Part 3 – CROSS-CUTTING ISSUES

Chapter 3.1
Legitimate Expectations of Investors

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A. INTRODUCTION

Legitimate expectations[1] are frequently invoked by investors before arbitral tribunals to support claims for alleged breaches by host states of investor rights occasioning impairment of investments. As Potesta argues, in recent years, one would hardly find cases in which "the concept of 'legitimate expectations' has not been invoked by the claimant and, at least to a certain extent, endorsed by the arbitral tribunal."[2] However, what the concept itself entails is far from clear. This makes it fluid, allowing for expansive use, and difficult for host states to address through legal and policy guidance.

The concept has been applied mainly as a component (or one of the substantive elements) of the fair and equitable treatment (FET) standard that is often found in international investment agreements (IIAs).[3] But the content and meaning of FET itself is imprecise – just as the content and meaning of legitimate expectations is imprecise. Yet, FET and legitimate expectations are frequently applied to the benefit of investors.

Despite its frequent use, the legal basis for the application of the legitimate expectation concept in international investment law remains debatable.[4] This chapter discusses the concept of legitimate expectations, exploring its evolution, how it has been applied, and its legal basis for the application in international investment law. It considers its application as a component of the FET standard,

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1 Sometimes referred to variously as 'reasonable expectations,' 'investment-backed expectations,' 'justifiable expectations,' or 'basic expectations.' *See, e.g.*, Yenkong Nganjo-Hodu and Collins C. Ajibo, *Legitimate Expectation in Investor-State Arbitration: Re-Contextualising a Controversial Concept from a Developing Country Perspective*, 15 Manchester Journal of International Economic Law (2018), pp. 45, 47.

2 Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28(1) *ICSID Review*—FILJ (2013), pp. 88, 90.

3 The phrase 'International Investment Agreements' (IIAs) is used here to describe treaties between two or more states covering investment relationships between nationals or other identifiable entities of one state in the jurisdiction of the other. The treaty may be solely on investments or be contained, usually as a chapter, in a broader International Economic Agreement (IEA) covering not just investment, but also trade, between the state parties and their nationals. The treaty may be bilateral (i.e. between two states), regional (often between a few countries in a geographical area) or between countries in dispersed regions that share a common goal in investment promotion and regulation. Thus, IIAs encapsulate Bilateral Investment Treaties (BITs) (of which there are over 2300 currently in force), Multilateral Investment Treaties (such as the ASEAN Comprehensive Investment Agreement), and other trade-related treaties that contain investment protection provisions, such as Preferential Trade Agreements (PTAs) or Free Trade Agreements (FTAs).

4 See, for example, Potestà, *above* note 2; as well as Caroline Henckels, *Legimate Expectations and the Rule of Law in International Investment Law*, in Reinisch & Schill (eds.), *Investment Protection Standards and the Rule of Law*, Oxford Univ. Press 2023, pp. 43-60.

whether it has evolved into a stand-alone doctrine independent of FET, and whether it has reached the status of a general principle of international law. To achieve this, Part B discusses the meaning and content of legitimate expectations as they have evolved; Part C discusses the legal basis for the application of legitimate expectations in international investment law; Part D discusses the positioning of host states in light of the concept; and Part E concludes the chapter.

B. MEANING AND CONTENT OF "LEGITIMATE EXPECTATIONS"

Despite its frequent invocation by investor-claimants, and almost as frequent use by arbitral tribunals in the adjudication of investment disputes, the content and legal nature of the doctrine of legitimate expectations remain controversial.[5] There is no precise definition of the concept of legitimate expectations, due to its general nature.[6] In many instances where legitimate expectations have been invoked and used, the concept has not been defined. An often referred to description is from *Thunderbird v Mexico.*[7] There, in the context of (the now defunct) NAFTA, the tribunal described the concept to be:

> 'a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on the said conduct, such that a failure by the NAFTA Party [host-state] to honour those expectations could cause the investor (or investment) to suffer damages.'[8]

From the above description, the concept has as its basis the conduct of a host-state in respect of an investor (or investment). Thus, it may be defined as conduct of a party, principally a host-state, that creates in another party, usually an investor, a reasonable and justifiable expectation that the conduct, when relied upon, will not be unjustifiably or arbitrarily departed from in circumstances where such a departure will cause material detriment to the investor (or investment). This formulation of legitimate expectations implies that the concept would be created and enure to the benefit of a party only when that party has been given precise, unconditional, and consistent assurances by authorised representatives of the host-state, and in accordance with applicable rules. For instance, Tribunals have found legitimate expectations to arise when a given state makes a representation (a promise to do or not to do something) to an investor and the investor decided to establish the investment on that basis.[9] This iteration of legitimate expectation is similar to what

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5 Potestà, *above*, note 2, at p. 90.

6 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law,* Oxford Univ. Press, 2nd ed. 2012, at p. 115.

7 *Thunderbird v Mexico*, Award of 26 January 2006.

8 *Ibid*, at para. 147. See also *Alpha GMBH v. Ukraine*, ICSID Case No. ARB/07/16, Award of 8 November 2010, para. 420.

9 See Nitish Monebhurrun, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela,* 32(5) *Journal of International Arbitration* (2015), pp. 551, 552-553. For examples of cases, see *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award of 22 September 2014; *Parkerings Companiet A.S. v. Lithuania*, ICSID Case No. ARB/05/8, Award of 11 September 2007, in particular para. 331; *Mobil Cerro Negro, Ltd. & Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award of 9 October 2014, para. 256. See also Christoph Schreuer, *Fair and Equitable*

is said to be the formulation of the concept in EU law, which is argued to converge with international investment law.[10] It is also close to the concept of estoppel.

However, it is common for foreign investors to claim broader expectations, for instance that a host state should not amend its law or adopt new policies to the investors' disadvantage; that the host-state maintain consistency and regularity of the legal rights granted to the investor by the law as it stood at the time of the investment without change; or that the host-state generally refrain from acting irregularly, inconsistently or arbitrarily. Viewed as such, the concept would require the host-state, among other things, to always act in good faith and without arbitrariness towards foreign investors, and to always act consistently with the letter and spirit of any applicable IIA.

Despite the uncertainties characterizing the normative content of legitimate expectations, certain situations that lead to the frustration of the expectations of investors in a manner considered as unfair and inequitable have been held to be a breach of legitimate expectations of investors by host states. These include inconsistent governmental action that adversely affects investment;[11] arbitrary changes to regulatory frameworks;[12] lack of transparency, and general administrative negligence.[13]

A breach of legitimate expectations is pleaded whenever there is a possibility of a host-state's breach of the indirect expropriation standard, a violation of the umbrella clause, or pretty much any other alleged violation of the terms of an investment treaty or contract. The doctrine, along with the broader fair and equitable treatment (FET) standard, operates as an overarching principle that embraces other standards of treatment in trade and investment relations.[14] It can, therefore, be a wildcard in the hands of adjudicators, mainly arbitrators.[15] Crucially, despite its regular invocation and use, the legal basis and nature of legitimate expectation remain doubtful.[16]

Treatment in Arbitral Practice, 6 *Journal of World Investment & Trade* (2005), pp. 357, 374.

10 See Carlos J. Moreiro González, *The Convergence of Recent International Investment Awards and Case Law on the Principle of Legitimate Expectations: Towards Common Criteria Regarding Fair and Equitable Treatment?,* 42 European Law Review (2017), pp. 402, 413-417.

11 *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award of 25 May 2004, para. 164.

12 *Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, para. 154.

13 *PSEG Global Inc. & anor. v. Republic of Turkey*, ICSID Case No ARB./02/5, Award of 19 January 2007, paras. 246-55, at 64-6.

14 Christoph Schreuer, *Fair and Equitable Treatment (FET): Interactions with other Standards*, Transnational Dispute Management (2007), Vol. 4(5), at pp. 1-2.

15 Charles H. Brower, *Investor-State Disputes Under NAFTA: The Empire Strikes Back*, Columbia Journal of Transnational Law (2001-2002), Vol. 40(1), pp. 43-88, at p. 56.

16 Monebhurrun, *above*, note 9, at p. 553.

C. THE LEGAL BASIS OF LEGITIMATE EXPECTATIONS

IIAs rarely, if at all, specify legitimate expectations as a substantive or procedural standard. This raises issues regarding the legal basis for the application of the doctrine in investment disputes.[17] That is, on what basis is it applicable in international investment law? It has found expression in the broader concept of Fair and Equitable Treatment (FET), but there is also a view that it may have evolved into a stand-alone, free-standing standard and, possibly, a general principle of law.[18] These sources of expressions are discussed next.

I. Legitimate Expectations as a Component of FET

The concept of legitimate expectations has mostly been applied as component (or an element) of FET, a concept that is frequently included in IIAs.[19] But the ambit and content of FET is itself imprecise.[20] Whether an investor has been given fair and equitable treatment depends on all the circumstances of the particular case.[21] Probably the most expansive description of FET, which also captures the notion of legitimate expectations, was that given by the arbitral tribunal in *TECMED*

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17 Nganjo-Hodu and Ajibo, *above*, note 1.

18 Teerawat Wongkaew, *Protection of Legitimate Expectations in Investment Treaty Arbitration – A Theory of Detrimental Reliance,* Cambridge Univ. Press (2019), at p. 16.

19 See, e.g. Zach Meyers, *Adapting Legitimate Expectations to International Investment Law: A Defence of Arbitral Tribunals' Approach*, 11(3) Transnational Dispute Management (2014), pp. 1, 2. For examples of cases in which legitimate expectations have been claimed as a component (or an element) of FET, see *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award of 22 September 2014; *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003 (*Tecmed v. Mexico*); *Suez Sociedad General de Aguas de Barcelona S.A. & InterAguas Servicios Integrales del Agua S.A. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction of 30 June 2010, paras 22–238; *Ioannis Kardassopoulos & Ron Fuchs v. Georgia*, ICSID Case Nos. ARB/05/18 & ARB/07/15, Award of 3 March 2010, paras 434–452; *AES Summit Generation Ltd. & AES-Tisza Eromu Kft. v. Hungary*, ICSID Case No. ARB/07/22, Award of 23 September 2010, paras 9.3.6–9.3.26; *Enron Corp. & Ponderosa Assets, L.P. v. Argentina*, ICSID Case No. ARB/01/3, Annulment Decision of 30 July 2010; *Alpha Projekholding GmbH v. Ukraine*, ICSID Case No. ARB/07/16, Award of 8 November 2010; *EDF (Services) Ltd. v. Romania*, ICSID Case No. ARB/05/13, Award of 8 October 2009; *AES Summit Generation Ltd. & AES-Tisza Eromu Kft. v. Hungary*, ICSID Case No. ARB/07/22, Annulment Decision of 29 June 2012; *Antoine Goetz et al. and S.A. Affinage des Métaux v. Burundi*, ICSID Case No. ARB/01/2, Award of 21 June 2012; *Ulysseas, Inv. v. Ecuador*, UNCITRAL Award of 12 June 2012; *EDF International S.A., SAUR International S.A. & León Participaciones Argentinas S.A. v. Argentina*, ICSID Case No. ARB/03/23, Award of 11 June 2012; *M. Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award of 8 April 2013; *LG&E Energy Corp. & anor. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability of 6 October 2006; as well as *Duke Energy & anor. v. Ecuador*, ICSID Case No. ARB/04/19, Award of 18 August 2008.

20 Dolzer and Schreuer, *above*, note 6, at p. 115.

21 UNCTAD, *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II, United Nations New York (2012), at 61-4; see also OECD, *Fair and Equitable Treatment Standard in International Investment Law*, OECD Working Papers Series on International Investment 2004/3, at 40; and Ioana Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment*, Oxford Univ. Press (2008), at pp. 66-8.

v Mexico.[22] There, the tribunal considered that FET required contracting parties to an IIA to provide (to covered) investors treatment that does not affect the basic expectations they took into account when they made the investment, and that the host-state was expected to act in a consistent manner, free from ambiguity and totally transparent in relation to the foreign investor.[23]

In *Gold Reserve v Venezuela,*[24] where the investor claimed that measures adopted to terminate its mining concessions breached the FET, full protection and security, most-favored nation (MFN), and expropriation provisions, the tribunal found for the claimant on only a breach of the FET. The tribunal held that the revocation measures had been adopted with an utter lack of transparency, consistency, predictability, and good faith. The tribunal found that the investor had relied on representations made by public authorities which gave rise to legitimate expectations that they would be fulfilled. Those expectations were held to have been frustrated by the revocation measures that Venezuela later adopted. The tribunal determined that, in so doing, Venezuela had not treated the claimant fairly and equitably.

When considered as an element of FET, the legal basis of legitimate expectations is arguably anchored in FET provisions in the applicable IIAs. As most IIAs provide for FET, the legitimate expectation standard, as an element of FET, is seen to be legally founded on the FET provision. However, apart from the fact that the FET standard itself is imprecise, there are those who question the soundness of legitimate expectation being an element of FET. For instance, in his separate opinion in *Suez, Sociedad General de Aguas de Barcelona, S.A. & Vivendi Universal, S.A. v. Argentine Republic,*[25] Pedro Nikken opined that the doctrine of legitimate expectations has no strong, convincing legal basis in international investment law because it could not be inferred on the basis of the ordinary meaning of the FET standard as it appears in investment treaties.[26] In the annulment proceedings in *CMS Gas Transmission Co. v. Argentine Republic,*[27] the tribunal stated that legitimate expectations might not arise as legal obligations if they are considered to arise by reason of a course of dealing between the investor and the host-state.[28] Similarly, in the annulment

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22 *Técnicas Medioambientales Tecmed, S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award of 29 May 2003 (*Tecmed v. Mexico)*, at para. 173.

23 *Ibid*.

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

25 *Suez, Sociedad General de Aguas de Barcelona, S.A. & Vivendi Universal, S.A. v. Argentine Republic,* ICSID Case No. ARB/03/19, Decision on Liability of 30 July 2010.

26 *Suez, Sociedad General de Aguas de Barcelona, S.A. & Vivendi Universal, S.A. v. Argentine Republic,* Ibid, Separate Opinion of Arbitrator Pedro Nikken, paras 2–3. See also, *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Annulment Decision of 25 September 2007, para. 89; and *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. 01/7, Decision on Application for Annulment of 21 March 2007, para. 67.

27 *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Annulment Decision of 25 September 2007, para. 89. In a similar sense, see *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. 01/7, Decision on Application for Annulment of 21 March 2007, para .67.

28 *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Annulment Decision of 25

proceedings in *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile,*[29] the tribunal questioned the *TECMED* tribunal's apparent reliance on the foreign investor's expectations as the source of the host-state's obligations.[30] It went on to state that the 'obligations of the host State towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have.'[31] Thus, a 'tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers.'[32]

Despite the above expressions of doubt over whether legitimate expectations are bourne out by FET, the majority of arbitral tribunals have found legitimate expectations to be an element of the fair and equitable treatment standard since the landmark *Tecmed* case.[33] Many scholars also tend to accept legitimate expectations as an element of FET.[34] In this view, legitimate expectations may be seen to have gradually consolidated into one of the cardinal elements of FET in international investment law.[35] In fact, in *Electrabel v Hungary,* the tribunal asserted that it 'is widely accepted that the most important function of the fair and equitable treatment standard is the protection of the investor's reasonable and legitimate expectations.'[36]

II. Legitimate Expectations as a Stand-Alone Doctrine

Some consider legitimate expectations to be a stand-alone doctrine independent of FET.[37] For instance, it has been said that 'a breach of an investor's legitimate expectations does not *ipso facto*

September 2007, para. 89.

29 *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile*, ICSID Case No. 01/7, Decision on Application for Annulment of 21 March 2007.

30 *Ibid*., at para 67.

31 *Ibid*.

32 *Ibid*.

33 See, e.g. *Novenergia II*, para. 646, where the tribunal stated, in respect of the FET provision in the Energy Charter, that 'the Tribunal agrees with the arbitral tribunals' findings in *Isolux, Plama* and *Eiser* that the stability and transparency obligation is simply an illustration of the obligation to respect the investor's legitimate expectations through the FET standard, rather than a separate or independent obligation.' See also cases cited in note 18 above.

34 See, e.g., Nganjo-Hodu and Ajibo, *above,* note 1; Monebhurrun, *above*, note 9. See also Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 Santa Clara J. Intl L. (2014), pp. 7, 14; Thomas J. Westcott*, Recent Practice on Fair and Equitable Treatment*, 8(3) Journal of World Investment & Trade (2007), pp. 409-30, at 414.

35 Monebhurrun, *above*, note 9, at p. 554.

36 *Electrabel S.A. v. Hungary*, ICSID No. ARB/07/19, Award of 25 November 2015, para. 7.75.

37 See, e.g., Nganjo-Hodu and Ajibo, *above*, note 1, pp. 45, 48 and 57; Julien Chaisse and Sum-yu (Ruby) Ng*, The Doctrine of Legitimate Expectations: Comparing International Law and Common Law in Hong Kong*, 48(1) Hong Kong Law Journal (2018), pp. 79, 81; *International Thunderbird Gaming Corporation v. United Mexican States*, UNCITRAL Award of 26 January 2006.

amount to a breach of the fair and equitable treatment obligation.'[38] If legitimate expectations is a stand-alone doctrine, questions arise as to the legal basis of the concept as a source of obligation on the part of a host-state. Arbitral tribunals have not evaluated in detail the legal sources of the concept.[39] Some continue to see it as an instrument of interpretation rather than a general rule,[40] while others have seen it as entailing substantive norms.[41]

Viewed as conferring substantive rights, the concept of legitimate expectations seems to have its basis in domestic legal systems. It is undisputed that the concept of legitimate expectations has been used in various contexts in domestic legal systems.[42] It has been applied in various procedural and, to some extent, substantive contexts within some domestic legal systems. It has been applied in the context of balancing of the rights of citizens and appropriate latitude needed by public authorities to effectively discharge their duties. In court- and other adjudicatory processes, the concept is used as entailing due process; parties can legitimately expect to be afforded a fair hearing. In some jurisdictions, the notion of legitimate expectations is said to be rooted in the national constitution.[43] In some other legal and administrative traditions, it is used for the protection of trust.[44]

The concept has also been applied in the context of the domestic takings doctrine, by which owners whose assets are expropriated can legitimately expect certain conditions (such as public purpose and adequate compensation) to be met. In some common law jurisdictions, its effects may manifest in other substantive law principles, such as estoppel in private law. In that context, it prevents a party who has made a presentation that was intended to be relied upon, and has been relied upon by the other party, to change its position in circumstances where allowing the representor to depart from the representation would result in a detriment to the relying party; hence, it would be unconscionable on the part of the representor to so depart.[45] To this extent, legitimate expectations may find expression in the principle of good faith in civil law systems,[46] and closely related to estoppel in international law.[47] Legitimate expectations are said to be a fundamental principle of the

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38 *Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award of 8 April 2013**,** para. 536. See also, *International Thunderbird Gaming Corporation v. United Mexican States,* Separate Opinion of Thomas Wälde, December 2005, para. 37.

39 Potestà, *above,* note 2, p. 89.

40 Monebhurrun, *above*, note 9, p. 554.

41 Chaisse and Ng, *above*, note 36, p. 81.

42 Nganjo-Hodu and Ajibo, *above*, note 1.

43 For example in Germany, see González, above, note 10, p. 412.

44 See Anneken Kari Sperr and Diana Hohenlohe-Oehringen, *Introduction*, in Sperr & Hohenlohe-Oehringen (eds.), *The Protection of Legitimate Expectations in Administrative Law: A Comparative Study*, Hart Publishing (2017).

45 See, Monebhurrun, *above*, note 9.

46 *Ibid*., at p. 557.

47 James Crawford, *Brownlie's Principles of Public International Law,* Oxford Univ. Press, 8th ed. 2012, p. 420.

European legal systems.[48] But its meaning in the EU context may be distinguishable from its conceptualization in the common law tradition.[49]

The diversity of understandings, content, source, and application of the legitimate expectation concept reflects different, though closely related, perspectives inherent in its meaning. For instance, its application in civil and administrative law may be different from its application in private law. Even in a particular area within a particular legal tradition, the concept may not be equivalent to the related principles through which it may be expressed. For instance, legitimate expectations are not necessarily the same as, may not entail the same elements of, or perform the same function as good faith or estoppel in a common law system.

On the point of legitimate expectations and estoppel, the words of Mason CJ and Wilson J in their joint judgment in the Australian case of *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* is instructive.[50] While upholding the right of a third party to sue on an insurance contract in the face of the privity rule, they stated: 'We doubt that the doctrine of estoppel provides an adequate protection of the legitimate expectations of such persons and, even if it does, the rights of persons under a policy of insurance should not be made to depend on the vagaries of such an intricate doctrine.'[51] In other words, the doctrine of estoppel may be inadequate to protect legitimate expectations; legitimate expectations should be protected directly, separate from estoppel (which the justices did in this case), rather than through the doctrine of estoppel, which would present serious impediments. Similar thoughts have been expressed in investor-state arbitration. For instance, in his separate opinion in the *International Thunderbird Gaming* arbitration, Thomas Wälde stated that arbitral tribunals find the principle of legitimate expectations to be a preferred way for providing protection to investors where the tests of a clear breach of more defined investor-protections appear 'too difficult, complex and too easily assailable for reliance.'[52]

The concept of good faith is also upheld in some jurisdictions independently of estoppel and legitimate expectations. For instance, the concept of good faith is recognized in Australian law independent of estoppel, and has been applied in various cases.[53] It is applied independently of estoppel or legitimate expectations. For example, the iteration of the concept and principles of good

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48 AG Jääskinen confirms that "according to settled case-law, the principle of the protection of legitimate expectations is one of the fundamental principles of the European Union." See *France Télécom SA v Commission* (C-81/10 P) EU:C:2011:554 at [159].

49 G. Nolte, *General Principles of German and European Administrative Law: A Comparison in Historical Perspective*, 57 *Modern Law Review* (1994), pp. 191, 195.

50 (1988) 165 CLR 107.

51 *Ibid*, 123.

52 *International Thunderbird Corporation v. United Mexican States*, NAFTA Arbitration under UNCITRAL, 2005, para. 37.

53 See, e.g., *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558; *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1; *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234. See also, John Carter and Elisabeth Peden, *Good Faith in Australian Contract Law*, 19(2) *Journal of Contract Law* (2003), pp. 155-172.

faith in Australian law was inapplicable in the *Trident case*[54] reffered to above.[55] This is similar in other jurisdictions, such as the US, where it exists alongside, and separate from, estoppel.[56] These concepts are different, devised to address different issues.

Considering the diversities of application of contexts and meanings between, and within, different domestic legal systems, it is problematic to superimpose a particular meaning or understanding of legitimate expectations as a stand-alone principle on international investment law, and on host-states in particular. Arguably, when legitimate expectations have been applied by arbitral tribunals, the members of the tribunals may have come from their conception and understanding of the concept from their particular legal background. Unsurprisingly, serious disagreements remain about what the concept entails and how it should be applied. In the case of *Novenergia II v Spain*[57] the tribunal disagreed with the formulation of legitimate expectations adopted by the tribunal in *Eiser v Spain.*[58] It went on to hold that Spain's actions had breached the Claimant's legitimate expectations (as a component of FET), in contrast to the tribunal in *Charanne v Spain*,[59] which found that the same acts of the Spanish government did not infringe on the legitimate expectations of the investor.

More importantly for the purpose of this chapter, the establishment of the concept of legitimate expectations in domestic legal systems, however uniform or divergent it may be, does not in itself make it international law. Domestic law of a state is not equated to international law. Thus, there is a need for an appropriate basis for the application of legitimate expectations, however they are conceived and couched, in international law.

III. Legitimate Expectations as General Principle of International Law

There is a view that the concept of legitimate expectations, as applied in domestic legal systems, has evolved into a general principle of law.[60] On that basis, legitimate expectations are arguably a principle of international law as encapsulated in Article 38(1) of the Statute of the International

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54 (1988) 165 CLR 107.

55 *Ibid*.

56 For a discussion of the concept of good faith in U.S. law, see, e.g., Robert S. Summers, *The Duty of Good Faith: Its Recognition and Conceptualization*, 67Cornell Law Review (1982), p. 810; as well as Emily Houh, *The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?,* Utah Law Review (2005), p. 1-56.

57 *Novenergia II Energy Environment Grand Duchy of Luxembourg SICAR v The Kingdom of Spain*, SCC Arbitration, Final Arbitral Award of 15 February 2018.

58 *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award of 4 May 2017, para 382.

59 *Charanne B.V. and Other v. Kingdom of Spain*, Award of 21 January 2016. See also *Isolux Infrastructure Netherlands, B.V. v. the Kingdom of Spain*, SCC V2013/153, Award of 12 July 2016, where Spain's actions were held *not* to have infringed its FET obligations.

60 *See,* Monebhurrun, *above*, note 9, pp. 551–562. See also Elizabeth Snodgrass, *Protecting Investors' Legitimate Expectations: Recognizing and Delimiting a General Principle*, (2006) 21 *ICSID Review—FILJ* (2006), pp. 1–58; and Potestà, above note 2, pp. 88–122; Chaisse and Ng, above, note 36, p. 81.

Court of Justice (ICJ). Article 38(1), which is generally considered to be the most authoritative enumeration of the sources of international law, identifies sources of international law other than treaties.[61] These include "general principles of law recognized by civilized nations."[62] International tribunals have applied general principles of law in deciding cases. For instance, in *Amco Asia Corporation v. Indonesia,* decided in 1984, the ICSID tribunal "looked to general principles of law rather than to the treaty's terms for guidance"[63] in calculating damages to be paid by Indonesia. The tribunal referred to and applied the general principles governing damages for contractual liability under Indonesian law, French law, English law and U.S. law, which it found to be similar.[64]

Based on many references in different international contexts, it can be argued that a general principle of law on legitimate expectations has evolved to maturity. The tribunal in *Gold Reserve Inc. v Venezuela*[65] seems to have taken this view of legitimate expectation, though it started, and ended, its analysis conceiving of the concept as a component of FET.[66] The tribunal examined the existing case law and reviewed the different elements of FET and legitimate expectations propounded by arbitral tribunals in those cases. It went on to consider the ICSID Convention and Additional Facility, which enables arbitral tribunals to refer to rules of international law when deciding on the applicable law, and concluded that those "rules of international law" encompass the general principles of law recognized by civilized nations as provided for by the ICJ Statute.[67] The tribunal saw legitimate expectations as being tantamount to a general principle of law common to

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61 The Statute of the International Court of Justice (hereafter 'ICJ Statute') provides in Article 38(1) that:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   (b) international custom, as evidence of a general practice accepted as law;
   (c) the general principles of law recognized by civilized nations;
   (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

62 ICJ Statute, Article 38(1)(c).

63 Krista Nadakavukaren Schefer, *International Investment Law: Texts, Cases and Materials,* Edward Elgar (2013), p. 51; *Amco Asia Corp. v. Indonesia,* ICSID Case No. ARB/81/1, Award of 21 November 1984, 24 I.L.M. 1022 (1985).

64 *Amco Asia Corp.*, 24 I.L.M. 1022 (1985), at pp. 1036–37.

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

66 *Ibid*., paras. 568-576, particularly para. 576, where the tribunal sated 'With particular regard to the legal sources of one of the standards for respect of the fair and equitable treatment principle, i.e. the protection of "legitimate expectations," these sources are to be found in the comparative analysis of many domestic legal systems.' For authority for this position, the tribunal cited, among other sources, Francisco Orrego Vicuña, *Regulatory Authority and Legitimate Expectations: Balancing the Rights of the State and the Individual under International Law in a Global Society*, 5(3) International Law Forum (2003), pp. 188, 194; and S. Schill, *Fair and Equitable Treatment, the Rule of Law, and Comparative Law*, in S. Schill (ed.), *International Investment Law and Comparative Public Law,* Oxford Univ. Press (2010), pp. 151, 156-157.

67 *Above*, note 65, paras. 568-576.

the main legal systems of the world, which can therefore be transposed into international law. Accordingly, it found legitimate expectations existing 'as a legal principle in many legal traditions of the European continent and of some Latin American states such as Argentina and Venezuela'[68] and applicable in the case at hand. Ultimately, though, the tribunal seems to have applied 'legitimate expectations as a FET component'[69] that had been breached by Venezuela.[70] It means that this case is not authoritative for the proposition that legitimate expectations have assumed the status of a general principle of law in international law.

More fatally for the view that legitimate expectations are a general principle of international law is the judgement of the ICJ in the case of *Bolivia v Chile.*[71] While the case itself was not about an international investment, the court rejected Bolivia's argument, for which it cited *Gold Reserve v Venezuela,* that legitimate expectations was applicable as a general principle of international law. The court noted:

> "that references to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation. Bolivia's argument based on legitimate expectations thus cannot be sustained."[72]

Judge *ad hoc* Daudet, in his dissenting opinion, agreed with the majority on this point.[73] Judge Salam, another dissenter, also agreed with the majority's conclusion on this point, though his reasoning was rather ambiguous.[74] Judge Robinson, also dissenting, was silent on this point.

It follows that the Court was almost unanimous on the point that there is no general international law principle of legitimate expectations that would give rise to an obligation. It is possible, however, to argue that the Court's decision that there is no rule of legitimate expectations in general international law is limited to *relations between States*. According to this argument, the existence of legitimate expectations between investors and host-states would be unaffected by *Bolivia v. Chile*. This seems tenuous, however. The Court's judgment does not have any such limitation on

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68 Monebhurrun, above, note 9; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela,* para. 576.

69 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela,* para. 606.

70 *Ibid*., paras. 577-610.

71 *Obligation to Negotiate Access to the Pacific Ocean* (*Bolivia v Chile*), ICJ Judgment of 1 October 2018, available at https://www.icj-cij.org/en/case/153/judgments.

72 *Ibid*., Judgment by the majority, para. 162.

73 *Ibid*., Dissenting Opinion of Judge *ad hoc* Daudet, para. 6, available at https://www.icj-cij.org/files/case-related/153/153-20181001-JUD-01-04-EN.pdf.

74 *Ibid*., Dissenting Opinion of Judge Salam, para. 25, available at https://www.icj-cij.org/files/case-related/153/153-20181001-JUD-01-03-EN.pdf.

its face with regard to its scope of application; it appears emphatic. The better view, therefore, is to accept that for the time being, there is no general international law principle of legitimate expectations that would give rise to host-state obligations.

IV. State of the Legal Basis of Legitimate Expectations

As discussed above, the jurisprudence on legitimate expectations may have its legal basis in one of three possible underpinnings, namely: (1) a component of FET; (2) a stand-alone concept independent of FET; and (3) general principle of law applicable as a rule of international law. Of these, its basis in international investment law as a stand-alone or a general principle of law seems dubious, and controversial. Its basis as a component of the FET obligation found in almost every IIA seems to be most widely accepted. Even then, since FET is largely undefined in IIAs, the content and meaning of its legitimate expectations component tend to derive from the varying contents, meanings, and applications of the concept's understandings from domestic legal systems.

That said, an overwhelming majority of cases support the contention that legitimate expectations can be generated by the conduct of states. That is, 'where the state has acted in such a way so as to generate a legitimate expectation in the investor and that investor has relied on that expectation to make its investment, action by the state that reverses or destroys those legitimate expectations will be in breach of the fair and equitable treatment standard and thus give rise to compensation.'[75] However, there remains disagreement as to when the action of a state crosses the line so as to constitute a breach of legitimate expectations of an investor. Most agree that legitimate expectations cannot result in a general freeze on regulatory or other changes in law or policy, or act as a stabilization clause.[76] In *Saluka*, the arbitral tribunal remarked that "[n]o investor may reasonably expect that the circumstances prevailing at the time the investment is made will remain totally unchanged."[77] In *EDF v. Romania,*[78] the tribunal remarked that except where specific promises or representations are made by the host-state to the investor, the investor 'may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State's legal and economic framework. Such expectation would indeed, neither be legitimate nor reasonable.'[79]

While certainly possible, there is no agreement on when regulatory changes tip over from the permissible to a breach of legitimate expectations. For instance, the arbitral tribunal in *Eiser* conceived of such a breach to occur where a radical change is adopted in ways that deprive

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[75] *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, Award of 11 December 2013, para. 667.

[76] See, e.g. *Micula v. Romania,* para 669*; AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award of 23 September 2010, para. 9.3.73; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award of 4 May 2017.

[77] *Saluka Investments B.V. v. Czech Republic*, UNCITRAL Partial Award of 17 March 2006.

[78] *EDF v. Romania*, ICSID Award of 8 October 2009.

[79] *Ibid*., para. 217.

investors of their investment's value.[80] But the tribunal in *Novenergia II* disagreed 'with the approach adopted by the arbitral tribunal in *Eiser*.'[81] It adopted what it described as 'a *balancing* exercise, where the state's regulatory interests are weighed against the investors' legitimate expectations and reliance.'[82] Ultimately, however, Spain was held to be in breach of its obligations to the investors in both cases.[83]

The question of what conduct creates legitimate expectation is also unsettled. Drawing on the conceptualization of legitimate expectation as a fundamental rule of European law, González argues that legitimate expectations would arise only when there are specific assurances to the investor by very clear and unambiguous conduct.[84] Thus vague, generic and unspecific assurances would not suffice; parties cannot claim hypothetical or potential expectations; nor will statements suffice that have a specific address but do not contain specific and unambiguous assurances. From this perspective, tribunals would need to exercise prudence when it comes to recognizing alleged violations of legitimate expectations, ensuring that they recognize the principle only in very limited circumstances.[85] Reliance sufficient to trigger claims would also require a measure of due diligence on the part of the investor. For instance, the claimant-investor must know in detail the relevant regulatory framework, including the possibility that reasonable changes may occur in the future.

However, others argue that legitimate expectations arise naturally, and that the undertakings and assurances need not be specific. The arbitral tribunal in *Electrabel* stated that "[w]hile specific assurances given by the host State may reinforce the investor's expectations, such an assurance is not always indispensable."[86] Other arbitral tribunals have taken a similar position. For instance, in *Micula* the arbitral tribunal observed that "[t]here must be a promise, assurance or representation attributable to a competent organ or representative of the state, which may be explicit or implicit."[87] In other words, the supposed assurance may be implied. The tribunal in *Novenergia* also took this view.[88]

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80 *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award of 4 May 2017, para. 382.

81 *Novenergia II v Spain* (2018), para. 694.

82 *Ibid*.

83 *Ibid.*, paras. 695-697; see also *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award of 4 May 2017, paras. 418. It must be added that the Eiser decision was subsequently annulled due to an arbitrator's undisclosed conflicts of interest.

84 González, *above*, note 10, p. 416.

85 See e.g. J. van Meerbeeck, *The Principle of Legal Certainty in the Case Law of the Court of Justice of the European Union: From Certainty to Trust*, 41 E.L. Rev. (2016), pp. 275, 282. See also J. Schwarze, *European Administrative Law*, Sweet & Maxwell (1992), p. 950.

86 *Electrabel S.A. v. Hungary*, ICSID No. ARB/07/19, Award of 25 November 2015, para. 7.78.

87 *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, Award of 11 December 2013, para. 669.

88 *Novenergia II v Spain* (2018); see also *Electrabel S.A. v. Hungary*, ICSID No. ARB/07/19, Award of 25 November 2015, para. 7.78.

From the above discussion, it can be seen that the legal underpinnings of legitimate expectations are debatable, while the content of the concept itself also remains fluid. This does not make for ease of legal and policy guidance for states. That said, there are a few things that can be concluded with regard to host-state obligations under international investment law. These are outlined next.

D. HOST-STATES AND LEGITIMATE EXPECTATIONS

As it currently stands, the legitimate expectation concept has been developed to create obligations for host-states in favor of investors. This is another example of the skewered nature of the current state of international investment law, creating obligations for host-states toward investors with no corresponding obligations by investors toward host-states and their citizens.[89] This presents pitfalls for host-states. The reason, though, is not difficult to fathom; it goes back to the genesis of the development of international investment law, and the motivations behind the development of the law, which have shaped its formulation and application. This is not the place to revisit the discussions of the development of the law and the much-documented criticisms of the current imbalance in international investment law.[90] This part simply looks briefly at how states may suffer the disadvantages associated with the application of the concept of legitimate expectations as it still operates at the present time. First, we look at how and why host-states may be disadvantaged by the application of the concept. Second, we discuss how host-states may be able to limit the impact of the application of the concept of legitimate expectations.

I. Disadvantages to Host-States

As noted by Thomas Wälde in his separate opinion in *International Thunderbird Gaming*, the principle of legitimate expectations has become for tribunals a preferred way of providing protection to investors where the tests of a breach appear 'too difficult, complex and too easily assailable for reliance.'[91] In other words, the concept is used to grant protections to investors (and compensation when the protections are held to have been breached) in circumstances where investors would otherwise be unsuccessful in establishing breaches of specific rights. Thus, legitimate expectations are pleaded, in particular, whenever there is a possibility of a host state's breach of the indirect

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89 For discussions of the imbalances in international investment law, see Part 6, Chapters 6.1, 6.2, 6.3, 6.4, as well as Frank Garcia et al, *Reforming the International Investment Law Regime: Lessons from International Trade Law*, 18 Journal of International Economic Law (2015), p. 861; Alessandra Arcuri and Francesco Montanaro, *Justice for All? Protecting the Public Interest in Investment Treaties,* 59 Boston College Law Review (2018), p. 2791; and George K. Forster, *Balancing Investor Protections, the Environment and Human Rights: Investors, States and Stakeholders: Power Asymmetries in International Investment and the Stabilizing Potential of Investment Treaties*, 17 Lewis & Clark L. Rev. 361.

90 For the evolution of the law, see Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital*, Cambridge Univ. Press (2013); Jeswald W. Salacuse, *The Law of Investment Treaties*, Oxford Univ. Press, (2nd ed. 2015), p. 46; Chester Brown, *The Evolution of the Regime of International Investment Agreements: History, Economics and Politics*, in Marc Bungenberg et al (eds.), *International Investment Law*, Bloomsbury T & T Clark (2015), p. 154; Kenneth J. Vandevelde, *A Brief History of International Investment Agreements*, 12 U.C. Davis J. Int'l L. & Pol'y 157.

91 Separate Opinion of Thomas Wälde, above, note 52, at para. 37.

expropriation standard, a violation of an umbrella clause, or other alleged violations of the terms of investment treaties and contracts.[92]

The concept is used as an overarching principle that is resorted to when specifics are not helpful to sustain investor claims. It can be used to maximize protection to the investor by circumventing the high threshold test of *expropriation* because it allows 'a measure of subjective judgment.'[93] Its recurrent application by arbitral tribunal seems to be based on their prioritization of precedent and preoccupation with investment protection.[94]

Application of the legitimate expectations concept overwhelmingly benefits investors. Unfortunately, the fluidity and indeterminacy of the scope and content,[95] and the inconsistent application of the principle, makes it harder for host-states to address. As has been observed, the legitimate expectation standard is unsettled. Tribunals disagree on when legitimate expectations were breached. One tribunal may hold a particular act of a host-state to be in breach of legitimate expectations of investors, while another tribunal may hold the same act of the state not to constitute a breach.[96] The inconsistency in investor-state arbitral tribunals is pervasive, well documented and heavily criticized, and presents problems for host-states. It makes it difficult to formulate a consistent policy regarding expectations of investors.

II. Limiting the Impact of Legitimate Expectations of Investors

1. Due Consideration of Investors' Expectations

One way by which host-states may avoid being held to have breached legitimate expectations of investors is to give due consideration to the investors' expectations. When regulating (or changing regulations) regarding economic activities, host-states are well advised to consider the interest of, and potential impact on foreign investments. It would help for them to engage with the sector to be affected, granting investors and relevant stake-holders a fair hearing. Host-states would be advised not to adopt regulatory policies that disproportionately affect investors, but to take a balanced and considered approach.

2. Omitting FET from IIAs

As previously discussed, legitimate expectation obligations (or breaches of legitimate expectations) are often applied as a component of FET provisions in IIAs. This means that states may be able

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92 Rudolf Dolzer, *Fair and Equitable Treatment: A Key Standard in Investment Treaties*, 39(1) International Lawyer (2005), pp. 87-106.

93 See, Wongkaew, *above*, note 18, p. 5.

94 Nganjo-Hodu and Ajibo, *above*, note 1.

95 See above, discussions under B. Meaning and Content of Legitimate Expectations, and under C.IV. State of the Legal Basis of Legitimate Expectations.

96 See, for instance, the contrasting decisions in respect of Spain's renewable energy tariff regime: *Novenergia*; *Charanne*, and *Eiser*.

to limit, or avoid, enlivening the application of the concept by omitting FET in their IIAs. While most IIAs have FET provisions, there are a few that do not.[97]

Further, even for states that concluded first generation IIAs with FET provisions in the 1990s, many of those IIAs have either reached the time for renewal or are coming up for renewal. States may rethink the need to retain FET provisions in their current form. In fact, states that wish to revise their IIAs do not need to wait for their IIAs to reach renewal time; they may be able to terminate and replace sooner if they wish.

Of course, the content of an IIA does not depend solely on one state. It would take the agreement of the counterparty state to omit or limit the ambit of a FET provision. This may not be forthcoming if the counterparty is adamant that FET must be included. That said, the general current trend in newer generation IIAs is to reduce the over-expansive rights conferred on investors to the disadvantage of host-states, as the implications of the provisions of those earlier IIAs have become clearer. Consequently, one may be inclined to think that more and more IIA parties may be open to omitting FET in IIA provisions.

It is arguable, though, that omitting FET provisions in IIAs may undermine the confidence of prospective investors in the protections available, the standard of treatment they can expect, and therefore their willingness to invest in a jurisdiction without such a regime. If the purpose of IIAs are to create an enabling international legal regime so as to promote and attract investment, then a perceived weaker regime under which investors cannot be sure of fair and equitable treatment would arguable undermine the purpose of the IIA and its prospect of inducing investments.[98]

3. Limiting the Ambit of FET Provisions

State parties may not omit FET from their IIAs altogether but, instead, limit its ambit to narrower circumstances. They may do this by defining the FET standard narrowly, and/or giving specific circumstances within with the protections apply. They may also reserve unto themselves conduct that would be outside the FET treatment. They may state government actions, such as changes in tax regimes and concessions, regulations for the protection of health and environment, and discretion to grant, renew or revoke concessions and licences, to be outside the FET standard.

4. Increased Caution in Granting Assurances to Investors

At the heart of all alleged breaches of legitimate expectations are claims that the host-state has breached assurances it gave to the investor-claimant, directly or implicitly. Such assurances could

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97 An example of IIAs with no reference to FET can be found in IIAs entered into by Singapore. Thus, the Australia-Singapore FTA (2003), the India-Singapore Comprehensive Economic Cooperation Agreement (2005), and the New Zealand-Singapore FTA (2001), do not contain FET provisions. Other examples are the New Zealand-Thailand Closer Economic Partnership Agreement (EPA) (2005), the Albania-Croatia BIT (1993), the Croatia-Ukraine BIT (1997), and a number of BITs concluded by Turkey. For further discussion of the impact of the omission of FET in IIAs, see UNCTAD, *Fair and Equitable Treatment* (2011), pp. 18-20, available at https://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf.

98 See Kevin P. Gallagher and Melissa Birch, *Do Investment Agreements Attract Investment? Evidence from Latin America*, Journal of World Investment & Trade (2006), 7(6): 961-74.

be in an investment contract concluded between the state and the investor.[99] Host-states may, therefore, save themselves from claims by being cautious in the assurances they give. The less they give, the less the prospect of their being found to have created legitimate expectations in the investor, and breached them.

As mentioned in respect of omitting FET provisions in IIAs,[100] however, the confidence of prospective investors may be undermined, and they be dissuaded from investing, if a prospective host-state declines to give assurances that investors consider to be critical for, and conditional to, them investing. This would be particularly the case where the investors' capital commitment will be high and the sector for the investment entails significant risk. Investors invariably conduct a risk-benefit analysis, and opt for the choice that gives them the highest risk-adjusted return relative to alternate investment options. All things being equal, if a jurisdiction presents a higher risk due to equivocation, for instance, that will affect its competitiveness in investment attraction. Ultimately, therefore, it would be a question of balance for the prospective host-state to weigh up the optimal assurances it can afford to give.

E. CONCLUSION

This chapter discussed the concept of legitimate expectations, which is frequently invoked by investors before arbitral tribunals, alleging breaches by the host-states that have impaired the investors' investments. We have examined the nature and content of the concept as applied in international investment law, and concluded that it is far from clear. The chapter also examined the legal basis for the application of the concept in international investment law. In so doing, we looked at the iteration of the concept as a component of the FET standard that is frequently found in IIAs, whether it has evolved into a stand-alone doctrine independent of FET, and whether it has reached the status of a general principle of international law. We found that in the vast majority of cases, legitimate expectations have found their expression and application as a component of the FET standard. While a few scholars and arbitrators have doubted the soundness of the legal basis of legitimate expectation as a component of FET, the vast majority of scholars and arbitrators agree that legitimate expectations are a component of FET. The status of legitimate expectations as a stand-alone doctrine or general principle of law is more controversial, and less sound. While some scholars and arbitrators have surmised that it may have evolved into a stand-alone doctrine or general principle of law, there is no clear evidence of legitimate expectations having been applied as such. The chapter has also examined the positioning of host-states with regards to legitimate expectations, and how they may curtail its expansive application.

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99 See, for instance, *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award of 5 September 2008, para. 261, where the tribunal observed that unilateral modification of contractual commitments by host government calls for scrutiny in view of the legal rights and legitimate expectations of compliance generated in favor of the investors.

100 See discussion in D.II.1, above.