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## At What Time Must Legitimate Expectations Exist? by C.H. Schreuer and U. Kriebaum

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# At What Time Must Legitimate Expectations Exist?

Christoph Schreuer & Ursula Kriebaum\*

## I. Preliminary Remarks

The protection of legitimate expectations is by now firmly rooted in arbitral practice. The purpose of protecting legitimate expectations is to enable the foreign investor to make rational business decisions relying on the representations made by the host State. Legitimate expectations are closely linked to the requirements of stability and predictability. However, not every expectation upon which a business decision is taken is protected by international investment law.<sup>1</sup>

The Tribunal in *Thunderbird v Mexico*,<sup>2</sup> of which Thomas Wälde was a member, devoted considerable attention to the question of legitimate expectations. The Award identifies the requirements for the existence of legitimate expectations in the context of fair and equitable treatment in the following way:

a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damages.<sup>3</sup>

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<sup>1</sup> Generally on the significance of legitimate expectations see C Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, (2005) 6 *The Journal of World Investment & Trade* 357, 374-380; E Snodgrass, 'Protecting Investors' Legitimate Expectations – Recognizing and Delimiting a General Principle' (2006) 21 *ICSID Review – FILJ* 1; S Fietta, 'The "Legitimate Expectations" Principle under Article 1105 NAFTA—*International Thunderbird Gaming Corporation v The United Mexican States*' (2006) 7 *The Journal of World Investment & Trade* 423; A von Walter, 'The Investor's Expectations in International Investment Arbitration' in A Reinisch, Ch Knahr (eds.), *International Investment Law in Context* (2008) 173; C Brown, 'The Protection of Legitimate Expectations as a 'General Principle of Law': Some Preliminary Thoughts' in *TDM*, January 2008; I Tudor, *The Fair and Equitable Treatment Standard in the International Foreign Investment Law* (OUP, 2008) 163.

<sup>2</sup> *International Thunderbird Gaming Corporation v The United Mexican States*, Award, 26 January 2006.

<sup>3</sup> At para 147.

Thomas Wälde, in his separate opinion, agreed on the test but not on its application to the facts of the case. In a detailed discussion of the concept<sup>4</sup> he stressed the role of legitimate expectations as an important part of the fair and equitable treatment (FET) standard under Article 1105 NAFTA. He said:

One can observe over the last years a significant growth in the role and scope of the legitimate expectation principle, from an earlier function as a subsidiary interpretative principle to reinforce a particular interpretative approach chosen, to its current role as a self-standing subcategory and independent basis for a claim under the 'fair and equitable standard' as under Art. 1105 of the NAFTA.<sup>5</sup>

One of the issues surrounding the principle of legitimate expectations that deserves closer attention is the question of time: when do the expectations have to exist to merit the protection of international investment law?

## **II. The Time of the Legitimate Expectations**

Pertinent treaty provisions in BITs give no indication of the time at which expectations must exist in order to be worthy of protection. But a number of tribunals have stated that protected expectations must rest on the conditions as they exist at the time of the investment.<sup>6</sup>

Some Tribunals have made this statement with regard to investment protection in general. They have pointed out that a foreign investor has to make its business decisions and shape its expectations on the basis of the law and the factual situation prevailing in the country as it stands at the time of the investment. The legal regime in place at the time of the investment is the starting point against which the treatment of the investment by the State will be assessed by an investment tribunal to decide whether an investment protection treaty was violated.

It is in this spirit that the Tribunal in *GAMI v Mexico*<sup>7</sup> held that its mandate was to assess how the legal regime in place at the time of the investment had been applied to the investor and not whether it was the proper legal regime:

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<sup>4</sup> Separate Opinion at paras. 21-58.

<sup>5</sup> At para 37.

<sup>6</sup> See also *Southern Pacific Properties (Middle East) Limited (SPP) v Arab Republic of Egypt*, Award, 20 May 1992, 3 ICSID Reports 189, paras 82, 83; *Saluka Investments BV (The Netherlands) v The Czech Republic*, Partial Award, 17 March 2006, para 329; *Azurix Corp. v Argentine Republic*, Award, 14 July 2006, para 372; *Siemens A.G. v Argentine Republic*, Award, 6 February 2007, para 299; *Duke Energy Electroquil Partners & Electroquil S.A. v Republic of Ecuador*, Award, 18 August 2008, paras 340, 347, 365, 366.

<sup>7</sup> *GAMI Investment Inc. v Mexico*, (NAFTA), Award, 15 November 2004.

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93. To repeat: NAFTA arbitrators have no mandate to evaluate laws and regulations that predate the decision of a foreigner to invest. ...

94. The duty of NAFTA tribunals is rather to appraise whether and how preexisting laws and regulations are applied to the foreign investor.<sup>8</sup>

A number of Tribunals explicitly applied this general approach to the concept of legitimate expectations. They held that the expectations that an investor had when it made the investment are decisive.

In *Tecmed v Mexico*,<sup>9</sup> one of the leading cases on fair and equitable treatment and on the investor's legitimate expectations, the Tribunal said that for a violation of FET the investor must have relied on his expectations when making the investment, thereby implying that the investor's expectations must have existed at the time of the investment. At the beginning of its famous and often quoted passage on investor expectations the Tribunal said:

154. The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, 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.<sup>10</sup>

Other Tribunals were even more explicit with regard to the timing of expectations. In *LG&E v Argentina*,<sup>11</sup> the Claimant owned a shareholding interest in three local gas distributing companies in Argentina. Argentina interfered with expectations which were based on the license of the local companies and the laws and regulations in force at the time of the investment. The Tribunal, quoted the passage from *Tecmed*, cited above.<sup>12</sup> It said with regard to the time component of the legitimate expectations:

130. It can be said that the investor's fair expectations have the following characteristics: they are based on the conditions offered by the host State at the time of the investment.<sup>13</sup>

*Enron v Argentina*<sup>14</sup> concerned Enron's indirect investment of 35.5% in Transportadora Gas del Sur ('TGS'), one of the major Argentine networks for the transportation and distribution of gas. Argentina had offered by

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<sup>8</sup> At paras 93, 94.

<sup>9</sup> *Tecnicas Medioambientales Tecmed S. A. v The United Mexican States*, Award, 29 May 2003, 43 ILM 133 (2004).

<sup>10</sup> At para 154.

<sup>11</sup> *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic*, Decision on Liability, 3 October 2006, 21 ICSID Review (2006) 203.

<sup>12</sup> At para 127.

<sup>13</sup> At para 130.

<sup>14</sup> *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic*, Award, 22 May 2007.

means of the Argentine Gas Law, the Gas Decree and the Basic Rules of the License key tariff-related guarantees. The Tribunal noted that it was essential for the protection of legitimate expectations that they existed at the time of the investment and were part of the considerations of the investor to invest:

262. The protection of the '*expectations that were taken into account by the foreign investor to make the investment*' has likewise been identified as a facet of the standard. ...What seems to be essential, however, is that these expectations derived from the conditions that were offered by the State to the investor at the time of the investment and that such conditions were relied upon by the investor when deciding to invest.<sup>15</sup>

Claimant in *BG v Argentina*<sup>16</sup> had a direct and indirect investment in MetroGas a natural gas distribution company incorporated in Argentina. The Tribunal relied on the characterisation of legitimate expectations by the *LG&E* Tribunal.<sup>17</sup> It said:

298. The duties of the host State must be examined in the light of the legal and business framework as represented to the investor at the time that it decides to invest.<sup>18</sup>

*National Grid v Argentina*<sup>19</sup> concerned a shareholding in a local investment vehicle which had obtained a concession for providing high-voltage electricity transmission services in Argentina. The Tribunal stated that the expectations that had existed and were relied upon by the investor at the time of the investment were protected:

173. A review of the case law adduced by the Parties shows ... that this standard protects the reasonable expectations of the investor at the time it made the investment and which were based on representations, commitments or specific conditions offered by the State concerned. Thus, treatment by the State should 'not affect the basic expectations that were taken into account by the foreign investor to make the investment.'<sup>20</sup>

These decisions focus on one particular point in time: the establishment of the investment. At first sight this approach appears eminently reasonable. The causal nexus between the investor's legitimate expectations and the investment can only exist in relation to contemporary expectations. This leads to the question whether 'the time of the investment' can always be determined with accuracy. In particular, it may be open to doubt

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<sup>15</sup> At para 262. Footnotes omitted. Italics original.

<sup>16</sup> *BG Group Plc v Republic of Argentina*, Final Award, 24 December 2007.

<sup>17</sup> At para 297.

<sup>18</sup> At para 298.

<sup>19</sup> *National Grid v Argentina*, Award, 3 November 2008.

<sup>20</sup> Footnotes omitted.

whether an investment is necessarily a one time event that can be reduced to a particular date.

### **III. Investment as a Complex Process**

An investment is often a process rather than an instantaneous act. This implies that it will often not be a single step on the basis of a single decision that needs to be taken. Rather, during the process of establishing an investment as well as during the lifetime of an investment project, a number of business decisions have to be taken by investors. To take a relatively simple example: shares of a local company are sometimes acquired in several steps over time rather than at once.

This was the case in *CMS v Argentina*.<sup>21</sup> CMS's shareholding in TGN was not established at once. First CMS purchased 25% of the company, later it acquired an additional 4,42%.<sup>22</sup> In *Eureko v Poland*<sup>23</sup> the central issue was the foreign investor's right to acquire additional shares of a Polish insurance company at a later point in time including the right to acquire majority control.

*Sempra v Argentina*<sup>24</sup> can also serve as an example for an investment that took place in instalments. The Tribunal described this process in the following terms:

88. The Claimant explains that it indirectly owns 43.09% of the shares of Sodigas Sur and Sodigas Pampeana, which in turn, respectively, own 90% and 86.09% of the distribution licensees CGS and CGP. The investment began in April 1996 when the Claimant acquired a 12.5% interest in Sodigas Pampeana and Sodigas Sur from Citicorp Equity Investment for the amount of U.S. \$ 48.5 million.

89. This participation was increased in March 1998 when the Claimant acquired an additional 9% interest in the Licensees from the Argentine company Loma Negra for an amount of U.S. \$ 42.4 million, thus totalling an interest of 21.545%.

90. Ownership was further increased in October 2000 when the Claimant acquired shares in the Licensees for U.S. \$ 159.4 million from Consolidated Natural Gas, thus doubling its participation to a total of 43.09%. Also in October 2000 Sodigas Pampeana acquired in auction from the Government of Argentina an additional 6.35% interest in CGP, totalling a 77.21% interest. On October 11, 2000, Camuzzi Argentina transferred to Sodigas Pampeana an 8.88% direct interest in CGP, which increased Sodigas Pampeana's interest in CGP to the current 86.09%.<sup>25</sup>

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<sup>21</sup> *CMS Gas Transmission Company v Argentine Republic*, Award, 12 May 2005, 44 ILM (2005) 1205.

<sup>22</sup> At para 58.

<sup>23</sup> *Eureko B.V v Republic of Poland*, Partial Award, 19 August 2005, 12 ICSID Reports 335.

<sup>24</sup> *Sempra Energy International v Argentine Republic*, Award, 28 September 2007.

<sup>25</sup> At paras 88-90.

*BG v Argentina*<sup>26</sup> is a further example of a successive acquisition of shares. Between 1994 and 1998 BG increased its investment in MetroGAS from 28.7% to 45.11%.<sup>27</sup>

These cases demonstrate that investments can take place incrementally over a certain period of time. The host State may well take steps during that period that create legitimate expectations with the foreign investor and have an impact on its further investment decisions. If a dispute were later to arise from the frustration of these expectations, it would be for the tribunals to identify the expectations relevant to particular investment decisions.

In addition, a typical investment is not a simple event. An investment operation is often composed of a number of diverse transactions and activities, which must be treated as an integrated whole. Therefore, an investment is often a complex process involving diverse transactions which have a separate legal existence but a common economic aim.

To a certain extent this is already reflected in the definition of 'investment' contained in BITs and other treaties covering a variety of different rights and transactions. Most investment protection treaties contain broad definitions of 'investment'. The definition of 'investment' in Article 1(6) of the Energy Charter Treaty is typical of these comprehensive definitions:

'Investment' means every kind of asset, owned or controlled directly or indirectly by an Investor and includes:

- (a) tangible and intangible, and movable and immovable, property, and any property rights such as leases, mortgages, liens, and pledges;
- (b) a company or business enterprise, or shares, stock, or other forms of equity participation in a company or business enterprise, and bonds and other debt of a company or business enterprise;
- (c) claims to money and claims to performance pursuant to contract having an economic value and associated with an Investment;
- (d) Intellectual Property;
- (e) Returns;
- (f) any right conferred by law or contract or by virtue of any licences and permits granted pursuant to law to undertake any Economic Activity in the Energy Sector.

The various assets listed in these definitions should not necessarily be seen as alternatives. Each of them may well constitute an investment in its own right. But in many if not most investment situations they will arise in combination. Typically, it is the acquisition and deployment of

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<sup>26</sup> *BG Group Plc v Republic of Argentina*, Final Award, 24 December 2007.

<sup>27</sup> At paras 24-26.



several or all of these various assets that combine into an investment operation.

Tribunals have emphasized repeatedly that what mattered for the existence of an investment was not so much ownership of specific assets but rather the combination of rights that were necessary for the economic activity at issue. This doctrine of the 'general unity of an investment operation' was set out already in the very first case that came before an ICSID tribunal, *Holiday Inns v Morocco*.<sup>28</sup> In that case, the agreement for the establishment and operation of hotels had also provided for financing by the Government by means of separate loan contracts. The Respondent objected to the jurisdiction of ICSID over the claims connected with the loan contracts. The Tribunal rejected this contention and asserted its jurisdiction over the entire operation including the loan contracts. It emphasized the general unity of the investment operation. The Tribunal said:

It is well known, and it is being particularly shown in the present case, that investment is accomplished by a number of juridical acts of all sorts. It would not be consonant either with economic reality or with the intention of the parties to consider each of these acts in complete isolation from the others. It is particularly important to ascertain which is the act which is the basis of the investment and which entails as measures of execution the other acts which have been concluded in order to carry it out.<sup>29</sup>

The classical formula for the doctrine of the general unity of an investment operation came from the Tribunal in *CSOB v Slovakia*.<sup>30</sup> The Tribunal observed that an investment is often composed of various elements some of which may qualify as investments in their own right but also included others that did not. In the context of jurisdiction under the ICSID Convention it described an investment as follows:

An investment is frequently a rather complex operation, composed of various interrelated transactions, each element of which, standing alone, might not in all cases qualify as an investment. Hence, a dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.<sup>31</sup>

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<sup>28</sup> *Holiday Inns v Morocco*, Decision on Jurisdiction, 12 May 1974. The decision is unreported. A detailed account with extensive quotations was published by *Lalive*, *The First 'World Bank' Arbitration (Holiday Inns v Morocco) – Some Legal Problems*, 51 *British Year Book of International Law* 123 (1980); also in 1 ICSID Reports 645 (1993).

<sup>29</sup> At 159 (1980).

<sup>30</sup> *CSOB v Slovakia*, Decision on Jurisdiction, 24 May 1999, 5 ICSID Reports 335

<sup>31</sup> At para 72.



In *Enron v Argentina*,<sup>32</sup> the Respondent argued that a 'Transfer Agreement' did not qualify as an investment agreement or authorization in terms of the applicable BIT. The Claimants insisted that the investment was a process that was manifested in several instruments and that their claim concerned their rights as investors in the process as a whole. The Tribunal accepted the Claimants' position and said:

The Tribunal notes in this context that an investment is indeed a complex process including various arrangements, such as contracts, licences and other agreements leading to the materialization of such investment, a process in turn governed by the Treaty. This particular aspect was explained by an ICSID tribunal as 'the general unity of an investment operation' and by one other tribunal considering an investment based on several instruments as constituting 'an indivisible whole'.<sup>33</sup>

In *Duke Energy v Peru*,<sup>34</sup> the parties had entered into a contract called the DEI Bermuda LSA which contained the arbitration clause that was the basis for jurisdiction in the case. The respondent argued that only the capital contribution foreseen in that contract was protected by the jurisdictional clause. The Tribunal rejected this argument. It found that the capital contribution was not an isolated transaction but was one of many transactions that were part of a single concerted effort of the Claimant's overall investment.<sup>35</sup> The Tribunal said:

in determining their jurisdiction, ICSID tribunals have recognized the unity of an investment even when that investment involves complex arrangements expressed in a number of successive and legally distinct agreements.<sup>36</sup>

It follows from this consistent case law that tribunals, when examining the existence of an investment for purposes of their jurisdiction, have not looked at specific transactions but at the overall operation.<sup>37</sup> Tribunals have refused to dissect an investment into individual steps taken by the investor, even if these steps were identifiable as separate legal transactions. What mattered for the identification and protection of the investment was the entire operation directed at the investment's overall economic goal.

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<sup>32</sup> *Enron v Argentina*, Decision on Jurisdiction, 14 January 2004.

<sup>33</sup> At para. 70. Footnotes omitted. The case references are to *Holiday Inns v Morocco* and to *Klöckner v Cameroon*.

<sup>34</sup> *Duke Energy v Peru*, Decision on Jurisdiction, 1 February 2006.

<sup>35</sup> At paras 92(2), 100, 102.

<sup>36</sup> At para 92(4).

<sup>37</sup> See also *PSEG v Turkey*, Decision on Jurisdiction, 4 June 2004, paras. 106-124, 11 ICSID Reports 434; *Joy Mining v Egypt*, Award, 6 August 2004, para. 54, 19 ICSID Review-FILJ (2004), (but see the apparent contradiction with the Tribunal's statement at paras. 42, 44); *Mitchell v DR Congo*, Decision on Annulment, 1 November 2006, para. 38; *Saipem v Bangladesh*, Decision on Jurisdiction, 21 March 2007, paras. 112-114, 22 ICSID Review-FILJ (2007).

The realization that an investment is often not a single right or an isolated transaction but a combination of rights and an integrated process of transactions is important also for the timing of the legitimate expectations upon which investment decisions rely. If the investment cannot be reduced to a one time event but is seen as a process, the identification of the relevant time for the existence of legitimate expectations becomes more difficult.

#### **IV. The Investor's Reliance upon Legitimate Expectations**

The acceptance of an investment as a complex processes involving a number of different transactions means that it is not possible to focus only on one particular point in time for the identification of legitimate expectations. Rather, it is necessary to identify the diverse transactions and activities, which combine to constitute the investment, and to examine individually whether they were based on contemporary legitimate expectations. In other words, it is necessary to ascertain the existence of legitimate expectations held by the investor at the time of each individual decision. The key issue is the actual reliance on expectations which existed at the particular point in time when the relevant decision was taken.

This differentiated approach to the time of the investment necessitates differentiation also with respect to the timing of the creation of expectations. There is no limited canon of governmental actions leading to legitimate expectations. To be able to rely on legitimate expectations the foreign investor must have knowledge, or at least access to knowledge of the facts on which the legitimate expectations are based. Furthermore, the foreign investor must have taken relevant business decisions on the basis of these facts.

Expectations can be created through the general regulatory framework prevalent in a country.<sup>38</sup> Expectations can also be created through specific transactions or governmental assurances. In some cases the expectations stemmed from the general regulatory framework as well as specific commitments contained in licenses.<sup>39</sup>

A foreign investor may be presumed to know the general regulatory framework prevalent in a country at the time it first embarks upon the

<sup>38</sup> *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic*, Award, 22 May 2007, at para 265.

<sup>39</sup> *BG Group Plc v Republic of Argentina*, Final Award, 24 December 2007, para. 307; *Sempra Energy International v Argentine Republic*, Award, 28 September 2007, paras. 148, 158; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic*, Decision on Liability, 3 October 2006, para. 133, 21 ICSID Review (2006) 203; *CMS Gas Transmission Company v Argentine Republic*, Award, 12 May 2005, paras. 275, 281.

investment. But it is not only the framework existing at that early stage that can create legitimate expectations. If there are favourable changes to the legal framework during the establishment or during the lifetime of the investment, this may also create legitimate expectations which will be protected if the foreign investor relies on them in subsequent business decision.

In some cases the legitimate expectations are based on specific assurances by the host State, whether in the form of contracts, licenses or otherwise. These specific assurances may have been given either before the first step in the investment process or at a later stage. If the investor relied on assurances given after the investment's inception and adapted its subsequent investment decisions accordingly, these assurances may have created expectations which deserve protection.

*Duke Energy v Ecuador*<sup>40</sup> gives some indication of a differentiated approach to the timing of legitimate expectations and the business decisions based on them. The dispute arose from contracts for the generation of electrical power in Ecuador between Electroquil S.A., an Ecuadorian company, and INECEL, a state-owned power company. In 1995 and 1996 INECEL entered into power purchase agreements (PPAs) with Electroquil. The US company Duke Energy acquired an ownership interest in Electroquil in 1998.<sup>41</sup> Both, Duke Energy and Electroquil were claimants before the ICSID tribunal.

The Tribunal conditioned the protection of legitimate expectations on their existence at the time of the investment and on the investor's actual reliance upon them when making the investment:

340. The stability of the legal and business environment is directly linked to the investor's justified expectations. The Tribunal acknowledges that such expectations are an important element of fair and equitable treatment. At the same time, it is mindful of their limitations. To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest.<sup>42</sup>

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<sup>40</sup> *Duke Energy Electroquil Partners & Electroquil S.A. v Republic of Ecuador*, Award, 18 August 2008.

<sup>41</sup> Duke Energy is the sole parent company of Duke Energy International del Ecuador Cía Ltda ('Duke Ecuador' or 'DEI'), through which it acquired the ownership interest in Electroquil, on 23 February 1998.

<sup>42</sup> At para 340, footnotes omitted. See also para. 347.

The Tribunal explicitly excluded the protection of expectations that may have arisen from an agreement that had been entered into two years after the relevant investment had been made:

365. ... the legitimate expectations which are protected are those on which the foreign party relied when deciding to invest. The Med-Arb Agreements were concluded more than two years later and can thus in no event give rise to expectations protected under the fair and equitable treatment standard.<sup>43</sup>

The Tribunal found a violation of the fair and equitable treatment clause of the BIT between Ecuador and the US. The Tribunal examined the existence of legitimate expectations in respect of the two claimants separately and in relation to different points in time.

The Tribunal held that Electroquil's expectations were embodied in the text of the PPAs concluded in 1995 and 1996.<sup>44</sup> The Tribunal said with respect to one of the PPAs:

359. ... it appears that Electroquil entered into the PPA 96 with the expectation that the Ministry of Finance would comply with the payment mechanism provided in Clause 8.6 of PPA 96. The Ministry of Finance was to take part in the 96 Payment Trust and to provide a payment guarantee. In the Tribunal's opinion, the Ministry of Finance engaged the responsibility of the State at this juncture and it was reasonable for Electroquil to rely on the Ministry's express commitment.

361. ... the Tribunal finds that Electroquil could reasonably rely on the State's representation that it would guarantee INECEL's payments under the 96 Payment Trust. Accordingly, the Tribunal is of the opinion that the Respondent failed to grant fair and equitable treatment to Electroquil's investment by not implementing the payment guarantee.<sup>45</sup>

With regard to Duke Energy the Tribunal took into consideration that it had only invested in 1998. The Tribunal examined the expectations it could have had at that later stage. It also took into consideration the knowledge Duke Energy had about facts which had occurred in the period prior to its investment. The Tribunal said with regard to Duke's expectations:

362. Duke Energy invested in a different context than Electroquil. It was aware of the circumstances surrounding the performance of the PPAs, in particular of the late payments and the imposition of heavy fines. As a result, it appears that Duke Energy requested certain guarantees from the State as a condition precedent to its investment, notably the Payment Decree and the establishment of the Payment Trusts (...).<sup>46</sup>

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<sup>43</sup> At para 365. Footnote omitted.

<sup>44</sup> At para 356.

<sup>45</sup> At paras 359, 361.

<sup>46</sup> At para 362.

Therefore, the Tribunal examined separately for each of the two claimants the contemporary expectations on which their respective business decisions had rested. The Tribunal strictly adhered to the position that only the expectations held at the time of the investment were relevant. The local company's expectations had arisen before the foreign investor had become involved. Duke Energy's expectations had arisen from the totality of the information it had at its disposal when it made its investment in 1998.

## **V. Conclusions**

The case law of arbitral tribunals suggests that the decisive element for the protection of legitimate expectations of foreign investors is reliance on general or specific assurances given by the host State at the relevant time. Where complex investment operations are involved, it may be impossible to reduce the relevant time to a particular date. Not infrequently, investments are made through several steps, spread over a period of time, through the acquisition and deployment of various assets. An investor typically makes important decisions not only when taking the first step towards the investment but also at a later stage during the lifetime of an investment project. If this is the case, legitimate expectations must be examined for each stage at which a decisive step is taken towards the creation, expansion, development or reorganisation of the investment.