
THE DEBATE SURROUNDING THE DEFINITION AND LEGAL BASIS OF THE LEGITIMATE EXPECTATION IN INVESTOR-STATE DISPUTE

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ABSTRACT: *The legitimate expectation is a term invoked during State-investment dispute, when a foreign investor claims the frustration of his legitimate expectation under the breach of fair and equitable treatment. All arbitral tribunals consider the legitimate expectation as the main element of Fair and Equitable Treatment (FET). Usually, the frustration of the legitimate expectation is caused by the host State measure, whether this measure is among the normal regulatory measure of the State or the one that leads to indirect expropriation. Even though being used in investment dispute, the legitimate expectation is creating a huge controversy since it is facing debates on what concerns, its definition and legal basis. Therefore, this paper will attempt to assess the debate surrounding these issues concerning the concept of legitimate expectation.*

KEYWORDS: legitimate expectation; fair and equitable treatment; investor-state dispute; definition; legal basis

INTRODUCTION

Today, the notion of legitimate expectations is considered as one of the central pillars in the understanding and application of the FET standard. In 2012, the Tribunal in *Electrabel v. Hungary*¹ highlighted that “the most important function” of the FET standard is the protection of the investor’s legitimate expectations². Therefore, legitimate expectations should be respected by granting investor’s security and avoiding inappropriate behavior. The obligation to guarantee FET to foreign investors, and more precisely to protect their “legitimate expectations”, is one of the key factors of investment protection. It ensures that investors and investments are protected against inappropriate treatment by the host state, because such behavior is considered unacceptable, arbitrary, unfair and abusive³.

As the focus and interested in protecting foreign investor’s Investment is growing around the concept of “legitimate expectations” through various claims in investment

¹ *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19

² Rudolf Dolzer, ‘Fair and Equitable Treatment: Today’s Contours’ (2014) Volume 12 Santa Clara Journal of International Law, Issue 1 *Symposium on the Law and Politics of Foreign Investment* Article 2 17 < <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1147&context=scujil> > accessed on 29 March 2019 p.17

³ Jeanne-Yolande Fores Bitomol, ‘Le Traitement Juste Et Équitable En Matière D’investissement’ (Master CEI International Affairs 2016) p.9

treaty arbitration. It is important to note that there are several issues surrounding the concept of legitimate expectations, especially in international arbitral jurisprudence¹. Since the aim of this paper is to analyze the debate surrounding the legitimate expectation in protecting the foreign investors' investment, it is essential to examine the main and important attempts in explaining and determining this notion.

MAEANING OF LEGITIMATE EXPECTATION

The massive apparition of Bilateral Investment Treaties about the protection and promotion of foreign investment shed light on specific elements and standards that would help in protecting foreign investor's investments². Among those elements of protection, there is the legitimate expectation that is considered as the dominant element of FET in international investment jurisprudence.³ There has been an important and independent development of the FET in some of the International Center for Settlement of Investment Dispute (ICSID) awards stressing on the notion of the legitimate expectations of the foreign investor at the time of entry of the investment⁴.

However, when trying to look deeper in the roots of the "Legitimate Expectations", it may be surprising to figure out that 'the concept has no explicit anchoring in the text of the applicable investment treaties... tribunals referred to previous arbitral awards which have endorsed such concept, in a sort of cascade effect'... and once a few awards begin to endorse a certain idea, subsequent tribunals feel they have a 'duty to adopt solutions established in a series of consistent cases.'⁵ This pattern led to the creation of a gap on what can constitute the definition of legitimate expectation, due to independent attempts to define it.

Many scholars and arbitral jurisprudence have tried to define this concept. But, there are some issues related to its definition due to its complexity, which means that it is necessary to know first; what are those issue(s) related to the definition of the concept of legitimate expectations? Why all the attempts provided by some tribunals to define the concept have not been successful? What are the missing elements in the proposed definitions? These questions can be answered through the general orientation of these definitions, which are used into two main approaches, namely the broad approach to the definition and the narrow approach.

¹ Yenkong Ngangjoh Hodu, 'A Critique of the Legitimate Expectations Doctrine in Investment Treaty Arbitration' (2013) European Journal of International Law <<https://www.ejiltalk.org/a-critique-of-the-legitimate-expectations-doctrine-in-investment-treaty-arbitration/>> accessed on 05 Avril 2019

² M. Pascal Schonard, 'La Protection Internationale des Investisseur Etrangers : Quel Impact sur la Politique Publique des Etats d'Accueil' (Master in Public Administration, Ecole National d'Administration 2003-2005) p.9-10

³ Trevor Zeyl, 'Legitimate Expectations In Investment Treaty Law; Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law' (2011) Alberta Law Review p. 207

⁴ M. Sornarajah, *the International Law on Foreign Investment*, (Cambridge University Press 2010) P.354

⁵ Potestà, Michele, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept II. In Search of a Justification Beyond Arbitral Precedent' (2014) volume 28 ICSID Review p.3

THE BROAD APPROACH TO THE CONCEPT OF LEGITIMATE EXPECTATIONS

Since *Tecmed* was the first tribunal to refer to the notion of legitimate expectations, it defined the concept in a broad sense. Some tribunals relied on this definition, like the case of *Eureko B.V. v The Republic of Poland*¹: "The Tribunal finds apposite the words of an ICSID Tribunal in a recent decision that the guarantee of fair and equitable treatment according to international law means that:

"[...] this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment[...]".²

This description is emphasizing the importance of protecting 'basic expectations', but it adds nothing new. It is simply following the broad interpretation of the concept. These definitions have been criticized for being too broad. The first critic was addressed to *Tecmed's* definition, in the case of *White Industries Australia Limited v. The Republic of India* stated that³ by the professor Zachary Douglas⁴, who criticized heavily that approach by saying:

"The so-called *Tecmed* standard is potentially very broad in application". Indeed, as Zachary Douglas has observed, "it is actually not a standard at all; it is rather a description of a perfect public regulation in a perfect world, to which all states should aspire, but very few (if any) will ever attain."

Furthermore, relying on the broad interpretation creates a discontent by the states, because, it will open more doors to include almost anything. Implementing such indefinite norms and concepts which are not rooted in the public or the international investment law will, consequently, give more advantage to the foreign investor than it should⁵.

In addition to this, it is argued that it overlooked the reality that the investors must 'expect legitimately' that regulations change over the time. Further to this, arbitration tribunals have to evaluate the state actions, those related to the investor licenses (like:

¹ *Eureko B.V. v. Republic of Poland*, Ad hoc, Partial Award, (August 19, 2005), para. 235

² *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, (May 29, 2003), para. 154

³ *White Industries Australia Limited v. The Republic of India*, UNCITRAL, Award, (November 30, 2011), para.10.3.6

⁴ Professor Zachary Douglas has a substantial practice before international courts and tribunals as counsel, arbitrator and expert witness, and also frequently appears before the English courts and the courts of other common law jurisdictions in cases with a public or private international law element. He is a Professor of International Law at the Graduate Institute of International and Development Studies in Geneva and was formerly a member of the Faculty of Law of Cambridge University. Zachary is recognized as a leading specialist in public international law and arbitration by Chambers and Partners and Legal 500 and received the award for International Arbitration at the 2011 Chambers and Partners Bar Awards. He is listed in the Chambers and Partners' Top 100 UK Bar.

⁵ Kareem Sallam, 'Investor's Legitimate Expectations under the Fair and Equitable Standard: should they be Protected? (Master, Uppsala University 2017) p.28

cancellation or abrogation of investor's license). The tribunal is mandated to assess state measures against international law¹ the expressed standard in *Tecmed* case is not at all a standard, rather a description of a perfect general rule in a perfect world which all the states must wish for it². Therefore, the concept of legitimate expectations constitutes part of the host state's law which necessarily applies to foreign investment, but it needs more precision³ about this matter while defining the concept.

As a consequence, the adoption of any specific legal concept should serve the stability and consistency of the legal framework. However, after many years of the adoption and implementation of this doctrine in the investment arbitration: "neither the tribunals nor jurisprudence could make a uniform rule for indicating the limits of investors' expectations to be protected. On the contrary, all these attempts created more inconsistency and instability than it served. An outcome which shaped a dissatisfaction condition about the current arbitration regime between concerned states". As a result, recently more states have "entered into a phase of evaluating the costs and benefits of International Investment Agreements [IIAs] and reflecting on their future objectives and strategies as regards these treaties⁴."

After being criticized for being too broad and giving too much advantages to foreign investors. In addition to the fact that when taken to the extreme, a broad definition of legitimate expectations has the potential to turn every breach of contract into a violation of FET⁵ and in return it will create an excessive burden on the state⁶. Therefore, how can arbitrator narrow the interpretation of legitimate expectations? What are the essential elements required in a narrow interpretation? On what does the narrow interpretation focus on?

THE NARROW APPROACH TO THE CONCEPT OF LEGITIMATE EXPECTATIONS

In order to narrow the definition of the concept of legitimate expectations and avoid the broad interpretation that may impose a practical commissioning on the state. Some tribunals have determined factors to limit the scope of such expectations in a way that looks more 'objective and closer to practical realities', as investor's legitimate

¹ Andrew Paul Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer International Law 2009) p.364

² Zeinab Asqari, Investor's Legitimate Expectations and a the Interests of the Host State in Foreign Investment (2014) Asian Economic and Financial Review Journal [1906-1918] V4 p.1910

³ Wenhua Shan, Penelope Simons & Dalvinder Singh, *Redefining Sovereignty in International Economic Law* (Oxford And Portland, 2008) p.268

⁴ Kareem Sallam, 'Investor's Legitimate Expectations under the Fair and Equitable Standard; should they be Protected? (Master, Uppsala University 2017) p.28

⁵ Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge University Press 2018) p.113

⁶ Shaheez Lalani & Rodrigo Polanco Lazo, *The Role of the State in Investor-State Arbitration* (Library of Congress Cataloging 2015) p.101

expectations: “are formed considering the governing situations, existing precedents and practical experiences¹”.

In the *Glamis* case referred to the *Methanex* case, in the part where it was stated that raising the standards of protection in the “highly regulated industry will not violate NAFTA”. However, the ruling further develops the standard of expectations and narrows it down in order to baring very specific characteristics and embodies the “specific requirements” to the NAFTA requirement².

A more narrowed definition of legitimate expectation was given in *Thunderbird v. Mexico* tribunal considering that the conduct of a contracting party created reasonable and justifiable expectations on the part of an investor to act with confidence in that conduct. The type of action that can create legitimate expectations is the general understanding that this action is directly linked to the government.³ Usually, disagreement between investors and the host State results from the type of action that legitimizes investor confidence.

Since it can be said that the investor’s legitimate expectations have some characteristics based on some definitions provided by tribunals and scholars. They can be summed up as the following: reasonable, justified, based on the conditions offered by the host State at the time of the investment and they must exist and be enforceable by law and cannot be established unilaterally by one of the parties. This is the main characteristics deduced from the definitions offered by the tribunals.

Consequently, legitimate expectations can be defined as follows: “legitimate expectation of a foreign investor is the reason of the investment in a foreign country. They should be justified based on the state act at the time of this conduct which should be linked directly or indirectly to any regulation change made that harmed the investment, taking into consideration the investors’ awareness about the state’s circumstances, transparency and the good faith of both parties”

According to the elements that constitute the definition of foreign investors’ legitimate expectations. There is no common definition found in the multilateral or bilateral agreements or even provided by scholars on which they all agree on. As a consequence, it left a wide area before the jurisprudence to try to fill in the gaps and attempt to give a clear definition emphasizing on the characteristics that are considered to be the cornerstone in the construction of the notion.

¹ Zeinab Asqari, Investor’s Legitimate Expectations and a the Interests of the Host State in Foreign Investment (2014) Asian Economic and Financial Review Journal [1906-1918] V4 p.1911

² Tamuna Beridze, ‘The Legitimate Expectations Requirement Under Fair and Equitable Treatment Standard in Investment Treaty Arbitration On Environmental Permitting In Mining Awards’ (Central European University Hungary 2017) p.39

³ *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award (January 26, 2006), para. 147.

LEGAL BASIS

The second issue concerning the legitimate expectation is its legal basis. There is a great debate regarding this matter considering that arbitrators do not refer to it when taking their decision, although some scholars have tried to find a legal basis in different international sources.

International law is a set of rules where states, organizations, individuals and courts refer to in order to apply principles of international law.¹ The International Court of Justice (ICJ) is universally considered as the most authoritative judicial body in international law². That is why this analysis of the legitimate expectation's legal basis will rely on the article 38 (1) of the Statute of the International Court of Justice that determines the sources of international law that are ranked in order of precedence³:

“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 recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized 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.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto⁴”.

This article determines the sources of international law in a sequence that should be respected. Based on this article, the study of the legal basis of legitimate expectations in international law will be limited to these sources.

THE LEGAL BASIS OF LEGITIMATE EXPECTATIONS IN INTERNATIONAL AGREEMENTS (CONVENTIONS OR TREATIES)

The analysis of the legal basis of legitimate expectations in international law is going to start with the conventions, as cited in article 38 of the ICJ, because conventions are the most prominent source of the international law in general and investment law in particular. In this matter, there are two distinct views, one claiming the absence of legitimate expectations in international agreements and the absence of legitimate expectation also, whereas the opposite view asserts that the legitimate expectations derive their power from conventions and, furthermore, they are found in the treaties.

¹ https://www.law.cornell.edu/wex/sources_of_international_law.

² Boleslaw Adam Boczek, *International Law: A Dictionary* (the Scarecrow Press, 2005) p26.

³ https://www.law.cornell.edu/wex/sources_of_international_law.

⁴ https://www.icj-cij.org/en/statute#CHAPTER_I access in 07/04/2019.

The View Claiming the Absence of Legal Base and even the Existence of Legitimate Expectation in International Agreements (Conventions & Treaties)

This view supports the idea which says that: “The public international law conception of legitimate expectations cannot find much support in treaty and customary laws¹”. In other words, there is no legal basis or legal power to support the protection of legitimate expectations. In addition to that, Professor Sornarajah² and even the arbitrator Pedro Nikken in *Suez v. Argentina*³ argued that the legitimate expectations can’t be protected in the absence of treaty provisions. Besides, some scholars’ view face difficulties in finding a concrete legal basis to the legitimate expectations under customary international law⁴.

Additionally, this view has been supported again by the arbitral tribunal in *Merrill and Ring Forestry L.P. v. Canada* and other cases in which they judged that there is no obligation to protect the legitimate expectations neither in the customary law nor under the minimum standard of treatment⁵. However, according to article 1105 of NAFTA the legitimate expectation is regarded as a factor that should be taken into consideration and the non-observance of the states to protect the legitimate expectation is not considered as a breach of FET⁶.

This was the claim denying the existence of legitimate expectations or minimizing its role in international law and more precisely in treaties and customary law. Yet, there is no solid ground to sustain their view.

Nonetheless, there is another view contradicting the one denying the importance of legitimate expectation and its support in the treaties. How scholars who are claiming the presence and importance of legitimate expectations have justified their claim?

The View that Support the Empowering of Treaties to the Concept of Legitimate Expectations

After 1999, a survey on bilateral investment treaties published by the United Nations Commission on Trade and Development (UNCTAD) was done showing a progressive development and focus on legitimate expectations under the FET standard in some

¹ Teerawat Wongkaew, *Protection of Legitimate Expectations in Investment Treaty Arbitration; a Theory of Detrimental Reliance*, (Cambridge University Press 2019) p34

² Professor Muthucumaraswamy Sornarajah is C.J. Koh Professor at the Faculty of Law of the National University of Singapore where he specializes in international investment arbitration. He is also an Advocate of the Supreme Court of Ceylon, an Advocate and Solicitor of the High Court of Singapore and a Solicitor of the High Court of England and Wales.

³ *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19 (formerly *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Re*)

⁴ Teerawat Wongkaew, *Protection of Legitimate Expectations in Investment Treaty Arbitration; a Theory of Detrimental Reliance*, (Cambridge University Press 2019) p.35

⁵ Tamuna Beridze, ‘The Legitimate Expectations Requirement Under Fair and Equitable Treatment Standard in Investment Treaty Arbitration On Environmental Permitting In Mining Awards’, Central European University Hungary (2017), p.10

⁶ Teerawat Wongkaew, *Protection of Legitimate Expectations in Investment Treaty Arbitration; a Theory of Detrimental Reliance*, (Cambridge University Press 2019) p.35

ICSID awards, considering the liability of its breach in a particular context where any contractual or non-contractual¹ guarantees are made to the foreign investors².

According to the article, 38 of ICJ, conventions and treaties are considered as the main source of international law, because they are based on “*pacta sunt servanda*”³, which is the main rule within the law of treaties⁴. When signing a bilateral treaty the state offers FET to the foreign investor as a protection to his investment⁵. As stated by Michael Byers⁶: “Treaty rules involve legitimate expectations because they are based on the general customary rule of *pacta sunt servanda*, which requires that treaty obligations be upheld in good faith⁷.” He also stated that: “treaty provisions would appear to give rise to legitimate expectations in and of themselves⁸”. Simply because during the formation of a treaty, and before being signed and published, it goes through a negotiation phase where customs and some legitimate expectations might be created. Further to this, as previously seen in this study, *Tecmed* tribunal considered legitimate expectation as part of good faith, which means that the legitimate expectations already exist in this context. Moreover, as Danilenko⁹ has described:

“By contrast to the elaboration of [an] international treaty, which requires formal negotiations, custom is created by conduct of members of the international community which constantly ‘negotiate’ with each other by means of actual deeds, statements and other acts¹⁰.”

Based on this description, legitimate expectation are created during an act emanating from a state, applied by some states and is considered as a custom even with the acquiescence of the remaining states, which is the process of the formation of international customs law according to Michael Byers.

Further to this, some arbitral tribunals interpreted the violation of legitimate expectations as a breach of FET. The legitimate expectation of a foreign investor arises from acts and some elements surrounding the process of establishing a contract. In addition to the fact that, the contract in itself may contain some requirements for an

¹ Non-contractual guarantees such as verbal.

² M. Sornarajah, *the International Law on Foreign Investment* (Cambridge University Press (2010) p.354

³ *Pacta sunt servanda*, is a basic principle of civil law, canon law, and international law. In its most common sense, the principle refers to private contracts, stressing that contained clauses are law between the parties, and implies that nonfulfillment of respective obligations is a breach of the pact.

⁴ Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press 2003) p.175

⁵ Fulvio Maria Palombino, *Fair and Equitable Treatment and the Fabric of General Principles* (Springer 2018) p.12

⁶ Michael Byers holds the Canada Research Chair in Global Politics and International Law.

⁷ *Ibid* p.107

⁸ *Ibid* p.124

⁹ Gennady M. Danilenko was a well-known scholar of international law at Wayne State University law school. He is the author of a book entitled: “Law-making in the international community”.

¹⁰ Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press 2003) p.37

expectation to be legitimate¹. In other words, the contract can be a sort of a container to foreign investor's legitimate expectation, which means that, legitimate expectations exist and cannot be denied. Therefore, the issue relies on their expectations, how they are viewed and which expectations must be protected, not about the matter of their existence, since some contracts contain some requirement for an expectation to be legitimate.

The distinction between the two opposite views may be based on the fact of having different conceptions of legitimate expectations (one restrictive and the other liberal)². That is another reason, which confirms the importance of having one common and precise definition of the legitimate expectations as suggested earlier.

Finally, the existence of legitimate expectation under FET in treaties, cannot deny the legal power that protects foreign investor's investment, even if it is to a certain extent. In addition, and without neglecting the fact that, conventions and treaties are in themselves a legal source of power since they bound states to legal rules and treaties are a codifying form of international customs law.³ So, do the legitimate expectations derive their legal power from the international customs law?

The Legal Basis of Legitimate Expectations in Customary International Law

Customary International Law (CIL) is the acceptance of a certain practice as a law by many states⁴ and they are bound by the rules⁵. In this matter, Michael Byers, who described the customary process by starting with a certain practice, then this practice is followed by other states along with the 'acquiescence' of a large number of other states until it becomes an obligation.⁶ He defined the term 'acquiescence' as "ambivalence or even apathy to the rule in question rather than a conscious support for the rule on the part of the acquiescing State⁷". According to him the acquiescing of one state may influence other states and give rise to new rules and obligations with the involvement of other states⁸.

As a consequence, he considers that legitimate expectations is involved in all the rules of international law, because: "any change from a voluntary pattern of behavior of a

¹ Ian A. Laird, Borzu Sabahi, Frédéric G. Sourgens, Todd J. Weiler, *Investment Treaty Arbitration and International Law* - Volume 7 (Juris 2014) p.133

² Teerawat Wongkaew, *Protection of Legitimate Expectations in Investment Treaty Arbitration; a Theory of Detrimental Reliance*, (Cambridge University Press 2019) p.35

³ Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press 2003) p125

⁴ https://en.wikipedia.org/wiki/Customary_international_law

⁵ Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press 2003) p.106

⁶ Vladimir Đuro Degan, *Sources of International Law* (Martinus Nijhoff Publishers 1997) p.177-178

⁷ Byers Michael, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press 2003) p 106

⁸ Ibid p.106

customary rule involves the transformation and legitimization of patterns of behavior, around which expectations of a legal character necessarily develop¹.”

Therefore, based on this process, legitimate expectation can be considered as a part of customary law, since the process starts with the adoption of a certain pattern and ends up with being firmly embedded in the rules or followed as a legal bounding rule. Michael Byers adds: “... acquiescence in this context may more accurately be described as being based on a principle of legitimate expectation, even though the principle of legitimate expectation may itself be based on some earlier, general acceptance of the process of customary international law.” It is clearly seen, that Michael Byers considers legitimate expectations as a principle embedded in customary law, although few scholars may have a different opinion as previously discussed. To conclude, it is too early to say that the legitimate expectation is a part of the process of customs formation, even though it is a strong possibility to see this concept as a part of it, because of the attention it have. The process explained by Michael Byers makes it easier to expect such a fact, especially, if those expectations will be used by other states, further to other states’ acquiescence.

However, it is important to look at how principles or elements are recognized in CIL. Hence, If we look at the custom from a practical way in international law, it can be seen that Article 38 (1) of ICJ did not state two things: how and who has the right to prepare and integrate any element in the CIL. Therefore, by examining the international practice, it can be found that states, even though they are theoretically considered as equal. Yet, the reality shows the opposite, because there are influential and powerful states, which are the reasons behind the effective application of the treaties and principles (what are these states and how many of them are needed to recognize a principle in CIL? Even though the term civilized nations, was mentioned in Article 38 (1) c and the CIL, as an example of the United Nation treaty, who imposed it? Consequently, what are the influential and powerful states that are needed in order to recognize and respect any principle in international law?

Accordingly, based on what the Article 38 of the ICJ stated about the general principle, as it was relied a long time ago, as a traditional idea, especially what concerns UN treaty for instance, they consider the developed countries and their recognition to any principle as a supporter that gives it the right to be effective in international law. Since, currently, the term ‘civilized nations’ has no significant meaning, because it is considered that all states have become civilized. Thus, to consider the possibility to be a part of CIL, this concept of legitimate expectation must be presented and used by the most influential states and world organizations.

Concerning the necessary number of States’ approval to a concept to be recognized as a CIL, it is difficult to check the number and, even though with the existence of influential and non-influential states, it is better to rely on the most influential ones, so as to guarantee the application of any principle. In addition to that, the Article 38 did not mention neither the responsible for the integration of a principle in CIL nor the

¹ Ibid p.107

number of states needed for it, while it required the acknowledgment of the civilized nations to the general rules. Accordingly, the CIL needs to be recognized and guarantees its effectiveness and its presence in international law. Therefore, so as to recognize the legitimate expectation in international law, it should be done by influential states and leaders of international investment, since there is no way to consider the matter of what is called civilized nations, since they are all known as such.

Furthermore, it's not possible for international arbitration to check the use of this term in all or most of countries in the world that are committed to it in the same way. And since international investment is also governed by specialized international organizations, the process of the recognition and integration of the principle can be done through it as evidence of a general practice accepted as law. Therefore, after a thorough examination, we found out that the concept of legitimate expectation was used by the most influential world organization. This was done for the first time during the negotiation of the Charter of International Trade Organization (ITO) at Havana under the provision of article 3 about the expected reasonable benefits where a committee report noted that non-violation remedy would be available:

“If the measures adopted by the other Member under the provisions of Article 3 had not produced the effects which they were designed to achieve and thus did not result in such benefits as might reasonably be anticipated.”¹

In addition to article XXIII: 3 of the GATT, which explicitly require such concept for the element “benefits accruing” to exist². Moreover, it was used in WTO dispute settlement practice. Thus, the notion of “reasonable expectations” and “legitimate expectations” have been used under both GATT 47 and WTO practice as a description of the same concept.³ Besides, some influencing countries have also used it like the US Model BIT in 2004.⁴

To conclude all this, the legitimate expectation has already integrated and recognized by influential countries. Further to this, I found that this concept is protecting the main values of an essential general principle of law which are good faith and FET. Therefore, it can be deduced from all this, that the legitimate expectation already exists in CIL, and as stipulated in Article 26 of the Vienna Convention on the Law of Treaties: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁵ Which means that, it can be considered that the legitimate expectation already

¹ Reports of Committees and Principles Sub-Committees of the United Nations Conference on Trade and Employment, UN. Doc. Interim Commission for the International Trade Organization (ICITO), (1948), Article 89 (a), p.155

² Kern Alexander & Mads Tønnesson Andenæs, ‘*The World Trade Organization and Trade in Services*’ (Martinus Nuhoff Publishers 2008), p. 538

³ Kern Alexander & Mads Tønnesson Andenæs, ‘*The World Trade Organization and Trade in Services*’ (Martinus Nuhoff Publishers 2008), p. 539

⁴ See: US Model BIT, Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment (2004), p.3-p.38

⁵ Vienna Convention on the Law of Treaties Signed at Vienna 23 May 1969.

has a legal basis. Besides, a written form that should provide it with a solid legal basis in international law. Therefore, it can be considered as an effective element of FET and Good faith principle.

Despite the fact that these arguments remain debatable, the concept of legitimate expectation is largely used in the investment dispute by a considerable number of states. Further to, the protection given to FET cannot be denied.

According to the third source of international law, what are the general principles of law, do they contain legal support to the legitimate expectations?

Finding a Legal Basis to the Legitimate Expectations in the General Principles of Law ‘Good Faith’ and in Arbitral Decisions

The Relevance of the Principal of Good Faith

Some arbitral tribunals reviewed legitimate expectations as a part of the good faith principle¹. The good faith principle was viewed as a ground for the protection of legitimate expectations in some arbitral decisions². However, arbitrators did not provide more details or explanations on how and why they decided that legitimate expectations is a part of the good faith principle³. Therefore, can the good faith principle serve as a justification for the protection of legitimate expectations? And what is the relationship between them?

There are two main arguments surrounding the justification of good faith in protecting legitimate expectations. First, the way how good faith is protecting legitimate expectations should be backed up⁴ and how legal obligation is created should be clarified. The ICJ in *Nicaragua v. Honduras*, stated that: “the Principle of good faith... is not in itself a source of obligations where none would otherwise exist⁵”. That is totally different from the original obligations emanating from the contract in itself, which means that the state must comply with the commitments of the contract in good faith and there is no legal obligation to protect legitimate expectations that are directed by good faith principle⁶.

Second, “there is little practical value in ascertaining the rule of legitimate expectations based on the good faith principle because the highly abstract character of good faith is hardly useful in clarifying the gray areas surrounding legitimate expectations in

¹ Kareem Sallam, ‘Investor's Legitimate Expectations under the Fair and Equitable Standard: should they be Protected? (Master Uppsala University 2017) p.15

² *Tecmed v. Mexico*, para 121, *Thunderbird v. Mexico*, para 25 and *Total v. Argentine Republic*, para. 128

³ Teerawat Wongkaew, *Protection of Legitimate Expectations in Investment Treaty Arbitration; a Theory of Detrimental Reliance*, (Cambridge University Press 2019) p.36

⁴ Teerawat Wongkaew, *Protection of Legitimate Expectations in Investment Treaty Arbitration; a Theory of Detrimental Reliance*, (Cambridge University Press 2019), p.36

⁵ *Nicaragua v. Honduras*, Border and Transborder Armed Actions, ICJ Judgment [1988], Rep 69 para 94

⁶ Teerawat Wongkaew, *Protection of Legitimate Expectations in Investment Treaty Arbitration; a Theory of Detrimental Reliance*, (Cambridge University Press 2019), P.37

investment treaty arbitration¹”. Thus, what about those expectations that arise apart from the good faith principle? According to this view, it is not necessary to link legitimate expectation to the principle of good faith all time in all contexts, simply because good faith does not create systematically a legal obligation to protect legitimate expectations.

Some tribunals justified the application of legitimate expectations due to fact that it constitutes a part of FET standard². But, according to some scholars view: “the doctrine of legitimate expectation has no enough ground to be applied as an international law principle as part of the good faith principle, from lacking enough recognized by all, or even the majority of national jurisdictions, which is a binding requirement to be considered as part of the international law if tribunals want to apply it as part of the ‘general principles of law’”³.

Therefore, legitimate expectations are used in these contexts in order to be justified, because, according to some scholars, the protection of foreign investor’s legitimate expectations is ‘grounded in shared notions of fairness and equity’. Which means that the protections of foreign investor’s legitimate expectations is recognized. Yet, the fact of considering legitimate expectations as a general principle is not confirmed⁴. Since arbitral tribunals recognize the reliance on the concept of legitimate expectation. Is there a judicial rule that may help the integration of the concept as a written legal principle?

Judicial Rules

When taking a closer look at the article 59 of the ICJ, which State that:

“The decision of the Court has no binding force except between the parties and in respect of that particular case”. Different views and interpretations have been given to this article: “Judge Jennings, e.g., described the purpose of Article 59 to be ‘to prevent legal principles accepted by the Court in a particular case from being binding also upon other States or in other disputes’. In a judgment allocating rights and duties, Article 59 provides a purely technical protection which is unlikely to be determinative. “The same title.” Judge Sette-Camara suggested that Article 59 goes to the doctrine of *res judicata* and not that of precedent“. In that it determines the rights and obligations of the parties *inter se* and is silent on the subsequent impact of the decision on third States.”⁵

Even though this article may be interpreted in different angles, it may also mean that, arbitral decision cannot create a binding concept out of the framework of the parties concerned in a specific context. Thus, it is difficult to rely only on arbitral tribunal’s decision to give a legal, formal nature to the concept of legitimate expectations. Without forgetting what the article 38 (1) of the Statute of the ICJ stated, especially in paragraph

¹ Ibid

² Kareem Sallam, ‘Investor's Legitimate Expectations under the Fair and Equitable Standard; should they be Protected? (Master Uppsala University 2017), p.15

³ Ibid p.21

⁴ Ibid p.145

⁵ Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm & Christian Tomuschat, ‘*The Statute of the International Court of Justice: A Commentary*’, (Oxford University Press 2019), 3 ed., p. 1715

(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."

Based on what have been presented, it can be deduced that the concept of legitimate expectation has already a solid legal basis, if assessed according to its mention in formal rules. In spite of the fact that arbitrators never referred to those rules when taking their decisions.

CONCLUSION

The concept of legitimate expectation plays an important role in investment disputes. That is why letting the controversy and ambiguity surrounding this concept may result in a divergent use of it in arbitral tribunals. Since each tribunal when relying on legitimate expectation would take into consideration some specific criteria, whereas others would not. Moreover, it created a sort of an unbalance between the investor and the host State. The same thing might apply to its legal basis. Thus, implementing a kind of common legal framework would help in applying this notion in an appropriate manner and a more effective manner.

Therefore, this debates and controversy surrounding the legitimate expectation, especially on what concerns its definition and legal basis should be settled once and for all. Most importantly, as previously seen, this concept already has enough support that should be converged and direct so as to be used effectively.