

**THE LEGITIMATE EXPECTATION REQUIREMENT UNDER FAIR AND
EQUITABLE TREATMENT STANDARD IN INVESTMENT TREATY
ARBITRATION ON ENVIRONMENTAL PERMITTING DECISIONS IN MINING
AWARDS**

by Tamuna Beridze

LL.M SHORT THESIS
COURSE: Environmental Law and Regulations
PROFESSOR: Jessica Charles Lawrence
Central European University
1051 Budapest, Nador Utca 9
Hungary

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Abstract

Legitimate expectations are being invoked in most investment disputes before the arbitral tribunals. However nowadays, there is no uniform practice of what would constitute the breach of legitimate expectations, or what are the sources which fully guarantee the reliance on the promised, indicated, stated commitments. The predictability of the mentioned commitments becomes more unreliable and vague in the fast-changing policies of the countries. Especially when the environmental protection policies are acknowledged more and more on the everyday bases.

The goal of this paper is to examine what are requirements on which the investors can rely to have legitimate expectation. The argument which is developed is that unless the commitments made by the host countries are not in writing the investors have a very high threshold to prove that they could rely on the legitimate expectations. The paper uses comparative analyses of the investment dispute cases which have invoked environmental protection under mining permitting licenses.

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Introduction

In international investment treaties, the Fair and Equitable Treatment (FET) standard is most commonly regarded.¹ Accordingly this has the highest rate of showing of success, that the treatment was breached.² Under the heading of FET, breach of the legitimate expectations is most commonly invoked by investors, referring to breach of the reliance on unilateral representations and contractual commitments. However, despite the high number of the cases, there is no uniform definition either what is FET or under which circumstances are legitimate expectations are deemed to be breached.

Lack of uniformity in the practice of arbitral tribunals, makes it difficult to define where the margins lay between the concepts of the investment law. Many of them are so entangled with each other that it is almost impossible to draw a precise line which belongs to which one. One of such issues is weather protection under legitimate expectations shall be invoked under the fair and equitable treatment or under indirect expropriation of the investment. Regardless, the margins in practice legitimate expectations has been mostly invoked under the standard of fair and equitable treatment. As the number of practices indicate in most disputes which are submitted to the investment arbitral tribunals, the references are made to the breach of the legitimate expectations.³

Despite of its high number of referrals in the investment disputes, there is still no uniform standard of what constitutes the requirements of the legitimate expectations, breach of which would have its consequences. The aim of this thesis is to examine what are the specific

¹ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, Second edition (Oxford, United Kingdom: Oxford University Press, 2012).

² Ibid.

³ Michele Potestà, "Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept," *ICSID Review - Foreign Investment Law Journal* 28, no. 1 (May 1, 2013): 88, doi:10.1093/icsidreview/sis034.

characteristics of the legitimate expectations, focus is made on selected landmark mining cases, with the special emphases on cases such as *Glamis Gold Ltd. V. USA*⁴, *Bilcon of Delaware Inc. et al v. Canada*⁵. For the purposes of more preciseness, and filling the gaps which were left in these cases, the practice of tribunals regarding the legitimate expectations in the cases outside the scope of mining will also be made references to.

In this thesis it is argued, that the investor's legitimate expectations run high risk of not being deemed breached in case they have been specifically agreed upon and there is a showing of recorded commitments in the contract. While other circumstances which lead to the expectations of the investor are additional tools for securing the commitments, and alone they do not produce the same outcome of certainty as the ones under the contract. Moreover, commitments given by the representatives of the governments have to have specific "quasi-contractual" character, otherwise they have less legal-standing in the era when environmental protection policy is being paid more attention to, and it overlaps the interest of the investor, investment of which is a threat to the environmental values of the community.

For the purposes of this thesis, comparative-analyses methodology will be used, drawing the conclusions through comparing the rulings of the investment tribunals. First part of the thesis will focus on the examination to what extent does fair and equitable treatment standard fall outside the scope of minimum standard treatment. As legitimate expectations derogate from the standard of fair and equitable treatment, it is crucial to analyze to what extent can they separately be invoked under FET. Moreover, in case the tribunal does not deem that FET can be invoked separately from minimum standard treatment, can legitimate expectations still exist?

⁴ *Glamis Gold, Ltd. v. The United States of America*, NAFTA/UNCITRAL, Award, June 8, 2009.

⁵ William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015. See more at: <http://www.italaw.com/cases/1588#sthash.m9VBCuAH.dpuf>

Second part of the thesis will focus on the requirements of legal expectations which have been derogated from the ruling of different arbitral tribunals. Moreover, it will be examined whether legitimate expectations can be afforded the protection directly under from the BIT and to what extent can the host country claim the breach of legitimate expectations from the investor.

Final, conclusive part of the thesis will focus on the prime application of the findings from the previous parts regarding legitimate expectation in the *Glamis Gold and Bilcon of Delaware case*. The examination of these cases will show the contradiction between the practices of arbitral tribunals.

I. Fair and Equitable Treatment same as Minimum Standard Treatment?

For the purposes of this thesis it is crucial to examine up to what extent can the violation of the FET standard be invoked under the breach of minimum standard treatment. As latter, is most commonly invoked claim submitted by investors. Position argued by this thesis is that if the tribunal does not regard protection offered under FET standard as having an independent standing, legitimate expectations cannot be invoked under minimum standard treatment. Which will be briefly discussed in the following section.

In international investment arbitration practice confusion is caused by different interpretations of the FET standard. Whether it is an autonomous or the same standard of treatment as the minimum standard in customary international law. The concern whether FET shall be interpreted as an autonomous principle or as the part of the customary international law derogates from the fact that some of the arbitral tribunals have given a broad definition to the standard.⁶ Historical observation provides that FET standard was to be interpreted as the minimum standard treatment.⁷ However the scope as well as the application of the minimum standard treatment and FET has evolved over time and has been given different meanings.⁸

The question particularly regarding the connection between the FET standard and minimum standard treatment arose, in the ISDS cases, which observed the application of standard under

⁶ Porterfield M.C., “A distinction without a difference? Interpretation of Fair and Equitable treatment under customary international law by investment tribunals”, Investment Treaty News, International Institute for Sustainable Development, 22 March, 2013, at: <https://www.iisd.org/itn/2013/03/22/a-distinction-without-a-difference-the-interpretation-of-fair-and-equitable-treatment-under-customary-international-law-by-investment-tribunals/>

⁷ United Nations Conference on Trade and Development, “Fair and Equitable Treatment, UNCAD, Series on Issues in International Investment Agreements II”, United Nations, New York and Geneva 2012, p. XIV at: http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf

⁸ Even though some scholars and arbitral awards indicate the evolution of the minimum standard treatment since the Neer case, there still exist differences in opinions about this matter. For more specific details see: Supra note 6, UNCTD p. 13. Aslo, Dolzer and Shreuer Supra note 1, pp. 125-127.

North American Free Trade Agreement (NAFTA).⁹ More specifically due to the fact that this agreement directly emphasizes that fair and equitable standard treatment is the same as the minimum standard treatment. Article 1105 (1) of NAFTA states: “Each Party shall accord to investments of investors of another Party, treatment in accordance with international law, including fair and equitable treatment and full protection and security.”¹⁰ The commentary which has been adopted by Free Trade Commission (FTC) and which has binding character of interpretation on NAFTA directly states that article 1105 (1) indicated the application of minimum standard treatment as understood under customary international law, and it does not give autonomous meaning to the fair and equitable treatment standard.¹¹ The interpretation also adds, that minimum standard treatment scope set by customary international law does not require any additional treatment to it or “beyond” it.¹² The difference regarding this issue is not embodied only to the NAFTA rather, goes beyond the agreements, and defines the states’ policy about the application of the standard. North American countries, Canada and USA have limited FET to the customary international law minimum standard application.¹³ On the other hand under Lisbon treaty, European Union is committed to the autonomous interpretation of the FET standard.¹⁴

It is crucial to have the understanding of the approaches as in the practice where the FET is regarded as same as the minimum standard treatment has the outcome such as, “standard of protection that is more deferential to the regulatory authority of governments than the EU’s “autonomous” standard.”¹⁵

⁹ Supra Note 6, XIV.

¹⁰ North American Free Trade Agreement, part five: investment, services and related matters, Article: 1105, Minimum Standard of Treatment, Available at: <http://www.sice.oas.org/trade/nafta/chap-111.asp>

¹¹ Brown CH., “*Commentaries on selected Model Investment Treaties*”, Oxford University Press, 2013, p. 520.

¹² Supra Note, 1, 125.

¹³ Supra Note, 5.

¹⁴ Ibid §1. It has been argued that in the upcoming North Atlantic Free Trade Agreement Negotiations this might come as a lapsus, which the parties would have to seriously try to agree on.

¹⁵ Ibid, §2.

The interpretation of NAFTA, Article 1105 (1) has been adopted in practice by various BITs the clear example of which is the United States BIT which states that customary international law is the minimum standard of treatment to be applied to the aliens and “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 that standard, and do not create additional substantive rights.”¹⁶

This approach has once again been demonstrated in *Glamis Gold, Ltd. v. United States*¹⁷. In this case a Canadian Mining company, brought claim against the United States of America, claiming that it breached article 11 of the NAFTA. Glamis alleged that USA expropriated its gold mining rights in southeastern California. Moreover, USA has failed to accord fair and equitable treatment to the company while utilization its rights.¹⁸

Glamis challenged the breach of fair and equitable treatment by the USA under article 1105 of NAFTA, it presented number of measures initiated by federal and state authorities regarding the impacts of the mining project on “environmental and cultural bases” (The Imperial Project).¹⁹ Which it claimed were artificially created to block the development of the project rather to serve the purpose claimed.

The parties to the claim agreed on the fact that fair and equitable treatment embodied in article 1105 of NAFTA was “to be understood by the reference to the customary international law minimum standard treatment of aliens”.,²⁰ which accorded at least the minimum standard of treatment as set by the *Neer case*.²¹ However the parties did not agree on the matter whether

¹⁶ US Model BIT, Article 5(2), available at <https://www.state.gov/documents/organization/188371.pdf>

¹⁷ Supra Note 4.

¹⁸ *Glamis Gold, Ltd. v. United States of America*, Award of 8 June 2009. Available at <http://www.italaw.com/sites/default/files/case-documents/ita0378.pdf>

¹⁹ Whitsitt E. and Vis-Dunbar Damon, “Glamis Gold Ltd. v. United States of America: Tribunal sets a high bar for establishing breach of “Fair and Equitable Treatment” under NAFTA”, Investment Treaty News, IISD, 15 July 2009, §3, available at <https://www.iisd.org/itn/2009/07/14/glamis-gold-ltd-v-united-states-of-america-tribunal-sets-a-high-bar-for-establishing-breach-of-fair-and-equitable-treatment-under-nafta/>

²⁰ Ibid, §9, also Supra note, 15, § 599.

²¹ Supra note, 16, §9.

the minimum standard treatment has undergone evolution since it was established, and the developed treatment was established in customary international law.

Glamis, brought for the argument the facts that fair and equitable treatment were incorporated in more than 2000 bilateral investment treaties, and many of them were interpreted by the arbitral tribunals to require “something less than the “egregious”, “outrageous,” or “shocking” threshold enunciated during the 1920s”.²²

Whitsitt and Vis-Dunbar note that regardless claimant’s argumentation, the tribunal concluded that in order to establish the change in customary international law, the claimant has to meet a very high threshold. Therefore in this case the claimant failed to do so, as “fair and equitable treatment” standard, holding that a violation “requires an act that is sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons ...”.²³ The authors add that this will raise the threshold for the claimants who want to claim the breach of Fair and equitable treatment under NAFTA, article 1105, even more which will make it difficult for them to prove such conduct by the host state.²⁴

Even though the ruling of the arbitral tribunal in this case sets very high bar for the claimants, the case law of the ICSID arbitration shows that even under the application of NAFTA and the BITs which lean to the policy set by art. 1105 (1), have interpreted the FET which was meant to be embodied under customary international law, as the autonomous principle and have inflicted broader meaning on the standard than set by Minimum standard treatment.²⁵ Clear demonstration of this is the decision of the tribunal in case *Azurix v. Argentina*, BIT of which sets that the standard of treatment shall be no less than required by international arbitration

²² Ibid, §10.

²³ Ibid, §10, also see Supra note 15, §427

²⁴ Supra note 16.

²⁵ Supra Note 5, §3.

practice.²⁶ The tribunal ruled that the reading of the provision of the BIT allowed the tribunal to impose higher standard to the FET than set only under international law. The standard is “set as a floor, not a ceiling, in order to avoid possible interpretation of these standards below what is required by international law”.²⁷

Even though, NAFTA tribunals are hesitant to rule that there has been the development of minimum standard treatment since the *Neer case*, there are number of other ICSID tribunals which admit that fair and equitable treatment standard has evolved. In fact, two landmark cases *Mondev International Ltf. v. The United States of America*²⁸ and *Waste Management Inc. v Mexico*²⁹, as noted by *Dolzer and Schreuer*, arbitral tribunals in these cases have treated the fair and equitable treatment to be so broad that, it cannot be preserved abstractly, rather requires individual assessment of the facts and circumstances of the case.³⁰

The authors also note one of the cases, *ADF v United States*³¹, where the tribunal interpreted fair and equitable treatment standard under NAFTA, not to be “frozen in time, and that the minimum standard of treatment does evolve”.

Regarding the autonomy principle of the fair and equitable treatment as noted by *Dozler and Stevens, FA Mann*, while commenting of 1981 British BIT said:

“It is submitted that nothing is gained by introducing the conception of a minimum standard and, more than this, it is positively misleading to introduce it. The terms ‘fair and equitable treatment’ envisage conduct which goes far beyond the minimum standard and adored protection to a greater extent and according to a much more

²⁶ *Azurix v Argentina*, award, July 14, 2006, in *Supra* note 1, p. 126.

²⁷ *Ibid.*

²⁸ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 available, at <http://www.italaw.com/cases/documents/716#sthash.Qb8d9hft.dpuf>

²⁹ *Waste Management, Inc. v. United Mexican States* ("Number 2"), ICSID Case No. ARB(AF)/00/3, Award, 30 April, 2004 See more at: <http://www.italaw.com/cases/1158#sthash.XXFFVYyOZ.dpuf>

³⁰ *Dolzer and Schreuer, Principles of International Investment Law*, 128.

³¹ *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1 - See more at: <http://www.italaw.com/cases/43#sthash.5pw1hImD.dpuf>

objective standard than any previously employed form of words/ A tribunal would not be concerned with a minimum, maximum or average standard. It will have to decide whether in all circumstances the conduct in issue is fair and equitable or unfair and inequitable. No standard defined by other words I likely to be material. The terms are to be understood and applied independently and autonomously.”³²

For concluding this section, even though NAFTA policy sets that the FET is to be understood as the same standard as MST, as number of case law demonstrates this interpretation can be avoided, thus, it is preferable to treat the standard as autonomous. Moreover, it is insensible to attach the different wording tot the same principle.

1.1. Can Legitimate Expectations be Invoked under Minimum Standard Treatment?

As it has also been mentioned above, determining whether legitimate expectations can be invoked under minimum standard treatment has big effect on the outcome of the ruling of the arbitral tribunal. As if this treatment can be separately invoked, then the investors do not need to derogate from the violation of fair and equitable standard of treatment, rather can directly claim damages under the breach of legitimate expectations. However, observing the approaches of different countries which are the parties of NAFTA, leads to the conclusion that, determining that there was breach of FET, is necessary, to invoke damages under the breach of legitimate expectations.

According to the observation made by *Magraw, Tejera and Coulombe* the minimum standard of treatment have not been deemed to include the requirement from the respondent countries

³² Mann F.A., “*British Treaties for the Promotion and Protection of Investments*”, 52 *British Yearbook of International Law*, 241, 244, see *Supra* note 1, p. 124.

to entail the reference to legitimate expectations.³³ It is the position of Canada as submitted by the arbitral tribunal in *Merrill and Ring Forestry L.P. v. Canada* that “The —obligation to protect the legitimate expectations of an investor is not part of the customary international law minimum standard of treatment of aliens. There is no such —obligation under Article 1105.”³⁴ This position has also been recorded in the cases of *SD Myers*³⁵, *Metalclad*³⁶, and *Glamis*³⁷, which respectively demonstrated the positions of Mexico and USA that under minimum standard of treatment the host states still preserve the right to regulate their environmental and other policies without the direct obligation of having regard to the interests of the investors. As it has been demonstrated the minimum standard treatment does not entail the obligation of the host states to take into account the expectations which the investors have relied on. Therefore, the breach of these expectations have to be always claimed under the breach of FET. For this reason the next sections will briefly touch the issue when the FET standard is deemed to be failed.

1.2. The necessary factors to determine the breach of Fair and Equitable Treatment

³³ Pauwelyn Joost, Magraw Kendra, Tejera Victorino, Coulombe Louis-Philippe, “Standards under the North American Free Trade Agreement: Fair and Equitable/Minimum Standard of Treatment, Expropriation of Rights and Contracts, and the Standard of Compensation and the Determination of Damages for Violations of the Fair and Equitable/Minimum Standard of Treatment”, The Graduate Institute Geneva, 10 June, 2011, available at: http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Law%20Clinic/Memoranda%202011/Standards_NAFTA.pdf

³⁴ *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Counter Memorial, §508-509 - See more at: <http://www.italaw.com/cases/669#sthash.t3UQP28H.dpuf>, Reference made in Supra note 33, p. 38.

³⁵ *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL/NAFTA, Available at <http://www.italaw.com/cases/969> Reference made in Supra note, 33. P. 39

³⁶ *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1 - See more at: <http://www.italaw.com/cases/671#sthash.3p9NbMp4.dpuf>, Reference made in Supra note, 33. P. 39

³⁷ Supra note, 4, reference made in supra note 33, p. 39.

Once it is established that the Fair and Equitable treatment is mostly regarded to be autonomous principle, it is necessary to examine whether there are necessary requirements to be met to determine whether the standard has been violated or not.

As majority of the Bilateral investment treaties do not specify substantial requirements of what would consist as the breach of the FET standard, in international investment arbitration practice several indications have been established, which are as follows as noted in the UNCTAD:

- “a) Denial of justice and flagrant violations of due process;
- b) Manifestly arbitrary treatment;
- c) Evident discrimination;
- d) Manifestly abusive treatment involving continuous, unjustified coercion or harassment;
- e) Infringement of legitimate expectations based on investment-inducing representations or measures, on which the investor has relied.”³⁸

However, it shall be mentioned that this is not an exact list of the requirements, and does not imply that once all of them or some of them are met this would qualify as the violation of fair and equitable treatment standard, rather it can be more limited, exhaustive, or broader taking into account the circumstances of the case at hand.³⁹ Generally whether adding or removing the requirements would depend on the wording of the BIT. Then, it is up to the Arbitrator to interpret the wording. Logically, the narrower the definition of the FET is in the BIT less discretionary power does the arbitral tribunals enjoy, versus the vague and broad definition of the standard under the BITs.

³⁸ Supra Note 6, p. 127-128.

³⁹ Ibid.

1.3. Language of formulation of FET Standard in Various BITs

Generally speaking, if there is no legal bases the claim does not exist and therefore it is difficult to identify what shall be the applicable standard of interpretation. Different interpretations have been implied on the standard by different “governmental officials, arbitrators and scholars”.⁴⁰ The meaning of the standard treatment vary in different treaties, they do not always express the same meaning.⁴¹ While interpreting the standard the circumstances such as the intent of the parties, drafting history, the wording of the treaty shall be taken into consideration.⁴² Logically speaking, the more vague the wording of the treaty is the more discretion will the arbitral tribunals have to interpret it, and in this situation the more “the process resembles *ex aequo et bono*”, based on the pure application of “fairness and equity”.⁴³

Due to the fact that there is no uniform wording regarding the fair and equitable treatment provisions in the international treaties, this also causes the lack of application of uniformity standard. According to the observations made by *Kalicki and Medeiros* there are certain categories of expressing the state obligations. In some categories the treaties directly refer to the “minimum standard treatment” as embodied in international law.⁴⁴ Other category refers only to the international law, and third category only states the fair and equitable treatment as a separate notion without any reference to minimum standard treatment, international law or customary international law.⁴⁵ In addition to these categories some expressly state that the state

⁴⁰ “*Fair and Equitable Treatment Standard in International Investment Law*”, OECD Working Papers on International Investment, OECD Publishing, 2004, 2. Available at: https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid, 3.

⁴⁴ Jean Kalicki and Suzana Medeiros, “Fair, Equitable and Ambiguous: What is Fair and Equitable Treatment in International Investment Law?” ICSID Review 22, no. 1 (2007), 27

⁴⁵ Ibid.

has the obligation not to act in the “arbitrary or discriminatory fashion”, which is the part of the fair and equitable treatment standard.⁴⁶ As the topic of this paper is not to discuss the language of the fair and equitable treatment provisions in details, brief examples of these categories include noted by *Kalicki and Medeiros* the following:

1. Wording providing minimum standard treatment:

“NAFTA Chapter 11:

NAFTA (1994), Article 1105(1), entitled “Minimum Standard of Treatment,” provides that “[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”⁴⁷

2. Referencing International Law:

The Spain—Mexico BIT (1995),

“Article 4(1), establishes that “[e]ach Contracting Party will guarantee in its territory fair and equitable treatment, according to International Law, for the investments made by investors of the other Contracting Party”.⁴⁸

3. Referencing directly fair and equitable treatment:

Germany – Argentina BIT (1991)

“Art 2 (1) “Each contracting party undertakes to promote the investments of nationals or companies of the other party and treat those investments justly and fairly.

Article 2 (3) “Neither of the Contracting Parties shall impair the management, operation and use of investments of nationals and companies of the other Contracting Party by arbitrary or discriminatory measures”.⁴⁹

⁴⁶ Ibid.

⁴⁷ *ibid*, 28

⁴⁸ *Ibid*, 29

⁴⁹ *ibid*, 30. For the detailed description please refer to *Supra* note 34.

Due to the variety of the categories of the fair and equitable treatment standard, when the arbitral tribunal becomes the authority to determine the standard, it is even challenging how this standard would be applicable to the environmental disputes in the situations when, under the Bilateral investment treaties the protection of the environment is not expressly specified and has broader reference

II. Requirements under Legitimate Expectations

Under international investment practice it has been held that the following requirements give rise to have solid reliance on the Legitimate expectations:

- A) Contractual arrangements
- B) Informal Representations
- C) Legal framework at the time of the investment⁵⁰

However, these requirements to be relied upon they have to be accorded the following treatments: Transparency and Reasonableness. In the following sections each of the requirements will be briefly described.

2.1. Contractual commitments basis for Legitimate Expectations?

Following logically the reasoning of *pacta sunt servanda*, it is not surprising that when an investor is making a specific contract she/he has the expectation that the contract will be fulfilled and that it can expect all the requirements and promises, which are expressed in the contract by the host state will be followed respectfully. However, it is ambiguous what does the legitimate expectations arising out of the “contractual”, “quasi-contractual” relationship mean? Does there have to exist already well-negotiated contract or the “legitimate expectations” can be based on the “umbrella” clauses under the BITs and other International Investment Agreements? The practice regarding these question is not equivocal; some tribunals regard the breach of the contractual relationships to amount the breach of the FET standard⁵¹,

⁵⁰ Riccardo Fornasari, “The Protection of Legitimate Expectations under the Fair and Equitable Standard Posted on May 12, 2015 by k1072069 , LLM Candidate, King’s College London,” *KSLR Commercial and Financial Blog*, May 12, 2015, <https://blogs.kcl.ac.uk/kslrcommerciallawblog/2015/05/12/the-protection-of-legitimate-expectations-under-the-fair-and-equitable-standard/>.

⁵¹ Dolzer and Schreuer, *Principles of International Investment Law*, 140–41.

while the others deem it to be only the matter of normal contractual relationship. Lack of uniformity regarding which breach of commitments under the contract amounts the breach of legal expectations under FET and which not, gives the arbitral tribunals wide discretion, and creates the uncertainty for the investors themselves to make the assumptions.

The landmark case regarding this issue is the *SGS v. Phillipines*, was the pioneer case for leading the way of the wide interpretation applications to the investment disputes. In this case the claimant brought the decision of tribunal in *SGS v. Pakistan* to support its claim, however the Tribunal deemed it irrelevant in the case at hand, based on the fact that the wording of the “umbrella” clause was very restrictive in that case. Therefore the tribunal viewed the BIT applicable to that instant case, however it also noted that the dispute mechanism chosen in the investment contract would be applicable in that case If “contract vests exclusive jurisdiction over disputes arising under its terms to another tribunal (domestic court or a contractual arbitral tribunal) then this tribunal has the primary jurisdiction.”⁵² It also concluded that the denial for the payment of the “sums admittedly payable under an award or contract at least raises arguable issues” under article 4 of the BIT.⁵³

Legal expectations to be “abiding” under the FET umbrella clause within the BIT was also confirmed in the case of *Noble Ventures v. Romania*, where the arbitral tribunal ruled that:

“One can consider this to be a more general standard which finds its specific application in *Inter alia* the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures and the obligations to observe contractual obligations

⁵² Yannaca-Small, Katia. "Interpretation of the umbrella clause in investment agreements" in International Investment Law: Understanding Concepts and Tracking Innovations, 2008, p.121.

⁵³ *SGS v. Phillipines*, Decision on Jurisdiction, 29 January 2008, 8 ICSID Reports 518, in Supra note 98, p.141.

towards investors.⁵⁴

Even though the fact that tribunal specifically made emphasizes among other commitments to “observe” contractual obligations, this still does not give a wider application of the “legitimate Expectations” as in order the contractual commitments to exist there needs to be a contractual relationship first. In this sense, it is necessary to examine what gives the rise to the contractual relationship. For this purpose, it is necessary to examine the requirements which in international investment arbitration practice has been held to give rise to legitimate expectations, give solid ground to the investor to be relying on them, to be more precise does the requirements under legitimate expectations have to be cumulative or can they be relied upon separately.

2.2. Transparency

Being able to have certain legitimate expectations is very closely related to Transparency.⁵⁵ Generally it refers to the reliance of the investor on the legal framework of the host country. The representations made by the governments of the host state which were “explicitly or impliedly” made.⁵⁶ However, the reliance on the implied representation might be tricky and connected to certain complications for the investor, as the burden of proof logically becomes higher when one has to interpret what was the nature of certain representation made by the government official or other authorized agent. However, once again it has to be emphasized that the arbitral practice regarding this issue is not uniform. As noted by *Dolzer and Schreuer* while in the case of *SPP v. Egypt*, the tribunal ruled that the even though the government made the promises, issuing the law, and making the acts which lacked legal bases and made them “null and void” could be still invoked by the investor to be the bases of the legitimate

⁵⁴ *Noble Ventures v. Romania*, Award, 12 October 2005, reference made in Supra note 99. P.141.

⁵⁵ Dolzer and Schreuer, *Principles of International Investment Law*, 133.

⁵⁶ *Ibid.*, 134.

expectation,⁵⁷ the tribunal stated:

“It is possible that under Egyptian Law certain acts of Egyptian officials including event Presidential Decree No. 475, may be considered legally nonexistent or null and void or susceptible to invalidation. However, these acts were cloaked within the mantle of Government authority and communicated as such to foreign investors who relied on them in making their investments... 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.”⁵⁸

As it is clearly shown from the statement in the arbitral award, even if certain legislative decrees are in violation of the laws of the country, they can still be relied upon. Does this mean that the transparency requirement does not refer to the legitimate framework of the certain country, rather just refers to is as “what has been served on the platter”? In other words, does the investor have any obligation to investigate up to what extent commitments made to her/him were legitimate?

Based on the arbitral rulings there has been no reference made that the investor has the obligation to investigate the legality of the issued decree or the representation made. In the ICSID case *Turizm Tricaret Ve Sanayi A.S. v Pakistan* the Arbitral Tribunal makes reference to the transparency requirement which has been laid out in the *Tecmed case*. In its ruling there are general emphasis made to what extent is transparency applicable in the interests of the

⁵⁷ Ibid., 135.

⁵⁸ SPP v Egypt, Award and Dissenting Opinion, 20 May 1992, 3 ICSID Reports. Referred in Dolzer and Schreuer, Principles of International Investment Law, 135.

investor, however there is no specific mention that the transparency implies also the legality of the adopted regulations:

“The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relation with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.”⁵⁹

As it can be seen from the ruling of the arbitral tribunal, the transparency requirement has a plain implication which indicates to the direction, that the investor can rely on the regulatory framework as has been offered to her/him. The burden is in this case on the host state to bear the consequences which has been followed by the commitments made on the illegal, null, void regulatory frameworks. Moreover, It has been emphasized in the *SPP v Egypt that*:

“whether legal under Egyptian law or not, the acts in question were acts of Egyptian authorities... These acts, which now are alleged to have been in violation of the Egyptian municipal legal system, created expectations protected by established principles of international law. A determination that these acts are null and void under municipal law would not resolve the ultimate question of liability for damages suffered by the victim who relied on the acts”.⁶⁰

However, it would be also completely wrong assumption to state that the investor can blindly accept the existing offered picture and waive its obligation to carry out some due diligence. Even though the rulings of the arbitral tribunals do not emphasize specifically that the investor

⁵⁹ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, Award | Italaw, para. 179, accessed April 5, 2017, <http://www.italaw.com/cases/documents/133>. Reference made in Potestà, “Legitimate Expectations in Investment Treaty Law.”

⁶⁰ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, para. 82.

has duty to investigate the grounds on which the legitimate expectation take place, this duty is derogated from the principle of reasonableness.

2.3. Requirement of Reasonableness under Legitimate Expectations

As it has been mentioned by *Potesta* the number of tribunals have stressed that investors need to have “reasonable” expectations, to be afforded the protection under “fair and equitable treatment standard”.⁶¹ However due to the individualistic approach of all the other cases, it is very difficult to determine what would be a standard of the reasonable expectations. In this matter the approach is divided into two parts, one which states that the assessment in the cases where the licenses are being granted is easier, as it requires individual negotiations, such as in *Metalclad* and *Tecmed*,⁶² and the other where the investor relies on the regulatory framework of the host state.⁶³ However the reliance on the regulatory framework cannot have the same standard of approach in every country, as the factors which shape the socio-economic development needs to be taken into the consideration. As it has also been noted by *Potesta*, the requirement that the development state of the country has to be taken into account has also been emphasized in the “Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA)”. The agreement states that the fact that different countries have different levels of development has to be taken into consideration, and “states at different forms of development may not achieve the same standards at the same time.”⁶⁴ Such statement has

⁶¹ Potestà, “Legitimate Expectations in Investment Treaty Law,” 116. Author also refers to the following cited cases where the tribunals have ruled the requirement of reasonableness: *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award of 26 January 2006, available at <http://www.italaw.com/cases/571> ; *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008, para. 260 available at: <http://www.italaw.com/cases/329>; *Total S.A. v. Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 333, available at: <http://www.italaw.com/cases/1105>

⁶² Fornasari, “The Protection of Legitimate Expectations under the Fair and Equitable Standard Posted on May 12, 2015 by k1072069 , LLM Candidate, King’s College London.”

⁶³ Ibid.

⁶⁴ Investment Agreement for the COMESA Common Investment Area, 2007, Article 14(3) reference made in Potestà, “Legitimate Expectations in Investment Treaty Law,” 117.

two aspects, at one hand it gives additional warning to the investors to be cautious while trying to assess what would be counted as the reasonable expectation. However, on the other hand it seems as if the statement that legitimate expectations to some extent can be more or less depending on the level of development of the country, it gives low threshold to the developing country that specific expectation has been created, which can be relied upon by the investor. The necessity for taking into account the socio-economic background of the country while emphasizing the reliance of the reasonableness has also been acknowledged by the arbitral tribunals. As noted by *Potesta* the arbitral tribunal in *Duke Energy case* has stated that:

“The assessment of the reasonableness or legitimacy [of the investor’s expectations] must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State.”⁶⁵

The investors have to pay extreme attention to the policy priorities of the countries, when it comes to the fields such as the ecological protection, protection of the cultural heritage. As the time elapses more acknowledgement is given to the protection of the environment, this has been exactly the case in the *Glamis*, where the tribunal has made reference that the investor had the obligation to had taken into account the changing environment of the state policy, which was becoming more favorable towards the acknowledgement of what would be “environmental consequences on open-pit mining”.⁶⁶

The arbitral tribunals also consider the “experience” of the investor in relation to the host country, to what extent is it familiar with the standing and the legal framework of the country.

⁶⁵ *Duke Energy Electroquil Partners an Eleqtroquil SA v. Ecuador*, ICSID case No. ARB/04/19, Award of 12 August 2008l §340. Reference made in *Ibid*.

⁶⁶ *Glamis Gold case*, §767.

As it was emphasized in the case *Metalpar case* the fact that the investor was aware of the unstable framework of the business in Argentina did not give it the reason to had based its reasonableness.

The lack of the uniform assessment standard makes the arbitral tribunal “constitutional agents”⁶⁷ which have the wide discretion to determine what will be reasonable in the specific circumstance. On the other hand the investors take active role in the development of the legal framework of the countries by submitting the claims to the tribunals. However, the investors always have to be cautious while basing their reasonableness especially in the rapidly changing environment of a developing country, as the process of uncertainty can always be invoked by the country to avoid the commitments towards the investor.

2.4. Representations as basis of the Legitimate expectations

Representations made by the governmental officials, agents, representatives are one of the core elements of the legitimate expectations and are very often invoked under the ICSID arbitral tribunals as the basis of reasonable reliance for carrying out the investment in the host country. The representations are generally emphasizing additional commitments and promises on top of the ones made under the contracts and legal frameworks.⁶⁸ Generally, it can be said to be additional invitation for the investor to, and logically speaking it is reasonable for the investor to have reliance on this and have legitimate right to invoke it under the claim against the country.

However, under international arbitration practice once again there is no uniform agreement at what times can the investor fully rely on the violation of the representations. It has been stated that the representations made have to be equivocal, precise and directed to the investor

⁶⁷ Fornasari, “*The Protection of Legitimate Expectations under the Fair and Equitable Standard*”, Posted on May 12, 2015.”

⁶⁸ Potestà, “Legitimate Expectations in Investment Treaty Law,” 98.

specifically in a repetitive manner to have the high probability for it to be invoked. As It has been emphasized in the case of *Parkerings-Compagniet AS v. Republic of Lithuania*, the representation can be deemed to be 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.”⁶⁹

This practice seems to be confirmed in this ICSID case. However, it seems that it is not always the case, according to the ruling in *Glamis Gold* as will be demonstrated below. Even though the specific representations in the matter of meeting with the DOI and administration of the President had been accorded in this current case, it still was not deemed enough by the arbitral tribunal. As it stated that the reasonableness of expectations would not be invoked due to the fact that the investor had the opportunity to observe that the regulatory framework had been changing.

However, the situation was different in the *William Ralph Clayton et al. v. Government of Canada*⁷⁰. In this recent case, the company (Bilcon of Delaware Inc.) which was part of the Clayton group controlled by William Ralph Calyton was planning to invest in Nova Scotia, the project entailed the development of quarry and marine terminal. According to the Claimant the investors were encouraged by the Nova Scotia to invest in the mining projects.⁷¹ There was also continuous showing of the support from the governmental authorities who had the knowledge that the company was interested in carrying out the mining project. The investors had tried to apply for obtaining the environmental permit for carrying out the project, it has been denied several times. Finally, the project got submitted to the Joint Review Panel, which

⁶⁹ *Parkerings-Compagniet v. Republic of Lithuania*, ICSID Arbitration Case No. ARB/05/8, Award, September 11, 2007, §82, available at: <http://www.italaw.com/sites/default/files/case-documents/ita0619.pdf>

⁷⁰ *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015. See more at: <http://www.italaw.com/cases/1588#sthash.m9VBCuAH.dpuf>

⁷¹ *Ibid.* §134.

stated that the environmental impact of the quarry would be against the “community core values”. The project was against the domestic laws. According to the observation of *Dudas* the tribunal paid attention to the following facts: a) It had been officially recognized that the policy of Nova Scotia was to strongly encourage mining investments, b) the official representation by of the technical officials has been confirmed, c) there was precise promise from the Minister of the Natural Resources of Nova Scotia, and d) the Canadian authorities have given the assurances that there would be no conflict with the environmental concerns, and any conflict would be resolved in favor of the investor.⁷²

As the representation had been so precise, the tribunal had ruled that the authorities were also aware of the domestic legal framework of the host state, in this case they have still made a precise commitment through the representations. Therefore, this amounted to the breach of the fair and equitable treatment under the minimum standard treatment embodied in international customary law.

As it can be seen from this case, the reasonable assessment of the representation made by the authorities had not been taken carelessly by the investors, moreover the burden for the breach of the promised commitments which would be impossible to be met were supposed to be borne by the promising authorities. Compared to the *Glamis case*, this once more establishes non-uniform practice of the tribunals, which can be very confusing for the investors and creates unreliable ground for estimating the outcome in case the legitimate expectations were made under the representations.

⁷² Stefan Dudas, “*Bilcon of Delaware et. al v. Canada: A Story About Legitimate Expectations and Broken Promises*” Kluwer Arbitration Blog, Wolters Kluwer, 11 September 2015.

III. Application of the Legitimate Expectation in number of selected cases

Following case studies of selected landmark cases will emphasize how legitimate expectations under fair and equitable treatment effect the rulings of the tribunal, it will once more direct the attention that the practice of the tribunals is not uniform. Special attention will be paid to the ruling of *Glamis Gold*, as it has been described to be one of the cases which had strong indication how strongly the change of the environmental policy might affect the ruling of the tribunal, and to what extent shall the investor pay the attention to the changes.

3.1. Metalclad Corporation v. Mexico

In 1990 COTERIN was authorized by the federal government of Mexico, to operate hazardous waste landfill which later was obtained by US corporation Metalclad through its subsidiary in Mexico. COTERIN was given permit to construct hazardous waste landfill with the condition to adapt with the “specifications and technical requirements of the corresponding authorities”, moreover the permit did not grant “any ownership, did not authorize work, construction or the functioning of business or activities”⁷³.

On August 10, 1993 the COTERIN was granted the permit to operate landfill which was later purchased by Metalclad. Metalclad asserted that it would not have exercised its COTERIN purchase option but for the apparent approval and support of the project by federal and state officials.

After it started constructing the landfill within five month the Municipality of Guadalcazar (Municipality where the landfill was to be operated) restricted the corporation from constructing the landfill on the bases that it was unlawfully operating, as it had not obtained the permit from the municipality authorities themselves. Metalclad applied for the municipal

⁷³ *Metalclad v. Mexico*, ICSID case No. ARB(AF)/97/1Award, Aug. 30, 2000.

permit, and at the same time did not stop constructing the landfill. The municipality permit application was rejected.

Metalclad asserted that their legitimate expectations were based on the representation of the federal officials, who said that obtaining the federal permit was enough for operating landfill, however the officials denied that they ever implied that obtaining of the municipality permit was not necessary. Even though according to the independent audit carried by *Convenio*, the independent sub-agencies of SEMARNAP stated that the project complied with the requirements, and Metalclad even complied with the deficiencies. However, the application was still rejected and shortly after the denial of granting of the permit the Governor of the municipality issued ecological protection decree, on the area where the landfill was constructed, which made the landfill inoperative.

Metalclad brought the claim before ICSID tribunal, and alleged the violation of articles 1105 and 1110 under NAFTA.

In this present situation only ruling of arbitral Tribunal Regarding Article 1105 of the NAFTA is substantial. The tribunal has held that Mexico has acted so that it amounted to the violation of fair and equitable treatment.⁷⁴ The tribunal concluded that insurance of providing “transparent and predictable framework for business planning and investment” was the obligation of the state under the framework of fair and equitable treatment.⁷⁵ As NAFTA under article 102 (1) sets as the objective the promotion of investments and their successful implementation in the host states.⁷⁶ The tribunal has interpreted that “Prominent in the statement of principles and rules that introduces the Agreement is the reference to “transparency””.⁷⁷ Tribunal interpreted this statement as strict requirement of full disclosure of

⁷⁴ ICSID case No. ARB(AF)/97/1, *Metalclad v. Mexico*, Award, Aug. 30, 2000, §104

⁷⁵ *Supra* Note 34, p. 31

⁷⁶ North American Free Trade Agreement, Article 102.

⁷⁷ *Supra* note 75, §76.

the “relevant legal requirements” with the goal of initiating and implementing the investment successfully in the host state.⁷⁸ While application of this rule to the case at hand, the tribunal expressly noticed that it made “reference to the investor’s right to receive notice and opportunity to be heard at city council meeting called to deliberate about its permit.”⁷⁹

Even though in the *Metalclad case* the tribunal had ruled transparency to had been included in the framework of fair and equitable treatment, as also noted by *Kalicki and Medeiros* in the later stage in the 2001 decision the Supreme Court of British Columbia has “vacated” the decision in the transparency case, and had ruled that the tribunal failed not only to interpret the wording of Article 1105, rather it also “misstated” transparency rule to had been included in the applicable law. Therefore, decision was based on the wrong concept.”⁸⁰ However, even though the court has annulled the ruling in this part in international investment arbitration practice, the establishment of the transparency requirement has been often regarded and *Metalclad case* has set this as a precedent requirement.

Obligation of the host state regarding the transparency requirement to accord fair and equitable treatment to the investor has also been confirmed in another landmark case *Maffezini v Spain*⁸¹.

3.2. Emilio Augustin Maffezini v. The Kingdom of Spain

In 1989, Argentinian investor Mr. Emilio Maffezini though forming joint venture “EAMSA” brought the investment in Galicia, the Kingdom of Spain. The purpose of the investment was to build production facility for the chemical products. In the company Mr. Maffezini held 70%

⁷⁸ Ibid.

⁷⁹ Supra note 34, p. 31.

⁸⁰ Ibid.

⁸¹ *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award, Nov. 13, 2000

of shares, while another 30% was held by the public entity, SODIGA. The prime function of SODIGA was to provide the investor with the advice in financing and other issues.

Three years later, as the company was experiencing financial difficulties due to the incurred costs which the investor had not estimated. Therefore, in the ICSID claim under Spain Argentinian BIT Mr. Maffezini, claimed that SODIGA has “misinformed” about the costs of the project, which were significantly higher than calculated. Moreover, in the second half of 1991 30 million Spanish pesetas had been transferred to the account of the public entity, which was ordered by its representative. Mr. Maffezini also claimed the reimbursement of unauthorized claim.⁸²

The tribunal rejected all the claims brought by Mr. Maffezini except the unauthorized transfer of the loan and stated that it was not in accordance to the commitment made by the Spain under Argentina-Spain BIT Art. 4(1), which ensures fair and equitable treatment of the investor, however ruled that “lack of transparency” in the carried activities breached the legitimate expectations of the investor.⁸³

3.3. Pac Rim Cayman LLC v. Republic of El Salvador

One of the latest significant cases regarding the environmental protection issues perhaps can be freely said to be *Pac Rim v. Republic of El Salvador*, which has had essential impact for the interest of the environmental protection activists, the decision of claim which had massive protest from the social activists and environmentalists has been “celebrated by civil society groups from El Salvador to Canada”.⁸⁴ As Douglas Melendez Ruiz, attorney general of El

⁸² Ibid, §4-22.

⁸³ Ibid, §83.

⁸⁴ The Guardian, “World Bank tribunal dismisses mining firm's \$250m claim against El Salvador”, <https://www.theguardian.com/global-development/2016/oct/14/el-salvador-world-bank-tribunal-dismisses-oceanagold-mining-firm-250m-claim>

Salvador has mentioned in the interview in guardian “For the people of Cabanas who have been fighting to defend their environment, it is mission accomplished,” In the country where third of the population lives under the poverty line, the claim worth of almost 300 million USD, which almost exceeds the international aid the country is receiving almost three times would have had deadly effect.⁸⁵

In the interview published by the guardian Bernardo Beloso, President for association for development of El Salvador said: “This is a law suit that should never have been allowed. The millions of dollars that El Salvador has spent in legal costs could have been used to strengthen badly needed social programs in our country.”⁸⁶

In the present case the claimant Pac Rim Cayman LLC, Canadian company which was a predecessor company of Pac Rim, has discovered the site for gold mining in 2002. At the time the government run by President Francisco Flores has granted the permit for the exploration for the mining to the company.

In 2004 the company after valid exploration permit, applied for the extraction permission in the site of El Dorado, in order to establish underground gold mine⁸⁷. This site was very close to the one of the main rivers of El Salvador Rio Rempa. As the company planned to use the “water-insentive cyanide ore processing” this put the river under very serious risk of incurring the harm.

⁸⁵ Cuervo-Lorens Ralph, “*No More Mining - Reflections from Pacific Rim Cayman v El Salvador (ICSID)*”, Blaney McMurty LLP, 16 February 2017, <http://www.blaney.com/articles/no-more-mining-reflections-from-pacific-rim-cayman-v-el-salvador-icsid>

⁸⁶ Supra note, 85.

⁸⁷ Julia Brown G., “International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?”, 3 W. J. Legal Stud. i (2013), p.14. In Amal Sethi “An exaggerated account of ICSID?: A reply to Professor Robin Broa” University of Pennsylvania Journal of International Law, August 2016 <http://pennjil.com/an-exaggerated-account-of-icsid-a-reply-to-professor-robin-broad/>

However, when the new President was elected Mauricio Funes, the government had rejected the granting of the extraction permit.⁸⁸ The company brought claim to the ICSID arbitration claiming that solid ground of promise to grant the permit for the mining was created by El Salvador by previous president, it had been assured of the governmental support through the procedure.⁸⁹

During carrying out mining exploration process there were certain requirements set by the El Salvadorian Mining law, which needed to be met by the company. El Salvador in the response claimed that the company did not meet the requirements set by the protocol, which required acquisition of the title over the possession of the land which would be necessary for implementing mining project, moreover the company dialed to obtain certain environmental authorization and never submitted final environmental assessment study about feasibility.⁹⁰ Instead company used “political pressure and lobbying”⁹¹, to obtain such permit. Indeed, the project to liberalize the mining regulatory framework had been initiated in the parliament of El Salvador, which had been declined.

Based on this Pacific Rim Cayman claimed that the state had breached the fair and equitable treatment commitment under CAFTA Art. 10.5(1)(a) which refers to minimum standard treatment and does not require any more treatment beyond the one required by the standard, Article states: “Fair and Equitable treatment” includes the obligation not to deny justice in criminal civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world”. As the tribunal decided that it did not have the Jurisdiction to rule under CAFTA as Canada is not party to CAFTA, and as

⁸⁸ Supra Note 86.

⁸⁹ Ibid.

⁹⁰ Amal Sethi, “*An exaggerated account of ICSID?: A reply to professor Robin Bora*”, University of Pennsylvania Journal of International Law, August 2016, <http://pennjil.com/an-exaggerated-account-of-icsid-a-reply-to-professor-robin-broad/>

⁹¹ *ibid.*

the parties had not agreed on the application of specific law, it decided to apply El Salvadorian Law⁹². Therefore under Salvadorian law the El Salvadorian Mining Law would be applicable. Article 30 of the mining law states that: “The exploitation concession for quarries, grants the title Holder, within the limits of the area and undefined in depth, the exclusive authority to extract, process, transport and sort mineral substances for which have been permitted.”⁹³

As the granting of the permit is depended on the environmental impact assessment according to the mining law the state has the discretion to decide over granting or revocation of the permit for mining.

The investor interpreted the language of the mining law that it would not require the permission of the landowners as it was not touching the surface of the land.⁹⁴ However, the tribunal sided with the government of El Salvador and denied such interpretation, rather it ruled that the permission from the land-owners was required, moreover the state did not have the obligation to grant the mining permission as the investor failed to meet with the regulatory requirements which were with the purpose of the environmental protection.⁹⁵ Therefore the state had not breached fair and equitable treatment.

3.4. Glamis Gold Ltd. v. Unites States of America

“*California’s sacred sites are more valuable than gold*” – California Governor Gray Davis. Sentence made of 8 words describes the outcome of 362-page award. *Glamis Gold Ltd. v. United States of America*⁹⁶ is a case which does not only show that international investment

⁹² *Pac Rum Cayman LLC v The Republic of El Salvador*, ICDIF case No. ARB/09/12, Award of 14 October 2016, p. 26. http://www.italaw.com/sites/default/files/case-documents/italaw7640_0.pdf

⁹³ *ibid.*

⁹⁴ *Supra* Note 91.

⁹⁵ *Ibid.*

⁹⁶ *Glamis Gold, Ltd. v United States of America*, Award, NAFTA, Chapter 11 Arbitral Tribunal, June 2009, available at: <https://www.state.gov/documents/organization/125798.pdf>

arbitral tribunals only become “forum” for environmental protection issues,⁹⁷ rather they go beyond this and become place for consideration of the protection of cultural heritage.

In 2009 an arbitral tribunal dismissed a case, ruling that no violation of “fair and equitable treatment” under Article 1105 of NAFTA, neither under Article 1110 regarding the expropriation has occurred.

Glamis case award was rendered under chapter 11 of NAFTA, which was a dispute over “Imperial Project”, a gold mining investment carried out by Canadian corporation Glamis Gold Ltd.⁹⁸ Canadian Corporation had subsidiary in Nevada. The corporation had been operating in the gold and silver mining since 1980s.⁹⁹ The corporation acquired three rights for mining under 1872 General Mining act. Glamis Gold had been aiming to obtain the rights for the Imperial Project under this act,¹⁰⁰ however in 1976, the act was amended, which supersedes the original one by Federal Land Policy and Management Act (FLPMA). As noted by *Jahn*, the act was amended with the purpose of avoiding “environmental harm”. According to the policy of the act the mining project shall not cause “undue impairment”¹⁰¹. As the site for the imperial project was Indian Pass in Southeast California, which had been given the status of “limited use” as noted by *Ryan* was subject of regulations to protect “the scenic, scientific, and environmental values of the public lands ... against undue impairment, and to assure against the pollution of the streams and waters.”¹⁰²

In 1994 the corporation filed for the permission of the Imperial project at the Buareou of Lanf Management (BLM), which at a later stage recommended to grant the mining permission.

⁹⁷ Jacur, Francesca Romanin, Angelica Bonfanti, and Francesco Seatzu, eds. *Natural Resources Grabbing: An International Law Perspective*. BRILL, 2015, 247.

⁹⁸ Jordan Kahn C., “*Striking NAFTA Gold* ”*Glamis Advances Investor-State Arbitration*”, Fordham International Law Journal, Vol. 33, Issue 1, Berkley Electronic Press, 2009, p. 102, see also supra Note 97, §32,

⁹⁹ Margaret Clare Ryan, “*Glamis Gold,Ltd. V The United States And The Fair And Equitable Treatment Standard*”, 56 McGill L. J. 919 2010-2011, Heinonline P. 924.

¹⁰⁰ Ibid.

¹⁰¹ §1781 (f), U.S.C 43 (2006), in Supra note 99, p. 103.

¹⁰² Supra note, 93 §48.

Based on this Glamis carried out more explorations and continued obtaining of necessary environmental permits, which amounted nearly USD 18.6 million.¹⁰³ According to the National Environmental Policy act of 1969 (NEPA) and California Environment Quality act of 1970 (CEQA) while carrying out the environmental impacts it is required to hold public hearings based on National Historical Preservation Act (NHPA).¹⁰⁴ During the public hearings the site as noted by *Jahn* was described as the “Jerusalem or mecca” to the Quechan people’s culture, as the project would destroy the “Trail of Dreams”.¹⁰⁵

In 2001 based on *Leshy Opinion*¹⁰⁶ the permit was denied. In March 2001 Glamis sued the federal government before the district court, however under the at the time President George W. Bush administration was persuaded to withdraw the claim. The denied permit was rescinded by the DOI Secretary Gale Norton. However, the rescission was described to lack “transparency”. As Noted by *Kahn* the most significant actions took place in December 2000, when State Mining and Geology Board issued emergency regulations which deemed it urgent to backfill all the mines. This emergency regulations were invoked during the high time when the federal permits were ready to be issued by “Golden State”.¹⁰⁷ These regulations became into force in 2003. Along with these regulations Bill 22 was passed by the state amending SMARA requiring backfilling of all the “mining projects located within one mile of any Native Ame4rican sacred site”.¹⁰⁸

In response to the state actions Glamis brought action in front of ICSID, claiming that both Federal government and California have acted in a manner which breached its legitimate

¹⁰³ Ibid, §98.

¹⁰⁴ See Glamis award §76-76, also Kahn, Supra Note 99, p. 104.

¹⁰⁵ Award, §111 in Supra Note 99, p. 105.

¹⁰⁶ As noted by Jahn in Supra Note 99, p. 105. John Leshy, Solicitor of DOI who was addressed for advice by the DOI for the pre-evaluation before granting the permit expressed the opinion to deny the permit due to the harmful impacts on the culture.

¹⁰⁷ Supra note 99, p. 103.

¹⁰⁸ Ibid.

expectations, that was based on the practice of granting previous mining permissions, in addition to this the claimant argued that arbitrary and discriminatory conduct had taken place from the host country and state.

The *Glamis case* is one of the landmark cases, because it is almost one of those few ones which has acknowledged that “legal expectations” are part of fair and equitable treatment standard and moreover it can be relied upon under NAFTA article 1105. However, it shall be emphasized that the ruling itself is very interesting as it does not specifically state this standard, rather is somehow controversial. As it also gives the definition of legitimate expectations in a different manner. The approach is interesting in a sense that it takes a different approach to the definition of legitimate expectation, it makes it more clear.

In its reasoning the tribunal first states that the decades long practice regarding the mining permits would have given reason to the investor to “develop expectations” that the discovery of Native American sacred places, might have come as a burden for granting of the mining permission, however it would not be expected that it would be to the extent to have caused the denial of the project.¹⁰⁹

Legitimate expectations are very closely connected to the customary international law, as generally if the investor wants to invest in a certain country it will firstly look at the environment, legal order, political background, rule of law in the host state. However, it makes it questionable to what extent can such conditions be declared to create legitimate expectations, when counter-argument issued to the customary law in the form of well argued legal opinion, can easily shift away the expectations which existed at the time of filing the application for the permission. This problem was brought in light by the arbitral tribunal, which questioned whether a well-reasoned legal opinion violates customary international law, because the

¹⁰⁹ Supra note, 97, § 758.

direction the legal opinion is taking, is “arguably dramatic”, as it changes all the expectations the investor relied upon.¹¹⁰ One of the core elements under fair and equitable treatment to be breached it shall be established that certain action was carried out in discriminatory and arbitrary way towards investor. Regarding M-Opinion the tribunal made emphasizes exactly on the fact that the opinion was not directed to be “arbitrary”, it was reasonable, and there were no elements of “blatant unfairness or evident discrimination”.¹¹¹

Based on this analyses, it shall be concluded that element of reasonableness entails careful observation of the shift of the country’s policy. Moreover, the country cannot be bound with the legal expectations due to the fact that legal framework had been the same for several decades, as the change of the policies is natural part of the development of the country and it can be expected at any time. Furthermore, when the change is not unforeseeable, and investor had the opportunity to observe it, this gives less chance to her/him to base its claims on the legitimate expectations, even if it was given the promise under governmental representations precisely. What is more it can be also disputed that even if the commitments are made under the contractual arrangement, it might not be abiding on the country while the change in the policy takes place. However such change has to include the opinion of the investor and invite it in the discussion for finding amicable solution.

3.5. “Quasi-Contractual” Relationship Basis as Basis of Legitimate Expectations

As it has been discussed above, the position regarding the issue of the fair and equitable and minimum treatment standard according to different arbitral tribunal rulings is not uniform. Some of them give the treatment a separate standing, while the others do not give a distinct

¹¹⁰ Ibid, § 761.

¹¹¹ Dumberry Patrick, “The Protection of Investors’ Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105”, *Journal of International Arbitration*, Kluwer Law International, 2014, Volume 31, Issue 1, p 54.

emphasis to it. *Glamis case* is significant for the international investment arbitration practice, because it adds a new element to the requirements of minimum standard treatment. Tribunal indicates on the requirement of “quasi-contractual” relationship in order the legal expectation to be relied upon in the permitting licenses, so that the claims are admissible under NAFTA article 1105.¹¹² The tribunal in *Glamis* stated:

“Assuming there was no quasi-contractual relationship, the Tribunal finds that a claimant cannot have a legitimate expectation that the host country will not pass legislation that will affect it.”¹¹³

Such a clear inclusion of the “quasi-contractual” element under the NAFTA, Article 1105 opens doors to the new direction to the future arbitral tribunals. As noted by *Kahn* the claimants will be in good standing to argue the claims based on legal expectations if they had obtained at least one governmental permit.¹¹⁴

It is reasonable while assessment of the host country with the purpose of making an investment to examine whether it will be a reliable place or not, what is the legal standing of the country, to what extent is rule of law protected, what is the established practice of treating investors. As a matter of fact it can be assumed that the established practice can be entertained to be the source of reliability. However, the threshold to prove that there were certain legal expectations are high according to the tribunal in the *Glamis case*. Which has established that in order the legal expectations to have legitimate basis there needs to be the element of “quasi-contractual” relationship.

Generally speaking the concept of “legitimate expectations” entails the concept that the states have obligation under their commitments made to the investors that they cannot derogate

¹¹² Supra note 97, § 24, 766-767, 812-813 in supra note 99, Kahn p. 152.

¹¹³ Ibid. §813 in Supra note 99.

¹¹⁴ Ibid.

from.¹¹⁵ As also emphasized by *Sauvant* and *Ünivar*, the practices of different arbitral tribunals under different IIAs and BITs have established the following bases that the investors can rely on to have legitimate expectations:

- a) Assurances made by the states to the investors in writing, which “go beyond mere contractual relationships;
- b) Assurances made by the government representatives directly to the specific investments.
- c) “Unilateral representations” to the investors, e.g. the promise of not changing the “regulatory framework” from the one which was existent during the contract formation.¹¹⁶

However, this definition might create vagueness in relation to what shall be determined as “quasi-contractual” relationship. Arbitral tribunal in the *Glamis case* evaluated the quasi-contractual relationship in the following manner:

“Investment-backed expectation requires, as a threshold circumstance, at least a quasi-contractual relationship between the State and the investor, whereby the State has purposely and specifically induced the investment.¹¹⁷

Although the M-Opinion and ROD came to a different result than a reasonable investor might expect under the mining regulatory regime as it stood, the federal government did not make specific commitments to induce Claimant to persevere with its mining claims. It did not guarantee Claimant approval of its claims, nor did it offer Claimant

¹¹⁵ Sauvant, Karl P., and Ünivar Güneş “*Can Host Countries Have Legitimate Expectations?*” Columbia FDI Perspectives, Perspectives on topical foreign direct investment issues No. 183 September 26, 2016, Columbia Centre for Sustainable Investment.

¹¹⁶ Schreuer Christoph and Kriebaum Ursula, “*At what time must legitimate expectations exist?*,” Jacques Werner and Arif Hyder Ali, eds., *Law Beyond Conventional Thought*, London: Cameron May, 2009, pp. 265-276, in *Supra* note 116.

¹¹⁷ *Supra* Note 97, §766-767.

any benefits to pursuing such claims beyond the customary chance to exploit federal land for possible profit.”¹¹⁸

According to the tribunal there needs to be assurances which are very specific given to the investor from the state in order the investor to be entitled to have legitimate expectations. Moreover, the tribunal sets even higher threshold standard due to the fact that it requires the promises made by the representation to be “definitive, unambiguous and repeated”.¹¹⁹ This standard might become a burden both to the country as well as to the investor. As the purpose of the NAFTA and other international investment agreements is to promote flexibility and freedom of investments, instead in order the investor to have the proof that it meet legal expectations threshold will require lengthy process of negotiations and meetings with the representatives of the state’s government. On the other hand this can be seen as a protective tool for the interests of both parties. As the development of the state is continually connected to the change of the policies and relatively the legislation of the country, which cannot be challenged by the investor due to the sovereignty of the country, in this case there will be no fear from the state’s side due to the changing of the legislation it will be sued under international investment arbitration tribunal. Nor will the investor be in an uncertain situation when the definition of “legal expectations” is very abstract and would raise the burden of proof standard for the claimant on a very high level. Tribunal in the *Glamis case*, puts the burden of proof on the claimant, that it was supposed to be aware of the changing situation as: “Claimant was operating in a climate that was becoming more and more sensitive to the environmental consequences of open-pit mining”.¹²⁰

In its ruling the tribunal makes reference to the ruling of the *Methanex* and leaves out the ruling

¹¹⁸Ibid.

¹¹⁹ Ibid, §802, in Supra note 112, p. 56

¹²⁰ Ibid, §767.

of *Metalclad*. However, it shall be noticed that between these two cases the circumstances were different in a political standing manner. As noted by *Sauvant* and *Üniivar*, *Methanex* distinguished the situation in *Metalclad case* and stated that the company had obtained federal permit “prior to the repudiation by political subdivisions that violated Article 1105.”¹²¹ *Glamis case* referred to the *Methanex case*, in the part where it was stated that raising the standards of protection in the “highly regulated Industry will not violate NAFTA”.¹²² However the ruling further develops the standard of expectations and narrows down it to baring very specific characteristics and embodies the “specific requirements” to the NAFTA requirement.¹²³

However, the practice regarding the reliance on the repetitiveness of the representations and the reassurances given by the state is not being set as the uniform standard in international investment arbitration practice. Comparing the *Metalclad case* and *Glamis case*, the conditions of the cases are almost similar, as both involve the assurances made by the federal government and the granting of the permit for their activities denied by the municipality and the state. However, in *Metalclad* where the case was brought regarding the expropriation of the investment, the meetings with the government representatives, which had even denied that they had given any specific and equivocal promises, was deemed to be enough argument to had caused legal representation. In this regard tribunal ruled that:

“In addition, this is not the type of specific inducement necessary to create the duty that is a prerequisite to any breach of Article 1105 by repudiation of investor expectations. The asserted assurances made to Claimant are not equivalent to the assurances in *Metalclad*, which were found to be “definitive, unambiguous and repeated” and thus

¹²¹ *Methanex corp. v. United Mexican States*, Award, 40 ILM 36, §74-101 in Supra note 116, p. 152.

¹²² Ibid.

¹²³ Ibid.

were sufficient to create threshold State obligation.”¹²⁴

However, question raises why did not tribunal take into account the oral specific assurances which were received during their negotiations from the DOI to the Glamis Gold Ltd. In the *Metalclad case* even though the federal government had given the assurances it had not “double-checked” with the government of its municipality, which had the discretion of issuing the permit for operating the landfill. Upon the close look the situation in the *Glamis case* does not fall far behind. As it also was the matter of legal order by the state of California the federal state had given the assurances to the investor regarding obtaining the permit for “Imperial Project”, however in this case the tribunal ruled that California did not have any obligation to comply with the expected commitments which the investor had. Tribunal stated:

“The inquiry as to whether the California’s requirement of mandatory backfilling repudiates Claimant’s Reasonable investment-backed expectations turns again on the threshold inquiry of whether or not there were specific assurances from the State of California that it would not enact such a regulation.”

Internationally while making different assurances, the “reasonableness” of the assurances might become the subject of criticism from other parties, weather specific assurances made are in accordance of the established practice of the host state or not, weather the state is making a mistake to deny certain permit or actually harms the interest of the state by granting such permit. At once glance, this might seem to be under the discretion of the authority settling the dispute to decide. While this might be true in case of the case courts, this is not a case in regards of the arbitral tribunals. In *Glamis case* the tribunal emphasized clearly that the assessment of the reasonableness of the permit does not fall under the authority of the arbitral tribunal, rather:

¹²⁴ Supra note 97, § 802.

“Is solely whether California, or the federal government, made specific assurances to Claimant that such that a requirement would not be instituted in order to induce Claimant’s investment in the imperial Project... Respondent has presented a prima facie showing that no such specific assurances were given to Claimant and Claimant has failed to rebut this showing. As no duty of the State was thus created ensuring maintenance of Claimant’s Reasonable expectations, the Tribunal also need not address what leved of Repudiation of this duty would be required to find such an act a violation of State under Article 1105.”¹²⁵

Even though the tribunal has ruled that there was no need to assess the reasonableness of the granting/revocation of the permit, the confusion is caused from the fact that in *Glamis*, the mining permit had been granted in the first instance, then revoked. During the revocation period the private meetings have been held between the Glamis Gold Ltd. and DOI under the administration of President Bush. However, as mentioned above, the private meeting has been subject of the disapproval as it had lacked the involvement of the interested groups in it.¹²⁶ Based on this, transparency could also be argued, to be element of requirement within the elements of legal representations given by the states to the investor.

3.6. The Legitimate Expectations of the Host States to the Investors

It has been established in this thesis, as well in the international arbitration practice that the Investors are generally the ones which have the right to have legitimate expectations towards the host states to meet the commitments they have made assurances about. However, it is rare practice when the host state is the one which has invoked right under the obligations taken out

¹²⁵ Ibid, §810, in supra note 99.

¹²⁶ Supra note 99, p. 255.

by the investors to meet the commitments that they have made under Investment agreements or pre-contractual representations.

In order for the state to be possible to bring the case against the investor in international investment arbitral tribunal under the violation of the legitimate expectations there need to be established pre-requisites which the state has to meet.

First it shall be determined whether the state has the right to bring Claim against investor under the arbitral tribunal. Up to date in the international arbitral practice under International Investment Arbitration agreements the countries do not have the power to initiate the arbitration. As the IIAs and BITs are deemed to be the “invitation”, “offer” for the investors, the consent of the investor is required to form the contractual relationships between the host-state and the investor. Moreover, even after the international investment agreement is formed the dispute resolution clause is the “offer” of the dispute resolutions mechanism for the investor, which has to be consented by bringing the action. As there exist no specific right of the host state to initiate the arbitration, merely due to the fact that there exists no consent from the investor’s side, this causes the situation when mostly the claims regarding the violation of the legitimate expectations can be only embodied within the counterclaims made by the host states.¹²⁷

Secondly, in order the host state to be able to raise the claims according to *Sauvant and Unuvar* the expectations of the host states has to be based on the following:

- “a) There needs to be the evidence of the commitments made by the investors to the host countries in writing.¹²⁸
- b) The contributions and impacts which have been assured by the corporate representatives of the company, which their investment will have on the host country.

¹²⁷ *Yukos Universal Limited v. Russia*, PCA Case No. AA 227, Final Award, July 18, 2014, In Supra note 116.

¹²⁸ *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award July 24, 2008, §§ 381-382 in Supra note 116.

c) Through the established policies of the corporations such as e.g. the Corporate Social Responsibility policies, “support for such instruments as the United Nations (UN) Guiding Principles on Business and Human Rights, the UN Global Compact or the OECD Guidelines for Multinational Enterprises.”¹²⁹

If these requirements exist then the host state will be entitled to bring the claim against the investor and claim the breach of legitimate expectations. Arbitral tribunal In the case of *Sempra energy international v. The Argentine Republic* has ruled that upon the claim by the Argentine Republic that the investor has violated the expectations of the host state that “the investor would bear any losses resulting from its activity, work diligently”¹³⁰, this would fall under the jurisdiction of the tribunal, however the respondent is only able to raise the counterclaim. In the international arbitral practice such actions are not frequent, however tribunals are not restricted to enforce their discretion under Article 46 of the ICSID Convention.¹³¹

In this regard It can be concluded that due to the nature of the investment treaties, the countries cannot bring the claims against the investors under international arbitral tribunals, which makes this approach more investor friendly and to some extent restricts the freedom of the country to be heard. However, if the investor brings the claim to the arbitration, in this case the host country has all the right to bring the counterclaim regarding the violation of legitimate expectations by the investor.

¹²⁹ BASF, “*Our responsibility to respect human rights,*” available at <https://www.basf.com/en/company/sustainability/employees-and-society/human-rights.html>, In supra note 116.

¹³⁰ *Sempra Energy International v. The Argentine Republic*, Award, ICSID Case No. ARB/02/16 - See more at: <http://www.italaw.com/cases/1002#sthash.U3IIn04g.dpuf> in supra note 116.

¹³¹ Ibid, §289.

Conclusion

This thesis examined under what circumstances can the legitimate expectations be invoked by the investors while submitting their claims under international investment arbitral tribunals. It is an established practice that, there is no uniform standard which can be applied to examine whether the breach of legitimate expectations has taken place. This on the one hand creates uncertainty for the investors who carry out their investment with the belief that the representations made by the certain governments will be accorded as the protective tool, however flexibility also guarantees the protection of the interest of the host state, as they will not be bound easily by every other statements made by them.

To claim protection under the legitimate expectations, the claimants need to meet quite high threshold, in case if there has been made no specific commitments in writing. However, in this point it is logical to ask why would contractual commitments have to fall under the legitimate expectation requirement as it can be easily asserted that obligations will need to be met under the concept of *pacta sunt servanda*. However, the quasi-contractual relationships which also include the requirement the history of the negotiations to be taken into account might give more emphasis than expected only under the commitments made in writing.

In order the legitimate expectations to be invoked by the party, it is crucial that the breach of fair and equitable treatment to be established, as the minimum standard treatment itself does not entail the obligation of the host state to give emphasis to the legitimate expectations of the investor.

Legitimate expectations have higher chance to offer the investor the protection, when they arose under transparent environment. Transparency does not require obligation from the part of investor to inquire about the legitimacy of the regulations which were invoked as the basis for legitimate expectations, however this obligation is entangled with the requirement of

reasonableness which the investor has to show. It has to take into account the socio-economic and legal framework factors while making an investment in a certain country.

To sum up the analyses made in the thesis, contractual commitments offer the investors higher level of protection, and the element such as representation by the countries can be invoked as an additional protection for strengthening the position of the investors.

Bibliography

Cases:

1. *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1 - See more at: <http://www.italaw.com/cases/43#sthash.5pw1hImD.dpuf>
2. *Azurix Corp. v The Argentine Republic, Award*, ICSID CASE No. ARB/01/12
3. *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, 27 August 2009 - <http://www.italaw.com/cases/131#sthash.NjWZyeI4.dpuf>
4. *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award July 24, 2008.
5. *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008, available at: <http://www.italaw.com/cases/329>;
6. *Duke Energy Electroquil Partners an Eleqtroquil SA v. Ecuador*, ICSID case No. ARB/04/19, Award of 12 August 2008.
7. *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL/NAFTA, Award, June 8, 2009 <http://www.italaw.com/cases/documents/505#sthash.iGvzErW6.dpuf>
8. *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award of 26 January 2006, available at <http://www.italaw.com/cases/571> ; July 14, 2006, <http://www.italaw.com/documents/AzurixAwardJuly2006.pdf>
9. *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award, Nov. 13, 2000
10. *Merrill and Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Counter Memorial.
11. *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, <http://www.italaw.com/cases/671#sthash.3p9NbMp4.dpuf>

12. *Methanex corp. v. United Mexican States*, Award, 40 ILM 36
<http://www.italaw.com/cases/683>
13. *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2
available, at <http://www.italaw.com/cases/documents/716#sthash.Qb8d9hft.dpuf>
14. *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11 , Award, 12 October
2005, <http://www.italaw.com/cases/documents/748#sthash.T4zdg60e.dpuf>
15. *Pac Rum Cayman LLC v The Republic of El Salvador*, ICDIF case No. ARB/09/12,
Award of 14 October 2016, http://www.italaw.com/sites/default/files/case-documents/italaw7640_0.pdf
16. *Parkerings-Compagniet v. Republic of Lithuania*, ICSID Arbitration Case No.
ARB/05/8, Award, September 11, 2007, available at:
<http://www.italaw.com/sites/default/files/case-documents/ita0619.pdf>
17. *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL/NAFTA, Available at
<http://www.italaw.com/cases/969>
18. *Sempra Energy International v. The Argentine Republic*, Award, ICSID Case No.
ARB/02/16 - See more at: <http://www.italaw.com/cases/1002#sthash.U3lIn04g.dpuf>
19. *SGS v. Phillipines*, Decision on Jurisdiction, 29 January 2008, 8 ICSID Reports.
20. *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID
Case No. ARB/84/3/
21. *Total S.A. v. Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27
December 2010, available at: <http://www.italaw.com/cases/1105>
22. *Waste Management, Inc. v. United Mexican States* ("Number 2"), ICSID Case No.
ARB(AF)/00/3, Award, 30 April, 2004 See more at:
<http://www.italaw.com/cases/1158#sthash.XXFFVyOZ.dpuf>

23. *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015. See more at: <http://www.italaw.com/cases/1588#sthash.m9VBCuAH.dpuf>
24. *Yukos Universal Limited v. Russia*, PCA Case No. AA 227, Final Award, July 18, 2014.

Academic Articles and Books:

1. Brown CH., “*Commentaries on selected Model Investment Treaties*”, Oxford University Press, 2013, p. 520.
2. Dumberry Patrick, “*The Protection of Investors’ Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105*”, Journal of International Arbitration, Kluwer Law International, 2014, Volume 31, Issue 1.
3. Jacur, Francesca Romanin, Angelica Bonfanti, and Francesco Seatzu, eds. *Natural Resources Grabbing: An International Law Perspective*. BRILL, 2015
4. Jean Kalicki and Suzana Medeiros, “Fair, Equitable and Ambiguous: What is Fair and Equitable Treatment in International Investment Law?” ICSID Review 22, no. 1 (2007),
5. Jordan Kahn C., “*Striking NAFTA Gold ”Glamis Advances Investor-State Arbitration*”, Fordham International Law Journal, Vol. 33, Issue 1, Berkley Electronic Press, 2009.
6. Julia Brown G., “International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?”, 3 W. J. Legal Stud. i (2013),.
7. Mann F.A., “British Treaties for the Promotion and Protection of Investments”, 52 British Yearbook of International Law.

8. Margaret Clare Ryan, “Glamis Gold, Ltd. v. The United States and the Fair and Equitable Treatment Standard”, 56 McGill L. J. 919 2010-2011, Heinonline P. 924.
9. Michele Potestà, “*Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*,” ICSID Review - Foreign Investment Law Journal 28, no. 1 (May 1, 2013): 88, doi:10.1093/icsidreview/sis034.
10. Pauwelyn Joost, Magraw Kendra, Tejera Victorino, Coulombe Louis-Philippe, “*Standards under the North American Free Trade Agreement: Fair and Equitable/Minimum Standard of Treatment, Expropriation of Rights and Contracts, and the Standard of Compensation and the Determination of Damages for Violations of the Fair and Equitable/Minimum Standard of Treatment*”, The Graduate Institute Geneva, 10 June, 2011, available at: http://graduateinstitute.ch/files/live/sites/iheid/files/sites/ctei/shared/CTEI/Law%20C1inic/Memoranda%202011/Standards_NAFTA.pdf
11. Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, Second edition (Oxford, United Kingdom: Oxford University Press, 2012).
12. Sauvart, Karl P., and Ünüvar Güneş “*Can Host Countries Have Legitimate Expectations?*” Columbia FDI Perspectives, Perspectives on topical foreign direct investment issues No. 183 September 26, 2016, Columbia Centre for Sustainable Investment.
13. Schreuer Christoph and Kriebaum Ursula, “*At what time must legitimate expectations exist?*”, Jacques Werner and Arif Hyder Ali, eds., *Law Beyond Conventional Thought*, London: Cameron May, 2009.
14. Stefan Dudas, “*Bilcon of Delaware et. al v. Canada: A Story About Legitimate Expectations and Broken Promises*” Kluwer Arbitration Blog, Wolters Kluwer, 11 September 2015.

15. United Nations Conference on Trade and development, “Fair and Equitable Treatment, UNCAD, Series on Issues in International Investment Agreements II”, United Nations, New York and Geneva 2012, p. XIV at. http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf
16. Whitsitt E. and Vis-Dunbar Damon, “Glamis Gold Ltd. v. United States of America: Tribunal sets a high bar for establishing breach of “Fair and Equitable Treatment” under NAFTA”, Investment Treaty News, IISD, 15 July 2009, §3, available at <https://www.iisd.org/itn/2009/07/14/glamis-gold-ltd-v-united-states-of-america-tribunal-sets-a-high-bar-for-establishing-breach-of-fair-and-equitable-treatment-under-nafta/>
17. Yannaca-Small, Katia. "*Interpretation of the umbrella clause in investment agreements*" in International Investment Law: Understanding Concepts and Tracking Innovations, 2008, p.121.

Internet Sources:

1. “*Fair and Equitable Treatment Standard in International Investment Law*”, OECD Working Papers on International Investment, OECD Publishing, 2004, 2. Available at: https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf
2. Amal Sethi, “*An exaggerated account of ICSID?: A reply to professor Robin Bora*”, University of Pennsylvania Journal of International Law, August 2016, <http://pennjil.com/an-exaggerated-account-of-icsid-a-reply-to-professor-robin-broad/>
3. BASF, “*Our responsibility to respect human rights,*” available at <https://www.basf.com/en/company/sustainability/employees-and-society/human-rights.html>

4. Cuervo-Lorens Ralph, “*No More Mining - Reflections from Pacific Rim Cayman v El Salvador (ICSID)*”, Blaney McMurty LLP, 16 February 2017, <http://www.blaney.com/articles/no-more-mining-reflections-from-pacific-rim-cayman-v-el-salvador-icsid>
5. Porterfield M.C., “A distinction without a difference? Interpretation of Fair and Equitable treatment under customary international law by investment tribunals”, Investment Treaty News, International institute for sustainable development, 22 March, 2013, at: <https://www.iisd.org/itn/2013/03/22/a-distinction-without-a-difference-the-interpretation-of-fair-and-equitable-treatment-under-customary-international-law-by-investment-tribunals/>
6. Fornasari, Riccardo, “The Protection of Legitimate Expectations under the Fair and Equitable Standard Posted on May 12, 2015 by k1072069 , LLM Candidate, King’s College London,” KSLR Commercial and Financial Blog, May 12, 2015, <https://blogs.kcl.ac.uk/kslrcommerciallawblog/2015/05/12/the-protection-of-legitimate-expectations-under-the-fair-and-equitable-standard/>.
7. The Guardian, “*World Bank tribunal dismisses mining firm's \$250m claim against El Salvador*”, <https://www.theguardian.com/global-development/2016/oct/14/el-salvador-world-bank-tribunal-dismisses-oceanagold-mining-firm-250m-claim>

International Acts:

1. Investment Agreement for the COMESA Common Investment Area, 2007
2. North American Free Trade Agreement, part five: investment, services and related matters, Minimum Standard of Treatment, Available at: <http://www.sice.oas.org/trade/nafta/chap-111.asp>

3. US Model BIT, available at <https://www.state.gov/documents/organization/188371.pdf>