Can “Legitimate Expectations” Ever be “Rights”?

Author : Jan Paulsson

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Florian Dupuy & Pierre-Marie Dupuy, What to Expect from Legitimate Expectations? A Critical Appraisal and Look into the Future of the ‘Legitimate Expectations’ Doctrine in International Investment Law, *in* **Festschrift Ahmed Sadek El-Kosheri: From the Arab World to the Globalization of International Law** 273-298 (Mohamed Abdel Raouf, Philippe Leboulanger, & Nassib G. Ziadé eds., Kluwer 2015).

The trouble with the amiable practice of collections of essays in honor of admired scholars is that they are so often published in a stand-alone volume rather than in journals of record, with the result that they may be lost to all but initiates who happen to know of its existence. In the just-published *Festschrift* for Professor Ahmed Kosheri, the preeminent Egyptian international lawyer of his generation, this pearl of an essay deserves a better fate. It addresses fundamental issues with respect to the degree of legal stability to which a foreign investment is entitled from a host state in light of the instruments applicable to its entry, and suggests broad guidelines to resolve the hesitations of the caselaw to date.

The authors are a father-son team of French authors, each exceptionally erudite and polyglot. Florian, the son, holds degrees from three major law faculties (Paris, Humboldt, and Cambridge). In 2007, he presented a thesis for joint recognition by Paris (Panthéon-Assas) and Humboldt which is of direct relevance to this joint contribution, entitled *La protection de l’attente légitime des parties au contrat – Étude de droit international des investissements à la lumière du droit comparé*. Pierre-Marie has for long been one of the bright stars on the firmament of international legal scholars and prominent among the lawyers who practice before the International Court of Justice. He has also served as arbitrator on tribunals deciding important disputes between states and foreign investors arising under bilateral investment treaties and thus applying the law referred to in their title.

This is precisely the kind of writing that attracts those of us who like to spend our lives indolently ruminating on fundamental (and thus never-resolved) questions, criticizing legislators and judges who stumble around in the land of Ad Hoc, and leaving our more industrious colleagues to “analyze,” “synthesize” and “restate” the indigestible torrent of rules produced by our rulers.

The central basic questions here asked by the Dupuys is whether a “subjective hope” could ever be a legally enforceable right. Is it nothing but a possibly relevant criterion for examining the performance of an obligation to act in good faith? Is the expression at all useful?

As a matter of legal philosophy, legitimate expectations can be seen as the ultimate fundament of law. A morally neutral legal system can be of significant value to its subjects; an amoral but predictable dictator may be preferable to chaos. And so the respect for legitimate expectations may be a requirement for a rule of decision to qualify under a conception of *law*, but this is not the authors’ subject, which is at one level lower of abstraction: are we looking at a meaningful rule of decision? If not, it can only lead to confusion.

International arbitrations involving claims brought by foreign investors under treaties is a phenomenon of recent vintage — its origin less than three decades in the past. The cases often involve the tension between a state’s insistence on its authority to adapt its rules to the public interest and an investor’s insistence on a right to rely on a regime which induced it to invest (and was perhaps specifically implemented to have that effect).

As the authors say, one should eschew the use of the expression in a tautological sense; to say that an investor has a legitimate expectation to "fair and equitable treatment" is as useless as saying that all citizens have such an expectation to the performance of contracts. One is already explicitly articulated in a treaty, the other in national law. "The doctrine of 'legitimate expectations' is about what the investor is concretely entitled to expect from the host state under the specific circumstances of a case, not about reiterating the state's general obligations flowing from the terms of the applicable treaty." (P. 275.)

If the reasonableness of expectations are given weight in the application of a rule of decision, it must be because it is derived from a "social environment." The diamond market in Antwep, one reasonably supposes, is different from the souk in Casablanca. More broadly, general commercial usages may differ depending on the institutional maturity and orderliness of any national community. Do shared expectations exist in a field as broad as that of the "community" of actors who have a stake in the network of several thousand investment treaties? Or does each treaty constitute its own environment?

Looking first at comparative law (a discipline with which the Dupuys are well conversant, notwithstanding the primary association of their name with international law), the authors note that the need for limits on the revocability of administrative acts have been broadly recognized, often in ways that parallel the notion familiar to the common law principle of estoppel; the expectation must have been generated by a public authority, the change in policy must have been unpredictable, there must have been detrimental reliance, and the expectations must not compromise a compelling public interest (this last qualification being true for all areas of law but most directly in the center of debates about acts of public administration).

Some national legal systems have developed complex (and more or less useful) conceptual frameworks for the state's liability for particular detrimental consequences of regulatory change on economic actors, designed in the French expression to achieve an approximation of *l'égalité devant les charges publiques*. Compared to the body of law and scholarship that have emerged from generations of struggles with the intricate tensions that emerge from the infinite variety of acts of administration, the corresponding state of the "international investment law" referred to in the authors' title, the latter may seem embarrassingly rudimentary. That should be not be surprising, and not only so because it is *in statu nascendi;* it is inconceivable that an international consensus would coalesce around detailed solutions derived by one system of national law.

Moreover, we have no world parliament to draft planetary federal regulations. Treaties tend to be expressed in general terms. It is exceedingly rare for the ICJ to be seized of an investor/state dispute *à la Barcelona Traction*. We must look to the reasoning and the outcomes produced by international arbitral tribunals. The first generation of awards was a mixed bag, as the Dupuys show.

Some tribunals yielded to the impulse to demonstrate their mastery of the obvious, for example in stating that a remedy will not be provided for the "mere frustration of hopes." But then when does treaty protection of foreign investment begin? The cases include such unhelpful pronouncements as the notion that what is required is the "active inducement of a quasi-contractual expectation." This suffers from the double flaw of mysteriousness and incoherence with the fundamental idea of investment-protection treaties: (i) "quasi-contract" is not a term known to international law, nor indeed to many national legal systems, and (ii) the very notion of requiring a contractual foundation for causes of actions seems to be a reversion to a past epoch when international tribunals competent to deal with investor claims were, apart from instances of home-State espousal of claims via diplomatic protection, those arising under "state contracts" directly concluded between State and the few private investors who had the wherewithal to enter into a bilateral relationship at that level.

The authors have little difficulty demonstrating that the early decisions included some awards which had more bark than bite, as though arbitrators first settled on concrete outcomes which may have been perfectly justifiable, but then yielded to the temptation of adorning them with unreliably over-broad general pronouncements, e.g. suggesting without qualification that the stability of the legal regime prior to the entry of a foreign investment is an essential component of

the familiar treaty promise of "fair and equitable treatment." This in turn encouraged some investors to make over-ambitious claims, and some states to tremble that they would succeed. But soon enough the mirage of such obiter dicta was dissolved by proper *holdings* which made clear that the stability of the investment regime, though a legitimate and important objective, was not necessarily decisive in establishing obligations under the treaty; the countervailing interest of the respondent state to make adaptations in the public interest may prevail.

And so investors failed, for example, to convince arbitrators that a respondent state was without more liable for (a) for changes in caselaw, (b) failing to freeze specific laws and regulations affecting investments, and even (c) enacting fundamental reforms provided they are not "arbitrary or grossly unfair or discriminatory."

The starting point for anyone coming new to these debates and wishing quickly to separate the intellectual wheat from the chaff will do well to press "fast forward" and take as a starting point the decision handed down in 2008 by a unanimous tribunal headed by Sir Arthur Watts QC (who served as a legal adviser in the British Legal Office from 1956 to 1991 — ending up as its chief — and among whose weighty scholarly contributions was his co-authorship with Sir Robert Jennings, a former President of the ICJ, of the ninth edition of *Oppenheim's International Law*) in the case brought by the Nomura banking group in response to the Czech Republic's treatment of its investment in that country's third largest bank. The award was in favor of Nomura (more precisely its investment vehicle, named Saluka) in the circumstances of the case, and led to a substantial payment by the State without the need for measures of compulsory execution, but its general account of relevant principles were measured and cautious, as in this prominent passage quoted by the Dupuys:

"*No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well.*" [Saluka Investments B.V. v. Czech Republic, ¶ 305, UNCITRAL Award (2006). Disclosure: the present author was, alongside Professor James Crawford SC, now a judge at the ICJ, one of Saluka's advocates.]

In the wake of this decision, as the authors show, further cases have made established that BITs do not prevent their signatories from amending legislation to adapt to change in the "normal exercise" of their prerogatives.

Where does this leave the balance, since the preceding sentence obviously does not have the effect of rendering thousands of BITs so many words writ on water? The proposition that expectations of stability are "protected to the extent that the investor has been led to believe that specific regulations would remain unchanged for a certain period of time" (p.291) leaves many questions unresolved by the body of decided cases. In particular, can states "create legitimate expectations without explicit promises"? Who bears the risk of ambiguities in the wording of governmental declarations which may have created expectations in the minds of investors? Must such representations have been made directly to the claimant? Is a claimant's own conduct relevant to the assessment of the legitimacy of its expectations?

The authors suggest three criteria as critical in weighing the consequences of expectations of stability: the presence of explicit commitments to stable rules, the severity of the imperatives of public policy which motivate subsequent regulatory change, and the degree of alteration of the relevant legal framework thereby caused.

They suggest a number of important "grey areas" that will continue to pose challenges. For example, while there can be no expectation of the absolute stability of the legal framework, and investors may held to a level of understanding and due diligence with respect to the prospects of legislative change in a given environment, there comes a point where the magnitude of the particular detriment caused to the investor makes it intolerable for the change to the imposed without compensation.

Similarly, the nature of implicit representations made to the investor may be "considered equivalent to a promise in the

light of the circumstances"; consistency in the conduct of state organs is "an important element of the protection of legitimate expectations" (p. 293). Thus, in the case of *Arif v Moldova,* ICISD Case No. ARB/11/23, Award (2013), the invalidation of a lease to operate an airport duty-free concession was considered to have been unfair given that the lease had been concluded and approved by competent administrative authorities and the investor was allowed for a significant period of time to make the necessary investments and thereafter to operate the shops. And in *Gold Reserve Inc. v Venezuela,* ICSID Case No. ARB/04/01, Award (2014), in which the tribunal, on which Pierre-Marie Dupuy served as the Respondent's nominee, awarded some $740m to the investor, the grant of a series of certificates of compliance and the continued failure to object to the investor's activities were held to be incompatible with the sudden withdrawal of mining rights on the purely formal ground of a long-past failure to comply with time limits under the mining law.

The degree of clarity of the state's representations is also a matter with respect to which it is difficult to generalize. If such representations were made in the context of incomplete information given by the investor, the latter is likely to have only itself to blame. But consider the award in *Ioan Micula et al v Romania*, ICSID Case No. ARB/05/20, Award (2013), where a number of incentives were retracted on the grounds that they were contrary to EU state aid law notwithstanding so-called permanent investor certificates that inter alia authorized those incentives for a stated duration. As might be expected, the difficult issue (with respect to which the arbitrators were divided, though not as to the outcome of the case) was whether a general tax incentive scheme was transformed into a commitment to the particular investor by dint of the certificate.

Finally, the potential significance of a lack of diligence on the part of the investor was illustrated by *MTD Equity Sdn. Bhd. et al v Chile*, ICSID Case No. ARB/01/7, Award (2004), where although the Government investment authority had triggered the government's liability by authorizing a project which later was annulled because the land selected for the investment was zoned exclusively for agricultural use, the Tribunal reduced recovery by 50% on account of the investor's failure to have conducted any investigations of its own.

All of this leads to a general conclusion that the notion of legitimate expectations, while not susceptible of serving as the basis of an autonomous cause of action, remains of great significance as a means of assessing compliance with the standard of fair and equitable treatment.

In this concise contribution, the Dupuys have exhorted us to organize our thinking and suggested a conceptual roadmap. Their essay does not so much inform us as it makes us reflect on the prospects of a more granular international consensus. Meanwhile, we might reflect that arbitrators earn their keep precisely by the quality of their reflection, and have no reason to follow unpersuasive precedents.

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