The Protection of Legitimate Expectations in International Law

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TABLE OF CONTENTS

I. INTRODUCTION 77
II. NATIONAL SOVEREIGNTY 79
III. LEGAL INSTITUTION 79
IV. THE INTER-STATE BOUNDARY 80
V. INTERNATIONAL LEGAL OBLIGATION 81
VI. PRINCIPLE OF GOOD FAITH 82
VII. GENERAL PRINCIPLE OF LAW 84
VIII. PRIVATE LAW—PUBLIC LAW 85
IX. EQUITY 86
X. *BOLIVIA V. CHILE* 88
XI. INTERNATIONAL INVESTMENT LAW / ARBITRATION 95
XII. CONCLUSION 99

I. INTRODUCTION

International law is mostly non-written,[1] with general principles of law constituting an important part of non-written international law. General principles of law have the same authority as written international law—

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1. Robert Kolb, *La Sécurité Juridique en Droit International: Aspects Théoriques*, 10 AFR. Y.B. OF INT'L L. 103, 118 (2002).

i.e., treaties. They may even overrule treaties.[2] For instance, no treaty may violate general principles of law which embody *jus cogens*—the peremptory norms of international law.[3] Therefore, the production of general principles of law cannot be neglected. Indeed, endorsing the existence of principle of (the protection of) legitimate expectations as a general principle of law would constitute a major step for international law.

The principle of legitimate expectations aims to secure the protection of the trust of the interlocutor of a state—e.g., another state, an international organization, a corporation or an individual.[4] Trust may stem from, in particular, state-to-state negotiations. Trust fosters international cooperation and is essential to peaceful and secure international relations, which is the utmost objective of the United Nations.[5] Indeed, the International Court of Justice (ICJ) has held that "trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential."[6]

The state, during its interactions with the outside world, engages in various acts. Interlocutors of the state demand consistency and predictability in those acts. Such interlocutor demands may come up, even though written treaties may not attach any legal consequences to previous state acts. The interlocutor demands may be based merely upon a certain normativity outside the written treaty law. Invoking such normativity presents a challenge for international law.

The argument of this Article is that international law has still not reached a stage wherein the protection of legitimate expectations can become a general principle of law. In that respect, the most favorable terrain for the protection of legitimate expectations, namely, inter-state negotiations, still largely remains outside international law. In pursuing this argument, this Article first examines the notions of national sovereignty, legal institution and inter-state boundaries. This paper then looks at the notion of general principles of law and highlights the principle of equity. Finally, the Article discusses the *Bolivia v. Chile* case and places international investment law / arbitration within a new perspective.

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2. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

3. *Id.* at 53, 64.

4. Adam Perry and Farrah Ahmed, *The Coherence of the Doctrine of Legitimate Expectations*, 73 CAMBRIDGE L.J. 61, 62 (2014).

5. Charter of the United Nations art. 1, 3 U.S.T. 1154.

6. Nuclear Tests, (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 47, ¶ 49 (Dec. 20).

II. NATIONAL SOVEREIGNTY

The principle of legitimate expectations involves national sovereignty. This is especially true with expectations stemming from inter-state negotiations. National sovereignty is a limit on the expectations of the interlocutors of a state in negotiations; a sovereign state shall not be legally obliged to continue to negotiate just because it has negotiated in the past. Envisaging the obligation to continue to negotiate within the confines of international law would considerably limit the sovereignty of a negotiating government.

One shall not extrapolate from past intergovernmental negotiations and readily infer that a certain legal obligation to continue to negotiate derives thereof. It would be facile to legally oblige a state to continue to negotiate as a corollary of past negotiations. Legitimate expectations of the interlocutor of the state do not suffice for the establishment of such a rule of international law. Indeed, in the *Land and Maritime Boundary* case, the ICJ held that a state cannot be bound by negotiations if those negotiations do not contain any legal obligation.[7] In other words, the ICJ made it clear that state-to-state negotiations and purported legitimate expectations in and of themselves do not create any binding legal obligation for the state.[8] State-to-state negotiation is not a "legal institution" involving a bundle of legal rights and obligations.

III. LEGAL INSTITUTION

A legal institution involves "unavoidable norms."[9] A legal institution implies an obligation to accept the rights and obligations as a bundle.[10] "A state must claim the whole bundle, or none of it."[11] If a state accedes to a certain legal institution, it cannot avoid obligations contained therein and cannot solely take advantage of the rights contained in that legal institution. However, international law, at its current stage, does not offer such terms for state-to-state negotiation. State-to-state negotiation is not a "legal institution" within international law. The 2018 decision of the ICJ—*Bolivia v. Chile*[12]—endorsed that view. This Article will elaborate upon this case

7. Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, 1998 I.C.J. Rep. 304, ¶ 59 (June 11).
8. *Id.*
9. VAUGHAN LOWE, INTERNATIONAL LAW 60 (Oxford Univ. Press 2007).
10. *Id.*
11. *Id*.
12. Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile), Judgment, 2018 I.C.J. 563, ¶ 175, 77 (Oct. 1) [hereinafter Bol. v. Chile Judgment].

below. Yet, there exists an important legal institution within international law which needs to be explicitly mentioned, and that is the legal institution of the "inter-state boundary."

IV. THE INTER-STATE BOUNDARY

One should be more prudent about the endorsement of the principle of legitimate expectations when it comes to the stability of boundaries between states. That is because the inter-state boundary is a firm legal institution within international law.[13] "Boundary treaties are sacrosanct."[14] The stability of boundaries is a general principle of law.[15] This is because this stability represents a vital interest of the international community—international peace and security.[16]

International law does not accept a challenge to the stability of borders unless it has a firm legal basis. That is in line with the positivist understanding of international law: one shall not be able to question state borders by merely advertising, during state-to-state negotiations, that the border in question is inequitable. One cannot invoke the principle of legitimate expectations—an equitable principle—to change state borders.[17] Such invocation would be deemed an invocation of abstract justice—that is, natural law.

Questioning state borders in the name of equity is a matter for political science, not law. In light of this statement, landlocked Bolivia's challenge of its boundary with Chile is a matter for natural law and political science and not a matter for international law. Previous negotiations between Bolivia and Chile do not create any legal basis for challenging the legal institution of the boundary under international law.[18] Negotiations do not bring about an "international legal obligation" to change the boundary between the two countries.[19]

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13. *See* Malcolm Shaw, *The Heritage of States: The Principle of Uti Possidetis Juris Today*, 67 BRITISH Y.B. INT'L L. 75, 77 (1997).

14. Obligation to Negotiate Access to the Pacific Ocean (Bol. v. Chile), Verbatim Records, 2018 I.C.J. 23, ¶ 3 (Mar. 19, 2018) [hereinafter Bol. v. Chile Vebatim Records].

15. *See* Shaw, *supra* note 13, at 77.

16. *See* Douglas M. Gibler, *Contiguous States, Stable Borders, and the Peace Between Democracies*, 58 INT'L STUD. Q. 126 (2014).

17. *Id.*

17. Bol. v. Chile Judgment*, supra* note 12, ¶ 162.

18. *Id.* ¶ 174.

19. *Id.* ¶ 166.

V. INTERNATIONAL LEGAL OBLIGATION

While state acts may involve a certain normativity outside the law,[20] the question is whether such non-legal normativity would transform into normativity within law. If that transformation takes place, an international legal obligation emerges. The ICJ, in the *Bolivia v. Chile* case (*Obligation to Negotiate Access to the Pacific Ocean*), responded in the negative to such transformation.[21] The ICJ held that previous acts by Bolivia and Chile—declarations, communications, diplomatic notes, diplomatic exchanges, minutes of meetings and memoranda—did not create a separate and independent legal obligation for Chile to further negotiate with Bolivia.[22] Those past state acts are not deemed international legal obligations binding Chile, but rather are considered political or diplomatic representations of Chile and Bolivia. Past acts by Chilean and Bolivian state officials are ineligible when it comes to creating an international legal obligation for Chile to continue to negotiate with Bolivia, even though Bolivia has argued that Chile is legally obliged to continue to negotiate with respect to Bolivian sovereign access to the sea and that "Chile must engage with the issue."[23] Chilean national sovereignty protects Chile from being bound by such purported international legal obligations.

The purported legitimate expectations of Bolivia from Chile did not transform acts by Chile into an international legal obligation to continue to negotiate.[24] Indeed, through this decision, the ICJ made it clear that it settles disputes through law alone and that the scope of law cannot be readily enlarged.[25] All past negotiations between Chile and Bolivia spanning more than a century regarding Bolivian sovereign access to the sea remain decidedly in the realm of 'non-law' and do not transform into an obligation in the realm of law.[26] That is a confirmation of the fact that there is a considerable non-law area where "relations between states cannot be limited to their bare legal aspects."[27]

It is possible that Chile and Bolivia could settle their disputes outside the law. Yet, Bolivia did not bring its dispute with Chile to the ICJ to be

20. LOWE, *supra* note 9, at 99.
21. Bol. v. Chile Judgment, *supra* note 12, ¶ 177.
22. *Id.* ¶ 174.
23. Bol. v. Chile Verbatim Records, *supra* note 14, ¶ 12.
24. Bol. v. Chile Judgment, *supra* note 12, ¶ 162.
25. *Id.* at 566, ¶ 6.
26. *Id.* ¶ 174
27. *Id.* at 567, ¶ 9.

settled outside the law. That is, Bolivia did not institute proceedings under article 38(2) of the Statute of the ICJ[28]—under *ex aequo et bono*. Under Article 38(2), the ICJ would have had discretion in settling the dispute between the two countries outside the law.[29]

By contrast, Article 38(1)—the actual provision under which Bolivia instituted proceedings as against Chile—requires that the ICJ decide the matter under law alone.[30] Bolivia maintained that all past negotiations between Bolivia and Chile possessed a certain value under the law and, in particular, under Article 38(1). This represents an attempt by Bolivia to transform the protection of legitimate expectations into a legal norm. Yet, the ICJ rebuffed the Bolivian "legal" overture and maintained that "peaceful settlement of disputes above and beyond the strictly legal" is available for the disputing parties where the ICJ does not intervene.[31] That is a reference to the normative area outside the law. Accordingly, Bolivia and Chile could search for "an equitable agreement" outside the law rather than an agreement within the law.

This means that not every purported accordance of minds during negotiations between governments qualifies as a "legal" agreement. A process of negotiations spanning a long time—in other words, repeated and/or prolonged negotiations—may not have a legal significance at all. In principle, they are political and diplomatic. Negotiations, in the process of which a number of state acts take place, may not create the conditions or context for the inference of an international legal obligation. Negotiations may not be sufficient for the establishment of a common intention constituting an international legal agreement between states.

Reading a legal value into every meeting of minds between states that comes about during negotiations, and thus increasing the scope of international law at the expense of the non-legal international domain, would pose a danger to the capabilities of international law too. There should be a limit to the expansion of the domain of international law. Even "the principle of good faith" may not help expand international law.

VI. PRINCIPLE OF GOOD FAITH

Granted, the intention of a state to be bound by its acts and statements should be evaluated in the light of the principle of good faith. "One of the basic principles governing the creation and performance of legal obligations,

28. United Nations Charter, *supra* note 5, art. 38.
29. Statute of the International Court of Justice, art. 38, ¶ 2.
30. *Id.* ¶ 1.
31. Bol. v. Chile Verbatim Records, *supra* note 14, ¶ 11; Bol. v. Chile Judgment, *supra* note 12, ¶ 176.

whatever their source, is the principle of good faith."[32] Moreover, the principle of good faith requires that a state keep its promise and that it behave in accordance with the legitimate expectations stemming from promises that it has previously made.[33]

Yet, the principle of good faith can be applied if a legal obligation to be kept already exists. The principle of good faith is not sufficient in and of itself to create a legal obligation out of nothing. Rather, the principle qualifies an already existing legal obligation. One cannot readily invoke the principle of good faith to read a legal obligation into negotiations between governments. The principle of good faith can be an issue only with regard to already existing legal obligations.[34]

In other words, one shall not overload the principle of good faith in respect to negotiations between states. Indeed, in the *Nuclear Tests* case, the ICJ stressed that *"when states make statements by which their freedom of action is to be limited, a restrictive interpretation is called for."*[35] Thus, the ICJ is of the view that one cannot readily infer a binding legal obligation from the past negotiations and declarations of states. National sovereignty shall not be readily constrained.

In *Bolivia v. Chile*, the ICJ openly indicated that "the fact that a given issue is negotiated at a given time is not sufficient to give rise to an obligation to negotiate."[36] That is to say, past negotiations—representations—are not binding on a state with a view to its future conduct. National sovereignty of the state prevails above past negotiations. In the course of negotiations, a state is free to give a certain impression to its counterpart without being bound thereby and that comports with the nature of state-to-state negotiations and diplomacy. The past representations and impressions do not legally dictate the future conduct of a sovereign state. The negotiating state has a large space to maneuver. The principle of good faith does not constrain that space.

Granted, the principle of good faith binds the future conduct of a state; states shall and are expected to act consistently. However, the ICJ, in its

32. Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. 473, ¶ 49 (Dec. 20) [hereinafter Nuclear Tests Judgment].

33. *See* Talya Uçaryılmaz*, The Principle of Good Faith in Public International Law,* 68 UNIVERSIDAD DE DEUSTO 47, 52 (2020).

34. Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nig.), Preliminary Objections, Judgment, 1998 I.C.J. 297, ¶ 39 (June 11).

35. Nuclear Tests Judgment, *supra* note 32, ¶ 49.

36. Bol. v. Chile Judgment, *supra* note 12, ¶ 91.

Bolivia v. Chile decision did not interpret the principle of good faith as a factor allowing a legal obligation for Chile to continue to negotiate.[37] That so-called consistency does not require the state to continue to negotiate. In particular, the ICJ did not break up the shell of the principle of good faith and did not reach out specifically to one of its constituent elements —the protection of legitimate expectations. The ICJ did not upgrade the protection of legitimate expectations to the level of "general principle of law" under international law. This approach of the ICJ leads us to further question the notion of the "general principle of law."

VII. GENERAL PRINCIPLE OF LAW

In theory, attaching a certain international legal normativity to the past representations of a state for the protection of legitimate expectations of interlocutors of said state is plausible. The category of a "general principle of law" would be a convenient instrument for such normativity. The protection of legitimate expectations—as a general principle of law—could be endorsed by the ICJ and could be invoked against a written treaty. Yet, for such an endorsement, the ICJ would first have to sense that the international community is ready for a policy decision and the ICJ's 2018 *Bolivia v. Chile* decision suggests that the international community is not ready for such new policy. There is no policy of upgrading the protection of legitimate expectations to the level of a general principle of law and invoking it against written treaties.

In contrast to customary international law, a general principle of law does not require widespread and consistent state practice.[38] Rather, for its establishment, a general principle of law needs to be recognized as law by civilized nations[39] and endorsed from various authorities of international law, such as international courts and legal scholars. Those are subsidiary means for the determination of the rules of law under Article 38(1)(d) of the Statute of the ICJ.[40] Yet, in the *Bolivia v. Chile* decision, the ICJ explicitly refrained from endorsing the protection of legitimate expectations as a general principle of law and therefore as a separate and independent source of international law.[41]

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37. *See id.*
38. Statute of the International Court of Justice, art. 38.
39. *Id.*
40. *Id*. ("The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.").
41. *See* Bol. v. Chile Judgment, *supra* note 12, ¶ 162.

Thus, arguably, the protection of legitimate expectations currently exists in the non-legal realm—it is extra-legal and includes a certain normativity outside positive law.[42] If imported into international law under the guise of a self-standing general principle of law, the protection of legitimate expectations may have serious repercussions for international law. The principle would qualify bilateral relationships between the participants within international law, which would increase the "public" dimension of international law. The protection of legitimate expectations would infringe upon the general structure of international law which is still arguably based upon "private" rights and obligations.

VIII. PRIVATE LAW—PUBLIC LAW

The subjects of international law are bound by the terms of their bilateral relationships. There is "private" security within the confines of the bilateral relationship. By contrast, the protection of legitimate expectations aims to secure an enlarged sense of security—a "public" international security—that oversteps the boundaries of bilateral relationships. The protection of legitimate expectations enables the intervention of "public" international law into private relationships between states—as a corrective to those relationships between states. The protection of legitimate expectations attaches public legal normativity to the declarations, actions and diplomatic exchanges that exist in bilateral, state-to-state relationships.

Arguably, the protection of legitimate expectations aims to bring about a "multilateral favorable order" for the interlocutors of a state where those interlocutors can repose their trust in the representations by the state and act accordingly. This implies the need for predictability and reliability. That supposedly multilateral order connotes a certain elemental sense of justice which is not specifically indicated in individual legal rules.[43] Yet, the protection of legitimate expectations cannot fulfill such a multilateral role by remaining as a mere claim to abstract justice. – i.e., "equity."[44]

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42. LOWE, *supra* note 9 at 97.
43. *See id.*
44. *See* Haneul Jung & Nu Ri Jung, *Unraveling the Longstanding Riddle About the Doctrine of Legitimate Expectation Under Int'l Investment Law: Ascertaining Legal Tests for the Customary Int'l Law's Minimum Standard of Treatment*, 42 NW. J. INT'L L. 189 (2022).

Granted, equity encompasses consistency and predictability.[45] When a state acts, it shall do that in a predictable manner in the eyes of its interlocutors. A fair and equitable treatment of the interlocutor means that the state is acting in a consistent manner vis-à-vis its interlocutor.[46] Yet, to what extent predictability and consistency can be considered a matter for international legal obligation constitutes the bone of contention.[47]

According to the positivist understanding of international law, international disputes are to be settled under legal norms.[48] International courts and tribunals shall not decide disputes through non-legal norms. That is because non-legal norms are policy considerations—that is, they are part of the political realm, and an international court, at least not overtly, shall not base its judgments on policy. Hence, the preeminent role of equity.

If the international court makes a policy decision in a covert manner to bend the positive rules of international law or to fill a gap among positive rules of international law, this may preferably take place under the cover of equity—i.e., justice.[49] The cover of equity is appropriate for the protection of legitimate expectations and the protection of legitimate expectations is a matter belonging in equity—it is an equitable principle. Yet, equity is not a self-standing source of international law; it is not a distinct source of law.[50] Equity is a mere corrective to reduce unfairness in current international law.[51] This means that equity has a secondary role in relation to positive international law.

The secondary role of equity is evident especially when a legal institution is at issue.[52] For instance, as mentioned above, the protection of international boundaries is a legal institution. That is one of the pillars of the current international system as embodied and represented by the United Nations.[53] Indeed, in *Cameroon v. Nigeria*, the ICJ held that *"equity is not a method*

45. *See id.* at 194.
46. *Id*. at 205.
47. *See id.* at 200.
48. *See* Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AMERICAN J. INT'L L. 260, 260–84, (1940), https://www.jstor.org/stable/2192998.
49. MALCOM N. SHAW, INTERNATIONAL LAW 22 (Cambridge Univ. Press 6th ed. 2008) ("Natural law was the fount of moral behavior as well as of social and political institutions, and it led to a theory of conditional acceptance of authority with unjust laws being unacceptable.").
50. *Id.* at 107.
51. CATHARINE TITI, THE FUNCTION OF EQUITY IN INTERNATIONAL LAW 69 (2021).
52. *See generally id.*
53. *E.g.*, United Nations Charter, *supra* note 5, art. 2. ("All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.").

of delimitation, but solely an aim that should be borne in mind in effecting the delimitation."[54] Likewise, in *Burkina Faso v. Republic of Mali*, the ICJ held that *"to resort to the concept of equity in order to modify an established frontier would be quite unjustified."*[55]

State boundaries represent the limits of national sovereignty. State boundaries are the bedrock of international peace and security and the primary objective and reference point for the United Nations.[56] Hence, positive international law is cautious with regards to citing equity when shaping and modifying state boundaries. Indeed, that is a factor to be considered when discussing a change of boundary in favor of landlocked states for their sovereign access to the sea.

Granted, the existing rules of international law may not always respond to the actual needs of the international community.[57] Positive international law may not always be able to take into consideration the growing demand on the part of the international community. In that case, a certain policy activism on the part of the legal doctrine or international courts may be necessary to adapt international law to the facts. Yet, such policy activism is a matter within the ambit of political science and not of law.[58] In other words, legal doctrine and international courts determine a political demand and attempt to respond to that. They engage in politics and shall cover their politics with legal normativity. Equity answers that need for legal cover.

Some may consider equity as an ordinary function of the international legal process. In this regard, it is all the more normal that international dispute settlement, as a "legal process", engages non-legal sources of normativity and policy considerations together with existing legal rules.[59] There is an "essential relationship between positive law and policy"[60] and equity functions as a convenient bridge between the two.

However, as mentioned above, the policy utilized in legal doctrine or international courts may not be overtly declared. This is despite the fact that some argue that "it is desirable that the policy factors be dealt with

54. Concerning Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Judgment, 2002 I.C.J. 443, ¶ 294 (Oct.10).
55. Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. 633, ¶ 149 (Dec. 22).
56. United Nations Charter, *supra* note 5, art. 1.
57. *See* SHAW, *supra* note 49, at 7.
58. SHAW, *supra* note 49, at 49.
59. ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 5 (Oxford Univ. Press 1995).
60. *Id.*

systematically and openly."[61] In the latter view, the international legal process shall openly acknowledge policy factors which contribute to the interpretation and modification of positive international law.[62]

Still, equity may not perform well because it is amenable to being a weak cover for policy changes and can be a source of ambiguity and legal insecurity.[63] Equity does not possess the robustness required for comprehensive explanation.[64] Invocation of equity may jeopardize legal security as it imports non-legal factors into the decision-making of international courts and tribunals. Equity does not rely on positive international law;[65] it relies on judicial discretion and subjective appreciation.[66] If the positive rules of international law are not enough, equity enters the stage and that carries a certain risk for the reliability of international law, which in turn presents a risk to international legal security.

Equity packages international policy preferences due to the weakness of positive international law[67] and can be seen as the infiltration of politics into international law for the sake of justice. In that respect, the ICJ's aforementioned *Bolivia v. Chile* decision is enlightening. In that particular case, the ICJ did not wish to engage in equity and considered the dispute between Bolivia and Chile in the light of positive international law alone. [68] Obliging a country (in this case, Chile) to continue to negotiate a dispute under international law would have vastly broadened the scope of positive international law and the competence of the ICJ. Additionally, it would have diluted positive international law, which in turn would have created a risk of governments in the future refraining from engaging in negotiations with other governments. In such a scenario, governments would find inter-governmental negotiations too risky under international law. Inferring a legal obligation to continue to negotiate from past negotiations would stretch the concept of equity and attribute it too much value as a substantive principle and force the limits of positive international law. Indeed, the ICJ in the *Bolivia v. Chile* was well aware of all those risks.

X. *BOLIVIA V. CHILE*

Granting sovereign access to the sea to a landlocked state would require changes in the boundary of the neighboring coastal state, and positive

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61. *Id.*
62. *Id.*
63. *See generally id.* at 227.
64. *Id.*
65. *Id.* at 227.
66. HIGGINS, *supra* note 59, at 226.
67. *Id.* at 224.
68. *See* Bol. v. Chile Judgment, *supra* note 12, ¶ 165.

international law is reluctant to give such access to a landlocked state without a written, bilateral, and binding treaty between the coastal state and the landlocked state. In that respect, equity—fair and equitable treatment of the landlocked state – does not influence the ICJ.

The 1982 Law of the Sea Convention did not give any perspective to landlocked states for sovereign access to the sea.[69] The 2018 *Bolivia v. Chile* decision of the ICJ confirmed that approach.[70] Interestingly, neither in the 1982 Law of the Sea Convention nor in the *Bolivia v. Chile* decision did the protection of legitimate expectations help landlocked states vis-à-vis coastal states.[71] Landlocked states have been left alone in their bilateral and private relationships with coastal states without a "public" intervention through the purported principle of legitimate expectations.[72] That is an endorsement of the bilateral paradigm inherent in international law.

The decision of the ICJ in the *Bolivia v. Chile* case also comes under the rubric of the aforementioned principle of stability of state boundaries. In the past, the ICJ has held that "to resort to the concept of equity in order to modify an established frontier would be quite unjustified."[73] Accordingly, the landlocked position of Bolivia and the past representations— declarations, statements, and diplomatic notes—by Chile in favor of giving Bolivia sovereign access to the Pacific Ocean during the long history of negotiations between the two states did not suffice to convince the ICJ to make a judicial intervention based on Bolivia's legitimate expectations.[74] The ICJ did not upgrade the protection of legitimate expectations to the rank of a "general principle of law" and specifically did not modify the legal *status quo* between Chile and Bolivia based on the written 1904 Treaty of Peace and Amity which surrendered Bolivia's coastal land to Chile.[75] The ICJ did not consider the legitimate expectations of Bolivia eligible for them to

69. *See generally* U.N. Convention on the Law of the Sea, art. 125, Dec. 10, 1982, 1833 U.N.T.S 397.

70. Bol. v. Chile Judgment, *supra* note 12, ¶ 177.

71. *Id.* at ¶ 162.

72. *See generally* BOJOTLHE O. BUTALE, BRIDGING THE GAP TO THE SEA FOR LANDLOCKED STATES: A CASE FOR BOTSWANA 3 (2016).

73. Frontier Dispute (Burk. Faso v. Republic of Mali), Judgment, 1986 I.C.J. 633, ¶ 149 (Dec. 22).

74. LOWE, *supra* note 9, at 88.

75. Zach J. Kleiman, *The Long, Not-So Pacific Struggle for the Coast: A Border Dispute between Chile and Bolivia*, 22 LAW & BUS. REV. AM. 247, 248 (2016); LOWE, *supra* note 9, at 87.

legally oblige Chile to renegotiate regarding Bolivian sovereign access to the sea.

Again, Bolivia requested that the ICJ merely legally oblige Chile to continue negotiations—an event that Chile should have interpreted as Bolivia's inevitable succession of their Chilean coast. Spanning for more than a century, the main goal of the two countries' negotiations was a peaceful sovereign transfer of the Chilean coastal territory to Bolivia.[76] Legally obliging Chile to continue to negotiate with Bolivia would indirectly mean that Chile must continue negotiations until a certain sovereign transfer of the Chilean coastal territory to Bolivia takes place. The ICJ rejected such an indirect approach and denied any legal obligation for Chile to continue to negotiate.[77] Thus, legitimate expectations of Bolivia in that respect did not influence the Court at all.[78]

The purported principle of legitimate expectations acknowledges that past practice has potential consequences in the bilateral relationship between the state and its interlocutor.[79] In this regard, states shall not be able to arbitrarily reverse their prior statements of policy without notice to their interlocutors.[80] If states have made their policy explicit through bilateral negotiations over a substantial period of time, they shall not be able to make a sudden change in that policy.

Accordingly, Bolivia, the claimant, invoked the past representations of Chile, the defendant. Bolivia implied that the intention of Chile to give Bolivia a sovereign access to the Pacific Ocean had been established during exchanges between the two countries spanning more than a century and that Chilean representations during those exchanges implied a binding legal obligation on Chile not to interrupt the negotiations and to continue to negotiate under "public" international law.[81]

Yet, the ICJ denied the existence of a favorable "public" international order based upon legitimate expectations. The Court held unequivocally that there is no general principle of legitimate expectations which can intervene into a "private" and bilateral relationship between states.[82] Bolivia and Chile are indeed in a private relationship in respect of sovereign access to the sea.

That is a stark reminder of the structure of international law as it stands now. International law is the law of private bilateral relations between the

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76. Bol. v. Chile Judgment, *supra* note 12, ¶ 155.
77. *Id*. at 564, ¶ 177.
78. *Id*. at 559, ¶ 162.
79. LOWE, *supra* note 9, at 90.
80. *Id.*
81. Bol. v. Chile Judgment, *supra* note 12, ¶ 141.
82. *Id.* ¶ 162.

subjects of international law where a purported favorable "public" order does not intervene into those relationships without a clear legal basis.[83] Accordingly, a state is free to make non-binding representations— declarations, actions and exchanges—to another without being bound by any binding legal consequences thereof. A state is free to conduct its bilateral political intercourse with other states without being subject to binding legal repercussions thereof.

The decision of the ICJ is a stark reminder of the fact that the source of international legal obligation is consent. [84] If a state does not consent to a specific obligation, then it is not bound. Representations of a state— declarations, statements, actions and unilateral acts by state officials— shall not violate an existing treaty which expresses the clear consent of a state. Equity considerations—legitimate expectations—cannot mitigate the requirement for consent. Equity—the language of legitimate expectations—cannot replace state consent indicated in a previous binding treaty.[85]

In the *Bolivia v. Chile* case, the principle of the protection of legitimate expectations—a natural law principle—could not challenge the requirement of state consent—a positive law principle. Equity did not correct the legal *status quo* in the bilateral relationship between Bolivia and Chile, which was and is based upon a written treaty. The *Bolivia v. Chile* decision of the ICJ made it clear that international law has still not reached a place where diplomatic and political representations of a state may in time oblige that state to further continue to negotiate a matter which had already been settled under a previous treaty.[86]

In fact, the *Bolivia v. Chile* decision sent unacknowledged shock waves among the proponents of the "publicness" of international law for whom "public" intervention of international law into "private" relations of states is the norm. The ICJ decision made it clear that international law is still predominantly a "private" matter between states where the expression of national sovereignty through explicit consent—preferably through written treaties—is essential. If two states had already settled a matter through their explicit consent in a written treaty, international law cannot intervene

83. *See* LOWE, *supra* note 9, at 64; *see* Bol. v. Chile Judgment, *supra* note 12, ¶ 91.
84. *See* Matthew Lister, *The Legitimating Role of Consent in International Law*, 11 CHI. J. INT'L L. 663, 664 (2011).
85. *See* Bol. v. Chile Judgment, *supra* note 12, ¶ 162.
86. *See* Kleiman, *supra* note 75, at 257 (stating that if the ICJ rules in favor of Chile, it would influence countries to "say and do anything that may benefit them, regardless if they intent to stay true" unless there has been an "already established . . . previous treaty").

into that matter for the sake of the protection of the legitimate expectations of one of the states and cannot amend a written treaty.[87] Past negotiations shall not amend the legal *status quo* between two states.

Negotiations between states cannot be interpreted as a subsequent practice eligible to change the *status quo*, which is based upon a written treaty. During negotiations spanning more than a century, Chile had never reached a legal deal with Bolivia to transfer a part of its coastal land to Bolivia.[88] The mention of the possibility of such transfer by Chile during negotiations is not deemed subsequent practice. The primacy of a written treaty between Chile and Bolivia over the so-called legitimate expectations of Bolivia is definitive. Through the 1904 Peace Treaty, Bolivia had already surrendered its coastal territory to Chile and became a landlocked state.[89] The ICJ did not allow the legal situation between Bolivia and Chile, as established through that treaty, to be modified through the purported principle of legal expectations.

Arguably, all international rights and obligations are bilateral.[90] The "legal security" stemming from rights and obligations in the international system is bilateral. The "legal security" *erga omnes*—the "public" international security—in the international system is weak and exceptional.[91] In general, a purported "public" international interest does not overrule the private and specific interests within bilateral relationships between states.[92] International law does not accept a recipient of representations from a state invoking a purported public international interest based upon the protection of legitimate expectations to change a legal *status quo* already bilaterally established by a written treaty.[93]

The principle of national sovereignty is a shield against "public" intervention from international law into bilateral relations between states.[94] In the 2018 *Bolivia v. Chile* case, the Court clearly stated that international law has no ability to force a government (i.e., Chile) to negotiate a matter with another government (i.e., Bolivia) just because the former purportedly generated some legitimate expectations in the latter.[95] That is the preference of

87. LOWE, *supra* note 9, at 64; *see* Bol. v. Chile Judgment, *supra* note 12, ¶ 162.
88. Bol. v. Chile Judgment, *supra* note 12, ¶ 155.
89. Kleiman, *supra* note 75, at 258.
90. *See* Eirik Bjorge, *Public Law Sources and Analogies of International Law*, 49 VICT. UNIV. WELLINGTON L. REV. 553, 558 (2018) (stating that "the character of international human rights and obligations is inherently bilateral").
91. Kolb, *supra* note 1, at 117.
92. *See id.*
93. Bol. v. Chile Judgment, *supra* note 12, ¶ 162.
94. L.C. Green, *Enforcement of International Humanitarian Law and Threats to National Sovereignty*, 8 J. OF CONFLICT & SEC. L. 101, 102 (2003).
95. Bol. v. Chile Judgment, *supra* note 12, ¶ 162.

national sovereignty over diplomatic negotiations. Importantly, the Court did not see any reason whatsoever to elaborate and endorse the so-called principle of legitimate expectations with a view to the intervention of public international law in a bilateral relationship between the two states.[96] The preponderance of the Chilean national sovereignty in this case is the corollary of the "bilateral" understanding of international law as between Chile and Bolivia which was firmly established through the 1904 treaty between the two states.[97] No purported "favorable international order" can intervene into that bilateral relationship through the purported principle of legitimate expectations and thereby constrain Chilean national sovereignty.[98]

National sovereignty gives states a margin to maneuver so states feel free in their representations towards other states, international organizations or individuals.[99] National sovereignty gives states the power to bind their external relations mainly on a written and contractual basis—i.e., treaty—where their consent to be bound is clear. In other words, national sovereignty enables states' foreign relations to be reduced to binding, bilateral, written treaties.[100] All-encompassing, non-written public international law providing public international security—legal security *erga omnes*—is lacking.[101] Rather, the legal security in international law is bilateral and private.[102]

The "publicness" of law is measured by its capacity to intervene into bilateral matters between the subjects of law.[103] In certain exceptional cases, the publicness of international law is manifested in some areas.[104] For instance, regarding the threat or the use of force, international law has the ability to intervene into the relationship between two states.[105] The "public" intervention of international law does not allow the threat or use of force to remain a mere private and bilateral matter between two states.[106] "Public" international law definitely prohibits the threat and the use of

96. *Id.*
97. Treaty of Peace and Friendship Between Chile and Bolivia, and Concentration for the Construction and Operation of a Railroad from Arica to La Paz, Chile-Bol., Oct. 2, 1904, Memorial of the Plurinational State of Bolivia, Annex 100.
98. *Id.*
99. LOWE, *supra* note 9, at 138.
100. *Id.* at 66.
101. Kolb, *supra* note 1, at 117.
102. *See generally id.* at 117–18.
103. *See generally id.*
104. United Nations Charter, *supra* note 5, art. 2.
105. *Id.*
106. *Id.*

force in international relations.[107] In other words, there are exceptional indications of a robust form of public international legal security—legal security *erga omnes*—such as in the prohibition of this threat or use.[108]

In particular, multilateral treaties and international organizations represent the public dimension of international law where states act beyond the bilateral dimension in their external relations. They transform private and bilateral legal security between states into global security – that is, public international security. Multilateral treaties and international organizations are platforms where states engage in an overarching discourse of legal principles. Both represent a legal dimension beyond private bilateral relationships between states.

Nonetheless, the public dimension, which emerges from multilateral treaties and international organizations, does not change the default position of international law. The mainstay of legal security in international law is still private and not all-encompassing.[109] International law does not endorse a general principle of law where national sovereignty of a state is to be limited by the legitimate expectations of another state.

That conclusion is all the more definitive in that the ICJ did not even try to elaborate in its 2018 *Bolivia v. Chile* judgment why the principle of legitimate expectations does not exist in general international law.[110] In the judgment, one does not see the reasons why the Court did not admit the principle as part of international law.[111] In its conciseness and bluntness, the Court was resolute in its rejection of the principle.[112]

Granted, the ICJ has never settled a dispute by merely basing itself on a general principle of law alone. Likewise, one did not expect the ICJ to settle the dispute between Bolivia and Chile solely on the basis of the purported principle of legitimate expectations. Being fully aware of that fact, Bolivia, the claimant in the 2018 *Bolivia v. Chile* case, did not invoke the principle of legitimate expectations as the sole legal ground.[113] Bolivia advanced the principle of legitimate expectations to bolster various treaties and customary international laws which purportedly substantiated the obligation of Chile to further negotiate with Bolivia regarding its sovereign access to the Pacific Ocean.[114]

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107. *Id.*
108. *See* Ardit Memeti et al., *The Concept of* Erga Omnes *Obligations in International Law*, 14 NEW BALKAN POL.: J. OF POL. 31, 37 (2013).
109. *See* Kolb, *supra* note 1, at 142.
110. Bol. v. Chile Judgment, *supra* note 12, ¶ 162.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* ¶ 160.

However, the ICJ rejected Bolivia's approach out of hand. The Court did not speculate at all about the influence of the notion of legitimate expectations on general international law and succinctly and unequivocally maintained the view that the principle did not exist in general international law.[115] This implies that there is no such international legal order where the protection of legitimate expectations oversees or supersedes the bilateral relationship between two states. The ICJ clearly stated that Chile had no "obligation to negotiate on the basis of what could be considered a legitimate expectation."[116]

The ICJ would not readily enforce public international law in a private/ bilateral relationship between two governments. Accordingly, a government cannot expect its private and bilateral expectations—whatever their legitimacy—to be implemented by another government at the behest of "public" international law. There is no international legal institution—*inter alia*, no international court—which can enforce the expectations of a government from another where no specific legal right stemming directly from state consent exists. Every state is free to produce representations—declarations, statements, actions and exchanges – in its negotiations with other subjects of international law. However, expectations which may stem from those representations cannot be invoked to oblige the state to continue to negotiate with a view to a specific objective.

This conclusion is all the more interesting when it comes to international investment law and international investment arbitration, where a different approach has been taken towards the notion of the protection of legitimate expectations.

XI. INTERNATIONAL INVESTMENT LAW / ARBITRATION

The firm negative attitude of the ICJ vis-à-vis the protection of legitimate expectations is even more conspicuous in that the ICJ has overtly acknowledged the existence and the application of the principle in a specific fragment of international law—that is, international investment law / arbitration.[117] Thus, the ICJ endorses the fragmentation of international law, in that it implies that a fragment of the body of international law—international investment law / arbitration—does not influence general international law in respect of the principle of legitimate expectations.

115. *Id.* ¶ 162.
116. *Id.*
117. Bol. v. Chile Judgment, *supra* note 12, ¶ 162.

Indeed, the ICJ's definite rejection of the principle of legitimate expectations in relation to general international law has to do with the fragmentation of international law. The ICJ does not take a warm view of the enforcement of legitimate expectations. While interpreting the principle of legitimate expectations, the ICJ implies that international investment law / arbitration has no relevance as regards general international law.

That is disappointing for the proponents of international investment arbitration for various reasons. First, the ICJ rejected the contribution of international investment arbitration to general international law. International investment arbitration has been interpreting the "fair and equitable treatment" clause in bilateral investment treaties in the light of the protection of legitimate expectations of the foreign investor vis-à-vis the host state. This is ultimately related to the need for protection against a subsequent change of the law of the host state which did not exist at the time of the investment.[118] A certain consistency and predictability is expected from the host state in the name of legitimate expectations of investors. Yet, this significant role of legitimate expectations in international investment law/ arbitration is not reflected in general international law.

International investment arbitration has weaved two non-legal concepts together—fair and equitable treatment and protection of legitimate expectations —with a view to the protection of the foreign investor. Both concepts are outside the law[119] yet international investment law / international investment arbitration grants a legal standing to both concepts. In contrast, they do not possess such legal status in general international law and cannot be directly applied in general international law, a fact the ICJ, in its *Bolivia v. Chile* decision, clearly acknowledged.

Second, the ICJ, through its *Bolivia v. Chile* decision, has signaled that it is not entering a dialogue with international investment arbitration in regard to a principle which is of utmost importance for the securing of rights of foreign investors vis-à-vis states. That is, the ICJ does not bolster international investment arbitration in its quest for constituting an investment jurisprudence on the basis of the protection of legitimate expectations. International investment arbitration has not received a normative endorsement from the ICJ with regard to a principle critical to foreign investment protection. Arguably, the ICJ has implied that the principle of the protection of legitimate expectations is based on the all too subjective discretion of investment arbitrators rather than on a legal basis in general international law.

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118. Rudolf Dolzer, Remarks by John B. Bellinger III. *in* 105 PROCEEDINGS OF THE ANNUAL MEETING 71, 72 (Cambridge Univ. Press 2011).

119. LOWE, *supra* note 9, at 98.

The principle of legitimate expectations as a clause exists only in a few investment treaties. In general, the principle is invoked by international investment arbitrators without a direct legal basis in written investment treaties.[120] Arguably, international investment arbitrators derive the principle of legitimate expectations from the fair and equitable clause in investment treaties.

Nobody in the international investment arbitration community really knows where the principle of legitimate expectations exactly comes from.[121] With this in mind, the principle seems an appendage of sorts to the typical fair and equitable treatment clauses that exist in bilateral investment treaties. Arguably, international investment arbitrators assumed that the principle of legitimate expectations would be a sound companion to the fair and equitable treatment clause found in investment treaties. In the final analysis, those two non-legal norms—both of which are based on the principle of equity—have come to support each other in international investment arbitration.

"Fair and equitable treatment" and its companion, "the protection of legitimate expectations", boil down to equity and equity is concerned with an elemental sense of justice.[122] Hence, it is a matter for natural law and is outside positive international law. In other words, "fairness and equity are not concepts whose content are prescribed by law."[123] In asking what is fair and equitable, we deal with "a system of normativity that lies outside the law".[124]

Hence the question of unfair or inequitable treatment is not a question of lawfulness of the state action.[125] Rather, it is about the specific relationship between the investor and the host state that involves trust.[126] The principle of fair and equitable treatment favors the foreign investor's trust in the representations of the state in which he has invested.[127] The principle enables the representations of states to be conceived of as binding

120. American Society of International Law*, Legitimate Expectations in Domestic Legal Systems and Public International Law*, YOUTUBE (Jan. 25, 2022), https://www.youtube.com/watch?v=-EMJaWXvZXE [https://perma.cc/Q7BM-AK2H].
121. *Id.*
122. LOWE, *supra* note 9, at 97–98.
123. *Id.* at 98.
124. *Id.*
125. *Id.*
126. *See generally* Rahim Moloo & Alex Khachaturian*, The Compliance with the Law Requirement in International Investment Law*, 34 FORDHAM INT'L L.J. 1473 (2011).
127. *See generally id.*

commitments vis-à-vis foreign investors.[128] It has created a favorable "public" international order for foreign investment.[129]

The ICJ's clear rejection of the principle of legal expectations is also concerned with the status of general principles of law among the sources of international law.[130] The Court is well aware of the fact that confirming a general principle of law is an enormous enterprise.[131] There is no hierarchy of sources among the sources of international law.[132] Treaties, customary international law and general principles of law are equal in rank.[133] Endorsing the protection of legitimate expectations as a general principle of law—as a self-standing source of international law—would have significant repercussions for international law.[134] Most importantly, it would challenge bilateral and private legal securities that exist in binding written treaties between states—as is the case with the treaty between Chile and Bolivia regarding sovereign access to the sea.[135]

All in all, in the *Bolivia v. Chile* case, the ICJ did not wish to upgrade the purported principle of the protection of legitimate expectations from the sphere of international investment arbitration into general international law.[136] Arguably, at the present stage of international law, the ICJ has not sensed any need for the international community to endorse the protection of general expectations as a general principle of law which would challenge and correct written treaties.[137]

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128. *See generally id.*

129. *See generally id.*

130. Jarrod Hepburn, *International Court of Justice Finds No Principle of Legitimate Expectations in General International Law*, IAREPORTER (Oct. 1, 2018), https://www.iareporter.com/articles/international-court-of-justice-finds-no-principle-of-legitimate-expectations-in-general-international-law/#:~:text=Login-,International%20Court%20of%20Justice%20finds%20no%20principle,expectations%20in%20general%20international%20law&text=The%20International%20Court%20of%20Justice,raised%20in%20investment%20treaty%20disputes [https://perma.cc/P5CR-R7SP].

131. *See id.*

132. *See* Himanshu Agarwal, *International Law Sources Primary Secondary*, 4 INT'L J.L. MGMT. & HUMAN 1770 (2021).

133. *See id.*

134. *See generally* Hepburn, *supra* note 130.

135. *See generally* Haneul Jung & Nu Ri Jung, *Unraveling the Longstanding Riddle about the Doctrine of Legitimate Expectation under International Investment Law: Ascertaining Legal Tests for the Customary International Law's Minimum Standard of Treatment*, 42 NORTHWESTERN J. INT'L L. & BUS. 189 (2021-2022).

136. *See id.*

137. *See id.*

XII. CONCLUSION

It is a challenge to establish a general principle of law. That challenge may prove insurmountable when the purported general principle of law defies positive international law based upon a written treaty. In particular, it is difficult to invoke the protection of legitimate expectations against a robust legal institution, such as the stability of boundaries between countries. International courts and the legal doctrine may be hesitant in endorsing such a general principle of law. That may be the case even though a fragment of international law has already adopted the general principle of law at issue.

Another difficulty with endorsing the protection of legitimate expectations as a general principle of law stems from the fact that the protection of legitimate expectations challenges national sovereignty. The protection of legitimate expectations risks endangering the institution of inter-state negotiations, which is based upon the national sovereignty of negotiating states. Negotiations require a space to maneuver for governments, and attaching the protection of legitimate protections to negotiations risks significantly constraining that space.

At present, there seem to be no prospects for establishment of the protection of legitimate expectations as a general principle of law under general international law. The institution of trust in international relations has still not come to the level where the establishment of such a general principle of law would be deemed natural. The production of a general principle of law requires a supportive position on the part of the international community. As of yet, there seems no indication or willingness on the part of the international community to declare the protection of legitimate expectations a general principle of law under general international law.