



Protecting Foreign Investment under International Law: Legal Aspects of Political Risk, by Paul Comeaux and Stephen Kinsella, Dobbs Ferry, New York, Oceana, 1997, ISBN 0-379-21371-0, 448 pages

Investment protection under international law, much controversial in the 1970s, is now sailing in more quiet waters. Three recent books have dealt in great length with the subject (Sornarajah, 1994; Muchlinski 1995; Robert Pritchard, 1996 - see my review in: *International Business Lawyer*, 1996, 392). Comeaux/Kinsella have now published a fourth. In this clear and easy to read survey of relevant international law, they set foreign investment protection principles, first into a political risk management perspective. They then examine often the same issues in more detail dealing with pertinent international law issues - state responsibility, remedies under international law, national treatment, state immunity, international law of expropriation, bilateral and multilateral investment protection treaties. Several chapters deal with political risk management methods - use of arbitration, stabilisation and related provisions; purchase of political risk insurance (OPIC, MIGA, bilateral and private insurance schemes. In a concluding chapter, they deal again with arbitration in detail, but also with diplomatic protection, economic sanctions, international claims tribunals, pursuit of nationalised property and in the end, again, with arbitration, this time in the shape of the 1958 New York Convention. From page 243 to 431, the second part of the book is taken up by the reprinting of appendices. They start - curiously - with an article on economic calculation under Socialism (presumably to bolster the pro-property philosophy of the book) and follow with the World Bank Foreign Investment Guidelines, the US model bilateral investment treaty and primary documents from OPIC, MIGA, ICSID, the US foreign sovereign immunities act and the New York arbitration convention.

The book is very useful for beginners as an introduction and easier to access and use than the much more comprehensive and in-depth studies by Sornarajah and Muchlinski. Different from those parallel works, the authors profess, often and strongly, their emphasis on private property of rich countries as a way to wealth - though they seem compelled - with regrets - to accept that force is no longer accepted to enforce foreign investment protection. This advocacy approach - perhaps more in line with the attitudes and requirements of the global economy than the more sovereignty-oriented study by Sornarajah or the studiously non-ideological book by Muchlinski - leads, though, to a significant problem: The book is meant for the use of the non-specialised practitioner, but the authors have often underplayed or simply ignored significant opposition to their views. Whatever is good for protection of property is acclaimed, but necessary information on the disputed nature of international law positions is not presented in a neutral and balanced way. A perhaps youthful pro-property enthusiasm (sign of generational change, no doubt) leads to information risk for the unwary reader. It reminds of those young Wallstreet traders who have only seen upturns, but never a bear market. For example, while the authors dedicate the book to Judge Rosalyn Higgins (whose course may well have influenced the theme and sequencing of the book), they downplay or even omit reference to Judge Higgins (and many others) sceptical or more balanced views on

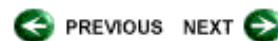
stabilisation clauses in transnational contracts. Similarly, while investment insurance (e.g. OPIC) is treated in great detail, their analysis is largely based on official reports, officious writing and legal documentation - thus ignoring that OPIC and presumably other investment insurance places a considerable burden on private investors who face frontally a difficult government and from behind a sometimes equally difficult insurer unwilling to pay. The book is written by two authors who are now practitioners, but it is largely written on the basis of recent US academic literature (which is very helpful for a non-US researcher) and primary documents; legal practice does not seem (as yet) to have introduced the authors to the greater complexities of the real-life foreign investment process where governments (including the US) discriminate in many ways against foreign investors; where remedies existing in theory are politically very hard to enforce against government bureaucracies with much indirect leverage at their disposal, where misconduct is not only committed by the untutored poor, but also by the self-centered wealthy countries. The real life of foreign investment does not much enter these pages, but rather a bookish reading of recent literature conforming with the authors' one-dimensional value system.

From young authors one would have expected less a re-statement of very classic positions on foreign investment protection, but a search for scenarios of political risk which are new and which require an innovative response from international economic law. Environmental regulation to be viewed as "expropriation", the use of tax powers by modern governments to renegotiate privatisation deals, transaction costs generated by volatile and ambiguous government policy, discrimination under environmental, human rights and other seemingly legitimate guises, the political risk implicit in the use of economic sanctions to pursue narrow domestic pressure group objectives, the allocation mechanism, the impact of corruption on international business deals, direct effect of transformation of classical stabilisation clauses into modern adaptation and risk- international investment law in domestic law and state responsibility for malign conduct by privatised utilities - these are all current issues of great concern for investors and without established management method. But they don't figure in this book which seems rather written for a politically correct replay of the "New International Economic Order" events in the 1970s.

To sum up: For a beginner a very useful introduction, clear and easy to read, with good (though mainly US) recent references on conventional principles of international law of foreign investment, but lacking in balance, sophisticated analysis and a "modern" perspective on contemporary foreign investment issues in the global economy. Good to start with, but not good enough to conclude.

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