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## **Expectations as Property: Histories, Contextualizations, Critiques**

Freya Irani and Katharina Pistor



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The last four decades have seen an enormous expansion in the number of international investment treaties (particularly bilateral investment treaties) and in investment treaty-based arbitrations and awards. Traditionally made between capital-exporters and capital-importing states (that is, along a North-South axis), such treaties generally assure investors of one signatory state (the “home state”) protection on the basis of pre-determined standards in the other signatory state or states (the “host state”). Such treaties also provide for compensation in case of breaches of these standards, and give investors recourse to arbitration in case of disputes. Given these provisions alongside arbitral treaties themselves, in recent decades, there have emerged a substantial number of arbitral decisions interpreting the treaties in question, decisions that are far more protective of, and solicitous of, investors’ arguments than many of the treaty-signatory states may have anticipated or intended.

This volume is provoked by, and takes as its point of departure, a very particular development in international investment law: arbitral tribunals’ practice of requiring states to compensate investors for interfering with their “legitimate expectations” of particular kinds of treatment or particular income streams. The “doctrinal hook” for this development has been the “fair and equitable treatment” clause, a clause which was inserted into many investment treaties beginning in 1950s, but which lay dormant in subsequent decades. Around the turn of the century, in a series of highly influential awards, arbitral tribunals began to newly and radically interpret the clause to include a requirement that the “legitimate expectations” of investors be protected.<sup>1</sup> In subsequent years, this new rule was very broadly constructed to give an enormous amount of protection to investors as tribunals held, for example, that the simple *existence* of a particular regulatory framework could give rise to the expectation within an investor that such a framework would not be substantially amended.<sup>2</sup>

These decisions have been much critiqued. For example, critics have pointed to the limited textual basis in the relevant treaties for the protection of investor expectations.<sup>3</sup> Relatedly, they have challenged the authority of arbitral tribunals to create new kinds of property rights (in this case, rights for investors in having their legitimate expectations fulfilled), considering such creation properly within

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1. For an account of this history, see M. SORNARAJAH, RESISTANCE AND CHANGE IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 245–63 (2015).
  2. See U.N. CONFERENCE ON TRADE & DEV., FAIR AND EQUITABLE TREATMENT: A SEQUEL, at 67, UNCTAD/DIAE/IA/2011/5, U.N. Sales No. E.11.II.D.15 (2012).
  3. See, e.g., SORNARAJAH, *supra* note 1, at 263.

the purview of domestic property law.<sup>4</sup> In addition, they have suggested that the protection of investor expectations works to transfer risk from investors to governments and populations (often, in very poor states), and causes “regulatory chill.”

These critical accounts are crucially important. Nonetheless, for the most part, they view the above-described developments in the field of investor-state arbitration in *isolation*. But investor-state arbitration can be seen as only one context, among many, in which the expectations of some humans (and, in fact, some non-humans, such as corporate entities) have been constructed as objects worthy of legal protection. What, if any, are the relations, the connections, between these different contexts? And what insights, about the histories and implications of the legal protection of (some) expectations, may be generated by looking, together, at legal fields that are generally considered autonomous, bounded, and distinct?

To address these questions, we organized a workshop at Columbia Law School in May 2017, bringing investment law scholars into conversation with others who have critically considered the legal construction and protection of expectations—as objects of property—in varied (but related and overlapping) contexts and areas of law. This special issue contains several papers presented at the workshop, which address the varied ways in which expectations have historically worked—and continue to work—in contexts ranging from federal land policy to international investment law. We hope that these papers will allow readers to gain a range of insights into the protection of expectations that might be obscured by traditional divisions between domestic and international law, public and private law, property and contracts, and so on.

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4. See, e.g., Lise Johnson, *A Fundamental Shift in Power: Permitting International Investors to Convert Their Economic Expectations Into Rights*, 65 UCLA L. REV. DISCOURSE 106 (published concurrently in this symposium 2018).