Host State's Unilateral Representations as a Basis of Legitimate Expectations Claim in International Investment Treaty Arbitration: Analysis into Its Juridical Roots, Nature and Implications on Ethiopia

By

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Submitted to Jimma University

School of Law

Senior Thesis for Partial Fulfillment of the Requirements for Masters of Laws (LLM) In Commercial and Investment Laws

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June, 2018

Jimma, Ethiopia

Declaration of Originality

I, the undersigned, hereby declare that this thesis is my own original work and it has not been presented to any institutions before. And any sources used are also duly acknowledged.

Ashenafi Tilahun Sign_____ Date_____

Acknowledgements

I am greatly indebted to, next to the Almighty, my principal advisor, Dr. Danile Behailu, not only for the continuous support to my master thesis, but also was constant source of inspiration and intellectual guidance. I owe a great debt to Mr. Kibrom Mekonen, co-advisor, from whose valuable comments and guidance during the hard work of my thesis I benefited impressively.

Abstract

The trend of using host states' unilateral representations as a basis of doctrine of legitimate expectation is flourishing within the jurisprudence of investment tribunals as a remedy to the investors when states' statements/conducts creates legitimate expectations that the investors relied on and subsequently frustrated, causing damages to the investment. The role of this doctrine is vital in these days where developing countries like Ethiopia are making huge investment representations within a box of attracting FDI. However, the juridical roots of using this doctrine and representations as its basis and nature of representations giving rise to liability per the jurisprudence of investment tribunals is not certain.

Hence, the objective of this research is to examine the juridical roots and the current jurisprudential place of representations as a basis of legitimate expectations claim in international investment treaty arbitration and the fate of representations by the Ethiopian government in light with this concept. As a means of achieving this aim, doctrinal research method, which is devoted to analysis of laws and cases using both primary and secondary data, is adopted.

This paper argues that doctrine of legitimate expectation and representations as its basis is justified under general principle of laws, and host states investment representation, excluding other basis of legitimate expectation claim, is also justified under binding effect of unilateral acts under international law. The jurisprudence of investment tribunals suggest incomprehensiveness of the concept and possibility of abusing the concept unless controlled with standard criteria and limitations to save the international investment arbitration regime from crisis. It also argues that with the current trend of huge unwarranted investment representations the Ethiopian government is engaging in, the country's potential liability under this concept is huge.

Finally, the paper recommends that the investment tribunals should justify the use of this doctrine under general principle of law, not as a part of good faith or minimum standard of treatment, and representations alone as its basis can also be justified under binding effect of unilateral acts, especially helpful if the applicable instrument is devoid of FET. And its use should be subject to limitations. It also recommends that the Ethiopian government should reconsider what it is representing to the investors.

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Acronyms

BIT **Bilateral Investment Treaties**

EC **European Community**

EU **European Union**

FDI **Foreign Direct Investment**

FET **Fair and Equitable Standard of Treatment**

FTA **Free Trade Agreement**

ICJ **International Court of Justice**

ICSID **International Center for Settlement of Investment Disputes**

NAFTA **North American Free Trade Agreement**

PCIJ **Permanent Court of International Justice**

UN **United Nations**

UNCITRAL **United Nations Commission on International Trade Law**

US **United States**

CHAPTER ONE

1.1. Background of the Study

These days, Investment (especially foreign direct investment, FDI) is being considered as an engine of economic development of countries, though international Law imposes no obligation on the state to accept foreign investors into their territory. But, once the states have admitted foreign investors they would be subject to International Investment law, a recently emerging aspect of international law shaped and characterized by the texts of investment treaties, by rulings of International Investment tribunals and by rules of general international law with the prime aim of protecting the Investors and promoting investment.[1] Hence, the investor is expected to follow the legal procedure starting from entry into the state and investment, operation and exit of the investment whereas the state should simultaneously protect the investment from any unexpected harm to the investment.[2] With a view of protecting the investors, different principles and standards of protections have been developed/are being developed within international law via treaties, decisions of investment tribunal and general international law.[3]

The need to promote and protect investment has resulted in emergence of different arrangements between the home and host states in a form of Bilateral Investment Treaties (BITs), among states (Multilateral Investment Treaties), and between the investor and the host states (Investment contracts). Out of these arrangements, these days, BITs are the most outshining instrument dealing with foreign investment due to which Riesman and Sloan has rightly stated that 'today we live in a BIT generation.[4] And these bilateral, multilateral and unilateral investment arrangements have gave birth to various principles most of which are common in almost all BITs and MIAs, among which the principle of Fair and Equitable Treatment (FET) is considered as the broadest and most Prominent Standard in Investment Treaties whose pace of movement, ever

[1] Rudolf Dolzer and Christoph schreuer, *Principles of International Investment Law*, Oxford University press, New york, 2008, pp.1
[2] Id.,*pp.* 88
[3] To state some of the principles: fair and equitable standard, prohibition of unlawful expropriation, most favored nations, National treatment, full protection and security and etc.
[4] Reisman, *Indirect Takings and its Valuations in the BIT Generation,* 2004, *accessible* at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2043&context=fss_papers, last accessed on April, 2018.

since, to the center of the investment dispute agenda has remained steady and has intensified.[5] And it is within the application and interpretation of the standard of FET, the doctrine of legitimate expectations has found its most frequent application.[6]

However, the curiosity of the states to attract more and more investment into their territory couldn't be fulfilled with these Bilateral and multilateral arrangements. Instead, currently host states, especially the developing states, are engaged in competition to host more and more investments through unilateral investment representations in the form of promises, encouragements, assurances and official promotions[7] with a view of influencing the investor's decisions. And the tendency of using representations to attract foreign investors has been increasing persistently because of, mainly, advancement of communication technology. Hence, the government or officials of a given state may undertake representations simply via internet website, for instance.

Besides, through time, the act of giving representations (promotions, assurance, and promises) and the tendency of investing relying on these representations have got the attention of the investment tribunals via the doctrine called 'Legitimate Expectations'.[8] This doctrine refers to expectations of the foreign investors from the host states to act in a certain manner in relation to investment and these expectations arise from the specific conducts, promises, commitments or representations made implicitly or explicitly by the host states.

The historical background of the concept reveals that it is a creation borrowed from [domestic] administrative law[9]. And this concept starts to shine up in investment arbitration as an element of FET in *Metalclad v. Mexico*, hinting at legitimate expectations where an investor was 'led to believe and did believe', where the investor had been told that the permit would be granted,

[5] Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, Sanat Clara Journal Of International Law, vol.12. 2014,, *pp.10*

[6] Von Walter, *The Investor's Expectations in International Investment Arbitration.* Transnational Dispute Management, Vol. 6, Issue 1, 2009, accessible at www.transnational-dispute-management.com , last accessed on 1 may 2018.

[7] The term representation within this paper includes promises, promotions, assurances/guarantee, encouragement, in any form, writing, oral or conduct.

[8] The terminology of this concept is not the same throughout the decisions of the tribunal. Tribunals use terminologies like 'reasonable', 'Basic' (e.g. in Tecmed case), 'justified' expectations. However, a "legitimate" expectation is opted for within this work as it provides for a more contextual argumentative basis.

[9] Soren J Schonberg, *Legitimate Expectations in Administrative Law*, Oxford University Press, 2000, pp. 13-14.

subsequent action against the belief breached the FET standard.[10] However, it was the tribunal in *Tecmed v. Mexico* that referred, for the first time, to the protection of an investor's expectations in general terms,[11] observing that the FET standard, in light of the good faith principle established by international law 'requires treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.[12]

Currently, this concept is developed into a prominent ground of claim before investment tribunal and Arbitral tribunals are undeniably relying on the investor's legitimate expectations.[13] As it exist today, investors' legitimate expectations can, and often do, rely on the legal framework and representations existing at each stage at which a decisive step is taken towards the establishment, expansion, development or reorganization of the investment.[14]

Although, protection of legitimate expectations have not been stated as an independent commitment in investment documents, some tribunals have referred to the investor's expectations as a core factor in deciding that an investment has been indirectly expropriated by the state respondent; others, particularly in some of the most recent awards, have referred to the investor's expectations as being a core indicator as to whether there has been a failure to accord FET to the investors.[15] Hence, some argue that, Tribunals, tasked with construing the meaning of investment treaty provisions in congruence with the intentions of the contracting parties and the relevant international legal principles, are creating new bodies of jurisprudence in their awards.[16] More often, the legal reasoning found in these awards is adopted in the decisions of subsequent tribunals, creating a body of law with precedential value.[17]

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[10] *Metalclad Corporation v. The United Mexican States,* ICSID Case No. ARB (AF)/97/1, Aug. 25, 2000 (hereinafter '*Metalclad vs. Mexico case'*)

[11] M. Potesta, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and Limits of a Controversial Concept*, 28 ICSID REV. 2013, pp. 88.

[12] *Tecmed v. Mexico,* ICSID Case No. ARB (AF)/00/2, Award, may 29, 2003 (hereinafter '*Tecmed vs.mexico case*)

[13] Dolzer R. & Schreuer C., *cited above at 1*, pp. 134,

[14] Thomas W Walde, *International Investment Law: an Overview of Key Concepts and Methodology*, 2007, pp.265.

[15] Zeinab Asqari, *Investor's legitimate expectations and The interests of the host state in foreign investment*, Asian Economic and Financial Review, 2014, pp. .1906. *See also* Stephen Fietta, *Expropriation and the "Fair and Equitable" Standard; The Developing Role of Investors' "Expectations" in International Investment Arbitration***,** Journal of International Arbitration, Kluwer Law International, Vol. 23 ,Issue 5, 2006,pp. 375 - 399

[16] Trevor Zeyl, *Charting the Wrong Course: The Doctrine Of Legitimate Expectations In Investment Treaty Law,* Alberta Law Review, 2011, pp.205

[17] See Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse*, Arbitration International, 2007, pp.361; *see also* Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 2010, pp.189.

As to the rationale of this concept, Tribunals and scholars agree that investors' legitimate expectations rely on the stability, predictability and consistency of the host State's legal and business framework.[18] Hence, the main rationale behind the protection of legitimate expectations is to encourage foreign investors to make adequate business decisions based on the legal regime of, and representations made by, the host State.[19] The investor makes its calculations and decisions in the light of the law of the host state as it is made available to it by the host state, and the investor's assumptions about the return for its investment will depend upon the stability and predictability of those laws and representations.[20] Had the legal order or representations been different, this decision to invest might have been different.

In Ethiopia too, the government is engaged in huge investment representations with a view of attracting more and more FDI in addition to entering into investment arrangements such as BITs.

1.2. Statement of the Problem

As stated above, the doctrine of legitimate expectations in general and representations as its basis in particular is becoming the vibrant ground of claim within international investment treaty arbitration. The main reasons giving rise to the proliferations of this doctrine as a ground of claim can be attributed to the increasing competitions between host states to attract more and more investors to their territory using representations in addition to formal arrangements. And the fact that unilateral representations made by the host states is getting attention of the investment tribunals is bad news for developing countries which are in fierce competition of attracting investors by undertaking huge representations.

The main reason that drags this concept into the table of discussion before the investment tribunals is the fact that host state's representations are usually unwarranted and being frustrated and promises broken. The two competitive interests here is the host state's insistence on its authority and sovereignty to adapt its rules, commitment and policies to the public interest and an investor's insistence on a right to rely on a regime which induced it to invest (and was perhaps

[18] Kenneth J Vandevelde, *A Unified Theory of Fair and Equitable Treatment'*, Journal of International law, 2010,pp.66
[19] Christoph Schreuer and Ursula Kriebaum, *At What Time Must Legitimate Expectations Exit?*
[20] Rudolf Dolzer, *cited above at 5*, pp.17

specifically implemented to have that effect). Within this spectrum, the main problems that are spotlighted within this paper are the following.

Firstly, though a representation is one of the bases of legitimate expectations claim, its exact place within international investment treaty arbitration is far from being certain. The conducts of the states that give rise to representations as a basis of legitimate expectations claim and the conditions thereto is yet a liquid concept. This problem is exacerbated due to the fact that representations (assurances, promotions, promises and encouragements) as the basis of doctrine of legitimate expectations claim is not within the text of investment treaties or contracts between the host states and investors; hence, conducts and undertakings and the criteria thereto that can give rise to it is difficult to comprehend. Due to this reason, what kind of conducts or representations of the states can/should give rise to the legitimate expectations of the investors is not settled. And the holding of investment tribunals largely vary, which makes the judgment of the tribunal usually unexpected on this point. This has made some scholars to believe that due to the very nature of representations, and the types of "commitments" or "undertakings" that tribunals have considered to be protected, the scope of potential liability under this new rule ~~is~~ might be extremely vast.[21]

Secondly, the juridical roots of making the host states liable for frustrating legitimate expectations (created through representations) of the investor is not a settled agenda. Investment tribunals discuss this doctrine usually as an element of FET or expropriation. However, majority of the tribunals didn't try to discuss the legal basis of doctrine of legitimate expectations in general and representations as its basis in particular whereas some refer the general principle of law (mainly 'good faith') to justify it; though whether the treaty interpretation allows such kind of extraction are left unanswered. Other than this, the tribunals use to cite the decisions of previous decisions in justifying the doctrine and due to this reason it is rightly described as a 'house of cards built by the references to other tribunals and academic opinions'.[22] Due to this some scholars taunt this concept as having no valid legal basis within international investment law regime.

[21] Lise Johnson & Oleksandr Volkov, *Investor-state contracts, host-state "commitments" and the myth of stability in International law*,2013
[22] Anthea Roberts, *cited above at 17*, pp. 179

What makes these problems worse is that, currently host states are competing to encourage and induce investors by using different huge unwarranted unilateral investment representations and at the same time, unknowingly, they are running to the hidden hole of liability; which they usually are getting disappointed of it to the extent of terminating investment agreements.

In Ethiopian context too, it has been common to the government making huge investment representations in the form of promises, assurances, promotions and encouragement through its officials and the webpage as well and most of which might not be up to what the government has represented. So, the fate of these kinds of representations needs to be examined in light with this doctrine.

The whole effect of unexamined aspects of these problems is that they may facilitate a potential crisis of legitimacy for the investment treaty regime[23] by serving to dissuade host States from admitting foreign investments and affecting the confidence of the investors; which discourage the interest of the investor to invest.[24] Solving these problems, require an inquiry into the exact place of representations as a basis of legitimate expectations claim within international investment treaty arbitration, its juridical basis and its potential effect on developing like Ethiopia. Further, although there are burgeoning literatures on the doctrine of legitimate expectations in general, little attention has been paid to unilateral investment representations as its basis, which is of vital interest to developing countries like Ethiopia. Hence, this is what makes this study relevant and timely.

1.3. Objective of the Study

1.3.1. General Objective

The general objective of this study is to examine the legal and jurisprudential status of unilateral Representations as a basis of doctrine of legitimate expectations claim in International Investment treaty arbitration and its implication on investment representations made by the Ethiopian government.

[23] Charles N Brower & Stephan W Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?* Chicago Journal of International law, 2009, pp.471-474.
[24] Trevor Zeyl, *cited above at 16*,pp. 204

1.3.2. Specific Objectives

This study has the following specific objectives in view**:**

- ✓ To identify the conceptual framework of Doctrine of Legitimate Expectations within international investment treaty arbitration in general
- ✓ To examine the juridical roots of doctrine of legitimate expectations in general and representations as its basis in particular
- ✓ To analyze the current jurisprudential place of host state's representations as a basis of legitimate expectation claims under International investment treaty arbitration
- ✓ To examine the fate of investment representations made by the Ethiopian government in light with this concept
- ✓ To suggest a tenable recommendation which can serve the aim of international investment law (protection and promotion of investment)

1.4. Research Questions

This study is conducted with a view of answering the following questions:

- ✓ What is the concept of doctrine of legitimate expectations claim within international investment treaty arbitration?
- ✓ What is/are the juridical root/s of doctrine of legitimate expectations in general and representations as its basis in particular?
- ✓ What is the current jurisprudential place of representation as a basis of legitimate expectations claim under international investment treaty arbitration?
- ✓ What is the fate of investment representations made by the Ethiopian government in light with this concept?
- ✓ How should this concept be used within international investment treaty arbitration so that it serves the purpose of international investment law regime?

1.5. Hypothesis/Propositions

Based on the statement of the problem and as a preliminary answer to the research questions, three main propositions were laid out at the inception which this paper has attempted to confirm

or refute. The first propositions suggest that the doctrine of legitimate expectations and representations as its basis is an established concept of investment law with noticeable roots in general international law. Accordingly, the first part of this paper offer an examination into the essence of doctrine of legitimate expectations, its origin and juridical roots validating its application within international investment arbitration.

The second proposition is devoted to the increasing concept of representations as a basis of legitimate expectations claim within international investment treaty arbitration with the investment tribunals adopting diverse interpretations to it due to its vagueness and ambiguity which has caused legitimacy crisis to it. Hence, the second part of this thesis examine the jurisprudence of investment tribunals focusing on what conducts are giving rise to legitimate expectations and what criteria and limitation the tribunals are attaching to it as a remedy of abusing the concept.

The third proposition is that the Ethiopian government is making investment representations which may potentially lead the country into liability based on the concept of representations as a basis of legitimate expectations. The Ethiopian investment objectives and the means used by the government to attain these objectives will be examined to refute or confirm this proposition.

1.6. Research Methodology

In order to achieve the purpose it has in view, the researcher has employed doctrinal legal research approach. Accordingly, analysis of arbitral awards and international laws relevant to the issue at hand has been made followed by evaluation of the Ethiopian trend on investment representations in light of the jurisprudence of international investment tribunals. And both primary and secondary sources of data have been relied on. Accordingly, international laws, cases decided by the investment tribunals (both by institutions and *ad hoc*), books, journals and reviews, case comments and etc. were used as a source of data. The case laws relevant to the issue at hand are purposively selected and cover the ever shining pivotal cases, which cannot be jumped over in any analysis, and more recent awards, which is one of the contributions of this thesis.

1.7. Significance

The paper is worth, by far, for the international investment law regime for it has tried to legitimize the use of host state's representations as a basis of legitimate expectations claim, though caveat has also be done to that effect. With equal value, as the main aim of this study is to pierce the mask on the issue of representations as a basis of legitimate expectations claim, it helps the host states, mainly the developing countries, to understand how they can be tapped with the obligation which they never intended, and the care that they can take to escape it. It also guide the investors on what type of commitments should they rely on to get a ripe of this doctrine. The significance of this paper is, in fact, vital for Ethiopia as it evaluate its government's investment representations in light of the issue at hand which helps it ripe a lesson for the future.

1.8. Scope of the Study

As it exist today, it is identified that three grounds can give rise to legitimate expectations and these are; commitment as to stability of legal frameworks, contractual and quasi contractual commitments and representations. However, this study is delimited to examining the status of unilateral representations by host states as basis of doctrine of legitimate expectations claim in investment treaty arbitration. On this issue too, this paper is limited to examining the jurisprudential place of this concept, its juridical roots and the fate of Investment representations by Ethiopian government. Although the implication of this concept is noticeable on developing countries, this paper is limited to discuss the Ethiopian situation only in detail. Hence, discussions on doctrine of legitimate expectations in general are made very briefly only to give a foundation for the discussions on representations as its basis. The discussion as to the situation of developing countries too is limited to use it as a foundation of discussing the Ethiopian case. So, the spotlight is dedicated to unilateral investment representations intentionally as it is of special interest to developing countries like Ethiopia because we are in the era in which they are making huge investment representations and incurring liability at the same time.

1.9. Organization of the Paper

The paper contains five chapters. The first chapter incorporates the proposal part. The general and current conceptual framework of the doctrine of legitimate expectations within international

investment treaty arbitration is dealt under chapter two. Further, the juridical roots of Doctrine of legitimate expectations in general and representations as its basis in particular are also given a broad space within this chapter. Hence, the proposition that doctrine of legitimate expectations in general and representations in particular have valid juridical roots within international investment law and international law in general is tested well.

The jurisprudential place of unilateral investment representations as a basis of legitimate expectations claim is made the focus of chapter three. Herein, circumstances/conducts/statements of the host states which amounts to be representations as a basis of legitimate expectations claim in light of the practice of international investment tribunals will be identified and analyzed. Chapter four of the paper is devoted to evaluation of the current trend of unilateral investment representations made by the Ethiopian government in light of the jurisprudence of international investment treaty arbitration. And chapter five will conclude the paper by conclusion and recommendation.

Operational Definition

Unilateral Representations: is declaration by the host states, in any form, in the form of promises, assurances, promotions and encouragements and it includes assertions, acts, practices, policy statements and etc.

1.10. Review of Related Literature

Lise Johnson & Oleksandr Volkov consider the doctrine of legitimate expectation as a new 'de facto' rule emerged in international investment law that emphasizes and prioritizes stability for foreign investors and imposes liability on host governments for measures of general applicability when (a) the measures cause a shift in the legal framework that (b) is inconsistent with a commitment or undertaking previously made to a foreign investor.[25]Further, having stated that the scope of potential liability under this new rule is extremely vast, these writers have stated that 'The legitimacy of this new rule giving primacy to stability – and the question of whether it is in fact

[25] Lise Johnson & Oleksandr Volkov, *cited at 21*

an international law norm of treaty, custom, or principle – are issues that have received little if any analysis in academic literature, and should be the focus of further study.' [26]

Rudolf Dolzer consider the doctrine of legitimate expectation of the investor as the central pillar in the understanding and application of the fair and equitable treatment standard which is going to be decided based on the objective conduct of the host state inducing legitimate expectations on the part of the foreign investor; reliance on that conduct on the part of the foreign investors; frustration of investor's expectation by subsequent conduct of the host state; unilateralism of conduct of the host state, i.e., absence of meaningful communication and/or consent with investors; and damages for the investor.[27] This writer consider representations by the host states as often invoked basis of legitimate expectations and he recognize that the legitimacy of reliance on representation by the host state to the investor flows directly from the principle of good faith.[28] However, he has made no attempt to justify how this concept can directly flow from the principle of good faith. Further, there is no discussion of what kind of representations has to serve as the basis of legitimate expectations.

In attempt to describe the content and legal basis of the doctrine of legitimate expectation, Andrew Newcombe and Lluis Paradell, notes that

> '*In its most specific form, legitimate expectations refers to expectations arising from the foreign investor's reliance on specific host state conduct, usually oral or written representations or commitments made by the host state relating to an investment in which sense is closely related to the principle of estoppel and state responsibility under public international law for unilateral acts'*.[29]

However, they retreated from discussing the concept of representations in detail so that it gives a lesson for the host states and the investors. Further, whether the public international law concept of state responsibility is really applicable on the claim between investor and the host state is not justified by these authors.

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[26] Ibid.
[27] Rudolf Dolzer, *cited above at* 5.pp 17-20
[28] Id. Pp.24
[29] Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* Kluwer Law International, 2009, pp.279-280

On the other hand, Trevor Zeyl concludes that the doctrine of legitimate expectations of the investor is being justified by the tribunals by using the 'general principles of law' and the problem is that:

> *'tribunals are contributing to the development of a body of international law that is inaccurate, or at least fails to reflect "a common sense in the domestic legal systems" perhaps due to the fact that tribunals are given wide interpretive discretions*.[30]

Hence, the focus of this writer was on showing the variance of the concept of legitimate expectation in domestic laws of different countries and which led him to conclude that the concept cannot be considered as the general principle of law.

Zeinab Asqari has persistently objected the broad understanding of the concept of legitimate expectations as it is currently being applied by the tribunal alleging that the tribunals are not considering the practical legitimate, economic, political issues and special needs of the state to protect the public interests which is imposed on it by legislation. This writer argues that the concept **'**must not exclusively consider the investor's interests, but has to consider the interests of the host state as well and should bring a balance between the interests of the parties. [31] Hence, the writer has given little attention to the issues at hand.

Stephen Fietta, on his part has wrote a lot on whether the doctrine of legitimate expectation of the investors should be an element of Fair and equitable treatment or Indirect expropriation, and concludes that the concept is a dominant element of the fair and equitable treatment than indirect expropriation.[32]

There are also other burgeoning literatures dealing with the doctrine of legitimate expectations of the investors under international investment law. However, the issue of representations as a basis of legitimate expectation has received little, if any, attention though it is controversial and very essential for the interest of the investors and host states.

Moreover, the potential effects of the rule as it exists today on the countries entering into huge commitment and promises such as Ethiopia have not given an attention.

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[30] Trevor Zeyl, *cited above at 16*,pp 204
[31] Zeinab Asqari, *cited above at 15,* pp. 1917
[32] Stephen Fietta, *cited above at 15*,pp. 375 - 399

CHAPTER TWO

2. Conceptual Framework of the Doctrine of Legitimate Expectations in International Investment Treaty Arbitration

2.1. Introduction

Within international investment treaty arbitration the principle of FET standard is the frequently invoked ground of claim by the investors and its space of within the center of the investment dispute agenda has remained steady and has intensified.[33] Currently, the frustration of investor's legitimate expectations has found its most frequent application within FET standard.[34] However, despite being the frequently invoked grounds of claim by investors in investment arbitrations, no BITs or multilateral investment treaties have assigned specific provisions dealing with this doctrine.[35] Hence, it is imperative to search for where the origin of this doctrine is, how it developed into international investment treaty arbitration, the rationales behind this doctrine and the circumstances giving rise to it as it is today. Further, the juridical roots of this doctrine in general and unilateral investment representations in particular need to be ascertained. Hence, the proposition that doctrine of legitimate expectations with its basis has valid place within international investment law is tested.

2.2. Introducing the Essence of the Doctrine of Legitimate Expectations

The main essence of the doctrine of legitimate expectations, which belongs to the field of public law and smears the principle of fairness, is that the government or officials of the government should be bound by their promises and representations for the persons who acted or decided something relying on those promises and representations.[36] It gives a remedy when the public body has made a representation, which is within its powers to make, but it later seeks to resile from it or when the public body set out policy criteria in which the individual expects something

[33] Rudolf Dolzer, *cited above at 5, pp.10*
[34] Von Walter *cited above at 6*
[35] Noah Rubins, *The Evolution of Investment Arbitration in the US FTAs with Singapore and Chile*, 2004, pp. 1 available at http://www.transnational-dispute-management.com/article.asp?key=205 last accessed April, 2018.
[36] Seemeen Muzafar, *Doctrine of Legitimate Expectation in India: an analysis, International Journal of Advanced Research in Management and Social Sciences*, Vol. 2, 2013, pp.117

out of it, and then the public body changes its mind and seeks to apply different policy criteria to the particular area and so dashes the expectations of those affected.[37]

In dealing with this doctrine, Lord Denning has interestingly stated the tenate of this doctrine alleging that;

> *"A man should keep his words. All the more so when promise is not a bare promise but is made with the intention that the other party should act upon it."* [38]

Hence, the decisions, policies, representations and promises made by the government should be consistent, stable, and transparent so that the citizens or organizations rely on them to decide something.

And within the context of international investment arbitration, doctrine of legitimate expectations of the investor can be considered as expectations of the foreign investors from the host state, which arise from the specific conducts, promises, commitments or representations of the host states, to act in a certain manner in relation to investment.

Hence, this doctrine can serve as a ground of claim when a person has relied upon policy or norm of general application existed but then subjected to a different policy or norm; when a policy or norm of general application existed and continued but was not applied to a given case at hand; when an individual received a promise or representation which was not honored due to a subsequent change to a policy or norm of general application when an individual received a promise or representation which was subsequently dishonored, not because there had been a general change in policy, but because the decision-maker had changed its mind in that instance.[39]

[37] Melanie Roberts, *Public Law Representations and Substantive Legitimate Expectations,* The Modern Law Review Limited, ,vol.64, 2001, pp.112
[38] Lord Denning "*Recent development in the Doctrine of consideration*" Modern Law Review, Vol. 15, 1956 as cited in Seemeen Muzafar, *cited above at 36,pp.*117
[39] Seemeen Muzafar, *cited above at 36,* pp.122

2.3. Origins of an Attachment of Legal Rights to the Legitimate Expectations

2.3.1. Doctrine of Legitimate Expectations as a Creation of Domestic Legal System

A look at the historical background of the doctrine of legitimate expectations reveals that it has been long practiced in domestic legal system of different states before becoming the dominant ground of claim in international investment arbitrations. It is a creation borrowed from [domestic] administrative law and more particularly related to the concept of judicial review [40]. It is a doctrine that is used to counter the principle of 'free revocability', which is the wide-ranging discretionary power vested in public authorities.[41]

Within domestic legal systems (specifically within administrative law realm), Seemeen Muzafar has identified the essential ingredients of the doctrine of legitimate expectations as containing; imposition of duty on public body/administrative authority to afford an opportunity of hearing to an affected party if the government or public body or public authority has acted arbitrarily in violation of their legitimate expectation, extends protection of natural justice or fairness, relevant factor for due consideration to make decision making process fair, the expectation should be reasonable, it may extends to the exercise of even non-statutory or common law powers, and may arise from an express promise or existence of a regular practice. [42]

It should also be noticed that doctrine of legitimate expectations within domestic administrative law is not absolute ground of claim. Instead there are some exceptions in which the legitimate expectations of the person may be frustrated. On this issue again, Seemeen Muzafar, after analyzing the practice within different jurisdictions has summarized some of outshining exceptions to the doctrine of legitimate expectations. Among others, he has identified that no legitimate expectations can be found if it would involve the violation of statutes, on application or claim rejected for failure of to comply with the conditions imposed for its considerations, and it is also subject to the larger consideration of public interest which is to be determined not according to the claimant's perception but the larger public interests.[43]

[40] Soren J Schonberg, *cited above at 9,* 2000, pp. 13-14.
[41] Robert Thomas, *Legitimate Expectations and Proportionality in Administrative Law,* Hart Publishing, 2014,pp.19
[42] Seemeen Muzafar, *cited above at 36,* pp. 123
[43] Id.pp. 125-126

2.4. Incorporation of Doctrine of Legitimate Expectation into International Investment Treaty Arbitration

Though it is originated in domestic administrative law, doctrine of legitimate expectations has made its way to being the forefront as a ground of claim in investment treaty arbitration. It can be said, from the reading of recent investment awards, that this doctrine is incorporated within international investment arbitration from non-existence to full acceptance. Due to this reason, having appreciated the direct incorporation of the doctrine of legitimate expectations from domestic public law (I.e. administrative law), Stephen Feitta consider it as 'The first domestic public law principle that has clear parallels in international investment'.[44]

Within the context of international investment treaty arbitration expectations arising from investor's reliance, in the form of making an initial investment or expansion, on specific host states conduct including oral or written representations.[45] However, it is only less than two decades that the doctrine of legitimate expectations starts to shine up in international investment arbitration. Firstly, it emerged as an element of Fair and equitable standard in *Metalclad v. Mexico*, hinting at legitimate expectations where an investor was 'led to believe and did believe', where the investor had been told that the permit would be granted, and subsequent action against the belief breached the fair and equitable standard.[46]

However, it was the tribunal in *Tecmed v. Mexico* that referred, for the first time, to the protection of an investor's expectations in general terms,[47] observing that the fair and equitable standard, in light of the good faith principle established by international law 'requires treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.[48] This tribunal has discussed the essence of this doctrine in a well-articulated statement reading:

> *'....The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it*

[44] Stephen Fietta, *cited above at 15*, pp. 375 -
[45] Andrew Newcombe & Lluís Paradell, *cited above at 29,* pp.279-280
[46] *Metalclad v. Mexico case.cited above at 10,para.75*
[47] M. Potesta, *cited above at 11,* pp. 88.
[48] *Tecmed v. Mexico case, cited above at 12, Para. 93*

may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investments and comply with such regulations…. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the state that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities...[49]*(Emphasis added)*

This case is one of the ever shining cases regarding the description it has given for the doctrine of legitimate expectations and it is also the most criticized case for unduly incorporating this new doctrine in the realm of international investment arbitration. The above statement is evident that the tribunal has comprehensively described the content of this doctrine. And following this tribunals, it has become common in other subsequent tribunals to cross refer it in their decisions.

And the current practice of investment tribunals reads that this doctrine is incorporated into the realm of investment treaty arbitration in its fullest sense. For example, the tribunal in *British Caribbean Bank Limited v. The Government of Belize* case has considered that the FET standard is generally linked to the concept of an investor's legitimate expectations.'[50] Hence, under the heading of FET standard, frustration of legitimate expectations is the mostly invoked grounds of dispute by investors by referring to the reliance on change of legal framework, contractual commitments and unilateral representations. Due to the inherent legal affinity between fair and equitable treatment, good faith, and the protection of the investor's legitimate expectations, the protection of legitimate expectations by the FET standard is today properly be considered as the central pillar in the understanding and application of the FET standard.[51] Hence, International arbitral tribunals presiding over recent investment claims have made frequent references to the "expectations" of the investor claimant in which some tribunals have referred it as a core factor in deciding that an investment has been indirectly expropriated by the state respondent; others, particularly in some of the most recent awards, as being a core indicator as to whether there has been a failure to accord fair and equitable treatment to the investor. [52]

[49] *Id.* Para. 98.
[50] *Bank Limited v. The Government of Belize*– Award of 19 December 2014 at para. 283
[51] Ibid. pp.17
[52] Stephen Fietta, *cited above at 15*,pp. 375

As stated generally within *International Thunderbird Gaming Corporation v. The United Mexican States*, doctrine of legitimate expectations, under certain conditions, allows a foreign investor to claim compensation in situations where the conduct of a host State creates a legitimate and reasonable expectation that the investor may rely on such conduct, and consequently the host State fails to fulfill those expectations, causing damages to the investor.[53]

Regarding the elements or components of the doctrine of legitimate expectations within international investment arbitration, Dolzer, after investigating cases, has summarized five components, the existence of which determines whether this doctrine can serve as a claim of breach of FET standard. According to this writer, these components are the objective conduct of the host state inducing legitimate expectations on the part of the foreign investor; reliance on that conduct on the part of the foreign investors; frustration of investor's expectation by subsequent conduct of the host state; unilateralism of conduct of the host state, i.e., absence of meaningful communication and/or consent with investors; and damages for the investor.[54]

2.5. Rationales and Justifications behind Doctrine of Legitimate Expectations

The protection of legitimate expectations is necessary to create legal predictability and certainty[55], which are prominent features with respect to economic development as 'legal provisions serve to secure the autonomy of economics agents as a precondition of self-co-ordination on the basis of private contracts'[56]. This is why, usually, predictability and stability of a particular legal regime and the mere existence of a unilateral representation by the host state will be seen by tribunals as grounds for legitimate expectations.[57]

From the viewpoint of the host country, it appears not unreasonable to accept the benchmark of the legal order which it has adopted for itself at the time of the investment in which way, the host

[53] *International Thunderbird Gaming Corporation v. The United Mexican States*, NAFTA/UNCITRAL, Award, 26 January 2006, para. 147 (hereinafter called '*Thunderbird vs. Mexico case')*.
[54] Rudolf Dolzer, *cited above at 15*,pp.20

[55] E. Sharpston, '*Legitimate Expectations and Economic Reality'* , 1990, pp.102 cited in Schonberg, *cited above at* 9,pp. 12

[56] M.E. Streit, *Economic Order, Private Law and Public Policy*, 1992, pp. 675
[57] Kenneth Vandevelde *cited above at 18*, pp.33.

state's exercise of its sovereign rights is respected, albeit focused on the time it admitted the investment.[58]

Hence, protection of legitimate expectations of the investor is serving as an incentive for foreign investors to settle on a particular investment destination based on a legal structure and representations made by the host state to make reasonable business decision. This is to say, had the law and policy or the representations made by the host state is/are different, the investor would not have decided to invest.

2.6. Basis of Doctrine of Legitimate Expectations in the Jurisprudence of International Investment Arbitration

Once it is agreed that the doctrine of legitimate expectations is playing an important role as ground of claim within the current international investment treaty arbitration, it is imperative to identify the circumstances laying ground for this doctrine as well. And as there is no treaty document that identifies situations warranting the creation of legitimate expectations, the only source serving this purpose is the jurisprudence of investment tribunals.

As it currently stands today, changes in general legal and regulatory framework of the host states, breach of contractual and quasi-contractual relationships between the host state and the investor and breach of unilateral representations from the host state that the investor has relied on when making its investment are identified by investment tribunals and scholars.[59]

I. *Change in legal and regulatory framework*

One of the vivacious basis on which the investor's expectations can be grounded is within the stability of the general legislative and regulatory framework of the host states which were in force at the time of the investment.

Legitimate expectations based on this general legislative and regulatory framework can be created based on instruments existing at the time of investment such as the legislation, treaties, decrees, regulations, directive, policies, cases and administrative decisions. This is because, one

[58] Rudolf Dolzer, *cited above at 5,* pp.17
[59] Ibid.

of the factors based on which the investor takes into account in deciding to invest within a given states is the legal framework of the states. So, it has a great bearing on the decision of the investment and can create expectations on the part of the investment that the legal framework will be stable and consistent, though not absolutely.

Regarding the existing jurisprudence on this issue, Rudolf Dolzer has examined cases such as *LG&E v. Argentina, Alpha v. Ukraine, Occidental v. Ecuador, and El Paso v. Argentina* which have incorporated the change in legal framework as an acceptable basis of legitimate expectations claim.[60] However, it should also be clear that the investor cannot, subsequently, complain on the application of the laws existing before its investment. It should take the domestic laws as it stands at the time of making investment.

However, the issues of the extent to which the investor can expect the stability of the legal framework, and its counter relationships with the host state's sovereignty to change its law, require a detail analysis whose content cannot be contained within this paper.

II. *Breach of contract between the investor and the host state*

Contractual relationships which are created between the investor and the host state is another basis generating legitimate expectations claim in international investment treaty arbitration. Once the host state has entered into contractual commitments with the investor, it serves as a valid basis up on which the legitimate expectations claim can be claimed. According to Dolzer and Christoph Schreuer, contracts are the classical instruments throughout all legal systems for the creation of legal certainty, stability and predictability.[61] Hence, when foreign investors acquire rights from contracts or in the nature of licenses, legitimate expectations arise, and international investment law will protect them not only from a host State's repudiation of such legal or contractual obligations, but also from any governmental or regulatory interference with their rights.[62]

[60] Id. , pp.20-24
[61] Rudolf Dolzer and Christoph Schreuer, *cited above at 1*, pp.140
[62] Matthew Weiniger, *International Investment Arbitration; Substantive Principles*, 2007, pp.325 cited in M.Potesta, *cited above at 6*, pp.14.

The typical investment tribunal award in this regard is the *MTD v. Chile* case in which the investors has entered into investment contracts with Chile's foreign investment agency on urban development project, on which the investors alleged to have created legitimate expectations on the success of the project, but frustrated when the investor was denied a permit. Then, after analyzing the factual backgrounds, the tribunal found that the host state, by entering into the investment contract on the one hand, and by denying the relevant permits on the other, had frustrated the investor's legitimate expectations and had thus acted unfairly and inequitably.[63]

However, it should be noted here that the total solidity of a contract between the investor and the host state can be sure when it is guaranteed by the umbrella clause. Further, some controversies on this issue, which this paper lags in scope to discuss, are the distinction between treaty and contract, whether breach of contract should be considered as breach of treaty (i.e. in absence of umbrella clause), whether breach of contract should be a cause of action before international arbitration tribunals and etc. And the application of legitimate expectations claim survives out of the analysis of these very relevant issues.

III. *Host state's representations*

Another vibrant basis of legitimate expectations claim within international investment treaty arbitration is hos states representations in the form of direct representations, promotions, assurances, promises and etc. made in any form such as by repeated practice, verbal or written.[64] Currently, investors in investment arbitration treaty are often invoking legitimate expectations claim when the host state made certain representations, on which the investor has relied in deciding to invest and the disillusionment of which pose a damages to the investment. However, the extent, nature, and acts which amounts representations acceptable before the tribunals and limitations thereto is far from being clear which require a thorough discussion; hence, the spotlighted focus of the next chapter.

[63] MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile, ICSID Case. No. ARB/01/7, Award, 25 May 2004 para. 160-167(hereinafter called '*MTD vs. Chile case'*)
[64] Rudolf Dolzer, *cited above at 5,* pp.24

2.7. Juridical Roots of Legitimate Expectations Claim In General and Host State's Representations as Its Basis In Particular in International Investment Law

2.7.1. Framing the Issue

It is currently beyond questions that the doctrine of legitimate expectations with representations as its basis is being one of the frequent ground of claim within international Investment treaty arbitration. However, though inquiry into the legal basis that lie beneath the doctrine of representations as a basis of doctrine of legitimate expectations is important to justify the application and bring credibility to its role within international investment arbitrations, investment arbitral awards lack a bolster for its use. This problem is exacerbated due to the fact that the doctrine of legitimate expectations with its basis in majority of cases does not have an explicit mooring in the text of applicable investment treaties. As of today, it is only the draft of Free Trade Agreement (FTA) between the European Union (EU) and Singapore and the U.S. Model BIT of 2012 which have clearly stated this doctrine within a treaty.[65]

Hence, so long as it is not anchored within the text of investment treaties, the logical question will be- where does the doctrine of legitimate expectation in general and it's pivotal basis (i.e. representations) in particular emanate from? As a look at the precedent of the tribunals cannot be adequate answer for this question, it requires a search of a justification beyond arbitral precedent.[66]

Although majority of the investment arbitration tribunals makes no effort to justify this doctrine legally, some investment arbitration tribunals have tried to link this doctrine with legal background. In brief manner, the investment tribunals have linked it with different legal roots in international law which can be summarized as follows. It should also be clear from the outset that legally justifying or refuting the doctrine of legitimate expectations amounts to the same on representations as its central element or basis as well.

Firstly, some tribunals and scholars opt to consider the FET standard, under which this doctrine is mostly invoked, as a reflection of **Minimum standard Treatment** principle under customary

[65] See chapter 9 of the draft of FTA between the European Union and Singapore and Annex B (4) of U.S. Model BIT of 2012.
[66] M. POTÈSTA, *cited above at 11*, pp. 90.

international law. And the argument is that if the FET is to be the same with minimum standard of treatment, the doctrine of legitimate expectation too is under the same siege. Secondly, the tribunals consider the doctrine as one of the **general principles of law**. Thirdly, some tribunals and writers consider this doctrine as part and parcel of **good faith principle**. Hence, what follow is an attempt to confirm or refute the propositions that the doctrine of legitimate expectations is proven principle of investment law with noticeable origins in international law.

2.7.2. General Principles of Law

One of the legal justifications for the application of the doctrine of legitimate expectations provided by the investment tribunals and scholars is that it is one of the general principles of law recognized by civilized nations. And the notable investment case that figured out this doctrine as general principle of law is the *SPP vs. Egypt case* stating that;

> "*Whether legal under Egyptian law or not, the acts in question were the acts of Egyptian authorities, including the highest executive authority of the Government. These acts, which are now alleged to have been in violation of the Egyptian municipal legal system, created expectations protected by established principles of international law*."[67](Emphasis added)

Following this land mark case, investment tribunals have been easily following the same path.

If anyone is to look at the general sources of international law, the best reference will be article 38 of the statute of the international court of justice which sets out the sources of international law that the International Court of Justice (ICJ) shall apply, including treaties, custom, *general principles of law recognized by civilized nations* and decisions and writing of publicists.[68] However, a deep reading on the concept of 'general principles of laws recognized by civilized nations' in general and its content in particular, which this thesis cannot go into detail, gives a feedback that it is proved to be the most controversial sources of international during the drafting of the *Statute for the Permanent Court of International Justice* (PCIJ) in 1929 and continues to divide the opinions of scholars and tribunals today.[69]

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[67] *Southern Pacific Properties v. Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, para.83 (hereinafter called '*SPP v. Egypt case'*)

[68] Article 38 of the Statute of the International Court of Justice, (hereinafter called '*ICJ statute'*)

[69] Rumiana Yotova, *Challenges in the Identification of the "General Principles of Law Recognized by Civilized Nations*: The Approach of the International Court, CJCCL, 2017 , pp.271

As to its sources and contents, Rumiana Yotova has identified that the references to general principles in the case law of the Permanent Court of International Justice and the ICJ can be grouped in three main categories: (i) general principles of international law; (ii) general principles of domestic law; and (iii) general principles of international procedural law.[70] From this it can be deduced that general principles of domestic law as well can form part of the general principles of law stated under article 38 of the ICJ statute.

Coming back to the doctrine of legitimate expectations, one of the elucidations for the protection of legitimate expectations by the investment tribunals is that due to the similarities and commonality of the application of this doctrine in domestic laws of many states, usually as a part of administrative law, it has got the status of general principles of law. That is to say, the doctrine of legitimate expectations is present in a number of both common and civil law countries embodying certain commonalities from which it follows that it might be a suitable candidate to be categorized as a general principle of law.[71] And this doctrine is smuggled into international law by the tribunals who extract principles applicable to investment arrangements and having significant influence on its formation.[72]

Further, general principles of law play an important role in the relationship between States and foreign investors, since these principles have emerged in domestic systems in a similarly asymmetric relationship, i.e. where at least one party is a natural or legal person.[73]Meyers, Z. has described an adoption of administrative principles into international law as global administrative law attempting to improve accountability in transnational and international context.[74] M.Nair, having in mind the general principles of private law whose function is to regulate private as opposed to inter-state relations, emphasizes the role of general principles in investment contracts between states and corporations, reasoning that: 'those contracts which, though not interstate contracts and therefore not governed by public international law *stricto sensu*, can more effectively be regulated by general principles of law than by the special rules of any territorial

[70] Id.,pp.294
[71] M. Potesta, *cited above at 11,* pp. 90.
[72] Gazzini, T., *General Principles of Law in the Field of Foreign Investment,* Journal of World Investment and Trade, Vol. 10, 2009, *pp.* 104-105.
[73] Id., pp.109
[74] Meyers, Z., *Adapting Legitimate Expectations to International Investment Law: A Defense of Arbitral Tribunals' Approach,* Transnational Dispute Management, Vol. 11, Issue 3, 2014,pp. 1

system'.[75] Investment arbitration tribunals also often use general principles of law to inform the content of an existing, but open textured treaty norm such as the FET standard[76] and it is through the elucidation of general principles of international law that the practice under investment treaties contributes to the development of general international law. [77]

Due to this, many of the investment arrangements directly or indirectly refer the application of international law (with its sources), one of which is general principles of law, including the International Center for Settlement of Investment Dispute (ICSID) convention which refers to 'such rules of international law as may be applicable'[78] and NAFTA which refers to 'applicable rules of international law'. [79] This is why that Sornarajah notes that general principles have acquired a role in the shaping of rules in the area of foreign investment protection.[80]

Once the fact that general principles of law can be derived from domestic laws and it is of vital importance within the investment law regime is ascertained, then it is essential to determine whether the doctrine of legitimate expectations as operated in domestic legal system of many states can be branded as a general principles of law stated under article 38 of the ICJ statutes. This require an examination of the practice of doctrine of legitimate expectations within different domestic laws as the content of general principle is to be determined by comparing national legal practices and extracting standards common to all (or most) national legal system as described above. However, it should be known from the outset that the methodological questions of how many domestic legal systems should be examined and how similar the standard must be are still without consistent answers within the public international law sphere. However, what is common in the practice of the ICJ and commentaries of majority of scholars is that an examination of each and every stat's practice and absolute similarities of the principle is not a requirement.

Typical investment arbitration tribunal which tries to examine the contents of the doctrine of legitimate expectations within different domestic legal system was the *Gold Reserve v.*

[75] Arnold M. Nair, *"The General Principles of Law Recognized by Civilized Nations*", British Yearbook of International Law 1957, pp.33 cited in Yotova, cited above at 87,pp.279
[76] Campbell McLachlan, *Investment Treaties and General International Law*, 2008, pp. 396
[77] Id. Pp.364
[78] Article 42 of International Centre for Settlement of Investment Disputes ICSID Convention, (hereinafter called 'ICSID')
[79] Article 1131 of North American Free Trade Agreement, January 1,1994, (hereinafter called 'NAFTA')
[80] M .Sornarajah, *The International Law on Foreign Investment*, New York: Cambridge University Press, 2010, pp. 86

Venezuela which, after examining the domestic laws of Germany, French and England, has asserted that;

> *'....the concept of legitimate expectations is found in different legal traditions according to which some expectations may be reasonably or legitimately created for a private person by the constant behavior and/or promises of its legal partner, in particular when this partner is the public administration on which this private person is dependent'.*[81]*Emphasis added)*

Scholars have also tried to examine the content of doctrine of legitimate expectations within different domestic legal systems and observed that there is no consistent practice. For example, after examining the practice of some states, Schonberg has stated that 'while English law relies mostly on procedural protection of expectations, European Community (EC)] law relies more on substantive principles, and French law on compensation. German, Dutch, and Scandinavian laws resemble EC law; the Commonwealth jurisdictions resemble English law in this area.[82]

In analyzing the doctrine of legitimate expectations under several domestic legal system, Potesta has concluded that protection of legitimate expectations is usually subsumed either under the reliance theory, where an individual suffers harm as a consequence of disappointment of an expectation created by the decision-maker where the individual relied on its fulfillment, or under the legal certainty principle, which constitutes a part of the law of rule theory.[83]

On the other hand, Trevor Zeyl, after examining the domestic laws of United Kingdom, Canada, Australia, France, Germany and European community, concludes that common law jurisdictions have a strong tradition of limiting the scope of judicial review of administrative action relying on the ultra vires doctrine, the rule against fettering, and the separation of powers doctrine— all constitutional principles that define the relationship the judiciary has with administrative discretion.[84] This is why that some writers like *Nikhil Teggi* argue that substantive legitimate

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[81] *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB (AF)/09/1), Award, Sep. 22, 2014, Para.576; *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, Dec.27, 2010, para.128-130

[82] Soren J Schonberg, *cited above at 9, pp.* 3

[83] M. Potèsta, *cited above at 11*,pp. 95.

[84] Trevor Zeyl, *cited above at 16***,** pp. 216

expectations is not recognized by common law jurisdictions such as United kingdom, hence, it cannot acquire the status of general principles of law.[85]

However, it is currently noticed that the doctrine of legitimate expectations in context of substantive expectations is granted in common law jurisdictions such as United Kingdom though it is in specific circumstances. Wade and Forsyth considered that such expectations may be protected more readily when the expectation is given individually to a small group than where a general announcement of policy is made to a large group, since in the former class of case the governmental decision-maker's freedom of action is being restricted only in exceptional cases.[86] Hence, substantive legitimate expectations too have got commonalities in many states.

In addition to these domestic laws, different institutional laws have also their own finger print for the development of the doctrine of legitimate expectations as one of the general principles of law. For example, this doctrine is fundamental to European Union (EU) Law as a supra national entity which recognize the doctrine of legitimate expectations as general principle of the EU law common to the laws of the member states pursuant to which the European court of justice can strike down national measures. The court has also shown in Sofrimport Sour v. Commission case that the court has had no difficulty in accepting claims for breach of legitimate expectations where the benefit sought is of substantive nature.[87]

Moreover, the doctrine of legitimate expectations has also got a moment from European court of Human rights case law of *Von Maltzan and Others v. Germany* in which the court has defined the term 'possession' broadly as'….. either existing possessions or assets, including claims, in respect of which the applicant can argue that he or she has at least a legitimate expectation of obtaining effective enjoyment of a property right.[88] Hence, it has recognized this doctrine in the context of the protection of proprietary rights.[89]

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[85] *Nikhil Teggi, Legitimate Expectations In Investment Arbitration: At The End Of Its Lifecycle?***,** 2016, pp.68-69
[86] H.W.R Wade & C.F. Forsyth, *Administrative Law* ,8th ed. 2000, pp. 499-500
[87] See Sofrimport SARL v Commission of the European Communities, Case C-I 52/88, 26 June 1990 2504 accessible at http://curia.europa.eu/juris/showPdf. , last accessed on march,2018
[88] *Von Maltzan and Others v. Germany*, ECHR, 2005, para.74 , accessible at http://swarb.co.uk/von-maltzan-v-germany-echr-2-mar-2005/, last accessed on march,2018
[89] Further recognition of the doctrine by the European court of Human rights can be found at S*tretch v. the United Kingdom*, European Court of Human Rights, Judgment, 44277/98, 35, 24 June 2003

Hence, as discussed above, the doctrine of legitimate expectations have its foundation both in domestic legal systems and institutional laws and practice such as European court of Justice and European court of Human rights. However, it should also be admitted that the practice of this doctrine within different legal systems have certain differences and variations as noticed well above. So, the crucial questions will be whether the existing dissimilarities on the practice of doctrine of legitimate expectations between and among different legal systems prohibit this doctrine from being the candidate of general principles of law under article 38 of the ICJ statute.

This point is slightly addressed above in a way that absolute similarities of the principle is not a requirement for a given principle to be extracted to the status of general principles of law. Brown has rightly argued that even though there are differences from one legal system to another, the fact that a principle is applied differently should not necessarily prevent its acceptance as a general principle of law within the meaning of Article 38(1) (c) of the ICJ Statute.[90] This writer support his argument by analogical comparison of this doctrine with *res judicata*, which also embodies differences in its use between common law and civil law countries (even within the civil law system itself), yet there is little dispute as to its characterization as a general principle of law.[91] This assertion is also convincing due to the fact that complete symmetry between and among different legal system is unlikely and even naive. As Snodgrass has noted what matters is that there is demonstrable congruence between the principles and outcomes served by the rules, not between the rules themselves.[92]

Therefore, even though there are slight differences in the application of the doctrine of legitimate expectations within different domestic legal systems and institutional laws and practice, the basic and the desired outcome shares commonalities that can make this doctrine a wise candidate of general principle of laws recognized by civilized nations under article 38 of the ICJ statute. Hence, the researcher is of the opinion that the doctrine of legitimate expectations with its basis is justified within international investment law through which the proposition that this doctrine is one of general principles of law is hereby confirmed.

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[90] Brown, Chester , *The Protection of Legitimate Expectations As A 'General Principle of Law': Some Preliminary Thoughts*, Transnational Dispute Management, Vol. 6, Issue 1, 2009, pp. 6.
[91] Ibid.
[92] Snodgrass, *Protecting Investors' Legitimate Expectations: Recognizing and Delimiting a General Principle.,* ICSID Review: Foreign Investment Law Journal, Vol. 21, 2006, pg. 22.

2.7.3. Minimum Standard Treatment under Customary International Law

Another legal backup that the doctrine of legitimate expectations might be linked with is the customary international law of minimum standard treatment. Hence, the appropriate question will be whether FET standard is part of or similar with minimum standard treatment under customary international law. This is because to decide the issue of whether this doctrine can be protected as part of minimum standard treatment or not is determined based on whether the FET standard is independent and autonomous standard from minimum standard treatment. It is if the FET standard is autonomous that the doctrine of legitimate expectations cannot form part of minimum standard treatment.

R. Dolzer has also stated that in investment treaty disputes, the invocation of the fair and equitable treatment standard is almost ubiquitous.[93]One of the customary international law which has a close connection with the FET standard is the Minimum Standard Treatment. It is due to this reason that the distinction between these two standards has been inviting debates and confusions between scholars. The major debate between tribunals in this interpretation process was whether the standard is related to the minimum standard under customary international law, or it is considered a self-contained principle.[94] And this confusion mainly emanate from the fact that some of the arbitral tribunals have given broad definition to the FET standard.[95]

Under international law, the international minimum standard has been characterized as an obligation on states to ensure that 'aliens are treated in accordance with the ordinary standards of civilization'[96] irrespective of the standards they accord to their nationals.

The question of connection between these two standards has arisen in international investment disputes as well. For example, the meaning of the international minimum standard has arisen in the context of NAFTA jurisprudence.[97]Under article 1105 of NAFTA international minimum

[93] Rudolph Dolzer, *Fair and Equitable Treatment: a Key Standard in Investment Treaties,* 2005, pp.87
[94] OECD, *Fair and Equitable Treatment Standard in International Investment Law", OECD Working Papers on International Investment*, 2004/03, OECD Publishing
[95] Porterfield M.C., *A distinction without a difference? Interpretation of FET under customary international law by investment tribunals,* 2013
[96]Elihu Root, *'The Basis of Protection to Citizens Residing Abroad'*, American Journal Of International law, 1910, pp.517cited in Hussein Haeri, *A Tale of Two Standards: 'Fair and Equitable Treatment' and the Minimum Standard in International Law*, *Arbitration International,* Vol. 27, 2011, pp.29
[97] Article 1105(1) of the NAFTA

standard treatment is treated similarly with FET standard. And this understanding is confirmed later by the members of NAFTA in Free Trade commission note of interpretation alleging that 'the concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens'.[98]

However, unlike NAFTA, although states have concluded increasing numbers of BITs to the obligation to provide foreign investors FET starting from mainly the second half of 20th century, the majority of investment treaties do not treat these two standards in similar way.

Further, investment cases such as *Azurix Corp.* v. *Argentine Republic* [99] and *Rumeli* v. *Kazakhstan*[100], which are outside of NAFTA, has taken the front to hold the view that absent any explicit treaty wording linking the fair and equitable treatment standard with the international minimum standard, the fair and equitable treatment standard must be interpreted as an autonomous standard in accordance with its 'ordinary meaning', rather than as a reference to the international minimum standard. This understanding is also persuasive if one is to look at the Versailles treaty which suggests that the ordinary meaning of the terms in their context and in light of the object and purpose of the treaty in question should take the prime in interpretation. Hence, so long as the FET standard is not expressly linked to the minimum standard treatment, an autonomous interpretation of FET is warranted so that the fair and equitable treatment standard cannot be construed as a reference to the international minimum standard in customary international law.

Another outstanding case making adequate distinction between these two standards are the *Enron* v. *Argentina and Sempra* v. *Argentina case that held the* fair and equitable treatment standard can require treatment that is not mandated by the international minimum standard [101] recent cases than these, such as the *Cargill* v. *Mexico and Glamis Gold v. United States have also found that* the fair and equitable treatment standard can be broader than the international minimum standard.[102]

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[98] Free Trade Commission (FTC) note of interpretation, 31 July 2001
[99] *Azurix Corp.* v. *Argentine Republic,* ICSID Case No. ARB/01/12, Award, 14 July 2006
[100] *Rumeli Telekom AS* v. *Republic of Kazakhstan,* ICSID Case No. ARB/05/16, Award, 29 July 2008,
[101] *Enron Corp. v. Argentine Republic,* ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 258.
[102] *Glamis Gold Ltd v. United States,* UNCITRAL (NAFTA), Award, 8 June 2009; *Cargill Inc.* v. *United*

Further, another remarkable distinction between these two standards made by tribunals adopting an autonomous interpretation of the FET standard (outstanding example can be *Tecnicas Medwambientaks Teemed SA* v. *United Mexican States*[103] is that they have incorporated elements, such as legitimate expectations and transparency, which are unknown to the customary international into the interpretation of FET standard.

Moreover, there is also a great difference between these two standards on their objective and methodology for identifying them. Nobody doubts that the main purpose of the minimum standard treatment is to prohibit demeanor against foreigners from falling below a certain threshold which is considered unacceptable in international law, which is usually a negative obligation. However, the goal of FET standard which is to be interpreted usually in line with the purpose it aspires to achieve under its preamble (often promotion and protection of investment) may incorporate positive obligation. Regarding methodology, minimum standard of treatment under international customary law is to be ascertained by identification of general practice plus *opinion juris* (intention to be bound); whereas the FET standard is a treaty based analysis.

Strengthening this position, Christoph Schreuer provides that 'it is inherently implausible that a treaty would use an expression such as 'fair and equitable treatment' to denote a well-known concept such as the 'minimum standard of treatment in customary international law'. If the parties to a treaty want to refer to customary international law, it must be presumed that they will refer to it as such rather than using a different expression.[104]

Therefore, it can safely be concluded that the FET standard has emerged in investment arbitration jurisprudence as a distinct and relatively broad standard where it is not expressly linked with the international minimum standard.

Hence, the instinctive inference form the above conclusion is that the doctrine of legitimate expectations too is not part of Minimum standard treatment of customary international law. Had this doctrine been part of the minimum standard treatment of customary international law, the

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Mexican States, ICSID Case No. ARB(AF)/05/2 (NAFTA), Award, 18 September 2009

[103] *Tecmed v. Mexico case, cited above at 12*,para. 153-154.

[104] Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, Journal of *World Investment and Trade*, 2005,*pp.360*

investor would not have been required to claim breach of FET standard due to frustration of its expectations. That is to say, the investor would simply base its claim based on violation of customary international law instead of FET standard.

2.7.4. Good Faith Principle

Another significant legal basis that the investment tribunals and scholars cite to justify the application of doctrine of legitimate expectation is the good faith principle. The good faith principle is, which is considered as inherent in the very concept of the law[105], is the cornerstone of any legal system. Due to this Sanja Dajic has rightly stated that Good faith is more than argument for legitimacy of international law and fairness required for its legitimacy.[106] It is famous in international law in general having clear foundations in several international binding documents, among others in the UN charter[107] and the *Vienna Convention on the Law of Treaties*[108] are pivotal. This implies the normative weight and its position as a significant interpretative tool.

Within the ambit of investment disputes, *Sempra Energy International v. Argentina tribunals* has described more about the good faith principle stating it as a principle which permeate the whole approach to the protection granted under treaties and contracts, lie at the heart of the FET standard and function as a guiding beacon that will orient the understanding and interpretation of obligations.[109]

And the first investment tribunal which derived the doctrine of legitimate expectation from the principle of good faith was the *Tecmed v. Mexico* tribunals, which for the first time import this doctrine from domestic legal systems into the international investment law. This tribunal, while analyzing the Spain –Mexico BIT, has considered the FET standard as part of the good faith principle and recognized the good faith principle to include the protection of the basic

[105] C. Focarelli, *International Law as Social Construct: The Struggle for Global Justice*, Oxford University Press, Oxford, 2012, pp. 323.
[106] Sanja Dajic, *Mapping the Good Faith Principle in International,pp.208*
[107] Article 2(2) of the United Nations Charter, 1945 state that *"All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter."*
[108] Article 26 of the *Vienna Convention on the Law of Treaties* 23 May 1969 state that *Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*
[109]*Sempra Energy International v. Argentina,* ICSID Case No. ARB/02/13, Award, 28 September 2007, para. 299, 298 and 297 (hereinafter called '*sempra v, Argentina case'*)

expectations of the investor stating that '…provision of the Agreement-FET-, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations.'[110] In addition, the tribunal in the *Thunderbird* award has held that formulation of the doctrine of legitimate expectations was informed by the "good faith principle of international customary law."[111]

However, these sample tribunals did not strive to establish a more detailed bond between the doctrine of legitimate expectations and the good faith principle. This fact has exposed the awards of the tribunals for critics because of lack of authority that would give justification for linking these two concepts.

Coming back to the main issue at hand, determining whether doctrine of legitimate expectations is part of the good faith principle require us to answer whether the good faith principle is an autonomous obligation or ancillary mechanism and an argument that can be deployed only in conjunction with an existing obligation. This is because the argument goes like; if the good faith principle is not an autonomous obligation by itself it cannot incorporate another independent substantive obligation (i.e. Doctrine of legitimate expectations).

A look at the jurisprudence of international courts such as the ICJ reveals that they incline to consider the good faith principle argument as part of another international norm. An outstanding ICJ case on this issue is the *Border and Trans border Armed Actions* between Nicaragua v. Honduras under which the ICJ held that good faith "is not in itself a source of obligation where none would otherwise exist.'[112] Hence, this suggests that the good faith principle cannot itself insert legal obligations where they would otherwise not exist. And so long as it is not an autonomous principle, as asserted above, cannot incorporate the doctrine of legitimate expectations as its part and parcel.

Another plausible reason supporting the above stand is the fact that had the doctrine of legitimate expectation been part of the good faith principle, its violation by host state acting in good faith wouldn't entail liability. However, in practice the investment tribunals are holding the state liable

[110] *Tecmed v. Mexico case, cited above at 12,* para.154.
[111] *Thunderbird v. Mexico case, cited above at 53,* Para.147
[112] *Border and Trans border Armed Actions* (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988,105, para.94.

for frustration of legitimate expectations of the investor despite the fact that the state acted in good faith.[113]

Hence, it can in one piece be concluded that the good faith principle is without teeth in absence of another existing legal obligation and it is not self-standing clauses of international having its own remedy. This led us to the valid conclusion that doctrine of legitimate expectation is not part of the good faith principle.

However, the above conclusion should not be understood as if it denies the crucial role of good faith principle in international investment disputes and arbitrations for it is a settled agenda that its role is prodigious. What the conclusion means is that the role of good faith principle should be limited to serve as a guiding beacon that will adjust the understanding and interpretation of existing obligations. Strengthening the above position, von Walter consider 'the good faith rule as a guiding interpretative principle which helps in the application of the legal rule of fair and equitable treatment, which contains, in itself, the duty to protect the investor's expectations.'[114] Hence, the role of good faith principle should be limited to serve as an assistive tool of interpretation of the doctrine of legitimate expectation instead of being the source of the doctrine itself.

2.7.5. Analogizing the Binding Effect of Unilateral Acts in International Law: Crafting an Alternative Legal Basis Limited to Representations as the Basis of Legitimate Expectation Claim

Though there is no specific investment tribunal which has referred to it, having spotlighted on host state's unilateral representations as a basis of doctrine of legitimate expectations, analysis of the application of the binding effect of unilateral acts of the states within international law is very important. This is because there is a well-developed concept of binding effect of unilateral acts within general international law.

It is known that the sources of obligations of the states within international emanates from treaties, customs, and general principles of law as articulated in article 38 of the ICJ statutes.

[113] In indication to this fact can be the *Occidental Exploration and Production Company v. The Republic of Ecuador*, UNCITRAL, Award, 1 July 2004, para. 186 and the *Tecmed v.Mexico case*, para.153
[114] Von Walter, *cited above at 6*, pp.30

And conventional agreements are the common way by which the states become subject of rights and obligations within international law. However, in addition to treaties, conduct of the states involving trade, security, investment, and innumerable other matters takes place through unilateral statements by representatives of the states ranging from the head of state, to bureaucrats or local diplomatic staff to foreign government officials or diplomatic representatives, to the local or world media, or within the domestic political context may have the effect of creating rights and duties.[115]

One of the earliest cases addressing the legal effect of unilateral statement of the state was the case concerning *Legal Status of Eastern Greenland (Norway vs. Denmark).* In this case, which the dispute between Norway and Denmark on the sovereignty in Eastern Green land, the Norwegian Foreign minister, Count Ihlen, made a declaration that the Norwegian Government would not make any difficulty in the settlement of this question. Then, after analyzing the facts, the PCJ consider 'it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.'[116]

Another recent far reaching case with regard to legal effects of unilateral statements/declaration is the *Nuclear Tests* case between Australia and New Zealand vs. France. In this case it was the Australia and New Zealand that brought application before the ICJ requiring cessation of atmospheric nuclear test which was being carried out by France in the south pacific. Meanwhile, while the application is pending before ICJ, France's government declares that it had already completed its test and did not plan to undertake more tests, while later resiled from. After considering the statements made by the officials of the French government, the ICJ stated that;

> *'It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making*

[115] Camille Goodman, *Acta Sunt Servanda? A Regime for Regulating the Unilateral Acts of States at International Law*, Australian Yearbook of International Law, 2006, pp.47

[116] *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment of April 5, 1933, PCIJ, Series A/B, No. 53 (1933), Para.71

the declaration that it should become bound according to its terms, that intention confers on the declaration the character of legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with intent to be bound, even though not made within the context of international negotiations, is binding….'[117]

The court has also addressed that the fact that whether the statement is made in writing or orally, it does not make a difference and interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.

In addition to these sampled international cases such as *the Frontier Dispute* case, the *North Sea Continental Shelf* cases, the *Nicaragua* case and etc. have also confirmed the fact that unilateral acts/statements of single states may create binding obligation on which interested states may take cognizance of it and place a confidence on it. However, what would the prevalent acceptance of unilateral acts as binding by international case contribute to its validity? That is to say, does the fact that the unilateral acts are being considered as binding by international courts make it one of tenable sources of international and branded under article 38 of the ICJ? Answering this question, calls for an examination of the value of judicial decisions as a source of international law.

According to article 38 of the ICJ, in addition to treaties, customs and general principles of law, judicial decisions can also be possible sources of international 'as subsidiary means for the determination of rules of law.'[118] However, caveat is also incorporated within this article which subjected the role of judicial decisions by reference to article 59 of the statute which state that decisions of the Court have 'no binding force except between the parties and in respect of that particular case.[119] This implies that there is no *stare decisis* within international law in which the decisions of the court may serve as a binding decisions, except between the parties and on that specific case.

[117] *Case Concerning Nuclear Tests (Australia v. France),* Judgment of December 20, 1974, I.C.J. Reports 1974; Case Concerning Nuclear Tests (New Zealand v. France), Judgment of December 20, 1974, I.C.J. Reports 1974, Para. 44-46.
[118] *Article 38(1)d) of the ICJ statute*
[119] *Id. Art.* 59

However, the jurisprudence of international courts shows that judgments of the Court are treated as 'authoritative pronouncements upon the current state of international law'.[120] Hence, the court will in invariably, in the course of making such a determination, invoke previous jurisprudence and *dicta* pertinent to the present facts'.[121] Rebecca Wallace has also observed that despite an absence of *stare decisis*, the Court does examine its previous decisions and takes them into account when seeking the solution to a dispute.[122] The justification behind this argument is that maintenance of judicial consistency within international sphere which is one of the parameters that strengthen the legitimacy and neutrality of the court.

Therefore, it is a winning to argue that the decisions of the court are persuasive on propositions of international law and its accepted manifestations. This led to the conclusion that since it is serving as an authoritative pronouncement as to the propositions of international law it may serve as a guidance for the states in issuing policy and entering into any transaction. Hence, it is not equal, but more, to subsidiary sources as it was initially articulated under article 38 and 59 of the ICJ statute.

Once it is settled that Unilateral acts of the state is a valid source of obligation under international law, the next crucial issue will be whether non state actors such as investors can benefit from this obligation without justifying it as breach of investment treaty via legitimate expectation claim. It is obvious that the current jurisprudence international law within the context in which the unilateral acts of the state is developed presupposing the relationships between and among states. It was only the states which were considered as subject of international law. It is only recent that non-state actors developed as a subject of international law.

On the other hand, it should also be underlined that the scope of unilateral statements made by the states is getting wide and wide through time encompassing issues which are no more the exclusive issue and interest of the states such as investment. So, it is not uncommon to states, especially developing states, in addition to concluding BITs, making unilateral declarations containing representations, promises, assurances, and inducement to investors with a view of

[120] Dame Rosalyn Higgins, *Problems and Process* , 1994,pp. 202,cited in Alexander Ovchar, *Estoppel in the Jurisprudence of the ICJ A principle promoting stability threatens to undermine it*, Bond Law review, vol.21, Issue 1, 2009, pp.23
[121] Ibid.
[122] Rebecca Wallace, *International Law,*2005, pp.26

touching the winning ballot in attracting more and more investment. Especially with the advancement of technology, websites of the states provide ample information about the government's policy to foreign investor promising certain treatment or assurances. And the investor may, just like states, take cognizance of the representations and rest a confidence on it. Hence, the necessity of making the host states liable for its representations to the investor is crystal clear. That is to say, the binding effect of the unilateral acts functioning within international law can be analogized within the context of investors as well. Reisman and Arsanjan assert that insofar as that statement is *infra legem* or *praeter legem*[123], unilateral statement or declaration would become binding as between the state and the private investors who relied on it, regardless of any limitations that might exist in the BIT which was binding on the two contracting states.[124] The following grounds also strength this argument.

Firstly, the nature of unilateral acts is that they are *ergaomnes*[125] in the sense that they require no acceptance or confirmation from another state. Thus, all states except the declarant are considered as third parties, unlike treaties which must be concluded between or among sovereign states. Hence, non-state actors such as investors can equally be benefited from unilateral acts because 'it is an obligation incurred by a state to a specific addressee without a need for international legal privity.[126]

Secondly, the ILC has, which come up with a legal regime governing the breach of obligation of states which emanates from unilateral acts, defined unilateral act as an unequivocal expression of will which is formulated by a State with the intention of producing legal effects in relation to one or more other States or *international organizations*, and which is known to that State or *international organization*'.[127] One of very important thing that is clear from this definition is that international organizations are also possible candidate to take cognizance of what a given state unilaterally declare. At the same time it should also be known that international

[123] A Latin term which means 'within a law'
[124] W. Michael Reisman and Mahnoush H. Arsanjani, *The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes*, ICSID Review—Foreign Investment Law Journal, pp.339. Accessible at https://academic.oup.com/icsidreview/article-abstract/19/2/328/744271, last accessed on March, 2018.
[125] A Latin term which means 'towards all or towards everything"
[126] *See* Frederic G. Sourgens, *Keep the Faith: Investment Protection Following the Denunciation of International Investment Agreements,* Santa Clara Journal of International law, 2013, pp.335
[127] Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session, 2001

organizations stated within this article are refereeing those created by treaties between states, not suggesting directly to business organizations. However, the point is that is crucial is the fact that non- state actors can also be a beneficiary of the declaration of states. And this fact can successfully show that investor can also possibly also be benefit from it.

Thirdly, international Investment tribunals have also given a chance to apply the binding effect of unilateral act under international law into investment arbitration. This is because most of the BITs and investment dispute settlement conventions give a room for the application of international law directly or indirectly. For example, the ICSID, which is the leading investment arbitration center, state that:

> *'(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.'*[128]

This implies that there is a room for the tribunal to apply international law which, as discussed above, may include unilateral acts of the state. This provision create strong link between ICSID and International law whose content is described under article 38 of the ICJ statute. In addition, the tribunal is also given the power to decide cases *ex aequo et bon*[129], leave alone based on international law.[130]

So, it should not be a curse for the tribunal which is allowed to decide a case *ex aequo et bono*, to create analogy between what is already established source of obligation (i.e. binding effect of unilateral acts) under international law.

Fourthly, from the view of objective of international investment law (i.e. protection and promotion of investment) as well it is imperative that the investor should be confident on what a given state have declared or represented. Else the investors would not decide to invest and undermine the main purpose of state in entering global markets. Therefore, the jurisprudence

[128] Article 42(1) of the ICSID convention
[129] A decision in absence of laws, based on equity and conscience
[130] Article 42(1) of ICSID

within international law giving a binding effect to unilateral acts should equally work on the representations made be the host states to the investors as well.

Generally, though tribunals are relating the doctrine of legitimate expectations with good faith principles and minimum standard of treatment, the tenable legal justification to it is general principles of laws. In addition, states unilateral representations as a basis of legitimate expectations claim can also be justified under the concept of binding effect of unilateral acts in international law.

CHAPTER THREE

3. Jurisprudential Place of Host State's Unilateral Representations as a Basis of Legitimate Expectations Claim in International Investment Treaty Arbitration Cases

3.1. Introduction

Another unexamined aspect of unilateral investment representations as a basis of legitimate expectations claim is its content as being applied by the investment tribunals. Hence, the liability for frustration of expectations of the investor created by the representations of the host states calls for an examination into the jurisprudence of international investment tribunals on how they are dealing with it. To detail it more, analysis on the extent to which the host states are being liable for the representations, statements/conducts that are giving rise to representations as a basis of legitimate expectations claim, and the conditions and requirement/limitations thereto, under current investment tribunals is imperative.

Hence, this chapter is devoted to the analysis of the practice of international investment tribunals dealing with the issue at hand directly or indirectly. However, more emphasis is given for recent cases, without prejudicing reference to some unavoidable and ever shining cases which have crafted the first path to the proliferation of representations as a basis of legitimate expectations claim.

3.2. Analysis into Current Practice of the Investment Tribunal

For the purpose of effectiveness, this section deals with selected cases under different investment arbitration centers so as to comprehensively understand the whole picture. Accordingly, the jurisprudence of ICSID, permanent court of Arbitration (PCA) and other *Ad hoc* tribunals established under the UNCITRAL and NAFTA are assessed.

3.2.1. ICSID

The jurisprudence of ICSID investment tribunals suggest that, liability for representations made by the host state is one of the segment of the doctrine of legitimate expectations claim usually under the FET standard. The *Metalclad* v. *Mexico case* has deepened the grounds of

representations as a basis of legitimate expectations. In this case, the investor was assured from the government officials that it had all the construction and operating permits required for the project which is later dismantled. Then, the tribunal held that the investor is entitled to rely on the representations and assurance of the government officials and any contrary act is a breach of FET standard. Hence, what this tribunal protects is the *assurance* made by the host state's official about a given fact within its territory.

And the existing investment tribunals practice also suggests that the trend of accepting representations made by the host states as capable of creating legitimate expectation claim is flourished and persisting, and even broadening in its scope. For instance, the award in *waste management Inc.v. United Mexican state* has clearly incorporated the concept that representations made by the host state are very pertinent to determine whether FET standard is violated or not stating that '...in applying this standard [FET] it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant'.[131] It is, hence, deductible that once the investor has reasonably relied on the host state's representations expecting that it is true, any frustrations of these expectations amounts to breach of FET standard.

Further, investment tribunals in *Parkerings-Compagniet AS v. Republic of Lithuania* echoed, in analyzing the doctrine of legitimate expectation, that 'the expectation is legitimate if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representation that the investor took into account in making the investment.'[132] Hence, the act of giving promise, guaranty, assurance or representations is being considered as a valid ground of claim. The *Sempra Energy International v. the Argentine Republic* award has also tinted the need to safeguard legitimate expectations of the investor mainly 'when the investment has been attracted and induced by means of assurances and representations'.[133] This tribunal has addressed behaviors that can be grounds of legitimate expectations claim via host state's representations as it include an act of attraction and inducement through representations.

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[131] *Waste Management v. Mexico*, Final Award, 30 April 2004, para 98, (hereinafter called '*waste management vs. Mexico case')*

[132] *Parkerings v. Lithuania Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8) , 2005

[133] *Sempra v, Argentina case, cited above at 109,* Para. 299, 298 and 297

In a more recent case again, the *Crystallex International Corporation v Bolivarian Republic of Venezuela*[134], it is reaffirmed that protection of investor's expectations created by a state's assurances, encouragements or representations meant to attract or induce investments is an important segment of the FET standard. Crystallex International Corporation, a Canadian company, yearned to invest in mining industry in state of Las Cristinas, Venezuela due to which the investor has processed some permits and administrative approvals. However, the investor's application to get the environmental permit was rejected although it has undertaken the environmental impact assessment and received a letter from the Venezuelan ministry of Environment noting that its Environmental impact assessment has been approved and the permit would be issued instantly. Yet, in the meantime the president of Venezuela make public statements about taking back of big mines which has resulted in nationalization of the Las Cristinas gold site which has triggered the investor to claim for a compensation of US$ 3.16 billion alleging that the government has eviscerated its legitimate expectations which is created by the representations made by the Venezuela's officials.

The tribunals in this case started the analysis of the case from forwarding the circumstances which may generate legitimate expectations alleging that;

> "*A legitimate expectation may arise in cases where the Administration has made a* ***promise*** *or* ***representation*** *to an investor as to a substantive benefit, on which the investor* ***has relied*** *in making its investment, and which later was* ***frustrated*** *by the conduct of the Administration.*[135] *(*Emphasis added*)*

Based on this standard, the tribunal has found that the Venezuelan government has frustrated the legitimate expectations of the investor which is created by the letter it has received from the Ministry of Environment noting that the Environmental impact assessment is approved and the permit will be given immediately. The tribunal considers this letter and the surrounding circumstances as very specific and directs to generate legitimate expectation frustration of which amounts to violation of FET standard.

[134] *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2) – Award,2016 (hereinafter called '*Crystallex International Corporation v. Venezuela case').*
[135] Ibid.

3.2.2. *Ad hoc* Tribunals Established under NAFTA and UNCITRAL

Although ICSID arbitration center is the prominent investment dispute settlement center, international investment dispute can also be settled before *ad hoc* tribunals established usually under the UNCITRAL and NAFTA. And a look at the practice and understanding of these *ad hoc* tribunals is also fundamental to capture the whole picture of the practice on the issue at hand. Hence, what follow is a look at some investment cases settled by *ad hoc* tribunals dealing, directly or indirectly, with the concept of representations as a basis of legitimate expectations within international investment treaty arbitration.

One of the influential case in this regard is the *Bilcon of Delaware Inc. et al v. Canada*[136] award which is very vibrant endorsing that host State representations, assurances or promises meant at persuading the investors to invest may give rise to legitimate expectations that can result in, or at least serve as starting point for a breach of the international minimum standard of treatment if the State does not live up to its representations. The Bilcon of Delaware Inc., had planned to invest in Nova Scotia by developing a quarry and marine terminal at Whites Point quarry, in Digby County, Nova Scotia, Canada. The investor's decision to invest was mainly influenced by the repeated encouragements and assurances from the public officials and the publicized policy of encouraging mining investment. After the investor has decided to invest the promises and support from the state officials started to pull to pieces due to which the investor was forced to negotiate for several years though in vain. In the meantime, the project was assigned to the Joint Review Panel to determine the environmental impact of the project towards which the panel has opined negative impact of the project. The investor has also conducted the environmental impact assessment which is automatically refused by the government alleging other extra grounds (i.e. the inconsistency with 'community core values').

Then, the tribunal has found that the conduct of the government is a breach of the FET standard (Minimum standard of treatment under NAFTA) due to the frustration of the investor's reasonable expectations which is generated by the host state's repeated encouragement and assurance.

[136] Clayton and Bilcon of Delaware Inc. v. Government of Canada , PCA Case No. 2009-04,2008, (hereinafter called '*Bilcon of Delaware v.Canada'*)

Interestingly, the tribunals has detailed and considered the circumstances which have created legitimate expectations to the investors. Among others, the tribunal has considered facts such as the official public policy of Nova Scotia was to encourage and support investment in mining and it's technical officials contacted and encouraged the investor's representatives, and it's Minister for natural resources has supported the White Point quarry. On the environmental issues the tribunal has considered that the state officials have pursued the investor that any potential environmental concern could be solved via fair process and the investor will have an opportunity to adjust the project design.

The main focus of the tribunal analysis in this case was on broken promise and encouragements made by the state officials in which it was clearly held that;

> *"…The basis of liability under Chapter Eleven [chapter dealing with FET standard] is that, after all the specific encouragement the Investors and their investment had received from government to pursue the project, and after all the resources placed in preparing and presenting their environmental assessment case, the Investors and their investment were not afforded a fair opportunity to have the specifics of that case considered, assessed and decided…"*[137]

Hence, encouragements and repeated assurance from technical or political officials of the host states on the fact that the investment would become reality with no or minimal challenges may become a ground of legitimate expectations claim. Hence, the liability for the representations by the host state is still vibrating within international investment arbitrations. This is case is also evident in that special encouragement into a specific sector (i.e. Mining sector in the case at hand) which is made publicly and represented by the state officials is also an act that amounts to representations that can be the basis of the legitimate expectations claim.

In *Frontier petroleum services Ltd.v. The Czech Republic*[138], the investor claim a compensation alleging that its legitimate expectations which is created when it received a letter from a Deputy Minister of Industry and Trade of the Czech Republic indicating the possibility to enter into

[137] *Ibid.*
[138] *Frontier Petroleum Services Ltd v. Czech Republic*, UNCITRAL/PCA, Final Award, 12 November 2010 (herein after called '*Frontier Petroleum v. Czech Republic case')*

negotiations with the investor in the future is frustrated later. In analyzing the concept of legitimate expectation this tribunal has asserted that:

> *"…the protection of legitimate expectation is closely related with the concept of transparency and stability….stability means that the investor's legitimate expectations based on this legal framework and on* ***any undertakings and representations*** *made explicitly or implicitly by the host state will be protected. The investor may rely on that legal framework as well as* ***on representations and undertakings*** *made by the host state including those in legislation, treaties, decrees, licenses, and contracts. Consequently, an arbitrary reversal of such undertakings will constitute a violation of fair and equitable treatment. While the host state is entitled to determine its legal and economic order, the investor also has a legitimate expectation in the system's stability to facilitate rational planning and decision making.*[139]*(*Emphasis added*)*

The holding of this tribunal is interesting in that it has tried to accommodate the two competitive interest on the issue at hand (i.e. State's sovereignty to change its policy and representations based on circumstances and investor's right to rely on the representations made by the host states which has induced it to invest). Accordingly, the tribunal has, thus, confirmed the fact that the representations made by the host state (*any undertaking and representations*) is capable of generating legitimate expectation of the investors, though it has rejected the claim on ground of in specificity in this case.

In *Thunderbird v. Mexican* case, the Thunderbird, a Canadian company has invested in gaming and entertainment facilities. But, before it invests in its fullest sense the investor has asked for the legal opinion of the Mexican officials on the legality of its investment. To this end, a written request to Mexican officials for an opinion on the legality of the operations was submitted by the investor on August 3, 2000. And on August 15, 2000, these officials issued a formal response concluding positively that the proposed investment is in line with the exiting legal frameworks based on which Thunderbird made substantial investments. In the meantime, the Mexican officials forbid the investment alleging its inconsistency with domestic gaming laws. Then, the investor claimed breach of FET standard against the Mexican states alleging that its legitimate

[139] *Id.* , para.285

expectation which is based on the representation of the Mexican officials is frustrated and suffered damage and seek a damages of $100 million. Hence, the issue was whether receiving an opinion letter from the government based on which the investor has relied to invest generate any liability on the government if it disregard what it has said?

In this case, the tribunal held that investors may rely on the host state's representations that leads to justifiable expectations alleging that 'the concept of legitimate expectations relates to situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or an investment) to act in reliance on such conduct, such that a failure by the Party to honor those expectations could cause the investor (or the investment) to suffer damages'.[140] The tribunal has confirmed that the investor is entitled to claim, but rejected it on the fact that the investor failed to full disclose the nature and equipment of the investment.

From this it can be deduced that representations made in writing from the pertinent officials of the host state, including opinion letter though it is not legally correct, to the investors creates legitimate expectations and can be a ground of claim, provided that other requirement has been fulfilled.

In the *White Industries v. India case*[141], the investor has alleged to be relied, in deciding to invest, on the representations made by Indian officials that "*it was safe to invest India and that the Indian Legal system was, to all intents and purposes, the same as the Australian legal system*". And later the investor has suffered damage from delay of enforcement of the awards before Indian courts. In this case, although the tribunal rejected the investor's claim based on the inspecificity of the statement, has confirmed that this kind of representations may give rise to legitimate expectations provided that they are specific.

From the reading of these cases, it can be understood that there is no comprehensive indications as to what specific kinds of state's conduct/statement can give rise to the basis of legitimate expectation claim. And this can open a door for the investment tribunals to abuse the concept by interpreting it broadly, which may affect the legitimacy of the international investment law

[140] *Thunderbird v. Mexico* case, *cited above at 53*, para.147.
[141] *White Industries Australia Limited v. The Republic of India*, Final Award, Nov. 30, 2011 (hereinafter called '*white industries v. India case'*)

regime in general. What is obvious is that the decisions of the tribunals on the issues are influenced by the circumstances surrounding each case. Yet, as these jurisprudences reveals, the acts/statements of the host states in the form of assurances, promises, guarantees, encouragements and promotions can give rise to this claim subject to the considerations of other relevant circumstances.

Finally, the liquidity of the concepts is inevitable to raise the fear of being abused by the tribunals, which calls for a mechanism to curb it.

3.3. Limitations/Requirements on Kinds of Representations giving rise to Legitimate Expectations Claim

As it is well considered in the above cases, it is crystal clear that representations made by the host state are working grounds that can give rise to legitimate expectations claim which is protected under the FET standard. It is also noted that due to the liquidity of the concept, there is a fear that it might be abused unless controlled. Due to this reason, some international investment law tribunals have tried to come up with factors to be considered and the limitations/ requirement that a given representations should met to be capable of generating legitimate expectations. A look at these some vivacious investment tribunals reveals that the following requirements, to be discussed in brief herein under, should be fulfilled.

Specificity

Some of the investment tribunals submit that representations, encouragement, and assurances must be specific. Hence, according to these tribunals, general representations are inadequate to trigger legitimate expectation protection as part of FET standard.

For example *in Parkerings-Compagniet case stated above*, the tribunal has used the term 'explicit' as a requirement for representation to trigger legitimate expectations. In the *white industries case* discussed above, the tribunal held that the statement officials which run '*it was safe to invest India….'* is not specific capable of triggering legitimate expectations on the investors. In *Bilcon of Delaware Inc. et al v. Canada* case as well the tribunal has jammed to the requirement of specificity in deciding that the basis of legitimate expectation is 'specific encouragement that the investor has received'. Hence,

However, *Crystallex International Corporation v Venezuela* case discussed above has spot lighted the crucial importance of the degree of specificity that state representations need to have in order to serve as the basis legitimate expectation claim under the FET standard. To this end this tribunal has clearly stated that;

> '*To be able to give rise to such legitimate expectations, such promise or representation – addressed to the individual investor – must be sufficiently specific, i.e. it must be precise as to its content and clear as to its form."*[142]

Having stated this fact, the tribunal has made a distinction between representations that were general and specific, by restricting specific representations to that contained within the letter only. However, it cannot be concluded that representations made by Venezuela's official cannot give rise to the legitimate expectations as the tribunal discuss it only with regard to the process of permit stating that there cannot be direct relationship between the state institution's representation and the permit process. Hence, one thing that can be deduced from this is that the representations made by the officials can also be specific had it not been regarding the permit process.

From these cases, it can be deduced that the representations, encouragements, or assurances from the host states should be specific. However, the level and measure of specificity requirement is far from being certain and clear. That is to say, whether the tribunals are requiring the representations to be specific in its subject or content or both is not clear. From some case it can be understood that the fact that the representations is addressed to a specific investor (*e.g. in white industries case*) is not sufficient to generate legitimate expectations. Hence, the tribunals seem to require that the representations should be specific both in subject and content wise. Though it is not the stand of all tribunals, it is possible from the award of some tribunals that the representations should be regarding specific investment to specific investor.

Clear/unambiguous and repeated

Another requirement for the representations to trigger legitimate expectations in jurisprudence of investment tribunals is that it must be clear and unambiguous. In recent famous case of

[142] *Crystallex International Corporation v Venezuela case, cited above at 134*

Crystallex International Corporation v Bolivarian Republic of Venezuela highlighted above, the tribunal has stated that 'indeterminate representations' cannot generate a claim of legitimate expectations.

However, it is the *Feldman v. Mexico case* that has purposefully spotlighted on the clarity and unambiguity requirement of the representations made by the host states in appreciating that the representations given by Mexican authorities in *Metalclad* are 'definitive, unambiguous and repeated'.[143] It is also possible to infer from this that the representations need to be repeated. However the requirement of repetitiveness should be tested on case by cases basis. For instance, if the representation is made in official letter a one spot representation might be enough to generate legitimate expectations.

Reliance Requirement

Another important requirement that a given representations made by the host state must fulfill to generate legitimate expectation claim is reliance requirement. This requirement is to mean that the representations made by the host state should have the effect of inducing the investor to invest. In other words, the investor should invest relying on the representations it has received from the host states. This requirement impose the burden of proof into the investor that it would not have decided to invest had it not been for the representations, encouragement, promises or assurance it has received from the host states. However, it should be known that this requirement is not an absolute and stand-alone requirement. That is to say, the investor needs not to be induced only be the representations for it may support other circumstances such as the existence of contract or stability of legal framework of the host state. Hence, the questions requirement has to do with whether the representations have influenced the decision of the investor to invest.

This requirement has great to do with the rationales of protecting legitimate expectations of the investors i.e. protecting the investor's expectation which has relied on the representations made by the host states and suffered damage when the states broke it. And this requirement can also serve as a safeguard the doctrine of legitimate expectations not be abused by investors.

[143] *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, para. 148 (hereinafter called '*Feldman v. Mexico case')*

Although the level of reliance and inducement varies in investment tribunals, it can be safely concluded that all tribunals confirm this requirement. For instance, *Sempra Energy International v. the Argentine Republic* award has clearly stated that the legitimate expectation of the investor is protected mainly 'when the investment has been *attracted and induced* by means of assurances and representations'.[144] The classic case of *Metalclad v. Mexico* has taken the front in adopting this requirement stating that legitimate expectations should be protected where an investor was 'led to believe and did believe' that the representation is true and relied on it.[145] However, the level of reliance required by the tribunals may vary. But, the conventional thing is that the representations made by the host states should pose some kind of inducement or influence on the decision of the investor to invest.

Time Requirement

This requirement is closely related with the reliance requirement, and is related with the time at which the representation is made and the investor decided to invest or to expand the investment. Logically, the yardstick is that the representations made by the host states must be before and if late at the time of decision to invest or expand the investment. Hence, the protection should rest on the conditions as they exist at the time of the investment. One of the magnificent investment case giving due attention to the time requirement is the *Duke Energy v Ecuador case* stating that*;*

> *'....To be protected[legitimate expectations of the investor], the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment ... such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest.'*[146]

Christoph Schreuer and Ursula Kriebaum have written on the time at which the legitimate expectations should exist by analyzing many investment tribunals award. They have asserted that the identification of the time at which the acts giving rise to legitimate expectation (representations in the case at hand) is important to determine whether the investor has relied on

[144] *sempra v, Argentina case, cited above at 109, para 298*
[145] *Metalclad v. Mexico case*

[146] Duke Energy vs. Ecuador, ICSID case No.ARB/04/19, Award of 12 August 2008, para.340 (hereinafter called '*Duke Energy v. Ecuador case*')

those acts. As to the specific time at which the legitimate expectations should exist, they have rightly concluded that it should be before or no later than the time of investment. And if the investment is a kind of multi stage investment (for example through expansion), legitimate expectations should be assessed for each and every stage of investment. [147]

Reasonableness

Another important requirement to benefit from representations made by the host states as a basis of legitimate expectation claim, the investor need to be reasonable. The investor should not rely on each and every representations made by the host state to invest. That is to say, the investor is expected to undertake reasonable considerations of other factors in addition to the representations made to it, for example easily identifiable factors such as the level of development of the state, political and environmental situations.

The tribunal in Duke Energy vs Ecuador case has given clear emphasis for the requirement of the reasonableness in stating that;

> *'..The assessment for the reasonableness of the expectations must take into account all circumstances, including not only facts surrounding the investment, but also the political, socio economic, cultural and historical conditions prevailing in the host states.'*[148]

Hence, according to this case the prevailing socio-economic and political situations within the host country in addition to factors surrounding the investment should reasonably be examined by the investor in addition to representations. However, it is not clear from this case on why the investors need to be imposed with such a difficult task such examining extra facts not related with the investment. This case seems to extremely extend the diligence required of the investor which may affect the investment protection and promotion purpose of international investment law.

In general, this requirement is all about the level of diligence which is required of the investors in relying on the representations made by the host states.

[147] Read in general Christoph Schreuer and Ursula Kriebaum, *cited above at 14.*
[148] *Duke Energy v. Ecuador case, cited above at 75,* para.341

Attribution

This criterion is related with the capacity of government officials to bind the government or the state whose representations can be relied up on validly by the investors. It is an act of identifying whether a given conduct or representations is attributed to a given government or state. Within domestic legal system, ultra vires representations cannot give rise legitimate expectations because the authority making representations needs to have actual or at least apparent authority.[149] Due to this reason, domestic laws usually put limitations on the power of officials to bind the government in the form of requirement of prior authorization or posterior ratification by internal legal process.[150]

However, within international law the treatment of attribution is seems different. Specific international legal regime governing the requirement of attribution is ILC's Articles on state responsibility for internationally wrongful acts. Irrespective what the internal rules may provide, this article recognize competence of state officials to bind their country stating that;

> *'The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions*.'[151]

And more specifically, the Vienna Convention on the Law of Treaties has considered Heads of State, Heads of Government and Ministers for Foreign Affairs, and heads of diplomatic missions, in virtue of their functions, as the representatives of the states.

The jurisprudence of international investment treaty arbitration as well seems to adopt the same approach. A look at the *MTD vs. Chile case* and *Crystallex International Corporation v Bolivarian Republic of Venezuela* case is evident on this issue. In MTD vs. Chile the tribunal has concluded that host states cannot excuse conduct that frustrates investor's legitimate expectations arguing that the act on which such expectations were based was contrary to domestic laws.[152]

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[149] Daphne Barak-Erez, *The Doctrine of Legitimate Expectations and the Distinction between the Reliance and Expectation Interests,* Kluwer Law International, Vol.11, 2005,pp. 583

[150] Ibid.

[151] Article 7 of Articles on state responsibility for internationally wrongful acts, adopted by the ILC, 2001.

[152] *MTD vs. Chile case cited above at 59,* paras 165–6. See also Elizabeth Snodgrass, *cited above 92*, pp.40

There is also an established principle of international law that the state cannot be relieved from liability on the ground of domestic laws.

The jurisprudence of investment treaty arbitration also reveals that legitimate expectations may arise despite the fact that representations or assurances granted to investor by one organ of government is challenged by another. For example in *MTD vs. Chile case*, the Chilean government had induced the investor to invest which has been later forbidden at the local level, which the tribunal found it as frustration of legitimate expectations.[153] The same approach was adopted in *Metalclad vs. Mexico case* in which the federal government had encouraged the investor to invest and issued all the necessary permits assuring that there is no requirement of other permits and later the municipality has denied the investment. [154]

To conclude, the reading of the above discussion is evident that the fact that the host state is liable for representations it has made to the investor, should not lead to the conclusion that any kind of representations, assurances, promises, or guarantee can give rise to legitimate expectations claim. This is supported with the proposition that international investment law should balance the interest of the investors and the host states as much as possible. Hence, giving a free license for representations to give rise to legitimate expectations would automatically distract the legitimacy of international investment law.

Due to this some investment tribunals are taking into account limitations and requirements such as specificity, time, reasonableness, reliance, clarity/unambiguity, attribution, repetitiveness of the representations and etc.

However, it can also be noted that there is no common practice of using these limitations and requirements. It is also seldom that the tribunals use a limitations aiming at taking into account the economic, social, and political conditions of the host states. Moreover, these limitations or criteria the investment tribunals are using by themselves suffer from ambiguity and vagueness, another stumbling block, due to under developed jurisprudence on this issue. And this can pose a problem on the legitimacy of international investment law.

[153] *Id.* paras 165–6
[154] *Metalclad v. mexico* case, *cited above at 5*, paras 37–59, 74–101

CHAPTER FOUR

4. Nature and Fate of Investment Representations Made by the Ethiopian Government in Light of Legitimate Expectations Claim

4.1. Introduction

As it is discussed well under the preceding chapters, within international investment treaty arbitration, doctrine of legitimate expectation is proliferating ground of claim usually as an element of the FET standard. It is also ascertained that host state's unilateral investment representations in the form of promise, encouragements, assurance, and promotions, as a basis of legitimate expectations has a profound jurisprudence within international investment treaty arbitration. Besides, respondents within international treaty arbitrations are developing countries which are currently in huge competition to host more and more FDI using different mechanisms including massive unilateral investment representations. Ethiopia is not an exception to this fact as the government is making massive investment representations, especially in the form of promotion, in order to meet the country's investment objectives, which have the potential of being the ground of legitimate expectations claim. Hence, it is of vital interest to look at the potential implication of this claim in light with the current trend of representations made by the Ethiopian government. Accordingly, Ethiopian investment objectives and the strategies which the government is using to meet these objectives are dealt under this chapter. Further, the common unwarranted representations by the government and their potential of entailing liability on the country will be discussed supported with some sample cases.

4.2. The Current Trend of Unilateral Investment Representations in Developing Countries

Developing countries are in need of encouraging more and more FDI into their territory. For many developing countries FDI has become the largest source of external finance, surpassing official development assistance, remittances, or portfolio investment flows.[155] For example, in 2016, more than 40 percent of the nearly $1.75 trillion of global FDI flows was directed to developing countries, providing much-needed private capital though the financing required to

[155] See the Global investment Competitiveness report 2017/2018, pp.1.

achieve the Sustainable Development Goals remains prohibitively large and largely unmet by current FDI inflows— especially in fragile and conflict-affected situations.[156]

In order to host more FDI these countries should reach the world community with potential investors and persuade them to invest in their territory. As the number of countries seeking for FDI is increasing, now the competition has become intense. To ripe a benefit out of these competition, the government need to show the advantages it have compared to other states in the form of conducive investment environment, investment safeguards and protections, suitable legal framework and etc. The formal way of doing this is by entering into formal investment arrangement such as FTA and investment treaties by affirming their commitment to meet an international standard with respect to the protection and promotion of the investment.

Yet, these investment arrangements are usually bilateral in nature in which it is impossible to reach the global community as required and to reach this part of the global market, other techniques must be found which is resorting to active promotional campaigns conducted either at the national level or abroad through diplomatic and consular channels, or through agencies and lobbyists and even through promotions via Internet.[157]Hence, currently, it is common for heads of state and ministers of developing countries to address groups of foreign investors with the intention of encouraging them to invest in their countries and with availability of on-line communication systems, websites of embassies or other government websites provide information about domestic law, and government policy with regard to foreign investment.[158]

To withstand the fierce competition, however, the developing countries are engaging in making ambitious laws which is devoid of the reality within the country, unwarranted representations in the form of promises, promotions and assurances of facts which actually are far from being true. And the proliferation of legitimate expectations claim as part of FET within the international investment treaty arbitration is bad news for developing countries.

A look at the case statistics of international investment treaty arbitration, the number of investment cases are increasing throughout the years and as of july,2017, the total number of

[156] Ibid.

[157]. M.Reisman andM. Arsanjani,pp *cited above at 123,* 328-29

[158] Ibid.

known investor-state investment dispute cases had reached 817 in which 114 countries have been respondents to one or more claims. [159] Within 2017, about 80% of the investment arbitrations were brought under BITs. Regarding the success rate, looking at the overall outcomes of some 530 cases concluded as of july,2017, it is only about one third that were decided in favor of the states whereas one quarter of the cases were decided in favor of the investors.[160] This implies that the success rate of investors before the investment tribunals is very high.

Then, a look at the respondents' statistics, the overwhelming cases are brought against developing countries. In 2017 alone, 32 countries were respondents out of all, save Spain, are developing countries whereas the developed country's investors brought about two third of the investment cases.[161] In 2016 too, 62 cases were brought against countries out of which only few was against developed country though developed country's investor brought most of the investment cases.[162] This shows that developing countries are the usual respondents in international investment arbitration.

And most importantly, the nature of the cases prevalent within international investment treaty arbitration concerns administrative acts of the host stat's government. According to UNCTAD's annual review of investment dispute settlement in 2014, revocations or denials of licenses or permits are the most frequently challenged state's conduct.[163] Another research has also concluded that 90% of the investment disputes cases concern administrative measures.[164]

Regarding specific grounds of administrative claims too, according to UNCTAD's case statistics of 2017, the FET is the most frequently alleged breach which count 65% out of the whole cases followed by indirect expropriation (32%).[165] This statistics was the same in the preceding years as well. Hence, the FET has dominated the treaty arbitrations. And under the umbrella of FET standard, legitimate expectations claim is the usual ground of claim.

[159] UNCTAD, International Investment agreements issue notes, Issue 3, nov,2017
[160] Ibid.
[161] Ibid.
[162] UNCTAD, International Investment agreements issue notes, Issue 3,may,2017
[163] UNCTAD, International Investment agreement Issues Note 1, Recent trends in IIAs and ISDS, February 2015
[164] *The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership*, Study prepared for the Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands, 24/06/2014 ,pp.127
[165] UNCTAD notes, cited above at 159

Hence, it can be concluded that developing countries are in competition to host more and more investment; they are the usual respondents in investment disputes, most of the cases are initiated by the investors from the developed country; and the mostly alleged breach is FET, as part of administrative issues, whose dominant element is legitimate expectations claim. This implies that the implications of the doctrine of legitimate expectations on developing countries in general are very high in holding them liable.

4.3. Investment Objectives of Ethiopia

Countries do not aspire to attract investment for nothing. Instead there are pre-determined objectives that the states want to get from the investment. That is to say, investment is a means to certain ends, not an end by itself, which can be social, political, economic, and etc. In Ethiopia too, investments has its own objective that the country aspire to achieve by promotion of investment through different mechanisms.

The grand investment objective of Ethiopia is improving the living standards of the peoples of Ethiopia through the realization of sustainable economic and social development.[166] Further, the proclamation has goes to the extent of elaborating every detail of these general objectives. Among others, the acceleration of the country's economic development; exploitation and development of the immense natural resources; development of the domestic market through the growth of production, productivity and services; increasing foreign exchange earnings, encouraging balanced development and integrated economic activity; enhancing the role of the private sectors within the economic development; and creation of ample employment opportunities.[167]

A look at these particular investment objectives of Ethiopia reveals that it is poorly drafted. As stated above, the nature of investment is that it is a means to an end, not an end by itself. And the grand end of the investment in Ethiopia is stated as improvement of the living standard of the peoples of Ethiopia. However, most of the particular objectives stated under article 5 of the investment proclamations are either redundant or a means rather than an end. Except the objectives of creation of ample employment opportunities, other particular objectives are a

[166] Article 5 of the Investment proclamation No. 769/2012 (hereinafter "The Investment Proclamation")
[167] Id. Sub article (1-8)

means to and end (i.e. improving the living standard of the Ethiopian Peoples). In addition, one of the main and common objectives of investment which the preamble of the proclamation aspires to achieve is technology transfer.[168] However, surprisingly, the objectives article has jumped over it.

4.4. Means of Investment Promotions/Encouragement in Ethiopia

Once the country has her own determined investment objectives, it is expected that a means by which she can achieve the objectives should also be designed through. These means are usually related with the reasons why the states regulate investment. States which aspire to achieve its investment objectives enter into different arrangements and mechanisms, among which enacting investment laws, policies and entering into treaties (bilateral or multilateral) are common. And these investment laws, treaties and policies usually device reasons for the regulations of the investment towards achieving the investment objectives. Accordingly, the Ethiopian investment laws, BITs and policies have made their purpose of investment regulation clear towards the achievement of the investment objectives through investment promotions and protections. What follow is the discussion on mechanisms that Ethiopia has adopted and implementing to promote or attract investment.

4.4.1. Ethiopian Investment Laws

Currently, Ethiopia has an independent investment proclamation regulating investment which is further supported by detail regulations, directive and guidelines made by the council of ministers and Ethiopian investment commission. In order to achieve the above stated objectives the Ethiopian law maker has made its firm belief that the encouragement and expansion of investment, especially in the manufacturing sector, has become necessary so as to strengthen, the domestic production capacity; to further increase the inflow of capital and speed up the transfer of technology, enhance and promote equitable distribution of investments among regions; ensure that the permits and incentives granted to investors are used for the intended purpose and making the administration of investment transparent and efficient[169], are important.

[168] See paragraph 2 of the Investment proclamation
[169] See the preamble of the Investment proclamation

From this it can be captured that Ethiopian Investment proclamation has dual objectives. These are Protection and promotion of the investment. An aspiration to the encouragement and expansion of investment is promotion and objectives like making the administration of investment transparent and efficient is a protection aspect. So, the Ethiopian parliament is induced with the fact that investment and appropriate regulation to its protection and promotion is a key to economic development which finally helps to improve the living standards of the Ethiopian Peoples.

Accordingly, with the objectives of promoting and encouraging the investment the proclamation and supporting regulations and directives has afforded protections to the investment, provide incentives and ease administrative hurdles within the investment administrations and implementations.

4.4.2. Investment Treaties (BITs)

In addition to enacting laws and policies, it has become a common trend in the world to enter into bilateral investment treaties to which Ethiopia is not an exception in order to encourage investment. Accordingly, currently Ethiopia has concluded more than 30 bilateral investment treaties with both developing and developed states. And these BITs are also concluded with their own objectives.

To start from the Ethiopian Model BIT, any BIT is to be concluded with the desire to develop economic co-operation between the contracting parties; seeking to promote, encourage and increase investment opportunities; creating favorable conditions for investments of the investors; a believe that promotion and protection of the investment stimulates business initiative and giving due regard to the other cross cutting issues such as human rights.[170]

Based on this model BIT, Ethiopia has concluded several BITs with almost the same objectives (promotion and protection of investment) though it may be contextualized based the circumstances of the signatory states. To look at some of the BITs; for example, the Ethio-United Kingdome BIT assert that it is concluded with the desire to create favorable conditions for greater investment, and recognizing that the encouragement and reciprocal protection under

[170] See the preamble of the Ethiopian Model BIT.

international agreement of such investments will be conducive to the stimulation of individual business initiatives and will increase prosperity in both Contracting States.[171]

The Ethio- Belgian-Luxembourg Economic Union BIT on the reciprocal promotion and protection of investments is also concluded with the desire to strengthen their economic cooperation by creating favorable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party.

Almost similar stipulation is also incorporated under the Ethio- Germany BIT which is concluded with the desire to intensify economic co-operation between the parties, creating favorable conditions for investment and encouragement and protection of the investment. [172] The verbatim copy of these objectives is also incorporated under the Ethio- China BIT. Ethiopian BITs concluded with African countries have also similar objectives. For example, the Ethio-Sudanese BIT is concluded with the desire to strengthen their traditional ties of friendship and to extend and intensify the economic relation between them and in particular to create favorable conditions for investments and stimulating the flow of investment and business initiative.[173] The same thing is also stated under the Ethio- Equatorial Guinea BIT. [174]

Generally, the Ethiopian BITs are concluded with the objectives of promotion (encouragement) and protection of the investments by creating favorable investment conditions and providing different protection mechanisms thereto.

4.4.3. Ethiopian Economic Policies, Strategies and Plans for Promotion of Investment

In addition to designing specific investment laws and entering into investment treaties, as of 1990s, Ethiopia has adopted investment favorable economic policies which is aimed at reorienting the economy from command to market economy, rationalizing the role of the state; creating legal, institutional, policy environment, and enhancing private sector investment. Further, the Ethiopian government has adopted different plans and strategies to this end. For example, it has adopted the a Plan for Accelerated and Sustained Development to End Poverty

[171] See the preamble and article 2 of the Ethio- UK bit.
[172] See the preamble of the Ethio- Germany BIT.
[173] See the preamble and article 2 of the Ethio- Sudanese BIT
[174] See the preamble and article 2 of the Ethio- Equatorial Guinean BIT

(PASDEP) which aimed at greater commercialization of agriculture and enhancing private sector development, industry, urban development and a scaling-up of efforts to achieve the Millennium Development Goals (MDGs).[175]

In order to achieve these aims, the plan has also adopted strategies which includes strengthening the institutional framework to enable private initiative, including: Continued simplification of business processes and licensing requirements; Strengthening of the regulatory framework, establishment of a level playing field with regard to property ownership through judicial strengthening, implementation of free competition policy, and enforcement of contracts; Financial sector reform, to increase the availability of capital and working finance; and Progressive withdrawal of state entities from areas that can be efficiently provided by the private sector, through the continued privatization program and increased competition.[176]

Up on the end of the above plan, another Growth and Transformation Plan (GTP) 2010/11-2014/15 was adopted by the ministry of Finance and Economic development with a vision of extracting the country from poverty and become a middle income country.[177] To this end, the economic pillars on which the strategy for sustaining the rapid and broad-based growth path hinges include: Sustaining faster and equitable economic growth; maintaining agriculture as a major source of economic growth; Creating favorable conditions for the industry to play key role in the economy.[178] The sectorial focus of this plan was on sectors which are labor intensive, use agricultural products as inputs, help achieve technology transfer and are either export oriented with significant export potential or import substituting.

And currently, the government is working based on GTP II (2015/16-2019/20) with the basis of becoming a lower middle-income country by 2025 and to render the country a leader in light manufacturing in Africa and one of the leaders in overall manufacturing globally. And to attain this vision, high emphasis is given the quality, productivity and competitiveness of the agricultural, manufacturing and modern tradable service sectors, and redressing macroeconomic imbalances (aggregate demand-supply) which aims to sustain the higher economic growth

[175] A Plan for Accelerated and Sustained Development to End Poverty (PASDEP) (2005/06-2009/10), prepared by Ministry of Finance and Economic Development (MoFED), Addis Ababa, septemper,2006,pp.43-44
[176] Ibid.
[177] Growth and Transformation Plan (GTP) 2010/11-2014/15 , by Ministry of Finance and Economic Development (MoFED), Addis Ababa, september,2010,pp.8-9
[178] Ibid.

registered so far within a stable macroeconomic framework during GTP. The key for this achievement is also set to be the increasing participation of private sectors in investment.[179]

Hence, it can be stated that Ethiopia is acting pro-investment as of 1990s by affording protections to investment and creating different favorable conditions for promotion of the investment.

4.4.4. Investment Incentives

Another mechanism through which the Ethiopian government uses to attract investment is by providing investment incentives though the interlink age between the investment incentives and attraction of investment is far from being proven. Investment incentives can be considered as Measures designed to influence the size, location or industry of a FDI investment project by affecting its relative cost or by altering the risks attached to it through inducements that are not available to comparable domestic investors.[180] The UNCTAD, on the other hand define it as 'any measurable advantage accorded to specific enterprises or categories of enterprises by (or at the direction of) government'.[181] But, in a brief and clearer manner, investment incentive can be seen as subsidy given to affect the location of investment the goal of which may be to attract new investment or to retain an existing facility.[182]

The most commonly used inducements are fiscal FDI incentives which includes Reduced direct corporate taxation, Reduced rates of corporate income tax, Tax holidays, Special tax-privileged zones, Incentives for capital formation, Reduced impediments to cross-border operation and etc.[183]whereas non-financial incentives include Special deals on input prices from parastatals (e.g. electricity, oil), Streamlined administrative procedures or exemptions from certain pieces of legislation, Export Processing Zones (EPZs) which offer a combination of fiscal and non-fiscal incentives within a particular geographical area, normally near a port, Legislation and/or

[179] Growth and Transformation Plan II (GTP) 2015/16-2019/20, by National Planning Commission, Addis Ababa, May, 2016, pp.79-82
[180] OECD on Checklist for Foreign Direct Investment Incentive Policies, pp.11
[181] UNCTAD 2003
[182] Kenneth P. Thomas, *Investment Incentives Growing use, uncertain benefits, uneven controls An exploration of government measures to attract investment*,2007, pp.1
[183] Id. Pp 20

policies that promote investment into certain sectors, or by certain investors, Subsidized financing through parastatal lending or equity.[184]

In Ethiopia too, the concept of investment incentives is incorporated as one strategy of attracting investment. The investment proclamation has recognized incentives for eligible areas of investment and empowered the council of ministers to come up with regulation which is expected to determine the type and extent of the entitlement to incentives[185], which has resulted in enactment of regulation on Investment incentives and investment areas reserved for domestic Investors.[186]

Hence, this regulation with its amendment regulation no-312/2014 and export trade Duty incentive scheme establishing proclamation[187] regulates the investment incentives under the Ethiopian investment regime. And these instruments have incorporated both the fiscal and non-fiscal types of incentives. Hence, what follow is a discussions on these incentives provided by the regulation.

Accordingly, these instruments give incentives for eligible areas of investment which includes exemption from custom duty[188], exemption from income tax[189], export duty incentives[190], remittance of profits and etc. which all are afforded to eligible investors to attract investment or retain the existing one towards investment expansions.

4.4.5. Establishment of independent Investment Administrative Organs

As a plus to the above methods of encouraging investment, countries have established separate focus body mandated with the issue of investment (investment permit, regulation, and exit).

[184] Danie Jordaan, *An overview of incentives theory and practice: A focus on the agro-processing industry in South Africa*,2012, pp.2
[185] See article 5 of the investment proclamation
[186] Investment incentives and investment areas reserved for domestic Investors council of ministers regulation no -270/2012.(hereinafter "investment regulation")
[187] Export trade Duty incentive scheme establishing proclamation no- 249/2001
[188] See article 5(1) cum the schedule attached to the investment regulation
[189] See the appendix/schedule attached to the regulation
[190] Export trade Duty incentive scheme establishing proclamation cited above at 176

Ethiopia has also established separate investment administrative organs which are composed of investment Board, Investment Commission and regional investment organs.[191]

The Ethiopian Investment commission(EIC) is established to serve as a nucleus for matters of investment and promote, coordinate and enhance activities therein; initiate policy and implementation measures needed to create a conducive and competitive investment climate and follow up its implementation; negotiate bilateral investment treaties; prepare and distribute pamphlets, brochures, films and other materials and organize such activities as exhibitions, workshops and seminars locally or abroad; collect, compile, analyze, update and disseminate any investment related information; issue, renew and cancel investment permits and etc. [192] Moreover, the investment proclamation has mandated the Ethiopian Investment Commission to provide the one-stop shop to investors on any issue related with investment.[193] And these all are made with the intent of easing the administrative hurdles and encouraging/promoting the investment.

The Ethiopian Investment Board, on the other hand, has a power and duties of supervising the implementation of the investment proclamation and the activities of the commission; deciding policy issues arising out of the investment proclamation, recommend necessary amendments to the proclamation and regulations, issue directives; decides on appeal submitted to it by investors against the decision of the commission; authorizing the granting of new or additional incentives; and authorize the opening of investment areas for foreign investors, otherwise exclusively reserved for domestic investors.[194]

4.4.6. Establishment of Industrial Parks

Another important device that the Ethiopian government uses to attract investment is establishment and expansion of Industrial parks with the vision to make Ethiopia a leading manufacturing hub in Africa by 2025.[195]. The development and expansion of industrial parks is necessary to accelerate the economic transformation and development of the country through its

[191] Article 2(3) of the Investment (Amendment) proclamation NO-849/2014
[192] Article 28 of the Investment proclamation and article 2(2) of the Investment (amendment) proclamation.
[193] Article 30 of the Investment Proclamation
[194] Id article 29 and article 2(4) of Investment (amendment) proclamation
[195] http://www.ipdc.gov.et/index.php/en/ , accessed on may, 2018

establishment in strategic locations to promote and attract productive domestic and foreign direct investment thereby upgrading industries and generate employment opportunity.[196]

The Ethiopian Industrial parks is administered by the Ethiopian Investment Board, Ethiopian Investment Commission, Ministry of Industry, and Ethiopian Industrial Parks Development Corporation (IPDC) with their own respective powers and duties.[197] These organs work towards the development and expansion of industrial parks which includes both hard and soft infrastructure and helps to ease the expansion of investment within the country.

Accordingly, industrial parks are developed and being established in different parts of the country such as Bole Lemi, Addis, Kilinto, Hawasa, Dire Dawa, Adama, Mekelle, Kombolcha, Jimma and etc. industrial parks.[198] In addition, Private Investors are also encouraged to develop their own industrial parks, either independently or through Public-Private Partnerships with IPDC. The Eastern Industrial zone, George Shoes cluster industrial park and Huajian Group shoes cluster Industrial Parks is a few to mention.[199]

Generally, Ethiopia, as a country looking for more and more investment, has devised different arrangements which help to attract investment. Firstly, it has enacted independent investment laws with the objectives of protection and promotion of investment. Secondly, it has also entered into BITs with several countries with the objectives of protecting the investment and promotions of investment through creating different favorable conditions. In addition, it has also adopted plans, policies and strategies that is favorable for the promotion of the investment. Further, the country has also provided different incentives to investors, and established different industrial parks.

4.5. The Existing Success Stories

Using the above stated arrangements and strategies; Ethiopia is able to register a remarkable achievement in attracting more and more investment through time which helps the country to be

[196] See the preamble of the Industrial Parks Proclamation No.886/2015"
[197] See the Investment proclamation, Industrial parks Proclamation, Ethiopian Investment Board and the Ethiopian Investment Commission Establishment Council of Ministers Regulation No. 313/2014 and The Industrial Parks Council of minsters Regulation No. 313/2014
[198] http://www.ipdc.gov.et/index.php/en/industrial-parks, accessed on may,2018
[199] http://www.ipdc.gov.et/index.php/en/our-services, accessed on may,2018

the fast growing country in the world. According to the report of the National Bank of Ethiopia (NBE) 2015/2016, Ethiopia has registered 8.0 percent real GDP growth which was much higher than 1.4 percent average for Sub-Saharan Africa; with industry growing 20.6 percent, services 8.7 percent and agriculture 2.3 percent.[200] According to the NBE, in 2015/2016, 852 projects were licensed by the Ethiopian Investment Commission and regional investment offices which were 109.3 percent higher than a year earlier.[201] These projects command investment capital Birr 6.7 billion showing 62.2 percent annual growth and of the total investment projects, 772 (or 90.6 percent) were domestic with a capital of Birr 5.5 billion; and 80 projects were foreign having Birr 1.2 billion capital.[202]

This shows that the country is showing a remarkable achievement in attracting foreign investment from time to time. Due to this, the World Investment Report has put Ethiopia as one of the top performing African countries in FDI flow, registering a 46 per cent increase in 2016.[203] As it is reported by the Ethiopian Investment Commission, about 130 investment projects that registered a capital of 20.2 billion Birr were offered with a license only in the first quarter of this Ethiopian budget year.[204]

In addition, according to the UNCTAD Investment report 2017, some diversified producers of East Africa registered strong in FDI in 2016, while Ethiopia attracting more inflows than ever before, though FDI flows to Africa declined in 2016. The UNCTAD report has also stated Ethiopia as one of the top performers in its effort to diversify its economy and consequently its FDI pool against extractive investment.[205] After the ambitious growth goals were set under GTP I and II which require significant investments, FDI was regarded as an essential tool to finance the national growth and development plans which has resulted in increased size of FDI inflows

[200] See the Annual Report of The National Bank of Ethiopia (NBE) 2015/2016, pp. 6. Accessible at http://www.nbebank.com/pdf/annualbulletin/Annual%20Report%202015-16%20N.pdf
[201] Id. Pp.80
[202] Ibid.
[203] http://www.waltainfo.com/FeaturedArticles/detail?cid=36087&locale=en, see also the World Investment report of 2017.

[204] http://www.waltainfo.com/FeaturedArticles/detail?cid=36087&locale=en

[205]See the UNCTAD investment Report 2017, accessible at http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf, last accessed on may,2018

and high profile investors targeting Ethiopia in the past few years.[206] Then after, the FDI inflow to Ethiopia showed a continuous increase of more than 12% per annum. [207]

Hence, the Ethiopian success stories on attracting and promoting investment is booming as of the last few years following the government's attempt to create conducive environment for investment through different arrangements dealt above.

4.6. Common Form of Unwarranted Representations in Ethiopia and Its Actual and Potential Liability: The Dark Side of the Success Stories.

It has been discussed above that Ethiopia is using different mechanisms to attract investments such as enacting investment laws, providing incentives, developing industrial parks, easing administrative hardships regarding investment. However, in addition to this, just like most of the developing countries, Ethiopian government has engaged in undertaking massive unilateral representations regarding investment orally or in writing by using different conferences or through websites made by the government officials. Hence, these unwarranted investment representations made by the Ethiopian government need to be assessed in light with the proliferation of unilateral representations as a basis of legitimate expectations claim within international investment treaty arbitration.

In doing this, it is important to look at the representations made by the Ethiopian government using the webpage and different forums of discussions or relations. However, as it is the nucleus of the issue of investment, the focus is made on the promotions/representations made by the Ethiopian Investment Commission (EIC) on general Investment issues, web page of the Ethiopian Industrial Parks Development Corporation (IPDC), and different government organs. Then, representations made by the Ethiopian officials on different forums will also be briefly looked into. And these representations will be tested as to their truthfulness supporting it with specific real cases and potential liability of the country.

4.6.1. Common form of Unwarranted Representations by Ethiopian Government

The common grounds through which these organs and government officials are urging investment in Ethiopia, on which the investors can rely on and have an effect of creating

[206] See The African Investment Report, 2015
[207] http://www.investethiopia.gov.et/why-ethiopia/economic-indicators , By Ethiopian Investment commission

legitimate expectations, are political stability and committed government, excellent climate and fertile soils, strong guarantees and protections, abundant and affordable labor, access to wide market, well developed infrastructure and etc. which are discussed herein under.

I. Assurance of 'Political, Legal and Social Stability'

One of the prevalent factors that the investment administration organs and government officials are basing to induce foreign investors to invest is political and social stability.[208] Under these websites, it is stated that Ethiopia has stable governance with sustained peace and security, high level of legal stability, high level of political commitment for investment promotion and protection, most stable countries in the region, democratic and multiparty system, prevalence of rule of law, country with lowest crime and corruption.[209]

However, the problem is that these representations are myth than reality when the investors looked into them after the investment. The whole year of 2016-2017 is an evident that the foreign investors are suffering from political instability within the country which is against their firm believe and expectations that the country is stable based on what the government is representing to them. For example, according to the Fragile States Index of 2017, though South Sudan has returned to top position on the annual Fragile States Index for 2017, Ethiopia, Mexico and Turkey recorded the greatest worsening over 2016.[210] This index has also asserted that the increase pressure in 2017 marks as a continuation of a long term worsening trend for Ethiopia whose score has increased from 91.9 in 2006 to a high of 101.1 in 2017.[211] Regarding corruption, although the government is representing that Ethiopia is the country with lowest crime and corruption, the Corruption Perceptions Index of 2017 made by the Transparency International, Ethiopia ranks 107 out of 180 countries.[212]

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[208] See the EIC webpage at http://www.investethiopia.gov.et/why-ethiopia/why-invest-in-ethiopia and An Investment Guide to Ethiopia 2014-2017 by prepared EIC; the same can be found at the web page of IPDC at http://www.ipdc.gov.et/index.php/en/investment-opportunitiesmm

[209] Ibid. see also the Investment guide to Ethiopia 2014, pp.4

[210] See the Fragile States Index of 2017, presented by the Fund for Peace on 14 may 2017, accessible at http://fundforpeace.org/fsi/2017/05/14/fsi-2017-factionalization-and-group-grievance-fuel-rise-in-instability/ , last accessed on may,2018

[211] Ibid.

[212] Available at https://www.transparency.org/news/feature/corruption_perceptions_index_2017 , last accessed on may,2018

On prevalence of rule of law, although the government is representing that rule of law is strictly adhered to, the World Justice Project Rule of Law Index of 2017-2018, which measures rule of law adherence in 113 countries worldwide, reported that Ethiopia ranks 107 out of 113 countries.[213] The report tells that Ethiopia stands 16 out of 18 countries in Sub Saharan Africa and 10 out of 12 among low income countries.[214]

On representations regarding legal stability, it is another myth that the government is representing to the foreign investors having the sole aim of attracting them. Stable legal framework means that the law should not be changed overnight, and existence of organized and comprehensive laws. However, a look at our legal system, it is genuine to allege that the parliament is enacting a bundle of proclamations, which some used to say 'law productions, in every meeting towards which, let alone the foreigner, the citizens have no idea. This would create instability not only to the foreign investors, but also to the domestic ones.

Specifically looking at investment laws, there is an investment proclamation with its amendment and regulation with directive with their amendments. Now, the problem is not the existence of these investment laws, but incomprehensiveness of these laws. These laws are incomprehensive on which the investors may rest their trust in whole because they repeatedly invite the application of other "applicable laws" (in the wording of the proclamation) which usually pose administrative and procedural difficulties to the investors frustrating the expectations of the investors in getting one stop shop service.

Hence, compared to the current practice of the investment tribunals on issue of legitimate expectation on the basis of unilateral representations discussed under the preceding chapter, the potential liability of the country based on this unwarranted promise is wide under the legitimate expectation claim.

II. 'Well-Developed Infrastructure'

This is the second mostly raised factors used by Ethiopian government to attract foreign investors to its territory, on which the investors are relying on to invest in Ethiopia. It is known

[213] See the World Justice Project Rule of Law Index of 2017-2018 at https://worldjusticeproject.org/our-work/publications/rule-law-index-reports/wjp-rule-law-index-2017-2018-report, Last accessed on april,2018
[214] Ibid.

that existence of adequate infrastructure is very crucial in making the investment environment conducive. The Ethiopian government encourages investors to invest alleging that there is 'well developed infrastructure'.[215] This 'well developed infrastructure is described in the form of adequate transportation infrastructure, Electricity, Telecommunication, huge water potential, expansive inter states road networks, massive industrial parks and etc.[216]

Government officials also announce the country as having well developed infrastructure. For example, it is enough to see the speech that Ethiopian Former Prime Minister, Haile Mariam Desalegn has made at *the 3rd world conference on finance for development* held at Cairo in 2015 presented that 'Ethiopia has adequate investment facility with good investment infrastructure and policy for attracting FDI'.[217] The web page of the Ethiopian ministry of mines also reads that the country has created a conducive investment environment.[218]

However, unlike what the government is representing, recent information compiled by Tadias Magazine based on World Bank (WB) study shows that to date only 22% of the country's rural population has access to a proper road, which is a major hindrance to trade and investment within the country.[219] The study has also disclosed that the existing infrastructures are concentrated into the center and north of the country and road connectivity for some regions is poor, both within those regions and with other regions, with consequences for labor mobility, the transportation of goods and services, and for agricultural productivity as the distance and travel times to market access are longer.[220] In addition, the WB has also currently displayed that Ethiopia's Information communication Technology and Electricity sector currently suffers from a poor institutional and regulatory framework.[221] For example, the Ease of doing Business Index of

[215] See http://www.investethiopia.gov.et/why-ethiopia/why-invest-in-ethiopia; http://www.ipdc.gov.et/index.php/en/investment-opportunitiesmm; see also Investment Guide to Ethiopia 2014-2017

[216] Ibid.

[217] Full speech of the Prime Minister can be found at https://www.youtube.com/watch?v=9EIDVqwtY14, JULY 14, 2015, last accessed onmay,2018

[218] See the wepage of the ministry at http://www.mom.gov.et/aboutEthiopia.aspx, last accessed on may,2018

[219] See Just follow the roads in Ethiopia to find Unequal Distribution of Infrastructure, published by Tadias Magazine on September 28th,2017; accessible at http://www.tadias.com/09/28/2017/just-follow-the-roads-in-ethiopia-to-find-an-unequal-distribution-of-infrastructure/

[220] Ibid.

[221] https://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-5595

2017/2018 of the World Bank has reported that Ethiopia ranks 125 out of 190 countries in ease of getting electricity. [222]

From this, it can be deduced that the government is making unwarranted representations to the investors on which the investors may rely on expecting legitimately that it is true; yet their expectations might be frustrated. This shows the potential and actual liability of the country under the legitimate expectations claim under international investment treaty arbitration. For example, the recent Israel Chemicals (ICL) v. Ethiopia case, to be discussed below, is one instance in which the investor's legitimate expectation of adequate infrastructure is frustrated.

III. Ease of Investment Administration

The Ethiopian government is also being proud of providing very 'ease investment administration' by providing one stop services provided by the EIC. However, the reality on the ground is that investors need to pass through complex procedural hardships to start the investment which is exacerbated by delay of other concerning organs in treating them. For example, per our investment proclamation every investors need to be registered according to the commercial code and any applicable law.[223] And this leads us to the application of the Business registration proclamation which is full of lengthy procedure of registration. Here the laws attempt to provide a one shop service by the commission will be effectively defeated and same procedural hardships continue during renewal of the permit, suspension and etc. These procedural hardships will work against the expectations of the investors developed by the representations made by the government.

As an evidence of the above unwarranted representations on the ease of investment administration, the World Bank's Ease of Doing Business Index of 2018 ranks Ethiopia 161st out of 190 countries while she ranks 159th in 2017 index, which is below the regional average of sub Saharan Arica (50.43.)[224] This shows that the country's ease of doing business is slipping down, unlike what the government is representing. For example, according to this index, in ease of

[222] Available at http://www.doingbusiness.org/data/exploreeconomies/ethiopia ,last accessed on may,2018
[223] See article 10 of the investment proclamation
[224] See the Ease of Doing Business 2018 by the World bank available at http://www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Profiles/Country/ETH.pdf, last accessed on may,2018

starting a new business or investment, Ethiopia ranks 174th out of 190 countries.[225] This shows the alleged one-stop shop service is myth than reality which may frustrate investor's legitimate expectations and leads to potential liability of the country.

IV. Cheap and Trained Labor force

The Ethiopian government encourages investors to invest in Ethiopia alleging that there is cheap and trained/trainable labor force. This is described in the form of having trained and disciplined labor force, ample opportunities to meet the demand of skilled man power in the technical and vocational field, lowest wage, good standard of spoken and written English and etc. [226] the webpage of the ministry of mines also reads that Ethiopia has huge labor force both disciplined and trained.[227]

Unlike what is being represented by the Ethiopian government, the Global Human Capital Index of 2017 made by the World Economic Forum (WEF), ranks Ethiopia 127th out of 130 countries.[228] This is an adequate testimony that the government's representations is unwarranted and misleading which can create expectations to the investors to be frustrated later.

4.6.2. Sample Cases in Which Legitimate Expectations Claim is Invoked or May be Invoked in Ethiopia

In the preceding sections, it has been seen how much the Ethiopian government is making unwarranted representations to the investors which may have the effect of creating expectations to the investors as to the truthfulness of the representations and influence its decisions to invest, yet to be frustrated short later. And this shows the potential liability of the country based on the proliferating legitimate expectations claim under international investment treaty arbitration. To magnify the fact that the country is passing to the red line of liability on the basis of frustration of legitimate expectations of the investors, it is imperative to look at some cases happened and happening within the country; just as an indications. Hence, what comes is a brief discussion on some typical cases.

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[225] Ibid.
[226] Ibid.
[227] See http://www.mom.gov.et/aboutEthiopia.aspx
[228] Available at https://www.weforum.org/reports/the-global-human-capital-report-2017 , last accessed on April,2018

I. Israel Chemicals (ICL) v. Ethiopia

The Israeli Fertilizer giant, Israel Chemicals (ICL), which was involved in potash mine development project in Dallol, Afar, Ethiopia has filed a lawsuit against the Ethiopian government at the Hague International Arbitration Court under UNCITRAL rules 'for losses it incurred due to the government's failure to provide the necessary infrastructure and regulatory framework' claiming 200 million USD.[229] In this case, as usual, the government has represented that there is adequate infrastructure which the investor found it false after it has already invested. And this case is an eyes break for other unwarrantedly induced foreign investors as well.

II. Closure of Shandong Dong Group, a Chinese donkey abattoir, in Bishoftu

The Shandong Dong donkey slaughtering house, a Chinese donkey abattoir, in Bishoftu (Debre Zeit) has secured a license from the then Ethiopian Investment agency in 2014 with an original plan of buying donkey skins from the Ethiopian market.[230]Then, the commission has suggested the investor to open its slaughterhouse instead, saying that they would not find any suppliers for donkey skin. Accordingly, the investor has constructed slaughterhouse with a capital of Eight million USD, sprawled on10, 050sqm of land.[231] Later, this investment has become subjected to huge public criticism alleging that it is against the culture and religion of Ethiopian society. As the protests against this investment increase the investment is ordered to be closed and stop the investment citing religious and cultural reasons.[232]

In this case, the investor has already secured a license to run the business of donkey slaughter for export to different countries. And even it has been alleged that the opening of the slaughter house is recommended by the Ethiopian investment commission, based on which the investors has invested millions of dollar expecting that it is normal to do that. Hence, closure of this investment based ion unexpected reason later can be amounts to frustration of the legitimate expectations of the investor and can give rise to legitimate expectations claim under international

[229] ICL Europe v. Ethiopia, PCA CASE No.2017-26, available at http://investmentpolicyhub.unctad.org/ISDS/Details/814
[230] Available at https://www.diretube.com/articles/donkey-slaughter-house-opens-in-bishoftu_14731.html, accessed on may,2018
[231] see Addis fortune News paper, by Samson Berhane, published on July,2017,vol.18,no.901, available at https://addisfortune.net/articles/ethiopia-exports-first-ever-donkey-meat/
[232] Ibid.

investment treaty arbitration. This case can be comparable with the *Thunderbird v. Mexican* case discussed in the preceding chapter.

III. Suspension of the MIDROC Gold Mine PVT.Ltd.co.(MGOLD)'s License

The MIDROC Gold mine private limited company is a gold mining investment in Lege Dembi, Guzi Zone, Oromia Regional States licensed by the Ethiopian Ministry of Mines, petroleum and Natural Gas. It was Ethiopia's exclusive gold exporter and Legedembi has had annually production of close to 5,000Kg of gold and silver.[233] And recently it has renewed its license for additional 10 years with the ministry on the same investment of mining. However, following the renewal of its license, the local residents have protested against it claiming for closure of the investment reasoning the environmental pollution the company is causing to the environment and the society. However, the Ministry alleged that different environmental assessment were conducted by the ministry itself, environmental auditors, the company itself and experts from Addis Ababa university and all of the assessments concluded that the chemical discharge from the company is up to the norm of international standards.[234]Further, the government was explaining that the protest was due to lack of awareness of the localities.[235]

However, as the protest heated up, the ministry has suspended the license of the company reasoning the necessity of further environmental study by an independent body.[236]Hence, its license is now suspended despite the fact that the ministry as renewed the license believing that there is no environmental hardships that the company is causing.

The current practice of the international investment treaty arbitration reveals that these kind of measure by the government amounts to violation of the legitimate expectations of the investors. Typical cases comparable with this case are the *Crystallex International Corporation v Bolivarian Republic of Venezuela* and *Bilcon of Delaware Inc. et al v. Canada* discussed in the

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[233]See the web of the company at http://www.midroc-ceo.com/midrocetg/?q=mgold, last accessed on june,2018

[234] See the representations by the ministry at www.ebc.et. See also http://debirhan.com/2018/05/mohammed-al-amoudis-midroc-lega-dembi-gold-mine-license-suspended-protests/, last accessed on April,2018

[235] Ibid.

[236] Ibid. see also https://www.thereporterethiopia.com/index.php/article/karuturi-close-settling-dispute-govt

preceding chapter. Hence, the potential liability of the country under the legitimate expectation claim is huge under this case too.

IV. Mining Dispute between Dangote Cement plc. and the Government

Dangote Cement PLC is Africa's leading cement producer with operations in 10 African countries, revenues in excess of US$2.2 billion and 24,000 employees.[237] In Ethiopia, it was commissioned in May 2015 with it plant in Oromia regional states and with rich limestone reserves of about 223 million tones; it is the largest cement plant in Ethiopia capable of producing high quality 32.5 and 42.5 grade cements spending $700 million.[238]

However, after it has functioned for years using the raw materials in the area of investment, following the prevalence of protests within a region, the government requires the company to outsource its pumice, sand and clay mines to youth groups.[239] The alleged reason for this order is the existence of huge unemployed youth within the region.[240] Following this order, the company showed disinterest to continue the investment and even was intimidating to shut down the investment. The company's manager alleged that in absence of raw materials the company is useless.[241]

In this case, the company was functioning by using the raw materials within the area and the license was also secured based on this expectation which later has frustrated by the government. Comparing it with the current practice of the international investment treaty arbitration the company may succeed in seeking compensation for its frustrated expectation.

To conclude, Ethiopia is using different strategies to meet its investment objectives of improving the living standard of its people via protecting and promoting investment. Among others, having separate investment laws with its administrative organs, provision of investment incentives, developing industrial parks and etc. which have enabled the country to test various success

[237] See the webpage of the company at http://www.dangotecement.com/
[238] Ibid.
[239] By Emele Onu and Nizar Manek, Africa's Richest Man May Quit Ethiopia Over Mining Dispute, on Bloomberg, available at https://www.bloomberg.com/news/articles/2017-06-21/dangote-cement-may-shut-ethiopian-plant-over-mining-disputes , last accessed on may,2018

[240] Ibid.
[241] Ibid.

stories. Besides, the Ethiopian government is making huge unwarranted investment representations, commonly representations as to the existence of social and political stability, assurance of well-developed infrastructure, cheap and trained labor, absence of corruption, adequate market access and etc., most of which are myth than reality which can frustrate expectations of the investors which is induced with the representations of the government. This implies the potential liability of the country for frustrations of legitimate expectations of the investor, proliferating ground of claim in international investment treaty arbitration, as it is evidenced by some sample cases in Ethiopia. However, it caveat must be made that the mere fact that the country has made representations using the above methods does not mean that there is automatic liability. Instead, per the jurisprudence of international investment tribunals, there are requirements that these representations should fulfill to give rise to claim. Hence, the indications as to the common form of unwarranted representations are made in general terms within which, based on certain conditions, the legitimate expectations claim may arise.

CHAPTER FIVE

5. Conclusion and Recommendation

5.1. Conclusion

Three propositions were set out at the beginning of this paper based on the statement of the problems and questions. Firstly, that the doctrine of legitimate expectations and representations as its basis is an established concept of investment law with noticeable roots in general international law. The second proposition has suggested that representations as a basis of legitimate expectations claim is proliferating with the investment tribunals adopting diverse interpretations due to the vagueness and ambiguity which require standard criteria and limitation thereto. The third suggested proposition was that the Ethiopian government is making investment representations which may potentially lead the country into liability based on the concept of representations as a basis of legitimate expectations.

In order to confirm or refute these suggested propositions, this paper has examined the essence of doctrine of legitimate expectations, its origin, rationales, its incorporation into international investment law, legal justifications for applying it as being applied by the tribunals and its tenability. Secondly, it analyzed the practice of investment tribunals (both institutional and *ad hoc)*on applying host state's investment representation as a basis of legitimate expectations claim, examining the conducts/statements giving rise to it and any limitations and criteria thereto. Thirdly, it has identified and examined the Ethiopia's investment objectives and the mechanisms the government is using to attain those objectives, including the current trend unwarranted representations.

On the first proposition, the following conclusions are made. The origin of doctrine of legitimate expectations is traceable to domestic legal systems of the world, both in common law and civil law countries. And by comparison of the application of doctrine of legitimate expectation within domestic legal system mainly as part and parcel of administrative law, it is revealed that there are shared communalities. And based on this fact the first suggested explanation as to the juridical roots of this doctrine is general principle of law.

According to article 38 of the ICJ statute, general principles of law are one source of international law. It is identified that these principles includes general principles of international

law, general principles of domestic law and general principles of international procedural law. Yet, there is a debate as to the exact content of these principles and the methodology of identifying them. Due to this reason some scholars warn against using doctrine of legitimate expectations as general principles of law citing the absence of similarity on its application within domestic legal systems. However, the researcher agree with scholars arguing that full symmetry between and among domestic legal system on the issue at hand is not a requirement, and even it is unlikely and unrealistic to expect so. Hence, the existence of insignificant differences on the application of doctrine of legitimate expectations claim cannot prevent it from becoming general principle of law.

The second explanation justifying the juridical roots of the protection of the doctrine is principle of good faith. However, the principle of good faith is not a self-standing clause within international law having its own remedy inserting legal obligation where they would otherwise not exist. Hence, it cannot give rise to substantive obligations which it didn't have at the first glance. And the best role of good faith principle within this doctrine should be limited to guiding its interpretation.

The third explanation on the juridical roots of this doctrine is its protection as part of minimum standard treatment of customary international law. For this explanation to be true the FET standard should be similar with minimum standard treatment, as FET is standard within which the tribunals are invoking this doctrine. However, close probation into this fact reveals that absent any explicit treaty wording linking the fair and equitable treatment standard with the international minimum standard, as their objective and methodology of identifying them vary, the FET must be interpreted as an autonomous standard.

In addition, the paper has crafted another alternative legal justifications limited to states unilateral representations as a basis of legitimate expectation claim by analogizing the binding effect of unilateral acts in international law. This is because these days, unilateral representations are no more limited to political issues rather encompassing commercial and investment aspect too in which the investor may, just like states, take cognizance of the representations and rest a confidence on it. Firstly, the *erga omnes* nature of unilateral acts and the fact that international organizations can ripe a benefit from them according to ILC articles suggest its possible application to the investor-state relationship. Secondly, investment arrangements usually give the

investment tribunals a chance to apply general principle of law, which include, though through jurisprudence, unilateral acts. Thirdly, the promotion and protection objectives of international investment law require that the investors should have a confidence on what the state has represented to it.

Hence, the first proposition is partially confirmed basing on general principles of law and binding effect of unilateral acts in international law.

On the second proposition, it is found that investment tribunals are increasingly recognizing the host states' representations as a basis of legitimate expectations claim, though giving diversified decisions based on circumstances, which leads to incomprehensiveness of specific conducts that give rise to liability. But, the tribunals' award reveals that states conduct such as assurance as to a given fact, promises, encouragement, promotion and inducement are considered as representations, violations of which may entail liability. Statement/conducts such as assurance as to the political and legal stability, opinion on legality of the intended investment, letter of validity of environmental impact assessment already done, tininess of procedure to start the investment, giving support and recognition to the intended investment, promise of possibility of having negotiation, and etc. are some which may give rise liability if frustrated later. It is also identified that there is no similar practice of investment tribunals, though very important, in using criteria and limitations in deciding cases which may expose the developing countries to unexpected and unjustifiable liability. Yet, though vary from case to case, requirements such as specificity, time, repetitiveness, attribution, reliance, reasonableness and etc. are sometimes employed by tribunals.

Finally, on the third proposition, it is found that Ethiopia is meeting her investment objectives via the use of several strategies such as enacting investment laws, establishing separate investment administrative organs, providing investment incentives, developing industrial parks and attained several success stories. However, it is also equally found that the government is making unwarranted representations in the form of political, social and legal stability, well developed infrastructure, well trained and cheap labor, ease of investment administrations and etc. which are found to be more myth than reality within the country which may lead to liability based on legitimate expectations claim. A look at some cases has also revealed that the potential and actual liability of the country is high.

5.2. Recommendation

Based on the problems identified and the findings found, the researcher has the following to recommend;

- ✓ The international investment tribunals should justify the use of doctrine of legitimate expectations under general principles of laws for an attempt to justify it as part of the principle of good faith and minimum standard of treatment is found to be futile. The same mistake would be committed and challenge the legitimacy of the international investment laws if the tribunals are going to use this doctrine for the mere fact that it was used in previous awards. In addition, the tribunals should also look out of the box to another valid alternative justification limited to representations as a basis of legitimate expectations claim.i.e. Binding effect of unilateral acts. This alternative ground is helpful in some critical scenarios like if there is no FET clause within the investment arrangements applicable to the case.
- ✓ Although coming up with comprehensive specific conducts/statements of state giving rise to liability based on unilateral representations is almost unlikely, the tribunals should look into various circumstances surrounding the representations and use standard criteria and limitations such as reasonableness, specificity, repetitiveness, host state's economic, social, and political conditions, attributions, and etc. in like manner with domestic legal systems. This mechanism helps to save the international investment treaty arbitration from legitimacy crisis it is suffering from now especially from the developing states.
- ✓ Although attracting investment is holy objective, the Ethiopian government should reconsider the unwarranted investment representations it is making only within a box of attracting FDI. As actions can speak more than words, the government should focus more on creating conducive investment environment than pretending and magnifying the little. It should work on stabilizing the political, social and economic crisis, developed the planned infrastructure, train skilled human power, broaden the privatization policy and etc.

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