

Proprietary Estoppel and Legitimate Expectations, *Res Judicata* in Interstate Arbitration

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Abstract

The concept of estoppel has been enshrined in international arbitration law and this is development arises from the pacta sunt servanda, abuse of rights, estoppel and acquiescence, which require disputes to be settled in good faith. The promissory estoppel is the ground which has been recognised in international arbitration and applies in interstate disputes where the Bilateral Investment Treaties (BITS) are in breach. The source of law that regulates disputes in arbitration tribunals is derived from European administrative law and relates to the principle of public bodies acting with probity and diligence in executing their functions. The doctrine of legitimate expectations emanates from public law in EU states, such as vertrauensschutz in German administrative law, which can be compared to legitimate expectations in BITs. The principles have been applied in the International Centre for the Settlement of Investment Disputes (ICSID) tribunals to provide protection for investors. In putting effect arbitral rulings, the courts have to consider if they are res judicata or merely collateral estoppel in their effect. This paper enquires the extent to which the courts will consider the arbitral rulings for their finality based on legitimate expectations and not overrule them in consideration of the doctrine of estoppel in international law.

Keywords: proprietary estoppel, legitimate expectations, BITS, state investor protection, fair and equitable treatment (FET), Energy Charter Treaty, vertrauensschutz, principe de sécurité des situations juridiques, collateral estoppel, res judicata.

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1. Introduction

The doctrine of proprietary estoppel is closely related to legitimate expectations and both are based upon clear and unambiguous promises. The doctrine of legitimate expectations has become a central tenet of international investment law.² The basis of this doctrine arose out of private actions in equity when the promise relies upon the promisor to act to their detriment and in so doing is then denied the benefit of the contract. The private remedy in equity has been extended to the commercial investment

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² Jarrod Hepburn, „The Legal Justification for the Doctrine of Legitimate Expectations in International Investment Law”, *European Journal of International Law*, 2025, chaf 017, <https://doi.org/10.1093/ejil/chaf017>.

arbitration, where the arbitration tribunal has been designated as the forum for the resolution of the issue if there is a breach of 'good faith'.³ The framework should be considered in its application to commercial and investment arbitration in the '*light of the distinction between reliance and the expectation interests established in private law*'.⁴

The concept of legitimate expectation is sometimes uses the definition of fair and equitable treatment and transparency, interchangeably, in the application of the reliance placed on the party is the promisor.⁵ It is deemed to be falling within the more overarching principle of fair and equitable treatment.⁶ According to other sources, the other 'principles' such as legitimate expectations, due process and even to some extent proportionality form aspects of the fair and equitable treatment standard in international investment law.⁷ The public law principles of legitimate expectations, based on the promise made by a public body that is part of the State infrastructure have found their way into international investment law.⁸

There are generally perceived to be two methods in which public law might impact on the interpretation of investors' rights, which are, firstly, 'it may extend those rights and sharpen their contours. Investment tribunals may deduce institutional and procedural requirements from domestic and international (public law) standards'.⁹ Secondly, the comparative public law analysis may also be used to limit an investor's right and it 'may demonstrate that certain state conduct is permitted in domestic legal systems, and thereby support the argument that the state measure at issue in an investment dispute is justified'.¹⁰

The logical connection between legitimate expectations and estoppel can be sustained before it can justify a limited explanation of legitimate expectations in civil law jurisdictions. There are different types of estoppels which can be distinguished by their application. The proprietary estoppel is specific to English private law; promissory estoppel, issue estoppel and collateral estoppel exist as defences in international law. The international arbitration case law has determined that there is a 'fair and equitable treatment principle included in international agreements for the protection of foreign investments expresses...the international law requirements of due process, economic rights, obligations of good faith and natural justice'.¹¹

There have been several circumstances in which a breach of legitimate

³ E. T. Laryea, *Legitimate Expectations in Investment Treaty Law: Concept and Scope of Application*, in Chaisse J., Choukroune L., Jusoh S. (eds), *Handbook of International Investment Law and Policy*, 2020, pp. 9–10.

⁴ Clive Lewis, "Fairness, Legitimate Expectations and Estoppel." *The Modern Law Review* 49.2 (1986): 251–258.

⁵ Ibid 255.

⁶ Ibid 256.

⁷ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2nd edition, 2012) 133.

⁸ See, *Suez et al. v. Argentina*, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, para. 203 (reasonable and legitimate expectations are important factors that influence initial investment decisions and afterwards the manner in which the investment is to be managed).

⁹ Stephan W. Schill (ed.). *International Investment Law and Comparative. Public Law*. Oxford: Oxford University Press, 2010. at 31.

¹⁰ Ibid at 32.

¹¹ *S. D. Myers, Inc. v. Government of Canada*, partial award of November 13, 2000, partial award of November 13, 2000; 134, p. 29; www.naftalaw.org.

expectations has been found based on governmental conduct; the unilateral representations of the state, which are host to a BIT; a right to a stable regulatory framework. This may create situations where the investor state is able to invoke contractual commitments and the issue that is in dispute will be adjudicated in the international investment tribunal. These need to be evaluated in order to determine the liabilities of the state in which there is investment, and that includes the expectation to be reasonable, and therefore, legitimate for the host country to have acted in a reasonable manner and to execute the terms of its contract with good faith.¹²

The International Court of Justice (ICJ) has ruled the protection of legitimate expectations under international law is a matter of principle, and has legality within the framework of investment treaty disputes. The argument was deemed by the court to be simply an effort to avoid the requirement of ‘detrimental reliance’ by Bolivia, in an estoppel, pleaded separately because it was unable to establish that it had acted detrimentally on alleged misrepresentations.¹³ The treaty-based analysis of legitimate expectations can be distinguished from ‘general international law by stating that the general international law’ contained any principle generating ‘binding obligations arising purely from a state’s legitimate expectations’.¹⁴

The references to legitimate expectations exist in arbitral awards that concern disputes, ‘between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment’. However, it has been clarified that it does imply that there is a concrete principle that ‘would give rise to an obligation on the basis of what could be considered a legitimate expectation’.¹⁵ This may be determined in arbitral awards concerning disputes between a foreign investor and the host State’ and these awards applied ‘treaty clauses providing for fair and equitable treatment’. The Court did not comment on whether an obligation to protect the legitimate expectations of foreign investors might form part of the minimum standard of treatment in customary international law, rather than the treaty clauses that it cited.¹⁶

There is literature on the subject of interstate arbitration that I have consulted in writing up this article. These is a recent text by Kidane¹⁷ which considers the transnational dispute resolution provided by investment treaty arbitration and the utility

¹² McLachlan, Shore and Weiniger argue that the ‘protection of legitimate expectations within carefully defined limits is a general principle of law, anchored in the world’s major legal systems’. C McLachlan, L Shore, and M. Weiniger, *International Law Arbitration Substantive Principle* (2nd edition, Oxford University Press, 2017) 315.

¹³ In *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection, Judgment, I.C.J. Reports 2015, p. 592 the ICJ rejected claims by the Plurinational State of Bolivia that its neighbour, the Republic of Chile, had an obligation in international law to negotiate with Bolivia on the land-locked country’s access to the Pacific Ocean. The Bolivian claim had contended that numerous statements by Chile over the years gave rise to a legitimate expectation its part that Chile would restore Bolivia’s access to the sea. The Bolivian argument that Chile’s refusal to engage in negotiations ‘frustrated the claimant’s legitimate expectations on this matter was not upheld because that would have amounted to a *pactum de contrahendo*’. Para 36.

¹⁴ It court considered international treaties as ‘binding treaties, and the ability of nations to engage freely in diplomatic discussions. It would undermine respect going forward for binding treaties and international law as a basis for regional stability, peace and co-operation in Latin America’. Ibid Para 14.

¹⁵ Para 162.

¹⁶ Jarrod Hepburn, *International Court of Justice finds no principle of legitimate expectations in general international law*, International Court Reporter, 14 October 2018.

¹⁷ Won L. Kidane, *The Culture of International Arbitration*, (2017) Oxford University Press.

of arbitration of various commercial parties. This considers their origins and the role of ‘culture in modern-day arbitral proceedings’ and a ‘detailed analysis of how cultural miscommunication could affect accuracy, efficiency, and fairness in both commercial and investment arbitration’ when the parties come together to arbitrate before a tribunal. The limitations of the text are quite obvious despite the fact that it is considered an authoritative guide to arbitration by parties who are from different cultural contexts.

The Oxford Handbook of the ‘Empirical Findings on International Arbitration: An Overview’ has a chapter authored by Drahozal¹⁸ based on analytical and empirical methodology in considering arbitration as an alternative dispute mechanism. The chapter considers the quantitative rather than qualitative empirical studies, and its spread is over ‘both international commercial arbitration and international investment arbitration’. Part I describes empirical research on the use of ‘arbitration to resolve transnational disputes to the extent to which parties use arbitration clauses in international contracts’ and their reasons for so doing. Part II examines arbitral procedures, and Part III considers the ‘applicable law in international commercial arbitration’.

The gaps in knowledge that I have identified are a lack of attention towards exploring investor state arbitration under BITS and proprietary estoppel, and extrapolating the judgments of tribunals. It lacks insight into the extent the rulings are final in the course of the disputes in international arbitration. There is a comparative element to synthesise the rules that operate in international commercial arbitration. It is already accepted that BIT arbitration has borrowed many principles that are the basis of international commercial arbitration and they need extrapolation in the arbitral framework of investment law. I have considered the international jurisdiction where BITS and the regulatory framework under the national acts that regulate arbitration and estimated the legal nature, effects, scope and legality of such acts and conveyed the reforms that are necessary to provide certainty to the investment arbitration framework. The methodology that I have adopted is empirical, which adopts an analytical and critical framework. The methods used are library research, arbitration hearings, and aggregating the vocational knowledge of arbiters, including those decisions that are appealed to the courts. The arbitration hearings are not as formal and recorded in the same manner as court hearings and the ‘black letter’ approach is not suitable. The empirical and analytical approach rejects the *lex doctrine* in sourcing materials and the research project takes into account the empirical context of the law, which would be traditionally outside the scope of legal studies. It evaluates international arbitration law that includes the norms of conduct but also the choice of law issues, the selection of forum courts, and the parties’ intentions in their own industry. This requires a researcher to ‘evaluate and substantiate a critical, qualitative analysis of legal materials’ to support findings and relate to the sum total of its conclusions.¹⁹

The road map of this paper is as follows: Part I examines the duty of good faith, moral principles and moral obligations in the law of investment arbitration and the growth of the estoppel from national law; Part II establishes the legitimate expectation is drawn from public law remedies as a fundamental principle of some European states

¹⁸ Christopher R. Drahozal, ‘Empirical Findings on International Arbitration: An Overview’, *Oxford Handbook on International Arbitration* (2016) OUP,

¹⁹ See Uwe Flick, *An Introduction to Qualitative Research*, SAGE Pub. (2006), at p. 33.

such as Germany and the relationship to international investment treaties; Part III C considers the distinction between the issue estoppel and *res judicata* in its application of arbitration treaty clauses and how they have been interpreted in the context of legitimate expectations and the doctrine of reliance in the disputes at ICSID. Part IV states that the *res judicata* decisions can be challenged by aggrieved parties if estoppel can be successfully pleaded that raises the issue of legitimate expectation of investors based on the quantum and merit in the claims of diminishing investment as a consequence of regulatory change.

2. Doctrine of Estoppel in International Law

The concept of estoppel typically signifies equitable estoppel, which prevents a party from enjoying rights and benefits under a contract while at the same time avoiding its burdens and obligations. The concept of estoppel has to be distinguished from the doctrine of collateral estoppel, similarly, derived from common law. This can be distinguished from collateral estoppel, which is a rule on par with *res judicata*, while not as stringent, that prevents parties from litigating an issue already effectively decided in a previous proceeding. In the international investment law context, estoppel could be defined as a legal response to prevent inconsistent behaviour, but not to create rights. It is recognised under international law through four doctrinal concepts: recognition, acquiescence, waiver and estoppel'. These originate in the concept of *good faith*. The consequence is that interferences between the two notions (estoppel and *bona fide*) have led to the determination that the party against whom estoppel is raised ought to have acted in bad faith for the doctrine to apply.

In arbitration "Traditionally, the principle of equitable estoppel was used to compel a non-signatory to arbitrate because the non-signatory had previously claimed that other provisions of the contract should be enforced to benefit him".²⁰ The doctrine of issue estoppel has been used to elevate the enforcement of the arbitration clause on the same principles as good faith as a component, such as in treaties between states and the Vienna Convention of 1969, which protects the international transactions that may underpin bilateral agreements.²¹ The element in international investment law upholds the duty of good faith, which is incorporated in arbitration clauses when a contract is made between a state party and the investing concern.²²

The collateral estoppel prevents additional litigation of similar issues that were within previously resolved in prior cases. In order to invoke the collateral estoppel, which is also known as issue preclusion infers that the determination of an issue by a

²⁰ Alexandra A. Hui, *Equitable Estoppel and the Compulsion of Arbitration*, 60 Vanderbilt Law Review 711 (2019) Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol60/iss2/14>.

²¹ While the precise nature of the bona fide principle is still debated, arbitral tribunals refuse to accept it an autonomous source of legal obligations. The principle is still debated and arbitral tribunals refuse to accept it as an autonomous source of legal obligations (for example, *Pact Sunt Servanda*, per Article 26 Vienna Convention of the Law of Treaties (VCLT 1969) and its process of treaty interpretation per Articles 31–32.

²² S. Đajić, *Mapping the Good Faith Principle in International Investment Arbitration: Assessment of its Substantive and Procedural Value*, in Novi Sad Faculty of Law Serbia, Collected Papers XLVI, 3/2012; Also see E De Brabandere, 'Good Faith', 'Abuse of Process' and the Initiation of Investment Treaty Claims, in Journal of International Dispute Settlement, Vol. 3 (3), 2012. Also see AR Ziegler, and J. Baumgartner, *Introduction*, in Andrew D. Mitchell, M. Sornarajah and Tania Voon, *Good Faith and International Economic Law*, Oxford University Press, 2015, p. 11.

prior court ruling is “conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation”.²³ These concepts often arise in arbitration proceedings and ruled upon in order to preserve the finality of arbitral rulings.

The principle of estoppel is now a firmly established rule in investment treaties and is applied in an increasingly wide variety of contexts in international investment arbitration. Contemporary practice shows that arguments about estoppel appear in “more diverse contexts” of a dispute about international trade or contractual rights involving goods or services.²⁴ The concept of estoppel has been used extensively in commercial arbitration between State and non-State parties and the good faith principle is a central tenet of transactions.²⁵ The remedies developed by arbitral tribunals “are not evidence of States’ practice to form a rule of custom under international law” but contribute significantly, in “the development of customary international law”, when arbitrators “confirm and clarify the content of such rules” and “States’ practice and the *opinio juris* exist rests with the arbitral tribunal”.²⁶

In general, international law rules such as ‘*pacta sunt servanda*’, abuse of rights, estoppel and acquiescence and the negotiation of disputes are grounded, to some extent, in good faith’.²⁷ This can be extended by incorporation into contract law, where it may be deemed as part of negotiating a valid agreement that leads to its acceptance in arbitral proceedings.²⁸ It has been asserted that ‘*Acquiescence and estoppel ascribe substantial legal consequences to the inactivity of a State; as such, these institutions should be restrictively interpreted and applied. They find their justification in the reasonable reliance of one State (based on good faith) on the representation or conduct of another*’.²⁹ The ‘*State has the ability to make declarations to preserve its rights and preclude the effects of tacit consent, placing the onus of action on the State that has allowed reliance and trust*’.³⁰

²³ *Bulbitz v Commissioner of Revenue* 545 NW 2D 382, 385 (Minn, 1996), <https://www.iareporter.com/articles/international-court-of-justice-finds-no-principle-of-legitimate-expectations-in-general-international-law>.

²⁴ Jo Braithwaite, „The origins and implications of contractual estoppel”. *Law Quarterly Review*, Vol. 13, 2. (2016) pp. 120–147.

²⁵ In *Texaco Overseas Petroleum Co v Libya* Int’l Arbitral Award, 104 J. Droit Int’l 350 (1977), translated in 17 I.L.M. 1 (1978), the International Court of Justice stated that where a ‘host state had made particular commitments to foreign investors that their position would be guaranteed or maintained, the commitment would give rise to legal obligations for the state’. Para 470.

²⁶ Patrick Dumberry, „The Role and Relevance of Awards in the Formation, Identification and Evolution of Customary Rules in International Investment Law”, *Journal of International Arbitration*, Vol. 33, 3 (2016) 269–287, <https://doi.org/10.54648/joia2016015>.

²⁷ Steven Reinhold, „Good Faith in International Law”, 2013. *UCL Journal of Law and Jurisprudence*, 2 (1) pp. 40–63. 10.14324/111.2052-1871.002.

²⁸ Article 7(1) of the Vienna Convention on Contracts for the International Sale of Goods 1980 states (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. <https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>.

²⁹ Marques Antunes, *Acquiescence*, In the Max Planck Encyclopedia of Public International Law (MPEPIL), para. 24. Oxford University Press, 2021. On the historical evolution of international arbitration law see I. C. MacGibbon, ‘Estoppel in International Law’, *International and Comparative Law Quarterly* 7, no. 3 (1958): 468–513.

³⁰ See generally on the standards for these actions or ‘pleas’ and on the difference between voluntarist and objective approaches to acquiescence, see Sophia Kopela, ‘The Legal Value of Silence as State Conduct in the Jurisprudence of International Tribunals’ (2010) 29 *Australian Year Book of International Law* 87, 88,

The implication is that of determination within the framework of international arbitration law as to whether the investment tribunals decide consistently and if the decisions are in accordance with international investment law. The legal reasoning based on the frequency and recognition of estoppel claims in international investment arbitration has become significant, with more cases coming up for arbitration. The BITS are still the predominant form of investment arbitration and its regulatory framework is necessary to understand where legitimate expectations are pleaded and where collateral estoppel is a concept that is applied in the arbitral rulings that are *res judicata*.³¹

It has become necessary because the majority of arbitrators in investor-state arbitration do not specialise in administrative law that is part of the structure of international arbitration law; and that ‘currently applicable mechanisms of adjudicating complex administrative law issues in practice are not satisfactory’.³² The advancement needs to be provided that can consist of the public law dimension of the framework of the investor-state treaty that needs to ingrain more specialised and trained arbitrators. This thesis will ascertain the impact of rulings in international investment tribunals, estoppel, *res judicata* and its intersection with international arbitration law.

The promissory estoppel is frequently invoked in international contracts and each party may employ estoppel in order to prevent the other side from asserting a claim including that of procedural matters, admissibility, jurisdiction, liability or quantum.³³ The legal reasoning based on the frequency and recognition of estoppel claims in international law.³⁴ In prescribing the equitable remedy, the existence of clear conscience will suffice if the court decides that it applies to the pre-contractual conduct or negotiations leading to the contract.³⁵

The consensus of the jurists is that arbitral tribunals do not offer a general principle of issue estoppel as a source of their jurisdiction.³⁶ Article 38 (1) (c) of the Statute of the International Court of Justice does not recognise *cause of action* or *issue estoppel*, which means that there is no customary rule framing *estoppel* as binding in law.³⁷ The evidence is not conclusive and the assertion that it is a general principle is

27–30.

³¹ ICSID, *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina*, Decision on Argentina’s Request for Annulment of the Award, 3 August 2010, ICSID Case no. ARB/97/3, paras 212–216; ICSID, *RSM Production Corporation et al v. Grenada*, Final Award, 7 December 2010, ICSID Case no. ARB/10/6, paras 7.1.1 – 7.1.3; *Chevron Corporation and Texaco Petroleum Company v. Ecuador*, First Partial Award on Track I, 17 September 2013, PCA Case no. 2009–23, para. 47.

³² Vuk Cucić, „Administrative Law Challenges in Investor-State Arbitration”, *Journal of International Arbitration*, Volume 41, Issue 5 (2024) pp. 623–646.

³³ Andreas Kulick, „About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals”, *European Journal of International Law*, Volume 27, Issue 1, February 2016, Pages 107–128, <https://doi.org/10.1093/ejil/chw003>.

³⁴ The basis for promissory estoppel and its significance has been incorporated in the arbitral rules contained in Article 42 of the ICSID Convention.

³⁵ Steven Reinhold, *op. cit.*, p. 45.

³⁶ Charles T. Kotuby Jr. and Luke A. Sobota, *General Principles of Law and International Due Process. Principles and Norms Applicable in Transnational Disputes* (Oxford University Press 2017), footnote 262, p. 200. Such a conclusion (that *estoppel* is not a general principle of law) is in accordance with one of the major views in international legal relations as to what constitutes a general principle of law: one ‘which can be derived from a comparison of the various systems of municipal law, and the extraction of such principles as appear to be shared by all, or a majority, of them [emphasis added]’, Hugh Thirlway, *The Sources of International Law. Second Edition* (Oxford University Press, 2019), p. 108.

³⁷ Christopher Brown, ‘A Comparative and Critical Assessment of Estoppel in International Law’,

also unproven by the case law. The positioning of estoppel as a principle to be applied when the negotiating position of the parties is asymmetrical and in the international contract the duty of good faith is implied because the parties need to demonstrate ‘reasonable regard’ for the other’s rights and interests. The basis for promissory estoppel and its significance has been incorporated in the arbitral rules contained in Article 42 of the ICSID Convention.³⁸ The disputes that arise in international commercial disputes and lead to arbitration often concern investment treaties.

3. Promissory Estoppel in National Law

The cause of action of contractual estoppel is integral to investment clauses and the origins can be found in the statutory law that governs contracts. Section 3 of the Misrepresentation Act 1967 provides, ‘Any term of a contract which attempts to exclude or restrict liability for pre-contractual misrepresentations or which tries to limit the remedies available for misrepresentation will be of no effect save to the extent that it satisfies the requirement of reasonableness’.³⁹ This needs a distinction between *exclusion clauses* (which must be reasonable) and *basis clauses* by which the parties were conducting business, rather than having been included as a means of evading liability. The basis clauses operate by way of contractual estoppel and are standard in investment bank correspondence.⁴⁰

The nature of estoppel in English law has its focus on two main points, firstly, the ‘factual circumstances in which estoppel may be brought into play in international commercial arbitration’, which implies that arbitrators in formulating definitions and concepts of estoppel may need to consider terminologies of different, albeit related, principles designed for different circumstances.⁴¹ Secondly, the ‘complexities of estoppel in English law highlight the dangers of the comparative method of formulating

University of Miami Law Review [Vol. 50:369 1996], 384–385; Pan Kaijun, ‘A Re-Examination of Estoppel in International Jurisprudence’, 16 *Chinese Journal of International Law* (2017), 751–786, <https://doi.org/10.1093/chinesejil/jmy001>.

³⁸ Article 42: (1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

³⁹ This is subject to the requirement of reasonableness set out in Unfair Contract Terms Act. Art. 77 Section 11 (1) states that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

⁴⁰ In *First Tower Trustees Ltd v CDS (Superstores International) Ltd* (2018) EWCA Civ 1396 the Court accepted the distinction in principle, but emphasised that if in fact there is reliance on a pre-contract misrepresentation, no amount of drafting can stop section 3 applying. This was because ‘*Although a non-reliance clause may create a contractual estoppel (by which the parties agree to accept a particular state of affairs even if they know that state of affairs to be untrue), this does not prevent consideration of whether the clause is an exclusion of liability for misrepresentation. The non-reliance clause was an exclusion clause as it sought to exclude a liability that would otherwise be there. As it had the effect of excluding liability for misrepresentation, it would be void (under section 3 of the Misrepresentation Act 1967) unless it satisfied the requirement of reasonableness under section 11 of the Unfair Contract Terms Act 1977*’, at 107.

⁴¹ Paul Bowden, *L’interdiction des se contredire au détriment d’autrui (estoppel) as a Substantive Transnational Rule in International Commercial Arbitration*, in: Gaillard (ed.), *Transnational Rules in Commercial Arbitration* (ICC Publ. Nr. 480.4), Paris 199, at 125 et seq.

substantive transnational principles'.⁴²

The contribution of equity is the notion of 'fairness in public law and is the context for substantive legitimate expectations in English law'.⁴³ However, as 'a substantive legitimate expectation deals with obligations, there is a sense of reciprocal consideration' and a 'moral obligation cannot amount to a legitimate expectation and therefore, conceptualising "lawful" promises is therefore essential'.⁴⁴ The notion of moral obligation has to be distinguished from a trust that does not create legal relations, such as in promissory estoppel, because it is based on 'protecting expectations, which the individual has decided to entertain at his own risk'.⁴⁵

There is no duty of good faith stipulated in English contract law.⁴⁶ The implied terms are those contractual provisions which were not but have been applied by either courts or by statute in order to circumvent the lack of certainty in the formation of contractual rights. In arbitration the commercial parties need to be aware that there is no specific term for what is a fair or an 'equitable reduction in hire purchase'⁴⁷ or a reasonable estimate in 'concluding an exchange of merchandise'.⁴⁸ When parties use '*Such language in a contractual document, they can be taken to intend that, if they cannot agree with each other on what is fair, equitable or reasonable in circumstances that arise, they wish that evaluation to be made by an independent adjudicator*'.⁴⁹

It is upon the breach of the contractual terms that the promissory equitable arises and there is redress available in the courts. In prescribing the equitable remedy, the existence of clear conscience will suffice if the court decides that it covers the pre-contractual conduct or negotiations leading to the contract.⁵⁰ The promissory estoppel is frequently invoked in international investment arbitration and each party may employ estoppel in order to prevent the other side from asserting a claim including that of procedural matters, admissibility, jurisdiction, liability or quantum.⁵¹ The legal reasoning based on the frequency and recognition of estoppel claims in international investment arbitration has become significant, with more cases coming up for arbitration.⁵²

Contemporary practice shows that arguments about estoppel appear in the context of a dispute about international trade or contractual rights involving goods or

⁴² Ibid.

⁴³ David Sykes, *Promises, promises*, January 19, 2017, The Local Government Lawyer, <https://localgovernmentlawyer.co.uk/governance/314-governance-a-risk-articles/33049-promises-promises>.

⁴⁴ Ibid

⁴⁵ Bailey H. Kuklin, „The Plausibility of legally protecting reasonable expectations,” 32 *Valparaiso University Law Review*, (1997) 22,

⁴⁶ *Pakistan International Airline Corporation (Respondent) v Times Travel (UK) Ltd (Appellant)* [2019] EWCA Civ 328.

⁴⁷ *Didymi Corp v Atlantic Lines and Navigation Co Inc* [1988] 2 Lloyd's Rep 108.

⁴⁸ *Lehman Brothers Special Financing Inc v National Power Corp* [2018] EWHC 487 (Comm).

⁴⁹ George Leggatt, (Lord Justice of Appeal) *Negotiation in Good Faith: Adapting to Changing Circumstances in Contracts and English Contract Law*, Jill Poole Memorial Lecture Aston University: 19 October 2018, p. 6, <https://www.judiciary.uk/wp-content/uploads/2018/10/leggatt-jill-poole-memorial-lecture-2018.pdf>.

⁵⁰ Steven Reinhold, *op. cit.*

⁵¹ Andreas Kulick, „About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals”, *European Journal of International Law*, Volume 27, Issue 1 February 2016, pp. 107–128, <https://doi.org/10.1093/ejil/chw003>.

⁵² *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6 (2010).

services. The concept of estoppel has been used extensively in commercial arbitration between State and non-State parties and the good faith principle is a central tenet of transactions. The remedies developed intend to strike a balance between individual interests and state interests and the ‘core task’ of investment treaty arbitration.⁵³ This brings into the arbitration proceedings the transnational values of estoppel and dispute resolution that have a special character, which underpins the equitable principles in investment treaties.

While general common law principles may inform and have impacted the ‘interpretation or application of fair and equitable treatment’, which can be seen as suitable ‘for the operation of such principles’.⁵⁴ Moreover, the notion that ‘investment law may benefit from an approach based on comparative public law’ has been promoted by ‘in scholarly work’,⁵⁵ and also in ‘arbitral rulings’.⁵⁶ There are several ‘investment treaties or treaty models now expressly recognise that domestic law concepts’ have achieved the level of ‘general principles’ are ingrained in the ‘text of investment protection standards’, including the abstractly conceived ‘fair and equitable’ approach.⁵⁷ Therefore, it makes it necessary to examine the legitimate expectations of civil law countries and the extent to which they give traction to the principle of reliance that is

⁵³ Campbell McLachlan, ‘Investment Treaty Arbitration: The Legal Framework’ in Albert Jan van den Berg (ed), *50 Years of the New York Convention: ICCA International Arbitration Conference* (Kluwer 2009) 101.

⁵⁴ See Tarcisio Gazzini, ‘General Principles of Law in the Field of Foreign Investment’, 10 *Journal of World Investment & Trade* 103, 112 (2009). See also Campbell McLaughlin, Laurence Shore & Matthew Weinger, *International Investment Arbitration. Substantive Principles*, Oxford: Oxford University Press, 2007, 259 (noting that the term fair and equitable treatment is ‘expressive of “general principles of law common to civilised nations”, within the meaning of Article 38 (1), letter c) of the Statute of the International Court of Justice’); Roland Klager, *Fair and Equitable Treatment in International Investment Law*, Cambridge: Cambridge University Press, 2011, 271–273.

⁵⁵ See in particular Stephan W. Schill, *op. cit.*, p. 31. See also Francisco Orrego Vicuña, ‘Foreign Investment Law: How Customary Is Custom?’ In *Proceedings of the Annual Meeting* (American Society of International Law), vol. 99 (2005): 97–100. (‘... in the light of a number of recent decisions, “fair and equitable treatment” is not really different from the legitimate expectations doctrine as developed, for example, by the English courts and also recently by the World Bank Administrative Tribunal. International law is not unaware of major domestic legal developments, particularly when the rights of citizens are entangled in promises made by their governments and the citizens have in good faith relied upon them. Whether this standard may be developed beyond foreign investments or international administrative law is just a question of time. The common standard thus continues to evolve’).

⁵⁶ In *Total S.A. v. Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, para. 111 (‘A comparative analysis of what is considered generally fair or unfair conduct by domestic public authorities in respect of private firms and investors in domestic law may also be relevant to identify the legal standards under BITs’). This passage was quoted with approval by the tribunal in *Toto Construzioni Generali S.p.A. v. Lebanon*, ICSID Case No. ARB/07/12, Award, 7 June 2012, para. 166, which added that ‘[t]he fair and equitable treatment standard of international law does not depend on the perception of the frustrated investor, but should use public international law and comparative domestic public law as a benchmark’.

⁵⁷ See U.S. Model BIT of 2004 (on which all subsequent U.S. BITs and FTAs with an investment chapter are modelled), and U.S. Model BIT of 2012, Art. 5(2)(a) (defining fair and equitable treatment as including ‘the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world’, emphasis added); China-New Zealand FTA (2008), Art. 143, available at <http://www.chinafta.govt.nz> (‘Fair and equitable treatment includes the obligation to ensure that, having regard to general principles of law, investors are not denied justice or treated unfairly or inequitably in any legal or administrative proceeding affecting the investments of the investor’, emphasis added).

included in their administrative law. This will provide insight to the extent it influences international investment law and estoppel as the remedy.

The domestic administrative law standard of legitimate expectations has been introduced into international investment law through the medium of good faith. In *Tecnicas Medioambientales Tecmed S. A. v. United Mexican States*,⁵⁸ there was a Spanish-Mexico BIT for investment in Mexico by a multi-national Spanish company, Tecmed, which had two Mexican subsidiaries. The companies brought a claim against Mexico alleging several violations of the Spain-Mexico BIT. These violations concerned Tecmed's investment in a water irrigation system acquired previously and it argued that the 'arbitrary and unverifiable decision of Mexico', the investment was dissipated and its economic value was became negligible with the 'consequent negative impact on the Claimant's capacity to expand and develop its activities in Mexico'.⁵⁹

The Tribunal referenced the *James and others v. the United Kingdom* (Application No. 8793/79 21 February 1986, at the European Court of Human Rights and stated, '*not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim 'in the public interest, but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised... The requisite balance will not be found if the person concerned has had to bear "an individual and excessive burden" ... The Court considers that a measure must be both appropriate for achieving its aim and not disproportionate thereto*'.⁶⁰

The Tribunal held that Mexico's expropriation constituted an expropriation and also violated its "fair and equitable treatment" obligation, which breached Article 4 (1) of the treaty. The tribunal stated that "the good faith principle established by international law requires" the host to provide the facility that does not "affect the basic expectations that were taken into account by the foreign investor to make the investment". This obligation included the commitment for the State "to act consistently, i.e. without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor" to carry out its obligations and to further its "business interests". Further, the investor would utilise the "legal instruments" that regulate the venture in "conformity with the function usually assigned to such instruments" and for the default there had to be "required compensation".⁶¹

The judgment in *Tecnicas* is not an absolute standard in arbitration where the legitimate expectations are pleaded. There is subsequent case law which has qualified that ruling, which has set out a more balanced test in interstate arbitration where BITS are concerned. In *Lemire v. Ukraine*,⁶² there was a BIT between the USA and Ukraine Concerning the Investment and Reciprocal Protection of Investment signed in 1996. An American citizen, Lemire claimed a breach of the broadcasting licenses and regulatory procedures in Ukraine based on Article VI of the BIT that entitled any national of a State party to the BIT to submit to ICSID any dispute with the other State party to the BIT.⁶³

⁵⁸ ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003.

⁵⁹ Para 45.

⁶⁰ Para 50.

⁶¹ Para 154.

⁶² ICSID Case No. ARB/06/18.

⁶³ Para 70.

The Tribunal interpreted the legitimate expectations to arise in the course of its interpretation of Article II.3 of the BIT, which “plays a subsidiary role as a normative criterion”⁶⁴. The standards enshrined in this provision or in the BIT were still interpreted in accordance with the Vienna Convention Article 31.1, which provided that terms used in a treaty must be construed “in their context”. It cross-referenced the preamble of the BIT, which establishes “that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment...” and concluded that the FET standard was closely tied to the notion of legitimate expectations.⁶⁵

The Tribunal attributed Lemire’s legitimate expectations could be defined on a general and on a specific level, which on a “general level, the Tribunal found that the Claimant was entitled to expect that the Ukrainian regulatory system for the broadcasting industry would be consistent, transparent, fair, reasonable, and enforced without arbitrary or discriminatory decisions”.⁶⁶ The Tribunal ventured that the application of “legitimate expectations were not based on an individual negotiation between Lemire and the Ukrainian State; they represent the common level of legal comfort, which any protected foreign investor in the radio sector could expect.”⁶⁷

The ICSID stated that the promotion of “greater economic cooperation between the parties to object and purpose in Article 11.6” was interpreted to be in accordance with “the promotion of Ukraine’s cultural inheritance, a purpose which is compatible” with its relevant provision.⁶⁸ The presumption was that Ukraine had an “inherent right” to organise its own affairs and promulgate laws to “protect the common good of its people” and that included strengthening the “cultural significance and national identity”.⁶⁹ The Tribunal awarded the “moral damages finds that excessive or disproportionate efforts” in his effort to obtain administrative licences, which were part of payment for the obligations on the state.⁷⁰

In *Glencore v. Colombia*,⁷¹ the interstate arbitration concerned ownership by C. I. Prodeco S. A., a thermal coal producer holding a concession for the Calenturitas mine in Northern Colombia. The claims arose from the Government’s alleged unlawful interference with the coal concession contract, including the launch of proceedings to challenge the validity of the amendment agreed by the parties in 2010. This was based on the imposition of royalties allegedly in excess of what is owed under the contract.

The Colombian argument was that the “Claimants’ claims are tainted by illegality” because they had been involved in “acts of corruption and bad-faith conduct”. This it was alleged deprived them of the “treaty rights” and because of the “illicit conduct”, the BIT “investments” no longer had the “protection of the Treaty and that the Centre lacks jurisdiction and Tribunal competence over such claims”.⁷² The argument was further that there was precedent that the State cannot be held liable for the State if the investor has not tried to have an “act reviewed by the competent state

⁶⁴ Para 68.

⁶⁵ Para 69.

⁶⁶ Ibid.

⁶⁷ Para 70.

⁶⁸ Para 335.

⁶⁹ Para 336.

⁷⁰ Ibid.

⁷¹ ICSID Case no ARB/16/6.

⁷² Para 84.

authority”. The investor had also not established either “harm or loss” before entering the claim.⁷³

The reference to the “local remedies not being exhausted” and it pointed to “*Generation Ukraine*, in which the tribunal found that exhaustion of local remedies” can be distinguished from the principle that a State is not negligent if there has not been an “effective attempt by the investor to have such an act reviewed by the competent State authority”.⁷⁴ The claimant had also argued that the state’s conduct with respect to the claimants’ investments, because it was ‘inconsistent and lacked transparency, lacked due process, was discriminatory, and frustrated the claimants’ legitimate expectations’.⁷⁵ The tribunal held that Colombia breached its obligations under Article 4(2) of the treaty by engaging in arbitrary and discriminatory conduct. The breach of the FET standard was sufficient to establish liability and legitimate expectations were not given consideration. The tribunal chose not to address the claimants’ additional allegations under the treaty.

The concept of fair and equitable treatment in investment treaties and protection of investor legitimate expectations is based on public law doctrines of legitimate expectations and reliance in administrative law that have been arbitrated upon at the ICSID tribunals.⁷⁶ This mandates that international arbitration has strict rules in terms of satisfying the test of legitimate expectations and if a party in a BIT does not comply with its obligations, then it will be subject to estoppel at the ICSID tribunal.

4. Integration of European Administrative Law into International Investment Treaties

The principle of legitimate expectations has developed into a general principle of EU law⁷⁷ and it has received particular recognition in the challenges to the retroactive application of laws.⁷⁸ There is also the consideration that when decisions of the EU institutions are invoked in court by the litigant based on assurances made in a promise

⁷³ Para 92.

⁷⁴ Para 335.

⁷⁵ Ibid.

⁷⁶ Phusavat Wongkaew, ‘The Transplantation of Legitimate Expectations in Investment Treaty Arbitration: A Critique’, in Shaheezal Lalani and Rodrigo Polanco Lazo (eds), *The Role of the State in Investor-State Arbitration* (2014), Leiden: Brill | Nijhoff, 75; Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, *ICSID Review – Foreign Investment Law Journal*, Volume 28, Issue 1, Spring 2013, pp. 88–122, <https://doi.org/10.1093/icsidreview/sis034>. Nitish Monebhurrun, ‘Gold Reserve Inc. v. Bolivarian Republic of Venezuela: Enshrining Legitimate Expectations as a General Principle of International Law?’ *Journal of International Arbitration* 32, no. 5 (2015): 551–564, at 553. Muthucumaraswamy Sornarajah, ‘Mutations of Neo-Liberalism in International Investment Law.’ *Trade, Law and Development* 3, no. 1 (2011): 203–231, at 223.

⁷⁷ *VEMW et al. v. Directeur van de Dienst uitvoering en toezicht energie*, C7/03, 7 June 2005, (‘The principle of the protection of legitimate expectations is unquestionably one of the fundamental principles of the Community’). para. 73; See also Stefán M. Stefánsson, *Legitimate Expectations in EC/EEA Law, in Economic Law and Justice in Times of Globalisation – Wirtschaftsrecht und Justiz in Zeiten der Globalisierung: Festschrift for Carl Baudenbacher* (Mario Monti et al, eds, 2007) (‘the principle of legitimate expectations can not only be invoked as a rule of interpretation but also as an independent source of subjective rights’). 627,628

⁷⁸ Takis Tridimas, *The General Principles of EU Law* (2006, 2nd ed.) 252–273; Paul Craig, *EU Administrative Law*. Oxford: Oxford University Press, 2006, 608–610.

made by a public body of the Community, a legitimate expectation may also arise if it is the result of precise and specific assurances given by the administration.⁷⁹ However, the European Court of Justice (ECJ) has affirmed that ‘traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained’.⁸⁰

In European Union law, the protections closely resembling legitimate expectation safeguards were deliberated in *Châtillon v High Authority*.⁸¹ The European Court of Justice (ECJ) ruled that for legitimate expectations to be met ‘*A decision must, in fact, appear as a measure emanating from the competent authority, intended to produce legal effects and constituting the culmination of procedure within that authority, whereby the latter gives its final ruling in a form from which its nature can be identified*’.⁸²

This makes it a principle that emanates from public law and it has been argued that the legitimate expectation is created by the ‘type of representation creating expectations that have come to be protected by the doctrine of legitimate expectations [...] has been protected as such in EU law, at least since the *Châtillon* case of 1966’. The ECJ has ruled in various claims that a ‘rule of protection of [...] legitimate confidence’ is a necessary element in public law transactions and is ‘a rule of protection’.⁸³

Hector A. Mairal contends that the ‘protection of legitimate expectations arising from government conduct is an important doctrine in some European legal systems and in investment arbitration’.⁸⁴ The protection offered to those who have seen their expectations defeated by an administrative decision is a procedural means of informing that the decision is overridden in order to avail an opportunity of the individual to state their case by allowing a hearing or adequate notice.⁸⁵ The protection is substantive when the decision by an administrative body is waived or, in certain circumstances, is allowed but compensatory damages are awarded.⁸⁶

This suggests that the protection of legitimate expectations in domestic legal systems is a branch of the equitable principle that has been adopted by the principle of estoppel. The process of application has been through recognising a public law remedy, which requires detrimental reliance. However, there is no identical legal concept in other

⁷⁹ See, e.g. *Kyowa Hakko v. Commission*, Case T-223/00, 9 July 2003, [2003] ECR II-2553, para. 38 (‘A person may not plead infringement of the principle [of legitimate expectations] unless he has been given precise assurances by the administration’); *Van den Bergh v. Commission*, Case T65/98, [2003] ECR II-4653, 23 October 2003, paras. 192–194.

⁸⁰ According to Paul Craig, in cases of changes of policy, ‘*A legitimate expectation may arise only if the applicant is ‘able to point either to a bargain of some form between the individual and the authorities, or to a course of conduct or assurance on the part of the authorities which can be said to generate the legitimate expectation*’’. Paul Craig, *EU Administrative Law* (2006) 637–639.

⁸¹ Case 54/65, [1966] ECR 185.

⁸² At 190.

⁸³ Geo Quinot, ‘Substantive Legitimate Expectations in South African European Administrative Law’ (2004) 5 *German Law Journal*, 65–95.

⁸⁴ See Hector A. Mairal, *Legitimate Expectations and Informal Administrative Representations*, in *International Investment Law and Comparative Public Law* (Stephan Schill ed., 2010) 413, 414.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

legal systems of the European member states. In France, the principle has not been adopted as integral to French administrative law (except in situations which fall within the scope of EU law).⁸⁷ It is understood to be incompatible with French law's complete insistence on the *Principe de sécurité des situations juridiques*.⁸⁸ The French *droit administratif* does not incorporate the protection of legitimate expectations in favour of prioritising certainty of the law as a whole.⁸⁹

This is above the private law remedy because it stems from the entitlement to legal protection from harm caused by a public authority overriding its previous recognised position, whether that be in the form of an official decision or in the form of a representation. In each instance the estoppel would arise that would imply it has breached its good faith. This principle is inherent in international arbitration law because it has the ability to exist in a bilateral treaty binding government institutions and international trading concerns.

It has been argued that the concept for granting the necessary remedy to the promise in the form of '*granting substantive protection to legitimate expectations through the enforcement of individual expectations*' when these were emanated in principle by the '*administrative authorities*'.⁹⁰ This was because the progress was based on the moral principles that had an ingrained respect for '*legitimate expectations, but often lacked a sound theoretical basis regarding the definition of the protected interest and the precise reasons for protecting it*'.⁹¹

EU states have extended the protection of the legitimate expectations of an investor under the same principles, but it is apparent that there is no similar underlying rule that meets all these purposes. It has not been confirmed whether the legitimate amounts to 'explicit assurances, or can also arise implicitly out of conduct or behaviour'. There is an indication from the 'decisions of tribunals that it is necessary that the host State has given specific assurances to the individual investor 'who has signed a treaty'. This is apparent in 'energy companies' who have been given this protection in investment by including a 'relevant clause'.⁹²

In *Infrastructure Services Luxembourg S. à r.l. and Energia Termosolar B. V. (formerly Antin Infrastructure Services Luxembourg S. à r.l. and Antin Energia Termosolar B. V.) v. Kingdom of Spain*⁹³ the ICSID tribunal decided in favour of the electricity, gas, steam and air conditioning supply. This was because the allegation was that the value of the investment had been diminished to the extent that it amounted to an expropriation. The Tribunal held that Spain had violated the Fair and Equitable Treatment obligation and also the legitimate expectations and the defence that

⁸⁷ See Christopher F. Forsyth, „The Provenance and Protection of Legitimate Expectations”, Cambridge Law Journal 47, no. 2 (1988): 238–260, at 243.

⁸⁸ Paul Reynolds 'Legitimate expectations and the protection of trust in public officials', *Public Law* 2 (2011): 330–341, at 339–341.

⁸⁹ Jürgen Schwarze, *European Administrative Law* (London: Sweet & Maxwell, 1st – English – edn, 1992) p. 869.

⁹⁰ Daphne Barak – Erez, „The Doctrine of Legitimate Expectation and the Distinction between the Reliance and the Expectation Interests”. *European Public Law*, Vol. 1, Issue 4 (2005) 583–600 at 584.

⁹¹ *Ibid.*

⁹² GM Farnelli 'Recent Trends in Investment Arbitration Concerning Legitimate Expectations: An Analysis of Recent Renewable Energies Investment Case Law', *International Community Law Review* 23 (2021): 27–56.

⁹³ ICSID Case No. ARB/13/31.

regulatory changes were necessary for economic and public policy reasons was rejected.

*'It is impossible for laws, or administrative acts, to give rise to legitimate expectations that are protected by the fair and equitable treatment standard. The standard 'comprises an obligation to afford fundamental stability in the essential characteristics of the legal regime relied upon by investors in making long-term investments'.*⁹⁴

The decision stated, 'Legitimate expectations must have an objective basis' and, consequently, cannot be abstract, such as 'based on fanciful or the result of misplaced optimism' (*Arif v Moldova*)⁹⁵. There is also inherent in the formulation of legitimate expectations that a 'requirement for the investor to have performed adequate *due diligence* before making the investment'. (*Novenergia v Spain*)⁹⁶. The award of damages was for the amount of \$124,919,200.

It is obvious from these judgments that the legitimate expectation is a public law concept that has been deemed to be applicable in international investment law, both in English law and in civil law. This is because it draws upon the two most fundamental principles, which are reliance and procedural justice. The objectivity that is necessary in this estimation of whether the diminution in the value of the investment is because of due diligence or any inferences that can be drawn from conduct or behaviour. The legitimacy of the expectations is in the context of BITS, and the arbitral tribunals are able to draw upon the variables of both common law and civil law concepts in their own rulings in interpreting the conduct of the party that has breached the agreement.

The principles inherent in domestic law systems of legitimate expectation are also enforced by international arbitration tribunals. This stems from the 'informal administrative representations, such as advice given to a private party or statements of intention or of future policies'.⁹⁷ The assumption is that there are subtle distinctions between the 'use of the doctrine in EU and national law and in investment arbitration' despite there being a connection 'between the protection of legitimate expectations and doctrines such as estoppel and *venire contra factum proprium*'. There are comparisons between the 'the protection of legitimate expectations arising from a formal act or contract with those arising from an informal representation', such as the main requirements in order for an 'expectation arising from an informal representation to be protected'.⁹⁸

In Germany, the protection of legitimate expectations derives from the 'principle of *vertrauensschutz* under Article 14-1 of the German Constitutional Law (which means the "protection of trust/confidence"), which implies the encouragement of confidence in public decision-makers by providing protections for those who rely on their representations'.⁹⁹ The Bundestag has codified a partial version of the principle of legitimate expectations in its Administrative Procedure Act

⁹⁴ Para 532.

⁹⁵ ICSID [2013] Case No ARB/11/23 para 532.

⁹⁶ *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain (Final Award of 15 February 2018)* SCC Case No 2015/063. Para 679; Also see *El Paso v Argentina* ICSID Case No. ARB/03/15 (2011) where it was held that 'the decisions of tribunals that legitimate expectations are an objective as opposed to a subjective concept'. At para 356.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ Paul Reynolds, *op. cit.*, p. 340-41.

(*Verwaltungsverfahrensgesetz*), article 48(2). This states that some forms of ‘that some types of unlawful administrative acts may not be withdrawn if the affected person has relied on them, unless the public interest justifies such a withdrawal’.¹⁰⁰

The expectations connected with this representation are safeguarded despite the fact that the representation itself was illegal.¹⁰¹ The protection of legitimate expectations is consecrated into a fundamental principle and its scope is widely defined by statute.¹⁰²

It can be distinguished by the concept of legal certainty that rests on the *rechtssicherheit*, a principle that demands certainty of the substance of law, and is primarily utilised in cases concerning retroactive law, whereas the protection of legitimate expectations is derived from the principle of *vertrauensschutz*¹⁰³ this is intended to ensure that ‘everyone who trusts the legality of a public administrative decision should be protected’.¹⁰⁴ There are two variables that are separated by legal certainty, not being a reflection of legitimate expectations by the conditions inherent in the concept.

In *Vattenfall Europe Nuclear Energy GmbH and Kernkraftwerk Krümmel GmbH & Co. OHG (the ‘Petitioners’)*¹⁰⁵ the issues concerned the German concept of legitimate protection and investment state dispute settlement procedures. The Swedish company Vattenfall brought proceedings under an investment arbitration proceeding under the Energy Charter Treaty and claimed €4.7 billion as compensation. This is for damages allegedly suffered from Germany’s decision to terminate all nuclear energy production under the Thirteenth Amendment that statutorily accelerated fixed end dates for the operation of nuclear power plants without any compensation. The terminated the operational lifetimes of the nuclear power plants that had just been fixed in 2010 by means of the Eleventh Amendment. The effect was that Vattenfall’s licenses to operate both plants were summarily withdrawn and operations in both plants were halted.

The Vattenfall lawsuit claimed that the loss to investment occurred ‘not as much from the decision not to stop the production of nuclear energy in Germany that caused their losses, but rather the unexpected political policy towards nuclear energy by the government’.¹⁰⁶ The compensation claimed was because the investment suffered from the replacement of nuclear power plants with a reduced industrial base for energy production. This German government went through two policy transformations and

¹⁰⁰ *Verwaltungsverfahrensgesetz* of 25.05.1976, last promulgated on 23.01.2003, last amended on 18.12.2018, online: <https://www.gesetze-im-internet.de/vwvfg/VwVfG.pdf>.

¹⁰¹ *Ibid.*

¹⁰² See in particular § 38 of the German Law of Administrative Procedure (‘Assurance. A promise made by a competent authority to take or refrain from taking an administrative act – assurance – must be in writing to be effective’) Georg Nolte, ‘General Principles of German and European Administrative Law – A Comparison in Historical Perspective’, *Modern Law Review* 57, no. 2 (1994): 191–212.

¹⁰³ The Berlin higher administrative court (*Oberverwaltungsgericht*) applied the notion of *vertrauensschutz* in 1956 to conclude that a decision-maker was bound to honour a representation concerning a welfare grant. Geo Quinot, ‘Substantive Legitimate Expectations in South African European Administrative Law’ (2004) 5 *German Law Journal* 65, 68; Christopher F. Forsyth, ‘The Provenance and Protection of Legitimate Expectations’ (1988) 47 *Cambridge Law Journal* 238, 243 The expectations connected with this representation were safeguarded despite the fact that the representation itself was illegal.

¹⁰⁴ M. Schroeder, ‘Administrative law in Germany’ in Seerden, R. and Stroink, F. (eds) *Administrative Law of the European Union, Its Member States and the United States – A Comparative Analysis* (Antwerp: Intersentia Uitgevers Antwerpen, 2005) p. 119.

¹⁰⁵ BVerfG, Judgment of the First Senate of 6 December 2016 – 1 BvR 2821/11 –, paras. 1–407.

¹⁰⁶ Para 288.

accelerated termination by fixing shutdown dates for all nuclear reactors, which ‘were without the remaining energy production’ volumes already allocated. This was on account of the concern for the protection of public health and the environment’.¹⁰⁷

The German Federal Court ruled that the Swedish company Vattenfall will be dismissed but also that Germany had violated their legitimate expectations. The decision stated that the government had ‘broad powers’ to formulate its atomic energy law, given the high-risk venture in this activity. However, these powers were ‘not absolute’ and the States were still obliged to preserve the ‘legitimate expectations of investors’.¹⁰⁸ The change of policy of reducing nuclear energy production caused the German State to have ‘unreasonably limited investors’ property by devaluing the investments that were made’ following their policy approach.

The Court determined that this was a ‘violation of the investors’ legitimate expectations, and therefore the State should have provided appropriate compensation’.¹⁰⁹ The investors were inducted into taking unreasonable risks that compromised because it allowed permission for nuclear power plants and boosted investors to ‘undertake investments in plants, and it was not foreseeable that the German legislature would shift its energy policy within the same legislative period’.¹¹⁰

The Petitioners filed another complaint regarding the legitimate expectations that were overturned by the Sixteenth Amendment. The Court held that the procedure was never executed because the Energy Charter had neither approved the Sixteenth Amendment, nor issued a binding communication that such an approval was not required.¹¹¹ The Court found that the violation of the Petitioners’ rights was extended and that no other remedial provision had been established. The breach of legitimate expectations extended to the Sixteenth amendment, making compensation an obligation. This was after transferring compensable electricity volumes to other companies under ‘adequate conditions, which were unreasonable’.¹¹² This was because, at the time they were to start negotiating the transfer of electricity, the investment companies would not be informed, ‘whether the transfer conditions would meet the § 7f(1) criteria’, and if that was not implemented, then there was no compensation for the breach of legitimate expectations.¹¹³

Simultaneously, the Vattenfall and its German subsidiaries had initiated an international arbitration under the ECT against Germany. This was to receive compensation for EUR 4.7 billion due to damage sustained from Germany’s decision to accelerate the phase-out of nuclear energy under the original Thirteenth Amendment. The arbitration was concerned with the expectations of the quantum and the merits of the application.

The anticipation in the international arbitration tribunal was that there will be a ‘balancing act between the’ investment company and the state’ based on the fact that the ‘legitimate expectation principle in investment arbitration law is striking’. This is because when the ‘States create legitimate expectations, which, in turn, have resulted

¹⁰⁷ Para 290.

¹⁰⁸ Para 372.

¹⁰⁹ Paras 372-73, 375-80.

¹¹⁰ Paras 375-377.

¹¹¹ Paras 53-69.

¹¹² Para 71.

¹¹³ Paras 74-76.

into investments, the investor can expect that the State acts in a reasonable and foreseeable manner'. Therefore, if the State does a complete change of policy and 'unexpectedly completely reverses in a very short time frame its policy, the legitimate expectations of the investors must be protected'.¹¹⁴

In *Vattenfall AB and Others v. Federal Republic of Germany*,¹¹⁵ the ICSID held hearings on the issue of any potential incompatibility between intra-EU investor-State dispute settlement under the ECT. The main issues concerned the merit and the quantum of the claim instigated by the FCC. The Claimants argued that the 2020 Judgment in the German Federal Court had: 1/removed any relevance of the Sixteenth Amendment on the arbitration proceedings (since Germany had argued that such an amendment rendered the Claimants' claims moot), and 2/showed precisely why the Claimants had to bring the ECT Arbitration: ten years after the constitutional challenge was brought, Germany still had failed to compensate the Claimants.¹¹⁶

The Tribunal stated that irrespective of the timeliness of the Respondent's objection, it was vested with the 'broad power to examine issues relating to its jurisdiction on an ex officio basis' and in regards to the issue of the 'incompatibility of intra-EU investor-State arbitration under etc. with EU law, the Tribunal would have exercised that power to examine its jurisdiction ex officio, even in the absence of a jurisdictional objection by the Respondent'.¹¹⁷

It has been observed that 'while judicial decisions do not constitute a binding precedent for an international investment arbitration tribunal, they can provide support to arguments' legitimate expectations are involved, such as those claimed by Vattenfall. This relates to investors facing energy bans without compensation from a host state. The reasoning in the case is at the ICSID tribunal is based on the 'Court's judgments in its final award (in particular, the reasoning in the 2016 Judgment regarding the violation of the investors' legitimate expectations and property rights'.¹¹⁸ The Court had held the amount of compensation provided. The Court held that Sixteenth amendment would lack sufficient specificity to determine compensation in circumstances where two corporations were shareholders in an affected investment

The legitimate expectation that has been upheld both in domestic law in Germany and in the ICSID tribunal is a firm indication that international arbitration rules depend on the constitutional law principles as framed in administrative law of civil law jurisdictions.¹¹⁹ It is apparent from the ruling that the 'declarations of intent or draft laws cannot create legitimate expectations but laws passed by parliament can'. This

¹¹⁴ Nikos Lavranos, *The German Constitutional Court Judgement in the Vattenfall case: lessons for the ECT*, Vattehall Arbitration Tribunal, Kluwer Arbitral Tribunal, 19/2/16 <https://arbitrationblog.kluwerarbitration.com/2016/12/29/german-constitutional-court-judgment-vattenfall-case-lessons-ect-vattenfall-arbitral-tribunal/>.

¹¹⁵ (II), ICSID Case No. ARB/12/12.

¹¹⁶ Hearings on Tribunal 8 (Nov 21, 2020) Claimant's Opening Statement.

¹¹⁷ Paras 104–106.

¹¹⁸ Daniela Pérez-Salgado, *A Battle on Two Fronts: Vattenfall v. Federal Republic of Germany*, 18 February 2021 <https://arbitrationblog.kluwerarbitration.com/2021/02/18/a-battle-on-two-fronts-vattenfall-v-federal-republic-of-germany/>.

¹¹⁹ The German magazine *Der Spiegel* has criticised the application of the doctrine of the legitimate expectations doctrine applied by arbitral tribunals' as impacted on Germany to mean 'quasi-comprehensive insurance for investors for broad interpretation'. ('Schiedsgerichte – Die Kläger-Clique', *Spiegel Online*, 16 April 2016), <http://www.spiegel.de/wirtschaft/soziales/ttip-schiedsgericht-streit-die-meisten-klaeger>.

implies that investors ought not to depend on the alleged irregularities but can ‘legitimately base their investment decisions on a competent court’s decision on a law’s constitutionality’. The legal framework must reflect the formula for damages if investors’ expectations are not met, which are legally enforceable and in the ‘public interest’.¹²⁰

The assumption is that there are subtle distinctions between the ‘use of the doctrine in EU and national law and in investment arbitration’ despite there being a connection ‘between the protection of legitimate expectations and doctrines such as estoppel and *venire contra factum proprium*’. There are comparisons between the ‘the protection of legitimate expectations arising from a formal act or contract with those arising from an informal representation’, such as the main requirements in order for an ‘expectation arising from an informal representation to be protected’.¹²¹

In *International Thunderbird Gaming Corporation v The United Mexican States*, the Arbitral Award¹²² it was held that ‘[T]he concept of “legitimate expectations” related [...] to a situation where a Contracting Party’s conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the [Contracting] Party to honour those expectations could cause the investor (or investment) to suffer damages.’¹²³

The consequence of this set of variables have to apply in the international arbitral tribunals are the administrative law systems from which the legitimate expectations emanate may lead to several different scenarios where, in an investment treaty default, where an estoppel could give rise. This includes the most frequent ‘application under the fair and equitable treatment standard’, which will bring into context the ‘governmental conduct’ in relation to the ‘contractual commitments, unilateral representations of the state and a right to a stable regulatory framework’. The ICSID tribunals would, in practical terms, would need to strike a balance between the ‘socio-economic circumstances of the state and the investor’s own conduct’.¹²⁴

5. Promissory Estoppel and Legitimate Expectations

The contemporary practice in estoppel has established that international investment law involves clauses in agreements that create legitimate expectations for investors. The concept has been used extensively in international arbitration between state and non-state parties and legitimate expectations have been a central tenet of transactions. The ICSID tribunals have formalised the transnational values of estoppel that have a special character, which underpins the equitable principles in investment treaties.

¹²⁰ Laura Yvonne Zielinski, “Legitimate Expectations” in the Vattenfall Case: At the Heart of the Debate Over ISD, Kluwer Arbitration Blog, 17 January ‘17. <https://arbitrationblog.kluwerarbitration.com/2017/01/10/legitimate-expectations-in-the-vattenfall-case-at-the-heart-of-the-debate-over-isds/>.

¹²¹ Ibid.

¹²² NAFTA Award 26 January 2006.

¹²³ Para 167.

¹²⁴ Michele Potestà, „Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept”, *ICSID Review – Foreign Investment Law Journal*, Volume 28, Issue 1, Spring 2013, pp. 88–122, <https://doi.org/10.1093/icsidreview/sis034>. Also see *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007.

It is accepted that ‘*Acquiescence and estoppel ascribe substantial legal consequences to the inactivity of a State: as such, these institutions should be restrictively interpreted and applied. They find their justification in the reasonable reliance of one State (based on good faith) on the representation or conduct of another*’. The State has the ability to make declarations to preserve its rights and preclude the effect of tacit consent, placing the onus of action on the State that has allowed reliance and trust’.¹²⁵ The issue of estoppel and the cause of action estoppel can be distinguished in their application to international commercial and investment arbitration. The factors that set them apart are the specific points of which can arise in arbitration. The issue estoppel arises to establish the cause of action, whereas the cause of action estoppel considers just the cause of action itself. This is necessary to preclude remedy when both parties suffer to their detriment and breach of good faith will not apply in the determination of the facts.

In exercising this freedom to contract, parties often negotiate arbitration clauses which are also referred to as ‘predispute arbitration agreements,’ which are contractual provisions agreed to in advance of any dispute that requires a party to submit any and all future disputes to arbitration. There is a distinction between investment arbitration and commercial arbitration and there are different procedures that regulate these two distinct forms of arbitration. There is no equivalent enforcement process for disputes that are resolved by litigation.¹²⁶ The international arbitral tribunals have viewed *estoppel* in its specific impact through the procedural aspects. In this regard, ‘*estoppel* acts as a more specific and technical mechanism designed to prevent an already litigated claim from being pursued again (similar to *res judicata*). The important branches of *estoppel* which may preclude a claim from being relitigated are: *cause of action estoppel*¹²⁷ and *issue (or collateral) estoppel*.¹²⁸

It is significant that both these doctrines *preclude the parties from relitigating an issue that has been ruled upon by a court of competent jurisdiction between them in a decided case. The only circumstances in which estoppel can be invoked include the discovery of further material relevant to issues in the previous litigation or fraud*.¹²⁹ The distinction is that of specificity because the *issue estoppel* is concerned with “the facts and issues required to establish the cause of action, whereas the cause of action estoppel looks only at the cause of action”.¹³⁰ This perspective is challenged by those who contend that the ‘*cause of action*’ is similar to the “*claim*” itself, whereas the *issue*

¹²⁵ Antunes, Nuno Sérgio Marques. «Acquiescence.» In the Max Planck Encyclopedia of Public International Law (MPEPIL), para. 24. Oxford University Press, 2021.

¹²⁶ The Hague Convention on Choice of Court Agreements of 2005 is the litigation alternative to the The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958 (the “New York Convention”). It came into force on 1 October 2015 and it has been ratified by the EU (including Denmark), Mexico, Montenegro, Singapore and the UK. There is also The Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. It is not yet in force.

¹²⁷ Audley Sheppard, ‘Chapter 8. Res Judicata and Estoppel’ in Bernardo M. Cremades Sanz – Pastor and Julian D.M. Lew (eds). *Parallel State and Arbitral Procedure in International Arbitration*, ICCA Congress Series, 2006, p. 225.

¹²⁸ Ibid.

¹²⁹ Sean Wilken QC, Karim Ghaly, *The Law of Waiver, Variation and Estoppel*. Third Edition (Oxford University Press 2012), para. 14.08.

¹³⁰ Ibid para 14.9.

estoppel prevents the reissue of the legal process on a point of law or of fact already decided upon by an arbitral tribunal.¹³¹

In *Southern Pacific Railroad Co. v. United States*,¹³² the Supreme Court of the United States considered the *issue estoppel* as a legal concept.¹³³ The Court stated that a general principle existed that presupposed ‘*that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies, and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified*’.¹³⁴ This established the issue of estoppel as a general principle that was inherited from the common law system.

In *Amco Asia Corporation and others v. Republic of Indonesia*,¹³⁵ the respondent Indonesia argued that the claimant was estopped from invoking the conduct by a third party to the government that was introduced at a later stage of the proceedings. The ICSID tribunal relied on the principles based on the common law notion of estoppel by raising the Anglo-American case law that affirmed the doctrine of equitable estoppel.¹³⁶ The judgment quoted Vice-President Alfaro’s separate opinion in the Temple of Preah Vihear (Cambodia v. Thailand) case,¹³⁷ by ruling that ‘*[a]lthough this dictum refers to the activities of states, the Tribunal is of the view that the same general principle is applicable in international economic relations where private parties are involved. In addition, the Tribunal considers that, in particular for its applications in international relations, the whole concept is characterised by the requirement of good faith*’.¹³⁸

The requirements of estoppel were not formulated in the ruling other than for the court to assert that it has to abide by the principle of *res judicial* and there was no reliance placed that was to the detriment or benefit of one or the other party.¹³⁹ The tribunal stated that ‘*it is by no means clear that the basic trend in international law is to accept reasoning, preliminary or incidental determinations as part of what constitutes res judicata*’.¹⁴⁰ It has been argued that the existence of an *issue/collateral estoppel* necessarily implies the fact that the reasoning of an award must be considered for the principle of *res judicial* to be applied.¹⁴¹

There is an overlap between the existence of estoppel and *res judicata* and the tribunals may apply the principle of *estoppel* when they are applying *res judicata*. In

¹³¹ Gavan Griffith; Isabella Seif, ‘Chapter 8: Work in Progress: *Res Judicata* and *Issue Estoppel* in Investment Arbitration’, in Neil Kaplan and Michael J. Moser (eds.), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (Kluwer Law International 2018), p. 124.

¹³² 168 U.S. 1 (1897).

¹³³ Pp. 48–49.

¹³⁴ Ibid.

¹³⁵ ICSID Case No. ARB/81/1.

¹³⁶ Para 47.

¹³⁷ ICJ 15 VI 62.

¹³⁸ Para 47.

¹³⁹ Para 48.

¹⁴⁰ Para 32.

¹⁴¹ Sheppard, *op. cit.*, p. 234; Griffith, Seif, *op. cit.*, p. 125.

Marco Gavazzi and Stefano Gavazzi v. Romania,¹⁴² the ICSID tribunal evaluated whether an initial decision which was based on a breach of good faith that precluded the claims before it and had ‘conclusive effects on the Parties to the present proceedings under the doctrine of *res judicata* or *issue estoppel*’.¹⁴³ It referred to the conditions for *res judicata* ‘Under international law, three conditions need to be fulfilled for a decision to have a binding effect in later proceedings: namely, that, in both instances, the object of the claim, the cause of action, and the parties are identical’.¹⁴⁴ The three element test was enunciated by the PCIJ in a landmark ruling in 1926.¹⁴⁵

The distinction between the *issue estoppel*, which is the *cause of action*, and *res judicata*, which is a ruling that forms the determination by the court is that the action can succeed in litigation but fails on the grounds because of strict time guidelines. This has been ruled upon in the domestic courts of the common law countries.¹⁴⁶ The concept of *issue estoppel* is that it can succeed because it can be invoked if the parties are litigating breached promises contingent on the principle of legal certainty and predictability that are protected under the Articles 48(3) and 52(1)(e) of the ICSID Convention that govern investment arbitration.

The abuse of process rights is protected by international tribunals and the doctrine of *res judicata* that bars the use of legitimate rights when the exercise of those rights violates the public policy goals of finality and protection. This common law principle has percolated to the international legal bodies have likewise recognised the application of abuse of rights as a general principle, such as the Appellate Body of the World Trade Organization (WTO) decision that has confirmed that abuse of rights is a general principle of international law.¹⁴⁷

The abuse of process doctrine has also developed into an acknowledged principle of international *estoppel* doctrine and in the period between 2012 and 2015, there was a procedure established by which the arbitral tribunal could determine if it had jurisdiction. This meant that a tribunal should not exercise its jurisdiction as a

¹⁴² ICSID Case No. ARB/12/25.

¹⁴³ Para 164.

¹⁴⁴ Para. 166.

¹⁴⁵ This can be discerned from the judgement of the 1927 case in *Chorzów (Merits)* PCIJ Series A. No 1 in which Judge Anzilotti mentioned in his dissenting opinion to the *Factory at Chorzów* case) a three-element identity between the concerned claims (the same person, the same claim and the same legal grounds) is also known as the ‘three-element test’ belongs to *res judicata*, p 126.

¹⁴⁶ In *Elite Property Holdings Limited & Anor v Barclays Bank plc* [2021] EWHC 772 (Comm), there were a series of claims brought by the same claimant property investment companies against the defendant bank in relation to alleged mis-sold interest rate hedging products (IRHPs). The High Court granted the bank’s application to strike out the claim alleging breaches of agreements because the claim was barred by the principle of *res judicata*: (i) in relation to the bank’s assessment of consequential loss suffered by the claimants in respect of their IRHPs and (ii) that the bank would not take enforcement action against the claimants. The Court ruled observed that: (i) even if it was wrong about the claim being barred by cause of action or *issue estoppel*, the new claim would fall squarely within the principle in *Henderson v Henderson* (1843) 3 Hare 100 and/or be an abuse of the court’s process.

¹⁴⁷ p. 31 “*Good faith – Pacta sunt servanda* the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state’s rights and enjoins that whenever the assertion of a right ‘impinges on the field covered by [a] treaty obligation, it must be exercised *bona fide*, that is to say, reasonably’. An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting”. WTO Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R (1998), para. 158.

consequence of a legal right, which means that it could still have jurisdiction but refuse to exercise it because of admissibility. This was affirmed in the case of *Phillip Morris Asia Ltd. v. Commonwealth of Australia*¹⁴⁸ where the tribunal confirmed the evolution of the abuse of process doctrine's application based on all the circumstances of the case in investment law and, specifically, in the context of corporate restructuring.

There is a difference between issue *estoppel* and *res judicata* and this was elaborated in *Factory at Chorzów* case.¹⁴⁹ Judge Anzilotti stated in his dissenting opinion that there was a three-element identity 'Between the concerned claims (the same person, the same claim and the same legal grounds) to be called the "three-element test"'.¹⁵⁰ The finding of *estoppel* extends as the private remedy of the relevant parties, while *res judicata* is not a private course of action.¹⁵¹ Without going into the details of how the three elements of *res judicata* have been interpreted, especially in investment arbitration (as this is another subject for another date), it can be reasonably stated that *estoppel* is a stronger tool (than *res judicata*) in the arsenal of investment tribunals, which can be used to prevent abusive re-litigation. The problem, however, is that the existence of such an instrument in international law is not clearly evident and tribunals seem to have taken its existence for granted.

There are problems with the investment tribunals' application of *estoppel*, which is that it is not a general principle of law recognised in Article 38 of the ICJ.¹⁵² While it is not a customary rule of international law, there are some arbitral tribunals have applied to *estoppel* as such and there is, at best, inconclusive evidence as to the existence of a general principle of *estoppel* and efforts have been made to construe it as such in the rulings. It has been argued that *estoppel* 'as a principle of law serves two aims: firstly, the tribunal justifies the application of *estoppel* by reference to a source of international law (usually, part of the applicable law). Secondly, this gives the tribunal legitimacy, as the tribunal grounds its decision to rely on *estoppel* on a widely applicable source of law (whether objectively true or not is not as important)'.¹⁵³

In the *Petrobart* tribunal judgment, the tribunal stated that 'while the doctrine of collateral *estoppel* seems to have primarily developed in American law, other legal systems have similar rules, which, in some circumstances, preclude examination of an issue which could have been raised, but was not raised, in previous proceedings. A doctrine of *estoppel* is also recognised in public international law'.¹⁵⁴

The tribunal, however, was unclear whether this amounted to a principle of law

¹⁴⁸ UNCITRAL PCA Case No. 2012–12, Award on Jurisdiction and Admissibility (17 Dec. 2015).

¹⁴⁹ PCIJ Series A. No 17.

¹⁵⁰ P. 335.

¹⁵¹ Gavan Griffith, Isabella Seif, 'Chapter 8: Work in Progress: *Res Judicata* and Issue *Estoppel* in Investment Arbitration', in Neil Kaplan and Michael J. Moser (eds.), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles* (Kluwer Law International 2018), p. 126.

¹⁵² Charles T. Kotuby Jr. and Luke A. Sobota, *General Principles of Law and International Due Process. Principles and Norms Applicable in Transnational Disputes* (Oxford University Press 2017), p. 200. Hugh Thirlway, *The Sources of International Law. Second Edition* (Oxford University Press, 2019), p. 108.

¹⁵³ Alexandros-Cătălin Bakos, *Investment Tribunals Are Too Quick to Establish the Existence of Issue and Cause of Action Estoppel in International (Investment) Law*, European Federation for International Law and Arbitration (EFILA), <https://efilablog.org/2019/09/03/investment-tribunals-are-too-quick-to-establish-the-existence-of-issue-and-cause-of-action-estoppel-in-international-investment-law/>.

¹⁵⁴ Pp. 66–67.

or not. The fact that there exist rules which establish a preclusion of issues which could have been raised but were not raised and that these rules occur outside of the American legal system, as well, does not transform *estoppel* into a principle of law. At the same time, the tribunal did not mention in what form is *estoppel* recognised in public international law.

The impact of investment disputes points to international arbitration agreements becoming part of public international law.¹⁵⁵ This is premised on the fact that ‘investment disputes being based partially or in some instances even exclusively on investment contracts do not substantially differ from ordinary contract law claims under domestic law, for they root in a relative, i.e. private relationship’.¹⁵⁶ This is not directly related to *estoppel*, which is a private remedy but it is worth considering and maintaining a requirement of good faith in contract law and, in general, investment treaties do have this stipulation in their provisions.

John David Branson contends, ‘that while the abuse of process doctrine in investment arbitration has largely become synonymous with corporate restructuring, there is no basis to suggest that a broader application of the theory cannot be extended to address the exercise of rights in other contexts that are equally abusive to the object and purpose of the ISDS system’.¹⁵⁷ However, the development of the doctrine of the abuse of process has been in conjunction with the good faith doctrine that has been accepted as crucial to claims in investment treaty arbitration.

In *Phoenix v. Czech Republic*,¹⁵⁸ it was stated that ‘[T]he principle of good faith governs the relations between States, but also the legal rights and duties of those seeking to assert an international claim under treaty. Nobody shall abuse the rights granted by treaties, and more generally, every rule of law includes an implied clause that it should not be abused’.¹⁵⁹

The res judicata application of this principle can lead to a rigidity in the final outcome that may defeat the framework of the investment treaties. The arbitrators on investment tribunals have applied the concept of collateral *estoppel* as a general principle, which implies that the ‘flexible’ approach to the res judicata, and/or the application of collateral *estoppel*, allows interpretation of the provisions of the treaty clauses to be interpreted with elasticity.¹⁶⁰ This does not mean that there is a standard or a fixed principle that has emerged in the field of international investment law that

¹⁵⁵ Gus Van Harten, Gus. *International Investment Treaty Arbitration and Public Law*. Oxford: Oxford University Press, 2007. Also see Martin Loughlin. ‘Investment Treaty Arbitration as a Species of Global Administrative Law.’ *European Journal of International Law* 17, no. 1 (2006): 121–150.

¹⁵⁶ Moshe Hirsch, ‘Investment Tribunals and Human Rights: Divergent Paths’, in Pierre-Marie Dupuy, Francesco Francioni, and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (2009), Oxford: Oxford University Press, p. 108.

¹⁵⁷ John David Branson, ‘The Abuse of Process Doctrine Extended: A Tool of Right Thinking Members of Society’, *Journal of International Arbitration*, Vol. 38, Issue 2, 2021, <http://arbitrationblog.kluwerarbitration.com/2021/04/13/the-contents-of-journal-of-international-arbitration-volume-38-issue-2-april-2021/>.

¹⁵⁸ ICSID Case No. ARB/06/5, Award (15 Apr. 2009), para. 22.

¹⁵⁹ Para 107.

¹⁶⁰ In *Apotex Holdings Inc., Apotex Inc. v. United States of America*, ICSID Case No. ARB (AF)/12/1, Award (25 Aug. 2014), it was held noted that international tribunals are increasingly ‘aware of the risk that if they use too restrictive criteria of “object” and “grounds,” the doctrine of res judicata would rarely apply; if only an exactly identical relief sought (object) based on exactly the same legal arguments (grounds)’ the doctrine would be easily evaded”. para. 7.14.

establishes estoppel as integral to decision making in breaches of investment treaty arbitration.¹⁶¹ There is a *res judicata* application of estoppel (and related principles) which extends beyond the one-off nature of an investment tribunal deciding a case under the specific language of the relevant treaty.

The principle has been established that a claim can succeed even if it is barred by *res judicata* based on collateral estoppel and the abuse of process can be surmounted as a defence against multiple and successive claims in investment arbitration. In *Orascom TMT Investments S.a.r.l. v. People's Democratic Republic of Algeria*,¹⁶² there were multiple proceedings issued 'in relation to the same investment, the same measures and the same harm'. The claimant was Orascom TMT Investments S.a.r.l (OTMTI, which owned Orascom Telecom Holdings S.A.E. (OTH) that bought Orascom Telecom Algeria S.P.A. (OTA). The three companies were controlled by a single shareholder and OTA was the subsidiary conducting business in Algeria and against whom the Algerian government instituted measures that had severely damaged OTMTI's financial standing in its investment. The claimant brought arbitration proceedings before the Orascom tribunal by invoking the Belgium-Luxembourg-Algeria Investment Treaty.

The tribunal concluded that it had to adjudicate similar disputes that led to the same economic harm, but between separate parties with different legal claims. The claimant's subsidiary, OTH, had reached a 'settlement of the identical disputes giving rise to the same economic harm with Algeria's state-owned enterprise'.¹⁶³ This created an issue that was procedurally difficult and could have breached *res judicata* or collateral estoppel, despite there being no final award. The tribunal held that it could extend the application of the 'abuse of process doctrine to encompass the filing of multiple disputes, 'to recover for essentially the same economic harm'.¹⁶⁴

There was an acknowledgement that the doctrine of abuse of rights is a 'general principle applicable in international law' that is applicable in situations where 'an investment has been restructured to attract a BIT of protection at a time when a dispute with the host state had arisen or was foreseeable'.¹⁶⁵ The decision stated that it was an abuse of process for an investor to 'impugn the same host state measures and claims for the same harm at various levels of the [corporate] chain in reliance on several investment treaties concluded by the host state'.¹⁶⁶

The ICSID tribunal ruling has established that the abuse of process doctrine is still valid and is an important factor for the *res judicata* and collateral estoppel to be overruled. There is no discretion for overriding the procedural mistakes by the claimant and the three identities still apply when there is an application to invoke investment treaties. The ruling also signifies that in BIT treaties the tribunal will make its own mind in reaching a conclusion and will be ready to separate the different causes of action before arriving to its ruling.

¹⁶¹ In *Petrobart v. Kyrgyzstan* SCC Case No. 126/2003, 184 I.I.C. (2005), Award (29 Mar. 2005) the arbitration was not allowed because in the respondent-State's collateral estoppel argument was not upheld because it was deemed to be a specifically national remedy. The ruling stated that the tribunal 'fails to see the relevance of this purely American statutory procedural doctrine' para 297.

¹⁶² ICSID Case No. ARB/12/35, Award (31 May 2017).

¹⁶³ Para 520.

¹⁶⁴ Para 543.

¹⁶⁵ Paras 540–541.

¹⁶⁶ Para 542.

6. Conclusion

In international investment law, the standard of legitimate expectations is based on reliance that is inherent in common law and in some civil law jurisdictions. no substitute for contractual rights. This concept is drawn from the good faith, acquiescence and *pacta sunt servanda*s intrinsic principles in contracts. These are intended to prevent abuse of process and their adoption in BIS allows the agreements and through Free and Equitable treatment to be of general public benefit. The origin is in the duty of fairness emanating from the promissory estoppel in English law within commercial contracts encourages business transactions with greater efficacy and the collateral estoppel governs the approach of the courts in interpreting the arbitration treaties. This can challenge the *res judicata* rulings in the courts from decisions by the international arbitration tribunals.

The integration of European administrative law into international investment treaties has been a significant factor in the presumption of legitimate expectations in BIT treaties. The German courts have endorsed the German administrative law, which emanates from the Constitution that is *vertrauensschutz* and this has been applied in the courts. The doctrine has been interpreted in recent case law that allowed the German courts to rule in favour of investors. This is now an accepted principle of international arbitration law.

In international arbitration the concept of legitimate expectation typically signifies cause of action or collateral estoppel, which prevents a party from enjoying rights and benefits under a contract while at the same time avoiding its burdens and obligations. The doctrine of issue estoppel has been used to elevate the enforcement of the arbitration clause on the same principles as good faith as a component such as in treaties between states and the Vienna Convention 1969 protects the international transactions that may underpin bilateral agreements. This has upheld the duty of good faith that has applied the principles of *res judicata* and collateral estoppel to preclude claims based on the legitimate expectations that were not contemplated against the party in breach of treaty rights.

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