Legitimate Expectations:

As Understood by International Investment Tribunals

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INTRODUCTION

Objective: provide a descriptive account of the way in which international investment tribunals apply the doctrine of legitimate expectations

Justification: investment tribunals:

- regularly rely on past decisions
- are constituted from a common group of arbitrators

Structure: To found a successful action the investor must prove that it would have been *reasonable for it to expect*, *at the time of making the investment*, on the strength of the *representations* made by the State, upon which it *actually relied*, understood in the *light of surrounding circumstances* at the time, that, given *subsequent developments*, it or its investment would *not have been treated* by the State *in the way that it was or they were*, and as a result *damage* was suffered.

The most systematic way to determine whether the doctrine applies is as follows:

(1) identify the:
   a. expectation; and
   b. the representation upon which it is based,
(2) determine whether the expectation (so identified) was:
   a. frustrated;
   b. actually relied upon;
   c. caused damage; and
   d. objectively reasonable.

Only (2)(b)—**actual reliance**, and (2)(d)—**objective reasonability** will be considered.

ACTUAL RELIANCE

Investor must have *actually relied upon* the representation(s):

- *Metalclad v Mexico* [85]: Metalclad was led to believe, and *did believe*, that the federal and state permits allowed for the construction and operation of the landfill.'
- *SPP v Egypt* [82]: '[T]hese acts were cloaked with the mantel of Governmental authority and communicated as such to the foreign investors *who relied on them in making their investments*.'
- *GAMI v Mexico* [91]: 'The imposition of a new license requirement may be viewed quite differently if it appears on a blank slate or if it is an arbitrary repudiation of a pre-existing licensing regime *upon which a foreign investor has demonstrably relied*.'

There can be *no reliance* where:

(1) the investment decision predates the representation ('*Timing*')
(2) the investor knew that the expectation was unreasonable ('*Awareness*')

(1) Timing

There can be no reliance where the investment decision predates the representation:

- *Thunderbird v Mexico* [167]: '[T]he Tribunal questions to what extent Thunderbird invested in Mexico in reliance on the *Oficio*, considering the non-negligible steps … completed for the operation of its gaming machines *prior to the issuance* of the *Officio* …'
- *Continental v Argentina* [259]: '[T]he general legislative "assurances" were not the basis on which Continental had relied in making its investment in Argentina, since it had *entered in that market before such assurances*.'
- *Jan de Nul v Egypt* [265]: '[L]egitimate expectations that are protected are the ones at the time of the making of the investment and the *Committee was only set up in 1996*. For this reason, the Tribunal finds no breach …'

(2) Awareness

There can be no reliance where the investor did not believe the expectation to be reasonable:

- *Metalpar v Argentina* [207]: 'When Claimants invested in Argentina, *they knew* that the Convertibility Law … could become unreal.'
- *Parkerings v Lithuania* [323]: '[The Claimant] *was aware* that the arrangements set out in the Agreement were untested and could be subject to legal challenge.'

OBJECTIVE REASONABILITY

The expectation must be:

(1) objectively reasonable (taking into consideration investor characteristics)
(2) at the time investment made
(3) on basis of representation(s) and surround circumstances
(4) by reference to developments occurring after investment made

(1) Objective reasonability

Reasonability determined by reference to what the investor *ought* to have expected.

This test allows for *some* characteristics of the investor to be taken into consideration:

- *Metalpar v Argentina* [202]: 'It is … valid to suppose that Claimants, with representatives who have *ample international experience*, living in a *neighbouring country* and with *strong relations* with that country, were aware of Argentina's reality.'
- *Duke v Peru* [363]: 'One might ask whether *an experienced investor such as [the Claimant]* should not have paid closer attention …'

(2) Reference point

Objective reasonability must be assessed at the time of investment:

- *Jan de Nul v Egypt* [265]: '[L]egitimate expectations that are protected are the ones *at the time of the making of the investment* …'
- *Duke v Peru* [340]: 'To be protected, the investor's expectations must be legitimate and reasonable *at the time when the investor makes the investment*.'

(3) Representation and surrounding circumstances

Representations may be found in many places: laws, minutes, official statements, behaviour of regulatory authorities, etc. This list is not exhaustive.

Surrounding circumstances influence the reasonableness of relying on the representation:

- industry crisis: *Duke v Peru*
- period of rapid political change: *Parkerings v Lithuania*
- past practice of State authorities: *Duke v Peru*
- active campaign to attract investment: *Metalpar v Argentina*, *CME v Czech Republic, National Grid v Argentina*.

(4) Subsequent developments

The expectation must be considered in the light of subsequent developments:

- economic and financial crises: *Genin v Estonia* and *Waste Management v Mexico*
- organic opposition by the public: *Waste Management v Mexico*
- claimant behaviour: *Biwater v Tanzania*, *Waste Management v Mexico, Azurix v Argentina,* and *CME v Czech Republic*.

CLIFFS NOTES

Claimant's Perspective	Respondent's Perspective
(1) The expectation is *x* (2) The representation is *y* (3) That expectation was frustrated (4) The Claimant actually relied on the representation when making its investment (5) As a result, damage was suffered (6) The expectation was objectively reasonable at the time of investment given the representation and surrounding circumstances upon which it was based, in light of subsequent developments.	(1) The Claimant has failed to identify an expectation, and even if it has (2) The expectations that might be asserted have not been frustrated, and even if one of them was (3) There is no representation upon which such expectations might be based, and even if there is (4) The investor did not actually rely on the representation, and even if it did (5) No damage was suffered as a result, and even if it was (6) The expectation was not objectively reasonable at the time of investment given the representation and surrounding circumstances upon which it was based, in light of subsequent developments.