AMERICAN UNIVERSITY OF ARMENIA

COLLEGE OF HUMANITIES & SOCIAL SCIENCES

LL.M. Program

TITLE

“STATE LIABILITY FOR REGULATORY CHANGES: INTERNATIONAL INVESTMENT AND ARMENIAN LAW PERSPECTIVES”

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ACKNOWLEDGMENTS

First and foremost, I would like to express my sincere gratitude to my master paper supervisor Mr. Mesrop Manukyan for his huge assistance and dedicated involvement throughout the whole process of my thesis drafting. He encouraged me to choose this specific issue, which is of considerable and important value for current Armenian investment issues.

Furthermore, I am grateful for the faculty members of AUA LLM program, with whom I had the pleasure to meet during these 2 years of studies. Such studies provided me with the opportunity to enrich my legal knowledge and develop research and academic analyze skills, which I used while preparing this paper.

American University of Armenia provided me with its challenging and highly stimulating educational environment. The possibility of studying and interacting in English while staying in my motherland and continue working was a win-win situation. Interaction with highly qualified professors and the chance of learning from their experience and skills inspired me to endeavor to achieve more educational and career goals.

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➢ INTRODUCTION

The main purpose of international investment law is to safeguard foreign investments against host state actions by means of various international bilateral and multilateral treaties. [1]

The most vital source in contemporary investment law is bilateral investment treaties. (hereinafter "BIT"). We can count approximately 3000 BITs[2], which tend to provide regulations between foreign investors and host states by specifying certain clauses, which protect investors from takings and/or regulatory changes from the side of the host State. At the same time, the State's interests are also subject to protection. The guarantees provided to foreign investors shall not preclude host States from implementing the rights to legitimate regulation since in some cases national population's rights and interests can also be at stake. That is why one of the major issues in international investment instruments is how to balance between such potential conflicting interests: the regulatory power of host States and the guarantees of legal predictability and stability for foreign investors.

It is, nevertheless, noteworthy that the right of a country to adopt a regulatory act regarding activities within its territory is one of the basic principles of public international law.[3] International investment tribunals have also recognized the importance of the mentioned basic right. In particular, the arbitral award of the *Parkerings v. Lithuania* case states that:

"*It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion*"[4]

On the other hand, however, there is also a necessity to enable foreign investors to plan their activities within the territory of the hosting State, since unexpected regulatory changes initiated by the host State may frustrate their economic returns and deter further investments. Doctrinal sources of international investment law have also highlighted the significance of legal

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[1] Aikaterini Titi, The Right to Regulate in International Investment Law, in 10 STUDIES IN INTERNATIONAL INVESTMENT LAW 19–21 (2014).
[2] https://investmentpolicyhub.unctad.org/IIA
[3] MN Shaw, International Law (6th. Ed., CUP, 2008), 649; Section 402(1)
[4] Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8 (Norway/Lithuania BIT), Award of 11 September 2007, para 332

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predictability for attraction and development of foreign investments[5] and namely for those, which involve large investments. [6] Moreover, some highly qualified experts in the field of international investment arbitration have concluded as follows:

"Finally, the protection of legitimate expectations must be qualified by the need to maintain a reasonable degree of regulatory flexibility on the part of the host state to respond to changing circumstances in the public interest."[7]

As for the respective case-law, namely, in the *Suez v. Argentina* case, it has been stated that: "*The resulting reasonable and legitimate expectations are important factors that influence initial investment decisions and afterward the manner in which the investment is to be managed*."[8]

Therefore, the parties, to find an adequate equilibrium, may seek to establish several mechanisms to stabilize the overall contractual structure.

It is proposed that this paper will discuss arbitral tribunals decisions to understand the necessity of the limitation of traditional principles of sovereignty of host States in the light of attracting foreign investments to contribute to the development of State's economy and international trade. Moreover, the issue of States liability for the regulatory changes affecting foreign investors' property rights will be the core in the arbitral awards discussions.
Namely, this paper will be developed in a way to understand how the rival interests of the state (e.g., freedom of action, adoption of regulatory measures) and the foreign investors (expectations of economic returns, enjoyment of property rights) are balanced and in which cases, most

[5] S Schill, 'International Investment Law and General Principles of Law,' in J Bering et al. (eds.). General Principles of Law and International Investment Law, (The International Law Association: German Branch, December 2009), p. 16
[6] A Shemberg, Stabilization Clauses and Human Rights – para. 19 (OECD Global Forum, 2008). Available at: http://www.oecd.org/dataoecd/46/48/40314647.pdf
[7] McLachlan, Shore, and Weiniger, International Investment Arbitration: Substantive Principles (OUP, 2007), p. 239. See also, Newcombe & Paradell, Law and Practice of Investment Treaties (Kluwer Law International 2009), p. 282; S Schill, *supra note 5*, p.16.
[8] Suez and Vivendi v. Argentina, ICSID Case No. ARB/03/19, Decision on Liability of 30 July 2010, para. 203

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importantly host States can be held responsible for the violations of legitimate expectations under the fair and equitable treatment guarantee.

This paper is divided into three Chapters, which will discuss interrelated issues. In Chapter 1 the paper will present general regulations on the types of guarantees provided for foreign investors. Mostly the legitimate expectations doctrine under the FET standard will be discussed. Furthermore, Chapter 2 will mostly focus on the discussions about the possibilities of engaging responsibility of the host states in the light of legitimate expectations and public policy doctrines application. Detailed review and analysis of ICSID Cases under the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States also known as the "Washington Convention" or "ICSID Convention", shall be presented in order to understand when and under what circumstances States can be declared liable for the breaches of their obligations undertaken under respective BITs. Chapter 3 will be dedicated to Armenian investment law regulations. Namely, Chapter 3 will present the analysis of Armenian legislation from the perspectives of foreign investors protection mechanisms. Risks and issues of Armenian law, as well as recent developments in the mining field, will be addressed. Taking into account the public announcement made by Lydian International according to which Lydian UK and Lydian Canada subsidiaries of Lydian International have formally notified the Government of the Republic of Armenia about the existence of the investment dispute in connection with the ongoing road protests resulting in the blockage of access to the Amulsar Gold project, the question as to whether Armenia is in compliance with public policy/interest doctrine of international investment law or breach of its international obligations will be as of considerable and essential value to discuss.
The research and the discussions further developed in this paper is vital since Armenia has all risks to face an international investment dispute to be initiated by one of its largest investors. In case no settlement is reached at the potential settlement negotiations stage, and mining field investor chooses to pursue claim its protection in arbitration and reduce its exposure and losses, Armenia may suffer severe economic and financial losses, if reasons precluding its responsibility are not justified.
Ultimately, the Conclusion will succinctly and briefly outline the main findings of the paper. Afterward, the bibliography listing all the sources used for the thesis will follow.

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➢ CHAPTER 1: GUARANTEES FOR FOREIGN INVESTORS RIGHTS PROTECTION UNDER INTERNATIONAL INVESTMENT LAW

This chapter will focus on the presentation of mechanisms existing for the protection of investors rights and freedoms; however, discussions from doctrinal sources on the regulations of fair and equitable treatment will be the core herein.

It is undisputable that one of the principal concerns for any investor considering investing in a foreign State is the level of legal protection that such State may ensure for an investment. This is an important factor since some substantial changes in government or political priorities may render their investment worthless. Host States are equally concerned that foreign investors may not show a willingness to investing in their economies.

Since there is an ongoing huge competition for investment capital between the States, myriad of mechanisms has been developed for the purposes of protecting investors against those State actions, which will deter their property rights and will create negative economic consequences by making their investment project implementation impossible.

To this regard, most countries, in a desire to attract foreign investments, have initiated the adoption of policies that are designed to create a favorable investment climate. Legal safeguards are important part of those policies since they include stable legal conditions, the quality of the local administration, the transparency of the local regulations system and an effective dispute settlement regime. Many of those countries have adopted investment codes designed to incorporate clarity with favorable foreign investment conditions.

In addition to the guarantees encompassed in domestic law, potential investment host States also provide investors with international legal guarantees. Most of these are laid down in bilateral and multilateral treaties.

While the treaties differ, most of them offer foreign investors a common core of six substantive protections:

- most-favored nation treatment (MFN);
- national treatment (NT);
- fair and equitable treatment (“FET”);

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- a guarantee of compensation for expropriation;
- an umbrella clause; and
- a free transfer of funds clause.

Investment treaties also provide other substantive safeguards — such as full protection and security guarantees, however many of these raise overlapping protection from host State behavior that would also violate one of the six core standards.

The table below outlines the frequency of investment treaty provisions[9], under which the primary standards for investors protections are enshrined.

Standards of protection	Investment treaties containing a provision (%)
Most-favoured-nation treatment	95%
Expropriation	95%
Investor-state dispute settlement	90%
Fair and equitable treatment	90%
Free transfer of funds	80%
Full protection and security	70%
Losses sustained due to insurrection, war	70%
National treatment	60%
Arbitrary, unreasonable, and/or discriminatory treatment	45%
Umbrella Clause	45%
Exceptions	10%
Performance requirements	5%

[9] UNCTAD's International Investment Agreements Navigator. https://unctad.org/en/Pages/Home.aspx Last updated on July 2016.

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Below I will briefly discuss some of the core standards of investors rights and freedoms protection, which will help us to understand to what extent international investment law values level of protection granted to investors.

- **Most-favored-nation treatment**

The standard of most-favored-nation (hereinafter the "MFN") is included in virtually every BIT. The main purpose of MFN provisions is to ensure that the host States undertakes to treat a foreign investor in a manner at least as favorable as they treat other investors from third States. MFN is a relative standard and the protection granted by its application is not absolute protection, since if no such treatment is granted to third states investors, a foreign investor cannot present any claim on MFN clause violation.

- **National treatment**

Similar to most-favored-nation principle, national treatment standard is also embodied in most international investment treaties. Essentially, the main idea of such a clause is to ensure that the host State treats foreign investors no less favorably than its nationals.

- **Expropriation**

Expropriation is the process of taking of foreign investor's property by a host State, which is not illegal, *per se*, under international investment law. However, it should be noted in order for the expropriation by a State to be legal; it shall be as of non-discriminatory nature, pursue public purpose and ultimately take place under the due process of law against effective and adequate compensation.[10]

Nowadays, provisions for regulating the taking of foreign property is largely contained in international investment protection treaties.

[10] Christoph Schreuer – "The concept of expropriation under ETC and other investment protection treaties" (revised 20 May 2005)

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- **Umbrella Clauses**

Umbrella clauses, found in many BITS, provides guarantees that the observance of obligations, which are assumed by host States, is kept with respect to investments[11]. An example of such clause is the following: “Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.” This shows that the main purpose of such clause is to establish an inter-state obligation to observe investment agreements which investors may enforce, in cases, when BIT entitles a right of recourse to arbitration. This feature of submission of an international investment dispute to an international forum is at the heart of umbrella clause definition.[12]

- **Fair and Equitable treatment**

Since the end of World War II, the FET clause has existed as a “*sleeping beauty*”[13] in bilateral treaties, but it has only been applied to a wide range of circumstances since 2000 by investment tribunals. This principle is currently included (although in a variety of contexts and wordings) in the vast majority of BITs and major multilateral investment treaties (such as NAFTA[14] and the Energy Charter Treaty)[15] and is the most frequently invoked standard for investment disputes. While in investment jurisprudence some aspects of the obligations arising from the FET clause have been clarified, other aspects of this principle remain vague. Thus, while the Suez tribunal claims that the obligation to grant fair and equitable treatment is “*the Grundnorm or basic norm of international investment law*,[16] it yields that an attempt to interpret the ordinary meaning of this term “yields little additional enlightenment”[17].

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[11] Judith Gill et al., Contractual Claims and Bilateral Investment Treaties: A Comparative Review of the SGS Cases, 21 J. INT’L. ARB. 397, 403 n.31 (2004)
[12] Jarrod Wong - Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes, 2006, p.
[13] C. Schreuer, “Fair and Equitable Treatment in Investment Treaty Law’ in F. Ortino, L. Liberty, A. Sheppard and H. Warner (eds.). Investment Treaty Law-Current Issues II (British Institute of International and Comparative Law, 2007) p. 92.
[14] Article 1105(1) of the North American Free Trade Agreement (NAFTA), 32 ILM 289 (1993).
[15] Article 10(1) of the Energy Charter Treaty, 34 ILM 360.
[16] Suez and Vivendi v. Argentina, *supra note at 8*, para. 213
[17] *Ibid*, para. 188

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Investment tribunals have preferred not to develop a comprehensive concept of the FET principle and their jurisprudence[18] is generally confined to a list of examples of stances that violate such standard.[19] The evolving jurisprudence shows that the FET standard requires host States to respect the legitimate expectations of investors, to take administrative decisions in a transparent and good faith manner, and refrain from arbitrary or discriminatory treatment, coercion, and harassment, as well as bad faith.[20]

The concept of legitimate expectations mentioned above is highly relevant to the need to reconcile the competing interests of legal predictability and regulatory flexibility. The protection of legitimate expectations has been identified by investment tribunals and scholars as one of the major components of FET treatment. [21] Several investment tribunals have stated, as will be explained below, that a "stable and legal environment" is an essential element of FET treatment, and several tribunals maintain that the regulatory framework of the host State can create legitimate expectations for foreign investors.

In this regard, some leading scholars on international investment law as *Dolzer* and *Schreuer* state: "(…) … *the legitimate expectations of the investor are based on this legal framework and any undertakings and representations expressly made by the host state. The legal framework on which the investor is entitled to rely will consist of laws and treaties; insurance will include similar executive insurance in decrees, licenses as well as contractual undertakings. A reversal of host state assurances that have led to legitimate expectations violates the principle of fair and equitable treatment*."[22] Moreover, another prominent scholar in international investment law – Salacuse, highlighted the link between the legitimate expectations of investors and the host State's subsequent actions that fundamentally frustrate these expectations: "*Investor expectations are*

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[18] SW Schill, "Fair and Equitable Treatment, The Rule of Law, and Comparative Public Law," in SW Schill (ed.). International Investment Law and Comparative Public Law (OUP, 2010) pp. 151, 159, 175

[19] Vandevelde, Kenneth J., A Unified Theory of Fair and Equitable Treatment. Jennings, Mark. 2016. "The International Investment Regime and Investor-State Dispute Settlement: States Bear the Primary Responsibility for Legitimacy." Business Law International 17 (2): 127. (JILP), Vol. 43, No. 38, p. 47-48

[20] Tecnicas Medioambientales TECMED S.A. v The United Mexican States (ICSID ARB (AF)/00/2), Award of 29 May 2003, para. 154, *see also* Waste Management v. Mexico (Number 2), ICSID Case No. ATB(AF)/00/3, Final Award of 30 April 2004, para. 98; Bayindirv. Pakistan, ICSID Case No. ARB/0/29, Award of 27 August 2009, para. 178; Lemire v. Ukraine, above n 7, paras. 260-262. See also Dolzer & Schreuer, Principles of International Investment Law (OUP, 2008) p.133-149;

[21] EDF v. Romania, ICSID Case No. ARB/05/13, Award of 8 October 2009, para. 216; see also Waste Management v. Mexico, supra note 19, para. 98

[22] Dolzer & C Schreuer, *supra note at 20,* p. 134.

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fundamental to the investment process ... States seek to prompt these investment decisions through their actions, laws, regulations, and policies. Thus, when a state has devised certain expectations through its laws and acts that have led the investor to invest, subsequent actions that fundamentally deny or frustrate those expectations are generally considered unfair for the state."[23]

The renowned German sociologist Max Weber highlighted the role of "*calculability*" in modern capitalism's development. In modern capitalism, he saw the main contribution of the legal system as making economic life more predictable or calculable.[24] Calculability refers to the probability of an economic actor achieving its legitimate economic expectations in the economic context. If calculability is reduced by governmental or other actions, economic activity will be negatively affected. The idea, that governing authorities must respect the legitimate expectations they create, is supported by various municipal law bodies as well. For example, the concept of legitimate expectations is central to EU law and constitutes a "*general principle of law*" which can justify the overturning of national offensive measures by the European Court of Justice.[25] It is also a fundamental principle of English public law that government entities honor policy or intention statements as part of a general duty of fairness, especially those directed to individuals or groups. Such assertions may create legitimate expectations, either of a procedural or substantive nature, whose disappointment may create a cause for action against the relevant government entities. [26] Besides, in US law, local courts have identified "investment-backed expectations" of claimants as a "relevant consideration" in determining whether or not public entities have "taken" a property in violation of the Fifth Amendment.[27]

A review of investment tribunals case-law "stable legal environment" (or "stable regulatory framework") indicates that three core components of the term "legal environment" are: (i) contractual and semi-contractual arrangements; (ii) unilateral promissory statements or specific representations made by the host state; and (iii) the host State's regulatory measures existing at the time the investment is made. The first two components of the term "legal environment" –

[23] JW Salacuse, The Law of Investment Treaties (OUP, 2010), p. 231
[24] R Swedberg, 'Max Weber's Contribution to the Economic Sociology of Law' (2006),
[25] Cases C-104/89 and 307/90, Mulder v Council and Commission [1992] ECR 1–3061; Case C-152/88, Sofrimport Sour v Commission [1990] ECR 1–2477; and Case 74/74, CNTA SA v Commission [1975] ECR 533
[26] H Wade and C Forsyth, Administrative Law (OUP, 2000) 498
[27] Penn Central Transportation Co and Ors v New York City and Ors, 438 US 104; 98 S Ct 2646.

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contractual and semi - contractual provisions as well as unilateral promissory statements or specific representations – are indeed the predominant components. As will be outlined below, the expectations of investors created by contractual, semi - contractual arrangements or promissory pledges are considered as "legitimate expectations" under the FET principle. As for the third component, the regulatory measures taken by the host State alone are not enough to form legitimate expectations protected by FET clauses. Only when regulatory changes are appended by additional and singular factors can the combination thereof amount to an infringement of legitimate expectations under the FET principle.

Such a review of investment tribunals case-law shall be presented and discussed in detail in the next chapter.

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➢ CHAPTER 2: BALANCE BETWEEN PUBLIC INTEREST AND PROTECTION OF INVESTOR'S LEGITIMATE EXPECTATIONS: CASE-LAW ANALYZE

Importance of a stable legal environment or in other words the non-seismic environment for the investments activities are often emphasized by investment awards. They entail that the investors' legitimate expectations are directly connected with the State's legal regulations during the period when the investment is made.

The first time the relationship between an investor's expectations and the FET was outlined, was in the *TECMED v. Mexico* case of 2003. [28] The court, in this particular case, found that the refusal of the Mexican authorities to renew TECMED's license to operate a hazardous industrial waste landfill, two years after the Spanish company had purchased the landfill at public auction, infringed the obligation to provide FET (among other guarantees) under the relevant Mexico-Spain BIT. The *TECMED* case is of high importance, as it explicitly framed, for the first time a host state's failure to meet specific assurances to its investor could breach FET standard. [29] The tribunal in *TECMED* has specifically stated that FET standard requires "treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment."[30] Similarly, in the *Metalclad* case, the investors' expectations and the FET were largely connected through the requirement of transparency and legal reliability:
"The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments… to be able to plan its investment and comply with such regulations."[31]

The tribunal further emphasized that an investor is entitled to expect that pre-existing decisions or licenses on which he/she/it relied on will not be arbitrarily rescinded and that the State will apply legal instruments governing the activities of the investor "in conformity with the function usually

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[28] Tecnicas Medioambientales TECMED S.A. v The United Mexican States, *supra note at 20.*
[29] Metalclad Corporation v The United Mexican States (ICSID ARB(AF)/97/1), Award of August 30, 2000; CME Czech Republic B.V. (The Netherlands) v Czech Republic (UNCITRAL), Partial Award of 13 September 2001
[30] *Ibid*, para 154
[31] *Ibid*

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assigned to such instruments."[32] Notably, it has been outlined that, whether interpreted in accordance with its ordinary meaning or with customary international law and good faith, these standard expectations under the FET guarantee shall not change.[33] Hence, the tribunal established that Mexico's termination of the activities at the landfill proceeded: "in spite of the expectations created, and without considering ways enabling it to neutralize or mitigate the economic effect of such closing by continuing with its economic and business activities at a different place."[34] Finally, it has been declared that Mexico failed to provide and ensure the application of FET since the legitimate expectation established under the mentioned standard has been breached and lack of transparency has been demonstrated by State authorities. The wider prominence on legal transparency and reliability in the *TECMED* case would, later on, become an imperative feature of the application of the legitimate expectations principle in subsequent cases. Based on this approach, the further changes in the regulatory framework which are not favorable for the foreign investors' interests are likely to be deemed as violations of the FET standard.

Moreover, in *CMS v. Argentina,* the tribunal highlights the essence of the stability of the legal environment:

The treaty Preamble provides some clarifications, nonetheless, that one vital assurance visualized is that fair and equitable treatment is alluring "to maintain a stable for investments and maximum effective use of economic resources." "There can be no doubt, therefore, that a stable legal and business environment is an essential element of fair and equitable treatment.''[35]

While tribunals had been unclear on this matter until this case, the *CMS v. Argentina* award clearly showed that the failure of a government to fulfill contractual undertakings could be equated with the disappointment of the legitimate expectations of an investor under the FET standard.

On a more precise level, *Occidental v. Ecuador* case arbitral tribunal's statement also touches upon the obligation of not modifying the legal environment:

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[32] *Ibid*
[33] *Ibid* para 155
[34] *Ibid* para 164
[35] CMS v. Argentina, ICSID Case No. ARB/01/8, Award of 12 May 2005, para. 274

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"[I]t was earlier concluded that there is not a VAT refund obligation under international law, except in the specific case of the Andean Community law, which provides for the option of either compensation or refund, but there is certainly an obligation not to alter the legal and business environment in which the investment has been made".[36] [Emphasis added]

From above mentioned statements of the investment tribunals and legal publications, one may assume that the FET clause has a vivid resemblance to a stabilization clause, as it could be considered in cases when the host state applies changes to the legal environment, which reduce the investors' benefits, hence the obligation to compensate arises on the state's behalf towards the investor. A detailed investigation of investment tribunals' awards suggests that such outcome does not reflect and isn't upheld by existing investment statute, nor it mirrors the proper harmony between the objectives of host states for regulatory stability and legitimate consistency. This jurisprudence does not correspond with the idea that FET clauses generate consequences, which are analogs to those that arise from the stabilization clauses; and it also expresses the new regulatory framework, or legislative changes are not sufficient to create an obligation on states to compensate the losses of foreign investors.
The statements of similar nature as mentioned above about the link between stable legal environment and the FET principle are also mentioned in cases such as *LG&E v. Argentina*[37] , *Enron v. Argentina*[38], *Suez v. Argentina*,[39] and *PSEG v. Turkey*[40] awards.

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[36] Occidental v. Ecuador, LCIA Case No. UN3467, Final Award of 1 July 2004, para. 191
[37]The tribunal has stated as follows: "Thus, this Tribunal, having considered, as previously stated, the sources of international law, understands that the fair and equitable standard consists of the host State's consistent and transparent behavior, free of ambiguity that involves the obligation to grant and maintain a stable and predictable legal framework necessary to fulfill the justified expectations of the foreign investor. LG&E v. Argentina, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006. para. 131
[38] It has been stated as follows: "The Respondent might be right in distinguishing this case from the factual scenarios that recent decisions have faced, but this does not mean that Argentina's acts are consistent with the meaning of the protection under the Treaty. It is clear that the 'stable legal framework' that induced the investment is no longer in place and that a definitive framework has not been made available for almost five years. Enron v. Argentina, ICSID Case No. ARB/01/3, Award of 22 May 2007, para. 267. See also para. 268.
[39] the tribunal has stated as follows: "When an investor undertakes an investment, a host government through its laws, regulations, declared policies, and statements creates in the investor certain expectations about the nature of the treatment that it may anticipate from the host State. The resulting reasonable and legitimate expectations are important factors that influence initial investment decisions and afterward the manner in which the investment is to be managed. Suez v. Argentina, *supra note at 8*, para. 203.
[40] PSEG v. Turkey, ICSID Case No. ARB/02/5, Award of 19 January 2007, para. 253

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The *LG & E* award dealt with duties and promises made by the host state concerning occasional modification of gas tariffs[41] that was mentioned in license[42] and in domestic legislation. The *Enron* award also has involved in it an obligation made on behalf of the hosting state about the shifts of the tariffs of gas which was distributed by the investor. That obligation of State was explicitly mentioned in the license and the respective legislation of the hosting state.[43] In the same manner and conclusion, the Total Tribunal stated that "[t]he expectation of the investor is undoubtedly "legitimate", and hence subject to protection under the fair and equitable treatment clause, if the host State has explicitly assumed a specific legal obligation for the future, such as by contracts, concessions or stabilization clauses on which the investor is therefore entitled to rely as a matter of law".[44] However, some controversial conclusion with respect to the changes in legislation has been highlighted in the case of *Parkerings v. Lithuania*, wherein the tribunal has shown that the laws of the host states may be subjected to the change and evolve over time: "It is each State's undeniable right and privilege to exercise its sovereign legislative power. <u>A State has the right to enact, modify or cancel a law at its own discretion</u>. Save for the existence of an agreement, in the form of a stabilization clause or otherwise; there is nothing objectionable about the amendment brought to the regulatory framework existing at the time an investor made its investment. As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.[45] [Emphasis added]".
In *Paushok v. Mongolia* case, the tribunal also embraced such an approach with respect to new measures undertaken in the taxation legislation.[46]

Further, another element of the "stable legal environment" is unilateral promissory statements or specific representations of the hosting State towards foreign investors. Usually, specific representations are utilized in the contractual environment. Several investment tribunals came to

[41] LG & E v. Argentina, *supra note at 37*, para. 49
[42] *Ibid*, para 42
[43] Enron v. Argentina, *supra note at 38*, para. 103
[44] Total v. Argentina, ICSID Case No. ARB/04/01 Decision on Liability of 27 December 2010, para. 117
[45] Parkerings-Compagniet AS v. Lithuania, *supra note at 4*, para. 332
[46] The Paushok tribunal has stated that: "An investor, without an agreement which limits or prohibits the possibility of tax increases, should not be surprised to be hit with tax increases in subsequent years and such an event could not be considered as "unpredictable."" Paushok v. Mongolia, UNCITRAL, Award on Jurisdiction and Liability of 28 April 2011, para. 305

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conclusions that any regulatory change on the State's behalf that influences the mentioned components constitutes the violation of the FET clause. Thus, in the case of *EDF v. Romania* tribunal has stated as follows: "the idea that legitimate expectations, and therefore FET, imply the stability of the legal and business framework, may not be correct if stated in an overly broad and unqualified formulation. The FET might then mean the virtual freezing of the legal regulation of economic activities, in contrast with the State's normal regulatory power and the evolutionary character of economic life. Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would be neither legitimate nor reasonable*''.* [47] *[Emphasis added]*

Similar statement has been enshrined also under the arbitral award of *EnCana v. Ecuador*, which reads as follows: "In the absence of a specific commitment from the host State, the foreign investor has neither the right nor any legitimate expectation that the tax regime will not change, perhaps to its disadvantage, during the period of the investment."[48] In this vein, without specific commitments promised by the host State, the *AES v. Hungary* tribunal rejected the contention that the host State constrained its sovereignty to change its laws.[49] The Total tribunal affirms these awards and further concludes that "[i]n the absence of some "promise" by the host State or a specific provision in the bilateral investment treaty itself, the legal regime in force in the host country at the time of making the investment is not automatically subject to a "guarantee" of stability merely because the host country entered into a bilateral investment treaty with the country of the foreign investor."[50]

Continuing discussions of the elements of "stable environment," it should be noted that the last element of it is the regulatory framework of the State existing at the moment of the investment. The case law of the investment tribunals suggests that the regulatory frameworks are not enough to form a legitimate expectation based on the FET clauses.[51] Nonetheless, the breach of the

[47] EDF v. Romania, *supra note at 21*, para. 217
[48] EnCana v. Ecuador, LCIA Case No. UN3481, UNCITRAL, Award of 3 February 2006, para. 173
[49] AES Summit Generation Ltd. v. The Republic of Hungary, ICSID No. ARB/01/04, para. 9.3.31
[50] Total v. Argentina, *supra note at 44*, para. 17. See also para. 309,118-119, 164
[51] Metalpar S.A. and Buen Aire S.A. v. Argentine Republic, ICSID Case No. ARB/03/5, para. 185; Total, Total v. Argentina, *supra note at 44*; Paushok v. Mongolia, *supra note at 46*, para. 305; Parkerings-Compagniet AS v. Lithuania, *supra note at 4*, p. 232;

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legitimate expectation of the FET principle is established in cases where the change of regulatory framework of the state is done in par with the exceptional factors. The following awards prove the mentioned statement.

In case of *Occidental v. Ecuador*, the tribunal discovers that changes embraced by Ecuador concerning tax refunds resulted in a breach of the FET clause,[52] but the tribunal outlined the misconduct on Ecuador's behalf stating stat: the contract was manifestly wrongly interpreted by the state's authorities and "clarifications that OEPC [the investor] sought on the applicability of VAT by means of a "consulta".... received a wholly unsatisfactory and thoroughly vague answer. The tax law was changed without providing any clarity about its meaning and extent, and the practice and regulations were also inconsistent with such changes."[53] Hence, the misconduct on behalf of the state of Ecuador was accompanying the changes in the law. The fact of the State's misconduct played an essential role, and the tribunal paid attention to such misbehavior in its statement when describing the obligations of the State and the breach of the FET clause.

The *PSEG* award likewise incorporates a statement with respect to the need to guarantee steady and predictable business conditions for investors and the tribunal expressly connected the breach of the FET standard to legislative changes implemented by the host State. The tribunal clarified that "administrative negligence" was the reason for violation of the FET provision, as well as "abuse of authority", "ignorance of rights granted by laws as a matter of policy or practice", contributed to the breach of FET, as extreme conditions uncovering "endless" administrative changes[54]. On the extreme nature of the specific authoritative and legislative changes that present "roller-coaster effect," the tribunal stated: "Thirdly, the Tribunal also finds 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. This is particularly the case of the requirements relating, in law or practice, to the continuous change in the conditions governing the corporate status of the Project, and the constant alternation between private law status and

[52] Occidental v. Ecuador, *supra note at 36*, para. 196
[53] *Ibid*, para 184
[54] PSEG v. Turkey, para 246-248

administrative concessions that went back and forth. This was also the case, to a more limited extent, of the changes in tax legislation.[55] [Emphasis added]"

Based on the discussed statements the changes by the host state in its legislation, the misconduct on behalf of state authorities and inadequate nature of the legislation (inconsistent legislative changes) altogether make the tribunal to draw a conclusion that FET is breached if the mentioned components are all in place.

In conclusion, the cited awards in this chapter establish a link between the FET clause and "stable legal environment." The decisions and the statements of the tribunals suggest that the "legal environment" is consisted of three elements:

(i) contractual and semi-contractual arrangements that can be in the form of contracts, license, concessions, permits and else,
(ii) unilateral promissory statements or specific representations made by the host state; and
(iii) host state's regulatory framework existing at the moment the investment is made.

The contractual, semi-contractual arrangements or unilateral promissory statements can be enough to create a ground for the foreign investors to have legitimate expectations from the host State. On the contrary, the host State's regulatory framework by itself is in most cases not enough to generate legitimate expectations protected by FET clauses without contractual and semi-contractual arrangements as well as unilateral statements.

This discussion of the arbitral awards helps us to understand how the harmony between interests of "legal predictability" for foreign investors and the flexibility of legislation on behalf of state could co-exist in harmony.

Some additional observations and research have also been done in connection with the policy power of states, which, again, shall be discussed and regarded in the light of legitimate expectations of foreign investors.

[55] Ibid, para. 250

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A well-accepted notion under international law is a state's right to regulate its political, economic and social affairs and to adopt laws to protect matters of public interest.[56] However, States' policing powers are not unlimited and absolute.[57] References of a State's policy power is often described as 'legitimate' [58], 'valid'[59]or 'normal'[60] exercise of power. The legitimacy of policy power is the most crucial feature thereof. It encompasses several components that must be satisfied for a regulation to be considered as a legitimate exercise of policy power. The exercise of policy power shall be considered legitimate, if the State enacts nondiscriminatory regulations,[61] in accordance with due process.[62] Some tribunals have also claimed that those regulations should be "bona fide[63] as well as be made in the public interest.[64]

States could use their regulatory authority for example for public purposes in the protection of the environment, public health, and welfare, as well as for the protection of human rights. For matters of environmental protection, it is particularly clear that "one cannot postulate that the environmental regime should be frozen, especially in the case of large-scale economic development projects and technological innovation and changing environmental expectations and accepted standards."[65] Some of the most regulated areas of a government are the environment and human health, and tribunals expect investors to be aware of those factors.

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[56] Joseph Charles Lemire v Ukraine, ICSID Case No.ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, 505

[57] Saluka Investments BV v Czech Republic, UNCITRAL, Partial Award, 17 March 2006, [258]; ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v Republic of Hungary, ICSID Case No.ARB/03/16, Award, 2 October 2006, [423]; Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador, ICSID Case No. ARB/06/11, Award, 5 October 2012, [529]

[58] James Crawford, Brownlie's Principles of Public International Law (Oxford University Press 2012) 624

[59] Chemtura Corporation v Canada, UNCITRAL, Award, 2 August 2010, [266]

[60] Saluka Investments BV v Czech Republic, UNCITRAL, Partial Award, 17 March 2006, [256];

[61] *Ibid,* El Paso Energy International Company v Argentine Republic, ICSID Case No.Arb/03/15, Award, 31 October 2011, [240] – [241]

[62] Methanex Corporation v United States of America, UNCITRAL, Final Award, 3 August 2005, Part IV, Chapter D, Paragraph 7; Chemtura Corporation v Canada, UNCITRAL, Award, 2 August 2010, [266]

[63] Saluka Investments BV v Czech Republic, *supra note at 60*, p. 255; Les Laboratoires Servier v Republic of Poland, UNCITRAL, Award, 14 February 2012, [569]; Ioannis Kardassopoulos v Republic of Georgia, ICSID Case Nos. Arb/05/18 and Arb/07/15, Award, 3 March 2010, [387]

[64] Marvin Feldman v Mexico, Case No.Arb(AF)/99/1, Award, 16 December 2002, [103] – [105]

[65] Thomas Walde and Abba Kolo, 'Environmental Regulation, Investment Protection And 'Regulatory Taking' In International Law' (2001) 50 International and Comparative Law Quarterly, p. 824.

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The risk of regulatory changes was deliberated under NAFTA Article 1110 in the case of *Methanex v. USA*. Methanex is a Canadian company with a US subsidiary that produces methanol, a key component in MTBE, which is a gasoline additive.[66] Methanex brought a claim under NAFTA before an ICSID arbitration, after the State of California banned the use of MTBE due to environmental and public motives claiming that the banning amounted, *inter alia*, to the violation of foreign investors rights and interests. California's ban, however, did not directly hinder with the methanol trade, but the product's main consumption was to be used in the production of MTBE. The respondent argued that MTBE posed a risk of drinking water contamination when it leaked from underground tankers and pipelines. This finding was also supported by the scientific reports presented in the case. The court found that the respondent was unsuccessful in making specific commitments or that there were no representations made by the host state that the claimant had reasonably relied on.[67] In addition, the court claimed that Methanex was entering a political economy, capitalizing in an area characterized to be strictly regulated to protect public health and the environment. Methanex "did not enter the United States market because of special representations made to it." Therefore, the investor's expectations were not protected in the absence of explicit commitments respecting restrictions on certain impending regulatory actions. Similarly, the ad hoc committee in the *MTD v. Chile* annulment decision has criticized the application of the legitimate expectations approach taken by the tribunals asserting that the "reliance on the foreign investor's expectations as the source of the host State's obligations (such as the duty to compensate for expropriation) is questionable." [68]

Consequently, the exercise of police power for the purposes of maintaining and protecting the environment and other public purpose issues do not always result in the breach of FET standard.

States' motivations when regulating explicit areas or revoking licenses for the conservation of public welfare were not elaborated. In prevailing situations, the tribunals adopt the approach in favor of either the investor or the host State while assessing only the effects of the regulations or the power of the States to regulate. Hence, an equilibrium between the competing interests of the

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[66] Methanex Corporation v. United Sates of America, *supra note at 62*, Part I - Preface - Page 4 para 1.

[67] *Ibid*, Part IV - Chapter D - Page 4, para 8

[68] MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, 21 March 2007, Decision on Annulment, para 67.

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parties is essential for promoting investment arbitration and strengthening the system's legitimacy. However, relations between foreign investors legitimate expectations and States regulatory power still remain asymmetric due to the absence of widespread approach on the settlement of such disputes, as well as due to the lack of precedent doctrine in international investment law.

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➢ CHAPTER 3: ARMENIAN INVESTMENT LAW REGULATIONS ON INVESTORS RIGHTS PROTECTION: RISKS AND ISSUES

Armenian investment law regulations

The existence of effective investment policy is one of the main factors resulting in the real enhancement of the economy, which in its turn, ultimately leads to the growth and prosperity of the population.

In this regard, the main long term social and economic strategy of Armenia shall have one big goal – granting sustainability and greater dynamics to the economy. The mentioned goal can be reached not only through effective and efficient use of national resources, but also with the help of direct foreign investments. Foreign investments are considered as a huge determinant for the economic growth of the host state. That is why, it is of a considerable and important issue for Armenia, as a developing country, at the present stage of world economy development, to establish effective investment legislation to provide proper regulations, namely protection guarantees, for foreign investments.
This Chapter aims to present information on the current regulatory framework of Armenia on foreign investments, issues and risks thereof. The recent developments in connection with the investment dispute between our Government and Lydian International shall also be addressed herein. It is as of high importance to understand what the possible outcome of this dispute may be.

The main local legal act, regulating the relations between foreign investors and Armenia, is the Law on Foreign investments, with the adoption of which Armenia has announced its "open door" investment policy. The mentioned law provides the definitions of "foreign investor," "foreign investment," stipulates the types and forms of foreign investments, guarantees ensuring the protection of foreign investments and as well as the procedure of investment disputes settlement.

One of the main issues of the current Armenian investment legislation is that no other substantive legislative acts have been adopted afterward. It is also worth mentioning that the RA Law on Foreign Investments has not been amended since its adoption (the year of 1994), which originally

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creates some obstacles for ensuring a well-regulated investment environment for foreign investors. In particular, the mentioned law does not reflect the new realities and developments of international investment law. The Armenian investment climate has undergone some changes, the rates of foreign investments have raised since 1994 (the year of adoption of RA Law on Foreign Investments). However, the lack of amendments and improvements to the current law makes our investment legislation not attractive for investors.

Particular attention shall be drawn to the foreign investor's protection guarantees, which are provided under the respective law.

By virtue of Article 8 of the Law of RA on Foreign Investments (hereinafter referred to as the "Law"), foreign investors are protected against nationalization and expropriation. Namely, it is provided that the foreign investments are not subject to nationalization. Further, it states that the state bodies of RA can confiscate the property of foreign investors solely in cases of emergency (as defined by the RA legislation) based on the judicial decision and with full and mandatory compensation. Another guarantee provided for foreign investors is the right to require (through due judicial proceedings) compensation for material damages and losses (including lost profit) resulting from unlawful acts of RA state bodies or state officials or improper performance of their duties established under the RA legislation.[69]

The problem in connection with the guarantees against foreign investments expropriation is that the Law does not specify what constitutes “emergency” and overall does not comply with the wording of expropriation clauses of international investment law, in accordance with which takings shall be done in "a non-discriminatory manner", for a "public purposes", etc. [70] Moreover, Armenian legislation has a specific law on deprivation of property rights for the needs of State and society[71], however, the Law does not make any references thereto and even does not include any

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[69] Article 9, Law of RA on Foreign Investments

[70] E.g., US-Armenia BIT provides the following provision on the expropriation under its Article III: Expropriation must be for a public purpose; be carried out in a nondiscriminatory manner; be subject to "prompt, adequate, and effective compensation"; be subject to due process. These rights also apply to direct or indirect state measures tantamount to expropriation or nationalization and thus apply to "creeping expropriations" that result in a substantial deprivation of the benefit of an investment without taking of the title to the investment.

[71] The Law of RA on Alienation of property for needs of State and society

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provision on expropriation for public purposes. No regulation on indirect expropriation, whereby there can be a deprivation of an investment without the formal transfer of ownership rights,[72] can also be found under the Law. Although it can be argued that not each and every source of international investment law specifically regulates the issues of indirect takings, in any case, the term of expropriation is defined broad enough to cover both direct and indirect kinds. The most common way of regulating it is through the use of phrases such as "equivalent to" or "tantamount to[73]

In addition to the above-described foreign investor's rights protection mechanisms, Armenian legislation also provides regulations on national treatment and non-discrimination standards. In particular, Article 6 of the Law stipulates that the legal regime applied to foreign investments cannot be less favorable than the laws governing the property rights and investments activities of RA citizens and legal entities. This shows that National treatment standard, which is globally used and referred to in various international investment instruments, is well-established and regulated under Armenian legislation.

Further, the guarantee for the investors in case of change of law is set forth under the Article 7 of the Law, which reads as follows: in case of any change in the legislation regulating foreign investment, the law in force at the time the investment was made can, upon the request of a foreign investor, shall continue to be applied for a maximum of 5 (five) years from the date of the investment.

This is a typical stabilization clause, whereby Armenia commits not to alter its domestic laws applicable to foreign investments. However, the crucial issue of the above-provided clause is the term of 5 (years) from the investment date. This means that the foreign investors cannot enjoy a stable legal environment following the expiration of 5 (five) years from the date when their investment is made.

Taking into consideration that foreign investors most often represent long-term projects and the fact that stabilization clauses, used in different international investment instruments, do not contain

[72] Expropriation: UNCTAD Series on Issues in International Investment Agreements II, UN New York, and Geneva, 2012

[73] *Ibid.*

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any indication of term/investment commencement date, it can be concluded that Article 7 of the law is weak from the investors rights protection perspectives.

In connection with the investments dispute resolution, the Law provides that investment–related disputes in which Armenia is a party shall be resolved by competent Armenian courts.[74] All other disputes, to which Armenia is not a party, shall be referred to the Armenian courts or any other bodies resolving economic disputes or, upon the agreement of the parties, in arbitration tribunals unless another procedure is defined by the international agreements or by the parties. [75] This provision is quite unclear and not precise since it is disputable whether an investor is entitled to bring a claim against Armenia solely in domestic courts or not.

Legal safeguards on the promotion and regulation of fair and equitable treatment and most-favored nation standards are also missing in Armenian legislation. Moreover, no specific clauses on the recognition of the State's right to regulate in the public interest and respective protective mechanisms minimizing possible adverse and negative effects of state's police power are provided under the Law. In one hand, this precludes Armenia, as a sovereign state, from exercising its regulatory rights. On the other hand, foreign investors are deprived of the possibility to plan their activities since unexpected State's actions may deter their economic stability. Such a lack of stable legal conditions, under which an investor can operate, create a non-favorable investment climate.

At this time of ongoing huge competition for foreign investments capital between developing countries, Armenian legislative body shall initiate adoption and insurance of proper protection mechanisms in order to attract more investments. This improvement will eventually translate into the increase in investment activities and will contribute to economic growth and substantial development.

Back in October 8 2015, the Government of Armenia has given its approval to the adoption of investment policy, where was stated that one of the main issues in the field of investments is the enhancement of the investment climate, improvement of the legislative field and promotion of

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[74] The Law of RA on Foreign Investments, Article 24
[75] *Ibid.*

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investments in the economy of the Republic of Armenia[76]. The Government of Armenia has shared the same above-described concerns with respect to the current Law and has proposed to make the following amendments.

- To include the standard of fair and equitable treatment;
- To improve clauses on expropriation;
- To clarify clause on disputes settlement through the provision of the possibility to refer the investor-state dispute to the jurisdiction of international arbitral tribunals.

Unfortunately, as I have already mentioned before, our current law on Foreign Investments has not been amended and improved since its adoption.

In addition to the domestic legislation, it is important to present bilateral agreements on the promotion and mutual protection of investments. The overwhelming majority of states has ratified and enforced such agreements. The Republic of Armenia is no exception. To this date, it has signed and ratified over 41[77] BITs with different countries. Should these agreements contain clauses, which differ from the ones provided under the domestic legislation, the clauses of international treaties shall prevail.[78] Such hierarchy given to the rules established under international legal acts puts Armenian investment environment in a more favorable and attractive position.

Lydian-Armenia dispute importance

Lydian International Limited (hereinafter "Lydian") is a gold developer focused on construction of its 100%-owned Amulsar Gold project, which contains second largest gold deposit in Armenia. The mining field of Armenia attracted Lydian's attention initially in 2005 and subsequently gold deposit located in Amulsar was discovered by them in 2006.
According to the calculations prepared by Lydian, the Amulsar Gold project would have contributed more than USD 450 mln. to the state budget of Armenia through taxes and royalties within its 10-year operation.

[76] Minutes from the session of the RA Government are available at http://www.irtek.am/views/act.aspx?aid=82676
[77] List of the countries is available at https://investmentpolicyhubold.unctad.org/IIA/CountryBits/9#iiaInnerMenu
[78] The Law of RA on Foreign Investments, Article 2

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Lydian and its subsidiaries, as huge investors operating in Armenia, has received the support from the Government of Armenia until the revolution in the country. In 2012, the investor has received all the licenses, permits and documents necessary for the exploitation of Amulsar mine.

However, following the change in the government of Armenia in May 2018, demonstrations and road blockades have started throughout the country, which were primarily targeted to the mining field, including the Amulsar Gold project. Blockades have prevented Lydian from accessing the Amulsar project site to perform its construction and other associated works since late June 2018. Subsequently, the Government of Armenia initiated inspections at Amulsar through two international highly qualified consultancy groups, which have been selected to review the case of Lydian and determine the possibility of harmful negative impacts by Amulsar project and to evaluate the validity of preventative and mitigation measures initiated by Lydian.

It is noteworthy that Lydian has been repeatedly subject of criticism for its activities. The environmental activists and people living near the mine, have been claiming about the health, social and economic damages resulting from Lydian's activities.

In March 11, 2019 Lydian Int. publicly announced that, in connection with the ongoing road protests resulting in the blockage of access to the Amulsar Gold project, Lydian UK and Lydian Canada, subsidiaries of Lydian Int., have formally notified the Government of the Republic of Armenia of the existence of disputes with the Government of Armenia under the BITs of Armenia with UK and Canada. In the announcement, Lydian international has mentioned that the initiation of arbitral proceedings against Armenia will depend on further conduct from the side of the Government. [79]

This outcome of the negotiations between Lydian and Armenia is as of importance, since Armenia has all the risks to face an international investment dispute initiated by one of its biggest investors. In case no settlement is reached at the potential negotiations stage and Lydian chooses to pursue its interest in arbitration and reduce its exposure and losses, it is assumed that one of the claims to

[79] https://www.lydianinternational.co.uk/news/2019-news/452-

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be presented before a competent tribunal will be the violation of FET standard. Namely, the breach of legitimate expectations, as being the dominant element of FET standard, may be addressed. As it has been discussed and presented under the Chapters 1 and 2, legitimate expectations concept refer to a situation, when the host State's conduct (assurances, representations, issuance of licenses and permits) creates "reasonable and justifiable expectations" for the foreign investor "to act in reliance on said conduct…".[80] Thus, issuance of licenses and other permits necessary for the exploitation of Amulsar mine shows, to a certain degree, an acknowledgment of Armenian Government's "commitments", which supposedly, would lead to the creation of Lydians reasonable and legitimate expectations.

On the other hand, Armenia can terminate Lydian's license through the exercise of its police power for the protection of environment and public health. It may well be argued that, Armenia as a sovereign state can adopt certain regulatory measures, which will not create any liabilities subject to compensations for Armenia; if such measures are proved to be "legitimate", "non-discriminatory" and exercised for the protection of public interests.

However, the settlement of this current dispute is subject to considerable debate since no further comments and actions has been initiated by both parties following the official announcement of a dispute existence. Moreover, the complexity of investments disputes and non-precedent nature of arbitral awards make the possible outcome of the Lydian-Armenia dispute hard to predict.

In any case, whenever Armenia wins or loses this case, the investment climate will be considerably shattered, which will make our country less attractive for the future potential investors. Thus, the existence of stable legal environment and protection guarantees for investors rights shall be insured and applied by Armenia.

[80] Parkerings- v. Lithuania, *supra note at 4,* para 329

➢ CONCLUSION

Summarizing the findings, observations and respective case-law analyses presented under the relevant chapters of this master paper, it can be concluded that.

- International investment law is currently considered as one of the most dynamic fields of international law, which generates numerous arbitral awards dealing with important legal issues. The burst of activity since the 20th century has its roots primarily in several investment treaties entitling investors direct access to international arbitration. The practice of international investment tribunals provides a valuable contribution to the enhancement of international law in a variety of fields.
- The standards of protection offered by investment treaties and the possibility of their enforcement through investor-State arbitration have improved the legal position of investors considerably.
- The diversity of investment tribunals has made the development of a coherent and consistent case law difficult. Different tendencies that have been applied in the practice of arbitral tribunals make the outcome of claims hard to predict.
- The principle of legitimate expectations requires transparency, consistency and stability. In the scope of the legitimate expectations, the host state is not deprived of liberty to decide upon the content of the legal regulations.
- The investment arbitration system aims to protect the foreign investors. Some aspects of investments' protection are mentioned in the investment treaties. Nevertheless, the term "legitimate expectations" is not defined or referred to as investment protection instrument in most of the investment treaties. Moreover, the scholarly opinions and arbitral awards do not provide the precise definition of such concept. The arbitral jurisprudence is the fundament for the tribunals to accept the term legitimate expectations and apply it in a general discretion. On the contrary to the investors' protection approach, some countries have raised concerns over the enhanced protection system of the investors. For instance, the countries have raised issues in regards with the obligation of stable regulatory framework on state's behalf, arguing that it creates obstacles for the host states in the aspect of environmental protection or any other issue that may impact the public interest. Hence, the problem arises when dealing with the

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harmonization between the states' freedom to regulate the issues concerning public interest and the protection of the legitimate expectation of stability and consistency of the foreign investors.

- Tribunals role is to balance State's freedom to regulate and protection of investors. Most of the approaches and conclusions made by the tribunals do not alter the principle of one-sided protection given to foreign investors. States expect more effort from the investors' side in the contribution of economy and more specifically the contribution to the development and environmental sectors. Under the constantly changing reality of the investment law, asymmetric protection has lost its value in the harmonization of the legitimate expectations of investors and States rights to regulate.
- Armenian domestic legislation on the foreign investment is not in full compliance with internationally recognized standards. Armenia shall initiate adoption and insurance of proper protection mechanisms of foreign investors rights in order to attract more investments. This improvement will surely contribute to growth and substantial development of Armenian economy.
- No matter what the outcome of the Lydian-Armenia dispute will be, the investment environment of Armenia will be surely frustrated. Losing to Lydian will entail harsh consequences for Armenia as the damages shall be compensated and, which, in retrospect, will cause both monetary and environmental damages and loses to Armenia in the first place.

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➢ BIBLIOGRAPHY

Laws and Treaties

Energy Charter Treaty, 1994, 34 ILM 360 10

Law of RA on Foreign Investments.. 25

North American Free Trade Agreement (NAFTA), 32 ILM 289 (1993). 10

Books and Articles

A Shemberg, Stabilization Clauses and Human Rights – para. 19 (OECD Global Forum, 2008). 5

Aikaterini Titi, The Right to Regulate in International Investment Law, in 10 STUDIES IN INTERNATIONAL INVESTMENT LAW 19–21 (2014).. 4

C. Schreuer, "Fair and Equitable Treatment in Investment Treaty Law' in F. Ortino, L. Liberty, A. Sheppard and H. Warner (eds.). Investment Treaty Law-Current Issues II (British Institute of International and Comparative Law, 2007)... 10

Christoph Schreuer – "The concept of expropriation under ETC and other investment protection treaties" (revised 20 May 2005)... 9

Dolzer & Schreuer, Principles of International Investment Law (OUP, 2008) 11

Expropriation: UNCTAD Series on Issues in International Investment Agreements II, UN New York, and Geneva, 2012 26

H Wade and C Forsyth, Administrative Law (OUP, 2000) 12

James Crawford, Brownlie's Principles of Public International Law (Oxford University Press 2012) 21

Jarrod Wong - Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes, 2006... 10

Judith Gill et al., Contractual Claims and Bilateral Investment Treaties: A Comparative Review of the SGS Cases, 21 J. INT'L. ARB. 397, 403 n.31 (2004).. 10

JW Salacuse, The Law of Investment Treaties (OUP, 2010) 12

McLachlan, Shore, and Weiniger, International Investment Arbitration: Substantive Principles (OUP, 2007)... 5

MN Shaw, International Law (6th. Ed., CUP, 2008), 649... 4

MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, 21 March 2007 22

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Newcombe & Paradell, Law and Practice of Investment Treaties (Kluwer Law International 2009) 5
R Swedberg, 'Max Weber's Contribution to the Economic Sociology of Law' (2006) 12
S Schill, 'International Investment Law and General Principles of Law,' in J Bering et al. (eds.). General Principles of Law and International Investment Law, (The International Law Association: German Branch, December 2009) 5
SW Schill, "Fair and Equitable Treatment, The Rule of Law, and Comparative Public Law," in SW Schill (ed.). International Investment Law and Comparative Public Law (OUP, 2010) ... 11
Thomas Walde and Abba Kolo, 'Environmental Regulation, Investment Protection And 'Regulatory Taking' In International Law' (2001) 50 International and Comparative Law Quarterly 21
UNCTAD's International Investment Agreements Navigator.. 8
Vandevelde, Kenneth J., A Unified Theory of Fair and Equitable Treatment. Jennings, Mark. 2016. "The International Investment Regime and Investor-State Dispute Settlement: States Bear the Primary Responsibility for Legitimacy." Business Law International 17 (2): 127. (JILP), Vol. 43, No. 38.. 11

Case law

ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v Republic of Hungary, ICSID Case No.ARB/03/16, Award, 2 October 2006.. 21
AES Summit Generation Ltd. v. The Republic of Hungary, ICSID No. ARB/01/04 18
Bayindirv. Pakistan, ICSID Case No. ARB/0/29, Award of 27 August 2009............................. 11
Case 74/74, CNTA SA v Commission [1975] ECR 533 12
Case C-152/88, Sofrimport Sour v Commission [1990] ECR 1–2477 12
Cases C-104/89 and 307/90, Mulder v Council and Commission [1992] ECR 1–3061 12
Chemtura Corporation v Canada, UNCITRAL, Award, 2 August 2010..................................... 21
CME Czech Republic B.V. (The Netherlands) v Czech Republic (UNCITRAL), Partial Award of 13 September 2001.. 14
EDF v. Romania, ICSID Case No. ARB/05/13, Award of 8 October 2009 11
El Paso Energy International Company v Argentine Republic, ICSID Case No.Arb/03/15, Award, 31 October 2011 21
EnCana v. Ecuador, LCIA Case No. UN3481, UNCITRAL, Award of 3 February 2006 18

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Enron v. Argentina, ICSID Case No. ARB/01/3, Award of 22 May 2007 16
Ioannis Kardassopoulos v Republic of Georgia, ICSID Case Nos. Arb/05/18 and Arb/07/15, Award, 3 March 2010 21
Joseph Charles Lemire v Ukraine, ICSID Case No.ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 21
Les Laboratoires Servier v Republic of Poland, UNCITRAL, Award, 14 February 2012 21
LG&E v. Argentina, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006 16
Marvin Feldman v Mexico, Case No.Arb(AF)/99/1, Award, 16 December 2002 21
Metalclad Corporation v The United Mexican States (ICSID ARB(AF)/97/1), Award of August 30, 2000 14
Metalpar S.A. and Buen Aire S.A. v. Argentine Republic, ICSID Case No. ARB/03/5 18
Methanex Corporation v United States of America, UNCITRAL, Final Award, 3 August 2005 21
Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador, ICSID Case No. ARB/06/11, Award, 5 October 2012 21
Occidental v. Ecuador, LCIA Case No. UN3467, Final Award of 1 July 2004 16
Parkerings-Compagniet AS v. Lithuania, ICSID Case No. ARB/05/8 (Norway/Lithuania BIT), Award of 11 September 2007 4
Paushok v. Mongolia, UNCITRAL, Award on Jurisdiction and Liability of 28 April 2011 17
Penn Central Transportation Co and Ors v New York City and Ors, 438 US 104; 98 S Ct 2646 12
PSEG v. Turkey, ICSID Case No. ARB/02/5, Award of 19 January 2007 16
Saluka Investments BV v Czech Republic, UNCITRAL, Partial Award, 17 March 2006 21
Suez and Vivendi v. Argentina, ICSID Case No. ARB/03/19, Decision on Liability of 30 July 2010 5
Tecnicas Medioambientales TECMED S.A. v The United Mexican States (ICSID ARB (AF)/00/2), Award of 29 May 2003 11
Total v. Argentina, ICSID Case No. ARB/04/01 Decision on Liability of 27 December 2010 ... 17
Waste Management v. Mexico (Number 2), ICSID Case No. ATB(AF)/00/3, Final Award of 30 April 2004 11

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