LEGITIMATE EXPECTATIONS IN INTERNATIONAL INVESTMENT LAW: The notion under the frame of the *fair and equitable treatment* standard.

BOGOTÁ D.C., COLOMBIA
2019
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I. INTRODUCTION

A. Background

1. Globalisation has been the catalyst for an expansion of economic activities among states, transnational corporations, enterprises and individual investors, which are now leading the mutation of international economic paradigm. In the past, individuals were excluded from participating in the international arena. Nevertheless, the appearance of international special regimes provides tangible evidence of the important roles that, currently, individuals play in the international order.

2. Investment treaty law is one example of those special regimes that have allowed for and facilitated the participation of individuals in the international sphere. Since 1950s, some states have shown a growing interest in importing foreign capital and, therefore, have signed bilateral treaties for the protection of investments suitable to attract foreign investors and their investments to their territories.

3. These bilateral treaties, signed by two states, provided the international set of rules that would be considered in the investment relation between them. On one side, there is an exporting-capital state who aims to protect its nationals. Nationals from these states are willing to export their capital to invest in the host state. On the other hand, the importing-capital state (Host state) must guarantee the adequate treatment of the foreign investments, and therefore attract foreign investment to its territory.

4. Such circumstances entail investor-state complex relationships. The complexity is founded mainly on their opposing interest. On the one side, the investor's private interest is seeking profit. On the other side, the public interest of the host state is searching for the satisfaction of public needs.

5. In consequence, investors and host states’ complex relationships have formed the treaty investment regime. Many of those relations have resulted from investment disputes where, in most cases, investors were claiming the protection of their property. In the disputes, arbitral tribunals are in
charge of interpreting the set of rules that bilateral investment treaties provide to elucidate such disputes and of applying them to find a solution.

6. In the development of the dispute settlement system, some investors have claimed the protection of their legitimate expectations. However, tribunals have inconsistently and sometimes wrongly elaborated the jurisprudence that establishes the scope and content of the concept. Currently, it is widely accepted that legitimate expectations are the core of the *fair and equitable treatment standard (FET standard).*

**B. Significance and justification**

7. Although there is agreement regarding legitimate expectations as being the main element of the FET standard, the legitimate expectations notion remains unknown. In the past, tribunals’ attempts to elaborate the notion was a failure. Thus, their awards brought confusion and a lack of understanding.

8. Current circumstances, for example, state treaty practice and the new approaches provide a better perspective. Though the scope and content of the legitimates expectations is not totally determined, it is also unclear and misunderstood.

9. The proper understanding and clarity about the boundaries of legitimate expectations under the FET standard would facilitate the protection of the interest, both for claimant’s and respondent’s. In the future, their understanding may result in more precise claims and consistent defenses, as well as full observance of legitimate expectations.

10. For these reasons, the present research pretends to assess the issues of uncertainty regarding the scope, content and legal nature of the notion of legitimate expectations.

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1 Técnicas Medioambientales Tecmed, S.A. v. Mexico, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 154 See also among many: MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile, ICSID Case. No. ARB/01/7 Award, 25 May 2004, para. 114, CMS Gas Transmission Company v. Argentina, ICSID Case No. ARB/01/08, Award, 12 May 2005, para. 279, and LG&E Energy Corp et al. v. Argentina, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 127.
C. Research Question

The research question which was adopted by the author for the purpose of this thesis is: *What is the notion of the legitimate expectations’ protection within the frame of the fair and equitable treatment standard in international investment law?*

D. Aim of the research

The main objective of the present research is:

i. To clarify the notion of legitimate expectations under the *fair and equitable standard*.

The secondary objectives of the research are:

i. To identify the legal nature of legitimate expectations.

ii. To distinguish the limits of the protection under the FET standard.

E. Methodology

11. In line with the research objectives, the present study is comprised by following a qualitative descriptive method through, first a doctrinal research and, second a comparative analysis. The object of study is “the legitimate expectations” and it is delimited by the frame of *the fair and equitable treatment standard* in international investment law.

12. Within the doctrinal research are examined recent and relevant documents that elaborate a preliminary notion of legitimate expectations in a general basis. Furthermore, documents where the essential elements of the notion are identified and analyzed. Once the preliminary notion is settled the study focuses on legal documents, mainly cases, of three regimes of international law that interpreted and apply the preliminary notion in distinctive manner.
13. The notion of legitimate expectations is elucidated considering the comparison of the three regimes of international law and the approach to the different lines of interpretation and application in international investment law. Also, a comparative study of case law is utilized descriptively to distinguish the application of legitimate expectations in the scope of the *fair and equitable standard.*
II. PART ONE

LEGITIMATE EXPECTATIONS AND ITS BOUNDARIES WITHIN
INTERNATIONAL LAW – PRELIMINARY REMARKS

A. Outline

1. Prior to immersing into the legitimate expectations concept as the core of the fair and equitable treatment ascribed to the field of international investment law, in this first part, the abstract notion of legitimate expectations will be studied, and will be specified by scrutinising the notion in a deductive manner. The procedure pursued to develop this specific subject of study can be summarised as follows:

2. The procedure consists of four steps deductively analysed. Those are: i) establishing a general definition or preliminary approach; ii) ascribing that definition to a specific field of international law; iii) establishing the nature of legitimate expectations; and iv) locating the origin of the legitimate expectations’ obligation within the sources of international investment law.

3. Regarding the first step of the process, to establish a general definition or preliminary approach, the legitimate expectations derived from the general principle of good faith will be considered. This concept or definition will be established through the developments of the International Court of Justice (ICJ), the World Trade Organisation (WTO) and international arbitral tribunals.

4. Afterwards, this definition will be ascribed to international investment law by considering the formulation established by different investment arbitral tribunals within their jurisprudence. Then, the nature of legitimate expectations will be identified in the jurisprudence of the same tribunals, in line with the third step.

5. Finally, the perspective of legitimate expectations in international investment law will be enunciated. Step four will be considered in detail in part II with a complete elaboration of both the sources of international law and international investment law.
B. Preliminary Definitions

6. Various authorities have determined a notion of legitimate expectations. Each of them has provided a meaning, depending on its place in the international legal system, its functions and the type of legal relationships each of them is acquainted with.

i. International Court of Justice (ICJ)

7. Although the International Court of Justice (ICJ) has recently\(^2\) denied the existence of the principle of legitimate expectations in general international law with reference to arbitral awards in investment disputes, legitimate expectations in state-state relationships had emerged from the application of the principle of good faith by the early ICJ of 1951.\(^3\)

8. The ICJ established back then that the principle of good faith operates as a source of obligations to states. In the specific Anglo-Norwegian Fisheries Case, (1951), the principle requested that the legitimate expectations created be respected for reasons of equity and legal security.\(^4\)

9. Following the Court’s analysis of that case, it was not conduct that created those legitimate expectations, but the United Kingdom’s inaction. The dispute consisted of the validity of the system applied to the drawing of baselines and defined the contention about water limits between the UK and Norway. The latter state, through an administrative decree, extended its straight lines towards the sea, drawing baselines, which was detrimental to some English fishermen who used to fish in those waters.

\(^2\) *Bolivia v. Chile,* Obligation to negotiate access to the Pacific Ocean, ICJ judgment of October 1/2018. Para. 162. Bolivia claimed that through Chile’s multiple declarations the “expectation of restoring” Bolivia's access to the sea will fulfilled. On the other hand, Chile argued that Bolivia had not demonstrated the existence of a legitimate expectations’ doctrine in International Law. The ICJ recognised Chile’s posture clarifying that, though legitimate expectations are mentioned in arbitral awards of state-investor investment disputes, the existence of that doctrine in general international law is not proved by those references.


10. The Court established that when Norway enforced its straight lines\(^5\) no state interested in the status of the water contested it. This included the UK and by not contesting it for a period of more than sixty years, it had accepted that system of delimitation or its application. This is due to the acquiescence by inaction on the part of the United Kingdom.

11. Therefore, since the delimitation was consistently applied by the Norwegian authorities and it did not find opposition on the part of the UK, the ICJ warranted the enforcement of the system by Norway against the United Kingdom.\(^6\)

12. In summary, legitimate expectations are the idea of one state regarding the other state’s conduct, who by its action or inaction creates a reasonable and justified assurance to the first state that its behaviour will be in accordance with what is expected in relation to certain matter.\(^7\) It is not completely clear if those representations alone create an autonomous obligation to the state.

13. However, by virtue of the principle of good faith, equity, acquiescence and estoppel, a new right is born for the state that reasonably expects a certain behaviour and a new equivalent obligation is burdened on the state that has created that expectation.

ii. World Trade Organisation (WTO)

14. The legitimate expectations of the WTO, within the specialised trade regime of international law, have been recognised as an independent and separate principle. This is in contrast to the general international law approach which is built and applied from other principles. In the words of Ernst Petersmann\(^8\), the WTO system is rule oriented. It entails the

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\(^5\) Norway decided unilaterally to delimit its waters by the enactment of a decree. States can delimit their waters by either drawing normal baselines or straight baselines. The first considers all sinuosities of the coast. The second connects, utmost islands, promontories and rocks with straight lines. Nugzar, Dundua. Delimitation of marine boundaries between adjacent states. United Nations. 2006-07. P. 15

\(^6\) See Supra note 4, p. 22.


observance of general rules by governments and individuals in order to reconcile their conflicting short-term trade interest with their common long-term interest.

15. Therefore, this characteristic of the WTO system has ensured that the principle of legitimate expectations fully permeates its jurisprudence. The application of this principle is indispensable to international agreements; indeed, it is fundamental to the World Trade Organisation, since it creates trust in negotiations and facilitates dispute settlement.

16. Now, the legitimate expectations notion in the WTO does not differ from the general international law definition. Simply it aims to emphasise its application as principle to the trade behaviour of states and individuals. Basically, it provides the assurance created by a state or individual toward another WTO member that its trade behaviour will be consistent with the regime’s basic rules.

17. Further, every member of the WTO in particular, is protected by the legitimate expectations in three respects: i) the maintenance of generalised conditions affecting future trade; ii) the consistency and predictability of the WTO’s law; and iii) the equal competition conditions among members. Namely, WTO members are entitled to form legitimate expectations regarding the other members’ trade behaviour.

18. In concrete cases, the legitimate expectations in the WTO regime were invoked in three different scenarios, before both panels and an appellate body. The first scenario concentrates on the measures of a member in violation to an obligation of WTO law. It means that the frustration of legitimate expectations leads to a later violation of the General Agreement

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9 See Supra note 7, P. 204.
11 For instance, EC-LAN panel applied LE and determined this scenario: Entitlement, the US was entitled to legitimately expect to receive the same treatment regarding LAN equipment agreed tariffs. Frustration, Legitimate Expectations were frustrated by a change of the reclassification practice in Europe. Violation (causal link), EU violated Article II: 1 GATT by failing to accord imports from US. EC – Computer Equipment Panel Report, European Communities – Customs Classification of Certain Computer Equipment, WT/DS62/R, WT/DS67/R, WT/DS68/R, adopted 22 June 1998.
on Tariffs and Trade (GATT). However, an appellate body in India-patent\textsuperscript{12} rejected this approach arguing a misinterpretation of Article II: I GATT by the panel.

19. The second scenario refers to non-violation measures of the WTO rules, i.e. to measures that nullify or impair a benefit. Due to the non-violation measures' nature in this scenario, the legitimate expectations “help in assessing”\textsuperscript{13} the predictability and, therefore, the validity of a benefit considering the measures consistency.\textsuperscript{14}

20. The third scenario illustrates the creation of legitimate expectations from Panel and Appellate Body reports. It simply lies in that every member of the WTO expects correspondence with those reports from the panel and appellate body, even though they only bind the parties in dispute on the concrete report considered.\textsuperscript{15} Finally, as a conclusion and for a better understanding of the notion of legitimate expectations in WTO, a brief description of the WTO system is provided.

21. As a response to the need to secure an international economy, in 1947 the GATT was signed and ever since, it has constituted the framework for international trade relations.\textsuperscript{16} From the very beginning, this organisation aimed to deal with discrimination, market access, transparency, rules on fair trade, trade liberalisation, and dispute settlement procedure.

22. The dispute settlement procedure, as long as the system became more rule-orientated by practice, adopted the term panel in reference to disputes. However, this system has sought primarily to resolve issues through agreement between the parties, and panels have become an effective procedure to provide an authoritative decision to settle any dispute when an agreement has not been possible. Lastly, when the


\textsuperscript{13} See Supra note 7, p. 212.

\textsuperscript{14} See supra note 10. The Japan-Film panel clarified the required test to determine the violation to legitimate expectations in this scenario. Test: i) Application of a measure by a WTO member; ii) a benefit accruing under the relevant agreement; iii) Nullification or impairment of the benefit as a result of the application of the measure.


\textsuperscript{16} Ibid. supra nota 6, p. 212
solution does not satisfy the parties, they appeal before the appellate body.

iii. Conclusion

23. Previously, it was studied the legitimate expectations notion considering general international law and WTO rules. Main points were: Firstly, the most important judicial authority, ICJ, does not recognise legitimate expectations as an autonomous principle with direct application, but as a simple construction from other principles, especially good faith.

24. Secondly, the legitimate expectations notion in WTO is much more elaborate and is considered an autonomous principle, which in many cases has been applied and, thus, has permeated the WTO jurisprudence. In relation to the notion of legitimate expectations elaborated by international investment case law the study now turns to.

iv. Introductory remarks of Investment law

25. The legitimate expectations notion was referred to in Boliví­a v. Chil­e, before the ICJ, in the terms explained previously.\(^\text{17}\) The first remark to be made in relation to the international law notion is that the ICJ did not recognise the existence of legitimate expectations in international law by extension to arbitral awards of international investment law. However, the court never denied the existence of an independent notion for general international law, and since Bolivia did not argue nor provide evidence on the matter, the court simply avoided making a background analysis.

26. One hypothesis of the court’s reluctance to complete the analysis could be that the legitimate expectations notion elaborated by investment arbitral awards is reductive, applicable only to investor-state disputes. In general terms, it is logical since the investment notion contains variables not found in international law in general. For instance, legitimate expectations are the main element of the fair and equitable treatment standard. It is not clear how it could be applicable in the same terms to disputes including other subjects of international law.

\(^{17}\) See supra para. 7 and footnote 1.
27. Now, another element to comment on is the similarity of the three regimes about good faith being harbinger to legitimate expectations. Arbitral awards have referred to this important principle in this manner. In relation to the WTO notion, the investment law notion is not as rigorous, as clear and as properly understood as it is to global trade relations. One possible explanation for this may be found in the WTO itself, which provides a multilateral agreement among members that promote cooperation in bilateral negotiations and even in disputes.

28. The international investment law notion of legitimate expectations has been formed *sui generis* from prefabricated notions of other regimes. Its constitution entails some variables that are necessary to highlight here.

29. In general, those variables are summarised by the fact that international investment law is one of the multiple examples of international law's fragmentation and its biggest consequence refers to the lack of understanding on the part of authorities, hence, leading to fragmented jurisprudence (interpretation mainly) and therefore causing uncertainty about the rule of law.

30. Variables, such as the large number of cases, the bilateral investment treaty (BIT) on which every single dispute is based and whether it is in the context of the North American Free Trade Agreement (NAFTA) tribunals or the International Centre for Settlements of Investment Disputes (ICSID) tribunal are the most important to consider in order to understand the legitimate expectations notion. Now, aiming to identify the notion in investment law, three categories will be reviewed. Each of these categories provides a relative notion. However, at the end of the present written piece, a concept of legitimate expectations in international investment law will be synthetised.

v. Investment Case Law

31. Firstly, the aim is to examine the notion through the first line of jurisprudence started by *Tecmed v. Mexico*\(^\text{18}\). This tribunal approach is

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\(^{18}\) Técnicas Medioambientales Tecmed, S.A. v. Mexico, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 154 See also among many: MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile, ICSID Case. No. ARB/01/7 Award, 25 May 2004, para. 114, CMS Gas Transmission Company v. Argentina, ICSID Case No. ARB/01/08, Award, 12 May 2005, para. 279, and LG&E Energy Corp et al. v. Argentina, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 127.
characterised by the fact that it included legitimate expectations within the fair and equitable treatment standard. Furthermore, the base BITs are diverse. However, all the cases that compounded the line of interpretation were before ICSID tribunals.

32. Secondly, the emblematic notion developed by the tribunal in the case Thunderbird Gaming Corporation\textsuperscript{19} will be analysed. Though the tribunal did not protect investor’s legitimate expectations, it provided a well-explained notion in the framework of NAFTA. Likewise, separately, Thomas Wälde’s\textsuperscript{20} opinion of the origins, scope and role of legitimate expectations will be mentioned, which ultimately introduces the third category.

33. Thirdly, the so-called comparative approach elaborated more recently by the Total v. Argentina\textsuperscript{21} tribunal and Toto construzioni v. Lebanon\textsuperscript{22} will be considered. This notion supports Thomas Wälde’s opinion which is more elaborate, since it considers different sources, in particular domestic law. Besides, it argues that legitimate expectations could be understood and applied as a general principle of law.

34. Following the structure proposed above, the tribunal in Tecmed define legitimate expectations as: “the basic expectations that the foreign investor took into account to make the investment”\textsuperscript{23}. Now, this definition is tied to the word “treatment” that alludes to the fair treatment that the host state has to provide to the investor.\textsuperscript{24} From this mere definition a link between fair and equitable treatment standard and the notion of legitimate expectations can be perceived.

35. Furthermore, the term “basic expectations” means that the host state has “to act in a consistent manner”. However, the nature of this consistency is not sufficiently clear, it provided other terms attempting to define it, such as “free from ambiguity and totally transparently in its relations

\textsuperscript{19} International Thunderbird Gaming Corporation v. Mexico, NAFTA/UNCITRAL, Award, 26 January 2006.
\textsuperscript{20} Ibid. Separate opinión of Thomas Wälde. Para. 1, 20, 21.
\textsuperscript{21} Total S.A. v. Argentina, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010.
\textsuperscript{22} Toto Construzioni Generali S.p.A. v. Lebanon, ICSID Case No. ARB/07/12, Award, 7 June 2012.
\textsuperscript{23} Técnicas Medioambientales Tecmed, S.A. v. Mexico, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 154
\textsuperscript{24} Ibid.
with the foreign investor” or “to know beforehand all the rules and regulations that will govern its investment”\textsuperscript{25}.

36. Also, in the words of the tribunal, these expectations mean “to act without arbitrarily revoking any preexisting decisions or permits issued by the state or use legal instruments that govern the actions of the investor or investment in conformity to the law”\textsuperscript{26}. It is not evident in relation to what exact conduct the state must be consistent to offer fair treatment to the investor. Instead, its interpretation remains wide open and can lead to many different outcomes since the term “consistency” is a relative concept.

37. Douglas Zachary\textsuperscript{27} criticises the interpretation in \textit{Tecmed} and asserts that the standard found by this tribunal is not a standard at all. Conversely, it is an utopic ideal of perfect regulation for states ever to attain. Besides, the notion is unsupported by any authority and he regrets the fact that now it constitutes the most important precedent on the matter. Likewise, the \textit{White Industries v. India} tribunal\textsuperscript{28} validates this criticism as well.

38. Continuing with the second category, \textit{Thunderbird Gaming v. Mexico}\textsuperscript{29} the tribunal defined legitimate expectations as: “the situation where a contracting party’s conduct creates reasonable and justified expectations on the part of the investor to act in reliance to said conduct”\textsuperscript{30}.

39. Beyond that, the tribunal ascribed the interpretation “within the context of NAFTA framework” and most importantly to highlight it, it established a consequence in the event that the host state does not adjust its conduct to the investor’s legitimate expectations -causation of damages- therefore, it implies valuation of damages and the condemnation of the defaulter state.

\textsuperscript{25} Ibid.
\textsuperscript{26} Ibid.
\textsuperscript{28} White Industries Australia Limited v. India, UNCITRAL, Final Award, 30 November 2011, para. 10.3.5
\textsuperscript{29} See supra note 19, para. 147.
\textsuperscript{30} Ibid.
40. Now, in regard to Thomas Wälde’s separate opinion, he agrees with the general view of the notion retrieved, the general conditions for claiming a protection of legitimate expectations. Nevertheless, he does not concur with the application of the standard to the specific factual situation that the tribunal made. The first two points will be examined below and in part III an approach to his disagreement will be elaborated.

41. In accordance with the first point, the general view of the notion, he alludes to separating the term “expectations” from “legitimate” to distinguish the concepts that legitimate expectations together contain. He clarifies that the term expectations imposes to the state the burden to properly communicate its messages or statements to the investor.

42. The burden means to “avoid ambiguity”, “send clear messages” and “correct misinterpretation”. Besides, he considers that investors have a necessity to predict the government’s conduct and, therefore, the state is obliged “to take into account prior assurances” communicated to the investor. Ultimately, expectations are created when assurances made by the state promote in the investor the willingness “to commit risk capital and effort”.

43. To complement the idea, the term “legitimate” entails the competence of the official who communicates an affirmation in the name of the state. Additionally, the affirmation has to be “reasonable”. To synthetise, for Thomas Wälde legitimate expectations are: reasonable assurances made by the state, which are clearly communicated to the investor by a competent state’s official through a legitimate procedure.

44. To be reasonable, the assurances have to respond to the following question: Do these assurances (prior fulfilment of the elements explained before) exhort the investor to commit risk capital and effort?

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32 Ibid., para. 1
33 Ibid., para. 21
34 Ibid.
35 Ibid.
36 Ibid.
45. Considering the second point, the general conditions for claiming a protection of legitimate expectations, he proposes: i) expectations caused by a government; ii) an investment relying on such expectations; iii) competency of the responsible officials and the procedure followed in the creation; and iv) the reasonableness of the expectations. In short, he names the concepts identified in each term as “conditions for claim”.

46. Moving forward, in the third category, the comparative approach proposed by Total v. Argentina\textsuperscript{37} tribunal examined and determined that a comparative analysis of legitimate expectations is justified. Finding that in civil law and common law jurisdictions, they are recognised and well determined, the analysis consists of comparing concepts in different domestic legal systems.\textsuperscript{38} However, this point will be elaborated further in part III.

47. For now, in the next set of paragraphs the notion of legitimate expectations will be synthetised, considering all three categories. The classification proposed by the comparative approach will be enunciated later in part III, and will be elaborated in detail.

C. Compound Definition in International Investment Law and Legal Nature

i. Synthesis of the notion

48. Previously, the notion of legitimate expectations in international investment law was examined considering various nuances compressed into three categories. Each category groups the most relevant elements into considerations to easily deduce the notion.

49. What can be observed, after the previous examination is that legitimate expectations are: reasonable assurances made by the state, clearly communicated to the investor, by a competent state’s official through a legitimate procedure. To be reasonable, the assurances have to respond

\textsuperscript{37} Total S.A. v. Argentina, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 111.
\textsuperscript{38} Michele Potestà, Legitimate expectations in investment treaty law: Understanding the roots and the limits of a controversial concept, ICSID Review 2013, p. 7.
to the question: Do these assurances (prior fulfilment of the elements explained before) exhort the investor to commit risk capital and effort?

50. Thomas Wälde’s examination of the notion is the clearest. It distinguishes every concept, circumstance and characteristic of the legitimate expectations notion. Yet, this does not mean that his analysis is correct or that it prevails over the others. The explanation permits the identification of every aspect of the other category’s notions.

51. It is therefore, appropriate to take this notion into account to examine its nature, scope and application in the following part. Besides, this concept reconciles all three approaches and gives birth to the comparative approach, which is currently the most favoured one.

ii. The legal nature of legitimate expectations

52. Until now, in accordance with the notion examined before, legitimate expectations are understood as a protection to the investor which implicitly contain an obligation to compensate damages caused by the state. The protection has been classified within the fair and equitable treatment standard, and the state in order to treat the investor fairly has to fulfil the burdens aforementioned.

53. Seeking to bring more clarity to the nature and origin of the legitimate expectations protection, in the next part, the sources of international law and international investment law will be studied, aiming to locate the source of law which enables the investor to find an extended protection to his investment.
III. PART TWO

SOURCES OF INTERNATIONAL LAW AND THE OBLIGATION OF LEGITIMATE EXPECTATIONS

A. Introduction

i. Sources of law

54. With respect to the sources of law, there is a notorious tradition to approach the matter by referring to a well-known metaphor. It consists of making reference to the literal significance or meaning of “source”. Source literally means a spring of water, the rising point of a stream of water from the ground. Nevertheless, it signifies the rising, but not the cause of existence of that water.

55. In order to explain the meaning of sources of law, the majority of scholars often use this metaphor pretending to graphically illustrate the origin of a certain law, rule or even principle. Yet, the real meaning of source cannot only be reduced to its origin.

a. Definition of sources of law

56. Sources of law means the source of the legal rights and obligations of the parties in relation to a legal instrument. For instance, in a specific jurisdiction, the law promoted by the legislator is a source of law, since it gives birth to the rights and obligations to the population on the part of the state. A contract is a source of law as well, both in domestic and international law. It contains the rights and obligations of the parties who enter into it. In international law, the treaties present the most common origin of the state’s obligations and rights, likewise in unilateral acts.

b. Written legal norms and unwritten norms

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40 For instance, Ibid.
57. The foregoing definition contemplates, however, only the written legal norms, although there are agreements that provided obligations and rights but not in written form.\textsuperscript{41} One example of this are customary rules. They are unwritten norms because they are established through the practice of the state and recognised as law. Therefore, a more suited definition is: the written or unwritten sources of legal rights and obligations to persons ascribed to a legal community. Now, in a deeper sense, the meaning of the sources of law can be classified.

c. Law-creating processes and law-determining agencies

58. According to its bare form or its origin, the term sources of law has a concrete meaning. Scholars have identified it as “\textit{the law-creating processes}.”\textsuperscript{42} Additionally, both “\textit{law-determining agencies}”\textsuperscript{43} and “\textit{law creating process}” complement each other.

59. The law creating processes are literally a series of acts directed to produce or give birth to laws, rules or principles. For instance, in international law, the agreement and signature of a treaty between states portrays the most basic process in creating rights and obligations of international law.

60. Conversely, the law-determining agencies do not create a law, instead, they aim to clarify the content and the scope of a certain existing law or rule. For example, the International Court of Justice usually interprets a treaty between two states and determines various rules within that law to apply it in the event of a concrete dispute between the two states concerned, but has no law-creating power.

61. Further, within the law-creating processes the primary sources of law are classified, whilst within the law-determining agencies the subsidiary sources of law or material sources are classified. Now moving forward to a particular system of sources of law, the international system of sources of law will be better illustrated.

\textsuperscript{41} V.D, Degan, Sources of international law, Martinus Nijhoff publishers, Boston, 1997, p. 8
\textsuperscript{43} Ibid.
B. Sources of International Law

i. Traditional canon of international sources of law

62. In international law, the sources of law have been classified into primary sources and subsidiary sources, so as to avoid the ambiguity of the term “source”. Some scholars refer to the strict doctrine that distinguishes between them as the traditional canon of international sources of law.44 This part of the doctrine gives an enormous relevance to the primary sources: treaties, custom and general principles of law.45

63. Further, when approaching the authorities of international law that provided an enumeration of the sources of international law, the relevance of the primary sources varies. Initially, the Twelfth Hague Convention in 1907 provided a hierarchy among the sources of law. Currently, in the Statute of the International Court of Justice, this distinction is not clear.

ii. Historic transition

64. Historically, the first explicit recognition of the sources of international law was in Article 7 of the Unratified Twelfth Hague Convention (1907). It enumerates treaties, custom and general principles of justice and equity and gives them hierarchy in a subsidiary manner. In other words, in the absence of a treaty, the judge will apply custom and in the absence of custom it will finally rely on the general principles of law. At that time, it was thought that, in this manner, the danger of non liquet could be effectively eliminated.46

65. Later, in 1920 a far more relevant enumeration in the determination of the sources of law appeared in Article 38 of the statute of the Permanent Court of Justice. This article, slightly amended, became Article 38(1) of

44 Patrick M. Norton: The role of precedent in the development of International Investment Law, ICSID Review, Vol 33, No.1. 2018, p. 280 See also Authors in footnote 5 of the same article, it was consulted: Hugh Thirlway, The Sources of International Law (OUP 2014) from those authors.
45 Hugh Thirlway: The sources of International Law, oup law 2014 p. 116
46 See supra note 41. P. 45
the Statute of the International Court of Justice in 1945.  

This article enumerates the sources of law as follows:

*Article 38*

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

   a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;

   b. international custom, as evidence of a general practice accepted as law;

   c. the general principles of law recognised by civilized nations;

   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

66. Conversely to what was intended to be established in 1907, Article 38 of the International Court of Justice statute did not provide a hierarchy among sources. Yet, the doctrine has been identified and divided into primary sources and subsidiary sources of law or, as it was mentioned, previously law-creating processes and law-determining agencies.

67. Namely, in literal (a) it mentions conventions, referring to multilateral treaties and bilateral treaties, in (b) custom, and in (c) the general principles of law catalogue, the primary sources. Further in literal (d) judicial decisions and doctrine or subsidiary sources of law are mentioned.

68. Nevertheless, some scholars\(^{48}\) ascertain that the importance of this article has been overrated, since the statute only binds the parties that give consent. Doubts among doctrine ultimately locate this enumeration as a source within a subsidiary source itself. It is true that the tradition has provided in Article 38 enough legal force to become the principal reference on which centres of arbitration and tribunals rely upon.  

\(^{47}\) Ibid., P. 7  
\(^{48}\) Ibid.  
\(^{49}\) Ibid., P. 4
69. Besides, the majority of doctrine ascribes the utmost importance to this article due to the fact that the statute, according to Article 92 of the UN Charter, is “an integral part of the charter”\textsuperscript{50} itself. The statute, therefore, binds almost all sovereign states in the world. Even the few exceptions are bound by it, following the procedure of Article 93 (2) of the charter.

70. In summary, the international law applied by the International Court of Justice is binding to all members of the UN. One of its six main organs legitimises it with sufficient authority to dictate how international disputes shall be solved. It means that in most cases arbitral tribunals follow this application of the sources of law to resolve concrete disputes. In short, Article 38 contains the most accepted enumeration of the international sources of law.

iii. Classification

71. The classification of Article 38(1), its consequences and critics should be studied because it has been accepted in doctrine as the sources of international law. In addition, its binding character is included within the UN Charter and it is reflected in State Practice.\textsuperscript{51}

72. The doctrine attempts to identify a possible hierarchy among the four listed sources.\textsuperscript{52} De Wet quoted by Tudor\textsuperscript{53}, for example, tends to interpret Article 38(1) similarly to Article 7 of the Unratified Hague Convention of 1907. That is to obtain a subsidiary hierarchy explained before in paragraph 58. However, agreeing to such an ambitious view can lead to errors.

73. Article 38(1) proposes an accepted classification: Treaties, Custom, General Principles of Law (Primary sources), Judicial decisions and Doctrine (Subsidiary sources). Trying to limit the application of each source restrictively is superfluous. All these sources have been applied in a complementary manner and proved by practice.\textsuperscript{54} Accepting the posture

\textsuperscript{50} Charter of the United Nations, Chapter XIV, Article 92. Consulted in un.org.
\textsuperscript{51} See supra note 41.
\textsuperscript{52} Ioana Tudor: The fair and equitable treatment standard in the international law of foreign investment, Oxford university press, 2008, p. 10
\textsuperscript{53} See note 6 in Ioana Tudor’s book: E de Wet, the chapter VII Powers of the UN security council, 2004, p. 79-80.
\textsuperscript{54} See in Supra Note 44, p. 282.
that proposes a classification between primary and subsidiary sources is correct, if interpreted openly and not restrictively.

74. The sources of law usually are not applied independently i.e. one from the other, since they are closely related. It is really unusual for a judge or an arbitrator to analyse a treaty and find in it all responses to the dispute. At least that is not exactly what the practice demonstrates, as a scholar\textsuperscript{55} has explained in the field of international investment law. This is a point which will be studied further, later in the text.

75. Now, the level of certainty i.e. of having the rule to apply within a Treaty (Formal source) is larger than having to apply a general principle of law, specially related to the obligation of the parties, since they will have been clearly portrayed there. Nonetheless, the rules contained in judicial decisions or arbitral awards tend to be useful and practical, particularly in cases where the applicable treaty does not provide the will of the parties clearly. Of course, the decision must take into account the relevant facts surrounding the case.

76. In summary, the sources of international law are classified in Article 38(1) of the International Court of Justice statute. They are accepted by the majority of scholars. The sources enumerated in this article, however, express in a rigid manner the real system of the sources of law. Therefore, limiting this theoretical classification does not restrict its real adherence in practice.

77. Currently, the international community has accepted Unilateral Acts and some Resolutions of International Organisations as sources of International Law\textsuperscript{56}. Although both are not enumerated in Article 38(1) of the International Court of Justice Statute, they have an important role in establishing and assuring norms and obligations that are binding for states.

C. Sources of International Investment Law

\textsuperscript{55} Ibid.
i. Outline

78. In previous lines, the sources of international law, in general, have been studied. Now, it is important to analyse more specifically and, therefore to study, the sources of international investment law, a subject which is pertinent to the origin of the notion of legitimate expectations. Despite the classification made by the doctrine that is mainly focused on highlighting the application of the primary sources, in this part this theory will be questioned. Finally, it will be demonstrated that the practice in international investment law differs from scholars’ common understanding in this regard.

ii. Classification of sources of international investment law

79. Some scholars\textsuperscript{57} tend to provide a traditional classification to international investment law sources as well, through the establishment of principles and rules derived from the following sources of law: The bilateral treaties for the protection of investments between states; custom, relevant judicial decisions of the ICJ and mainly those extracted from arbitral tribunals interpretations within its awards; and general principles of law\textsuperscript{58} and not directly from rules in themselves.

iii. ICSID convention and Article 42

80. The International Court of Justice has considered multilateral treaties as an important source of international law, though, in international investment law, there are no multilateral treaties that comprehend a large number of states, which in any case would be taken as a compilation of the law.\textsuperscript{59} Following Sornarajah on this point, “The only successful convention in the field is the ICSID Convention. But, this is a procedural convention only, setting up machinery for the settlement of investment disputes through arbitration”.\textsuperscript{60} Without failing to mention the New York

\textsuperscript{58} Ibid., p. 81
\textsuperscript{59} Ibid., p. 80
\textsuperscript{60} Ibid.
Convention of 1958, which is a relevant instrument in the recognition and enforcement of foreign arbitral awards by domestic law.

81. In spite of being ICSID convention a procedural convention, in Article 42(1) the rules that tribunals will base their decisions upon are stipulated. It gives a wide range to the parties to decide the rules which they will use to resolve any eventual dispute. On this point, Article 42(1) refers to the contracting states in the bilateral agreement, at the moment of a bilateral investment treaty’s (BIT’s) signature, both states agree what rules shall be applied in case of a dispute between one of them and a national from the other state.

82. In a subsidiary manner, it then provides that in the absence of the previous agreement, the law of the contracting state party to the dispute shall apply. Finally, it refers to the applicable rules of international law, though Article 38(1) of ICJ statute, which is not mentioned here. Nevertheless, that enumeration results pertinent since it might be applicable directly or indirectly. In the opinion of scholars\(^\text{61}\), the application of international law refers both to the procedure rules and a substantive body of rules.

83. Lastly, in regard to article 42(1), it is important to say that the arbitrator should start by determining the nature of the claim, whether it is a BIT claim or a contract claim. If it is a contract claim, it will verify whether the parties agreed on the applicable law and therefore apply that law. On the other hand, if it is a treaty claim, it will directly apply international law.

84. After this brief introduction, this chapter aims to develop a better understanding of the sources of international investment law in order to locate the precise origin in relation to legitimate expectations. The following sources, therefore, will be analysed with the aim of identifying it: Bilateral Investment Treaties, Custom, Case law and Judicial Decisions of the ICJ and Investment awards, and General Principles of Law.

iv. Bilateral Investment Treaty

a. Definition

85. To understand the concept of bilateral treaty, it is necessary to understand exactly what a treaty is. A treaty is a concordance of wills of two or more subjects of international law, intended to achieve an effect in international law. It represents the creation of a legal relationship of mutual rights and duties.62

86. Now, a bilateral treaty is a type of international treaty which received its name “bilateral” due to the number of parties that sign it and ratify it, which is two. In other words, in this kind of treaty, two states agree to achieve an effect in international law creating a legal relationship between them.

87. Further, a BIT, condenses these two characteristics and the effect in international law aimed by this treaty is that the two states will mutually promote and protect the investment of their nationals. They specifically address the risk of a long-term investment project and, therefore, provide stability to the investors of the contracting states in the BIT.63

b. Object and purpose

88. Unlike other treaties, as mentioned before, the BIT has a specific object and purpose which, as scholars64 have said it, “is closely tied to the desirability and to the nature of foreign investments, to the mutual benefits for the host state and for the investor, to the conditions necessary for the promotion of foreign investment”65. Its primary end is to remove the obstacles that are not permitting or properly directing more foreign investment into the host states. On the one hand, the host state receives benefits derived from the economic prosperity promoted by foreign investments and on the other hand, the investor mitigates the risk of a long-term investment in the territory of the host state.

c. Expansion of the BIT and actual environment

62 See supra note 41. p. 9
64 Ibid.
65 Ibid.
89. In recent times, the BITs have become an international instrument often used by developed states willing to export capital to developing states that promise a wide range of opportunities in different sectors. More than 200 states are now obliged under a series of BITs signed with other states. A study shows that there are more than 3,300 bilateral investment treaties providing investor-state arbitration under the ICSID Arbitration Rules\(^6\). It also shows a framework for at least 800 investment treaty arbitrations against more than 100 states.\(^7\)

90. Every BIT is a pact between two states that can decide to oblige themselves in different manners, aiming to promote and protect foreign investment. This situation has resulted in a variety of rules applicable to the same issues, but specifically applied to the cases between determined states that decide the rules independently in their BIT. Nevertheless, along the development of the tendency of states to sign BITs, there have appeared paradigms or models of BITs that contain similar clauses and, therefore, rules.

91. The application of these large number of BITs, in at least 800 arbitration disputes, has established a diverse number of rules and has created lines of interpretation. Most of the tribunals respecting the authority of other tribunals that had resolved a similar case prior to them tended to take their interpretation as a precedent.

92. The phenomenon has been catalogued by the doctrine as the “de facto system of precedent” that in the opinion of some scholars\(^8\) is in complete opposition to the orthodox canon of sources of international law because it considers arbitral tribunal decisions as a main source of law considered, by them, a subsidiary source of law.

d. Application of BITs example: Case


\(^7\) UNCTAD reports that as of 1 March 2017, at least 767 investor-State arbitrations had been filed. UNCTAD (n 24) p. 114.

Pursuing to illustrate in more detail, the content, rules, interpretation and application of the BIT by the tribunals the *Anglo-Adriatic Group v. Albania* case will be taken as an example.

General description

The case under analysis is a dispute between a National (Corporation) of the British Virgin Islands and the Republic of Albania. The Investment agreement has been named LFI, it provides (as an example) in Article 8 the dispute settlement clause (Procedure rule). This clause provided the *Anglo-Adriatic Group* with choices to settle a dispute regarding their investment in the Republic of Albania. Article 8(2) established the jurisdiction of an ICSID tribunal to arbitrate a dispute between the Anglo-Adriatic group and the Albanian public administration if the dispute is related to expropriation, compensation for expropriation or discrimination.  

Rule and application

In the corresponded BIT, the Tribunal found the rule to apply in order to determine whether it has or not jurisdiction over the dispute. The tribunal will have jurisdiction following Articles 1 and 8 requiring the fulfilment of three elements: (a) existence of a protected investment; (b) existence of a protected investor; and (c) that the claimant is the owner or titleholder of the protected investment.

Albania argued that the tribunal lacks jurisdiction over the dispute, since the claimant does not fulfil elements (a) and (c). In other words, there is not a protected investment and there is doubt about the property entitlement of the claimant. The tribunal sides with Albania because the burden of prove lies with the claimant and it has not provided enough evidence to satisfy its interest.

Conclusion

The BIT is interpreted as a whole by the parties in the dispute. In this interpretation, the parties argue over the rules that they would apply to
make their case. Those rules are related, first to the jurisdiction (procedural rules) of the tribunal, and second to the merits (substantive rules) of the case. In the example, the parties apply the rule of jurisdiction. The claimant, *Anglo-Adriatic Group*, argues the for the jurisdiction of the tribunal while the Republic of Albania, the respondent, argues that the tribunal lacks jurisdiction over the dispute.

98. The tribunal interprets the BIT as well. To decide on the matter, one of the first elements that it has to determine is the applicable law to the dispute. It will decide over the rules in the BIT applied by the parties. Contrasting both positions, it verifies which of the parties is correct on its interpretation or it provides its own rules and applies them, if necessary. In the present case, the tribunal decided to apply the interpretation provided by the republic of Albania, since the respondent did not fulfil the requirements in the BIT.

e. Legitimate expectations

99. Having a better understanding of the sources of international law and investment law, it is also pertinent to identify the origin of the legitimate expectations within the sources of law. Among the large number of current BITs signed by multiple states, there is no explicit mention of the term “legitimate expectations”. There is no specific article in the BITs that provided an obligation regarding legitimate expectations.

100. Yet, legitimate expectations' jurisprudence has been elaborated by arbitral tribunals that have encountered a substantial protection to the investors’ legitimate expectations in regard to the fair and equitable treatment standard provided in the majority of BITs.

101. Since 1999, the legitimate expectations notion has been stressed in the autonomous and independent development of the fair and equitable treatment standard in arbitral awards. It started since the United Nations Commission on Trade and Development (UNCTAD) published a survey\(^\text{70}\) related to bilateral investment treaties that year.\(^\text{71}\) According to the UNCTAD, at the moment of publication of that survey there was no

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major authority relating to the fair and equitable standard. However, this jurisprudence emerged strongly from that very moment.

102. The awards had recognised legitimate expectations as the core of the fair and equitable treatment standard substantial protection in the BITs. This category of legitimate expectations is characterised by scholars addressing its obligation under three different scenarios: I) obligation from a written contract between the host state and a specific investor; II) unilateral declarations by the host state; and III) those based on the regulatory framework at the time of the investment.

- Cases of legitimate expectations

103. For instance, the Thunderbird v. Mexico tribunal has approached the application of a possible rule of legitimate expectations. This tribunal had identified the issue in the concrete case: “whether a legitimate expectation was created by SEGOB’s letter, dated 15 August 2000, to the effect that it brings Thunderbird’s claims in the present case under Article 1102, 1105 and/or 1110 NAFTA.”

104. In this case, the tribunal defines the legitimate expectations within the context of the NAFTA framework, as “a situation where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA party to honour those expectations could cause the investor to suffer damages”.

105. In this case, the claimant argues that a letter (oficio) written by the SEGOB, administrative entity, and directed to Thunderbird corporation created legitimate expectations. This letter, following the claimant’s arguments, induced its investment since it guaranteed that the permits necessary to operate the investment in Mexico would be provided by the administration.

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73 International Thunderbird Gaming Corporation v. Mexico, NAFTA/UNCITRAL, Award, 26 January 2006, para. 137.
74 Ibid., para 147.
106. The tribunal considered “recent investment case law” and “the good faith principle of international Customary Law” as sources to evaluate the concept of legitimate expectations. The tribunal decided that regardless of the standard applied, it did not find that the Letter (oficio), submitted by the claimant, generated legitimate expectations upon which it could reasonably rely on operating its machines in Mexico.

107. Another example of this matter is El Paso Energy Corp. v. Argentina. This tribunal agreed that the fair and equitable treatment standard can be “linked to foreign investors’ legitimate and reasonable expectations”. However, that expectations, “as well as their violations, have to be examined objectively”. The tribunal considered that the notion of “legitimate expectations” is an objective concept, that is the result of a balancing of interests and rights, and that it varies according to the context.

f. Conclusion

108. In brief, the BITs, the most important source of international investment law, in general, do not explicitly mention the legitimate expectations literally in their clauses. Nevertheless, the tribunal has developed a jurisprudence that catalogued legitimate expectations as core of fair and equitable treatment (FET). Its obligation within this jurisprudence arises in three scenarios. Lastly, the case law has established that the legitimate expectations and its violation have to be examined objectively, balancing interest and rights.

v. Customary International Law (CIL)

a. Definition

109. In international law, a custom is a repeated legal conduct adopted by states which became a primary source of international law when it was generally accepted by the states as law. Namely, a rule of customary

75 Ibid.
international law is formed when it appears in a consistent state practice and *Opinio juris* catalogued it as law.\textsuperscript{77}

110. Now, the manifestation of a uniform practice is usually previous to a state's perception of the rule as a binding law. Both are manifested in the state conduct; however, both can be identified in other written instruments such as treaties, declarations of international organisations or unilateral acts of certain number of states consistent in the matter. Also, it is relevant to point out the fact that decisions of international courts or tribunals influence future practice of states and it leads to the creation of new rules of customary law.

111. Regarding international investment law, rules of customary international law still play an important role. Many issues, such as: expropriation, denial of justice, state responsibility, and minimal protection of investors under international law (so-called minimum standard of protection) are regulated by customary international law. Even if the applicable rules in the dispute between parties are rules established in investment treaties, customary rules may be applicable and very important.

b. Three stages of customary international law

112. Customary international law as a source of international investment law had three stages which provided different content or created distinguishable rules from one to the other. The first stage spans from the second half of the nineteenth century to the first half of the twentieth century and is characterised by the Calvo doctrine, Russian Revolution and Mexican position\textsuperscript{78}. The second stage, which started in the early 1970s, is characterised in the United Nations General Assembly by the New International Economic Order. The third stage started in 1994 when the Hull rule was positivised in instruments, such as the Energy Charter Treaty or NAFTA and it is characterised by developing countries giving full protection to the investments of foreign investors.

- First stage

\textsuperscript{77} See supra note 41, p. 8

113. The Calvo doctrine developed by Argentine jurist Carlos Calvo means, in general, that no foreigner can benefit from a wider protection than the one granted to the citizens of that state. Further, international law does not differentiate between citizens of the state and foreigners, but it provides equal treatment to both. Foreigners, therefore, have to adjust their business to be in total compliance of the host state’s law, regulations and jurisdiction.

114. Regarding investment law, the Calvo doctrine established the nature of the customary international standard of protection to aliens’ property. It asserted a correlation between the nationals’ property and the aliens’ property. In other words, protection of foreign property can be extended or reduced in correspondence to the domestic law of each state. This led to either strong guarantees or a total lack of protection of foreign property, which was completely tied to national protection of property.79

115. After the Russian Revolution, Calvo’s doctrine was “revived on a practical level”80 when the Soviet Union expropriated the national’s property and left the alien’s protection empty. Based on the principle of Unjust Enrichment, the Soviet Union was condemned to pay compensation in the Lena Goldfields Arbitration in 193081 and the Customary International standard was settled: the states can expropriate foreign property, but they were obliged to pay compensation.

116. Further, in similar fashion, in 1938 Mexico’s nationalisation of the US agrarian and oil business led to a “diplomatic exchange” between those states that gave birth to the Hull rule, which basically reasserted the customary standard mentioned in the paragraph above: “The rules of international law (Custom) allowed expropriation of foreign property, but required ‘prompt, adequate and effective compensation’”, wrote the US secretary of State, Cordell Hull, at the time in his famous letter.82

117. These three highlighted points formed the early status of protection of the alien in general. Aliens are protected by rules of international law,

79 Ibid. p. 12
80 Ibid.
81 See in supra note 78, footnote 44 within that text.
82 Ibid. p. 13
independent from domestic law. They provided that certain measures of the host states were unacceptable.

- Second stage

118. In this stage the status of customary law governing foreign property was questioned. In this regard, the confrontation was settled between developing countries and capital-exporting countries. They chose as battleground the UN General Assembly, where the first group of countries was and still is in the majority. As early as the 1970s, they promoted several resolutions that intended to proclaim a New International Economic Order.

119. One of their pretensions was to replace the rules governing the expropriation of alien property with domestic rules determined by each state. During this period, the customary international rules were uncertain until the early 1990s, when the socialist view collapsed.

- Third stage

120. In this stage, Latin American countries started to conclude more bilateral investment treaties in the early 1990s. Due to the fact that the economic independence searched by the New International Economic Order led to a financial crisis, instead of promoting economic welfare for the people. Therefore, at that time, these countries were trying to obtain an alternative source of capital to finance their public programmes.

121. Moreover, the recognition that a “great flow of foreign direct investment brings substantial benefits to bear on the world economy and the economies of developing countries in particular”83 characterised the intention of these states to incline their economies to a more foreign investment-friendly environment. Among the benefits reaped, host states looked forward to improving long-term efficiency through increasing competition, transferring capital, technology and expanding global trade in exchange for their openness.84

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84 Ibid.
122. Eventually, these interests turned around the international climate on the protection of foreign investment. This is in contrast to the second stage and in complete opposition to the application of the customary international law standard by developing countries. In this stage they granted wider protection to foreign investment than in traditional customary law. The Hull rule became the predominant standard of customary international law.\textsuperscript{85}

123. Investors can address their claim arguing an obligation breach derived from CIL, in which case the tribunal will seek a remedy that is reliant on the same source of law.

c. Cases: Custom application in the practice as the basis of a claim

124. Customary international law can be considered as a source of applicable law to resolve an investment dispute before an arbitral tribunal. Investor could argue that the host state has breached an obligation established by customary international law (apart from substantive rights violated from BIT). However, the possibility is remote, in some cases the tribunal can decide to apply custom, in others is the treaty that redirects to custom, or even it can be taken as the applicable law of the dispute.

125. The decision to consider custom is not solely an investor’s decision when addressing its claim. As mentioned before the tribunal would sometimes refer to customary international law to look for a content, or to interpret some ambiguous notions under treaty. Therefore, to properly define notions such as FET or FPS Tribunal may refer and look for clarifications in custom, when treaty does not provide a clear answer.\textsuperscript{86} Further, the applicable BIT can explicitly provide that certain clause is determined by custom. e.g under NAFTA article 1105 the content of the FET standard is equated with the minimum standard of treatment under CIL. In this cases, the tribunal might provide a remedy to the investor for the breach of its rights under customary international law.\textsuperscript{87}

\textsuperscript{85} See supra note 78, p. 16
\textsuperscript{86} Accession Mezzanine Capital LP and DKV v Hungary, ICSID Case No ARB/12/3, Decision on Respondent’s Objection under Arbitration Rule 41(5), 16 January 2013.
\textsuperscript{87} Kate Parlett: Claims under Customary International Law, ICSID Review Vol 31, No. 2 2016. P. 435.
126. However, it is worth noticing that, if the arbitral proceeding is based on the BIT, the application of CIL has to be derived from that treaty. In the case *Generation Ukraine Inc v Ukraine* the tribunal rejected the claimant’s claim based only in custom because it did not have general jurisdiction over the causes of action. Custom cannot be invoked without a BIT under its base due to procedural evident reasons.\(^8^9\)

127. Finally, the most pertinent situation to the present study is where the protection under the treaty or investment law excludes certain protection that might otherwise be available under customary international law.\(^9^0\) For example, the applicable BIT literally excludes from the FET the legitimate expectations of the investor. These expectations can be part of the investor’s claim under customary international law.

d. NAFTA approach to customary international law: Minimum standard

128. To present a different perspective, the NAFTA treaty among the US, Canada and Mexico decided to equate the customary law to the obligation of the host states to observe a ‘*fair and equitable treatment*’ and ‘*full protection and security*’ standards in relation to foreign investors. Likewise, the CMS arbitral tribunal also equates the minimum standard to FET. It clarifies that *fair and equitable treatment* is no different than the minimum standard and its development under customary law.\(^9^1\)

e. Conclusion

129. In conclusion, following the previous line of analysis, custom can be a source of the investor’s legitimate expectations when those expectations are derived by the tribunal from applicable customary norms. .

\(^{88}\) See supra note 88, p. 436.
\(^{89}\) *Generation Ukraine Inc v Ukraine*, ICSID case No. ARB/00/9 Award of 16 september 2003, para. 11.3.
\(^{90}\) See supra note 87.
\(^{91}\) *CMS Gas Transmission Co. V. The republic of Argentina*, ICSID case No. ARB/1/08 Award of 12 May 2005. Para. 284
Legitimate expectations will be protected then in such an event, also based by the application of customary international law.

vi. Case law and judicial decisions of the ICJ

130. In previous lines, it has been explained how doctrine accords that the judicial decisions of the ICJ and arbitral awards constitute only a subsidiary source of international law. Furthermore, the role ascribed to this subsidiary source was also studied. It plays a part in determining the agency of international law in contrast to the creating-processes characteristic of the primary sources of law.

131. Nevertheless, the latter is a tendency among scholars that widely differs in practice. International investment law practice has been characterised by commentators as a ‘de facto system of precedent’92. That is to say, it is a system where previous decisions of arbitral tribunals are preponderant in the formation of new awards.

132. Beyond that, the rules applied to provide a solution to a case come from the interpretation and application that other tribunals had previously brought to life in their awards. In the practice of international investment law excels a ‘common law’ system, at least with regard to the application of the sources of law to concrete cases.

133. In support of such affirmations, Ole Kristian Fauchald developed a study of 98 ICSID awards in 2008. He found that when identifying rules of international law: i) few tribunals referred to Article 38(1) of the ICJ statute and its traditional sources;93 ii) that tribunals cited customary international law only in 34 of the 98 awards and general principles of law only on four occasions;94 and finally and most importantly iii) that the most notable aspect of the tribunals' jurisprudence was its reliance upon case law.95

- Legitimate expectations obligation in case law

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92 See supra note 68.
94 Ibid., p. 324-326.
95 Ibid., p. 343.
134. The study of BITs as a source of international investment law determined that even though most investment treaties do not literally refer to an obligation regarding legitimate expectations, since 1999 the majority of arbitral tribunal awards started to develop a (not unified) jurisprudence. There, the legitimate expectations obligation has been categorised as the core of the fair and equitable treatment clause within the BITs.96

135. In summary, arbitral awards, even if just subsidiary sources of international law under the article 38 of the ICJ Statute, have a very relevant position in international investment law as a source of law. However, in the international investment law and the texts of BITs, there is no explicit provision or reference to the obligation to recognise legitimate expectations of investor. It can be concluded that the origin of legitimate expectations is mainly derived by the interpretation and application of norms of BITs in regard to FET standard, therefore it produces the formation of jurisprudence by arbitral awards.

vii. General Principles of Law

a. Definition

136. General principles are rules that emerged from the idea of natural law and equity. In the opinion of some authors97, including Charles Fenwick, these principles are linked to a fundamental morality and justice deduced from the civil law tradition.

b. Legitimate expectations in general principles of law

137. International law has approached legitimate expectations by applying various general principles of law that function toward its protection. For instance, principles such as good faith,98 and equity. The ICJ has also considered these two principles, as basis for recognising acquiescence, estoppel and legitimate expectations.

96 See supra para. 101.
138. Nevertheless, this doctrine of legitimate expectations has been implemented only in the scenario of state-state relationships. It has never been implemented in investor-state relationship by arbitral tribunals.

139. However, authors have attempted to extend its application to investor-state relationships. One has justified its application by stating that an analogy would allow for the implementation of this legitimate expectations’ doctrine as general principle of law to the disputes arising between investors and states.

140. Nonetheless, this posture seems problematic since analogy in international law means “the application of a rule which covers a particular case to another case which is similar to the first but itself is not regulated by the rule” different from what is intendent through analogy here. A consistent application by analogy following the previous meaning would be applying the existing rule to a case not yet considered between states. At first sight, pretending to widen its application, in general, to all the investor-state disputes appears to be impossible.

141. The uncertainty regarding the existence of a link between the origin of the legitimate expectations obligation in international investment law, and the general principles of law as a source of investment law still remains. It seems that neither the doctrine nor the jurisprudence is willing to inquire soon on this matter.

viii. Conclusion

142. To conclude this part some key points must be highlighted. Firstly, in relation to the traditional understanding on the sources of international law, they are not completely extended in the same manner to international investment law. However, the doctrine has approached the

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99 For example, the Port of Portendick case (1843), the Norwegian Fisheries case (1951), The Temple of Preah Vihear case (1962). See in: ibid.
101 Ibid. p. 156
102 Silja Vöneky, Analogy in International Law, Max Planck, Encyclopedia of Public International Law, 2008.
matter referring to Article 38(1) of the International Court of Justice statute reality in the practice of arbitral tribunals, which widely differs.

143. Even though the primary and subsidiary sources of law are applied in international investment law, the role of arbitral tribunals is predominant, since they determine the content, scope and application of the treaties.

144. Secondly, in relation to the origin of legitimate expectations from one of the sources of international investment law, most BITs do not mention explicitly an obligation to observe and respect the legitimate expectations of the investor. Nevertheless, since the content and scope of BITs are the primary subject of the “de facto precedent system” or interpretations of other arbitral tribunals of BITs, there is a tendency in the approach to the fair and equitable treatment standard that has established that the core of this substantive protection is the obligation to observe the legitimate expectations of the investor.

145. Furthermore, customary international law has been ineffectively invoked by investors on the protection of legitimate expectations, because BIT explicitly excludes the obligation to observe them within the FET standard clause. Finally, the general principles of law as a source for legitimate expectations jurisprudence cannot be considered in relation to state-investor relationships, since it has only been applied to state-state relationships and analogy does not fulfil the burden to extend it.
IV. PART THREE

LEGITIMATE EXPECTATIONS AS THE CORE OF THE FAIR AND EQUITABLE TREATMENT STANDARD

A. Outline

146. In the previous parts some preliminary remarks regarding the legitimate expectations’ notion (part I) were analysed. Likewise, a close study of international sources of law attempted to locate the legitimate expectations source within international investment law (part II). Moreover, international investment awards have established legitimate expectations as the “major element” of the fair and equitable treatment standard, which is the topic that will be discussed in part III.

147. Firstly, the fair and equitable treatment’s notion will be elucidated with an emphasis on its composition in accordance with the legitimate expectations in international investment law. In order to accomplish this task, the examination will consider the doctrine’s perspective, and highlight related investment arbitration cases.

148. Secondly, as introduced in part I, the comparative approach of legitimate expectations will be analysed in detail. The aim is to provide a comparison of some domestic legal systems, present a brief overview of the reasons underpinning both, a procedural or substantive protection of legitimate expectations in international investment law, and address the possible global recognition of legitimate expectations as a general principle of law.

149. Thirdly, considering the preliminary notion of legitimate expectations elaborated in part I and the comparative approach developed in this part, the examination will be immerged into a deeper observation of the subject of study in the light of international investment law. Further, the division of the three scenarios identified in relevant arbitral tribunals decisions by Michael Potestà will be exposed alongside their requirements in order to provide a guideline for the current study.
150. Afterwards, some applications of the operational rule on legitimate expectations by different arbitral tribunals in regard to each scenario will be examined. This practical analysis will provide a clear and simple understanding of the legitimate expectations’ application in international investment law.

B. Notion of the *Fair and Equitable treatment* standard

i. Doctrine

151. Many scholars have referred to the fair and equitable treatment standard in different terms. Nonetheless, from the different pronunciations that have been made, some general characteristics can be detected in most of them. One that has been repeated several times, is the link between the fair and equitable treatment and the protection of property.

152. Sornarajah, for instance, asserts that the most common cause of action to invoke the protection under the fair and equitable treatment has been the taking of property.\(^{103}\) However, arbitral awards have made a distinction between the FET standard and the actual protection of property.

153. This is in contrast to the customary international law minimum standard. For example, he has highlighted the absence of discussion about the minimum standard of treatment’s violation outside the context of property taking.\(^{104}\)

154. On the other hand, international investment law has distinguished between the FET standard and the protection of property without, setting apart their close connection. Further, investment treaty law has recognised certain standards that the signing host state in the BIT has to observe in reference to the investment of the investor protected by the same treaty. Sornarajah also affirms that this recognition provides

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104 Ibid. p. 334
an independent centre of liability for the state from the taking of property.\textsuperscript{105}

155. Nevertheless, from time to time, investment law and specially investment awards have been criticised over exceeding the reading of state's obligations.\textsuperscript{106} Following the distinction of FET from property's protection, it is evident that the standards of treatment created by every single BIT guarantee other more concrete standards. For example, the protection of the property against expropriation.

156. In other words, the fair and equitable treatment standard is an abstract standard whose purpose is to fill the gaps left by more concrete standards, as has been asserted by Dolzer and Shreuer.\textsuperscript{107} These two scholars have affirmed, as well, that some treaties might aim to reach the fundamental goal of legal stability by providing standards of fair treatment. They identified a correlation between the FET standard and good faith in its broader sense and some variables related to the notions of \textit{venire contra factum propium} and estoppel.\textsuperscript{108}

157. Now, following this distinction, the question about the meaning of the fair and equitable standard has arisen. To respond to this inquiry, some scholars such as Martins Paparinskis understand the FET to be a "substantive guarantee for the protection of property" specially in relation to conducts that pretend to restrict and interfere with it.

158. Paparinskis established the meaning of the FET standard from state practice and arbitral decisions. He has observed in those a reference to the ordinary meaning of the term, thus concluding that in most cases the FET is an obligation formulated in "a broad and general manner", which (at last) is an acceptable interpretative conclusion.\textsuperscript{109}

159. Nonetheless, he was cautious about the definition of FET and offered a smart solution to the inclusion of the general clauses in the majority of

\textsuperscript{105} Ibid. p. 204
\textsuperscript{106} Martins Paparinskis: The international minimum standard and fair and equitable treatment, Oxford Monographies in International Law, 2013. p. 229.
\textsuperscript{108} Ibid. p. 123.
\textsuperscript{109} See supra note 107, p. 112. See also: footnote 12 in the same page.
BITs. For Paparinskis, the FET is a standard or rule that oscillates between, on the one side “fairness”, and on the other the requirement to ensure fairness. Therefore, the interpretation of the FET standard is to be made on a discretionary case-by-case basis, by each tribunal.\textsuperscript{110} Further, the tribunal must consider the concrete BIT and within it the concrete normative elements that promoted and ensured fair treatment.

160. Some of those elements are principles found in state practice (BITs) and in earlier decisions that have determined relevant factors for the fairness and equity of the state’s conduct. For instance, transparency, due process, the stability and predictability of the state acts and the legitimate expectations of the investor, among others.

161. The legitimate expectations factor has been identified as the core of the FET standard by some arbitral tribunals that have resulted in the clarification of the FET notion. In the following paragraphs references will be made to some of those approaches.

ii. Case Law

162. In line with Paparinskis’ characterisation of the FET standard clauses, most tribunals have come to deal with BITs that establish an obligation formulated in a “broad or general manner” relating to the fair treatment of investments covered under those treaties. Some of them have to approach the subject by determining the ordinary meaning of the terms in accordance with the Article 31 of the Vienna Convention on the Law of Treaties.

163. However, the ordinary meaning of the terms has not provided a sufficiently clear image of the FET standard’s notion. Tribunals, therefore, have relied on the purpose and object of the BITs by following the rule in Article 31 under the same treaty.

164. For instance, the \textit{MTD v. Chile} tribunal considered the definition of FET provided by the claimant. That is, “Fair and equitable treatment is a broad and widely accepted standard encompassing such fundamental

\textsuperscript{110} Ibid. p. 115.
standards as good faith, due process, non-discrimination, and proportionality”111

165. That is to say, fair and equitable treatment should be understood to be “treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment”112. In this case, it relied upon the BIT’s object and purpose. Further, arbitrator Schwebel clarified that the meaning of the FET standard is defined and applied to specific facts.

166. In CMS v. Argentina, the tribunal also identified a broad and general formulation of the FET standard in the applicable BIT. It suits the respondent’ defense. In this case, Argentina emphasised the vague and general nature of the FET clause. However, the tribunal considered both postures proposed by the claimant and respondent. It quoted the definition in CME case113 “FET standard is breached by an evisceration of the agreements in reliance upon the foreign investor was induced to invest”.

167. In this definition, the reductive approach that tends to equate the fair and equitable treatment to a broad notion of legitimate expectations only is evident. Moreover, the tribunal referred to the Tecmed v. Mexico case about this posture. Because in that case the applicable BIT provided within the FET clause an enunciation of legitimate expectations, the tribunal reduced the whole concept to “the basic expectations that were taken into account by the investor to make the invest”.

168. Yet, someone would argue that those basic expectations signified a broader concept than the legitimate expectations under the FET standard. In other words, that legitimate expectations in lato sensu correspond to “basic expectations” in the Tecmed case and legitimate expectations in stricto sensu correspond to the main element of the FET standard. Finally, the tribunal in CMS followed the claimant’s posture that alleged a notion of a FET standard tied to the maintenance of a stable framework for investments. That is the FET standard is

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111 Opinion of judge Schwebel quoted in footnote 61 of MTD v. Chile. Para. 109
112 Ibid. Para 113.
113 CMS Gas Transmission Company v. Argentina, ICSID Case No. ARB/01/08, Award, 12 May 2005, para 267.
“inseparable from stability and predictability”\textsuperscript{114} of the state’s conduct. All the above will be examined further later.

C. Comparative analysis: most relevant remarks

169. Previously in part I, the legitimate expectations’ approach of comparative analysis was introduced in order to define a preliminary notion of the topic. In this part, though, the comparative analysis will be conducted in-depth. Since, the proposal of the comparative analysis will be a tendency in the future.

170. Comparative analysis proposes the recognition of legitimate expectations as an emerging general principle of law.\textsuperscript{115} The majority of the domestic legal systems protect legitimate expectations in situations of individualised representations that the administration repudiates. Protection attracts a restricted judicial review in cases where the individual is affected by a general change of policy is exceptional.\textsuperscript{116}

i. Definition

171. This approach consists of comparing the protection of legitimate expectations among different domestic legal systems. Apart from comparing domestic legal systems, it identifies relevant topics to be examined in each domestic system regarding the subject in a more specific way. For example, it examines the justification for an emerging tendency to approach the legitimate expectations’ protection in a comparative manner.

172. In general, legitimate expectations protection is defined by this approach as the legal protection from a previous publicly stated position of the administration that has caused certain harm to an individual, either through a formal decision or informal representation. The protection is justified by different theories: on the one hand the reliance theory, and on the other the rule of law theory.

\textsuperscript{114} Ibid. para 276.
\textsuperscript{115} Michele Potestà, Legitimate expectations in investment treaty law: Understanding the roots and the limits of a controversial concept, ICSID Review 2013, p. 12
\textsuperscript{116} Ibid. p. 11.
ii. Reasons to protect the legitimate expectations

173. These two theories provide the main reason for protecting legitimate expectations. The reliance theory conceives the protection from a considerable harm caused by the disappointment of an expectation created by the decisionmaker. The rule of law theory, instead, seeks to protect the right to legal certainty and to individual autonomy. It conceives legal certainty and individuals’ capability as prerequisites for the development of enterprises in the capitalist economy.

iii. Some aspects of domestic legal systems – bases of comparison

174. Among many of the aspects that this analysis bases its comparison on, the following aspects excel: the root of the protection in each system, the legitimate expectations’ nature, and the type of protection whether it is procedural or substantive.

175. For instance, in Germany the legitimate expectations are rooted in the protection of trust, which is wide-reaching. In EU law the legitimate expectations have particular relevance in the context of retroactive application of laws. Also, in the case of the representations of community institutions, the legitimate expectations can transpire.

176. Now, considering the nature of legitimate expectations, for example in EU law, they are a general principle of law. However, this principle does not aim for a stability of the regulatory framework in relation to companies.

177. Yet, the EU considers it as General Principle. Some states do not recognise the same nature and they protect other rights instead of the legitimate expectations. This is the case of France that protects the right

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118 Suez et al. v. Argentina, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, para. 203.
120 Stefán M. Stefánsson, Legitimate Expectations in EC/EEA Law, in Economic Law and Justice in times of Globalisation, 2007, p. 627-28,
to be heard, vested rights and legal certainty as opposed to legitimate expectations.\textsuperscript{121}

178. The type of procedural or substantive protection has varied from one domestic system to the other. For example, in Canada and Australia, the protection has been strictly limited to a procedural protection. In contrast, in England (for instance) the substantive protection has been accepted, though the majority of judges were cautious. They clarified that the substantive protection is only viable in exceptional situations.

179. A procedural protection consists of giving the opportunity to the individual to state its case, that is to protect the rights of having an appropriate hearing and being given adequate notice. Conversely, the substantive protection either sets the decision aside or maintains it, but awards the individual with compensatory damages.\textsuperscript{122}

180. Finally, to conclude, two points must be highlighted: first in order to recognise legitimate expectations as a general principle of law, at the very least, a careful examination of the most representative legal systems must be made. Second, though it is too soon to proclaim legitimate expectations as a general principle of international law, it can be considered that it is emerging as such.

D. Legitimate expectations in investment case law

i. Outline

181. In part I, the general notion of legitimate expectations was examined. Some remarks were made, and it was concluded that the notion provided by Thomas Wälde’s in Thunderbird v. Mexico was the simplest, the clearest and the most sufficient to introduce the subject and to continue with the analysis of the legitimate expectations’ origin in international sources of law.

182. By now, the study has identified a general notion, and distinguished the source of law from which legitimate expectations emanate. From this point forward, the specific notion that the protection of legitimate

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\textsuperscript{121} See supra note 120.
\textsuperscript{122} See supra note 115, p. 9.
expectations is adopting will be discussed. For this, Thomas Wälde's notion\textsuperscript{123} is theoretically useful and can be easily applied by the tribunals. However, in practice a more limited notion of the protection has been developed.

183. Case law has restrained the protection by judging different degrees of legal protection, variant in their magnitude. Further, some diverse issues have been addressed when protecting the investor's legitimate expectations.

184. Michael Potestà\textsuperscript{124} identified three different scenarios where legitimate expectations were analysed in investment cases: i) Formal commitments in investment contracts; ii) Unilateral declarations of the host state; and iii) Change in the regulatory framework of the investment. In the following part, those three scenarios will be elaborated, and their requirements will be explained.

ii. Formal commitment and contractual rights

185. In this scenario, due to a contractual commitment between the state and the foreign investor, legitimate expectations were protected under the fair and equitable treatment standard. Namely, it consists of the protection of legitimate expectations created by the state when it has entered into a formal commitment. Historically, contracts have been the classical instruments used for the creation of an obligation. They also aim to achieve a level of legal certainty and, therefore, stability.

186. Therefore, this instrument of ultimate relevance in every legal system deserves a high level of protection in international investment law. Legitimate expectations created upon the entering into a formal commitment with the investor have the most cautious protection. This has been supported by the Continental v. Argentina tribunal\textsuperscript{125} that categorised different levels of protection.

\textsuperscript{123} See paragraphs 49 – 50 at p. 20.
\textsuperscript{124} See supra note 115.
\textsuperscript{125} Continental Casualty Company v. Argentina, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 261.
187. To illustrate this scenario of protection, in *MTD v. Chile* the claimant successfully addressed the legitimate expectations claim. The investor argued that the investment contract and other factors had given rise to the expectation that the project would be developed. The tribunal in this case found that the host state entering into a formal commitment in the investment contract and later denying the relevant permits to develop the project had violated the legitimate expectations of the investor.\(^{126}\) Thus in this case, the host state acted unfairly and inequitably.

188. Nevertheless, the protection of the legitimate expectations in this scenario can lead to errors and misinterpretations. The intrinsic expectation of the contract fulfilment cannot be regarded as the same as the legitimate expectations under the FET clause. In Potestà’s own words, it would mean the transformation of the FET standard “to a wide general umbrella clause”\(^{127}\), which is indeed erroneous.

189. The tribunal in *Parkerings v. Lithuania* distinguished the mere expectation of the contract fulfilment from the legitimate expectations under the FET standard. It clarified that the mere expectation of the fulfilment entails a contractual right which might be addressed before a domestic tribunal of the host state.\(^{128}\) Hence, it implies that in order to frustrate the legitimate expectations under the FET standard something else has to be at stake. The tribunal in *Duke v. Ecuador*\(^{129}\) supported this distinction.

190. Therefore, could it be considered as the distinct characteristic of legitimate expectation under the FET standard and the mere contractual expectation of compliance? In order to be considered a legitimate expectation under the FET standard, apart from the contract breach, an element involving the sovereign power of the host state must be present.

\(^{127}\) See supra note 115, p. 116.
\(^{128}\) Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 344
For example, the contract breach is simply based on the government's arbitrariness.\textsuperscript{130}

191. More clearly, the tribunal in \textit{Glamis Gold v. USA}\textsuperscript{131} has clarified the mere contractual breach from the breach that entails, for example, a denial of justice or discrimination on the part of the host state, in which case the protection of legitimate expectations under FET (NAFTA article 1105) is completely justified.

iii. Unilateral declarations of the host state

192. Legitimate expectations can also arise from non-formal statements of the host state in which the investor based its decision to invest. Those statements could be promises, representations, assurances or even comfort letters directed to induce the investment.\textsuperscript{132}

193. In some cases, it can involve a breach of contract tied to a non-fulfilment of the state representations. Thus, making it almost impossible to categorise this scenario of protection. However, tribunals have examined the extent to which a promise, assurance, or representation is capable of creating legitimate expectations.

194. The \textit{Waste Management}\textsuperscript{133} tribunal applied the protection under the fair and equitable treatment standard due to the breach of representations, made by the host state, which the investor relied on. Arbitral practice has established that representations by the host state are capable of generating legitimate expectations to the investor. Therefore, they may be protected under the FET standard when the host state does not consistently fulfil them.

a. Requirements

195. Informal representations do not automatically create legitimate expectations. Some tribunals have identified the requirements or

\textsuperscript{130} Consortium R.F.C.C. v. Kingdom of Morocco, ICSID Case No. ARB/00/6, Award, 22 December 2003, para. 51.
\textsuperscript{131} Glamis Gold, Ltd. v. USA, NAFTA/UNCITRAL, Award, 8 June 2009, para. 620
\textsuperscript{132} See supra note 115, p. 19.
\textsuperscript{133} Waste Management, Inc. v. Mexico, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para 98.
qualities in the representations to be consider in the protection of legitimate expectations under the FET standard. For example, the tribunal in *El Paso Enegy v. Argentina*\(^{134}\) qualifies the representations and asserted that it must be specific to be considered in the formation of the investor's legitimate expectation.

- Specificity of the representation

196. The specificity quality was categorised by the same tribunal under two separate elements: 1) object and form of the statement; and 2) individualisation of the investor. Further, firstly, to be specific the assurance may concern the object and the unambiguous form of the representation.

- Individualised investor

197. Secondly, the representation must be addressed to the specific individual investor, who claims protection, and not in general. In *Frontier Petroleum v. Czech Republic*, the tribunal understood that two letters that were reviewed were not an undertaking but a signal to the investor of the interest of the host state to negotiate.\(^{135}\) Similarly, the *White Industries v. India* tribunal denied the recognition of legitimate expectations due to the lack of specificity of the representation.\(^{136}\)

198. Though, the legitimate expectations protection is recognised in cases where the host state, in a non-formal manner, makes promises or assurances to the investor, and those representations by the state have to be specific. To fulfil the specificity, the quality affirmations must be content specific assurances related to the investor’s investment and, also, they must be directed to the individual investor who will rely on them to execute its investment.

iv. The regulatory framework: Stability of the investment’s environment


\(^{135}\) *Frontier Petroleum Services Ltd v. Czech Republic*, UNCITRAL/PCA, Final Award, 12 November 2010, para. 455.

\(^{136}\) *White Industries Australia Limited v. India*, UNCITRAL, Final Award, 30 November 2011, para. 5.2.6.
In the third type of scenario, the legitimate expectations are grounded on the certainty of the investor about the general legislative and regulatory framework in force, at the time of making the investment. The expectations consist of the assurance that the regulatory framework will be maintained in time to bring stability to the investor’s investment.

In this type of protection, the tribunal has to determine if the legislation, regulation and provisions invoked constitute a set of promises and commitments whose modification entail a breach of the legitimate expectations. In this scenario the expectations are rooted in a normative regulation, not specifically addressed to the investor.

Now, the main reason to protect the expectations from normative regulation is that the fair and equitable treatment standard entails regulatory framework stability since the investor bases the decision to invest by considering it.

The *Occidental exploration v. Ecuador* tribunal referred to the applicable BIT preamble and concluded that the “stability of the legal and business framework is an essential element of the fair and equitable treatment”. Thus, the state has an obligation not to alter the legal environment in which the investment has been made.

a. Stability and legitimate expectations v. right to regulate

Some arbitral awards give privilege to the state’s right to regulate above investor’s legitimate expectations to have a stable framework. The *Parkerings v. Lithuania* tribunal required due diligence on the part of the investor. This tribunal asserted that the investor has to anticipate all circumstances of change and structure its investment, to make it adaptable to the potential changes. References to a stable framework

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138 Ibid. para, 122.
139 Occidental Exploration and Production Company v. Ecuador, UNCITRAL/LCIA Case No. UN 3467, Final Award, 1 July 2004.
140 Ibid., para. 183.
141 Ibid., para. 191.
142 Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 333.
in most BITs’ preamble cannot impose the burden upon the host state of not changing its laws.

204. However, it is evident\textsuperscript{143} that the general framework only entails reduced expectations with the weakest form of protection, when it is compared to contractual commitments and specific promises. Tribunals have proposed different tests to determine the violation of the FET standard as a result of the change of regulatory framework. It varies from consideration of change\textsuperscript{144}, to the manner the change occurs\textsuperscript{145}, up to the discriminatory effect\textsuperscript{146}, or the unreasonable nature of such change.\textsuperscript{147}

205. A cautious government who thinks that the regulatory framework is justified should give an adequate warning to the investor and also adopt transitional measures. In this manner, the change will not be abrupt and in case of a dispute, the arbitral tribunal would consider such safeguards in favour and, therefore, would not protect the legitimate expectations.\textsuperscript{148}

206. Ultimately, protection requires an analysis of the expectations’ reasonableness, determined by the due diligence of the investor when planning its investment. Besides, the tribunal has to consider, not only the facts surrounding the case but, the political, socioeconomic, cultural and historical conditions\textsuperscript{149} prevailing in the host state at the moment of the investment.

\textsuperscript{143} Total S.A. v. Argentina, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 121-124.
\textsuperscript{144} El Paso Energy International Company v. Argentina, ICSID Case No. ARB/03/15, Award, 31 October 2011, para 184.
\textsuperscript{145} PSEG v. Turkey, ICSID Case No. ARB/02/5, Award, 19 January 2007, para. 254.
\textsuperscript{146} Toto Construzioni Generali S.p.A. v. Lebanon, ICSID Case No. ARB/07/12, Award, 11 September 2007, para. 337.
\textsuperscript{147} Impregilo S.p.A v. Argentina, ICSID Case No. ARB/07/17, Award, 21 June 2011, para 291
\textsuperscript{148} See supra note 115, p. 35.
V. CONCLUSION

A. Summary

207. The present research has observed different perspectives of the legitimate expectations in international investment law. Legitimate expectations has not been a motionless topic in international law. Conversely, it has been complex and sometimes controversial.

208. At times, the lack of understanding has characterised both complexity and controversy. At other times, lack of clarity. Without an understanding or clarity, legitimate expectations have been guided through unknown and unjustified developments which have added more complexity.

209. In accordance with the above and other reasons, the concern to find an understanding and clarity directed this study in its attempt to i) identify a general notion of legitimate expectations and its variables; ii) distinguish the source of the developments in international investment law; and iii) categorise the findings in a simple and clear manner.

210. In correspondence with the purposes of the study, it was divided into three parts. In the first part, a preliminary notion of legitimate expectations, not only in international investment law but in general international law and other special regimes was examined. Then, the notion was analysed and identified. It was necessary in this first part to establish the ground from where the obligation of legitimate expectations emerged in international investment law.

211. The second part briefly reconstructed a picture of the sources of both international law and international investment law aiming to find the source that gave birth to the obligation of states to act in conformity with the investor’s legitimate expectations.

212. Finally, the third part the study was strictly delimited to the legitimate expectations in international investment law. Here, the emerging
recognition of legitimate expectations as a general principle of law through the comparative analysis approach was studied. Besides, considering the notion examined in part I, in this part the legitimate expectations under fair and equitable treatment were categorised under three different scenarios of protection. In other words, how the legitimate expectations have been protected in multiple investment arbitral awards.

B. Findings

213. The legitimate expectations are: Reasonable assurances made by the host state, clearly communicated to the investor through a competent state's official, following a legitimate procedure. To be reasonable, the assurances have to respond to the question: Do these assurances exhort the investor to commit risk capital and effort?

214. The legal nature of legitimate expectations is constituted by two elements: first, it is a protection to the investor based on the good faith principle. Second, it entails two obligations -the state is obliged to adjust its conduct to the assurances communicated to the investor. Once this first obligation has been breached the second obligation suffices - the obligation to compensate damages caused to the investor's property by the state's maladjusted conduct.

215. To locate the origin of legitimate expectations, it is indispensable to first understand that the sources of international investment law operate in a “de facto precedent” system, which provide ultimate authority to arbitral tribunal's awards. Arbitral tribunals are almost completely responsible for identifying the set rules in investment law. They interpret bilateral investment treaties and apply the rules identified there to concrete disputes between host states and investors.

216. Therefore, though legitimate expectations are not explicitly established in most BITs, arbitral tribunals have considered that they are a prevalent element in the fair and equitable treatment standard. The majority of BITs provided a clause for this standard, whose principal function is to fill gaps left by more concrete standards.
217. Bearing in mind the comparative analysis approach, legitimate expectations are an emerging general principle of law within international law. Unlike domestic legal systems in international investment law, the substantive protection of legitimate expectations prevails. Most arbitral tribunals that identified them have awarded substantive protection to the investor.

218. Yet, legitimate expectations in investment treaty law is not recognised as a principle. In particular, the subject has been examined by arbitral tribunals within the framework of the *fair and equitable* standard. Three different scenarios to protect legitimate expectations tribunal were analysed. Protection of legitimate expectation derived from: i) formal commitments; ii) informal representations made by the state; and iii) regulatory framework changes.

219. Regarding the first scenario, legitimate expectations under FET differ from the mere contractual expectations of contract compliance. Protection under FET requires more than a simple breach of obligations in the investment contract. The contract breach must be tied to an arbitrary use of the host state’s power. For instance, denial of justice or a discriminatory measure.

220. In view of the second scenario, for legitimate expectations to be protected, representations of the host state must be specific and expressly directed to an individual investor. General assurances made by the host state are not able to create legitimate expectations and thus are not protected, similar to what happens in domestic legal systems.

221. Concerning scenario three, legitimate expectations can arise from a change of the investment regulatory framework. Nevertheless, it constitutes a weak protection compared to the protection of legitimate expectations derived in specific assurances directed to the investor.

222. Furthermore, arbitral tribunals have determined that the reasonableness of the expectations must be considered which, at last, depends on the diligence implemented by the investor. Finally, to establish the existence of the legitimate expectations, tribunals have to study the facts surrounding the dispute, as well as the political, socioeconomic, cultural, and historical conditions prevailing in the host state.
C. Final remarks

223. Sometimes claimants and respondents do not consider important elements that can either make a precise claim or a consistent defense. Due to the lack of clarity and understanding about the rules applicable in each case. Thus, it is necessary to follow a well-structured procedure to examine the viability of a legitimate expectations claim.

224. In general, in order to effectively claim the protection of legitimate expectations, it is important to consider some conditions: if i) the expectations were caused by the host state; ii) the investment relied on such expectations; and iii) they were grounded by a competent representative of the government who followed the adequate procedure.

225. Moreover, other elements can be helpful at the moment of addressing the claim. For instance, determining the possible scenario of protection that the facts imply might be applicable for the concrete case. Then, a consistent analysis of the similarities between the facts in past disputes and the facts surrounding the case being considered can provide a solid ground for the development of strong arguments.
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