

## TRANSFORMING THE TREATIES SILENCE ON “LEGITIMATE EXPECTATIONS” IN INTERNATIONAL ARBITRATION? THE RECENT DEVELOPMENT IN ARBITRAL PRACTICE ON THAT MATTER

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**Abstract:** This article explores the development of legitimate expectations in international investment arbitration, highlighting its key role in the fair and equitable treatment (FET) standard. Initially defined by the *Tecmed v. Mexico* case, which demanded consistent and transparent actions from host states, this doctrine has faced criticism for exceeding arbitral mandates. Scholars argue that expectations must be reasonable and specific. The *Red Eagle v. Colombia* case recently narrowed its application, emphasizing concrete state commitments rather than general stability. This evolution balances investor protection with state sovereignty, reflecting international arbitration's role in developing international law and maintaining legal certainty in investments.

**Resumé:** Tento článek se zabývá vývojem legitimního očekávání v mezinárodní investiční arbitráži a zdůrazňuje jeho klíčovou roli ve standardu spravedlivého a rovného zacházení (FET). Tato doktrína, která byla původně definována v případě *Tecmed v. Mexiko*, který požadoval konzistentní a transparentní jednání ze strany hostitelských států, čelila kritice za překračování rozhodčích mandátů. Vědci tvrdí, že očekávání musí být přiměřená a konkrétní. Příklad *Red Eagle v. Kolumbie* nedávno zúžil její použití a zdůraznil konkrétní závazky státu spíše než obecnou stabilitu. Tento vývoj vyvažuje ochranu investorů se státní suverenitou a odráží roli mezinárodní arbitráže při rozvoji mezinárodního práva a udržování právní jistoty v oblasti investic.

**Key words:** Legitimate Expectations – Fair and equitable treatment (FET) – Bilateral Investment Treaties (BITs) – International investment Arbitration – State regulatory authority – Investor Protection – Minimum Standard of Treatment (MST) – Customary international law – Stability and predictability – Good faith – Arbitral jurisprudence – Regulatory autonomy – Comparative public law – Specific commitments – Arbitrariness – State sovereignty – *Red Eagle v. Colombia* – *Tecmed v. Mexico* – *Vattenfall case* – General principles of law

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## Introduction

The doctrine of legitimate expectations has emerged as a pivotal—yet often debated—concept in the field of international investment arbitration. As cross-border investments have proliferated and the network of bilateral investment treaties (BITs) has expanded, questions regarding the protection of investors' expectations and the boundaries of state regulatory authority have come to the forefront of arbitral jurisprudence. This contribution explores the evolution, doctrinal foundations, and practical application of legitimate expectations within the broader framework of the fair and equitable treatment (FET) standard, drawing on leading arbitral awards, comparative public law, and critical scholarly commentary.

The analysis situates legitimate expectations at the intersection of investor protection and state sovereignty, highlighting the dynamic interplay between arbitral practice and the development of international law. By examining both the strengths and the limitations of the doctrine as it has been interpreted by arbitral tribunals, this work aims to provide a nuanced understanding of how international arbitration not only resolves disputes but also shapes the contours of legal standards governing foreign investment. The following pages offer a critical yet constructive perspective on the role of legitimate expectations in fostering a stable, predictable, and equitable investment environment, while respecting the evolving needs of host states and the international community.

## Definition and Role of BITs in Investment in the Host State

In the absence of a global investment treaty, most international legal disciplines on the relationship between host countries and international investors have been developed at a bilateral level. Treaties establishing minimum guarantees regarding the treatment of foreign investment have existed for more than two centuries. In the latter half of the 20th century, bilateral investment treaties (BITs) emerged as the first international agreements exclusively focusing on the treatment of foreign investment. In view of their similar legal structure, as well as the fact that BITs have burgeoned, these agreements rank among the most important pillars in international law on foreign investment.<sup>1</sup> Bilateral investment treaties are international agreements concluded between two states with the primary objective of promoting and protecting investments made by investors from one contracting state in the territory of the other contracting state. BITs typically confer rights upon investors as defined in each treaty, entitling them to specified standards of treatment and granting them the power to bring claims to enforce those entitlements independently of their home state. BITs regulate the conduct of the host state and the foreign investor, establishing a legal framework that governs the reception and treatment of investments.<sup>2</sup> They create a new legal relationship between the host state and the foreign investor, which may complement or replace any pre-existing relationship under domestic law.<sup>3</sup> The obligations of the host state

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<sup>1</sup> UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking*, UNCTAD/ITE/IIA/2006/5, 2007, p. 11.

<sup>2</sup> *Adria Group B.V. and Adria Group Holding B.V. v. Republic of Croatia*, ICSID Case No. ARB/20/6, Decision on Intra-EU Jurisdictional Objection, 30 October 2023, paras. 227–228.

<sup>3</sup> *Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award (Resubmission Proceeding), 9 July 2023, paras. 178–179.

towards the foreign investor derive from the terms of the applicable investment treaty, not from any set of expectations the investor may have.

While most BITs include the standard of fair and equitable treatment — sometimes combined with the principle of full protection and security and/or the international minimum standard — only a small fraction of them clarify the meaning of this provision. Different approaches are in use — for instance, a statement that *fair and equitable* treatment does not mean more than what is prescribed by customary international law, a reference to international law, or the linkage of the fair and equitable treatment principle to non-discriminatory treatment.

Most bilateral investment treaties (BITs) incorporate the most-favored-nation (MFN) principle, although exceptions often apply for double taxation and regional economic integration agreements. While recent arbitration has led to inconsistent interpretations of the MFN clause, BITs generally have not clarified its scope any further. Over the past decade,<sup>4</sup> BITs have become increasingly aligned on expropriation standards, requiring actions to be non-discriminatory, serve a public purpose, be accompanied by prompt and adequate compensation, and follow due process. BITs vary in their specifics regarding the calculation and payment of compensation, and most cover both direct and indirect expropriations, but rarely address regulatory takings explicitly. Additionally, many BITs include provisions for protection and compensation during war or civil unrest, with some specifying compensation amounts in such cases.

These treaties not only supplement or supersede domestic legal provisions but also ensure that investor-state relationships are governed by transparent and mutually agreed standards rather than unilateral investor expectations. Ultimately, BITs play a vital role in fostering cross-border investment and enhancing the confidence of investors operating in foreign jurisdictions.

## Resolution of Disputes under BITs

Procedurally, BITs provide mechanisms for the resolution of disputes between investors and host states, most notably through investor-state arbitration, which allows investors to bring claims directly against the host state for alleged breaches of the treaty.<sup>5</sup> BITs do not generally establish an investment framework for domestic investors; rather, they are designed to protect investors of a different nationality from the host state, consistent with the principle that an individual or entity may not bring an international claim against its own state.<sup>6</sup>

International investment arbitration plays a role as an effective mechanism for resolving disputes between foreign investors and host states, upon principles ensuring fairness, balance, and predictability in governing investor-state relations. Specifically, BITs standardize state commitments to uphold a certain level of behavior, which acts as a safeguard against unjustified interference or other arbitrary and capricious actions by the host state. Specifically,

<sup>4</sup> Ibid. 1, Introduction summary, page xii.

<sup>5</sup> *Alois Schönberger v. Republic of Tajikistan*, ICSID Case No. ARB(AF)/19/1, Award, 7 December 2023, paras. 198–200.

<sup>6</sup> *Antonio del Valle Ruiz et al. v. Kingdom of Spain*, PCA Case No. 2019-17, Final Award, 12 March 2023, paras. 430–431.

BITs establish clear obligations for states, ensuring that they adhere to defined standards of conduct. This framework serves as a protective barrier for investors, shielding them from unwarranted interference or any arbitrary and unreasonable actions on the part of the host state.

Arbitral tribunals possess the authority to attribute specific obligations to host states, drawing on principles of international law. For example, in the *Philip Morris v. Uruguay* case,<sup>7</sup> the tribunal employed the relevant BIT and augmented its application with pertinent international law principles. Similarly, in the *Muhammet Çap & Sehil İnşaat v. Turkmenistan* case,<sup>8</sup> international law principles guided the tribunal in interpreting obligations under the BIT.

Tribunals may also explore obligations from other BITs or international instruments if these are pertinent to the issue at hand and fall within the tribunal's jurisdiction. In the *Bernhard von Pezold v. Zimbabwe* case,<sup>9</sup> for instance, the tribunal evaluated the German BIT alongside other applicable treaties and international law rules under the regime of MFN clause.

One can observe the integration of FET across various layers of international instruments besides BITs, weaving through expansive frameworks such as the Energy Charter Treaty, regional trade agreements such as USMCA,<sup>10</sup> former NAFTA, and scores of bilateral accords, while a new generation of model BITs contains a new type of FET clauses including an exhaustive list of measures which are considered to breach the FET.<sup>11</sup>

There is support in scholarly work and arbitral practice for the proposition that investment law may benefit from an approach based on comparative public law. For example, Schill has argued that the fair and equitable treatment (FET) standard under investment treaties can be understood as an embodiment of the rule of law, drawing on comparative public law principles. This approach has found resonance in certain recent arbitral awards, which have looked to domestic law concepts—particularly those recognized as general principles of law—to inform the content of investment protection standards, especially the FET standard.<sup>12</sup>

A number of investment treaties and treaty models now expressly recognize that domestic law concepts, when they have attained the status of general principles, may inform the interpretation and application of investment protection standards.

<sup>7</sup> *Philip Morris Brand SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, paras. 176–177.

<sup>8</sup> *Muhammet Çap & Sehil İnşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6, Award, 4 May 2021, paras. 717–719.

<sup>9</sup> *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, paras. 170–173.

<sup>10</sup> Agreement between the United States of America, the United Mexican States, and Canada, Article 1105: Minimum Standard of Treatment, Article 14.6: Minimum Standard of Treatment, (a) 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world. 1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

<sup>11</sup> US Model Bilateral Investment Treaty (2012), Art. 5(1).

<sup>12</sup> *Gaspar v. Costa Rica*, ICSID, Award, 29 June 2022, para 356; *Gosling and others v. Mauritius*, ICSID, Award, 18 February 2020, para 243; *Anglo American v. Venezuela ICSID*, Award, 18 January 2019, para 442.

This is particularly relevant for the FET standard, which is often vaguely worded and thus open to interpretation by reference to broader legal principles. There is no a priori limitation on the scope or content of a host state's obligations.<sup>13</sup>

Tribunals have considered whether the host state's domestic legislation or conduct gave rise to legitimate expectations for the investor, and this analysis is often informed by general principles derived from domestic legal systems. The timing and formation of legitimate expectations, as well as their reasonableness, are also discussed in the context of both international and comparative public law. Several tribunals have found it essential to determine whether the investor's legitimate expectations existed at the moment of each specific decision or transaction.<sup>14</sup>

## Doctrine of the Legitimate Expectations

The doctrine of legitimate expectations starts by the final arbitral award, in re *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States (Tecmed)*<sup>15</sup> emphasized that the foreign investor expects the host state to act consistently and not arbitrarily by revoking the preexisted decision(s) or permit(s) of the host state that the investor relied upon to make its investment and plan its business activities,<sup>16</sup> it qualifies the investors' expectations as "fair" and "basic" and clarifies that such expectations are anchored in the legal framework and commitments made by the host state at the time the investment was made. The *Tecmed* arbitral tribunal underscores the importance of a stable and predictable legal and business climate like indispensable for investors in evaluating the genuine legal landscape and making well-informed decisions<sup>17</sup> and concluded that the Mexican authorities' actions, particularly the refusal to renew the permit for the landfill, violated the expectations of Tecmed. The tribunal noted that the political and social circumstances were not foreseeable by the investor at the time of the investment and the authorities failed to act in a manner that would ensure the stability and predictability required by international law,<sup>18,19</sup> but it does not anywhere use the term *legitimate (expectations)*.

Reflecting on the *Tecmed's* decision, identified weaknesses include the tribunal's significant reliance on principles of stability and predictability as derived from the *Eletronica Sicula S.p.A. (ELSI)* case. However, the fair and equitable treatment (FET) standard does not inherently promise absolute stability of commercial and legal landscapes. The tribunal's interpretation may be perceived as overly rigid, failing to account for the fluidity inherent in regulatory contexts. Although *Tecmed* underscored the value of good faith, it fell short in addressing the level of evidence needed to confirm a breach of this principle. Under international law, proving good faith violations typically demand showing

<sup>13</sup> CRAWFORD, J., Treaty and Contract in Investment Arbitration, *Arbitration International*, Vol. 24, Issue 3, 1 September 2008, p. 354.

<sup>14</sup> *Frontier v. Czech Republic*, PCA, Final Award, 12 November 2010, para 287; *Muszynianka v. Slovakia*, PCA, Award, 7 October 2020, para 473; *Crystallex v. Venezuela*, ICSID, Award, 4 April 2016, para 557.

<sup>15</sup> *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award – 29 May 2003.

<sup>16</sup> *Ibid.* 15, para. 154.

<sup>17</sup> *Ibid.* 15, para. 167.

<sup>18</sup> *Ibid.* 15, para. 149.

<sup>19</sup> *Ibid.* 15, para. 150.

intentional misconduct or deceitful actions by the state. In the aftermath of the tribunal's correct finding of liability in *Tecmed*, the *obiter dictum* in that award, unsupported by any authority, is now frequently cited by tribunals as the only and therefore definitive authority for the requirements of fair and equitable treatment.

The critics may argue that the *Tecmed* tribunal insufficiently differentiated between negligence and intentional wrongdoing. The tribunal's focus on protecting legitimate expectations might be viewed as excessive, overlooking that the FET standard encompasses broader concepts. Beyond legitimate expectations, the FET standard also includes considerations of reasonableness and non-discrimination.

In summary, while the *Tecmed* tribunal's decision adheres to principles from the *ELSI* case, it potentially faces criticism for its limited emphasis on the good faith requirement, and its excessive concentration on legitimate expectations. The *Tecmed* tribunal could have leveraged the principles set forth in the *ELSI*'s case to bolster its arguments concerning the fair and equitable treatment (FET) standard and the safeguarding of legitimate expectations. This can correspond with the opinion made by Zachary Douglas,<sup>20</sup> that noting that

[t]he *Tecmed* 'standard' is not a standard at all; it is rather a description of perfect public regulation in a perfect world, to which all states should aspire but very few (if any) will ever attain. For instance, the tribunal referred in *White Industries Australia Limited v. India*,<sup>21</sup> to the *Tecmed* statement as having been 'subject to what it considers to be valid criticism.

While the *Tecmed* tribunal obviously interprets the BIT in good faith, considering the ordinary meaning of its terms in their context and in light of the treaty's object and purpose, its invocation of good faith scarcely fulfills the intended purpose. While good faith is undoubtedly recognized as 'one of the fundamental principles guiding the formation and execution of legal obligations,' it does not, on its own, constitute an independent source of obligation. More critically, it falls short of adequately justifying why a treaty standard like fair and equitable treatment ought to be interpreted as encompassing a specific component such as the duty to safeguard legitimate expectations, at least without more comprehensive reasoning to substantiate such a reading. In assessing whether a host state has breached the bilateral investment treaty (BIT) by not upholding fair and equitable treatment, even if the treaty's language does not explicitly mention the *legitimate expectations* of the foreign investor, the tribunal must have evaluated this carefully. The crux lies in determining if the BIT inherently safeguards the investor's legitimate expectations under the fair and equitable treatment clause, despite the absence of explicit terms. Furthermore, the tribunal must consider whether the signatories intended for the BIT to protect these expectations, especially if such intention is not directly articulated in the treaty's provisions.

The *Tecmed* tribunal asserts that the fair and equitable treatment (FET) standard includes the protection of the investor's legitimate expectations, which are linked to the stability of the legal and business environment.<sup>22</sup> However, the FET standard does not

<sup>20</sup> Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex, 27(1) ARB. INT'L 27, 28 (2006) (in Legitimate expectations in investment treaty law: Understanding the roots and the limits of a controversial concept, Michele Potestà, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2102771](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2102771)).

<sup>21</sup> *White Industries Australia Limited v. India*, UNCITRAL, Final Award, 30 November 2011, para. 10.3.5.

<sup>22</sup> *Achmea B.V. (formerly Eureko B.V.) v. The Slovak Republic (I)*, PCA Case No. 2008-13, Final Award, 7 December 2012, para. 241.

necessarily protect legitimate expectations to the extent of guaranteeing absolute stability of the commercial and legal framework.<sup>23</sup> For instance, in the case of *Mobil Exploration and Development Inc. v. Argentine Republic*, it argues that the FET standard requires good-faith, transparent, and reasonable treatment, free from arbitrariness and discrimination, but does not protect legitimate expectations to the extent of an absolute stability of the commercial and legal framework.<sup>24</sup> A violation of the principle of good faith can also occur even in the absence of intentional or manifestly damaging or fraudulent behavior, and that mere negligence or disregard of treaty provisions can suffice while one can imagine the opposing arguments that the principle of good faith in international law typically requires a higher threshold of proof, such as demonstrating intentional misconduct or bad faith actions by the state.<sup>25</sup>

This is supported by the case of *Frontier Petroleum Services Ltd. v. The Czech Republic*, where it was argued that fair dealing, reasonableness, and fidelity are integral to the good faith exercise of public authority.<sup>26</sup>

Is it legally permissible to argue that breaching the principle of good faith might occur without intentional or overtly damaging actions, suggesting that negligence or simple disregard for treaty provisions could suffice? While some may contend that international law traditionally demands a higher standard of proof—such as showing intentional misconduct or bad faith by a state—the case of *Frontier Petroleum Services Ltd. v. The Czech Republic* underscores that fairness, reasonableness, and integrity are core to exercising public authority in good faith.<sup>27</sup>

In *ELSI*, the ICJ underscored the obligation of host states to treat foreign investments fairly and equitably, avoiding arbitrary or discriminatory measures. On the other hand, the *Tecmed* arbitral tribunal states that it would be absurd if measures later quashed by a higher authority or a superior court could, for that reason, be said to have been arbitrary in the sense of international law by referring to the decision made in the decision in *ELSI* and it finds that the actions by Italy could have ‘shock(ed), or at least surprise(d), a sense of juridical propriety’ regarding the requisition of Elettronica Sicula S.p.A. (*ELSI*) by the Italian Government.

Even when the *Tecmed* tribunal refers to the judgement of the International Court of Justice (ICJ) in the case of *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*<sup>28</sup> and its reasoning in sense that the *ELSI* case previously set significant legal precedent by clarifying the responsibilities and expectations concerning state behavior and investor treatment the International Court of Justice (ICJ) in the case *ELSI (United States of America v. Italy)* it explicitly addresses only the breach of specific regulations, deeming such actions unlawful, that could potentially lead to the host state’s arbitrariness. The

<sup>23</sup> *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Award, 5 November 2021, paras. 210–214.

<sup>24</sup> *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability, 10 April 2013, paras. 903–904.

<sup>25</sup> *Ibid.*, 24, paras. 901–903.

<sup>26</sup> *Frontier Petroleum Services Ltd. v. The Czech Republic*, PCA Case No. 2008-09, Final Award, 12 November 2010, para. 278.

<sup>27</sup> *Frontier Petroleum Services Ltd. v. The Czech Republic*, PCA Case No. 2008-09, Final Award, 12 November 2010, para. 279.

<sup>28</sup> *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, 19 July 1989.

tribunal's reasoning aligns with the idea that arbitrariness is a distinct concept from mere unlawfulness. The *Tecmed* tribunal distinguishes its case from *ELSI*, noting that the *ELSI* case involved a requisition order based on a serious emergency and social crisis, which was recognized by the local courts as a significant public hardship. The *Tecmed* tribunal points out that, unlike in *ELSI*, the Mexican authorities did not specify reasons of public interest, public use, or public emergency to justify their actions.<sup>29</sup>

However, the *Tecmed* award does not explicitly adopt or reference the proposition that 'it would be absurd if measures later quashed by higher authority or a superior court could, for that reason, be said to have been arbitrary in the sense of international law' as found in the *ELSI* decision. Instead, *Tecmed* uses *ELSI* primarily to contrast the factual circumstances and the presence or absence of a genuine emergency or public crisis.<sup>30</sup> The *Tecmed* tribunal, in its discussion of fair and equitable treatment, states:

as presenting insufficiencies that would be recognized '...by any reasonable and impartial man,' or, although not in violation of specific regulations, as being contrary to the law because: ... (it) shocks, or at least surprises, a sense of juridical propriety<sup>31</sup>

in order to articulate the standard for fair and equitable treatment, but the award does not attribute this language to the *ELSI* case (sic!). Rather, it appears as part of the tribunal's own reasoning regarding the scope of fair and equitable treatment under international law.

The *ELSI* judgment does not use the phrase 'shock(ed), or at least surprise(d), a sense of juridical propriety' regarding the requisition of *ELSI* by the Italian Government. The *ELSI* case discusses the context of the requisition, the emergency, and the subsequent legal proceedings, but does not frame its assessment in terms of juridical propriety using that language.<sup>32</sup> The *Tecmed* tribunal references the *ELSI* case to distinguish the factual and legal context, particularly the presence of a genuine emergency in *ELSI*, but does not cite *ELSI* for the proposition about the arbitrariness of measures later quashed by higher authority. The phrase 'shock(s), or at least surprise(s), a sense of juridical propriety' is used in *Tecmed* to describe the standard for fair and equitable treatment but is not directly attributed to *ELSI*.

An arbitrator evaluating the provided text and the relevant case law could genuinely conclude that the standard of conduct which 'shocks, or at least surprises, a sense of juridical propriety' is not a formulation found in the *ELSI* judgment itself but rather is articulated by the *Tecmed* tribunal as part of its interpretation of the fair and equitable treatment standard under international law. The *Tecmed* tribunal references the *ELSI* case primarily to distinguish the factual and legal context—specifically, the existence of a genuine emergency in *ELSI* that justified the state's actions, which was not present in *Tecmed*.<sup>33</sup> The tribunal also recognizes that arbitrariness under international law is not equated with mere unlawfulness under domestic law, a principle discussed in *ELSI*. Arbitrariness under international law is obvious a higher threshold than mere unlawfulness under domestic law. The Court additionally explained that it would be "absurd" to categorize governmental actions as arbitrary under international law merely on the grounds that a superior judicial

<sup>29</sup> Ibid. 15, paras 145–146.

<sup>30</sup> Ibid. 15, paras. 124–125.

<sup>31</sup> Ibid. 15, paras. 154–155.

<sup>32</sup> Ibid. 28, paras. 12–13 and 30–32.

<sup>33</sup> Ibid. 15, paras. 145–146.

body subsequently overturned them. The *Tecmed* tribunal, when analyzing the fair and equitable treatment (FET) standard and arbitrariness, distinguished between mere unlawfulness and arbitrariness, emphasizing that not every unlawful act by a state amounts to arbitrariness or a breach of FET. Thus, a finding of unlawfulness, unreasonableness, or even arbitrariness by a municipal court is not determinative for international law purposes, though the qualification given to the impugned act by a municipal authority may be a valuable indication. On the other hand, in the very context of the *ELSI* case, the ICJ found that the actions of the Mayor of Palermo—namely, the requisition of ELSI—did not meet the threshold of arbitrariness under international law, especially since ELSI was already in financial distress and the requisition was not the use of its bankruptcy.<sup>34</sup> The ICJ concludes that Italy did not violate the relevant treaty (the FCN Treaty) because the conduct did not amount to a willful disregard of due process or a shocking departure from juridical propriety.<sup>35</sup> Additionally, the ICJ noted that ELSI was already in a precarious financial state prior to the requisition, and the bankruptcy was not caused by the requisition order.<sup>36</sup> When interpreting arbitrariness, the ICJ makes clear that it is a willful disregard of due process or a shocking departure from juridical propriety, rather than a mere breach of domestic law.<sup>37</sup> The Court did not use the term *legitimate expectation* anywhere in its judgment, and its reasoning was anchored in the concepts of property protection and the rule of law as the standard for arbitrariness under international law.<sup>38</sup>

The *Tecmed* tribunal articulated the tribunal's protection of the foreign investor's interests as fair and reasonable because in its view the fair and equitable treatment standard under international law requires the host state to act in a manner that does not affect the *basic expectations* taken into account by the foreign investor when making the investment, i.e., the expectation that the host state will act consistently, transparently, and free from ambiguity, so that the investor can know in advance the rules and regulations governing its investment and plan accordingly.<sup>39</sup> The tribunal emphasized that the foreign investor expects the host state not to arbitrarily revoke preexisting decisions or approvals that the investor relied upon to assume its commitments and launch its business activities.<sup>40</sup> The protection of these expectations is rooted in the principle of good faith in international

<sup>34</sup> Ibid. 28, para 130: 'The Chamber does not, therefore, see in the requisition a measure which could reasonably be said to earn the qualification 'arbitrary', as it is employed in Article I of the Supplementary Agreement. Accordingly, there was no violation of that Article.'

<sup>35</sup> Ibid. 28, para 128: 'Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. ... It is a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety. Nothing in the decision of the Prefect, or in the judgment of the Court of Appeal of Palermo, conveys any indication that the requisition order of the Mayor was to be regarded in that light.'

<sup>36</sup> Ibid. 28, paras. 97–99 and 119.

<sup>37</sup> Ibid. 28, para 124: 'Yet it must be borne in mind that the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise.'

<sup>38</sup> Ibid. 28, paras. 68–69, 113, and 127–129.

<sup>39</sup> *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Award, 27 February 2024, paras. 196–197 \* The arbitral tribunal in *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Award, 27 February 2024 was composed of the following arbitrators: Sir Daniel Bethlehem KC (President), Professor Campbell McLachlan KC (Claimant's appointee), Professor Brigitte Stern (Respondent's appointee).

<sup>40</sup> *Alcor Holdings Ltd. v. The Czech Republic*, PCA Case No. 2018-45, Award, 1 March 2022, paras. 182–185.

law, which requires the state to provide treatment that is fair, equitable, and consistent with the investor's legitimate expectations.<sup>41</sup> Furthermore, the *Tecmed* tribunal recognized that the fair and equitable treatment standard encompasses fundamental principles such as good faith, due process, non-discrimination, and proportionality. The ICJ emphasized in the *ELSI* case the importance of a stable and predictable legal and business environment for foreign investors.<sup>42</sup> This principle aligns with the tribunal's reasoning in *Tecmed*, where it held that the FET standard includes the protection of the investor's legitimate expectations and requires the host state to provide a stable and predictable environment.

## Two Examples of Criticism on the *Tecmed* Decision by Michele Potestà and Laura Yvonne Zielinski

### *Potestà's Analysis*

Potestà's analysis<sup>43</sup> provides a comprehensive and critical overview of the doctrine of legitimate expectations in investment treaty law, focusing on its roots, evolution, and current limitations as interpreted by arbitral tribunals. The paper scrutinizes both the doctrinal underpinnings and the practical application of the concept, especially under the fair and equitable treatment (FET) standard, referencing a wide array of legal authorities and arbitral awards. He observes that the concept of legitimate expectations has become pervasive in investment arbitration, often invoked by claimants and, to varying extents, endorsed by tribunals. However, he criticizes the lack of systematic and rigorous analysis by tribunals, noting that most decisions rely heavily on precedent rather than principled justification.<sup>44</sup> The doctrine is not explicitly anchored in most investment treaties, with only a few (notably those by the US and Canada) referencing 'investment-backed expectations' in the context of indirect expropriation.<sup>45</sup> Further, Michael Potestà suggests that a more fruitful approach is to ground legitimate expectations in general principles of law, as reflected in domestic administrative law systems.<sup>46</sup> He notes that many domestic systems protect individuals from harm caused by public authorities resiling from prior positions, but such protection is often limited and context-dependent.<sup>47</sup> The comparative approach is endorsed by authorities such as Thomas Wälde and arbitral tribunals like *Total v. Argentina*, which recognize the doctrine's roots in both civil and common law traditions, albeit within well-defined limits.<sup>48</sup>

As to the application in Investment Arbitration of the doctrine of legitimate expectations Potestà comes to the opinion that the doctrine has gained prominence under the FET standard, evolving from a subsidiary interpretative principle to a self-standing subcategory

<sup>41</sup> *LSF-KEB Holdings SCA and others v. Republic of Korea*, ICSID Case No. ARB/12/37, Award, 29 August 2022, paras. 713–715.

<sup>42</sup> *Ibid.* 40, paras. 294–295.

<sup>43</sup> POTESÀ, Michele, Legitimate expectations in investment treaty law: Understanding the roots and the limits of a controversial concept, Final version published in 28 *ICSID Review* (2013) 88–122, available at <http://icsidreview.oxfordjournals.org/content/28/1/88.full.pdf+html>, p. 1.

<sup>44</sup> *Ibid.* 43, pp. 2–3.

<sup>45</sup> *Ibid.* 43, pp. 5–6.

<sup>46</sup> *Ibid.* 43, pp. 5–6.

<sup>47</sup> *Ibid.* 43, pp. 7 and 12.

<sup>48</sup> *Ibid.* 43, pp. 7 and 12.

and independent basis for claims.<sup>49</sup> The *Tecmed v. Mexico* award is cited as a landmark, articulating that FET requires treatment that does not affect the basic expectations relied upon by the investor at the time of investment.<sup>50</sup> Subsequent jurisprudence has treated legitimate expectations as a dominant element of FET, though with increasing caution and refinement.<sup>51</sup>

Potestà categorizes the situations in which legitimate expectations arise into three main types, each with distinct legal consequences:

1. **Contracts between the investor and the state** are seen as the strongest basis for legitimate expectations, as they reflect carefully negotiated terms and crystallize the parties' intentions.<sup>52</sup> However, Potestà warns against equating contractual expectations with treaty claims, emphasizing that legitimate expectations should not serve as a vehicle to rewrite contracts.<sup>53</sup>
2. **Informal promises, assurances, or representations** by the host state can also generate legitimate expectations if they are specific, targeted, and induce the investment.<sup>54</sup> The specificity and clarity of such representations are crucial; vague or general statements by politicians or in policy documents are generally insufficient.<sup>55</sup>
3. **Claims based solely on the stability of the general regulatory framework** are treated with the greatest caution. While some early cases suggested that FET entails a duty to maintain a stable legal environment, more recent awards have emphasized the host state's sovereign right to regulate and adapt its laws.<sup>56</sup> Legitimate expectations in this context are only protected in exceptional circumstances, particularly where specific commitments have been made.<sup>57</sup>

Potestà concludes that while the doctrine of legitimate expectations is now firmly embedded in investment arbitration, its application is subject to significant limitations and a more rigorous, context-dependent analysis than in earlier awards.<sup>58</sup> The doctrine's flexibility enables tribunals to mediate between investor protection and state sovereignty but also demands scrutiny to avoid overreach. He highlights that the most robust protection arises from specific commitments (contractual or otherwise), while claims based on general regulatory stability are rarely successful unless accompanied by clear, individualized assurances. The investor's own conduct and the reasonableness of their expectations, considering all circumstances, are now central to the analysis.

Potestà's analysis is grounded in a wide range of legal authorities, including arbitral awards (*Tecmed*, *Total*, *El Paso*, *MTD*, *Thunderbird*, *Waste Management*, *Parkerings*, *BG*, *PSEG*, *Impregilo*, *Saluka*, etc.), scholarly works (Schönberg, Craig, Dolzer & Schreuer, Snodgrass), and comparative administrative law sources. He frequently references the

<sup>49</sup> Ibid. 43, p. 13.

<sup>50</sup> Ibid. 43, p. 14.

<sup>51</sup> Ibid. 43, p. 15.

<sup>52</sup> Ibid. 43, pp. 16 and 18.

<sup>53</sup> Ibid. 43, p. 19.

<sup>54</sup> Ibid. 43, pp. 19–20, and 30.

<sup>55</sup> Ibid. 43, pp. 21 and 23–24.

<sup>56</sup> Ibid. 43, pp. 26–28.

<sup>57</sup> Ibid. 43, pp. 31–32 and 34.

<sup>58</sup> Ibid. 43, pp. 39–41.

ICSID Convention, the ICJ Statute, and specific treaty models (e.g., US Model BIT), as well as the writings of Thomas Wälde, Anthea Roberts, and others.<sup>59</sup>

It is obvious that Potestà's synthesis provides a nuanced framework that legitimate expectations are protected under FET, but only when they are reasonable, specific, and contextual justified, the doctrine must be applied with caution, respecting both the investor's reliance and the host state's regulatory autonomy, arbitral precedent, while influential, should not substitute for principled analysis rooted in general principles of law and comparative public law, balancing of interests is essential, and the investor's conduct is as important as the state's commitments.

## Another Critical Analysis by Laura Yvonne Zielinski on Kluwer Arbitration Blog

### Summary of Legal Arguments and Assessment: "Legitimate Expectations" in the *Vattenfall Case*<sup>60</sup>

The document by Laura Yvonne Zielinski critically examines the doctrine of legitimate expectations within the context of the *Vattenfall v. Germany* investment arbitration, situating it at the heart of debates over Investor-State Dispute Settlement (ISDS). The analysis draws on both international arbitral practice and German constitutional law, referencing key authorities and arbitral awards to elucidate the contours and limits of the legitimate expectations standard. She finds that the doctrine of legitimate expectations, originally rooted in domestic administrative law, has been incorporated into international investment law through the principle of good faith. It is now widely recognized as part of the fair and equitable treatment (FET) standard and is *firmly rooted in arbitral practice*. The concept is defined as arising when a state's conduct creates reasonable and justifiable expectations for an investor, such that a failure to honor those expectations may result in damages.<sup>61</sup> Over time, arbitral tribunals have refined the doctrine to consider factors such as the socio-economic context of the host state and the conduct of the investor.<sup>62</sup> Under this prerequisites she mentions the *Vattenfall Case*<sup>63</sup> and the German Context.

The *Vattenfall* case arose after Germany's abrupt policy reversal on nuclear energy following the Fukushima disaster, which led to the accelerated phase-out of nuclear power and significant losses for investors.<sup>64</sup> The claimants argued that it was not the decision to phase out nuclear energy per se, but the unexpected and sudden political changes that violated their legitimate expectations.<sup>65</sup> The German Federal Constitutional Court (BVerfG) addressed the issue under the principle of Vertrauensschutz (protection

<sup>59</sup> Ibid. 43, pp. 3–6, 11–13, 16, 31, and 35.

<sup>60</sup> ZIELINSKI, Laura Yvonne, Legitimate Expectations in the *Vattenfall Case* at the Heart of the Debate over ISDS, Kluwer Arbitration Blog, 10 January 2017, <https://arbitrationblog.kluwerarbitration.com/2017/01/10/legitimate-expectations-in-the-vattenfall-case-at-the-heart-of-the-debate-over-ids/> p. 1.

<sup>61</sup> Ibid. 60, p. 1.

<sup>62</sup> Ibid. 60, p. 1.

<sup>63</sup> *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany* (I), ICSID Case No. ARB/09/6, Award embodying the parties' settlement agreement – 11 Mar 2011.

<sup>64</sup> Ibid. 60, p. 2.

<sup>65</sup> Ibid. 60, p. 2.

of legitimate expectations) as enshrined in Article 14(1) of the German Constitution.<sup>66</sup> The Court held that while the state has broad powers to change the legal framework, compensation is warranted when the state directly prevents or substantially limits the use of investments made in justified reliance on a specific legal framework.<sup>67</sup> The Court clarified that legitimate expectations could only arise from laws passed by parliament, not from political statements or draft laws.<sup>68</sup> The period during which legitimate expectations existed was strictly limited—from the enactment of the 11th Amendment (December 2010) until the government’s letter announcing a moratorium (March 2011). General debates about a law’s constitutionality do not undermine its ability to create legitimate expectations unless and until a competent court rules otherwise.<sup>69</sup> The Court emphasized that while public interest justifications (such as health and environmental protection) are important, they do not absolve the state from the consequences of violating legitimate expectations it has created.<sup>70</sup> The Court’s analysis draws a clear line between mere political statements and binding legal realities: only the latter can create legitimate expectations.<sup>71</sup> The doctrine does not function as insurance against all business risks; rather, it requires the state to consider investors’ interests and provide compensation where appropriate, without undermining the purpose of the law.<sup>72</sup> The document of Laura Yvonne Zielinski references leading arbitral authorities, including *Tecmed v. Mexico*, *Crystallex v. Venezuela*, *International Thunderbird v. Mexico*, and *Parkerings-Compagniet v. Lithuania*, to illustrate the evolution and limits of the legitimate expectations doctrine in international law.<sup>73</sup> The *Crystallex* tribunal, for example, emphasized that the protection of legitimate expectations under the FET standard occurs within “well-defined limits”.<sup>74</sup>

In conclusion one can say that the German Court’s approach provides valuable guidance for arbitral tribunals: only clear, legally binding acts (such as enacted laws) can create legitimate expectations, and such expectations are temporally and substantively limited.<sup>75</sup> The state retains broad discretion to pursue public interest objectives but must balance these against the justified reliance of investors and provide compensation were warranted.<sup>76</sup> In the view of Laura Yvonne Zielinski the comparative analysis between domestic and international standards may help further define the legitimate expectations doctrine, potentially enhancing the legitimacy and predictability of the FET standard in ISDS.<sup>77</sup> For arbitrators, the authorities and reasoning cited by Zielinski underscore the importance of distinguishing between political rhetoric and binding legal commitments, and of carefully assessing the temporal and substantive scope of any legitimate expectations claimed by investors.

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<sup>66</sup> Ibid. 60, pp. 2–3.

<sup>67</sup> Ibid. 60, p. 3.

<sup>68</sup> Ibid. 60, p. 3.

<sup>69</sup> Ibid. 60, p. 4.

<sup>70</sup> Ibid. 60, p. 4.

<sup>71</sup> Ibid. 60, p. 4.

<sup>72</sup> Ibid. 60, pp. 4–5.

<sup>73</sup> Ibid. 60, pp. 1, 4–5.

<sup>74</sup> Ibid. 60, p. 5.

<sup>75</sup> Ibid. 60, pp. 3–4.

<sup>76</sup> Ibid. 60, pp. 1 and 3–4.

<sup>77</sup> Ibid. 60, p. 5.

The critical points made by Michele Potestà and Laura Yvonne Zielinski, focusing on the doctrinal debate and practical implications regarding the doctrine of legitimate expectations in investment treaty law can lead to the conclusion that Potestà critically examines the doctrinal foundations of legitimate expectations in investment treaty law, noting that arbitral tribunals have often relied on precedent without sufficient analysis of the concept's origins or limits. He observes that the invocation of legitimate expectations is largely based on a chain of awards referencing each other, rather than a robust legal justification.<sup>78</sup> Potestà suggests that a more fruitful approach is to look at general principles of domestic administrative law, which may inform the content of fair and equitable treatment (FET) under investment treaties.<sup>79</sup> He highlights that while there is an emerging general principle of protection of legitimate expectations, its recognition and scope vary across legal systems, and even where accepted, it is subject to clear limitations.<sup>80</sup> Zielinski situates the doctrine at the heart of public criticism of ISDS, noting that the concept is often perceived as providing quasi-comprehensive insurance for investors. She traces its roots to domestic administrative law and notes its incorporation into international investment law through the prism of good faith, becoming a core element of the FET standard and firmly rooted in arbitral practice.<sup>81</sup> Both authors emphasize the need to balance the investor's reliance on legal stability with the state's right to regulate in the public interest. Potestà identifies three main types of state conduct that may generate legitimate expectations: contractual arrangements, informal representations, and the general regulatory framework.<sup>82</sup> Contractual arrangements Potestà explains that "the state takes certain contractual commitments with the individual investor, which allegedly give rise to certain legitimate expectations." Informal representations cover situations "characterized by a lower level of formality" involving "unilateral declarations" by the host state (promises, assurances, representations, etc.) and general regulatory framework addresses "probably the most controversial scenario" where "a legitimate expectation of the investor is allegedly found to arise based on the existence of the regulatory framework per se, at the time the investor performs its investment in the host state."<sup>83</sup> The contrast between the weak protection for general regulatory frameworks versus the stronger protection when specific commitments (like stabilization clauses) exist is a central theme throughout, where Potestà analyzes how tribunals have distinguished between scenarios as follows: In the *Continental v. Argentina* case, the tribunal classified different types of state conduct and found that general legislative statements only "engender reduced expectations, especially with competent major international investors in a context where the political risk is high." In *Total v. Argentina*, the tribunal noted that "the legal regime in force at the time of making the investment is not per se subject to a guarantee of stability, unless the state has explicitly assumed a legal obligation such as a stabilization clause." Potestà also explains that "reduced protection of statements or guarantees contained in legislation is justified because these 'promises' are not addressed to individual subjects (i.e., they lack the element of specificity with regard to the addressee).<sup>84</sup> Potestà emphasizes that individualized representations receive the most robust protection, whereas broad policy

<sup>78</sup> Ibid. 60, pp. 2–6.

<sup>79</sup> Ibid. 60, pp. 2 and 5–6.

<sup>80</sup> Ibid. 60, pp. 12 and 32.

<sup>81</sup> Ibid. 60, p. 3.

<sup>82</sup> Ibid. 43, pp. 2 and 15.

<sup>83</sup> Ibid. 43, pp. 2, 15 and 37.

changes are subject to review only under exceptional and cautious circumstances:” The tribunal (in the context of the *Continental v. Argentina* case) contrasted “general legislative statements’ to other types of undertakings (in particular contractual undertakings, which in the tribunal’s opinion ‘deserve clearly more scrutiny’)” and found that general legislative statements only “engender reduced expectations.” Potestà notes that in *EDF v. Romania*, the tribunal stated: “Except where specific promises or representations are made by the State to the investor, the latter may not rely on a bilateral investment treaty as a kind of insurance policy against the risk of any changes in the host State’s legal and economic framework.” Most explicitly, (when discussing domestic administrative law systems), Potestà explains: “an unequivocal representation made to a person [...] carries a particular moral force” and “holding the public body to such a representation is less likely to have serious consequences for the administration as a whole.” He further notes that “most domestic systems tend to distinguish protection of expectations in situations of individualized representations which the administration repudiates, from cases where the individual is affected by a general change of policy. It is the first case that is treated as the strongest, whereas protection in the second instance would be quite exceptional.”<sup>84</sup>

Potestà further highlights that tribunals have gradually imposed limits on the doctrine. He concludes: “It is evident that case law has already gone a long way from an early utilization of the concept of legitimate expectations as a rhetorical and potentially boundless catchphrase, towards a more coherent and rigorous application of the doctrine, which is wary of its limitations.”<sup>85</sup> This final observation captures his thesis that tribunals have increasingly imposed boundaries requiring expectations to be reasonable, specific, and grounded in explicit assurances. Zielinski underscores that only laws passed by parliament, not mere political statements or draft laws, can create legitimate expectations. Investors should not rely on controversies or declarations of intent but may legitimately base their decisions on competent court decisions regarding a law’s constitutionality.<sup>86</sup>

In my opinion the doctrine of legitimate expectations is not absolute and must be balanced against the state’s sovereign right to regulate, so that one can concur with the Potestà who concludes that while there is an emerging general principle of protection of legitimate expectations, its application in investment treaty arbitration must be cautious and context specific. He warns against an “exacerbated subjectivism” and calls for a more coherent and rigorous application of the doctrine, mindful of its limitations<sup>87</sup> and that tribunals have moved away from treating legitimate expectations as a boundless catchphrase, instead requiring a weighing of the investor’s expectations against the respondent’s regulatory interests<sup>88</sup> while Zielinski similarly notes that the balancing act between public interest and investor reliance is central, and that only legal realities—not political statements—can ground legitimate expectations.<sup>89</sup>

<sup>84</sup> Ibid. 43, pp. 22–23 and 12.

<sup>85</sup> Ibid. 43, pp. 38 and 39–41.

<sup>86</sup> Ibid. 60, p. 4.

<sup>87</sup> Ibid. 43, pp. 40 and 42.

<sup>88</sup> Ibid. 43, p. 40.

<sup>89</sup> Ibid. 60, p. 4.

## Recent Practice of the Arbitral Tribunals on the *Tecmed* Concept of Legitimate Expectations

The tribunal's approach has been widely cited for requiring states to provide a stable and predictable legal and business framework, and to avoid measures that are arbitrary or in particular, the subsequent revision provided by the arbitral tribunals have noted that the *Tecmed* award did not rely on evidence of state practice or *opinio juris* to support its broad interpretation of the minimum standard of treatment (MST) under customary international law. For example, the majority in *Red Eagle Exploration Limited v. Republic of Colombia*, as mentioned below.<sup>90</sup>

This indicates that the *Tecmed* tribunal's reasoning was not grounded in a demonstrated evidentiary consensus regarding the scope of the MST or the fair and equitable treatment standard. Therefore, while the *Tecmed* tribunal articulated principles such as the protection of legitimate expectations and the need for consistency and transparency, later tribunals have questioned whether it brought in enough evidence to substantiate these conclusions as reflecting customary international law, as mentioned above.

### ***Tecmed* and the Doctrine of Legitimate Expectations was Recently Corrected by the *Red Eagle Exploration Limited v. Republic of Colombia* Arbitral Tribunal**

#### ***Red Eagle's* Direct Critique of *Tecmed***

By its award issued on 28 February 2024<sup>91</sup> the *Red Eagle* tribunal explicitly addresses the *Tecmed v. Mexico* award and its approach to legitimate expectations under the fair and equitable treatment (FET) and minimum standard of treatment (MST) standards. The tribunal notes that *Tecmed* has been heavily relied upon by claimants to argue for a broad protection of legitimate expectations, even in the absence of specific representations or reliance.<sup>92</sup> However, the *Red Eagle* tribunal is 'very far from being persuaded that this view of the MST is correct or even plausible,' criticizing *Tecmed* for relying on no evidence of state practice or *opinio juris* to support its conclusion that legitimate expectations are part of the customary MST.<sup>93</sup> The tribunal further observes that the *Tecmed* standard is now 'rarely (if ever) followed by tribunals and has been strongly criticized in explicit terms by the annulment committee in *MTD v. Chile*'. The outcome as *Tecmed* and the legitimate expectation concerns when decided by the annulment committee in *MTD v. Chile* are significant. The Annulment Committee addressed the use of the *Tecmed* standard and the doctrine of legitimate expectations while the Committee noted that the tribunal in *MTD* had cited the *Tecmed* award for the content of the fair and equitable treatment standard, particularly the protection of the investor's *basic expectations*<sup>94</sup> and that the *Tecmed* approach,

<sup>90</sup> Ibid. 39, para. 295.

<sup>91</sup> *Red Eagle Exploration Limited v. Republic of Colombia*, ICSID Case No. ARB/18/12, Award, 27 February 2024, paras. 268–269 and 295–296.

<sup>92</sup> Ibid. 91, paras. 196–197 and 294–295.

<sup>93</sup> Ibid. 91, para. 295.

<sup>94</sup> *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 20 March 2007, para. 8.

which bases the host state's obligations on the investor's expectations, is *questionable*. It emphasized that the obligations of the host state derive from the terms of the applicable investment treaty, not from any set of expectations investors may have or claim to have. The Committee stated: 'A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material might do so manifestly.'<sup>95</sup> The *Tecmed* dictum is also subject to strenuous criticism from the respondent's experts, Mr. Jan Paulsson<sup>96</sup> and Sir Arthur Watts.<sup>97</sup> The Committee appreciates some aspects of these criticisms. For example, 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. A tribunal which sought to generate from such expectations a set of rights different from those contained in or enforceable under the BIT might well exceed its powers, and if the difference were material, might do so manifestly.<sup>98</sup> The Committee ultimately found that the tribunal did not manifestly exceed its powers in its account of the fair and equitable treatment standard, and that the tribunal's approach to legitimate expectations was within the bounds of the applicable law and case law. The Annulment Committee rejected the application for annulment and upheld the award, including the tribunal's findings on fair and equitable treatment and legitimate expectations. In summary the Committee criticized the *Tecmed* approach to legitimate expectations as a source of obligations distinct from the treaty, it affirmed that legitimate expectations may be relevant, but only as they relate to the guarantees in the treaty and it found no manifest excess of powers or failure to apply the law by the tribunal in its treatment of legitimate expectations.

### ***Red Eagle's Assessment of the Doctrine of Legitimate Expectations***

The *Red Eagle* tribunal undertakes a detailed analysis of whether legitimate expectations form part of the MST under customary international law. It concludes that there is insufficient evidence to support the proposition that the doctrine of legitimate expectations, as articulated in *Tecmed*, is part of the MST.<sup>99</sup> The tribunal emphasizes that legitimate expectations do not receive privileged treatment under the MST, the most that can be said is that a state's failure to fulfill a promise made to an investor may amount to a breach of the MST if the state's actions fall foul of the usual standard, but not every frustration of expectations is actionable,<sup>100</sup> evidence of reliance or inducement is essential for any claim based on legitimate expectations, whether under MST or FET,<sup>101</sup> the tribunal found that the claimant in *Red Eagle* failed to demonstrate the existence of a legitimate expectation or a quasi-contractual relationship, and thus the claim based on legitimate expectations failed.<sup>102</sup>

<sup>95</sup> Ibid. 94, para. 67.

<sup>96</sup> In *ibid.* 94, Mr. Jan Paulsson, Expert Opinion, 22 July 2005, paras. 9–14.

<sup>97</sup> In *ibid.* 94, Expert Opinion of Sir Arthur Watts, paras. 93–106.

<sup>98</sup> Ibid. 94, para. 71.

<sup>99</sup> Ibid. 91, paras. 292–294.

<sup>100</sup> Ibid. 91, para. 293.

<sup>101</sup> Ibid. 91, para. 300–301.

<sup>102</sup> Ibid. 91, paras. 298 and 301–302.

## Outcome and Practical Implications

The *Red Eagle* award marks a clear departure from the broad approach to legitimate expectations seen in *Tecmed* insofar that the tribunal requires specific and unambiguous commitments or representations by the state to give rise to legitimate expectations,<sup>103</sup> general expectations of stability and consistency, unsupported by specific promises, are not sufficient, the tribunal aligns itself with more recent practice, particularly in the NAFTA context, which has moved away from the *Tecmed* approach and requires a higher threshold for establishing legitimate expectations.

## Conclusion for Practice

*Red Eagle Exploration Limited v. Republic of Colombia* is highly significant for the correction and evolution of the *Tecmed* doctrine while it represents a strong rejection of the broad, claimant-friendly interpretation of legitimate expectations advanced in *Tecmed* and reinforces the need for specific, clear, and relied-upon state commitments to establish a claim based on legitimate expectations. The award reflects and contributes to a trend in recent arbitral practice that narrows the scope of legitimate expectations under MST/FET, requiring more rigorous evidentiary standards and a closer link to customary international law.

## Difference Between MST and FET as Interpreted by the *Red Eagle* Tribunal

The *Red Eagle* tribunal provides a detailed analysis of the relationship and distinction between the Minimum Standard of Treatment (MST) under customary international law and the fair and equitable treatment (FET) standard, particularly as they apply under Article 805 of the Canada-Colombia Free Trade Agreement (FTA).

### 1. FET as a Component of MST, Not an Autonomous Standard

The tribunal emphasizes that, under the FTA, the FET is not a standalone or autonomous standard. Instead, the FET is expressly linked to and forms part of the MST under customary international law. The FTA Parties intended that the FET obligation would not go beyond what is required by the MST,<sup>104</sup> while the tribunal notes: ‘the norm by reference to which the Respondent’s conduct is to be assessed is FET as part of the MST, and not the FET standard applied alone’ and the FTA text and the Parties’ binding interpretation confirm that ‘the FET is not self-standing and that changes in their standard agreements reflected their intent. . The MST, as interpreted by the tribunal, sets a high threshold for breach. It is only violated by conduct that amounts to ‘an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency’ (citing *Neer v. Mexico*<sup>105</sup>). The tribunal rejects the broader, more flexible approach to FET found in some earlier cases (such as *Tecmed*), which allowed for findings of breach based on frustration of legitimate expectations, lack of transparency, or disproportionality, even absent egregious conduct. Under the *Red Eagle* approach, legitimate expectations, transparency, and

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<sup>103</sup> Ibid. 91, paras. 249–252.

<sup>104</sup> Ibid. 91, paras. 285–286 and 288–290.

<sup>105</sup> *Neer and Neer (U.S.A.) v. United Mexican States*, Decision – 15 Oct 1926.

proportionality are not independent grounds for breach unless the state's conduct also meets the high threshold required by the MST. The tribunal specifically rejects the claimant's attempt to use the Most-Favored-Nation (MFN) clause to import a broader, autonomous FET standard from other treaties. The FTA's text and the parties' interpretation prohibit this, confirming that only the MST-linked FET applies.

The practical result is that, in the *Red Eagle* case, the FET standard does not provide broader protection than the MST. The tribunal's approach means that only conduct that is egregiously unfair, arbitrary, or shocking to judicial propriety will breach the FET/MST obligation under the FTA.<sup>106</sup>

### Summary Table: MST vs. FET in *Red Eagle*

Aspect	MST (as per <i>Red Eagle</i> )	FET (as per <i>Red Eagle</i> )
Source	Customary international law	Incorporated into MST, not autonomous
Threshold for Breach	High: Outrage, bad faith, willful neglect, etc.	No broader than MST; not breached by mere expectations
Legitimate Expectations	Not privileged; only relevant if MST threshold met	Not an independent ground for breach
Transparency/Proportionality	Not independent grounds; must meet MST threshold	Not independent grounds for breach
MFN Importation	Not permitted	Not permitted

## Conclusion

By providing a possibly comprehensive analysis of the doctrine of legitimate expectations, tracing its evolution, application, and current limitations one can admit that this concept, though not explicitly mentioned in most bilateral investment treaties (BITs), has become a central element of the fair and equitable treatment (FET) standard through arbitral practice. The doctrine is rooted in the principle that investors are entitled to expect a stable and predictable legal and business environment, and that host states should not act arbitrarily or revoke pre-existing decisions or permits relied upon by investors.

The seminal *Tecmed* award can be identified as a landmark case, articulating that FET requires treatment that does not affect the basic expectations relied upon by the investor at the time of investment. Subsequent jurisprudence has refined this approach, emphasizing that legitimate expectations must be reasonable, specific, and contextually justified, and that the investor's conduct is as important as the state's commitments. The domestic legal systems often protect legitimate expectations, but within clear and context-dependent limits.

Recent arbitral practice, such as the *Red Eagle v. Colombia* award, has narrowed the scope of legitimate expectations, requiring specific, clear, and relied-upon state commitments to establish a claim. The doctrine's flexibility allows tribunals to balance investor protection with state sovereignty, ensuring that only individualized and well-founded expectations are protected.

<sup>106</sup> Ibid. 91, paras. 237–240 and 293–296.

The contribution would like to acknowledge several weaknesses in the current arbitral approach to legitimate expectations: The *Tecmed* standard has been criticized for not being grounded in evidence of state practice or *opinio juris*, and for potentially exceeding the powers of arbitral tribunals by generating obligations not contained in the treaty. Tribunals have often over relied on a chain of awards referencing each other, rather than a robust legal justification or systematic analysis of the doctrine's origins or limits.

The doctrine of legitimate expectations is not explicitly anchored in most investment treaties, leading to inconsistent application and uncertainty. There is a risk that the doctrine could be used to unduly limit the host state's right to regulate, especially if based on general regulatory stability rather than specific commitments.

Despite these weaknesses, the overall outcome of the contribution is positive. It demonstrates that international arbitration serves as a dynamic forum for the development and clarification of international law principles, such as legitimate expectations. Through arbitral jurisprudence, the doctrine has evolved from a vague concept to a nuanced standard that balances investor protection with state sovereignty. Arbitral tribunals have certainly contributed to the harmonization of standards across different legal systems and have fostered greater predictability and legitimacy in the application of international investment law. By engaging with comparative public law and refining the requirements for legitimate expectations, international arbitration has helped to ensure that the doctrine is applied in a manner that respects both the justified reliance of investors and the regulatory autonomy of states. This ongoing dialogue between arbitral tribunals, domestic courts, and scholarly commentary exemplifies how international arbitration contributes to the progressive development of international law.

The contribution to legitimate expectations, while not without its weaknesses, might showcase the positive role of international arbitration in shaping and advancing international law. By providing a forum for the articulation, critique, and refinement of legal standards, arbitration enhances legal certainty, balances competing interests, and promotes the rule of law in cross-border investment relations.