AN EXERCISE IN EQUIVOCATION: A CRITIQUE OF LEGITIMATE EXPECTATIONS AS A GENERAL PRINCIPLE OF LAW UNDER THE FAIR AND EQUITABLE TREATMENT STANDARD

Reference:

Josef Ostřanský, *An Exercise in Equivocation: A Critique of Legitimate Expectations as a General Principle of Law under the Fair and Equitable Treatment Standard,* in Gattini, A., Tanzi, A, *General Principles of Law and International Investment Arbitration* (Brill, forthcoming 2016) (on file with the author).

Introduction

Over the last roughly two decades, fair and equitable treatment (´FET´) has developed from a seldom, if at all, negotiated provision[1] into a standard with a breath-taking breadth. This is despite the fact that the treaty formulations have hardly changed. It has become a ubiquitous claim in investment arbitration. It is resorted to in virtually all investment cases. And it can be safely said that it is the most successful head of investment claims.[2]

Although its precise contours and normative content are not clear and are still debated, it seems that certain statements about its juridical nature can be taken for granted:

- It is a non-contingent standard, connoting a minimum threshold standard;
- it is not limited to a bad-faith conduct;
- and is independent from the level protection accorded on the national level, ie it is an international standard.

Clearly, these statements do not get us very far in ascertaining the true meaning of the FET, let alone the application of the standard to the facts at hand. There have been attempts in the doctrine to define FET by a unified legal principle, such as good faith,[3] the rule of law and good governance,[4] or justice).[5] All these are problematic and none of them is entirely coherent.[6] Hence

[1] E.g. Prof Scheuer´s expert statement in *Wintershall Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/04/14, Award, 8 Dec 2008, para 85.
[2] UNCTAD, *Fair and Equitable Treatment: A Sequel*, UNCTAD Series on Issues in International Investment Agreements II (New York, Geneva 2012) 1.
[3] T Grierson-Weiler, I Liard, ´Standards of Treatment´ (2008) in Muchlinski (et all) eds., *The Oxford Handbook of International Investment Law*, 272; R Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties´ 39 (2005) International Lawyer 1, 87, 91.
[4] K Vandevelde, ´A Unified Theory of Fair and Equitable Treatment´, 43 (2010) NYU Journal of International Law and Politics 43, 49; S Schill, ´Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law´ (2010) in Schill (ed) *International Investment Law and Comparative Public Law*, 151.
[5] R Kläger, *Fair and Equitable Treatment in International Investment Law* (CUP 2013) 153.

it is better to view the FET standard as composed of several elements of protection. Recent scholarly accounts also came to different conclusions about the juridical content of the FET depending on what methodology they used. For instance, according to Dolzer and Schreuer, the FET protects (1) stability and protection of legitimate expectations (´LE´), (2) transparency, (3) compliance with contractual obligations, (4) procedural propriety and due process, (5) good faith, (6) freedom from coercion and harassment.[7] Bonnitcha´s functional division includes (1) legitimate expectations, (2) procedural aspects, (3) examination of substantive justification, (4) discrimination.[8] Paparinskis´s traditional inductive method leads him to dividing the content of the FET into (1) administration of justice and (2) protection of property, which further includes arbitrariness, due process, transparency, discrimination, good faith, expectations.[9] We see that in all cases, the protection of expectations is included in the list.

In this chapter, I will first overview different justifications for the protection of LE offered in case law and doctrine, while focusing primarily on LE as a general principle of law based on a comparative overview in administrative law. I will highlight rationales offered for and limits attendant to the protection of LE in legal systems where the concept is most at home. I will then move to the context of international investment law (´IIL´) and to an example where I find the use of the concept misplaced: LE arising from contracts. The main thesis of the chapter is that the concept of LE must be applied in rather limited set of circumstances, where the other rules and principles do not suffice for solving the investment claim, if it is to retain some analytical value. I will argue against the use of LE as an intellectual framework, an organizing principle that can be filled with subjective content driven by dubious teleology. The latter use of the concept of LE, unfortunately all too common in investment arbitration practice, respects neither the role general principles play in the application of treaty obligations, nor the limits of the very principle of LE drawn from various legal systems.

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[6] See J Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (CUP 2014) 164. Arguing that good faith fails to explain the FET as an objective standard not dependent on whether respondent acted in good faith; the rule of law, itself a contestable concept, fails to explain why a reasoned change in policy arrived at through lawful and reasoned procedures can violate the FET; and finally, justice, an inherently contestable concept, fails to explain many aspects of arbitral practice, such as the protection of expectations or why distributive social welfare objectives, a typical objectives of any theory of justice, do not play role in arbitral decision-making.
[7] R Dolzer, Ch Schreuer, *Principles of International Investment Law, 2nd Ed.* (OUP 2012) 145-60.
[8] Bonnitcha (n 6)2014, 166.
[9] M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013) 181-259.

Theoretical justifications of legitimate expectations in international investment law

Some have suggested that LE found their way into the IIL and the FET as a general principle of law, others attempted to conceptualize them through analogy with international obligations created by unilateral acts of State, yet others have accepted them as part and parcel of the FET mostly through their use in arbitral practice. Finally, some authors take an issue with LE as part of FET altogether.[10] There have been four basic approaches to justify legitimate expectations in scholarship and practice of investment tribunals.

Legitimate expectations as customary and conventional international law

In comparison with other elements of FET, such as procedural propriety, due process, prohibition of arbitrariness, discrimination, and sovereign interference into State contracts, the protection of LE is not clearly rooted in traditional State practice.[11] It is true that certain states have accepted LE as part of the FET in their submissions.[12] One should not, however, make much of this acceptance by a few disparate states. Apart from that, the new generation of treaties that specify and detail the content of FET include the protection of LE.[13] These treaties show that the doctrine certainly gained traction and acceptance in some quarters. But it still does not explain the emergence before and beyond these limited treaty iterations.

Legitimate expectations derived from arbitral practice

Early investment arbitration cases adopt the view that the source of the expectations as a protected object, are the expectations per se.[14] These cases did not cite any previous authority (apart from the general principle of good faith) for their resort to the doctrine, and rather read it into the applicable treaty. Later cases picked up on their pronouncements and all of the sudden we are faced with established jurisprudence on LE.[15] To be sure, this practice relates also to other

[10] E.g Ch Campbell, 'House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law' (2013) 30 Journal of International Arbitration 4, 361.

[11] Paparinskis, *International Minimum Standard* (n 9) 255; Campbell, ´House of Cards´ (n 10)

[12] *Plama Consortium Limited v Bulgaria*, ICSID Case No ARB/03/24, Award, 27 Aug 2008, para 175; *MTD Equity Sdn. Bhv. v Chile*, ICSID Case No ARB/01/07, Decision on Annulment, 21 Mar 2007 para 69; *Frontier Petroleum Services Ltd v Czech Republic*,UNCITRAL, Final Award, 12 Nov 2010, para 279.

[13] E.g. EU-Canada The Comprehensive Economic and Trade Agreement (CETA), August 2014, Section 4, Art X.9, not yet in force.

[14] *Técnicas Medioambientales* Tecmed, *S.A.* v. *The United* Mexican *States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, para 154; *MTD* Award (n 12), 25 May 2004, para 180; *CMS Gas Transmission Company* v. *The Republic of Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005, para 279; *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para 372.

[15] A recent tribunal went as far as stating that 'the most important function of the fair and equitable treatment is the protection of the investor's reasonable and legitimate expectations;' *Electrabel S.A. v Republic of Hungary*, ICSID

controversial concepts that have simply ´appeared´ in case law and then have been picked up by subsequent tribunals and doctrine.[16] Such an approach works a self-fulfilling prophecy. The fact that later tribunals refer to previous ones to uphold similar legal reasoning, often without the requisite analysis and attention to the context and circumstances, may hold as an empirical observation. Yet, it does not explain the normative force of these pronouncements as a matter of law, as long as they are not explained in terms of the traditional theory of sources.[17] This approach does not hold as a matter of legal methodology of determining normative and juridical status of a concept, let alone its content.[18] It goes against the basic scriptures of international law making. Unless one is willing it accept outright that investment tribunals´ pronouncements are sources of law, this theory, without more, cannot explain the province of legitimate expectations in international investment law.[19]

In all fairness, later cases provided more clarity as to the grounds and contours of the doctrine.[20] They have clearly attempted to make sense and provide normative anchoring that the concept has been theretofore lacking. Importantly, they have attempted to provide the juridical foundations to legitimate expectations as a general principle of law, not as a creation of arbitral practice.

Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 Nov 2012, para 7.75, further *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, 24 Jul 2008, para 602, *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic*, ICSID Case No. ARB/02/1 127; Decision on Liability, 3 Oct 2006, para 102; *MTD* Award (n 12) para 114, *Occidental Petroleum and Production Co. v The Republic of Ecuador*, LCIA Case No UN 3467, Final Award, 1 Jul 2004, para 185, *CMS v Argentina* (n 14) para 279.

[16] E.g. compound interest, damages for non-expropriatory breaches, see JE Viñuales, 'The sources of international investment law', in Besson, d'Aspremont (eds.), *The Oxford Handbook on the Sources of International Law* (Oxford University Press, forthcoming in 2016), D Bentolila, *Arbitrators as Lawmakers* (PhD Thesis, The Graduate Institute, Geneva, 2015).

[17] Vinuales has explained that many anomalies in the practice of investment arbitration may be explained through the prism of traditional theory of sources, thus the theory retains its explanatory as well as normative traction. Viñuales, ´Sources´ (n 16) VI.

[18] A Roberts, ´The Power and Persuasion in International Investment Arbitration: The Dual Role of States, 104 (2010) American Journal of International Law 2, 179, 189-91; Campbell, ´House of Cards´ (n 10).

[19] Some authors that adopt the view of international arbitration as an autonomous legal order argue that arbitrators function as law-makers in this legal order. Bentolila (n 16).

[20] Notably International *Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Separate Opinion of Prof Wälde, Dec 2005; or recently *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 Dec 2010.

Legitimate expectations as unilateral declarations

This theory holds that certain representations of the State towards foreign investors create international obligation through unilateral acts of State.[21] There are several problems with this proposition. It is problematic because the method of unilateral declarations creates an obligation on the inter-State level as a new obligation,[22] while in the case of LE the conduct of State is taken as becoming part of the content of an existing obligation, that is, the FET. Usually, under the typical ISDS provisions limited to the obligations under the treaty, this obligation might not be within tribunal´s jurisdiction.[23] Furthermore, even assuming that the beneficiary of the obligation may be an individual,[24] unilateral declarations in general international law are directed to create effects on the international level, thus they bind only when declared by officials having capacity to bind the state internationally. This is not the case with situations in IIL, where the effects in absolute majority are to be within the national law; effects as to the legality of certain projects, permits, authorizations etc. The fact that addressee is a foreigner changes none of it. Hence, the analogy does not really fit.[25] Additionally, the analogy would create a bizarre situation when a unilateral statement towards an investor may create a self-standing international legal obligation, while an agreement embodied in a contract may not, except in the presence of an umbrella clause or stabilization clause. This conceptualization lacks explanatory force, as practice of investment treaty arbitration virtually never explains normative standing of legitimate expectations in terms of unilateral declarations.[26] For the sake of completeness, one should also mention that international law dictates restrictive interpretation of unilateral declarations.[27]

[21] WM Reisman, MH Arsanjani, ´The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes´ (2006) in P-M Dupuy et all (eds), *Common Values in International Law: Essays in Honour of Christian Tomuschat*, 409; *Nuclear Tests Case (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p 457, para. 46.

[22]ILC, ´Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations´, Adopted by the International Law Commission at its 58th session in 2006 together with commentaries thereto (ILC Report, A/61/10, 2006, Chapter IX), para 1, 4.

[23] Paparinskis, *International Minimum Standard* (n 9) 252

[24] The commentary to the ILC Guidelines (n 22), para 6, does not lend much support to this view; doubts where expressed also by *Total* (n 20) para 132.

[25] To be fair, Reisman and Arsanjani do not refer specifically to the type of situations typically resolved through the use of LE in BIT arbitrations. As they rather refer „campaigns… conducted either at the national level or abroad through diplomatic or consular channels, or through agencies and lobbyists and even through promotions via Internet." (n 21) 410

[26] One tribunal viewed considerations of unilateral declarations ´relevant´, yet did not apply them to the case of investor´s expectations; *Total* (n 20), para 131-134.

[27] ILC Guidelines (n 22) para 7.

Legitimate expectations as a general principle of law

More persuasive view is that LE form a general principle of law. There are two ways to conceptualize the notion as a general principle of law.

First, one can attempt to analogise the doctrine of LE with other similar principles, such as estoppel. However, this analogy has been recognized as problematic because estoppel presupposes interaction between equal parties. The major reason for the inadequacy of estoppel as a doctrine of public law is that public authorities' activities are based on a specific grant of power and are subjected to the requirement of legality. The requirement of legality secures that important public interests embodied in the procedures and powers of the authorities are respected; applying estoppel against public bodies goes against the doctrine of legality, thus ultimately against the public interests enshrined in the legal prescriptions binding upon the authority. In public law, this explains the move towards functionally similar, but structurally different principle of legitimate expectations.

The problematic nature of the analogy with estoppel in the context of IIL is enhanced by adding the layer of international law making. Even if the investment obligations are owed directly to the investors, they would represent ´the only relevant international law relationship between the State and the investor (human rights aside),´[28] created through traditional treaty and customary law-making process. In other words, the involvement of the home State is crucial (in the sense of the other indispensable law-maker). When using estoppel, it is hard to imagine it as an interpretative doctrine, because when solving a FET claim, the tribunal is concerned with interpretation of an international treaty standard and its application to the facts at hand. Either way, tribunals admitted similarity with the doctrine of LE but never conceptualised it as an incarnation of estoppel.[29]

The second strand sees LE as a stand-alone general principle, as a separate source of law under Art. 38 of the ICJ Statute; LE work here as a self-standing element of FET, or by assisting

[28] Paparinskis, *International Minimum Standard* (n 9) 253

[29] *Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award 28 Aug 2008, para 241; *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 Dec 2002, para 63; in the context of domestic law see e.g. *Lord Hoffman in House of Lords, Regina v. East Sussex County Council, ex part Reprotech* 128 Feb 2002: „It seems to me that in this area, public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and the time has come for it to stand upon its own two feet".

interpretation of the rule. This approach requires as a threshold question establishing existence of the principle.

Many authorities have warned that generation of a general principle of law is rather strict process, when one needs to ascertain its existence in most legal systems and be attentive to its variations.[30] In this sense, we are talking about principles that originate in *foro domestico,* as opposed to principles that are inherent in the very concept of law, such as principle of good faith. Regrettably, this methodology is often used as a short-cut to posit an assumed conclusion.[31]

When applied to LE, this approach may be objected to as importing on the international level notions peculiar to a limited number of mostly developed, therefore capital-exporting States. This may be challenged as influencing content of international law in a way traditional law-making techniques do not support.[32] For instance, the fact that LE operate as a principle of EU administrative law offers little refuge. EU is territorially defined economic and political integration organization; one that has as one of the defining criteria for membership similarity of legal cultures, and requires its prospective members to adjust their legal systems. How can then the law developed within EU be taken as a benchmark for an international law standard?

Yet, many legal systems beyond EU seem to operate with the doctrine as well, for instance Latin American countries.[33] Moreover, BITs are said to promote the rule of law, therefore it may be apposite to apply a principle that fosters legal certainty and confidence in the law as their important element.

The function of general principles of law (be they of national or international origin) is usually found in the elucidation of other rules of international law, and in the gap-filling role.[34] Similarly as other principles derived from good faith, such as estoppel or abuse of rights, these principles do not lead to the creation of a new obligation.[35] General principles are properly to be used when

[30] Paparinskis, *International Minimum Standard* (n 9) 255; G Gaja, ´General Principles of Law´, MPEPIL (2013), para 13; *South West Africa Cases (Ethiopia v South Africa, Liberia v South Africa)*, ICJ Second phase, 18 July 1966, para 88.
[31] Gaja, ´General Principles´ (n 30) para 30.
[32] Paparinskis, *International Minimum Standard* (n 9) 255.
[33] H Mairal, ´Legitimate Expectations and Informal Administrative Representations´ (2010) in Schill (ed) *International Investment Law and Comparative Public Law*, 416-7.
[34] Gaja, ´General Principles´ (n 30) para 21; the idea of real legal gaps, however, is only applicable when one adheres to a strict positivist voluntarist position that international law is a system of disparate rules, not a full system of law.
[35] It should be noted that some scholars argue that the principles of LE is a concrete incarnation of the general principle of good faith and as such a source of rights and obligations. See R Kolb, ´Principles as Sources of

a more specific rule of treaty or custom cannot ground the decision. In this sense, tribunals might find great refuge in the versatility of general principles, such as the principle of LE, in the application of the FET. However, they cannot use the principle to extend or rewrite the applied norm.[36] Certain cases have applied LE precisely with that effect, while the less controversial elements of the FET seemed perfectly capable and sufficient to ground the decision on.[37]

If one is indeed to accept LE as a general principle in IIL, one may not reject, although implicitly, limitations posed on it by national systems without adequate explanation.[38] Authors have showed that LE conceptions applied in IIL cases, at least in some instances, go far beyond what any national system would allow.[39] This might strike as a disconnection with the idea of FET as the minimum customary standard of protection. The argument for augmenting or adjusting a general principle to the international law context is much more difficult an exercise than a proof of its existence, already an exacting task. Still, this does not mean that structural and institutional differences between international and domestic law should not be taken into account, to the contrary. When this operation is being conducted, that is, adaptation of general principles of domestic legal systems to the international law context, one needs to take into account and compare mostly the purpose and rationale for the use of the principle in domestic systems, as well

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International Law: with Special Reference to Good Faith´, 53 (2006) Netherlands International Law Review 1, 23. However, this is a peculiar argument in the context of FET. LE are used as a general principle that is put to work to interpret and apply the standard of FET, it seems superfluous to refer and reach out to another principle of higher level of abstraction to justify another general principle to be applicable within the context of application of a specific treaty obligation. Legal principles apply directly as a formal source of law, but they do not create material source of rights and obligations, they operate to facilitate resolution of international disputes. *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, ICJ, Preliminary Objections, 11 Jun 1998, ICJ Rep 1998, 275, para 39; *Border and Transborder Armed Activities (Nicaragua v Honduras)*, Jurisdiction and Admissibility, Judgment, ICJ Rep 1988, 69, para 94; I Brownlie, *Principles of Public International Law*, 6th Ed (OUP 2003), 616.

[36] *CMS* (n 14) Decision on Annulment, 25 Sep 2007, para 89, ´Legitimate expectations are not, as such, legal obligations´, similarly *Cameroon v Nigeria; Nicaragua v Honduras*, ICJ (n 35); cf see Kolb, ´Principles as Sources´(n 35).

[37] E.g. *Werner Schneider, acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v. The Kingdom of Thailand (formerly Walter Bau AG (in liquidation) v. The Kingdom of Thailand*, UNCITRAL, Award, 1 Jul 2009, para 12.1-13.31; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 Jul 2008, para 615.

38 M Potestà, ´Legitimate Expectations in Investment. Treaty Law: Understanding the Roots and the Limits of a Controversial Concept´ (2013) ICSID Review 1; E Snodgrass, ´ Protecting Investors' Legitimate Expectations: Recognizing and Delimiting a General Principle´ 21 (2006) ICSID Review 1.

[39] L Johnson, O Volkov, 2013, ´Investor-State Contracts, Host-State "Commitments" and the Myth of Stability in International Law,´ Columbia University Academic Commons, http://dx.doi.org/10.7916/D8K0727X (last accessed 8 Oct 2015).

as its scope and relation to surrounding norms.[40] Lauterpacht´s classic work on the use of analogies in international law famously explained the operation of analogy by reference to factual characteristics that are identical or similar in the contexts of two legal systems (international and domestic), that justify equal legal treatment by the legal system into which we transplant with the legal treatment received in the system we transplant from.[41]

The foregoing was to show that the concept of LE, currently considered bedrock of the FET, is standing on far less solid juridical foundations than is usually assumed. I do not intend to contest its relevance in the IIL context, as it seems already well-entrenched. I want to point out some problematic aspects of its use in arbitral practice. In the following I will sketch a general principle of LE that is derived from comparative analysis of national administrative law; and also distinguish it from international law incarnations of the concept, such as the human rights conception. Then I will move to draw the link to its contours in IIL in general, and investment contracts in particular. This overview does not claim to be exhaustive, as such a comparative study would make good for a couple of books.[42] By pointing to the traditional families of law, I intend to merely point out different rationales and functions of the concept, and its varying calibration and contents.

Legitimate expectations as a general principle of law in a comparative perspective

As legitimate expectations are considered a general principle of law transposed from domestic legal systems, it is important to comparatively review the major families of law that apply the notion in order to understand its rationale, scope, function and limitations. In many national administrative and constitutional law systems the concept has very specific and narrow meaning. It connotes an interest that does not rise to the level of a right, which is nevertheless worthy of

[40] By this is meant, first and foremost, the juridical character of legitimate expectations, legally protected interest not amounting to the status of a formal right, as an exceptional concept available in limited circumstances where well-established avenues for remedy do not reach. As the concept of LE is a doctrine of public law, many other public law doctrines condition its application. For instance, the requirement of legality of representations giving rise to expectations must be assessed carefully when the principle is transplanted to international law. Some of these limiting principles will be discussed below.

[41] Lauterpacht, *Private Law Sources and Analogies of International Law: with Special Reference to Internatinal Arbitration* (Longman Greens 1927) 35; A Watson, *Legal Transplants: an Approach to Comparative Law, 2nd Ed* (University of Georgia Press 1993) 8-9.

[42] For excellent accounts see e.g. S Schonberg, *Legitimate Expectations in Administrative Law* (OUP 2000); M Sigron, *Legitimate Expectations Under Article 1 of Protocol No. 1 to the European Convention on Human Rights* (Intersentia 2014).

legal protection. This object does not, however, stem from private dealings among individuals, but it is derived from acts of the State administration. It relates to procedures administrative bodies follow, and which, through their previous repetitive activity, create an expectation according to which individual acted and was entitled to act, or to representations and promises made to individuals which engendered trust. The protected interest may not always be related to property as in IIL, but to health care, fundamental freedoms, immigration etc.[43]

The doctrine is recognition by a legal system of the fact that individuals have certain expectation as to how legal system and the State apparatus should operate. In other words, it protects against incoherent exercise of administrative discretion and abuse of power. As it is a concept which is not based on formal rights (one may even say it is, in fact, exception to the formalism of public law), its scope is rather limited and the criteria for application generally exacting. In all legal system, the claim can be easily raised but rarely succeeds on the merits.[44] The protection of LE is exceptional, for it goes against the otherwise default principles of public administration; such is the principle of legality, and the ability to alter a policy for the future. The following comparative overview exemplifies that the protection of legitimate expectations is based on various rationales, suggesting that a host of principles may justify the use of the concept, while at the same time shows that there is still a rather thin basis for the use of the principle to helpfully solve specific cases that arise in the IIL context.

England

In England, the protection is justified by reference to fairness in public administration and on the concept of reliance and trust.[45] English law has historically protected only procedural LE, that is, when the addressees of administrative conduct, decisions, or regulations are entitled to certain procedural guarantees, such as the right to prior notice or to be heard, when the new conduct diverges from the previous without respecting these guarantees. In this situation, however, the claim can be settled by application of the principle of consistency in policy application and the

[43] Mairal, (n 33) 420; e.g. *Commissioner of Police of the Metropolis ex. p P* [1996] 8 Admin LR 6; *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607 [2002] WLR 2; *Immigration and Naturalization Service v Hibi*, 414 U.S. 5, 8 (1973).

[44] Mairal (n 33); CF Forsyth ´The Provenance and Protection of Legitimate Expectations´, 47 (1988) Cambridge Law Journal 238, CF Forsyth, ´Legitimate Expectations Revisited´, 16 (2011) Judicial Review 4, 429; M Elliot, ´Unlawful Representations, Legitimate Expectations and Estoppel in Public Law´ 8 (2003) Judicial Review 2, 77.

[45] See e.g. *R v Ministry of Agriculture, Fisheries and Food, ex p Hample (Offshore) Fisheries Ltd* [1995] 2 All ER 714. Schonberg (n 42) 10; Forsyth 2011 (n 44).

requirement of fair procedure.[46] The resort to legitimate expectations may be indeed redundant in such cases.[47]

This is different from situations where authority makes representations that an individual will be treated in a manner consistent with incumbent policy, while the policy or procedure has changed in the interim. In the latter case, the authority is merely obliged to take into account the previous representation, but can effectively proceed as it sees fit within the bounds of rationality [Wednesbury-reasonable test].[48]

In the 1999 *Coughlan* decision, however, the Courts of Appeals established in English Law also the concept of substantive LE. That is, expectations to a certain substantive outcome. The major difference is that in Coughlan, there was an express, specifically addressed, unqualified, repeated and confirmed promise that certain situation will occur addressed to an individual or a small group of people. To renege on the promise was held unfair and amounting to abuse of power. In this particular type of cases, the expectation has a character of quasi-contract.[49] It behoves to add that only in cases of substantive protection of expectations, such as *Coughlan,* the question of fettering statutory discretion arises. Substantive protection is only exceptionally afforded.[50]

Apart from English courts, which ground the protection of LE in the concept of trust and fairness, other European courts, as well as EU courts, recognized the principle as based on good faith and legal certainty.[51] According to the classic Schonberg´s treatise, legal certainty and the rule of law are more appropriate justificatory principle as they seem to overcome the too narrow and inflexible justifications of the protection of legitimate expectations based on the theory of reliance.[52]

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[46] e.g. *Commissioner of Police of the Metropolis ex. p P* (n 43).
[47] Forsyth 2011 (n 44).
[48] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; *R v Secretary of the Home Department, ex p. Hargreaves* [1997] 1 WLR 906; *R v Secretary of State for Education and Employment ex p. Begbie* [2001] 1 WLR 1115; *R (Bibi) v Newham London Borough Council* (n 43).
[49] *Regina v. North and East Devon Health Authority, ex parte Coughlan* [2000] 2 W.L.R. 622. In international investment arbitral practice, Glamis Gold conceptualized protected expectations stemming from governmental representations as quasi-contractual, emphasising the need for specificity of the unilateral undertaking. *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, 8 Jun 2009, para 766.
[50] Forsyth 2011, (n 44) 243.
[51] See e.g. Craig, *EU Administrative Law* (2006), Chap. 16; Schonberg (n 42), J Schwarze, *European Administrative Law* (Sweet and Maxwell 1992) 946-952, Sigron (n 42) 47.
[52] Schonberg explains that the reliance theory is too narrow because it should not be a precondition for protection of LE, as it may lead to unjustified distinctions between similar cases because whether a person relies on the representation (defined as actual harm caused as opposed to frustration of plans) or not may be entirely fortitous. The

Germany, Switzerland

European countries that are inspired by Germany provide the protection of legitimate expectations that is substantive as well as procedural, and which is usually justified by reference to the rule of law considerations and the concept of *Vertrauensschutz* – protection of trust.[53] German administrative law recognizes and protects substantive expectations at least since 1957.[54] Although both principles of legal certainty and *Vertrauensschutz* are derived from Article 20 of the Basic law, thus enjoying the status of constitutional principles, they are separate.[55] More specific codification of the principle may be found in Article 38 German Administrative Procedure Act.[56] In Switzerland, the protection of legitimate expectations is derived from the principle of legal certainty.[57]

The insistence on the principle of legality as a condition for protection of an expectation is much weaker in German administrative law than it is in English law. German courts recognise administrative discretion only when expressly granted, and are generally less accepting of considerations of non-fettering. They habitually review and duplicate the decision-making of administrative bodies.[58] This approach leads to a more intrusive judicial review, which can also override statutes. Other European courts that reach to the German jurisprudence for inspiration also adopt this approach to legitimate expectations that relates to situations when authority creates expectations through its acts which an individual relies on, and that are later on frustrated.[59]

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theory is inflexibile, as it does not give adequate expression to the need of balancing between individual harm and broader public interest. Schonberg (n 42) 10-1.

[53] Craig (n 51) 613; Schonberg (n 42) 12.

[54] Oberverwaltungsgericht Berlin (1957) *72 DVBI* 505-6; later confirmed by the Federal Constitutional Court in (1981) *59 BverGE 128*, 164-7, both cited in G Nolte ´General principles of German and European administrative law – a comparison in historical perspective´ 57 (1994) Modern Law Review 191, 203.

[55] Schwarze (n 51) 886-7; M Schroeder, ´Administrative Law in Germany´ in Seerden, Stroink (eds) *Adminitrative Law of the European Union* (2005) 119; Nolte (n 54) 195.

[56] ´(1) The agreement by a competent authority to issue a certain administrative act at a later date or not to do so (assurance) must be in writing in order to be valid. If, before the administrative act in respect of which such assurance was given, participants have to be heard or the participation of another authority or of a committee is required by law, the assurance may only be given after the participants have been heard or after participation of such authority or committee.´ Verwaltungsverfahrensgesetz (VwVfG) of May 25th 1976.

[57] Sigron, (n 42) 46; Swiss Federal Tribunal, *BGE 72 I 75, E. 1*, 80 et seq; *BGE 101 Ia 92, E. 3*, 99.

[58] Nolte (n 54) 196.

[59] See e.g. Czech Constitutional Court, IV. ÚS 525/02, 11 Nov 2003; I. ÚS 605/06, 15 Jan 2008.

France

In French law, the concept as such is not used, but similar outcomes are arrived at through the doctrine of abuse of powers and widely defined protection of vested rights.[60] One of the principal reasons French law resists the application of the doctrine is the fear of destabilizing effects on the overall legal certainty.[61]

United States

To complete the picture, the overview includes US law as well, which does not operate with the concept of LE as such. American law extends, in limited circumstances, the doctrine of equitable estoppel against public authorities.[62] These limited situations are based on the important distinction between the government acting as a sovereign and the government acting in a proprietary function, the latter being exception to the traditional view restricting actions against government.[63] The US law bases the duty to protect representations on the notion of fairnessand detrimental reliance. [64] The reliance justification is the principal one because US law uses the doctrine of estoppel, not a distinct principle of LE. Duty to protect expectations is usually limited to situations where individual was deprived of something she was entitled to by right;[65] this puts the US approach apart from its continental and English counterparts, where legitimate expectations are not conceptually viewed as rights. US courts strictly construe the reasonableness of expectations and in certain circumstances put on the individual the duty to inquire.[66] However, the lack of conceptual clarity for holding government liable for misrepresentations or

[60] Schonberg (n 42) 114-7; JP Puissochet, ´Vous avez dit confiance legitime?´ (in Mélanges Guy Braibant, Dalloz, Paris, 1996),p.584 ; limited recognition of the principle has been admited by Conseil d´État in the *KPMG* case but only in relation to the implementation of EU law, *Sté KPMG et autres*, 24 mars 2006, n° 288460.

[61] Schwarze (n 51) 869, 874; P Reynolds, ´Legitimate Expectations and the Protection of Trust in Public Officials´ (2011) Public Law, 330, 345.

[62] MV Laitos, DV Smith, AE Mang, Equitable Defences against the Government in the Natural Resources and Environmental Law Context, 17 (2000) Pace Environemental Law Review 2, 273; Johnson, Volkov (n 39).

[63] *Federal Crop Ins. Corp. v Merrill*, 332 U.S. 280 (1947); JF Conway, Equitable Estoppel of the Federal Government: An Application of the Proprietary Function Exception to the Traditional Rule, 55 (1987) Fordham Law Review) 5, 707; For an overview of the case law on the proprietary function and State contracts and its comparison with investment arbitral practice see Johnson, Volkov (n).

[64] E.g. *Santiago v I;mmigration Service* (1975) 526 F 2d 488.

[65] Laitos, Smith, Mang (n 62) 285. This approach also effectively substitutes the requirement of legality, as illegal conferral of benefit is not protected. E.g. *Heckler v Community Health Serv. Of Crawford County, Inc.*, 467 U.S. 51 (1984).

[66] E.g. *United States Envtl Protection Agency v Environmental Waste Control Inc.*, 917 F.2d 327, 334 (7th Cir. 1990); *United States v Menominee, Mich.*, 727 F.Supp. 110 (W.D. Mich 1989).

misinformation in the case law of US courts makes generalisations difficult.[67] Yet, as the doctrine of equitable estoppel is applicable to commercial dealings with the State, there is little what can be taken from the US law for the principle of LE.

European Union Law

In the EU law the principle of legitimate expectations is clearly connected with the notion of legal certainty and vested rights.[68] Importantly, the principle is recognized as a general maxim, limited by other general principles.[69] The EU law has recognized the stature of the principle as ´one of the fundamental principles of the Community´.[70] The conceptualization of legitimate expectations by connecting them to legal certainty as used by the CJEU has been, however, considered unfortunate, as the two concepts aim at different targets. While certainty is concerned with the retroactivity of law and its general functioning, legitimate expectations are derived from the concept of *Vertrauensschutz*, which seeks to protect trust engendered by an act of an individual decision- maker; and this can go even against legislation.[71] It behoves to act that CJEU never found the strict conditions of redress based on legitimate expectations against the exercise legislative powers of the EU met in a case submitted to it.[72]

European Convention on Human Rights

Apart from legitimate expectations stemming from administrative practice that does not necessarily relate to the protection of assets, which has been analysed heretofore, some European constitutional courts, provide protection to legitimate expectations as a particular incarnation of property.[73] This type of protection has its roots in the jurisprudence of the European Court of Human Rights (´ECtHR´), which uses legitimate expectations as an extensive interpretation of the term ´possesions/biens´ in Art 1 P-1.[74] This conception differs structurally as well as in its

[67] Some court decisions point to the direction that an additional requirement of affirmative misconduct applies to estoppel against government, which makes the meagre chances of success of a claim yet slimmer. See e.g. *INS v Hibi* (n 43).
[68] Schwarze (n 51) Chapter 6; Craig (n 51); Sigron (n 42) 52.
[69] Schwarze (n 51) 867.
[70] Case 112/80 *Dürbeck v Hauptzollamt Frankfurt/Main-Flughafen* [1981] ECR 1095, 1120.
[71] Forsyth 2011 (n 44); It should be noted that this, however, holds in a country like Germany, while in the UK, the notion cannot defeat statutory prescription; Ch Brown, ´The Protection of Legitimate Expectations As a "General Principle of Law": Some Preliminary Thoughts´, 6 (2009) TDM 1, 5.
[72] *Total* (n 20) para 130.
[73] See e.g. Czech Constitutional Court, Pl. ÚS 2/02, 9 Mar 2004; II. ÚS 156/06, 6 Mar 2008.
[74] *Kopecky v Slovakia* (App No. 44912/98, Judgement of 28 Sep 2004), para 74; *Pine Valley Developments v Ireland* (App No 12742/87, Judgement of 29 Nov 1991), para 51; *Stretch v United Kingdom* (App No. 44277/98, Judgement 24 Jun 2003).

justification from those analysed above. The important aspect of this conception is that it treats legitimate expectations as a property, a right protected as a human right. Under this conception the applicant must have a ´possession´ so that the doctrine of legitimate expectations can apply.[75] Property is protected as a human right due to its impact on freedom, independence and the development of an individual.[76] Although freedom, autonomy and independence are also the values at the heart of the rule of law, which fosters the rationale for the protection of legitimate expectations in constitutional and administrative law, the rule of law and the human right to peaceful enjoyment of property cannot be held as conceptually identical.

In the context of ECHR, it is evident the concept of LE has a useful role only in the first step of the analysis of claims under Art 1, P-1. That is, in deciding whether the LE in the case at hand constitutes ´possessions, ´ an autonomous concept under the ECHR.[77] In next steps the Court proceeds to determine whether there has been an interference sanctioned by the convention, using its established tests, thus looking whether the national courts´ decisions are arbitrary or otherwise manifestly unreasonable. It behoves to add that the Convention protects only existing assets, not a right to acquire property.[78] The fact that ECtHR understands the concept as a specific incarnation of property arrived at through the extensive evolutionary interpretation of the term in the Protocol 1 to the ECHR should make one pause before classifying this conception as a general principle of law in the sense of Article 38 of the ICJ Statute. This conception should be distinguished from the administrative law conceptions discussed above.

Convergence or divergence?

It should be noted that grounding the protection of LE in legal certainty does not succeed in explanation or guidance in application. Legal certainty demands predictability and regularity of legal system overall, not ad hoc exceptions to statutory and other legal prescriptions, which is precisely what protection of LE requires in its application. As pointed out by Reynolds, ´whilst it may be that application of the doctrine [of LE] will gradually become less uncertain the fact that the doctrine *can cause* uncertainty means that the principle of legal certainty plainly cannot be

[75] The EctHR generally treats legitimate expectations as a component of or attachment to the property right at hand. E.g. *Stretch v UK* (n 74) para 35; Sigron (n 42) 85.
[76] Sigron (n 42) 78.
[77] *Gasus Dosier und Fördertechnik GmbH v Netherlands* (App No. 15375/89, Judgement of 23 Feb 1995).
[78] *Marckx v Belgium* (App No. 6833/74, Judgement 19 jun 1979) para 50.

offered as an explanation of the doctrine of legitimate expectations.´[79] Thus, a more appropriate justificatory principle seems to be indeed the protection of trust as understood by the concept of *Vertrauensschutz,* not the general legal certainty as *Rechtssicherheit.*[80]

This cursory overview shows that emphasis on different abstract principles as justificatory basis of the notion of LE yields different results. English law with its stress on the principle of legality and administrative discretion limits the room for the protection of expectations; French law with its insistence on the principle of legal stability resists the use of the notion altogether; US law is similarly dismissive of the notion; while German law seems to be more generous in the protection afforded, as the legal system based on the substantive *Rechtstaat* is more concerned with the effects of administration´s activities on the individual. ECtHR applies a conception of legitimate expectation that is yet different, although it is sometimes replicated by national courts.

National courts and legitimate expectations claims

Despite the differences among conceptions of legitimate expectations in administrative legal systems, the role of courts applying the principle is generally two-fold. To determine whether a legitimate expectations exists and what is its nature; in other words, whether what was expected was legitimate based on the circumstances of the case; and then, to review the sufficiency of justifications to depart from the expected course of action.

In some countries, courts use a simple rationality review, thus awarding a greater deference to the administration. This is mostly in cases of individual decisions or policy changes on expectations related to economic or financial benefits. However, it may be questioned whether in these cases the resort to legitimate expectations is indeed necessary.[81] In cases of substantive legitimate expectations, where there has been clear, unmistakable and unambiguous specific promise that certain course of action will or will not follow, there is usually balancing present (e.g. three-prong proportionality) and the review is more searching.

[79] Reynolds (n 61) 346.
[80] Ibid.
[81] Forsyth 2011 (n 44).

Legitimate expectations and opposing legal principles

In all legal systems that apply LE, however, there are other legal principles that counter-balance the effects of the application of LE.[82] These principles are almost never considered when investment tribunals refer to LE. These doctrines are e.g. non-fettering doctrine (which requires that agencies retain the discretion they are bound to exercise by law), overriding public interest, the doctrine of legality (lawful administration), and also formal equality. These opposing and limiting doctrines are important when considering the transplanting of a concept onto international level, as they provide the crucial context within which the principle of LE has emerged and evolved.

To illustrate the point, legitimate expectations are balancing principle of an exceptional character, which protects individual against misuses and abuses of the public power.[83] The principle of formal equality, on the other hand, may weigh against the protection of the addressee of the representation, as to grant an individual what she had been led to expect through informal representations is likely to result in to unequal treatment of other addressees of the rule or policy.[84] The principle of legality is used precisely to protect the formal equality. These other doctrines and principles carry the wider public interests that are eventually weighed against the harm caused to the individual and they add to already limited scope of the principle.[85] Prof Forsyth famously noted that to hold an agency bound to an undertaking that goes beyond its power would be to create ´that legal horror: a body that can set limits to its own jurisdiction.´[86] Nevertheless, this will leave international lawyers quite unmoved.

[82] E.g. Schwarze (n 51) 867.

[83] It should be noted that the very protection of legitimate expectations might at times serve a broader interest, through the protection of an individual interest. That is when the frustration of an individual expectation is considered capable of shaking the legal certainty and trust in the law, government and administration. This point is important because it allows us to see that legitimate expectations play a broader, systemic role, in the legal systems where they operate. See e.g. Schonberg (n 42) 25.

[84] Schonberg (n 42) 14.

[85] See e.g. *Henry Boot Homes Ltd v Bassetlaw Dictrict Council* [2002] EWCA Civ 983 (2002); *R (Hammerton) v London Underground* [2002] EWHC 2307 (Admin), for holding that representations in contravention of statutory powers only rarely engender protected expectations; Elliot (n); although this requirement is never absolute, as otherwise the doctrine of legality may lead to undue unfairness in exceptional situations. More recently, some authors stress that the legality doctrine stands uncontroversial against protection of legitimate expectations against a statute; see Forsyth 2012 (n), *Rowland v Environment Agency*, [2003] EWCA Civ 1885, para 102. Yet, this considerations play much stronger role in England, while in a country like Germany, the adherence to the legality principle would not be as strong.

[86] Forsyth 1988 (n 44) 240.

This shows that the protection of LE is an action of exceptional nature, and the success in its pleading lies in showing that the factual circumstances have been such that the macro-level principles, such as legality of public authorities' action, can be set aside in favour of an individual interest. The principle of LE works as a residual basis for state liability.[87] In investment law, on the other hand, LE have become a common and basic element of the FET claims.[88] It is all the more surprising that, as the concept is derived from the general notion of legal certainty, the references to legal certainty as an organizing principle of law are much more sporadic in investment case law.

The opposing doctrines should be recognized by investment tribunals, because they form the context from which the general principle emerged. Subsuming the function of the opposing principles under a general rubric of sovereignty is not enough, and will be rejected by a tribunal.[89] By the same token, to reject these doctrines and their important function by reference to an argument that they play no role in interpretation of an international standard, or that the tribunal applying international law cannot be influenced by national law determination is not availing either; this precisely because the principle is anchored and finds its legal justification in national legal systems and is formed by those limiting principles.

In IIL, if one is to accept the existence of the concept of expectations, it should be noted that expectations are more coherently viewed as an extension of the investment, as a proprietary interest protected by other rules of international law.[90] Here it is important that this interest is created legally, similarly as the original acquisition of any investment must be in accordance with the law of the host State. This legality criterion is expressed in the requirement that expectations stem from representations made by authorities that have power to make them, i.e. have the power to make such a substantive promise.[91] The act of frustration is subsequent to the creation of

[87] Mairal (n 33) 424.
[88] Ibid; UNCTAD (n 2).
[89] JE Viñuales, ´Dissecting Sovereignty´ (2014) in Douglas, Pauwelyn, Viñuales (ed) The Foundations of International Investment Law: Bringing Theory into Practice, Ch 9, on the need of actionable legal concepts expressing the notion of sovereignty.
[90] Z Douglas, ´Property, Investment and the Scope of Investment Protection Obligations´ (2014) in Douglas, Pauwelyn, Viñuales (ed) The Foundations of International Investment Law: Bringing Theory into Practice, Ch 10; similarly the above analysed conception of LE applied by ECtHR.
[91] National courts sometimes distinguish promises based on actual and ostensible authority to soften the strictness of the legality principle, the latter being exception to the principle. See e.g. *South Buckinghamshire District Council v Flanagan* [EWCA] Civ 690 [2002] WLR 2601; *R (Boggs 61) v Secretary of State for the Home Department* [2002] EWHC 1921 (Admin); Elliot (n 44) 76

expectation stemming from legal representations, and this is clearly an issue judged by application of international investment standards. Some tribunals have been more receptive to the limiting effect of the doctrine of legality.[92] Similarly, some investment tribunals recognized that the essentially balancing nature of legitimate expectations calls for inclusion of public interest considerations into the analysis.[93]

The fact that the principle is recognized by different legal systems does not mean that all those legal systems apply the principle in an identical way.[94] One may add that in national legal systems, the notion of legitimate expectations is not used to solve contractual disputes and only rarely it is used in disputes concerning property rights. In these instances, the concept of legitimate expectations does not have any additional value, because these disputes are simply disputes about who has a better right. After all, even the ECtHR uses the concept of legitimate expectations to peaceful enjoyment of possessions in situations where the underlying property or asset is not disputed.[95] This would, for the very least, call for caution in application of such a controversial principle as a general principle of law. Some international law authorities suggest that for application of a general principle, it is not only necessary that this principle is adopted by most, if not all, countries, but that ´major legal systems of the world take the same approach to [the] notion.´[96] That the notion is indeed used in its various incarnations in different legal systems and regimes may explain its indiscriminate use in investment treaty arbitration. Rather than that, however, this diversity of approaches should be taken to question the very function and utility of LE as a general principle of law in the context of foreign investment; a matter to which we now turn.

Legitimate expectations in international investment law

In investment case law, we find that LE take on many different guises. They sometimes make up the object of protection, at once they provide a rule that determines a violation of the FET related to that object, or, still, they are used as an interpretative principle for the FET. We too often

[92] *Thunderbird*, Separate Opinion (n 20)
[93] *Saluka Investments B.V. v. The Czech Republic*, Partial Award. 17 Mar 2006, para 305-6.
[94] Brown (n 71) 5.
[95] See *Kopecky v Slovakia* (n 74); *Pine Valley v Ireland* (n 74).
[96] Prosecutor v Duško Tadic, ICTY, Case No. IT-94-1-A, Appeal Chamber ICTY, para 225.

encounter tautologies stating that investor has LE that it will be treated fairly and equitably.[97] If we say that investor has expectation that State will comply with international obligations, these arguments are circular.[98] If we, on the other hand, refer to investor's subjective appreciations we are depriving the investment standard of its objective regulatory and normative content. Saying that ´investor has legitimate expectations to be treated in a non-arbitrary manner´ is misconception, because the notion serves no function here. It is superfluous. What should be said instead is that investor's ´investment shall be treated in a non-arbitrary manner.´ And that in some cases, ´the investment may extent to legitimate expectations created by the State's conduct that are worthy of protection.´ And then, taking one step down the ladder of specificity, we can say that ´investor's legitimate expectations, as its protected interest, were defeated by State's arbitrary conduct.´ That's why we need to dissect those general statements in order to find a meaningful analytical and practical role for the legal concept in the context of IIL.

In the following section, I overview the evolution of the use of the concept in the investment treaty arbitration practice, from the first ventures to a more sophisticated understanding and application of the concept. I will then move to an area where the application of the concept is, in my opinion, superfluous and incorrect: the area of investment contracts. I will also highlight some questions, where I find the application of the notion problematic.

First ventures

Metalclad

Metalclad is a well-known case where investment into a landfill was defeated by non-granting municipal permits, despite the federal assurances given. The tribunal in that case stated:

> [A]ll relevant requirements should be capable of being readily known to all affected investors… there should be no room for doubt or uncertainty… Once central authorities become aware of any scope of uncertainty in this connection, it is their duty to ensure that the correct position is properly determined.[99]

The case stands for a proposition that LE exist whenever a State official advice investor on the content of law, and even requires State officials to dispel possible uncertainties. One commentator mentioned that outside of the context when the body consulted is tasked with

[97] *Saluka* (n 93) para 446; *Tecmed* (n 14) para 154;
[98] The circularity of the argument was recently recognized in *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 Apr 2013, para 533.
[99] *Metalclad Corporation v. The United Mexican* States, ICSID Case No. ARB(AF)/97/1, Award, 30 Aug 2000, para 76.

official authoritative interpretation, one can hardly think of a commercial relationship when one party has to act as a legal counsel of the other, let alone the other party having to rely on that advice.[100]

The decision was partly annulled on the grounds that the NAFTA Chapter 11 does not include a stand-alone obligation of transparency, which the tribunal read into Article 1105 via reference to Article 102(1).[101]

Tecmed

The other leading case on the FET dealt with revocation of a permit to operate a landfill. *Tecmed* tribunal divined a standard that has been criticised as an ideal governance programme; and that was not even applied in the case (because the tribunal found a violation of procedural propriety).[102] The far-reaching conception of FET unsupported by any authority apart from good faith is showed at its best in the famous quote:

> Good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.

We can see that from good faith the tribunal derived very onerous and distinct obligations that in effect require the State to report to investor any potential regulations that may be applicable, including the rationale for them. Moreover, one cannot help but to recognize the tautological reasoning to the effect that investor has expectations to be treated consistently, etc. If this is so, the controlling obligation would be the obligation of consistency of policy application, not a subjective expectation of such.

[100] Campbell, ´House of Cards´ (n 10) 366.
[101] *The United Mexican States v Metalclad Corp*, Supreme Court of British Columbia Court of British Columbia, 2001 BCSC 664, 2 May 2001.
[102] Z Douglas, ´Nothing if Not Critical for Investment Treaty Arbitration: *Occidental*, *Eureko* and *Methanex´*, 22 (2006) Arbitration International 1, 27, 28.

Metalclad and *Tecmed´*s sweeping dicta were then picked up by other cases, and referred to as authority supporting the principle of LE, although these cases in fact had not applied the protection of LE to the case at hand.[103]

Thunderbird

It was not until the case of *Thunderbird v Mexico* when an investment tribunal decided the case based on the application of LE, although rejecting the claim *in casu.* The case related to official advice as to the legality of a gambling project, which turned out to be incorrect. Dissenting arbitrator, the late Prof Wälde, already saw LE as a ´self-standing subcategory and independent basis for a claim.´[104] Wälde´s comparative review of EU Law, national administrative law systems as well as WTO jurisprudence leads him to the recognition of the doctrine of LE, while he admits that its exact contours are not yet clear.

What is interesting is that Wälde has claimed that international law has long applied the doctrine of LE of the kind applied by modern investment tribunals, referring to such cases as *Shufeldt*,[105] or *Aminoil v Kuwait*,[106] *Amoco v Iran*[107]. However, upon a closer look these cases really do not have much in common with LE as we know them from IIL. *Schufeldt* case was not about an illegal contract later reneged on, this was merely a defence by Guatemala, the arbitrator held the contract valid and the repudiation decree was held as an internationally unlawful sovereign interference into a contract.[108]

Similarly, *Aminoil* and *Amoco* referred to LE only as a principle applied to the calculation of damages, in order to help them establish what could be a reasonably foreseeable lost profit. It may also be said that in *Aminoil* the use of this concept to calculate compensation was heretofore novel; and even in the subsequent *Amoco* decision, the Iran-U.S. Claims Tribunal explained that the meaning of the term in the context of *Aminoil* case was very specific.[109]

103 E.g. *Bayindir* Insaat Turizm Ticaret Ve Sanayi A.S. *v.* Islamic Republic of *Pakistan*, ICSID Case No. ARB/03/29, Award, 27 Aug 2009, para 179-80; *MTD* Award (n 12) para 114-5; *Occidental* (n 15) para 185; *Duke v Ecuador* (n 29) 339; *LG&E v Argentina* (n 15) para 127; *Saluka* (n 93) para 302.
104 *Thunderbird*, Separate Opinion (n 20) para 37.
105 *Shufeldt Claim* (Guatemala, USA), 24 Jul 1930, UNRIAA 2 (1949) 1079.
106 *Kuwait v. The American Independent Oil Company (AMINOIL)*, 21 ILM 976, para 149.
107 *Amoco Int'l Finance Corp. v. Iran*, 15 IRAN-U.S. C.T.R., at 189.
108 *Schufeldt Claim* (n 105) 1088.
109 *Amoco v Iran* (n 107) para 265.

Although Wälde recognizes that previous awards have not explained the doctrinal background of the principle, they have contributed towards establishing the legitimate expectation as a sub-category of FET.[110]

Saluka

Although the decision should be praised for stressing the balancing function of LE, it must be criticised for understanding the notion in a tautological sense. The tribunal stated that:

> Tribunal also emphasises that the host State, in providing State aid, is clearly bound not to frustrate an investor's legitimate and reasonable expectation to be treated fairly and equitably.[111]

It is interesting that, although currently investment law scholarship and practice refer to LE as a general principle of law, in virtually all cases we find a reference to *Tecmed´*s assertion of unfettered protection of expectations as an authoritative statement.[112] This shows how easily controversial and unprincipled legal solutions can come to hold sway in the area of investment arbitration. The cases that cite as authority for the use of LE to previous awards, which do not explain the provenance of the concept, typically contain the mantra along the lines that 'legitimate expectations are an important element of FET, while at the same time the protection has its limitations, for the expectations must be legitimate and reasonable, and the assessment must take account of all circumstances.'[113] This type of verbiage is similarly circular and virtually content less. As long as the limitations are not spelled out, it effectively gives a tribunal a free pass to judge the expectations at its whim.

Further cases applying the concept rather indiscriminately often link it with the obligation of stability that is derived from nothing more than a policy language in the treaty's preamble. Thus the *Occidental I* tribunal, for instance, is sure that 'under international law […] there is certainly an obligation not to alter the legal and business environment in which the investment has been made.'[114] The tribunal is so certain of the existence of this unqualified and sweeping obligation that it does not cite a single authority for its simple assertion. Other tribunals connected the

[110] *Thunderbird*, Separate Opinion (n 20) para 31
[111] *Saluka* (n 93) para 446.
[112] *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, 7 Jun 2012, para 152; *Bayindir* (n 103) para 179-80, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 Jan 2007, para 298-9; *Duke v Ecuador* (n 29) para 339-40; *Thunderbird*, Separate Opinion (n 20) para 32.
[113] Similar lines can be found in *Duke v Ecuador* (n 29) para 340;
[114] *Occidental* (n 15) para 191.

doctrine of LE with stability of legal framework.[115] It is worth stressing out that in domestic legal systems, LE virtually never play this role. To be fair, more recent tribunals qualified this stating that 'legitimate expectations, and therefore, FET, imply the stability of the legal framework of stability of the legal and business framework, may not be correct if stated in an overly-broad and unqualified formulation.'[116]

Is there a light at the end of the tunnel?

Starting with *Thunderbird* award, a tendency to explain the function, nature and scope of the principle has become observable. The comparative analysis carried out by some recent decisions suggests that the principle may have much more limited scope than previously asserted in cases described above.[117]

The *Total* tribunal, for instance, has based the principle on comparative analysis of legitimate expectations in domestic jurisdictions, and recognized that the principle is accepted with variations within well-defined limits.[118] Similarly, the *Gold Reserve* award refers to the principle of *Vertrauensschutz,* as the basic rationale of the protection of legitimate expectations, thus abandoning the circularity of the early awards.[119] Annulment committee in *CMS v Argentina*, notoriously comprised of highly reputed publicists, could have also contributed to a more rigorous approach to the concept. The committee stated that 'although legitimate expectations might arise by reason of a course of dealing between the investor and the host State, these are not, as such, legal obligations, though they may be relevant to the application of the fair and equitable treatment clause.'[120] *MTD* annulment committee, in a decision issued the same year, penned similar criticism of the lavish use of the concept, specifically aimed at the *Tecmed* award.[121] If this decision is to be taken as authority, it would mean that the protection of LE is not an autonomous obligation incumbent upon the State. Yet, how this concept may be applied remains open.

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[115] *Toto* (n 112) para 224*; LG&E v Argentina* (n 15) para 125; *Bayindir* (n 103) para 178.
[116] *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 Oct 2009, para 217.
[117] *Toto* (n 112) para 166, 193; *Total* (n 20) para 111, 128; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 Sep 2014, para 576.
[118] *Total* (n 20) 128.
[119] *Gold Reserve* (n 117) para 576.
[120] *CMS* Annulment (n 14) para 89.
[121] *MTD* Annulment (n 12) para 67: ´The TECMED Tribunal's apparent reliance on the foreign investor's expectations as the source of the host State's obligations (such as the obligation to compensate for expropriation) is questionable. 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.'

In *Glamis*, a case decided under NAFTA Article 1105, the claimant complained of a withdrawal of initially approved request, which was based on a legal opinion issued in the interim and on a new legislation. The tribunal rejected the claim, as there was absence of 'active inducement of a quasi-contractual expectation' that could be taken as a specific, definite, unambiguous and repeated basis for LE.[122] This was for the tribunal a threshold question for the existence of expectations. All in all, the inducement of a quasi-contractual nature was taken as a requirement for the creation of a duty to uphold the expectation.[123] Similar approach was taken in *Cargill.*[124]

It deserves to note that NAFTA tribunals are generally much more restrictive when assessing claims based on LE, as opposed to non-NAFTA tribunals.[125] Although, this may be based on the alleged autonomous nature of the FET in the BITs that do not link the standard with general international law, the position adopted here is that this distinction is not legally defensible.[126]

Legitimate expectations and contracts?

Although having origins in the national public law systems, LE in IIL are creatures of international law, in this sense their existence is in principle independent of their recognition as protected interests at the municipal level. This understanding is in line with treatment of LE as a sub-category of possessions under ECHR. ECtHR case law links the existence of LE as a protected autonomous interest with some other possessions, the existence of which is at least *prima facie* beyond dispute.[127] LE are therefore an object of legal protection under the FET.[128] Whenever there are expectations at stake in IIL context, there are other underlying proprietary or contractual interests involved. Investment treaties do not protect expectations as such, there is always something which investor invests, that is, an underlying investment. This explains why expectations do not feature in the typical BITs illustrative lists of investment. Expectations can only feature alongside of other interests that form the investment; they can be, so to speak, an

[122] *Glamis Gold* (n 49) 766-7, 802.
[123] Ibid, para 802.
[124] *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, 18 Sep 2009, para 290.
[125] F Dupuy, PM Dupuy, ‚What to Expect from Legitimate Expectations', 278-89; P Dumberry, 'The Protection of Investors' Legitmate Expectaions and the Fair and Equitable Treatment Standard Under NAFTA Article 1105', 31 (2014) J Intl Arb 47.
[126] See generally on FET and minimum standard Paparinskis, *International Minimum Standard* (n 9); specifically in relation to LE, Dupuy, Dupuy (n) 282; cf T Weiler, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context* (Brill 2013).
[127] *Pine Valley v Ireland* (n 74).
[128] Douglas, ´Property´ (n 90).

extension of the investment. Yet, they are not identical with the underlying proprietary or contractual rights.

Investment tribunals by and large have held that LE may arise from specific commitments, which is uncontroversial, among which they count contractual arrangements.[129] It is the latter proposition which is problematic. In words of the *Continental* tribunal, 'contractual undertakings by government, notably when issued in conformity with a legislative framework and aimed at obtaining financial resources from investors deserve clearly more scrutiny, in the light of the context, reasons, effects, *since they generate as a rule legal rights and therefore expectations of compliance.'*[130] One remains wondering why contracts generate legally protected expectations above and beyond the legal rights. Investor cannot have expectation of this kind. Or better, it may, but its defeat is not sanctioned by IL.[131] Investor may have ´expectations´ (here used as a non-technical term) that the State will not use its sovereign power to interfere into the contract to investor's detriment. But here, we are not applying the concept of LE, but a well-established rule of international law that State cannot arbitrarily interfere into State contracts through its sovereign power.[132] Apart from that, in the presence of an umbrella clause, there is a separate treaty provision addressing situations of contractual breaches. Then, the investor might have succeeded in insertion of a stabilization clause into the contract, which creates yet another legal dynamics; but again, not the one that would involve LE.[133] Beyond that, investor simply has contractual rights and remedies. It does not have an additional layer of protected expectations to contractual compliance that would be sanctioned by international law by virtue of LE.[134]

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[129] Bonnitcha (n 6) 183 ; *Toto* (n 112) para 159, *Continental Casualty Company v. The Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 Sep 2008, para 261; *CME Czech Republic B.V. v. The Czech Republic*, Partial Award. 13 Sep 2001, para 611.

[130] *Continental* (n 129) para 261; similarly *Metalpar S.A. and Buen Aire S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/5, Award on the Mertis, 6 Jun 2008, para 185-6; Total, para 117; *Walter Bau* (n 37) para 12.31.

[131] *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 Sep 2007, para 344. *Arif v Moldova* (n 98) para 536.

[132] Paparinskis, *International Minimum Standard* (n 9) 255, RY Jennings, ´State Contracts in International Law´, 37 (1961) BYIL, 181-2. It is true that this rule operate with the notion of expectations (as do most legal concepts, rules and principles, G Schwarzenberger. *The Fundamental Pricniples of International Law*, 1955, 290), but it is the rule on State contract which governs the situation, not the concept of legitimate expectations as a technical term.

[133] Potestà (n 38) 100.

[134] *Duke v Ecuador* (n 29) para 358; *Parkerings* (n 131) para 344 (´It is evident that not very hope amounts to an expectation under international law. The expectation a party to an agreement may have of the regular fulfilment of the obligation by the other party is not necessarily an expectation protected by international law. In other words, contracts involve intrinsic expectations from each party that do not amount to expectations as understood in international law.´); similarly *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 Jun 10, para 335; *Arif v Moldova* (n 98) para 536.

Some commentators have expressed concerns with the proposition that legitimate expectations cannot stem from contracts.[135] Bonnitcha argues that the proposition that a breach of contract never breaches legitimate expectations:

´entails the result that when an investor enters into a legally binding agreement with a host state about the arrangements to govern a particular investment, it *reduces* the degree of protection which the FET standard provides from changes to this arrangements. This result is not doctrinally coherent.´[136]

However, the argument of ´reducing the protection´ in situations of contract relative to other situations is based on disregarding the protection already afforded to contracts under national law and under the international rule on the protection of contracts from sovereign interference, an element of the FET. Once this level of protection is added to the picture, contractual undertakings cease to look like a loophole in the international investment standard. Also, Bonnitcha assumes that each and every element of the FET is applicable to any and all conceivable situations that may arise with regard to an investment. However, different conceptions of investment that are all subject to a BIT are not equally protected by individual obligations that the BIT includes.[137] Similarly, the denial of justice, an element of the FET, can only be invoked when there has been an act of adjudication and the claimant exhausted the local remedies.[138] There is simply no doctrinal incoherence in admitting that only certain types of investment and certain types of State conduct attract protection by only certain international norms.

The redundancy of the protection of contractual obligations through the prism of legitimate expectations seems more evident when one points out that in the domestic law context, the protection of substantive legitimate expectations itself is paralleled with a quasi-contract.[139] Hence, it is a substantive expectation (factually) stemming from further State conduct which

[135] Bonnitcha (n 6) 183.
[136] Ibid (emphasis original).
[137] Douglas, ´Property´ (n 90). Arguing that investment-as-contractual rights cannot be object of an expropriation claim or full protection and security claim. The latter seems confirmed by the recent treaties that specify that full protection and security relates to physical security of investors and investment, see EU-Canada CETA (n 13) Section 4, Art X.9 etc.
[138] Z Douglas, ´International Responsibility for Domestic Adjudication: Denial of Justice Deconstructed´, 63 (2014) ICLQ 867.
[139] *Coughlan* (n 49) para 59; *R(Niazi)* v. *Home Secretary* [2008] EWCA Civ 755, para 41; in the investment context see *Glamis Gold* (n 49) para 766.

engenders a quasi-contractual obligation, not a contractual obligation which engenders additionally protected substantive expectation.[140]

It is true that the tribunals that reached to the concept of LE when there has been an underlying contract, in fact focused on State conduct that was external to the contract, i.e. where the State uses its sovereign power to repudiate the contract or to otherwise deprive investors of the fruits of the contract; and some authors found the concept of legitimate expectations useful to assess this kind of situations.[141] It is submitted here, that even such application of the notion of LE is redundant and invites subjective evaluations of the facts. We should not be talking about legitimate expectations that are stemming from the contract, because the contract itself is a crystallization of expectations and is protected at the national as well as at international level.[142] Despite the fact that investment tribunals make the distinction between a simple contractual breach and sovereign interference into a contract sanctioned by international law,[143] it remains unexplained why the doctrine of legitimate expectations brings more clarity or any additional value beyond the established rules.[144]

The case of *MTD v Chile* well illustrates the point. The investor signed a contract with Foreign Investment Commission (´FIC´) regarding a construction of a real estate project, which was eventually halted because of the non-compliance with the zoning policy applicable to the location. Approval by the FIC was without prejudice to necessary approvals and the FIC´s authority was limited to the approval of the flow of funds into the country.[145] The tribunal took the approval of the contract as a basis for the creation of expectations, and as these have been frustrated by the subsequent denial of requisite permits, there was a violation of the FET. The *MTD* approach is problematic. The contract had an entirely different subject matter, it provided certain investment guarantees relating to foreign exchange and tax-stability, and even specified that it was not a substitute for all other relevant permits. Hence, it was hardly legitimate for MTD to believe in more than the contract said. The tribunal saw the major problem in the fact that under the regulatory framework as it stood, the project could not move forward, and the agencies

[140] And as with any other contract, the authority should have competence to enter into a contract of this kind.
[141] Potestà (n 38) 103.
[142] This was recently articulated in *Arif v Moldova* (n 98) para 536, 539.
[143] *Parkerings* (n 131) *Hamester* (n 134) *Impregilo* S.p.A. *v. Argentine* Republic, ICSID Case No. ARB/07/17, Award, 21 Jun 2011, para 292; *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Liability, 29 Dec 2014, para 216.
[144] Similarly see J Crawford, 'Treaty and Contract in Investment Arbitration', 24 (2008) Arb Intl 3, 351, 373.
[145] *MTD* Award (n 12) para 76, 160.

did not coordinate its policies in a consistent manner.[146] Apart from the fact that this is a common feature of all developed administrative law systems, where each agency is bound to guard and exercise its own function and competence, this suggests that the case could have been easily decided on this ground, that is, failure to act consistently in application of policies.[147] The solution does not require assessment of legitimate expectations.[148] It would have certainly been a more objective ground than adding the notion of expectations to the picture. Interestingly, the tribunal being aware of the far-reaching consequences of application of its standard to the facts decided to lower the compensation due to the lack of due diligence on the part of the investor.[149]

The principle of LE should be limited to situations of specific and unambiguous representations that may be *conceptualised as* quasi-contracts; and such situations may be even surrounding investments in the form of a contract proper.[150] Contracts are afforded protection by a separate element of the FET, which does not operate with the concept of expectations.

Legitimate expectations in international investment law and the disconnection with the common justificatory principles?

Extended protection of legitimate expectations through the concept of inducement?

In IIL context, LE are often based on the doctrine of reliance and extremely broad conception of *inducement*,[151] which is explained not through reference to the general principle of LE, but by exclusive reference to the object and purpose of a treaty. LE then do not work here as a general principle that helps interpretation of the FET standard; they work as a self-standing legal obligation arrived at through an extension of the governing rule. Taking the concept of inducement as a basis for the conception of LE is exacerbating the tensions between limiting

[146] Ibid para 163, 165.
[147] E.g. *Arif v Moldova* (n) para 538; Paparinskis, *International Minimum Standard* (n) 256-7; For English law see e.g. *Lumba and Mighty v Home Secretary,* [2011] UKSC 12, per Lord Dyson.
[148] *Arif v Moldova* (n 98) para 538.
[149] *MTD* Award (n 12) para 176-8, 242-6.
[150] See e.g. *Duke v Ecuador* (n).
[151] Ch Schreuer, U Kriebaum, ´At What Time Must Legitimate Expectations Exist?´ (2009) in J Werner, A Hyder Ali (eds) *A Liber Amicorum Thomas Wälde: Law beyond Conventional Thought*, 265, 273; *MTD* Award (n 12) para 160-166; *Tecmed* (n 14) para 154; *Waste Management, Inc. v. United Mexican States ("Number 2"),* ICSID Case No. ARB(AF)/00/3, Award, 30 Apr 2004, para 98; *Glamis Gold* (n 49) para 766; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 Jun 2012, para 997; *CME v Czech Republic* (n 129) para 611; *Saluka* (n 93), para 302-4; *Thunderbird* Award (n 20) para 147; *Total* (n 20) para 121 even EU-Canada CETA (n 13) Section 4, Art X.9

doctrines that are otherwise present and applicable under national laws, such as the principle of legality and the requirement of administrative discretion to be unfettered.[152] Also, the extension of the protection of LE based on inducement is, in the end, an argument based on the policy of BITs, not on a legal principle, although cloaked in the legitimacy of the object and purpose interpretation according to the customary treaty law and the Vienna Convention. To find a solid basis for the augmentation of the protection of LE in the IIL is important, as the augmentation has important consequences for the State´s ability to regulate.

Importantly, the overreliance on the concept of inducement as a justificatory principle for the protection of LE in investment context may, in effect, work against the rationale for the protection of LE furnished at the national level. This is for two reasons.

First, the inducement component of LE is drawn from the empirical and instrumental claim that protecting wide expectations of foreign investors leads to the promotion of investment and ultimately to more efficient use of resources. Recent studies have shown that the empirical argument that the protection of investment through BITs leads to higher inflows of foreign investment is simply absent.[153] This should make tribunals pause before reaching out to extensive conceptions of LE.

Second, the extension of the protection of LE can be also drawn from the so-called spill-over argument based on the rule-of-law functions of IIL; that is, an argument that the wide protection through BITs (thus by extension through the protection of legitimate expectations) leads to the

[152] The non-fettering of discretion should not be exaggerated, however. This is because the steps in arriving at a successful legitimate expectations claim are generally demanding. First, the proof of existence of the expectation on the facts is exacting. Second, the proof of existence of expectation as a first step of the analysis leads to the balancing and assessing the reasons for departing from the expectations. Third, the remedies available may not result in fettering of the discretion; Craig (n 51) 614. A wholesale revocation of the measure or policy is never an automatic result. The authority may be asked to reconsider the measure taking the expectation into account; this is perhaps the least fettering result. Then, the applicant may be awarded damages, which is only indirectly limiting the discretion. Still, the policy or measure may not take effect only vis-à-vis the applicant, while remain in force towards third parties.

[153] For recent overview see Bonnitcha (n 6) 109; further J Tobin, S Rose-Ackerman, 'Foreign Direct Investment and the Business Environment in Developing Countries: the Impact of Bilateral Investment Treaties', (May 2005) *Center for Law, Economics and Public Policy Research Paper No. 293,* Yale Law School; JW Yackee, 'Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do IITs Promote Foreign Direct Investment?', 42 (2008) *Law & Society Review* 4, 805; KP Gallagher, MBL Birch, 'Do Investment Agreements Attract Investments? Evidence from Latin America' in: KP Sauvant, LE Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press, 2009) 295; M Hallward-Driemaier, 'Do Bilateral Investment Treaties Attract FDI? Only a bit…And They Could Bite', (June 2003) *World Bank Policy Research Working Paper* No. 3121; UNCTAD, *Bilateral Investment Treaties in the Mid-1990s,* chapter IV (United Nations, New York and Geneva, 1998)

positive effects on good governance.[154] There are several problems with this line of reasoning. Using the conception of LE that is different and wider would lead, effectively, to two set of legal standards, one applied to national and the other to foreign investors. This argument is not an argument against the idea that BITs afford preferential treatment to foreigners, far from that. The problem here is that, assuming that the concept of legitimate expectations has well-defined scope within domestic law circumscribed by other well-established public law principles, accommodation of the broader and special protection of LE for foreigners may only be possible in two ways. One is the already mentioned double-regime, which may increase costs of administrative decision-making and accentuate the risk of erroneous decisions.[155] The second possibility is to assimilate and upgrade the domestic principle of LE into the IIL standard. This would go at the expense of the limiting public law principles, and would create an overall undesirable situation. One can immediately imagine that too generous protection of legitimate expectations negates the principle of legality of administration, which in turn leads to eradication of the principle of formal equality, and ultimately erodes the overall adherence to the rule of law.[156] A side-note to this is that such a systemic move, is at odds with the use of legitimate expectations as a general principle deployed for helping interpretation of a given international obligation.

Extended protection of legitimate expectation through the requirement of stability of legal framework?

Connecting LE with the requirement of stability of legal framework is not convincing either.[157] LE fulfil the role of residuary protection based on the fundamental principle of trust and fairness, thus they are an exception to the principle of legality and the general legal certainty. The stability of business environment is a policy principle that explains the chief reason for the conclusion of

[154] E.g. J Paulsson, ´The Power of States to Make Meaningful Promises to Foreigners,´ 1 (2010) Journal of International Dispute Settlement 2, 341; ; Schill (n 4); R Dolzer, ´The Impact of International investment Treaties on Domestic Administrative Law, 37 (2005) *NYU Journal of International Law and Politics* 953; SD Franck, ´Foreign Direct Investment, Investment treaty Arbitration, and the Rule of Law´, 19 (2007) Global Business and Development Law Journal, 367.

[155] Braunstein, In Defense of Traditional Immunity – Toward an Economic Rationale for not Estopping Government 14 (1982) Rutgers Law Review 1, 32-35; E Sharpson, Legitimate Expectations and Economic Reality, 15 (1990) European Law Review 2, 103, 105.

[156] Sometimes it is also considerations of substantive equality that are put against the principle of legitimate expectations, see e.g. Case 2/70 *Riva v. Commission* [1971] ECR 97, 109.

[157] Stability was connected with legitimate expectations explicitly in e.g. *Duke v Ecuador* (n 29) para 339; *Bayindir* (n 103) para 240; *Occidental* (n 15) para 183-6; *LG&E v Argentina* (n 15) para 137; *CMS v Argentina* (n 14) para 279; *Saluka* (n 93) para 302.

BITs. Yet, it is not a rationale that underpins LE as a general principle in municipal legal systems. Rather, the general rule of international law is that the business conditions are fleeting.[158] This customary rule was not replaced by the FET standard. Unless this has been specifically contracted through stabilization clause, the requirement does not apply. Moreover, the stability as a condition favourable for investment negates the fundamental structural features of the principle of LE, namely that it is a balancing tool.[159]

This does not mean, however, that the consistency element of the international minimum standard does not apply.[160] Similarly as in domestic law, the principle of consistency of policy application requires state to act in a consistent manner, which includes ability to make justifiable distinctions. The balancing aspect needs to take into account the conduct of investor and its due diligence already in the considerations of the legitimacy of the expectation.[161] LE should play role only when specific and unambiguous commitments having quasi-contractual nature are given to a specific investor.[162]

Conclusion

Some of the cases and scholarship analysed above stand for a proposition that LE in IIL are divorced from their roots in comparative administrative law. They imply that LE as a general principle should protect more in the IIL than in any other national law. This seems as a strange proposition when one speaks about applying a general principle of law; it is more akin to application of a General-Principle-Plus. This based on relatively straight-forward teleology that the protection obligations under BITs need to be interpreted as favouring investment promotion. Although it is expected that the investment protection in BITs will attract the investment, it is incorrect for tribunals to confuse an obligation of protection with obligation to promote, foster, and stimulate. The idea of pro-active approach of government agencies to dispel possibile

[158] *Oscar Chinn*. PCIJ, A/B63, Judgment of 12 December 1934, p 88, Dupuy, Dupuy (n 125) 291; *Toto* (n 112) para 242-4, *Parkerings* (n 131) para 335-6; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 Oct 2011, para 374; *Total* (n 20) para 117; *Continental* (n 129) 258.
[159] E.g. *Total* (n 20) para 121.
[160] See e.g. *MTD* Award (n 12); *Arif v Moldova* (n 98) para 538; Paparinskis, *International Minimum Standard* (n 9) 256-8.
[161] P Muchlinski, ´Caveat Investor? The Relevance of the Conduct if the Investior under the Fair and Equitable Treatment Standard´, 55 (2006) ICLQ 527, 534.
[162] *Thunderbird* Award (n 20) para 147; *Total* (n 20) para 199, *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, Dissenting Opinion of Prof Abi-Saab, para 3.

ambiguities is incompatible with basic structural elements of the concept of LE in national laws. As creatures of public law, LE cannot generally arise from silence or inactivity.[163] Public law in virtually all systems of law is governed by formalism; hence oral and informal representations shall be only exceptionally creative of legally protected interests. Such an augmented version of LE is at odds with the idea of international minimum standard, with methodology of applying general principles of law, and possibly also with the Vienna convention interpretation rule, as it unduly stresses the teleological interpretation.

The fact that expectations in one form or another are crucial consideration in many areas of international law[164] does not mean that the notion of legitimate expectations, a specific and concrete legal principle, should be applied as an argumentative framework for solving all too various legal claims; particularly when other less controversial rules and principles may readily to the work, such as consistency, prohibition of discrimination, prohibition of sovereign interference into contracts. The principle needs to retain its limited and exceptional function, if it is to have meaningful role in solving investment disputes. In the words of one investment tribunal: ´The multiplication of legitimate expectations may create a ´moving target´ for a respondent that in an extreme case might raise issues of due process.´[165] LE should not be diluted into a rhetorical frame that invites uncertainty and subjective judgement.[166] What I would warn against is a use of this amplified version of LE. Teleology of BITs is rather shaky basic for such a radical departure from established strictures. As long as one cannot establish a general pro-investor approach to treaty interpretation as legally mandated and applicable, I would hesitate to embrace this wide and far-reaching augmentation of a general principle. Yet, for the time being it may be said that in the domain of IIL, the opposite seems to be case to what Prof Forsyth once uttered about the provenance of legitimate expectations in English administrative law: ´that it is much easier to establish ground upon which to deny LE than grounds upon which to grant such protection.´[167]

[163] Mairal (n 33) 432. Where Mairal mentions exception of knowing toleration of individual's course of conduct.
[164] G Schwarzenberger. *The Fundamental Pricniples of International Law* (1955) 290; M Byers, *Custom, Power and the Power of Rules* (1999) ch 7.
[165] *Arif v Moldova* (n 98) para 534.
[166] In the context of English law, Forsyth recently wrote that ´there is a real danger the concept will collapse into an inchoate justification for judicial intervention. [For it] often gives little guidance and plays at best a rhetorical role.´ Forsyth, 2012 (n 44) 429
[167] Forsyth 1988 (n 44) 239.