International Investment, Political Risk and Dispute Resolution

A Practitioner's Guide

Noah Rubins
N. Stephan Kinsella

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INTERNATIONAL INVESTMENT, POLITICAL RISK AND DISPUTE RESOLUTION

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Freshfields Bruckhaus Deringer

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Applied Optoelectronics, Inc.

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Manufactured in the United States of America on acid-free paper.

To Alfred Rubin

and Hans-Hermann Hoppe

ABOUT THE AUTHORS

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GUIDANCE ON CITATIONS

To facilitate use of *International Investment, Political Risk and Dispute Resolution*, extensive cross-references are employed to alert the reader of a related discussion in another chapter or section of the same chapter.

Citations generally follow Blue Book style, with some exceptions (such as italicized case names in footnotes).

Online sources are often provided for many of the cited materials, but are omitted for very common sources or to avoid excessive repetition. For example, the text of ICJ and PCIJ decisions, many investment arbitraton awards, and a great many bilateral investment treaties (BITs) and other treaties can be found online at websites listed in Appendix XVII. The reader is therefore referred to **Appendix XVII** for the online location of these and other cited materials.

PREFACE

As globalization continues, foreign direct investment, including investment in developing economies, continues to grow each year as well. Political risk—the risk that a host government will interfere with the property rights of a foreign investor—is therefore a topic increasingly central to strategic discussions within both governments and the international business community. While domestic legal, economic and political considerations are critical to assessing political risk, international law also plays an important role. State responsibility for investor protection, treaties protecting foreign investment, political risk insurance, the immunity of states from suit in national courts, and international arbitration between states and investors are just a few of the matters governed or affected by evolving principles of international law.

There has long been a need for a current reference work integrating these and other issues related to international investment and political risk. Many of the relevant topics have been addressed in law journals or monographs, but never as part of an integrated analysis of political risk. And while there is certainly a wealth of material concerning the international law of investment protection, much of it is written from an academic viewpoint rather than from the perspective of assisting businesses and governments in avoiding or reacting to the conflict between interests private and public, foreign and domestic.

The 1997 Oceana monograph *Protecting Foreign Investment Under International Law: Legal Aspects of Political Risk*, penned by one of the present volume's co-authors and his former colleague, Paul Comeaux, was written to address these and other topics. As one reviewer wrote, "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."[1] Another commented:

> This book provides an in depth analysis of the political risk associated with foreign investment—that the host government may decide to nationalize, or otherwise interfere with, alien property rights. It succinctly identifies the decisional factors including treaties, political risk insurance, sovereign immunity, and arbitration between States and investors. It serves as a useful primer for investors, corporate counsel, and anyone interested in expropriation litigation disputes.[2]

Since the previous book was released eight years ago, far more attention has been paid to some of these topics, in particular investor-state arbitration. This is no surprise: the number of cases registered at the International Centre for the Settlement of Investment Disputes between 1997 and 2001 was equal to the number initiated before 1997 since the Centre's inception in 1965.

The present volume addresses the same issues as did the 1997 work, with updated and expanded coverage. Our goal here is to enable the investor to appreciate the risks associated with government interference in property rights, to minimize those risks and deal effectively with their consequences. But we also hope to promote understanding within host governments about investors' expectations and concerns, to allow them to avoid conflict and maximize the benefits of foreign direct investment for their countries and constituencies.

This book is addressed to a wide audience, and is written to appeal to lawyers and non-lawyers alike. It is suitable as a primer for attorneys and investors seeking to familiarize themselves with international law pertaining to political risk. It is also addressed to both in-house and outside counsel for corporations who either have made or are contemplating foreign direct investment in developing (or other) countries. Experienced attorneys involved in expropriation-related litigation should also find this book useful as a reference guide to important principles of international law related to political risk. It should also be useful to law students studying international law and academics seeking a reference work pertaining to the legal aspects of international investment and political risk. Last but certainly not least, government officials and attorneys can glean important information about the mindset of foreign investors and their likely course of action should State measures adversely affect their investment. We hope that practitioners will find the sample and source documents in the appendices of use as well, both for comparison purposes and for ease of reference.

We are convinced that the reduction of political risk, through the active participation of both host countries and foreign investors, is a critical factor in the im-

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1 T. Wälde review, *CEPMLP Internet Journal*, vol. 3 (1998) www.dundee.ac.uk/cepmlp/. *See also* review by Assad Omer, *Transnational Corporations*, vol. 10, no. 1 (UNCTAD, April 2001).

2 American Society of International Law: Reader's Corner (Issue #16, June 1998), www.lawschool.cornell.edu/lawlibrary/asil/16READ.html.

provement of the human condition worldwide. Entrepreneurship and capital investment are essential to the expansion of prosperity. This conviction, in addition to a more detached enthusiasm for the subject of our practice and research, is one motivation for undertaking this book and, we believe, has spurred us to forcefully explain both how investors can protect themselves, and the ways that host States can make such protection superfluous. It should be noted that, regardless of the authors' policy preferences, we have attempted to remain strictly objective in evaluating the realities of international law, business, and politics.

Before concluding these brief prefatory remarks, a few words of thanks are in order. We would like to thank Mr. Frederic Sourgens for his research assistance, Farouk Yala, Avocat à la Cour, Paris, for helpful comments and suggestions, and Ms. M.C. Susan De Maio of Oceana Publications for her encouragement in the preparation and revision of a book-length treatment of these topics. Our gratitude also to Masha Rubins and Cindy DeLaney Kinsella for their support and encouragement as we spent many hours in the preparation of this book.

To two individuals we owe special thanks, and it is to these two that we dedicate this book. One of the authors (Kinsella) has been lucky enough to be befriended and informally mentored by Professor Hans-Hermann Hoppe, a leading libertarian theorist and Austrian school economist in the tradition of Ludwig von Mises. Hoppe's brilliant and tireless advocacy of the principles of individual liberty, sound economics, and international trade, peace and harmony has been an inspiration. Gratitude also to Alfred Rubin (no relation), Professor Emeritus at the Fletcher School of Law and Diplomacy, whose unflagging drive for precision about the impreciseness of international law made a lasting impression on the other author of this book. Professor Rubin demonstrated through his teaching and research that a clear head and a warm heart are fully compatible, and for that his students will always admire him.

One final note. While this book is intended to shed some light on the interaction between international law, foreign investment, and political risk, a book cannot substitute for the advice of an attorney with information and expertise in the particular circumstances of each situation. We encourage anyone requiring counsel in the matters discussed in this book to consult an attorney for individualized advice and assistance.

The authors finally inform all and sundry that the opinions expressed in this book are solely their own, and should not to be attributed to any entity or person other than themselves.

Noah Rubins

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August, 2005

INTRODUCTION

The last century witnessed two important economic counter-currents affecting the international investment community. On the one hand, institutionalized respect for individual rights has spread swiftly across many parts of the globe. On the other hand, collectivist ideologies, political clashes, and misunderstandings between the developing and developed world[1] have led at times to massive nationalizations and confiscations of the property of investors from capital-exporting states. As the prominent Danish legal scholar Isi Foighel once pointed out,

> [i]f we wish to pick out one single feature of the social-economic character of the 20th century, one fact accompanying the technical development will strike us very forcibly: the direct and indirect interference by government action with private property.[2]

Most of these nationalizations and confiscations were takings of property invested in developing states in the form of so-called "foreign direct investment." Foreign direct investment refers to direct or indirect control of either assets or an enterprise in a foreign country through ownership of a substantial portion of the assets or enterprise.[3] It is "investment that is made to acquire a lasting interest in an enterprise operating in an economy other than that of an investor,

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1 Developing states have often accused multinational corporations of adopting overly capital-intensive production techniques and making insufficient transfers of technology. Klaus P. Berger, *The New Multilateral Investment Guaranty Agency Globalizing the Investment Insurance Approach Towards Development*, 15 SYR. J. INT'L L. & COM. 13, 31 (1988).

2 ISI FOIGHEL, NATIONALIZATION: A STUDY IN THE PROTECTION OF ALIEN PROPERTY IN INTERNATIONAL LAW 13 (1957).

3 Thomas L. Brewer, *International Investment Dispute Settlement Procedures: The Evolving Regime for Foreign Direct Investment*, 26 LAW & POL'Y INT'L BUS. 633, 634 (1995); *see also* Cheryl W. Gray & William W. Jarosz, *Law and the Regulation of Foreign Direct Investment: The Experience from Central and Eastern Europe*, 33 COLUM. J. TRANSNAT'L L. 1, 1 (1995). Different countries use different threshold levels of ownership, usually between ten and twenty-five percent, to distinguish foreign direct investment from so-called "portfolio investment." Brewer, *supra*, at n2.

the investor's purpose being to have an effective voice in the management of the enterprise."[4] One commentator defined "foreign direct investment" in the following terms:

> [Foreign direct investment] may best be defined as the creation, acquisition or endowment in the host country of enterprises, either incorporated as branches, subsidiaries, or associate companies, or in the form of unincorporated enterprises or joint ventures. The desired result is to acquire a lasting interest, with powers of management and control, where the investor's return depends upon the performance of the enterprise. [Foreign direct investment] flows include all funds provided by the investor, specifically, equity capital, reinvested earnings, and net borrowings. Equity investment that does not meet this standard constitutes portfolio investment which is placed through the capital markets without entrepreneurial commitment and merely for the sake of capital yield.[5]

Foreign direct investment (FDI) as a mode of economic activity offers impressive benefits for both investors and host states that cannot be gleaned from portfolio investment. From the private party's standpoint, FDI provides a platform for implementing improvements, seizing on potential efficiency and synergy gains, and otherwise gaining advantage from the investor's own initiative, innovation, and vision. From the government's perspective, FDI is a potential engine for development, as the foreigner employs and trains local personnel, indirectly encourages secondary service providers and producers of goods, pays taxes, and—in some case—leaves behind valuable know-how.[6]

But FDI's benefits for all cannot come without concomitant risks. In order to obtain the necessary control over local operations, the investor must "invest himself," placing his money, equipment, personnel, and day-to-day operations within

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4 International Monetary Fund, Balance of Payments Manual para. 408 at 136 (4th ed. 1977). Thus, "[w]ith respect to foreign direct investment, a foreign investor retains at least part of the ownership and control, unlike [official development assistance] and private bank lending where the business is owned and controlled by local companies or entrepreneurs." Berger, *supra* note 1, at 17.

5 Berger, *supra* note 1, at 17 (references omitted).

6 *See generally* UNCTAD/U.N.E.P., Foreign Direct Investment and the Promotion of Sustainable Human Development (1999); J.P. Agarwal, *Effect of Foreign Direct Investment on Employment in Home Countries*, 6 Transnat'l Corporations 1 (1997); *See also Running into the Sand, Why a failure at the Cancun Trade Talks threatens the world's poorest people*, OXFAM Briefing Paper no. 53, September 2, 2003, at page 33, available at www.oxfamamerica.org/pdfs/wto_brief_090203.pdf (foreign direct investment can play a crucial role in development by transferring capital, technology and skills into developing countries; UNCTAD research indicates that the number of regulatory changes in the domestic foreign investment regulations of the relevant countries during the relevant period was over 1,300, 95% of which were aimed at facilitating foreign investment) (citing UNCTAD, World Investment Report, Geneva (2002)).

the sphere of the host State's local law, customs, and political vagaries.[7] For developing state governments, meanwhile, the political pressure to extract additional benefits for local constituents grows as the foreign-owned enterprise prospers. Particularly in times of social and economic instability, host governments may be tempted to redistribute some of the foreigner's property to achieve political gain. Such a shift of property may take any number of forms, from direct nationalization by fiat to increases in taxes, fees, or investment requirements.

Furthermore, the salubrious effect of FDI on the economy of developing countries is hardly undisputed. Some argue that freedom of investment equals a license for multinational corporations to pillage the assets of poorer countries, buying resources for less than their true value and expatriating them to the home country. At the very least, the influx of capital does not necessarily mean that the profits gained from that investment will remain in the developing host country. Between 1965 and 1986, "net transfers" on FDI, meaning the flow of investment adjusted for the repatriation of profits, was either negative or only slightly positive.[8] Therefore, some have argued that an increase in direct investment into a less-developed country may not necessarily provide substantial support for long-term development projects, infrastructure improvements, or other welfare-enhancing activities.[9] Additionally, the drain of repatriating profits may in fact harm a capital-importing country's balance of payments, if FDI flows are not consistently renewed and outward transfer of profits continues.

These concerns were part of the impetus that drove the "new international economic order" movement among developing countries. In 1974, as part of a movement that became known as the "New International Economic Order" (NIEO), a large number of States initiated a campaign against the prevailing norms of equal treatment for foreign investors, culminating in a United Nations resolution known as the Charter of Economic Rights and Duties of States.[10] These States advocated preferential treatment for local capital. The Charter set forth a new standard for the treatment of investments, although the standard was vehemently opposed by developed countries in the General Assembly: "Every State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over

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7 The distinction between "investing" and "investing oneself" was best articulated by Professors Carreau and Juillard in DOMINIQUE CARREAU & PATRICK JUILLARD, DROIT INTERNATIONAL ECONOMIQUE 387 (2003) ("Il faut non seulement que l'investisseur investisse, mais encore qu'il s'investisse").

8 WORLD BANK, 1 WORLD DEBT TABLES 1992-93, at 20-21 (1992).

9 IBRAHIM SHIHATA, LEGAL TREATMENT OF FOREIGN INVESTMENT: THE WORLD BANK GUIDELINES 9 (1993).

10 G.A. Res. 3281, 29 U.N. GAOR Supp. (No.31), at 50, 51-55, U.N. Doc. A/9631 (1974), *reprinted in* 14 I.L.M. 251, 252-60 (1975), available at www.un.org/documents/resga.htm. *See* Patricia Robin, *The BIT Won't Bite: The American Bilateral Investment Treaty Program*, 33 AM. U.L. REV. 931, n.93 (1984).

all its wealth, natural resources and economic activities."[11] While the general exhortatory provisions of the Charter were approved by a wide margin, the most controversial provision—Article 2, which purported to remove the act of nationalization from the protections of international law—was passed over the objections of all the major industrialized nations, as well as several developing countries.[12]

In this atmosphere of conflicting interests, some governments in the Middle East and Africa turned to nationalization of foreign investment as an economic and political tool, in part as an assertion of "permanent sovereignty" over natural resources following de-colonialization.[13] Many of these expropriations took place despite elaborate, long-term concessions that the host States had granted to foreign investors.[14] Expropriations of foreign investment continued into the 1970s in States such as Uganda, Ethiopia, Pakistan, and Iran. By 1980, the only OPEC States where oil concessions benefitting multinational corporations remained in effect were the United Arab Emirates and Libya. This represented a substantial deterioration in stability from the middle part of this century.[15] (These historical developments are elaborated in Chapter 5.)

However, the NIEO ultimately had little impact on targeted institutions such as the Bretton Woods system, the GATT, and WTO. Subsequent attempts to include NIEO principles in documents elaborating development strategy also failed to obtain any consensus.[16] By the beginning of the 1990s, with the fall of Communist regimes in Europe and the onset of debt crises throughout the developing world (caused in part by centralized planning and protectionism) the NIEO appeared to have fallen into wide disfavor. In its place, a more balanced, pragmatic approach to foreign economic participation gained currency, one that recognized both the

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11 29 U.N. GAOR Supp. (No. 31) at 52, 14 I.L.M. at 254-55, *supra* note 10.

12 Robert von Mehren & P. Nicholas Kourides, *International Arbitration between States and Foreign Private Parties: The Libyan Nationalization Cases,* 75 A.J.I.L. 476, 523 (1981).

13 On the concept of permanent sovereignty and rights to oil deposits in international law *see* David M. Ong, *Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?* 93 A.J.I.L. 771 (1999).

14 *See* Vratislav Pechota, *The 1981 U.S.-Czechoslovak Claims Settlement Agreement: An Epilogue to Postwar Nationalization and Expropriation Disputes*, 76 A.J.I.L. 639. *See also* Rode, *The American-Polish Claims Settlement Agreement of March 30, 1960*, 55 A.J.I.L. 452 (1961); Gordon Christenson, *U.S.-Rumanian Agreement of March 30, 1960*, 55 A.J.I.L. 452 (1961); Richard B. Lillich, *The United States-Bulgarian Claims Agreement of 1963*, 58 A.J.I.L. 187 (1964); Branko Peselj, *The New Yugoslav-American Claims Agreement*, 59 A.J.I.L. 362 (1965); EXPROPRIATION IN THE AMERICAS (Andreas Lowenfeld, ed., 1971); ERIC N. BAKLANOFF, EXPROPRIATION OF U.S. INVESTMENT IN CUBA, MEXICO, AND CHILE (1975).

15 Edith Penrose, George Joffe & Paul Stevens, *Nationalization of Foreign-Owned Property for a Public Purpose: An Economic Perspective on Appropriate Compensation*, 55 MODERN L. REV. 351, 353 (1992).

16 Russel Lawrence Barsh, *A Special Session of the U.N. General Assembly Rethinks the Economic Rights and Duties of States*, 85 A.J.I.L. 192, 192-93 (1991).

so-called humanitarian risks of unregulated capitalism and the simple fact that "less-developed countries compete on a worldwide scale for scarce private investment capital, and that capital will not come unless there is security and a good chance of profit making."[17]

In recent years, the attitudes of developing States toward foreign direct investment have continued to shift, and foreign direct investment flows to developing States are increasing. In the second half of the 1980s, investment increased from Western Europe and North America to developing countries in Asia, Latin America, and Eastern Europe.[18] Foreign direct investment worldwide increased three times faster than domestic output,[19] peaking at US$ 1.3 trillion in 2001.[20] In Central and Eastern Europe alone, foreign direct investment has increased from almost nothing in 1989 to a projected $28 billion by the end of 2003.[21]

While some states have been cautious in welcoming foreign direct investment, others have begun avidly to pursue capital inflows, in part by privatizing formerly state-run enterprises.[22] In the Philippines, for example the state has accelerated privatization of the telephone, steel, electricity, paper, and oil industries.[23] In Mexico, the national telephone company is partially owned by American and

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17 Frank Ruddy, *Book Review: Foreign Investment in the Present and a New International Economic Order*, 84 A.J.I.L. 961, 962 (1990).

18 Gray & Jarosz, *supra* note 3, at 5.

19 U.N. Department of Econ. & Social Development, Transnational Corporations and Management Division, World Investment Reports 1992: Transnational Corporations as Engines of Growth at 4, U.N.Doc. ST/CTC/130, U.N. Sales No. E.92.II.A.19 (1992). Foreign direct investments to developing countries has increased dramatically over the past several years. Multilateral Investment Guaranty Agency (MIGA), Annual Report, 2004, available at www.miga.org.

20 Guy de Jonquieres, *Foreign Direct Investment flow set to begin recovery UNCTAD DATA*, Financial Times (London, England), January 13, 2004 at 11; on the 2001 figures, *see* Frances Williams, *Investment flows grow strongly*, Financial Times (London, England), August 4, 2001 at 6. FDI subsequently fell sharply from 2001 to 2002, to US$653 million. Seen in context, however, foreign direct investment is again growing at a healthy clip. The 2001 volume of foreign direct investment was unusually high due to the perceived need for consolidation in the European Union and the United States, as well as inflated stock prices before the high-tech collapse of 2001. Since many of the transactions in the telecommunications market and the technology sector were made in stock, prices were probably inflated above the actual value of these mergers.

21 Stefan Wagstyl, *Investment flows into region at record levels: Although still beset by problems, much of the former Communist bloc is also experiencing surprising economic growth*, Financial Times (London, England), October 21, 2003 at FT Report—Central and Eastern Europe: Finance Pg. 1.

22 Anna Gelpern & Malcolm Harrison, *Ideology, Practice, and Performance in Privatization: A Case Study of Argentina*, 33 Harv. Int'l L.J. 240 (1992) ("at least eighty-three countries were conducting some significant form of privatization" by the early 1990s).

23 *Id.* at 256.

French companies, and Pemex, the national oil company, is planning to sell petrochemical plants to foreign investors.[24]

As part of this same gradual liberalizing process, the oil and gas companies that suffered nationalization in the 1970s are now returning to their former hosts for new projects.[25] By 1992, Tunisia, Egypt, Oman, Yemen, and Syria had begun to allow foreign participation in their oil industries.[26] Algeria also now permits joint ventures with foreign oil companies, provided that the state oil company retains a controlling share.[27] In November, 1994, Azerbaijan approved the "Deal of the Century," a $7.5 billion development deal with a consortium of foreign oil companies.[28] Morris Adelman, an expert in oil economics at the Massachusetts Institute of Technology, opines that in the Middle East "[t]hose countries have realized that nationalization has been a lousy way to run their oil business. They now know that throwing out the oil companies with their technical expertise and big money was a terrible mistake."[29]

According to at least one World Bank official, "[t]he present interest in privatization is no fad. . . . Lessons have been learned . . . and today's strategies reflect those lessons."[30] Foreign markets are being re-opened to foreign investment in many parts of the world, and this tendency is likely to continue. Along with the rejection of nationalization as a useful development model, there has been an increasing recognition of the crucial importance of property rights.[31] States formerly hostile to foreign investment are beginning to enact investment codes

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24 *Id*. at 238.

25 Allanna Sullivan, *Plunging Back: Western Oil Giants Return to the Countries That Threw Them Out*, WALL STREET J., Mar. 5, 1995, § A, at 1, col. 1 ("Conoco's return to Iran is the latest in a wave of such U-turns. British Petroleum Co., expelled 16 years ago by Nigeria over the issue of apartheid in South Africa, is back in Nigeria despite a despotic military regime there. Mobil Corp., which fled Viet Nam in 1975 because of the war, is back even though a border dispute may lead to a brawl with China. Occidental Petroleum Corp., whose holdings in Venezuela were nationalized 19 years ago is back, despite a tottering economic system that could trigger a military coup").

26 Penrose *et al.*, *supra* note 15, at 353.

27 *Id.* at 354.

28 This consortium includes Amoco, British Petroleum, Azerbaijan State Oil Company, UNOCAL, Delta (a Saudi-affiliated entity), Lukoil (Russia), Pennzoil, Statoil (Norway), the Government of Iran, McDermott, RAMCO, and Turkish Petroleum Corp. COMMERCE, THE OFFICIAL NEWSLETTER OF THE C.I.S.-AMERICAN CHAMBER OF COMMERCE 3 (Fall 1995).

29 Sullivan, *supra* note 25.

30 Mary M. Shirley, *The What, Why, and How of Privatization: A World Bank Perspective*, 60 FORDHAM L. REV. S23, S31-32 (1992).

31 Brice M. Clagett, *Present State of the International Law of Compensation for Expropriated Property and Repudiated State Contracts*, *in* PRIVATE INVESTORS ABROAD §12.02 (1989) ("Some of the States that had been the most vociferous exponents of Third World ideology began to become exporters of capital and thus to acquire a heightened appreciation of property rights").

favorable to investors,[32] and are beginning to adopt legal and business methodologies familiar to foreign enterprises, such as Anglo-American methods of contract interpretation.[33] Many developing states have also passed legislation guaranteeing compensation in the event of expropriation,[34] and have entered into bilateral investment treaties with capital-exporting countries, which normally establish a range of baseline guarantees to qualifying investors.

Also, in a reversal of the previously dominant doctrine that investment disputes should be resolved under the laws and within the judicial system of the host state,[35] many developing states have enacted investment laws allowing for settlement of disputes in a neutral forum, using the facilities and procedural rules of arbitral institutions such as the International Chamber of Commerce and International Centre for the Settlement of Investment Disputes.[36] Likewise, regional and bilateral investment treaties have multiplied around the globe, often providing foreign investors both substantive protections and mandatory arbitration of disputes.[37] Finally, there have been a number of incentives offered by developing states to attract foreign direct investment, including tax breaks, inexpensive financing, and land at reduced prices.[38]

To some degree, these changes were probably brought about as a result of competition among developing states for FDI. As developing states' demand for foreign

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34 Ibrahim F.I. Shihata, *Recent Trends Relating to Entry of Foreign Direct Investment*, 9 ICSID REV.—FOR. INV. L.J. 47 (1994). For a discussion of the national foreign direct investment codes of several nations, *see* Michael A. Geist, *Toward a General Agreement on the Regulation of Foreign Direct Investment*, 26 LAW & POL'Y INT'L BUS. 673, 686-706 (1995); Antonio Parra, *Principles Governing Foreign Investment as Reflected in National Investment Codes*, 7 ICSID REV.—FOR. INV. L.J. 428 (1992). International organizations have also shifted their emphasis from the regulation of foreign direct investment to the liberalization of government policies toward such investment. *See* Brewer, *supra* note 3, at 639; *see also* OECD, CHECKLIST FOR FOREIGN DIRECT INVESTMENT INCENTIVES 2003, available at www.oecd.org/dataoecd/45/21/2506900.pdf (providing a guide for policy makers on the liberalization of their home economy in order to attract further investment).

33 For a discussion of such practices in Central and Eastern Europe, *see* Gray & Jarosz, *supra* note 3, at 32.

34 For examples of such legislation in Central and Eastern Europe, *see id.*, at 29; Geist, *supra* note 32.

35 On this so-called "Calvo Doctrine," *see* DONALD SHEA, THE CALVO CLAUSE: A PROBLEM OF INTER-AMERICAN AND INTERNATIONAL LAW AND DIPLOMACY (1955).

36 Adeoye Akinsanya, *International Protection of Direct Foreign Investments in the Third World*, 36 INT'L & COMP. L.Q. 58, 70-75 (1987).

37 *See, e.g.,* Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, with Protocol, signed at Washington on November 14, 1991, entered into force October 20, 1994, *reprinted at* 31 I.L.M. 124 (1992), available at www.state.gov/e/eb/rls/fs/22422.htm. On the wider implication of such investment treaties, *see* Marian Nash (Leich), *U.S. Practice: Bilateral Investment Treaties*, 87 A.J.I.L. 433 (1993).

38 Geist, *supra* note 32, at 679.

direct investment increased in the late 1970s and early 1980s, the supply of available capital was decreasing significantly.[39] While FDI to developing countries reached a peak of US$17.24 billion in 1981, it fell to US$11.86 billion in 1982 and US$7.8 billion in 1983.[40] This was due in part to rising interest rates and falling commodity prices, causing many developing states to default on their debts to Western banks in the 1980s.[41] This series of defaults caused some international banks and investors to tighten the supply of capital flowing to these States. Many multinationals took to borrowing funds from their foreign subsidiaries, rather than injecting capital into them.[42] One way States found to attract an ever-smaller pool of foreign funds was to liberalize the local regulatory regime, and to provide other guarantees that reduce the political risk that would otherwise make investing expensive.[43] As Professors Wälde and Weiler explain:

> It is at first sight perhaps difficult to understand why governments would voluntarily limit their sovereignty by submitting to such processes of arbitration-enforced discipline. One needs to realise, though, that by accepting such external, politically less malleable, discipline a country gains in reputation, in lowering its political risk reputation and by enhancing its ability to participate and benefit fully from the global economy. Governments who don't are seen as higher risk and therefore penalised, usually with good reason, in many ways by investors and the global markets. Submitting to such external disciplines also provides governments with a defense against domestic pressure groups—business lobbies and ideological interest groups—which can often capture the domestic regulatory machinery and manoeuvre it for protectionist policies which in the end damage the country at large and wealth-creating potential of the global economy.[44]

Developing states also strengthen investment protections because, as explained above, FDI benefits both the citizens of the host State and the investor. For example, by the end of the 1970s developing countries were becoming aware of an

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39 In 1993 and 1994, it is estimated that half of all foreign direct investment flowing to developing countries went to East Asia and to the Pacific, while lower income countries, excluding China and India, received only about US$3 billion. MIGA, ANNUAL REPORT 1995, available at www.miga.org.

40 Organization For Economic Cooperation And Development (OECD), DEVELOPMENT COOPERATION—1984 REVIEW 64, Table IV-1 (1984).

41 The total debt of developing countries exceeded $950 billion in 1985, causing the international capital flow to developing countries to slow and interest rates to rise. SHIHATA, *supra* note 9, at 672.

42 *Id.* at 674.

43 "Political risk" can be broadly defined as the risk that the laws of a country will change to the investor's detriment after it has invested capital in the country, reducing the value of its investment. Put simply, it is the risk of adverse government intervention. *See* PHILIPP HARMS, INTERNATIONAL INVESTMENT, POLITICAL RISK, AND GROWTH (2000); DAVID A. JODICE, POLITICAL RISK ASSESSMENT: AN ANNOTATED BIBLIOGRAPHY (1985).

44 Thomas Wälde & Todd Weiler, *Investment Arbitration under the Energy Charter Treaty in the Light of New NAFTA Precedents*, INVESTMENT TREATIES AND ARBITRATION 159, 161 (G. Kaufmann-Koehler/B. Stucki, eds. 2002).

increasing technology gap between North and South. They realized that encouraging FDI was a more effective means of developing and importing high technology than purchasing it directly.[45] In addition,

> [b]ecause [FDI] is not a debt creating instrument requiring regular payments and generating continuous demands on the host country's balance of payments, only when the investment earns a profit are payments implied, thereby placing part of the risk on the foreign investor.[46]

Foreign direct investment also helps the host State by creating more opportunities for local subcontractors and suppliers.[47] An additional rationale for accepting FDI is summarized by former ICSID Secretary General Ibrahim Shihata:

> First, direct investment does not simply provide funds, but an integrated package of financial resources, managerial skills, technical knowledge, and marketing connections. Second, it is not a debt-creating instrument; the investor bears the risks of project failure, while a lender has the right to be repaid regardless of how effectively the borrowed funds were used. Third, other indirect but important attributes of this form of capital relate to benefits that insure the introduction of efficient and internationally competitive enterprises in local economy. In the long run, direct foreign investment can foster a general improvement in production by stimulating the adoption of improved techniques and management in other sectors of the economy, and among local entrepreneurs. Fourth, foreign investment often works as a catalyst for associated lending for specific projects, thus increasing the overall availability of external resources for productive purposes. Also, foreign investors often act as lobbyists in their home countries for the benefit of their projects in developing countries.[48]

As a consequence of the market liberalization described above and developing States' apparent embrace of FDI, one might assume that foreign investors can look forward to ever-decreasing political risk in the twenty-first century.[49] But despite new laws and treaties, as well as a new culture of mutual benefit between capital exporters and capital importers, the potential for a trend reversal remains real, and political risk concerns persist.[50]

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45 Berger, *supra* note 1, at 15.

46 *Id.*

47 *Id.*

48 Ibrahim F.I. Shihata, *Factors Influencing the Flow of Foreign Investment and the Relevance of a Multilateral Investment Guaranty Scheme*, 21 INT'L LAW. 671, 675 (1987).

49 Expropriations appear to have peaked in 1975 with 83 expropriations in 28 different countries, but declined by fifty percent the following year. Between 1980 and 1985, the rate of expropriation averaged three per year. UN Centre on Transnational Corporations, *The New Environment*, UNTC Current Studies, Series A, No. 16 (New York: United Nations, 1990), p. 18.

50 *See generally* PETER B. KENEN, THE INTERNATIONAL FINANCIAL ARCHITECTURE (2001); ANDREAS LOWENFELD, INTERNATIONAL ECONOMIC LAW 565-616 (2002); Grant Nulle, *IMF ignores causes of crisis*, FINANCIAL TIMES (London, England), August 18, 2003 at 10; Adam

While the United Nations' Centre on Transnational Corporations has argued that nationalization will represent a minimal risk in the future, this conclusion has been challenged as optimistic:

> This conclusion must be seen as optimistic if account is taken of the fact that the year 1975 was in the middle of a severe economic crisis for many countries in the developing world, as a result of the rise in oil prices and the accompanying world recession. These countries not only had by that time to search for outside assistance, but also to turn to the IMF for help. One of the conditions of such help required them to relax their previous attitudes toward private foreign investment and to encourage the return of multinational corporations. It is by no means clear, therefore, that the postulated changes in attitudes, born partly of economic crises, will be permanent.[51]

More importantly, today host states can interfere with private property and foreign investment more subtly than through direct confiscation and transfer of title. Over the last twenty years, the risk of indirect or *de facto* expropriation, or of other, less extreme interference, has come to the forefront of business consciousness in the developing world. Thus, even when an investor remains in full control of his assets, he may find their value evaporated no less effectively than in an outright taking.[52] In post-1979 Iran, for example, the government commonly imposed a requirement that companies hire "managers" appointed by the State, who effectively directed the company's activities for the State's benefit. In Argentina during the most recent crisis, the government converted private contracts denominated in U.S. dollars to Argentine pesos at a one-to-one exchange rate, although the peso had dropped to a value of under 30 cents.[53] This measure had the effect of shifting as much as two-thirds of private investors' revenues to consumers, who benefited from artificially low prices.

Risks such as these are relatively low in a stable country with well-developed legal institutions, where the rule of law is normally assiduously defended and

Thomson, *Argentina defiant towards private creditors*, FINANCIAL TIMES (London, England), March 11, 2004 at 11.

51 Penrose *et al.*, *supra* note 15, at 351. *See also* Amy L. Chua, *The Privatization-Nationalization Cycle: The Link Between markets and Ethnicity in Developing Countries*, 95 COL. L. REV. 223 (1995), (arguing that in many States, there is an ongoing cycle of privatization and nationalization).

52 *See Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award of March 9, 1998 at para. 103, 40 I.L.M. 36 (2001) (the host state's regulatory action can have the effect of an outright taking).

53 Thomson, *supra* note 50.

property rights protected.[54] For example, a Belgian national investing in a power project or oil and gas properties in the United States will be reasonably confident that, in the event that the government were to confiscate her property, she would have recourse in the courts to challenge the action and to obtain full compensation for the value of the property taken.[55]

On the other hand, if the same Belgian national were investing in a project in Russia, and Russia were to take unfair measures affecting her property, the investor's domestic remedies may be limited, given doubts about the independence of the judiciary and the robustness of the rule of law.[56] Nevertheless, the political risks described in this book are not restricted only to developing and transition economies. Indeed, recent cases before NAFTA arbitration tribunals and the European Court of Human Rights demonstrate that overzealous regulators and the demands of local interest groups at times can make even the most "advanced" country a risky place for the foreign investor.[57]

Whether an investor brings capital to a developed or developing country, how can he assess and manage the incumbent political risk before deciding whether to invest? What can an investor do to deter manifestations of political risk once the investment has been made? How can international law be brought to bear as protection against political risk? Finally, what remedies are available if political risk materializes to the investor's detriment? This book is an attempt to suggest some answers to these questions.

In the first part of the text, we offer guidance on the assessment and pre-investment management of political risk. In Chapter 1, we discuss the types of political risk that foreign investors are likely to encounter, and suggest some practical

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54 Such protection is, however, not absolute. In the United States, for example, the government may impose a range of "restrictions" on the use of property. Many governmental actions in the U.S. which could be considered interference with property rights—such as zoning regulations—are not always considered to be takings by U.S. courts. *See generally* Richard Epstein, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

55 In the United States, just compensation for property taken by the State is normally measured by "the market value of the property at the time of the taking." *Olson v. United States*, 292 U.S. 246, 255 (1934), aff'd. in *United States v. 50 Acres of Land*, 469 U.S. 24 (1984).

56 *See* Tamara Lothien & Katharina Pistor, *Local Institutions, Foreign Investment and Alternative Strategies of Development: Some Views from Practice*, 42 COLUM. J. TRANSNAT'L L. 101, 106 n.13 (2003) (citing Transparency International, Corruption Perceptions Index (Aug. 28, 2002) at www.transparency.org (giving Russia a 2.7 out of 10 score for the perceived corruption in Russia where a 10 denotes no corruption), *see also* Transparency International, Corruption Perceptions Index (Oct. 7, 2003) at www.transparency.org/cpi/2003/cpi2003.en.html (giving Russia the same 2.7 out of 10 score of the previous year, on par with Mozambique at country rank 86 of a 133 surveyed).

57 *See, e.g., Loewen Group Int'l v. United States*, ICSID Case No. ARB(AF)/98/3, 42 ILM 811 (2003), Award of June 26, 2003 (a U.S. trial court's conduct towards a Canadian investor was "a disgrace by any standard" and violated international standards of fair and equitable treatment).

steps that might be taken to measure such risk in a particular State before investing capital. We then turn to the actions that the investor can take to reduce exposure to political risk prior to investing. Chapter 2 analyzes the types of investment projects most often undertaken in developing states, and provides an analysis of the structures that can be implemented to reduce exposure to political risk. Chapter 3 deals with the modalities of political risk insurance, which typically provides coverage against non-commercial risks such as currency inconvertibility, expropriation, and war, and is available from nationally-sponsored insurance agencies, private insurance companies, and the World Bank's Multilateral Investment Guarantee Agency.

In the second part of the book, we turn to the international law framework of investment protection and political risk. Chapter 4 covers the general background international law pertaining to state responsibility, in particular state responsibility incurred in relation to foreign investment, as well as the general nature and types of remedies available to investors when a state expropriates an investor's property or interferes with its investment. In Chapter 5, we discuss the principles of customary international law related to expropriation. This chapter includes an overview of the historical development of the international law of expropriation, as developed in international arbitration decisions, commentators, treaties, and state practice. The current state of the customary international law of expropriation is also discussed, including the various substantive protections established in customary and conventional international law, such as the "full compensation" standard for expropriation, the public purpose requirement, and the prohibition against discrimination.

Investors look not only to customary international law principles, however, they increasingly rely on the substantive protections provided in a growing number of investment treaties. The modern international law of investment protection as embodied in multilateral and bilateral investment treaties, including principles such as fair and equitable treatment, and full protection and security, is covered in Chapter 6. Also included is a detailed discussion of methods of valuation of damaged or expropriated property. Chapter 7 concerns the jurisdictional requirements for invoking investment treaty protections—who has standing to maintain a claim, what assets qualify as protected "investments," and the effect of related contractual forum selection clauses.

Finally, in a third section, we provide practical guidance on the procedural recourse available to investors who face political risks that have materialized. In Chapter 8, we provide an overview of international arbitration procedure—both under arbitration treaties and contractual arrangements—particularly under the auspices of the World Bank's International Centre for the Settlement of Investment Disputes (ICSID) and arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL). Next, Chapter 9 addresses the possibility of mediation, conciliation, and other non-litigious forms of alternative dispute resolution, methods which have drawn significant attention in recent years.

In Chapter 10, we discuss the actions that an investor's home government may take to protect the investor in response to unreasonable host-State interference with investment.

Every author must ultimately end his research and choose his field of battle, even so broad a field as the one we attempt to cover here. This book is limited in scope to the topics just described, and does not address the related and vitally important topics of commercial risk involved in direct foreign investment;[58] business, financial, or tax strategies for FDI;[59] or political risks connected with import/export transactions and portfolio investment.[60] Nor do we discuss the political risks of any particular country in detail. Because such risks necessarily evolve over time, such a discussion would be of limited value. There are, however, several services that provide up-to-date political risk assessment on a country-by-country basis.[61]

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Cross-border investment has become a central driving force in local economies around the world. Indeed, more than ever private investment and trade, as much as national politics, shape the development of global commerce.[62] In part through the management of political risk, private parties—and their counsel—are today called upon to help draw the contours of international law alongside national legislatures and executives.[63]

This unconscious collaboration may at first seem an odd result of the historical clash between capital importers and capital exporters. But on further reflection, it is only natural that private investors and the States where they seek their fortune

58 Commercial risks are the types of risks inherent in any business venture, such as the risk of low consumer demand, higher than expected manufacturing costs, insolvency of purchasers, and cost overruns in production. Commercial risk is thus the business risk that remains even in the most stable political climate. While commercial risks affect any business, whether operating in its home country or abroad, these risks are often greater in a developing country due to lack of a developed infrastructure, primitive telecommunications systems, and an unskilled, uneducated, and relatively impoverished consumer base. As a practical matter, however, it may sometimes be difficult to distinguish between political and commercial risks. For example, the failure of a government-operated utility to deliver services to an investor's facility may be either commercial or political in nature. On commercial risk and commercial risk management, *see* Tim Boyce, Commercial Risk Management (2003).

59 Raymond Rody, International Business Negotiations: Strategies, Tactics and Practices (2002); Peter Buckley, The Strategy and Organization of International Business (1993).

60 Yen Yee Chong, Investment Risk Management (2004).

61 *See* The Economist Intelligence Unit, Country Reports, available at www.eiu.com; *see also* The Economist Intelligence Unit, Country Risk Service, available at www.eiu.com.

62 *See* Susan Strange, The Retreat of the State: The Diffusion of Power in the World Economy (1996); Susan Strange, Mad Money, When Markets Outgrow Governments (1998).

63 *See*, *e.g.*, Lothien & Pistor, *supra* note 56.

should find common ground, even if by way of occasional collisions. The increased flow of investment means new opportunities for those businesses willing and able to assess and address political risk, and at the same time offers the surest path to sustainable growth for countries too small or impecunious to rely on domestic capital. Furthermore, the tables have begun to turn on the traditional capital exporting States: formerly less-developed countries now invest heavily abroad, including projects in Western Europe and North America. Some of the world's industrialized powers are therefore softening their previously uncompromising pro-investor approach in anticipation of conflicts where roles will be reversed and they will be compelled to defend their own regulatory actions.[64]

Therefore, most foreign investment participants today understand the delicate balance between international law constraints and the legitimate interests of development and sovereignty.[65] The increased control over political risk that private investors now enjoy, in part as a result of the investment treaties that states themselves conclude, is mutually beneficial. States have insulated themselves from external political pressure and lowered the cost of foreign investment by demonstrating their resolve to provide a predictable investment climate. At the same time, private investors must properly appreciate the extent of their new rights if they are to lower political risk and the accompanying financial burden.

In this guide, we hope to provide the non-specialist lawyer, business person, or government official with the tools necessary to understand the international law of investment and its relationship to political risk. If we have succeeded in our task, the reader will be better equipped to better choose between investment opportunities, negotiate, safeguard investments, and react efficiently to the consequences of political risk.

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64 *See* Noah Rubins, *Loewen v. United States: The Burial of an Investor-State Claim*, 21 ARB. INT'L 1, 32-36 (2005); Guillermo Aguilar Alvarez & William W. Park, *The New Face of Investment Arbitration: NAFTA Chapter 11*, MEALEY'S INT'L ARB. REP., January 2004 at 39, 41.

65 The maze of bilateral and multilateral investment treaties bears witness to this development. *See e.g.* K.V.S.K. NATHAN, THE ICSID CONVENTION: THE LAW OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (2000).

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