Can host countries have legitimate expectations? (also in Chinese)

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by Karl P. Sauvant and Güneş Ünüvar *

The concept of “legitimate expectations” was introduced into the legal relations between foreign investors and host country governments to denote that the latter cannot act contrary to certain expectations they have set in the past. Absent a clear-cut framework regarding which expectations qualify as “legitimate”, dispute-settlement practice indicates that such expectations can be relevant under fair-and-equitable treatment and indirect expropriation articles in international investment agreements (IIAs). They can be based on:

- Governments’ written commitments to investors, e.g., contractual commitments beyond mere contractual expectations;
- Governments’ representations vis-à-vis specific investments, e.g., direct and public endorsements; or
- Host countries’ unilateral representations, e.g., favorable regulatory frameworks as they existed at the time of an investment.¹

Foreign investors can claim breach when host countries fail to fulfill expectations based on any of these sources. Since the early 2000s, “legitimate expectations” have often been invoked in investor-state arbitrations.

By analogy, the question arises whether host countries too can have legitimate expectations concerning the behavior of foreign investors within their economies, absent any specific investor obligations in IIAs. Such expectations could be inferred from treaty preambles recognizing the objectives of IIA parties’ economic or “sustainable development”, as well as articles providing that investors “shall strive to carry out the highest level possible of contributions to the sustainable development of the host State and the local community”² or corporate social responsibility (CSR) articles reaffirming “the importance of each Party encouraging enterprises … to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of [CSR]”.³ Expectations could be based on:
• Investors’ written commitments to host country governments, e.g., contractual infrastructure commitments concerning the quality of services such as water and sanitation;  
• Investors’ representations, e.g., statements by corporate executives about contributions their investments will make to a host country; or  
• Investors’ unilateral representations, e.g., as evidenced by CSR policies or by support for such instruments as the United Nations (UN) Guiding Principles on Business and Human Rights, the UN Global Compact or the OECD Guidelines for Multinational Enterprises.

Host countries could claim breach when investors fail to fulfill expectations based on any of these sources.

In any event, assessing the legitimacy of expectations involves an inherent, context-bound balancing of investors’ and states’ expectations. Arguably, in fact, even the assessment of investor’ legitimate expectations under the current approach should require that a state’s legitimate expectations are taken into account.

Countries are beginning to refer to their own expectations. In Sempra v. Argentina, for example, Argentina argued that it “had many expectations in respect of the investment that were not met or otherwise frustrated … [such as] that the investor would bear any losses resulting from its activity, work diligently and in good faith, not claim extraordinary earnings exceeding by far fair and reasonable tariffs, resort to local courts for dispute settlement, dutifully observe contract commitments, and respect the regulatory framework” in response to the investor’s claim that its expectations went unfulfilled. While the expectations of Argentina did not play a significant role in the outcome of this particular case, Argentina’s reference to such expectations per se illustrates their inherent relevance to disputes between investors and host countries.

However, since governments currently cannot initiate IIA-based arbitral proceedings against foreign investors, their reliance on legitimate expectations is limited to counterclaims brought in response to investors’ claims.

Tentative steps are underway toward reducing this asymmetry and laying the ground for recognizing host countries’ legitimate expectations. For example, more than 75% of IIAs concluded between 2008 and 2013 reference “sustainable development” or “responsible business conduct”⁵قود. Future IIAs could explicitly stipulate that host countries’ legitimate expectations are protected (or, going further, recognize investor obligations) and establish an independent, substantive right to claim for breach of host countries’ legitimate expectations, provided that treaty-based or domestic regulatory prerequisites regarding consent are satisfied. This would help to ensure that IIAs further the interests of all parties and, in so doing, contribute to a more balanced international investment regime—thereby strengthening the regime’s legitimacy.
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3 Trans-Pacific Partnership (2016), art. 9.17.

4 See, e.g., Biwater Gauff (Tanzania) Ltd. v. Tanzania, ICSID Case No. ARB/05/22, Award (Jul. 24, 2008), paras. 381-382.


6 Sempra Energy International v. Argentina, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007), para. 289.

7 While “contributory fault” may curb host countries’ responsibilities insofar as claimants’ actions contribute to the outcome that prompted claims, this principle does not create obligations for investors nor result in direct responsibility. See, Yukos Universal Limited v. Russia, PCA Case No. AA 227, Final Award (Jul. 18, 2014), pp. 500-510.


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东道国能否拥有合法预期？

Karl P. Sauvant and Güneş Ünüvar

“合法预期”的概念被引入外国投资者和东道国政府之间的法律关系中，以表明后者不能违背它们以往持有的特定预期。争端解决实践尚缺乏能使预期“合法”的相关规定。这表明这些预期在公平公正的待遇下及国际投资协定（IIAs）间接征收条款中较为相关。它们可以基于:

• 各国政府对投资者的书面承诺，如超越了单纯的合同预期的合同承诺;

• 政府对特定投资的表示，如直接公开的背书；或是

• 东道国的单边陈述，如投资时有利的监管框架。1

当东道国无法满足这些预期时，外国投资者可以要求违约索赔。自本世纪初，“合法预期”往往被投资者-国家仲裁采用。

与此类比，问题在于若无国际投资协定中规定的任何特定投资者义务，东道国是否也能拥有对于外国投资者在本国经济中行为的合法预期。这样的预期可以从以下内容中推断出来：承认国际投资协定各方经济或“可持续发展”目标的条约序文，以及投资者“应力求为东道国及当地的可持续发展做出尽可能大的贡献”的条款2或企业社会责任（CSR）中重申“各缔约方鼓励企业……自愿把国际公认的标准、方针和（CSR）原则加入其内部政策的重要性”的条款。3预期可以基于：

• 投资者对东道国政府的书面承诺，如与供水和卫生设施的服务质量有关的合同承诺：4

• 投资者的表示，如企业高管对于他们对东道国投资的声明；或是
投资者单方面的陈述，如企业社会责任（CSR）政策的证明或联合国（UN）商业与人权指导原则、联合国全球契约或经合组织的跨国公司指南等文书的支持。

当投资者无法满足这些预期时，东道国可以要求违约索赔。

在任何情况下，评估预期的合法性涉及到一种内在的、与具体情境相关的投资者和国家的预期平衡。可以说事实上，在目前的情况下，即使是投资者的合法预期评估也应将一个国家的合法预期考虑在内。

各国正逐渐涉及到自身的预期。以森普拉能源公司诉阿根廷案为例，对于投资者提出的其预期未得到满足，阿根廷在回应时认为自身“在投资方面有很多需求未被满足或不尽如人意……如投资者应承担其行为造成的任何损失，认真刻苦地工作，不享有公正合理的关税外的额外收入，诉诸当地法院解决争端，尽职尽责遵守合同承诺，并尊重监管框架”。6 虽然阿根廷的预期并没有在这一特定情况下对结果发挥关键作用，它提及这种预期本身已说明了投资者和东道国之间纠纷的内在相关性。

然而，由于政府目前还不能启动针对外国投资者的基于国际投资协定的仲裁程序，它们对于合法预期的依赖仅限于回应投资者的索赔时提出的相应索赔。7

为了减少这种不对称，并为认可东道国的合法预期奠定基础，目前已有少数初步措施正在进行。例如，2008 至 2013 年间，75%的国际投资协定涉及到了“可持续发展”和“负责任的商业行为”。8 未来的国际投资协定可能会明确规定，东道国的合法预期受到保护（或者更进一步，承认投资者的义务），并规定东道国合法预期违约索赔的独立、实质性的权利，但必须建立在相关条约或国内法规认可的前提下。这将有助于确保国际投资协定扩展各方的利益。这样做有利于建立一个更为平衡的国际投资体制——从而加强体制的合法性。

（南开大学胡行宜翻译）

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3 Trans-Pacific Partnership (2016), art. 9.17.
4. See Biwater Gauff (Tanzania) Ltd. v. Tanzania, ICSID Case No. ARB/05/22, Award (Jul. 24, 2008), para. 381-382.
7. Despite “mutual有过失” would mitigate a host state’s responsibility, the plaintiff can still pursue the claim. See Yukos Universal Limited v. Russia, PCA Case No. AA 227, Final Award (Jul. 18, 2014), pp. 500-510.

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