. Only the State in the exercise of its sovereign authority ("*puissance publique*"), and not as a contracting party, may breach the obligations assumed under the BIT."[349]

[346] *Consortium RFCC v. Royaume du Maroc*, ICSID Case No. ARB/00/6, Award, 22 December 2006 [*Consortium RFCC*].
[347] *Consortium RFCC*, paras. 33-34.
[348] *Duke*, para. 342.
[349] *Impregilo S.p.A. v. Islamic Republic of Pakistan,* ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005, para. 260 [*Impregilo v. Pakistan*].

Finally it should be noted that even if the relationship between the host State and the investor is of a commercial nature, the motives for certain conduct may still be governmental.[350]

As a representative of the second group, that is cases concerned with an outright repudiation of a contract, the tribunal in *Waste Management* held:

> " […] even the persistent non-payment of debts by a municipality is not to be equated with a violation of Article 1105, provided that it does not amount to an outright and unjustified repudiation of the transaction and provided that some remedy is open to the creditor to address the problem."[351]

Lastly, as a part of the third group of circumstances connected to a substantial breach of the contract under specific circumstances, the tribunal in *Parkerings*[352] was dealing with a construction contract entered into by the city of Vilnius and the investor and later terminated by the city. The tribunal recognized the possibility that "[u]nder certain limited circumstances, a substantial breach of a contract could constitute a violation of a treaty."[353] Nevertheless, it subsequently rejected a broad approach to the concept of legitimate expectations and held that:

> "It is evident that not every hope amounts to an expectation under international law. The expectation a party to an agreement may have of the regular fulfilment of the obligation by the other party is not necessarily an expectation protected by international law. […] Indeed, the party whose contractual expectations are frustrated should, under specific conditions, seek redress before a national tribunal."[354]

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[350] DOLZER, SCHREUER 2008, pg. 142.
[351] *Waste Management*, para 115.
[352] *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007 [*Parkerings*].
[353] *Parkerings*, para. 316.
[354] *Ibid*, para. 344.

Several other tribunals have also embraced the restrictive approach.[355]

4.3.3 Individual assurances/representations

The last category of circumstances laying ground for legitimate expectations are specific assurances, representations or promises from the host State aimed at the investor that the investor relies on when making its investment.[356] It is therefore apposite to examine to what extent such representations are capable of arousing legitimate expectations of the investors, frustration of which would lead to violation of the FET standard. It should be recognized that clear and unequivocal unilateral statements are binding under customary international law, irrespective of the context of the FET standard.[357] In some cases, the investor relies solely on such representations, however it is more often the case when the individual assurances are present together with the two above mentioned categories, i.e. regulatory framework and contractual commitments.

The recognition of legitimate expectations arising from individual representations is no novelty. In 1992, the tribunal in *SPP* held that even acts of Egyptian officials that were challenged as invalid under domestic law created expectations protected by established principles of international law.[358]

In a more general way, the tribunal in *Waste Management* stated the following:

> "In applying [the fair and equitable treatment] 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."[359]

The investor in *Thunderbird* claimed breach of the FET standard essentially relying merely on a legal opinion issued by Mexican officials regarding the legality of

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[355] For example *Duke*, para. 358; *Impregilo v. Argentina*, para. 292; *Saluka*, para. 442 ('[t]he Treaty cannot be interpreted so as to penalise each and every breach by the Government of the Rules or regulations to which it is subject and for which the investor may normally seek redress before the courts of the host State.').

[356] For convenience, the terms assurance, representation and promise will be used interchangeably for the purposes of this thesis.

[357] DOLZER, *Fair and Equitable Treatment: Today's Contours*, pg. 24.

[358] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award and Dissenting Opinion, 20 May 1992, paras. 82-83 [*SPP*].

[359] *Waste Management,* para. 98.

the investment. The Mexican authorities subsequently forbid the investment to be performed due to its conflict with domestic gaming regulations. The tribunal ruled that an investor may rely on the host State's actions that lay ground to justifiable expectations and found:

> "[T]he concept of "legitimate expectations" relates . . . to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or an investment) to act in reliance on such conduct, such that a failure by the Party to honor those expectations could cause the investor (or the investment) to suffer damages."[360]

The claim was however subsequently dismissed, the key issue in that case being the investor's incomplete disclosure[361] of the nature of its investment that "put the reader on the wrong track"[362] which thus the Mexican officials were not fully informed when drafting the legal opinion.[363]

4.3.3.1 Relied on assurance must induce the investment

Some tribunals have added a condition that the relied on assurances must have specifically induced the investment. Thus the tribunal in *Sempra* commented that the protection of legitimate expectations becomes "particularly meaningful when the investment has been attracted and induced by means of assurances and representations."[364] The tribunal in *Glamis Gold* made a corresponding statement and furthermore elevated the expectations based on representations that induced the investment to a quasicontractual level. It held:

> "[A] State may be tied to the objective expectations that it creates in order to induce investment. Such an upset of

[360] *Thunderbird Gaming,* Award, para.147.
[361] Similarly, the tribunal in *Chemtura* observed that legitimate expectations are unworthy of protection if the representation, assurance or promise was procured by fraud o rif the investor failed to disclose relevant facts (*Chemtura Corporation v. Government of Canada*, NAFTA/UNCITRAL, Award, 2 August 2010, para. 179).
[362] *Thunderbird Gaming,* Award, para. 155.
[363] *Ibid*, paras. 145-155.
[364] *Sempra*, para. 298.

expectations thus requires something greater than mere disappointment; it requires, as a threshold condition, the active inducement of a quasi-contractual expectation."[365]

4.3.3.2 Ambiguity and lack of specificity of the assurances

Not every representation of the host State is capable of creating legitimate expectations. A certain level of specificity and lack of ambiguity must be present in order to enforce protection under the concept of legitimate expectations.[366] The tribunal in *El Paso* opined that no general definition of what constitutes a specific commitment can be given because all depends on circumstances.[367] Nevertheless, the tribunal created two categories of assurances that would typically give rise to legitimate expectations – representations specific as to the addressee and those specific as to the object and purpose they address.[368] The former can exist in the form of for example contract, letter of intent or a specific promise given in a personal business meeting.[369] The latter is relevant because it addresses a particular object of investment which typically could not be done in general regulatory texts as those evolve and modify in the course of their existence.[370]

An example of insufficiently specific representations may be found in the *Frontier Petroleum*[371] case. The investor received two letters from a Deputy Minister of Industry and Trade of the Czech Republic which merely indicated that there may be a possibility to enter into negotiations with the investor in the future.[372] The tribunal in its analysis of the claim brought under the full protection and security standard examined the nature of the relevant letters. It found that the letter merely presented a possibility that the state could negotiate with the investor and as such "did not provide an adequate basis for the [investor] to rely on some form of representation or expectation."[373] The tribunal dismissed the claim finding that the representations "do not exhibit the level of

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[365] *Glamis Gold*, para. 766.
[366] POTÈSTA, pg. 109.
[367] *El Paso,* para. 375.
[368] *Ibid.*
[369] *Ibid*, para. 376.
[370] *Ibid*, para. 377.
[371] *Frontier Petroleum Services Ltd v. Czech Republic*, UNCITRAL/PCA, Final Award, 12 November 2010 [*Frontier Petroleum*].
[372] *Frontier Petroleum*, para. 76.
[373] *Ibid*, para. 465.

specificity necessary to generate legitimate expectations" and furthermore pointed out that since the letters were issued after the investment had been made, they could not have generated legitimate expectations by the investor because legitimate expectations are temporally tied and must be present at the date of making of the investment.[374]

The following pair of cases demonstrates the contrast between specific and ambiguous representation. In *Metalclad*, the investor had received construction and operating permit for its investment from the Mexican federal and state officials. [375] It lacked a construction from the municipality, but it was repeatedly assured by the federal officials that the municipal permit would be issued as a matter of course and proceeded with the construction.[376] The municipality subsequently took steps to prevent the construction from being completed and the site itself from ever operating. The tribunal found a breach of the FET standard because the municipality's actions in denying the permit were improper and that the investor was "entitled to rely on the representations of federal officials and to believe that it was entitled to continue [the] construction."[377]

Consequently, the tribunal in *Feldman* when assessing the specificity of the representations in the case at hand looked at the *Metalclad* scenario and compared the factual patterns. In *Feldman*, the investor, a registered exporter of cigarettes, was allegedly deprived of benefits of a law that provided certain tax refunds to domestic exporting companies.[378] The investor alleged that Mexican tax officials issued oral assurances in that rebates would be paid and that a negotiation of an oral agreement took place; both of which Mexico vigorously denied.[379] The tribunal looked at the representations that the investor relied on when making its investment. It opined that while the assurances in *Metalclad* were "definitive, unambiguous and repeated"[380], nor was there "any indication that the assurances received by [investor], despite some ambiguities, were inconsistent with Mexican law on its face"[381], the situation in *Feldman* was substantially different in several ways. Firstly, the Mexican authorities opposed the investor's business activities from the very outset; secondly, the assurances

[374] *Frontier Petroleum*, para. 468.
[375] For a more detailed facts summary, see pg. 32.
[376] *Metalclad*, para. 88.
[377] *Ibid*, para. 89.
[378] *Feldman*, paras. 7-23.
[379] *Ibid*, para. 18.
[380] *Ibid*, para. 148.
[381] *Ibid*.

that the investor in *Feldman* allegedly relied on were in direct conflict with national law; and lastly, the relied on assurances were at best ambiguous and largely informal, considering that the investor never sought a formal tax ruling or litigated the issue until years later.[382]

Another example of assurances not found to give rise to legitimate expectation is the *PSEG* case. The investor relied on legislative changes courting foreign investors to invest, informal assurances that investment agreements would be signed, together forming the host State's policy to encourage and welcome investors which allegedly laid ground for the investor's legitimate expectations.[383] The tribunal was not persuaded as to the relevancy of the alleged wrongdoing to the concept of legitimate expectations. According to the tribunal, "[l]egitimate expectations by definition require a promise of the administration on which the Claimants rely to assert a right that needs to be observed",[384] whereas the host State's conduct "did not entail a promise made specifically to the Claimants about the success of their proposed project."[385] While legitimate expectations were not found to have been frustrated, breaches of other components of the FET standard gave rise to the host State's liability.[386]

4.3.3.3 Assurances granted by politicians – assurances at all?

When it comes to statements of a more general nature issued by politicians in varying contexts, tribunals' approach differs.[387] While the tribunals in *Continental* and *El Paso* disregarded them observing that "political statements have the least legal value, regrettably but notoriously so"[388] and pointed out "the limited confidence that can be given to such political statements in all countries of the world",[389] other tribunals at least took them into consideration. For instance, in *MTD*, the award repeatedly uses in its analysis a toast speech praising the project of the investment together with a public

[382] *Ibid*, para. 149.
[383] *PSEG*, para. 226.
[384] *Ibid*, para. 241.
[385] *Ibid*, para. 243.
[386] *Ibid*, paras. 245-256.
[387] POTÈSTA, pg. 111.
[388] *Continental*, para. 261.
[389] *El Paso*, para. 395. The tribunal in El Paso further held that also road shows, conferences and seminars performed on behalf of the host State in order to explain the main features of the regulatory framework set up to induce investment lacked sufficient specificity in order to lay ground for legitimate expectations.

statement sent to be read at the inauguration of the project.[390] The tribunal may have taken these actions into consideration,[391] however the impact is not clear.

4.4 Conclusion

The following conclusions may be drawn. Even if the concept of protection of legitimate expectations does not have clear contours and it is inherently impossible to formulate a finite definition as to what all types of conduct give rise to legitimate expectations, arbitral tribunals have throughout their practice identified boundaries limiting the concept.

When investors' expectations are grounded in general regulatory, legal and/or business framework of the host States, the majority of tribunals has put emphasis on to the States' sovereign power to regulate conduct within its territory.

With regard to legitimate expectations based on contractual commitments, the majority approach clearly differentiates between expectations arising from purely contractual commitments and those arising from investment treaty. Tribunals have stated that in order for a frustration of legitimate expectations arising out of purely contractual commitment to violate the FET standard and thus reach investment treaty protection, an aggravating element must be present together, such as conduct of the host States' beyond the capacity of a mere contractual party due to its sovereign nature.

In cases of legitimate expectations founded on individual representations or assurances, an element of specificity either toward the investor or the object of the investment together with lack of ambiguity must be present in order for the expectations to enjoy treaty protection. Tribunals have provided rather casuistic examples of insufficiently specific representations, such as a letter merely suggesting a future possibility for negotiations.

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[390] *Continental*, paras. 63, 133, 156, 157.
[391] POTÈSTA, pg. 111.

Conclusion

At the beginning of this thesis, two propositions were set out. Firstly that the principle of protection of legitimate expectations is an established principle of investment law with traceable origins in both domestic and general international law. The second proposition suggested that invocation of legitimate expectations in investment disputes has become the keystone of investors' claims in investment disputes in general with tribunals adopting increasingly extensive interpretation of the concept, inquiring whether the concept of legitimate expectations due to its vagueness provides an unjustifiably broad protection to investors. In order to confirm or refute the suggested propositions, this thesis firstly examined the concept of legitimate expectations, its origins and evolution, searching for justification of its application in investment law. Secondly, it analyzed the application of the concept of legitimate expectations by arbitral tribunals within expropriation and FET standard claims based on relevant case law, examining the scope of interpretation of the concept by the tribunals.

With regards to the first part, the following conclusions may be drawn. Protection of legitimate expectations in the most general way provides under certain conditions protection to a party that has suffered damages due to frustration of its reasonable, objectively grounded expectations that it relied on. Such expectations were created and consequently frustrated by the counterparty. Protection of legitimate expectations is a legal principle well known in many legal systems of the world, both in the civil and common law countries. Through comparison of application of the concept in individual systems, usually as a part of administrative law, shared commonalities are evident. This fact provides one of the possible answers to the question as to what are the roots of the concept of protection of legitimate expectations as applied in investment law.

Accordingly, the first possible explanation suggests that the concept of protection of legitimate expectations is a general principle of law. According to the ICJ Statute, general principles of law recognized by civilized nations are sources of law and furthermore act as an interpretative tool. There is nevertheless debate as to whether in fact application of the concept within domestic systems demonstrates sufficient uniformity necessary in order to pronounce it as a general principle of law. Indeed,

while common law countries such as Australia or Canada generally provide protection of legitimate expectations only to procedural rights, the civil law countries extend protection to substantive rights as well, Germany at the front with the most extensive system, other European countries following with a more restrictive approach. The concept is present also in the legal system of the European Union.

Critics warn about considering protection of legitimate expectations as a general principle of law because of its vast applicability that could subsume many various assurances given by the States. I on the other hand agree with the presented counterarguments stating that even if there are slight discrepancies between the application in individual domestic systems, such differences cannot preclude a globally known concept from becoming a general principle of law. Indeed, a full symmetry between individual domestic systems is unrealistic and highly unlikely. Furthermore, as case law demonstrates, sometimes even if the concept of protection of legitimate expectation is not denominated in the same explicit terms, jurisprudence reaches a similar outcome, thus demonstrating congruence and further supporting the understanding of the principle of protection of legitimate expectations as a general principle of law.

The second possible explanation justifying the presence of legitimate expectations in investment law suggests that the concept is a part of the general principle of protection of good faith. However, the principle of protection of good faith cannot itself insert legal obligations where they would otherwise not exist. Therefore, if the protection of legitimate expectations were to be a part of the obligation to act in good faith, frustration of legitimate expectations should not in theory lead to liability of the State as long as it acts in good faith. Yet, several arbitral awards such as *Tecmed* have held States liable for breach of investors' expectations under an FET claim despite the fact that the State acted in good faith. In my opinion, a reasonable approach would be to derive the duty to respect legitimate expectations from the fair and equitable treatment standard and utilize the good faith principle as a guiding interpretative tool for its application.

As to the evolution of the principle of protection of legitimate expectations in investment law, the concept has been employed as early as in 1982 in the *Aminoil* case, yet it is only in the past roughly 15 years that they have surfaced and acquired a

prominent position within investment claims. While in the past protection of legitimate expectations was applied rather as a subsidiary principle to reinforce a particular chosen interpretative approach, it has evolved into a self-standing category for breach of investors' rights of an ever increasing importance. The concept has nevertheless been criticized for uncertainty as to its content, lack of boundaries and thus providing protection to investors relying on unrealistic, unlimited or purely subjective expectations allowed exactly due to the unclears contours of the concept.

Accordingly, the second main goal of this thesis was to illuminate the content of the concept of legitimate expectations which was achieved by analysis of practical approach by the arbitral tribunals in interpreting and applying the concept of legitimate expectations in two main substantive provisions, under which frustration of legitimate expectations is most often claimed – protection against expropriation and FET standard.

In the case of expropriation claims, frustration of legitimate expectations has been claimed by investors in the vast majority in instances of indirect expropriation. Indirect expropriation itself invites discussion as to what measures of the host State are to be determined as legitimate non-compensable regulatory measures, even if harmful to the investment, and which measures already amount to compensable indirect expropriation, yet that discussion is beyond the scope of this thesis. One of the guiding criteria set out by tribunals in assessment whether expropriation has taken place are the investors' legitimate expectations that its rights will not be regulated or restricted in a certain way that the investor has reasonably relied on. However, case law has demonstrated that a substantial interference with the investment effectively neutralizing or destructing the investment must be present for a finding of indirect expropriation. Moreover, tribunals have applied a high threshold for finding of a frustration of legitimate expectation in this context, accepting only explicit and specific representations towards the investor rather than assurances of a more general nature.

The restrictive approach adopted by the tribunals is in my opinion correct. Expropriation represents the most serious infringement of property rights of investors exercised by the host State in public interest. Accordingly, only truly substantial interferences with the investment, such as when the host State completely prevents the operation of the investment or deprives the investor of ownership rights, should fall within the ambit of expropriation as a narrow category by nature.

Nevertheless, protection to investors against detrimental conduct by the host State that is not covered by narrower substantive provisions must be safeguarded by broader and more general provisions. The second part of the practical section of this thesis thus addresses the fair and equitable treatment standard under which frustration of legitimate expectations is most frequently claimed.

The following may be concluded. The FET standard has become the most invoked standard of protection in investment disputes, yet still the content of the standard is not clear. Two major opinions have crystalized regarding the relationship between the FET standard and customary international law. The first opinion argues that both are the same and the FET standard is nothing more but another expression for the minimum standard of treatment under customary international law. The second view on the other hand considers the FET standard as an autonomous standard of protection that goes beyond customary international law. Unless an indication is present in the text of the investment treaty or a binding interpretation exists such as in the case with NAFTA, it is my opinion that the second view must prevail. It is unimaginable that drafters of investment treaties would use the terms “fair and equitable treatment” and in fact mean the well-known minimum standard treatment. The autonomous approach is moreover accepted by majority of tribunals, whereas tribunals applying the minimum standard treatment out of NAFTA context are scarce.

An autonomous FET standard is a flexible concept open to arbitral findings as to its content. It is precisely its elasticity that makes it attractive to investors and threatening to host States. From its nature, the FET standard is ready to cover all possible factual patterns of breaching conduct that do not fall within the ambit of more specific provisions such as protection against expropriation or full security and protection, but still violate the rights of investors who are to be justly compensated.

The tribunals, even if somewhat reluctant in the beginning, have gradually found the protection of investors’ legitimate expectations to constitute a part of the FET standard. In fact, the protection of legitimate expectations has risen to become considered as the “dominant element”, “one of the major components”, “the essential element” or the “most important function” of the FET standard.

Generally, in order for expectations to reach treaty protection, they must be reasonable, based on objective assessment of the environment of the host State and the investor must rely on them at the time that the investment is made. Already exceeding the prescribed range, it was beyond the scope of this thesis to inquire further into all the necessary factors the investor must take into consideration at the time the investment is made and that could play a role in assessing the legitimacy of such expectations, such as vicissitudes in economic and social environment, changing political regimes, or generally low development of the host State. However, the topic is certainly worth further research and may be the subject of future academic works.

One may divide the circumstances laying ground to investors' expectations into three subgroups – firstly the general legal and regulatory framework of the host State, secondly contractual commitments between the investor and the host State, and lastly individual representation attributable to the host State.

It is not unusual for an investment to have a longer time span, often exceeding decades. Thus when an investor makes an investment and relies on general legal and regulatory framework as it is at the time of the investment, it expects an environment of stability, consistency and predictability. The host States on the other hand undeniably have the sovereign right to regulate conduct within their territory; however, a change of the framework is to be performed in a transparent, non-discriminatory and non-arbitrary manner. These two competing interests, legal predictability and regulatory flexibility, are in contradiction and tribunals have applied different tests to find balance between the two.

Some tribunals in cases such as *Occidental* or *Lemire* have emphasized the importance of stability of the legal framework, often pointing to the language in preambles of the relevant investment treaties, and found legitimate expectations to be rooted in the legal framework *per se*, unilateral change of which would frustrate such expectations. In my opinion such an attitude appears too extensive. If such approach is adopted, it is hard to find any difference between the FET standard provision and a stabilization clause. The differentiation would thus lose its purpose and the FET standard would effectively preclude States from exercising its sovereign power, or rather sanction it by providing damages to the investors.

Other tribunals have on the contrary favored States' sovereign power to regulate over investors' expectations of stability, finding that requirement of stability imposes inappropriate and unrealistic obligations on the host States and reliance on such a requirement by investors is unreasonable since economic and legal life is by nature evolutionary. Nevertheless, it is important to point out that this does not give the host State a permission to regulate in any discretionary manner since the host State is always obligated to treat the investor fairly and equitably.

With regard to contractual commitments, one must distinguish between expectations arising purely out of investment contracts as to its fulfilment, and expectations stemming from the investment treaty, frustration of which causes a breach of the FET standard. Certain tribunals have equated the two types of expectations, stating that an investor is entitled to expect that the investment contract will be performed, however such approach would effectively turn the FET standard into an umbrella clause. Majority of tribunals on the other hand require an aggravating factor to be present in order to elevate a breach of an investment contract to a violation the FET standard. Based on case law, such an aggravating factor may materialize as mainly the host State's exercise of public authority and thus exceeding its position as an ordinary contractual party or an outright repudiation of the contract connected with the host State's abuse of its superior position.

The third category of circumstances are statements of a specific nature by the host State aimed at the investor in order to induce the investment. However, not all representations are protected. A certain level of specificity and lack of ambiguity must be present in order for legitimate expectations to be created. While it is not possible to provide an all-embracing definition of the specific conditions, tribunals have clarified some of insufficiently specific representations, such as written communication merely confirming a possibility for future negotiations, oral representations not further sought to be confirmed or host State's policy to encourage and welcome investors. Special negative connotation is connected with statements issued by politicians which were found to have the least legal value.

The outcome of this thesis is thus following – the concept of legitimate expectations are a well-established principle of the international investment law with solid traceable roots in domestic law and international law. Two main mutually non-

exclusive explanations suggest that the concept may either be considered a general principle of law or part of the good faith principle. The first proposition is thus confirmed.

As to the second proposition, legitimate expectations together with the FET standard play a major role in investment arbitration and will continue to shape the contours of investment law in general. It is nevertheless my opinion based on the performed research of case law that there is not a trend in an extensive interpretation. Tribunals attempt to set limits to the flexible standard of protection and exclude illegitimate expectations in a casuistic manner. Yet indeed, the multitude of grievances suffered by the investors will continue to vary and evolve. The types of actions which affect the foreign investors' interests have turned out to be very broad, ranging from tax matters to contractual issues, from tariff regulations to the conduct of renegotiation, from open communication among state and investor, including to the organization of a bidding process. However, the fact that some yet unknown factual patterns rightfully fall within the scope of protection of legitimate expectations cannot be equated with an extensive interpretation. The second proposition is therefore partially refuted.

As to the future development of the FET standard and the concept of protection of legitimate expectations, it is my strong belief that both will remain highly relevant. New factual patterns of breaching conduct will be discovered which will not fall into the ambits of the more specific categories of protection set out in the investment treaties. That is where legitimate expectations together with the FET standard do and will continue to be of most use, in filling the gaps and providing protection to investors where otherwise it may not be granted.

List of abbreviations

BIT	Bilateral Investment Treaty
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECT	Energy Charter Treaty
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
ICJ	International Court of Justice
ICSID	International Center for Settlement of Investment Disputes
NAFTA	North American Free Trade Agreement
UNCTAD	United Nations Commission on Trade and Development
VCLT	Vienna Convention on the Law of Treaties

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Abstrakt

Právní institut ochrany legitimních očekávání hraje v právu mezinárodních investic důležitou roli. Ačkoli se do popředí dostal především v průběhu posledních patnácti let, jeho význam a uplatnění stále vzrůstá. Daný institut poskytuje ochranu rozumným a ospravedlnitelným očekáváním na straně investorů založeným na objektivně seznatelném chování hostitelského státu, na které se investor při investování spoléhá a jimž hostitelský stát následně nedostojí, a způsobí tak investorům škodu.

Koncept legitimních očekávání nicméně vyvolává debaty týkající se oprávněnosti aplikace institutu v právu mezinárodních investic a vzbuzuje obavy z nejasných hranic daného institutu a přílišně extenzivního výkladu. Tato diplomová práce si klade za cíl potvrdit, či vyvrátit dvě základní teze. Zaprvé, princip ochrany legitimních očekávání je etablovaný právní institut práva mezinárodních investic s patrnými kořeny v národních právních systémech i v obecném mezinárodním právu. V rámci zkoumání této otázky práce nastiňuje možná teoretická zakotvení konceptu obhajující jeho aplikaci v investičním právu, ale i související kritiku. Mají legitimní očekávání svou oprávněnou pozici v právu mezinárodních investic, nebo se jedná o nesprávné použití daného institutu?

Druhá teze reaguje na zvyšující se varovné hlasy upozorňující na stále výraznější pozici legitimních očekávání v rámci investičních sporů a související přílišně extenzivní výklad daného institutu rozhodčími tribunály. Porušení legitimních očekávání jsou ve většině investičních sporů součástí nároků investorů z porušení práva na spravedlivé a rovné zacházení, jenž jakožto flexibilní standard ochrany je sám předmětem kritiky pro neurčitost vymezení případů, na které jej tribunály aplikují. Druhý postulát je tedy následující: Poskytují legitimní očekávání díky své vágnosti neoprávněně široké spektrum ochrany investorům?

Při zkoumání platnosti nastíněných tezí práce vychází primárně z judikatury jak institucionálních, tak *ad hoc* rozhodčích tribunálů. Sekundárním zdrojem je akademická literatura týkající se dané problematiky. Vzhledem k tomu, že pro zkoumání platnosti tezí je třeba zhodnotit historický vývoj i stávající stav judikatury a ze sesbíraných poznatků následně formulovat obecné závěry, práce užívá metodu syntetickou a

analytickou. Pro druhou část práce zabývající se vyhodnocením judikatury rozhodčích tribunálů je použita metoda diachronní komparace.

Abstract

The concept of legitimate expectations plays a significant role in international investment law. Although it is only in the past roughly fifteen years that the concept has come to the spotlight, its importance and utilization is on the rise. Generally speaking, the concept of legitimate expectations, under certain conditions, allows a foreign investor to claim compensation in situations where the conduct of a host State creates a legitimate and reasonable expectation that the investor may rely on such conduct, and consequently the host State fails to fulfill those expectations, causing damages to the investor.

However, the concept of protection of legitimate expectations has stirred up debates as to the legitimacy of its use in investment law and raised concerns due to its imprecise boundaries and excessively extensive interpretation. Accordingly, it is the goal of this thesis to either confirm or refute two main propositions. The first proposition suggests that the principle of protection of legitimate expectations is an established principle of investment law with traceable origins in both domestic law and general international law. The examination of the first proposition addresses theoretical roots of the concept of legitimate expectations justifying its application in investment law together with related criticism. Do legitimate expectations hold a rightful position in investment law or has there been a misapplication of the concept?

The second proposition addresses the increasing warning voices drawing attention to the ever growing role of legitimate expectations in investment claims and related allegedly excessively extensive interpretation adopted by arbitral tribunals. Frustration of legitimate expectations is most frequently claimed within the violation of the fair and equitable treatment standard, a flexible standard of protection which itself is not seldom subject to criticism due to its unclear contours. Thus, the second proposition asks the following: Does the concept of legitimate expectations due to its vagueness provide unjustifiably broad protection to investors?

This thesis uses as a primary type of utilized sources investment case law, formulated both by institutional and *ad hoc* tribunals. Secondary sources employed in research for this thesis include academic literature embracing all the set out topics. With regard to both propositions, the aim of this thesis is to either confirm or refute the given

statements and formulate a general conclusion which is best achieved through evaluation of the current status and preceding historical evolution. Accordingly, this thesis employs the synthetic and analytic method as the most suitable approaches. The second part of this thesis partially uses the method of diachronic comparison addressing the evolution of interpretation of the concept of legitimate expectations by arbitral tribunals.

Teze v českém jazyce

Právní institut ochrany legitimních očekávání hraje v právu mezinárodních investic důležitou roli. Ačkoli se do popředí dostal hlavně v průběhu posledních patnácti let, jeho význam a uplatnění stále vzrůstá. Daný institut poskytuje ochranu rozumným a ospravedlnitelným očekáváním na straně investorů založeným na objektivně seznatelném chování hostitelského státu, na které se investor při investování spoléhá a jimž hostitelský stát následně nedostojí, a způsobí tak investorům škodu.

Koncept legitimních očekávání nicméně vyvolává debaty týkající se oprávněnosti aplikace institutu v právu mezinárodních investic a vzbuzuje obavy z nejasných hranic daného institutu a přílišně extenzivního výkladu. Tato diplomová práce si klade za cíl potvrdit, či vyvrátit dvě základní teze. Zaprvé, princip ochrany legitimních očekávání je etablovaný právní institut práva mezinárodních investic s patrnými kořeny v národních právních systémech i v obecném mezinárodním právu. V rámci zkoumání této otázky práce nastiňuje možná teoretická zakotvení konceptu obhajující jeho aplikaci v investičním právu, ale i související kritiku. Mají legitimní očekávání svou oprávněnou pozici v právu mezinárodních investic, nebo se jedná o nesprávné použití daného institutu?

Druhá teze reaguje na zvyšující se varovné hlasy upozorňující na stále výraznější pozici legitimních očekávání v rámci investičních sporů a související přílišně extenzivní výklad daného institutu rozhodčími tribunály. Porušení legitimních očekávání jsou ve většině investičních sporů součástí nároků investorů z porušení práva na spravedlivé a rovné zacházení, jenž jakožto flexibilní standard ochrany je sám předmětem kritiky pro neurčitost vymezení případů, kdy jej tribunály aplikují. Druhý postulát je tedy následující: Poskytují legitimní očekávání díky své vágnosti neoprávněně široké spektrum ochrany investorům?

První část této diplomové práce nastiňuje teoretické zakotvení právního institutu ochrany legitimních očekávání. Nálezy rozhodčích tribunálů zřídkakdy obsahují právní argumentaci podporující užití legitimních očekávání, naopak často pouze odkazují na předchozí nálezy. Takový cyklický proces vede k otázkám, je-li vůbec aplikace principu legitimních očekávání v právu mezinárodních investic legitimní, a to i s ohledem na

fakt, že ve většině případů není právo na ochranu legitimních očekávání výslovně zakotveno v textu investičních smluv.

Práce popisuje dvě nejrozšířenější pojetí principu ochrany legitimních očekávání odůvodňující jeho použití – zaprvé jako samostatná obecná právní zásada a zadruhé jako součást právní zásady ochrany dobré víry.

Chápání ochrany legitimních očekávání jako samostatné právní zásady lze vyvodit z jeho přítomnosti a aplikace v právních systémech mnoha jednotlivých států, a to zpravidla jako součást správního práva. Rozhodčí tribunály při své činnosti aplikují právní zásady z národního správního práva, které se jeví jako vhodné, jelikož vznikly v obdobně asymetrických podmínkách, v jakých se nachází investor a stát. Ochrana legitimních očekávání se objevuje jak v zemích kontinentálního právní systému, kde největším zastáncem s nejširším pojetím je Německo, tak v zemích anglosaského práva, kdy ovšem státy jako Kanada, Austrálie či donedávna Spojené království Velké Británie a Severního Irska poskytují ochranu pouze procesním, nikoli materiálním očekáváním. Nicméně aby ochrana legitimních očekávání mohla být považována za obecnou právní zásadu, musí se vyskytovat v národních právních systémech a musí existovat shoda týkající se aplikace daného principu, ačkoli není zcela jasně stanoveno, v kolika právních systémech se musí vyskytovat či jak stejnorodá musí aplikace být. Třebaže jistě existují rozdíly v aplikaci v jednotlivých národních systémech, nelze rozumně předpokládat naprostou uniformitu, práce se tedy přiklání k názoru, že princip ochrany legitimních očekávání lze považovat za obecnou právní zásadu.

Jako druhé možné pojetí lze uvažovat o zařazení legitimních očekávání pod právní zásadu ochrany dobré víry. Dobrá víra slouží jako důležité vodítko pro interpretaci smluv, což je podpořeno i výslovným zakotvením v článku 31 Vídeňské úmluvy o smluvním právu. Zásada ochrany dobré víry nicméně sama o sobě nezakládá právní povinnost, která by jinak neexistovala na jiném právním základě. Z toho vyplývá, že porušení legitimních očekávání, pokud by spadalo po zásadu ochrany dobré víry, by nevedlo k právní odpovědnosti států vůči investorům. Ačkoli tedy rozhodčí tribunály například v nálezech *Thunderbird* či *Tecmed* propojily povinnost ochrany legitimních očekávání se zásadou ochrany dobré víry, byly zároveň předmětem kritiky právě pro nedostatečné objasnění vyvození odpovědnosti států za narušení takových očekávání.

Závěr první části této práce tedy potvrzuje první stanovenou tezi v tom smyslu, že princip ochrany legitimních očekávání lze považovat za obecnou právní zásadu, jejíž aplikace je v právu mezinárodních investic odůvodněná. Ochranu legitimních očekávání lze uchopit i jako součást principu ochrany dobré víry, v takovém případě ale jejich porušení nestačí samo o sobě ke vzniku odpovědnosti státu, jelikož princip ochrany dobré víry slouží pouze jako interpretační vodítko pro zkoumání porušení jiných práv investorů.

Druhá část této práce se zaměřuje na aplikaci principu ochrany legitimních očekávání v praxi rozhodčích tribunálů. Analyzuje otázku, zda ochrana poskytovaná investorům je příliš extenzivní, a to na základě zkoumání vybraných nálezů rozhodčích tribunálů v rámci nároků investorů na dva nejčastěji porušované standardy ochrany – ochrany proti vyvlastnění a ochrany proti porušení standardu spravedlivého a rovného zacházení.

Vyvlastnění mezinárodních investic jako nezávažnější zásah státu jako suveréna do vlastnického práva investora lze obecně charakterizovat jako odnětí vlastnické práva investora k investici. Vyvlastnění není v principu v mezinárodním právu zakázáno, pokud je tak učiněno ve veřejném zájmu, v souladu s právem na spravedlivý proces, bez diskriminace a pokud je investorovi poskytnuta adekvátní náhrada v přiměřeném čase.

Zatímco dříve hostitelské státy investice typicky vyvlastňovaly přímo a předmětem sporu byla hlavně výše náhrady za vyvlastněnou investici, dnes se častěji setkáváme s tím, že hostitelský stát zničí investorovu investici nepřímo, takže předmětem sporu bývá spíše otázka, zda k vyvlastnění vůbec došlo nebo ne. K přímému vyvlastnění dochází spíše zřídka, vzhledem k negativnímu vnímání ze strany veřejnosti s ohledem na investiční prostředí daného státu.

Je to právě nepřímé (někdy také „plíživé“, „*de facto*“ či „konstruktivní“) vyvlastnění, k němuž dochází typicky regulačními opatřeními státu, aniž by formálně došlo k odnětí vlastnického práva investora, v rámci nějž je nejčastěji nárokováno porušení legitimních očekávání. Doktrína nepřímého vyvlastnění poskytuje ochranu zahraničním investorům před zásahy státu, které z formálního hlediska vyvlastněním nejsou, avšak mají srovnatelné účinky. Typicky se jedná o zásahy, které vedou k trvalému zničení ekonomické hodnoty investice nebo efektivně odnímají investorovi

možnost spravovat, užívat nebo kontrolovat investici. Investiční smlouvy nicméně již neposkytují návod, jak rozpoznat, zda k takovému vyvlastnění došlo či nikoli.

Zásahy státu, jenž mohou ve své spojitosti dosáhnout intenzity nepřímého vyvlastnění, lze těžko zařadit pod jedinou definici. Rozhodčí tribunály tak v minulosti spíše zvolily vymezení indikativních kritérií, která napomáhají v určení, zda došlo k nepřímému vyvlastnění. Právě jedním z užívaných kritérií je případné porušení legitimních očekávání na straně investorů. V nálezech, kdy se investoři domáhali náhrady za vyvlastnění, rozhodčí tribunály obecně aplikovaly spíše vyšší standard v souvislosti s legitimními očekáváními, kdy taková očekávání musela být založena na specifických a konkrétních tvrzení ze strany hostitelského státu vůči investorům.

V nálezu *Metalclad* tribunál shledal porušení legitimních očekávání, což kromě jiného přispělo k uznání nároku investora z nepřímého vyvlastnění. V této kauze šlo o investici ve formě výstavby skládky nebezpečného odpadu, k jejíž stavbě dostal investor povolení a jiná opakovaná potvrzení od mexické administrativy na federální úrovni. Následně nicméně byla stavba zastavena lokální samosprávou a jedním z opatření mexických státních orgánů bylo vyhlášení přírodní rezervace na ochranu vzácného druhu kaktusu v místě, kde měla stát investorova skládka. Tribunál shledal, že investorova očekávání povolení investice na základě utvrzení od mexických federálních státních orgánů byla oprávněná. V nálezu *Tecmed* nicméně tribunál dospěl k názoru, že investorova očekávání byla oprávněná z důvodu očekávaného dlouhodobého provozu skládky a vidiny souvisejícího zisku. Následně dva roky po dokončení výstavby skládky došlo ze strany mexických státních orgánů k odmítnutí udělení licence potřebné k provozu skládky, čímž došlo k totální a nezvratné destrukci jakýchkoli obchodních činností souvisejících s investicí, jelikož z důvodu povahy dané investice nemohla být využita jinak než jako skládka.

Z judikatury vyplývá, že samostatné porušení legitimních očekávání investora není bez jiného postačující ke shledání vyvlastnění. Vždy musí být přítomen ještě nějaký další prvek, který dané situaci dá závažnější rozměr dosahující totální destrukce předmětné investice nebo slovy tribunálů musí dojít k významnému zásahu do investice. Takový přístup potvrzuje nález *Waste Management*, kdy ke shledání nepřímého vyvlastnění nepostačovalo podstatné porušení smlouvy a narušení očekávání investora,

nebo nález *CMS*, kde investorova plná kontrola a nerušený výkon vlastnického práva k investici utvrdily tribunál v konstatování, že nedošlo k vyvlastnění.

Lze tedy uzavřít, že přístup tribunálů v rámci nároků investorů z nepřímého vyvlastnění vůči ochraně legitimních očekávání je spíše zdrženlivý. Ochrany se dočkají pouze taková očekávání, kdy společně s porušením legitimních očekávání dojde k totální destrukci investice nebo významnému zásahu do vlastnického práva investora. Je nutno si uvědomit, že ochrana proti vyvlastnění směřuje proti relativně úzce vymezenému zásahu státu, a tedy nelze všechny zásahy do práv investorů hodné náhrady pod ní zařadit. Pokud tedy není investorův nárok z vyvlastnění uznán tribunálem, může stejný zásah spadat pod jiný standard ochrany poskytovaný v rámci ochrany mezinárodních investic.

Právě takovým standardem ochrany postihujícím širší okruh zásahů do práv investorů je standard spravedlivého a rovného zacházení. Tento standard se stal významnou součástí ochrany investorů v investičním právu a je přítomen v téměř každé investiční smlouvě poskytující ochranu proti svévolným, diskriminačním či nezákonným zásahům ze strany hostitelského státu.

Standard spravedlivého a rovného zacházení se poprvé objevil v Havanské chartě o Mezinárodní obchodní organizaci z roku 1948, nicméně výslovně uplatněn byl až padesát let poté v nálezu *Maffezzini*. Navzdory všudypřítomnosti tohoto standardu a faktu, že jeho porušení představuje nejčastější nárok investorů, není zcela zřejmé, jaký je rozsah jednání, které tento standard postihuje. Rozhodčí tribunály se přiklonily k praxi posuzování porušení toho standardu případ od případu; jisté ovšem je, že se jedná o objektivní standard chování nezávislý na národní právní úpravě poskytující ochranu proti škodlivým zásahům hostitelského státu, bez ohledu na vnitřní pohnutky či motiv, který k takovému jednání mohl hostitelský stát vést. Menšina tribunálů se pokusila o definování standardu spravedlivého a rovného zacházení, většina spíše kazuisticky pojmenovala kategorie chování, které jsou buď žádoucím chování dle standardu, nebo jej naopak porušují. Poskytnout všeobjímající a vyčerpávající definici ovšem není možné ani žádoucí, jelikož standard spravedlivého a rovného zacházení je flexibilním standardem s cílem postihnout různorodé typy škodlivého chování, které nelze dopředu pojmenovat a jenž se mohou v čase vyvíjet. Tento je ovšem zároveň i vyčítanou vlastností – vyvolává totiž nejistotu ohledně rozsahu standardu a s tím

související obavy z přespříliš široké ochrany poskytované investorům. Je tedy úkolem především rozhodčích tribunálů stanovit pomocí své rozhodovací činnosti co nejvíce jasné hranice, čímž by podpořily důvěru v tento institut.

Práce stručně reflektuje i značné debaty, které se vytvořily v souvislosti se vztahem standardu spravedlivého a rovného zacházení a standardu minimálního zacházení v rámci mezinárodního obyčejového práva. Na základě přístupu akademické obce a rozhodovací praxe tribunálů vykrystalizovaly dva hlavní názory. První názorová linie zastává tezi, že standard spravedlivého a rovného zacházení je obsahově totožným standardem zacházení jako minimální standard a jeho povaha je tak obyčejová a podléhá vývoji s ohledem na mezinárodní právo. Naproti tomu druhá linie se přiklání k názoru, že standard spravedlivého a rovného zacházení je samostatný smluvně založený standard zacházení odlišný od standardu minimálního zacházení poskytující širší ochranu.

První názor tedy chápe standard spravedlivého a rovného zacházení jako odraz minimálního standardu pouze za použití jiné slovní formulace. Obecně lze říci, že mezinárodní minimální standard je považován za pravidlo obyčejového mezinárodního práva, které reguluje zacházení s cizinci tím, že poskytuje sadu pravidel, které státy musí respektovat při jednání cizinci a jejich majetkem, bez ohledu na své domácí právo a státní praxi. Cílem mezinárodního minimálního standardu je tedy stanovit určitá základní práva vytvořená mezinárodním právem, která státy musí cizincům přiznat bez ohledu na úroveň zacházení poskytovanou jejich vlastním občanům. I když zprvu byl minimální standard zacházení užíván spíše v souvislosti s fyzickými osobami, následně se tento institut přenesl i do práva mezinárodních investic a je aplikován i na zacházení s investorem a investicí. Významným zástupcem užívání tohoto přístupu jsou všechny nálezy řídící se Severoamerickou dohodou o volném obchodu, a to na základě závazného interpretačního stanoviska stavícího oba standardy naroveň. Pro tento názor se vyslovili rozhodci například v nálezech *Occidental* nebo *Genin*. Jedná se ovšem o přístup menšinový.

Druhá, většinová, názorová linie standard spravedlivého a rovného zacházení vnímá jako nezávislý samostatný standard chování poskytující investorům širší spektrum ochrany než minimální standard zacházení. Dle tohoto názoru je třeba každou smlouvu vykládat dle článku 31 Vídeňské úmluvy o smluvním právu v dobré víře, v souladu s

obvyklým významem, který je dáván výrazům ve smlouvě v jejich celkové souvislosti, a rovněž s přihlédnutím k předmětu a účelu smlouvy. V tomto světle je třeba poukázat na preambuli investičních smluv osvětlující účel smlouvy, jímž často je podpora a ochrana investic, a na samostatný text smlouvy týkající se standardu spravedlivého a rovného zacházení ve většině případů postrádající jakýkoli odkaz na mezinárodní (obyčejové) právo či minimální standard. Je tedy těžko představitelné, že by záměrem autorů smluv bylo dát naroveň samostatně formulovaný standard zacházení se zavedeným právním pojmem minimálního standardu zacházení. Tento názor je v současné rozhodovací činnosti tribunálů převažující a byl aplikován například v nálezech *Saluka* či *Tecmed*.

Ať už se tribunály přiklonily k jakémukoli názoru, při pokusech definovat standard spravedlivého a rovného zacházení většinou pojmenovaly jisté sub-kategorie buď žádoucího chování v souladu s daným standardem, nebo naopak jednání příčícího se mu. Jednou z nejcitovanějších je definice vyslovená v nálezu *Tecmed*, kde tribunál jako prvky standardu spravedlivého a rovného zacházení označil „povinnost hostitelského státu jednat ve vztahu k investorovi konzistentně, bez svévole, transparentně, aby ten byl dopředu seznámen jak s veškerými pravidly a opatřeními vztahující se na jeho investici, tak i s relevantními cíli a plány hostitelského státu a mohl se jim tak přizpůsobit." Tribunál dále stanovil, že investor má právo očekávat konzistentní chování, stát tedy není oprávněn svévolně zrušit předchozí rozhodnutí či odejmout existující povolení, na něž se investor spoléhal na počátku své investice. Kromě toho, že se jedná o jeden z nejextenzivnějších přístupů rozhodčích tribunálů k standardu spravedlivého a rovného zacházení obecně, je tato definice i prvním případem, kde lze nalézt výslovné propojení mezi standardem spravedlivého a rovného zacházení a konceptem ochrany legitimních očekávání.

Ochrana legitimních očekávání postupně zaujala významnou pozici v rámci standardu spravedlivého a rovného zacházení a byla označena jako jeho dominantní či základní prvek. Je nutné podotknout, že ne každé porušení očekávání investorů je zároveň porušením standardu spravedlivého a rovného zacházení. Ochrany dosáhnou pouze taková očekávání, která jsou důvodná a ospravedlnitelná ve světle okolností v době, kdy se investor rozhodl a započal s investicí. V potaz je třeba vzít objektivní okolnosti a události, nikoli subjektivní, leckdy přílišně optimistické představy investorů.

Na základě rozhodovací činnosti tribunálů lze kategorizovat tři typy chování či poměrů hostitelských států, jenž dávají vznik legitimním očekáváním investorů. Zaprvé se jedná o obecný právní a regulační rámec daného státu, zadruhé smluvní či kvazismluvní závazky mezi státem a investorem a zatřetí individuální přísliby či záruky ze strany hostitelského státu, na něž se investor spoléhá.

První skupinou je obecný právní rámec hostitelského státu zahrnující typicky legislativu, uzavřené mezinárodní smlouvy, různá opatření či jiné správní akty v účinnosti v okamžiku, kdy investor přistoupí k investování, na které se investor spoléhá a očekává, že zůstanou zachovány v takové podobě, v jaké jsou na počátku investování. Do konfliktu se zde ovšem dostávají dva protichůdné zájmy, a to na jedné straně zájem investora na uchování transparentního a stabilního prostředí úzce související s požadavkem právní jistoty a na straně druhé zájem státu jako suveréna vykonávat státní moc ve veřejném zájmu a regulovat dění na svém území. Státy nicméně podpisem investičních smluv toto své suverénní právo omezují a musí respektovat legitimní očekávání investorů. Otázkou zůstává, do jaké míry mohou investoři legitimně očekávat, že právní rámec zůstane neměnný a kdy by již povinnost neměnit právní rámec uvalená na státy přílišně zasahovala do jejich suverénních práv?

Tribunály stojící před nelehkou úlohou nalézt rovnováhu mezi těmito zájmy ke svému úkolu přistupovaly rozlišně. Nálezy přiklánějící se k názoru, kdy povinnost zachovat stabilní a předvídatelný právní a regulační rámec je chápána jako součást standardu spravedlivého a rovného zacházení, ve své argumentaci odkazovaly na preambule bilaterálních investičních smluv, které nezřídka zmínku o stabilitě obsahují. Takový přístup byl například přijat v nálezech *Occidental* či *Lemire*. Tento přístup byl ovšem kritizován pro neodmyslitelnou proměnlivost ekonomického a právního života a fakt, kdy chápání stability jako součásti standardu spravedlivého a rovného zacházení v podstatě do tohoto standardu inkorporovalo stabilizační klauzuli. Opačný postoj, tedy upřednostnění práva států jako suverénů regulovat aktivitu na svém území proti zájmům investorů, zaujaly například tribunály v nálezech *Saluka* či *Continental*. Očekávání investorů spoléhající se na obecný regulační rámec označily za nerozumné a nepřiměřeně zatěžující vůči státům.

Druhou skupinou jednání, jenž může dát vznik legitimním očekáváním investorů, je uzavření smluvních či kvazismluvních závazků, které stát a investor mezi sebou vytvoří.

Pro účely posuzování ochrany legitimních očekávání je nutné rozlišovat právní povinnosti vznikající z běžných smluvních závazků a z investičních smluv. Očekávání investorů týkající se splnění povinností z běžných smluvních závazků totiž v případě jejich porušení nedosáhnou ochrany poskytované v rámci standardu spravedlivého a rovného zacházení a odškodnění musí být dosaženo jinou cestou, obvykle u národních soudů. Jedná se tedy o otázku, zda dostání běžným smluvním závazkům lze podřadit pod povinnosti spadající pod standard spravedlivého a rovného zacházení, jejichž porušení je chráněno v rámci bilaterální investiční smlouvy.

Názory tribunálů na tuto otázku se různí. Na straně jedné stojí názory přijaté například v nálezech *Mondev* či *Rumeli*, které povinnost dostát běžným smluvním závazkům zařadili pod standard spravedlivého a rovného zacházení a ochrana proti porušení tak vycházela z bilaterální investiční smlouvy. Nález *Rumeli* konkrétně vyložil ukončení smlouvy jako porušení legitimních očekávání investora. Kritici této názorové linii vytýkají efekt, který by nárokované porušení legitimních očekávání ve finále přineslo – totiž pokud by porušení běžných smluvních povinností mělo zároveň být porušením legitimních očekávání dle investiční smlouvy, změnil by se tak v podstatě koncept ochrany legitimních očekávání v zastřešující doložku (umbrella clause).

Na druhé straně názorového spektra stojí nálezy jako například *Glamis Gold* či *Parkerings*, které se odklonily od shora uvedeného pojetí a stanovily, že porušení běžných smluvních závazků se nerovná porušení legitimních očekávání investora a tedy standardu spravedlivého a rovného zacházení. Nálezy nicméně nevyloučily úplně možnost, aby porušení smlouvy dosáhlo ochrany v rámci investiční smlouvy; v takovém případě ovšem musí být přítomen nějaký další přitěžující prvek. Takovým prvkem může být jednání státu jako suveréna, jenž překračuje rámec běžného jednání v postavení kontraktační strany nebo přímé neoprávněné vypovězení běžného smluvního závazku, kdy stát nejedná v rovnocenné pozici jako druhá smluvní strana, nýbrž využije svého nadřazeného postavení vyplývající z jeho suverénní povahy. Jako ukázky relevantní judikatury práce prezentuje nálezy *Consortium RFCC, Duke, Impregilo v. Pakistan, Waste Management* či *Parkerings*, kdy ve všech případech tribunály nedovodily porušení legitimních očekávání investorů na základě porušení běžných smluvních závazků právě z důvodu chybějícího přitěžujícího prvku. Lze tedy vyvodit, že tribunály zastávají spíše zdrženlivý postoj.

Poslední skupinou okolností, na které se investoři nejčastěji spoléhají při investování a které tak dávají vznik jejich legitimním očekáváním, jsou individuální přísliby či záruky ze strany hostitelského státu vůči investorům. Tribunály v rámci své rozhodovací činnosti vyjasnily, že se musí jednat o dostatečně specifické přísliby, jenž zároveň nejsou příliš nejednoznačné. Specifičnost lze posoudit buď ve vztahu k předmětu investice či k osobě investora. Jako nejednoznačné označil tribunál v nálezu *Frontier Petroleum* dva dopisy od Ministerstva průmyslu a obchodu České republiky, které pouze naznačovaly, že by v budoucna mohla existovat příležitost k vyjednávání s investorem, a odmítl tvrzenou legitimitu očekávání investora na takových dopisech založenou. Zvláštní skupinou ujištění od hostitelského státu jsou výroky politiků. Rozhodci k nim vyslovili negativní postoj a v nálezech *Continental* či *El Paso* je označili za nejméně důvěryhodné a nesoucí nejmenší právní váhu.

Závěr této práce reflektuje a odpovídá na dvě teze stanovené na jejím počátku. První teze, tedy že princip ochrany legitimních očekávání je etablovaný právní institut práva mezinárodních investic s patrnými kořeny v národních právních systémech i v obecném mezinárodním právu, byla potvrzena. Provedená rešerše prokázala výskyt principu ochrany legitimních očekávání v mnoha národních právních systémech jednotlivých států, stejně tak jako jeho akceptované pojetí jako součást obecného právního principu ochrany dobré víry. Rozbor druhé teze, tedy jestli užití principu ochrany legitimních očekávání je oprávněné v rámci práva mezinárodních investic a zda díky své vágnosti neposkytuje tento koncept přespříliš extenzivní ochranu, mě vedl k následujícím úvahám. Ačkoli princip ochrany legitimních očekávání ani standard spravedlivého a rovného zacházení nemá pevně stanovené hranice, je tomu tak správně s ohledem na jeho funkci jako ochranného institutu, jenž má poskytnout ochranu investorům vůči škodlivému chování hostitelských států, které není postihnutelné v rámci jiných specifičtěji zaměřených institutů jako například ochrana proti vyvlastnění či standard plné ochrany a bezpečnosti. Na závěr je nutno podotknout, že ochrana legitimních očekávání se navíc do popředí dostala během zhruba posledních patnácti let, jedná se tedy o institut relativně nový, co se jeho aplikace týče a tribunály v rámci své rozhodovací činnosti postupně přesněji stanovují a identifikují jeho obrysy a hranice.

Keywords

Legitimate expectations; fair and equitable treatment standard; investment disputes.

Legitimní očekávání; standard spravedlivého a rovného zacházení; investiční spory.