

# Legitimate Expectations as Part of the FET Standard: An Overview of a Doctrine Shaped by Arbitral Awards in Investor-State Claims

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## I Origins of the Doctrine of Legitimate Expectations in English Administrative Law

Legitimate expectations is a doctrine inherent to the English administrative law. It is most commonly defined as a position of a subject of law having

a 'legitimate expectation' that a public body will exercise its discretion in some way [...] may be entitled to the law's protection if that 'expectation' is disappointed.<sup>1</sup>

This doctrine, albeit common in many jurisdictions that originate in the laws of England and Wales, is still subject to development by case-law and is quite a new one. The fact that it has spread across many Anglo-originated jurisdictions is a result of the cross-fertilization of legal science and practice rather than a common colonial heritage, as the term 'legitimate expectations' was arguably first used in the post-colonial era, namely in 1968 by the Court of Appeal in *Schmidt v Secretary of State for Home Affairs*<sup>2</sup> and it was only in 1983 that English courts actually started recognising its existence as part of the grounds for a judicial review of administrative decisions and the conduct of public authorities, giving individuals standing to challenge the legality of decisions of public bodies, namely in *O'Reilly v Mackman*<sup>3</sup> and in particular in the *GCHQ Case (Council of Civil Service Unions v Minister for the Civil Service)*.<sup>4</sup>

The textbook essence of the doctrine of legitimate expectations subsequent to the *GCHQ Case*<sup>5</sup> is that two kinds of legitimate expectation of a private party are to be protected by law, namely legitimate expectation based upon (i) an express promise given on behalf of a public

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<sup>1</sup> F. Ahmed, A. Perry, 'The Coherence of the Doctrine of Legitimate Expectations' (2014) 73 (1) Cambridge Law Journal 61.

<sup>2</sup> *Schmidt v Secretary of State for Home Affairs* [1968] EWCA Civ 1, [1969] 2 Ch. 149 at 170–171, Court of Appeal (England and Wales).

<sup>3</sup> *O'Reilly v Mackman* [1983] UKHL 1, [1983] 2 A.C. 237, H.L. (UK).

<sup>4</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6, [1985] A.C.

<sup>5</sup> *Ibid.*

authority, or, alternatively (ii) a regular practice that the private party can reasonably expect to continue.<sup>6</sup> A third alternative that might generate legitimate expectations are policies of public authorities, as per the subsequent case of *R. Home Secretary ex parte Khan*.<sup>7</sup>

## II Continental Origins of this Doctrine in Germany and in the European Communities

The doctrine of legitimate expectations emerged in the second half of the 20<sup>th</sup> century on the continent as well. The German *Grundgesetz* (the German post-WWII constitution) contains a provision that elevates the legitimate expectations of an addressee of both legal norms and the conduct of the state (intertwined with the doctrine of *Rechtsstaat*) to fundamental rights, way beyond the mere doctrine of legal security.<sup>8</sup>

A very similar doctrine also emerged in Community Law, in the context of the revocation of administrative decisions. Nolte summarises the doctrine(s) of legitimate expectations, as they emerged in Germany, England, and in (EEC) community law, as follows:

In Community Law, the principle of legitimate expectations developed from cases which concerned the revocation of administrative decisions [citing in his FN no. 33 these cases: Cases 7/56, 3/57 and 7/57, *Alnera* [1957] ECR 83, 117–119; Cases 42/59 and 49/59, *SNUPAT* [1961] ECR 109, 172; Case 14/81, *Alphasteel Ltd* [1982] ECR 749, 764]. In English law, the term comes from a different source: there it is connected with the procedural guarantee of ‘natural justice’, or, to use a more modern term, the duty to act fairly. At least until recently [as of 1994], its procedural origin constrained the development of the concept as a substantive principle of English administrative law. Therefore, as a general rule, a violation of ‘legitimate expectations’ only gives rise to a right to an administrative hearing or possibly a lesser procedural right. In both German and Community law, on the other hand, ‘legitimate expectations’ confer substantive protections. According to section 48(2) of the German Administrative Procedure Act of 1976, for instance, ‘an unlawful administrative decision granting a pecuniary benefit may not be revoked insofar as the beneficiary has relied upon the decision and his expectation, weighted against the public interest in revoking the decision, merits protection. The Court of Justice has confirmed that such a rule is also part of the legal order of the Community.’<sup>9</sup>

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<sup>6</sup> Fraser L.J. and Lord Diplock in the *GCHQ Case*. Summary from Ahmed, Perry (n 1) 65.

<sup>7</sup> *R. v Secretary of State for the Home Department, ex parte Khan* [1984] EWCA Civ 8, [1984] W.L.R. 1337, C.A. (England & Wales). Summary from Ahmed, Perry (n 1) 67.

<sup>8</sup> G. Nolte, ‘General Principles of German and European Administrative Law. A Comparison in Historical Perspective’ (1994) 57 (2) *The Modern Law Review* 195.

<sup>9</sup> *Ibid.*

Nolte also points out, arguing also in his article that the doctrine of legitimate expectations was ‘Made in Germany’,<sup>10</sup> that the German Constitutional Court ruled on the principle of legitimate expectations as early as 1961. Nonetheless, it needs to be pointed out that, in this case, the issue at hand was retroactive legislation and the breach of the doctrine of *Rechtsstaat*, and the related legitimate expectations of the general public in the context of legal certainty. As such, it was a slightly different topic to that of court review of administrative decisions under the laws of England and Wales.<sup>11</sup>

### **III Legitimate Expectations as a Part of the FET Standard in BIT Arbitral Practice – Wherefrom, How Come, and Really?**

The objective of this piece is to analyse the legal nature (i.e., the source) of the principle of *legitimate expectations* in international investor/state arbitration pursuant to bilateral investment treaties (BITs) and other investment protection-related agreements, such as NAFTA. The objective of this piece is also to summarise the current doctrine, if any, of this institution within the FET standard and the precise contours of the institution. In doing so, one needs first to consider the nature of the FET standard.

#### **1 The FET Standard of Treatment Under International Law**

The protection of legitimate expectations is treated by arbitral tribunals as a subheading of the standard of fair and equitable treatment (FET).

The meaning of the FET standard has historically varied depending on the wording of the respective investment treaty. As Panitchpakdi et al. observe, tribunals have varied in interpreting the content of the FET standard under BITs depending on the wordings of the respective BIT FET provisions, namely:<sup>12</sup>

a) FET linked to international law, including the minimum standard of treatment of aliens under customary international law, such as NAFTA Article 1105 or in the Croatia-Oman BIT, Art. 3(2):

Investments or returns of investors of either Contracting Party in the territory of the other Contracting Party shall be accorded fair and equitable treatment in accordance with international law and provisions of this Agreement.

<sup>10</sup> Nolte (n 8) 191. For a similar view, citing also Nolte, see: D. Barak-Erez, ‘The Doctrine of Legitimate Expectations and the Distinction between the Reliance and Expectation Interests’ (2005) 11 (4) *European Public Law* 584.

<sup>11</sup> BverfGE 13, 261. Online at: <<http://sorminiserv.unibe.ch:8080/tools/ainfo.exe?Command=ShowPrintText&Name=bv013261>> accessed 7 August 2017.

<sup>12</sup> S. Panitchpakdi et al., *FAIR AND EQUITABLE TREATMENT UNCTAD Series on Issues in International Investment Agreements II*. UNCTAD/DIAE/IA/2011/5 (United Nations 2012, New York – Geneva) 20–29.

b) Unqualified FET formulation, such as in the Belgium-Luxembourg Economic Union – Tajikistan BIT, Art. 3:

All investments made by investors of one Contracting Party shall enjoy a fair and equitable treatment in the territory of the other Contracting Party.

Accordingly, the tribunals have historically either ventured into analysing the content of the meaning of the term ‘under customary international law’, very often arriving at the minimum standard of treatment of aliens (MST) as the customary standard of treatment and then into discussion of whether FET merely corresponds to MST, or imposes a higher standard;<sup>13</sup> or went along quite a different path and discussed the very content of the principle of FET and the nature thereof, sometimes arguing that it may be vague intentionally to enable such discussion and its broad applicability (Brower)<sup>14</sup> without pigeonholing it into either mere MST or into some new *sui generis* higher standard.

In particular in situations where the respective BIT (such as the above cited Croatia-Oman BIT) describes the FET standard as being ‘accordance with international law’, this has given rise to interpreting the FET as a mere alter ego of the MST. As Panitchpakdi et al. pointed out in 2012, ‘several tribunals have held that the actual content of the unqualified [plainly textually mentioned FET in a BIT] is not materially different from the MST’<sup>15</sup> (citing *Rumeli Telekom v Kazakhstan*,<sup>16</sup> *Biwater Gauff v Tanzania*,<sup>17</sup> *Duke Energy v Ecuador*,<sup>18</sup>

<sup>13</sup> *Pope and Talbot v Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, para. 110.

<sup>14</sup> C.H. Brower, ‘Structure, legitimacy and NAFTA’s investment chapter’ (2003) 36 *Vanderbilt Journal of Transnational Law* 203, FN 163: ‘As stated elsewhere, the reference to ‘fair and equitable treatment’ in Article 1105(1) represents the exemplification of an intentionally vague term, designed to give adjudicators a quasi-legislative authority to articulate a variety of rules necessary to achieve the treaty’s object and purpose in particular disputes. See Brower, *Empire Strikes Back*, supra note 2, at 56. See also J.G. Merrills, *International Dispute Settlement* (3rd edn 1998) (‘When an arbitrator is asked by the parties to have regard to equitable considerations ... he ... begins to assume the role of a legislator, creating law for the case in hand.’); U.N. CTR. ON TRANSNATIONAL CORPS., *BILATERAL INVESTMENT TREATIES* 41 (1988) (‘It is in the nature of a very general concept like fair and equitable treatment that there can be no precise definition. What is fair and what is equitable may largely be a matter of interpretation in each individual case.’; Kenneth J. Vandeveld, *United States Investment Treaties* 76 (1992) (‘The phrase is vague and its precise content will have to be defined over time through treaty practice, including perhaps arbitration under the disputes provisions.’); Ian Brownlie, *Legal Status of Natural Resources in International Law*, (Legal status of natural resources in international law 162 Brill – Nijhoff 1979, Leiden – Boston) 253, 287 (‘The point is a simple one: with little or no clear content a direction to apply equitable principles is a conferment of a general discretionary power upon the decision-making body.’); Stephen Vasciannie, ‘The Fair and Equitable Treatment Standard in International Investment Law and Practice’ (1999) 70 (1) *Brit. Y.B. Int’L L.* 99, 142 (‘In practice, ... this approach may also mean giving considerable discretion to the tribunal entrusted with determining whether a breach of the [fair and equitable] standard has occurred, bearing in mind the subjectivity inherent in the notions of fairness and equity.’). Available online at: <<https://www.thefreelibrary.com/Structure,+legitimacy,+and+NAFTA's+investment+chapter.-a099555207>> accessed 10 August 2017.

<sup>15</sup> Panitchpakdi et al. (n 12) 59.

<sup>16</sup> *Rumeli Telekom v Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, para. 611.

<sup>17</sup> *Biwater Gauff v Tanzania*, ICSID Case No ARB/05/22, Award, 24 July 2008, para. 592.

<sup>18</sup> *Duke Energy v Ecuador*, ICSID Case No. ARB/04/19, Award, 18 August 2008, para. 337.

*Saluka v Czech Republic*,<sup>19</sup> *Azurix v Argentina*,<sup>20</sup> *CMS v Argentine Republic*,<sup>21</sup> and *Occidental v Ecuador*.<sup>22</sup>)

The issue of the precise nature of the FET is, however, still unsettled and will remain so for some time. For instance, in the recent decision in *Philip Morris v Uruguay* of 28 June 2016,<sup>23</sup> the tribunal at first refused to accept that FET was an autonomous standard and in turn concluded that it did not correspond to the traditional MST under international law, but that under the influence of the FET standard the MST had evolved to a new one, one under which treatment of direct foreign investment must be tested, namely:

316. At the outset, the Tribunal notes that the absence of any reference in Article 3(2) of the BIT to ‘treatment in accordance with international law’ or ‘to customary international law or a minimum standard of treatment,’ as provided by some other investment treaties with regard to the *FET standard*, does not mean that the BIT creates an ‘autonomous’ FET standard. [...] In the absence of any additional qualifying language, the reference to FET in Article 3(2) cannot be read as “treatment required by the minimum standard of treatment under international law.

317. As any other treaty provisions, the text of Article 3(2) of the BIT must be interpreted according to the normal canons of treaty interpretation as contained in Articles 31 and 32 of the VCLT. This includes interpretation in accordance with general international law, as stated in Article 31(3)(c) which requires that a treaty be interpreted in the light of ‘[a]ny relevant rules of international law applicable to the relations between the parties.’ The scope and content of FET under Article 3(2) must therefore be determined by reference to the rules of international law, customary international law being part of such rules.

318. As held by *Chemtura v Canada*, ‘such determination cannot overlook the evolution of customary international law, nor the impact of BITs on this evolution.’ The tribunal in that case relied on *Mondev v United States* which held as follows:

*[B]oth the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of ‘fair and equitable treatment’ and ‘full protection and security’ of foreign investments to what those terms – had they been current at the time – might have meant in 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith [...].*

319. In line with the evolution of customary international law, the FET standard has evolved since the time, in 1926, when the *Neer* case, on which the Respondent relies, 429 was decided. The standard is today broader than it was defined in the *Neer* case although its precise content is far from being settled.

<sup>19</sup> *Saluka v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 291.

<sup>20</sup> *Azurix v Argentina*, ICSID Case No. ARB/01/12, Final Award, 14 July 2006, para. 361.

<sup>21</sup> *CMS v Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, paras. 282–284.

<sup>22</sup> *Occidental v Ecuador*, LCIA Administered Case No. UN 3467, Award, 1 July 2004, para. 190.

<sup>23</sup> *Philip Morris v Uruguay*, ICSID Case No. ARB/10/7, Award, 28 June 2016, paras. 316–319.

Paraphrased, the tribunal in *Philip Morris v Uruguay*<sup>24</sup> essentially concludes that, irrespective of whether or not *FET is defined in the BIT (or any other IIA) by reference to customary international law, it is either way an alter ego of a new standard of MST, way beyond that of Neer*,<sup>25</sup> essentially a MST version 2.0 containing an enlarged pool of rights of investors (aliens), since (customary) law too has evolved since the times of Neer.

Yet what else is MST 2.0 than an evolution from Neer into a general FET, which we merely do not dare to label accordingly?

On the other hand, for instance in a different ICSID case from about the same time relating to a BIT between Costa Rica and Switzerland, which includes the FET protection without any link to general international law when talking of FET, the tribunal explicitly concluded the BIT-based FET standard to be of a particular nature: *Cervin Investissements S.A. v Rhone Investissements S.A. v Costa Rica*<sup>26</sup>:

451. As a preliminary matter and in relation to the argument made by the Claimants about the autonomy of the standard, the Tribunal notes that the fair and equitable treatment provision has been interpreted in relation to customary international law on multiple occasions depending on the context and specific treaty in which it is found, in order to determine if it is a standard that goes beyond customary international law or, if it is part of it. [fn 491: For example, MTD c. Chile (Annex CL-41) §§ 110–112 and Occidental Petroleum Corporation et al. c. Republic of Ecuador, ICSID Case No. ARB / 06/11, Award, July 1, 2004 (*Occidental v Ecuador*) (Annex CL-69), §§ 188–190] By way of example, in the context of Article 1105 of the NAFTA, the contracting parties have interpreted the text of the treaty stating that fair and equitable treatment ‘does not require [...] additional treatment to that required by the minimum standard of treatment of foreigners under customary international law or that goes beyond this.’ [fn 492: Free Trade Commission, Interpretive Note to Certain Provisions of Chapter 11, July 31, 2001] However, Article 1105 of the NAFTA differs clearly from Article 4.1 of the BIT, since the text of the first provision makes an express reference to the ‘minimum standard of treatment’ and ‘international law’, linking the expressions ‘fair and equitable treatment’ and ‘full protection and security’ by the use of the word ‘included.’<sup>27</sup>

<sup>24</sup> *Philip Morris v Uruguay*, ICSID Case No. ARB/10/7, Award, 28 June 2016, paras. 316–319.

<sup>25</sup> *L.F.H. Neer and Pauline Neer (U.S.A.) v United Mexican States*. Award of 15 October 1926, available online at: <[http://legal.un.org/riaa/cases/vol\\_IV/60-66.pdf](http://legal.un.org/riaa/cases/vol_IV/60-66.pdf)> accessed 8 October 2017.

<sup>26</sup> *Cervin Investissements S.A. y Rhone Investissements S.A. v Costa Rica*, ICSID case No. ARB/13/2, award of 7 March 2017, paras 451–454. Online at: <[https://www.italaw.com/sites/default/files/case-documents/italaw\\_9215.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw_9215.pdf)> accessed 8 October 2017.

<sup>27</sup> In original:

451. Como cuestión preliminar y en relación al argumento señalado por las Demandantes sobre la autonomía del estándar, el Tribunal nota que la disposición de trato justo y equitativo ha sido interpretada en relación con el derecho internacional consuetudinario en múltiples ocasiones dependiendo del contexto y tratado específico en el que se encuentra, a fin de determinar si se trata de un estándar que va más allá del derecho internacional consuetudinario o bien, si forma parte de éste. [fn 491: Por ejemplo, MTD c. Chile (Anexo CL-41) §§ 110–112 y Occidental Petroleum Corporation et al. c. República del Ecuador, Caso CIADI No. ARB/06/11, Laudo, 1 de julio de 2004 (*Occidental c. Ecuador*) (Anexo CL-69), §§ 188–190] A manera de ejemplo, en el contexto del Artículo 1105 del TLCAN, las partes contratantes han interpretado el texto del tratado señalando que el trato justo y equitativo ‘no requiere [...] un trato adicional al requerido por el nivel mínimo de trato a los extranjeros propio

453. In view of the foregoing, *the Tribunal sees no reason to equate this obligation with the minimum standard of treatment standard under customary international law. The Tribunal thus agrees with the Parties that the standard of fair and equitable treatment in Article 4.1 refers to an autonomous standard.*

454. It is then necessary to begin the analysis of the standard of fair and equitable treatment applicable in accordance with the general rule of interpretation established in Article 31 of the Vienna Convention on the Law of Treaties ('Vienna Convention'), which states: '[A] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'

[emphasis added]

The matter will thus surely undergo further discussion in both literature and cases. For the time being, in relation to treaties that do link the FET standard to (general/customary) law, it appears (although the current writer is of a different opinion as to the purpose of such wording) that the current state of the law can be summarised in the words of Dumberry:

In the [...] context of *unqualified* FET clauses (not referring to international law), there are good reasons to interpret the term FET as an *independent* treaty standard that has a distinct and separate meaning from the minimum standard of treatment. Yet, this approach is not convincing in cases (such as in that of NAFTA Article 1105) where the treaty *explicitly* links the FET standard to 'international law'. Moreover, the approach mentioned above is simply not sustainable in situations where the parties to a treaty have expressly stated their intention that the FET standard be considered as a reference to the minimum standard of treatment under custom. This is clearly the case under NAFTA Article 1105. Thus, under the aegis of the Free Trade Commission (FTC), NAFTA parties responded to the three controversial awards that had been rendered in 2000 (Metalcad, S.D.Meyers, and Pope&Talbot) on the scope and meaning of Article 1015. It issued the 'Notes of Interpretation of Certain Chapter 11 Provisions [...] which clarified, *inter alia*, that 'Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as

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del derecho internacional consuetudinario o que vaya más allá de éste' [fn 492: Comisión de Libre Comercio, Nota Interpretativa de Determinadas Disposiciones del Capítulo 11, 31 de julio de 2001] No obstante, el Artículo 1105 del TLCAN se diferencia claramente del Artículo 4.1 del APPRI, dado que el texto de la primera disposición hace una referencia expresa al 'nivel mínimo de trato' y al 'derecho internacional', vinculando las expresiones 'trato justo y equitativo' y 'protección y seguridad plenas' mediante el uso de la palabra 'incluidos'.

452. Por el contrario, el Tribunal Arbitral nota que el texto del APPRI no hace referencia alguna al derecho internacional consuetudinario, ni a un 'nivel mínimo de trato'. Esto tiene particular importancia dado que las Partes Contratantes del APPRI pudieron haber referido el estándar incluido en el APPRI expresamente a cualquiera de ellos. La ausencia de estas expresiones confiere un significado particular a la obligación de trato justo y equitativo bajo el APPRI.

453. En vista de lo anterior, *el Tribunal no ve razones para equiparar esta obligación con el estándar de nivel mínimo de trato bajo el derecho internacional consuetudinario. Coincide así con las Partes en que el estándar de trato justo y equitativo del Artículo 4.1 se refiere a un estándar autónomo.*

454. Corresponde entonces comenzar el análisis del estándar de trato justo y equitativo aplicable conforme a la regla general de interpretación establecida en el Artículo 31 de la Convención de Viena sobre el Derecho de los Tratados ('Convención de Viena'), que señala: '[u]n tratado deberá interpretarse de buena fe conforme al sentido corriente que haya de atribuirse a los términos del tratado en el contexto de estos y teniendo en cuenta su objeto y fin'

the minimum standard of treatment to be afforded to investments of investors of another Party' and that the concept of FET does 'not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.'<sup>28</sup>

## 2 Protection of Legitimate Expectations and the FET Standard of Treatment

In any event, the UNCTAD Panitchpakdi et al. sequel concludes, gathering from the arbitration decisions, that 'it is possible to single out certain types of improper and discreditable State conduct that would constitute a violation of the [FET] standard. Such relevant concepts include':<sup>29</sup>

- (a) Defeating investors' legitimate expectations (in balance with the host State's right to regulate in the public interest),
- (b) Denial of justice and due process,
- (c) Manifest arbitrariness in decision-making,
- (d) Discrimination,
- (e) Outright abusive treatment.

So, *opinio doctoris* has it that legitimate expectations have made it into the FET (aka MST version 2.0.) standard of treatment of investors/investments. Indeed, authors have concluded that: 'The protection of legitimate expectations is by now firmly rooted in arbitral practice.'<sup>30</sup> This statement is indeed perfectly true. As will also be illustrated below, the invocation of legitimate expectations has been around for quite a while in arbitral practice and has become quite a trendy topic in recent years. But how come?

As we have seen, the doctrine of legitimate expectations is quite new to both continental Europe and, in its alter ego, in England and Wales. How could it have, legally speaking, firmly set roots into arbitral practice? How could MST version 2.0 as shaped by FET in arbitral decisions (that is: by non-subjects of international law elaborating their respective chains of thoughts in awards) become part of (an evolved) customary international law? Where is state practice and *opinion iuris* of state actors – in particular state practice (*usus longevus*)? The current writer is sceptical as to whether there are formally satisfying answers to these theoretical questions.

Similarly sceptical is the current writer about the position articulated by some authors, namely, that the doctrine of legitimate expectations is a general principle of law (recognized by civilized nations) because it be recognized in many municipal legal systems.<sup>31</sup> The reason

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<sup>28</sup> P. Dumberry, 'The Protection of Investor's Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105' (2014) 31 (1) Journal of International Arbitration 49.

<sup>29</sup> Panitchpakdi et al. (n 12) 59.

<sup>30</sup> Ch. Schreuer, U. Kriebaum, 'At What Time Must Legitimate Expectations Exist? IN: Liber Amicorum Thomas Wälde - Law Beyond Conventional Thought' 1 (2012) TDM available online: <[https://www.univie.ac.at/intlaw/pdf/97\\_atwhattime.pdf](https://www.univie.ac.at/intlaw/pdf/97_atwhattime.pdf)> accessed 27 October 2018

<sup>31</sup> Such as in, as Dumberry points out, *Total S.A. v Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 128; *International Thunderbird Gaming Corp. v Mexico*, UNCITRAL award, 26 January 2006, separated Opinion of Thomas Wälde, para. 30. See: Dumberry (n 28) 63.

for this scepticism is the recent nature of this doctrine in some municipal legal systems which hardly elevates (somewhat instantly) this institution to the pedestal of a general principle of law.

Similar scepticism has been articulated by other commentators. As Carmody and Carmody point out:

Martins Paparinskis has pointed out how a doctrine of expectations fits poorly within the traditional doctrine of sources of 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.

[...] the doctrine of expectations has been heavily criticized by a number of commentators. For instance, [Sornarajah] has observed that prior to 2005, expectations "had not been used in the sense hitherto in international law. Sornarajah goes on to identify the source of legitimate expectations as lying either in good faith or administrative law principles.<sup>32</sup>

If we accept, however, the presumption that MST version 2.0 as shaped by FET does indeed include the doctrine of legitimate expectations then how precisely does this doctrine currently stand in the theory of contemporary international law, pursuant to the rulings in arbitral awards, and how is it applied?

### 3 The Content of the Doctrine of Legitimate Expectations under the FET Standard

As we observed in the introductory paragraphs of this piece, legitimate expectations of an addressee of state power under English administrative law may, pursuant to case law, derive from either:

- (i) an express promise given on behalf of a public authority, or, alternatively
- (ii) a regular practice that the private party can reasonably expect to continue.

as per the *GCHQ Case*<sup>33</sup>; or as per *R. Home Secretary ex parte Khan*<sup>34</sup>:

- (i) policies of public authorities.

The question therefore is both the extent to which these alternatives are reflected as part of the FET standard and the extent to which the institution of legitimate expectations differs on this topic on the plane of international law.

<sup>32</sup> C Carmody, C. Carmody, 'Great Expectations: the Treatment of Expectations in WTO and International Investment law' (2017) 85 Law Publications. Available online: <<http://ir.lib.uwo.ca/lawpub/85>> accessed 8 October 2017.

<sup>33</sup> Panitchpakdi et al. (n 12) 9.

<sup>34</sup> *R. v Secretary of State for the Home Department, ex parte Khan* [1984] EWCA Civ 8, [1984] W.L.R. 1337, C.A. (England & Wales). See also: Summary from Ahmed, Perry (n 1) 67.

In *AWG Group v Argentine*<sup>35</sup> the tribunal observed that

214. The context of the term ‘fair and equitable’ largely depends upon the contents of the treaty in which it is employed. Thus, the term must be interpreted not as three words plucked from the BIT text *but within the context of the various rights and responsibilities, with all their various conditions and limitations, to which the Contracting Parties agreed*. However, conducting such analysis *in abstracto*, namely without addressing specific relations between specific provisions of the BITs, would not take us further than the analysis of the ordinary meaning of the terms ‘fair and equitable’ [emphasis added]

The provisions of the tribunal’s observation in bold can find application by analogy on relations between states and investors. Clearly, if the legitimate expectations principle finds application then any express promise given on behalf of a public authority [alternative *ad* (i)] would give rise to legitimate expectations protected under the FET.<sup>36</sup>

Less clear would be *prima facie* the situation in relation to the two other grounds for invocation of legitimate expectations, namely (ii) a regular practice that the private party can reasonably expect to continue and (iii) policies of public authorities. In particular, the question arises whether the latter can also be understood as legitimate expectations of a legal framework expected to give certainty of unchangeable conditions for an investment. As will be illustrated below, BIT case-law is indeed predominantly concerned (apart from direct promises by states) with the question of legitimate expectations in relation to legislative frameworks.

In *Eiser Infrastructure Limited and Energia Solar Luxembourg S.a.r.l v Spain*,<sup>37</sup> the tribunal, whilst confirming the above articulated conclusion that a specific undertaking would

<sup>35</sup> *AWG Group v Argentine*, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010, para. 214.

<sup>36</sup> In *Micula v Romania*, ICSID Case No. ARB/05/20, Award of 11 December 2013, para. 668, the tribunal discusses this topic as follows:

668. The Parties agree that, in order to establish a breach of the fair and equitable treatment obligation based on an allegation that Romania undermined the Claimants’ legitimate expectations, the Claimants must establish that (a) Romania made a promise or assurance, (b) the Claimants relied on that promise or assurance as a matter of fact, and (c) such reliance (and expectation) was reasonable.[134] This test is consistent with the elements considered by other international tribunals.[135]

[FN 134 reads: In their final briefs, both Parties refer to the reasonableness of the reliance, although Romania at first had focused on the reasonableness of the expectation. In the Tribunal’s view, both must be reasonable, but in particular the expectation itself.]

[FN 135 reads: For example, the late Prof. Thomas Wälde explained that a claim of legitimate expectations required ‘an expectation of the investor to be caused by and attributed to the government, backed-up by investment relying on such expectation, requiring the legitimacy of the expectation in terms of the competency of the officials responsible for it and the procedure for issuing it and the reasonableness of the investor in relying on the expectation’ (*International Thunderbird v Mexico*, Separate Opinion of Thomas Wälde, 1 December 2005, para 1). It must be noted that Prof. Wälde did not dissent on the standard, but rather on the application of that to the facts of the case).]

<sup>37</sup> *Eiser Infrastructure Limited and Energia Solar Luxembourg S.a.r.l v Spain*, ICSID case No. ARB/13/36, award of 4 May 2017, para. 362.

give rise to legitimate expectation, referring to previous cases, namely *Parkerings-Compagniet AS v Lithuania*,<sup>38</sup> *EDF (Services) Ltd. v Romania*,<sup>39</sup> *BG Group Plc. v Argentine Republic*,<sup>40</sup> and *Micula v Romania*<sup>41</sup> limited the public policies practice in relation to current legal framework as follows:

362. Absent explicit undertakings directly extended to investors and guaranteeing that States will not change their laws or regulations, investment treaties do not eliminate States' right to modify their regulatory regimes to meet evolving circumstances and public needs. As other tribunals have observed, '[i]n order to adapt to changing economic, political and legal circumstances the State's regulatory powers still remain in place.'<sup>42</sup> "[T]he fair and equitable treatment standard does not give a right to regulatory stability per se. The state has a right to regulate, and investors must expect that the legislation will change,<sup>43</sup> absent a stabilization clause or other specific assurance giving rise to a legitimate expectation of stability.<sup>44</sup>

Given the particular situation in that case, the tribunal then went on to observe that<sup>45</sup>:

371. Respondent faced a legitimate public policy problem with its tariff deficit, and the Tribunal does not question the appropriateness of Spanish authorities adopting reasonable measures to address the situation. However, in doing so, Spain had to act in a way that respected the obligations it assumed under the ECT, including the obligation to accord fair and equitable treatment to investors. As the tribunal in *ADC v Hungary* observed:

423. [...] while a sovereign State possesses the inherent right to regulate its domestic affairs, the exercise of such right is not unlimited and must have its boundaries. [...] [T]he rule of law, which includes treaty obligations, provides such boundaries. Therefore, when a State enters into a bilateral investment treaty like the one in this case, it becomes bound by it and the investment-protection obligations it undertook therein must be honoured rather than be ignored by a later argument of the State's right to regulate.

424. The related point made by the Respondent that by investing in a host State, the investor assumes the 'risk' associated with the State's regulatory regime is equally unacceptable to the Tribunal. It is one thing to say that an investor shall conduct its business in compliance with the host

<sup>38</sup> *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 332.

<sup>39</sup> *EDF (Services) Ltd. v Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, paras. 217–218.

<sup>40</sup> *BG Group Plc. v Argentine Republic*, UNCITRAL, Award, 24 December 2007, para. 298.

<sup>41</sup> *Micula v Romania*, ICSID Case No. ARB/05/20, Award of 11 December 2013, para. 66.

<sup>42</sup> *BG Group Plc. v Argentine Republic*, UNCITRAL, Award, 24 December 2007, para. 298.

<sup>43</sup> *Micula v Romania*, ICSID Case No. ARB/05/20, Award of 11 December 2013, para. 666.

<sup>44</sup> Since the matter being decided by the particular tribunal was one under the ECT, the tribunal then also noted (in the same paragraph of the award) that: 'The question presented here is to what extent treaty protections, and in particular, the obligation to accord investors fair and equitable treatment under the ECT, may be engaged and give rise to a right to compensation as a result of the exercise of a State's acknowledged right to regulate.'

<sup>45</sup> *Eiser Infrastructure Limited and Energia Solar Luxembourg S.a.r.l. v Spain*, ICSID case No. ARB/13/36, award of 4 May 2017, para. 362 (available online: <<https://www.italaw.com/sites/default/files/case-documents/italaw9050.pdf>> accessed 8 October 2017).

State's domestic laws and regulations. It is quite another to imply that the investor must also be ready to accept whatever the host State decides to do to it. In the present case, had the Claimants ever envisaged the risk of any possible depriving measures, the Tribunal believes that they took that risk with the legitimate and reasonable expectation that they would receive fair treatment and just compensation and not otherwise. [fn 466]<sup>46</sup>

Finally, citing the awards in *CMS Gas Transmission Co. v Argentina* (both the award<sup>47</sup> and annulment decision upholding this chain of thought),<sup>48</sup> *LGE Energy Corp. v Argentina*,<sup>49</sup> *BG Group Plc. v Argentina*<sup>50</sup> and finally *Parkerings*,<sup>51</sup> the tribunal in *Eiser v Spain*<sup>52</sup> arrived at the following summary in relation to the changes to the legal framework for investors, namely, in the words of the tribunal in *Parkerings*, that '*any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.*'<sup>53</sup> It is submitted by the current writer that the prohibition of unfair, unreasonable and inequitable conduct of states is not confined

<sup>46</sup> FN 466 reads: *ADC Affiliate Ltd. et al. v Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, paras. 423–424.

<sup>47</sup> *CMS Gas Transmission Co. v Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 274.

<sup>48</sup> *CMS Gas Transmission Co. v Argentina*, ICSID Case No. ARB/01/8 (Annulment Proceeding), Decision of the Ad Hoc Committee on the Application for Annulment of the Argentina Republic, 25 September 2007, para. 85.

<sup>49</sup> *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 125.

<sup>50</sup> *BG Group Plc. v Argentine Republic, UNCITRAL, Award, 24 December 2007, para. 307.*

<sup>51</sup> *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 332.

<sup>52</sup> *Eiser Infrastructure Limited and Energia Solar Luxembourg S.a.r.l. v Spain*, ICSID case No. ARB/13/36, award of 4 May 2017, para 386–387 (available online: [https://www.italaw.com/sites/default/files/case-documents/italaw\\_9050.pdf](https://www.italaw.com/sites/default/files/case-documents/italaw_9050.pdf) accessed 8 October 2017).

<sup>53</sup> The full text of the respective award reads:

386. The CMS tribunal found that the disputed measures at issue 'did in fact entirely transform and alter the legal and business environment under which the investment was decided and made,'<sup>488</sup> leading to a finding that respondent had violated its obligation to extend fair and equitable treatment.<sup>489</sup> Other tribunals assessing Argentina's extensive changes in regulatory regimes and legislation relied upon by investors have similarly found that those changes violated the obligation of fair and equitable treatment:

– *LGE Energy Corp v Argentina*: 'Several tribunals in recent years have interpreted the fair and equitable treatment standard in various investment treaties in light of the same or similar language as the Preamble of the Argentina-US BIT. These tribunals have repeatedly concluded based on the specific language concerning fair and equitable treatment, and in the context of the stated objectives of the various treaties, that the stability of the legal and business framework in the State party is an essential element in the standard of what is fair and equitable treatment. As such, the Tribunal considers this interpretation to be an emerging standard of fair and equitable treatment in international law.'

– *BG Group Plc. v Argentina*: 'Argentina [...] entirely altered the legal and business environment by taking a series of radical measures [...]. In so doing, Argentina violated the principles of stability and predictability inherent to the standard of fair and equitable treatment.'

387. Claimants could not reasonably expect that there would be no change whatsoever in the RD 661/2007 regime over three or four decades. As with any regulated investment, some changes had to be expected over time.<sup>492</sup> However, Article 10(1) of the ECT entitled them to expect that Spain would not drastically and abruptly revise the regime, on which their investment depended, in a way that destroyed its value. But this was the result of RDL 9/2013, Law 24/2013, RD 413/2014 and implementation of the new regime through Ministry

merely to legislative powers but extends to other activities of states *vis-à-vis* investors, in particular to the conduct of the public authorities of the legislative and judicial branches of states as well.

Apart from unfair, unreasonable, and inequitable conduct, or perhaps to some extent within the meaning of unreasonable, a state would be liable for breach of the FET standard also when the state would keep changing the legal framework for the existence of a particular investment, be it out of the chaos of policy decisions or for other reasons beyond the threshold of reasonableness within its sovereign rights to legislate. An example of such situation was described by the tribunal in *PSEG Global v Turkey*:<sup>54</sup>

250. [...] Tribunal also finds that the fair and equitable treatment obligation was seriously breached by what has been described above as the ‘roller-coaster’ effect of the continuing legislative changes. This is particularly the case of the requirements relating, in law or practice, to the continuous change in the conditions governing the corporate status of the Project, and the constant alternation between private law status and administrative concessions that went back and forth. This was also the case, to a more limited extent, of the changes in tax legislation.

The existence of legitimate expectations based upon the mere fact of the existence of municipal law of particular quality/content (as to licences, conditions, taxes, tax breaks, etc.) has been repeatedly been denied in particular in NAFTA. As Dumberry<sup>55</sup> points out

tribunals have repeatedly narrowly qualified the concept of legitimate expectations by requiring, for instance, that the investor’s expectations be based on specific commitments made by the host state to have purposely induced its investment. Tribunals have denied that such expectations can be solely based on the host state’s existing domestic legislation at the time of the investment.

Writing his pieces in 2014, Dumberry argued that this rather orthodox approach is in contrast ‘with more liberal approaches taken by non-NAFTA tribunals’<sup>56</sup> and attributed this to the fact that

the FET standard clause under Article NAFTA 1105 must be analysed under the specific parameters that do not exist under most of the other investment treaties. The specificity of Article 1105 is first and foremost the result of the language contained in the provision whereby the NAFTA Parties must accord a ‘fair and equitable treatment’ *under ‘international law’*. This explicit reference to ‘international law’ contrasts with the vast majority of BITs which contain FET clauses that do not make any reference to ‘international law’.

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implementing Order IET/1045/2014.493 As it was put in Parkerings: ‘any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.’

<sup>54</sup> *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Şirketi v Republic of Turkey*, ICSID Case No. ARB/02/5, award of 19 January 2007, para. 250.

<sup>55</sup> Dumberry (n 28) 49.

<sup>56</sup> *Ibid.*

The current writer, whilst observing that the distinction drawn by Dumberry between NAFTA 1105 and ‘other’ BITs corresponds to the classification also mentioned by the UNCTAD Panitchpakdi et al. sequel of 2012, disagrees with the opinion that the majority of ‘other’ – that is non-NAFTA – tribunals would be more liberal in interpreting the nature and content of the FET standard *vis-à-vis* legitimate expectations. Whilst one could argue that the NAFTA cases might be somewhat more coherent in their statements of reasons (given, after all, that they always interpret the same treaty provision and need nowadays, or at least ought to take into consideration the above discussed FTC Note of Interpretation), the above identified recent case-law, such as *Eiser*,<sup>57</sup> making reference to older cases, seems to be quite restrained in opening the sluice of *legitimate expectations* in recent years, even on the plane of the self-standing FET standard, which in the current writer’s view corresponds to the MST 2.0 law standards as it has evolved since *Neer*.

#### 4 Casuistry of Legitimate Expectations under the FET Standard

So what precisely is the current contour of the doctrine of legitimate expectations in the BIT case-law? The answer (for lack of any sound theoretical explanation of the nature of the FET standard as such and the doctrine of legitimate expectations as a part thereof) rests in cases, and cases referring to cases, as a matter of casuistry with some potential to generalise situations described in the respective cases.

This part of this piece is dedicated to a brief overview of the existing casuistry. Deriving conclusions from existing cases, we can arrive at these abstracted categories that give rise to a successful invocation of a breach of the fair and equitable treatment standard under the legitimate expectations doctrine, namely:

(i) *Changing legislative framework beyond reasonable exercise of the state’s sovereign right to legislate: The so called ‘roller-coaster’ effect of continuing legislative changes negatively influencing investors/investments thereunder as per PSEG Global v Turkey.*<sup>58</sup> It is precisely the test of reasonableness and justifications of an economic, social or other nature that may legitimise changes in law/in the conditions under which the investment had been made. The boundaries have been set in these cases and summarized by reference to these cases in *BLUSUN v Italy*.<sup>59</sup>

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<sup>57</sup> *Eiser Infrastructure Limited and Energia Solar Luxembourg S.a.r.l. v Spain*, ICSID case No. ARB/13/36, award of 4 May 2017.

<sup>58</sup> *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v Republic of Turkey*, ICSID Case No. ARB/02/5, award of 19 January 2007, para. 250.

<sup>59</sup> *BLUSUN S.A., JEAN-PIERRE LECORCIER AND MICHAEL STEIN v ITALIAN REPUBLIC*, ICSID Case No. ARB/14/3, Award of 27 December 2016, para. 367 (available online: <<https://www.italaw.com/sites/default/files/case-documents/italaw8967.pdf>> accessed 8 October 2017).

367. [T]ribunals have so far declined to sanctify laws as promises. For example, as noted already (above, paragraph 317), the tribunal in *Charanne* was clear:

under international law, in the absence of a specific commitment toward stability, an investor cannot have a legitimate expectation that a regulatory framework such as that at issue in this arbitration is to not be modified at any time to adapt to the needs of the market and to the public interest.<sup>60</sup>

368. The *El Paso* tribunal made a similar distinction, as follows:

Under a FET clause, a foreign investor can expect that the rules will not be changed without justification of an economic, social or other nature. Conversely, it is unthinkable that a State could make a general commitment to all foreign investors never to change its legislation whatever the circumstances, and it would be unreasonable for an investor to rely on such a freeze.<sup>61</sup>

369. As stated by the tribunal in *Philip Morris v Uruguay*:

It clearly emerges from the analysis of the FET standard by investment tribunals that legitimate expectations depend on specific undertakings and representations made by the host State to induce investors to make an investment. Provisions of general legislation applicable to a plurality of persons or of category of persons, do not create legitimate expectations that there will be no change in the law.<sup>62</sup>

In *Duke v Ecuador*<sup>63</sup>

the tribunal (relying on *Tecmed*<sup>64</sup> and *Occidental*<sup>65</sup> and *LG&E*<sup>66</sup>) set out correctives for changes to circumstances an investor may have relied upon as follows:

340. The stability of the legal and business environment is directly linked to the investor's justified expectations. The Tribunal acknowledges that such expectations are an important element of fair and equitable treatment. At the same time, it is mindful of their limitations. To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all

<sup>60</sup> *Charanne B.V. and Construction Investments S.A.R.L. v The Kingdom of Spain*. Case No: 062/2012, award of 21 January 2016, para. 510. Unofficial English Translation by Mena Chambers available here: <<https://www.italaw.com/sites/default/files/case-documents/italaw7162.pdf>> Spanish original available here: <<https://www.italaw.com/sites/default/files/case-documents/italaw7047.pdf>> (both accessed 8 October 2017).

<sup>61</sup> *EL PASO ENERGY INTERNATIONAL COMPANY v THE ARGENTINE REPUBLIC*. ICSID Case No. ARB/03/15, award of 31 October 2011, para. 372. Available online: <<https://www.italaw.com/sites/default/files/case-documents/ita0270.pdf>> accessed 8 October 2017.

<sup>62</sup> *Philip Morris v Uruguay*, ICSID Case No. ARB/10/7, Award, 28 June 2016, par. 426.

<sup>63</sup> *Duke Energy Electroquil Partners and Electroquil SA v Ecuador*, ICSID Case No. ARB/04/19, Award, 12 August 2008, para. 340. Available online: <<https://www.italaw.com/sites/default/files/case-documents/ita0256.pdf>> accessed 8 October 2017).

<sup>64</sup> *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No. ARB (AF)/00/2, award of 29 May 2003, para. 154.

<sup>65</sup> *Occidental Petroleum Corporation and Occidental Exploration and Production Company v The Republic of Ecuador*, ICSID Case No. ARB/06/11, award of 5 October 2017, para. 185.

<sup>66</sup> *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, award of 30 April 2004, para. 127.

circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest.

(ii) *Breach of specific commitments beyond 'mere' private law contracts.* These commitments (warranties or terms) must be directed at attacking or keeping the investment on the plane of support of direct foreign investment and should not be confused with mere commitments in, say, a private law contract. So for example, as Potestà<sup>67</sup> points out:

[i]n *Duke v Ecuador*, the tribunal noted that 'Electroquil's expectations under the [power purchase agreement] must be regarded as 'mere' contractual expectations which are not protected under the BIT'.<sup>68</sup> Also the tribunal in *Hamester v Ghana* emphasised 'that the existence of legitimate expectations and the existence of contractual rights are two separate issues'.<sup>69</sup> Citing to *Parkerings* with approval, the tribunal concluded that 'the alleged contract violations could not have amounted to a violation of the FET standard based on a theory of 'legitimate expectations'. *Impregilo v Argentina* stands for the same proposition.<sup>70</sup>

[...]

Thus, the concept of legitimate expectations in these kinds of situations can be accepted as a useful tool to measure the parties' assumptions when they entered into contractual arrangements, provided, however, the unfair or inequitable treatment by the host state is established by reference to additional factors (beyond the mere non-fulfilment of contract) [...]

(iii) *Breach of specific representation.* These representations include representations (warranties or terms) made to attract investors. In *Sempre v Argentine*,<sup>71</sup> the tribunal observed, in relation to both the development of the nature of the FET and of legitimate expectations in particular, as follows:

297. The evolution [of the FET] that has taken place is for the most part the outcome of a case-by-case determination by courts and tribunals, as is evidenced by many investment treaty and NAFTA decisions, including the *Tecmed*, *OEPC* and *Pope & Talbot* cases cited. This shows that, as with the international minimum standard, there has been a fragmentary and gradual development. However, it has been rightly commented that essentially 'the purpose of the clause as used in BIT practice is to fill gaps which may be left by the more specific standards, in order to obtain the level of investor

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<sup>67</sup> Potestà, M. Litimate expectations in investment treaty law: Understanding the roots and the limits of a controversial concept. 28 ICSID Review (2013) p. 88–122. Cited via the commentators RSSN profic, pre-print version at <<https://ssrn.com/abstract=2102771>> (PDF, pages 1–41) at p. 17–18.

<sup>68</sup> *Duke Energy Electroquil Partners and Electroquil SA v Ecuador*, ICSID Case No. ARB/04/19, Award, 12 August 2008, para. 358.

<sup>69</sup> *Gustav F W Hamester GmbH & Co KG v Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2008, para. 335.

<sup>70</sup> *Impregilo S.p.A. v Argentina*, ICSID Case No. ARB/07/17, Final award, 21 June 2011, para. 292.

<sup>71</sup> *Sempre Energy International v Argentina*, ICSID Case No. ARB/02/16, award of 28 September 2007, para 297–298, online: <<https://www.italaw.com/sites/default/files/case-documents/ita0770.pdf>> accessed 3 April 2019.

protection intended by the treaties'. The principle of good faith is thus relied on as the common guiding beacon that will orient the understanding and interpretation of obligations, just as happens under civil codes.

298. The essence of the protection sought was well explained in *Tecmed*, where the tribunal held in the light of the good faith requirement that under international law, the foreign investment must be treated in a manner such that it 'will not affect the basic expectations that were taken into account by foreign investor to make the investment'. This requirement becomes particularly meaningful when the investment has been attracted and induced by means of assurances and representations, as has been established in the jurisprudence that the Claimant has invoked.<sup>4</sup>

## IV Conclusion

The nature of the origin of the doctrine of legitimate expectations remains unclear in terms of the categorisation of sources of norms (from the formal point of view) under international law. In fact, it is quite safe and accurate to conclude that it is a recent invention of arbitrators inspired by some municipal legal orders. There seems to exist no evidence that could support the argument that the doctrine of legitimate expectations would constitute a part of positive customary international law. Nor is there any theoretical framework, given that the doctrine emerged quite recently in some municipal legal systems, which would support this doctrine as a general principle of law (recognized by civilised nations).

Nevertheless, the existence of this doctrine has been firmly rooted in arbitral decisions and (also already in) theory, despite the conceptual lack of clarity of its origin on the plane of international law. It currently constitutes a sub-set doctrine of the FET standard, although the nature of this standard and its precise meaning remains disputed and varies depending on the particular wording of the BIT and the composition of the particular tribunal.

It is probably fair to say that the FET standard's position, including the doctrine of legitimate expectations as a part thereof, will, down the road of time – *vis-à-vis* customary international law – undergo further development. This development will take place under the practical influence of arbitral decisions. One will quite likely see the FET truly becoming general MST version 2.0, including the doctrine of legitimate expectations – even without proper prior state practice and *opinio iuris* in the first place. The time has not yet come, though.

On a different note, irrespective of the doctrine's nature, to summarise briefly the abstracted content of the doctrine of legitimate expectations as it has materially crystallised by now, we can conclude that, under the current state of this doctrine's framework, it materially contains the following categories of circumstances: (i) Changing legislative framework beyond a reasonable exercise of the state's sovereign right to legislate: the so-called 'roller-coaster' effect of continuing legislative changes; (ii) Breach of specific commitments beyond 'mere' private law contracts; and (iii) Breach of specific representation made by those whose conduct is attributable to state(s).