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# Great Expectations: the Treatment of Expectations in WTO and International Investment Law

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## Great Expectations: the Treatment of Expectations in WTO and International Investment Law

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**Abstract:** A continuing issue in many areas of law is the treatment of “reasonable” or “legitimate” expectations. This contribution posits that a doctrine of expectations is vital to both the law’s stability and flexibility, functioning as a kind of ‘shock absorber’ that accommodates divergent pressures within a legal system. Expectations may arise subjectively, but what the law protects in most instances is determined objectively. This contribution goes on to examine the treatment of expectations in WTO and international investment law. Their treatment in WTO law has been to read them out as a matter of pleading in WTO dispute settlement, apart from the rare instance of non-violation. Their treatment in international investment law, where they are prominent, continues to be controversial. Still, expectations are unlikely to be completely effaced as a source of norms. They remain a constitutive element of any legal system. This contribution also examines the consequences of a doctrine of expectations

for the revival of embedded liberalism, suggesting that any effort to do so will have to grapple with expectations as a pervasive feature of normativity under conditions of stasis and change.

## Great Expectations: the Treatment of Expectations in WTO and International Investment Law

by Chios Carmody<sup>1</sup>

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### 1. Introduction

\*. In his coming of age story *Great Expectations*, Charles Dickens told the tale of Pip, an orphan whose drive and ambition is to better himself and who, against the colourful tapestry of early Victorian England, does just that, overcoming a series of obstacles to win the hand of the beautiful Estella.

\*. Dickens' tale is one of achievement and of where motivation can lead. His suggestion is that, ultimately, life is a matter of vision - not of what is, but of what we expect. Pip expects great things and, by and large, with some detours and a few disappointments, he achieves them.

\*. Fast forward 150 years and the same underlying force seems to be evident in law. In the last few decades there have been a number of references to expectations in the dispute settlement system of the World Trade Organization (WTO). There has also been persistent mention of them in arbitral awards made in international investment law. This practice raises a number of intriguing questions: why do decision-makers feel the need to resort to 'expectations'? What purpose is served by them? How should they be treated, especially where the expectations of a single actor can clash with collective expectations embodied in law and the need for domestic policy space?

\*. In this contribution I want to suggest that the answer to these questions lies in recognition of the fact that expectations are a pervasive feature of the law. They can be thought about as a sort of underlying constitutive norm. This is because every rule can be conceived of as creating expectations, whether pertaining to expectations of road safety or child custody or the negotiability of financial instruments. The same can be said of a promise of national treatment or fair and equitable treatment for foreign investment. Expectations become the law's duty to protect.

\*. I will also suggest, however, that the inherent vagueness of expectations make them difficult to sustain in every instance and goes a long way to explain their divergent treatment in different areas of law, including international economic law. On the one hand, what has been observed in WTO dispute settlement is their effective burial. In cases like *India – Patent Protection* and others, the organs of WTO dispute settlement have made clear that the individualized expectations of member countries as to the trade-related behaviour of other members is essentially irrelevant, at least as a matter of pleading. Why? Because the job of treaty interpretation is one of ascertaining the "common intent" of the membership and so no individual expectation of any member country should matter more than any other.<sup>2</sup> The one area where individual expectations do continue to have relevance is in the rare case of a non-violation claim under GATT Art. XXIII:1(b), yet even there they remain controversial and problematic. In sum, in WTO law the idea of subjective expectations as an independent source of law appears to have been laid to rest.

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<sup>2</sup> As the Appellate Body observed in *EC – Computers*, "The purpose of treaty interpretation under Article 31 of the Vienna Convention is to ascertain the common intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined "expectations" of one of the parties to a treaty." WT/DS62/AB/R, para. 84 (5 June 1998).

\*. On the other hand, expectations have become an acknowledged element in fair and equitable treatment (FET) claims, now the most popular ground of claim in international investment arbitration, yet have also raised substantial objections, particularly from commentators who complain of their novelty and subjectivity. Law is fundamentally an objective process and privileging individual expectations is a little too subjective. The issue has been most graphically raised in a number of claims involving Argentina, where specific commitments were made to individual investors that were later reneged upon. The persistent criticism is that the expectations in question should not be allowed to insulate foreign investors from what amount to broad-based policy changes by a government. Several commentators have called, in effect, for their abolition.<sup>3</sup>

\*. For reasons I will cover in this contribution, I suggest that that course of action is unlikely to happen. Individualized expectations as a point of pleading have been all but removed from WTO law because recourse to common intent is instantly justifiable. Most WTO commitments are made on a Most Favoured Nation (MFN) basis. Hence, the expectation of one “immediately and unconditionally” becomes the expectation of all. That same structure and logic is not apparent in international investment law. There, a great plurality of treaties subsists and governments can – and occasionally do - make specific commitments to individual investors. Moreover, the doctrine of legitimate expectations has taken hold in the arbitral mind such that it is unlikely to be expunged from it anytime soon.

\*. Yet my point here is broader than this. It is that the idea of expectations in law is a very great one. Their vagueness means they must be interpreted collectively, a practice which tends to reinforce the objectivity of the law. Expectations become, as the WTO Appellate Body aptly recognized in *India – Patent Protection*, reflected in specific provisions of law itself.<sup>4</sup> Thus, when we speak of rules we inevitably appeal to the idea of expectations. Why? Because a principal idea – perhaps *the* principal idea – in a legal system is one of stability and predictability. Conditions are best protected when things are constant. In this respect, the WTO Appellate Body has referred to the need for stability and predictability in treaty interpretation on many occasions. Stability necessarily relates to expectations. Likewise in international investment law, a lively debate continues about the nature of precedent in the system. It would not be otherwise if stability and predictability were unimportant.

\*. Simply put, expectations are raised almost everywhere in law whether we are speaking about a tariff concession, an investment commitment, a presumption, or more particularized doctrines like unilateral declarations, estoppel and exceptions. For this reason, expectations can be considered a major premise of *any* legal system. They cannot be forgotten about, even if they may not serve as the express basis for a legal complaint. They are very great indeed.

## 2. Expectations in Law

\*. The protection of expectations as the primary purpose of the law immediately raises a number of intriguing questions: *whose* expectations? concerning *what*? and as of *when*?

\*. The answers to these questions are not apparent. In this respect, Bailey Kuklin has noted the vagueness and difficulty of employing a term like “reasonable expectations” in law. Kuklin concludes, “[t]here is no principled way of characterizing reasonable expectations. It is an essentially contested concept.”<sup>5</sup> Accordingly, the protection of expectations is not so much a rule as a general principle of law.<sup>6</sup> Variation is observed in its

<sup>3</sup> Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* 253 (2013); Christopher Campbell, “House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law”, 30:4 *J. Int'l Arb.* 361 (2013); Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* 257 (2015).

<sup>4</sup> In *India – Patent Protection* the Appellate Body noted that the term “expectations” was absent from the treaty text and observed that they “are [instead] reflected in the language of the treaty itself.” WT/DS50/AB/R, para. 45 (19 Dec. 1997).

<sup>5</sup> Bailey Kuklin, “The Justification for Protecting Reasonable Expectations” *Hofstra Law Review* 863 at 865 (Spring 2001); see also Catherine Mitchell, “Leading a Life of its Own? The Roles of Reasonable Expectations in Contract Law” 23:4 *Ox. J. Legal Studies* 639 (2003); Barry Reiter & John Swan, “Contracts and the Protection of Reasonable Expectations” in Barry J. Reiter & John Swan (ed.), *Studies in Contract Law* 1-22 (1980).

<sup>6</sup> See Johan Steyn, “Contract Law: Fulfilling the Reasonable Expectations of Honest Men” 113 *L.Q.R.* 433 at 434 (1997) (The doctrine of

application, leaving considerable discretion and power in the hands of decision-makers.<sup>7</sup>

\*. There are definite advantages to focusing on the protection of reasonable expectations in law and making this, in effect, the first task of a legal system. One is objectivity. Expectations are ill-defined constructs. In most instances the expectation is not measured by what the parties believed their expectations to be subjectively, but by a third-party's opinion of what those expectations were objectively.<sup>8</sup> In this way expectations can be made to bear, like the shock absorbers in an automobile, much of the tension in a legal system. Through interpretation the individual expectation is reconciled with the collective one.<sup>9</sup> They become a reflection of community standards.<sup>10</sup>

\*. Another advantage is flexibility. As Jill Poole points out, the generic concept of "reasonable expectations" is ambiguous enough that it can be repurposed for use in different domains of the law to suit particular circumstances.<sup>11</sup> Kuklin notes, for instance, that the protection of expectations is identified as a central principle in several areas of Anglo-American law including contract, tort, property, constitutional and administrative law.<sup>12</sup>

\*. A further advantage of "reasonable expectations" is the way that their inherent vagueness leaves the law open to evolution and change. Lon Fuller and Henry Purdue made this point in justifying Anglo-American contract law's preference for expectation-based damages as the presumptive measure of recovery in contract law:

It may be said that there is not only a policy in favor of preventing and undoing the harms resulting from reliance, but also a policy in favor of promoting and facilitating reliance on business agreements. As in the case of [a] traffic light ordinance we are interested not only in preventing collisions but in speeding traffic. Agreements can accomplish little, either for their makers or for society, unless they are made the basis for action. When business agreements are not only made but are also acted on, the division of labor is facilitated, goods find their way to the places where they are most needed, and economic activity is generally stimulated.<sup>13</sup>

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reasonable expectations "is certainly not a rule of law. It is possible to argue that it is a general principle of law, such as, for example, the principle that no man may benefit from his own wrongdoing."); see also Kuklin, p. 884 ("While general principles may be agreed upon, including the general principle of protecting reasonable expectations, particular circumstances may call forth considerations that dominate or reorder them.").

<sup>7</sup> Catherine Mitchell speaks of "the inherent manipulability of the reasonable expectations argument. ... This manipulability arises because there are at least three broad justificatory bases upon which to found reasonable expectations arguments or, alternatively, three benchmarks for reasonableness: an institutional basis, an empirical basis and a normative basis ... almost any outcome can be justified by appealing to reasonable expectation. The fluidity of the notion, it subsumes, rather than explains, the diverse range of factors that influence modern contract law. Reasonable expectation may therefore do useful work in imparting the illusion, while not necessarily reflecting the reality, of coherence and unity in contract law." See Catherine Mitchell, "Leading a Life of its Own? The Roles of Reasonable Expectations in Contract Law" 23:4 *Ox. J. Legal Studies* 639 at 641 (2003).

<sup>8</sup> Joseph Perillo, "The Origins of the Objective Theory of Contract Formation and Interpretation" 69 *Fordham L. Rev.* 427 (2000).

<sup>9</sup> "... if from a moral point of view cooperation always entails some kind of effacing of one's own interests in deference to others or the group, then from a cognitive point of view, cooperative thinking always entails some kind of effacing of one's own perspective in deference to the more "objective" perspective of others or the group." Michael Tomasello, *A Natural History of Human Thinking* 122 (2014).

<sup>10</sup> Johan Steyn has pointed out, for instance, that objectivity in the assessment of expectations helps promote predictability in the law by removing the need for inquiry into subjective motivations. Johan Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" 113 *L.Q.R.* 433 at 434 (1997).

<sup>11</sup> Jill Poole, *Contract Law* (10<sup>th</sup> ed.) 16-17 (2010).

<sup>12</sup> Bailey Kuklin, "The Justification for Protecting Reasonable Expectations" *Hofstra L. Rev.* 863 (Spring 2001). Kuklin has noted that "The protection of reasonable expectations has been advanced as a central principle in various areas of the law, including contracts, torts, and property, or aspects of them. [FN1] It has even been championed as the overarching principle of the law in general." Kuklin cites Roscoe Pound, *An Introduction to the Philosophy of Law* 189 (1922) ("Looking back over the whole subject, shall we not explain more phenomena and explain them better by saying that the law enforces the reasonable expectations arising out of conduct, relations and situations..."); see also Roscoe Pound, *Social Control Through Law* 80-81 (Transaction Publishers 1997) (1942) (noting that nearly all legal rights are "conferred consciously and intentionally ... as a recognition of reasonable expectations"). See also Bailey Kuklin, "The Plausibility of Legally Protecting Reasonable Expectations", 32 *Val. U. L. Rev.* 19 (Fall 1997).

<sup>13</sup> Lon Fuller & William Purdue, "The Reliance Interest in Contract Damages" 46 *Yale L.J.* 52, 59-60 (1936). See contra W. David Slawson, "Why Expectation Damages for Breach of Contract Must Be the Norm: A Refutation of the Fuller and Purdue "Three Interests" Thesis", 81 *Neb. L. Rev.* 839 (2003).

Fuller and Purdue's reference to "promoting and facilitating reliance" can be understood as an acknowledgement of the benefits of the expectation measure. In focusing on the protection of ill-defined expectations from case to case the law remains flexible, and indeed, welcomes flexibility as a promoter of well-being.

\*. A number of legal doctrines can be traced to expectations even though they do not explicitly mention "expectations" *per se*. That is because a rule – indeed almost *any* rule – will give rise to an expectation merely by virtue of its normativity. Thus, the doctrine of precedent depends upon the idea that prior decisions will be followed and become the basis for law in the future.<sup>14</sup> The doctrine of estoppel prohibits a party from going back on its representation when doing so would prejudice another party who has relied upon it.<sup>15</sup> The doctrine of mistake prohibits enforcement of a legal document where a written instrument does not accord with the true intentions – or expectations – of the parties.<sup>16</sup> The doctrine of desuetude, whereby the law has fallen into disuse is disregarded, is an indication of how expectations can trump existing rules.<sup>17</sup> Similarly, the legal fiction of a "reasonable person" is used as a standard in tort law, criminal law and administrative law to assess what the relevant expectation of behavior is.<sup>18</sup> In short, there is a recognition in many areas of law that expectations must be protected for communal well-being. They underpin a legal system. "When legal rules conflict with expectations, the citizenry may lose respect for law, or the courts. Peaceful human interactions depend on expectations."<sup>19</sup>

\*. In the last few decades a parallel doctrine of "legitimate expectations" has evolved in English and EU administrative law. The doctrine, which "has existed in some form in English law since the early 1970s", allows "expectations raised as a result of a public authorities conduct to be legally protected."<sup>20</sup> For instance, written reasons may fulfill a claimant's expectation of administrative action or a hearing a refugee's expectation of proper treatment. The doctrine now appears to be well-established.<sup>21</sup>

\*. Serious issues remain as to when the doctrine of legitimate expectations will apply and what considerations are relevant in deciding the results that should be reached in cases involving them. English law has tended to invoke principles of fairness, abuse of power and good administration to justify the doctrine whereas European and EU law has more directly linked it to principles of legal certainty (*Rechtssicherheit*) and trust in public administration (*Vertrauensschutz*).<sup>22</sup> Articulations of the doctrine in English and European systems are broadly consistent and overlap at points, but some commentators have detected contradictions. Paul Reynolds notes, for example, that a commitment to the protection of legitimate expectations through legal certainty is not always consistent with fairness, which tends to vary from case to case, or with trust in public administration, which may require the development of new principles to deal with novel phenomena.<sup>23</sup>

\*. Legitimate expectations are also fundamentally objective in nature whereas at least in English administrative law the protection of legitimate expectations is inherently subjective, being grounded in "subjective perceptions [of fairness] and individual relationships."<sup>24</sup> The malleability of the doctrine also means that it has been "consistently rejected by French courts as it is seen as being incompatible with French law's absolute

<sup>14</sup> "Basic among [rational considerations for a principle of *stare decisis* in English law] were the advantages of predictability and consistency in legal adjudication; but given that a policy of following previous decisions was already firmly established, an important additional consideration was the need to keep faith with those who had reasonably relied upon this policy." Jim Evans, "Change in the Doctrine or Precedent during the Nineteenth century" in Laurence Goldstein, *Precedent in Law* 35 at 37 (1987). See also Arthur Goodhart, *Precedent in English and Continental Law* (1934); Mohamed Shahabuddeen, *Precedent in the World Court* (1996).

<sup>15</sup> Elizabeth Cooke, *The Modern Law of Estoppel* (2000).

<sup>16</sup> Thus, "[w]here a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake ..." Restatement of the Law of Contracts (2<sup>nd</sup>) s 152.

<sup>17</sup> Bailey Kuklin, "The Justification for Protecting Reasonable Expectations" *Hofstra L. Rev.* 865 at 894 (Spring 2001).

<sup>18</sup> Mayo Moran, *Rethinking the Reasonable Person* (2003).

<sup>19</sup> Bailey Kuklin, "The Justification for Protecting Reasonable Expectations" *Hofstra L. Rev.* 865 at 883 (Spring 2001).

<sup>20</sup> Paul Reynolds, "Legitimate Expectations and the Protection of Trust in Public Officials" *Public Law* 330 (2011).

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*, at 341.

<sup>23</sup> *Ibid.*, at 339.

<sup>24</sup> *Ibid.*, at 340.

insistence on the *principe de sécurité des situations juridiques*.<sup>25</sup> Likewise, Reynolds notes that the European Court of Justice's exposition of the doctrine of legitimate expectations is not uniformly based on legal certainty but instead shows "a great variety of approaches and applications."<sup>26</sup>

\*. At the same time, a survey of contemporary legal literature reveals that expectations are not everything. The task of protecting reasonable or legitimate expectations must vie with many other perspectives, doctrines and principles as a source of legal obligation. Kuklin notes, for instance, the need to accommodate "doctrines such as risk avoidance, cost internalization, and the relative equities regarding "two innocent parties", which create pockets of various forms of strict liability disassociated from expectations."<sup>27</sup> How is this to be reconciled with what is set out above, namely, that expectations underpin, and in some sense are constitutive of, *all* law?

\*. One way is simply to expand the ambit of the doctrine's application and recognize that many apparently independent doctrines are simply a reconstitution of the protection of expectations in other forms. A strict liability rule in tort, for example, reflects the communal expectation that some actor must be held responsible for injurious wrongdoing, and moreover, that this assignment is best made regardless of individual culpability. Commentators may argue as to the merit of this assignment, but it is hard to escape the conclusion that such rules are part of a generalized assumption – or expectation – that risk must be allocated so as to discourage recklessness and simplify decision-making.<sup>28</sup> Similarly, law and economics presumes, or expects, that individual actors are utility maximizers and that many legal outcomes are structured efficiently.<sup>29</sup> Hence, in one way or other, the myriad doctrines that have gone in and out of academic fashion are those which, in one way or other, can be traced to expectations.

\*. The notion of expectations may thus be said to be woven into the very fabric of the law. They culminate in *the expectation of orderly continuity in a legal system*.<sup>30</sup>

### 3. Expectations in WTO Law

\*. The preceding section highlighted the way that a given rule creates expectations. This proposition appears true whether the rule is one of domestic or international law. Commenting on the importance of expectations in international law Michael Byers has observed:

It may be that all rules of international law involve legitimate expectations ... Treaty rules involve legitimate expectations because they are based on the general customary rule of *pacta sunt servanda*, which requires that treaty obligations be upheld in good faith. In short, States *expect* other States to abide by their treaty obligations.<sup>31</sup>

Byers concludes that "the principle of legitimate expectation is, in a sense, at the heart of all customary and treaty rules."<sup>32</sup>

\*. In WTO law the importance of expectations arises from the scheme of the WTO Agreement itself. What is

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid., citing Jürgen Schwarze, *European Administrative Law* 869 (1992).

<sup>27</sup> Bailey Kuklin, "The Justification for Protecting Reasonable Expectations" *Hofstra Law Review* 863 at 874 (Spring 2001).

<sup>28</sup> Frank Vandall, *Strict Liability: legal and economic analysis* (1989).

<sup>29</sup> Richard Posner, *Economic Analysis of Law* (8<sup>th</sup> ed.) 3, 31 (2011) (noting that "[t]he task of economics, so defined, is to explore the implications of assuming that man is a rational maximizer of his ends in life" and also that "many areas of law bear the stamp of legal reasoning. Few judicial opinions contain explicit references to economic concepts. But often the true grounds of legal decision are concealed rather than illuminated by the characteristic rhetoric of opinions.")

<sup>30</sup> Kuklin, notes that "[r]easonable expectations, foreseeability, and blameworthiness are inextricably intertwined in the common moral consciousness." Bailey Kuklin, "The Justification for Protecting Reasonable Expectations" *Hofstra Law Review* 863 at 871 (Spring 2001).

<sup>31</sup> Michael Byers, *Custom, Power and the Power of Rules* 106 (1999) [emphasis added]. "Certain, more specific rules of international law, such as the rules concerning estoppel and unilateral declaration, may be subsumed within the broader principle of legitimate expectation." Ibid., p. 107. See also José Alvarez, *International Organizations as Law-makers* 339 (2005) ("Once a promise is made in the context of a treaty it becomes embedded in a normative system that is premised on a long-term perspective, namely the rule of law. By creating stable *expectations* between states, treaties also increase the importance of reputation. ...") [emphasis added].

<sup>32</sup> Ibid., at p. 109.



most relevant to the law as a normative phenomenon is the “security and predictability” of “reciprocal and mutually advantageous [trade] arrangements”. The phrase “security and predictability” is not found in the preamble. It only appears in DSU Art. 3.2. However, the concept has been repeatedly referenced in a line of cases and is now understood to serve as a constitutive idea for the treaty as a whole.<sup>33</sup>

\*. This idea is clear from GATT’s principal provision for dispute settlement, Art. XXIII:1(a), which reads in part:

#### Article XXIII

##### *Nullification or Impairment*

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

(a) the failure of another contracting party to carry out its obligations under this Agreement ...

Article XXIII links responsibility under GATT to the failure of a member “to carry out” its obligations. There is no requirement of any particular *effect*. Instead, the basis of state responsibility is the failure of a country to follow certain *conduct*, thereby leading to a breach of expectations belonging to other members.<sup>34</sup>

\*. In the early years of GATT, dispute settlement panels were quick to recognize such an aim. International trade usually evokes images of trade flows – Ricardo’s famous wines-for-woolens example comes to mind<sup>35</sup> – but successive panels were able to see beyond this and to acknowledge that the treaty’s true purpose was something much more profound: the protection of expectations.<sup>36</sup> Under GATT ‘expectations’ meant the

<sup>33</sup> “We agree with the Panel that the security and predictability of “the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade” is an object and purpose of the *WTO Agreement*, generally, as well as of the GATT 1994.” *EC – Computer Equipment*, WT/DS62, 67, 68/AB/R, para. 82 (5 June 1998), see also *EC – Selected Customs Matters*, WT/DS315/R, para. 6.34 and see comments at para. 7.431 (16 June 2006). Another way of emphasizing the importance of security and predictability, and hence the protection of legitimate expectations, is to note the rarity of references to other objects and purposes. They are few and far between. [Nevertheless, from time to time they do occur. “... such situations would be out of keeping with one of the key stated purposes of the WTO Agreement, namely the need for positive efforts on behalf of developing countries ...”. *Canada – Civilian Aircraft (21.5)*, WT/DS70/RW, para. 5.135 (9 May 2000). “... the Panel considers that one of the most important objectives of GATT 1994, as stated in the preamble, is “expanding the production and exchange of goods”. In order to achieve this objective, the preamble sets out the principle of “elimination of discriminatory treatment in international commerce”. This principle is reflected mainly in Articles I and III of GATT 1994.” *EC – Tariff Preferences*, WT/DS246/R, para. 7.157 (1 Dec. 2003).] Moreover, unlike the case of secure and predictable concessions and commitments, little systematic attempt has been made in dispute settlement to show how a particular interpretation will “raise living standards”, “expand the production of and trade in goods and services”, “allow for the optimal use of the world’s resources” or “ensure that developing countries secure a share in the growth of international trade.” Panels and the Appellate Body generally have been circumspect in dealing with these other preambular purposes. Thus, for instance, in *EC – Asbestos* the panel observed that “although the preamble to the WTO Agreement refers in particular to expanding trade in goods, it does not give sufficiently precise information on the terms which we must interpret.” *EC – Asbestos*, WT/DS135/R para. 8.48 (18 Sept. 2000). Likewise, in *EC – Chicken Cuts* the Appellate Body disagreed with the view that the expansion of trade and the reduction of tariffs was an interpretative principle. *EC – Chicken Cuts*, WT/DS269/AB/R, para. 243 (12 Sept. 2005).

<sup>34</sup> For this reason, John Jackson has observed that ‘the prerequisite to invoking Article XXIII does not depend upon a breach of the GATT agreement’: Jackson, *ibid.* at 179.

<sup>35</sup> David Ricardo’s famous exposition of the theory of comparative advantage in 1817 involved two countries’ exports to each other of products they were comparatively more efficient at producing, in that case Britain’s exports of wool for Portugal’s exports of wine: see J.R. McCulloch, *The Works of David Ricardo* (1888), at 76.

<sup>36</sup> For cases where panels stated that the purpose of GATT is to protect expectations see Working Party Report, ‘Brazilian Internal Taxes’, adopted 30 June 1949, BISD II/181, at para. 16; Panel Report, *United States— Taxes on Petroleum and Certain Imported Substances*, adopted 17 June 1987, BISD 34S/136, at para. 5.1.9; Panel Report, *Canada—Administration of the Foreign Investment Review Act*, adopted 7 Feb. 1984, BISD 30S/140, at para. 6.6; Panel Report, *Japanese Measures on Imports of Leather*, adopted 15/16 May 1984, BISD 31S/94, at para. 55; Panel Report, *Japan—Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, adopted 10 Nov. 1987, BISD 34S/83, at para. 5.11; Panel Report, *European Economic Community—Restrictions on Imports of Apples*, adopted 22 June 1989, BISD 36S/135, at para. 5.25; and Panel Report, *United States—Measures Affecting the Importation, Internal Sale and Use of Tobacco*, adopted 4 Oct. 1994, DS44/R, at para. 99. For some WTO dispute settlement reports referring to the protection of expectations see *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R (5 Sept. 1997), paras 45-62; *EC—Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R (5 June

expectations formed by both governments and traders about the trade-related behaviour of *other* governments.<sup>37</sup>

\*. The basis for protecting expectations is set out in GATT. The treaty provides for a range of disciplines concerning border measures and market access, as well as obligations concerning customs valuation, administrative fairness and transparency, balance of payment and exchange arrangements, development assistance, and recourse to dispute settlement. GATT Art. III:2 requires, for instance, that countries should not subject foreign products to “internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products”, a commitment which naturally creates *expectations* in other countries that foreign products will not be so treated.<sup>38</sup>

\*. Expectations and their importance are also linked to the treaty’s idea of normativity. In *U.S. – OCTG* the panel recognized that a measure possesses “normative value” in WTO law when it “creates *expectations* among the public and among private actors.”<sup>39</sup> Likewise in *China – Audiovisual*<sup>40</sup> a panel observed that certain administrative guidance of the Chinese government was reviewable under WTO law because it “... *creates the expectation* that going forward the government agencies addressed therein will conduct themselves in their administration of foreign investment in the cultural sectors in a manner consistent with the provisions set forth in the *Several Opinions*.”<sup>41</sup>

\*. A related concern in the system is with latency, or in other words, with what might or will impair concessions. An oft-quoted source for this idea is the GATT panel’s decision in *U.S. – Superfund* where the panel dealt with a minimal U.S. charge on oil imports. The charge was a clear violation of GATT Art. III:2, but the U.S. argued in defence that the charge was justified on the basis that it had either little or no effect. The panel disagreed, observing that the provision made no reference to trade effects, and moreover, that the various remedial options for the U.S. meant that the law “cannot be interpreted to protect expectations on export volumes; it protects *expectations on the competitive relationship between imported and domestic products*.”<sup>42</sup> In this sense GATT - and now WTO - disciplines “are not only to protect current trade but also to create the predictability needed to plan future trade.”<sup>43</sup>

\*. As we will see, this attitude has profound consequences for the orientation of the system. The system is inherently prospective and forward looking. It is also immanent. Nothing is to be done which might possibly disrupt or impair its overarching obligations and these, in turn, give rise to broad-based expectations.

### 3.1 Violation

\*. Despite this, expectations are notoriously difficult to identify and do not always mirror trade flows. As a definitional matter, the WTO Agreement is formally silent about them. The indeterminacy of expectations undoubtedly explains the inconsistent behaviour of panels and the Appellate Body in dealing with them. While a number of panels under GATT made reference to the protection of expectations, the stridency of WTO dispute settlement has made litigants insistent about knowing what they are, and consequently, panels and the Appellate Body more cautious in interpreting them.<sup>44</sup> In *India – Patent Protection*, for instance, the Appellate

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1998), paras 83-84; *Korea—Taxes on Alcoholic Beverages*, WT/DS75/AB/R (18 Jan. 1999), paras 125-127; *Korea—Measures Affecting Government Procurement*, WT/DS163/R (1 May 2000), paras 7.9ff, 7.75.

<sup>37</sup> So sure were panels of this position that by 1962 they had all but dispensed with the need for evidence to found state responsibility. There was no need for evidence where vast, and essentially indeterminate, expectations were the centrepiece of the system. The presumption is now embodied in DSU Art. 3(8) which says that “[i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment’. The presumption has never been successfully rebutted.

<sup>38</sup> GATT Art. III:2.

<sup>39</sup> *U.S. – Oil Country Tubular Goods*, WT/DS268/AB/R, para. 187 (29 Nov. 2004).

<sup>40</sup> *China – Audiovisual Products*, WT/DS363/R (12 Aug. 2009).

<sup>41</sup> *Ibid.*, para. 7.173.

<sup>42</sup> *U.S. – Taxes on Petroleum and Certain Imported Substances (Superfund)*, 34<sup>th</sup> Supp. 136, para. 5.1.9 (17 June 1987) [emphasis added].

<sup>43</sup> *Ibid.*, para. 5.2.2.

<sup>44</sup> For violation cases referring to expectations under GATT Art. XXIII:1(a) see *EC—Computer Equipment*, supra note 15; *EC— Trade Description of Sardines*, WT/DS231/AB/R (Sept. 26, 2002); *India—Patent Protection*, supra note 15; *Korea—Alcoholic Beverages*, supra note 15; and *Canada—Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R (2 Aug. 1999). Likewise, for cases involving expectations

Body noted that the term “expectations” was absent from the treaty text and observed that they “are [instead] reflected in the language of the treaty itself.”<sup>45</sup> Although the Appellate Body did not disavow individual expectations as a substantive basis of WTO law, it pointed out that they should only be considered as a basis of state responsibility under GATT Art. XXIII:1(b) non-violation cases. To do otherwise, it said, “confuses the bases of liability”.<sup>46</sup>

\*. Some commentators appear to have interpreted these remarks as implying that expectations have *no* place in violation cases.<sup>47</sup> Yet the Appellate Body did not say this. All it said was that “expectations are reflected in the language of the treaty itself”, indicating that they play no role as a matter of pleading in violation cases.

\*. The way in which expectations have been interpreted in *India – Patents* and other cases, and their amorphous, collective form, means that, notwithstanding their importance, they have been little excavated in WTO dispute settlement. In many respects their true significance seems shrouded. Nevertheless, expectations and expectancy continue to play a central - even pivotal - role in the system. The law is replete with references to them.

\*. In *EC – Seal Products*, for instance, the panel made reference to the “design, structure, and *expected* operation” of an EU prohibition on the importation and sale of seal products, highlighting the impact of that measure on competitive opportunities for imports.<sup>48</sup> Similarly in *Argentina – Hides* the panel held that by virtue of the obligation of uniform treatment in GATT Art. X:3(a) “every exporter and importer should be able to *expect* treatment of the same kind ... .” It went on to note that “[u]niform administration requires that Members ensure that their laws are applied *consistently and predictably*.”<sup>49</sup> In *U.S. – Cotton* the panel referred to the expectation of U.S. farmers for higher prices as an indication of government subsidization.<sup>50</sup> And in *Canada – Aircraft* the panel referred to a number of factual elements found in official documentation associated with a subsidy scheme as bearing on the expectation of exports.<sup>51</sup> In sum, the law’s logic is heavily influenced by what actors contemplate going forward, which invariably involves the matter of their expectations

\*. At the same time, several expectation-based devices figure prominently in the scheme of the WTO system. Among them is the statement in WTO Art. III:2 that:

The WTO shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements in the Annexes to this Agreement. The WTO may also provide a forum for further negotiations among its Members

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in non-violation under GATT Art. XXIII:1(b) see *Japan—Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (21 Mar. 1998), *EC—Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (12 Mar. 2001).

<sup>45</sup> *India—Patent Protection*, supra note 15, at para. 45.

<sup>46</sup> The reason for this distinction is clear. GATT Art. XXIII:1, the principal provision ascribing responsibility under GATT, is silent about ‘expectations’. Instead, the language at issue in any dispute is whether a WTO member has failed ‘to carry out its obligations’ or, less likely, whether it impeded ‘the attainment of any objective of the Agreement’. Breach of either of these bases of responsibility is what violates expectations. However, the Appellate Body has conceded that, in practice, ‘panels ... have frequently stated that the purpose of these articles is to protect the expectations of Members concerning the competitive relationship between imported and domestic products, as opposed to expectations concerning trade volumes’. It added that ‘this statement is often made *after* a panel has found a violation’: *India—Patent Protection*, supra note 15, at para. 40.

<sup>47</sup> See Thomas Cottier & Nadia Schefer, ‘Good Faith and the Protection of Legitimate Expectations in the WTO’, in M. Bronckers and R. Quick (eds), *New Directions in International Economic Law* (2000), at 60, who identify the Appellate Body as rejecting the use of ‘legitimate expectations’ or ‘reasonable expectations’ outside non-violation cases. They observe that ‘[i]nstead of generalizing the recognition of the existence of legitimate expectations throughout the WTO, the Appellate Body has recognized it only in the realm of non-violation, denying its applicability elsewhere. This segregation of uses of legitimate expectations is at odds with the current integration of WTO rules into international law, and deserves closer examination’: *ibid.*

<sup>48</sup> For discussion see *EC – Seal Products*, WT/DS401, paras. 5.222-5.224 (22 May 2014) (“We therefore do not see that a panel falls into error by projecting what contribution will be brought about by the measure.”)

<sup>49</sup> *Argentina – Hides*, WT/DS155/R, para. 11.83 (19 Dec. 2000) [emphasis added], cited in *China – Raw Materials*, WT/DS394/R, para. 7.692 (5 July 2011).

<sup>50</sup> *U.S. – Cotton*, WT/DS257/R, para. 445 (8 Sept. 2004). See also *U.S. – Cotton*, WT/DS267/RW (18 Dec. 2007) (“the Panel considers that it is reasonable to conclude that the fact that US cotton producers know that they will receive marketing loan payments whenever the adjusted world price is below the marketing loan rate continues to be an important factor affecting the level of acreage planted to cotton ...”).

<sup>51</sup> *Canada – Aircraft*, WT/DS70/AB/R, footnote 35, para. 175 (2 Aug. 1999).

concerning their multilateral trade relations ...

With this promise the institutional framework of the organization signals its commitment to continuity, and by extension, the protection of expectations.

\*. Another expectation-related device is the dispute settlement system which, as noted, “is a central element in providing security and predictability to the multilateral trading system.”<sup>52</sup> There is clearly the expectation that “absent cogent reasons, [a WTO] adjudicatory body will resolve the same legal question in the same way in a subsequent case.”<sup>53</sup>

### 3.2 Non-Violation

\*. The non-violation clause in GATT Art. XXIII:2 has stood out as an anomaly since its inclusion in GATT 1947.<sup>54</sup> Commentators have struggled to understand how such clause, which prohibits measures which do *not* breach the treaty, could give rise to a cause of action in GATT/WTO law. The answer becomes apparent when considers what an expectations-based understanding of the treaty highlights. These include the systemic aspect of WTO law, its dislike of uncertainty, and its emphasis on indirect effect. In short, non-violation can be thought of as embodying an anti-circumvention principle.

GATT Art. XXIII:1(b) reads:

If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of:

(b) the application by another contracting party of any measure, *whether or not it conflicts with the provisions of this Agreement* ...

Anti-circumvention is critical to the integrity of a legal system. It works to buttress the bare requirements of the law and to reinforce its legitimacy. The same function makes anti-circumvention unusual. In most cases the established law should be enough to ascribe responsibility. To pursue responsibility beyond that point is extraordinary and essentially for the greater purpose of achieving justice.<sup>55</sup>

\*. Non-violation claims in GATT/WTO law are intriguing because they appear to be a blend of elements. Case law has specified that action for non-violation under Art. XXIII:1(b) lies where:

- i. there is some benefit under the WTO Agreement,
- ii. a member applies a non-violating measure, for instance an income tax,

<sup>52</sup> DSU Art. 3.2.

<sup>53</sup> *U.S. – Stainless Steel*, WT/DS344/AB/R, para. 160 (30 April 2008).

<sup>54</sup> For work on non-violation claims see Sungjoon Cho, “GATT Non-Violation Issues in the WTO Framework” 39 *Harv. Int’l L. J.* 311 (1998); Thomas Cottier & Krista Schefer, “NVNI Complaints in WTO/GATT Dispute Settlement: Past, Present and Future”, in Ernst-Ulrich Petersmann (ed.), *International Trade Law and the WTO/GATT Dispute Settlement System* 145-193 (1997); Marc Busch & Eric Reinhardt, “Bargaining in the Shadow of the Law”, 24 *Fordham Int’l L. J.* 158 (2000); Robert Hudec, *Enforcing International Trade Law* (1993); John Jackson, *World Trade and the Law of GATT* (1969); Andrew Mitchell, “Good Faith in WTO Dispute Settlement”, 7 *Melbourne J. Int’l L.* 339 (2006); Marion Panizzon, *Good Faith in the Jurisprudence of the WTO* (2006); Dae-Won Kim, *Non-Violation Complaints in WTO Law* (2005).

<sup>55</sup> A parallel development can be discerned in domestic law’s identification of restitution, sometimes referred to as unjust enrichment. The idea of restitution as residual, arising from a combination or exhaustion of other categories of obligation and therefore tied to the idea of anti-circumvention, is evidenced in its strongly communal character. Brice Dickson has observed, for instance, how “indirect comparison of the structure of unjust enrichment claims in common law and civil law systems is bound to be misleading because the principle against unjust enrichment serves distinctly different purposes in the two sets of systems. For common lawyers unjust enrichment is a *rationale* for allowing some claims in restitution; for civil lawyers it is a residual category in the law of obligations which comes into play when other categories have been exhausted. Moreover, *within* each set of systems unjust enrichment claims perform very different roles and the relevant legal rules have not developed at the same pace in all countries. It is arguable, consequently, that in some respects there is more in common between, say, American and German unjust enrichment law than there is between American and English or between German and French.” Brice Dickson, “Unjust Enrichment: A Comparative Overview” in William Swaddling (ed.), *The Limits of Restitutionary Claims: A Comparative Analysis* 35 (1997).

iii. there is nullification or impairment of the benefit by the non-violating measure.<sup>56</sup>

The scenario envisaged above illustrates non-violation's concern with circumvention of treaty disciplines. The basic fear is that a WTO-consistent measure – like an income tax – could be used indirectly to erode WTO concessions, commitments and benefits.

\*. The substantive requirements of non-violation are accompanied by certain procedural idiosyncrasies. Under DSU Art. 26.1(b) there is “no obligation to withdraw the measure”, but in such cases “the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment”. In addition, under DSU Art. 26.1(c), any arbitration may include a determination of the level of benefits which have been nullified or impaired, and under DSU Art. 26.1(d) “compensation may be part of a mutually satisfactory adjustment”. Taken together, these features suggest the reintroduction of bilateralism in which the matter is essentially reduced to being viewed as something involving merely two countries and their relationship.

\*. What is noteworthy about these features is their specificity. The concessions, commitments and benefits in question in non-violation are not those of members as a whole, but of a *single* complainant.<sup>57</sup> Expectations and ‘benefit’ are individualized, usually as of the date of negotiation, and thought to be continuing.<sup>58</sup> Thus, in *Korea – Government Procurement* the panel contrasted the difference in treatment of expectations between violation and non-violation cases as follows:

At the outset of our analysis of this issue, we must address some relevant issues relating to use of negotiating history which arose in the *European Communities — Computer Equipment* dispute. In that dispute, the Appellate Body specifically found that the standard of reasonable expectation or legitimate expectation existing with respect to non-violation cases had no role in reviewing negotiating history in order to aid in resolving the issues pertaining to a violation case. One of the reasons is that *in a non-violation case the relevant question is what was the reasonable expectation of the complaining party*. However, if it is necessary to go beyond the text in a violation case, the relevant question is to assess the objective evidence of the mutual understanding of the negotiating parties. This involves not just the complaining and responding parties, but also involves possibly other parties to the negotiations.<sup>59</sup>

\*. A number of cases have recognized how expectations in non-violation are essentially taken to be fixed and static. Their inert conception contrasts sharply with the dynamism and prospectivity of expectations as conceived under the treaty generally. Thus, in *Japan – Film* the panel questioned the U.S.’s expectation of market access for American-made photographic film in Japan, querying why the U.S.’s expectation of market access had not changed since Japan’s original concession on certain types of photographic film in 1964, 1979 and 1994:

... where the United States claims that it did not know of a measure’s relevance to market access conditions in respect of film or paper, we would expect the United States to clearly demonstrate why initially it could not have reasonably anticipated the effect of an existing measure on the film or paper market and when it did realize the effect. Such a showing will

<sup>56</sup> For identification of the criteria see *Japan – Film*, WT/DS44/R, para. 10.41 (31 Mar. 1998).

<sup>57</sup> To emphasize the point, DSU Art. 26.1(a) specifies that a country asserting non-violation “shall present a detailed justification in support of any complaint”.

<sup>58</sup> Thus, in *Japan – Film* the panel noted that “the purpose of Article XXIII:1(b) ... is to protect the balance of concessions under GATT by providing a means to redress government actions not otherwise regulated by GATT rules that nonetheless nullify or impair a Member’s legitimate expectations of benefits from tariff negotiations.” WT/DS44/R, para. 10.50 (31 Mar. 1998). On that occasion the U.S. claimed to have had reasonable expectations of benefits accruing to it specifically as the result of tariff concessions granted by Japan on black and white film and paper during the Kennedy Round (1967), on colour and black and white film and paper during the Tokyo Round (1979) and on colour and black and white film and paper during the Uruguay Round (1994).

<sup>59</sup> *Korea – Government Procurement*, WT/DS163/R, para. 7.75 (1 May 2000) [emphasis added]. In *Chile – Price Band System*, WT/DS207/R, para. 7.98 (3 May 2002), the panel observed that “non-violation rests on reasonable expectations in a primarily bilateral context whereas violation claims rest ultimately in a multilateral context.”

need to be tied to the relevant points in time (i.e., the conclusions of the Kennedy, Tokyo and Uruguay Rounds) in order to assess the extent of the United States' legitimate expectations of benefits from these three Rounds.<sup>60</sup>

Notwithstanding its query, the panel determined that the U.S. expectation had been set as of certain fixed dates. It was not affected by interim change.<sup>61</sup>

\*. Struggling to make sense of this oddity, many commentators have pointed to the non-violation clause's close connection with the principles of good faith, as highlighted in *Korea – Government Procurement*.<sup>62</sup> In that case, the issue was incomplete answers given by Korean negotiators to U.S. counterparts during negotiations over the extent of Korean commitments under the WTO GPA. The commitments later became an issue when the Korean government undertook the construction of a new international airport at Incheon, near Seoul. The panel found the absence of a negotiated commitment by Korea and hence no violation.<sup>63</sup> Nevertheless, the panel indicated a willingness to consider the U.S. claim “flowing in part from the panel's belief that non-violation should be interpreted against the backdrop of customary international law and, in particular, the principle that treaty commitments must be performed in good faith.”<sup>64</sup> Staiger and Sykes conclude from the case “that the function of non-violation claims is to address deceit and other forms of opportunistic behaviour.”<sup>65</sup> Their conclusion about non-violation, anchored in VCLT Art. 26, comes close to a non-circumvention principle.

\*. Nevertheless, non-violation is rarely pleaded successfully as a cause of action in WTO law. In GATT/WTO history there have only been a handful.<sup>66</sup> As pointed out in *Japan – Film*, “[m]embers negotiate the rules they agree to follow and only exceptionally would *expect* to be challenged for actions not in contravention of those rules.”<sup>67</sup> What this quote reveals is the way that non-violation is linked to the idea of expectation. In essence, expectation ultimately determines the scope of responsibility under the treaty.

#### 4. Expectations in International Investment Law

\*. Emphasis on the protection of expectations in international investment law is a relatively recent phenomenon, dating from the *Tecmed v. Mexico* decision in 2003.<sup>68</sup> In that case Tecmed, a Spanish company, claimed that its investment had been expropriated due to the refusal of local authorities to renew the company's license to run a hazardous waste dump in the Mexican state of Sonora. In allowing the claim, the tribunal observed:

The foreign investor *expects* the host State to act in a consistent manner, free from ambiguity and

<sup>60</sup> *Japan – Film*, WT/DS44/R, para. 10.80 (31 March 1998).

<sup>61</sup> In *Japan – Film* the panel observed that in all but one non-violation case “the claimed benefit has been that of legitimate expectations of improved market-access opportunities arising out of relevant tariff concessions”. For expectations to be legitimate, “they must take into account all measures of the party making the concession that would have been reasonably anticipated at the time of the concession.” The panel agreed with the U.S. that reasonable expectations may continue to exist in successive rounds of GATT tariff renegotiations and therefore rejected Japan's argument that the most recent tariff concessions replaced older ones. The panel asserted that reasonable anticipation must be assessed on a case-by-case basis. In the instant case, it determined that most measures the U.S. complained of could have been reasonably anticipated. Therefore, they did not give rise to a non-violation claim. *Japan – Film*, WT/DS44/R, para. 10.61-80 (31 March 1998). In *EC – Asbestos*, WT/DS135, for instance, the panel held that Canada had failed to plead non-violation with sufficient certainty and dismissed the claim. However, the panel also observed that “the accumulation of international and [European] Community decisions concerning the use of asbestos, even if it did not necessarily make it certain that the use of asbestos would be banned .... could not do other than create a *climate* which should have led Canada to anticipate a change in the attitude of the importing countries, especially in view of the long-established trend towards ever tighter restrictions on the use of asbestos”. WT/DS135/R, para. 8.297 (18 Sept. 2000) [emphasis in original]. In other words, Canada's reasonable expectations derived from tariff negotiations in the 1970s could be anticipated to have changed, likewise undermining the basis of a non-violation claim.

<sup>62</sup> WT/DS163/R (1 May 2000).

<sup>63</sup> *Ibid.*, para. 7.119.

<sup>64</sup> Robert Staiger & Alan Sykes, “Non-Violation” 16:4 *J.I.E.L.* 741 at 752 (2013).

<sup>65</sup> *Ibid.*, at 753.

<sup>66</sup> Dae-Won Kim observes “There have been as of June 2005 15 cases in which a claim under Article XXIII:1(b) has been considered by Working Parties, Panels and the Appellate Body. In six of these cases, the NVNI claims were successful and on three of these occasions, the report was adopted ...” Dae-Won Kim, *Non-Violation Complaints in WTO Law* 78 (2006).

<sup>67</sup> *Japan – Film*, WT/DS44/R, para. 10.36 (31 Mar. 2010).

<sup>68</sup> *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, ICSID Case No. ARB (AF)/00/2 (May 29, 2003).

totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. [...] The foreign investor also *expects* the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.<sup>69</sup>

*Tecmed* is often taken to be the first instance of explicit reference to expectations in international investment law, a reference clearly tied to investor's anticipation ("know beforehand") and its desire for consistency and predictability.

\*. The novelty of the protection of expectations and the way that the doctrine was undifferentiated in early investment awards attracted criticism.<sup>70</sup> This, in turn, spurred an effort by commentators to identify their source.<sup>71</sup> Martins Paparinskis has pointed out how a doctrine of expectations fits poorly within the traditional doctrine of sources in international law. The term "expectations" is not found in treaties, and likewise, it is difficult to find consistent practice about them as custom. In terms of general principles, Paparinskis notes that expectations are expressly identified only in certain legal systems.<sup>72</sup> Casting beyond these sources, he also notes that expectations are difficult to characterize as unilateral acts or to justify in terms of estoppel. If all of the above is true, Paparinskis suggests that "it would be better to articulate the concerns [addressed by the doctrine of expectations] in terms of formal and procedural arbitrariness or develop special rules, rather than incorporate all other concerns as part of expectations."<sup>73</sup>

\*. Due to these and other objections, the doctrine of expectations has been heavily criticized by a number of commentators. For instance, Muthucumaraswamy Sornarajah has observed that prior to 2005, expectations "had not been used in the sense hitherto in international law. There are few references to the idea of legitimate expectations in the literature of international law."<sup>74</sup> Sornarajah goes on to identify the source of legitimate expectations as lying either in good faith or administrative law principles. In the case of the former, he notes that good faith is ultimately too vague a standard on which to erect such a doctrine. The tie between good faith and expectations is ill-defined.<sup>75</sup> Likewise, with respect to administrative law principles, "legitimate expectations of a citizen are not something against which legislation is tested." Instead, "[w]hen a remedy ha[s] to be given, the remedy has usually been a procedural remedy that requires a hearing to be given to the affected party."<sup>76</sup> Discussing the FET standard Sornarajah observes:

<sup>69</sup> *Ibid.*, para. 154 [emphasis added]. Potestà notes that prior to *Tecmed*, a few other investment tribunals had already hinted at the concept of expectations, "however without clearly taking a position as to whether fair and equitable treatment encompasses protection of legitimate expectations."

<sup>70</sup> M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* 257 (2015) (noting, for instance, that "[t]he notion of legitimate expectations was unknown to international investment law in the form in which it has come to be used in recent times.")

<sup>71</sup> Chester Brown, "The Protection of Legitimate Expectations as A 'General Principle' of Law", 6 *Transnational Dispute Management* 1 (2009); Christopher Campbell, "House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law", 30:4 *J. Int'l Arb.* 361 (2013); Stephen Fietta, "Expropriation and the 'Fair and Equitable' Standard: The Developing Role of Investors' 'Expectations' in International Investment Arbitration" (2006) 23:5 *J Int'l Arb* 375; Stephen Fietta, "The 'Legitimate Expectations' Principle under Article 1105 NAFTA – *International Thunderbird Gaming Corporation v. The United Mexican States*" (2006) 7 *JWIT* 423; Hector Mairal, "Legitimate Expectations and Informal Administrative Representations" in Stefan Schill, ed, *International Investment Law and Comparative Public Law* (2010) 413; Elizabeth Snodgrass, "Protecting Investors' Legitimate Expectations – Recognizing and Delimiting a General Principle" (2006) 21 *ICSID Rev.* 1; Michele Potestà, M. "Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept," (2013) 28 *ICSID Rev.* 88; Michele Potestà, "The Doctrine of Legitimate Expectations in Investment Treaty Law," Paper presented at the Third Biennial Global Conference of the Society of International Economic Law July 12-14, 2012 (Jul. 9, 2012); André von Walter, "The Investor's Expectations in International Investment Arbitration" in A. Reinisch & C. Knahr (eds), *International Investment Law in Context* 173 (2008); Trevor Zeyl, "Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law" (2011) 49 *Alta L. Rev.* 203.

<sup>72</sup> Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* 253 (2013); Michele Potestà, "Legitimate Expectations in Investment Treaty Law" 28:1 *ICSID Rev.* 88 at 93-98 (2013).

<sup>73</sup> Paparinskis, *ibid.*, p. 256 (2013).

<sup>74</sup> Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* 257 (2015).

<sup>75</sup> *Ibid.*, p. 260.

<sup>76</sup> *Ibid.*, p. 261.

No canon of treaty interpretation can support the view that the term ‘fair and equitable treatment’ can include any reference to the protection of the legitimate expectations of the foreign investor. It is not the natural meaning of the term. It has to be conjured through a mystical process of divining the intention of the parties from the preamble and infusing the intention into the fair and equitable treatment standard.<sup>77</sup>

\*. Similar criticism has been voiced by Christopher Campbell, who notes that “expectations” are not referred to in any international investment agreement provision. The doctrine is “essentially an arbitral innovation”.<sup>78</sup> Focusing solely on protection of the investor will produce a skewed perspective since “[t]he true perspective of international investment agreements is to promote development through ensuring reasonable conditions for foreign *investments* (as opposed to *investors*).”<sup>79</sup> For that reason, Campbell asserts, the doctrine of expectations “should be disavowed.”<sup>80</sup>

\*. At the same time, it is important to recall that a doctrine of sources in international law is not fixed or immutable. Treaties, custom and general principles are recognized - but not exclusive - sources of international law. We might agree that breach of a contractual undertaking is not itself an international breach, thereby inferring that disappointed expectations are not part of international law, yet there remains something unmistakably legal about them, hence the effort by other commentators to link them to “the turn to administrative law.”<sup>81</sup> At a minimum, it seems that Sornarajah and Campbell’s positions can be challenged inasmuch as virtually no investment treaty ties state responsibility to the level of investment. There is something less immediately evident – and ultimately more profound – that international investment law is concerned with.

\*. The development of legitimate expectations as a basis of legal obligation in international investment law is most apparent in five principal instances. The first involves expectations arising from contractual commitments made by governments to a specific investor. Obviously, investor expectations may be disappointed if a government breaches an express contractual commitment. However, arbitrators have been clear that “not every hope amounts to an expectation under international law.”<sup>82</sup> A line of decisions suggests that frustration of contractual expectations is not susceptible of protection under international standards without something more. At the same time, the case law is not uniform in identifying what that additional element is. Michele Potestà has observed, for instance, that “one would require either ‘a breach involving sovereign power’ (*puissance publique*), or ‘outright and unjustified repudiation of the transaction’, or a ‘substantial breach’ ‘under certain limited circumstances’.”<sup>83</sup> In sum, Potestà concludes that “the unfair or inequitable treatment by the host state is established by reference to additional factors (beyond the mere non-fulfilment of contract).”<sup>84</sup>

\*. A second instance of the doctrine of legitimate expectations in international investment law occurs with respect to informal representations. In this situation, the host state is alleged to have made certain promises or representations on which an investor relies. Here, an outstanding question is “whether an expectation may arise irrespective of the presence of a representation or assurance.”<sup>85</sup> In other words, can legitimate expectations be created by implication?<sup>86</sup> Tribunals do not seem to have ruled out this possibility, although much appears to

<sup>77</sup> *Ibid.*, p. 263.

<sup>78</sup> Christopher Campbell, “House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law”, 30:4 *J. Int’l Arb.* 361 at 362 (2013).

<sup>79</sup> *Ibid.*, p. 377 [emphasis in original].

<sup>80</sup> *Ibid.*, p. 379.

<sup>81</sup> Muthucumaraswamy Sornarajah, *Resistance and Change in the International Law on Foreign Investment* 268 (2015).

<sup>82</sup> *Parkerings-Compagniet AS v Lithuania*, ICSID Case No ARB/05/8, Award (11 September 2007) para 344, cited in Potestà, *ibid.* at 102.

<sup>83</sup> Potestà, *ibid.* at 102.

<sup>84</sup> Potestà, *ibid.* at 103.

<sup>85</sup> Potestà, *ibid.* at 105.

<sup>86</sup> Potestà notes that in *Parkerings* “The Tribunal does not seem to rule out this possibility, depending on the surrounding circumstances.” See *Parkerings-Compagniet AS v Lithuania*, ICSID Case No ARB/05/8, Award (11 September 2007). Potestà, *ibid.* at 105. Potestà also cites *Saluka Investments v Czech Republic*, UNCITRAL, Partial Award (17 March 2006) at para 329 (“The Tribunal finds that the Claimant’s reasonable expectations to be entitled to protection under the Treaty need not be based on an explicit assurance from the Czech Government”); *Grand River Enterprises Six Nations Ltd et al v United States of America*, NAFTA/UNCITRAL, Award (12 January 2011) paras 140–1 (holding that “[t]he Tribunal understands the concept of reasonable or legitimate expectations in the NAFTA context to correspond with those expectations upon



depend on the surrounding circumstances, including whether or not the representation was individualized and whether or not the representation, as in the case of a unilateral declaration, is “clear and specific”.<sup>87</sup>

\*. A third instance of the doctrine arises out of expectations engendered by the regulatory framework. Investors making investments obviously have some expectation of continuity concerning a country’s legal and administrative framework. It is plausible that sudden or unforeseeable changes might trigger state responsibility, although this possibility is more likely where there is a stabilization clause or where legislative changes work in such a way that they affect a single investor.<sup>88</sup> At the same time, there appears to be general acceptance that governments always retain a degree of sovereign flexibility. An investor cannot legitimately expect regulatory conditions to remain fixed forever.<sup>89</sup>

\*. A fourth instance of the doctrine involves taking into account all relevant circumstances as bearing upon legitimate expectations, including the level of development of the host state.<sup>90</sup> This broader accounting is controversial since it evidently departs from a narrow focus on the investor’s subjective expectations. However, some commentators assert that attention to the level of development as part of the calculation of what is legitimately expected is traceable to the individual investor which, again, will be cognizant of the domestic conditions they are investing in.<sup>91</sup>

\*. A final instance of the doctrine of legitimate expectations in international investment law arises with respect to the investor’s conduct. Again, consideration of the *investor’s* conduct as an aspect of legitimate expectations is controversial in as much as international investment law is classically understood to focus on the behavior of *host* states.<sup>92</sup> To flip this around is to invert - and to some extent undermine - investment law’s central premise that the aim of the law is to protect investors. Nevertheless, a few tribunals have referenced investor conduct in their assessment of the legitimate expectations involved in particular claims.<sup>93</sup>

\*. The conclusion from all of the above is that consideration of legitimate expectations as a component of state responsibility in international investment law is now well-established. While first-generation awards displayed a broad-brush approach in developing such a doctrine, the case law has now entered a period of fine-tuning wherein an effort is being made by arbitrators to tie their conclusions more specifically and concretely to certain constellations of expectations.<sup>94</sup> In particular, where specific representations are made to an investor the doctrine of legitimate expectations provides a “valuable tool” to hold states responsible. Still, as Potestà and others have noted, there is a danger of investing too much in the ill-defined notion of legitimate expectations, which could constitute “a rhetorical and potentially boundless catchphrase”.<sup>95</sup>

## 5. Expectations and Embedded Liberalism

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which an investor is entitled to rely as a result of representations or conduct by a state party. . . . Ordinarily, reasonable or legitimate expectations of the kind protected by NAFTA are those that arise through targeted representations or assurances made explicitly *or implicitly* by a state party.’). See Potestà, *ibid.*, n 100.

<sup>87</sup> Potestà, *ibid.* at 110.

<sup>88</sup> Potestà, *ibid.* at 110-117.

<sup>89</sup> Potestà, *ibid.* at 112.

<sup>90</sup> Potestà, *ibid.* at 117-119.

<sup>91</sup> For example in *Duke Energy v Ecuador*, the Tribunal set out a holistic approach to the evaluation of expectations, noting that “The assessment of the reasonableness or legitimacy [of the investor’s expectations] must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State.” *Duke Energy Electroquil Partners and Electroquil SA v Republic of Ecuador*, ICSID Case No ARB/04/19, Award (18 August 2008) para 340. Cited in Potestà, *ibid.* at 118.

<sup>92</sup> Potestà, *ibid.*, 119-121. See also Peter Muchlinsky, “Caveat Investor’? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard’ (2006) 55 *ICLQ* 527.

<sup>93</sup> See *ADF Group v United States of America*, ICSID Case No ARB(AF)/00/1, Award (9 January 2003) para. 189; *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, ICSID Case No ARB/01/7, Award (25 May 2004), paras 168-178; *Metalpar v Argentine Republic*, ICSID Case ARB/03/05, Award (6 June 2008), para. 187. Potestà also notes that “It is quite evident that legitimate expectations are unworthy of protection if the representation, promise or assurance was procured by fraud, or if the investor failed to disclose relevant facts.” Potestà, *ibid.* at 120. Potestà cites *Thunderbird v United Mexican States*, NAFTA/UNCITRAL, Award (26 January 2006) paras 151–9, and *Chemtura v Canada*, NAFTA/UNCITRAL, Award (2 August 2010) para 179.

<sup>94</sup> Potestà, *ibid.* at 121.

<sup>95</sup> *Ibid.*, at 122.

\*. The compromise of embedded liberalism denotes a reconciliation of market and society in which “practices of domestic interventionism would tame socially disruptive effects of markets without, however, eliminating welfare and efficiency gains derived from cross-country trade.”<sup>96</sup> In the ascendant as mode of Western political and economic thought from 1945 to approximately 1980, embedded liberalism regarded national societies as sharing in the risks of economic development through a variety of safeguards, subsidies and insurance schemes taking the shape of the welfare state. Its core principle “is the need to legitimize international markets by reconciling them to social values and shared institutional practices.”<sup>97</sup>

\*. To fulfill this principle, there is implied a:

... need to bridge gaps in the governance of firms that produce, buy, and sell around the world, firms whose rights have in effect in the recent era of globalization outstripped the global frameworks that should regulate them. This principle further implies the need to balance, both domestically and internationally, the benefits of internationalized financial markets with their substantial risks; to share the rewards and costs of the disruptions created by internationalized markets across national societies; and to ensure that global governance is based on multilateral deliberation among countries whose leaders believe that the influence of their voices reflects their place in a multipolar—or at least “nonpolar”—world.<sup>98</sup>

\*. I have pointed out that stability is perhaps the prime instrumental requirement of any legal system. It is a precondition to the achievement of almost anything else. It gives rise to expectations. For this reason it is not irrelevant to embedded liberalism. Indeed, much of the angst detected in many parts of the world since the Great Recession of 2008 can be directly tied to the current era’s lack of stability and to the inability of actors to project or expect within it. Since the advent of neoliberalism, there has been a steady increase in middle-class anxiety about the transformative effects of globalization. Whereas agricultural and blue-collar jobs were once made redundant by neoliberal and hyper-capital policies, now the same phenomenon is happening to white-collar and professional workers.<sup>99</sup> In short, much of the contemporary *zeitgeist* can be linked to a nostalgia for security and predictability.

\*. Still, on careful reflection, what becomes apparent is the fact that stability on its own is insufficient as the singular goal of a legal system. A legal system must accommodate both stasis and change. As such, stability must be matched by flexibility and by the ability of actors within a legal system to respond transformatively to ever-evolving conditions. What is perhaps most important is that actors have tools to be able to do so, hence renewed calls for lifelong learning and threshold minimum salaries.<sup>100</sup> Simply put, participants must be enabled. This is not a return to embedded liberalism *tout simple*, but instead, something akin to Amartya Sen’s “capabilities approach”, wherein each actor is given the opportunity to meaningfully achieve for themselves.<sup>101</sup>

\*. Within this accommodative process, however, expectations remain relevant. That is because change in a legal system needs to be controlled and control itself is subject to expectations. When a legal system embodies change, it does so by positing rules that depart from the norm. In this, it is likely to possess several key characteristics. First, because of the need to embody departures and flexibilities, change is often a law of *rights*, a law that “confer[s] on the right holder the benefit, the protection, the assurance, the individuality of

<sup>96</sup> Rawi Abdelal & John G. Ruggie, “The Principles of Embedded Liberalism: Social Legitimacy and Global Capitalism” 151 at 153 in David Moss & John Cisternino, *New Perspectives on Regulation* (2009).

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*, pp. 153-154.

<sup>99</sup> Ekkehard Ernst, “The Shrinking Middle” 52:1 *Finance & Development* 20 (March 2015).

<sup>100</sup> Prakash Lougani, “Jobs, Jobs, Jobs” 52:1 *Finance & Development* 6 (March 2015).

<sup>101</sup> Amartya Sen, *Commodities and Capabilities* (1985). The capabilities approach is an economic theory conceived in the 1980s by Amartya Sen as an alternative approach to welfare economics. In it, Sen brought together a range of ideas that were previously excluded from (or inadequately formulated in) traditional approaches to the economics of welfare. The core focus of the capability approach is on what individuals are able to do. It inspired creation of the UN’s Human Development Index, a popular measure of human development, capturing capabilities in health, education, and income.

the law.”<sup>102</sup> It has been said that “rights may protect certain willing and acting but they protect *only that area* willing and acting.”<sup>103</sup> This is where expectations are most pertinent since “the limits of a right amount to a peripheral duty ... not to exceed those limits.”<sup>104</sup>

\*. Second, change is also – perhaps counterintuitively - a law of the *past*. That is because the departures and flexibilities just mentioned must be measured against something, typically some prior condition. By necessity, a legal system’s attempt to embody change is calibrated to the degree of change foreseen, but as assessed on existing conditions. Where, for instance, a change is accommodated in the law it must be proportionate.

\*. Third, change involves *fairness*. Fairness bears many meanings but its most common connotation is one of appropriateness.<sup>105</sup> A fair determination is what is appropriate in the circumstances. This is to be distinguished from what is equal.

\*. Fourth, change is necessarily individualized. In its stress on particular and incremental change, a legal system necessarily looks ‘*contractual*’. A contract is chiefly distinguished from other sources of legal obligation by the way that it embodies what is voluntary. It serves as a law of agreement. A contract is an accord among parties which binds their relations *inter se* and does not, generally speaking, have consequences for parties beyond it.<sup>106</sup>

\*. Fifth, in being a law of rights, of the past and of contract, change is frequently linked to *inductive logic*.<sup>107</sup> In other words, it demands proof. An inductive rule is subtly retrospective and real. It rests on the way the world is, or perhaps more accurately *was*, since the present can only be measured by reference to facts ascertained as part of a constantly elapsing past.

\*. What sorts of examples can be accessed to confirm these ideas? WTO law offers several examples, most notably in the ‘rules’ disciplines of safeguards, anti-dumping and countervailing duties. All of these provide an illustration of what has been outlined above. A fundamental idea behind GATT, and later the WTO Agreement, was that liberalized trade would be tempered by adjustments that took account of real conditions. As the original American proposal for an International Trade Organization noted, no country was willing to “embrace “free trade” in any absolute sense”. Instead, the best that could be hoped for were “rules and principles with which the restrictions permitted to remain should be administered.”<sup>108</sup>

\*. GATT negotiators therefore developed a series of disciplines that attempted to take account of conditions not only as they were *prospectively expected*, but as they were *actually encountered*. Rules appear in GATT and the WTO Agreement that allow governments to respond to certain realities through the exercise of rights. Thus, they are allowed to impose safeguards where serious injury, effect and causation can be proven, or anti-dumping or countervailing duties where material injury, effect and causation can be proven. What is important to note is the way that this exercise of rights is conditional. Countries must meet certain requirements in order to exercise the right in question. Inevitably, this creates expectations.

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<sup>102</sup> Philip Allott, *Eunomia* 160 (1990).

<sup>103</sup> *Ibid.* [italics in original].

<sup>104</sup> *Ibid.* at p. 162.

<sup>105</sup> “Fair ... [f]ree from bias, fraud or injustice; equitable, legitimate.” J.A. Simpson & E.S.C. Weiner, *The Oxford English Dictionary – Vol. V* (2<sup>nd</sup> ed.) 671 (1989). Legal dictionaries offer a slightly different definitions. “Fair means ... 1. impartial; just; equitable; disinterested; 2. Free from bias or prejudice ...”. *Blacks Law Dictionary* (9<sup>th</sup> ed.) 674 (Brian Garner, ed.); “Fair means ... reasonable”, Daphne Dukelow, *The Dictionary of Canadian Law* (4<sup>th</sup> ed.) 474 (2011). A commitment to fairness is a community’s pledge that the community will be attentive to an individual’s particular concerns, needs or wants. In effect, the pledge is one of ‘appropriateness’ that helps to secure an individual’s participation in communal arrangements. See Joseph Henrich’s definition of fairness as “whatever combination of motivations and expectations yields *more equal divisions*.” Joseph Henrich et al., “Markets, Religion, Community Size, and the Evolution of Fairness and Punishment”, 327 *Science* 1483 (19 March 2010) (emphasis added).

<sup>106</sup> Charles Fried, *Contract as Promise* 6 (1981).

<sup>107</sup> J.S. Covington, Jr., *The Structure of Legal Argument and Proof* 4 (1993)

<sup>108</sup> See “Statement by President Truman and Prime Minister Attlee” (Dec. 6, 1945), reprinted in XII *Department of State Bulletin* 905, 915 (Dec. 9, 1945).

\*. At the same time, what also becomes evident in scrutinizing the rules disciplines is the way that they are fundamentally anchored in the past. The law looks backwards at a determination already issued by a national investigating authority. Naturally, the constrained temporal frame of relevance allows the law to be more specific and precise. Things are ‘fixed’. The relevant disciplines are heavily marked by the desire to quantify. Thus, SAF Art. 4.1(b) specifies that “... the existence of a threat of serious injury shall be based on *facts* and not merely on allegations, conjecture or remote possibility”. In *U.S. – Lamb*, for instance, the Appellate Body noted that in conducting their evaluation “whether increased imports have caused or are threatening to cause serious injury” under SAF Art. 4.2(a), “competent authorities cannot rely exclusively on *data* from the most recent past, but must assess that *data* in the context of the *data* for the entire investigative period.”<sup>109</sup> Similar empiric requirements are found in the ADA and SCM.<sup>110</sup>

\*. There is also the matter of fairness. Fairness is a matter of what is ‘appropriate’, as opposed strictly speaking to what is equal. There are some preliminary indications that the standard under SAF is equality. For example, SAF Art. 5.1 provides that a WTO “Member shall apply safeguard measures *only to the extent* necessary to prevent or remedy serious injury and to facilitate adjustment.” At the same time, there are other indications inferring that the amount of trade affected by the safeguard may be what is fitting or suitable. For instance, SAF Art. 8.3 provides that the right of retaliatory suspension by a responding member is not to be exercised for the first three years that a safeguard measure is in effect. There is, therefore, a kind of ‘discount’ implicit in safeguard action that applies in recognition of the fact that countries imposing a safeguard may have no alternative when applying them. What is critical is that the underlying metric is not one of equality, but of fairness.

\*. The SAF may also be described as a law of contract in the sense that it is chiefly bilateral. One country imposes safeguards against imports from another country. Again, the SAF itself appears to contradict this, at least superficially, in that SAF Art. 2.2 provides “Safeguard measures shall be applied to a product being imported *irrespective of its source*.” Yet SAF Art. 5.2(b) also envisages situations where WTO members may depart from this requirement where imports from certain members have increased in disproportionate percentage, where justification is provided, and where conditions of such departure are “equitable” to all suppliers of the product concerned. Many applications of safeguards, in fact, have been applied bilaterally and therefore, in some sense, contractually.

\*. Finally, there is the issue of inductive logic as the dominant form of logic under the SAF. Perhaps the high-water mark of inductive logic in WTO law occurs in relation to the question of non-attribution. In such instances, national authorities are obligated not attribute injury to imports that cannot be so attributed. For example, SAF Art. 4.2(a) specifies that “[i]n the investigation to determine whether increased imports have caused or are threatening to cause serious injury to a domestic industry ... the competent authorities shall evaluate all relevant factors of *an objective and quantifiable nature* ...”. A debate has ensued in case law as to whether the causation test is satisfied only when increased imports, considered in isolation, are causing injury, or when they merely make “a contribution” toward factors causing injury. In *U.S. – Wheat Gluten* the Appellate Body took an intermediate position, holding that there must be “a genuine and substantial relationship”<sup>111</sup> between increased imports and injurious effects. This issue is inevitably resolved by recourse to metrics.

\*. All of the above characteristics – rights, pastness, fairness, contract and induction - are evident in a law of change and departure from the norm. As demonstrated, this law is also marked by the generation of expectations. In fact, it can be said that all of the requirements outlined above depend implicitly on their nature

<sup>109</sup> *U.S. – Lamb*, WT/DS177, 178/AB/R, para. 137 (1 May 2001).

<sup>110</sup> Thus, for instance, in ADA 3.7 it is noted that “a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility.” Identical wording appears in SCM Art. 15.7. For discussion in the standard in case law see *U.S. – Hot Rolled*, WT/DS184/AB/R, para. 192 (24 July 2001), *Thailand – H Beams*, WT/DS122/R, para. 7.143 (28 Sept. 2000) (defining “positive evidence” as “formally or explicitly stated; definite, unquestionable (*positive proof*)” [emphasis in original]. Particularism is also noted in the standard of “special care” required by SCM Art. 15.8. See *U.S. – ITC Lumber*, WT/DS277/R, para. 7.33 (22 March 2004).

<sup>111</sup> WT/DS166/AB/R, para. 69 (22 Dec. 2000).

as expectation-based. This points to the fact that whether a renewed or revised embedded liberalism will require either obligations or rights, it will have to grapple with expectations.

## 6. Conclusion

\*. What I have attempted to do in this contribution is to identify why expectations bear different treatment in different systems of international economic law and why so much controversy attends them. Differential treatment of expectations in different domains of law is emblematic of the fact that they are hard to assimilate. As such, they involve the unknown. Their treatment vests substantial discretion in the hands of decision-makers.

\*. In WTO law their relevance has been circumscribed by deft decision-making which has disclaimed any relevance for individual expectations, at least as a matter of pleading, apart from the rare instance of a non-violation case. In international investment law, by contrast, legitimate expectations continue to be asserted as “the most far-reaching element”<sup>112</sup> of the much-pleaded FET standard, much to the annoyance and dismay of a number of commentators. As I have pointed out, expectations are difficult to completely reconcile with the traditional sources, structure and substance of international law.

\*. Yet it seems implausible that the idea of legitimate expectations will be completely effaced or disappear, as some critics have argued. My point is that expectations are a vital part of any legal system. They are part of every legal rule and need to be acknowledged as such. They resurface again and again. We also treat them on two levels: one at the level of subjective commitments, the other as part of objective legal rules. Perhaps all that can be hoped for is a gradual refinement of their treatment as a matter of interpretation. In WTO law this refinement has already taken place. They have been effectively read-out of the treaty. In a number of instances in international investment law, however, the refinement continues.

\*. When it comes to the relevance of a doctrine of legitimate expectations for the embedded liberalism compromise, I have suggested that expectations are part and parcel of any legal system that must accommodate both stasis and change. In the case of WTO law, I have endeavored to show how rules disciplines are primarily a law of rights, of the past, of fairness, contract and induction, and how in so being, they also give rise to expectations. Their example reveals how incremental decision-making inevitably converges on the protection of expectations. Any reintroduction of embedded liberalism will have to take this tendency to protect expectations into account.

\*. In sum, reasonable or legitimate expectations are important because stability is valued in the law. Stability and predictability is what actors in a legal system are entitled to *expect*. In this sense, there is a discernible link between the key ideas examined in this contribution, ideas which interrelate, as Anne Peters has observed, “like stones in a house or pieces of a puzzle.”<sup>113</sup> Their interconnections are indicative of a system of ideas, or in other words, a theory.

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<sup>112</sup> Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* 251 (2013).

<sup>113</sup> Anne Peters, “Realizing Utopia as a Scholarly Endeavour” 24:2 *E.J.I.L.* 533, 536 (2013).