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The legitimate expectations of the... arbitrators!

Epameinondas Stylopoulos (Stylopoulos & Associates) · Tuesday, September 8th, 2009

In modern treaties, a fair and equitable treatment standard (*hereinafter* “FaETS”) is to be provided to foreign investors and investments by the host state. In the past, the FaETS had been viewed as merely a sub-category of the international minimum standard. However, recent practice and international case law has started taking the view that the FaETS expands the scope the international minimum standard by allowing future tribunals to create new standards when the situation demands so that justice may be done for the foreign investor, who suffers unfair treatment at the hands of the host state ¹⁾. More specifically, in [Biwater Gauff \(Tanzania\) Limited v. United Republic of Tanzania](#) the tribunal adopted the view that even though the FaETS is an autonomous standard, its content is not materially different from the content of the minimum standard of treatment in customary international law (see paras. 591/592).

To this direction, recent case law regarding the concept of FaETS suggests that state action affecting investors’ legitimate expectations and legal and business stability may constitute a breach of the FaETS. The legitimate expectations position is reflected in the awards of recent cases; in [CMS v Argentine Republic](#) the legitimate expectations doctrine had been closely connected with stability and predictability (see para 277). Moreover, in [Metalclad Corporation v. United Mexican States](#) the tribunal compared the attitude of the host state to the expectation of the investor to be treated fairly and justly (see para 99). To this end, in this award it was stated that once the authorities of the host state become aware of any scope for misunderstanding or confusion in connection with initiating, completing and successfully operating investments made, it is their duty to ensure that the correct position is promptly determined and clearly stated to the investors (see para 76). Furthermore, in [Técnicas Medioambientos Tecmed, SA \(Tecmed\) v United Mexican States](#) it was held that the FaETS was an expression of the international law principle of “good faith”, which requires host states to treat foreign investments in accordance with the legitimate expectations of the investors. Those legitimate expectations include transparent, unambiguous and non-contradictory governmental conduct (see para 154). Additionally, in [Occidental Exploration and Production Company \(OEPC\) v Republic of Ecuador](#) and in [LG&E v Argentine Republic](#) the tribunals adopted similar views by linking the legitimate expectations principle with the transparency obligation of the host state.

More specifically, in [MTD v. Chile](#) the tribunal acknowledged the legitimate expectations principle as a sub-category of the duty to fair and equitable treatment and it concluded that the “investment promotion” obligation was not just a prescription for passive behaviour or avoidance of prejudicial conduct, but it had a “pro-active” meaning (see para 113). Furthermore, the tribunal supported the view that even if government’s assurances were ambiguous and an extra-careful investor could

have found this out, the government still owes a duty of consistency and protection of legitimate expectations to the foreign investor.

However, the most influential judicial text as far as the legitimate expectations doctrine is concerned may be the dissenting opinion of Prof. Thomas W. Wälde in *International Thunderbird Gaming Corp. v. Mexico* (the award available at https://www.naftaclaims.com/Disputes/Mexico/Thunderbird/Thunderbird_Award.pdf and the dissenting opinion at https://www.naftaclaims.com/Disputes/Mexico/Thunderbird/Thunderbird_Dissent.pdf

According to Prof. Wälde, the principle of legitimate expectations is part of the duty of a government to afford fair and equitable treatment under Art. 1105 of the NAFTA. An investor's expectation is legitimate when it is caused by and attributed to a government requiring the legitimacy of the expectation, in terms of the competency of the officials responsible for it, (see para 1), so that the investors' expectation can be "reasonable" (see para 21). The greater the formality of an assurance, the greater its ability is to trigger a legitimate expectation (see para 31). A government's conduct, including informal, oral or general assurances can give rise to or support the existence of a legitimate expectation. Specific expectations that have been created by the acts, statements or omissions of the relevant public authorities are "close parallels" to the requirement to accord 'treatment that is fair and equitable (see para 32).

Moreover, Prof. Wälde mentions that the principle of the protection of the "legitimate expectations" of the investors is also known to the ECJ and the European Court of Human Rights jurisprudence (for a list of cases see ref. 34) and he adds that apart from the EU law field, the principle of protection of the investors' legitimate expectations is recognized in several systems of administrative law (see para 27) and has been recognized as an important principle guiding the interpretation of other obligations in international economic law, e.g. it can be inferred from several WTO panel decisions (see para. 29). Prof. Wälde concludes that developed systems of law provide for some protection to the citizen – even more to an investor – against unexpected and detrimental changes of policy, if the latter has carried out significant investment with a reasonable, public-authority initiated assurance in the stability of such policy.

Prof. Wälde concludes that the government agency has to bear the risk of its own ambiguity and that the risk of ambiguity requires that an investor could reasonably take comfort from a state assurance (see para 47). This conclusion is reinforced by the traditional international law principle that the construction of a legal instrument in need of interpretation and with elements of ambiguity should be '*in dubio contra proferentem*²⁾' (see para 50).

The wide acceptance of the "legitimate expectations" principle supports the concept that it is indeed part of the FaETS as owed by governments to foreign investors under modern investment treaties. In recent years, the legitimate expectation principle evolved to a self-standing subcategory and independent basis for a claim under the FaETS. Even though in many investment treaties awards, the principle of the legitimate expectations may not have been explained in detail, those awards contributed towards the establishing of the legitimate expectations principle as a subcategory of the FaETS. Finally, it is clear that the legitimate expectations doctrine stems from the "good faith" principle which is a general principle of the international law seen either as a separate obligation or as a guiding principle for applying the FaETS.

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References

- ¹ M. Sornarajah – The International Law on Foreign Investment, Cambridge University Press, 2nd Ed., p. 333
- ² This principle implies that the drafter and the authority issuing a legally relevant statement, in other words the superior party, have to bear the risks of the ambiguity.

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