

Research Proposal – Doctoral Thesis

Unilateral promises in general international law and investment law

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Introduction

On the international plane, state officials regularly issue statements containing a pledge to take action on the global stage, outlining state policy with regards to specific issues or making promises to states as well as non-state actors. Most of these statements are merely political and entail few legal consequences. Nevertheless, they can also serve a legal purpose – either in the context of a treaty or as a means to create international legal obligations outside a treaty framework. While in state-to-state interactions the former primarily involve declarations made on the basis of a treaty or for purposes of accepting a treaty regime,¹ the latter primarily encompass those unilateral declarations, which constitute unilateral acts regarded as an autonomous source of international obligations.² However, promises made by state organs can also lead to an international obligation vis-à-vis another state based on the principle of estoppel.³

Not only in inter-state relations can statements create international legal obligations, but they may also constitute legally relevant acts in the realm of international investment law.⁴ State officials occasionally give assurances to investors through written or oral promises as well as legislation and decrees.⁵ Where promises are made to investors the question arises whether these may trigger international legal obligations. While investment law is part of public international law,⁶ account must be taken of the structural differences between general international law and international investment law. In the latter body of law declarations by state representatives typically become legally significant through specific standards of treatment enshrined in international investment agreements (IIAs), in particular fair and equitable treatment (FET)⁷ and umbrella clauses.⁸ However, there may be additional grounds to establish legal obligations based on promises, which have remained mostly unexplored.

¹ See e.g. *Fisheries Jurisdiction (Spain v. Canada)* (Jurisdiction and Admissibility) [1998] ICJ Rep 432.

² See e.g. *Nuclear Tests (Australia v. France)* (Jurisdiction and Admissibility) [1974] ICJ Rep 253, para. 43; ILC, 'Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations', Yearbook of the ILC 2006, Vol 2, Part 2, A/CN.4/SER.A/2006/Add.1 (Part 2) 369, 370.

³ Bowett, 'Estoppel before International Tribunals and Its Relation to Acquiescence' (1957) 33 *BYIL* 176, 188 ff.

⁴ See e.g. *Olin Holdings Limited v. State of Libya*, ICC Case No. 20355/MCP, Final Award, 25 May 2018, para. 308.

⁵ Reisman/Arsanjani 'The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes' (2004) 19 *ICSID Review — FILJ* 328.

⁶ De Brabandere, *Investment Treaty Arbitration as Public International Law* (2014) 17.

⁷ *Waste Management, Inc. v. United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98 ('In applying this standard [i.e. FET] it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.');

see also *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, paras. 117-119.

⁸ *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 10 February 2012, para. 77 ('None of the above findings excluded the possibility that any additional statements or alleged promises to pay made by Paraguayan officials might in themselves constitute binding commitments under

Current state of research and main issues

The term ‘promise’ in the doctoral thesis is not used as legal concept. Rather, promises are attributed a legally binding character through specific instruments or principles found in international law, which the doctoral thesis will generally refer to as ‘normative foundations’. As described above, several distinct normative foundations may confer a binding character on a promise under international law. Hitherto, a systematic, comparative analysis of these normative foundations in the context of promises, addressing both the developments in general international law and international investment law, is missing.⁹ Promises by states vis-à-vis other states and vis-à-vis investors have mostly been explored in isolation from each other. Hence, there is a lack of theoretical and dogmatic explanations of the similarities and differences in the application of similar (and dissimilar) normative foundations in general international law and investment law.

This doctoral thesis shall examine the full spectrum of normative foundations relevant for transforming promises into legal commitments protected under international law and provide a more comprehensive understanding of the role of promises in public international law. This is accomplished by a process of cross-fertilisation between general international law and investment law, i.e. a comparative analysis of judicial, arbitral and state practice in these areas.

The idea that unilateral promises by state organs may result in binding commitments has been addressed by scholarship, state practice and judicial practice for a long time with regards to general international law.¹⁰ The primary basis conferring a binding character on promises is unilateral acts, often taking the form of unilateral declarations. Against the backdrop of the adoption of the ‘ILC Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations’ a renewed interest by scholarship emerged with regards to unilateral acts as a specific normative basis for binding promises. However, neither the ILC nor academics have addressed the developments in international investment law,¹¹ limiting their

Article 11 of the BIT. [...] Oral and written representations outside the Contract could, therefore, be enforceable under Article 11 in certain circumstances.’)

⁹ See in particular fn(11).

¹⁰ For a brief overview of state practice and judicial practice with regards to promises as unilateral acts see Degan, *Sources of International Law* (1997) 293-305; Eckart, *Promises of States under International Law* (2012) 81-173.

¹¹ The most recent monographs by Eckart (2012) fn(10), Kassoti, *The Juridical Nature of Unilateral Acts of States in International Law* (2015) and Saganek, *Unilateral Acts of States in Public International Law* (2015) as well as ILC Commentary to the Guiding Principles fail to address actual unilateral acts or promises that might be classified as unilateral acts in investment law.

focus to the inter-state level, but ignoring relevant findings concerning the inter-state level by investment tribunals.¹²

Similarly, in the field of investment law arbitral tribunals and academics sometimes merely apply the normative foundations employed in general international law when it comes to promises without taking account of the inter-state relationship in which these normative foundations have been formulated.¹³ At the same time, there is a lack of discussion why certain normative foundations of general international law play virtually no role in the relationship between investors and states. Could the general principle of estoppel provide a legal basis for binding promises by a state vis-à-vis investors? Can substantive obligations under national investment laws constitute unilateral acts under international law? Can a state representative create an obligation under international law vis-à-vis investors by virtue of a unilateral declaration? If so, under which circumstances?

Promises in state-to-state context

Unilateral promises by states directed at other states in the form of **unilateral acts** can as such create international binding obligations. Accordingly, a written or oral statement (unilateral declaration) has ‘the character of a legal undertaking’ under international law if given ‘with an intent to be bound’.¹⁴ Such an intention has to be ascertained by interpreting the act in question, taking into account not only of the text of the unilateral declaration, but also ‘all the factual circumstances in which the act occurred’¹⁵ and applying a restrictive interpretation.¹⁶ Whereas the jurisprudence does not regard any form of reliance as relevant in determining the legal effects of declarations,¹⁷ the ILC Guiding Principles cite the ‘reactions to which they gave rise’¹⁸ as a necessary element for assessing the legal effects, approximating this very idea to the principle of estoppel. However, the ICSID tribunal in *Total v. Argentina*, when discussing

¹² See e.g. *Total v. Argentina* fn(7), paras. 131-134; *Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013, para. 92 (distinguishing between different kinds of unilateral acts and explaining which of these are covered by the ILC Guiding Principles).

¹³ See e.g. *Reisman/Arsanjani* fn(5); *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, paras. 95-99.

¹⁴ *Nuclear Tests* fn(2), para. 43; *Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)* (Merits) [1986] ICJ Rep 554, para. 39 (‘Thus it all depends on the intention of the State in question, [...]’).

¹⁵ *Frontier Dispute* fn(14), para 40; see also *Nuclear Tests* fn(14), para. 51; *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6, para. 49.

¹⁶ *Nuclear Tests* fn(2), para. 44; Guiding Principles fn(2), 377 (whereas *Nuclear Tests* seems to suggest that the restrictive interpretation is relevant for assessing whether a legal obligation has been created, Principle 7 of the Guiding Principles prescribes a restrictive interpretation for the determining the scope of the obligation).

¹⁷ *Nuclear Tests* fn(2), para. 43 (‘[N]othing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect [...]’).

¹⁸ Guiding Principles fn(2), 371.

unilateral acts under public international law in the abstract, observed that ‘the legal basis of that binding character appears only in part related to the concept of legitimate expectations--being rather akin to the principle of “estoppel”.’¹⁹ In light of the jurisprudence by the ICJ,²⁰ the majority of scholars merely identify good faith as the principle granting legal force to unilateral acts, requiring nothing else for the existence of an international obligation than the intention of the state.²¹ The legal foundations of unilateral acts remain contested.²² Considering the approach taken by the ILC Guiding Principles,²³ the question needs to be asked whether the existing theoretical approach towards the binding nature of unilateral acts should be re-addressed. What role does reliance indeed play? Is a certain level of due diligence required by states before they can ‘take cognizance of unilateral declarations and place confidence in them’²⁴? While most arbitral practice in investment law involves promises within the national legal framework that are elevated to or become relevant at the international level through treaty provisions, the arguments developed in that regard might be instructive for a reappraisal of unilateral acts in general international law. Another question that remains unsettled despite the ILC Guiding Principles, is the manner in which unilateral acts could be revoked.²⁵

Promises in investor-state context

When it comes to investment law, unilateral promises are primarily of legal relevance under **legitimate expectations** in FET.²⁶ Such unilateral promises can take various forms. They can either be included in legislation and administrative decrees²⁷ or be less formal representations

¹⁹ *Total v. Argentina* fn(7), paras. 131; on estoppel see *Temple of Preah Vihear (Cambodia v. Thailand)* [1962] Dissenting Opinion Sir Percy Spender ICJ Rep 6, 143-144; *North Sea Continental Shelf (Germany v. Netherlands)* (Judgment) [1969] ICJ Rep 3, para. 30.

²⁰ See e.g. *Nuclear Tests* fn(2), para. 46 (‘Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.’)

²¹ E.g. Zemanek, ‘Unilateral Acts Revisited’ in Wellens (ed), *International Law: Theory and practice: Essays in honour of Eric Suy* (1998) 209, 217; Saganek fn(11), 404-406.

²² Rubin, ‘The International Legal Effects of Unilateral Declarations’ (1977) 71 *AJIL* 1, 29; Thirlway, ‘The Sources of International Law’ in Evans (ed), *International Law* (2014) 112; see also Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006) 345 ff.

²³ See above fn(18).

²⁴ *Nuclear Tests* fn(2), para. 46.

²⁵ Eckart fn(8), 275; Guiding Principles fn(2), 380; Crawford, *Brownlie’s Principles of Public International Law* (2012) 418, 421.

²⁶ Legitimate expectations have become a relatively well-established concept under FET, see e.g. *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 302; *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 348; *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, paras. 7.75.

²⁷ At least under certain circumstances general laws may contain promises and generate legitimate expectations, though it remains contested when this is the case; see e.g. *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Award, 27 December 2016, para. 371; *Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. The Kingdom of Spain*, ICSID Case No. ARB/13/31, 15 June 2018, para. 681.

as well as written and oral assurances.²⁸ The tribunal in *Parkerings v. Lithuania* clearly held that ‘an explicit promise or guaranty from the host-State, or [...] implicitly [...] made assurances or representations that the investor took into account in making the investment’²⁹ can create legitimate expectations.³⁰ The more specific the promise and the more formal, the more likely will legitimate expectations arise.³¹ Unlike contractual undertakings, these undertakings are properly unilateral. However, the investors’ conduct is also taken into account, in particular requiring reasonable reliance upon the promise when making the investment and due diligence.³² In this respect the question of unlawful representations and legitimate expectations is particularly relevant. Under which circumstances can representations illegal under domestic law lead to legitimate expectations?³³ Which level of due diligence is required by the investor and what role does international law play in this assessment?³⁴

Additionally, the **minimum standard of treatment** under customary international law could include a protection of **legitimate expectations**, which in turn might require states to respect promises that have induced reliance by investors. It remains disputed in scholarship whether such legitimate expectations are covered by the customary minimum standard of treatment.³⁵ However, NAFTA tribunals have treated legitimate expectations as part of Article 1105 NAFTA,³⁶ a provision that does not go beyond the minimum standard according to an FTC

²⁸ See e.g. *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL, Separate Opinion Thomas Wälde, 1 December 2005, para. 32 (‘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. [...]’); *El Paso v. Argentina*, fn(26) para. 376 (‘specific commitments directly made to the investor – for example [...] through a specific promise in a person-to-person business meeting’).

²⁹ *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 331.

³⁰ See also Mairal, ‘Legitimate Expectations and Informal Administrative Representations’ in Schill (ed), *International Investment Law and Comparative Public Law* (2010) 413.

³¹ Yannaca-Small, ‘Fair and Equitable Treatment Standard: Recent Developments’ in Reinisch (ed), *Standards of Investment Protection* (2008) 111, 126.

³² *Parkerings v. Lithuania*, fn(29), para. 333; *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award, 12 November 2010, para. 288; *Mr. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, para. 532 ff.; *Antin v. Spain* fn(27), para. 537.

³³ In English law *ultra vires* representations cannot result in legitimate expectations, see Elliott, ‘Unlawful Representations, Legitimate Expectations and Estoppel in Public Law (2003) 9 *Judicial Review* 71, 72.

³⁴ *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992, paras. 81-85; *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/03/28, Award, 18 August 2008, paras. 247-251, 432-442; see, however, *Duke v. Peru*, Partial Dissenting Opinion of Arbitrator Pedro Nikken, para. 10; see also *International Thunderbird Gaming Corporation v. The United Mexican States*, Separate Opinion Thomas Wälde fn(28), para. 31.

³⁵ Yannaca-Small fn(31), 130; Dumberry, ‘The Protection of Investors’ Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105’ (2014) 31 *Journal of International Arbitration* 47, 60 (‘In the author’s view, there is little support for the assertion that there exists under customary international law any obligation for host states to protect investors’ legitimate expectations.’).

³⁶ Article 1105(1) NAFTA (‘Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.’); see *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Final Award, 8 June 2009, para. 621; *Grand River*

interpretation.³⁷ The ICJ has recently ruled ‘that there exists in general international law [no] principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation’,³⁸ but has refrained from commenting on whether it is included in the minimum standard.

As far as **umbrella clauses** are concerned, it is accepted that they can apply to unilateral promises directed at investors.³⁹ However, the question is under which circumstances such an application would be permissible. The wordings of IIAs have led to divergent views whether unilateral state promises constitute an obligation under the umbrella clause. A comparatively easier argument can be made that commitments ‘entered into’ only encompass contractual and not unilateral undertakings, such as assurances or sometimes even general host state laws (though it remains highly disputed if and when general host state law constitutes a promise vis-à-vis an investor).⁴⁰ Moreover, arbitral tribunals slightly disagree whether an obligation actually needs to exist under domestic law for an umbrella clause to take effect or whether the rules of international law can be relied upon to establish the existence of a legal obligation.⁴¹ Could the rules applicable to unilateral acts apply (by analogy) to such situations?⁴²

Enterprises Six Nations, Ltd. and others v. United States of America, UNCITRAL, Award, 12 January 2011, para. 140.

³⁷ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Final Award, 11 October 2002, paras. 119-122; *William Ralph Clayton and others v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, paras. 432-433, 438; *Eli Lilly and Company v. Government of Canada*, ICSID Case No. UNCT/14/2, Final Award, 16 March 2017, paras. 380-381.

³⁸ *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)* (Merits) [2018] General List No. 153 ICJ 1, para. 162.

³⁹ Gritón Salias, ‘Do Umbrella Clauses apply to Unilateral Undertakings?’ in Binder/Kriebaum/Reinisch/Wittich (eds), *International Investment Law for the 21st Century* (2009) 490, 495; see e.g. *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, 12 February 2010, para. 167.

⁴⁰ *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment, 25 September 2007, para. 95; *Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, para. 257; see, however, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, para. 275.

⁴¹ *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004, para. 117 (‘Whether collateral guarantees, warranties or letters of comfort given by a host State to induce the entry of foreign investments are binding or not, i.e. whether they constitute genuine obligations or mere advertisements, will be a matter for determination under the applicable law, normally the law of the host State.’); see also *Ioan Micula and others v. Romania I*, ICSID Case No. ARB/05/20, Award, 11 December 2013, para. 418; *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015, para. 365; see, however, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 174 (‘In order to determine the applicability of the umbrella clause, the Tribunal should establish if by virtue of the provisions of the Gas Law and its regulations, the Argentine State has assumed international obligations with respect to LG&E and its investment.’); *CMS v. Argentina* fn(40), para. 95 (‘[...] obligations arising independently of the BIT itself (i.e. under the law of the host State or possibly under international law).’); see also Newcombe/Paradell, *Law and Practice of Investment Treaties* (2009) 449.

⁴² See claimant’s submission in *Micula v. Romania* fn(41), para. 354.

Whereas unilateral promises in state-to-state interactions can lead to binding commitments outside a treaty framework on the basis of a **unilateral act**, academic literature has hardly addressed the question whether this concept of general international law could become directly applicable **in investment cases**.⁴³ The concept of unilateral acts and declarations could be pertinent in two respects: 1) written or oral promises given to an individual investor and 2) national investment legislation.

The former (1) can be subsumed under FET or umbrella clauses, provided they fulfil the necessary requirements. The argument that these statements also constitute unilateral acts under international law, thereby creating a commitment directly under international law, would constitute an alternative ground for a claim, where the criteria relevant for legitimate expectations are absent or where no umbrella clause and/or FET provision exists.⁴⁴ Taking the position of *Nuclear Tests*, any reaction by the investor would not be relevant in determining the existence of the obligation.⁴⁵ Hence, the reliance criterion found in legitimate expectations could be disregarded. Moreover, the timing of the promise might be immaterial, implying that promises given after an investment might become legally relevant. Scholarly opinion has only discussed this concept in passing, stressing that arbitral tribunals will most likely have no jurisdiction to hear such claims.⁴⁶ The jurisdictional obstacle would be relevant in instances where IIAs only provide for jurisdiction related to the respective treaty standards.⁴⁷ While arbitral practice concerning the application of this concept is scarce, the possibility to invoke it cannot be ruled out.⁴⁸ In a recent redacted award, *Marfin v. Cyprus*, the ruling by the tribunal indicates that the argument of the claimant revolved around the concept of unilateral declarations made by the host state to the investor.⁴⁹

⁴³ A seminal paper by Reisman/Arsanjani ('The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes' fn(5) 343) was the first to arguably support this idea.

⁴⁴ E.g. Egypt-Japan BIT (1977); China-Slovakia BIT (1991); Japan-Turkey BIT (1992); Albania-Romania BIT (1995).

⁴⁵ See above fn(17).

⁴⁶ Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (2013) 252 ('The unilateral act would be different from the investment protection treaty in general and fair and equitable treatment in particular, and (unless the jurisdictional or MFN clauses were formulated in very wide terms) the Tribunal would lack jurisdiction to rule on its breach').

⁴⁷ E.g. Article VII Egypt-US BIT (1986); a BIT that would otherwise not include an FET provision.

⁴⁸ *El Paso v. Argentina* fn(26), para. 392; see also Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28 *ICSID Review —FILJ* 88, 110. ('The *El Paso* tribunal [...] refused the proposed analogy from the *Nuclear Tests* cases – not as matter of legal principle it would seem, but because it found the acts at issue to be factually very different.); *Hochtief AG v. Argentine Republic*, ICSID Case No. ARB/07/31, Award, 29 December 2014, para. 291; see also *Swissbourgh Diamond Mines (Pty) Ltd. v. Kingdom of Lesotho* [2018] SGCA 81, paras. 86-89.

⁴⁹ *Marfin Investment Group v. Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, 26 July 2018, para. 1356 (XIII. Whether Respondent breached its unilateral declarations. [redacted]. The Tribunal need not engage in an analysis of the legal basis of Claimants' claim hereunder in order to conclude that it lacks merit. As the Tribunal's

Whereas scholarship questions whether these kinds of unilateral declarations would be covered by the dispute settlement clauses of IIAs, the question whether an investor is actually capable of being an addressee of such an autonomous unilateral act has received almost no attention. Since the concept of unilateral acts or declarations has been developed for a state-to-state relationship, the legal status of the investor on the international plane could be an important preliminary question: does the investor have to possess (at least limited) international legal personality to be an addressee of an autonomous unilateral act binding under international law?⁵⁰ Is the investor's status under an investment treaty enough to treat it as a partial subject of international law?⁵¹ The problem of the legal status of investors in this regard seems to have been implicitly recognised in *Total v. Argentina*.⁵²

It should be noted that arbitral tribunals apparently have accepted that promises made by agent or counsel of a state during arbitral proceedings may constitute unilateral acts and give rise to an obligation under international law vis-à-vis an investor.⁵³ In state-to-state proceedings, international courts and arbitral tribunals have not articulated a normative theory that explains the legally binding character of a promise made during proceedings and scholarly opinion is divided.⁵⁴ In investment arbitration, scholarship has so far neglected to address the theoretical

analyses under Sections IX-XII above make clear, Respondent offered liquidity and recapitalization support to Laiki and this permitted the Bank to continue operating until March 2013. The Tribunal does not consider it necessary to reiterate these considerations here. This claim is therefore dismissed.’)

⁵⁰ Crawford fn(25), 122 (‘In principle, however, corporations do not have international legal personality. Thus a concession or contract between a state and a foreign corporation is not governed by the law of treaties.’); Sornarajah, *The International Law on Foreign Investment* (2010) 101 (‘Unilateral guarantees against expropriation without full compensation have no international effect, unless backed up by a treaty commitment and jurisdiction is created in a foreign tribunal to safeguard this commitment. [...] The guarantees are addressed to individuals or entities such as multinational corporations which do not have personality in international law; just as treaties cannot be made with those who lack international personality, no obligations [under international law] can flow from guarantees given to those who lack international personality.’); see, however, Sourgens, *A Nascent Common Law* (2015) 57 (‘[The ILC] noted that unilateral acts “may be addressed to the international community as a whole, to one or several states or to other entities.” These “other entities” can include foreign investors.’); Hepburn ‘Domestic Investment Statutes in International Law’ (2018) 112 *AJIL* 658, 677 (‘However, there is no reason to think that private entities—individuals or corporations—could not be addressees of a unilateral act’).

⁵¹ Braun, ‘Globalization-Driven Innovation: The Investor as a Partial Subject in Public International Law’ (2014) 15 *Journal of World Investment & Trade* 73, 106-108.

⁵² *Total v. Argentina*, fn(7) para. 132 implicitly suggesting that unilateral acts under international law can only be directed to subjects of international law, excluding investors (‘We are aware that the Guidelines deal with the legal effects of unilateral acts of States addressed to other subjects of international law, and not with domestic normative acts relied upon by a foreign private investor.’).

⁵³ *Vito G. Gallo v. Government of Canada*, UNCITRAL, Decision on Place of Arbitration, 4 June 2008, para. 26; *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, paras. 95-99; *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador I*, PCA Case No. 34877, Final Award, 31 August 2011, para. 352.

⁵⁴ *Mavrommatis Jerusalem Concessions (Greece v. United Kingdom)* (Merits) PCIJ [1925] Series A. No 5, 6, 37 f.; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (Merits) [2002] ICJ Rep 303, para. 317; see Rubin fn(22), 3; Skubiszewski, ‘Unilateral Acts of States’ in Bedjaoui (ed), *International Law* (1991) 221, 223 (arguing that these declarations are not unilateral acts); in contrast, Eckart fn(10), 75-77; Kassoti fn(11), 162 (arguing that these declarations constitute unilateral acts).

underpinnings of such declarations. In general, one needs to carefully examine whether indeed new international obligations are created or existing ones recognised.⁵⁵ However, many questions remain open: can unilateral declarations before arbitral tribunals genuinely create new international obligations vis-à-vis investors? Do such declarations rather fall under a treaty regime or rules of procedure conferring a binding character upon them? Have arbitral tribunals in fact rightly characterized such declarations as unilateral acts creating international legal obligations?⁵⁶ Who is the actual addressee of such declarations: the investor or the tribunal?⁵⁷

As for national investment legislation (2), treating them as unilateral acts has also been scarcely explored by scholarship. Against the backdrop of several arbitral decisions concerning foreign investment laws and consent to ICSID arbitration,⁵⁸ academic literature has addressed the question whether these domestic laws constitute unilateral acts on the international level.⁵⁹ However, the analyses were limited to the question of consent to arbitration, ignoring whether substantive obligations contained in these investment laws could constitute unilateral acts under international law.⁶⁰ Arbitral practice has so far refrained from explicitly treating the substantive obligations of these laws as unilateral acts.⁶¹ Still, some tribunals have explicitly referred to

⁵⁵ *M.C.I. Power Group, L.C. and New, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, para. 352; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of ICSID), 1 September 2006, paras. 28 and 49 f.

⁵⁶ The declarations themselves typically do not refer to international law, let alone the concept of unilateral acts, but rather leave it to the tribunal to determine the legal meaning of such declarations. See *Joy Mining* fn(53), para 95; *Chevron* fn(53), para. 352.

⁵⁷ See e.g. the claimant's submission in *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 4 November 2008, para. 15 ('promise to the *ad hoc* committee').

⁵⁸ These decisions generally treat investment laws as unilateral acts, albeit under a treaty regime to which the Guiding Principles are not directly applicable. See e.g. *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, paras. 82-88; *Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste*, ICSID Case No. ARB/15/2, Award, 22 December 2017, para. 151; see also Schreuer, 'Investment Arbitration based on National Legislation' in Hafner/Matscher/Schmalenbach (eds), *Völkerrecht und die Dynamik der Menschenrechte* (2012) 527, 529-533; see, however, *ABCI Investments N.V. v. Republic of Tunisia*, ICSID Case No. ARB/04/12, Decision on Jurisdiction, 18 February 2011, para. 101 refusing to qualify a national investment law as 'a unilateral act within the meaning of international law [...] because of the distinct nature of these acts' [original in French].

⁵⁹ Caron, 'The Interpretation of National Foreign Investment Laws as Unilateral Acts under International Law' in Arsanjani/Cogan/Sloane/Wiessner (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (2010) 649; Potestà, 'The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws' (2011) 27 *Arbitration International* 149; Mbengue, 'National Legislation and Unilateral Acts of States' in Gazzini/De Brabandere (eds), *International Investment Law. The Sources of Rights and Obligations* (2012) 183; Hepburn, 'Domestic Investment Statutes in International Law' (2018) 112 *AJIL* 658.

⁶⁰ All of the above fn(59), except Hepburn.

⁶¹ It should be noted that currently at least 5 disputes based on national investment laws are pending (<http://www.italaw.com/case-types/foreign-investment-law> [not exhaustive]); according to Hepburn's own calculation 10 cases remain pending, see fn(59), note 251.

claims based on the substantive provisions of investment laws as ‘international law claims’,⁶² arguably lending support to the view that these investment laws constitute unilateral acts. Characterising such investment laws as unilateral acts could have major implications: first, when it comes to interpreting these laws the rules of international law are pertinent and the principle of restrictive interpretation might play a role.⁶³ Secondly, if they are to be treated as unilateral acts, how and when could these laws be modified or revoked?⁶⁴ Are these conclusions different for the substantive obligations of investment laws and the provision granting consent to international arbitration?

As far as **estoppel** is concerned, there is disagreement if and how estoppel can apply between states and investors in the same manner as it applies between states.⁶⁵ While the principle of estoppel in state-to-state relations might require a state to respect statements on which another state has detrimentally relied, only few investment cases have discussed the issue or actually applied estoppel to situations where investors relied on representations by state officials.⁶⁶ However, in particular various arbitral tribunals have treated assurances that investments were in accordance with domestic law under the doctrine of estoppel.⁶⁷ When do promises give rise to legitimate expectations protected in FET and when is a promise protected under estoppel? Can the principle of estoppel substitute a missing FET clause in a treaty? The relationship between estoppel and legitimate expectations needs to be critically explored in this regard.⁶⁸

⁶² *Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria*, ICSID Case No. ARB/13/20, Decision on Preliminary Objections, 29 October 2014, para. 124 (claims solely based on a foreign investment law, which the tribunals has characterized as an ‘arbitration, which relates to violation of international law’) [dispute still pending]; *Caratube International Oil Company LLP and Devinci Salah Hourani v. Republic of Kazakhstan*, ICSID Case No. ARB/13/13, 27 September 2017, Award, para. 419 (‘international law claims arising under the Nigerian Investment Promotion Commission Act’).

⁶³ See above fn(16). See, however, *CEMEX v. Venezuela* fn(58), paras. 82-87; *Venezuela Holdings B.V. and others (formerly Mobil Corporation and others) v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, paras. 86-94.

⁶⁴ See above fn(25); Guiding Principles fn(2), 380.

⁶⁵ Roberts, ‘Power and Persuasion in Investment Treaty Interpretation: the Dual Role of States’ (2010) 104 *AJIL* 179, 214; *Total v. Argentina*, fn(7) Concurring Opinion of Luis Herrera Marciano, para. 8; see, however, *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, para. 47.6 (‘[...] the Tribunal is of the view that the same general principle [of estoppel] is applicable in international economic relations where private parties are involved.’).

⁶⁶ *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, paras. 59-65; *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Award, 1 July 2004, paras. 194-196; *Duke v. Peru* fn(34), paras. 241-251, 432-442 (however, *Duke v. Peru* was a contract dispute and the doctrine of estoppel also formed part of domestic law); *Micula v. Romania*, fn(41), para. 831.

⁶⁷ *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015, paras. 466-479; *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, paras. 411-414; *Karkey Karadeniz Elektrik Uretim A.S. v. Pakistan*, ICSID Case No. ARB/13/1, Award, 22 August 2017, paras. 621-628.

⁶⁸ *Internationl Thunderbird v. Mexico*, Separate Opinion Thomas Wälde fn(28), paras. 25-27; *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Separate Opinion of Pedro Nikken, 30 July 2010, paras. 22-23.

Research Question and Methodology

The above analysis leads to the following main research questions:

Which normative foundations are available for the creation or assumption of international legal obligations through promises by states vis-à-vis other states and investors, respectively? What are the similarities and differences in the application of those normative foundations in general international law and international investment law and what are the reasons for these similarities and differences?

In order to answer these questions, case law, state practice and doctrine of both general international law and international investment law shall be analysed. The methodology will be guided by a comparative approach. Such a comparative analysis, however, needs to take into account the structural differences between these “two” fields of law and the context in which the distinct normative foundations evolved.

In the course of this comparative analysis the following legal material will be examined: ILC Guiding Principles; the Commentary by the ILC on these Guiding Principles; Reports by the Special Rapporteur and by the Working Group of the ILC; submissions by applicant states and respondent states in state-to-state disputes involving promises by states and judicial decisions by international courts and arbitral tribunals; submissions by claimants and respondent states in investor-state proceedings and decisions by investment tribunals; available expert opinions in international disputes; state practice that has not been the cause for legal disputes (particularly in the context of unilateral declarations); international investment agreements as well as national foreign investment laws; scholarly literature.

The doctoral thesis shall be divided into two main, complementary parts: The first part will be dedicated to promises and the potential normative foundations conferring a binding character on promises in state-to-state relations. The second part will then address promises and the potential normative foundations for their binding nature in relations between states and investors.

Findings by investment tribunals directly relevant to a state-to-state context will be analysed in the first part, thereby addressing a major blind spot in existent academic literature. Additionally, the thesis will discuss promises made in the course of judicial and arbitral proceedings in a separate section, albeit promises before investment tribunals will also be partially addressed in the context of unilateral acts in the second part of the doctoral thesis.

Preliminary Outline

1. Introduction
 - 1.1. Research question and main issues
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 - 1.3. Terminology: declarations, acts, statements, promises, assurances, representations
 - 1.4. Defining general international law and international investment law
2. Normative foundations
 - 2.1. Treaty related and non-treaty related ('autonomous') promises
 - 2.2. Principle of *Good Faith*
3. Promises in state-to-state context
 - 3.1. Preliminary remarks
 - 3.2. Unilateral acts and declarations
 - 3.2.1. Definition: when is an act a unilateral act under international law?
 - 3.2.2. Source of law or source of obligation?
 - 3.2.3. Legal nature: criteria for bindingness of unilateral declarations
 - 3.2.4. A role for legitimate expectations?
 - 3.2.5. Interpreting unilateral acts
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 - 3.3. Estoppel
 - 3.3.1. Estoppel in international law
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 - 3.4.1. Legitimate expectations as part of general international law?
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 - 4.2. FET: Legitimate Expectations
 - 4.2.1. Unilateral host state acts
 - 4.2.2. Reliance- when is it legitimate?
 - 4.2.3. At what time must legitimate expectations arise?
 - 4.2.4. Competent state organs and unlawful representations
 - 4.2.5. Relevance of the rules on unilateral acts *stricto sensu* under public international law
 - 4.3. Umbrella Clause
 - 4.3.1. Unilateral host state acts
 - 4.3.2. Relationship to FET and legitimate expectations
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- 4.4. Minimum standard of treatment
 - 4.4.1. Evolvement of the minimum standard
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- 4.5. Estoppel
 - 4.5.1. Doctrinal concerns
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- 4.6. Unilateral acts and declarations
 - 4.6.1. Doctrinal concerns
 - 4.6.1.1. Public-private relationship
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 - 4.6.2. Formal declarations and informal assurances as unilateral acts
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 - 4.6.2.3. Relationship to legitimate expectations under FET and umbrella clauses
 - 4.6.3. National foreign investment laws as unilateral acts
 - 4.6.3.1. Consent to arbitration as a unilateral act
 - 4.6.3.2. Substantive obligations as a unilateral act
- 4.7. Interim Conclusion
- 5. Excursus: Promises made in proceedings before international courts and investment tribunals
 - 5.1. Legal and factual value of promises
 - 5.2. Judicial and arbitral practice on promises made during proceedings
 - 5.3. Conclusion
- 6. Conclusion

Preliminary Bibliography

Books and book chapters

Johnathan Bonnitcha, *Substantive Protection under Investment Treaties. A Legal and Economics Analysis* (Cambridge University Press 2014) 143-227.

Eric De Brabandere, *Investment Treaty Arbitration as Public International Law* (Cambridge University Press 2014) 15-70.

David D. Caron, 'The Interpretation of National Foreign Investment Laws as Unilateral Acts under International Law' in Mahnoush H. Arsanjani, Jacob Cogan, Robert Sloane and Siegfried Wiessner (eds), *Looking to the Future: Essays on International law in Honor of W. Michael Reisman* (Brill | Nijhoff 2010) 649-674.

Daniel Costelloe, *Legal Consequences of Peremptory Norms in International Law* (Cambridge University Press 2017) 152-183.

James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012) 121-123, 415-422.

Vladimir-Djuro Degan, *Sources of International Law* (Martinus Nijhoff Publishers 1997) 251-338, 339-343, 348-354.

Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 18-19, 145-149, 177-178.

Christian Eckart, *Promises of States under International Law* (Hart Publishing 2012).

Florian Grisel, 'The Sources of Foreign Investment Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales, *The Foundations of International Investment Law: Bringing Theory Into Practice* (Oxford University Press 2014) 213-233.

María Cristina Gritón Salias, 'Do Umbrella Clauses apply to Unilateral Undertakings?' in Chirstina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press 2009) 490-496.

Eva Kassoti, *The Juridical Nature of Unilateral Acts of States in International Law* (Queen Mary Studies in International Law 2015).

Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006) 345-364.

Roland Kläger, 'Fair and Equitable Treatment' in *International Investment Law* (Cambridge University Press 2011).

Hector A. Mairal, 'Legitimate Expectations and Informal Administrative Representations' in Stephan W. Schill (ed), *International Investment Law and Comparative Public Law* (2010 Oxford University Press) 413-452.

Makane Moïse Mbengue, 'National Legislation and Unilateral Acts of States' in Tarcisio Gazzini and Eric De Brabandere (eds), *International Investment Law. The Sources of Rights and Obligations* (Nijhoff International Investment Law Series 2012) 183-213.

Peter Muchlinski, Federico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008).

Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties* (Kluwer Law International 2009).

Josef Ostránský, 'An Exercise in Equivocation: A Critique of Legitimate Expectations as a General Principle of Law under the Fair and Equitable Treatment Standard' in Andrea Gattini, Attila Tanzi and Filippo Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (Brill | Nijhoff 2018) 344-377.

Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press 2013) esp. 251-256.

Anne Peters, *Beyond Human Rights. The Legal Status of the Individual in International Law* (Cambridge University Press 2016) 282-347, 408-435.

Georgios Petrochilos, 'Attribution: State Organs and Entities Exercising Elements of Governmental Authority' in Katia Yannaca-Small (ed), *Arbitration under International Investment Agreements* (2nd edn, Oxford University Press 2018) 332-369, esp. 361-363.

August Reinisch, 'Investment and ...' – the Broader Picture of Investment Law' in A. Reinisch/Ch. Knahr (eds), *International Investment Law in Context* (Eleven International Publishing 2008) 201-207.

August Reinisch, 'Investors' in Math Noortmann, August Reinisch and Cedric Ryngaert (eds), *Non-State Actors in International Law* (Hart Publishing 2015) 253-271.

August Reinisch and Jane Hofbauer, 'Jurisprudential Cross-Fertilization: Investment Arbitration and General International Adjudication and Arbitration' in G. Z. Capaldo (ed), *The Global Community: Yearbook of International Law and Jurisprudence 2012 (I)* (Oceana 2013) 191-214.

Przemysław Saganek, *Unilateral Acts of States in Public International Law* (Queen Mary Studies in International Law 2015).

Marc Jacob and Stephan W. Schill, 'Fair and Equitable Treatment: Content, Practice Method' in Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds), *International Investment Law* (C.H. Beck-Hart-Nomos 2015) 700-763.

Christoph Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention. A Commentary* (2nd edn, Cambridge University Press 2009).

Christoph Schreuer, 'Investment Arbitration based on National Legislation' in Gerhard Hafner, Franz Matscher and Kirsten Schmalenbach (eds), *Völkerrecht und die Dynamik der Menschenrechte. Liber Amicorum Wolfram Karl* (Facultas 2012) 527-537.

Krzysztof Skubiszewski, 'Unilateral Acts of States' in Mohammed Bedjaoui (ed), *International Law* (UNESCO & Martinus Nijhoff Publishers 1991) 221-240.

Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press 2010) 101-103, 424-425.

Frédéric Gilles Sourgens, *A Nascent Common Law: The Process of Decisionmaking in International Legal Disputes between States and Foreign Investors* (Brill | Nijhoff 2015) 30-60.

Anthony Sinclair, 'Umbrella Clause' in Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds), *International Investment Law* (C.H. Beck-Hart-Nomos 2015) 887-958.

Eric Suy, *Les actes juridiques unilatéraux en droit international public* (Librairie Générale de Droit et de Jurisprudence 1962).

Hugh Thirlway, *The Sources of International Law* (Oxford University Press 2014) 20-21, 44-52, 191-194.

Hugh Thirlway, 'The Sources of International Law' in Malcolm D Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 91, 111-112.

Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford University Press 2008).

Alfred Verdross and Bruno Simma, *Universelles Völkerrecht. Theorie und Praxis* (Duncker & Humblot 1976) 340-345.

Jan Wouters and Anna-Luise Chané, 'Multinational Corporations in International Law' in Math Noortmann, August Reinisch and Cedric Ryngaert (eds), *Non-State Actors in International Law* (Hart Publishing 2015) 225-251.

Katia Yannaca-Small, 'Fair and Equitable Treatment Standard: Recent Developments' in Reinisch (ed), *Standards of Investment Protection* (Oxford University Press 2008) 111-130.

Karl Zemanek, 'Unilateral Acts Revisited' in Karel Wellens (ed), *International Law: Theory and practice: Essays in honour of Eric Suy* (Nijhoff 1998) 209-21.

Articles

Yulia Andreeva, 'Interpreting Consent to Arbitration as a Unilateral Act of State: A Case Against Conventions' (2011) 27 *Arbitration International* 129-148.

Jose E. Alvarez, 'Are Corporations "Subjects" of International Law?' (2011) 9 *Santa Clara Journal of International Law* 1-36.

Derek W. Bowett, 'Estoppel before International Tribunals and Its Relation to Acquiescence' (1957) 33 *British Yearbook of International Law* 176-202.

Tillmann Rudolf Braun, 'Globalization-Driven Innovation: The Investor as a Partial Subject in Public International Law. An Inquiry into the Nature and Limits of Investor Rights' (2014) 15 *Journal of World Investment & Trade* 73-116.

Sergio Carbone, 'Promise in International Law: A Confirmation of its binding force' (1975) 1 *Italian Yearbook of International Law* 166-172.

Christopher Campbell, 'House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law' (2013) 30 *Journal of International Arbitration* 361-379.

Vladimir-Djuro Degan, 'Unilateral Act as a Source of Particular International Law' (1994) 5 *Finnish Yearbook of International Law* 149-266.

Patrick Dumberry, 'The Protection of Investors' Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105' (2014) 31 *Journal of International Arbitration* 47-74.

Mark Elliott, 'Unlawful Representations, Legitimate Expectations and Estoppel in Public Law' (2003) 9 *Judicial Review* 71-80.

Mark Elliott, 'Legitimate Expectations and Unlawful Representations' (2004) 63 *Cambridge Law Journal* 261-264.

James W. Garner, 'The International Binding Force of Unilateral Oral Declarations' (1933) 27 *American Journal of International Law* 493-97.

A. Gigante, 'The Effect of Unilateral State Acts in International Law' (1969) 2 *New York University Journal of International Law and Politics* 333-362.

Camille Goodman, ‘Acta Sunt Servanda- A Regime for Regulating the Unilateral Acts of States at International Law’ (2006) 25 *Australian Yearbook of International Law* 43-74.

Jarrold Hepburn, ‘Domestic Investment Statutes in International Law’ (2018) 112 *American Journal of International Law* 658-706.

Andreas Kulick, ‘About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals’ (2016) 27 *European Journal of International Law* 107-128.

Felipe Mutis Téllez, ‘Conditions and Criteria for the Protection of Legitimate Expectations Under International Investment Law’ (2012) 27 *ICSID Review—Foreign Investment Law Journal* 432-442.

Michele Potestà, ‘The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws’ (2011) 27 *Arbitration International* 149-170.

Michele Potestà, ‘Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept’ (2013) 28 *ICSID Review—Foreign Investment Law Journal* 88-122.

W. Michael Reisman and Mahnoush H. Arsanjani ‘The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes’ (2004) 19 *ICSID Review—Foreign Investment Law Journal* 328-343.

Anthea Roberts, ‘Power and Persuasion in Investment Treaty Interpretation: the Dual Role of States’ (2010) 104 *American Journal of International Law* 179-225.

Alfred P. Rubin, ‘The International Legal Effects of Unilateral Declarations’ (1977) 71 *American Journal of International Law* 1-30.

Elizabeth Snodgrass, ‘Protecting Investors’ Legitimate Expectations – Recognizing and Delimiting a General Principle’ (2006) 21 *ICSID Review—Foreign Investment Law Journal* 1-58.

Eric Suy, ‘Some unfinished new thoughts on unilateral acts of states as a source of international law’ (2001) 26 *Journal for Juridical Science* 1-11.

William Thomas Worster, ‘Relative International Legal Personality of Non-State Actors’ (2016) 42 *Brooklyn Journal of International Law* 207-273.

UN Documents

ILC, ‘Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations’, Yearbook of the ILC 2006, Vol 2, Part 2, A/CN.4/SER.A/2006/Add.1 (Part 2).

Nine Reports of the Special Rapporteur Mr. Victor Rodríguez Cedeño [A/CN.4/486 (1998), A/CN.4/500 and Add.1 (1999), A/CN.4/505 (2005), A/CN.4/519 (2001), A/CN.4/534 (2003), A/CN.4/542, Corr.2, and Corr.3 (2004), A/CN.4/557 (2005), A/CN.4/569 and Add.1 (2006).

Case Law

International Court of Justice/ Permanent Court of International Justice:

Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile) (Merits) [2018] General List No. 153 ICJ 1.

Case concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda) (Jurisdiction and Admissibility) [2006] ICJ Rep 6.

Fisheries Jurisdiction (Spain v. Canada) (Jurisdiction and Admissibility) [1998] ICJ Rep 432.

Legal Status of Eastern Greenland (Denmark v. Norway) (Merits) PCIJ [1925] Series A./B. No 53.

Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali) (Merits) [1986] ICJ Rep 554.

Certain German Interests in Polish Upper Silesia (Germany v. Poland) (Merits) PCIJ [1926] Series A. No 7.

Land and Maritime Boundary (Cameroon v. Nigeria: Equatorial Guinea Intervening) (Preliminary Objections) [1998] ICJ Rep 275.

Land and Maritime Boundary (Cameroon v. Nigeria: Equatorial Guinea intervening) (Merits) [2002] ICJ Rep 303.

The Mavrommatis Jerusalem Concessions (Greece v. United Kingdom) (Merits) PCIJ [1925] Series A. No 5.

Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) (Jurisdiction and Admissibility) [1984] ICJ Rep 392.

Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) (Judgment) [1986] ICJ Rep 14.

North Sea Continental Shelf (Germany v. Netherlands) (Judgment) [1969] ICJ Rep 3.

Nuclear Tests (Australia v. France) (Jurisdiction and Admissibility) [1974] ICJ Rep 253.

Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Provisional Measures) [2006] ICJ Rep 113.

Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia) (Provisional Measures) [2014] ICJ Rep 147.

Temple of Preah Vihear (Cambodia v. Thailand) Dissenting Opinion Sir Percy Spender [1962] ICJ Rep 17.

Temple of Preah Vihear (Cambodia v. Thailand) Separate Opinion of Sir Gerald Fitzmaurice [1962] ICJ Rep 6.

WTO- Dispute Settlement Body:

WTO, *United States–Sections 301-310 of the Trade Act 1974*, WT/DS152/R, Report of the Panel (22 December 1999).

Arbitral tribunals:

Case concerning filleting within the Gulf of St. Lawrence between Canada and France (1986) 19 RIAA 225.

Award in the Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom of Great Britain and Northern Ireland (2015) 31 RIAA 359.

Investment arbitral tribunals:

ABCI Investments N.V. v. Republic of Tunisia, ICSID Case No. ARB/04/12, Decision on Jurisdiction, 18 February 2011.

Amco Asia Corporation and others v. Republic of Indonesia, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983.

Antaris Solar GmbH and Dr. Michael Göde v. Czech Republic, PCA Case No. 2014-01, 2 May 2018.

Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. The Kingdom of Spain, ICSID Case No. ARB/13/31, Award, 15 June 2018.

Antoine Abou Lahoud and Leila Bounafteh-Abou Lahoud v. Democratic Republic of the Congo, ICSID Case No. ARB/10/4, Award, 7 February 2014.

Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award, 8 April 2013.

Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 28 December 2007.

BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019.

Bernhard von Pezold and others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, 28 July 2015.

Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic, ICSID Case No. ARB/14/3, Award, 27 December 2016.

Brandes Investment Partners, LP v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/3, Award, 2 August 2011.

Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Award, 27 September 2017.

CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010.

Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999.

Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. The Republic of Ecuador I, PCA Case No. 34877, Final Award, 31 August 2011.

CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8 (Annulment Proceeding), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 1 September 2006.

CMS Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Decision of the Ad Hoc Committee on the Application for Annulment, 25 September 2007.

Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 4 November 2008.

Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru, ICSID Case No. ARB/03/28, Award, 18 August 2008.

Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru, ICSID Case No. ARB/03/28, Partial Dissenting Opinion of Arbitrator Pedro Nikken, 18 August 2008.

El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Award, 31 October 2011.

Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007.

Frontier Petroleum Services Ltd. v. The Czech Republic, UNCITRAL, Final Award, 12 November 2010.

Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014.

Greentech Energy Systems A/S, et al v. Italian Republic, SCC Case No. V 2015/095, Final Award, 23 December 2018.

Hochtief AG v. The Argentine Republic, ICSID Case No. ARB/07/31, Award, 29 December 2014.

International Thunderbird Gaming Corporation v. The United Mexican States, UNCITRAL, 26 January 2016.

International Thunderbird Gaming Corporation v. United Mexican States, UNCITRAL, Separate Opinion Thomas Wälde, 1 December 2005.

Interocean Oil Development Company and Interocean Oil Exploration Company v. Federal Republic of Nigeria, ICSID Case No. ARB/13/20, Decision on Preliminary Objections, 29 October 2014.

Ioan Micula and others v. Romania I, ICSID Case No. ARB/05/20, Award, 11 December 2013.

Joy Mining Machinery Limited v. The Arab Republic of Egypt, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004, 30 July 2004.

LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006.

Karkey Karadeniz Elektrik Uretim A.S. v. Pakistan, ICSID Case No. ARB/13/1, Award, 22 August 2017.

Lighthouse Corporation Pty Ltd and Lighthouse Corporation Ltd, IBC v. Democratic Republic of Timor-Leste, ICSID Case No. ARB/15/2, Award, 22 December 2017.

Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan, ICSID Case No. ARB/07/14, Award, 22 June 2010.

Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award, 30 March 2015.

Marfin Investment Group v. The Republic of Cyprus, ICSID Case No. ARB/13/27, Award, 26 July 2018.

Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002.

- 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.
- Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000.
- Mohammad Ammar Al-Bahloul v. Republic of Tajikistan*, SCC Case No. V064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009.
- Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Award, 1 July 2004.
- Olin Holdings Limited v. State of Libya*, ICC Case No. 20355/MCP, Final Award, 25 May 2018.
- Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015.
- Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012.
- Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007.
- PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea*, ICSID Case No. ARB/13/33, Award, 5 May 2015.
- PSEG Global Inc., the North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Decision on Jurisdiction, 4 June 2004.
- Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54), 5 March 2009.
- SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003.
- SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 10 February 2012.
- SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004
- Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, 20 May 1992.
- Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. Argentine Republic*, ICSID Case No. ARB/03/17, Separate Opinion of Pedro Nikken, 30 July 2010.
- Swissbourgh Diamond Mines (Pty) Ltd and others v. Kingdom of Lesotho*, [2018] SGCA 81, Judgment of the Singapore Court of Appeal, 27 November 2018.
- Tidewater Investment SRL and Tidewater Caribe, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013.
- Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010.
- Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Concurring Opinion of Luis Herrera Marciano, 27 December 2010.

Venezuela Holdings, B.V., and others (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010.

Venoklim Holding B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/12/22, Award, 3 April 2015.

Vito G. Gallo v. Government of Canada, UNCITRAL, Decision on Place of Arbitration, 4 June 2008.

Waste Management, Inc. v. United Mexican States ("Number 2"), ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004.