PARIS BABY ARBITRATION

BIBERON

Monthly Arbitration Newsletter
in French and English
NOVEMBER 2018, N°18

Chronique mensuelle de l'arbitrage
en français et anglais
NOVEMBRE 2018, N°18

PARIS BABY ARBITRATION TEAM — L'ÉQUIPE DE PARIS BABY ARBITRATION

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FOREWORD

Recently we witnessed huge movement against discrimination in the legal field. Whilst still present, discrimination is not only about origin or gender, but it is also about age.

Paris Baby Arbitration, an association of students and young professionals, has set itself the goal of presenting to the arbitration world its youngest members.

We are Baby Arbitration because we promote the contribution of the youngest.

We are also Baby Arbitration because we are trying to create a safe environment for the youngest. "Baby" is a sign of sense of humour and an open mind needed to reach our goal.

And last but not least, we are also Baby Arbitration because one's name, one's age one's position shall not prejudge the quality of one's work.

As a part of our engagement, we are honoured to present to your attention Biberon, a monthly arbitration newsletter in French and English, prepared by volunteer students and young professionals. You can find all the previously published editions of Biberon and subscribe to receive a new issue each month on our website: babyarbitration.com.

We also kindly invite you to follow our pages on LinkedIn and Facebook as well as to become a member of our Facebook group.

Have a good reading!

AVANT-PROPOS

Récemment nous avons assisté à un mouvement considérable contre la discrimination dans la profession juridique. Bien que toujours présente, la discrimination ne concerne pas seulement l'origine ou le sexe, mais aussi l'âge.

Paris Baby Arbitration, association d'étudiants et de jeunes professionnels, se fixe comme objectif de présenter au monde de l'arbitrage ses plus jeunes membres.

Nous sommes Baby arbitration parce que nous favorisons la contribution des plus jeunes.

Nous sommes également Baby arbitration parce que nous essayons de créer un environnement favorable aux plus jeunes. Baby est un filtre d'humour et d'ouverture d'esprit dont nous avons besoin pour atteindre notre objectif.

Et finalement, nous sommes également Baby arbitration parce que votre nom, votre âge et votre position ne doivent pas préjuger la qualité de votre travail.

Dans le cadre de notre engagement, nous sommes ravis de vous présenter Biberon, la revue d'arbitrage mensuelle en français et en anglais, préparée par des étudiants et des jeunes professionnels bénévoles. Vous pouvez trouver tous les Biberon publiés précédemment et vous y abonner sur notre site: babyarbitration.com. Nous vous invitons également à suivre nos pages LinkedIn et Facebook et à devenir membre de notre groupe Facebook.

Bonne lecture !

Cour de cassation, 14 November 2018, *Mazroui Trading and General Services v. Constructions mécaniques de Normandie et Financière de Rosario*, no. 17-10184

Contributed by Ekaterina Grivnova

The shipping and transportation company Félix A. ("SAMT") hired Mazroui Trading and General Services ("Mazroui"), an Emirati company, to represent it before the authorities of the United Arab Emirates in the context of a tender.

SAMT terminated the representation contract on 21 March 1985, claiming that the tender was canceled. However, the tender was awarded to another company on 14 February 1987. Mazroui brought two proceedings against SAMT in order to be awarded damages.

In 1992, La Boissière Beauchamps ("SFIBB") sold all the shares of SAMT to Soffia. The share purchase agreement contained an arbitration clause. SAMT and Soffia accused SFIBB of having concealed information regarding the risks related to the proceedings initiated by Mazroui during this sale. They therefore joined SFIBB to the proceedings. SFIBB raised a jurisdictional plea, arguing that the arbitral tribunal should here the dispute.

CMN replaced SAMT and Soffia and Rosario replaced SFIBB.

Cour de cassation, 14 novembre 2018, *Mazroui Trading and General Services c. Constructions mécaniques de Normandie et Financière de Rosario*, no. 17-10184

Contribution d'Ekaterina Grivnova

La Société d'armement maritime et de transports Félix A. (« SAMT ») a donné mission à la société Mazroui Trading and General Services (« Mazroui »), de droit des Emirats Arabes Unis, d'assurer sa représentation auprès des autorités de cet Etat, lequel avait lancé un appel d'offres.

La SAMT a résilié le contrat, le 21 mars 1985, en prétendant que l'appel d'offres avait été annulé. Cependant, le marché a été attribué à une autre société le 14 février 1987. Mazroui a engagé deux procédures contre la SAMT en réparation de son préjudice.

En 1992 la société Financière immobilière La Boissière Beauchamps (« SFIBB ») a cédé la totalité des actions de la SAMT, à la société Soffia. L'acte de cession contenait une clause compromissoire. La SAMT et la société Soffia, reprochant à la société SFIBB d'avoir dissimulé des informations sur la teneur et les risques liés aux procédures engagées par la société Mazroui lors de cette cession, l'ont appelée en garantie. SFIBB a soulevé l'incompétence de la juridiction saisie, au profit du tribunal arbitral.

The court of appeal upheld the judgment declaring that the commercial court had jurisdiction to rule on the claim, thereby rejecting the jurisdictional plea of SFIBB. The court concluded that the dispute did not fall within the material scope of the arbitration clause.

The Cour de cassation annuls the decision since the court of appeal has not established in its reasoning that the arbitration clause was manifestly void or inapplicable.

La société CMN est venue aux droits de la SAMT et de la société Soffia et la société Financière de Rosario (« Rosario ») à ceux de la société SFIBB.

La cour d'appel a confirmé le jugement ayant déclaré le tribunal de commerce compétent pour statuer sur la demande de garantie, en rejetant l'exception d'incompétence au profit d'un tribunal arbitral formée par SFIBB. La cour a conclu que le litige ne rentrait pas dans le champ d'application matériel de clause compromissoire.

La Cour de cassation casse et annule l'arrêt puisque la cour d'appel n'a pas établi dans son raisonnement si la clause compromissoire litigieuse était manifestement nulle ou inapplicable.

COURTS OF APPEAL

COURS D'APPEL

Aix-en-Provence Court of Appeal, 8 November 2018, *SCP Z- Wincker Azoulay- X & others v. Jean-Christophe U*, no. 18-09954

Contributed by Virginie Brizon

In 2013, Mr Jean-Christophe U wished to join Ben Soussan Edme Winckler Azoulay Beraudo company (the « Company ») by buying one of the notaries' shares. Following the Company's approval dated 17 December 2013 of the assignment project, the assignor and Mr U concluded a deed of assignment on 27 December 2013, including an arbitration clause.

The instruction proceeding of the assignment has been initiated before competent authorities. Due to uncertainties regarding the impact of the on-going reform on the notary status, these authorities have

Cour d'appel d'Aix-en-Provence, 8 novembre 2018, *SCP Z- Wincker Azoulay- X & autres c. Jean-Christophe U*, no. 18-09954

Contribution de Virginie Brizon

Courant 2013, Me Jean-Christophe U a souhaité rejoindre la SCP Ben Soussan Edme Winckler Azoulay Beraudo (la « Société ») en succédant à l'un des notaires dont il se proposait de racheter les parts. Suite à l'agrément donné au projet de cession le 17 décembre 2013 par la Société, le cédant et Me U ont signé un acte de cession de parts le 27 décembre 2013, comprenant une clause compromissoire.

La procédure d'instruction du dossier de cession a été engagée auprès des différentes autorités intéressées. En raison des incertitudes sur l'impact de la réforme alors en cours d'adoption sur le statut du notariat,

requested, amongst others, to decrease the assignment price.

Mr U and the assignor met again in 2015, suggesting a new assignment price. However, the Company pointed that its approval in 2013 was null and void due to changes on the assignment conditions. Mr U brought an action against the Company and the assignor before Grasse High Court in order to obtain damages. The defendants raised a plea of lack of jurisdiction before the pre-trial counsellor in favour of the arbitral tribunal. The pre-trial counsellor dismissed this claimed and the defendants appealed this decision. Mr U claimed that only the assignor and himself have signed the arbitration clause so that the Company cannot rely on this clause. On this ground, the appeal court supported this claim, quoting Article 1165 (new 1199) of the Civil Code providing that agreements only bind the contractors and dismissed the appellants.

celles-ci ont notamment demandé la diminution du prix de cession.

Les parties se sont à nouveau rapprochées en 2015, proposant un nouveau prix de cession. Cependant, la Société a indiqué que son agrément de 2013 était caduc, compte tenu des modifications apportées aux conditions de cession. Me U a assigné la Société et le cédant devant le TGI de Grasse afin d'obtenir réparation. Les défendeurs ont soulevé une exception d'incompétence devant le juge de la mise en état au profit du tribunal arbitral. Le juge de la mise en état a débouté cette demande, les défendeurs ont fait appel. L'intimé a fait valoir que la clause d'arbitrage n'avait que pour signataires le cédant et lui-même de sorte que la Société ne peut se prévaloir d'une telle clause. Au même titre, la Cour a appuyé cet argument en citant l'art. 1165 (devenu 1199) du code civil disposant que les conventions n'ont d'effet qu'entre les parties contractantes et a débouté à nouveau les appelants.

Basse-Terre Court of Appeal, 12 November 2018, *Mrs Amanda Z & Mr Clifford Y v. Mr Stuart X*, no. 18-00341

Contributed by Virginie Brizon

On 21 March 2017, Carib cats Inc. made an offer to Mrs Z and Mr Y in order to purchase a ship. Beforehand, this offer provided for an expertise. Mrs Z and Mr Y mandated an expert, Mr X, to determine the price. Following the expertise, Mrs Z and Mr Y purchased the ship.

Shortly after, the buyers found that the expert's report contained errors and omissions, questioning the ship

Cour d'appel de Basse-Terre, 12 novembre 2018, *Mme Amanda Z & M. Clifford Y c. M. Stuart X*, no. 18-00341

Contribution de Virginie Brizon

Le 21 mars 2017, la société Carib cats Inc a fait une offre à Mme Z. et M. Y afin d'acquérir un navire. Cette offre prévoyait au préalable une expertise. Mme Z et M. Y ont mandaté un expert, M. X, afin d'en déterminer le prix et suite à l'expertise, Mme Z. et M. Y ont acquis le navire.

Peu de temps après, les acquéreurs ont constaté que le rapport de l'expert contenait des erreurs et omissions remettant en cause la sécurité du navire, ce qui

safety, causing damages, implying the expert's liability before the courts.

The expert raised a plea of lack of jurisdiction, asserting that the deed concluded on 21 March 2017 includes an arbitration clause, applicable to the present dispute. However, the court finds that this clause is applicable at the authorized persons' request, namely Little ship company, the buyer and the seller. On this ground, Mr X, as an expert, cannot rely on this clause.

entraînait selon les parties un préjudice de nature à engager la responsabilité de l'expert devant les juridictions judiciaires.

L'expert a soulevé une exception d'incompétence en indiquant que l'acte du 21 mars 2017 contient une clause compromissoire applicable au présent litige. Néanmoins la cour affirme que cette clause est applicable à la demande des parties habilitées à s'en prévaloir à savoir Little ship company, l'acquéreur et le vendeur. Qu'à ce titre, M. X, en tant qu'expert, n'a pas qualité à se prévaloir de la clause.

Paris Court of Appeal, 13 November 2018, *Heli-Union v. Airbus Helicopters*, no. 16-25942

Contributed by Paola Damé

The French company Heli-Union and the company Airbus Helicopters ("Airbus") concluded a sale contract for four helicopters. The company Heli-Union filed a request for arbitration before the ICC for the payment of various amounts totaling 26,097,563.52 euros. The company Airbus formulated a counterclaim for damages in the amount of 1,000,000 euros. Airbus requested an order of separation of costs. The ICC allocated the provision equally but set separate provisions in the event that the entire provision would not be settled in a due time. The deadline having expired, the Secretariat of the Court of the ICC informed the parties that the separate advances on costs were requested.

The Heli-Union company brought an action for the annulment of the decisions of the ICC before the Paris High Court. The Paris High Court rejected the request and the company Heli-Union appealed. It submits that

Cour d'appel de Paris, 13 novembre 2018, *Heli-Union c. Airbus Helicopters*, no. 16-25942

Contribution de Paola Damé

La société Heli-Union de droit français a saisi la CCI d'une demande d'arbitrage dans un litige l'opposant à la société Airbus Helicopters (« Airbus ») relativement à la vente de quatre hélicoptères. La demande principale tendait au paiement de diverses sommes d'un montant global de 26.097.563,52 euros. La société Airbus formule alors une demande reconventionnelle de dommages-intérêts d'un montant de 1.000.000 euros et sollicite une fixation de provisions distinctes. La CCI a procédé à une répartition à parts égales de la provision mais a fixé des provisions distinctes dans l'hypothèse où la totalité de la provision ne serait pas réglée dans les délais impartis. Le délai ayant expiré, le Secrétariat de la Cour de la CCI a alors informé les parties que les provisions distinctes étaient appelées.

La société Heli-Union a assigné devant le TGI de Paris la CCI et Airbus aux fins de voir prononcer

it is entitled to bring an action against an association and one of its members concerning the application of an article of the by-law of that association. On the merits, it considers that the principle provided by the Arbitration Rules is to split the advance of costs equally and that it impossible to fix separate provisions in the event of a counterclaim.

The Paris Court of Appeal first considers the admissibility of the claim. In the sales agreement between the two companies, all disputes were referred to arbitration under the ICC Arbitration Rules. The arbitration clause does not express a will to abide by the statutes of the association but a will to conclude a contract to organize the arbitration. The Court reiterates that in matters of domestic arbitration, the parties who entrust to a pre-constituted third party the administration of the arbitration award, waive - with the exception of the institution's default or denial of justice - the possibility to request a substitution of the State judge to interpret the arbitration rules. The parties may only appeal against the award and / or bring an action for contractual liability against the arbitration center after the award is rendered.

The Court decides that the company Héli-Union has paid the advance on costs that it owes and does not claim to have been deprived of access to a judge and therefore, its action, which seeks the annulment of decisions made by the ICC as a pre-constituted third party for the administration of the arbitral proceedings, is inadmissible.

l'annulation des décisions de la CCI Le TGI a rejeté la demande et la société Héli-Union a alors interjeté appel. Elle soutient être recevable pour agir contre une association et l'un de ses adhérents à propos de l'application d'un article du règlement de cette association. Sur le fond, elle affirme que le principe prévu par le règlement d'arbitrage est le partage par moitié de la provision et qu'il n'est donc pas possible de fixer des provisions distinctes en cas de demande reconventionnelle.

La Cour d'appel de Paris considère en premier lieu la recevabilité de la demande. Dans le contrat de vente conclu entre les deux sociétés, tous les différends étaient soumis à l'arbitrage sous le règlement d'arbitrage de la CCI Cette clause compromissoire n'exprime pas une adhésion aux statuts de l'association mais une volonté de conclure un contrat d'organisation de l'arbitrage pour résoudre le différend.

La Cour rappelle qu'en matière d'arbitrage interne, les parties qui confient à un tiers préconstitué l'administration de la sentence arbitrale, renoncent – sauf carence de l'institution ou déni de justice – à demander au juge étatique qu'il se substitue, pendant l'instance, au centre d'arbitrage dans l'interprétation du règlement d'arbitrage. Les parties peuvent obtenir réparation de violations du règlement d'arbitrage qu'*a posteriori* dans le cadre d'un recours contre la sentence et/ou un action en responsabilité contractuelle dirigée contre le centre d'arbitrage.

La Cour considère qu'en l'espèce la société Héli-Union a versé la provision mise à sa charge et ne prétend pas avoir été privée de l'accès à un juge et que son action,

qui tend à l'annulation des décisions prises par la CCI en tant que tiers préconstitué pour l'administration de la procédure arbitrale, est donc irrecevable.

Paris Court of Appeal, 13 November 2018, *Shackleton and associated Limited v. Messrs. A... H... A... N... G..., E...(m)ed A... H... A... L... AL G... et H... A... H... A... N... G... (the "Consorts")*, no. 16-16608

Contributed by Edwige Nathan

On 13 November 2018, the Paris Court of Appeal rejected the qualification of the non-payment of the legal costs related the enforcement of an award as a breach of the contract containing the arbitration clause.

An arbitral award ordered the Consorts to pay the fees due to the firm Shackleton ("Shackleton"), pursuant to the arbitration clause provided by the letter of engagement. Shortly thereafter, Shackleton initiated a second arbitration claim to obtain a judgment acknowledging that the law firm had not committed any fault and ordering the consorts to pay all legal fees incurred before the French and English courts to enforce the first award. The firm considered that it had only obtained partial reimbursement of those fees pursuant to the decisions rendered by those courts. The sole arbitrator rejected its jurisdiction to rule over Shackleton's claim of legal fees and Shackleton then brought an action for annulment before Paris Court of Appeal against this award. Shackleton's assumption is that such an award constitutes a denial of justice and violates international public policy.

Cour d'appel de Paris, 13 novembre 2018, *Shackleton and associated Limited c. MM. A... H... A... N... G..., E...(m)ed A... H... A... L... AL G... et H... A... H... A... N... G... (« les Consorts »)*, no. 16-16608

Contribution d'Edwige Nathan

Le 13 novembre 2018, la Cour d'appel de Paris a refusé de qualifier comme violation du contrat contenant la clause arbitrale, le non-paiement des frais de justice engagés pour obtenir l'exécution d'une sentence arbitrale.

Une sentence arbitrale a condamné les Consorts au paiement des honoraires dus au cabinet Shackleton (« Shackleton »), sur le fondement de la clause compromissoire figurant dans la lettre d'engagement. Peu de temps après, Shackleton a engagé une seconde procédure arbitrale aux fins d'obtenir un jugement reconnaissant que le cabinet d'avocats n'avait commis aucune faute et condamnant les Consorts au règlement de tous les frais engagés devant les juridictions étatiques françaises et anglaises pour obtenir l'exécution de la première sentence et dont il estime n'avoir obtenu qu'un remboursement partiel aux termes des décisions rendues par ces juridictions. L'arbitre unique s'est déclaré incompétent pour statuer sur les frais exposés par Shackleton et ce dernier a alors exercé un recours en annulation devant la Cour d'appel de Paris contre cette sentence, qui selon lui constitue un déni de justice et viole l'ordre public international.

The Petitioner considers that, by refusing to enforce the award, the Consorts committed a breach of contract and that the legal fees incurred constituted contractual compensation for damages. In addition, it states that Respondent violated the letter of engagement since the arbitration clause included in the letter referred to the ICC Rules, which in turn provided for an obligation to enforce the award spontaneously.

The Court of Appeal dismisses the Petitioner's application and held that this classification of the legal fees as contractual compensation for damages was incorrect. The costs incurred by the Petitioner to obtain the enforcement of the award before the French and English courts are legal costs. As a consequence, the arbitrator rightly held that these costs did not arise from the arbitration clause but from the legal proceedings, and had therefore no jurisdiction to hear them. In addition, the Court of Appeal considers that the Petitioner has not been deprived of its right of access to a judge and that the principle of full compensation has been respected insofar as the State courts, before which the legal costs have been incurred, have ruled on these costs.

L'appelant estime qu'en refusant d'exécuter la sentence les Consorts ont commis une faute contractuelle et que les frais de justice engagés constituaient des dommages-intérêts contractuels. Il estime en outre que l'intimé a violé la clause compromissoire figurant dans la lettre d'engagement dans la mesure où cette clause faisait référence au Règlement CCI, qui lui-même prévoyait une obligation d'exécution spontanée de la sentence.

La Cour d'appel rejette la demande de l'appelant et estime que cette qualification des frais de justice en dommages-intérêts contractuels est erronée. Les sommes engagées par l'appelant pour obtenir l'exécution de la sentence devant les juridictions françaises et anglaises sont des frais de justice, c'est donc à juste titre que l'arbitre a jugé que ces frais ne découlaient pas de la clause compromissoire mais des procédures engagées, de sorte qu'il n'était pas compétent pour en connaître. En outre, la Cour d'appel estime que l'appelant n'a pas été privé de son droit d'accès à un juge et le principe de réparation intégrale du dommage a été respecté dans la mesure où les juridictions étatiques, devant lesquelles les frais de justice ont été exposés, se sont prononcées sur ces frais.

Paris Court of Appeal, 20 November 2018, *BAALOUDJ & Fils v. Dall'Aglio International*, no. 16-23406

Contributed by Paola Damé

An Algerian company BAALOUDJ & Fils ("company B.") and an Italian company Dall'Aglio International ("company D.") entered into a contract for the supply

Cour d'appel de Paris, 20 novembre 2018, *BAALOUDJ & Fils c. Dall'Aglio International*, no. 16-23406

Contribution de Paola Damé

La société a responsabilité limitée BAALOUDJ & Fils (« société B. ») de droit algérien et la société Dall'Aglio international (« société D. ») de droit italien ont conclu

of a bottle filling line. Several disputes arose between the parties and the company D. filed a request for arbitration before the International Chamber of Commerce (I.C.C.). The Arbitral Tribunal ordered B. to fulfill its contractual obligations.

The company B. then seized the Paris Court of Appeal and requested the annulment of the arbitral award by application of article 1520, 3rd,4th, and 5th of the French Code of Civil Procedure.

First, the company B. considers that the Arbitral Tribunal failed to respect the principle of contradiction by interpreting a recognition document as a partial payment of the contractual price, without the parties having been able to provide their observations. The Paris Court of Appeal decides that it must be rejected, the arbitral tribunal having ruled after an adversarial debate between the parties, in view of the regularly exchanged memorials and the exhibits communicated.

Second, the company B. considers that the Tribunal exceeded its mission by acting as an *amiable compositeur* and interpreting the contract *contra legem*. The Court also rejects the second ground of appeal, alleging that the Tribunal set out the grounds on which it was to interpret the contract and did so in conformity with the law. The Court adds that the content of the reasoning of the arbitral award is beyond the control of the judge of the regularity of the award and that the alleged distortion of a contractual document by the Arbitral Tribunal cannot be assimilated to the violation by it of its obligation to comply with its mission of enforcing the contract.

un contrat de fourniture d'une ligne de remplissage de bouteilles d'eau. Des différends se sont élevés entre les parties et D. a introduit une demande d'arbitrage auprès de la CCI. Le tribunal arbitral condamne alors la société B. en exécution de ses obligations contractuelles.

La société B. saisi la Cour d'appel de Paris d'un recours en annulation de la sentence arbitrale en invoquant les dispositions de l'article 1520, 3e, 4e, et 5e du Code de procédure civile.

En premier lieu, la Cour d'appel de Paris considère que le tribunal a statué après un débat contradictoire entre les parties, au vu des conclusions régulièrement échangées et des pièces communiquées et que le premier moyen tiré du non respect du principe de la contradiction doit donc être écarté.

En second lieu, la société considère que le tribunal a excédé sa mission en agissant en tant qu'amiable compositeur et en interprétant *contra legem* le contrat. La Cour écarte ce deuxième moyen tiré de la violation de sa mission par le tribunal et considère que ce dernier a exposé les motifs qui le conduisaient à interpréter le contrat et qu'il a bien statué en droit et non en amiable compositeur. La Cour rappelle en outre que le contenu de la motivation de la sentence arbitrale échappe au contrôle du juge de la régularité de la sentence et que la dénaturation alléguée d'un document contractuel par le tribunal arbitral ne saurait être assimilée à la violation par celui-ci de son obligation de se conformer à sa mission qui était celle d'appliquer le contrat.

En troisième lieu, la société B. considère que le tribunal a violé les principes du droit à un procès

Third, the company B. considers that the Tribunal violated the principles of the right to a fair trial by reducing its motivation to the submissions of company D. and by misapplying the exhibits submitted in the proceedings.

The Court dismisses this line of argument by recalling that the Tribunal explained the reasons for its decision.

Fourth, the Court of Appeal recalls that according to article 30 of the ICC Arbitration Rules, the Arbitral Tribunal renders its final award within the six-month period and the Court of arbitration may, on a reasoned request of the Tribunal or, if necessary, delay it. In the present case, the period has been extended in accordance with article 30 and therefore the plea alleging breach of the French international public policy must be rejected.

The Court of Appeal dismisses the action for annulment of the award brought by the company B.

équitable en réduisant sa motivation aux écrits de la société D. et en faisant mauvaise application des pièces versées aux débats. La Cour écarte ce troisième moyen en rappelant que le tribunal a expliqué les motifs de sa décision.

En quatrième et dernier lieu, la Cour rappelle qu'aux termes de l'article 30 du Règlement d'arbitrage de la CCI., le tribunal arbitral rend sa décision finale dans un délai de six mois et que la Cour d'arbitrage peut, sur demande motivée du tribunal ou au besoin d'office, prolonger ce délai si elle l'estime nécessaire. En l'espèce, le délai a été prorogé conformément à cet article et donc le moyen tiré de la violation de l'ordre public international français du fait du dépassement du délai imparti à l'arbitre pour rendre la sentence doit être écarté.

La Cour d'appel rejette le recours en annulation de la sentence formé par la société B.

Paris Court of Appeal, 20 November 2018, *Ministry of Industry and Minerals, Ministry of Finance v. Instrubel*, no. 16-10379

Contributed by Paola Damé

The Iraqi Ministry of Industry, Research and Development, the Iraqi Ministry of Defense and the state-run entity Salah Al Din ("Iraqi parties") concluded five contracts for the supply of military equipment with the Belgian company Instrubel ("I."). Following the invasion of Kuwait by the Iraqi army, the UN Security Council adopted a Resolution demanding the immediate withdrawal of Iraqi forces, followed by a second Resolution, drawing the

Cour d'appel de Paris, 20 novembre 2018, *Ministère irakien de l'Industrie et des Minéraux et Ministère des Finances c. Instrubel*, no. 16-10379

Contribution de Paola Damé

Le ministère irakien de l'Industrie, de la Recherche et du Développement, le ministère irakien de la Défense et l'établissement public Salah Al Din (« parties irakiennes ») ont conclu avec la société de droit belge Instrubel (« société I. ») cinq contrats portant sur la fourniture de matériels militaires.

A la suite de l'invasion du Koweït par l'armée irakienne, le Conseil de Sécurité des Nations Unies a

consequences of the Iraqi refusal to comply, deciding the establishment of an economic and military embargo against Iraq. The company I. filed a request for arbitration before the International Chamber of Commerce seeking compensation for loss of profits and damages resulting from the termination of the three contracts. The Arbitral Tribunal rendered a partial award condemning the Ministry of Defense to pay unpaid invoices under the first two contracts executed by the company I., declaring the three contracts not executed because of the embargo null and void and providing compensation for the consequences of the invalidity. In a final award, the tribunal sentenced the Iraqi parties to pay the company I. 13,812,624.51 euros in compensation for the damages incurred.

The Iraqi parties brought an action for the annulment of the first partial award and the final award. They maintain that the award was not motivated as required by Article 1520, 3rd of the French Code of Civil Procedure. The Tribunal, by recognizing that the parties to the arbitral proceedings were distinct from the Republic of Iraq, could not admit their responsibility without explaining the misconduct and thus ignored its obligation of motivation included in its mission.

The Court of Appeal of Paris considers that the requirement of motivation is an element of the right to a fair trial and is therefore included in the mission of the arbitrators. However, the State judge's review of the annulment concerns only the existence, and not the relevance of the reasons, of the award. Since the Tribunal found that the embargo led to the invalidity

adopté une Résolution exigeant le retrait immédiat des forces irakiennes, puis, une deuxième Résolution, tirant les conséquences du refus irakien d'obtempérer, décidant la mise en place d'un embargo économique et militaire à l'encontre de l'Irak.

La société I. a déposé une demande d'arbitrage à la Chambre de commerce internationale (CCI) pour obtenir indemnisation des pertes de bénéfices et des préjudices résultant de la résiliation des trois contrats du fait de l'embargo.

Le tribunal arbitral rend une sentence partielle condamnant le ministère de la Défense à régler les factures impayées au titre des deux premiers contrats exécutés par la société I., considère comme caducs les trois contrats inexécutés du fait de l'embargo et prévoit une indemnisation des conséquences de la caducité. Par une sentence finale, le tribunal condamne les parties irakiennes à payer à la société I. 13.812.624,51 euros en réparation des dommages subis.

Les parties irakiennes ont formé un recours en annulation de la première sentence partielle et de la sentence finale. Elles soutiennent que les arbitres n'ont pas motivé leur décision au sens de l'article 1520, 3e du code de procédure civile. Le tribunal, en reconnaissant que les parties à l'instance arbitrale étaient distinctes de la République d'Irak, ne pouvait admettre leur responsabilité sans s'expliquer sur la faute commise et a donc méconnu son obligation de motivation comprise dans sa mission.

La Cour d'appel de Paris considère l'exigence de motivation est un élément du droit à un procès équitable et est donc comprise dans la mission des arbitres. Toutefois, le contrôle du juge de l'annulation

of the current contracts, the parties who wish to free themselves from their contractual liability must show a justifying cause, such as *force majeure*. However, the Iraqi parties cannot claim force majeure and are therefore obliged to compensate I. for the losses suffered because of the invalidity of the contracts.

The Court of Appeal dismisses the appeal for partial annulment of the partial award and the appeal for total annulment of the final award.

ne porte que sur l'existence et non sur la pertinence des motifs de la sentence. Le tribunal ayant considéré que l'embargo emportait la caducité des contrats en cours, les parties qui veulent se libérer de leur responsabilité contractuelle doivent démontrer une cause justificative telle que la force majeure. Or, les parties irakiennes ne peuvent se prévaloir de la force majeure et sont donc tenues d'indemniser les préjudices subis par la société I. du fait de la caducité des contrats. Les recours en annulation partielle de la sentence partielle et en annulation totale de la sentence finale, sont rejetés par la Cour d'Appel.

Aix-en-Provence Court of Appeal, 22 November 2018, *De Monchy Natural Products BV v. SAS Vanille et produits*, no. 15-22286

Contributed by Edwige Nathan

On 22 November 2018, the Aix-en-Provence Court of Appeal reaffirmed that the arbitral tribunal has sole jurisdiction to rule over its jurisdiction.

A dispute arose between two companies, a French vanilla supplier, SAS Vanille et produits ("Vanipro") and a Dutch spice trader, De Monchy Natural Products BV ("Monapro"), over the delay in the payment of two invoices for the sale of vanilla in 2010 and 2011.

Vanipro sued Monapro before the Grasse Commercial Court, which ordered Monapro to pay the sums due. Monapro ("Petitioner") then brought an action before the Court of Appeal on the ground that the French courts must decline jurisdiction in favour of the arbitral tribunal in respect of the 2011 order and in favour of the Dutch courts in respect of the 2010

Cour d'appel d'Aix-en-Provence, 22 novembre 2018, *De Monchy Natural Products BV c. SAS Vanille et produits*, no. 15-22286

Contribution d'Edwige Nathan

Le 22 novembre 2018, la Cour d'appel d'Aix-en-Provence a rappelé que le Tribunal arbitral est seul compétent pour statuer sur les contestations relatives à son pouvoir juridictionnel.

Un litige oppose deux sociétés, une française de fourniture de vanille, la SAS Vanille et produits (« Vanipro ») et une hollandaise de commercialisation d'épices, De Monchy Natural Products BV (« Monapro »). Le litige concerne le retard dans le règlement de deux factures de 2010 et 2011 portant sur la vente de vanille.

Vanipro a assigné Monapro devant le Tribunal de commerce de Grasse, qui a finalement condamné Monapro à régler les sommes dues. Monapro (« appelante ») a alors saisi la Cour d'appel au motif que les tribunaux français doivent se déclarer

order. Respondent believes that the Court of Appeal has jurisdiction.

The Court of Appeal considers that the disputed invoice of 2011 corresponds to a purchase order that included an arbitration clause. It adds that insofar as the Arbitral Tribunal has already declared that it has jurisdiction to hear the dispute between the same parties and in the same circumstances, this clause does not appear to be manifestly void. It recalls that, pursuant to Article 1465 of the French Code of Civil Procedure, the Arbitral Tribunal has sole jurisdiction to rule over its jurisdiction. Consequently, the Court of Appeal has no jurisdiction to hear this order.

With regard to the 2010 invoice, the Court notes that Vanipro does not prove that its general terms and conditions of sale on the back of the invoice, which include a jurisdiction clause in favour of the French courts, have been approved by Monapro. Consequently, the clause is not enforceable and Monapro is entitled to claim the jurisdiction of the Dutch courts, since it is the place of residence of Respondent and of delivery of the goods.

In the presence of this contradiction in jurisdiction between the Arbitral Tribunal and the Dutch courts, the Court grants the Petitioner's request declines jurisdiction in favour of the Dutch courts.

incompétents au profit du Tribunal arbitral s'agissant de la commande de 2011 et au profit des juridictions néerlandaises s'agissant de la commande de 2010. L'intimé estime que la Cour d'appel est bien compétente.

La Cour d'appel considère que la facture litigieuse de 2011 correspond à un bon de commande qui prévoyait une clause d'arbitrage. Elle ajoute que dans la mesure où le Tribunal Arbitral s'est déjà, entre les mêmes parties et dans les mêmes circonstances, déclaré compétent pour connaitre du litige, cette clause n'apparait pas manifestement nulle. Elle rappelle qu'en application de l'article 1465 du Code de procédure civile, le Tribunal arbitral est seul compétent pour statuer sur les contestations relatives à son pouvoir juridictionnel. Par conséquent, la Cour d'appel de céans est incompétente pour connaitre de cette commande.

S'agissant de la facture de 2010, la Cour relève que Vanipro ne rapporte pas la preuve du fait que ses conditions générales de vente, présentes au dos de la facture et comportant une clause attributive de juridiction au profit des tribunaux français, aient été approuvées par Monapro. Dès lors la clause ne lui est pas opposable et Monapro est fondée à prétendre à la compétence des juridictions néerlandaises, lieu du domicile du défendeur et de livraison des marchandises.

En présence de cette contradiction de compétence entre le Tribunal arbitral et les juridictions néerlandaises, la Cour fait droit à la demande de l'appelante et se déclare incompétente au profit des juridictions néerlandaises.

England and Wales High Court, 5 November 2018, *RJ & Anor v HB* [2018] EWHC 2958 (Comm)

Contributed by Ekaterina Grivnova

Baker J issues an order on costs following set-aside proceedings. The award was set aside in part, as sought by the claimants.

Baker J first reiterates the general rule that at the conclusion of the proceedings, the unsuccessful party is ordered to pay the costs of the successful party. Nevertheless, the court should depart from the general rule, only where the needs of justice and the circumstances of the particular case require, and where a measure of caution is required.

In the present case, the claimants obtained the partial setting aside of the award, having established that it was affected by procedural irregularity causing substantial injustice. However, the claimants did not obtain all of the relief they sought – their claim did not succeed in full. The initially-sought removal of the arbitrator was not granted. Thus, Baker J considers that the costs will have been aggravated less than might have been the case, because of the claimants' apparent misapprehension that setting aside the Award would involve a new arbitrator. This misapprehension should be reflected in the size of the discount to the costs order in the claimants' favour.

Haute Cour de justice d'Angleterre et du Pays de Galle, 5 novembre 2018, *RJ & Anor v HB* [2018] EWHC 2958 (Comm)

Contribution d'Ekaterina Grivnova

Le juge Baker émet une ordonnance sur les dépens à la suite d'une procédure d'annulation d'une sentence arbitrale. La sentence a été partiellement annulée sur la requête des demandeurs.

Le juge Baker rappelle d'abord la règle générale selon laquelle, à la conclusion d'une procédure, la partie qui succombe est condamnée aux dépens de celle-ci. Néanmoins, le tribunal peut déroger à cette règle si les besoins de la justice et les circonstances de l'espèce le requièrent.

En l'espèce, les demandeurs ont obtenu l'annulation partielle de la sentence, après avoir établi que celle-ci était entachée d'une irrégularité de procédure entraînant l'injustice substantielle. Cependant, les demandeurs n'ont pas obtenu tous les chefs de la requête - leur demande n'a été que partiellement acceptée. La révocation de l'arbitre, demandée en premier lieu, n'a pas été accordée. Ainsi, le juge Baker estime que les coûts ont été aggravés, en raison de l'apparente erreur des demandeurs de penser que l'annulation de la sentence impliquerait la désignation d'un nouvel arbitre. Cette incompréhension devrait se refléter dans l'escompte des dépens accordés en faveur des demandeurs.

Therefore, the order is that the defendant shall pay 80% of the claimants' costs.

Par conséquent, il est ordonné que le défendeur paie 80% des frais exposés par les demandeurs.

England and Wales Court of Appeal, 8 November 2018, *Haven Insurance Company Ltd v. EUI Ltd* [2018] EWCA Civ 2494

Contributed by Ekaterina Grivnova

The Appellant ("Haven") and the Respondent ("Elephant") are both motor insurers, and members of the Motor Insurers Bureau ("MIB"). Article 75 of MIB's Articles of Association provides for disputes between members to be resolved in the first instance by a Technical Committee. The decision of the Technical Committee can be later appealed to an arbitrator within 30 days from the notification of the decision.

On 13 February 2015, the Technical Committee determined an insurance dispute between Haven and Elephant against Elephant and in favour of Haven.

On 30 April 2015, Elephant gave written notice of appeal to an arbitrator.

Haven contended that Elephant's appeal was out of time. According to Haven, the starting point of the time limitation was 13 February 2015, as both parties were present at the meeting of the Technical Committee. In the alternative, it should run from 24 February 2015 when MIB's secretariat confirmed by an e-mail the decisions taken.

The arbitrator rejected Haven's jurisdictional challenge, holding that Elephant's appeal had been brought on time, because time for an appeal only ran from the date on which the final draft minutes of the

Cour d'appel d'Angleterre et du Pays de Galle, 8 novembre 2018, *Haven Insurance Company Ltd v. EUI Ltd* [2018] EWCA Civ 2494

Contribution d'Ekaterina Grivnova

L'appelant («Haven») et l'intimé («Elephant») sont assureurs automobiles et membres du Bureau des assureurs automobiles («MIB»). L'article 75 des statuts du MIB prévoit que les différends entre les membres doivent être réglés en premier lieu par un comité technique. La décision du comité technique peut être sujet à un appel devant un arbitre dans un délai de 30 jours à compter de la notification de la décision.

Le 13 février 2015, le Comité technique a réglé un litige en matière d'assurance entre Haven et Elephant contre Elephant et en faveur de Haven.

Le 30 avril 2015, Elephant a interjeté appel devant un arbitre.

Haven a soutenu que l'appel d'Elephant était tardif. Selon Haven, la prescription a commencé à partir du 13 février 2015, les deux parties étant présentes à la réunion du Comité technique. À titre subsidiaire, elle a commencé à courir à partir du 24 février 2015, lorsque le secrétariat du MIB a confirmé par un courrier la décision entreprise.

L'arbitre a rejeté la contestation de Haven, estimant que l'appel d'Elephant avait été interjeté dans le délai imparti, car le délai de recours n'a commencé à courir qu'à partir du le 31 mars 2015, la date à laquelle le

meeting communicated to the Parties on 31 March 2015.

Haven challenged the arbitrator's decision on jurisdiction before the High Court. On 31 January 2018, Knowles J allowed Haven's challenge, finding that Elephant's appeal was time-barred, but granted Elephant's application for an extension of time and remitted the matter to the arbitrator for substantive determination.

Haven appealed Knowles J's decision granting Elephant an extension of time.

The Court of Appeal dismissed the appeal as none of Haven's arguments served to undermine the decision in granting an extension of time to Elephant.

In general, the time for an appeal runs from the publication of the minutes, rather than from the date on which the decisions of the meeting are notified. Moreover, MIB confirmed that its custom and practice had been "to allow 30 days from the date of the final minutes" for the commencement of arbitration proceedings. Therefore, all the circumstances of the case show that, even if the appeal was lodged after the deadline, it would be just to grant an extension.

dernier projet de procès-verbal de la réunion a été communiqué aux Parties.

Haven a contesté la décision de l'arbitre devant la Haute Court. Le 31 janvier 2018, le juge Knowles a accueilli la contestation de Haven, concluant que l'appel d'Elephant était tardif, mais avait accueilli la demande de prolongation présentée par Elephant et renvoyé la question à l'arbitre pour qu'il se prononce sur le fond. Haven a fait appel de la décision du juge Knowles sur ce qu'elle accorde la prolongation du délai à Elephant.

La Cour d'appel rejette l'appel, aucun des arguments avancés par Haven n'ayant porté atteinte à la décision d'accorder une prorogation de délai à Elephant.

En général, le délai de recours court à compter de la publication du procès-verbal et non à compter de la date à laquelle les décisions de la réunion ont été notifiées. En outre, MIB a confirmé que sa coutume et sa pratique attribuaient un délai de 30 jours à partir de la date du procès-verbal final pour l'ouverture de la procédure d'arbitrage. Par conséquent, toutes les circonstances de l'affaire montrent que, même si l'appel était formé tardivement, il est juste de prolonger le délai.

PBA ACADEMICS

CONTRIBUTIONS FROM STUDENTS AND YOUNG PRACTITIONERS

CONTRIBUTIONS D'ETUDIANTS ET JEUNES PROFESSIONNELS

CHÉRINE FTOUKI,

International Investment Arbitration Law

King's College London, The Dickson Poon School of Law,

International Dispute Resolution LLM, November 2018

THE PRESERVATION OF INVESTOR'S LEGITIMATE EXPECTATIONS IN INTERNATIONAL INVESTMENT ARBITRATION –

Shaping a sustainable global governance within a de-regulated ruthless capitalized economy

DISCLAIMER

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ABSTRACT

International arbitral litigation related to investments progressively gave room to the preservation of investor's legitimate expectations. This new turn in international investment law was marked by the representation of these expectations, their appearances or the mention of legitimate beliefs. Such criteria have often been taken into consideration and argued by

ABSTRAIT

Le contentieux d'arbitrage international d'investissements a progressivement évolué vers la reconnaissance systématique des attentes légitimes des investisseurs, notamment à travers la prolifération des conventions internationales de protection des investissements. Ce nouveau tournant est marqué tant par la représentation de ces attentes, de leurs

arbitral tribunal. Nonetheless, the compulsory character of the protection is not evoked as a basis legitimatising legitimate expectation claims and the scope of this protection remains unstable and vague.

Usually, the sentences evoke an ideal of equity more than a real juridical construction. This is undoubtedly why each case dealing with the treatment of legitimate expectations is to be consider with regards to its particular circumstances. We will use a range of cases that have marked the evolution of investment arbitration and the rise of a systemic analysis of investor's legitimate expectations, we will discuss their pertinence and the consequences of this recognition for both corporate actor's and states.

apparences, que par la mention de « croyances légitimes ». Ces critères, souvent pris en considération et débattus par les tribunaux arbitraux établissent les bases du raisonnement arbitral en matière de protection des attentes légitimes. Cependant, le caractère obligatoire de la protection n'est pas un motif de légitimation en matière de reconnaissance des attentes légitimes. Ainsi, dans le cadre de la revendication d'attentes légitimes de la part d'investisseurs, le champ de protection demeure vague et instable.

Souvent, les sentences arbitrales évoquent un idéal d'équité bien plus qu'une réelle construction juridique. C'est pourquoi chaque litige est à considérer à la lumière de circonstances particulières. Notre étude portera sur un ensemble de litiges arbitraux ayant marqué à la fois l'évolution de l'arbitrage d'investissement et l'essor des revendications en matière d'attentes légitimes des investisseurs. Nous discuterons de la pertinence de ce concept, et des conséquences de sa reconnaissance pour les États accueillant l'investissement et les investisseurs.

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INTRODUCTION

There is currently a real challenge to deal with sensitivities within the financial organization about taking what can be seen as a partisan position in a highly political environment. Balancing market and political concerns or harnessing law for sustainable development and other public interests' prerogatives while preserving state's sovereignty, makes it difficult to prioritise particular interests. It is questionable whether we really have to prioritize, or if it is possible to promote equitable and proportional decision-making?

These questions are important to investigate, especially when we know that this transition implies radical changes in matter of investment, such as decarbonisation of energy, transportation or manufacturing at a scale that is historically unprecedented and probably incompatible with economic growth. Understanding the most conducive approach to economic growth is no easy task. It might be hard to correlate with state's public interest policies, especially in an era in which neoliberalism still dominates political imaginations around the world. Thus, it is harder to delimitate the balance between private interests and the 'greater good'. How do we then shape a global governance within a de-regulate ruthless capitalized economy where only peculiar interests seems to prevail?

The constant and fast development of investment arbitration and the nationalisation of investment litigation wave proved that the legal framework has been constantly refined with regards to economic operations. Today, investment litigation is rarely about direct expropriation, however indirect expropriations litigation is sparking more arbitral cases. Usually, those cases deal with measures related to the standards of protections of foreign investors in a host state. Investment protection standards are progressively stabilising their formulation, this study will focus on the principle of Fair Equitable Treatment (FET). This standard is the most significant to analyse the evolution of international investment litigation.

The controversial concept of legitimate expectations has been described as "*a house of cards built by the references to other tribunals and academic opinions*"[1] This accurate description highlights the asymmetric protection currently provided by the arbitral investment law system. Indeed, there is a systematic use of this concept by investors to claim an alleged violation of Bilateral Investment Treaty (BIT). Such violations usually result in economic loss when the state changes the regulation. Tribunals used several approaches and methods to cover the protection of legitimate expectations, among them the definition of legitimate expectations as being a subsidiary component of FET treatment standard.

[1] Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 The American Journal of International Law, 179 (2010).

1. DELINEATING THE CONTOURS OF THE CONCEPT

Legitimate expectations are not a novel issue as such, but it has more recently received increasing attention. This theme of legitimate expectations on the part of the investor has found expression in various forms of domestic laws. In fact, the most common is the affiliation as part of the general law. This is arguable, as the concept plays a key role in the interpretation of the FET Standard, but have also entered the law governing indirect expropriation.

Therefore, it is hard to delineate the general nature of this concept, which might be created both by explicit undertakings on the part of the host state in contracts and also implied by the legal framework of the host state. This framework provided by the host state is subject to both political prerogatives and market volatility, which makes us wonder at what time must legitimate expectations exist? Tribunals have emphasised that an investor could claim a violation of its legitimate expectations as they stand at the time of the acquisition of the investment.[2] Numerous tribunals have stressed that the legal framework that existed at the time of making the investment was decisive for any legitimate expectations.[3]This concept is now firmly rooted within arbitral practice, however, it implies that investors should make rational business decisions based on representations made by the host states. Nonetheless, not every change within the state's regulatory framework affecting foreign property will violate legitimate expectations.

Thus, to the extent that the state of the law did not violate minimum standard[4] and was transparent, the investor will hardly succeed to convince a tribunal that the proper application of the law led to a violation of its legitimate expectations. No violation will occur if the changes do not affect the boundaries of normal adjustments customary in the host state and accepted in other states. Which makes the notions of predictability and stability crucial to initiate a claim for alleged violation of the commitments or the promises made to the investors.

This study will not analyse in depth the concept of FET, it will provide a comment of the analysis provided by tribunals regarding legitimate expectations claims. This thesis does not cover the entire field of legitimate expectations per se but it aims to establish a general description to establish a better understanding of this concept.

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[2] C Schreuer and U Kriebaum, *"At What Time Must Legitimate Expectations Exist?"* in J Werner and A H Ali (eds), A liber Amicorum: Thomas Wälde. Law Beyond Conventional Thought (2009) 265.

[3] *SD Myers v Canada*, Second Partial Award, 21 October 2002. See also *Feldman v Mexico* Award, 16 December 2002, para 128 ; *Enron v Argentina*, Award, 22 May 2007, para 262; *BG v Argentina*, Final Award, 24 December 2007, para 297-8; *Duke of Energy v Ecuador*, Award, 18 August 2008, para 340-365; *Frontier Petroleum v Czech Republic*, Final Award, 12 November 2010, para 287, 468.

[4] International minimum standard: usual starting point is 1926 Case, *Neer*. For the relevant treatment to breach international law, it would have to: "*amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far* short of international standards that every reasonable and impartial man would readily recognise its insufficiency". UNRIAA, 1926, IV, 60. It is often said that the minimum standard may have evolved since Neer. See e.g., *Mondev v. United States of America*, Award of 11 October 2002, para. 125; *ADF v. United States of America*, para. 179, *PM v Uruguay*, Award of 8 July 2016, para. 319. But see also NAFTA decision in *Glamis Gold v. USA*.

2. A CONCEPT PART OF THE GENERAL PRINCIPLES OF LAW

Legitimate expectations are evoked in various sources of international law. From international conventions to judicial decisions. The article 38.1(c) of the ICJ Statute[5] states that sources of international law also entails general principles of law and international customs[6]. As this study focuses on investment treaty arbitral practice, it involves the analysis of treaties, which also makes the Vienna Convention on the Law of Treaties[7] an accurate instrument to interpret this concept.

In addition, multiple sources and other legal instruments such as Bilateral Investment Treaties (BITs), Multilateral Investment Treaties (MITs), International Investment Agreements (IIAs), Free Trade Agreements (FTAs) and scholars' opinions contribute to shape the contours of this notion.

3. THE STATE OF THE CURRENT SYSTEM: AN UNSTABLE ARBITRAL SYSTEM MISSINTERPRETING INTERNATIONAL LAW

Tribunals are rendering award in a system that is not harmonised. Indeed, if the decisions of subsequent tribunals constitute a" body of law with precedential value"[8], it still lacks legal value, which makes difficult to shape a global reasoning that will apply to each situation. Therefore, at first, interpretive failures create an unpredictable and instable environment for investors. Secondly, such environment threatens the legitimacy of the investment treaty regime.

From the current arbitral investment practice, we distinguish substantive legitimate expectations and procedural legitimate expectations. Both encompass a growing body of investment precedent awards that has been also seen as "a misstatement of international law"[9]. The reason is that those precedent awards do not have a realistic jurisprudence value.

As Benedict Kingsbury and Stephan Schill note: MITs and BITs and several important regional treaties are "*burgeoning as many arbitral disputes are also initiated each year*"[10]. And yet despite its popularity, the investment regime

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[5] *United Nations, Statute of the International Court of Justice*, 18 April 1946, available at: http://www.refworld.org/docid/3deb4b9c0.html [accessed 2 September 2018].

[6] See Martti Koskenniemi, "*General Principles: Reflexions on Constructivist Thinking in International Law* "in Martti Koskenniemi, ed, *Sources of International Law* (Burlington: Ashgate, 2000) 359 at 363.

[7] United Nations, (VCLT) *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Art 31. online: http://www.refworld.org/docid/3ae6b3a10.html [accessed 2 September 2018].

[8] Gabrielle Kaufmann-Kohler, "*Arbitral precedent: Dream, Necessity or Excuse?* "(2007) 23:3 Arb Int'l 357 at 351. See also Campbell McLachlan, Lauren Shore & Matthew Weiniger, International Investment Arbitration: Substantive Principles (New York: Oxford University Press, 2007) at 18.

[9] Trevor Zeyl, "*Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law*", 49, Alta.L. Rev 203 (2011) at 49.1, p205.

[10] Benedict Kingsbury & Stephen Schill, "*Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*", in Albert Jan van den Berg, ed, 50 Years of New York Convention, ICAA International Arbitration Conference (Alphen aan den Rijn, Netherlands: Kluwer Law International, 2009) 5 at 7. See also United Nations Conference on Trade and Development (UNCTAD), Latest Developments in Investor-State Dispute Settlement, IIA Issues Note No 1 UN Doc IA/2010/3 (2010) at 2.

is still considered as complex and confusing, highly fragmented, and characterised by overlaps and incoherence. However, some commitments are on the rise and recent investment agreements have adopted innovative approaches to clarify that the FET obligation does not extend to every "unfair" government conduct[11].

Unfortunately, such progress remains humble and the system still remains shakeable as the recent Achmea case has proved. This case sounded like a "*loud clap of thunder on the intra-EU BIT sky*" [12]. The Court of Justice of the European Union (the CJEU's) recent controversial decision Slovak Republic v Achmea BV [2018], in which judgment was handed down on 6 March 2018, impacted considerably on intra-EU investment. It underlined that in many areas heavily regulated by states (states subsidies, energy, environment etc.) legal certainty and more especially legitimate expectations are inherent to the legitimacy of government measures. Indeed, regarding a Member State of the EU, the judgment implied that "*(a) arbitral tribunals constituted under an intra-EU BIT would not have jurisdiction and (b) any award rendered by such a tribunal would not be enforced by Member State courts*".[13]

The judgment left answered whether it was also applicable to MIT's from which the EU is itself a party, such as the Energy Charter Treaty. The Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain ICSID Case[14] was the first on to provide a preliminary answer to this question. The case concerned shareholding in the Spanish company Torresol Energy which operated three concentrated solar power plants in Spain. Claims arised out of a series of energy reforms undertaken by the Government affecting the renewables sector, including a 7 per cent tax on power generators' revenues and a reduction in subsidies for renewable energy producers. The tribunal awarded by majority damages to the investor. Spain has now asked the Swedish Court of Appeal to seek a preliminary ruling from the CJEU on whether Achmea applies to ECT cases. If the CJEU follows the European Commission's statement[15], one might expect the CJEU to extend Achmea to ECT claims.

Such cases raise the crucial question of investment tribunals processing to deal with disputes related to alleged unfair government conduct. Over the past years, public scrutiny and questioning increased regarding the problems that have been identified as stemming from Investor-State Dispute Settlement (ISDS), which is based on the main principles of arbitration. In this system, the State will always be a respondent, never a claimant. Concretely, tribunal first should determine the scope and content of the standard breach, then determine their applicability. Starting

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[11] Mark Feldman (Peking University School of Transnational Law)/ BIT, Investment Agreements, Investment Arbitration, Investment Protection, Trade, Trans-Pacific Partnership, Transatlantic Trade and Investment Partnership, "*The Emerging Harmonization of the International Investment Law Regime*".
July 20, 2015, Kluwer Arbitration Blog. Online: http://arbitrationblog.kluwerarbitration.com/2015/07/20/the-emerging-harmonization-of-the-international-investment-law-regime/

[12] Clément Fouchard, Marc Krestin (Linklaters), "*The Judgment of the CJEU in Slovak Republic v. Achmea – A Loud Clap of Thunder on the Intra-EU BIT Sky!", March* 7, 2018. Online: http://arbitrationblog.kluwerarbitration.com/2018/03/07/the-judgment-of-the-cjeu-in-slovak-republic-v-achmea/

[13] Richard Power, Clyde & Co, "*Solar Wars Part V: Achmea – a phantom menace?"* July 18, 2018 . Online : https://www.clydeco.com/insight/article/solar-wars-part-v-achmea-a-phantom-menace

[14] *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain* ICSID Case No. ARB/14/1.

[15] In its Decision of 10 November 2017 (EC Decision C(2017) 7384), the EC expressly criticised the ECT claims brought against Spain as being contrary to EU law.

from the premise that states are often held responsible for tax, environment and financial markets regulations[16], there should be in practise a democratisation of arbitral awards appeals by another arbitral tribunal or by a national court[17] to allow a process in accordance with state's right to regulate and avoid both fallacious and pro-investors treaty interpretations.

These CJEU decisions will undoubtedly have a negative impact, especially on the short term as the companies that will choose to settle and invests within Europe will be exposed to an "*uncomfortable situation where the validity of intra-EU BITs is questionable at best and thus the investor protections provided for by those BITs is uncertain*"[18]. Moreover, among other considerations, to preserve their substantive legitimate expectations they will also have to avoid being dismissed on jurisdictional grounds.[19]

CHAPTER I: THE STATE OF THE CURRENT SYSTEM: LEGITIMATE EXPECTATIONS, A SUBSIDIARY COMPONENT OF FET TREATMENT STANDARD RATHER THAN AN AUTONOMOUS NOTION.

1. THE ADMINISTRATIVE AND SUBSTANTIVE PROTECTION OF A "DOMINANT ELEMENT" OF FET

Legitimate expectation doctrine did not exist within international law, before the proliferation of investments awards. These awards anchored the doctrine within the FET standard. As it was stated by the Saluka tribunal: "*The standard of "fair and equitable treatment" is therefore closely tied to the notion of legitimate expectations which is the dominant element of that standard …*" [20]. In its substance the concept of legitimate expectations could be find via a basic test. This test was taken from the decision International Thunderbird Gaming Corp v The United Mexican States[21] within the context of a NAFTA framework dispute:

"*Having considered recent investment case law and the good faith principle of international customary law*[22] *, the concept of "legitimate expectations" relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates*

[16] Susan D Franck, "*Development and Outcomes of Investment Treaty Arbitration*", (2009) 50:2 Harv Int'l LJ 435 at 435.
[17] Anders Nilsson, Oscar Englesson, *"Inconsistent Awards in Investment Treaty Arbitration: Is an Appeals Court Needed?"* (2013) 30 Journal of International Arbitration, Issue 5, pp. 561–579.
[18] Raid Abu-Manneh, Ali Auda and Jonathan Clarke discuss a hot topic at the Paris Arbitration Week, Arbitration: "*A Brexit bonus? The Commercial Litigation Journal*" May-June 2018 #79. Online: https://www.lawjournals.co.uk/the-commercial-litigation-journal/arbitration-a-brexit-bonus/
[19] *See Phoenix Action, Ltd v The Czech Republic* [2009], *Venezuela Holdings BV et al v Bolivarian Republic of Venezuela* [2010] and *Levy de Levi v Republic of Peru* [2014].
[20] *Saluka Investments BV v The Czech Republic*, Partial Award, 17 March 2006, note 1 para 302.
[21] *Thunderbird Gaming Corp v The United Mexican States* , Arbitral Award, NAFTA, 26 January 2006, Online: https://www.italaw.com/sites/default/files/case-documents/ita0431.pdf. See also, *Azurix v Argentina*, Award, 26 June 2000, para 102 ; *Metalclad v Mexico*, Award, 30 August 2000, para 103.
[22] F. Orrego Vicuña, *Regulatory Authority and Legitimate Expectations*, 5 Intl Law Forum, 188m 193 (2003).

reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages."

However, the threshold for legitimate expectations may vary depending on the nature of the violation alleged, which makes even harder to adopt this concept as a general principle of law. Tribunals thought comparative analysis, will provide a decision based on potential similarities. Not surprisingly, tribunals have failed in establishing a general concept that could be recognised by every domestic jurisdiction as such. However, the doctrine of legitimate expectations it has been well-established by tribunals that the doctrine includes a substantive expectation, whereas a vast majority of domestics' jurisdictions only limits the application of the doctrine to procedural protections.[23]

The problematic is that imposing a substantive doctrine within domestic's jurisdictions could be of a real struggle for host states administrations. Indeed, administrative bodies will have to anticipate that incompatibilities might arise between tribunals methods, when investigating a violation of legitimate expectations, and with methods used by host states to check the legality of their actions.

As there is no de jure jurisprudence in investment arbitration, the main principle of the system lies in the idea of reliance, which means that despite all the preliminary precondition to an investment, the stability of the investment and the respect of legitimate expectations are first arising from treaties and secondly based on trust and good faith. There is no strict authority of precedents and legitimates expectations are just a corollary of the bona fide principle. Indeed, despite their reliance on case law, tribunals have repeatedly pointed out that they are not bound by previous cases.[24]

2. LEGITIMATE EXPECTATIONS, THE MANIFESTATION OF "MACRO GOOD FAITH"

The doctrine of legitimate expectations starts with an investment or the extend of an investment. Making a foreign investment has to be distinguish from making a traditional trade transaction, as it initiates a long-time relationship between the host state and the foreign investor. One of the key features of such investment is that the investor will analyse in advance the risks inherent to his investment and plan his implementation from both a legal and a business perspective. Therefore, the implementation of a projection will be subsequent to the particularities of the host state market and environment. The key feature of this dynamic in the host-state-investor relationship starts from the negotiations, when, on one hand the investor tries to seek guarantees and on the other hand, the host state is keen to attract the investor and make compromise.

[23] Ibid 8 at page 208.
[24] *Amco v Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID Reports 395; *Feldman v Mexico*, Award, 16 December 2002, para 107; *Enron v Argentina*, Decision on Jurisdiction (Ancillary Claim), 2 August 2004, para 25.

For all of these reasons combined, the frustration of legitimate expectations seems like a breach of a "macro good faith principle"[25]. Indeed, the defined character of legitimate expectations is that an investor makes an investment in a host state based on a specific insurance for some measure of protection or behaviour by the host state at the time of the investment. Then, the frustration of these expectations comes from the fact that the state contradicts substantially that insurance, which, characterise the breach of legitimate expectations. There are two components to analyse a claim of legitimates expectations violation. Firstly, the regulatory framework that is specific to the investment. Secondly, insurance related to the investment has to be given by the host state. Regarding this latter point,

it might be in the contract, or it could be a ministerial communication and even a promise of support by a representative of the host state.

There is an argument that says that the insurance does not need to be expressly from the minister or government and the argument could be find within the system of law that the state chooses to enact (e.g. form of a legislative rule or mandate or potentially in the administrative practices or policies).

Furthermore, it is important to highlight that as a claim for legitimate expectations violation is a strong one, the insurance has to be made at the time of the making investment. It is crucial, especially as it is sometimes evoked as the reliance between the investor and its commitments. Reliance might be slightly a too strong word, however, because there are other things to consider when evaluating an investment; this makes sense to qualify these negotiations as such. Indeed, reliance between the two contracting parties implies that the investor will normally bear the commercial risks inherent to his project, whether it is market volatility, exchange rates, the arrival of new potential competitors, etc. In specific transactions, it might be necessary and relevant to revaluate commitments in the light of financial and political sovereign changes made by the host state. If investors can include provisions on potential inflation, dispute settlement or duty of the host state to buy a certain amount of product (this latter example is very common especially for energy production investment) unfortunately, the dynamics of the doctrine of legitimate expectation embody a massive crush point.

Literally, a state could comply with both standards settled during the negotiation period and in the investment treaty. In such case, the state will be considered to have acted in good faith. Nonetheless, it is less certain that the state will always be considered to have acted in good faith, specifically if on the long term the state also needs to comply to its other international treaty obligations. For instance, this could be the case when the states regulate with an incentive to protect environmental resources or human rights. Then, could we inversely presume that the state will be implicated in bad faith vis-à-vis foreign investors?

[25] Munir Maniruzzaman (University of Portsmouth), "*The Concept of Good Faith in International Investment Disputes – The Arbitrator's Dilemma*", Kluwer Arbitration Blog, April 30, 2012. Online: http://arbitrationblog.kluwerarbitration.com/2012/04/30/the-concept-of-good-faith-in-international-investment-disputes-the-arbitrators-dilemma-2/

3. JURIDICAL INTERPRETATION OF THE PRINCIPLE

The need to settle a real framework for the investor comes from the host state's incentive to attract foreign investment. This desire to channel more investment implies the removal of every obstacles that could jeopardise a sustainable investment.

Creating an "investor-friendly" environment also means try to provide them with certainty and predictability.

Indeed, once a state admits a foreign investor, it is subject to the respect of a minimum standard[26]. Among the driving parameters of juridical interpretation and the appraisal of legitimate expectations, the intelligibility and clarity of the legal framework provided is a key element. Indeed, the problem lies in the sense that the main principle of law clarity is an ambiguous ideal. Legally defining with too much details a concept has a counterpart, which is the restriction of the legal scope. The positivist ideal and classical theory asserts that the juridical interpretation should not be a problem if the wording is clear (claris non fit interpretatio).

Nonetheless, it is arguable, as obscurity could also come in the expression of laws. Obscure norms come from the fact that they are too verbose, too talkative, or on the contrary from an excessively brevity. So far, tribunals have failed in harmonising domestic recognition of the standard and keep always including substantive expectations. The mere fact that legitimate expectations are not precisely delineate and generally defined, is a way to encompass more dispute cases. Paradoxically, it is also at the same time raising a problem of judicial accountability, openness and independence of the investment arbitral system.

It is obvious that harmonising a concept applicable to different states environments and finding the right balance between an obscure norm and clear wording is no easy task. Giambattista Vico[27], stated regarding legal clarity that "*clarity is the vice of human reason rather than its virtue*", because a clear idea is a finished idea. However, in the investment world, the reality is that the environment hosting an investment will always be subject to evolution and it is difficult for a state willing to improve its global policy to provide the investor with an irremovable and perfectly stable framework. Indeed, the real role of law as an instrument of political public policy has been questioned multiple time, especially when it comes to deregulation and privatisation policies. Yet, the society is evolving, becoming more technical and complex, more atomised, all at the same time as being more and more globalised. Globalisation has led to a lack of stability surrounding investment. Investors perceive risks but cannot anticipate the expression of sovereign decisions. Among these host state decisions: expropriation or impending expropriation that have become known for affecting the value of the investment.

This article will intend to provide a comment regarding systemic interpretative challenges that the principle of legitimate expectations raise for investors. The study will analyse possible indicators to delineate the principle and

[26] See E.Root, " *The Basis of Protection to Citizen Residing Abroad*" (1910) 4 AJIL 517,528 at pp 134-8.
[27] Hazard (Paul*), European Thought in the Eighteenth Century: From Montesquieu to Lessing*, Paris, Fayard, 2e éd., 1979, p. 29-30.

eventually sustain the "autonomy" of the legitimate expectation doctrine, while efficiently balancing both states and investors' expectations.

CHAPTER II: SPECIFIC FACTS AND ACTS OF LEGITIMATE EXPECTATIONS

1. ROAD SHOWS LEGITIMATE EXPECTATIONS

Only legitimate expectations generated by the host state will be protected under the FET standard. In the Sempra case, the respondent stated that "*legitimate expectations cannot in any event arise from mere road shows or information materials not attributable to the Government*"[28]. "Road shows" are occurring during the period of the meeting between investors and corporate actors' representatives of a firm. During this phase, they discuss the characteristics or results of an ongoing financial operation. These "preparatory acts" do not generate legitimate expectations as the information's used in this context are not attributable to the host state. Therefore, legitimate expectations are only to be considered when linked to states "accountable acts or facts". It is evident that the difficulty is largely reduced when the investor refers to expectations generated by a state organ acting on its behalf and in compliance with domestic law.[29] On the contrary, when the organ part of the dispute is not acting within the limits of its competence and authority or exceeding them, the interpretation is confused. Usually, international law provides a codification [30] for states responsibility that settles pertinent elements and criteria to solve such issues.

In the Enron and Sempra cases, the nationalisation campaign that has been led by the Argentina State had been prepared by consulting firms with the essential mission to explain to potential investors, juridical and technical modalities of this privatization plan (information memorandum). Arbitrators do not rule out the possibility for legitimate expectations to be generated at the benefit of investors for these acts, however this assumption is only implicit. Indeed, acts, declarations and facts of these consulting firms only contribute to generate these expectations but do not create them. In these two cases, the silence of the Argentine government was a decisive factor. Both arbitral tribunals confirmed that if a mistake had been made by the consulting firms providing documents for the investors, these mistakes should have been under the control of the state. As a consequence, the Argentine State have a direct obligation to clarify the wordings of the documents provided to avoid the birth

[28] *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, at para 277. Online: https://www.italaw.com/sites/default/files/case-documents/ita0770.pdf

[29] *PSEG Global, Inc., The North American Coal Corporation*, and Konya Ingin Electrik Üretim ve Ticaret Limited *Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5. Award 19 January 2007, at para 225. Online: https://www.italaw.com/sites/default/files/case-documents/ita0695.pdf

[30] The International Law Commission of the United Nations (ILC) was established by the United Nations General Assembly in 1948 for the "*promotion of the progressive development of international law and its codification.*"

of "false legitimate expectations"[31].The doings of consulting firms are not neutral and should be considered at some point regarding the creation of legitimate expectations. However, technically, they are only preparatory acts of a process, validated and subject to the state approval. Whether this approval is express or implicit, this is a classical situation of international law, where the state has the obligation to react to a situation that is contrary to its law or to its good will. If the states fail to contest a document in contradiction with its commitments, there is a considerable risk that these "preparatory acts" will be enforceable and even accountable to the state.

2. FORMALISED AGREEMENTS BETWEEN THE INVESTOR AND OTHER ENTITIES.

Some agreements made between the investor and entities are not emanating from the state. The ICSID case Ioannis Kardassopoulos v. The Republic of Georgia[32], illustrates well such hypothesis. In this case the claimant alleged that the Georgian authorities had created legitimates expectations regarding the acceptable rate return and benefits expected from the conclusion of both a joint venture agreement and a concession.

The Georgian state contested the ability for these entities to act on its behalf. The reason was that they were presumed not to be competent to conclude such agreements, as a result, those acts were contested as not being attributable to the state. However, the arbitral tribunal did not go down this path and the arbitrators based their answer on international law of responsibility as codified by the International Law Commission of the United Nations (ILC). The article 7 of the ILC project adopted in 2001 by the Assembly General of the United Nations states that" The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions."[33] The arbitrators did not took into account whether Saknavtobi and Transneft were competent, regarding the Georgian law, to conclude a joint venture agreement or a concession. The conduct of these entities remains accountable to the State, even though they acted ultra vires[34].

Moreover, the analysis of these two precedent cases conducts to rapidly notice that in the present case, the Georgian State had validated the entire agreements procedure. If we consider that these acts (joint venture agreement and agreement of concession), were concluded by the investor with the incompetent authorities, these acts could be null and void in the domestic Georgian juridical order. From that point, it is questionable whether

[31] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (also known as: *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic*), Award, 22 May 2007, at para 103. Online: https://www.italaw.com/sites/default/files/case-documents/ita0293.pdf; See also ibid 28, *Sempra* Case, at para 113.
[32] *Ioannis Kardassopoulos v. The Republic of Georgia*, ICS.ID Case No. ARB/05/18, Jurisdiction Decision, 6 July 2007, at para 189.
[33] Resolution adopted by the General Assembly [on the report of the Sixth Committee (A/56/589 and Corr.1)] 56/83. Responsibility of States for internationally wrongful acts, 12 December 2001, doc. ART 7.
[34] Ibid 33 at para 190. See also *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, at para 85.

illegal and null acts within the domestic court of the host state could create legitimate expectations for the investor, whom is protected by international law.

Another former ICSID case is relevant to answer that question. In the SPP v Egypt case, the respondent contented that some acts of Egyptian representatives, upon which the claimants relied, were null and void because they were not taken pursuant to the procedures prescribed by the Egyptian Law.[35] The tribunal answer in this case emphasised that the investor was rightfully relying on the representatives acts as it is possible that under the domestic law "*certain acts of Egyptian officials may be considered as legally non-existent or null and void or susceptible to invalidation*"[36]. However, if these acts are communicated as emanating from the government to the investor, then it is legitimate for the investor to rely on them. These decisions are arguable, as the investor is privileged, and it could appear that implicitly all acts sealed by a public authority could create legitimate expectations at the benefit of the investor. The tribunals could have underlined that the investor could also be aware if some acts appeared manifestly irregular and unlikely to create expectations in its favour. Indeed, it is in the old adage that "*nemo auditur propriam suam turpitudinem allegans*", and if in mentioned cases the acts were not irregular, the tribunal adopted a general and broad formulae in this latter decision.

Such general wording implies that presumably in the situation of irregular acts, the possibility for the investor to claim the violation of its expectations will still be legitimated, which is arguable.

Finally, some arbitrators could notice that in certain circumstances the host state implication is too minimal in the investment operation, for legitimate expectations to be created at the benefit of the investor. Thus, in the William Nagel v. The Czech Republic case[37], the agreement concluded during the negotiations had been concluded by the state and the investor, but between the investor and a firm who did not had operating rights on behalf of the state. Again, in this case, international law of state responsibility ensures a total or global control.

3. NATURE OF ACTS AND FACTS CREATING LEGITIMATES EXPECTATIONS

The arbitral "jurisprudence" is poorly explicit on the forms that facts could take to be considered as generating legitimate expectations. The formulations related are various and sometimes contestable as they tend to oscillate and swing like an irregular pendulum, between total commitment and partial-commitment. The unilateral commitment of the state founds its roots within the will, autonomy of its author and within the legitimate trust of its beneficiary. Whereas, the partial commitment is more like a responsibility-oriented fact of the author that comes from the legitimate belief of its beneficiary.

[35] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, at para 82
[36] Ibid 36 at para 83.
[37] *William Nagel v. The Czech Republic*, SCC Case No. 049/2002, Award 9 September 2003, at 174.

The decision of the ad hoc committee in the CMS case[38], delivers interesting elements related to the judicial nature of legitimate expectations. The finality of this analysis is not strictly theoretical, it is about determining if legitimate expectations can be covered by umbrella provisions. In the present case, the members of the ad hoc committee clearly indicated that legitimate expectations were not as such legal obligations, though they may be relevant to FET application.[39]

Starting from that point, legitimate expectations that arise at the benefit of the investor do not reflect the host state's obligations, that should be considered in an umbrella clause. Regrettably, the ad hoc committee did not develop this point. From this analysis only, legitimate expectations are framing the applicability of FET standard, this latter is the only standard that will be violated if the investor's expectations were frustrated.

Only the FET standard creates rights for the investor, legitimate expectations is a concept at the borderline between fact and law. This thesis has been extended at its extreme point by Argentina in the Enron case, when state's representatives maintained that the bilateral treaty promoting investment and investment protection, did not protected legitimate expectations of the investor, but "specific rights":

"*The Treaty does not protect legitimate expectations but only specific rights and in this case none of the measures questioned can be equated to those considered in other cases as being inconsistent with the guarantees offered to induce the investor or amounts to the destruction of the capacity for rational decision-making.*"[40]

From then on, given that legitimate expectations always come from investors' rights that are emanating from various pre-existing sources, it must be questioned if the preservation of legitimate expectations requires a state's accountable commitment, or if a "partial-commitment" is sufficient to create them. In the first case, we will focus on the State side to determine how a state commit to an investor, in the second case, on the investor point of view to determine if he could legitimately believe that a State made a commitment to him.

a) LEGITIMATE EXPECTATIONS CREATED BY A STATE COMMITEMENT

If we consider, as many arbitral tribunals, that legitimate expectations of the investor emanate from a State's commitment, three questions are worth considering. First, what is the nature of this commitment? Secondly, what are the consequences of the nullity or invalidity of this commitment? And finally, what is the is the interest of legitimate expectations preservation when the protected rights are emanating from these commitments?

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[38] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, 25 September 2007, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic.
Online: https://www.italaw.com/sites/default/files/case-documents/ita0187.pdf

[39] Ibid 39 at para 89.

[40] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3 (also known as: Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. The Argentine Republic), Award 22 May 2007, at para 239. See also Ibid 28, *Sempra* Case, at para 277.

- **Nature of State's Commitment**

It is not rare that the investor will invoke the respect of legitimate expectations based on various states commitments. Arbitral awards often either target an instrument in which the commitment is expressed (law, administrative act, contract etc.) or the nature of this commitment (guarantee, insurance, agreements, etc.).

The distinction is without consequences as it is only a language commodity aiming to consider the "instrumentum" and/or the "dispositivum", the essential being that there is a real commitment of the State.

In the Sempra case, all the promises that have been made creates expectations on which the investors should be able to rely on[41], an analogous formulation is find in the Parkerings - Companiet and CME cases[42]. The existence of promises is not necessitated for the legitimate expectations to be created in favour of the investor. However, when it is the case, the investor could legitimately expect that the promises will be honoured.

The position of the arbitrator in the PSEG v. Republic of Turkey case is more surprising, as they asserted that although the claimants "*provided a long list of legitimate expectations that in their view have not been met, the Tribunal is not persuaded that all such complaints relate to legitimate expectations. Legitimate expectations by definition require a promise of the administration on which the Claimants rely to assert a right that needs to be observed.*[43]".

The arbitrators referred to a decision J. of the World Bank Administrative Tribunal in which promissory estoppel[44] had been used. This formulation of the conditions that need to be reunited to protected investor's legitimate expectations is very restrictive. Indeed, as we will see in this study, the tribunal in the PSEG case recognised further in the award that legitimate expectations could arise at the benefit of the investor in the absence of a State's accountable commitment. Thus, promissory estoppel simply constitutes, one hypothesis among others when protected legitimate expectations will be created in favour of the investor. In those circumstances, the tribunal has to determine three key elements: If they were an underlying promise, if reasonably the investor could expect that the promise will be fulfilled and rely on it, and if the trust put in the realisation of the promise was the cause of a prejudice.

Consequently, legitimate expectations of the investor are not establishing a right, they are only supplementing an existing right or direct consequences in line with this right. Apart from this PSGE award, which seemed to make the existence of a promise a prerequisite to the creation of legitimate expectations, the arbitral "jurisprudence" has been more flexible in its interpretations.

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[41] Ibid 29, at para 299 and 303.

[42] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, at para 331. See also, *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial award, 13 September 2001, at para 157.

[43] *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award 19 January 2007, at para 241.

[44] J, Decision No. 349, World Bank Administrative Tribunal, 2006. 119 Opening Statement of Ms. Carolyn Lamm, April 3, 2006, Hearing transcripts, Vol. 1, at 80–81.

If we push the parallel with the estoppel notion, we can affirm that legitimates expectations could be protected not only by promissory estoppel, but also by estoppel by representation. The first one refers to the reality of the act (the promise), and the other to the fact (the representation or the appearance). Both elements could create legitimates expectations for the investor. The promise is clearly similar to a State commitment. It is formulated for the investor; the latter will not need to formally accept it to take advantage of it. Even so, all the promises made by the State cannot systematically generate expectations juridically protected at the benefit of the investor. It is traditionally considered that the State is bind only by promises that he can honour or that we could reasonably expect him, in good faith, to honour[45]. If the investor had known that the promise of the host state could not be honoured, it is impossible to consider this promise, as being constitutive of any legitimate expectations. In such circumstances, the expectations could exist, but they will not be legitimate.

- **Illicit or null acts regarding the host state domestic law**

If it is established that the State has engaged to the investor in an intern regulatory act, in some hypothesis, the commitment will be considered as null by the State, questioning possibility to protect expectations that arose from it. As previously evoked, in the arbitral "jurisprudence", arbitrators considered that if from the point of view of the host state's domestic law the commitment is irregular, then, it will be without any effect on the investor legitimate expectations[46].

A more delicate questions could arise when the host state commitments results from an act, which initially was in conformity with the domestic law and that becomes illegal after a regulatory change within the investment host state framework. Such problem arose in the Parkerings-Companiet case, in which a revision of the Lithuanian law challenged the conformity to domestic law. Notably, essential dispositions that were part of the agreement concluded between the investor and the public authority. The investor did not base his demand on the preservation of legitimate expectations generated by this agreement, but on the frustration of its legitimates expectations. Indeed, the claim was based on the idea that "Lithuania frustrated Parkerings's legitimate expectation that it would respect and protect the legal and […] economic integrity of the Agreement"[47]. The Claimant alleged that it was "*entitled to expect that Lithuania maintain a stable and predictable legal and business framework*"[48].

Consequently, despite the posterior manifestation the illegality of the initial agreement's dispositions, it is the survival of the legitimates expectations arisen from this agreement that are creating legitimate expectations. In

[45] See Peel, E., *"The Status of Agreements to Negotiate in Good Faith"* in Burrows, A. and Peel, E. (eds.), *Contract Formation and Parties* (Oxford 2010). See also Mason, A.F., "Contract, Good Faith and Equitable Standards in Fair Dealing" (2000).
[46] Ibid 33, Ioannis Kardassopoulos Case. See also Ibid 36, SPP Case, at 26-27.
[47] Ibid 43, at para 321.
[48] Ibid 43, at para 322.

these circumstances, it is of the legal framework stability of the investment that will be questioned on the basis of a stabilisation clause or the preservation of a potential legitimate expectation regarding stability.

- **Utility of legitimate expectations**

All these elements previously mentioned are questioning the utility and relevance of the preservation of investor's legitimate expectations. Especially, when these latter results from an act accountable to a State. The obligation made to the State to respect bona fide[49] its commitments is already self-sufficient.

The Compania de Aguas del Aconquija case[50] illustrates well this statement. The claimants considered that the FET standard impose "*affirmative obligation on government to treat investors in good faith in a reasonable and measured manner that respects the contractual provisions that embody the expectation of the parties and to promote the realisation of their expectations – including a fair profit for the investor.*"[51]

In this dispute, the investor claim that the State modified unilaterally the agreement disposition, which gave an incentive to the customers not to pay the bills in due time to the investor.

Therefore, the Province "*not only failed to protect, but itself directly undermined, Claimants' legitimate, investment-backed, expectations with respect to the Tucumán concession when the Province directly and unilaterally modified the terms of the Concession Agreement.*"[52]Indeed, the state required the investor to include certain taxes within its tariff caps; and prevented him from cutting service to non-paying customers.

Among these elements, various could be analysed as a violation of the concession contract between the State and the investor. As a consequence, using the prism of the frustration of legitimate expectation to claim a violation of contractual disposition could seems obsolete. These ambiguities results from the fact that legitimate expectations of the investor are a large prism standard, from which the most elementary manifestation consists in affirming that the State is bind by its commitments and most of all, that the co-contracting party (investor) has the right to have legitimate expectations. In the precited case, the expectation is legitimate because it is legally acquired. The expression "preservation of legitimate expectation" allows to consider hypothesis in which there are no violation of legally, but simply a substitution from a legal framework to another, a from one legality to another.

[49] See also the principle of good faith articulated in the "*Aminoil" Case: Government of the State of Kuwait v. American Independent Oil Co., 21 ILM 976 (1978) ("Aminoil").*
[50] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (formerly Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic), Award, 20 August 2007.
[51] Ibid 51, at para.5.2.15.
[52] Ibid 51, at para.5.5.16.

In the absence of a stabilisation clause or a freezing clause[53], this legal transformation is always possible, still the investor can legitimately expect to find beyond a co-contractor State, also a stable partner.

The investor will always consider the juridical framework of a potential host state before deciding to initiate an operation on its territory. He could legitimately require a certain stability of the regulatory framework and that the State will respect the equilibrium of the agreement. To this extent, preservation of legitimate expectations is a standard treatment that is subsidiary to other States[54] and investors obligations.

All expectations that the host state will respect legal rights of the investors, are not similar to legitimate expectations protected by the application of the FET Standard. On that point, the Parkerings-Companiet dispute is an illustrative case. The tribunal considered that if legitimate expectations of the investors had been frustrated due to the Lithuanian legislation change, therefore, the expectations are from a contractual nature. Yet, the violation of contractual expectations does not significate that there is necessary a violation of legitimate expectations under the international law. Thus, stemming the principle from a right to a Fair and Equitable Treatment[55]. If we go beyond this particular framework, it is possible to consider that this question refers to the controversy about the link between a violation of the investment contract and the BIT promoting and protecting the investment. In the absence of an umbrella clause in the contract, the violation of the contract, does not imply the violation of the treaty. To this substantive question, a procedural question was added in the Parkerings-Companiet case. Indeed, the litigious contract recognised jurisdiction to domestic Lithuanian tribunals to extend claims related to its application.

This analysis clearly underlines that it is not of a real interest to consider that the preservation of legitimate expectations should be an autonomous juridical institution, if we do not consider the State good will and simply rely upon determining if the investors had reasonably trusted the State's intention emanating from the act. It is the reason why, the study of the preservation of legitimate expectations is without doubt, more accurate when there is no authentic commitment of the State, but rather more accurate when assessed regarding what could be designated as a "partial-commitment". "A partial commitment" is the idea that it is the false promise and deliberately taken the commitment took only in appearances, that deluded the legitimate belief of the investor.

A total commitment is the main criteria of a juridical act, as a source of obligation, it implies two consequences: The creation of obligations for the author of the promise (the host state), and the attribution of a coercive power for its recipient (the investor). As a result, the commitment is distinguishable from the obligation that it generates.

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[53] Some states have introduced specific legislation to authorise the executive branch to conclude special contract stabilizing pre-existing agreement ("Legal Stability Agreement" – LSA). See *Duke Energy v Per*, Award, 18 August 2008, The tribunal had to interpret such an LSA. See also, *AGIP v Congo*, Award, 30 November 1979.

[54] *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8.
Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, at para 89.

[55] Ibid 43, at para 344.

b) LEGITIMATE EXPECTATIONS ARISING FROM A PARTIAL-COMMITMENT OF THE STATE

When a State's commitment exists in favour of an investor, it is not systematically necessary for an investor to use the protection of legitimate expectations in order to be successful in his attempt to secure his expectations. In practice, things are more complex when the investor cannot prove the formal commitment that the state has made to him.

Nonetheless, after his analysis on that particular point, Thomas Wälde attested in his separate advisory opinion of the Thunderbird case, that:

"*A review of these cases suggests that conduct, informal, oral or general assurances can give rise to or support the existence of a legitimate expectation. But the threshold for such informal and general representations is quite high. On the other hand, a legitimate expectation is assumed more readily if an individual investor receives specifically formal assurances that display visibly an official character and if the official(s) perceive or should perceive that the investor intends, reasonably, to rely on such representation (the element of "investment-backed expectation".)*".[56]

Here we could use the expression of "partial-commitment" or "quasi-commitment", as the commitment imposed to the investor the legitimate belief that an equitable agreement was made. If we apply this notion to international investment law disputes related to legitimate expectations and FET, the investor could try to base its claim on the attitudes and behaviours of the States (a) or acts that are not attributable to the State (b).

- **Attitude and behaviour of the state**

If no formal commitment has been made by the State to the investor, the legitimate expectations of this latter cannot either be protected by international investment law. Thereby, it is the case when legitimate expectations arise from representations that the investor believed that were made on the State's behalf.[57] As legitimate expectations are perceived from the investor point of view (we are searching what the investor could legitimately expect from the State), it is logical that we focus on the way the investor perceive the action or behaviour of the State. The idea from which the State, in the absence of formal commitment, could still be committed to the investor via his behaviour or attitude, is not systematically questioned by States. Thus, in the Parkerings-Companiet case, Lithuania considered that not any public authority did encourage the company to invest, by only creating mere representations of the stability that the legal framework could offer for such possible investment.[58]

[56] *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, 1 December 2005, Separate Opinion of Thomas Wälde, at para.32. Online: https://www.italaw.com/sites/default/files/case-documents/ita0432.pdf
[57] Ibid 22, at para.138.
[58] Ibid 43, at par. 323.

In another precited relevant case, Ioannis Kardassopoulos[59], Georgia implicitly recognised, as necessary, that the representations could create legitimate expectations for the investor when the Georgian State testified that the litigious representations were not pertinent as they could not be accountable to the State. As a result, Georgia did not align its defence arguments on intrinsic ability of representations, but rather on accountability.[60]

Herein, we are in the hypothesis where the law is trying to solve the problem of illusory situations, trying to give a creative force to the belief. It is because we believe in the existence of a legal relationship, that should exist.

Implicit deductions are the key element in this study, as on a case by case basis, the point of view of the investor differs as well as the State's behaviour. Some arbitral tribunal argued the implicit deduction theory. Notably the tribunal in the Eurotunnel case, in which, the claimants, despite of the lack of precisions in the concession contract, claimed that he could with certainty maintain legitimate expectations. More precisely, the claimants asserted that: "*The successful applicants would not suffer from discriminatory measures of support to their competitors, when all financial assistance or public guarantees were precluded to them for the duration of the Concession*".[61] This was in the context of an invitation made to promoters that addressed the issue of equality of treatment between types of international transport. However, the tribunal rendered a partial award, which firmly rejected this pretention by asserting that "*Nor can there have been a legitimate expectation based on indications given in the Invitation to Promoters. The promoters must have known that their legal relationship with the Governments would be determined not by the Invitation but by the Concession Agreement to be negotiated. Clause 41.1 of the Concession Agreement expressly so provides. That expectations may have been raised by the terms of the Invitation would have been a reason to insist on their inclusion in the Concession Agreement. But it is not a reason for reading into that Agreement stipulations which are notably absent from it.*"[62]

Therefore, legitimate expectations created at the stage of negotiation phase forfeit this character, if afterward an agreement questioning these expectations is signed by the investor.

If the State attitude could generate legitimate expectations for the investor, so could State's behaviour too. The investor could legitimately believe and expect that the State will act as it usually does and base its expectations grounds on its frequent behaviour.

This happened in the PSEG case, in which the tribunal concluded to an indisputable violation of the FET standard as an obvious negligence of the administration occurred during the negotiation proceedings. The negligences (misconducts) were as follow: some important communications never got examined, no deadline to these negotiations were agreed, even though they appeared to lead to no solutions and to be useless. The Claimants had

[59] Ibid 33.
[60] Ibid 33, at para 189.
[61] The Channel Tunnel Group Ltd and France: Manche SA v United Kingdom and France, Partial Award on Jurisdiction, Decision of 30 January 2007, at para.381. See also Audit, Mathias. "The Channel Tunnel Group Ltd and France: Manche SA v United Kingdom and France, Partial Award on Jurisdiction, Decision of 30 January 2007." The International and Comparative Law Quarterly, vol. 57, no. 3, 2008, pp. 724–732. Online: www.jstor.org/stable/20488241.
[62] Ibid 62 at para. 384.

the right to expect that the negotiations "*would be handled competently and professionally, as they were on occasion*"[63]. The question in the latter case is not about the existence of a State's promise to negotiate in a way and following predefined terms and conditions, but rather about the investor expecting that the State will simply negotiate in compliance with its usual practice. Somehow, there is a standard of normal or reasonable behaviour[64] that the investor could legitimately expect.

- **Legal acts not generating rights for the investor**

The usual practice for State's organs does not necessarily generates legitimate expectations for the investor. Like so, it is not uncommon that decisions were taken to be durably and effectively maintained by the State's in its future practice. The ADF Group case[65] is very original on that particular question. The investor classically affirmed that legitimate expectations arose from the consistent practice of the American administration, but also surprisingly, that some expectations were generated by the American tribunal "jurisprudence". This possibility was not rejected by the competent tribunal to examine the case, however, in this case, it considered that the jurisprudence that was evoked by the investor did concerned neither the same text nor the same conditions of applicability. Consequently, the evoked jurisprudence could not be analysed as generating protected legitimate expectations.[66]

CHAPTER III: THE CONTENT OF LEGITIMATE EXPECTATIONS

All legitimate expectations could not be protected by international investment law. Usually, arbitral awards highlight that international investment law mission is not to protect and preserve the investor from the realisation of any form of risk.[67] The doctrine of unforeseeability or unforeseeable risk underlines the idea that all the expectations and hopes of the investor could not constitute expectations under international law[68]. As BIT promoting and protecting investment do not states legitimate expectations, there is no distinctive and conventional criterion between protected expectations and unprotected ones. That is why, the arbitral practice of international

[63] Ibid 44 at para. 246.
[64] Ibid 22, *Thunderbird Gaming Corp v The United Mexican States*, at para 147. See also, *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, at para.2 79. Online: https://www.italaw.com/sites/default/files/case-documents/ita0500.pdf
[65] *ADF Group Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1, Award, 9 January 2003, at para.72.
[66] Ibid 66, at para.189.
[67] *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, 1 July 2004, at para.182. See also *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, at para.130; *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, 16 September 2003, at para 20.23 and 20.30.
[68] Ibid 43, *Parkerings-Compagniet*, at para.344.

investment disputes forges a path toward more consistency. These precedents provide information on the object of protected legitimate expectations (1) and on their legitimacy. (2)

1. THE OBJECT OF LEGITIMATES EXPECTATIONS

Without focusing on the legitimate character of the expectations, it is questionable whether all investors' expectations can be protected and preserved by the FET Standard. Although legitimate expectations are inevitably intertwined, the expectations of all investor operating abroad, could be divided in two categories: Firstly, the economic expectations and secondly the legal expectations. If the practice almost sanctifies the application of legitimate expectation protection to legal expectations, it does not exclude the applicability to economic ones. Nonetheless, it is quite certain that some (legal expectations) are only a way to reach the others (economic expectations).

a) ECONOMIC EXPECTATIONS

Obviously, the first objective of an investor is to obtain a capital gain and a return rate on its investment, in other words, benefit economically of its operation. One wonders if this profit expectations should and could be protected at the same level as legitimate expectations.

In arbitral disputes, this presumption is a frequent ground[69] for investors 'claims. Often, States will contest such claim by affirming that investment law should not eliminate ordinary risks accepted by foreign investors.[70]In these awards, such risks are not explained in detail, but it is certain that traditionally the main risk for an investor, is the economic risk.[71]Evidently, when it comes to evaluating the management of an investment; it is well-established that host states should not be hold accountable for investors "unwise business decisions"[72]. Indeed, the host state should not pay the consequences for investor's irrational behaviour.

Therefore, in which circumstances, States could be held liable for legitimate expectations frustration? In the Telenor dispute, in the rendered award, the arbitrators used the expression "legitimate expectations of the investor" to designate two distinctive realities. On one hand, legitimate expectations that are in conformity with the domestic regulation of the host state; and on the other hand, the investor legitimate expectations of profits.[73]

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[69] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3 (formerly *Compañía de Aguas del Aconquija, S.A. and Compagnie Générale des Eaux v. Argentine Republic*), Award, 20 August 2007, at para. 5.2.15; See also *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, 16 September 2003, at para 6.12.

[70] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, at para.226.

[71] Ibid 70, *Generation Ukraine, Inc. v. Ukraine*, at para 20.30. See also, *Malaysian Historical Salvors Sdn., Bhd. v. The Government of Malaysia*, ICSID Case No.ARB/05/10, Award on Jurisdiction, 17 May 2007 ("Award"), para. 112.

[72] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, at para. 167.

[73] *Telenor Mobile Communications A.S. v. The Republic of Hungary*, Award, 13 September 2006, at para.61.

The second branch of this statement implies that international law should recognise the investor's legitimate expectations related to the investment return rate. These expectations are directly consecrated by some arbitral tribunals. In the Middle East Cement Shipping dispute, the contested measure what an administrative withdrawing license. Yet, the tribunal stated that "*the License had not exhausted its potentiality of yielding further profits to Claimant's benefit and that, accordingly, Claimant had a legitimate expectation that it could have earned additional profits under the License.*"[74]The tribunal relied this right to legitimate additional profits to the protection of legitimate expectations. However, this could just as much refer to the benefit expected regarding the determination of the amount of compensation. Compensation of the lucrum cessans[75]and the protection of profit legitimate expectations could constitute the "two sides of the same coin".

Predictability and certainty are key mandatory requirements to evaluate the amount of damages to compensate the investor. As a result, would it be logical to expect that the same requirements will help recognising a legitimate expectation at the benefit of the investor? Obviously, the profit expectation will not be legitimate if it is dilettante or unreasonable regarding the host state economic reality.

Nevertheless, in both circumstances, when analysing legitimate expectations or compensation, it is not desirable nor advisable that the arbitrator research with the same rigour profit certainty and predictability. Unfortunately, this distinction does not seem to be applied by arbitral tribunals. Thus, in the Middle East Cement Shipping, the tribunal considered that in order to consider market value legitimate expectations, the claimant should prove the existence of the pecuniary value of the asset(s) taken. In other words, the proof of both missed contracts and profit loss that occurred from the State's authority. Evidently, as it is hard to evaluate the loss of prospected profit, the claimant did not succeed to provide proves. The Tribunal concluded that the claimant did not fulfilled that burden of proof and that, therefore, no additional compensation was due in this regard.[76]

It is certain that the recognition of legitimate expectation preservation and protection does not mean for the investor that he is entitled to a right to a specific amount of profit or an investment market value target. However, arbitrators do not rule out totally economic legitimate expectations of the investor. Thus, in the Generation Ukraine case, the tribunal recognised that the investor had led his investment in Ukraine as he could expect a higher productivity than in other States, in which the economy was more developed.[77] Finally, as well as a State

[74] *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2006, at para.61.
[75] Michael Pryles, President, Australian Centre for International Commercial Arbitration; President, Asia Pacific Regional Arbitration Group; Consultant, Clayton Utz Lost Profit and Capital Investment.
Online:https://www.arbitration-icca.org/media/4/43096502954185/media012223892171920damages_in_the_international_arbitration_paper.pdf ; See *also Sapphire International Petroleums Ltd. v. National Iranian Oil Co.*, 35 I.L.R. 136 (1967); 13 Int'l & Comp. LQ 1011 (1964).
[76] Ibid 75 at para.128.
[77] Ibid 71, *Generation Ukraine*, at para.20.37

can include an umbrella clause within the framework of a concession agreement or for the operation of business, it is also possible to include a guarantee for investor's financial compensation.[78]

b) LEGAL EXPECTATIONS

It is delicate to research the exact nature and what are substantive legitimate expectations of the investor that should be protected. Nonetheless, and despite that some awards remain silent on this point[79], the arbitral practice in this field, offer an overview. Two elements are essentials: The State's transparency and the stability of the judicial and economic framework of the investment.

- **The State's transparency**

The transparency requirement is inherent to the FET standard and constantly evolving within the arbitral investment practice.[80]To program its investment project and comply to this latter, the investor must be able to know beforehand all the rules and regulations, as well as regulatory objectives that apply to its investment project. The principle had been clearly stated in the Tecmed award: "*Ambiguity and uncertainty (…) are prejudicial to the investor in terms of its advance assessment of the legal situation surrounding its investment and the planning of its business activity and its adjustment to preserve its rights*"[81].On the basis of State's transparency principle, investors are entitled to be informed of juridical circumstances, policies and legal framework of their investment. Which allows no lingering doubts or unsecure situations, notably in such cases, renegotiation and adaptation of the agreement should be allowed. On the contrary, if such adaptation is not possible, the State has the obligation to ensure that investors could act in accordance with domestic regulation. In other words, the State "*has an obligation to act coherently and apply its policies consistently, independently of how diligent an investor is*"[82].

The Metalclad case is very illustrative regarding this principle. The investor obtained a construction and an exploration - extraction permit to settle its investment project. The Mexican authorities had ensured that the commercial framework was predictable and that no additional permit nor authorisation will be needed for the business planning and the investment. However, the Mexican State affirmed afterward that this previous statement

[78] Ibid 68, *Siemens*, at para.227. See also, Ibid 32 *Enron*, at para.266.
[79] Ibid 74 Telenor; Ibid 73 MTD.
[80] *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, Award, 29 May 2003, at para.98 and 174.
[81] Ibid 81, at para. 172.
[82] Some awards are restrictive on this point and do consider that the State has no obligation to inform the investor, as the latter can obtain by himself the necessary information regarding the legal and technical feasibility of its project: *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award 25 May 2004, at para.165.

was in contraction with its domestic law[83]. Despite of that, the tribunal ruled that the investor "*was entitled to rely on the representations of federal officials and to believe that it was entitled to continue its construction of the landfill*"[84].

The transparency principle put on the State the burden of a legal precision obligation. Indeed, the State has the obligation to directly inform investors of potential regulatory changes. Of course, this obligation is not absolute. In the Parkerings-Companiet case, the tribunal ruled that nothing was demonstrating that the respondent had deliberately neglected this obligation of disclosure: the political environment was constantly changing and consequently, the investor should have known that the legal environment could be subject to a change too. This idea highlights that the investor should not be passive, but rather be actively preserving its own expectations by being fully aware of all the risks. Besides, in this case, the investor did not succeed to demonstrate that it was neither possible for a qualified law firm, nor for the investor to obtain informations on the ongoing regulatory project.

Henceforth, the so-called obligation of disclosure does not constitute a legitimate expectation for the investor.[85] Thus, it could be logical to believe that the obligation of transparency is opposable only to the State, provided that the investor is careful. For instance, in the MTD dispute, arbitrators agreed "*that it is the responsibility of the investor to assure itself that it is properly advised, particularly when investing abroad in an unfamiliar environment.*"[86].

The Thunderbird case illustrates well these precited difficulties. The dispute concerned a corporation (Thunderbird) that wanted to invest in the business of gaming facilities in Mexico, a state in which the legislation is quite restrictive regarding gaming investments. The investor seek certainty regarding his investment and requested to the Mexican federal administration a clarification of its regulatory framework. The competent state's organ gave to the investor the official opinion as below: "*Thunderbird could operate skill machines without regulation, […] the standard being that the machines had to be ones in which the "principal factor" of operation was the user's skill and ability*"[87]. According to the investor, this opinion generated, a legitimate expectation upon which he should have been able to reasonably rely. Nevertheless, the tribunal considered quite rightly that the letter addressed by the Mexican administration to the investor, operated a simple reminder of the applicable law. Namely, the obligation to apply for an authorisation for gambling and luck activities. The tribunal also ruled that if the investor activities relied on skills and ability games, and not on gambling, therefore, such games could be exploited on the Mexican territory without any authorisation.[88]

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[83] *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, at para. 77-99. It has to be noted that the recognition of the transparency principle based on ALENA dispositions, had been contested.
[84] Ibid 84, at para.89.
[85] Ibid 43, *Parkerings-Compagniet*, at para.342.
[86] Ibid 83, MTD, at para.147.
[87] Ibid 22, Thunderbird, at para.139.
[88] Ibid 22, *Thunderbird*, at para.148.

The State in this case fulfilled its transparency obligation by informing the claimant of the regulatory framework and the state of law regarding gambling games investments. Thomas Wälde in his separate advisory opinion stated that "the government cannot rely on its own ambiguous communications, which the foreign investor could and did justifiably rely on, in order to later retract and reverse them– in particular in change of government situations"[89]. It is easy to agree with such statement, as it follows the precited traditional adage "*nemo auditur propriam suam turpitudinem allegans*". Even so, it is more doubtful to consider that the Thunderbird dispute presented the best circumstances to make such an affirmation. Indeed, it was established in that case, that the investor could not ignore that an authorisation was mandatory for gambling games and could not reasonably consider that prima facie official opinion of the administration had the effect of an authorisation.[90]

- **The stability obligation of the investment regulatory and economic framework**

Legitimate expectations are both subsidiary and inherent to the FET standard. That is why the requirements of stability and predictability cannot be separated from the host state's domestic regulation framework.[91] This prerequisite raised subtle semantic debate among ICSID arbitral tribunals. Undoubtedly, the CMS case illustrates perfectly the meaning of the expression "stability of the investment legal framework". In this dispute, the Argentine was the respondent and the latter considered that the arbitral tribunal that rendered a decision, wrongfully interpreted international investment law. On this basis, the Argentine was affirming that the tribunal which rendered the award had recognised an absolute right to stability of both economic and legal environment to the investor. The right was qualified as unlawfully absolute by the State, as it was applicable to the investor operation, in any circumstances.[92] If the tribunal had sacralised the protection of stability legitimate expectations, it would have had conferring to this rule of law the same traditional effect as umbrella clauses. Notably, by extending their application scope to all foreign investors. However, if the protection of stability legitimate expectations and umbrella clauses fulfil the same protecting role for the investor, it is still quite excessive to affirm that they are both producing same effects. The arbitral tribunal in the CME case clearly set aside this hypothesis in 2001, by ruling that there "*can be no legitimate expectation that provisions, and laws become frozen the minute that they touch the interests of foreign investors*"[93].

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[89] *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, 1 December 2005, Separate Opinion of Thomas Wälde, at para.4. Online: https://www.italaw.com/sites/default/files/case-documents/ita0432.pdf

[90] Ibid 22, Thunderbird, at para.164.

[91] See *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee at para.274 and 276; See also Ibid 32, *Enron* at para.260; *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, at para.190 and 191; *LG&E Energy Corp., LG&E Capital Corp.*, and *LG&E International, Inc v. Argentine Republic*, Decision on Liability, 3 October 2006, at para.124.

[92] Ibid 92, CMS, at para.79.

[93] *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial award, 13 September 2001, at para 356.

In the CMS dispute, the arbitrators ruled identically[94]. Indeed, in the absence of State's commitment to the stability of its legal framework, nothing prohibits the States to change or modify its regulation or the applicable dispositions of an investment. This power of the State is particularly legitimate as every government has to face important economics changes. However, when the State uses its normative power, it cannot use it at the detriment of an investor or to deprive an investor's from a legitimate right.[95] In order to accentuate and underline the absence of assimilation between legitimate expectations and umbrella clauses, the arbitral tribunal in Parkerings-Companiet indicated very precisely that by deciding to invest in a host state in economic transition, the foreign company took a "business risk". The tribunal added that the investor should have tried to protect itself from regulatory changes risks, by negotiating a stabilisation clause within the agreement concluded with the public authority.[96]Therefore, in this last case, the tribunal considered that the State did not acted unreasonably, unfairly, or without equity within the exercise of its sovereign powers.[97]

As we could easily conclude that a stability insurance should be granted to the investor, what is the exact instability threshold to punish a violation of this insurance? On this point, tribunal arbitral practice varies. Some awards are strongly supporting the idea that instability could constitute a violation of FET Standard. Thus, in the PSEG dispute, the tribunal ruled that "*the fair and equitable treatment obligation was seriously breached by what has been described above as the "roller-coaster" effect of the continuing legislative changes.*"[98] A key issue in this case was that arbitrators ruled that instability legally sanctionable does not have to be necessary formal. Indeed, it could be an instability due to the misinterpretation or the conditions of a law applicability.[99] Investors requirements are often formulated in this sense, thus, in the Total v. Argentine case, the claimant insisted on the fact that Argentine "*radically changed – contrary to promises, guarantees and legitimate expectations – the legal regime in which the local companies operated, by changing the denomination and adjustment of tariffs and by unilaterally altering the terms of the licenses held by these companies*"[100].

It has to be noted that over the past ten years, Argentine has been a powerhouse generating a high number of ICSID disputes. This occurred after the financial crisis in 2001-2008.[101]Indeed, awards piled up as Argentine overturned prior contractual and legal commitments made to investors. It has been argued that the use of state emergency in the middle of a global economic crisis emphasised the gap between wealthier governments in North America and Europe, which may give a fresh, more sympathetic look to some aspects of the ICSID arbitration system that have long vexed Argentina and other developing countries[102]. Apart from these considerations, it is

[94] Ibid 39, at para.277 ; See also Ibid 32, Enron, at para.261.
[95] Ibid 29*, Sempra*, at.para 114; Ibid 32, Enron, at para.104.
[96] Ibid 43, *Parkerings-Companiet*, at para.336
[97] Ibid 43, *Parkerings-Companiet*, at para.337
[98] Ibid 30, PSEG, at para.250.
[99] Ibid 30, PSEG, at para.254.
[100] *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, 25 August 2006, at para.72.
[101] See Antoine Martin, *"Investment Disputes after Argentina's Economic Crisis: Interpreting BIT Non-precluded Measures and the Doctrine of Necessity under Customary International Law"* (2012) 29 Journal of International Arbitration, Issue 1, pp. 49–70.
[102] Luke Eric Peterson, "*Argentine Crisis Arbitration Awards Pile Up, but Investors Still Wait for a Payout*"

questionable whether the Argentine State had legitimacy in using its state emergency situation as a shield to create a rebound effect of its unlawful acts on investors.

If we contextualise these circumstances with our study, notably the examination of investor's stability and predictability of legitimates expectations, then, Argentine's defensive line emphasis both economic crisis circumstances and the unreasonable character of expropriation measures that occurred in this context.[103]To conclude, it is certain that in this context, investors are entitled to invoke a right to maintain the existent legal framework[104], and that tribunals should consider "the existing conditions of the [host] country". This element will be examined infra in the presentation of the legitimisation of these expectations[105].

2. THE LEGITIMATE CHARACTER OF THE EXPECTATIONS

It is easier to identity investor's legal expectations among expectations that should be protected under international investment law. However, it is more delicate to objectively list expectations that will be universally legitimate. Indeed, as the arbitrators did in the Thunderbird case, the threshold to delineate if the expectations are legitimate may vary according to the alleged violation nature of the expectations and specific circumstances.[106]An alternative formulation to legitimate expectations gives an idea of the true meaning of the legitimate character. Indeed, numerous arbitral awards use the expression "basic expectations" of the investor[107]. This formulation, used to similarly refer to legitimate expectations, highlights that these latter will be the ones that an investor could bona fide expect. In such circumstances, one's belief is legitimate if he could reasonably expect that an unequivocal agreement will be executed.

Once again, the Parkerings-Companiet arbitral tribunal ruled that "*The expectation is legitimate if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representation that the investor considered in making the investment. Finally, in the situation where the host-State made no assurance or representation, the circumstances surrounding the conclusion of the agreement are decisive to determine if the expectation of the investor was legitimate. In order to determine the legitimate expectation of an investor, it is also necessary to analyse the conduct of the State at the time of the investment.*"[108]

Thereby, multiples situations can be distinguished: Either the State had promised or granted guarantees; either the State, without promising, let a representation appear. Another possibility could be that if they were no promises,

www.Law.com | 06-25-2009. Online: http://bilaterals.org/?argentine-crisis-arbitration&lang=fr
[103] Ibid 29, *Sempra*, at para.293.
[104] Ibid 92, *CMS* decision of the *ad hoc* Committee, at para.82.
[105] *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 10 February 1997, at para.7.13.
[106] Ibid 56, *Thunderbird,* at para.148.
[107] Ibid 81, at para. 154; Ibid 83, MTD, at para.114; Ibid 29, Sempra, at para.298.
[108] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, at para.331.

nor granted guarantees or representations, the conditions of the agreement's negotiations were crucial to determine whether investor's legitimate expectations arose from it. This proves that the nature or the qualification of the fact that generates the expectation is not the key element to determine the legitimacy of the expectation.

Indeed, the latter is deeply anchored within the scope of standards and flexible on a case by case basis. From a ratione materiae point of view, the standard is an undetermined concept, that could be a complex tool to manipulate for arbitrator. Therefore, arbitrators will have to render reasonable solutions under the light of each dispute circumstances. Which also means that the concept of legitimate expectations could not be isolated from its main structure: the FET standard.

For that reason, legitimate expectations of the investor could be protected only if they are reasonable in the precise circumstances of the dispute. An investor has to anticipate potential circumstances changes and prepare his investment project with due diligence, which means, by considering eventual evolutions of the host state's legal environment.[109]

Hence, in the Parkerings-Companiet case, the arbitrators did not challenge the fact that important legislative changes occurred, far from being unpredictable. The reason was that as any business man would, the investor should have noticed the circumstances surrounding the decision to invest. As back to this time, Lithuania was in transition and this was certainly not an indication of stability of the legal environment. Consequently, arbitrators stated that in such circumstances, the legal stability should be the exception and the change of the framework, the rule. Indeed, an expectation of regulatory stability could not be legitimate.[110] This means that, as the tribunal also did in the Generation Ukraine case, it is pertinent to consider market volatility and economic evolutions of the host state to determine investor's legitimate expectations[111].

The obligation made to the investor to hold into account the context of the investment operation has been clearly reminded by the respondent in the famous case RosInvest v.the Russian Federation. Russia reminded that when the claimant bought in December 2004 shares of the company Yukos, this latter was exposed to very important tax sanctions that the claimant could not have reasonably ignored. As a matter of fact, the claimant could not nurture legitimate expectations, without considering these particular circumstances.[112]

Then, for the expectations to be legitimate, in other words potentially subject to international investment law, it is necessary that the belief in these expectations do not collude with an investor that ignored the reality surrounding his investment.

[109] Ibid 43, *Parkerings-Compagniet*, at para.333.
[110] Ibid 43, *Parkerings-Compagniet*, at para.335.
[111] Ibid 68, *Generation Ukraine*, at para.20.37.
[112] *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction, October 2007, at para.3.

On the contrary, if an investor has reasonable reasons to believe that the representations of the State emanate from the host state's authority, behaviours or attitudes, then the arbitrator should treat the appearances as it was the reality. Finally, in the absence of State's real commitment, a juridical fiction will apply as if the State committed to the investor.

CHAPTER IV: SYSTEMIC ISSUES & REMARKS

1. THE LACK OF DE JURE DOCTRINE OF PRECEDENT IN INVESTMENT TREATY LAW, AN OPEN DOOR TO INCONSISTENCY

The inherent weakness of international law comes from the various form of core treaties groups that constitute the corpus of this field of law. All the attempts to codify international investment law have been useless. This area of law has been described by Pr. Subedi as a real "*patchwork of IIAs, BITs and FTA's and some WTO agreements such as the General Agreement on Trade and Services (GATS) and the Agreement on Trade-related Investment Mesasures (TRIMS).*"[113]

However, despite the fact that general principles have acquired a role in rules shaping within the field of foreign investment protection. Arbitral tribunals are delineating an inaccurate framework and more especially failing into harmonising the interpretation of legitimate expectations violation.

This inconsistency also comes from other flaws in the current regime of international investment law. Among them, arbitrator's appointment procedure to serve ICSID panels. Rather than improving stability and predictability for investors, "the system is ripe for bad-decision making"[114] The quest for clarity had been the trend over the past few years. Thus, to address imbalances within the system, attempts have been made to reform the ISDS system, as negotiations over the TTIP Agreement. Unfortunately, these attempts seem incremental, which makes the revival of the Calvo doctrine both a new trend and a harsh reality of the current system.[115]

2. CONSOLIDATION THE CORE MEANING OF LEGITIMATE EXPECTATION DOCTRINE

This revival of the Calvo doctrine could also be explain by the fact that the current system dooms State to an unpredictable and unstable fate, which limits the opportunity for a state to maintain a constant framework that

[113] Surya P Subedi, *International Investment Law, Reconciling Policy and Principle*, 1st Edition, Hart Publishing, (2016), at. p.19.
[114] B.Appleton, "*The Song Is Over: Why it's Time to Stop Talking about an International Investment Arbitration Appellate Body*" (2013), 107 *Proceedings of the Annual Meeting of the Amercian Society of International Law* 23,25.
[115] This doctrine was considered long-dead by many scholars. See also on the Calvo doctrine, R. James C. Baker and Dr. Lois J. Yoder, J.D., C.P.A, ICSID and the Calvo Clause a Hindrance to Foreign Direct Investment in LDCs, Ohio State Journal on Dispute Resolution, vol. 5, no. 1 (1989), 75-95.

will be stable enough to thwart both market volatility and the unpredictability of political environments. As this is a way for investors to put pressure on state, wouldn't be more reasonable to create an investment climate more beneficial for both states and investors? To counter this unfairness, there is a need to shape a global regulatory framework. The problem is that awards are often based on replication of precedent awards, which makes it hard to produce a definitional scope and more common; situations where states chose to revaluate their regulatory position to avoid potential payout.

The main essence of the arbitral investment system seems to be procuring protection for foreign investors, however the enhancement of investors' standards raise concerns for host state and makes harder for State to regulate in matters of environmental rights, health and other public interests' issues.[116] As a result, a more state-driven approach could be the key answer. Notably, the possibility for States to invoke legitimate expectations, as it could eventually help to consolidate the core meaning of legitimate expectations.

3. THE NEED TO INCREMENTALLY REMAPPE THE DOCTRINE OR TO UNVEIL THE VARIANCE OF DOCTRINAL APPROACHES ALREADY EXISTING

The legitimate expectation doctrine's is characterised by "*the choice between procedural and substantive rights as a dilemma as between legality and justice*"[117].Yet, the use of the doctrine to adjudicate the policy sphere is a risky game, that seems to suggest that investment treaty arbitration is a system that leaves out the doctrine of both power separation and State's ultra vires doctrine. All these concerns converge with the idea that to avoid a total collapse of the ISDS system, the latter needs to be incrementally "remapped" or clarified.

On this central question, the dismay of many observers has led to the conclusion that regarding decision-making, either a margin of appreciation doctrine, or a proportionality approach could be the key issue. Indeed, the first one, based on the doctrines of constraints[118], will allow tribunals to recognise host states regulatory obligations.

[116] See Kathryn Gordon, Joachim Pohl, Marie Bouchard Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact-Finding Survey, OECD Working Papers on International Investment (2014/01) at 9-10. See also: Margaret B. Devaney, Remedies in Investor-State Arbitration: A Public Interest Perspective (22 Mar. 2013) Investment Treaty News, Online: http://www.iisd.org/itn/2013/03/22/remedies-in-investorstate-arbitration-a-public-interest-perspective; ; Kate Miles, Sustainable Development, National Treatment and Like Circumstances in Investment Law in Sustainable Development In World Investment Law 265, 268-269 (Marie-Claire Cordonier Segger, Markus W. Gehring, Andrew Newcombe eds., 2011). Philip Morris Asia Limited v. The Commonwealth of Australia (PCA Case No. 2012-12); Eiser Infrastructure Limited and Energía Solar Luxembourg S.a.r.l. v. Kingdom of Spain, ICSID Case No. ARB/13/36, May 2017.

[117] P.Craig, Adminsitrative Law (OUP 2006) 621.

[118] Yuval Shany, "*Toward a General Margin of Appreciation Doctrine in International Law*?" (2005) 16:5 EJIL 907 at 920. See also Rudolf Dolzer statement to "*favour the state in case of doubt*", "The impact of International Investment Treaties on Domestic Administrative Law" (2005) 37 NYUJ Int'L & Pol 953 at 970; F.Ortino, (2017). Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing. Leiden Journal of International Law, 30(1), 71-91.

The second approach will guarantee balanced decision-making in "*situations of collisions or conflicts of different principles and legitimate objectives*"[119].

CONCLUSION

Legitimate expectations is probably the concept in International Law that has come in greatest distance, and arguably in Public International Law in general. Additionally, the move toward economic liberalism increased performance requirements and compliance from both States and investors.

The concept of contributory fault[120] could be the first rough outline in the battle against variant legitimate expectations doctrinal approaches. Investors are encountering legal resistance from host state that are more often depriving them of their rights upon the nationalisation of foreign assets. The reality is that the world has become a global village for socioeconomic resources exchange. Imperatives in the face of multi-faceted global social and economic challenges, especially in developing countries have shaped the central question of investor's legitimate expectations.

The main question sought to be answered here is whether the inclusion of a more balanced system, which will provide a sustainable framework to foreign investors, is compatible with a strict economic prosperity logic. As the worldwide arbitral investment system is globalised, and yet still capitalised and de-regulated; fighting regulatory mix and arbitral award versatility is the first step to ensure a stable and predictable macroeconomic framework for businesses.

[119] B.Kingsury & S.Schill, *" Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law*", in Alberta Jan van den Berg, ed, *50 years of the New York Convention*, ICAA International Arbitration Conference (Alpha aan den Rijn, Netherlands: Kluwer Law International, 2009) 5 at 7. See also, Ibid 82 *Tecmed.*
[120] *Bear Creek Mining Corporation v. Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, p. 211, para. 568.

INTERVIEW DE BENJAMIN ROSS, ASSOCIATE AT MCDERMOTT, WILL & EMERY

Interview taken and translated by Alice Clavière-Schiele

L'interview réalisé et traduit par Alice Clavière-Schiele

1. Hi Benjamin, would you mind recalling us briefly your background?

I am an Irish citizen, but spent all my childhood in France. I went through the traditional French education system and following the *Baccalauréat*, I integrated the dual law degree program between the *Université de Nanterre Paris Ouest* (Paris 10) and the University of Essex. Accordingly, I spent my first two years studying in the UK and my third and fourth in France. Many students who follow this program then enter Nanterre's "*Master 2 Billingue des droits de l'Europe*", which gives you the opportunity to study abroad at one of Nanterre's partner universities. Through this *Master 2*, I enrolled at American University, Washington College of Law, where I obtained my *Juris Doctor*. I then sat the New York Bar exam and returned to France to gain some experience as a *stagiaire* before passing the Paris Bar exam.

1. Bonjour Benjamin, peux-tu nous rappeler brièvement ton parcours ?

Je suis irlandais mais j'ai grandi en France. J'ai suivi le système éducatif français traditionnel et après le baccalauréat j'ai intégré le double diplôme en droit de l'Université de Nanterre Paris Ouest (Paris 10) et de l'Université d'Essex (Angleterre). Durant les deux premières années, j'ai étudié en Angleterre puis en France pour les troisième et quatrième. Beaucoup d'étudiants qui suivent ce cursus intègrent ensuite le Master 2 Bilingue des droits de l'Europe de Nanterre, qui donne la possibilité d'étudier à l'étranger dans l'une de ses universités partenaires. Grâce à ce Master 2, je me suis inscrit à *American Université*, *Washington College of Law*, où j'ai obtenu mon *Juris Doctor*. J'ai ensuite passé le barreau de New York et je suis rentré en France pour compléter mon cursus avec des stages avant de passer le barreau de Paris.

You studied law in the US, the UK and France. Could you outline the different approaches each jurisdiction has towards legal studies?

The approach to legal studies in these countries can be quite different in both form and substance.

Regarding the form, as you may be aware, you can only begin studying law as an undergraduate in France or the UK. In the US, however, law schools only accept postgraduate students. The undergraduate law courses in both France and the UK are generally split between lectures, which are held in large amphitheatres, and tutorials, which take place in smaller classrooms. There are usually a lot more students in France than in the UK. This means that students in the UK are more likely to interact with their professors, which is something I found very helpful. At the postgraduate level, however, French students study a *Master 2*, which is typically a specialized course directed by a prominent law professor. Only a few students are accepted onto the course. They enjoy a privileged relationship with their professor and gain a very high level of training in their speciality.

In the US, most classes are taught as lectures, limited to around 80 students. The professors expect every student to be highly prepared and many will use the "Socratic Method" to teach their class. Although the prospect of being called on at any time can be extremely daunting, there is no better way to ensure that every student is attentive in class.

The three countries you mentioned also take a different substantive approach to studying law. In my

Tu as étudié le droit aux États-Unis, en Angleterre et en France. Peux-tu nous décrire les différences entre ces systèmes universitaires ?

La conception des études de droits dans ces pays est assez différente, tant sur la forme que sur le fond.

Concernant la forme, comme vous le savez sûrement, il est possible de commencer des études de droit dès le premier cycle en France et en Angleterre. En revanche, aux États-Unis, les facultés de droit n'acceptent les étudiants qu'à partir du deuxième ou troisième cycle. Les cours de droit, en France et en Angleterre, se composent généralement de cours magistraux dispensés en amphithéâtres et de travaux dirigés, qui ont lieu dans des plus petites salles. Mais il y a en général beaucoup plus d'étudiants en France qu'en Angleterre ; cela permet aux étudiants anglais d'interagir davantage avec leurs professeurs, ce qui est très appréciable. À partir du troisième cycle, les étudiants français intègrent un Master 2, qui est généralement un cursus spécialisé dirigé par un professeur de droit reconnu. Seuls quelques étudiants sont acceptés dans ces cursus. Ils bénéficient d'une relation privilégiée avec les professeurs et acquièrent un haut niveau de formation dans leur spécialité.

Aux États-Unis, la plupart des cours sont dispensés sous forme de séminaires, limités à environ 80 étudiants. Les professeurs attendent des étudiants qu'ils préparent très sérieusement les séances et beaucoup utilisent la méthode socratique pour enseigner. Même si l'idée de pouvoir être interrogé à tout moment peut être intimidante, il n'existe pas de meilleur moyen pour s'assurer que tous les élèves sont attentifs.

experience, exams in France generally involved drafting a note or commenting case law. This exercise is very academic and trains students to structure their ideas. My UK law school adopted a similar approach, but also placed great emphasis on mid-term essays, which counted for a substantial part of your final grade.

In the US, however, every exam I sat took a practical approach. Students were required to answer a legal issue in the same way as a partner would ask an associate to draft a memo or a legal brief, *i.e.* by using the "IRAC" method (issue, rule, application to the facts, conclusion). A lot of effort is put into training students to master IRAC, thus ensuring that they are well equipped for a career in the law.

Les trois pays que vous mentionnez ont également des approches différentes de l'enseignement du droit. D'après mon expérience, les examens en France impliquent généralement de rédiger une dissertation ou de commenter un arrêt. Cet exercice est très académique et forme les étudiants à structurer leurs idées. Ma faculté en Angleterre adoptait une approche similaire, mais accordait également une importance considérable aux essais que les étudiants devaient soumettre à la mi-semestre.

En revanche, aux États-Unis, chaque examen que j'ai passé avait une approche pratique. Il était demandé aux étudiants de répondre à un problème juridique, de la même manière qu'un associé demanderait à un collaborateur de rédiger un mémo ou une note juridique, c'est-à-dire en utilisant la méthode « IRAC » (question, règle de droit, application aux faits et conclusion). Une grande attention est portée à la formation des étudiants à la méthode « IRAC » afin de s'assurer qu'ils sont bien préparés pour débuter une carrière dans le droit.

During your *Juris Doctor* in Washington DC, you were a Dean's Fellow, can you tell us about this experience?

At American University, Washington College of Law, a Dean's Fellow is a student that is hired by a faculty member to assist them with their research. During my first year in Washington DC, I studied Contract Law with Professor David V. Snyder. At the time, Professor Snyder was writing a book with Professor Martin Davies, which was eventually published in 2014: *International Transactions in Goods: Global Sales in Comparative Context*. Professor Snyder mainly hired me

Pendant ton *Juris Doctor* à Washington, tu as été « *Dean's Fellow* ». Peux-tu nous parler de cette expérience ?

À *American University*, *Washington College of Law*, un « *Dean's Fellow* » est un étudiant qui est engagé par un professeur pour l'assister dans ses recherches. Pendant ma première année à Washington, j'ai étudié le droit des contrats avec le Professeur David V. Snyder. À l'époque, le Professeur Snyder était en train d'écrire un livre avec le Professeur Martin Davies, qui a été publié en 2014 : *International Transactions in Goods : Global Sales in Comparative Context*. Le Professeur Snyder m'a engagé

to assist him with any task related to his book. This included conducting US, UK and French legal research, but also spending time editing the book. I thoroughly enjoyed my time as a Dean's Fellow. It was good work experience and it gave me the opportunity to build a strong relationship with Professor Snyder.

pour l'assister principalement dans toutes les tâches liées à l'écriture de cet ouvrage. Cela impliquait d'effectuer des recherches juridiques en droit américain, anglais et français mais aussi de passer du temps à éditer le livre. J'ai vraiment apprécié mon travail de *Dean's Fellow*. C'était une bonne expérience qui m'a permis de nouer des liens avec le Professeur Snyder.

You started your career in a French arbitration boutique and then moved to an American international law firm. What differences do you see between these two types of structures?

When you are part of a full service firm you sometimes get a chance to work with other practice groups. For example, it can be very satisfying to assist the corporate department in drafting an arbitration clause for an important M&A transaction. It can also be very useful to chat with colleagues working in other areas of the law if you are dealing with an arbitration that involves very technical legal issues.

Other than this, there aren't many differences between a boutique firm and a big American firm. Arbitration practitioners are usually assigned big cases that involve a lot of procedural steps, factual research and legal analysis. In my experience, all firms use similar methods and have access to the same databases and software tools.

Tu as débuté ta carrière dans une boutique française d'arbitrage, pour ensuite intégrer un cabinet américain international. Quelles différences remarques-tu entre ces deux types de structures ?

Lorsque tu fais partie d'un cabinet *full service*, tu peux être amené à travailler avec d'autres équipes. Par exemple, il est plaisant d'aider l'équipe *corporate* à rédiger une clause d'arbitrage dans le cadre d'une opération de fusion acquisition. Il peut également être utile de discuter avec des collègues qui exercent dans d'autres domaines lorsque tu travailles sur un arbitrage impliquant des questions très techniques dans un domaine particulier.

Autrement il n'y a pas beaucoup de différences entre une boutique et un grand cabinet américain. Dans les deux cas, les praticiens en arbitrage se voient généralement confier de gros dossiers, impliquant de nombreuses étapes procédurales, des recherches factuelles et des analyses juridiques. D'après mon expérience, tous les cabinets utilisent des méthodes similaires et ont accès aux mêmes bases de données et outils pour travailler.

In your opinion, is it better to specialize in a specific practice (investment or commercial arbitration) or to have a more global practice?

I would tend to think that young lawyers should keep their options open. You learn a tremendous amount purely by working on different matters and distinct legal issues. I would therefore encourage *stagiaires* to seek out diverse assignments. I understand that this is not always easy, but you should not be afraid to discuss your training and progress with senior lawyers or partners.

I have been fortunate enough to work on both investment and commercial arbitrations. I think students are sometimes drawn to investment arbitration because a lot of information regarding these cases is public, which naturally stirs up their interest and curiosity. However, both investment and commercial arbitration involve the same skills (legal research, drafting, case management, *etc*), which is really what you should be focusing on at the start of your career.

Additionally, investment arbitration only represents a small amount of the work that is available in an already extremely competitive market. Accordingly, the chances of securing a job are very slim if your CV focuses only on investment arbitration. I therefore feel that it is better to try and have a more global practice.

Selon toi, est-il plus intéressant de se spécialiser dans un domaine spécifique (arbitrage d'investissement ou commercial) ou d'avoir une pratique plus globale ?

J'aurais tendance à penser que les jeunes avocats doivent étendre leurs compétences. Vous apprenez énormément en travaillant sur différents dossiers et questions juridiques. Je ne peux donc qu'encourager les stagiaires à rechercher des tâches diversifiées. Je comprends que cela n'est pas toujours évident, mais il ne faut pas avoir peur de discuter de votre stage et de son déroulement avec les collaborateurs séniors et les associés.

J'ai eu la chance de travailler sur des arbitrages d'investissement et commerciaux. Je pense que les étudiants sont souvent attirés par l'arbitrage d'investissement car beaucoup d'informations concernant ces affaires sont publiques, ce qui suscite naturellement leur intérêt et leur curiosité. Néanmoins, l'arbitrage d'investissement et l'arbitrage commercial impliquent les mêmes compétences (recherches juridiques, rédaction, gestion du dossier, *etc.*), sur lesquelles vous devriez vous concentrer au début de votre carrière.

Enfin, l'arbitrage d'investissement ne représente qu'une petite partie du travail disponible sur un marché déjà très concurrentiel. Par conséquent, les chances d'obtenir une collaboration seront donc plus minces si votre CV est concentré uniquement sur cette pratique. Pour ces raisons, je pense qu'il est préférable d'essayer d'avoir une pratique plus générale.

Do you have any tips for young people who want to start their arbitration career?

Work hard as a *stagiaire*! The stage is an integral part of your training and you should aim to learn as much as possible to prepare yourself for being an associate.

Cheerfulness goes a long way and you should always be willing to take on new tasks and assist your colleagues. This will demonstrate that you work well within a team. There will inevitably be some awful tasks that need to be taken care of, but the best way to deal with them efficiently is by taking them on with a positive attitude. A career in arbitration will be very rewarding, but it is also very demanding.

I recommend that you also try to seek out other professional projects to broaden your expertise. In France, we are fortunate enough to be "libéral", which allows lawyers to take on cases in their own name and gain a different sort of experience.

As-tu des conseils pour les jeunes qui souhaitent débuter une carrière en arbitrage international ?

Travaillez dur en tant que stagiaire ! Le stage fait partie intégrante de votre formation et il faut y apprendre le plus possible pour vous préparer à la collaboration.

Il faut toujours être enthousiaste et partant pour accepter de nouvelles tâches et assister vos collègues. Cela montrera que vous savez travailler au sein d'une équipe. Il y aura inévitablement des tâches ingrates qui devront être réalisées, mais la meilleure manière de les gérer efficacement est de les accomplir avec une attitude positive. Une carrière dans l'arbitrage sera très enrichissante, mais aussi très exigeante.

Je vous conseille également d'essayer de rechercher d'autres projets professionnels pour étendre le champ de vos compétences. En France, nous avons la chance d'être une profession libérale, ce qui permet aux avocats de traiter des dossiers personnels et d'avoir des expériences diversifiées.

UPCOMING ARBITRATION EVENTS IN PARIS IN DECEMBER	EVENEMENTS EN ARBITRAGE A PARIS EN DÉCEMBRE
5 December 2018 – Conference: "Arbitration x Technology: A Call for Awakening?"	**5 décembre 2018** – Conférence : « Arbitrage & technologie : L'appel au réveil ? »
7 December 2018 – Topical Issues in ISDS: The 'New NAFTA'	**7 décembre 2018** – Les sujets d'actualité en matière du ISDS : « Le 'nouvel ALENA' »
10 – 13 December 2018 – CMAP courses on OHADA arbitration	**10 – 13 décembre 2018** – Formation à l'arbitrage OHADA du CMAP
12 December 2018 – Conference: "Construction Arbitration in Africa"	**12 décembre 2018** – Conférence : « L'arbitrage de construction en Afrique »