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The Legal Justification for the Doctrine of Legitimate Expectations in International Investment Law

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Abstract

The doctrine of legitimate expectations has become a central concept in international investment law. The doctrine has no textual foundation in investment treaties, and it has been described as an 'invention' of arbitrators, who have not offered much plausible legal justification for the doctrine's existence. The most frequent justification for the doctrine in the literature is that it reflects a general principle of law. However, this justification is problematic. This article canvasses four alternative legal justifications: the ordinary or special meaning of investment treaty provisions, the subsequent practice of states parties to investment treaties, agreement between disputing parties in investment treaty cases and customary international law. The article concludes that the most practical and plausible legal justification for the doctrine is as a rule of special custom, applying between those several dozen states that have manifested acceptance of it in pleadings before investment tribunals. The article thus responds to critics describing the doctrine as a legal 'interloper', and it offers some legal (though not necessarily normative) legitimacy to a controversial concept in investment law. However, the article also acknowledges the remaining gaps to be filled by states, leaving the doctrine still without any formal legal basis in many cases.

1 Introduction

The connection between the 'fair and equitable treatment' (FET) standard in investment treaties and the protection of investors' legitimate expectations is usually said

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to find its origin in the 2003 case of *Tecmed v. Mexico*.[1] In that case, as is well known, the tribunal held that the FET clause in the Spain-Mexico bilateral investment treaty (BIT) obliged the state to protect the 'basic expectations that were taken into account by the foreign investor to make the investment'.[2] This finding was repeated by subsequent tribunals,[3] and, by 2006, legitimate expectations was already being described as the 'dominant element' of the FET standard.[4] Since then, investors have 'frequently invoked' the doctrine of legitimate expectations in investment treaty proceedings,[5] leading to numerous awards of compensation. In 2019, for example, a tribunal in *RREEF Infrastructure v. Spain* ordered the respondent to pay nearly €60 million for its breach of the legitimate expectations of a renewable energy investor.[6]

However, apart from some recent examples, investment treaties make no express reference to legitimate expectations. The doctrine, now firmly implanted in investment treaty awards,[7] has been described as a mere arbitral 'invention'.[8] In a system of law without a formal rule of precedent, arbitrators cannot create the law; the awards of investment tribunals themselves cannot be the formal source of any doctrine of legitimate expectations in investment law.[9] But 'tribunals have never clearly determined

1 Wongkaew, 'The Transplantation of Legitimate Expectations in Investment Treaty Arbitration: A Critique', in S. Lalani and R. Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration* (2014) 75; Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept', 28 *ICSID Review* (2013) 88, at 99; Monebhurrun, '*Gold Reserve Inc. v. Bolivarian Republic of Venezuela*: Enshrining Legitimate Expectations as a General Principle of International Law?', 32 *Journal of International Arbitration* (*JIntlArb*) (2015) 551, at 553; *cf.* Sornarajah, 'Mutations of Neo-Liberalism in International Investment Law', 3 *Trade, Law and Development* (2011) 203, at 223 (finding the origin in a 2004 speech by Francisco Orrego Vicuña).

2 ICSID, *Técnicas Medioambientales Tecmed S.A. v. Mexico – Award*, 29 May 2003, ICSID Case no. ARB(AF)/00/2, para. 154.

3 Potestà, *supra* note 1, at 91; Schill, 'Landmark Cases on Fair and Equitable Treatment: Empowering and Controlling Arbitrators as Law-Makers', in H. Ruiz Fabri and E. Stoppioni (eds), *International Investment Law: An Analysis of the Major Decisions* (2022) 365.

4 PCA, *Saluka Investments B.V. v. Czechia – Partial Award*, 17 March 2006, PCA Case no. 2001-04, para. 302.

5 Laryea, 'Legitimate Expectations in Investment Treaty Law: Concept and Scope of Application', in J. Chaisse, L. Choukroune and S. Jusoh (eds), *Handbook of International Investment Law and Policy* (2021) 98.

6 ICSID, *RREEF Infrastructure (GP) Limited v. Spain – Award*, 11 December 2019, ICSID Case no. ARB/13/30, para. 81; ICSID, *RREEF Infrastructure (GP) Limited v. Spain – Decision on Responsibility and on the Principles of Quantum*, 30 November 2018, ICSID Case no. ARB/13/30, para. 399 (*RREEF Merits Decision*).

7 R. Dolzer, U. Kriebaum and C. Schreuer, *Principles of International Investment Law* (3rd edn, 2022), at 208.

8 Campbell, 'House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law', 30 *JIntlArb* (2013) 361, at 379. See also Y. Radi, *Rules and Practices of International Investment Law and Arbitration* (2020), at 88 (the doctrine 'has emerged in international investment law through arbitral practice'); A. Stone Sweet and F. Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (2017), at 198; M. Sornarajah, *The International Law on Foreign Investment* (5th edn, 2020), at 445 ('plucked from the air').

9 See, e.g., de Brabandere, 'Arbitral Decisions as a Source of International Investment Law', in T. Gazzini and E. de Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (2012) 245; Paparinskis, 'Sources of Law and Arbitral Interpretations of *Pari Materia* Investment Protection Rules', in O. Fauchald and A. Nollkaemper (eds), *The Practice of International and National Courts and the (De-)Fragmentation of International Law* (2014) 87, at 101–103 (contending that it is problematic to use prior awards even as supplementary materials in interpreting treaties under Art. 32 of the Vienna Convention on the Law of Treaties [VCLT] 1969, 1155 UNTS 331). *Cf.* Reisman, 'Canute Confronts the

the juridical basis for the protection of legitimate expectations in terms of Article 38 of the ICJ Statute'.[10] Its continued existence has been likened to a jurisprudential 'house of cards', with new awards offering no independent legal justification for the doctrine but simply citing previous awards.[11] In *Tecmed* itself, the tribunal gave no justification for introducing the concept of expectations beyond reasoning that the FET standard was connected to the international law principle of good faith.[12] Several other cases have similarly found that an obligation to respect legitimate expectations is derived from a customary principle of good faith, without explaining how this principle was related to the FET obligation in the treaty.[13] More recent tribunals have continued and even exacerbated this minimalist approach. The *RREEF Infrastructure v. Spain* tribunal's 2019 award of nearly €60 million came after it merely asserted that 'respect for the legitimate expectations of the investor is implied by [the treaty's FET provision] and is part of the FET standard', even though the concept was 'not expressly mentioned' in the treaty.[14] It has simply become 'widely accepted' that the FET clause includes protection of legitimate expectations,[15] to the point where its legal justification is routinely ignored; as one prominent arbitrator has put it, 'everyone knows what [FET] means'.[16]

Tide: States versus Tribunals and the Evolution of the Minimum Standard in Customary International Law', 30 *ICSID Review* (2015) 616; Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion', 26 *European Journal of International Law* (*EJIL*) (2015) 417 (contending that the International Court of Justice (ICJ) often merely asserts the existence of customary rules).

10 Wongkaew, *supra* note 1, at 80.

11 Campbell, *supra* note 8; Roberts, 'Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States', 104 *American Journal of International Law* (*AJIL*) (2010) 179, at 179.

12 *Tecmed*, *supra* note 2, paras 152–153. See also, e.g., PCA, *CC/Devas (Mauritius) Ltd v. India – Award on Jurisdiction and Merits*, 25 July 2016, PCA Case no. 2013-09, para. 458; SCC, *Charanne B.V. v. Spain – Final Award*, 21 January 2016, SCC Case no. 062/2012, para. 486. For problems with the good faith suggestion, see Wongkaew, *supra* note 1, at 82. *Cf.* Bjorge, 'Legitimate Expectations', in *Max Planck Encyclopedia of Public International Law* (*MPEPIL*) (2023), paras 13–14.

13 See, e.g., ICSID, *Lopez-Goyne v. Nicaragua – Award*, 1 March 2023, ICSID Case no. ARB/17/44, para. 420; ICSID, *IC Power Ltd v. Peru – Award*, 3 October 2023, ICSID Case no. ARB/19/19, para. 306; UNCITRAL, *International Thunderbird Gaming Corporation v. Mexico – Arbitral Award*, 26 January 2006, para. 147; UNCITRAL, *International Thunderbird Gaming Corporation v. Mexico – Separate Opinion of Thomas Wälde*, December 2005, para. 25 (*Thunderbird Separate Opinion*); ICSID, *El Paso Energy International Company v. Argentina – Award*, 31 October 2011, ICSID Case no. ARB/03/15, para. 348.

14 *RREEF Merits Decision*, *supra* note 6, para. 260. The tribunal offered no other justification for the doctrine's existence, apart from recording that both parties agreed on it (see *ibid.*, para. 378). For another example, see PCA, *Allard v. Barbados – Award*, 27 June 2016, PCA Case no. 2012-06, para. 193 (where the tribunal asserted (stating no argument, authority or evidence) that both autonomous FET and the customary international law (CIL) minimum standard of treatment (MST) protected legitimate expectations).

15 ICSID, *Electrabel v. Hungary – Award*, 25 November 2015, ICSID Case no. ARB/07/19, para. 7.75; Schill, *supra* note 3, at 361.

16 United Nations Commission on International Trade Law (UNCITRAL) / International Centre for Settlement of Investment Disputes (ICSID), *Draft Code of Conduct: Comments by Article and Topic as of January 14, 2021* (2021), at 150, available at icsid.worldbank.org/sites/default/files/Code_of_Conduct_Comments_by_Article_UPDATED.pdf (comments of Bernard Hanotiau, disclaiming the need for lengthy party submissions on the meaning of fair and equitable treatment [FET]).

The most frequent legal justification for the doctrine given in the literature is that it reflects a general principle of law in the sense of Article 38(1)(c) of the Statute of the International Court of Justice.[17] The argument is seemingly that, under Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT), the treaty term 'fair and equitable treatment' must be interpreted taking into account the general principle of legitimate expectations as a 'relevant rule of international law'.[18] On this view, the content of the doctrine can be found using the typical method of identifying general principles – namely, looking to the content of an equivalent doctrine recognized across a variety of domestic legal systems.

Nevertheless, although prominent, this justification based on general principles has various problems.[19] First, it does not fully explain the leap from simply interpreting FET, 'taking into account' the putative general principle of legitimate expectations (while also taking into account other possibly countervailing general principles), on the one hand, to including an actual obligation of protection of expectations within the FET clause, on the other hand.[20] Second, FET clauses are often categorized into two broad types: 'autonomous' clauses that simply guarantee 'fair and equitable treatment' with no further textual explanation and clauses that textually connect (or

[17] Statute of the International Court of Justice 1945, 33 UNTS 993; see, e.g., Snodgrass, 'Protecting Investors' Legitimate Expectations: Recognizing and Delimiting a General Principle', 21 *ICSID Review* (2006) 1; Potestà, *supra* note 1; Dolzer, Kriebaum and Schreuer, *supra* note 7, at 208; C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles* (2nd edn, 2017), at 315; Schill, 'General Principles of Law and International Investment Law', in T. Gazzini and E. de Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (2012) 133, at 168; Hamamoto, 'Protection of the Investor's Legitimate Expectations: Intersection of a Treaty Obligation and a General Principle of Law', in W. Shan and J. Su (eds), *China and International Investment Law: Twenty Years of ICSID Membership* (2014) 141. By contrast, Palombino contends that protection of legitimate expectations is a 'general principle of international law': F.M. Palombino, *Fair and Equitable Treatment and the Fabric of General Principles* (2018), at 89. Tudor relatedly contends that FET itself is a general principle of law but does not discuss the legitimate expectations doctrine in this context: I. Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (2008), at 85–104. Other authors have offered normative justifications for the doctrine, without necessarily seeking to tie these justifications to a legal justification for the doctrine's existence: Henckels, 'Justifying the Protection of Legitimate Expectations in International Investment Law: Legal Certainty and Arbitrary Conduct', 38 *ICSID Review* (2023) 347.

[18] VCLT, *supra* note 9; see, e.g., Ostransky, 'An Exercise in Equivocation: A Critique of Legitimate Expectations as a General Principle of Law under the Fair and Equitable Treatment Standard', in A. Gattini, A. Tanzi and F. Fontanelli (eds), *General Principles of Law and International Investment Arbitration* (2018) 344, at 352 (the general principle of legitimate expectations 'assist[s] interpretation and application of the rule' of FET).

[19] See also M. Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (2013), at 256; Ortino, 'The Public Interest as Part of Legitimate Expectations in Investment Arbitration: Missing in Action?', in C. Brower *et al.* (eds), *By Peaceful Means: International Adjudication and Arbitration: Essays in Honour of David D Caron* (2024) 399, at 416 (noting the 'still controversial question of whether or not the doctrine of legitimate expectations is a general principle of law').

[20] See similarly Dumberry, 'Article 38 of the ICJ Statute: Sources', in A. Kulick and M. Waibel (eds), *General International Law in International Investment Law: A Commentary* (2024) 464, at 477 ('tribunals rarely explain *why* they are referring to a given [general] principle and almost never mention the actual function played by a given principle in their awards'; emphasis in original); Ostransky, *supra* note 18, at 354 (general principles cannot be used to 'extend or rewrite' a treaty rule).

are interpreted to connect) FET in some way to the customary minimum standard of treatment of aliens.[21] An argument using the rules of treaty interpretation to understand the treaty text in light of a general principle might be appropriate for FET clauses in the first category, but it does not explain how legitimate expectations might be included within FET clauses in the second category. The content of those FET clauses must presumably be ascertained primarily by reference to the traditional elements of custom – state practice and *opinio juris* – rather than by reference to general principles via Article 31(3)(c) of the VCLT.[22] Cases such as *Lee-Chin v. Dominican Republic*,[23] *IC Power v. Peru*[24] or *Lopez-Goyne v. Nicaragua*,[25] in which tribunals found an obligation of legitimate expectations even within an FET clause viewed by the tribunal as reflecting custom, can therefore not be explained by the general principles argument. Third, the protection of private entities' legitimate expectations varies even between very similar domestic legal systems (such as England and Australia), making it difficult to identify the precise content of any general principle recognized across different domestic systems that might be transposable to the international level.[26] In Ostransky's view, these variations 'should, at the very least, call for caution in application of such a controversial principle as a general principle of law', while, for Douglas, the variations render the argument 'far from uncontroversial'.[27] Fourth, with very few exceptions, neither disputing parties nor tribunals have sought to justify the legitimate expectations doctrine using the general principles argument.[28] Instead, as noted above, parties and

[21] See, e.g., Radi, *supra* note 8, at 71.

[22] See similarly Dumberry, 'The Protection of Investors' Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105', 31 *JIntlArb* (2014) 47, at 63–64; Angelet, 'Fair and Equitable Treatment', in *MPEPIL* (2022), para. 24; Bondy, 'Fair and Equitable Treatment: Ten Years On', in J. Kalicki and M. Abdel Raouf (eds), *Evolution and Adaptation: The Future of International Arbitration* (2019) 198, at 215–216.

[23] ICSID, *Lee-Chin v. Dominican Republic – Final Award*, 6 October 2023, ICSID Case no. UNCT/18/3, paras 432–436.

[24] *IC Power*, *supra* note 13, paras 306–310.

[25] *Lopez-Goyne*, *supra* note 13, at paras 408, 423.

[26] Potestà, *supra* note 1, at 98; Peat, 'International Investment Law and the Public Law Analogy: The Fallacies of the General Principles Method', 9 *Journal of International Dispute Settlement* (*JIDS*) (2018) 654, at 661; Zeyl, 'Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law', 49 *Alberta Law Review* (2011) 203; Sornarajah, *supra* note 1, at 222–225; von Walter, 'The Investor's Expectations in International Investment Arbitration', in A. Reinisch and C. Knahr (eds), *International Investment Law in Context* (2008) 175, at 198; Palombino, *supra* note 17, at 87–88; ICSID, *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentina – Separate Opinion of Arbitrator Pedro Nikken*, 30 July 2010, ICSID Case no. ARB/03/19, para. 22 (*Suez*, Nikken Separate Opinion); *cf.* Brown, 'The Protection of Legitimate Expectations as a "General Principle of Law": Some Preliminary Thoughts', 6(1) *Transnational Dispute Management* (*TDM*) (2009); Monebhurrun, *supra* note 1, at 558.

[27] Ostransky, *supra* note 18, at 369; ICSID, *Mathias Kruck v. Spain – Partial Dissenting Opinion of Prof Zachary Douglas KC*, 13 September 2022, ICSID Case no. ARB/15/23, para. 18 (*Kruck Dissenting Opinion*).

[28] Wongkaew, *supra* note 1, at 81. Of the plethora of awards relying on legitimate expectations, those adopting the general principles argument are only: ICSID, *Gold Reserve Inc. v. Venezuela – Award*, 22 September 2014, ICSID Case no. ARB(AF)/09/1, para. 576; ICSID, *Total S.A. v. Argentina – Decision on Liability*, 27 December 2010, ICSID Case no. ARB/04/1, paras 128–130; ICSID, *Crystallex v. Venezuela* – Award, 4 April 2016, ICSID Case no. ARB(AF)/11/2, para. 546 (but see Dumberry, *supra* note 20, at 477, contending that none of these three tribunals explicitly held that legitimate expectations was a general principle of law); PCA, *Cairn Energy plc v. India – Award*, 21 December 2020, PCA Case no. 2016-7, para. 1715 (while

tribunals typically rely instead on citations of previous decisions. These citations usually do not even include those earlier cases that do rely on the general principles argument, which might otherwise have excused the lack of justification in the later case.[29] Even if this absence of actual reliance on the argument by tribunals and parties does not make the argument incorrect, it demonstrates that the well-known argument does not appear to carry much weight with those in the system. Meanwhile, some commentators suggest that inventing a new doctrine of legitimate expectations within the FET standard is unnecessary since other elements of that standard already capture all relevant factual situations.[30] Whether or not this suggestion is true, it likely comes too late, as the arbitral construction of legitimate expectations has now become a 'central concept' in understanding FET.[31]

Moving beyond the general principles justification, this article canvasses four alternative legal bases for the doctrine of legitimate expectations under the FET standard.[32] The first basis (section 2) is that the ordinary or special meaning of 'fair and equitable treatment' may have changed following the solidification of the expectations doctrine in tribunal decisions. The second basis (section 3) is that, for some pairs of states, their pleadings in investment treaty cases demonstrate subsequent practice affecting the interpretation of those state pairs' investment treaties. The third basis (section 4) is that tribunals might be legally justified in applying the rule on expectations because the disputing parties themselves agree that the rule applies. In section 5, the article considers an objection that the expectations doctrine needs no legal justification because it is purely a conceptual tool used by tribunals to assess breaches of FET on the facts. The final possible basis (section 6) is that, in light of several decades of pleadings from states in investment treaty claims, an obligation of protection of legitimate expectations may have now become part of the customary minimum standard of treatment guaranteed by many (or even all) FET clauses.

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noting that 'the exact contours' of the putative general principle were 'far less clear', citing Ostransky, *supra* note 18); and, seemingly, an unpublished award in *Aljarallah v. Turkey*. L. Böhmer, 'Uncovered: UNCITRAL Tribunal in *Waleed Aljarallah v. Turkey* Finds that Restriction of Minority Shareholder's Rights in Aftermath of Attempted Coup Does Not Amount to BIT Violation', *Investment Arbitration Reporter* (26 April 2024). Arbitrator Waelde's separate opinion in *Thunderbird v. Mexico* also ostensibly relied on the general principles argument, although based on a 'brief survey' of domestic legal systems that 'does not specify exactly the contours of this principle' and without explicitly declaring legitimate expectations a general principle of law: *Thunderbird Separate Opinion*, *supra* note 13, para. 30. Meanwhile, Arbitrator Douglas ultimately accepted the argument in *Kruck v. Spain* but only as a 'working assumption' to deliberately constrain arbitrators' interpretive discretion: *Kruck Dissenting Opinion*, *supra* note 27, paras 18, 21. See also the respondent's comments in UNCITRAL, *Frontier Petroleum v. Czechia – Final Award*, 12 November 2010, para. 280.

29 The relevant discussions in *Total v. Argentina*, *Crystallex v. Venezuela*, *Gold Reserve v. Venezuela* and *Cairn v. India* (cited in note 28) have not been cited in later cases, except that *Crystallex* and *Gold Reserve* cite *Total*.

30 Paparinskis, *supra* note 19, at 259.

31 Dolzer, Kriebaum and Schreuer, *supra* note 7, at 208.

32 A further alternative basis for the doctrine might be the protection of unilateral acts in the sense of the *Nuclear Tests* decision of the ICJ. See Paparinskis, *supra* note 19, at 252; Wongkaew, *supra* note 1, at 78; *Total*, *supra* note 17, para. 131; Reisman and Arsanjani, 'The Question of Unilateral Government Statements as Applicable Law in Investment Disputes', 19 *ICSID Review* (2004) 328. For sceptical views of this suggestion, see ICSID, *El Paso v. Argentina – Award*, 31 October 2011, ICSID Case no. ARB/03/15, para. 392; Ostransky, *supra* note 18, at 350–351. This possible basis is not examined here.

The article concludes that the objection and the third basis both fail and that there are only very limited circumstances in which the first or second bases might apply. The most plausible legal basis for the doctrine of legitimate expectations currently is that it is a rule of special custom, applying between several dozen states that have manifested assent to it. This conclusion implies, though, that there are many other states for which any formal legal justification for applying the doctrine of legitimate expectations against them remains difficult to identify. This is troubling given the ubiquity of the doctrine in arbitral awards analysing FET, as noted above. Quite apart from larger concerns over the legitimacy of a system in which the legal justification of one of its central concepts is unclear, the more specific task of identifying the actual content of the concept will depend on its formal source. It is only 'once the juridical basis [for legitimate expectations] is identified [that] it will be possible to determine the distinct and unique role of legitimate expectations and to delimit the contours of expectations protected in each circumstance'.[33]

2 Ordinary or Special Meaning

As noted above, typical investment treaties guarantee only 'fair and equitable treatment' and make no express reference to legitimate expectations. Even if it could be said that some unfairness is inherent in resiling from a promise, it is not obvious that the ordinary meaning of the words 'fair and equitable treatment' includes the full doctrine of legitimate expectations as constructed by tribunals.[34] However, since the *Saluka* tribunal described legitimate expectations in March 2006 as the 'dominant element' of the FET standard, states have concluded nearly 1,000 investment treaties.[35] In nearly all of these treaties, states have offered no indication that they disagree with the *Saluka* view.[36] FET clauses have largely not been rewritten to reject *Saluka* and clarify that legitimate expectations are not protected; instead, newer treaties have mostly continued to use the same language as in earlier treaties. As a result, it might be argued that states' continued use of the phrase 'fair and equitable treatment' in these treaties, where there is no further clarification of the relevance of investors' expectations, implies an acceptance of the prevailing interpretation given to that phrase by tribunals.[37] In other words, at least since 2006, the ordinary meaning of 'fair and equitable treatment', when interpreted against the background of recurrent tribunal rulings (perhaps representing supplementary means under Article 32 of

[33] Wongkaew, *supra* note 1, at 102; see also Monebhurrun, *supra* note 1, at 553.

[34] See note 55 below. But see Fietta, 'Expropriation and the "Fair and Equitable" Standard: The Developing Role of Investors' "Expectations" in International Investment Arbitration', 23 *JIntlArb* (2006) 375, at 396 (protection of legitimate expectations is an 'element of the requirement to act "fairly" as part of the [FET] standard').

[35] Based on UNCTAD data, available at investmentpolicy.unctad.org/international-investment-agreements. The number is even higher if the *Tecmed* award of May 2003 is the starting point. Not all of these treaties are currently in force.

[36] See similarly Stone Sweet and Grisel, *supra* note 8, at 212 (examining treaties from 2002 to 2015).

[37] At least where the prevailing interpretation is sufficiently clear. See similarly Paparinskis, *supra* note 9, at 98.

the VCLT, being part of the circumstances of the conclusion of the treaty),[38] arguably includes protection of legitimate expectations.[39] The same evidence – states' general failure to counteract tribunals' development of the legitimate expectations doctrine – might alternatively demonstrate states' intentions to give a special meaning under Article 31(4) of the VCLT to the term 'fair and equitable treatment' in their post-*Saluka* treaties, regardless of the ordinary meaning of that term.[40]

As with the general principles argument above, though, the strength of this 'ordinary/special meaning' argument depends on the correct interpretation of FET clauses, the texts of which vary across treaties. A clause viewed as 'autonomous' could perhaps be interpreted using the regular tools of treaty interpretation to include consideration of the ordinary or special meaning of the words in the context of recurrent tribunal rulings. A clause connecting FET to custom, by contrast, directs the interpreter to discover the ordinary (or special) meaning of the clause instead by consulting custom. While tribunal rulings could arguably affect the content of custom,[41] the primary evidence must come from the traditional sources of state practice and *opinio juris*. Moreover, as discussed in section 6 of this article, very few states have ever directly supported the view of FET clauses as autonomous, making arguments contingent on this view being correct less persuasive.

The ordinary/special meaning argument is also naturally less persuasive in relation to treaties concluded before the legitimate expectations doctrine solidified in tribunal rulings, which represent the majority of treaties in force and litigated today. Before the 2000s, there was naturally no tribunal practice on legitimate expectations that states might have implicitly accepted by including FET clauses in their treaties. Without this element of interpretation, it would be difficult to conclude that the ordinary meaning of 'fair and equitable treatment' includes the legitimate expectations doctrine.[42] Demonstrating a special meaning of FET, meanwhile, would require proof of states' intention to interpret FET in this way when concluding their pre-*Saluka* treaties. But

[38] Shirlow and Waibel, 'Article 32 of the VCLT and Precedent in Investor-State Arbitration: A Sliding Scale Approach to Interpretation', in E. Shirlow and K. Gore (eds), *The Vienna Convention on the Law of Treaties in Investor-State Disputes: History, Evolution and Future* (2022) 127, at 142; ICSID, *Caratube International Oil Company LLP v. Kazakhstan – Decision Regarding Claimant's Application for Provisional Measures*, 31 July 2009, ICSID Case no. ARB/08/12, para. 71.

[39] Paparinskis, *supra* note 9, at 96–97 (making this argument in general). But see ICSID, *Fraport AG Frankfurt Airport Services Worldwide v. Philippines – Dissenting Opinion of Mr. Bernardo M. Cremades*, 16 August 2007, ICSID Case no. ARB/03/25, para. 7 (casting doubt on the use of prior rulings in treaty interpretation: 'Other awards or decisions are no more than illustrative of the implications of a standard form of treaty wording'); *Suez*, Nikken Separate Opinion, *supra* note 26, para. 24.

[40] As King and Moloo have put it, 'it is probably reasonable to assume that the treaty parties intended to adopt the meaning ascribed to that phrase [FET] as it is understood in the field'. King and Moloo, 'International Arbitrators as Lawmakers', 46 *New York University Journal of International Law and Politics* (2014) 875, at 899–900. The understanding of FET – or at least autonomous FET – 'in the field' likely includes protection of legitimate expectations.

[41] See note 9 above. But see UNCITRAL, *Glamis Gold Ltd v. USA – Award*, 8 June 2009, para. 605 ('[a]rbitral awards … do not constitute State practice and thus cannot create or prove customary international law'); Dumberry, *supra* note 20, at 469.

[42] Unless FET was understood to be a generic term with an evolutionary meaning that could be affected by later tribunal interpretations, but that seems unlikely: Paparinskis, *supra* note 9, at 99–101.

it is not clear that any such evidence exists.[43] Archival and historical evidence instead suggests that states had no particular intentions about FET at all when drafting early investment treaties; FET 'played almost no role' in the first British and German investment treaty negotiations in the 1950s–1980s, for instance.[44]

The argument that legitimate expectations are protected under FET clauses because tribunal rulings have affected the ordinary or special meaning of those clauses will also not apply, of course, where the treaty explicitly purports to clarify the relevance of investors' expectations. As mentioned, some newer treaties do contain such text. Article 2(3) of the 2019 Belarus-Hungary BIT, for example, contains an exclusive list of state measures that are deemed to breach FET. This list does not include any reference to expectations, presumably resolving the matter by indicating that the tribunal-constructed doctrine of legitimate expectations cannot be relied on in claims under that treaty. In the other direction, the European Union-Canada Comprehensive Economic and Trade Agreement (CETA) provides an example; Article 8.10.4 of that treaty provides that, when 'applying the … fair and equitable treatment obligation', a tribunal '*may* take into account' whether a state frustrated a legitimate expectation.[45] This provision clearly gives tribunals power to consider legitimate expectations, and it grounds the legal source of the doctrine in the treaty text itself (even if it also indicates that tribunals could ignore legitimate expectations entirely if desired).

Other newer treaties use more ambiguous language on expectations. The Trans-Pacific Partnership Agreement (TPP), for example, provides that 'the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach' of FET.[46] As discussed in section 6.B, this wording could mean either that expectations are not relevant to FET or that they are relevant but are subject to a high threshold for breach. If, on its true meaning, the remainder of the TPP's FET clause does not protect legitimate expectations, the first meaning of this additional text on expectations is more likely correct; if the clause does protect expectations, the second meaning is more likely correct. By itself, due to the ambiguity, the additional text does not clarify tribunals' legal authority to consider legitimate expectations.

[43] Yackee, 'The First French BIT', 35 *EJIL* (2024) 623, at 646.

[44] Hepburn *et al.*, 'Investment Law before Arbitration', 23 *Journal of International Economic Law* (2020) 929, at 945; see similarly Yackee, *supra* note 43, at 633 (in relation to the first French BIT).

[45] European Union–Canada Comprehensive Economic and Trade Agreement (CETA) (signed 30 October 2016, partly provisionally applied 21 September 2017), available at policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/canada/eu-canada-agreement/ceta-chapter-chapter_en (emphasis added). See similarly European Union–Vietnam Investment Protection Agreement (signed 30 June 2019, not yet in force), available at policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/vietnam/eu-vietnam-agreement/texts-agreements_en, Art. 2.5.4; Agreement between the Swiss Federal Council and the Government of the Republic of Indonesia on the Promotion and Reciprocal Protection of Investments (signed 24 May 2022, entered into force 1 August 2024), Art. 4(5).

[46] Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States of America and Vietnam (TPP), 4 February 2016, [2016] ATNIF 2, Art. 9.6.4.

Where the treaty and its text permit,[47] then, an argument based on the ordinary or special meaning of FET can justify a rule on legitimate expectations, but the circumstances in which this will arise appear to be relatively limited.

3 Subsequent Practice

A further argument, similarly dependent on the 'autonomous' view of FET clauses, considers state pleadings on legitimate expectations as 'subsequent practice' under Article 31(3)(b) of the VCLT, which must be taken into account when interpreting FET.[48] If concordant pleadings existed from both treaty parties to a BIT, this could provide a legal basis on a which a tribunal could validly conclude that FET includes legitimate expectations, without the need for recourse to either custom or general principles.

Investment tribunals have rarely accepted interpretive arguments based on subsequent practice. Tribunals have found that the treaty parties' concordant views expressed in subsequent practice did not match with (the tribunal's view of) the ordinary meaning of the relevant provision,[49] or that the views reflected the states' views at the time of the dispute but not the relevant time of treaty conclusion.[50] Tribunals have also rejected the use of pleadings as subsequent practice by finding that the pleadings were entered in the course of a different dispute (even one under the same treaty),[51] did not qualify as practice in the 'application' of the treaty[52] or did not evidence the states' 'agreement' since they were directed to the tribunal rather than expressed between the states themselves.[53]

[47] Paparinskis, *supra* note 9, at 98 (suggesting that these conditions will be 'inapplicable to most investment arbitrations', largely because of the temporal constraint).

[48] Concordant pleadings of both (or all) treaty states might also constitute a 'subsequent agreement' under Art. 31(3)(a) of the VCLT, at least where the pleadings relate to the same dispute: T. Gazzini, *Interpretation of International Investment Treaties* (2016), at 193. However, this provision is often taken to require a higher degree of formality than Art. 31(3)(b) and may require a joint statement from the relevant states rather than concurring statements in separate documents such as pleadings: Sheargold, 'The VCLT Rules on Interpretation and the Triangular Nature of Investment Treaties: State Control Versus Investor Rights', in E. Shirlow and K. Gore (eds), *The Vienna Convention on the Law of Treaties in Investor-State Disputes: History, Evolution and Future* (2022) 151, at 161. Indeed, efforts to characterize pleadings as subsequent agreements have failed in several cases: *Ibid.*, at 167. Given these doubts, this section focuses on the argument based on subsequent practice.

[49] See, e.g., ICSID, *Eco Oro Minerals Corporation v. Colombia – Decision on Jurisdiction, Liability and Directions on Quantum*, 9 September 2021, ICSID Case no. ARB/16/41, paras 367–378, 836.

[50] See, e.g., UNCITRAL, *Pope & Talbot Inc. v. Canada – Award on the Merits of Phase 2*, 10 April 2001, para. 116; ICSID, *Sempra Energy International v. Argentina – Award*, 28 September 2007, ICSID Case no. ARB/02/16, para. 385; ICSID, *Enron Corporation v. Argentina – Award*, 15 May 2007, ICSID Case no. ARB/01/3, para. 337.

[51] ICSID, *Urbaser S.A. v. Argentina – Decision on Jurisdiction*, 19 December 2012, ICSID Case no. ARB/07/26, para. 51; ICSID, *Telefónica S.A. v. Argentina – Decision of the Tribunal on Objections to Jurisdiction*, 25 May 2006, ICSID Case no. ARB/03/20, para. 113; ICSID, *Gas Natural SDG S.A. v. Argentina – Decision of the Tribunal on Preliminary Questions on Jurisdiction*, 17 June 2005, ICSID Case no. ARB/03/10, para. 47.

[52] *Telefónica*, *supra* note 51, para. 112.

[53] *Ibid.*, para. 113.

This hesitation from tribunals is not insurmountable in general,[54] and perhaps even less so on the particular question of whether the FET obligation includes protection of investors' legitimate expectations. One concern potentially underlying the hesitation is the sense that reliance on concordant home and host state pleadings would permit the treaty parties to 'move the goalposts in the middle of the game', undercutting investors' rights under the treaties. In the present context, though, the premise of this section is that the state pleadings would instead support investors by accepting the obligation to protect legitimate expectations. This might remove some of the general hesitation. On the more specific concerns of tribunals, first, it is widely accepted that the ordinary meaning of the FET clause is unclear.[55] It would seem difficult for a tribunal to find, then, that state pleadings did not match the ordinary meaning. Second, it is true that the subsequent practice must establish the treaty parties' agreement on interpretation at the time of concluding the treaty (or, at least, the time of the alleged breach) rather than at the time of engaging in the practice.[56] But, as with the use of pleadings as state practice in the formation of custom (discussed in section 6), it should be assumed, in general, that states enter their pleadings to international tribunals carefully and in good faith, with both defensive and offensive interests in mind. States will not lightly take a position on the law purely to evade responsibility in a particular case, given the systemic implications of their pleadings for future cases in which they or their nationals may be claimants. If both treaty states' practice indicates that their intention at the time of concluding the treaty was to protect legitimate expectations via the FET clause – or at least that they agree with the findings of the numerous tribunals interpreting FET as such – the starting point should be that this is sufficient to demonstrate that intention.

Third, the careful and good faith nature of states' pleadings also responds to the concern over reliance on pleadings from a different dispute (even under the same treaty). This concern suggests that such pleadings are too closely linked to the circumstances of the other dispute to allow for any 'broader understanding' of the states' general position on the law, as the *Urbaser* tribunal put it.[57] However, when a state chooses to make statements about an abstract point of law divorced from any factual context – such as declaring that the FET obligation includes protection of legitimate expectations – it is difficult to see why this does not offer a 'broader understanding concerning an interpretation shared by [that state] … in general pertaining to the application of' the FET clause.[58]

[54] State submissions in other disputes have indeed been accepted as subsequent practice in at least two NAFTA cases: Sheargold, *supra* note 48, at 169.

[55] See, e.g., *Suez*, Nikken Separate Opinion, *supra* note 26, paras 2–3; J. Bonnitcha, L. Poulsen and M. Waibel, *The Political Economy of the Investment Treaty Regime* (2017), at 109; Schill, *supra* note 3, at 362; Hamamoto, *supra* note 17, at 157; R. Kläger, *'Fair and Equitable Treatment' in International Investment Law* (2011), at 40–42.

[56] Gazzini, *supra* note 48, at 206 (suggesting that the time of breach is relevant).

[57] *Urbaser*, *supra* note 51, para. 51.

[58] *Ibid.*; Gazzini, *supra* note 48, at 205; UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Interpretation of Investment Treaties by Treaty Parties, Note by the Secretariat, UN Doc. A/CN.9/WG.III/WP.191, 17 January 2020, at 5.

Fourth, pleadings are a well-accepted form of subsequent practice for the purposes of Article 31(3)(b),[59] and it is therefore not clear why pleadings in a dispute under a treaty would not qualify as an instance of application of the treaty. As the *Kappes v. Guatemala* tribunal put it, 'separate submissions [from states] in separate cases [under the same treaty] … could be compelling evidence of subsequent practice'.[60] Fifth, and relatedly, there is no reason why a treaty state's practice must be directly addressed to its treaty partner states in order to count as subsequent practice. The objective is simply to find an agreement in fact, implied in the states' concordant and consistent conduct.[61]

Thus, there are good reasons why previous state pleadings in relation to the same treaty's FET clause at issue in a pending case should qualify as subsequent practice, influencing the tribunal's interpretation of the clause. The VCLT does not indicate that states' views about a treaty clause must prevail over the other elements of treaty interpretation; under Article 31(3), these views must only be 'taken into account'.[62] But the subsequent practice should carry significant weight, particularly where the other elements of Article 31 do not necessarily provide much clear guidance on whether an FET clause viewed as autonomous protects legitimate expectations.

However, this argument will apply only where there have been prior cases under the same treaty involving claims of breach of legitimate expectations, thereby calling for pleadings on the issue. At least one case would also need to have been brought against each of the treaty states in order to give each state an opportunity to submit pleadings as a respondent, unless home states sought to file non-disputing party submissions in the prior cases. Outside of the (now-terminated) North American Free Trade Agreement (NAFTA) context,[63] these circumstances are relatively rare (and even more so for larger multilateral treaties such as the Energy Charter Treaty [ECT]), and, as a result, this argument is necessarily limited.[64] Furthermore, the argument is also not likely to apply where the prior cases were under a different treaty, even though involving (one of) the same states. Article 31(3)(b) requires practice 'in the application of the treaty' in question, rather than some other treaty, and the practice must establish 'the agreement of the parties regarding its [that is, that treaty's] interpretation'.

Certainly, despite its foundation on thousands of largely bilateral treaties, it is relatively common to view the investment treaty system, at least informally, as a unified multilateral system.[65] Textbooks contain chapters on 'expropriation', 'non-discrimination' and 'FET', for instance, implying that the content of these obligations

[59] ICSID, *Kappes v. Guatemala – Decision on Respondent's Preliminary Objections*, 13 March 2020, ICSID Case no. ARB/18/43, para. 156.

[60] *Ibid.*

[61] Gazzini, *supra* note 48, at 201 ('the progressive emergence between the parties of a common understanding as to the meaning of the relevant treaty provision').

[62] Roberts, *supra* note 11, at 205; Sheargold, *supra* note 48, at 163.

[63] See note 54 above. North American Free Trade Agreement (NAFTA) 1992, 32 ILM 289, 309 (1993).

[64] Energy Charter Treaty 1994, 2080 UNTS 95.

[65] See, e.g., Schill, *The Multilateralization of International Investment Law* (2009).

is shared in essential respects across all treaties.[66] Disputing parties and tribunals routinely cite cases relating to different states and different treaties, as legally tenuous as this practice might be.[67] The *Urbaser* tribunal itself – which rejected the relevance of practice under other treaties, as noted above – relied in part on the findings of tribunals interpreting other treaties in its own elaboration of FET.[68] On this 'multilateral' view, concordant pleadings on FET entered by states in other disputes in relation to different treaties might perhaps serve to establish the agreement of those states on the interpretation of FET under a bilateral treaty between them, at least where the treaty wording is sufficiently similar. The same argument might even be used to contend that pleadings under other treaties represent the necessary practice 'in the application of' the treaty in question. Still, these arguments would be unorthodox and would likely stretch the rule reflected in Article 31(3)(b) too far.

Thus, even where evidence of pleadings is available,[69] the argument based on subsequent practice is, like the ordinary meaning argument, relatively limited.

4 Ad Hoc Disputing Party Agreement

A further way in which tribunals' use of the doctrine of legitimate expectations might arguably be legally justified is based on agreement of the disputing parties in a particular case. *Silver Ridge v. Italy*, a claim under the ECT, provides a possible example. In that case, the tribunal observed that the treaty contained 'no further clarification as to what the obligation "to accord … fair and equitable treatment" means' and that the treaty was unclear on 'what legal standard should positively apply in view of the ECT's guarantee of fair and equitable treatment'.[70] However, the tribunal took 'note … of the Parties' agreement that "specific commitments" by a State may give rise to legitimate expectations of investors protected under the fair and equitable treatment standard', citing both parties' pleadings.[71] The tribunal then proceeded to analyse the legitimate expectations claim, including deciding certain issues that were disputed by the parties such as what exactly constituted a 'specific commitment'.[72]

[66] See, e.g., Dolzer, Kriebaum and Schreuer, *supra* note 7; Radi, *supra* note 8. On tribunals viewing the most favoured nation (MFN) clause as similarly having an essential nature despite textual variation across treaties, see Batifort and Heath, 'The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization', 111 *AJIL* (2017) 873, at 882.

[67] Mitchell and Munro, 'Someone Else's Deal: Interpreting International Investment Agreements in the Light of Third-Party Agreements', 28 *EJIL* (2017) 669; Gazzini, *supra* note 48, at 202; *cf.* Dumberry, '"Cross Treaty Interpretation" *en bloc* or How CAFTA-DR Tribunals Are Systematically Interpreting the FET Standard Based on NAFTA Case Law', 22 *Law and Practice of International Courts and Tribunals* (2023) 384.

[68] ICSID, *Urbaser S.A. v. Argentina – Award*, 8 December 2016, ICSID Case no. ARB/07/26, para. 622.

[69] Gazzini, *supra* note 48, at 205 (noting the limited availability of pleadings for use as subsequent practice).

[70] ICSID, *Silver Ridge Power B.V. v. Italy – Award*, 26 February 2021, ICSID Case no. ARB/15/37, paras 395, 402.

[71] *Ibid.*, para. 402.

[72] *Ibid.*, paras 403–474.

If neither party disputes that the FET obligation protects legitimate expectations, does this in itself provide legal authority for a tribunal to reach this conclusion? The proposition seems unlikely. Neither a private investor nor a respondent state can unilaterally control the meaning of an investment treaty, and their joint agreement cannot do so either without consent from the other states party. Certainly, in arbitrations at the International Centre for Settlement of Investment Disputes, the tribunal 'shall decide a dispute in accordance with such rules of law as may be agreed by the [disputing] parties',[73] respecting the basic arbitration principle of party autonomy in choice of substantive law. But this provision generally refers to the broad choice of law or legal system (such as domestic or international law) rather than the content of that law.[74] Moreover, that choice of law is often made in advance of a dispute by the states parties to the investment treaty in a clause specifying that, for example, '[w]hen rendering its decision, the tribunal shall apply this Agreement … and other rules and principles of international law applicable between the Contracting Parties'.[75] By instituting arbitral proceedings under the treaty, the investor claimant is deemed to have accepted this choice of law.[76] A further agreement between the disputing parties on the meaning of a particular provision of the treaty cannot affect this earlier agreement.

Furthermore, if tribunals disagree with the concordant (or even discordant) pleadings of the parties on a legal issue, they arguably have an obligation to reject the pleadings and make an alternative finding.[77] The International Court of Justice (ICJ) held in *Fisheries Jurisdiction* that it was 'required … to consider on its own initiative all [relevant] rules of international law', it being 'the duty of the Court itself to ascertain and apply the relevant law'.[78] In the *Nicaragua* case, the Court added that it was 'not solely dependent on the argument of the parties before it with respect to the

[73] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) 1965, 575 UNTS 159, Art. 42(1). Similar provisions exist in other prominent arbitration rules, such as UNCITRAL Arbitration Rules, GA Res. 65/22, 6 December 2010, Art. 35(1).

[74] Article 42(1) does allow parties to choose to apply specific rules from within a legal system: S. Schill *et al.* (eds), *Schreuer's Commentary on the ICSID Convention* (3rd edn, 2022), at 822. But this does not imply that the tribunal abdicates responsibility for determining the meaning or content of those specific rules. See also Kaufmann-Kohler, 'The Arbitrator and the Law: Does He/She Know It? Apply It? How? And a Few More Questions', 21 *Arbitration International* (2005) 631, at 632 (distinguishing choice of law from content of the chosen law).

[75] Agreement between the Government of the Republic of Belarus and the Government of Hungary for the Promotion and Reciprocal Protection of Investments (signed 14 January 2019, entered into force 28 September 2019), Art. 9(7).

[76] Schill, *supra* note 74, at 834.

[77] See, e.g., *Lee-Chin*, *supra* note 23, para. 433 ('[w]hile the Tribunal cannot fully endorse the Claimant's reading of the applicable standard, it also cannot endorse the reading proposed by Respondent'); 'Comments from the United States on the International Law Commission's Draft Conclusions on the Identification of Customary International Law as adopted by the Commission in 2016 on First Reading' (2016), at 18, available at legal.un.org/ilc/sessions/70/pdfs/english/icil_usa.pdf (criticizing tribunals that 'accept without analysis that a rule is customary based on nothing more than the absence of a dispute between the parties').

[78] *Fisheries Jurisdiction (Germany v. Iceland)*, Judgment, 25 July 1974, ICJ Reports (1974) 175, at 181.

applicable law'.[79] In the context of investment law, as Paulsson has put it, a tribunal 'cannot content itself with inept pleadings, and simply uphold the least implausible of the two'.[80] The exact width of this principle of *iura novit curia* in international law is debated,[81] and it may well be true that 'few people will call for expansive *proprio motu* exploration [by tribunals] of issues that reflect shared consensus of disputing parties as well as the broader community'.[82] But if tribunals are obliged to satisfy themselves on the law, party agreement on the meaning of FET cannot displace a tribunal's own investigation of the issue. Even if the tribunal agrees with the disputing parties' pleadings, it should present its own reasons for agreement rather than relying on the fact of agreement itself.

5 Expectations as Facts

For most commentators and tribunals, the protection of legitimate expectations is a legal sub-obligation within the obligation of FET; states have a legal obligation (under FET) to respect investors' expectations, and a failure to do so is sufficient to violate the FET standard.[83] However, this view of expectations is sometimes questioned. On some accounts, protection of expectations is not a legal obligation but simply one factual element that can be taken into account in determining breach of the actual legal obligation – FET. The *Waste Management v. Mexico* award likely represents an early indication of this view, noting that 'in applying [FET] it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant'.[84] Other scholars and tribunals have made similar comments.[85] States have also sometimes supported this view in pleadings[86] and in certain recent treaties.

[79] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Judgment, 27 June 1986, ICJ Reports (1986) 14, at 24.

[80] Paulsson, 'International Arbitration and the Generation of Legal Norms: Treaty Arbitration and International Law', 3(5) *TDM* (2006) 14.

[81] See J. Hepburn, 'Domestic Law in International Adjudication' in *Max Planck Encyclopedia of International Procedural Law* (2018), paras 53–59 (*inter alia*, suggesting that the comments in *Fisheries Jurisdiction* and *Nicaragua* (and similar comments in *BP v Libya*) were influenced by the non-appearance of the respondents in those cases).

[82] Paparinskis, 'MFN Clauses and Substantive Treatment: A Law of Treaties Perspective of the "Conventional Wisdom"', 112 *AJIL Unbound* (2018) 49, at 53 (in the context of debates over the extension of the MFN clause to dispute settlement).

[83] Bonnitcha, Poulsen and Waibel, *supra* note 55, at 109 (FET comprises several 'more specific legal principles', including legitimate expectations); Radi, *supra* note 8, at 89 ('[m]ore frequently, legitimate expectations is conceived of as a self-standing subcategory in and of itself, the violation of which establishes the violation of the FET standard').

[84] ICSID, *Waste Management Inc. v. Mexico – Award*, 30 April 2004, ICSID Case no. ARB(AF)/00/3, para. 98.

[85] See, e.g., ICSID, *CMS Gas Transmission Company v. Argentina – Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic*, 25 September 2007, ICSID Case no. ARB/01/8, para. 89 (legitimate expectations 'are not, as such, legal obligations, though they may be relevant to the application of the fair and equitable treatment clause'); *Crystallex*, *supra* note 17, para. 545; McLachlan, Shore and Weiniger, *supra* note 17, para. 7.179; Dumberry, *supra* note 22, at 61–62.

[86] See, e.g., ICSID, *Rand Investments Ltd v. Serbia – Respondent's Rejoinder*, 24 January 2020, ICSID Case no. ARB/18/8, para. 1363.

CETA, for example, provides that, when 'applying the … fair and equitable treatment obligation' (that is, presumably, when applying it on the facts, rather than interpreting its legal meaning),[87] a tribunal 'may take into account' whether a state frustrated a legitimate expectation.[88]

If this view of expectations is adopted (going beyond treaties like CETA where it is textually specified), the implication is that the 'rule' on protection of expectations does not have (or need) any legal basis because it is only a factual and not a legal inquiry. Just as the revocation of an operating licence for a company might represent one factual way in which a state might indirectly expropriate the company,[89] the frustration of the company's legitimate expectations might arguably represent one factual way in which a state might fail to accord FET. As such, on this account, the present inquiry into the legal basis for the rule on protecting expectations would be just as futile as an inquiry into the legal basis for the 'rule' against revoking operating licences.

This view would render legitimate expectations qualitatively different from other commonly recognized elements of FET, such as denial of justice and arbitrariness, which are clearly treated as legal obligations within FET (whether customary or autonomous). The view struggles to match with the treatment given to claims of breached expectations by tribunals (and disputing parties). Tribunals often set out an extensive description of the requirements of a legitimate expectations claim, including that the representations creating the expectations be sufficiently clear, specific and formal, that they are reasonably relied upon by the investor and that there be no sufficiently serious public interest justifying the breach of expectations. These requirements are of course arguably designed to mirror the requirements of the legal doctrine of legitimate expectations as applied in some domestic legal systems.[90] The requirements are then typically applied to the facts of the case as tribunals debate whether qualifying representations were actually made or whether a prudent investor should have relied on the representations in the particular circumstances at hand. It is somewhat difficult to understand this reasoning as an application of facts to facts rather than law to facts. It is easy enough to characterize a tribunal's finding that an operating licence was revoked as a finding of fact, but more difficult to characterize similarly a tribunal's finding that expectations were frustrated.

[87] See note 120 below.

[88] Henckels, *supra* note 17, at 356 (rather than viewing legitimate expectations as a 'standalone element of FET', the CETA parties 'view legitimate expectations as one [factual] situation that might … amount to manifestly arbitrary conduct', the latter being one enumerated element of CETA's FET clause). See also reported comments by Paparinskis, seemingly suggesting that *all* the enumerated elements of FET in CETA (including denial of justice and arbitrariness) are instances of factual application of FET rather than legal interpretation. S. Batifort, B. Ibañez and R. Gerbay, *Unearthing FET: What Did States Intend, and Does It Matter?*, 2 May 2022, available at arbitrationblog.kluwerarbitration.com/2022/05/02/unearthing-fet-what-did-states-intend-and-does-it-matter.

[89] See, e.g., ICSID, *Westwater Resources Inc. v. Turkey – Award*, 3 March 2023, ICSID Case no. ARB/18/46, para. 253.

[90] Even if the argument based on general principles of law is problematic, as discussed earlier. *Cf.* Ortino, *supra* note 19, at 416 (who expresses concern that tribunals do not follow the 'core tenets' of the doctrine in domestic law even if it is not a general principle).

In the absence of a clear textual direction in the treaty, then, a tribunal's decision to consider whether the state frustrated the investor's legitimate expectations would need a legal, rather than factual, justification as an exercise of interpretation (of FET) rather than application.

6 Customary International Law

The argument considered in this section, finally, is that the protection of investors' legitimate expectations has become a customary rule, part of the minimum standard of treatment. If this customary rule exists, it will naturally form part of an FET clause reflecting custom. But, as a relevant rule of international law that must be taken into account under Article 31(3)(c) of the VCLT,[91] the rule will also provide a solid justification for interpreting the protection of expectations into an FET clause viewed (rightly or wrongly)[92] as autonomous.

A *Existing Evidence and Arguments*

At the outset, the argument might seem to be foreclosed by a 2018 decision of the ICJ, rejecting the view that a doctrine of legitimate expectations exists in general international law. In *Obligation to Negotiate Access to the Pacific Ocean*, the ICJ considered an argument by Bolivia that numerous statements made by Chile over the years had given rise to a legitimate expectation on Bolivia's part that Chile would restore Bolivia's access to the sea. Bolivia noted that the doctrine of legitimate expectations had been 'widely applied by arbitral tribunals in the context of investment protection', and it cited the finding of the *Gold Reserve v. Venezuela* tribunal that the doctrine was part of international law.[93] According to Bolivia, the doctrine also applied in interstate relations; the doctrine 'focuses on the position of States that have relied upon the views taken up by another State, and treats them as entitled to rely upon commitments made by the other State'.[94] Chile rejected this statement, arguing that 'there is no "doctrine" of legitimate expectations in international law as it applies between States'.[95] The ICJ agreed with Chile, finding that, although investment awards contained references to legitimate expectations in cases applying treaty clauses on FET, it did 'not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered

[91] Paparinskis, *supra* note 19, at 166–167 (the content of the customary minimum standard would carry 'significant weight in the interpretive process' and 'provide at least an authoritative starting point for determining the content' of an autonomous FET clause); *Kruck Dissenting Opinion*, *supra* note 27, para. 20.

[92] As section 6.C discusses, evidence from pleadings indicates that states overwhelmingly support a customary, rather than autonomous, view of FET.

[93] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Reply of the Government of the Plurinational State of Bolivia, 21 March 2017, para. 339.

[94] *Ibid.*

[95] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Rejoinder of the Republic of Chile, 15 September 2017, para. 9.27.

a legitimate expectation'.[96] The Court was perhaps speaking about general principles of law rather than custom,[97] but, if legitimate expectations was a recognized part of the customary minimum standard, the Court might have been expected to qualify its statement to reflect this.

However, although the Court did not comment further, it seems clear that the Court rejected only the suggestion that a doctrine of legitimate expectations applies in inter-state relations.[98] Indeed, Chile's pleadings put this point to the Court directly. The respondent contended that, even if the doctrine existed in the context of investment protection, it did not 'create obligations applicable in relations between States' and that it was 'entirely without foundation to seek to transpose' a principle applying vertically between states and investors 'into general international law applicable horizontally between States'.[99] While the Court did not explicitly address these contentions, its finding leaves open the possibility that a doctrine of legitimate expectations might exist in vertical investor-state relations, whether as part of the customary minimum standard or as a general principle of law. Indeed, in at least one set of pleadings filed since the 2018 judgment in *Obligation to Negotiate*, one state (Costa Rica) has accepted that the customary minimum standard includes protection of investors' legitimate expectations.[100]

Even if *Obligation to Negotiate* has not foreclosed the argument, opposition clearly remains. Several authors have rejected any customary basis for legitimate expectations.[101] Yannaca-Small, for instance, contends that, unlike other elements of the FET standard, protection of expectations is not grounded in customary international law.[102] Wongkaew asserts that a 'theory of legitimate expectations based on customary international law is without any legal basis',[103] while Dumberry finds 'little support' for such a theory.[104]

By contrast, in *CMS Gas Transmission v. Argentina*, the tribunal held that the customary minimum standard included protection of the 'stability and predictability of the business environment'.[105] While this phrase does not refer to expectations directly, the tribunal appeared to connect the ideas of stability and predictability to the

[96] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, 1 October 2018, ICJ Reports (2018) 507, at 559.

[97] *Cf.* Ortino, *supra* note 19, at 416.

[98] Recent investment tribunals have also taken this view. See *IC Power v. Peru*, *supra* note 13, para. 305; *Lopez-Goyne v. Nicaragua*, *supra* note 13, para. 419 (both tribunals chaired by the same arbitrator). Contra Laryea, *supra* note 5, at 109–110.

[99] *Obligation to Negotiate*, *supra* note 95, paras 2.29, 2.32.

[100] ICSID, *Díaz Gaspar v. Costa Rica – Award*, 29 June 2022, ICSID Case no. ARB/19/13, para. 365 (citing Costa Rica's Counter-Memorial of 30 July 2020).

[101] See also Sornarajah, *supra* note 8, at 444; Campbell, *supra* note 8, at 368, 374 (although he appears to confine his conclusion to the three NAFTA states).

[102] Yannaca-Small, 'Fair and Equitable Treatment Standard: Recent Developments', in A. Reinisch (ed.), *Standards of Investment Protection* (2008) 111, at 130; *cf.* Yannaca-Small, 'Fair and Equitable Treatment: Have Its Contours Fully Evolved?', in K. Yannaca-Small (ed.), *Arbitration under International Investment Agreements: A Guide to the Key Issues* (2nd edn, 2018) 501, at 531 (legitimate expectations is 'not *initially* grounded in customary international law' [emphasis added]).

[103] Wongkaew, *supra* note 1, at 81.

[104] Dumberry, *supra* note 22, at 60.

[105] ICSID, *CMS Gas Transmission Company v. Argentina – Award*, 12 May 2005, ICSID Case no. ARB/01/8, para. 284.

expectations of the investor; it recounted the claimant's reliance on the discussions of investor expectations in *CME v. Czech Republic* and *Tecmed*, and it noted that guarantees given by Argentina were 'crucial for the investment decision'.[106] More directly, the *Glamis Gold v. USA* tribunal held that a breach of the customary minimum standard codified in Article 1105 of NAFTA would arise from 'the creation by the State of objective expectations in order to induce investment and the subsequent repudiation of those expectations'.[107] In *Lee-Chin v. Dominican Republic*, the tribunal similarly asserted that the customary minimum standard protected expectations, citing only previous decisions (including *CME*, *CMS* and *Tecmed*).[108]

However, although the tribunals and authors just mentioned come to divergent conclusions, all of those conclusions appear to rely either on assertions or on previous tribunal decisions, neither of which are a formal source of customary rules.[109] Going to some degree beyond this level of reasoning, other tribunals, as noted above, have also found protection of legitimate expectations within customary international law by linking expectations to the customary principle of good faith.[110] In *IC Power v. Peru*, for example, the tribunal held that protection of expectations was 'part of their [states'] broader customary international law obligation to act in good faith'.[111] But this view is also problematic; it runs up against the familiar response that the principle of good faith is not a source of obligation in itself,[112] making it difficult to understand how the principle could generate a new obligation of protection of expectations.[113]

A further potential indication that custom protects investors' expectations is the fact that the USA has described itself as a persistent objector to this alleged rule, thereby perhaps implying that the rule was sufficiently well advanced in its development to require persistent objection from states that wished to avoid being held to it.[114] However, apart from doubts over the status of the persistent objector rule itself,[115] the existence

[106] *Ibid.*, paras 267–268, 275, 278–279.

[107] *Glamis Gold*, *supra* note 41, para. 627. However, see Dumberry, *supra* note 22, at 59–60 (contending that this holding is difficult to reconcile with other comments in the *Glamis Gold* award).

[108] *Lee-Chin*, *supra* note 23, para. 436.

[109] See note 9 above.

[110] See note 13 above.

[111] *IC Power v Peru*, *supra* note 13, para. 306.

[112] *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Judgment, 20 December 1988, ICJ Reports (1988) 69, at 105. See Paparinskis, *supra* note 19, at 243–245; Potesta, *supra* note 1, at 92.

[113] Separately, since the argument is premised upon the customary good faith obligation, it also does not clearly explain how protection of legitimate expectations might appear within an FET clause that is held not to be connected to custom.

[114] In *Certain Iranian Assets*, the USA denied that custom protected investors' expectations but argued that, if the Court disagreed, the USA was a persistent objector to that rule. The evidence presented by the USA for its persistent objection was precisely its pleadings in investment treaty cases, further confirming the relevance of these materials for generating (or, here, purportedly resisting) customary rules, as argued below. See *Certain Iranian Assets (Iran v. USA)*, Counter-Memorial of the United States of America, 14 October 2019, para. 14.22; *Certain Iranian Assets (Iran v. USA)*, Rejoinder of the United States of America, 17 May 2021, para. 10.25. Peru has similarly described the USA as a persistent objector to the alleged rule: PCA, *The Renco Group, Inc. v. Peru – Respondent's Counter-Memorial*, 1 April 2022, PCA Case no. 2019-46, para. 678.

[115] Dumberry, 'The Last Citadel! Can a State Claim the Status of Persistent Objector to Prevent the Application of a Rule of Customary International Law in Investor-State Arbitration?', 23 *Leiden Journal of International Law* (2010) 379. But see International Law Commission (ILC), Draft Conclusions on Identification of Customary International Law, with Commentaries, UN Doc. A/73/10 (2018), Conclusion 15.

of the expectations rule could not be inferred merely from objections to it.[116] Instead, the positive evidence in favour of the expectations rule would still need to be assessed.

Meanwhile, the *Waste Management* award of 2004 is often cited as an authoritative description of the customary minimum standard.[117] In that award, as noted in section 5, the tribunal commented that 'in applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant'.[118] Some later tribunals have taken this comment as confirming that the customary standard protects investors' expectations.[119] However, the comment does not go this far; at most, it suggests that expectations are 'relevant' for tribunals when 'applying' the FET legal obligation to the facts of the case rather than suggesting that the FET obligation can be interpreted to include protection of expectations as a legal sub-obligation.[120] In any event, and even if this 'factual' view of legitimate expectations is unjustifiable (as discussed in section 5), the *Waste Management* tribunal did not particularly clarify its source or evidence for the comment,[121] leaving any conclusions unclear on whether the customary standard contains a legal obligation to protect investors' expectations.

Under the formal two-element model of custom, a stronger argument that custom protects expectations will instead be built upon the existence of sufficient state practice and *opinio juris* favouring the protection of expectations. None of the authors and tribunals reaching conclusions on this argument to date appear to have conducted an actual assessment of these two elements. Other arbitrators and authors have properly recognized the need for this assessment. In 2010, Arbitrator Nikken suggested in his separate opinion in *Suez v. Argentina* that no state 'has made any statement … linking it [the customary minimum standard] to the "legitimate expectations" of investors'.[122]

[116] Particularly when framed only in the alternative, as the US objection was. See note 114 above.

[117] See cases cited in Paparinskis, *supra* note 19, at 238.

[118] *Waste Management*, *supra* note 84, para. 98.

[119] See, e.g., *Lopez-Goyne*, *supra* note 13, para. 421; PCA, *Clayton v. Canada – Award on Jurisdiction and Liability*, 17 March 2015, PCA Case no. 2009-04, para. 442; ICSID, *Railroad Development Corporation v. Guatemala – Award*, 29 June 2012, ICSID Case no. ARB/07/23, para. 219; *IC Power v. Peru*, *supra* note 13, para. 307.

[120] See note 85 above; ICSID, *Railroad Development Corporation v. Guatemala – Respondent's Counter-Memorial on Merits*, 5 October 2010, ICSID Case no. ARB/07/23, para. 424. This recalls the basic distinction between interpretation ('determin[ing] what a treaty provision mean[s]') and application ('apply[ing] it to the circumstances of the case before it') of international law: ICSID, *Industria Nacional de Alimentos S.A. v. Peru – Decision on Annulment*, 5 September 2007, ICSID Case no. ARB/03/4, para. 68. See also Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication', 2 *JIDS* (2011) 31.

[121] The tribunal set out its well-known statement of FET after reviewing the NAFTA cases of *SD Myers*, *Mondev*, *ADF* and *Loewen*. Of these four cases, only *ADF* discussed the concept of legitimate expectations. The *ADF* tribunal appeared to accept that expectations were protected by FET, but, like the *Waste Management* tribunal, also did not particularly explain the reasons for this conclusion: ICSID, *ADF Group Inc. v. USA – Award*, 9 January 2003, ICSID Case no. ARB(AF)/00/1, para. 189.

[122] *Suez*, Nikken Separate Opinion, *supra* note 26, para. 7 (referring to FET but accepting that FET was equivalent to the customary minimum standard). However, assuming that the information was public at the time, Arbitrator Nikken perhaps overlooked earlier cases such as *MTD v. Chile*, *Plama v. Bulgaria* or *Rumeli v. Kazakhstan*, where the respondents' pleadings admitted that FET protected legitimate expectations: ICSID, *MTD Equity Sdn Bhd v. Chile – Decision on Annulment*, 21 March 2007, ICSID Case no. ARB/01/7, para. 69; ICSID, *Plama Consortium Limited v. Bulgaria – Award*, 27 August 2008, ICSID Case no. ARB/03/24, para. 175; ICSID, *Rumeli Telekom A.S. v. Kazakhstan*, 29 July 2008, ICSID Case no. ARB/05/16, para. 600.

Similarly, in February 2024, the tribunal majority in *Red Eagle Exploration v. Colombia* rejected the claimant's suggestion of a customary basis for legitimate expectations, commenting that it was not aware of any evidence of state practice (or *opinio juris*) to support the suggestion.[123] Moreover, in also rejecting this suggestion, Dumberry nevertheless conceded in 2014 that no tribunal had actually examined state practice and *opinio juris* on the question.[124]

An assessment of state practice on legitimate expectations thus remains to be conducted in order to determine whether it can provide a formal grounding for the existence of the (alleged) rule on legitimate expectations in customary international law. As the next section explains, the strongest evidence of such state practice (and *opinio juris*) can be found in the pleadings of states in investment treaty proceedings.

B *Source of Relevant State Practice*

Pleadings before international courts and tribunals are one recognized form of state practice.[125] As such, they contribute to the formation of customary rules. There is, to be sure, a risk that pleadings by a disputing state will be self-serving, designed not to impartially recount the state's view of the law but merely to favour whichever legal position best assists the state's argument in the proceedings.[126] Whether government or private lawyers, counsel representing states have a duty to put every good faith argument to the court on behalf of their client.[127] The facts of a particular dispute may also colour the state's view of the law, meaning that pleadings might not indicate support for a broader, abstract legal position beyond the dispute at hand.[128] Thus, some suggest that pleadings may only be treated as state practice '*sub modo*' or 'with all due caution'.[129]

However, lawyers representing states are likely to (and perhaps even required to) attempt to balance short-term and long-term interests in their arguments.[130] In the

[123] ICSID, *Red Eagle Exploration Ltd v. Colombia – Award*, 28 February 2024, ICSID Case no. ARB/18/22, para. 293.

[124] Dumberry, *supra* note 22, at 60.

[125] ILC, *supra* note 115, Conclusion 6, commentary para. 5; Paparinskis, *supra* note 19, at 16 ('the clearest example of State practice').

[126] Roberts, *supra* note 11, at 218; P. Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (2016), at 222; ICSID, *Industria Nacional de Alimentos S.A. v. Peru – Decision on Annulment, Dissenting Opinion of Sir Franklin Berman*, ICSID Case no. ARB/03/4, para. 9.

[127] Fauchald, 'The Legal Reasoning of ICSID Tribunals: An Empirical Analysis', 19 *EJIL* (2008) 301, at 348; Paparinskis, *supra* note 19, at 128; see also *Losinger (Switzerland v. Yugoslavia)*, PCIJ Ser C, No. 78, Yugoslav Counter-Memorial, 3 August 1936, at 187–188.

[128] Paparinskis, *supra* note 19, at 171 ('such pleadings would mostly relate to the legal significance of the particular factual situations in dispute'); Schill, 'MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J Benton Heath', 111 *AJIL* (2017) 914, at 927.

[129] Crawford, Pellet and Redgwell, 'Anglo-American and Continental Traditions in Advocacy before International Courts and Tribunals', 2 *Cambridge Journal of International and Comparative Law* (2013) 715, at 724; Berman, *supra* note 126, para. 9.

[130] Gibson, 'Representing the United States Abroad: Proper Conduct of US Government Attorneys in International Tribunals', 44 *Georgetown Journal of International Law* (2013) 1167, at 1209–1210; Legum, 'Representing States: A US Perspective', 6 *Arbitration & ADR* (2001) 46, at 47.

investment treaty system, states will likely also balance their dual roles as potential respondents and as home states of potential claimant investors.[131] These factors will tend to reduce the risk of pleadings aimed solely at winning the case at hand. Indeed, as will be seen, the pleadings surveyed for this article demonstrate this: in arguing for a broader interpretation of FET that includes protection of investors' legitimate expectations, many states are arguing against their own short-term interests as respondents in the proceedings. While pleadings in general might perhaps require caution, the particular pleadings reviewed here are therefore likely to represent a more reliable indication of states' views, minimizing potential distortions arising from the context of contentious proceedings.[132] Furthermore, since pleadings are by their nature formal statements of a state's views on international law, they represent recognition of a belief that the practice discussed in pleadings (that is, protection of expectations) is required by law, thus constituting *opinio juris* as well as state practice.[133]

Some scholars have suggested that the concerns about pleadings as state practice are exacerbated when the pleadings are drafted not by state officials but, rather, by private law firms simply 'hired to fend off a claim'.[134] However, under basic principles of attribution,[135] pleadings of private law firms – as entities empowered by domestic law (typically, a power of attorney granting full powers)[136] to exercise elements of governmental authority (representing the state on the international plane) – are attributable to the state.[137] For this reason, observers (including the United Nations Commission on International Trade Law [UNCITRAL]) advise both counsel and states to pay close attention to pleadings prepared by outside counsel, which may affect the state's long-term interests.[138] At the formal level, beyond the general concerns with pleadings addressed above, there is thus no less reason to characterize pleadings of private

[131] Roberts, *supra* note 11; Bonnitcha, Poulsen and Waibel, *supra* note 55, at 67 (states 'have an incentive not to advance legal arguments [in favour of their own investors] that are likely to "backfire" in future arbitrations that might be brought against them' as respondents).

[132] ILC, *supra* note 115, Conclusion 3, commentary para. 5; Paparinskis, *supra* note 82, at 51.

[133] ILC, *supra* note 115, Conclusion 3, commentary para. 8, Conclusion 10, commentary para. 4. The ICJ has sometimes used the same evidence to demonstrate both state practice and *opinio juris*. Charlesworth, 'Law-Making and Sources', in J. Crawford and M. Koskenniemi (eds), *The Cambridge Companion to International Law* (2012) 187, at 194.

[134] Schreuer, 'The Development of International Law by ICSID Tribunals', 31 *ICSID Review* (2016) 728, at 737.

[135] ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10 (2001), Art. 5.

[136] See, for example, the discussion of powers of attorney granted by Venezuela in ICSID, *ConocoPhillips Petrozuata B.V. v. Venezuela – Order on the Applicant's Representation*, 3 April 2020, ICSID Case no. ARB/07/30.

[137] *Cf.* ITLOS, *M/V Norstar (Panama v. Italy)*, Preliminary Objections, Judgment, 4 November 2016, ITLOS Reports (2016) 44, at 68 ('[t]he fact that [the agent for Panama] is a lawyer in private practice … does not imply that Panama is prevented from entrusting him with the powers to represent Panama').

[138] UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Advisory Centre, UN Doc. A/CN.9/WG.III/WP/168, 25 July 2019, para. 18; Sharpe, 'The Agent's Indispensable Role in International Investment Arbitration', 33 *ICSID Review* (2018) 675, at 677–678; Sharpe, 'Representing a Respondent State in Investment Arbitration', in C. Giorgetti (ed.), *Litigating International Investment Disputes: A Practitioner's Guide* (2014) 41, at 42, 49.

firms as state practice compared to pleadings of government counsel. At the substantive level, a state's choice to hire a private law firm naturally does not imply that the state is seeking to disclaim responsibility for, or avoid involvement in, the firm's submissions in the case. States – particularly less well-resourced ones – may feel that their interests are better served by hiring experienced external counsel more familiar with the language (likely English) and procedures of the arbitration.[139]

Empirical scholars have noted the extensive vetting process that precedes some states' choice of private firm,[140] suggesting that states place great importance on their defence. It is in any event quite rare that states are represented solely by external counsel in investment treaty cases; according to Franck, around 25 per cent of cases (up to 2012) involved solely in-house representation, while 68 per cent of cases used external counsel, an (unspecified) majority of which were in collaboration with government counsel.[141] The review of pleadings conducted for this article (discussed further below), meanwhile, found similarly that around 80 per cent of cases involved in-house counsel of record, either alone or in conjunction with external firms.[142] Even in the remaining 20 per cent of cases reviewed where no government entity was indicated as counsel of record, government representatives attended the hearings in many of those cases, suggesting a substantive endorsement of the arguments presented on the state's behalf by the private firm.[143] Only seven cases involved no government counsel of record and no government presence at hearings. Even if this points to a substantive lack of involvement (which is difficult for an external observer to confirm), the pleadings remain formally attributable to the state, as suggested above. To the extent that a firm's pleadings are inconsistent with other practice by state organs, this inconsistency is merely a factor to take into account when assessing it, as with any other kind of state practice.[144]

In any event, apart from such pleadings, it is difficult to imagine many alternative instances of state practice that would better demonstrate states' acceptance of a rule on the protection of investors' expectations. One possibility, of course, would be actual examples of states protecting – that is, not upsetting – expectations that they had generated in investors following representations on which the investors had relied. Although there are likely to be many such examples, they are unlikely to

[139] Polanco Lazo, 'Systems of Legal Defence Used by Latin American Countries in Investment Disputes', 17 *Journal of World Investment and Trade* (2016) 562, at 591; A. Sarvarian, *Professional Ethics at the International Bar* (2013), at 167; Sharpe, 'Agent's Role', *supra* note 138, at 676, 693.

[140] J. Ostransky and F. Perez Aznar, *National Governance and Investment Treaties: Between Constraint and Empowerment* (2023), at 195, 197; Sharpe, 'Representing a Respondent State', *supra* note 138, at 47.

[141] S. Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (2019), at 101–102 (finding only a 'minor' trend of states entirely outsourcing their defence); *cf.* Sharpe, 'Agent's Role', *supra* note 138, at 676.

[142] Based on indication of counsel of record in the relevant award or, if there was no indication in the award, on the ICSID website (for ICSID cases).

[143] In *MNSS v. Montenegro*, for example, the state's foreign minister attended the hearings: ICSID, *MNSS B.V. v. Montenegro – Award*, 4 May 2016, ICSID Case no. ARB(AF)/12/8, para. 40. It seems difficult to argue that a state has no responsibility for what is being said on its behalf, in the presence of its foreign minister, before an international tribunal.

[144] ILC, *supra* note 115, Conclusion 7.

be accompanied with any clear *opinio juris* indicating that the reason for the state's conduct was its belief that the conduct was required under the customary minimum standard. Another possibility would be to identify statements about legitimate expectations made by states before bodies other than investment tribunals, such as multilateral fora. The most prominent multilateral fora for discussions of investment treaties in recent years have been UNCITRAL's Working Group III and the Energy Charter Conference, the latter conducting the process of modernization of the ECT. However, as is well known, the UNCITRAL process focuses solely on procedural reforms to the system. The process thus does not directly invite comments from states on the substance of FET and its connections with legitimate expectations, and no such comments appear to have been submitted.[145] While the ECT's modernization process focused on substance, states did not submit any publicly available views relating to legitimate expectations in that process either.[146]

A further possible instance of state practice is recent treaties in which states have explicitly linked FET to custom and offered clarifications on the role of expectations in the FET obligation. The TPP provides a good example: Article 9.6 contains the FET obligation, connects that obligation directly to custom and adds that, '[f]or greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article'. At a glance, this clause might represent recent state practice from the 11 parties bound by this clause, indicating that investors' expectations are not relevant to the customary minimum standard including FET, and that there is therefore no customary rule protecting such expectations.[147] Other recent treaties have similar clauses, including the USMCA, arguably adding practice from further states.[148] However, the clause can be read in at least one other sense. For example, it might simply represent an acknowledgement that the doctrine of legitimate expectations as developed by tribunals imposes a fairly

[145] Some UNCITRAL submissions, however, have noted the uncertainty over whether FET protects legitimate expectations. See, e.g., UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of Morocco, UN Doc. A/CN.9/WG.III/WP.161, 4 March 2019, at 7; UNCITRAL, Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters, Note by the Secretariat, UN Doc. A/CN.9/WG.III/WP.150, 28 August 2018, at 5.

[146] Initial proposals from ECT member states in 2019 did not offer clear views on legitimate expectations. See Energy Charter Secretariat, Policy Options for Modernisation of the ECT, Doc. CCDEC2019 08, 6 October 2019), available at energycharter.org/fileadmin/DocumentsMedia/CCDECS/2019/CCDEC201908.pdf. The modernized text, adopted in December 2024, will protect expectations under certain circumstances, but it does not connect FET to custom. Energy Charter Secretariat, Decision of the Energy Charter Conference, Doc. CCDEC2024 12, 3 December 2024. The modernized text can thus probably be analysed similarly to the European Union's recent treaties with a closed list of FET violations, discussed below.

[147] But see Henckels, *supra* note 17, at 356 (contending that the TPP does ultimately protect legitimate expectations despite this language, where the state's conduct frustrating the expectations is 'so grave as to be … arbitrary', thus violating another aspect of the customary minimum standard). *Contra* Dumberry, 'Fair and Equitable Treatment', in M. Mbengue and S. Schacherer (eds), *Foreign Investment under the Comprehensive Economic and Trade Agreement (CETA)* (2019) 95, at 107 (in relation to the TPP).

[148] United States-Mexico-Canada Agreement (USMCA) (signed 30 November 2018, entered into force 1 July 2020), Article 14.6.4; Agreement between the Argentine Republic and Japan for the Promotion and Protection of Investment (signed 1 December 2018, not yet in force), Art. 4(4).

high standard for breach.[149] The text might remind readers, '[f]or greater certainty', that the question is not merely whether an investor's (subjective) expectations were upset but whether a specific representation was made to the investor by organs of the state on which the investor had relied in making its investment and which was subsequently frustrated by the state without a sufficiently important public interest at stake.[150] On this reading, the clause does not disclaim the existence of a customary rule protecting expectations; it only limits the scope of that rule if it exists based on evidence of state practice and *opinio juris* found elsewhere.

Other recent treaties (particularly those concluded by the European Union), meanwhile, do not connect FET to custom but contain closed lists of categories of conduct that are stated to violate FET. These lists do not include a breach of legitimate expectations, but the treaties go on to specify that tribunals 'may take into account' whether the state frustrated a legitimate expectation.[151] This kind of clause may give a treaty-based justification for considering expectations (as discussed above), but, since it does not connect FET to custom, it does not say anything about customary protection of legitimate expectations.

C *Assessing the Evidence in Pleadings*

As a result, as noted above, this section takes pleadings in investment treaty cases as the best available evidence of state practice in assessing the argument that the protection of expectations has become a customary rule.

Relevant pleadings were identified for this article via a review of the United Nations Conference on Trade and Development (UNCTAD) database for cases involving an alleged FET breach.[152] At least one pleading was reviewed from as many different states (either as respondent or as non-disputing party) as could be identified in the cases found in the UNCTAD database. This process resulted in relevant pleadings from 56 states, reviewed to determine the state's position on whether FET protected legitimate expectations. No claim is made as to comprehensiveness; pleadings (or awards containing summaries of pleadings) in many cases are not public, meaning that, even if every publicly available pleading was reviewed, the result would still not constitute a comprehensive survey of state practice. Given the article's findings as presented below, a more comprehensive survey would not likely change those findings greatly in any event.

[149] In *Crystallex v. Venezuela*, Venezuela argued that the threshold for breach of the FET clause in the 1996 Canada-Venezuela BIT was high and that, under customary international law, 'merely failing to live up to *subjective* expectations cannot be sufficient to establish a breach': *Crystallex*, *supra* note 17, para. 496 (emphasis added). Venezuela nevertheless accepted that the BIT protected legitimate expectations when properly generated: *Ibid.*, para. 507. The Canada-Venezuela BIT did not contain the clarificatory text on expectations found in the much newer TPP, but Venezuela's argument arguably foreshadows the alternative reading of Article 9.6 of the TPP offered here.

[150] Tribunals have differed, though, on the relevance of the final requirement of public interest. See Ortino, *supra* note 19.

[151] See note 45 above.

[152] United Nations Conference on Trade and Development (UNCTAD), Investment Dispute Settlement Navigator, available at investmentpolicy.unctad.org/investment-dispute-settlement/advanced-search.

In some cases, states addressed claimants' arguments on legitimate expectations only on the facts. These pleadings were generally classified as supporting the rule on expectations on the ground that an argument on the facts implies acceptance of the law or, otherwise, the state would have argued more directly that the law did not protect legitimate expectations.[153] (Where this classification relied on tribunals' summaries of state pleadings rather than the pleadings themselves, it involved an assumption that the award would have summarized the state's pleadings not only on the facts but also on the law if the state had presented any such pleading.) However, in some cases within this subset, states' arguments on the facts were presented as arguments in the alternative (using arguments of the form: 'even if the treaty protects legitimate expectations, no such expectations were created here'), albeit without offering an explicit principal argument on the law. These cases were classified as rejecting the rule on the ground that a principal argument rejecting protection of legitimate expectations was implied by the state's argument in the alternative. Cases where the state clearly argued against legitimate expectations on the law but continued to address the argument on the facts were naturally also classified as rejecting the rule.

For the argument on the connection between expectations and custom to succeed, though, it must be shown that there is sufficient state practice not only favouring an obligation to protect legitimate expectations as part of the FET standard but also contending that the FET standard is connected to customary international law. It is only where states make the connection between FET and custom that their pleadings on FET can be taken as practice in relation to the content of customary international law.[154] The identified pleadings were thus also reviewed to determine the state's position on the connection between FET and custom.

In fact, on this latter question, the surveyed pleadings reveal that the available state practice is remarkably uniform. Unsurprisingly, in relation to treaties that contain more or less explicit text connecting FET to custom (such as NAFTA and treaties on the same model including the Dominican Republic–Central America–United States Free Trade Agreement [DR–CAFTA]), states routinely argue that the FET clause instantiates the customary minimum standard.[155] But even in relation to treaties with 'unqualified' FET clauses making no explicit link to custom, publicly available evidence suggests that only one state has ever clearly supported an autonomous view of FET.[156] States

[153] It is perhaps possible that states argue only on the facts and refrain from contesting the law not because they accept the expectations rule but because they suspect that tribunals will inevitably follow previous awards supporting the rule, making the contest futile. Whatever a state's internal motivations, though, for an external observer, failure to contest the law more obviously indicates acceptance of the law.

[154] Where a state argues that FET includes legitimate expectations but that the FET clause is an 'autonomous' treaty-based clause rather than reflecting custom, such an argument does not represent state practice in favour of a customary obligation on legitimate expectations. Instead, as discussed in section 3, it may contribute to an argument about the meaning of FET under the rules of treaty interpretation. However, as noted here, based on the available evidence, it is extremely rare that any state has clearly argued in favour of autonomous FET.

[155] Dominican Republic–Central America–United States Free Trade Agreement 2004, 43 ILM 514 (2004); see, e.g., *Glamis Gold*, *supra* note 41, para. 543; *Railroad Development Corporation*, *supra* note 120, para. 346; *Lopez-Goyne*, *supra* note 13, para. 398.

[156] Iran in *Certain Iranian Assets (Iran v. USA)*, Judgment, 30 March 2023, ICJ Reports (2023) 51, para. 126. That case was not technically brought under an investment treaty, but the relevant provisions of

commonly argue instead that even unqualified FET clauses should be interpreted as reflecting the customary minimum standard.[157] This is perhaps also unsurprising since the autonomous view is typically considered to place more onerous obligations on states than the alternative view that connects FET to custom.[158] However, states are sophisticated enough to recognize their dual interests in investment treaty arbitration both as respondents and as home states of claimant investors. Some states (perhaps more likely, traditionally capital-exporting states) might then be expected to support the autonomous view for the additional protection that it may provide to the states' outward investors, even if this harms the states' litigation interests as potential respondents in arbitration claims.[159] Still, there is no clear evidence of this in publicly available materials.

Therefore, in many cases, the only relevant question is whether or not the pleading supports an obligation to protect legitimate expectations as part of FET. Indeed, while, in many other cases, the state's pleading on the connection between (unqualified) FET

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the treaty at issue were closely equivalent to modern investment treaties, including the FET clause. Some states, though, have offered indirect support for the view that the relevant treaty's FET clause was an autonomous standard unconnected to custom. Pleadings from Lebanon, for example, denied a claimant's suggestion that the state was conflating FET with custom, perhaps implying that the two standards are unconnected: ICSID, *El Jaouni v. Lebanon – Decision on Jurisdiction, Liability and Certain Aspects of Quantum*, 25 June 2018, ICSID Case no. ARB/15/3, para. 494. Pleadings from Mongolia have similarly referred to both FET and the customary MST as if they were separate standards: PCA, *Khan Resources Inc. v. Mongolia – Award on the Merits*, 2 March 2015, PCA Case no. 2011-09, para 223. Pleadings from the Netherlands and Chile have not expressly argued that FET was connected to custom, thereby perhaps implying the opposite (although Chile drew attention to the view that FET was connected to custom): ICSID, *RWE AG v. Netherlands – Respondent's Counter-Memorial*, 5 September 2022, ICSID Case no. ARB/21/4, paras 875–878; ICSID, *MTD Equity Sdn Bhd v. Chile – Award*, 25 May 2004, ICSID Case no. ARB/01/7, para 111. Colombia has offered more ambiguous pleadings, suggesting that an autonomous FET clause has a different meaning than one linked to the customary MST, but also arguing (in the same case) that the claimant had not proven that an autonomous FET clause did not simply reflect custom in any event: *Red Eagle*, *supra* note 123, paras 229–238. None of these examples necessarily offers much support for an autonomous view of FET. However, states' pleadings in investment treaty cases are frequently not publicly available and not fully described in tribunals' decisions. Pleadings more explicitly supporting this view may therefore exist, which would qualify the claim here.

157 Pleadings from Argentina, Jordan, Uruguay, India, Sri Lanka, Tanzania and Mauritius provide only some examples: ICSID, *Casinos Austria International GmbH v. Argentina – Award*, 5 November 2021, ICSID Case no. ARB/14/32, para. 286; ICSID, *Fouad Alghanim & Sons Co for General Trading & Contracting, WLL v. Jordan – Award*, 14 December 2017, ICSID Case no. ARB/13/38, para. 254; ICSID, *Philip Morris Brands SARL v. Uruguay – Award*, 8 July 2016, ICSID Case no. ARB/10/7, para. 314; PCA, *Deutsche Telekom AG v. India – Interim Award*, 13 December 2017, PCA Case no. 2014–10, para. 310; ICSID, *Deutsche Bank AG v. Sri Lanka – Award*, 31 October 2012, ICSID Case no. ARB/09/02, para. 414; ICSID, *Biwater Gauff (Tanzania) Ltd v. Tanzania – Award*, 24 July 2008, ICSID Case no. ARB/05/22, para. 587; ICSID, *Gosling v. Mauritius – Award*, 18 February 2020, ICSID Case no. ARB/16/32, para. 179. This position matches some archival evidence of early European BIT negotiations: Yackee, *supra* note 43, at 634–635; Hepburn *et al.*, *supra* note 44, at 946.

158 See, e.g., Howse, 'The International Law Minimum Standard of Treatment', in A. Kulick and M. Waibel (eds), *General International Law in International Investment Law: A Commentary* (2024) 539, at 546–547.

159 This was perhaps Iran's logic in supporting the autonomous view as a claimant at the ICJ (see note 156 above), upholding the 'offensive' interests of its nationals rather than as a respondent in investment treaty proceedings protecting its own 'defensive' interests. No documents are publicly available in Iran's only known investment treaty case as respondent, *Turkcell v. Iran*.

and custom is not clear from the publicly available documents, it might even be assumed that support for the connection is mirrored in those unclear (or unpublished) pleadings, given the nearly universal support for the connection where pleadings are clear.

One complication with the apparent widespread support for a connection between FET and custom, however, arises from the 2023 decision of the ICJ in *Certain Iranian Assets*. In that case, the Court was called to interpret a clause in the US–Iran Treaty of Amity[160] that required each state to 'accord fair and equitable treatment to nationals and companies' of the other state. The Court noted that this clause did not explicitly refer to 'international law' or the 'minimum standard'. Therefore, the Court held, there was simply 'no need to examine the content of the customary minimum standard of treatment'. This reasoning – surprisingly thin as it is[161] – suggests that, in the Court's view, the meaning and content of an autonomous FET clause should not be found by reference to custom.[162] This implies that the apparently near-universal view of states on the question is incorrect, which would in turn limit the available evidence on the connection between expectations and custom to pleadings in relation to FET clauses that have clear textual links to custom. It remains to be seen whether states will now abandon their position on unqualified FET clauses and custom or will instead seek to sidestep the *Certain Iranian Assets* decision, perhaps by recalling that it related only to the Treaty of Amity and that its binding effect is confined to the USA and Iran under Article 59 of the ICJ Statute.

What, then, does the evidence in pleadings suggest about states' support for the view that customary international law protects investors' legitimate expectations? The survey of state pleadings conducted for this article reveals that at least 23 states have argued both that the FET clause in the relevant treaty reflects the customary minimum standard and that protection of investors' legitimate expectations is a legal obligation under the treaty clause (and, therefore, under custom). At least six of those states (Czechia, Ecuador, Slovakia, Spain, Turkey and Turkmenistan) have made this argument in more than one case. In *Gosling v. Mauritius*, for example, Mauritius argued that the FET clause in the UK-Mauritius BIT[163] was connected to custom[164] and that

[160] Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran (signed 15 August 1955, entered into force 16 June 1957, terminated 3 October 2019) 284 UNTS 93.

[161] At least three of the judges in *Certain Iranian Assets*, *supra* note 156 – Peter Tomka, Abdulqawi Ahmed Yusuf and Ronny Abraham – have had some experience as arbitrators in investment treaty proceedings. They were therefore likely to have been aware of the extensive debates on the relationship between FET and the customary minimum standard. Despite this, the Court felt able to dismiss the debates in a single sentence.

[162] The Court offered no comment on where states should look instead. The Court did hold that FET included the (presumably customary) prohibition against denial of justice, but it seemingly did so only the basis that the parties agreed on this point: *Certain Iranian Assets*, *supra* note 156, para. 142. The Court also found that FET included protection against unreasonable or discriminatory measures, but this finding was influenced by the fact that the treaty specifically provided this latter protection in the same clause as the FET guarantee: *Ibid.*, para. 144.

[163] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Mauritius for the Promotion and Protection of Investments (signed 20 May 1986, entered into force 13 October 1986).

[164] Even though Art. 2(2) of the BIT did not make any express textual link to custom.

'it is generally accepted that international law does recognize a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation'.[165] In *Indian Metals & Ferro Alloys v. Indonesia*, the respondent state argued that 'the FET standard … is intended to reflect the customary international law minimum standard of treatment' and that FET protected expectations based on 'a specific commitment made by the host State that is reasonable in light of the circumstances and relied upon by the investor when deciding to invest or making the investment'.[166] For those states, their pleadings represent both state practice and *opinio juris* on this issue.

At least 19 states have argued in at least one case that FET protects expectations, but their view on the connection between FET and custom was unclear from the available material. As discussed above, there is almost no evidence of any respondent state clearly rejecting the view that the FET clause in the treaty under consideration was connected to custom. These 19 states can therefore also be included if it is assumed that their view aligns with the apparently near universal state view that FET reflects custom.

At least 20 states, meanwhile, have argued in at least one case directly against the suggestion that the customary minimum standard protects investors' legitimate expectations. Probably the most well known of these is the USA, which has frequently argued that it is 'aware of no general and consistent State practice and *opinio juris* establishing an obligation under the minimum standard of treatment not to frustrate investors' expectations'.[167] Some of these states (Bolivia, Colombia, Poland, Ukraine, Uruguay and Venezuela), however, have also argued in favour of the rule in other cases. Uruguay, for example, resisted a claim of frustrated expectations in 2014 on the facts 'even if legitimate expectation were to apply', suggesting a primary case that no such doctrine existed under custom.[168] In a different case in 2022, Uruguay appeared to argue only on the facts without the 'even if' caveat, implying that it now accepted that a legal obligation on expectations existed under custom.[169] Ukraine and Bolivia also rejected the obligation in earlier pleadings but accepted it in more recent pleadings, suggesting a similar shift in their position over time. The earlier practice of these three states against the rule could therefore arguably be discounted.

Colombia, Poland and Venezuela do not fit this pattern though. Colombia's pleadings arguably offered some support for the rule in 2018[170] but fairly clearly rejected it in 2017, 2019 and 2020.[171] Poland has vacillated, arguing in 2006 and in October

[165] *Gosling*, *supra* note 157, para. 179. The clause did 'not require treatment beyond the customary international law minimum standard of treatment'.

[166] PCA, *Indian Metals & Ferro Alloys Limited v. Indonesia – Award*, 29 March 2019, PCA Case no. 2015-40, paras 205, 209.

[167] See, e.g., ICSID, *Riverside Coffee LLC v. Nicaragua – Submission of the United States of America*, 15 March 2024, ICSID Case no. ARB/21/16, para. 17, citing Dumberry.

[168] *Philip Morris*, *supra* note 157, paras 376 (on expectations), 314 (on FET and custom).

[169] ICSID, *Latin American Regional Aviation Holding S de RL v. Uruguay – Award*, 13 February 2024, ICSID Case no. ARB/19/16, para. 658 (citing pleadings from 2022).

[170] ICSID, *América Móvil SAB de CV v. Colombia – Award*, 7 May 2021, ICSID Case no. ARB(AF)/16/5, paras 117–121 (citing different pleadings from 2018–2020).

[171] ICSID, *Glencore International AG v. Colombia – Award*, 27 August 2019, ICSID Case no. ARB/16/6, para. 1204 (citing pleadings from 2017); *Eco Oro*, *supra* note 49, para. 732 (citing pleadings from 2019); *Red Eagle*, *supra* note 123, para. 240 (citing pleadings from 2020).

2016 that legitimate expectations were not 'cognizable under the customary international law standard'[172] but arguing in April 2016 and in 2019 that the minimum standard protected 'basic, legitimate and reasonable expectations'.[173] Venezuela has similarly gone back and forth over time. These discrepancies may potentially reflect states' differing capacities to coordinate arguments with different external legal counsel in each proceeding.[174]

Apart from inconsistencies over time, there are other limitations on the argument considered in this section. In many cases surveyed, as noted, the state's pleadings are not publicly available. The state's view of the connection between FET and the minimum standard, and its view of legitimate expectations, were therefore often found by examining the description of the state's pleadings in the relevant tribunal decision. Sometimes, the state's pleadings on these issues were barely described at all by the tribunal but were merely briefly acknowledged. While it is perhaps unlikely that a tribunal's description (however long or short) of a party's arguments would be inaccurate, the description may omit some relevant nuance. The support for – and the opposition to – a customary rule protecting investors' expectations, therefore, may well be stronger or weaker than indicated by the figures presented here.

Even if the present figures are an accurate reflection of states' views, though, the result is likely not enough to claim that the rule is now established. At its strongest, on a somewhat crude tallying of states for and against, the result is 39–15.[175] The formation of a new customary rule is usually said to require widespread, concordant and consistent practice.[176] Although universal practice is not required, some sufficiently large number of states must follow the practice, out of a sense of legal obligation, before it can be recognized as a customary rule according to the orthodox test.[177] This poses a clear problem for the argument in this section: even if 39 diverse states have accepted legitimate expectations as part of the customary minimum standard, this is far from representing widespread state practice. Moreover, this favourable state practice must be balanced against the 15 states that have explicitly rejected a customary obligation of legitimate expectations.[178] In light of the divergences, it cannot be concluded that all states are presently obliged to protect investors' legitimate expectations under customary international law.

However, international law recognizes the possibility of special custom, applying not to all states but only between those states accepting the rule in issue.[179] Rules of

[172] ICSID, *Cargill, Inc. v. Poland – Final Award*, 29 February 2008, ICSID Case no. ARB(AF)/04/2, para. 436; see also UNCITRAL, *Manchester Securities Corporation v. Poland – Award*, 7 December 2018, para. 201.

[173] SCC, *GPF GP Sarl v. Poland – Award*, 29 April 2020, SCC Case no. V 2014/168, para. 513; see also PCA, *Horthel Systems B.V. v. Poland – Award*, 16 February 2017, PCA Case no. 2014-31, paras 224, 238 (indicating that Poland accepted in its April 2016 submissions that FET protected expectations).

[174] Polanco Lazo, *supra* note 139, at 574, 578.

[175] Assuming that states with unclear pleadings on FET and custom are added to the supporting side, that the opposition from Bolivia, Ukraine and Uruguay is discounted as discussed above, that Colombia's practice counts against the rule and that the inconsistent pleadings from Poland and Venezuela are disregarded.

[176] ILC, *supra* note 115, Conclusion 8.

[177] *Ibid.*, Conclusion 2.

[178] *Ibid.*, Conclusion 8, commentary para. 5.

[179] Attempts to establish such rules, however, have so far failed on the facts: J. Crawford, *Brownlie's Principles of Public International Law* (9th edn, 2019), at 28.

special custom – sometimes called 'particular' or 'regional' custom – have usually been contended to arise between states having some geographical relationship (for example, the purported institution of diplomatic asylum in Latin America, or fishing rights along a border river).[180] But 'there is no reason in principle why a rule of particular customary international law could not also develop among States linked by a common cause, interest or activity other than their geographical position'.[181] Indeed, one author has suggested that legitimate expectations might constitute such a rule of special custom, binding any states around the world (perhaps 'linked by a common … interest' in investment protection) that have manifested acceptance of it. Pointing to recognition of the doctrine of legitimate expectations in pleadings by Bulgaria, Chile and Czechia, Paparinskis has briefly contended that these states might have created a special customary rule applicable in relations between these states (thus including these states' treatment of each other's nationals).[182]

As noted above, the survey of pleadings conducted for this article reveals that support for a customary obligation extends far beyond the three states identified by Paparinskis.[183] Evoking the idea of regional custom, support appears to cluster in the Eastern Hemisphere, comprising 33 of the 39 states accepting the obligation. By contrast, the survey reveals that there is distinct opposition to the obligation in the Western Hemisphere (12 of the 15 states opposing the obligation; of the 18 Western Hemisphere states pleading on the obligation, two-thirds were therefore opposed). Unlike, perhaps, customary obligations relating to geographical features that might logically find more support in particular regions of the world,[184] there is no apparent reason why support for an obligation of protection of legitimate expectations would be expected to differ across geographical regions. Differentiation might perhaps be expected between traditionally capital-importing and capital-exporting states; the latter might more readily support a customary rule seeming to offer additional protection to outward investors. However, these two categories do not easily map onto the Western and Eastern Hemispheres respectively.

The most likely explanation for the difference stems from the fact that Canada and the USA took an early position in their pleadings against protection of legitimate expectations under the customary minimum standard reflected in Article 1105 of NAFTA,[185] maintaining this position in later cases.[186] As Canada and the USA were

[180] ILC, *supra* note 115, Conclusion 16, commentary paras 4–5.

[181] *Ibid.*, para. 5.

[182] Paparinskis, *supra* note 19, at 254.

[183] *Cf.* Ostransky, *supra* note 32, at 348 ('[o]ne should not, however, make much of this acceptance [of legitimate expectations in pleadings on custom] by a few disparate states [the three states identified by Paparinskis] in the context of arbitration proceedings').

[184] Such as the sea, the Arctic or the Antarctic, where landlocked or equatorial states might have less interest in the relevant rules.

[185] UNCITRAL, *United Parcel Service of America, Inc. v. Canada – Government of Canada Counter-Memorial*, 22 June 2005, para. 942; UNCITRAL, *Glamis Gold, Ltd v. USA – Counter-Memorial of the Respondent United States of America*, 19 September 2006, at 230. But see even earlier arguments in Argentina's February 2004 Counter-Memorial. ICSID, *Azurix Corp. v. Argentina – Award*, 14 July 2006, ICSID Case no. ARB/01/12, paras 18, 336.

[186] See, e.g., UNCITRAL, *Grand River Enterprises Six Nations Ltd v. USA – Counter-Memorial of the Respondent United States of America*, 22 December 2008, 96; ICSID, *Mobil Investments Canada Inc. v. Canada – Government*

generally successful in spreading NAFTA's wording (including the textual connection between FET and customary international law) to their other treaties,[187] many of which were with South American and Central American states, NAFTA's position on legitimate expectations also appeared to be adopted by those other states. Thus, respondents and non-disputing party submissions in cases under the DR–CAFTA,[188] and under US and Canadian agreements with Peru and Colombia,[189] repeated the NAFTA states' position in their pleadings.

Regardless of any regional element, though, this section demonstrates that the rule on protection of investors' legitimate expectations has a plausible basis as a rule of special custom, binding at least 39 states *inter se* on its strongest account.

7 Conclusion

The arbitral invention of legitimate expectations may or may not be normatively justified. But a legal rule created entirely by arbitrators themselves will struggle to maintain legitimacy in a system where arbitral awards carry no formal precedential value and no real possibility of substantive review. Even if we should 'pause before sweepingly rejecting the consensus [on legitimate expectations] that [tribunals] have helped to generate',[190] tribunal rulings remain only subsidiary means for the determination of rules of international law. This suggests that a clearer basis for legitimate expectations, in terms of the traditional sources of international law, is essential if this rule is to remain central to modern investment law.

This article concludes that the most plausible and practically useful legal basis on which legitimate expectations can currently be grounded is as a rule of special custom, binding those states that have manifested acceptance of it. This conclusion contrasts with the typical justification in the literature of legitimate expectations as a general principle of law.[191] Although the general principles justification would apply to all states and is thus more systemically attractive than the special custom justification,

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of Canada Counter-Memorial, 1 December 2009, ICSID Case no. ARB(AF)/07/4, para. 254. Mexico has adopted similar pleadings, although much later than Canada and the USA. See, e.g., ICSID, *Odyssey Marine Exploration, Inc. v. Mexico – Rejoinder*, 19 October 2021, ICSID Case no. UNCT/21/1, para. 389.

187 Bondy, *supra* note 22, at 220.

188 ICSID, *Teco Guatemala Holdings LLC v. Guatemala – Award*, 19 December 2013, ICSID Case no. ARB/10/23, para. 616; ICSID, *Teco Guatemala Holdings LLC v. Guatemala – Non-Disputing Party Submission of the Republic of El Salvador*, 5 October 2012, ICSID Case no. ARB/10/23, para. 14; ICSID, *Teco Guatemala Holdings LLC v. Guatemala – Non-Disputing Party Submission of the Republic of Honduras*, 15 November 2012, ICSID Case no. ARB/10/23, para. 10; PCA, *Ballantine v. Dominican Republic – Dominican Republic's Statement of Defense*, 25 May 2017, PCA Case no. 2016-17, para. 244; ICSID, *Aven v. Costa Rica – Final Award*, 18 September 2018, ICSID Case no. UNCT/15/3, para. 396.

189 ICSID, *Bear Creek Mining Corporation v. Peru – Respondent's Rejoinder on the Merits and Reply on Jurisdiction*, 13 April 2016, ICSID Case no. ARB/14/21, para. 528 (treaty with Canada); ICSID, *Gramercy Funds Management LLC v. Peru – Final Award*, 6 December 2022, ICSID Case no. UNCT/18/2, para. 733 (treaty with the USA); *Eco Oro*, *supra* note 49, para. 732 (treaty with Canada).

190 Paparinskis, *supra* note 82, at 53 (in the context of MFN rather than legitimate expectations).

191 See note 17 above.

there are doubts about its strength, as explained in the introduction. Meanwhile, although other bases (such as arguments relying on the ordinary meaning of FET or on subsequent practice) are in theory justifiable, they are likely to apply in such narrow circumstances in practice that they do not offer a useful way forward.

Rationalizing legitimate expectations as a rule of special custom suggests that critics of the investment treaty regime are, at least in some circumstances, unwarranted in their views that the doctrine is 'an interloper which ha[s] no basis in law'[192] and that awards relying on the doctrine are simply wrong and 'of no consequence'.[193] This article also reveals that the doctrine has not been developed entirely 'in disregard of the views of states',[194] as critics maintain, given the sizeable number of states explicitly supporting it. However, this conclusion further implies that, in the numerous past and future investment treaty proceedings under treaties between states not bound by the special custom, a tribunal's decision to apply a doctrine of legitimate expectations under the FET obligation will remain without any plausible formal legal basis, lending more credence to critics' views. Although problems of older treaties and path dependence amongst arbitrators pose difficulties,[195] the best course of action now for states – particularly those opposed to the doctrine – is likely to send clearer signals in new treaty text on the doctrine's status in investment law. In the meantime, demonstrating the flexibility of international law-making, states supporting the doctrine can unilaterally manifest their acceptance of it and bind themselves to the special custom, granting at least legal (if not normative) legitimacy to a concept that has been at the heart of significant controversy in investment law.

[192] Sornarajah, *supra* note 8, at 450.

[193] *Ibid.*, at 456. It is unclear whether Sornarajah's conclusion in 2020 on this point extends to the 2019 award in *Indian Metals & Ferro Alloys v. Indonesia*, where Arbitrator Sornarajah agreed that FET encompassed protection of legitimate expectations (but dissented from his co-arbitrators on the facts): *Indian Metals & Ferro Alloys*, *supra* note 166, paras 226, 250.

[194] Sornarajah, *supra* note 8, at 445.

[195] W. Alschner, *Investment Arbitration and State-Driven Reform: New Treaties, Old Outcomes* (2022).