



INVESTOR'S LEGITIMATE EXPECTATIONS AND THE INTERESTS OF THE HOST STATE IN FOREIGN INVESTMENT

Zeinab Asqari^{1*}

¹ Public International Law, Faculty of Law, Department of Public Law, Allame Tabatabaai University, Tehran, Iran

ABSTRACT

Protection of investor's legitimate expectations is one of the commitments that international investment law impose on host states. Though this commitment is not stated directly in treaty texts, but arbitration case law has distinguished it as an inseparable element of a fair and equitable treatment standard. The idea of legitimate expectations is trying to support the stability and predictability of the legitimate space of the host country. However, legitimate expectation is not an abstract concept and each hypothesis is meaningful in special situations. For a fair and equitable treatment, it is necessary that the legitimate expectations of the investor be Proportionate against general interests of the host state, legislation rights of the state and so on.

© 2014 AESS Publications. All Rights Reserved.

Keywords: Legitimate expectations, Fair and equitable treatment, International investment law, Proportionality principle.

JEL Classification: E21, E22, F21.

1. INTRODUCTION

Nowadays, acceptance of the principle of legitimate expectations in the international investment cases is so common. In most of the conflicts, the investors had questioned the violation of their legitimate expectations and asked arbitrator to interfere with these cases. Therefore, arbitration procedure in the content and nature of this concept is of great importance. The idea of the legitimate expectations which has been originated from England law, seeks to protect foreign investors against sudden changes of host state policies in international investment law. (Pandya, 2011)

Although, protection of legitimate expectations have not been stated as an independent commitment in investment documents, it has been accepted as an inseparable part of the fair and equitable treatment standard in most of the investment conflicts. But what puts this concept into

*Corresponding Author

question, is not its acceptance, rather it is the degree of the expectations which is considered legitimate and degree of commitments that is imposed on the host state. protection of legitimate expectations mean that in general, state is not allowed to change the policies that affect the investor? Does supporting legitimate expectations mean violation of the state's right in legislation. Sometimes, the urgent and abrupt changes in and economic conditions force the state, in order to conserve the general benefits, to make changes which affect the investor. Do these actions violate the legitimate expectations and consequently the standard of the fair and equitable treatment?¹

In this study, we attempt to discuss the limits and gaps of concept of supporting legitimate expectations by investigating the recent arbitrator votes. Studying arbitrator votes show that, although some of the tribunals have taken a broad approach in interpreting this concept, but the standard of fair and equitable treatment has not supported each hope and expectation that have been taken into account in taking the trading decisions of the investor and considerations such as general interests of the host state and the prevailing objective conditions and so on has an effect in its evaluation.

2. DEFENSE OF LEGITIMATE EXPECTATIONS FOLLOWING OF THE FAIR AND EQUITABLE TREATMENT STANDARD

The idea of protection of legitimate expectations is not stated directly in most of the investment treaties,² but has been identified repeatedly by several arbitrator sources as an essential element and key part of the standard of fair and equitable treatment³. The tribunal stated in Saluka case: the fair and equitable standard has been tied strongly into the concept of legitimate expectations, which is its prevailing element.⁴ This position has been stated in EDF preposition in award as: tribunal agrees with other tribunals in that one of the essential components of fair and equitable treatment is the legitimate expectations of the parties regarding investment⁵ International

¹ UNCTAD, Fair And Equitable Treatment, Series on Issues in International Investment Agreements II, 2012, p63.

² Only some of the investment treaties such as the one held by America and Canada has stated investment expectation agents as factors which are considered in indirect expropriation evaluation. For example, the sample attachment of investment treaty of the U.S.A 2012 had been stated at the B (4) (a) (ii): indirect expropriation requires that how much of state's functions has violated the distinct and reasonable expectations of the investment. In addition, the same literature has been used in the sample attachment of mutual investment treaty of Canada in B. 13 (1) (b) (ii). Please check U.S. Model BIT of 2012, Annex B(4)(a)(ii) (requiring, for a finding of indirect expropriation, consideration of 'the extent to which the state action interferes with distinct, reasonable investment-backed expectations).

³ Its worth mentioning that, not stating the legal expectations as a commitment in investment treaties has had objections toward existence of such commitment. For example, in fairly new Suez case, one of the arbitrators stated that the claim that the fair and equitable treatment includes commitment to legal expectations of the investor or at least preventing such infertility, does not at all have the same meaning as the fair and equitable treatment phrase. Check: Suez et al. v. Argentina, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, Separate Opinion of Arbitrator Pedro Nikken, para. 3.

⁴ Saluka Investments BV (The Netherlands) v. Czech Republic (Partial Award) (UNCITRAL), (17/ 03/06) ,2006, para 302.

⁵ EDF (Services) Limited v Romania ICSID Case No. ARB/05/13 (Award on 8 October,2009, para 216.

investment treaties in general tend to enhance stability of investment space and reduce political risks, which are manifested as the fair and equitable treatment standard. The fair and equitable treatment has relation with stability and security of the investor and requires uniform manner by the host state. However, this does not mean that this standard imposes a general commitment on the host state to act uniformly in a period of time. In general, states possess the discretion to change their policies. However, standard violation occurs when the host state committed to act in a special manner or has given some guarantees to the investor who logically acts according to it.

The introduction of the bilateral treaty of Argentina and the United States has noted the fair and equitable treatment to preserve the stable investment space and the utmost effective use of desired economic sources. According to this, the arbitrator tribunal in CMS case against Argentina stated that undoubtedly stable trading and legitimate environment is an essential element of fair and equitable treatment⁶. In addition, the arbitrator tribunal also in Occidental case against Ecuador reminded that stability of legitimate and trading framework is a major element in fair and equitable treatment.

The concept of legitimate expectations has linked to the occasion. Investment is not a paid trading exchange, but is an economic project requiring a considerable amount of time and most of the investments may not have a time limitation at all, such as establishing foreign factories in other countries. Because of the longevity of investment interval, it is possible that changes occur during the project which can effect negatively on the investment.⁷ It is possible that there are numerous reasons to changes in business space: some has only economic basics such as new renovations in technology replacing the older materials, or increase or decrease in costs and the relative economic power of competitors which is part of the trading risk, necessary for any economic activity. However there may be some other changes originating from the actions of the host state which is taken generally or specifically or in the form of deeds or quitting deeds. Some of these changes are dependent on the political changes in the host state. This group of changes in fair and equitable treatment is worth examining.

Foreign investors like other economic activists need to obey national rules. Sometimes and especially in case of long-term projects, there is also a direct agreement between the investor and the host state which identifies the limits and gaps of the state interferences in agreement rights. Cases relating to violation of legitimate expectations are raised in situations where the investors have faced loss because of the state actions. In other words, when the actions of the host state has a deleterious effect on the investor, such as reducing the economic value of fund, in this situations the investor may claim that the host state has violated the legitimate expectations provided at the beginning of the investment. Therefore, the problem is that does and to what extent the equitable treatment criteria supports the legitimate expectations of the investor and which expectations are considered legitimate.⁸

3. BROAD APPROACH TO THE CONCEPT OF LEGITIMATE EXPECTATIONS

Regarding this issue some of the votes like Tecmed vote against Mexico have focused on the stable trading and legitimate framework. This approach requires that the officials of the host state act stably, clearly and without ambiguities and make sure that the investor knows in advance, all the regulations and policies which he has to obey. In this conflict, the host

⁶CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award of May 12, 2005, para. 274.

⁷Occidental Exploration and Production Company v. The Republic of Ecuador, LCIA Case No. UN3467, Final Award of July 1, 2004, par. 183.

⁸Tecmed v. Mexico, ICSID Case No ARB (AF)/00/2, Award, 29 May 2003.

state replaced the unlimited license of the investor's actions with a timelimited license, leading to the claim that the change in trading and legitimate space of the investment violates the fair investment treaty between Spain and Mexico. It is stated that: each party of the treaty guarantees the fair and equitable treatment according to the international law of the investments of the other party in its own land. The tribunal by attainability that the Mexican officials have acted in an unclear and ambiguous manner and have violated the legitimate expectations, accepted the claim of the claimers. The tribunal expresses a category of principles which has been paid attention in many of the following votes: the arbitrator tribunal considers that the cited regulation of the agreement according to the goodwill principle which is accepted in the international rights, requires that the parties behave toward the international investment in a way not to affect the essential expectations of the investor considered in the beginning of the investment. The foreign investor expects the host state to act in a clear, uniform and unambiguous way, so that he not only knows in advance all the rules governing his investment, but also be aware of the investment objectives, regulations, and related administrative procedures in order to able to manage their activities and obey the regulations as well.⁹

In this perspective, doctrine, based on un-changeability of the regulations and policies of the host state, provide the investor with inherent right of legitimate expectations, unless state finds a reason to alter it. In addition, the trust of the investor for stabilization the investment has been taken into account.

After the pronouncement of this vote, the arbitrators followed them in some other cases such as Enron and CMS cases against Argentina. In theses votes also the arbitrators believed that fair and equitable treatment requires "investment stable framework". Both tribunals cited the introduction of the bilateral treaty of the U.S.A and Argentina which clearly emphasized the importance of fair and equitable treatment to protect the investment stable framework.¹⁰

Consequently this view brought about some worries regarding the role of the state. First, where is the position of the options and the legislation discretion of the state. Second, how much is the options and the legislation discretion of the state in solving an economic and crisis. The tribunal in its argument about the fair and equitable treatment expressed that: Despite the awesome powers of

the State Legislature, these options obey the law; therefore individuals have the right to support¹¹. The tribunal has evaluated this issue from the angle that investors as private individuals has gained the right of support against state policies¹², but

⁹ Ibid, para54.

¹⁰ CMS v. Argentina, Op.cit, para. 274; Enron v. Argentina, , ICSID Case No. ARB/01/3, Award, 22 May 2007, paras. 259–260.

¹¹ Ibid, para 220.

¹²In fact, the state has sought help from the concept of *public interest* and has limited the state authority in its framework. There is no problem in necessity of *public interest* in people and state relationship in a democratic system, but the point is that the *public interest* attempts to equalize the general and public interests and in situations where it is necessary to resolve an economic and *public interest* crisis, allows crossing the individual interests in the form of suitable and logical actions and seeks public legitimate objectives. (Schill, 2006)

They did not care that Argentina was in an economic crisis and had to alter the law and therefore changed the law in order to protect the interests of majority of citizens and exercise its sovereign jurisdiction. In this approach the state in order to avoid the responsibilities, has to consider priority in investor's interests, even against managing the economic crisis.

In this cases, the arbitration tribunals have considered any deleterious change of the host state in the legitimate and trading space as violation of the legitimate expectation of the investor, predictability, and stability of the investment space and therefore regarding it as the violation of the fair and equitable treatment criteria. In these votes considering the regulations and legitimate framework of a country as motivating the investment has formed the basics of the concept of the legitimate expectations. The state even when there are essential public economic cases is not able to cross the policies guaranteeing the investor's interests. This approach bestows greater benefits upon the foreign investor than the native economic activists and even majority of citizens in the host country, and prefers investors' interests to national priorities. This approach is incautious about the reality that the investors must expect legitimately that the regulations depending on the natural function of political, legitimate and economic process change over time. In this approach the arbitrator tribunals had an open hand in evaluating the state actions, and not only examine actions such as cancellation or abrogation of investor licenses but may also investigate any state policy changes which cause financial loss of the investor. Potentially, such broad approach gives the arbitrator tribunal an authority to examine all state policies which can affect the investor, and consequently because of the interference in internal affairs of the state, it weakens the investment arbitrator.

Therefore, many have criticized this approach, since they consider such a request impossible, thus evaluating it without any desirable practical effect. According to one of prominent people in investment arbitrator: the expressed standard in Tecmed case is not at all a standard, rather a description of a perfect general rule in a perfect world which all the states must wish for it¹³.

Though the Tecmed vote was worth regarding the focus on clarity and legitimate stability in explaining this concept, but the generalizations, not paying attention to practical and objective conditions, using unilateral treaty to the host state and not paying attention to necessity of appropriate care by the investor are its main flaws which have been resolved in the following votes.

4. THE NARROW APPROACH TO THE CONCEPT OF LEGITIMATE EXPECTATIONS

There are also other things in case law that are closer to reality and do not impose a practical commissioning on the state. In other words, in order to avoid broad reading of the concept of the fair and equitable standard, some tribunals have determined factors to limit the scope of such expectations. The approach seems more objective and is closer to practical

¹³ UNCTAD, Op.cit, p77.

realities, as investor's legitimate expectations are formed considering the governing situations, existing precedents and practical experiences.

5. ATTENTION TO SPECIFIC CONDITIONS GOVERNING EACH CASE

Professor Walde in Thunderbird case emphasized that the investors' expectations must be formed based on affirmative action of the state: the investor can be supported against the deleterious and sudden changes of the policies, in case he has started the investment with a logical guarantee of state officials concerning the stability of these policies¹⁴. To put it in other words, considers the principle as the possibility of change in rules, unless the state has a clear commitment regarding the protection of one policy or rule or a special reward. In Tecmed vote, the arbitrary change of situations on behalf of the state was forbidden, that means the state had to prove that its deeds, having a justifiable reason, were not arbitrary. In other words, the investor is right against the created changes, unless the host state proves its entitlement for the complaining changes.

The tribunal, in National Grid case against Argentina noted an interesting approach and stated the economic crisis of Argentina in that time must be considered in assessing the actions complained of. Considering all these situations, the tribunal concluded that the violation of the fair and equitable treatment did not happen when those proceedings were adopted but Argentina violated the commitments when asked the investor to dismiss all the performance guarantees¹⁵. Therefore it seems that the tribunal gives some rights to the host state to adjust its commitment, based on the economic situations, an approach which adapts more with the concept of the fair and equitable treatment.

In addition, the investor must be aware of the development level of the host state and the executive routine of that country and considers it in his estimations. The expectations made without considering the development level of a country cannot be regarded as legitimate and logical. In fact, the investors who tend to the developing countries imagine that activities in such countries compared to most of the developing countries have probably better income and benefit. Cheap

ingredients, ample workforce and available market are the benefits of working in developing countries that generally attracts the investor. Therefore, it's natural that the image of a higher benefit must coordinate with more risk. The investor must accept the trading in a legitimate space of the developing countries as a continuum, not just waiting for the interests without considering the prediction of the possible risks that are appropriate to the , political and economic situations of the country. The tribunal in Genin case against Estonia, as the claimer had the right to choose for the investment in this country, did not qualify the fair and equitable treatment standard. The tribunal stated nicely that: the claimers have chosen the investment in this

¹⁴ International Thunderbird Gaming Corporation v. Mexico, UNCITRAL (NAFTA) 26/01/06,2006; (Separate Opinion) at para 30.

¹⁵ Nat'l Grid, P.L.C. v. Arg. Republic, UNCITRAL Arb., Award, Nov. 3, 2008, para 180 .

country knowing that the state has just been independent and is severely facing the financial, trading and banking modern realities and the state organizations that are responsible to supervise and adjust this sections, may not have experience such affairs previously¹⁶. In Parkerings-Compagniet case against Lithuania, the source tribunal expressed that Lithuania was in a transferring state regarding the political issues and therefore the investor should have predicted the possible change in legitimate system. In such cases, no expectation can be regarded legitimate about stability of the regulations. An investor facing such conditions accepts the instability as a trading risk and must protect his legitimate expectations by mentioning clear treaty conditions to prevent unexpected legitimate changes¹⁷.

6. THE RIGHT OF LEGISLATION

In Parkerings-Compagniet case against Lithuania¹⁸, the tribunal evaluated the investor' claim about the instability because of the changes in local regulations. The tribunal said that each state can legislate, modify or cancel it. This right of the state was considered as a general principle and then examined the state's activities considering that the state cannot have new regulations in contrast with the previous ones or cannot have illogical, unfair and inequitable changes¹⁹. The tribunal stated that the investor has the right to protect his legitimate expectations, those expectations that seem logical when considering all conditions²⁰. The tribunal continued that in this case, Lithuania hadn't guaranteed and didn't act in a manner to provide a logical expectation for the investor concerning the absence of changes in new regulations. In that time, Lithuania was in transition period and was moving its condition which was previously part of the Soviet Union in a direction to be a candidate registering in the European Union. Therefore the change in legislation was possible in this situation and any expectation based on stability of regulations was illegitimate. Therefore the tribunal did not consider the legitimate expectations as illogical, unfair and inequitable²¹. In tribunal's idea the legitimate space was unpredictable and the claimer should have predicted the possibility of such changes. The arbitrator source also emphasized that Lithuania behavior was the flaw of the agreement and its possible that the flaw of the agreement be because

of the goodwill but expecting adherence to the agreement is not a legitimate expectation in tribunal's opinion so that be supported based on the fair and equitable treatment standard. This standard is not violated with any agreement violation that the claimer has access to guarantee the performance of inner rights. The tribunal emphasized that violating any agreement or internal regulations does not mean the violation of the treaty. In some limited situations, the substantive violation of the agreement can be regarded as the violation of the treaty²². The tribunal explained

¹⁶ Genin v. Estonia, ICSID Case No. ARB/99/2, Award, 25 June 2001, para. 348.

¹⁷ Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007, paras. 335–336. available at <http://ita.law.uvic.ca/documents/Pakerings.pdf>

¹⁸ Parkerings-Compagniet AS v. Republic of Lith, Op.cit..

¹⁹ para332.

²⁰ para333.

²¹ para 337.

²² para 316 that in most of such cases, violating the agreement leads to a vote by a local tribunal.

Therefore, the major issue for the arbitrator source was whether the treatment of these tribunals were right or not, in other words, the tribunal believes that violation of one agreement, violates the fair treatment when it leads to deprivation from justice.

In Continental Casualty case against Argentina, the arbitrator tribunal clearly emphasized that the stability of legitimate framework of investment which was mentioned in the bilateral treaty introduction, do not potentially create a legitimate commitment for treaty parties, and fundamentally it is a non conscience affair that a country promises to stabilize its regulation which need to be altered in a period of time.²³ In tribunal's opinion implication of stability at treaty introduction is the violation of the efficient interpretation of the treaty. Therefore the arbitration source has accepted the right of the host state in legislation regarding the general interests, even though, its stimulated changes has some negative and deleterious effect on the investor²⁴. Such actions, followed by a goodwill, must not be regarded the violation of the legitimate expectation of the investor neither violation of the fair and equitable treatment standard.

7. THE PROPORTIONALITY OF LEGITIMATE EXPECTATIONS OF THE INVESTOR AND THE INTERESTS OF THE HOST STATE

The tribunal has warned against the broad and mental approaches stimulate dangers about the concept of the legitimate expectations in Saluka case and pointing to the Tecmed vote stated that: however, this tribunal observes that though it agrees with the proclamations in general, but if this phrase be interpreted word by word, it is possible that the host state undergo some commitments that are practically impossible and nonrealistic. In addition to that, the scope of treaty support of the foreign investor against unfair and inequitable deeds cannot be established exclusively considering the motivations and mental considerations of the investor. Their expectations are protected in case they are logical and legitimate, considering the situations²⁵. In Methanex case against the United

States, the tribunal emphasized the necessity of existence of clear proclamations. In this case, the claimer who was an accessible Canadian producer, protested the California legislation organization which was forbidding the production of gasoline with additional methanol because of bioenvironmental reasons. Besides other things, the investor

²³ Continental Casualty v. Argentina, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 258.

²⁴ Its right that legislation to protect public interests is the right and of course the duty of each state, but it must be done logically and fairly. In PESG case against Turkey, the tribunal emphasized that the happening the changes in the legitimate and performance space of the investment are in contrast with the necessity of guaranteeing a stable and predictable investment environment which the treaty requires. The case is complex that the mentioned regulations have been changed repeatedly, therefore questioning the predictability of the legitimate system. The tribunal believed that the host state using its authority violated the fair and equitable behavior. In this vote, though the state did not have any commitment or guarantee to protect this framework, the repeated changes of regulations have been considered illegitimate in legitimate space. See PSEG Global et al. v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, 19 January 2007, paras. 252–253.

²⁵ Saluka Investments BV (The Netherlands) v. Czech Republic (Partial Award) (UNCITRAL) (17 03/06) at para 304.

Claim the violation of the fair and equitable treatment of the Nafta convention, explain that such prohibition was not justifiable, disturbing its market, and was biased toward the interests of the internal ethanol producers. In rejecting this claim, the tribunal expressed that the claimer has not

Taken any proclamations on behalf of the United States that can conclude logically that such changes won't occur, based on it. In fact, based on the previous approach that stability of the regulations are the principle, in this approach the principle is that the regulation can be changed based on the situations unless the state promises frankly about some special regulations²⁶. In some tribunal's approach, it is assumed that the investor must be aware of the prevailing general legitimate situation of the host country and his expectations being formed based on his real knowledge. In Methanex case against the United States, the tribunal emphasized that the investor must have a general awareness from the investment space so that his expectations can be considered as legitimate. The tribunal expressed, the claimer is activated in a space with identified economic and political atmosphere and generally the economic activists know that the health and environment protecting organizations at state and federal level continuously use and control the effect of chemical complexes and usually prohibit or limit the usage of some of the compounds because of public health or environmental reasons²⁷.

The tribunal in Saluka case analyzed the balance process in violation of legitimate expectation claims as: the expectations of the investor are supported in case it possesses a logical and legitimate

level, considering the situations. Logically no investor generally expects the prevailing situations of the investment time to remain stable. In order to determine if the sterilizing the foreign investor's expectations are logical and justifiable or not, attention must be paid to legitimate rights of the host state in adjusting the internal subjects concerning the public interests. Therefore identifying the flaw of paragraph 1 article 3 of the treaty by Czech Republic requires that the legitimate and logical expectations of the investor in one hand and the legitimate interests of the claimer in the other hand be evaluated. A foreign investor can rightly expect that the Czech Republic has followed its policies with goodwill and its proceedings are justifiable in logical aspect and general policies and such treatment is not the obvious violation of the implications of uniformity, clarity, and prohibiting bias and unilateralism. The host state must not neglect the right legitimate procedures and the accuracy of executive communion and must not put the investor under the coercion and duress of regulatory authorities. Especially each different treatment with the investor must not be based on unreasonable demands and distinctions an must be proved to have a logical relation to logical state policies that have not been raised because of preference of other investors to this investor²⁸.

Therefore, the concept of legitimate expectations is flexible to some extent that reconciles the interests

²⁶ Methanex Corporation v. United States of America, UNCITRAL, (NAFTA), Final Award, 3 August 2005, at Part IV, Chapter D, page 5, para 7.

²⁷ Methanex v. United States, Final Award, 3 August 2005, Part IV, Chapter D, para. 10.

²⁸ Saluka v. Czech Republic, UNCITRAL Rules, Partial Award, 17 March 2006, paras. 304-308.

Of the foreign investor and the host state and balances them together.

In addition, in Joseph C. Lemire vote against Ukraine, considering the subject and objectives of the treaty between Ukraine and the United States, interpreted the fair treatment standard and stated: the subject and goal of the treaty is not protecting the foreign investor but helping to develop the internal economics. Local development requires that the preferable treatment toward the foreign investor in accepting the regulations and adopting proceedings be balanced by legitimate rights of Ukraine to protect the public interests²⁹.

8. THE EXISTENSE OF FRANK COMMITMENT OR GUARANTEE

The arbitrator tribunals in several votes have stated that the host state did not have any commitment or a guarantee to be violated later. In Plama case against Bulgaria³⁰ that was to the arbitrator based on the energy charter, Bulgaria modified its bioenvironmental regulations that caused some protests by the investor, but the arbitrator expressed that there was no guarantee leading to stability of regulations³¹. Also, in tribunal's opinion the claimer cannot protest against the state tax functions of some of the exchanges, because these deeds are done because of the present regulations. Bulgaria state has not provided any legitimate expectation that the claimer investment be treated in other way³².

The tribunal in EDF case against Romania noted that: the idea that legitimate expectations and therefore the fair and equitable treatment standard guarantees the stable legitimate and trading framework, if stated broadly and unclearly cannot be considered right³³. The tribunal's loyalty toward the view of arbitrator source in Saluka case against Czech Republic added that: legitimate expectations can't exclusively be the mental expectations of the investor. These expectations must be evaluated considering what the investor expected as starting to establish its activity that is inferring considering all situations and with sufficient attention to authority of host state in adjusting its economic life and protecting public interests³⁴.

In Metalpar case against Argentina, the tribunal expressed that there was not any kind of license or special agreement between the state and the foreign investor on these expectations so the claimer expectations cannot be considered legitimate³⁵.

When the host state undergoes some commitments, limits its discretion about altering these commitments. We can't expect a legitimate system to be kept stable during the investor's activities, rather changes because of the developments is a requirement of any legitimate

²⁹ Joseph C. Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 21 January 2010

³⁰ Plama Consortium, Ltd. v. Republic of Bulg., ICSID Case No. ARB/03/24, Award (Aug. 27, 08),2008.

³¹ para 219.

³² para 267.

³³ EDF v. Romania, Op.cit ,para. 217.

³⁴ para. 219.

³⁵ Metalpar v. Argentina, ICSID Case No. ARB/03/5, Award on the Merits, 6 June 2008, para. 186.

system, but when a state gets the investor with certain promises about the prevailing legitimate and trading framework and the investor starts the activity based on state explicit proclamations, the investment law protects the investors from the deleterious changes in this space. Therefore, what is on importance is the explicit commitments that the state has at the beginning of the investment and these commitments are the main motivators of the investor to have activities in host country and decides considering all of these.

In Duke Energy case, the tribunal emphasized attention to all conditions and stated: the stability of legitimate and trading space has been tied directly to the justifiable expectations of the investor. The tribunal emphasizes that such expectations are major elements of the fair and equitable treatment standard. But, its limitations must be considered also. The expectations of the investor are legitimate in case they are legitimate and logical at the investment establishing time. The evaluation of the logicity or legitimateity must be done considering all conditions and not only the incidents about investment but also the political, , economic, cultural and historical conditions of the host country. In addition to this, such expectations must be done based on the suggested conditions of the host state and the investor has invested based on this³⁶.

9. CONCLUSION

Attention to the legitimate expectations of the investor is one of the basics of the fair and equitable treatment that is emphasized in many of the arbitrator votes. However, reference to the legitimate expectations to qualify the flaw of the fair and equitable treatment standard cannot be evaluated in vacuum, without considering the practical legitimate, economic, , political issues and without the balance between the investor's expectations and special deeds of the state to protect the public interests which is imposed on it by legislation. This issue is of utmost important especially in developing countries. The concept of fair and equitable behavior 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. Acting instead of the proportionality principle and creating the balance by balancing the compensation is a suitable instrument that can guarantee the interests of both parties. (Tudor, 2008)

The arbitration procedures and the legitimate logic require that the expectations which are considered legitimate and are supported, be limited and clear. Especially, the investors must predict this issue and must accept that the legitimate space can be changed during the period of time. However, the investors based on the fair and equitable treatment standard can expect such expectations happened with goodwill and without any misuse and in fact the host state does not use public interests as a tool to hide its biased and arbitrary deeds and goals. On the other hand, the authority of the states is limited in modifying the regulations without paying the compensation to the foreign investor in cases where state explicitly has distinct

³⁶ Duke Energy v. Ecuador, ICSID Case No. ARB/04/19, Award, August 18, 2008, para. 340.

guarantees about protecting some aspects of the legitimate and trading system. In other words, when a state explicitly guarantees that the investor protects the special rewards that have been general regulations that explicitly is provided to motivate the investor, and the investor enters the country because of that, if changed later or cancelled may have some responsibilities to the state. Sometimes it is possible that despite the presence of some motivating regulations in legitimate system of a host country, there may be exceptions in the treaty that the function of the state in changing or modifying regulations in this situation be justifiable based on that. For example, cases which are against public discipline or endanger the environment are the exceptions in the treaty.

The investors also have to take enough care in evaluating the possible risks and adjust their expectations with the real conditions of the host country. Especially, when the investors decide to invest, they must consider the special prevailing conditions of the host country such as the level of democracy, the governance practices, and amount of its legitimate development. Logically, we can't expect a state to change its governance practices and prevailing system because of investor's expectations, but the investor can be asked to evaluate the host country with sufficient care and decide with all the existing risks.

REFERENCES

- Pandya, A.P., 2011. Interpretations and coherence of the fair and equitable treatment standard in investment treaty arbitration. The London School of Economics and Political Science (LSE).
- Schill, S.W., 2006. Fair and equitable treatment under investment treaties as an embodiment of the rule of law. *Transnational Dispute Management (TDM)*, 3(5): 115-141.
- Tudor, I., 2008. The fair and equitable treatment standard in the international law of foreign investment. Oxford: Oxford University Press.

BIBLIOGRAPHY

- Bell, G., I. Filatotchev and R. Aguilera, 2014. Corporate governance and investors' perceptions of foreign IPO value: An institutional perspective. *Academy of Management Journal*, 57(1): 301–320.
- Bell, R.G., C.B. Moore and I. Filatotchev, 2012. Strategic and institutional effects on foreign IPO performance: Examining the impact of country of origin, corporate governance, and host country effects. *Journal of Business Venturing*, 27(2): 197-216.
- Blomstrom, M., 1992. Host country benefits of foreign investment. National Bureau of Economic Research.
- Blomström, M., A. Kokko and M. Zejan, 2000. Foreign direct investment: Firm and host country strategies. Basingstoke: Macmillan.
- Dutta, N. and S. Roy, 2011. Foreign direct investment, financial development and political risks. *The Journal of Developing Areas*, 44(2): 303-327.
- Hayakawa, K., F. Kimura and H.H. Lee, 2013. How does country risk matter for foreign direct investment? *The Developing Economies*, 51(1): 60-78.
- Henisz, W.J. and B.A. Zelner, 2005. Legitimacy, interest group pressures, and change in emergent institutions: The case of foreign investors and host country states. *Academy of Management Review*, 30(2): 361-382.
- Lipsey, R.E., 2004. Home-and host-country effects of foreign direct investment challenges to globalization: Analyzing the economics. Chicago: University of Chicago Press.
- Lipsey, R.E. and F. Sjöholm, 2011. Foreign direct investment and growth in East Asia: Lessons for Indonesia. *Bulletin of Indonesian Economic Studies*, 47(1): 35-63.
- Poulsen, L.S. and G.C. Hufbauer, 2011. Foreign direct investment in times of crisis. *Transnational Corporations*, 20(1): 19-38.
- Shihata, I.F., 1993. Legitimate treatment of foreign investment: The world bank guidelines. Boston: Martinus Nijhoff Publishers.
- Sornarajah, M., 2010. The international law on foreign investment. Cambridge: Cambridge University Press.