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The way forward in reforming the legitimate expectations test

by

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The protection of an investor's legitimate expectations has become the most significant element in an assessment of fair and equitable treatment (FET) in ISDS cases. The frustration of an investor's legitimate expectations often translates to the breach of the FET standard. The common critique of the application of the legitimate expectations standard by tribunals is based on the broad interpretation of this concept *vis-à-vis* the state's right to regulate. The lack of any methodological approach in the assessment of legitimate expectations by tribunals has led to a growing body of contradictory decisions ([see Spanish energy cases](#)). The approach toward legitimate expectations proposed here is the integration of a structured reasoning by way of the application of some elements of proportionality.

The state's right to regulate has a key role in determining limits on the protection of the investor's legitimate expectations by arbitral tribunals. In recent cases, tribunals have underscored that the assessment of legitimate expectations implies an inherent balancing of a state's right to regulate and the rights of an investor.¹ Tribunals have developed a "checklist" for the assessment of legitimate expectations. Its starting point is the assessment of the type of commitments relied upon by the investor. Additional factors may play a role, such as the severity of economic impact; the extent of change and the procedure followed by a state; the public interest involved; external circumstances; and the due diligence done by an investor.² The problem, however, is a lack of clarity regarding the hierarchy and allocation of weight among these factors in a tribunal's final determination regarding the breach of legitimate expectations. More importantly, a state's legitimate objective in serving the public interest is only one among other intermediary factors in tribunals' assessments.³

Principles of proportionality, combined with the duty to defer to the margin of appreciation of states' authorities, may serve as an anchor for a consistent and methodological approach in FET cases. The latter approach is already integrated in several international investment

agreements (IIAs) with regard to indirect expropriation clauses (e.g., [Australia-Malaysia FTA](#)). These clauses tend to clarify the relevant factors in the balancing process and their hierarchical relationship, prioritizing the public interest. A comparable approach toward legitimate expectations can facilitate (i) more legal certainty and predictability for states and investors regarding the weight allocation in the balancing process, (ii) prioritization of the legitimate public interest in publicly sensitive cases and, at the same time, (iii) sufficient flexibility for arbitrators to make a decision.

The following proportionality elements might be considered in drafting guidelines for legitimate expectations under an FET standard for the determination of liability:

- Tribunals should take into consideration whether a state's measure affecting the legitimate expectations of an investor pursues a legitimate public policy objective, e.g., the protection of public health or the environment.
- A state's measure to achieve legitimate objectives must be adopted in a non-discriminatory and non-arbitrary manner.
- The tribunal should afford a wide margin of appreciation in assessing a state's measures to achieve legitimate objectives.

The proposed formulation is still flexible regarding the competence of tribunals to interpret the concept of legitimate expectations. The goal of the above proposal is to stress that tribunals should explicitly attach significant weight to public interest and adopt a low standard of review when a legitimate public interest is involved.

The above criteria are based on the first prong of proportionality, namely the review of suitability. In this way, the pursued policy objective is prioritised and must be weighed in a systematic manner against the interests of investors. To ensure that the economic rights of investors are duly considered, states are required to adopt a non-discriminatory and non-arbitrary procedure in achieving their public policy objectives.

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¹ [InfraRed v. Spain](#), ICSID Case No. ARB/14/12, Award, para. 366 (August 2, 2019); [Mamidoil v. Albania](#), ICSID Case No. ARB/11/24, Award, para. 614 (March 30, 2015); [Cavalum v. Spain](#), ICSID Case No. ARB/15/34, Decision on Jurisdiction, Liability and Directions on Quantum, para. 423 (August 31, 2020).

² Yulia Levashova, "The legitimate expectations of investors under the fair and equitable treatment in times of pandemic and aftermath," in Yulia Levashova and Pascale Lorfing, eds., *Balancing States' Responses and the Protection of Foreign Investors in the (Post) Pandemic World* (Alphen: Kluwer, 2022).

³ In several assessments, where tribunals determined that investors' expectations were raised by specific assurances of a host state, the proportionality and reasonableness of a state measure adopted in a public interest had little relevance. See, [ESPF v. Italy](#), ICSID Case No. ARB/16/5, Award, para. 581 (14 September 2020).

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