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Legal Framework on Protection of Foreign Investors vis-a-vis Legitimate Expectation of Host Government: A Lesson from DP World Agreement

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Abstract

This paper examines the validity of the principle of legitimate expectation of the host government in protection of foreign investors, to safeguard protection of host government expectations and interest of all citizens in the host government towards their natural from only benefiting the investors from developed economies which are sometimes supported by their home countries and the mechanism set forward under international law.

The author is establishing a core argument that, despite the reality that the principles of customary international law form the basis of investment agreements specifically hereunder in natural resources development; are not conveyed to benefit host government as the owner, rich in natural resources were investment is carried through.

This argument is tangible. Considering the Investment Agreements concluded by the government of Tanzania. Further, it is in support of the evidence collected from qualitative research technique from such particular agreements.

This paper contributes to the understanding and awareness to the other literary works and previous debates amongst advanced economy nations and the emerging ones in dealing with natural resources expansion which has been based on minerals and gases to ensure legitimate expectation of the host government in investment is adhered in its wide sense. As a result, it resumes debates in different areas of Tanzania; to scholars, religious leaders, officials in public and private sector and the entire public at large on the following aspects; hosts government are conscious about their natural resources as their communal heritage which does not need authorization over maximum enjoyment from anyone. Therefore, the majority citizens deserve supreme enjoyment and benefits from its development. Further, host governments to exercise their legitimate expectation in every investment agreement which these government concludes with foreign investors and it should first in place before anything else. Lastly but not least, there should be in place a conducive legal framework providing for the legitimate expectation of the host government resource rich countries, developing African countries in particular to adopt adequate legal framework which does have significant impact to the country economies and ensure improvements in the living conditions of the people in the host government

Keywords: Principles of Customary International Law, Natural Resources Development, and Natural Resources are the Common Heritage of the People, Adequate Legal Framework.

The Concept of Legitimate Expectation

The term denotes an individual's aspiration or inclination to secure a favorable arrangement, influenced by historical precedent or advocated through representation, thereby providing the applicant with adequate standing for judicial review.¹ This notion acquired prominence following its presentation in *Schmidt v Secretary of Home Affairs* [1968] EWCA Civ 1, Court of Appeal (England and Wales) by Lord Denning where he acknowledged, as obiter, the "right, interest, or legitimate expectation of an individual concerning administrative action in relation to the right to be heard."ⁱⁱⁱ Legitimate Expectation asserts that expectations generated by administrative actions must be honored and realized, at a minimum, in consideration of the public interest and the imperative for improvement;ⁱⁱⁱ failure to do so would be unjustifiable. For instance, in the bilateral accord established between Tanzania and Dubai. Tanzania, in its capacity as a host government, anticipated advantages concerning local content, employment, and corporate social responsibility, as outlined under Article 13 of agreement. This article emphasizes Tanzania's priority in the identification and execution of local content initiatives and corporate social responsibility,^{iv} alongside the preservation of existing jobs, the employment of Tanzanian nationals, and the establishment of training and development programs.

Moreover, the effective implementation of the local content requirement clause will yield numerous advantages for the host state. Many host states regard the matter of local content to be a mechanism to foster economic and sustainable development, as it frequently provides diverse opportunities for local populations in need of the; Jobs, Transfer of knowledge, and they need to be connected to the global economy.

The local content clause within the international agreement has the potential to cultivate such opportunities by facilitating investments in skills development, training, and the transfer of technology to local workers and enterprises. Furthermore, the local content requirement that foreign investors must comply with has significant implications for the national economy.

The notion appears to be grounded in the frameworks of national legal systems. This concept has undoubtedly found application across various contexts within domestic legal systems. It has found application in a range of procedural, and to a certain degree, substantive contexts within various domestic legal frameworks. The application of this principle has facilitated a balance between the rights of citizens and the necessary discretion afforded to public authorities in the effective execution of their responsibilities.^v Parties have a right to anticipate a fair hearing in courts and other adjudicatory proceedings, when the idea is utilized as entailing due process. The concept of reasonable expectation is said to have its origins in the constitution of certain countries. Its purpose is to safeguard confidence in other systems of law and administration.^{vi}

The case of *Council of Civil Service Union v. Minister for Civil Service*,^{vii} an English case known all over. Lord Diplock, has enshrined the concept of legitimate expectation in both procedural and substantive settings as the former relates to a representation

that a hearing or other appropriate process would be given before any judgment is delivered. The primary idea of the theory is that the trust vested to another person on receipt of benefits should never be changed at the time of implantation of such trust.

One must either have a recognized legal connection with the authority or engage in contacts, transactions, or talks with them in order to use the notion of reasonable expectation, which is based on established practice.^{viii}

The concept lacks a precise definition under investment law, owing to its general nature.^{ix} In several cases where legitimate expectation has been applied, it remains undefined. A frequently cited description originates from *Thunderbird v. Mexico*,^x The tribunal, in the context of the now-defunct NAFTA, characterized the concept as follows:

"A situation where a Contracting Party's conduct establishes reasonable and justifiable expectations for an investor (or investment) to rely on that conduct, such that a failure by the NAFTA Party (host-government) to fulfill those expectations could result in damages for the investor (or investment)."^{xi}

Legitimate expectation entails that a party may only be entitled to specific advantages if it is given explicit, consistent, and unequivocal guarantees by authorized officials of the host government in compliance with relevant rules. Tribunals have determined that when a state promises an investor it will act or not act, and the investor bases their investment on that promise, then there are legitimate expectations.^{xii} This interpretation of reasonable expectation is proposed to converge with international investment law and is consistent with the definition of the term in EU law.^{xiii}

More expansive expectations are often expressed by foreign investors. A host government ought to abstain from making legislative changes or implementing new measures that might be detrimental to investors. The host government should preserve, without alteration, the uniformity and regularity of the legal rights granted to investors at the time of investment. The host government need to desist from taking any erratic, inconsistent, or capricious measures. In accordance with the idea, the host government must, among other things, treat foreign investors fairly and without bias.

Legitimate Expectation as a Component of Fair and Equitable Treatment

Legitimate expectation is usually part of Fair and Equitable Treatment in International Investment Agreements.^{xiv} The idea's breadth and content are unclear.^{xv} Fair and Equal Treatment of investors depends on circumstances.^{xvi} The arbitral tribunal in *TECMED vs Mexico*,^{xvii} explained this premise, which includes justifiable expectation, best. Fair and Equitable Treatment requires contractual parties to an International Investment Agreement to treat covered investors fairly without undermining core investment decision expectations, the tribunal said. Moreover, the host

government must be consistent, clear, and transparent to the foreign investor.^{xviii}

In *Gold Reserve v Venezuela*,^{xix} the investor argued that the revocation of its mining rights violated the laws of most-favored nation, expropriation, fair and equitable treatment, and total protection and security. Only on the basis of breaches of Fair and Equitable Treatment did the tribunal rule in favor of the applicant. The revocation actions lacked openness, consistency, predictability, and good faith, according to the tribunal. The panel concluded that the investor had reasonable expectations for the fulfillment of claims made by public authorities, which it relied upon. Venezuela seemed to defy these predictions with its revocation moves. Venezuela abused the complaint, the panel concluded.

A reasonable expectation under Fair and Equitable Treatment is probably predicated on the relevant International Investment Agreement. The reasonable expectation criteria are supported by Fair and Equitable Treatment, which is a component of the majority of international investment agreements. Apart from the vagueness of the idea, some dispute the significance of actual expectation in Fair and Equitable Treatment. In *Suez, Sociedad General de Aguas de Barcelona, S.A. & Vivendi Universal, S.A. vs. Argentine Republic*, Pedro Nikken contended in a different opinion,^{xx} that legitimate expectations cannot be derived from the ordinary interpretation of the Fair and Equitable Treatment standard in investment treaties.^{xxi} The annulment tribunal in *CMS Gas Transmission Co. v. Argentine Republic*,^{xxii} ruled that reasonable expectations from investor to host government exchanges may not constitute legal requirements. The tribunal examined the TECMED

Tribunal's apparent reliance on foreign investor expectations to determine the host government's duties.^{xxiii} In *MTD Equity Sdn. Bhd. & MTD Chile S.A. vs. Republic of Chile*,^{xxiv} annulment proceedings. The host government's responsibilities to foreign investors are based on the investment treaty, not investor expectations.^{xxv}

Legitimate Expectation as Independent Principle

Some authors consider this idea to be its own philosophy, apart from the Fair and Equitable Treatment school of thought.^{xxvi} It has been argued that the need to treat investors fairly and equally is not necessarily violated when an investor's reasonable expectations are not met as stated in the case of *Arif vs. Republic of Moldova*.^{xxvii} Tribunals that hear arbitration cases have not looked into the concept's legal underpinnings.^{xxviii} Opinions vary on whether it contains substantial rules or is more of a tool for interpretation.^{xxix}

The idea that one may reasonably expect to be granted substantive rights seems to have its origins in regional legal systems. Within domestic legal systems, the concept of reasonable expectation has been used in a number of situations. It has been used in several domestic legal systems in a variety of procedural and, to some extent, substantive contexts. It has been utilized to strike a balance between people's rights and the discretion that public authorities

need in order to properly carry out their duties. The idea includes due process in court and other adjudicative actions; parties may reasonably expect to be given a fair hearing.^{xxx} The national constitution of some nations is said to provide the foundation for the idea of reasonable expectation. It serves to safeguard faith in some other legal and administrative traditions.^{xxxi}

The idea has also been used to the theory of domestic takings, which holds that owners whose property is taken may legitimately expect that certain conditions, such as a public purpose and just compensation, would be met. Its effects may be seen in other substantive legal theories in some common law jurisdictions, such as estoppel in private law. It means that in this case, one party cannot change its position after making a representation that the other party relied upon and that was meant to be relied upon. It would be considered unconscionable to let the representor to depart from the representation since it would harm the party that is depending on it. To this point, as Nitish Monbehurrin discusses, the concept of good faith in civil law systems,^{xxxii} and estoppel in international law are two places where justified expectations might find expression.^{xxxiii} The European legal system is believed to be based on the core idea of legitimate expectation.^{xxxiv} However, its interpretation in the common law tradition may differ from its meaning in the EU.^{xxxv} Diverse but related viewpoints are reflected in the definition of the reasonable expectation notion, as shown by the differences in its uses, sources, substance, and interpretations. Applications under administrative and civil law may not be the same as those under private law. In a particular domain of a legal tradition, the notion could not coincide with the corresponding principles that are used to express it. Within a common law context, legitimate expectation does not always correspond with good faith or estoppel, nor may it have the same functions.

Establishing a single understanding of reasonable expectation as a stand-alone concept in international investment law is made more difficult by the variances in how contexts and meanings are applied across various domestic legal systems, especially with regard to host governments. Because of their varied legal experiences, arbitral tribunal members' views and understandings of the idea may be reflected in how they apply reasonable expectation. Not surprisingly, there are still significant differences about the definition and implementation of the idea. The panel disapproved of the definition of justifiable expectation used by the *Eiser vs. Spain*,^{xxxvi} tribunal in its relatively recent ruling in *Novenergia II vs. Spain*.^{xxxvii} It went on to decide that Spain's acts had broken the Claimant's legitimate expectation (as a component of FET), in contrast to the tribunal in *Charanne vs. Spain*, which found that the investor's reasonable expectations had not been infringed by the same behavior of the Spanish government.

The creation of the notion of the host government's reasonable expectation in investment agreements herein specifically the DP World Agreement is the main topic of this chapter. International law is not the same as a state's domestic law. As a result, international law requires a suitable basis before legitimate expectation in whatever form it may be understood can be applied.

Legitimate Expectations to Host Governments

The idea of reasonable expectation has evolved to impose duties on host governments in favor of investors. This exemplifies the imbalanced character of contemporary international investment law, which imposes responsibilities on host governments towards investors without imposing reciprocal obligations on investors towards host governments and their populations. This poses challenges for host governments. The rationale is readily ascertainable; it pertains to the origins of international investment law's evolution and the underlying reasons that have influenced its creation and implementation. This is not meant to reexamine the discourse around the evolution of the law and the well recorded objections of the existing legal imbalances. This section briefly examines how governments, especially in poor countries, often encounter challenges related to the implementation of the idea of reasonable expectations.

First, it investigates how and why developing countries, as host governments, may be harmed by the idea's adoption.

Second, it investigates how host governments might decrease reasonable expectation consequences. It also investigates how host governments might set investment expectations.

Investors have increasingly utilized legitimate expectations to assert a state's responsibility to treat them fairly. In *Schulz Holding GmbH case*,^{xxxviii} the panel ruled that any regulatory system change must be severe and unwarranted to undermine reasonable expectations. The investor argues that legitimate expectations can be formed from both direct statements and representations by the host government and from the overarching legislative and regulatory framework, which the investor has relied on for stability. The tribunal believes that a breach must be assessed based on the content of the remarks and conduct and the validity and proportionality of the state's punishment.

Arbitral rulings indicate that an investor may have valid expectations from either;

- a) Specific commitments directed towards it personally, such as through a stabilization clause. Stabilization clauses represent clear and defined commitments established by a host state towards one or more foreign investors. These clauses aim to protect foreign investors from political risks, particularly
- b) Concerning any unfavorable legislative or regulatory changes that may occur within the host state.

The Agreement between Tanzania and the Emirate of Dubai includes a stabilization clause within it. The clause includes provisions for comparable and acceptable services, stipulating that the host government must take all necessary or appropriate measures to fulfill and execute the commitments outlined in the project. The clause specifies that the details of such stabilization shall be agreed upon between DP World or the relevant company and TPA, to take effect on the date of signature.

It is evident that Tanzania may alter its policy, potentially affecting DP World significantly due to the long-term nature of the agreement. Consequently, it is essential to provide investors with a degree of protection against potential unforeseen circumstances and substantial changes in the future. Consequently, stabilization hardship force majeure and price review clauses are frequently utilized for such protection.

Furthermore, the Stabilization clause has the potential to expand the range of any legislation that affects the economic circumstances of the contract. The breadth of a stabilization clause may include aspects such as property rights, fiscal frameworks, labor laws, export-import regulations, free transferability, and the comprehensive legislative and contractual environment. This clause raises apprehensions regarding its potential to limit Tanzania's ability to legislate in a manner that aligns with its international human rights commitments. Consequently, there may exist instances where environmental or human rights legislation is subject to exceptions, particularly in contexts where the state may favor a lack of constraints and where it becomes increasingly difficult for investors to persuasively contest the implementation of modifications.

Efforts to enhance government revenue may face challenges due to the contract Tanzania has established with foreign investors, as the terms necessitate comparable and satisfactory benefits from the project. The clause and general agreement do not specify the exact amount that could be obtained and shared by the parties. This presents a significant challenge for Tanzanians as the host government regarding the benefits that can be derived from the agreement.

Evidence from other stabilization clauses suggests that Tanzania is forfeiting substantial revenue from foreign investment in the mining sector as a result of low royalty rates and extensive tax exemptions. Contracts containing stabilization clauses have committed the government to this tax regime for an extended period, especially within the mining sector. These regulations are designed to encourage foreign investment and are not aimed at individual investors, relying on the stability they provide for foreign investors in their investment decisions. The assessment of excessive and unreasonable criteria demonstrates a strong protection for governmental legislative authority to enact policies that serve the public interest, despite potential effects on investor expectations. The methodology employed by the Schulz tribunal defines the legal boundaries of valid expectations, thereby strengthening a specific jurisprudential practice. Moreover, it diminishes the recognized authority of the Termed tribunal, which is cited by investors and tribunals supporting the extension of reasonable expectation protection to the stability of the regulatory or legislative framework.^{xxxix}

The Constitution of the United Republic of Tanzania of 1977

The Constitution of the United Republic of Tanzania,^{xl} provide for the rights of Tanzania citizens over its natural resources. Article

8(1)(b) states that the primary objective of the Government is the welfare of the people. The wording of the provision indicates that the Government of the United Republic of Tanzania aims to safeguard the welfare of its citizens, which includes the protection of natural resources for the benefit of the populace and the promotion and protection of investments.

The Constitution stipulates further that, every individual has the right to own property and to the protection of that property as per legal provisions.^{xii} In accordance with the stipulations of sub article (1), it is prohibited for any individual to be dispossessed of their property for nationalization or other purposes without legal authority that ensures fair and adequate compensation.^{xiii}

The stipulations of the aforementioned Article explicitly address two aspects. Firstly, every individual has the right to rightful property ownership. Secondly, this provision safeguards such property from nationalization without legal justification, and in cases where nationalization is deemed necessary, fair and adequate compensation must be considered.

The Tanzania Investment Act of 2022

The Act,^{xiii} repeals the enduring Tanzania Investment Act of 1997 and fundamentally seeks to establish procedures and frameworks designed to enhance the investment climate in Tanzania. The Foreign Direct Investment (FDI) inflows to Tanzania during the period from March to November 2021 amounted to USD 4.144 billion, representing a remarkable 300% increase compared to the USD 1.013 billion recorded in 2020. It is observed that from the total of USD 4.144 billion, the TIC filed project accounted for an FDI inflow of USD 3.55 billion. Consequently, the nation must guarantee that its investment opportunities are impartial and foster a welcoming environment for investors to engage with the economy.^{xiv}

The Act holds the promise of transforming the nation's investment appeal, fostering the growth of local industries, and catalyzing socio-economic development. It reflects a strategic approach to harnessing FDI for national development, ensuring that the influx of capital translates into widespread economic benefits. The successful implementation of the Act could mark a pivotal shift in Tanzania's economic trajectory, steering the nation towards sustainable growth, technological advancement, and enhanced well-being for its people.^{xv} Despite the efforts made in amending the Tanzania Investment Act yet there is a lesson to be learned from other Investment legislation in SADC states and East African state where Tanzania is a member. For example, under SADC jurisdiction Sections 2, 3, 4 and 5 of the South Africa Investment Act, 2015 which make reference to the Constitution and the Bill of right and the same time consider time frame for investment and predictability of profit to the Republic of South Africa. Under the EAC jurisdiction Kenya is considered to be a good example to which Section 4 and 19 of the Kenya Investment Promotion Act, 2004 are taken as provision which shows a means to protect legitimate expectation of the country for they cover entitlement to certificate criteria's and consequences to appointed official once convicted of dishonest, fraud or moral turpitude whereby in

Tanzania, the Act which is the one to regulate investment in itself does not cover specifically these areas which are fundamental in protecting legitimate expectation of Tanzania as a tool to rely in case of investment dispute.

For the protection of Legitimate Expectation of the Host Government in Investment Agreements, the Host Governments should ensure that the following are observed; -

Omitting FET from IIAs

As was previously covered in earlier chapters, the Fair and Equitable Treatment clause in international investment agreements usually includes duties or violations of reasonable expectation. This indicates that states might restrict or circumvent the activation of the concept by excluding FET from their International Investment Agreements. While most International Investment Agreements (IIAs) contain Fair and Equitable Treatment (FET) provisions, there are few that do not. Tanzania may reconsider the necessity of maintaining their FET provisions in their existing format. Tanzania can revise her International Investment Agreements without waiting for the renewal period; she has the option to terminate and replace them sooner if desired.

A single state does not decide all of the substance of an international investment agreement. Restricting or eliminating the application of a FET provision requires the corresponding state party's approval. The counterparty's rigidity on include FET might impede development. As the consequences of prior IIA provisions have become more apparent, the current tendency in later generation IIAs is to restrict the broad powers formerly provided to investors, which often disadvantaged host nations. It is thus reasonable to assume that parties to an IIA would be motivated to exclude FET from IIA regulations. The absence of Fair and Equitable Treatment (FET) clauses in International Investment Agreements has the potential to erode the trust that potential investors have in the safeguards that are available, the level of treatment that is anticipated, and ultimately, their desire to invest in countries that have such a system. A supposedly weaker regime, where investors are not guaranteed fair and equitable treatment, would probably undermine the effectiveness of international investment agreements (IIAs) and their ability to attract investment, if the goals of IIAs are to create a supportive international legal framework to encourage and attract investment.

Cautious in granting Assurances to Investors

Claims that the host state has not, either directly or implicitly, fulfilled promises given to investors who are claimants in investment disputes are at the heart of all alleged breaches of reasonable expectations. A contract for investment that is made between the investor and the state may include a guarantee. Tanzania, as the host nation, should lessen the likelihood of such lawsuits by being cautious when giving guarantees to foreign investors. The lower the assurance provided by Tanzania, the diminished likelihood of establishing legitimate expectations for the investor and the potential for breaching those expectations. The omission of FET provisions in International Investment

Agreements may undermine the confidence of prospective investors. If a potential host state fails to provide necessary assurances deemed critical by investors, it may deter them from proceeding with their investments. This is especially relevant when the investors' capital commitment is substantial and the investment sector involves significant risk. Investors periodically perform risk-benefit analyses to select options that yield the highest risk-adjusted returns compared to alternative investments.

Limiting the ambit of FET provision

In this context, Tanzania and the Investor state cannot entirely exclude FET from their International Investment Agreements; rather, they may choose to confine its application to specific, limited circumstances. This can be achieved by delineating the FET standard with precision, specifying the particular contexts in which it is applicable. The two state parties may also retain the authority to engage in conduct that falls outside the scope of the FET treatment. In other words, it is possible for them to articulate that governmental-actions, including alterations in tax structures and concessions, as well as regulations pertaining to health and environmental matters, along with the authority to grant, renew, or revoke concessions and licenses, may fall outside the framework of the FET standard.

Established Mechanisms of Ensuring Investors against Loses

It was found that most of investors are afraid of entering into Public Private Partnerships due to the fear of getting loss under the PPP agreements. Such fear is caused by non-assurance that they will be ensured against losses in case of negligence by the government or its agencies. The investment Act ensuring protection of foreign investors for their projects, capital and their stay to Tanzania. Additionally, it is the same statute advocating for training to private sector on investment while leaving them behind in bringing about competition in investment project monitoring so as to create trust to investors for the established PPPs arrangements in investment projects. Therefore, it is suggested that a mechanism should be set to ensure that investors are made to believe that they will not lose under Public Private Partnerships.

Training

It was found that, among the challenges to the application of Investment laws precisely on the legitimate expectation of Tanzania is, inadequate knowledge to professional in the country on investment sphere for both procedures and requirements. It is recommended that trainings be conducted to raise awareness and increase professionalism among government officials, in the specific Ministries, Ministry for Investment and those officials appointed specifically to deal with investment arrangement, projects monitoring in the established bodies and institutions under the Act on the reasons and importance of the legitimate expectation of Tanzania in investment certainly to foreign investors. Indeed, this knowledge should spread to the Local Government Authorities as the lower lever of the government to enable the Trade, Industry and Investment department under Mwanza City Council to be

informed on the strategy planned by the government through Ministry for investment to protect legitimate expectation of Tanzania vis-a-vis protection of foreign investors on strategic investment forum at the local authority jurisdiction.

Involvement of Public on Investment Arrangements

As it has been observed from the respondents that there exist dialogues in the public, it is now a right time involve the entire public on the investment agreements which the government is intending to enable them understand the essence of such investment and adherence of the principle of legitimate expectation of Tanzania in the particular agreement. This may be conducted through radio and television programs to which Minister of State, President's Office Planning and Investment may give clarifications for the same on behalf of the government or authorized officials in investment to conduct seminars and discussions in different parts of the country to ensure awareness people hence the entire public will understand the intention of the government from initial stage until monitoring of investment projects to which legitimate expectation of Tanzania is observed to be implemented practice and not otherwise as seen in current years.

ENDNOTES

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ⁱⁱ <https://www.slideshare.net> visited on 22nd July, 2024

ⁱⁱⁱ Ibid

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^{vii} [1985] A.C. 374, H.L. (UK)

^{viii} Ram Pravesh Singh and Ors. vs. State of Bihar and Ors, (2006) (8) SCJ 721, Para 14

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^x Award of 26 January 2006.

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^{xviii} *S.A. v. Mexico*, ICSID Case No. ARB(AF)/00/2, Award of May 29, 2003, (*Tecmed v. Mexico*) para. 173.

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- ^{xxi} Ibid
- ^{xxii} ICSID Case No. ARB/01/8, Annulment Decision of Sep. 25, 2007.
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- ^{xl} Cap 2 as amended from time to time
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