Legitimate Expectations in Investment Treaty Arbitration:
An unclear future
Abhijit P.G. Pandya and Andy Moody

1 Introduction

The use of the doctrine of legitimate expectations in investment treaty arbitration is unclear. Until the recent decision of EDF v. Romania, a significant tidy-up of this area of law was needed. It was unclear on what basis legitimate expectations were to be formed and critically what rights the formation of a valid expectation gave. This difficulty may be partly accounted for by the use of administrative law in the field of commercial arbitration. It can also, to a degree, be explained by using commercial arbitration to decide treaty based disputes. Investors can be seen in this field to have unlimited expectations due to the nature of undefined treaty obligations. What is often not appreciated by tribunals construing liability is the possible conflict with public interest that such an approach may have, leaving huge areas of public policy susceptible to be overridden by judicial construction.

1 Abhijit PG Pandya is a Fellow at the Department of Law, London School of Economics and can be contacted at pandyalawyer@gmail.com. Andy Moody is a Senior Associate in the International Arbitration Group at Eversheds LLP and can be contacted at AndyMoody@eversheds.com or on +44 207 919 4585.

2 EDF (Services) Limited v. Romania ICSID Case ARB/05/13 (Award Merits) (8/10/2009).


4 See G. Van Harten, Investment Treaty Arbitration and Public Law (OUP 2007) 58-68; The expansive approach to construe rights by investment arbitration panels has gone in a directed that some wished for other courts, such as the International Court of Justice: See L. Gross, 'The International Court of Justice: Considerations of requirements for enhancing its role in the international legal order' (1971) 65 AJIL 253, 259-269.
The EDF decision may prove to be a turning point in how future investment treaty arbitral tribunals approach the doctrine of legitimate expectations. The aim of this article is to welcome the EDF decision by examining the doctrine of legitimate expectations and how it has been used in investment treaty arbitration. By way of comparison, we juxtapose the doctrine's applications within investment treaty arbitrations to its more traditional application in English law. English law provides an interesting comparator as under the UK constitution courts have to defer to the legislature, a restriction that is not placed upon investment treaty arbitration panels. The latter are only restricted by the language of treaties and the rules of treaty law. There is therefore an arguably larger licence for judicial creativity than occurs when English courts determine the rights of claimants. Thus substantial differences occur when determining substantive rights and the basis upon which these rights are formed. This article will argue that the application of the doctrine in investment treaty arbitration needs to be more clearly formulated and its scope more narrowly defined to strike a fair balance between the rights of the investor and the state. Though the EDF decision is a step in the right direction, there are further considerations needed for an improved balance between the interests of investors and host-states.

2 Legitimate Expectations in General

Governments often create expectations, to businesses and citizens, that they will keep their word about laws and policy. However, this does not mean that a change in law or policy gives rise to a valid expectation in law. In English law, expectations that are legitimate are those that do not give a right to a particular law or policy and grant only rights of participation in the decision-making processes of public bodies or the state. The doctrine of legitimate expectations protects individuals from changes to representations made by Government bodies, in so far as it gives an opportunity to challenge the change. However, theoretically the doctrine can be used to give protection both by the grant of: (i) due process rights, such as a right to participation in public body decision-making or (ii) substantive rights,

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