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The Scope and Justification of Legitimate Expectations Protection under FET Clauses : Case Law Study

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المجلد ٣ ، العدد ١ ، ٢٠٢٢

نطاق وأسباب حماية التوقعات المشروعة في إطار شرط المعاملة العادلة

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Abstract

In the last few years, it became rare to see an arbitral award in an investor-state cases that the tribunal found the state liable for breaching the Fair and Equitable Treatment (FET) clause without relying to a certain extent on the violation of the legitimate expectations of the investor in his relation with that state. However, most of these tribunals prefer not to invoke the basis and the limitation of this concept. This led many scholars to criticize and question the legality of its application. So, a thorough study to this concept is vital in order to understand how do arbitration tribunals are dealing with it and how it is applied in different awards, but prior to that I will refer to the beginning of it and why it was found as an important element of the FET clauses. Then will discuss whether it can be applied if no FET is included in the treaty, and finally an examination to the justification of the concept in an effort to answer the debatable question of is it enough to find a state liable for breaching of the FET clause, i.e. the BIT, for acting in contrary with the investor's legitimate expectation?

Keywords: FET clauses, legitimate expectations, investors protection, investment arbitration

الملخص

أصبح من النادر في السنوات القليلة الماضية رؤية حكم تحكيم صادر في إحدى منازعات الاستثمار الدولية التي انتهت فيها هيئة التحكيم إلى مسؤولية الدولة دون أن تستند في خيبيات حكمها لقيام تلك الدولة بانتهاك شرط المعاملة العادلة والمنصفة (FET) وذلك في أحيان كثيرة بالاعتماد على أساس انتهاك الدولة لتوقعات المستثمر المشروعة في علاقته بتلك الدولة. ومع ذلك، يندر في معظم هذه الهيئات التحكيمية تحديد الحكم الصادر لأساس وحدود هذا المفهوم. كل هذا دفع العديد من العلماء إلى انتقاد هذا المبدأ بل والتشكيك في شرعية تطبيقه. لذلك، فإن إجراء دراسة شاملة لهذا المفهوم أمر حيوي لفهم كيفية تعامل هيئات التحكيم معه وكيفية تطبيقه في الواقع بالمقارنة والمقاربة بين العديد من القرارات المختلفة التي تناولته، ولكن قبل ذلك يتعين الإشارة إلى بداية ذلك المبدأ وتأصيله ولماذا تم إقراره باعتباره عنصر هام من عناصر شرط المعاملة العادلة والمنصفة FET. ثم سنناقش بعدها ما إذا كان يمكن تطبيقه إذا لم يتم تضمين المعاهدة في الأصل لشرط المعاملة العادلة والمنصفة FET، وأخيراً سيتم فحص ما ساقه العديد من الفقهاء و هيئات التحكيم في تبرير ذلك المبدأ ومفهومه في محاولة للإجابة على السؤال الخلفي حول مدى مسؤولية الدولة عن حماية التوقعات المشروعة للمستثمرين وهل يكفي عدم حماية تلك التوقعات لاعتبار الدولة مسؤولة عن انتهاك شرط المعاملة العادلة والمنصفة FET وبالتالي مخالفتها لمعاهدة الاستثمار الثنائية BIT بين الدولتين؟

الكلمات المفتاحية: التحكيم في منازعات الاستثمار، التوقعات المشروعة، حماية المستثمرين، شرط المعاملة العادلة.

Introduction

In the last few years, it became rarely to see an arbitral award in an investor-state cases that the tribunal found the state liable for breaching the Fair and Equitable Treatment (FET) clause without relying to a certain extent on the violation of the legitimate expectations of the investor in his relationship with that state. However, most of these tribunals prefer not to invoke the basis and the limitation of this concept. This led many scholars to criticize and question the legality of its application.

So, a thorough study to this concept is vital in order to understand how arbitration tribunals are dealing with it and how it is applied in different awards, but prior to that I will refer to the beginning of it and why it was found as an important element of the FET clauses. Then will discuss whether it can be applied if no FET is included in the treaty, and finally an examination to the justification of the concept in an effort to answer the following debatable question: is it enough to find a state liable for breaching of the FET clause, i.e. the BIT, for acting in contrary with the investor's legitimate expectation?

The scope of the legitimate expectation scope through arbitral awards analysis.

1- The early application of the concept

The first case to rely on the expectations of the investor as a ground for finding the state liability was *Tecmed v. Mexico* in 2003, the tribunal considered the FET clause in the Spain-Mexico Bilateral Treaty as part of the good faith principle adopted under international law, then it recognized the bona fide principle to include the protection of the expectations of the investors by stating that:

“The Arbitral Tribunal considers that this provision of the Agreement-FET-, in light of the 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. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor

also expects the host State to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.”⁽¹⁾

The approach adopted by this tribunal put much of the burden on the host state to protect a wide scope of the investors’ expectations, including the basic expectations of the investor. This was heavily criticized and was described as “the most far-reaching exposition of the principle underlying the developing notion of legitimate expectations as applied to fair and equitable treatment in investment law.”⁽²⁾

In addition to that, the broad interpretation adopted by the Tecmed tribunal was questioned by many scholars including the MTD v. Chile Annulment Committee.⁽³⁾ Professor Zachary Douglas has heavily criticized that approach by saying: “the Tecmed ‘standard’ is actually 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.”⁽⁴⁾

Although heavily criticized, some tribunals relied on the Tecmed interpretation for the level of expectations that the Host State shall protect, based on that standard the tribunals found the respondents liable.⁽⁵⁾

This broad approach in my view may lead to unbalanced results, as this can deny in a pragmatic perspective the host state’s right to change and develop its laws/regulations and give the foreign investor a level of security in business that can surpass the accepted amount of risk in the usual business.

1- The application development of the concept

The clear majority of the Bilateral Investment Treaties include an obligation that the host state shall protect the investments, but this should not be considered as an insurance obligation to all the losses occurred to the investor based on his own expectations. The state should always keep the right to organize its internal market policies if it acts reasonably, non-discriminatory and with due process.

⁽²⁾Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration. Substantive Principles* 325 (2007) (referred to in *Legitimate expectations in investment treaty law: Understanding the roots and the limits of a controversial concept*. By Michele Potestà p. 6. See also *Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, para. 179 (‘the Tecmed case lays out a broad conception of the FET standard’

This strict outcome led more recent tribunals to abandon this wide interpretation. In the case *Saluka v. Czech Republic*, where the Claimant sought compensation from the Host State for breaching the FET clause through favoring the rival investors in the market by giving state aid which made the claimant's investment worthless, the tribunal tried to criticize the Tecmed standard by stipulating that:

“This Tribunal would observe, however, that while it subscribes to the general thrust of these and similar statements, it may be that, if their terms were to be taken too literally, they would impose upon host States' obligations which would be inappropriate and unrealistic. Moreover, the scope of the Treaty's protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors' subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances. No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.”⁽⁶⁾ During this period, and after a sort of consensus has been established between scholars that the protection of legitimate expectations is an important part of the FET standard.⁽⁷⁾ Indeed, it became the most considerable element of the FET standard, or as the concept was described by Dolzer and Schreuer as “firmly rooted in arbitral practice.”⁽⁸⁾ This led most of the tribunals to try to use their discretion to interpret and formulate a more reasonable approach of the investors' expectations that worth protection, so in the case *Thunderbird v. Mexico* the tribunal tried to define the level of protected expectations by observing that:

“Having considered recent investment case law and the good faith principle of international customary law, the concept of “legitimate expectations” relates, within the context of the NAFTA framework, to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honor those expectations could cause the investor (or investment) to suffer damages. The threshold for legitimate expectations may vary depending on the nature of the violation alleged under the NAFTA

⁽⁶⁾Saluka Investments B.V. v. The Czech Republic, Partial Award, para 304-5, 17 March 2006, see at (<https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf> last visited on July 1, 2021)

⁽⁷⁾Arbitration and Mediation in the ACP-EU Relations – Maklu publishers – 2008, p. 144

⁽⁸⁾Rudolf Dolzer and Christoph Schreuer, Principles of International Investment Law, 2008, p. 134

and the circumstances of the case.”⁽⁹⁾

One of the cases that dealt with the same issue and presented a development of the concept was *Enron v. Argentina*, in this case the claimant had more than 35% investment in one of the major Argentinian gas companies, The Respondent according to its related law offered some tariff guarantees that could not keep later according to the Claimant, in which the investment of the later was affected.⁽¹⁰⁾ The tribunal in dealing with the issue in question required that in order for the investor’s expectations to be legitimate, the Host State should have presented certain conditions and that the investor relied on them in his decision to invest, it disapproved with Tecmed standard as well by stating that: “The protection of the ‘expectations that were taken into account by the foreign investor to make the investment’ has likewise been identified as a facet of the standard. The Tecmed approach has been consistently adopted by subsequent decisions. Tecmed described such expectations as ‘basic’, while in the context of NAFTA, tribunals have qualified them as ‘reasonable and justifiable’. What seems to be essential, however, is that these expectations derived from the conditions that were offered by the State to the investor at the time of the investment and that such conditions were relied upon by the investor when deciding to invest.”⁽¹¹⁾

That approach adopted in *Enron* case was a step forward to put a tangible standard that can be relied upon by other tribunals and was in some similar words used in the case *Glamis Gold, Ltd. v. United States of America*, but with different implementation on the facts. The tribunal found that the Claimant failed to establish enough proof for the commitments presented by USA, hence one of the requirements was absent. Therefore, the tribunal found no need to discuss whether the actions of the state were contradictory with the investor’s expectations or not. The tribunal summarized its approach and approval of the previously mentioned definition by saying:

Article 1105(1) -NAFTA- requires the evaluation of whether the State made any specific assurance or commitment to the investor so as to induce its expectations. The Tribunal therefore agrees with *International Thunderbird* that legitimate expectations relate to an examination under Article 1105(1) in such situations “where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment)

⁽⁹⁾See *International Thunderbird Gaming Corporation v. The United Mexican States*, Arbitral Award, para 147-8, 2006 see at (<https://www.italaw.com/sites/default/files/case-documents/ita0431.pdf> last visited on July 1, 2021)

⁽¹⁰⁾U. Kriebaum; C.H. Schreuer; «At What Time Must Legitimate Expectations Exist?» *TDM* 1 (2012), see at (www.transnational-dispute-management.com/article.asp?key=1793, last visited on July 1, 2021) p. 3

⁽¹¹⁾*Enron Corporation, Ponderosa Assets, L.P. v. Argentina Republic*- Award 22 May 2007, para. 262, see at (<https://www.italaw.com/sites/default/files/case-documents/ita0293.pdf> last visited on July 1, 2021)

to act in reliance on said conduct” As the Tribunal determines below that no specific assurances were made to induce Claimant’s “reasonable and justifiable expectations,” the Tribunal need not determine the level, or characteristics, of state action in contradiction of those expectations that would be necessary to constitute a violation of Article 1105. In this way, a State may be tied to the objective expectations that it creates in order to induce investment.”⁽¹²⁾

In another case, the tribunal applied a different scope for the concept. This was in case *Continental v. Argentina*, where the tribunal categorized different sources of expectations by differentiating between the expectations of the investor coming out of the investment contract made by the government and categorized it in a higher rank of protection than the expectations relied upon for other reasons, in that respect it held that:

“In summary, in order to evaluate the relevance of that concept applied within Fair and Equitable Treatment standard and whether a breach has occurred, relevant factors include: i) the specificity of the undertaking allegedly relied upon which is mostly absent here, considering moreover that political statements have the least legal value, regrettably but notoriously so.

ii) general legislative statements engender reduced expectations, especially with competent major international investors in a context where the political risk is high. Their enactment is by nature subject to subsequent modification, and possibly to withdrawal and cancellation, within the limits of respect of fundamental human rights and *ius cogens*; iii) unilateral modification of contractual undertakings by governments, 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.”⁽¹³⁾

This same categorization for the scope of the concept can be seen in the tribunal analysis in the case *MTD v. Chile*, where the investor signed a contract with the Chilean Investment Agency for the exploitation of a certain location to build a planned community, however, the Chilean authorities denied him the needed permits. The investor argued that the agreement gave him a legitimate expectation that the planned project was about to be carried out, in

⁽¹²⁾*Glamis Gold, Ltd. V. The United States of America*, Award, 8 June 2009, para. 620/1/2, see at (<https://www.italaw.com/sites/default/files/case-documents/ita0378.pdf> last visited on July 1, 2021)

⁽¹³⁾*Continental Casualty Company v. The Argentine Republic – Final Award* 5 Sep. 2008, para 261, see at (<https://www.italaw.com/sites/default/files/case-documents/ita0228.pdf> last visited on July 1, 2021)

which the tribunal agreed to.⁽¹⁴⁾ Thus, held that:

“Approval of a Project in a location would give prima facie to an investor the expectation that the project is feasible in that location from a regulatory point of view... This is not to say that approval of a project in a particular location entitles the investor to develop that site without further governmental approval... What the Tribunal emphasizes here is the inconsistency of action between two arms of the same Government vis-à-vis the same investor even when the legal framework of the country provides for a mechanism to coordinate.”⁽¹⁵⁾

However, this consideration for the legitimate expectations under FET rising out of the contract should not be, by any means, applied to all the contractual obligations. Otherwise, it will transform the FET clause to be considered as an umbrella clause, which is totally undesired outcome.⁽¹⁶⁾

Moreover, one of the more recent landmark awards that explained in depth the concept in question is *Micula v. Romania*. The tribunal “majority opinion” found that the Respondent was in breach of the FET according to the violation of the “promises” made by the Romanian government to the Claimant in form of Incentives and its duration. The majority concluded that the repealing of the incentives is considered inconsistent with the legitimate expectations of the Claimant, which should have been protected. Accordingly, the tribunal “majority” held that:

“it cannot be fair and equitable for a state to offer advantages to investors with the purpose of attracting investment in an otherwise unattractive region, require these investors to maintain their investments in that region for twice the period they receive the investments, and then maintain the formal shell of the regime but eviscerate it of all (or substantially all) content.”⁽¹⁷⁾

One other important analysis was made by the tribunal in case *El Paso v. Argentina* in its try to control the scope of the concept, it concluded that:

“the Tribunal considers that FET is linked to the objective reasonable legitimate expectations

⁽¹⁴⁾Michele Potestà, Legitimate expectations in investment treaty law: Understanding the roots and the limits of a controversial concept, *Society of International Economic Law*, 2012, P. 16.

⁽¹⁵⁾MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile, Award, supra n. 5, para 163

⁽¹⁶⁾see Christoph Schreuer, Fair and Equitable Treatment (FET): interactions with other standards, in *Investment Protection and The Energy Charter Treaty* 63, 2007, 89-90, see at (www.transnational-dispute-management.com/article.asp?key=1138 last visited on July 1, 2021)

⁽¹⁷⁾See 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, Award, 11 Dec. 2013, para 687, see at (<https://www.italaw.com/sites/default/files/case-documents/italaw3036.pdf> last visited on July 1, 2021)

of the investors and that these have to be evaluated considering all circumstances. As a consequence, the legitimate expectations of a foreign investor can only be examined by having due regard to the general proposition that the State should not unreasonably modify the legal framework or modify it in contradiction with a specific commitment not to do so.”⁽¹⁸⁾.

1- A balanced application of the concept

A balanced application of any legal notion would necessarily take time and different views. However, it would be fair to claim that the recent approach concluded by multiple tribunals is rather rational and reasonable. This newly adopted approach was duly represented in *Eiser v. Spain*, where the tribunal decided that:

“Taking account of the context and of the ECT’s object and purpose, the Tribunal concludes that Article 10(1)’s obligation to accord fair and equitable treatment necessarily embraces an obligation to provide fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments. This does not mean that regulatory regimes cannot evolve. Surely they can. “[T]he legitimate expectations of any investor [...] [have] to include the real possibility of reasonable changes and amendments in the legal framework, made by the competent authorities within the limits of the powers conferred on them by the law.”⁴⁸² However, the Article 10(1) obligation to accord fair and equitable treatment means that regulatory regimes cannot be radically altered as applied to existing investments in ways that deprive investors who invested in reliance on those regimes of their investment’s value.”⁽¹⁹⁾

This same approach, referring to the early *Parkerings*⁽²⁰⁾ tribunal understanding, was echoed in other awards, setting the basis of a more balanced and stable application of a debatable concept.⁽²¹⁾

⁽¹⁸⁾See *El Paso Energy Int’l Co. v. Argentine Republic*, Award, 27 Oct. 2011, para 364, see at (<https://www.italaw.com/sites/default/files/case-documents/ita0270.pdf> last visited on July 1, 2021)

⁽¹⁹⁾See *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*, ICSID, Case No. ARB/13/36, final award, 4 May 2017, para 382, see at (<https://www.italaw.com/sites/default/files/case-documents/italaw9050.pdf> last visited on July 1, 2021)

⁽²⁰⁾See *Parkerings-Compagniet AS v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, para. 332, see at (<https://www.italaw.com/sites/default/files/case-documents/ita0619.pdf> last visited on July 1, 2021)

⁽²¹⁾For more understanding see Tomas Mach, *Legitimate Expectations as Part of the FET Standard: An Overview of a Doctrine Shaped by Arbitral Awards in Investor-State Claims*, *ELTE Law Journal*, 2018/1, p. 116-118

Is the concept part of the FET?

The vast majority of BITs include a kind of FET clause, even with different wording.⁽²²⁾ Top of Form But can it be possible that the concept of legitimate expectations of the investor be applied in case of FET clause is absent?

Due to the rarity of this situation, it can still be arguable that the concept may be applied if argued that the protection standard is a general principle of law. This was described by Dolzer and Schreuer when concluded that “it is arguable whether the concept of legitimate expectations is part of the general principles of law.”⁽²³⁾ this approach was adopted in *SPP v. Egypt*, where the tribunal considered that acting contrary to the legitimate expectations of the investor was in breach of the international law principles, as it stipulated that:

“It is possible that under Egyptian law certain acts of Egyptian officials, including even Presidential Decree No. 475, may be considered legally nonexistent or null and void or susceptible to invalidation. However, these acts were cloaked with the mantle of Governmental authority and communicated as such to foreign investors who relied on them in making their investments. 83. Whether legal under Egyptian law or not, the acts in question were the acts of Egyptian authorities, including the highest executive authority of the Government. These acts, which are now alleged to have been in violation of the Egyptian municipal legal system, created expectations protected by established principles of international law.”⁽²⁴⁾

Thus, despite being unusual, but the concept of legitimate expectations can remain arguable, in the absence of fair and equitable treatment clause, under the general principles of the international law.⁽²⁵⁾

Is it justified and the critics to the concept

Although the wide acceptance of the legitimate expectations concept under FET as the cornerstone or the most important element of the clause, as previously discussed. Some scholars argue its justification and its legality.

Those who are in favor of the concept justify it on the light of the nature of the investment business, which shall be protected. This nature allows the investor to make his business

⁽²²⁾Ian A. Laird, Borzu Sabahi, Frédéric G. Sourgens, Todd J. Weiler, *Investment Treaty Arbitration and International Law* - Volume 7, May 2014, p. 134

⁽²³⁾Dolzer, Schreuer *supra* n. 8, 2012, p. 115

⁽²⁴⁾*Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt – Award*, 20 May 1992, para 82, 83, see at (https://www.italaw.com/sites/default/files/case-documents/italaw6314_0.pdf last visited on July 1, 2021)

⁽²⁵⁾see Dolzer and Schreuer, *supra* (2008 edition) p. 135 “there is authority to the effect that transparency and the investor’s legitimate expectations are protected even without a treaty guarantee of FET.”

calculations according to the laws and regulations available at the time of the investment start and to what is presented or promised by the host state officials. This allows a certain amount of predictability and assumptions to the returns of the investment. These factors that were taken into consideration when the investor decided to start his business could have been different if the circumstances changed. This as well would not affect the host state sovereignty, because the applicable legal order would be that chosen by the state itself when it admitted the investment.⁽²⁶⁾ moreover, the state has a duty to present a clear and transparent legal framework for the investors, so if this predictability for the legal order is breached then the FET standard would be violated. This same approach was described by one of the tribunals as “roller-coaster” policy, where it found that continuous legislative changes can set a ground for the breach of FET.⁽²⁷⁾

On the other hand, some scholars criticize the prevalence of the standard and view the concept as unrealistic to form an essential element of all FET clauses. They justify this view with many reasons. Firstly, the non-uniformity wording of FETs in the different treaties cannot lead to uniform result. Hence, the tribunals are applying unified concept without seeking the actual meaning of the FET which may not lead to the same outcome regarding the adoption of legitimate expectations. Secondly, the FET origin was taken from the international minimum standard, but recently it became usable as an independent standard without consideration to the international minimum itself which may allow certain protection for the state as long as it does not act in bad faith. But like Haeri observed that: “Investment treaty jurisprudence suggests that the fair and equitable treatment standard could be interpreted as an autonomous treaty standard which differs from the international minimum standard (despite the apparent provenance of the fair and equitable treatment standard in the international minimum standard), especially where treaty wording so allows.”⁽²⁸⁾

And this clearly contradicts with the genesis of the standard. Finally, they support their view with arguing that the main source of the legitimate expectations standard under FET is the arbitral precedents. This source does not have any binding force whether under international law or even in the arbitration practice itself. All these factors should not have

⁽²⁶⁾Rudolf Dolzer, Fair and Equitable Treatment: Today «s Contours, Santa Clara Journal of International Law, v. 12, Article 2, 2014, p. 17

⁽²⁷⁾See PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey – Award, 19 Jan. 2007, para 250, see at (<https://www.italaw.com/sites/default/files/case-documents/ita0695.pdf> last visited on July 1, 2021) it found that: the fair and equitable treatment obligation was seriously breached by what has been described above as the “roller-coaster” effect of the continuing legislative changes.

⁽²⁸⁾Hussein Haeri, A Tale of Two Standards: ‘Fair and Equitable Treatment’ and the Minimum Standard in International Law, 27 Arb. Intl. 45 (2011)

led to the application of legitimate expectation standard like it is currently applied in the arbitration field. This strict application astonished the states, who did not foresee or intend the outcome of the FET clauses when they signed the BITs.⁽²⁹⁾

Conclusion

From the mentioned cases, we can find an answer to the raised question whether it is enough to find a state liable for acting in contrary with the investor's legitimate expectation or not.

According to the vast majority of the cases since the standard was adopted many years ago, the legitimate expectation became the most important element in analyzing whether a breach for the FET occurred by the host state or not. In many of these cases relying on that standard was enough to constitute the ground for the breach of fair and Equitable treatment clause, hence the liability of the state. Although many critics are being brought to the standard and the broad recognition it gained, the arbitral practice is heavily relying on it. However, the arbitral tribunals during the years tried to determine certain definition or criteria in order to narrow the broad scope of the standard that was initially born with. Nowadays, the most widely accepted elements of the standard are that the expectations should be derived from the promises or the manner of the state, and that the investor relied on what was offered in the decision made to invest.

⁽²⁹⁾for more about the critics to the standard see Christopher Campbell, House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law, *Journal of International Arbitration*, (Kluwer Law International; 2013, Volume 30 Issue 4, p. 361-379