

LEGITIMATE EXPECTATIONS IN INVESTMENT ARBITRATION: AT THE END OF ITS LIFE-CYCLE?

*Nikhil Teggi**

Abstract

The doctrine of legitimate expectations has become a central element of the fair and equitable standard. However, the author argues that the use of the doctrine of legitimate expectations by investment tribunals is erroneous and unnecessary. In order to do so, the author analyses the roots and scope of the doctrine, the manner in which it has been expanded upon by tribunals and the manner in which States have responded to this arbitral innovation. The article concludes with the argument that the use of the doctrine of legitimate expectations is perhaps bound for a decline.

INTRODUCTION

The doctrine of legitimate expectations as an element of the Fair and Equitable [“FET”] standard is of relatively recent origin, finding its roots in arbitral awards rendered in the last 16 years. However, during this period, it has become such an integral part of FET¹ that a majority of awards examining FET breach have also analysed the alleged breach / violation of investor’s legitimate expectations,² perhaps to the effect of legitimate expectations becoming a ‘supple way of providing a remedy’, as was argued by Thomas Wälde in his separate opinion in the *Thunderbird*³ case.

Investors have been successful in persuading tribunals to find breaches of investor’s legitimate expectations in a broad array of circumstances, basing State liability on characteristics of State conduct regardless of the extent of interference with investor rights.⁴ For instance, tribunals have interpreted investors’ legitimate expectations as arising from conduct of the State,⁵ from specific

* B.A.LL.B. (Hons.) (NUALS, Kochi), LL.M. (IBL) (NUS, Singapore). Mr. Teggi recently finished his Master’s in International Business Law, prior to which he was practicing in India as a legal advisor to start-up businesses.

¹ See for instance *Saluka Investments B.V. (The Netherlands) v. The Czech Republic*, Partial Award, ¶ 305 (Mar. 17, 2006) IIC 567 (2012), describing legitimate expectations as the “dominant element” of FET. See also *Electrabel S.A v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, at 7.75 (Nov. 30, 2012) IIC 567 (2012).

² JONATHAN BONNITCHA, SUBSTANTIVE PROTECTION UNDER INVESTMENT TREATIES: A LEGAL AND ECONOMIC ANALYSIS 168, (2014); See also M. Potesta, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and Limits of a Controversial Concept*, 28 ICSID REV. (2013), at 88.

³ *International Thunderbird Gaming Corporation v. The United Mexican States*, Separate Opinion (Dissent in Part) by Professor Thomas Wälde, ¶ 37 (Jan. 26, 2006). He went to on to state “[...] ‘legitimate expectation’ has become for tribunals a preferred way of providing protection to claimants in situations where the tests for ‘regulatory taking’ appear too difficult, complex and too easily assailable for reliance on a measure of subjective judgement.”

⁴ JONATHAN BONNITCHA, *supra* note 2, at 168.

⁵ *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, ¶¶ 147, 196 (Jan. 26, 2006).

enforceable contractual rights,⁶ and including stability of the legal framework,⁷ regardless of whether the State made such representations to the investor.

However, the use of legitimate expectations in assessing a violation of the FET standard is not without its problems⁸ and has been subject to significant criticism.⁹

In this article, the author argues that reliance by investment tribunals on the doctrine of legitimate expectations is not grounded in acceptable principles of law, is misplaced, and is unnecessary for protection of investors' rights when such rights are pitted against the State's right to regulate.

This is done in four parts. In Part I, the author attempts to outline the origins of the doctrine of legitimate expectations as understood in investment treaty arbitration and goes on to analyse popular theories advanced in its support. In Part II, the author examines the reliance by investment tribunals on the doctrine of legitimate expectations as an element of the FET standard, with a focus on its changing contours, in an attempt to highlight the vague character of the doctrine. Part III contains an examination of recent State actions with regard to the doctrine of legitimate expectations and FET, and its reconciliation with the discussion in the article. The author then concludes in Part IV, arguing that the principle of legitimate expectations is perhaps on its last leg.

I. Origin / Roots of the Doctrine of Legitimate expectations in investment arbitration

If one were to trace the origin of the doctrine of legitimate expectations under the FET standard in investment arbitration, a starting point could be the observations of the tribunal in *Metalclad v. Mexico*, hinting at legitimate expectations where an investor was 'led to believe and did believe',¹⁰ where the investor had been told 'that the permit would be granted', subsequent action against

⁶ LG&E Energy Corp., LG&E Capital Corp., LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 130 (Oct. 3, 2006) 43 I.L.M. 133 (2004) [hereinafter "*LG&E v. Argentina*"].

⁷ Tecnicas Medioambientales Tecmed S.A. v. Mexico, ICSID Case No. ARB (AF)/00/2, Award, ¶ 154 (May 29, 2003) 43 I.L.M. 133 (2004). [hereinafter "*Tecmed v. Mexico*"]; See also CAROLINE HENCKELS, PROPORTIONALITY AND DEFERENCE IN INVESTOR-STATE ARBITRATION – BALANCING INVESTMENT PROTECTION AND REGULATORY AUTONOMY 72 (2015).

⁸ See, the tribunal's discussion in Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award, ¶¶ 533-534 (Apr. 8, 2013).

⁹ Teerawat Wong Kaew, *The Transplantation of Legitimate Expectations in Investment Treaty Arbitration – A critique*, in THE ROLE OF THE STATE IN INVESTOR-STATE ARBITRATION 70 (Shaheez Lalani & Rodrigo Palanco eds., 2014).

¹⁰ *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award, ¶ 85 (Aug. 25, 2000) 5 ICSID Rep 212 (2002) [hereinafter "*Metalclad v. Mexico*"].

the belief breached the FET standard.¹¹ In *CME v. Czech Republic*, the tribunal was of the view that ‘evisceration’ of arrangements relied upon by investors breached the FET standard.¹²

However, it was the tribunal in *Tecmed v. Mexico* that referred, for the first time, to the protection of an investor’s expectations in general terms,¹³ observing that the FET standard, ‘in light of the good faith principle established by international law’ requires treatment ‘that does not affect the basic expectations that were taken into account by the foreign investor to make the investment’.¹⁴ It went on to state:

“The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, 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 [...]”¹⁵

The use of such broad and far-reaching grounds has come under criticism from various sources¹⁶ and the reliance of the tribunal on the principles of good faith is erroneous, as shall be argued in the subsequent paragraphs. Nonetheless, a similar approach was adopted by the tribunal in *Total v. Argentina*,¹⁷ and generally “set a trend for subsequent tribunals to include the element of the investor’s legitimate expectations as one of the main components of fair and equitable treatment”.¹⁸ Arguably, once an arbitral tribunal creates a new body of jurisprudence, as is with the doctrine of legitimate expectations, the legal reasoning set forth is adopted by subsequent tribunals.¹⁹

The juridical roots of the doctrine, however, are fragmented, ambiguous and subject to serious criticism, necessitating an examination of the various arguments advanced by arbitral tribunals to justify the import of the doctrine of legitimate expectations in investment arbitration.

¹¹ *Id.* ¶¶ 88, 89.

¹² *CME Czech Republic B.V. v The Czech Republic*, Partial Award, ¶ 611 (Sep. 13, 2001) 9 ICSID Rep 121 (2002).

¹³ JONATHAN BONNITCHA, *supra* note 2, at 167.

¹⁴ *Tecmed v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award, ¶ 154, (May 29, 2003) 43 I.L.M. 133 (2004).

¹⁵ *Id.*

¹⁶ *See* MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, ICSID Case No. ARB/01/7, Decision on Annulment, ¶ 67 (Mar. 21, 2007); *Saluka Investments BV (The Netherlands) v. The Czech Republic*, Partial Award, ¶ 304 (Mar. 17, 2006); *See also* M. Potestà, *supra* note 2, at 100.

¹⁷ *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, ¶ 128 (Dec. 27, 2010) [hereinafter “*Total v. Argentina*”].

¹⁸ K.Y. Small, *Fair and Equitable Treatment Standard: Recent Developments*, in STANDARDS OF INVESTMENT PROTECTION 122 (August Reinisch ed., 2008).

¹⁹ Trevor Zeyl, *Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law*, (2011) 49(1) *Alberta L. Rev* 203, at 203.

A. Good faith

One of the primary arguments that may be made for using the doctrine of good faith to protect an investor's interests would be to invoke a State's ability to bind itself by a unilateral act, basing the argument on the *Nuclear Tests*²⁰ case. Under international law, a State may, as an exercise of its sovereign functions, bind itself by unilateral representations to investors. However, this argument would not serve any purpose as the breach of such unilateral act would result in a separate obligation under international law, and not one arising from a breach of the FET standard. Further, a State may only be so bound when the representation / unilateral act comes from a source that may represent the State in international affairs, with the intent of binding it.

An extension of this argument is attribution of responsibility to the State for the actions of its representatives, say, that of a minister. Investors and tribunals place reliance on the International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts [the "**ILC articles**"] to hold States liable for representations or acts of State agents. However, this argument has been questioned as lacking basis, in part due to the ILC articles only applying for internationally wrongful acts,²¹ thereby pre-supposing that the State act is internationally wrongful, a criteria not usually met when it comes to breach of investor expectations. Another argument regarding good faith would be to state that the doctrine of legitimate expectations establishes a sort of estoppel. However, the principle of estoppel does not play any role in investor-state relations, being as it is, a creature of domestic legal systems created to prevent a party from taking unfair advantage of another when the parties take part in the formulation of inter-party obligations.²² This would not be the case as far as State obligations to investors are concerned, grounded as they are in treaties and general principles of law, with no participation from the investor.²³

If the estoppel arises as a result of contractual obligations, a scenario where the parties may arguably be on an equal footing, any action that disturbs the obligations may be a breach of the contract. If such an action is performed by the State in its sovereign capacity, the legitimacy of an

²⁰ *Nuclear Tests (Australia v. France)*, [1974] ICJ Rep. 253, ¶ 47.

²¹ Articles on Responsibility of States for Internationally Wrongful Acts, art. 2, art. 3, Aug. 3. 2001, U.N. Doc. A/56/83 (2001).

²² For a detailed analysis of the application of doctrine of good faith with respect to fair and equitable standard in general, and legitimate expectations in particular, see Martin Paparinskis, *Good Faith and Fair and Equitable Treatment in International Investment Law*, in GOOD FAITH AND INTERNATIONAL ECONOMIC LAW, (Andrew Mitchell et al eds., 2015) [hereinafter "*Paparinskis, Good Faith*"]; See also MARTIN PAPARINSKIS, THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT 251-259 (2013), available at <http://www.oxfordscholarship.com.libproxy1.nus.edu.sg/view/10.1093/acprof:oso/9780199694501.001.0001/acprof-9780199694501-chapter-9> [hereinafter "*PAPARINSKIS, MINIMUM STANDARD*"].

²³ *Id.*

expectation of continuation of the obligations would have to be determined in the manner set forth earlier.

Incidentally, Paparinskis, in examining the interrelationship of good faith and the FET standard, argues that the development of the FET standard is “*much better served by elaboration of particular elements of good or bad faith in arbitrariness and its particular applications – discrimination, due process, and transparency*”.²⁴ This argument appears to reflect the crux of recent State contributions to the development of the FET standard as will be argued in the third part.

B. General principles of law

Another method to explain the roots of legitimate expectations in investment arbitration is that it allegedly forms a part of general principles of law as a supposed result of similarities in domestic legal principles. The argument at play is that as part of ‘general principles of law’, it is recognised by Article 38(1)(c) of the Statute of the International Court of Justice, and hence renders itself to application by arbitral tribunals.²⁵

It would be useful to note here the observations of the tribunal in *Gold Reserve v. Venezuela* on the sources of legitimate expectations to be found in a comparative analysis of domestic legal systems:

“[...] the concept of [legitimate] expectations is found in different legal traditions according to which some expectations may be reasonably or legitimately created for a private person by the constant behaviour and/or promises of its legal partner, in particular when this partner is the public administration on which this private person is dependent [...]”²⁶

The tribunal then went on to analyse the German principle of *Vertrauensschutz* (protection of trust) and its influence on the development of the European Union law, the French legal system’s concept of *confiance légitime*, and the recognition of substantive principles of protection of legitimate expectations in English law.²⁷

²⁴ See Paparinskis, *Good Faith*, *supra* note 22, at 171.

²⁵ Specifically, International Convention for the Settlement of Investment Disputes (ICSID) tribunals are required to apply ‘such rules of international law as may be applicable’ unless otherwise agreed to by the parties, vide Article 55 of the Arbitration (Additional Facility) Rules.

²⁶ *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB (AF)/09/1), Award, ¶ 576 (Sep. 22, 2014); *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, ¶¶ 128-130 (Dec. 27, 2010).

²⁷ *Id.*

Even if one were to take this comparative review at face value, an argument could be made that they do not necessarily address the legal systems of States such as China, Russia and India,²⁸ which are significant players in the international investment scene. A related argument would be that undertaking of internationalisation of domestic principles of only certain States must be done with caution, with due regard to the historical normative backlash that arose when a not dissimilar undertaking was carried out in the past century.²⁹

A further argument would be that even if one were to undertake such a comparative review, the answer may not be as straightforward as concluded by the *Gold Reserve v. Venezuela* tribunal. Even if the doctrine is broadly accepted as a principle operating at a domestic level, the various limitations on its operation must be taken into account, especially given that such limitations may not lend themselves to transposition so easily.³⁰ For instance, in many domestic legal systems where the doctrine of legitimate expectation is recognised, the protection provided by the doctrine would not be a substantive right, but would only be a procedural one, subject as it is to State right to regulate in public interest. Common law systems of the United Kingdom, Australia and Canada, while accepting the doctrine of legitimate expectation, limit the application to procedural protection and not a substantive expectation.

In the United Kingdom, while the Court of Appeal in *R v. North and East Devon Health Authority, ex parte Coughlan* upheld substantive legitimate expectation,³¹ the proposition has subsequently received qualifications that highlight the doctrine of deference. For instance, in *R (Bhatt Murphy) v. Independent Assessor*, the Court recognised substantive legitimate expectation arising from specific undertakings directed at the investor,³² subject to a principle of deference to the State's public authorities.³³

²⁸ Paparinskis, *Good Faith*, *supra* note 22, at 170.

²⁹ Towards the start of the 20th century, notable awards were rendered such as in the *L.F.H Neer and Pauline Neer v United Mexican States* and the *Norwegian Shipowners Claims Tribunal* case that essentially internationalised American constitutional protections on property. This in turn led academicians to undertake an examination of various domestic legal systems to decipher an international standard for expropriation – an attempt that proved futile. For further discussion, see PAPARINSKIS, MINIMUM STANDARD, *supra* note 22, at 60, 173, 255; Further, a lack of general and consistent State practice on the subject of expropriation may be observed from United Nations General Assembly Resolutions 1803 and 3281 where a number of traditionally capital importing states stressed the sovereign right to expropriate upon payment of appropriate compensation, mindful of all circumstances the State deems pertinent. This was a radical departure from the 'Hull doctrine' of full adequate and prompt compensation propounded by the United States of America and other capital exporting states.

³⁰ For instance, see the observations of the tribunal in *Total v. Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, ¶ 130 (Dec. 27, 2010).

³¹ See [2001] QB 213 (CA) ¶ 57 (U.K.).

³² [2008] EWCA Civ. 755 at ¶ 43 (U.K.).

³³ *Id.* at ¶ 62.

In Canada, the Courts have generally followed their counterparts in the United Kingdom, recognising procedural rights upon a legitimate expectation but denying rights of substantive review. Pre-*Coughlan*, the Supreme Court of Canada observed a lack of authorities in English and Canadian laws that supported substantive rights being created by legitimate expectations.³⁴ Post *Coughlan*, the Court clearly departed from the position adopted by the English Courts, choosing to recognise only procedural protections.³⁵

In Australia, the Courts have examined the principle laid down in *Coughlan* and have ruled deference to be the prevailing standard, in line with the Australian Constitution that does not allow the judiciary to impose upon the executive its ideas of good administration.³⁶

In other words, in these common law jurisdictions, the doctrine limits the power of courts to review the manner in which administrative decisions have been made and does not authorise an examination of the content of the decision itself.³⁷ However, arbitral tribunals have, through a comparative approach, interpreted the doctrine to be a part of the general principles of law and as providing substantive protections. Hence, the transposition of the doctrine, even if taken at face value, does not account for limitations on the doctrine that may be found in the domestic laws.

Thus, there is considerable confusion regarding the roots of legitimate expectations and the manner in which tribunals have attempted to transplant this arbitral innovation into international investment law. A further complication is added by the ambiguity of content of the doctrine and the manner in which the scope of the doctrine has been expanded and read down by arbitral tribunals over the years.

II. Legitimate Expectations in Investment Arbitration – Expansion and Scope

It was not until the year 2006 that the term ‘legitimate expectations’ was used in the FET context by the tribunal in *Thunderbird*. Since then, various tribunals have heard and rendered awards that have both broadened and limited the scope of the doctrine, and it becomes useful to observe the various expectations tribunals have held as being legitimate and part of the FET standard.

³⁴ *Reference Re Canada Assistance Plan (BC)* [1991] 2 S.C.R. 525, 557-58 (Canada).

³⁵ *See Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 S.C.R. 281, ¶ 61 (Canada); *See also Trevor Zeyl, supra* note 19 at 214.

³⁶ *See Trevor Zeyl, supra* note 19 at 215.

³⁷ *Id.* at 205. However, a contrary view has been adopted by many jurists. *See M Potestà, supra* note 2.

A. Specific Rights / Expectations

In its narrowest interpretation, the doctrine of legitimate expectations can be stated to arise only when the investor relies on certain specific legal or enforceable rights.³⁸ Such rights may have been obtained by the investor pursuant to negotiations with the State or by virtue of some State action pre-dating the investment such as announcement of relevant public policy or enactment of certain legislation that was relied upon by the investor. Such reliance must have been reasonable and the investor should have been deprived of such right by a unilateral and arbitrary State action. The question of whether the reliance was reasonable is a subjective one and requires an examination of various factors.

The *LG&E* tribunal observed, placing reliance on *Tecmed*, that an investor's fair expectations "[...] must exist and be enforceable by law; [...] however, the investor's fair expectations cannot fail to consider parameters such as business risk or industry's regular patterns".³⁹ The tribunal held a tariff regime (linking the Argentine gas distribution tariffs to the US Producer Price Index) to be more than an economic policy and to be a set of rights guaranteed by the State. For an expectation to meet the criteria put forth by the *LG&E* tribunal, it must exist and be enforceable in accordance with the governing law elected by the parties or the domestic laws of the host state. Furthermore, such an expectation must be 'fair', with such analysis including a discussion on business risks and industry patterns.⁴⁰

In *MCI v. Ecuador*, the tribunal rejected protection of mere assumptions that formed the basis of investment,⁴¹ observing that legitimacy of the expectation depended not only on the intent of the parties, but also 'on certainty about the contents of the *enforceable obligations*'.⁴²

Metalpar v. Argentina saw the investor claiming a breach of its legitimate expectations as a result of steps taken during the Argentine financial crisis. The tribunal examined other awards arising out of the crisis, distinguished the claimant from other investors in as much the claimant having had 'no bid, license, permit or contract of any kind'⁴³ and thus, refused to hold its expectations as legitimate.

³⁸ JONATHAN BONNITCHA, *supra* note 4 at 70.

³⁹ *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 130 (Oct. 3, 2006) 43 I.L.M. 133 (2004) (emphasis added).

⁴⁰ See JONATHAN BONNITCHA, *supra* note 4 at 172 for further analysis on this subject.

⁴¹ *MCI Power Group v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, ¶ 237 (Jul. 31, 2007).

⁴² *Id.* ¶ 278.

⁴³ *Metalpar v. The Argentine Republic*, ICSID Case No. ARB/03/5, Award on the Merits, ¶ 186 (Jun. 6, 2008).

In *David Minnotte v. Poland*, the tribunal observed that it must make a decision on breach of legitimate expectations on the basis of the evidence before it, and that *specific expectations had to be specifically created and proved*.⁴⁴

These awards tend to suggest that an expectation may only be legitimate if it is premised upon a fair pre-existing or specific expectation with regard to a specific right or set of rights that must be analysed objectively, in light of the business conditions and such other factors, and must have been reasonably relied upon by the investor.⁴⁵

It is submitted that regardless of whether the right in question was a result of negotiations or reliance on pre-existing conditions, an arbitrary deprivation of such right would in any event be a breach of the minimum standard of treatment under customary international law, the most basic of obligations that may be stated to be observed generally and consistently by States. In essence, it is argued that such arbitrary deprivation would be against the principles of due process or non-discrimination and would therefore run afoul of treaty obligations. Furthermore, in the event such deprivation was not arbitrary and was general in nature, and no compensation was awarded by the State, such act would again be a breach of existing treaty obligations on States to not nationalise or expropriate investments.

Thus, it may be argued that breach of such specific expectations would be capable of redressal by arbitral tribunals, contingent on the terms of the treaty, without resorting to the doctrine of legitimate expectations.

B. Contractual Rights

Under international law, regardless of the failed attempts to internationalise government contracts, the breach of a contract does not, by itself, equate to a breach of treaty obligation. The Commentary to the ILC articles suggests that an additional element is required for a contractual breach to amount to breach of treaty obligations, such as denial of justice.⁴⁶

In *Consortium v. Morocco*, the tribunal was of the opinion that for a contractual breach to result in the violation of the FET standard under the applicable treaty, the breach must result from conduct exorbitant from the one which a regular contractor could have adopted'.⁴⁷ In line with

⁴⁴ David Minnotte & Robert Lewis v. Republic of Poland, ICSID Case No. ARB (AF)/10/1, Award, ¶ 193 (May 16, 2014) (emphasis added).

⁴⁵ JONATHAN BONNITCHA, *supra* note 4 at 175.

⁴⁶ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, November 2001, U.N. Doc. A/56/10, art. 4, Comment 6, 41.

⁴⁷ Consortium RFCC v. Kingdom of Morocco, ICSID Case No. ARB/00/6, Award, ¶ 51 (Dec. 22, 2003).

the *Consortium* award, the tribunal in *Impreglio v. Argentina* held that contractual breaches could amount to breach of treaty only if the host State exercised ‘sovereign power’⁴⁸ to breach the contract.

It is submitted that in the event the State were exercising such sovereign power to terminate an agreement, by virtue of an administrative act or otherwise, the investor would be deprived, logically, of the investment in question. Such a deprivation could then be argued to be an act of expropriation by the State, without resorting to the vague doctrine of legitimate expectations. In this regard, the three-pronged test propounded by the tribunal in *Vigotop v. Hungary*⁴⁹ to determine whether a contractual breach could amount to expropriation,⁵⁰ would lend itself as a viable structured alternative to the vague and arguably baseless doctrine of legitimate expectations.

C. State Representations

Investors have often relied on representations made by the State or its officers to allege a breach of legitimate expectations, claiming to have based the investment on such representations. The rationale usually put forward is that investors need to be protected from unilateral representations by States which may have influenced the decision to invest.

The tribunal in *White Industries v. India* had to determine whether reliance on representations made by Indian officials, that “it was safe [...] to invest in India and that the Indian legal system was, to all intents and purposes, the same as the Australian legal system”⁵¹ amounted to a legitimate expectation. Holding the statements to be suffering from vagueness and generality, the tribunal determined that a reliance on such statements would not give rise to reasonable legitimate expectations.⁵²

In *Total v. Argentina*, another award dealing with consequences of enactment of laws during the Argentine crisis, the tribunal observed that legitimate expectations could be based on

⁴⁸ *Impreglio v. The Argentina Republic*, ICSID Case No. ARB/07/17, Award, ¶ 296 (Jun. 21, 2011) [hereinafter “*Impreglio v. Argentina*”].

⁴⁹ *Vigotop Limited v. Hungary*, ICSID Case No ARB/11/22, Award, ¶ 329 (Oct. 1, 2014).

⁵⁰ The *Vigotop* tribunal, tasked with determining whether a contractual breach could amount to expropriation analysed various awards that preceded it and laid down a framework – 1. Did the State have public policy reasons for terminating the contract in question? If not, expropriation would not flow from such a breach. If yes, a second question needed asking. 2. Did the State have contractual reasons for termination? If not, it would be indicative of the contract being a pretext to cover a measure amounting to expropriation. If yes, a further analysis would be required. 3. Was the termination in exercise of the contractual right? In essence, a determination must be made if the termination was in good faith or was an abuse of the right in question. Taken together, this framework could assist a tribunal in determining if state conduct with respect to a contract could amount to expropriation.

⁵¹ *White Industries Australia Limited v. The Republic of India*, Final Award, ¶ 5.2.6 (Nov. 30, 2011).

⁵² *Id.* ¶ 10.3.17.

‘undertaking and representations made’⁵³ and ‘specifically addressed to a particular investor’.⁵⁴ The tribunal also recognised that the principle could not be construed as to stabilise the State’s legal system.⁵⁵

The tribunal in *Bayindir v. Pakistan* held that an expectation that the State, following a change in the government, would not exercise its rights to terminate a contract as a result of its defective performance, would not meet the criteria of being legitimate even if such expectations arose from the actions of a former head of State.⁵⁶

In *El Paso v. Argentina*, the tribunal decided that political statements by the President of the Republic could only be an economic inducement to invest and could not amount to legal guarantees.⁵⁷

The tribunal in *Frontier Petroleum v. Czech Republic* had to determine whether legitimate expectations were created as a result of (two) letters sent to the investor by the Czech Ministry of Industry and Trade indicating that the State retained the possibility of negotiating with the investor. The tribunal answered in the negative, holding that the statements did not generate the level of specificity required to establish legitimate expectations.⁵⁸ The tribunal also placed great reliance on the timing of when the expectation arose, as the statements were made after the investment by the claimant.

An analysis of these awards leads one to the conclusion that expectations of investors arising from representations, in order to qualify as legitimate, must meet rather high thresholds. The expectation must be a result of an identifiable legal commitment by the State to the investor and not merely arising from political statements.⁵⁹ Further, a determination of the legitimacy of the expectation cannot be made in isolation and must take into account various factors including public policy requirements.⁶⁰

⁵³ Total S.A. v. The Argentine Republic, ICSID Case No. ARB/04/01, Decision on Liability, ¶ 120 (Dec. 27, 2010).

⁵⁴ *Id.* ¶ 119.

⁵⁵ *Id.*

⁵⁶ Bayindir Insaat Turizm Ticaret VE Sanay A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, ¶ 197 (Aug. 27, 2009).

⁵⁷ El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award, ¶ 395 (Oct. 31, 2011) 21 ICSID Rev. 488.

⁵⁸ Frontier Petroleum Services Ltd. v. The Czech Republic, Award, ¶ 468 (Nov. 12, 2010) IIC 465 (2010).

⁵⁹ Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania, ICSID Case No. ARB/05/20, Separate Opinion of Georges Abi-Saab, ¶ 4 (Dec. 5, 2013) [hereinafter *Micula v. Romania*].

⁶⁰ Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, ¶ 340 (Aug. 18, 2008).

Thus, if upon an examination of all relevant factors, the State action is in breach of such an enforceable commitment and is unjust or arbitrary, such action would be in breach of express treaty obligations or the minimum standard of treatment under customary international law. In such circumstances, an arbitral tribunal may resort to other provisions of the treaty itself, without resorting to the doctrine of legitimate expectations. If, on the other hand, a State action is in breach of an enforceable commitment arising from an express representation directed at the investor, all other conditions being satisfied, such action could amount to expropriation. The investor would then have recourse to the anti-expropriation provisions in the treaty, again without resorting to the doctrine of legitimate expectations. An alternate argument would be that any action that breached a representation by the State would trigger responsibility under other standards such as full protection and security. For instance, a regulatory change that breaches an enforceable commitment arising from State representation (in a non-arbitrary and unjust manner) may run afoul of legal certainty that a guarantee of full protection and security entails.⁶¹

D. Stability

When trying to ascertain the contours of legitimate expectations arising from representations, it is inevitable that the question of stability of the legal / business framework must be tackled. Investors have argued that they are entitled to such stability and state actions that alter the legal framework would be in breach of its legitimate expectations. An analysis of select awards shows a departure from the strict-liability type stance adopted by the early tribunals, with recent tribunals stressing the need to balance the investor's expectations with the State's right to regulate so as to ensure that a regulatory-chill does not arise.

The starting point for an examination of this leg of legitimate expectations may be the *Occidental v. Ecuador* award, where the tribunal considered stability of the legal and business framework to be an essential part of the FET standard.⁶²

FET being a standard of conduct of the State, an investor has the expectation that the legal framework in existence at the time of investment will not be disregarded or applied in an arbitrary manner.

⁶¹ See for instance, the tribunal's observations in *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic II*, ICSID Case No. ARB/97/3, Award, ¶ 7.4.17 (Aug. 20, 2007).

⁶² *Occidental Exploration and Production Company v. The Republic of Ecuador (I)*, LCIA Case No. UN3467, Final Award, ¶ 183 (July 1, 2004) 43 I.L.M. 1248 (2004).

However, it is argued that in the absence of specific representation, a State cannot be expected to freeze its laws and regulations, and any analysis of the reasonableness of the expectation must take into account this underlying presumption.⁶³ Further, even if the representation were specific in nature, ‘a wilful disregard of the law or an arbitrary application of the same by the regulator constitutes a breach of the minimum standard, with *no need to resort to the doctrine of legitimate expectations*’ as observed by the tribunal in *Teco v. Guatemala*.⁶⁴

Reference must also be made to the *Saluka* award, where the tribunal observed that ‘in order to determine whether frustration of the foreign investor’s expectations was justified and reasonable, the *host State’s legitimate right subsequently to regulate domestic matters in the public interest* must be taken into consideration as well’.⁶⁵

In other words, it may be stated that tribunals require a public policy justification for changes made to laws, policies, or representations. It is submitted that if such justification is provided, the expectation of the investor with regard to stability of the legal framework would be fulfilled as the investor’s expectation must necessarily take the State’s right to regulate into consideration. If however, the State does not provide such justification, or merely provides one that is deemed unsatisfactory by the tribunal in question, the State may be stated to have acted in an arbitrary manner, abusing its sovereign rights. The question of the extent to which an arbitral tribunal may determine the necessity of the State action is however, subject matter of debate. For instance, a State may claim that such a determination is beyond the mandate of the arbitral tribunal, or that a sovereign right to regulate includes the right to take actions in response to changing circumstances, such as in the introduction of taxes upon windfall gains, which may be accepted by tribunals.⁶⁶

For our purposes, if the tribunal is authorised by the parties to make a determination in this regard and the tribunal concludes the State act to be arbitrary, such an act would constitute a breach of the minimum standard of treatment due to the investor under customary international

⁶³ *Micula v. Romania*, supra note 59.

⁶⁴ *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award, ¶ 621 (December 19, 2013) (emphasis added).

⁶⁵ *See Saluka Investments B.V. (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, ¶ 305 (Mar. 17, 2006), IIC 567 (2012) (describing legitimate expectations as the “dominant element” of FET). *See also Electrabel S.A v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 7.75 (Nov. 30, 2012), IIC 567 (2012).

⁶⁶ For instance in *Perenco Ecuador Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador*, ICSID Case No. ARB/08/6, Decision on Remaining issues of Jurisdiction and on Liability, (Sep. 12, 2014), the tribunal reiterated the right of a State to retain flexibility to respond to changing circumstances at ¶ 586. The tribunal held imposition of windfall taxes at 50% of the revenue derived by Perenco during an extraordinary increase in oil prices. However, it must be noted that the same tax at 99% was held to be in breach of the FET standard.

law. The investor shall then have recourse to the anti-nationalisation / expropriation provisions in the BIT relied upon, notwithstanding the general claim for breach of the minimum standard of treatment, or that of the breach of the FET standard as such.

E. Brief summation

In the preceding part, certain arbitral awards were analysed in an attempt to show the reader the broad contours the doctrine of legitimate expectations has attained in the short period it has been employed by arbitral tribunals. It is clarified that the selection of the awards in question was based on a few broad categorisations that were followed by the author with respect to the scope of legitimate expectations, namely, those arising from contractual rights, those arising from representations by the State or entities, and those arising from changes in the regulatory structure / legislative changes.⁶⁷

For the purposes of carrying forward the discussion, it is necessary to broadly summarise the position adopted by arbitral awards:

1. Legitimate expectations may arise from specific or enforceable legal rights grounded in the domestic law / governing law chosen by the parties.
2. Legitimate expectations may arise from representations made to investors or by conduct of the State if such expectations of the investor are reasonable, contingent on the manner in which representations were made, and the nature of the representation, which must be analysed against the rights of the State. As observed by Teerawat, the factors that may be pertinent include 'political, socioeconomic, cultural and historical conditions prevailing, political volatility, high regulatory risk, financial crisis, energy crisis and national shortage'.⁶⁸
3. Legitimate expectations may also arise from expectations relating to the nature of the legal framework, or the manner of interference with it. However, even if there is an express stabilisation clause or an express representation to the investor, the legitimacy of the expectation would be contingent on an examination of all the relevant circumstances including the State's right to regulate, and public policy considerations.

⁶⁷ It is pertinent to note that both Bonnitca and Potestà whose works have been referenced and relied on by the author in this article, follow, more or less, a similar structure. The former lists an additional category of legitimate expectations arising from business plans of the investor.

⁶⁸ Teerawat Wong Kaew, *supra* note 9 at 98 (with further citations).

It is submitted that such a broad interpretation of the doctrine has come about purely as a result of arbitral practice and was not in consideration of the States when the treaties were drafted. This in turn has led to a backlash of sorts by States, which shall be discussed in the next part.

III. Legitimate Expectations – Recent State Practice

Of late, there has been growing dissatisfaction with the existing international investment regime, particularly with its impact on the State's powers to pursue public interests and enhance sustainable development. There has been a push by States to ensure that treaty provisions are clear and detailed, and drafted after a thorough legal analysis of their actual and potential implications.⁶⁹ States have “entered into a phase of evaluating the costs and benefits of International Investment Agreements [“IIAs”] and reflecting on their future objectives and strategies as regards these treaties”.⁷⁰ The sheer scale of the change that is afoot may be inferred from the fact that at a minimum, 50 states or regions are currently revising or have recently revised their model IIAs.⁷¹ It is also pertinent to note that the Indian Model BIT adopted in 2015 does away with FET altogether, replacing it with protection against denial of justice, fundamental breach of due process, targeted discrimination and manifestly abusive treatment that constitutes a violation of customary international law.⁷² Furthermore, a clarification to the relevant article specifies that customary international law must be interpreted to mean a ‘*general and consistent practice*’ of States, followed from a sense of legal obligation. In line with the arguments made earlier, the doctrine of legitimate expectation would fail to meet such a criteria, given the disparity in its presence / substance in various domestic legal systems.

Given the widespread movement by States to reform their investment protection regimes, one may be forgiven for questioning how many of those States are responding to the presence and expansion of legitimate expectations under the FET standard as we have come to know, or affect the principle tribunals have transplanted and upheld with gusto. An analysis of the UNCTAD World Investment Report 2015 shows that of the eighteen IIAs concluded in 2014⁷³

⁶⁹ U.N. CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2015: REFORMING INTERNATIONAL INVESTMENT GOVERNANCE, at 12, U.N. SALES NO. E.15.II.D.5 (2015) [hereinafter “UNCTAD Report”].

⁷⁰ *Id.* at 124.

⁷¹ *Id.* at 108.

⁷² Article 3.1 of the Indian Model BIT specifies the level of protection afforded to an investor.

⁷³ This includes the Mexico–Panama FTA, Israel–Myanmar BIT, Treaty on Eurasian Economic Union, Japan–Kazakhstan BIT, Egypt–Mauritius BIT, Colombia–Turkey BIT, Colombia–France BIT, Canada–Serbia BIT, Canada–Senegal BIT, Canada–Nigeria BIT, Canada–Mali BIT, Canada–Republic of Korea FTA, Canada–Côte d’Ivoire BIT, Canada–Cameroon BIT, Australia–Republic of Korea FTA, Australia–Japan EPA, ASEAN–India Investment Agreement, and Additional Protocol to the Framework Agreement of the Pacific Alliance.

and whose texts are available, twelve⁷⁴ contain general exceptions, such as protection of human, animal or plant life, health or conservation of natural resources, and fourteen⁷⁵ have expressly linked the FET standard to the minimum standard of treatment of aliens under customary international law.⁷⁶ This is particularly of relevance as tribunals have interpreted that a wilful disregard of the law or its arbitrary application violates the FET standard without resorting to legitimate expectations.

Thus, an argument that correlates an expansion of the FET standard (including the introduction and expansion of the doctrine of legitimate expansion – the centrepiece of FET today) with the move by States to carve out more exceptions that preserve State's right to regulate, would not be a stretch.

IV. Conclusion

As may be seen from the preceding parts, the doctrine of legitimate expectation in investment treaty arbitration may be questioned on multiple fronts. It is arguably lacking in any juridical basis, has been transplanted perhaps ignoring domestic limitations in the select jurisdictions tribunals have thought fit to consider. In other jurisdictions that have not been so examined, the doctrine may not even exist, thus questioning whether it may form part of the general principles of customary international law. Further, the doctrine has also been the subject of State intervention in the form of overhaul of treaty provisions to ensure doctrines and principles that are arbitral innovations (and not originally intended by States) are laid to rest.

One may even argue that restrictions to the doctrine of legitimate expectations adopted by later tribunals were a direct result of the blind expansion resorted to by the earlier tribunals, and course-corrective measures intended to impart a semblance of legitimacy to a creation that was neither needed nor anticipated by States.

While it may be that arbitral tribunals, by relying on other awards to further the doctrine, only sought to impose a global standard of governance when it came to investor protection, it does not and should not take away from the necessity of State consent. Any arbitral innovation to

⁷⁴ This includes the Japan–Kazakhstan BIT, Egypt–Mauritius BIT, Colombia–Turkey BIT, Canada–Serbia BIT, Canada–Senegal BIT, Canada–Nigeria BIT, Canada–Mali BIT, Canada–Republic of Korea FTA, Canada–Côte d'Ivoire BIT, Canada–Cameroon BIT, Australia–Republic of Korea FTA, and the Additional Protocol to the Framework Agreement of the Pacific Alliance.

⁷⁵ This includes the Mexico–Panama FTA, Egypt–Mauritius BIT, Colombia–Turkey BIT, Canada–Serbia BIT, Canada–Senegal BIT, Canada–Nigeria BIT, Canada–Mali BIT, Canada–Republic of Korea FTA, Canada–Côte d'Ivoire BIT, Canada–Cameroon BIT, Australia–Republic of Korea FTA, Australia–Japan EPA, ASEAN–India Investment Agreement, and the Additional Protocol to the Framework Agreement of the Pacific Alliance.

⁷⁶ Teerawat Wong Kaew, *supra* note 9, at 113.

provide a remedy not originally intended (or even contemplated) by the States would arguably be a result of an interpretation of the treaty by the arbitral tribunal. Such interpretation would run against the rules under Article 31 of the Vienna Convention on the Law of Treaties that requires a treaty to be interpreted in good faith, and in accordance with the ordinary meaning of the terms therein.⁷⁷

Thus, when viewed as a whole, it would not be illogical to arrive at the conclusion that perhaps, the doctrine of legitimate expectations is at the end of its life-cycle as a useful tool in balancing of interests. Perhaps the doctrine should not have been used in the first place, being based as it is on weak foundations, and illogical expansions, as observed by Arbitrator Pedro Nikken in the *Suez* award:

*“I find, indeed, that the development of the doctrine of legitimate expectations is the result of the interaction of the claims of investors and their acceptance by arbitral tribunals, buttressed by the presumed moral authority of the decided cases [...] has been interpreted so broadly that it results in arbitral tribunals imposing [...] obligations that do not arise from the terms the Parties used [...]”*⁷⁸

This article set out to examine the concept of legitimate expectations as a part of the FET standard, as introduced, applied, expanded, and restricted by arbitral tribunals. In an attempt to do so, certain awards have been cited and arguments have been drawn to support the conclusion. While one may view this as a selective approach, without considering awards that may not necessarily fit in the argument raised, it is pertinent to note the recent wave by States to limit arbitral innovation, either by limiting the standard of protection granted to investors, by providing explanatory notes in treaties, or by specifying more general exceptions to the application of the treaty. The adoption of such limitations seems to suggest a trend towards greater balance between the protection of investments and the preservation of a State’s right to regulate. In such times, it is indeed plausible to conceive of an era where the doctrine of legitimate expectations would be discarded completely in favour of more acceptable, well-rooted standards of protection.

⁷⁷ Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969).

⁷⁸ *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguasServiciosIntegrales del Agua S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability, Separate Opinion of Arbitrator Pedro Nikken, ¶ 27 (July 30, 2010).