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*THE LIMITS OF THE COMPARATIVE PUBLIC LAW METHODOLOGY  
IN INTERNATIONAL INVESTMENT LAW: AN AUSTRALIAN CASE STUDY*

Alexander Ferguson

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# THE LIMITS OF THE COMPARATIVE PUBLIC LAW METHODOLOGY IN INTERNATIONAL INVESTMENT LAW: AN AUSTRALIAN CASE STUDY

Alexander Ferguson

## Résumé

*La conduite du gouvernement peut de plus en plus être examinée par les tribunaux des traités d'investissement. Ces tribunaux examinent souvent si un État hôte n'a pas réussi à accorder un traitement juste et équitable en allant à l'encontre des attentes légitimes d'un investisseur étranger. Afin de discerner ce à quoi un investisseur étranger peut légitimement s'attendre, certains tribunaux utilisent une méthodologie de droit public comparé qui s'inspire du droit public national. En utilisant le droit australien comme étude de cas, il est suggéré que la méthodologie du droit public comparé ne pourra peut-être pas atteindre tous ses objectifs.*

*Mots clés : droit public compare, traité d'investissement, traitement juste et équitable, attentes légitimes, état de droit, bonne foi*

## Abstract

*Government conduct is increasingly reviewable by investment treaty tribunals. These tribunals often consider whether a host state has failed to afford fair and equitable treatment by defeating a foreign investor's legitimate expectations. To discern what a foreign investor can legitimately expect, some tribunals use a comparative public law methodology that draws on domestic public law. Using Australian law as a case study, I suggest that the comparative public law methodology may not be able to achieve all of its aims.*

*Keywords: Comparative public law, investment treaty, fair and equitable treatment, legitimate expectation, rule of law, good faith*

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## I. INTRODUCTION

In Australia, like numerous other countries, a review of government conduct, such as an administrative act, is not confined to domestic law. Increasingly, international law provides a way for government conduct to be reviewed.<sup>1</sup> For example, investment treaties<sup>2</sup> confer on foreign investors a right to be treated according to certain standards by governments and to a process of reviewing government conduct that the foreign investor perceives has failed to meet that standard. Foreign investors can challenge government conduct in a quasi-judicial process before a tribunal, typically consisting of three arbitrators.<sup>3</sup> If the tribunal is satisfied that the government has not fulfilled its duties to the foreign investor, then a significant sum can be awarded,<sup>4</sup> which is enforceable throughout most of the world.<sup>5</sup>

One of the aims of investment treaties is to promote and protect investments in the state receiving the investment ('host state').<sup>6</sup> In furtherance of this aim, investment treaties impose duties on host state governments. One common duty is for the host state to provide 'fair and equitable treatment'

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<sup>1</sup> Justin Gleeson, 'Australia's Increasing Enmeshment in International Law Dispute Resolution: Implications for Sovereignty' (Speech delivered at the Kirby Lecture in International Law, Canberra, 30 June 2016) 32.

<sup>2</sup> I use 'investment treaties' or 'investment treaty' to refer to a bilateral investment treaty ('BIT'), a multilateral investment treaty, or the investment protection provisions contained within a trade agreement, such as the North American Free Trade Agreement, Canada-Mexico-United States, signed 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994) ('NAFTA').

<sup>3</sup> Salacuse, Jeswald W. 2015. *The Law of Investment Treaties* Oxford University Press, 2nd ed 403, 413.

<sup>4</sup> Dolzer, Rudolf and Christoph Schreuer. 2012. *Principles of International Investment Law*. Oxford University Press ch 10. The largest public award was over US\$50 billion, awarded in three related proceedings: *Yukos Universal Ltd v Russia (Final Award)* (Permanent Court of Arbitration, Case No AA 227, 18 July 2014) [1888](f); *Hulley Enterprises Ltd v Russia (Final Award)* (Permanent Court of Arbitration, Case No AA 226, 18 July 2014) [1888](f); *Veteran Petroleum Ltd v Russia* (Permanent Court of Arbitration, Case No AA 228, 18 July 2014) [1888](f).

<sup>5</sup> Dolzer and Schreuer, above n 4, 310.

<sup>6</sup> Roberts, Anthea. 2014. State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority. *Harvard International Law Journal* 55: 1-70, 20. See, eg, *Agreement between the Government of Australia and the Government of the Republic of the Philippines on the Promotion and Protection of Investments, and Protocol*, signed 25 January 1995, [1995] ATS 28 (entered into force 8 December 1995) Preamble ('Australia-Philippines BIT'); *Técnicas Medioambientales Tecmed SA v Mexico (Award)* (2004) 43 ILM 133, 174 [156] ('Tecmed').

(‘FET’) to foreign investors.<sup>7</sup> Indeed, foreign investors regularly invoke and have been successful in alleging that they have not been afforded FET.<sup>8</sup>

By itself, the phrase ‘fair and equitable’ is ‘nebulous’.<sup>9</sup> Tribunals also have ‘very different understandings of the legal content’ of FET<sup>10</sup> and some states resist attempts to ‘define a taxonomy’ of the ‘component[s]’ of FET.<sup>11</sup> Notwithstanding this uncertainty, a ‘high degree of consensus’ has emerged among tribunals<sup>12</sup> that the ‘most important function’ of FET is to prevent a host state from defeating a foreign investor’s legitimate expectations.<sup>13</sup> However, ‘legitimate expectation’ is a similarly jargonistic term.<sup>14</sup>

Tribunals and legal scholars alike have sought to ‘concretize the normative content’ of a legitimate expectation, as well as FET, using a comparative public law methodology.<sup>15</sup> The comparative public law methodology draws parallels between international investment law and domestic public law, rather than public international law or international

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<sup>7</sup> Salacuse, above n 3, 241. See, eg, Australia-Philippines BIT art 3.

<sup>8</sup> Arato, Julian. 2015. Corporations as Lawmakers *Harvard International Law Journal* 56: 229-295, 265; Bonnitcha, Jonathan. 2014. *Substantive Protection under Investment Treaties: A Legal and Economic Analysis*. Cambridge University Press 144; United Nations Conference on Trade and Development. 2017. Special Update on Investor–State Dispute Settlement: Facts and Figures. *IIA Issues Notes* 1.

<sup>9</sup> Sornarajah, M. 2004. *The International Law on Foreign Investment*. Cambridge University Press 332.

<sup>10</sup> Bonnitcha, above n 8, 166.

<sup>11</sup> Hartmann, Jacques, Sangeeta Shah and Colin Warbrick. 2012. United Kingdom Materials on International Law 2011. *British Yearbook of International Law* 82: 676-1105, 693.

<sup>12</sup> Bonnitcha, above n 8, 154.

<sup>13</sup> *Electrabel SA v Hungary (Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/07/19, 30 November 2012) [7.75] (‘*Electrabel*’). See also *EDF (Services) Ltd v Romania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/13, 2 October 2009) [216] (‘*EDF*’); *Saluka Investments BV v Czech Republic (Partial Award)* (2010) 15 ICSID Rep 274, [302] (‘*Saluka*’). Cf Dumberry, Patrick. 2014. The Protection of Investors’ Legitimate Expectations and the Fair and Equitable Treatment Standard under NAFTA Article 1105. *Journal of International Arbitration* 31: 47-73, 63–4. Noting that legitimate expectations are not typically found in the text of an investment treaty: Crawford, James. 2012 *Brownlie’s Principles of Public International Law*. Oxford University Press, 8th ed, 617–18. See, eg, *Electrabel* (ICSID Arbitral Tribunal, Case No ARB/07/19, 30 November 2012) [7.79]; *EDF* (ICSID Arbitral Tribunal, Case No ARB/05/13, 2 October 2009) [215]–[216]; *Impregilo SpA v Argentina (Final Award)* (ICSID Arbitral Tribunal, Case No ARB/07/17, 21 June 2011) [285].

<sup>14</sup> Schill, Stephan W. 2010. International Investment Law and Comparative Public Law – An Introduction. In *International Investment Law and Comparative Public Law*, ed. Stephan W Schill, 3-37. Oxford University Press, 2010, 3, 6.

<sup>15</sup> Schill, Stephan W. 2012. General Principles of Law and International Investment Law. In *International Investment Law: The Sources of Rights and Obligations*, eds. Tarcisio Gazzini and Eric De Brabandere, 133-181. Martinus Nijhoff. 133, 162, 170.

commercial arbitration.<sup>16</sup> It is easy to see the attractiveness of applying such a methodology, given the ‘close resemblance between the problems arising’ in international investment law and domestic public law, namely individuals ‘faced with the misuse of governmental powers’.<sup>17</sup> Proponents of this methodology argue that its application helps develop consistency ‘in the interpretation and application of investment treaties’,<sup>18</sup> legitimises existing jurisprudence by focusing on the overlap between the two legal systems, facilitates reform based on ‘solutions adopted in other public law systems’,<sup>19</sup> and vindicates the international investment law system.<sup>20</sup> The first use of the comparative public law methodology to concretise the content of a legitimate expectation by an investment treaty tribunal was in *International Thunderbird Gaming Corporation v Mexico (Separate Opinion of Thomas Wälde)*.<sup>21</sup> Subsequent tribunals have endorsed<sup>22</sup> and applied the comparative public law methodology.<sup>23</sup>

When applying the comparative public law methodology, parallels are typically drawn between international investment law and the ‘principal legal

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<sup>16</sup> Schill, ‘Introduction’, above n 14, 24–5. This view is not without its critics: see, eg, Foster, Caroline. 2015. A New Stratosphere? Investment Treaty Arbitration as “Internationalized Public Law”. *International and Comparative Law Quarterly* 64: 461–485.

<sup>17</sup> Schill, ‘Introduction’, above n 14, 24. See also Foster, above n 16, 466; Schill, Stephan W. 2011. Enhancing International Investment Law’s Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach. *Virginia Journal of International Law* 52: 57–102, 59–60, 88. The comparative public law methodology can also draw on supranational and other international law, such as the World Trade Organization, but that is not the focus of this article.

<sup>18</sup> Schill, ‘Introduction’, above n 14, 26.

<sup>19</sup> Ibid 27. See generally Bassiouni, Mahmoud. 1989. A Functional Approach to General Principles of International Law. *Michigan Journal of International Law* 11: 768–818, 775–6.

<sup>20</sup> Schill, ‘Enhancing International Investment Law’s Legitimacy’, above n 17, 60.

<sup>21</sup> (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, 1 December 2005) (*‘Thunderbird Separate Opinion’*). It has been suggested that in *Saar Papier Vertriebs GmbH v Poland (Final Award)* (German-Polish Investment Protection Treaty Arbitral Tribunal, 16 October 1995) a comparative public law approach was used: Hepburn, Jarrod. 2014. Comparative Public Law at the Dawn of Investment Treaty Arbitration: *Saar Papier Vertriebs GmbH v Republic of Poland*. *Journal of World Investment and Trade* 15: 705–715, however, that case did not relate to FET, but rather indirect expropriation: at 707–8.

<sup>22</sup> *Toto Costruzioni Generali SPA v Lebanon (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/12, 7 June 2012) [166], [193] (*‘Toto’*); *Total SA v Argentina (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/04/1, 21 December 2010) [111] (*‘Total v Argentina’*).

<sup>23</sup> *Gold Reserve Inc v Venezuela (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/09/1, 22 September 2014) [576].

orders of the world',<sup>24</sup> of which Australia probably does not rank. However, one proponent of the methodology notes that case studies of less prominent legal systems, such as Australia, may enrich and strengthen the comparative public law methodology,<sup>25</sup> and 'a single legal order may suffice when suggesting legal reform'.<sup>26</sup> The comparative public law methodology is suited to drawing parallels from rule of law based systems<sup>27</sup> and the rule of law is the 'dominant ideology' of Australian administrative law,<sup>28</sup> such that the Australian legal system is an uncontroversial case study. Two prominent international investment law scholars have drawn parallels between a legitimate expectation in international investment law and Australian administrative law.<sup>29</sup> However, Australian law is typically only considered cursorily, with scholars just looking for the presence of the phrase 'legitimate expectation' in Australian law to concretise the doctrine of legitimate expectations in international investment law.<sup>30</sup>

Using Australian administrative law as a case study, I argue that there are limitations with the current use of the comparative public law methodology to develop the doctrine of legitimate expectations in international investment law.

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<sup>24</sup> Schill, 'Introduction', above n 14, 29 (emphasis altered).

<sup>25</sup> Schill, 'Enhancing International Investment Law's Legitimacy', above n 17, 93.

<sup>26</sup> Ibid 90.

<sup>27</sup> Ibid 93; Schill, Stephan W. 2010. Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law. In *International Investment Law and Comparative Public Law*, ed. Stephan W Schill, 151-182, 151, 154.

<sup>28</sup> Cane, Peter and Leighton McDonald. 2012. *Principles of Administrative Law: Legal Regulation of Governance*. Oxford University Press, 2nd ed 307.

<sup>29</sup> Brown, Chester. 2009. The Protection of Legitimate Expectations as a "General Principle of Law": Some Preliminary Thoughts. *Transnational Dispute Management* 1-10, 4; Mairal, Hector A. 2010. Legitimate Expectations and Informal Administrative Representations. In *International Investment Law and Comparative Public Law*, ed. Stephan W Schill, 413-451. Oxford University Press. 413, 416. See also Snodgrass, Elizabeth. 2006. Protecting Investors' Legitimate Expectations: Recognizing and Delimiting a General Principle. *ICSID Review* 21: 1-58, 26-7. Michele Potestà notes that Australia has been 'reluctant so far to extend judicial protection in cases of frustration of substantive expectations, and ... [has] generally taken the view that expectations about the exercise of administrative powers may only give rise to procedural rights': Potestà, Michele. 2013. Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept. *ICSID Review* 28: 88-122, 97. In Potestà's work the purpose and underpinnings of a legitimate expectation in Australian administrative law are not discussed and it is nonetheless concluded that legitimate expectations is an 'emerging general principle': at 98.

<sup>30</sup> Cf Zeyl, Trevor. 2011. Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law. *Alberta Law Review* 49: 203-235, where some of the Australian constitutional issues in Part V are discussed.



I discuss the implications of these limitations with reference to the aims of the comparative public law methodology.<sup>31</sup> In Parts II–IV, I undertake a novel analysis on the conflicts between Australian administrative law and international investment law. In Part II, I probe the different purposes of a legitimate expectation in Australian administrative law and international investment law. In Part III, I scrutinise the conflicting and differing underpinnings of Australian administrative law and international investment law.

In Part IV, I illustrate how the differences discussed in Parts II–III affect the enforcement of a legitimate expectation. I illustrate this through cases in both legal systems where a government has not renewed a licence. It is relevant to look at these types of cases because tribunals have emphasised the importance of the circumstances of each case.<sup>32</sup> In Australian administrative law, the circumstances are also relevant, because they shape how a legitimate expectation informs procedural fairness. In Part IV, I show that a cursory look at the cases suggests similarities, but when the purpose and underpinnings are considered, significant differences are evident. These differences relate to the effect of defeating a legitimate expectation, the role of compensation and a libertarian view of the rule of law in the chosen investment arbitral award.

In Part V, I consider the issues for the comparative public law methodology when two domestic legal systems, Australian and English, conflict. I draw on the difference between the enforceability of a substantive legitimate expectation in English law and its conscious disavowal in Australian law.

This article identifies a number of limitations with the current comparative public law methodology. Analytical tools could be developed so that the methodology can overcome these limitations. However, until that time, questions loom about the extent to which domestic law, and Australian administrative law in particular, can concretise the normative content of international investment law.

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<sup>31</sup> See Part I above.

<sup>32</sup> *Mondev International Ltd v United States of America (Award)* (2003) 42 ILM 85, 88 [118]; *CME Czech Republic v Czech Republic (Partial Award)* (2006) 9 ICSID Rep 113, 156 [157], 183 [336] ('CME'); *Toto* (ICSID Arbitral Tribunal, Case No ARB/07/12, 7 June 2012) [159]; *MTD Equity Sdn Bhd and MTD Chile SA v Chile (Award)* (2004) 12 ICSID Rep 6, 22 [109] ('MTD'). See also Dolzer and Schreuer, above n 4, 146.

## II. THE PURPOSE OF A LEGITIMATE EXPECTATION

There are differing purposes of a legitimate expectation in Australian administrative law and international investment law. In Australian administrative law, a legitimate expectation provides the content of the fair hearing rule of procedural fairness and an exercise of power that does not provide a fair hearing can be unlawful or invalid – a power-constraining legitimate expectation.<sup>33</sup> In international investment law the doctrine of legitimate expectations gives foreign investors an enforceable right to the fulfilment of their legitimate expectations – a right-conferring legitimate expectation.

I adopt the distinction between a power-constraining and right-conferring purpose of a legitimate expectation from Joanna Bell's work, which observes a similar distinction within English administrative law.<sup>34</sup> The significance of the distinction between the two purposes of a legitimate expectation lies in the consequences. On the one hand, the consequence of defeating a power-constraining legitimate expectation in either English or Australian administrative law is that the exercise of administrative power is invalid or unlawful.<sup>35</sup> On the other hand, Bell argues the breach of a legal right to a legitimate expectation in English law often entails 'a monetary payment making good the right-holder's loss'.<sup>36</sup> Similarly in international investment law, compensation is the most frequently awarded remedy.<sup>37</sup> To help illustrate these differences, I analyse cases where a representation from the government has given rise to a legitimate expectation.

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<sup>33</sup> *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [13] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

<sup>34</sup> Bell, Joanna. 2016. The Doctrine of Legitimate Expectations: Power-Constraining or Right-Conferring Legal Standard?. *Public Law* 437-455, 451.

<sup>35</sup> *Ibid*; *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 334 [26]–[27], 340 [47]–[48] (Kiefel, Bell and Keane JJ), 345 [69] (Gageler and Gordon JJ) ('*MIBP v WZARH*').

<sup>36</sup> Bell, above n 34, 453.

<sup>37</sup> Sabahi, Borzu. 2011. *Compensation and Restitution in Investor-State Arbitration: Principles and Practice*. Oxford University Press 4; Schreuer, Christoph. Investment Arbitration. 2014. In *The Oxford Handbook of International Adjudication*, eds. Cesare P R Romano, Karen J Alter and Yuval Shany. Oxford University Press. 295-315, 310.

### A. A Legitimate Expectation as a Constraint on Power in Australian Law

To understand the contemporary relevance of a legitimate expectation, it is necessary to track how the concept has developed in Australian administrative law. Initially, a legitimate expectation gave rise to a procedural fairness obligation and informed the content of the fair hearing rule of procedural fairness. The fair hearing rule 'requires that a person who may be adversely affected by a decision be given an opportunity "to put their case" prior to the decision being made'.<sup>38</sup> Today, a legitimate expectation finds utility as a conceptual tool to understand how a fair hearing is to be afforded.

Originally, a legitimate expectation satisfied the threshold question of whether there was a need to afford a hearing. That is, if someone held a legitimate expectation, the decision-maker had to provide a fair hearing, otherwise, the decision would be made without procedural fairness and could be quashed. This use of a legitimate expectation can be seen in Mason J's influential statement in *Kioa v West* that 'when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it'.<sup>39</sup> McHugh J in *Haoucher v Minister for Immigration and Ethnic Affairs* also considered that if a person had a legitimate expectation of obtaining or continuing to enjoy 'any right, interest, benefit or privilege', the person was entitled to be heard, before an exercise of statutory power deprived them of their right, interest, benefit or privilege.<sup>40</sup>

Using a legitimate expectation to enliven procedural fairness extended the application of procedural fairness<sup>41</sup> to 'uncertain' areas.<sup>42</sup> There was uncertainty, in part because a legitimate expectation was used to enliven a fair

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<sup>38</sup> Cane and McDonald, above n 28, 117.

<sup>39</sup> (1985) 159 CLR 550, 582; see also at 564 (Gibbs CJ).

<sup>40</sup> (1990) 169 CLR 648, 679 ('*Haoucher*').

<sup>41</sup> *Ibid* 680 (McHugh J).

<sup>42</sup> Aronson, Mark and Matthew Groves. 2013. *Judicial Review of Administrative Action*. Thomson Reuters, 5th ed 418. See also Cane and McDonald, above n 28, 119.

hearing when there was something less than a right at stake. Jacobs J in *Salemi v MacKellar [No 2]* stated that a person ‘may have ... a “legitimate expectation”’. That does not mean that the expectation is itself the right. The right is the right to natural justice in certain circumstances and a “legitimate expectation” is one of those circumstances’.<sup>43</sup> Brennan J observed in *Annetts v McCann*: ‘judicial review may protect “legitimate expectations”, in the sense of interests which do not amount to legal rights, powers or privileges’.<sup>44</sup> Similarly, Mason J in *Kioa v West* observed that ‘the reference to “legitimate expectation” makes it clear that the doctrine applies in circumstances where the order will not result in the deprivation of a legal right or interest’.<sup>45</sup>

As part of a broader normative restructuring of Australian administrative law and the ‘rare absence of parliamentary act’,<sup>46</sup> the threshold for the fair hearing rule moved towards a statutory presumption – reference to a legitimate expectation became ‘unnecessary’.<sup>47</sup> The normative restructure may have arisen in part from a desire to increase democratic legitimacy and respect for parliamentary sovereignty by focusing on interpreting parliamentary acts, particularly in a sensitive political context.<sup>48</sup> Once we appreciate the normative restructuring, we can ascertain a greater understanding of the marked differences between the decisions in *Minister of State for Immigration and Ethnic Affairs v Teoh*<sup>49</sup> and *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*.<sup>50</sup> In *Teoh*, Mason CJ and Deane J took the view that a legitimate expectation could satisfy the threshold question of whether a fair hearing was required ‘if a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the

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<sup>43</sup> (1977) 137 CLR 396, 452.

<sup>44</sup> (1990) 170 CLR 596, 605. See also *Salemi v MacKellar [No 2]* (1977) 137 CLR 396, 404 (Barwick CJ); *Haoucher* (1990) 169 CLR 648, 680 (McHugh J); Mason, Sir Anthony. 2005. Procedural Fairness: Its Development and Continuing Role of Legitimate Expectation. *Australian Journal of Administrative Law* 12: 103-110, 106.

<sup>45</sup> (1985) 159 CLR 550, 582–3.

<sup>46</sup> Bateman, Will and Leighton McDonald. 2017. The Normative Structure of Australian Administrative Law. *Federal Law Review* 45: 153-179, 176.

<sup>47</sup> *MIBP v WZARH* (2015) 256 CLR 326, 335–6 [30] (Kiefel, Bell and Keane JJ).

<sup>48</sup> Bateman and McDonald, above n 46, 166, 171–3, 175.

<sup>49</sup> (1995) 183 CLR 273 (*‘Teoh’*).

<sup>50</sup> (2003) 214 CLR 1 (*‘Lam’*).

persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course'.<sup>51</sup>

The views of Mason CJ and Deane J did not go unchallenged. McHugh J, the sole dissenter in *Teoh*, stated that 'the rules of procedural fairness are presumptively applicable to administrative and similar decisions made by public tribunals and officials'.<sup>52</sup> In *Lam*, McHugh and Gummow JJ explicitly adopted McHugh J's statement<sup>53</sup> and expressed their view of the relevant Act in that case:

*[The] exclusion of the operation of the rules of natural justice is not expressed as applying to the exercise of power under s 501(2) [of the relevant Act], the power exercised in this present case. The section, in addressing the power under s 501(3), assumes the operation of those rules where what is at stake is a decision made under s 501(2).*<sup>54</sup>

Callinan J in *Lam* was of a similar view, observing that the decision-maker's 'obligations and processes owe their existence to, and are defined by, the [relevant] Act'.<sup>55</sup> The views of McHugh, Gummow and Callinan JJ have subsequently been followed. In *Saeed v Minister for Immigration and Citizenship*, the majority observed: 'Observance of the principles of natural justice is a condition attached to such a statutory power and governs its exercise'.<sup>56</sup>

The shift towards procedural fairness as a presumption and the large number of decisions now made under a statute<sup>57</sup> mean that when determining whether procedural fairness is to be afforded, a legitimate expectation 'adds

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<sup>51</sup> (1995) 183 CLR 273, 291–2.

<sup>52</sup> Ibid 311.

<sup>53</sup> (2003) 214 CLR 1, 28 [83].

<sup>54</sup> Ibid 16 [47].

<sup>55</sup> Ibid 48 [147].

<sup>56</sup> (2010) 241 CLR 252, 259 [13] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

<sup>57</sup> Bateman and McDonald, above n 46, 175–6.

nothing'<sup>58</sup> and is 'unnecessary'.<sup>59</sup> Focusing on whether a legitimate expectation gives rise to an obligation to afford procedural fairness may therefore distract from the 'true inquiry'<sup>60</sup> and 'critical question in most cases':<sup>61</sup> what does procedural fairness require in the circumstances?

The concept of a legitimate expectation has been and continues to be used 'in so far as'<sup>62</sup> it has a 'bear[ing] upon the practical content of that obligation' to afford procedural fairness as part of the fair hearing rule.<sup>63</sup> This view of a legitimate expectation was accepted by McHugh and Gummow JJ in *Lam*, who concluded that '[t]he notion of legitimate expectation serves only to focus attention on the content of the requirement of natural justice in this particular case'.<sup>64</sup>

Notwithstanding the doubts cast on the utility of legitimate expectations in *Lam*, cases decided before then are useful, because they explicitly identified the expectation and its source, such as a representation from a government. Those cases also show how a legitimate expectation can constrain an exercise of administrative power. For instance, the High Court in *Haoucher* considered that Mr Haoucher, a migrant, had an expectation that he would only be deported in accordance with a policy announced by the Minister for Immigration in Parliament. The policy stated that the Minister would only depart from a recommendation from the Administrative Appeals Tribunal ('AAT') in 'exceptional circumstances' with 'strong evidence'.<sup>65</sup> The policy thus formed the basis for Mr Haoucher's legitimate expectation that the AAT

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<sup>58</sup> *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 658 [65] (Gummow, Hayne, Crennan and Bell JJ).

<sup>59</sup> *MIBP v WZARH* (2015) 256 CLR 326, 335 [30] (Kiefel, Bell and Keane JJ).

<sup>60</sup> *Ibid* 343 [61] (Gageler and Gordon JJ).

<sup>61</sup> *Kioa v West* (1985) 159 CLR 550, 585 (Mason J).

<sup>62</sup> *MIBP v WZARH* (2015) 256 CLR 326, 343 [61] (Gageler and Gordon JJ).

<sup>63</sup> *Lam* (2003) 214 CLR 1, 12–13 [34] (Gleeson CJ), quoted with approval in *MIBP v WZARH* (2015) 256 CLR 326, 343 [61] (Gageler and Gordon JJ). See also *Lam* (2003) 214 CLR 1, 34 [105] (Gummow and McHugh JJ); Dyer, Bruce. 2005. Legitimate Expectations in Procedural Fairness after *Lam*. In *Law and Government in Australia*, ed. Matthew Groves. Federation Press 184–212, 191; Burmester, Henry. 2004. Teoh Revisited after *Lam*. *Australian Institute of Administrative Law Forum* 40: 33–39, 36.

<sup>64</sup> (2003) 214 CLR 1, 34 [105].

<sup>65</sup> (1990) 169 CLR 648, 665 (Toohey J).

recommendation would not be rejected, unless there were exceptional circumstances with strong evidence.<sup>66</sup> The Minister rejected the AAT's recommendation that Mr Haoucher not be deported by weighing the factors differently.<sup>67</sup> However, the Minister did not provide the evidence that demonstrated exceptional circumstances, nor did the Minister provide an opportunity for Mr Haoucher to comment on those circumstances.<sup>68</sup> The exercise of power to deport Mr Haoucher was held to be exercised invalidly because there was a failure to afford Mr Haoucher a fair hearing.<sup>69</sup> The legitimate expectation derived from the publicly announced policy helped to provide the content of procedural fairness, because the policy created an expectation that exceptional circumstances would be disclosed.

A more recent example of a legitimate expectation as a conceptual tool to inform the content of a fair hearing is *MIBP v WZARH*. In that case, the respondent contested an unfavourable assessment of his refugee status. An issue arose because the first reviewer of the respondent's refugee status had been replaced by a second reviewer. On the basis of written materials and a recording, the second reviewer made an adverse assessment of his refugee status. The High Court held that there was a failure to afford procedural fairness, because the second reviewer did not inform the respondent that they were taking over the case<sup>70</sup> and the respondent's answers were not personally observed.<sup>71</sup>

Using a legitimate expectation as a conceptual tool helps to explain why there was a failure to afford a fair hearing and thus a denial of procedural fairness. The representations by the first reviewer provided two legitimate expectations about the process and conduct of the assessment. The first legitimate expectation was that the process stipulated would be followed.<sup>72</sup>

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<sup>66</sup> Ibid 682 (McHugh J).

<sup>67</sup> Ibid 682–3.

<sup>68</sup> Ibid 684–5.

<sup>69</sup> Ibid 685.

<sup>70</sup> *MIBP v WZARH* (2015) 256 CLR 326, 340 [46] (Kiefel, Bell and Keane JJ), 349 [69] (Gageler and Gordon JJ).

<sup>71</sup> Ibid 339 [43] (Kiefel, Bell and Keane JJ).

<sup>72</sup> Ibid 340 [46] (Kiefel, Bell and Keane JJ).

This expectation was defeated when there was a departure from the stated process, and a reviewer was replaced without the respondent being informed. The plurality considered that this meant the respondent should have had an opportunity to comment on the change of process, stating: 'Elementary considerations of fairness required that the respondent be informed that the process explained to him by the First Reviewer would not be completed so that he would have the opportunity to be heard on the question of how the process should now proceed'.<sup>73</sup>

Gageler and Gordon JJ looked at the impact on the submissions that would have been made, stating:

*The Second Reviewer ought reasonably to have considered that the evidence and submissions presented to the First Reviewer could reasonably be expected to have differed in their coverage, detail and emphasis had the respondent and his advisors been aware that the First Reviewer would not be making the assessment.*<sup>74</sup>

The second legitimate expectation was that all the information provided by the respondent would be considered. This expectation was defeated when the second reviewer did not personally interview the respondent. Of particular importance, given the respondent's credibility was in issue, were the 'impressions gained from his demeanour at the interview'.<sup>75</sup> As the plurality observed, the respondent 'may have been in a better position if the Second Reviewer had formed the impression that he was genuinely doing his best to give truthful evidence in difficult circumstances'.<sup>76</sup> The respondent's legitimate expectation based on the representation from the first reviewer thus constrained the power of the second reviewer to make a determination of the respondent's refugee status that was inconsistent with their representations. When a legitimate expectation is viewed as a conceptual tool to inform the content of the fair hearing rule it becomes evident that the legitimate

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<sup>73</sup> Ibid.

<sup>74</sup> Ibid 344 [66]

<sup>75</sup> Ibid 338 [37] (Kiefel, Bell and Keane JJ), see also at 338–9 [40], [44] (Kiefel, Bell and Keane JJ).

<sup>76</sup> Ibid 339 [44].



expectation can constrain power. The same cannot be said of international investment law.

## **B. A Right to the Fulfilment of a Legitimate Expectation in International Investment Law**

Foreign investors have a right to the fulfilment of their legitimate expectations. There is a debate about the nature of the rights and obligations provided by investment treaties. At least four theories have been proposed: derivative rights, intermediary rights, direct rights and triangular treaties. Part of the contestation relates to who can hold the rights, because investment treaties 'do not clarify' if 'the investor, the home state, or both' have substantive rights under investment treaties.<sup>77</sup> To demonstrate that foreign investors have rights, I highlight the conceptual difficulties with the derivative rights and intermediary rights theories. This leaves the direct rights and triangular treaties theories, both of which accommodate foreign investors having a right to the fulfilment of their legitimate expectations.<sup>78</sup>

Within the four theories it is possible that the word 'right' is being used with different meanings or that uncertainty persists as to whether foreign investors have rights. To bring greater clarity to answering the question of whether a foreign investor has a right to the fulfilment of their legitimate expectations, I turn to Joseph Raz's rights theory. It provides an analytical framework to assess the rights in question. To the extent that the word 'right' is used with different meanings, Raz's theory is useful as it purportedly encapsulates the 'common core of all rights', moral and legal.<sup>79</sup> I pass no judgment on a foreign investor's moral rights; my focus is on legal rights. To this end it should be noted that Raz claimed that his 'account [of rights] applies to legal rights'.<sup>80</sup> The justification for using Raz's rights theory 'is in its use in moral, political and legal thought'.<sup>81</sup>

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<sup>77</sup> Roberts, Anthea. 2015. Triangular Treaties: The Extent and Limits of Investment Treaty Rights. *Harvard International Law Journal* 56: 353-417, 355, 369.

<sup>78</sup> It may still be possible for a state to possess rights under an investment treaty, an issue which is beyond the scope of this article.

<sup>79</sup> Raz, Joseph. 1986. *The Morality of Freedom*. Oxford University Press. 167.

<sup>80</sup> Raz, Joseph. 1984. Legal Rights. *Oxford Journal of Legal Studies* 4: 1-21, 1.

<sup>81</sup> Raz, Joseph. 1984. On the Nature of Rights. *Mind* 93: 194-214, 212.

Before understanding the purpose of a legitimate expectation in international investment law, it is useful to refer to the most often quoted,<sup>82</sup> albeit controversial,<sup>83</sup> description of the doctrine. The Tribunal in *Tecmed* stated ('the Tecmed principle'):

*[FET] requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand ... the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations ... The foreign investor also expects the host State to act consistently, ie, without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities.*<sup>84</sup>

The Tecmed principle was stated before a comparative public law methodology was explicitly applied. However, in the first application of the comparative public law methodology to a legitimate expectation, the *Thunderbird Separate Opinion*, the Tecmed principle was considered an 'authoritative [precedent]'<sup>85</sup> that aligned with English and Latin American notions of a legitimate expectation.<sup>86</sup> Thus suggesting that the Tecmed principle could have been arrived at had the comparative public law methodology been applied.

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<sup>82</sup> Dolzer and Schreuer, above n 4, 142; Alvarez, José Enrique. 2011. The Once and Future Investment Regime. *Recueil des Cours* 344: 434-516, 504. See, eg, *Eureko BV v Poland (Partial Award)* (2007) 12 ICSID Rep 331, 383 [235]; *Thunderbird Separate Opinion* (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, 1 December 2005) [41], [45]; *MTD* (2004) 12 ICSID Rep 6, 23 [114]–[115]; *Occidental Exploration and Production Co v Ecuador* (Final Award) (London Court of International Arbitration, Case No UN3467, 1 July 2004) [185].

<sup>83</sup> See, eg, Crawford, Brownlie's Principles, above n 13, 614–15; Douglas, Zachary. 2006. Nothing if Not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex. *Arbitration International* 22: 27-51, 28. See also Schneiderman, David. 2001. Investment Rules and the Rule of Law. *Constellations* 8: 521-537, 522.

<sup>84</sup> *Tecmed* (2004) 43 ILM 133, 173 [154] (emphasis added).

<sup>85</sup> (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, 1 December 2005) [30].

<sup>86</sup> *Ibid* [47]–[48], [52].

The root of the derivative theory is a public international law approach to international investment law.<sup>87</sup> The derivative theory is based on diplomatic protection cases,<sup>88</sup> where it has been reasoned that a home State brings an action for one of its nationals, and is asserting 'its own right'.<sup>89</sup> The Tribunal in *Archer Daniels Midland Co and Tate & Lyle Ingredients Americas Inc v Mexico* endorsed the derivative theory,<sup>90</sup> stating that 'the investor will be in reality stepping into the shoes and asserting the rights of the home State'.<sup>91</sup> The Tribunal in *Loewen* also adopted the derivative theory, describing a foreign investor as being permitted 'for convenience' to enforce 'what are in origin the rights of Party states'.<sup>92</sup> If this view is accepted, a foreign investor would not have a right to the fulfilment of their legitimate expectations. Rather, their home state has the right. Whilst the derivative theory probably has a solid basis in public international law, it overlooks the operation of investment treaties.

James Crawford has observed that an investment treaty typically 'disaggregates the legal interests that were clumped together under' diplomatic protection.<sup>93</sup> The direct rights theory reflects that disaggregation. The Tribunal in *Corn Products International Inc v Mexico* concluded that investment treaties confer 'upon investors substantive rights separate and distinct from those of the State of which they are nationals'.<sup>94</sup> The Tribunal reasoned that the 'central purpose' of investment treaties was to allow investors to 'assert their rights directly against a host State'.<sup>95</sup> The English Court of Appeal accepted as much when it reviewed the *Occidental Exploration and Production Co v Ecuador* (Final

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<sup>87</sup> See, eg, *Loewen Group Inc v United States of America (Award)* (2003) 42 ILM 811, 848–9 [233] ('*Loewen*').

<sup>88</sup> The International Law Commission described diplomatic protection as 'the procedure employed by the State of nationality of the injured persons to secure protection of that person and to obtain reparation for the internationally wrongful act inflicted': International Law Commission, Report of the International Law Commission Fifty-Eighth Session, UN GAOR, 61st sess, Supp No 10, UN Doc A/61/10 (2006) 24.

<sup>89</sup> *Barcelona Traction, Light and Power Co Ltd (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3, 44. See also *Mavrommatis Palestine Concessions (Greece v United Kingdom)* (Judgment) [1924] PCIJ (ser A) No 2, 7, 12.

<sup>90</sup> (2012) 146 ILR 439, 501 [168] ('*ADM*').

<sup>91</sup> *Ibid* [169].

<sup>92</sup> (2003) 42 ILM 811, 848–9 [233].

<sup>93</sup> Crawford, James. 2002. The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect. *American Journal of International Law* 96: 874–890, 888.

<sup>94</sup> (Decision on Responsibility) (2012) 146 ILR 581, 631 [167] ('*Corn Products*').

<sup>95</sup> *Ibid* 629–30 [161].

Award) award and endorsed Zachary Douglas's observation that '[t]he functional assumption underlying the investment treaty regime is clearly that the investor is bringing a cause of action based upon the vindication of its own rights rather than those of its national state'.<sup>96</sup> This accords with recent analysis by the International Court of Justice, in the context of the provision of consular assistance to foreign nationals, that treaties can confer 'individual rights'.<sup>97</sup>

There are two significant problems with the derivative theory. First, as the Tribunal in *Corn Products* explained, there is no longer a need for the legal fiction of diplomatic protection that an injury to a national of the home state was 'an injury to the State itself'.<sup>98</sup> The legal fiction is redundant in international investment law, because a foreign investor 'is vested with the right to bring claims of its own'.<sup>99</sup> Secondly, states have made submissions that are opposed to the interests of their investors,<sup>100</sup> which 'contradicts the view that investors are bringing derivative claims on behalf of their own national state'.<sup>101</sup> Another theory, the intermediary theory, posits that the substantive protections contained in investment treaties 'remain at an intergovernmental level while the procedural right to arbitration is applied to the investor as its own right after the filing of a notice of arbitration'.<sup>102</sup> The Tribunal in *ADM* described this theory in the context of NAFTA:

*the Chapter Eleven scheme establishes rights regarding the treatment of investors, but these rights are not owed by the host State to the investors, but to the investors' home State ... [T]he only individual right investors enjoy*

<sup>96</sup> Douglas, Zachary. 2004. The Hybrid Foundations of Investment Treaty Arbitration. *British Yearbook of International Law* 74: 151-289, 182, quoted in *Ecuador v Occidental Exploration and Production Co* [2006] QB 432, 450-1 [20] (Mance LJ). See also *Ecuador v Occidental Exploration and Production Co* [2007] 2 CLC 16, 25-6 [19], 32-3 [39].

<sup>97</sup> *LaGrand (Germany v United States of America) (Judgment)* [2001] ICJ Rep 466, 494; cf Foster, above n 16, 476-7.

<sup>98</sup> *Corn Products* (2012) 146 ILR 581, [170]. See also Bennouna, Mohamed, Special Rapporteur, Preliminary Report on Diplomatic Protection, 50th sess, Agenda Item 6, UN Doc A/CN.4/484 (4 February 1998) [40].

<sup>99</sup> *Corn Products* (2012) 146 ILR 581, 632-3 [173].

<sup>100</sup> Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration', above n 96, 170. See also Roberts, 'State-to-State Investment Treaty Arbitration', above n 6, 49-50.

<sup>101</sup> Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration', above n 96, 170.

<sup>102</sup> Braun, Tillmann Rudolph. 2014. Globalization-Driven Innovation: The Investor as a Partial Subject in Public International Law. *Journal of World Investment and Trade* 15: 73-116, 88-9.

*under Chapter Eleven is the procedural right[s] under Section B to invoke the responsibility of the host State.*<sup>103</sup>

There are three reasons why the intermediary theory is not suited to analysing whether a foreign investor has a right to the fulfilment of their legitimate expectations. First, if we accept the *ADM* Tribunal's reasoning that the primary obligation is owed to the host state, it is not clear how compensation can be calculated without reintroducing the legal fiction that an injury to the investor is an injury to the state. This takes us back to the conceptual difficulties with the derivative theory.<sup>104</sup> Secondly, the intermediary theory was posited in the context of an argument about countermeasures. It does not appear to have been adopted elsewhere. To the extent the intermediary theory has relevance it may be better confined to its unique circumstances. Thirdly, as the concurring opinion in *ADM* observed: 'Nowhere in the case law of Chapter Eleven [of NAFTA] or of BITs will you find the suggestion that claimants are enforcing the rights of the State. Nowhere do you find the suggestion that somehow investors are just deputized to enforce the rights of the State'.<sup>105</sup>

Investment treaties have also been conceptualised as 'triangular treaties', that is 'agreements between sovereign states that create enforceable rights for investors as non-sovereign, third-party beneficiaries'.<sup>106</sup> This theory, it is said, focuses attention on the 'extent and limits' of the rights under investment treaties.<sup>107</sup> It is nonetheless implicit in this theory that a foreign investor can have a right, as Roberts states:

*a strong argument can be made that investment treaties should be understood as contracts between A and B (the home and host state) that create enforceable rights for C (the class of investors from A and B investing*

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<sup>103</sup> *ADM* (2012) 146 ILR 439, 504 [178]–[179]. I note that in the unreported version the plural 'rights' is used: *Archer Daniels Midland Co and Tate & Lyle Ingredients Americas Inc v Mexico* (ICSID Arbitral Tribunal, Case No Arb(AF)/04/05, 21 November 2007) [178]–[179].

<sup>104</sup> See McLachlan, Campbell, Laurence Shore and Matthew Weiniger. 2017. *International Investment Arbitration: Substantive Principles*. Oxford University Press, 2nd ed 76 [3.120], where this argument is made with respect to the derivative rights theory.

<sup>105</sup> *ADM* (2012) 146 ILR 439, 457 [45].

<sup>106</sup> Roberts, 'Triangular Treaties', above n 77, 356.

<sup>107</sup> *Ibid* 416.

*in B and A respectively) ... Investors are not mere beneficiaries of investment treaties; rather, they are a specific, identifiable class of intended third-party beneficiaries with enforceable rights.*<sup>108</sup>

Roberts also argues that we should presume that both the home state and investor have substantive rights, because they both have an interest in ‘vindicating investment treaty obligations’ and both typically have ‘procedural mechanism[s]’ for so doing.<sup>109</sup>

While the direct rights and triangular treaty theories accommodate a foreign investor having a right to the fulfilment of their legitimate expectations, the contested nature of this proposition suggests greater analytical authority may be needed. Raz’s rights theory offers one such source.

Raz theorised that an entity can possess a right if the entity can have rights and that other things being equal, the entity’s interests are a sufficient reason for holding someone else to be under a duty.<sup>110</sup> This theory has three components. The first component is that the entity must be capable of possessing rights. Foreign investors may be natural persons who Raz considered were capable of possessing rights.<sup>111</sup> However, the claimant in an investment treaty arbitration is more frequently a corporation.<sup>112</sup> Raz stated that corporations could possess rights,<sup>113</sup> because they could be subject to duties.<sup>114</sup> Typically, a host state has duties under international investment law, but it is also possible for a foreign investor to have duties. The foreign investor’s duties can include the duty to appoint an arbitrator when requesting an arbitration,<sup>115</sup> to reasonably assess investment risks,<sup>116</sup> to admit the investment in accordance

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<sup>108</sup> Ibid 372.

<sup>109</sup> Roberts, ‘State-to-State Investment Treaty Arbitration’, above n 6, 39.

<sup>110</sup> Raz, *The Morality of Freedom*, above n 79, 166.

<sup>111</sup> Ibid.

<sup>112</sup> Dolzer and Schreuer, above n 4, 250.

<sup>113</sup> Raz, *The Morality of Freedom*, above n 79, 166.

<sup>114</sup> Ibid 176.

<sup>115</sup> See, eg, Australia-Philippines BIT art 12(3).

<sup>116</sup> Muchlinski, Peter. 2006. “Caveat Investor”? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard. *International and Comparative Law Quarterly* 55: 527-557, 542.

with the host state's laws,<sup>117</sup> sometimes to exhaust local remedies,<sup>118</sup> and may extend to compliance with host state laws.<sup>119</sup> It has been suggested that international investment law is analogous to human rights,<sup>120</sup> but, as Raz acknowledged, a corporation's rights are of a lesser quality than an individual's rights<sup>121</sup> and are not 'morally fundamental right[s]'.<sup>122</sup>

The second component of Raz's rights theory is an interest that provides a reason for a host state 'to behave in a way which protects or promotes' the foreign investor's interest.<sup>123</sup> The foreign investor's interest that international investment law protects is commonly, albeit controversially,<sup>124</sup> understood as the 'protection and promotion' of a foreign investor's investment. This interest is found in the preamble of numerous investment treaties.<sup>125</sup> According to Raz, the foreign investor's right will be legal in character if the 'law holds' the foreign investor's 'interest to be sufficient ground to hold another to be subject to a duty'.<sup>126</sup> The foreign investor's interests, identified in the preamble, is considered a sufficient basis for subjecting host states to substantive duties or

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<sup>117</sup> See, eg, Australia-Philippines BIT arts 1(1)(a), 3. See *Fraport AG Frankfurt Airport Services Worldwide v Philippines (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/25, 16 August 2007) [398], [401], [404].

<sup>118</sup> See, eg, *Agreement between Australia and the Republic of Hungary on the Reciprocal Promotion and Protection of Investments*, signed 15 August 1991, [1992] ATS 19 (entered into force 10 May 1992) art 12(4). The duty of the foreign investor to exhaust local remedies is not the norm: Dolzer and Schreuer, above n 4, 264–5. In customary international law, local remedies must generally be exhausted: see *Interhandel (Switzerland v United States of America) (Judgment)* [1959] ICJ Rep 6, 26–7; *Elettronica Sicula SpA (ELSI) (United States of America v Italy) (Judgment)* [1989] ICJ Rep 15, 42; Crawford, Brownlie's Principles, above n 13, 711.

<sup>119</sup> Government of India, 'Model Text for the Indian Bilateral Investment Treaty' (2016) arts 11–12, at the time of this re-published article, a modified version of those provisions was adopted in the *Treaty Between The Republic of Belarus and The Republic of India On Investments*, signed 24 September 2018 (not yet in force) art 11.

<sup>120</sup> See, eg, Klein, Nicolas. 2012. Human Rights and International Investment Law: Investment Protection as Human Right?. *Goettingen Journal of International Law* 4: 179–195, 186; contra Alfred-Maurice de Zayas, Promotion of Democratic and Equitable International Order, UN GAOR, 70th sess, Agenda Item 73(b), UN Doc A/70/285 (5 August 2015) [27].

<sup>121</sup> Raz, The Morality of Freedom, above n 79, 179.

<sup>122</sup> Ibid 192.

<sup>123</sup> Ibid 183.

<sup>124</sup> See, eg, Sornarajah, M. 1997. Power and Justice in Foreign Investment Arbitration. *Journal of International Arbitration* 14: 103–140, 104.

<sup>125</sup> Roberts, 'State-to-State Investment Treaty Arbitration', above n 6, 20; *Tecmed* (2004) 43 ILM 133, 174 [156]. See, eg, Australia-Philippines BIT Preamble.

<sup>126</sup> Raz, 'Legal Rights', above n 80, 14.

obligations in the investment treaty itself, such as the obligation to afford FET.<sup>127</sup> Under the triangular treaties theory there are no rights, only obligations on host states.<sup>128</sup> The Razian theory takes the obligations as grounding the rights of the foreign investor.

The second component of Raz's theory also requires the host state's reason for promoting the foreign investor's interests to be of a peremptory nature.<sup>129</sup> The peremptory reason a host state intends to protect the foreign investor's interests is because it may increase foreign investment, as explicitly stated in some investment treaties.<sup>130</sup> Whilst it is debated whether investment treaties actually increase foreign investment,<sup>131</sup> this is immaterial because as Raz observed, '[m]any rights ground duties which fall short of securing their object'.<sup>132</sup> Raz's theory requires that the right conferred on the foreign investor makes a 'significant difference' to the foreign investor.<sup>133</sup> Protecting the foreign investor's interests via an investment treaty makes a significant difference to the foreign investor because the foreign investor is otherwise at a purported disadvantage to a domestic investor<sup>134</sup> and the foreign investor does not need to rely on their home state to assert their rights, which can be considerably difficult.<sup>135</sup>

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<sup>127</sup> *CME* (2006) 9 ICSID Rep 113, 237–8 [611].

<sup>128</sup> Roberts, 'State-to-State Investment Treaty Arbitration', above n 6, 37.

<sup>129</sup> Raz, *The Morality of Freedom*, above n 79, 183.

<sup>130</sup> See, eg, *Agreement between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments, and Protocol*, signed 23 August 1995, [1997] ATS 4 (entered into force 11 January 1997) preamble; *Saluka* (2010) 15 ICSID Rep 274, 337 [300]; *Tecmed* (2004) 43 ILM 133, 174 [156].

<sup>131</sup> Vandevelde, Kenneth J. 1998. The Political Economy of a Bilateral Investment Treaty. *American Journal of International Law* 92: 621–641, 627; Roberts, 'Triangular Treaties', above n 77, 409–10; Yackee, Jason Webb. 2010. Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence. *Virginia Journal of International Law* 51: 397–442; Yackee, Jason Webb. 2008. Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?. *Law and Society Review* 42: 805–832; Roberts, 'State-to-State Investment Treaty Arbitration', above n 6, 27.

<sup>132</sup> Raz, *The Morality of Freedom*, above n 79, 170–1.

<sup>133</sup> *Ibid* 183.

<sup>134</sup> See, eg, Paulsson, Jan. 2005. *Denial of Justice in International Law*. Cambridge University Press. 149; *Thunderbird Separate Opinion* (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, 1 December 2005) [34].

<sup>135</sup> Dolzer and Schreuer, above n 4, 252–3.



The third component of Raz's rights theory is that a right is a ground for a duty if 'not counteracted by conflicting considerations'.<sup>136</sup> A conflicting consideration could be the host state's 'legitimate regulatory interests',<sup>137</sup> because as Christopher Campbell argues it is 'not reasonable for [the foreign investor's] legitimate expectations to wholly tie the hands of a state from regulating in the public interest'.<sup>138</sup> In some situations, a competing public interest can justify defeating a foreign investor's legitimate expectation,<sup>139</sup> but that is not always the case.<sup>140</sup> In cases where the foreign investor's interests outweigh the host state's, the foreign investor has a right to the fulfilment of their legitimate expectations.

### C. The Implications for the Comparative Public Law Methodology

The differing power-constraining and right-conferring purposes of a legitimate expectation in Australian administrative law and international investment law pose issues for attaining the aims of the comparative public law methodology.

One of the purposes of the comparative public law methodology is to draw on domestic law to legitimise existing international investment law jurisprudence. However, it is unclear how domestic law can fulfil this legitimising function when the purpose of a doctrine or concept differs in domestic law from international investment law, as this case study has shown.

More significantly, the Australian case study shows two issues with the comparative public law methodology. First, one of the purposes of the comparative public law methodology is to suggest reforms to international

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<sup>136</sup> Raz, *The Morality of Freedom*, above n 79, 171, 181.

<sup>137</sup> *Saluka* (2010) 15 ICSID Rep 274, 339 [306]. See also *Duke Energy Electroquil Partners & Electroquil SA v Ecuador (Award)* (ICSID Arbitral Tribunal, Case No ARB/04/19, 18 August 2008) [340] ('*Duke*'); *International Thunderbird Gaming Corporation v Mexico (Award)* (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, 26 January 2006) [148]; *Continental Casualty Co v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/9, 5 September 2008) [233] ('*Continental Casualty*').

<sup>138</sup> Campbell, Christopher. 2013. House of Cards: The Relevance of Legitimate Expectations under Fair and Equitable Treatment Provisions in Investment Treaty Law. *Journal of International Arbitration* 30: 361-379, 373.

<sup>139</sup> See, eg, *Continental Casualty* (ICSID Arbitral Tribunal, Case No ARB/03/9, 5 September 2008) [233], [266].

<sup>140</sup> See, eg, *Tecmed* (2004) 43 ILM 133, 171 [145], 177 [164].

investment law. The Australian case study shows that domestic legal systems may conceptualise an idea (such as a power-constraining legitimate expectation) differently to international investment law (right-conferring legitimate expectation). If the reform function of the comparative public law methodology is followed through, changes to international investment law may occur. For example, Australian administrative law suggests that a legitimate expectation should be considered power-constraining in international investment law. Given the *de facto* arbitral precedent that exists in international investment law,<sup>141</sup> it is unclear how domestic public law would affect that precedent. In *Duke* the Tribunal described following a *de facto* precedent as its duty, '[w]hile the Tribunal considers that it is not bound by previous decisions, it is of the opinion that it must pay due consideration to earlier decisions', such that 'subject to compelling contrary grounds, it has a duty to consider the solutions consistently established in prior similar cases ... [and] a duty to seek to contribute to the harmonious development of investment law'.<sup>142</sup> Given the widespread support for the Tecmed principle in arbitral awards, it could be considered a *de facto* precedent. In these circumstances, it is unclear whether reforms proposed by the outcomes of the comparative public law methodology could justify a departure from a *de facto* precedent like the Tecmed principle.

The lack of clarity about the hierarchy of comparative public law is in stark contrast to the considered interaction between sources of law in the *Statute of the International Court of Justice* ('ICJ Statute'). Article 38(1)(c) of the ICJ Statute states that a source of international law is general principles of law recognised by civilised nations, which is somewhat similar to the comparative public law methodology.<sup>143</sup> Article 38(1)(d) of the ICJ Statute states that 'judicial decisions' are a source of law, which is somewhat similar to the *de facto*

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<sup>141</sup> Salacuse, above n 3, 17; Kaufmann-Kohler, Gabrielle. 2007. Arbitral Precedent: Dream, Necessity or Excuse?. *Arbitration International* 23: 357-378, 371-3.

<sup>142</sup> *Duke* (ICSID Arbitral Tribunal, Case No ARB/04/19, 18 August 2008) [117]. See also *Saipem SpA v Bangladesh* (Decision on Jurisdiction and Recommendation on Provisional Measures) (ICSID Arbitral Tribunal, Case No ARB/05/7, 21 March 2007) [67].

<sup>143</sup> Foster, above n 16, 468; Schill, 'Enhancing International Investment Law's Legitimacy', above n 17, 89. The comparative public law methodology is similar to the approach described in Friedmann, Wolfgang. 1963. The Uses of "General Principles" in the Development of International Law. *American Journal of International Law* 57: 279-299, 282.

precedent system in international investment law. It has been considered likely that the law emerging from article 38(1)(c) of the ICJ Statute would prevail over article 38(1)(d), because the latter is a 'subsidiary means for the determination of rules of law'.<sup>144</sup> If the comparative public law methodology is indeed similar to article 38(1)(c), this may suggest that the outcomes of that methodology should prevail over the de facto arbitral precedent. However, as discussed below, there may be difficulties in identifying the results from a closer application of the methodology.

The Australian case study on the purpose of a legitimate expectation suggests a second issue for an aim of the comparative public law methodology. One of the purposes of the comparative public law methodology is to assist with the interpretation of an investment treaty. Proponents of the comparative public law methodology argue that, in accordance with article 31(3)(c) of the *Vienna Convention on the Law of Treaties* ('VCLT'), the outcomes of the methodology are binding interpretative statements as one of the 'relevant rules of international law applicable in the relations between the parties'.<sup>145</sup> Some tribunals have developed the doctrine of legitimate expectations in international investment law based on the object and purpose of an investment treaty.<sup>146</sup> Referring to the object and purpose of a treaty is a well-accepted treaty interpretation practice. The Australian case study shows that a legitimate expectation has a different purpose in Australian law than international investment law. It is unclear how an interpretation of an investment treaty flowing from the comparative public law methodology that is based on domestic legal systems could be incorporated or reconciled with an interpretation flowing directly from the object and purpose of an investment treaty. Particularly given that article 31(3)(c) is merely to be 'taken into account' together with context, where the context forms part of the general rule of interpretation in article 31(1) of the VCLT. The absence of clarity on this point

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<sup>144</sup> Crawford, Brownlie's Principles, above n 13, 34.

<sup>145</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(3)(c); Schill, 'Enhancing International Investment Law's Legitimacy', above n 17, 89.

<sup>146</sup> Campbell, above n 138, 377–8. See also *Suez v Argentina (Separate Opinion of Pedro Nikken)* (ICSID Arbitral Tribunal, Case No ARB/03/19, 30 July 2010) [21]; VCLT art 31(1).

suggests that the comparative public law methodology may not be able to achieve its aim of assisting with the interpretation of an investment treaty.

### III. CONFLICTING AND DIFFERING UNDERPINNINGS

The underpinnings of a legitimate expectation in international investment law conflict and differ with Australian administrative law. Good faith and estoppel underpin a legitimate expectation in international investment law, but this conflicts with Australian administrative law where a link between estoppel and administrative law has been explicitly rejected. It has been separately argued that the rule of law underpins both international investment law and Australian administrative law. I argue that upon closer examination the feature of the rule of law are different in the two legal systems. These conflicts and differences pose issues for the comparative public law methodology that are yet to be addressed.

#### A. Good Faith and Estoppel

One of the underpinnings of the doctrine of legitimate expectations in international investment law is good faith and estoppel. The Tecmed principle was stated ‘in light of the good faith principle’.<sup>147</sup> Similarly, Thunderbird Separate Opinion considered a legitimate expectation to be the common law equivalent of estoppel and based on the principle of good faith.<sup>148</sup> A prominent international investment law scholar has suggested that a legitimate expectation ‘bears some relation’ to the concept of estoppel.<sup>149</sup> This shows that at least some tribunals and commentators consider good faith and estoppel to provide the underpinning for a legitimate expectation in international investment law.

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<sup>147</sup> *Tecmed* (2004) 43 ILM 133, 173–4 [154]. See also *Saluka* (2010) 15 ICSID Rep 274, 338 [302]; *El Paso Energy International Co v Argentina (Award)* (ICSID Arbitral Tribunal, Case No ARB/03/15, 31 October 2011) [348] (‘*El Paso*’).

<sup>148</sup> (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, 1 December 2005) [25], [27].

<sup>149</sup> Mairal, above n 29, 421. On the meaning of estoppel in international law, see *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections (Cameroon v Nigeria)* (Judgment) [1998] ICJ Rep 275, 303–4 [57].

Australian law does not rely on estoppel to underpin a legitimate expectation, indeed a link between the two concepts has been rejected. There are at least two reasons why estoppel and a legitimate expectation are not connected in Australian administrative law. First, there is no administrative estoppel. As Brennan J observed in *Annetts v McCann*, '[n]o doctrine of administrative estoppel has emerged' in Australian law.<sup>150</sup> In fact, 'estoppel has been rejected in Australian administrative law',<sup>151</sup> making it 'difficult to draw a parallel with estoppel' and a legitimate expectation.<sup>152</sup> Secondly, as Mason CJ observed in *Attorney-General (NSW) v Quin*, 'a public authority ... cannot be estopped from doing its public duty'.<sup>153</sup> Therefore, a legitimate expectation cannot operate to prevent a public authority from exercising its administrative powers. In contrast to Australian law, a person can have a right to the fulfilment of their legitimate expectations in English law (see Part V).<sup>154</sup> But even in English law, Bell observes that this right bears 'no necessary relationship' to estoppel.<sup>155</sup> This further demonstrates that a legitimate expectation is distinct from estoppel in Anglo-Australian law. It may appear that there is a link, albeit weak, between estoppel and a legitimate expectation, because one of the elements of estoppel, detriment, emerged in Gleeson CJ's judgment in *Lam*.<sup>156</sup> However, the detriment Gleeson CJ referred to was the 'loss of an opportunity to make representations'.<sup>157</sup> Understood this way, detriment is really just a guide for determining what procedural fairness requires in the circumstances.

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<sup>150</sup> (1990) 170 CLR 596, 605, quoted in *Lam* (2003) 214 CLR 1, 22 [69] (McHugh and Gummow JJ).

<sup>151</sup> Groves, Matthew. 2008. Substantive Legitimate Expectations in Australian Administrative Law. *Melbourne University Law Review* 32: 470-523, 506; *Annetts v McCann* (1990) 170 CLR 596, 605 (Brennan J).

<sup>152</sup> Mason, Sir Anthony. 2005. The Place of Estoppel in Public Law. In *Law and Government in Australia*, ed. Matthew Groves. Federation Press. 160-183, 179. See also *Annetts v McCann* (1990) 170 CLR 596, 605 (Brennan J); *Haoucher* (1990) 169 CLR 648, 669-70 (Toohey J); *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 207 (Gummow J); contra Groves, Matthew. 2007. Is Teoh's Case Still Good Law?. *Australian Journal of Administrative Law* 14: 126-144, 138.

<sup>153</sup> (1990) 170 CLR 1, 17 ('Quin'), quoting *Lever Finance v Westminster London Borough Council* [1971] 1 QB 222, 230 (Lord Denning MR). See also *Lam* (2003) 214 CLR 1, 22 [69] (McHugh and Gummow JJ); *Annetts v McCann* (1990) 170 CLR 596, 605 (Brennan J).

<sup>154</sup> See, eg, *R v North and East Devon Health Authority; Ex parte Coughlan* [2001] QB 213, 242 [57] (Lord Woolf MR).

<sup>155</sup> Bell, above n 34, 446-7. See also Brown, above n 29, 9.

<sup>156</sup> Lacey, Wendy. 2004. A Prelude to the Demise of Teoh: The High Court Decision in *Re Minister for Immigration and Multicultural Affairs: Ex Parte Lam*. *Sydney Law Review* 26: 131-156, 140.

<sup>157</sup> *Lam* (2003) 214 CLR 1, 13 [37].

One of the purposes of the comparative public law methodology is to legitimise existing international investment law jurisprudence by demonstrating a resemblance to domestic law. A superficial similarity in terminology between domestic law and international investment law may suggest a line of enquiry for investigating whether domestic law can legitimise international investment law. However, where the underpinnings of domestic law and international investment law conflict, it is not possible to argue that the domestic law legitimises international investment law. This suggests that a greater degree of sophistication and analysis is needed when applying a comparative public law methodology to international investment law.

### **B. Rule of Law**

The following consideration of the rule of law underpinnings of a legitimate expectation in Australian administrative law and international investment law demonstrates the need for a detailed analysis of the foundations of domestic law before it can be used to draw parallels with international investment law. It is not enough to simply state that the rule of law provides an underpinning for a legitimate expectation, because the rule of law is a contested concept.<sup>158</sup> The features of the rule of law to which a legitimate expectation gives effect must be identified. After identifying the central features of the rule of law reflected in a legitimate expectation in Australian administrative law and international investment law, it becomes evident that they differ.

The rule of law is the ‘dominant ideology’ of Australian administrative law.<sup>159</sup> A legitimate expectation gives effect to the rule of law feature of due process, by providing the content of the fair hearing rule.<sup>160</sup> More significantly, one of the features of the rule of law is Raz’s minimum content for rule of law. Raz stated that unless an act is authorised by the law, it cannot be an action ‘of

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<sup>158</sup> See, eg, Waldron, Jeremy. 2002. Is the Rule of Law an Essentially Contested Concept (in Florida)? *Law and Philosophy* 21: 137-164.

<sup>159</sup> Cane and McDonald, above n 28, 307.

<sup>160</sup> Raz, Joseph. 1979. *The Authority of Law: Essays on Law and Morality*. Oxford University Press. 217; Rawls, John. 1971. *A Theory of Justice*. Harvard University Press. 239.

the government as a government'.<sup>161</sup> Raz argued that in the absence of authorisation by the law, the administrative act will be 'without legal effect and often unlawful'.<sup>162</sup> This feature of the rule of law can be seen in Gaudron J's statement in *Enfield*, that it is the 'rule of law that requires the courts' to intervene when administrative powers are not exercised 'in accordance with the laws which govern their exercise'.<sup>163</sup>

In Australian administrative law, a legitimate expectation can provide the basis for a court's intervention to ensure administrative power is lawfully exercised by providing a fair hearing when one is due. If the procedural fairness afforded does not meet the content required, as informed by a legitimate expectation, the exercise of power may be invalid or unlawful. For example, in *Heatley v Tasmanian Racing and Gaming Commission*, the applicant, Mr Heatley, had a legitimate expectation of continuing to receive 'customary permission' to enter a racecourse.<sup>164</sup> This expectation was defeated when a warning-off notice was issued by a statutory body that precluded Mr Heatley from entering any racecourses in Tasmania. This case arose before procedural fairness was a statutory presumption, so the legitimate expectation gave rise to the need to afford procedural fairness.<sup>165</sup> The basis upon which procedural fairness arose is only of historical relevance for this article, given the normative shift towards a statutory presumption. Of contemporary relevance is that Mr Heatley's legitimate expectation also influenced the content of procedural fairness. Mr Heatley should have been afforded an opportunity to comment before he was issued with the 'warning-off',<sup>166</sup> because he had a legitimate expectation that the statutory body would not prevent him from accessing racecourses. Consequently the Commission's decision was invalidated via the remedy of certiorari.<sup>167</sup> *Heatley* is consistent with the more recent case of *MIBP v WZARH*, as the legitimate expectation in *Heatley* in part provided the content

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<sup>161</sup> Raz, *The Authority of Law*, above n 160, 212.

<sup>162</sup> *Ibid.*

<sup>163</sup> *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 158 [59]. See also *Quin* (1990) 170 CLR 1, 35–6, 38 (Brennan J).

<sup>164</sup> (1977) 137 CLR 487, 509 (Aickin J) ('*Heatley*').

<sup>165</sup> *Ibid* 494 (Mason J).

<sup>166</sup> *Ibid* 495 (Murphy J), 516 (Aickin J).

<sup>167</sup> *Ibid* 516.

of the fair hearing rule of procedural fairness. Heatley demonstrates that an Australian court may intervene where there is an exercise of administration that requires a fair hearing, but the content of that hearing, informed by the expectation, has not been provided.

In international investment law, it has been argued that a legitimate expectation, as described in the Tecmed principle and elsewhere, pursues or even embodies the rule of law.<sup>168</sup> However, international investment law does not pursue the same rule of law features as Australian administrative law. It has been suggested that a legitimate expectation in international investment law embodies the rule of law feature of subjecting ‘public power to legal control’.<sup>169</sup> However, any subjugation of public power to legal control by a tribunal will generally result in an award of compensation.<sup>170</sup> The award may have a deterrent effect,<sup>171</sup> but that does not render the exercise of power invalid. It is also demonstrable that international investment law is not concerned with the validity or lawfulness of government conduct. For example, in *Saluka* the Tribunal observed that ‘the unlawfulness of a host State’s measures under its own legislation ... is neither necessary nor sufficient for a breach of’ the relevant FET obligation.<sup>172</sup> Thus implying that the Tribunal would not consider whether the expectation was created lawfully.<sup>173</sup> In Australian administrative law, an invalid or unlawful act could not provide a legitimate expectation, because the act would be of no legal consequence. This demonstrates that a legitimate

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<sup>168</sup> Schill, ‘General Principles of Law and International Investment Law’, above n 15, 162–3, 165; Schill, ‘Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law’, above n 27, 175. See also Kulick, Andreas. 2012. *Global Public Interest in International Investment Law*. Cambridge University Press. 84.

<sup>169</sup> Schill, ‘General Principles of Law and International Investment Law’, above n 15, 162–3, 165. See also Kulick, above n 168, 84.

<sup>170</sup> Sabahi, above n 37, 4.

<sup>171</sup> Kulick, above n 168, 82.

<sup>172</sup> (2010) 15 ICSID Rep 274, 363 [442].

<sup>173</sup> By implying that the legality of the expectation would not be considered, the Tribunal in *Saluka* appears to have endorsed the Tribunal’s analysis in *Southern Pacific Properties (Middle East) Ltd v Egypt (Award)* (1995) 3 ICSID Rep 189 (‘*SPP*’). *SPP* did not arise from an investment treaty, but from a national law on foreign investment. The tribunal was faced with administrative action that was ‘null and void or susceptible to invalidation’ in domestic law. Rather than invalidating the conduct of government officials, the Tribunal considered whether actions ‘cloaked with the mantle of Governmental authority ... created expectations’: at 208 [82]–[83].



expectation in international investment law does not seek to subject public power to legal control by the same methods as Australian administrative law.

There are also doubts about the strength of the claim that a legitimate expectation in international investment law attains the rule of law. One tribunal suggested that a legitimate expectation attains the rule of law value of stability,<sup>174</sup> but another tribunal disagreed.<sup>175</sup> Another feature of the rule of law is that 'the law should not demand the impossible of the subject',<sup>176</sup> where the subject in international law is the state.<sup>177</sup> The Tecmed principle demands the impossible of its subject (a host state), because, as Crawford has observed, 'many governments would fail to meet' the 'utopian standard [of the Tecmed principle] much of the time'.<sup>178</sup> Whilst a bit unclear what features of the rule of law such a legitimate expectation aims to pursue, it is clear that those features are different to Australian administrative law.

The rule of law features that have been identified as being pursued by international investment law are different to Australian administrative law. Benjamin Guthrie has suggested that the Tecmed principle gives effect to the rule of law features of consistency, prevention of a host state acting in an ambiguous or arbitrary manner, and transparency.<sup>179</sup> Another feature of the rule of law value is the libertarian idea of freedom, which has been expressed as requiring 'minimal interference'.<sup>180</sup> In the international investment law context, this could mean minimal interference with an investment. The Tribunal in *ADC Affiliate Ltd v Hungary* appears to have accepted this view of the rule of

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<sup>174</sup> See generally Fuller, Lon L. 1969. *The Morality of Law*. Yale University Press, 2nd ed 45; *Suez v Argentina (Decision on Liability)* (ICSID Arbitral Tribunal, Case No ARB/03/19, 30 July 2010) [222].

<sup>175</sup> *Total v Argentina* (ICSID Arbitral Tribunal, Case No ARB/04/1, 21 December 2010) [115].

<sup>176</sup> Fuller, above n 174, 71.

<sup>177</sup> Waldron, Jeremy. 2011. Are Sovereigns Entitled to the Benefit of the International Rule of Law. 22 *European Journal of International Law* 22: 315-343, 322-3; Hart, H L A. 1961. *The Concept of Law*. Oxford University Press. 215.

<sup>178</sup> Crawford, Brownlie's Principles, above n 13, 615. See also Douglas, 'Nothing if Not Critical for Investment Treaty Arbitration', above n 83, 28; Schneiderman, above n 83, 522.

<sup>179</sup> Guthrie, Benjamin K. 2012. Beyond Investment Protection: An Examination of the Potential Influence of Investment Treaties on Domestic Rule of Law. *New York University Journal of International Law and Politics* 45: 1151-1200, 1188.

<sup>180</sup> Laws, John. 1996. The Constitution: Morals and Rights. *Public Law* 622-635, 630.

law, having stated that ‘the rule of law, which includes treaty obligations’, provides the boundaries for the state’s right to regulate.<sup>181</sup> Regulation falls within the boundary of the libertarian rule of law when it is for a legitimate regulatory interest and is not outweighed by the foreign investor’s legitimate expectations.<sup>182</sup> If the regulation is not legitimate, or is outweighed by the investor’s interests, then there will be substantial interference which undermines the investor’s freedom. This suggests that one of the rule of law features a legitimate expectation in international law gives effect to is minimal interference.

The rule of law has been proposed as one of the indicia for identifying a domestic legal system that the comparative public law methodology prefers to draw upon. However, the rule of law features sought by the comparative public law methodology have not been specified. It is not enough to identify the name of a legal theory that the comparative public law methodology will seek out in domestic legal systems, because, as the rule of law example demonstrates, the theory can be contested and have multiple dimensions. Further, it is unclear how a domestic legal system emphasising significantly different features of a legal theory can be used to draw parallels with international investment law. This suggests that further work is needed to identify the theoretical underpinnings of international investment law before domestic law can be used as part of the comparative public law methodology.

Another aim of the comparative public law methodology is to legitimise existing jurisprudence in international investment law by showing a resemblance to domestic law. It is arguable that a similarity in theoretical underpinnings between the two legal systems legitimises international investment law. However, where the features of the theory are different, this argument carries no weight because it is merely superficial. Further, where

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<sup>181</sup> (*Award*) (2010) 15 ICSID Rep 539, 606–7 [423].

<sup>182</sup> *Saluka* (2010) 15 ICSID Rep 274, 338–9 [305]; *Thunderbird Separate Opinion* (North American Free Trade Agreement Chapter 11 Arbitral Tribunal, 1 December 2005) [30]; *El Paso* (ICSID Arbitral Tribunal, Case No ARB/03/15, 31 October 2011) [356]; *Toto* (ICSID Arbitral Tribunal, Case No ARB/07/12, 7 June 2012) [165]; *Parkerings-Compagniet AS v Lithuania (Award)* (ICSID Arbitral Tribunal, Case No ARB/05/8, 11 September 2007) [332].

international investment law has chosen not to pursue one of the aims of domestic law, such as the subjugation of public power to legal control, there is arguably no resemblance between the two legal systems. Therefore, for domestic law to legitimise existing jurisprudence in international investment law it is necessary to show that the particular aspects of the theory underpinning domestic law are pursued by international investment law.

#### **IV. ILLUSTRATION THROUGH CASES WHERE A LICENCE WAS NOT RENEWED**

Examining cases where a licence was not renewed illustrates how the different purposes and underpinnings of a legitimate expectation affect the application of a legitimate expectation in Australian administrative law and international investment law. The superficial parallels between legitimate expectations arising from an annually renewable licence in each legal system should not distract from looking more closely at the cases. Upon a close examination of the purpose and underpinnings of a legitimate expectation, significant differences are evident. Cases where a licence was not renewed have been chosen because a consensus is building in the literature that a legitimate expectation can arise from such conduct in both international investment law<sup>183</sup> and Australian administrative law.<sup>184</sup>

##### **A. An Australian Insurer's Legitimate Expectation**

In the Australian case of *FAI Insurances Ltd v Winneke*, a workers' compensation insurer was found to have a legitimate expectation that the Victorian Governor in Council would renew their annual licence granted under a statute.<sup>185</sup> The relevant minister wrote a letter to the insurer summarising the

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<sup>183</sup> Henckels, Caroline. 2015. Will Greater Precision in Investment Treaties Protect the Right to Regulate? An Assessment of the TPP's Investment Chapter. *New Zealand Business Law Quarterly* 21: 351-371, 365; Dolzer and Schreuer, above n 4, 145; *Metalpar SA v Argentina (Award on the Merits)* (ICSID Arbitral Tribunal, Case No ARB/03/5, 6 June 2008) [186].

<sup>184</sup> Groves, 'Substantive Legitimate Expectations in Australian Administrative Law', above n 151, 472-3; Tate, Pamela. 1988. The Coherence of "Legitimate Expectations" and the Foundations of Natural Justice. *Monash University Law Review* 14: 15-81, 31.

<sup>185</sup> (1982) 151 CLR 342, 356, 362, 369 (Mason J) ('*FAI Insurances*').

case against them and informing them that their licence would not be recommended for renewal.<sup>186</sup> The insurer requested better particulars and an opportunity to comment, but this fell on deaf ears.<sup>187</sup> The Minister's recommendation against renewal was accepted by the Victorian Governor in Council. A majority of the High Court declared the decision not to renew the licence invalid.<sup>188</sup> In light of the insurer's expectation, procedural fairness in this case required the insurer to be given the adverse material and an opportunity to comment.<sup>189</sup> Consistent with *MIBP v WZARH*, the expectation that the licence would be renewed was a conceptual tool to find that the insurer should have had an opportunity to know and comment on the material against them.

### **B. A Spanish Investor's Legitimate Expectation**

In *Tecmed*, a Spanish investor had an annually renewable licence to operate a hazardous waste facility in Mexico.<sup>190</sup> After community opposition, Mexican authorities wanted to move the facility to a new location and refused to renew the licence at the existing location.<sup>191</sup> The Tribunal found that the Mexican authorities breached the Spanish investor's legitimate expectation that the waste site would continue to operate until relocated.<sup>192</sup> The Spanish investor's expectation arose from what the Tribunal described as the Mexican authorities' failure to give 'an explicit, transparent and clear warning' that the facility would be closed prior to relocation.<sup>193</sup> The Tribunal awarded US\$5 533 017.12 plus interest in part because the Spanish investor's legitimate expectation was defeated.<sup>194</sup>

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<sup>186</sup> Ibid 358 (Mason J), 376 (Aickin J).

<sup>187</sup> Ibid.

<sup>188</sup> Ibid 351 (Gibbs CJ), 421 (Wilson J).

<sup>189</sup> Ibid 355 (Stephen J), 372 (Mason J), 395 (Wilson J), 383 (Aickin J).

<sup>190</sup> (2004) 43 ILM 133, 179 [170].

<sup>191</sup> Ibid 139 [42], 177 [164].

<sup>192</sup> Ibid 175 [160].

<sup>193</sup> Ibid 175 [160], 176–7 [163].

<sup>194</sup> Ibid 186 [201].

### C. Not All Legitimate Expectations Are the Same

The facts of *FAI Insurances* and *Tecmed* appear somewhat similar: the renewal of a renewable licence was denied. Both cases in part rely on a legitimate expectation. Concern was expressed in both cases about the financial implications flowing from the defeat of the legitimate expectation.<sup>195</sup> However, when the purpose and underpinnings are considered, three significant differences emerge. The first difference is that in Australian administrative law it is lawful to defeat a legitimate expectation if a fair hearing is provided beforehand.<sup>196</sup> That is because the power to deny the licence has been exercised lawfully by providing procedural fairness. While procedural fairness may be required in international investment law,<sup>197</sup> if it is provided, a legitimate expectation can still be defeated.<sup>198</sup> That is because a foreign investor has a right to the fulfilment of their legitimate expectation, which is still breached by the defeat of their expectation in the fairest possible process. This demonstrates the different relationship between procedural fairness and a legitimate expectation which is due, at least in part, to the differing purposes of the two legal systems.

The second difference between the cases is the effect of compensation. In Australian administrative law, compensation does not cure the defeat of a legitimate expectation, because the defeat of the expectation without procedural fairness is void. As Aickin J observed, the Minister 'mistakenly exceeded his powers' by defeating the insurer's legitimate expectations without affording procedural fairness.<sup>199</sup> Consequently the 'proceedings before the Governor in Council have miscarried so that no effective Order in Council has been made'.<sup>200</sup> However, an award of compensation can cure a defeat of a foreign investor's legitimate expectation in international investment law,<sup>201</sup> because the breach of the right is compensable. This demonstrates the

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<sup>195</sup> *FAI Insurances* (1982) 151 CLR 342, 348 (Gibbs CJ), 360 (Mason J), 411 (Brennan J); *Tecmed* (2004) 43 ILM 133, 177 [164].

<sup>196</sup> *FAI Insurances* (1982) 151 CLR 342, 348 (Gibbs CJ), 369 (Mason J), 378 (Aickin J), 395 (Wilson J).

<sup>197</sup> *Tecmed* (2004) 43 ILM 133, 176 [162], 180 [173].

<sup>198</sup> *Ibid* 179 [170].

<sup>199</sup> *FAI Insurances* (1982) 151 CLR 342, 383.

<sup>200</sup> *Ibid*.

<sup>201</sup> *Tecmed* (2004) 43 ILM 133, 177 [164].

difference in the power- constraining and right-conferring approach in the two legal systems.

The third difference is the underpinnings. The rule of law requirement that an exercise of power not in accordance with law is invalid is manifested in *FAI Insurances*, where the decision to defeat a legitimate expectation without a fair hearing was invalid. The libertarian rule of law idea of freedom, manifested as minimal interference with an investment, is evident in *Tecmed*. In that case, the Spanish investor's legitimate expectation was that the existing landfill site would continue until 'effective relocation'.<sup>202</sup> Health and safety, and political pressure were not legitimate regulatory objectives or interests that outweighed the foreign investor's legitimate expectation.<sup>203</sup> Thus, compensation was awarded.

Whilst this is merely a case study of two similar cases in different legal systems, it shows that the concept of a legitimate expectation is significantly different in both legal systems. A possible reason for the difference is that the purpose, consequences and underpinnings of a legitimate expectation in the two systems differ and conflict. These differences suggest that although there may appear to be similarities between a concept in domestic law and international investment law, that appearance can be deceptive. Consequently, there may be limits to the usefulness of the comparative public law methodology.

## **V. CONFLICT BETWEEN DIFFERENT DOMESTIC LEGAL SYSTEMS**

There can be a conflict between two domestic legal systems, but the comparative public law methodology is yet to develop a way to resolve these conflicts. The absence of a resolution mechanism in the methodology suggests that it is ill-suited for practical application. For instance, a substantive legitimate expectation is enforceable in English law, but not enforceable in Australian administrative law, in part because of the Australian Constitution. It is

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<sup>202</sup> Ibid 175 [160].

<sup>203</sup> Ibid 171 [145], 177 [164].

particularly relevant to compare these two legal systems because the Australian understanding of a legitimate expectation was, at least initially, heavily influenced by English law.<sup>204</sup>

### A. Substantive Legitimate Expectations in English Law

On one view of English law, a substantive legitimate expectation confers 'prima facie legal rights to be treated in particular ways' by a public body that gives a representation.<sup>205</sup> One of the 'concrete instances'<sup>206</sup> of a substantive legitimate expectation is *R v North and East Devon Health Authority; Ex parte Coughlan*. In that case, Miss Coughlan, a tetraplegic, had been promised that she would have a 'home for life' at a purpose-built health facility.<sup>207</sup> Subsequently, the health authorities decided to close the facility. The English Court of Appeal held that this defeated Miss Coughlan's legitimate expectation that she could remain at the facility. The court held that Miss Coughlan's case fell within the category of a substantive legitimate expectation, which is:

*Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power.*<sup>208</sup>

The defeat of Miss Coughlan's legitimate expectation could not have been cured by providing procedural fairness, because the expectation was substantive.

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<sup>204</sup> *Haoucher* (1990) 169 CLR 648, 679 (McHugh J); *Quin* (1990) 170 CLR 1, 20 (Mason CJ), 40 (Brennan J), 54 (Dawson J).

<sup>205</sup> Bell, above n 34, 438. See also *Lam* (2003) 214 CLR 1, 10 [28] (Gleeson CJ); contra Pandya, Abhijit PG. 2009. Legitimate Expectations in English Law: Too Deferential an Approach?. *Judicial Review* 14:170-176.

<sup>206</sup> *R (Niazi) v Secretary of State* [2008] EWCA Civ 755, [44] (Laws LJ).

<sup>207</sup> [2001] QB 213, 260 (Lord Woolf MR) ('*Coughlan*').

<sup>208</sup> *Ibid* 242 [57] (Lord Woolf MR).

## **B. Absence of Substantive Legitimate Expectations in Australian Law**

A substantive legitimate expectation is not enforceable in Australian administrative law.<sup>209</sup> Australian law has developed independently of English law.<sup>210</sup> In *Quin*, decided before Coughlan, the High Court explicitly rejected that an Australian court could enforce a substantive legitimate expectation.<sup>211</sup> In that case, the majority held that a magistrate did not have an enforceable substantive legitimate expectation to be re-appointed as a magistrate after a restructure of courts in New South Wales. In separate judgments, Deane and Dawson JJ reasoned that to allow the enforcement of a substantive legitimate expectation would require the concept of a legitimate expectation to be removed from its roots in procedural fairness and take on a life of its own.<sup>212</sup> To introduce a substantive legitimate expectation into Australian administrative law would require a ‘revolution in Australian judicial thinking’,<sup>213</sup> including in judicial thought on the separation of powers.<sup>214</sup> The separation of powers requires governmental power to ‘be split between the Legislature, Executive and Judiciary’.<sup>215</sup> The separation of powers is embodied in the Australian Constitution via a ‘federal written constitution with its express or implied limitations on legislative, executive and judicial powers’, which differs from the unwritten English constitution.<sup>216</sup> A manifestation of the separation of powers in Australian administrative law is the distinction between judicial review and merits review.<sup>217</sup> Australian courts undertake judicial review to determine the

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<sup>209</sup> Cane, Peter. 2003. The Making of Australian Administrative Law. *Australian Bar Review* 24: 114-134, 126.

<sup>210</sup> Allars, Margaret. 1995. One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: Teoh’s Case and the Internationalisation of Administrative Law. *Sydney Law Review* 17: 204-241, 236.

<sup>211</sup> *Quin* (1990) 170 CLR 1, 23-4 (Mason CJ).

<sup>212</sup> *Ibid* 48-9 (Deane J), 53-4 (Dawson J).

<sup>213</sup> Mason, ‘Procedural Fairness’, above n 44, 108.

<sup>214</sup> Aronson and Groves, above n 42, 428. See also Stern, Kristin. 2007. Substantive Fairness in UK and Australian Law. *Australian Bar Review* 29: 226, 280.

<sup>215</sup> Bathurst, Thomas. 2013. ‘Separation of Powers: Reality or Desirable Fiction?’ (Speech delivered at the JCA Colloquium, Sydney, 11 October 2013). See *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

<sup>216</sup> Mason, ‘Procedural Fairness’, above n 44, 109. See also *Lam* (2003) 214 CLR 1, 10 [28] (Gleeson CJ), 24-5 [76]-[77] (McHugh and Gummow JJ).

<sup>217</sup> Cane and McDonald, above n 28, 33.



legality or validity of an administrative act.<sup>218</sup> It is for the executive to make a decision on the merits; a judge is not to put themselves in the shoes of the decision-maker and make a decision.<sup>219</sup> However, enforcing a substantive legitimate expectation undermines the distinction between the two types of review, because it tends towards merits review.<sup>220</sup> Thus, the possibility of a court giving effect to a substantive legitimate expectation is significantly impeded by the constitutionally limited role of courts in Australia. It is therefore incorrect to characterise the Australian position as one of reluctance,<sup>221</sup> rather, there has been an intentional disavowal based on constitutional principles.

### **C. Implications for the Comparative Public Law Methodology**

It has been acknowledged that one of the challenges facing a methodology like the comparative public law methodology is finding universal agreement.<sup>222</sup> One proponent of the comparative public law methodology has found a way to overcome this with respect to differences between French and English law. That proponent claimed that although there is no explicit recognition of a legitimate expectation in French law, there are a range of equivalents so that there is no need for a doctrine of legitimate expectations.<sup>223</sup> Whilst this legal manoeuvring may work with French law, the same cannot be said of the differences between English law and Australian law. There is no equivalence in the enforceability of a substantive legitimate expectation in English and Australian law. Rather, there is explicit disagreement and Australian law has made a conscious turn away from English law.<sup>224</sup> Another proponent

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<sup>218</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 393 (McHugh, Gummow, Kirby and Hayne JJ).

<sup>219</sup> *Quin* (1990) 170 CLR 1, 36 (Brennan J); *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, 26 [76] (Griffiths J).

<sup>220</sup> *Quin* (1990) 170 CLR 1, 23 (Mason CJ), 39–40 (Brennan J); *Lam* (2003) 214 CLR 1, 23, 25 (McHugh and Gummow JJ); Mason, 'Procedural Fairness', above n 44, 109; Cane and McDonald, above n 28, 129; Groves, 'Substantive Legitimate Expectations in Australian Administrative Law', above n 151, 480; Teoh (1995) 183 CLR 273, 321 (McHugh J).

<sup>221</sup> *Contra Potestà*, above n 29, 97.

<sup>222</sup> Ford, Christopher A. 1994. Judicial Discretion in International Jurisprudence: Article 38(1)(c) and "General Principles of Law". *Duke Journal of Comparative & International Law* 5: 35-86, 68.

<sup>223</sup> Snodgrass, above n 29, 27.

<sup>224</sup> See, eg, *Lam* (2003) 214 CLR 1, 10 [28] (Gleeson CJ).

has acknowledged differences, but suggested that ‘core similarities’ within domestic legal systems ‘could be highlighted’.<sup>225</sup> This conclusion plainly does not apply to the role of substantive legitimate expectations in English and Australian law. Whilst these differences are just with Australian law and English law, it is possible that other domestic legal systems could also conflict. The difference between Australian law and English law on the enforceability of a substantive legitimate expectation highlights an issue that the comparative public law methodology is yet to confront. There is no mechanism to reconcile laws in domestic legal systems that conflict. It is unclear how domestic legal systems can help develop a consistent interpretation and application of an investment treaty, when there are inconsistencies in the domestic legal systems. The absence of such a mechanism appears to limit the comparative public law methodology to concretising international investment law in situations where there is no conflict between domestic legal systems.

## VI. CONCLUSIONS

Reviewing government conduct in international investment law could be legitimised and developed based on parallels with domestic legal systems through the application of the comparative public law methodology. However, a comparison between international investment law and Australian administrative law suggests that there are marked differences (and sometimes conflicts) in the purpose, consequences and underpinnings of a legitimate expectation. Cases where a legitimate expectation was defeated by the non-renewal of a licence confirms these differences and conflicts.

Australian administrative law is by no means the only domestic legal system worth considering, but it does illuminate issues with the comparative public law methodology. These issues suggest that the aims of the comparative public law methodology, such as legitimising existing jurisprudence, may not be attainable. Considering Australian administrative law as a case study also reveals that reforming international investment law will require difficult

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<sup>225</sup> Potestà, above n 29, 121.

questions about departing from the de facto precedent in international investment law and existing interpretations of investment treaties.

When two domestic legal systems are considered, another issue with the comparative public law methodology becomes evident. It is possible that two domestic legal systems, even those with similar historical roots, will develop independently and inconsistently. The comparative public law methodology currently does not offer a way to reconcile these differences, which significantly limits the attainment of the aims of the comparative public law methodology. Until the comparative public law methodology develops a greater degree of sophistication and internal conflict resolution processes, there will continue to be limits on the extent to which it can achieve its aims.