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## **A CRITICAL ANALYSIS OF LEGITIMATE EXPECTATION VIS-À-VIS EU BLOCKING REGULATIONS**

by Niyati Ahuja & Naimeh Masumy

### **I. INTRODUCTION**

Blocking regulations are a national legislation creation designed to hinder the extraterritorial application of law created by a foreign jurisdiction.<sup>1</sup> The EU Blocking Regulation of 1996 (Regulation (EC) 2271/96) was first introduced on November 22, 1996 for the protection of EU businesses against the effects of the extraterritorial application of legislation adopted by any third country.<sup>2</sup>

On June 6, 2018, the EU updated the annexure to its Blocking Regulation to include the US extraterritorial sanctions regime.<sup>3</sup> This was done with the aim of mitigating the extraterritorial impact of US sanctions on EU entities engaged in trade with Iran and preserving their interests.<sup>4</sup> The uncertainty to cross-border investments caused by the interplay of US and EU laws is unprecedented. Notably, it raises speculations regarding their role in investment-related disputes. To date, it remains unsettled whether blocking regulations are an effective measure to protect the interests of foreign investors and their underlying investments. It is therefore imperative to understand how blocking regulations operate within the scope of investment arbitration and their impact on investors seeking to invest in the EU. In light of this, our article analyzes whether blocking regulations invoke legitimate expectations through the lens of investment arbitration.

The first part of this article sets out a brief overview of the genesis of the doctrine of legitimate expectations. It examines the normative underpinnings of the concept

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<sup>1</sup> Giesela Ruehl, *The Renaissance of the Blocking Statute*, CONFLICTOFLAWS.NET (Dec. 12, 2018), <https://conflictoflaws.net/2018/the-renaissance-of-the-blocking-statute/>.

<sup>2</sup> CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 18 (2008).

<sup>3</sup> Council Regulation (EC) No 2271/96 of 22 November 1996, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623535/EPRS\\_BRI\(2018\)623535\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/623535/EPRS_BRI(2018)623535_EN.pdf).

<sup>4</sup> M. Andreeva, *Updated Blocking Statute in Support of Iran Nuclear Deal enters into Force*, European Commission-Press Release (Aug. 6, 2018), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_18\\_4805](https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4805).



of legitimate expectations, exploring its evolution and the ways in which it has been applied within the context of investment arbitration. It then proceeds to elaborate why the invocation of legitimate expectations has been largely grounded on precedent, that is, awards citing to precedent to establish a violation of this principle. It contends that a coherent international law basis of legitimate expectations is necessary for the uniform application of this principle. The article then examines the use of the EU Blocking Regulation to determine its appropriateness within the context of investment arbitration. Finally, this article delves into the viability of this Regulation in generating legitimate expectations.

## II. LEGITIMATE EXPECTATIONS

The doctrine of legitimate expectations refers to the justifiable and reasonable expectations of investors invoked by the consistent conduct of a host state.<sup>5</sup> In principle, these expectations provide investors with a recourse in circumstances where the conduct of a government or an administrative entity conveys an understanding that the investor will reap or continue to reap substantive and procedural benefits, and then acts inconsistently with its prior conduct.<sup>6</sup> Generally, these expectations can be engendered either by specific commitments addressed to particular investors or by a set of rules, assurances, policies, or presentations aimed at promoting and enhancing foreign investments.<sup>7</sup> If an investor relies on the promises and conduct of a host state but suffers damages because of the failure of the host state to honor such expectations, it amounts to a violation of the principle of legitimate expectations.<sup>8</sup>

Despite the widespread use of the principle of legitimate expectations in

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<sup>5</sup> See MCLACHLAN ET AL., *supra* note 2.

<sup>6</sup> PAUL CRAIG, *ADMINISTRATIVE LAW* 677 (7th ed. 2012); Farrah Ahmed & Adam Perry, *The Coherence of the Doctrine of Legitimate Expectations*, 73 CAMBRIDGE L.J. 61, 67 (2014).

<sup>7</sup> Patrick Dumberry, *The Protection of Investors' Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105*, 31 J. OF INT'L ARB. 47 (2014); see also *Charanne Construction v. Spain*, SCC Case No. 062/2012, Award, ¶ 494 (Jan. 21, 2016); *Metalclad Corp. v. Mexico*, ICSID No. ARB(AF)/97/1, Award, ¶ 89 (Aug. 30, 2000).

<sup>8</sup> FAIR AND EQUITABLE TREATMENT: UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS II, at 69, U.N. Doc. UNCTAD/DIAE/IA/2011/5, U.N. Sales No. E.11.II.D.15 (2012); *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶ 274 (May 12, 2005).



investment arbitration, as evidenced by the large number of arbitral awards, tribunals have not identified a generally applicable definition of this principle, instead basing its application on the particular facts of each case.<sup>9</sup> This is due to various factors: firstly, the contour of this principle is not precisely explained because of the imprecise nature of the legal basis of the concept of legitimate expectations. It remains unclear whether the principle of legitimate expectations is only a constituent component of the Fair and Equitable Treatment (“FET”) standard or if it has evolved into a stand-alone doctrine.<sup>10</sup> Secondly, the principle of legitimate expectations is neither absolute<sup>11</sup> nor binding<sup>12</sup> (unless codified or memorialized into an agreement) and may be interpreted inconsistently across the board, making it susceptible to diverging interpretations.

The following section provides a brief description of the origin of legitimate expectations by scrutinizing domestic legal systems and the EU legal framework with an intent to identify the salient features of this principle. It then proceeds to investigate the criteria considered by arbitral tribunals when examining the alleged violation of this principle. Finally, this section examines if there is a concrete benchmark to evaluate this principle.

#### A. *Genesis of the Legitimate Expectations Principle*

The concept of legitimate expectations was first introduced in the context of private law.<sup>13</sup> It then developed into a central principle of administrative law in the

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<sup>9</sup> See e.g., *ADF Group Inc. v. United States*, ICSID No. ARB (AF)/00/1, Award, (Jan. 9, 2003); *Mobil Investments Canada Inc. & Murphy Oil Corp. v. Canada*, ICSID No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum (May 22, 2012); *Glamis Gold, Ltd. v. United States*, UNCITRAL, Award (June 8, 2009); *ADF Group Inc. v. United States*, ICSID No. ARB (AF)/00/1, Award (Jan. 9, 2003); *Grand River Enterprises Six Nations, Ltd. v. United States*, UNCITRAL, Award, (Jan. 12, 2011).

<sup>10</sup> Patrick Dumbery, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Wolters Kluwer, 2013); E. Snodgrass, *Protecting Investors’ Legitimate Expectations and Recognizing and Delimiting a General Principle*, 21 ICSID REV. 53 (2006); C. Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. WORLD INVEST. & TRADE 363–366, 365, 385 (2005); see also *International Thunderbird Gaming Corp. v. Mexico*, Separate Opinion of Thomas Wälde, ¶ 30 (Dec. 2005); *Mobil*, *supra* note 9, ¶ 153.

<sup>11</sup> *Parkerings-Compagniet AS v. Lithuania*, ICSID Case No. ARB/05/8, Award, ¶ 332 (Sep. 11, 2007).

<sup>12</sup> Stephan Schill, *Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW* 151, 156–157 (2010).

<sup>13</sup> Daphne Barak-Erez, *The Doctrine of Legitimate Expectations and the Distinction between the Reliance and Expectation Interests*, 11(4) EUR. PUB. L. 583, 586 (2005).



UK and European law in the judicial review sphere.<sup>14</sup> Initially, only procedural protections (such as the ability to participate in hearings) were granted to the party whose legitimate expectations were infringed.<sup>15</sup> Gradually, a number of legal systems started extending substantive protections as an additional component of protection under this principle.<sup>16</sup>

Although the concept of legitimate expectations has transformed from the mere expectation of procedural safeguards to including a substantive element,<sup>17</sup> this evolution has not yet been fully recognized by all jurisdictions.<sup>18</sup> For example, Latin American states serve as prime examples where legitimate expectations are limited to the revocation of formal administrative decisions that created rights to the benefit of a private party.<sup>19</sup> Similarly, English courts exhibit reluctance to intervene when investors' expectations are frustrated by general changes of policy.<sup>20</sup> States like Canada and Australia have adopted a fairly restrictive approach in extending judicial protection in cases where substantive expectations have been frustrated. These states have taken the view that the expectation stemming from the exercise of administrative power may only give rise to procedural rights.<sup>21</sup>

This indicates that despite the existence of this principle in many domestic legal systems, its scope of protection is not uniformly applicable. The inconsistent application of the principle of legitimate expectations also impacts its operation

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<sup>14</sup> MATTHEW GROVES & GREG WEEKS, *LEGITIMATE EXPECTATIONS IN THE COMMON LAW WORLD* 23 (2017).

<sup>15</sup> *Parkerings*, *supra* note 11, at 584; see also C.F. Forsyth, *The Provenance and Protection of Legitimate Expectations*, 47 *CAMBRIDGE L.J.* 238 (1988); N. Teggi, *Legitimate Expectations in Investment Arbitration: At the end of its life-cycle*, 5 (1) *INDIAN J. OF ARB. L.*, 64–80 (2016).

<sup>16</sup> P. Craig, *Grounds for Judicial Review: Substantive Control over Discretion*, *ENG. PUB. L.* 831, 843–866 (2004).

<sup>17</sup> PETER LEYLAND & GORDON ANTHONY, *TEXTBOOK ON ADMINISTRATIVE LAW* 363 (8th ed. 2016).

<sup>18</sup> See, e.g., Michele Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28(1) *ICSID REV.* 88–122 (2013); see also Paul Craig, *Substantive Legitimate Expectations, Domestic and Community Law*, 55(2) *CAMBRIDGE L.J.* 289, 290 (1996).

<sup>19</sup> Hector A. Mairal, *Legitimate Expectations and Informal Administrative Representations*, in *INTERNATIONAL INVESTMENT LAW AND COMPARATIVE PUBLIC LAW*, 413, 416–417 (2010).

<sup>20</sup> *R (Niazi) v. Secretary of State for the Home Department* [2008] *EWCA (Civ)* 755, ¶ 43.

<sup>21</sup> Trevor Zeyl, *Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law*, 49(1) *ALTA. L. REV.*, 203, 214–15 (2011).



within the broader realm of investment arbitration.

In recent years, the concept of legitimate expectations has gained a strong foothold as the basis for a claim in investment arbitration.<sup>22</sup> Tribunals have regarded the doctrine of legitimate expectations as a dominant component of the FET standard.<sup>23</sup> In this context, legitimate expectations are perceived as an incentive by investors to seek particular host states based on their attractive legal structure and representations made by the host state.<sup>24</sup> In addition, while this concept has been largely regarded as a core constituent of the FET standard, some scholars believe that this concept has evolved into a stand-alone doctrine, analogous to that of a general principle of international law.<sup>25</sup>

#### B. *Legitimate Expectations vis-à-vis International Law*

International law standards play a significant role in international investment arbitration by reinforcing roles and expectations and by distributing power and authority amongst decision makers.<sup>26</sup> When we draw upon methods employed by arbitrators to situate the investor within the legal framework of state responsibility, most legal authorities do not provide substantive norms for the principle of legitimate expectations. Despite the lack of an anchor, various scholars contend that the concept of legitimate expectations has evolved into a stand-alone doctrine, or possibly a distinct principle of law, entailing substantive norms.<sup>27</sup> They hold the view that the basis for the legitimate expectations principle is no longer anchored in the FET standard.

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<sup>22</sup> International Thunderbird, *supra* note 10, ¶ 37.

<sup>23</sup> *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶ 298 (Sept. 28, 2007).

<sup>24</sup> C. Sschreuer & U. Kriebaum, *At What Time Must Legitimate Expectations Exist*, in *A LIBER AMICORUM THOMAS WÄLDE*, CMP Publishing 273 (2009).

<sup>25</sup> Emmanuel T. Laryea, *Legitimate Expectations in Investment Treaty Law: Concept and Scope of Application*, in *HANDBOOK OF INTERNATIONAL INVESTMENT LAW AND POLICY* 1–24 (2020).

<sup>26</sup> Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20(3) *AM. U. INT'L L. REV.* 465, 467 (2005).

<sup>27</sup> See, e.g., Yenkong Nganjo-Hodu & Collins C. Ajibo, *Legitimate Expectation in Investor-State Arbitration: Recontextualising a Controversial Concept from a Developing Country Perspective*, 15 *MANCHESTER J. OF INT'L ECON. L.* 45, 48, 57 (2018); see also Julien Chaisse & Sum-yu (Ruby) Ng, *The Doctrine of Legitimate Expectations: Comparing International Law and Common Law in Hong Kong*, 48(1) *H.K. L.J.* 79, 81 (2018).



The EU iteration of the legitimate expectations principle also supports its convergence with general principles of international law.<sup>28</sup> The Court of Justice of the European Union (CJEU) has recognized the principle of legitimate expectations as a general principle of EU law in numerous cases where EU administrative acts or decisions were challenged.<sup>29</sup> In furtherance of the direct link between investor interests and legal certainty, the doctrine of legitimate expectations has been classified as a fundamental principle of the European legal system.<sup>30</sup>

The doctrine of legitimate expectations was addressed by the European Court of Human Rights (ECtHR) in *Sunday Times v. United Kingdom*. In this case, the ECHR summarized two requirements that flow from the expression “prescribed by law.” First, that the law must be adequately accessible to the citizens. Second, a norm shall be regarded as a “law” if it is formulated with sufficient precision to enable the citizen to regulate his conduct, such that he can foresee, to a reasonable degree, the consequences of an action. Additionally, the law must not be too rigid, and must keep pace with changing circumstances.<sup>31</sup> The court considered that the principle of legitimate expectations often arises when new legislation is introduced, especially if the new rules have retroactive effect or if they interfere with a behavior which had been specifically encouraged by the state.<sup>32</sup>

In addition to this, cognizance must be taken of the fact that the EU regulatory framework poses certain complications for international investments. This is because in a claim for a violation of this standard, one carries the burden to question the regulatory competency of the EU or the international agreement concluded by

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<sup>28</sup> Moreiro González, Carlos J., *The Convergence of Recent International Investment Awards and Case Law on the Principle of Legitimate Expectations: Towards Common Criteria Regarding Fair and Equitable Treatment?* 42 EUR. L. REV. 402–419 (2017).

<sup>29</sup> See, e.g., Case 120/86, *Mulder v Minister van Landbouw en Visserij* ECR 2321 (1988) Case 111/63, *Lemmerz-Werke v High Authority of the ECSC* ECR 677 (1965); Case C-563/12, *BDV Hung. Trading Kft v. Nemzeti Adó- és Vámhivatal Közép-magyarországi Regionális Adó Főigazgatósága*, ECLI:EU:C:2013:854 (Dec. 19, 2013); see also Jürgen Schwarze, *European Administrative Law*, Sweet & Maxwell 941, 942 (2006).

<sup>30</sup> Case C-81/10 P, *Fr. Télécom SA v. Eur. Comm'n*, Opinion of Advocate General Jaaskinen, ECLI:EU:C:2011:554, ¶ 159 (Sept. 8, 2011).

<sup>31</sup> *The Sunday Times v. The United Kingdom*, App. No. 6538/74, Eur. Ct. H.R., Merits, ¶ 49 (Apr. 26, 1979).

<sup>32</sup> *Scoppola v. Italy* (No. 2), App. No. 50550/06, Eur. Ct. H.R., ¶¶ 137–138 (Sept. 17, 2009).



its member states. Proving such competence is not straightforward, as some of the matters captured in international investment treaties fall within the exclusive jurisdiction of the EU. On the other hand, there are several other objectives enshrined in the Treaty on the Functioning of the European Union (TFEU) that are considered to fall within the common competence of both the EU and the member states. Some arbitral awards in recent years raise issues pertaining to the recognition of an investment arbitration tribunal's authority and execution over intra-EU disputes.<sup>33</sup>

The inducement of legitimate expectations implies that such expectations are generated or conferred upon a party only when that party has been given precise, unconditional, and consistent assurances by authorized representatives of the host state in accordance with its applicable laws. To that end, some tribunals have established that legitimate expectations arise when a state makes a representation, i.e., a promise to do or not to do something to an investor, and the investor subsequently invests on that basis.<sup>34</sup>

Contrary to the views held by the ECHR and the CJEU, the International Court of Justice (ICJ) adopted a different stance in *Bolivia v. Chile* in 2018.<sup>35</sup> The ICJ distinguished between the obligations arising out of treaties and those arising out of international law.<sup>36</sup> The court held that while such obligations may arise from treaty clauses (or bilateral investment treaties where the principle of legitimate expectations is often encompassed within the FET standard), international law does

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<sup>33</sup> *Micula. v. Gov't of Romania*, 15-3109-cv (2<sup>nd</sup> Circuit 2015), Amicus Curiae by the Commission of the European Union in support of Defendant Appellant; see also Case C-284/16 *Slovak Republic v. Achmea BV* [2018], ECLI:EU:C:2018:158. The analyses viewing intra-EU BITs incompatible with EU law and therefore inapplicable include e.g.: Steffen Hindelang, *Circumventing Primacy of EU Law and the CJEU's Judicial Monopoly by Resorting to Dispute Resolution Mechanisms Provided for in Inter-se Treaties? The Case of Intra-EU Investment Arbitration*, 39 *LEGAL ISSUES OF ECON. INTEGRATION* 179 (2012); Angelos Dimopoulos, *The Validity and Applicability of International Investment Agreements between EU Member States under EU and International Law*, 48 *COMMON MKT. L. REV.* 63 (2011).

<sup>34</sup> Nitish Monebhurrin, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, 32(5) *J. INT'L ARB.* 551, 552-553 (2015). For case examples, see *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (Sept. 22, 2014); *Parkerings*, *supra* note 11.

<sup>35</sup> *Obligation to negotiate access to the Pacific Ocean, Bolivia v. Chile*, Judgment on Merits (Oct. 1, 2015).

<sup>36</sup> *Id.* ¶ 162.



not enshrine any principle generating binding obligations purely arising from a state's legislative acts or policies.<sup>37</sup> In arriving at its decision, the court noted:

[R]eferences to legitimate expectations may be found in arbitral awards concerning disputes between a foreign investor and the host State that apply treaty clauses providing for fair and equitable treatment. It does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation.<sup>38</sup>

Effectively, the breach of an investor's expectation without an appropriate protection under the investment contract or treaty from the perspective of the taxonomy of different international legal regimes would not give rise to a binding obligation. In fact, the excessive reliance by some tribunals on the legitimate or reasonable expectations of investors led one annulment committee of *MTD. v. Chile* to note that "[t]he obligations of the host state towards foreign investors derive from the terms of the applicable investment treaty and not from any set of expectations investors may have or claim to have."<sup>39</sup> This position has been echoed in *Charanne v. Spain* where the tribunal observed that in the absence of a specific commitment towards stability, an investor cannot have a legitimate expectation that a regulatory framework will not be modified to adapt to the needs of the market.<sup>40</sup> *Impregilo v. Argentina* stands for the same proposition.<sup>41</sup> The ruling in this case suggests that the frustration of contractual expectations is not, without something further, protected under the fair and equitable standard.<sup>42</sup> This is consistent with the international law on state responsibility whereby a breach of contract with an alien is not, without more, considered a breach of international law.<sup>43</sup>

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<sup>37</sup> *Id.* ¶ 171.

<sup>38</sup> *Id.*

<sup>39</sup> *MTD Equity Sdn Bhd. v. Republic of Chile*, ICSID Case No. ARB/01/07, Decision on Annulment, ¶ 67 (Mar. 21, 2007).

<sup>40</sup> *Charanne B.V. v. Kingdom of Spain*, SCC Case No. V 062/2012, Award, ¶ 486 (Jan. 21, 2016).

<sup>41</sup> *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, ¶ 292 (June 21, 2011).

<sup>42</sup> *Id.* ¶ 292.

<sup>43</sup> Int'l Law Comm'n, Rep. on the Work of its Fifty-Third Session, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, U.N. Doc. A/56/10, at art. 4, cmt. ¶ 6 (2001), reprinted in [2001] 2(2) Y.B. Int'l L. Comm'n 40, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).



As a result, owing to the varying information available for evaluating legitimate expectations under international law, this principle may be susceptible to divergent interpretations and applications. Such varying interpretations stem from the analysis by arbitral tribunals into the meaning of the investment protections under either customary or international law.

The authors suggest that the lack of a uniform international law definition has been detrimental to the principle of legitimate expectations because it prevents tribunals from endorsing well-established authorities to justify their reliance on the principle. As such, this has led to the patchy, inconsistent application of the principle. A line of recent cases illustrates an inclination towards establishing the concrete existence of the doctrine by citing to prior decisions.<sup>44</sup>

This article argues that despite the distinct interpretations and applications by tribunals, there exists common criteria regarding the treatment of legitimate expectations by tribunals. At first glance, these criteria might come across as eclectic. However, a deeper analysis has led to identification of core standards recognized across the board. To this end, the authors have identified four main components connecting these awards: (i) regulatory guarantees and commitments under contracts; (ii) clarity and unambiguity regarding protection of expectations; (iii) intention behind promises and commitments made by the host state; and (iv) the reasonableness of the expectations so created.

#### 1. Regulatory Guarantees and Commitments Made through Contracts

Arbitral tribunals generally draw a distinction between a contractual undertaking and the independent legislative framework adopted by governments to bolster their investment climate. Tribunals scrutinize the source of commitments giving rise to expectations. On the one hand, a state may make a commitment in the form of a law in favor of a class of investors providing a set of elements for ensuring the operation of promoted investments,<sup>45</sup> while on the other hand a state could execute a

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<sup>44</sup> M. Potestà, *Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept*, 28(1) ICSID REVIEW 112 (2013).

<sup>45</sup> Deyan Draguiev, *Legitimate Expectations in Renewable Energy Treaty Arbitrations: The Lessons So Far*, KLUWER ARB. BLOG (Mar. 22, 2018).



contractual agreement with investors to stabilize its legislation or provide concessions under a contract (usually development agreements or concession agreements). The *Parkerings* tribunal held that “[t]he expectation is legitimate if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representation that the investor took into account in making the investment.”<sup>46</sup> In *Continental Casualty v. Argentina*, for instance, Argentina provided certain contractual commitments to foreign investors. The tribunal emphasized that “unilateral modification of contractual undertaking by governments . . . deserve clearly more scrutiny [as compared to political statements and general legislative assurances] in . . . light of the context, reasons, effects, since they generate as a rule legal rights and therefore expectations of compliance.”<sup>47</sup> This line of reasoning was also echoed in *Gustav v. Ghana* where the tribunal underscored that “the existence of legitimate expectations and the existence of contractual rights are two separate issues.”<sup>48</sup> This same proposition was in turn iterated by the tribunal in *Impregilo v. Argentina*.<sup>49</sup>

## 2. Clarity and Unambiguity regarding Protection of Expectations

Arbitral tribunals place significant weight on the language used by states when making promises and assurances to induce investment. Tribunals exercise caution and limit the protection of expectations to situations where the policies and regulatory guarantees embody explicit, clear, and unambiguous protections. For example, in *Total v. Argentina*, the ICSID tribunal highlighted that under domestic law “only exceptionally has the concept of legitimate expectations been the basis of redress when legislative action by a State was at stake.”<sup>50</sup> In a similar vein, the tribunal in *Occidental v. Ecuador* referred to the preamble of the BIT to conclude that “stability of the legal and business framework is . . . an essential element of fair and

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<sup>46</sup> *Parkerings*, *supra* note 11, at ¶ 331.

<sup>47</sup> *Id.* ¶ 261.

<sup>48</sup> *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, ¶ 335 (June 18, 2010).

<sup>49</sup> *Impregilo*, *supra* note 41.

<sup>50</sup> *Total v. Argentina*, ICSID Case No. ARB/04/01 Decision on Liability ¶ 129 (Dec. 27, 2010).



equitable treatment.”<sup>51</sup> The *Enron v. Argentina* tribunal followed this position, holding that a “key element of fair and equitable treatment” is the requirement of a “stable framework for investment.”<sup>52</sup>

### 3. Intention behind the Promises and Commitments made by the Host State

Another teleological element that tribunals often factor into their analysis is whether the representations made by states had the purpose of inducing investment. The tribunal in *Glamis Gold v. United States* took this stance and held that the host state may be held accountable for the objective expectations that it sets out to induce investment.<sup>53</sup> Further, in *Sempra Energy v. Argentina*, the tribunal noted that the requirement to protect legitimate expectations “becomes particularly meaningful when the investment has been attracted and induced by means of assurances and representations.”<sup>54</sup> It is, therefore, established that the violation of the legitimate expectations standard requires something more than mere disappointments; it requires an active inducement of quasi-contractual expectations.<sup>55</sup> In addition, the reliance of investors on those promises is an equally resolute criteria that most tribunals take into account when holding states liable for the frustration of the principle. In *PSEG v. Turkey*, the tribunal held that Turkey’s policy to encourage and welcome investment was not a violation of legitimate expectations after noting that “[l]egitimate expectations by definition require a promise of the administration on which the Claimants rely to assert a right that needs to be observed.”<sup>56</sup>

### 4. Reasonableness in having Legitimate Expectations

Reasonableness is the hallmark of the principle of legitimate expectations. As explained above, various tribunals have held that the actions taken by the state ought to form a clear, unambiguous commitment that the regulatory framework will remain

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<sup>51</sup> *Occidental Expl. & Prod. Co. v. Republic of Ecuador*, LCIA Case No. UN 3467, Award, ¶ 183 (July 1, 2004).

<sup>52</sup> *Enron Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, ¶ 260 (May 22, 2007).

<sup>53</sup> *Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Award, ¶ 766 (June 8, 2009).

<sup>54</sup> *Sempra Energy Int’l v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, ¶ 298 (Sept. 28, 2007).

<sup>55</sup> *Glamis Gold*, *supra* note 53, at ¶ 799.

<sup>56</sup> *PSEG Glob. Inc. v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, ¶ 241 (Jan. 19, 2007).



unchanged.<sup>57</sup> In addition to a specific commitment, it must be reasonable for the investor to have “expectations” that the promises and commitments will be honored by the host state. In the case of the fair and equitable treatment standard, the benchmark for “reasonableness” does not lie in the expectations of a reasonable person, but in those of a reasonable investor that has to take the laws and regulations of the host state as it finds them, providing that these laws and regulations conform to international law.<sup>58</sup> The reasonableness of an expectation also means that there must be a sufficient nexus between the nature of the state declaration or conduct and the content of the investor’s expectation.<sup>59</sup>

*Saluka* is seminal in this regard. In *Saluka*, the tribunal held that a “foreign investor whose interests are protected under the [the Czech Republic–Netherlands BIT] is entitled to expect that the [host] State will not act in a way that is manifestly inconsistent, non-transparent, [and] unreasonable.”<sup>60</sup> The tribunal observed:

No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor’s expectations was justified and reasonable, the host State’s legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well . . . The determination of a breach of [FET] by the Czech Republic therefore requires a weighing of the Claimant’s legitimate and reasonable expectations on the one hand and the Respondent’s legitimate regulatory interest on the other.<sup>61</sup>

In general, tribunals thoroughly examine the “reasonable” justification behind a state’s actions. This posture was memorialized by the ICSID tribunal in *Philip Morris* which excluded the arbitrariness of restrictions on cigarette packaging aimed at protecting health.<sup>62</sup> The tribunal held that the FET standard had not been breached,

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<sup>57</sup> JÜRGEN SCHWARZE, *EUROPEAN ADMINISTRATIVE LAW* 950 (2nd ed. 2006).

<sup>58</sup> Part II: The Content and Scope of the FET Standard, Chapter 6: The Content of the FET Standard, in Alexandra Diehl, *The Core Standard of International Investment Protection*, 26 *International Arbitration Law Library*, 311–537 (2012).

<sup>59</sup> Florian Dupuy and Pierre-Marie Dupuy, *What to Expect from Legitimate Expectations? A Critical Appraisal and Look into the Future of the “Legitimate Expectations” Doctrine in International Investment Law*, in NASSIB G. ZIADÉ (ED), *FESTSCHRIFT AHMED SADEK EL-KOSHERI*, 273–298 (2015).

<sup>60</sup> *Saluka Invs. B.V. v. Czech Republic*, UNCITRAL, Partial Award, ¶ 309 (Mar. 17, 2006).

<sup>61</sup> *Id.* ¶ 305.

<sup>62</sup> *Philip Morris Brands SÀRL v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (July 8, 2016).



noting that in the light of the “widely accepted articulations of international concern for the harmful effect of tobacco, the [legitimate] expectation could only have been of progressively more stringent regulation of the sale and use of tobacco products,”<sup>63</sup> concluding that that non-arbitrariness entails reasonableness.<sup>64</sup>

The notion that investors should not expect that the regulatory framework of a state would remain unchanged for long periods of time has been enshrined in various arbitral decisions as detailed herein. This also points to the potential unreasonableness arising from harboring such expectations. The tribunal in *El Paso* stressed that “legitimate expectations cannot be solely the subjective expectations of the investor, but have to correspond to the objective expectations” examined in the context of the circumstances that are present in the host state.<sup>65</sup> Any assessment regarding breach of legitimate expectations “should include ‘the context of the evolution of the host state’s economy’, as well as the ‘reasonableness of the normative changes challenged and their appropriateness in the light of a criterion of proportionality also have to be taken into account.’”<sup>66</sup> The *Charrane* tribunal held that an investor can only claim protection under the notion of legitimate expectations in the situation where regulatory measures were not “reasonably foreseeable at the time of the investment.”<sup>67</sup> The tribunal in *Isolux* made similar observations about an investor’s legitimate expectations only being violated if the new regulatory changes were not foreseeable by “a prudent investor.”<sup>68</sup>

Further, the tribunal in *Parkerings v. Lithuania* summarized the change to the legal framework for investors and observed that “any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power.”<sup>69</sup> The

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<sup>63</sup> *Id.* ¶ 430.

<sup>64</sup> *Id.* ¶ 391.

<sup>65</sup> *El Paso v. Argentina*, ICSID Case No. ARB/03/15 Award, ¶ 358 (Oct. 31, 2011).

<sup>66</sup> *Total*, *supra* note 50, at ¶ 123.

<sup>67</sup> *Charanne Construction v. Spain*, SCC Case No. 062/2012 Award, ¶ 505 (Jan. 21, 2016).

<sup>68</sup> *Isolux Netherlands, BV v. Kingdom of Spain*, SCC Case V2013/153 Award, ¶ 781 (July 17, 2016).

<sup>69</sup> *Parkerings Companiet*, *supra* note 11, at ¶ 332.



tribunal in *Eiser v. Spain* accepted that the regulatory change introduced by the state was so radical and fundamental that it affected the financial fundament of the investments and “washed away”<sup>70</sup> the benefits envisioned at the time of investment, and this qualified as a breach.<sup>71</sup> *Duke Energy* also brought up the issue of reasonableness wherein the tribunal observed that “the assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State.”<sup>72</sup>

C. Discretionary Powers of Arbitral Tribunals

Arbitral tribunals have a wide discretion to interpret and apply the principle of legitimate expectations. A line of recent cases shows a more empathetic interpretation of the host state’s obligations, signifying the expansive discretion tribunals enjoy. In other words, these arbitral tribunals recognize certain margins of discretion for host states to *amend their legislations and policies*. The ICSID tribunal in *Philip Morris* recognized that the legislature enjoys a “margin of appreciation”<sup>73</sup> to which international arbitrators should pay “great deference,”<sup>74</sup> and held that the requirements of legitimate expectations and legal stability as manifestations of the FET standard do not affect the State’s rights to exercise its sovereign authority to legislate and to adapt its legal system to changing circumstances. Thus, tribunals intervene only if there is a very serious imbalance between a party’s reasonable expectation and the wider public interest in a decision which will disappoint it.<sup>75</sup> Tribunals look into the corresponding regulatory framework, and the foresight that this may be modified or changed with regards to that existing at the time the

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<sup>70</sup> *Eiser Infrastructure Ltd. v. Spain*, ICSID Case No. ARB/13/36, Award, ¶¶ 389 (May 4, 2017).

<sup>71</sup> *Id.* ¶¶ 371, 379, 382.

<sup>72</sup> *Duke Energy Electroquil Partners v. Republic of Ecuador*, ICSID Case No. ARB/04/19, Award ¶ 340 (Aug. 18, 2008).

<sup>73</sup> *Philip Morris*, *supra* note 60, at ¶ 388.

<sup>74</sup> *Id.* at ¶ 399.

<sup>75</sup> SØREN SCHØNBERG, *LEGITIMATE EXPECTATIONS IN ADMINISTRATIVE LAW* 112 (2000).



investment is made.<sup>76</sup>

In exercising their discretion, tribunals attribute great significance to the importance of commercial considerations. In *Genin v. Estonia*, the tribunal determined that Estonia's regulatory investigations against the Estonian Innovation Bank, controlled by US citizen Alex Genin, were non-discriminatory and "constituted entirely legitimate and fully proper exercises of the central bank's regulatory and supervisory responsibilities."<sup>77</sup> The tribunal noted "the particular context in which the dispute arose, namely, that of a nascent independent state, coming rapidly to grips with the reality of modern financial, commercial and banking practices and the emergence of state institutions responsible for overseeing and regulating areas of activity perhaps previously unknown."<sup>78</sup> In *Duke Energy v. Ecuador*, the tribunal took a holistic approach to the evaluation of expectations by observing that the consideration for socio-economic circumstances helps shape the content of expectations. The tribunal noted that "the stability of the legal and business environment is directly linked to the investor's justified expectations"<sup>79</sup> and that "such expectations are an important element of fair and equitable treatment. At the same time, [the Tribunal] was mindful of their limitations." The Tribunal also observed that "in view of the contract history, the expectation could only have been deemed reasonable if it had been based on clear assurances from the Government."<sup>80</sup> This means that an investor ought to consider the legal and business environment as well as commitments made by the state in order to have "reasonable" and legitimate expectations. Thus, it can be argued that recent cases have moved towards a more expansive interpretation of the host state's obligation to protect investments where

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<sup>76</sup> Bailey H. Kuklin, *The Plausibility of Legally Protecting Reasonable Expectations*, 32 VAL. U. L. REV. 19, 2344 (1997).

<sup>77</sup> *Genin v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, ¶ 353 (June 25, 2001).

<sup>78</sup> *Id.* ¶ 348.

<sup>79</sup> *Duke Energy*, *supra* note 72, at ¶ 340.

<sup>80</sup> *Id.* ¶ 351.



the holistic approach to socio-economic considerations is accounted for.<sup>81</sup>

It is therefore evident that host states ought to act coherently, unambiguously and with complete transparency so that foreign investors are aware of the regulatory landscape, objectives of public policy, and relevant administrative practices that will govern their investment at the time of making their investment. Further, host states should avoid arbitrary conduct that could change the regulatory framework.

In light of these considerations, the authors assess whether blocking regulations are capable of generating legitimate expectations and whether the nature, application, and structure of the regime meets the aforementioned.

#### D. *The EU Blocking Regulation and Legitimate Expectations*

This section examines the contour and purpose of the EU Blocking Regulation and endeavors to assess whether such a regulatory framework offers concrete commitments to invoke a breach of the legitimate expectations standard. A textual analysis of some provisions is conducted to establish if they are capable of espousing clear and unambiguous protections. Furthermore, this section inquiries into the discretion of competent authorities and the approach of courts towards this framework to determine whether this Regulation induces reliance from an investment standpoint. In doing so, it explores whether this instrument grants competent authorities the discretionary power to assess potential breaches of the standard of legitimate expectations. Finally, it examines whether this instrument can be deemed to generate legitimate expectations.

##### 1. Background of EU Blocking Regulation: An Investment Protection Undertone

In May 2018, the EU amended its Blocking Regulation<sup>82</sup> to offset the extraterritorial effects of the re-imposed sanctions by the US. This Regulation was instituted to, inter alia, prohibit EU persons from complying with specified

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<sup>81</sup> MARTINS PAPARINSKIS, *THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT* 4–5, 171–180 (2013).

<sup>82</sup> Commission Delegated Regulation (EU) 2018/1100/ED on amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (Jun. 6, 2018) [O.J. L199/1].



extraterritorial sanctions.<sup>83</sup> This Regulation was adopted by Council Regulation (EC) No. 2271/96 of 22 November 1996.<sup>84</sup> It was brought into immediate effect on August 7, 2018. The purpose of the EU Blocking Regulation, as set out in Article 1, is to provide a “safeguard for European persons from the effects of the extra-territorial application of laws specified in the Annex, including regulation and legislative instruments and of actions based thereon or resulting therefrom adopted by a third country, where such application affects the interests of covered persons.”<sup>85</sup>

Whilst this framework is not *prima facie* introduced to directly promote investment between EU and foreign investors, it is adopted in consonance with the Treaty Establishing the European Community, which hailed the promotion of investment and trade as the core principles of the EU.<sup>86</sup> In particular, Articles 73, 113, and 235 of this Treaty recognize objectives which encompass contributing to the harmonious development of world trade and the progressive abolition of restrictions on international trade and investment.<sup>87</sup> In addition, the EU Blocking Regulation was adopted having considered the opinion of the European Parliament regarding achieving the objective of free movement of capital by removing any restrictions on direct investments, including investments in real estate, financial services, or securities.<sup>88</sup> The overarching spirit of this regulatory framework is therefore to promote and foster the free movement of investment among EU member states and citizens of a third country.

The following sections seek to illustrate particular areas of the Regulation that undermine its viability as a purely investment-related instrument. Certain legal

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<sup>83</sup> The annex to the Blocking Regulation as originally drafted referred to the following extraterritorial legislation: (i) National Defense Authorization Act for Fiscal Year 1993, Title XVII “Cuban Democracy Act 1992”, sections 1704 and 1706; (ii) Cuban Liberty and Democratic Solidarity Act of 1996; and (iii) Iran Sanctions Act of 1996.

<sup>84</sup> Council Regulation (EC) No 2271/96, *supra* note 3, art. 1.

<sup>85</sup> *Id.*

<sup>86</sup> Treaty Establishing the European Community, Aug. 31, 1992, 6-79.

<sup>87</sup> *Id.* art. 73, 113, 235.

<sup>88</sup> Christian Schneinert, *Free Movement of Capital*, Fact Sheets on the European Union, Apr., 2021, at 3, <https://www.europarl.europa.eu/factsheets/en/sheet/39/vrij-verkeer-van-kapitaal>.



uncertainties have been identified with respect to contextual analysis, authorization, and the margin of discretion afforded to the competent authority. Prior to explaining these risks, it is important to first lay out the scope of the Regulation's application.

(i) Scope of Application of the Updated EU Blocking Regulation  
2271/96

The EU Blocking Regulation 2271/96 applies to persons set out in Article 11, i.e., Covered Persons. The Regulation is designed to protect EU operators engaged in lawful international trade, investment, and other related commercial activities, against the effects of the extraterritorial legislation. Article 11 lays out the scope of the Regulation's application. Under this Article, the provisions will apply to any natural person "being a resident in the community and a national or a member state and any natural or legal person."<sup>89</sup>

2. Textual Analysis of the Blocking Regulation

The interpretation of the Blocking Regulation is ultimately a matter reserved to the CJEU. However, in the absence of case law, it appears that domestic courts or international tribunals may have a role in interpreting its scope of application. But, it should be pointed out that the task of interpreting this legal framework is fraught with difficulties. This is largely due to the ambiguity surrounding some of the terms in the Regulation. This section asserts that these ambiguities may render the application of the Regulation arbitrary and devoid of a clear and definitive interpretation. The key provision of the EU Blocking Regulation 2271/96 is Article 5, which expressly prohibits persons covered by the Blocking Regulation under Article 11 ("Covered Persons") from complying whether directly or indirectly with any requirement or prohibition, including requests of foreign courts.<sup>90</sup> The apparent ambiguity of certain terms of the Blocking Regulation are discussed below.

(i) "Comply with"

The first notion that provokes confusion is the phrase "comply with" in Article 5. Article 5 is broadly structured and may be understood as including compliance with

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<sup>89</sup> Council Regulation 2271/96 /EC, *supra* note 3, art. 11.

<sup>90</sup> Council Regulation 2271/96 /EC, *supra* note 3, art. 5.



requirements imposed by governmental bodies and commitments carried out by governmental bodies or third parties such as financing institutions.<sup>91</sup> The threshold of this standard has not been clearly identified.

The phrase “comply with” US secondary sanctions gives rise to difficulties with respect to clearly establishing what measures will amount to complying with US secondary sanctions. US secondary sanctions only outline potential consequences that might arise if a non-US person breach one of the provisions stipulated in the designated sanction regime.<sup>92</sup> Crucially, the US secondary sanctions do not provide clear, positive mandatory requirements.<sup>93</sup> More specifically, the existing archetype of US secondary sanctions does not postulate what prohibitive measures could fall within the purview of the sanction regime.<sup>94</sup> It is, therefore, not clear what action could constitute “compliance” or could trigger some of the provisions within the US secondary sanctions framework.<sup>95</sup> Generally, a decision to enter a commercial deal is made based upon a whole host of commercial and legal considerations. Oftentimes, it would be difficult to discern how much weight has been attributed to non-commercial considerations such as secondary sanctions. As a result, it is equally hard to establish if such avoidance may amount to compliance.<sup>96</sup> The difficulties within the contour of the notion of “compliance” is affirmed by the European Commission advisory opinion, whereby it stated that the decision to engage in business activities could be also driven from commercial considerations, thereby making it hard to determine if the decision was made as a direct result of US sanctions.<sup>97</sup> The recent English court case *Mamancochet Mining Ltd. v. Aegis Managing Agency Ltd.*

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<sup>91</sup> Financial Markets Law Committee, June 2019, *U.S Sanctions and the E.U. Blocking Regulation: Issues of Legal Uncertainty* ¶ 2.13. <http://fmlc.org/wp-content/uploads/2019/06/Report-U.S.-Sanctions-and-the-E.U.-Blocking-Regulation.pdf>.

<sup>92</sup> *Id.* ¶ 3.17.

<sup>93</sup> *Id.*

<sup>94</sup> Jeffrey A. Meyer, *Second Thoughts on Secondary Sanctions*, 30 (3) U. Pa. J. Int'l L. 906-910 (2014).

<sup>95</sup> Financial Markets Law Committee, *supra* note 91, at ¶¶ 3.17, 3.24, 70.

<sup>96</sup> *Id.* ¶ 3.85.

<sup>97</sup> Answer given by Vice-President Mogherini on behalf of the commission with regard to non-compliance with Regulation (EC) No 2271/96 (Apr. 1, 2015) [E-007804/2014].



underscores the inherent difficulty in ascertaining the compliance requirement.<sup>98</sup> The court noted that a party merely relying upon the terms of a sanctions clause to resist performing a contractual obligation cannot be construed as an act of “compliance” with a third country sanctions regime, and thereby would not breach the updated EU Blocking Regulation.<sup>99</sup>

In the absence of CJEU case law interpreting the Blocking Regulation, the interpretations adopted by the EU courts are followed by parties. Pending a definitive interpretation by the CJEU, the phrase “comply with” ought to be interpreted in good faith, in conformity with its ordinary meaning, in consideration of its context, and in light of the Regulation’s object and purpose.<sup>100</sup> The main objective of the EU Blocking Regulation is to offset the effect of the US long arm legislation, by protecting EU individuals and companies that are directly and indirectly exposed to it.<sup>101</sup> Construing Article 5 in light of this, “compliance” occurs when the specified US sanctions would affect the interest of a “Covered Person” engaging in international trade or finance between the EU and third states.<sup>102</sup> Therefore, the updated EU Blocking Regulation would apply where the EU individuals and companies are directly and indirectly subject to negative effects from the designated sanction regime. In other words, it only applies to compliance or actions resulting from situations where these provisions apply extraterritorially. This understanding of the scope of application of the EU Blocking Regulation suggests that compliance by US person (even outside the US) with primary US sanctions would not be covered by the EU Blocking Regulations.<sup>103</sup> Therefore, this instrument does not *per se* eliminate obstacles in relation to foreign investments generally, instead focusing only on those investments affected by extraterritorial sanctions. To this end, its scope of protection is quite

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<sup>98</sup> Mamancochet Mining Ltd. v. Aegis Managing Agency Ltd, [2018] EWHC (Comm) 2643.

<sup>99</sup> Financial Markets Law Committee, *supra* note 91, at ¶ 3.39.

<sup>100</sup> Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), art. 31 (2), 1155 U.N.T.S. 331.

<sup>101</sup> European Commission, Guidance Note- Question and Answers: adoption of update of Blocking Statute (July, 8. 2018) [O. J. C2771] at 4-10.

<sup>102</sup> Financial Markets Law Committee, *supra* note 91, at ¶¶ 3.6, 3.7.

<sup>103</sup> *Id.* ¶ 3.15.



limited and does not provide an impetus for third parties to freely engage in investment-related activities without the risk of having its investment being exposed to secondary sanctions.

(ii) Extraterritoriality

Activities that are impacted by extraterritorial application of the specified US sanctions are covered under the EU Blocking Regulation. It is not entirely clear whether compliance triggered by primary sanctions of the US regime rather than by secondary sanctions is also prohibited by the Regulation.

Moreover, the Annex expressly notes that the summaries of the instruments are “only for informational purposes.”<sup>104</sup> Since there is no further guidance as to how this concept is to be realized and applied, it runs the risk of rendering this instrument vague and generic which will diminish its chances of generating legitimate expectations.

(iii) Economic Interest

Another concept within Article 5 giving rise to uncertainty is the phrase “economic and/or financial interest.” This phrase can be interpreted very broadly. As Article 2 obliges the affected person to notify the EC, one could imply that Covered Persons may also be required to report any future or anticipated effects of the laws specified in the Annex or perhaps any loss of opportunities arising from the wide-reaching impacts of the sanctions. Additionally, the Article does not purport what evidence is required for reporting and what is the appropriate threshold for the precise state of knowledge. Moreover, the Article fails to clearly identify what transactions could qualify as an investment.

The ambiguity surrounding this phrase gives rise to further complications as to what degree a Covered Person bears the burden of demonstrating a disturbance to its interest, or to what degree a person bears the burden of demonstrating economic

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<sup>104</sup> Commission Delegated Regulation (EU) 2018/1100/ED on amending the Annex to Council Regulation on protecting against the effects of extra-territorial application (Jun. 6, 2018) [O.J. L199/1]. See *Annex Note*: “The main provisions of the instruments contained in this Annex are summarized only for information purposes. The full overview of provisions and their exact content can be found in the relevant instruments.”



loss. This argument has significant implications for investment arbitration where the investor's conduct is given enormous consideration. The onus is on the claimant to prove the existence of conduct by the administration that supposedly created legitimate expectations, which can be particularly difficult if the complaint also alleges abuse of power and arbitrariness.<sup>105</sup>

An investor is responsible for practicing extreme diligence when the intention is to ground its expectations in a highly regulated state. This due diligence requires undertaking a comprehensive analysis of the legal framework before making an investment. Along with this, the investor bears the burden of proving the arbitrary or irrational nature of the controversial measures within the framework of arbitration proceedings.<sup>106</sup>

#### (iv) Requirement to Inform the Commission

The EU Blocking Regulation introduces a requirement for “notification” under Article 2 without clearly setting out its scope of application. The provision fails to specifically set out a minimum (or maximum) threshold to inform the EC, which makes this Regulation prone to arbitrary or capricious application.<sup>107</sup> As explained above, a claimant's alleged expectations must arise from unequivocal and precise assurances that are consistent with the applicable rules. The current text of Article 2 does not clearly indicate whether an additional factor is required to trigger the Article 2 notification requirements.<sup>108</sup>

The generic use of terms may prevent this Regulation from establishing a robust rule of law. According to Raz, a distinguished scholar, the rule of law is rooted in the autonomy of the law.<sup>109</sup> The law should operate prospectively only, be open and clear, and be relatively stable. Individuals should be able to discern the law and organize their lives according to it, and the law should not be promulgated or applied in an

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<sup>105</sup> Case C-566/14 P, *Marchiani v. Eur. Parliament*, ECLI:EU:C: 437, ¶¶ 75–80 (2016).

<sup>106</sup> *Charanne B.V. v. Kingdom of Spain*, SCC Case No. V 062/2012, Award, ¶¶ 507, 536 (Jan. 21, 2016).

<sup>107</sup> Financial Markets Law Committee, *supra* note 91 ¶ 3.24.

<sup>108</sup> *Id.* ¶ 3.25.

<sup>109</sup> JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 214, 219–220 (1979).



arbitrary manner.<sup>110</sup> In order to avoid unintended arbitrary application, more guidance or elaboration of terms stipulated in the Blocking Regulation is required.

(v) Authorization to Comply “Fully or Partially”

Under Article 5 of the EU Blocking Regulation, a Covered Person is allowed to apply for an authorization to “comply fully or partially” with the laws specified in the Annex to the “extent that noncompliance would seriously damage [that person’s] interests or those of the community.”<sup>111</sup> This authorization will be subject to the EU examination procedures. Article 5 does not clearly define the scope of an authorization. It is not clear as to whether an exemption can be sought from the EU Blocking Regulation in its entirety or just for specific transactions.<sup>112</sup> Additionally, it does not stipulate who can seek exemptions and on what basis, for example on the basis that it is a subsidiary of a US company. The Guidance Note of the EU Blocking Regulation did not provide much clarity regarding the ways in which the exemptions will be sought. Due to the limited guidance on what situations would potentially qualify for an authorization, it would be difficult to assess when applications for exemption will be granted.<sup>113</sup> This authorization process poses a great risk whereby the Blocking Regulation may be amended or disregarded at the EC’s discretion.

(vi) Redressal Mechanism for Breach

Article 2(1) stipulates that any violation of Article 5 of the Blocking Regulation constitutes a criminal offence punishable by a fine.<sup>114</sup> The appropriate remedy is “to be determined by Member States” (Article 9); to this end, the Regulation has instructed the Member States to devise “effective, proportionate and persuasive” remedies.<sup>115</sup> In addition, under this Article, EU member states are required to inform the EC if they are affected by US sanctions. Since the Blocking Regulation came into force in 1996, EU member states have implemented respective laws.

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<sup>110</sup> *Id.* at 220.

<sup>111</sup> Council Regulation 2271/96 /EC, *supra* note 3, art. 5.

<sup>112</sup> Financial Markets Law Committee, *supra* note 91 ¶ 3.66.

<sup>113</sup> *Id.* ¶ 3.67.

<sup>114</sup> Council Regulation 2271/96 /EC, *supra* note 3, art. 2.

<sup>115</sup> Council Regulation 2271/96 /EC, *supra* note 3, art. 9.



For instance, under Swedish law, a breach of Article 2 or the first paragraph of Article 5 carries a potentially unlimited criminal fine and maximum sentence of 6 months.<sup>116</sup> Similarly, an Austrian law implemented such penalties of up to EUR 70,000.<sup>117</sup> Under German law, breach of the EU Blocking Regulation may constitute an administrative offence and can result in a fine up to EUR 500.<sup>118</sup>

### III. AUTONOMY TO INTERPRET THE BLOCKING REGULATION

Courts and other dispute resolution authorities enjoy ample autonomy to interpret and apply the provisions in the Blocking Regulation. As the following analyses illustrate, the existing case law in relation to the scope of application of the EU Blocking Regulation is devoid of uniform outcome. An Italian case, which has remained unpublished, held that if a company faced a real threat of going insolvent due to the re-imposition of sanctions, then the termination of the contract without notice would be permitted.<sup>119</sup> This approach reflects the growing tendency of the courts to attribute significant weight to commercial considerations when establishing if the breach has occurred. In a notable German case, the court dismissed the claim of sanctions and granted interim measures, noting that the complications imposed by sanctions were not adequately explained and the breaching party failed to sufficiently demonstrate that the sanctions imposed significant commercial impediments, rendering the performance unfeasible.<sup>120</sup> Similarly, a Dutch case followed the same reasoning, noting that mere exposure to the risk of US sanctions is not an adequate ground for terminating a contract.<sup>121</sup> It

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<sup>116</sup> Lag om EG:s förordning om skydd mot extraterritoriell lagstiftning som antas av ett tredje land (Svensk författningssamling [SFS] (1997:825) (Swed.).

<sup>117</sup> Federal Law Gazette for the Republic of Austria I No. 117/1997, [https://www.ris.bka.gv.at/Dokumente/BgblPdf/1997\\_117\\_1/1997\\_117\\_1.pdf](https://www.ris.bka.gv.at/Dokumente/BgblPdf/1997_117_1/1997_117_1.pdf).

<sup>118</sup> Außenwirtschaftsverordnung vom, Aug. 2, 2013 (BGBl. I S. 2865), zuletzt geändert durch Artikel 32 des Gesetzes vom 23 Juni 2021 (BGBl. I S. 1858).

<sup>119</sup> Maya Lester QC, *Italian Judgment on the EU Blocking Regulation*, *European Sanctions: Law, Practice and Guidance*, European Sanctions, Oct. 2, 2019, <https://www.europeansanctions.com/2019/10/italian-judgments-on-the-eu-blocking-regulation/>.

<sup>120</sup> Landgericht Hamburg [LG] Hamburg [Hamburg District Court], Nov. 28, 2018, 319 O 265/18. Nennung der Zeigniederlassung als Antragstellerin, Vorliegen eines wichtigen Grundes für ein fristlose Kündigung.

<sup>121</sup> ECLI: NL: RBDHA: 2019:6301, Rechtbank Den Haag, C-09-573240-KG ZA 19-430.



also added that the position would be different if the contract became practically unfeasible because of the US sanctions.<sup>122</sup>

The reasoning of these cases denotes that courts are firmly in favor of applying this instrument without diminishing its role and purpose; they have also simultaneously considered many commercial considerations which potentially limit the scope of protection afforded by the regulation. The above cases demonstrate the significant freedom given to judges and other competent authorities to adequately determine the scope of blocking regulations. In essence, the judges engage in a close examination of the effect of sanctions with extraterritorial reach and decide how detrimental their impact is, and in doing so they place significant importance on the commercial aspects of each case.

In another German case, which provides welcome clarify on what extent the EU Blocking Regulation operates, the court took the view that the risk of the threat of sanctions should have an immediate impact on the operation of entity.<sup>123</sup> In this case, the court held that while the EU Blocking Regulation prohibits persons from complying with extraterritorial sanctions, it does not mean that it compels EU business to continue trading with Iranian entities.

These cases demonstrate that the EU Blocking Regulation do not oblige European entities to continue trade and business with Iranian counterparts. Their purpose is rather to ensure that EU businesses have the freedom to continue with Iranian transactions rather than protecting ongoing or future investments. Therefore, they do not always create “expectations” for the investors or oblige the states to abide by them. Until a uniform interpretation develops, the impact of blocking regulations on legitimate expectations remains speculative.

#### IV. CONCLUSION

This article focuses on the important elements that contribute to the invocation of legitimate expectations in international investment law. It contends that clarity,

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<sup>122</sup> *Id.*

<sup>123</sup> Oberlandesgericht, Landgericht Hamburg [LG] [Hamburg District Court] Oct. 15, 2018, 318 O 330/18, (Case no. 11 U 116/19) Wirksamkeit der Kündigung des Girokontovertrages durch die Bank.



unambiguity, non-arbitrariness, and the intent to make policies and commitments are characteristics delineating the principle of legitimate expectations, and at the same time, guide the analysis relating to the breach of legitimate expectations.

The article examines the blocking regulation regime through the lens of legitimate expectations in investment arbitration by identifying some commonalities in arbitral jurisprudence. For instance, the *Micula* tribunal held that there must be a promise, assurance, or representation attributable to a competent organ and representative of the state to give rise to “legitimate expectations” on the part of the investor.<sup>124</sup> Such attribution has not been clearly spelled out in the provision stipulated in the blocking statute. The *Novenergia* tribunal took the view that assurance needs to be attributed explicitly and implicitly to a competent authority which is not clearly asserted in the regulations.<sup>125</sup> Such an assurance would obviate the possibility of the misapplication of the regulations by adjudicators in resolving disputes. Drawing on the conceptualization of legitimate expectations, this article argues that legitimate expectations would only arise when there are specific assurances made to investors by very clear and unambiguous conduct. However, the authorization to comply fully or partially has created such unspecific assurances and undertaking from European states, rendering it difficult for prospective investors to rely on these provisions.

Further, the article recognizes reasonableness as a yardstick for reviewing the breach of legitimate expectations, thereby placing a large latitude of discretion onto arbitral tribunals to examine if state practice circumvents or generates legitimate expectations. However, it also acknowledges that reasonableness is not a standalone element and tribunals adopt a holistic approach to determine a violation of legitimate expectations.

Finally, the article conducts a textual analysis of blocking regulations, and provides that the language of blocking regulations - in particular the lack of proper remedial mechanism, the absence of clear recourse, the ambiguous provisions

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<sup>124</sup> *Ioan Micula Viorel Micula & Others v. Romania*, ICSID Case No. ARB/05/20, Award, ¶ 178 (Dec. 11, 2013).

<sup>125</sup> *Novenergia II-Energy & Environment (SCA), SICAR v. Kingdom of Spain*, SCC Case No. 2015/063, Award, ¶¶ 545, 546, 547 (Feb. 15, 2018).



regarding the interpretation, the vagueness surrounding the notion of economic interest and the usage of the phrases “comply with” and “extra” confirm that this regulatory framework is not capable of inducing expectations in foreign investors. The article has established that the language of blocking regulations generally gives rise to its inconsistent interpretation and failure to emanate unambiguous and transparent commitments by host states to provide substantive and procedural safeguards for foreign investors.



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# INSTITUTE FOR TRANSNATIONAL ARBITRATION

of

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