

BOOKS

International Investment, Political Risk and Dispute Resolution: A Practitioner's Guide

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It is now the North American home of Nissan, has been the home of many internationally famous musicians (including the King himself) and gave the world its seemingly favourite environmentalist, Al Gore, but otherwise Tennessee is maybe not somewhere that commonly comes up when people talk about international investments. However, international investors around the world appear to owe the Volunteer State a debt of thanks. This is because one of her sons, Cordell Hull, America's longest-serving Secretary of State and winner of the Nobel Peace Prize (he was a key drafter of the UN Charter), appears to have been the first to have precisely articulated 'the principle of full compensation' for an expropriation. In 1938, Secretary Hull wrote to Mexico 'regarding the nationalisation of certain agricultural and oil-related properties' and demanded that expropriation must be accompanied by 'prompt, adequate and effective' compensation. Messrs Rubin and Kinsella's broad, and extremely practical, book is full of these sorts of interesting factual nuggets in addition to being an excellent first resource for anyone interested in political risk.

The aim of their book is to tackle, from an international legal perspective (as opposed to, say, purely domestic legal, economic or political considerations), the issue of international investment and political risk, ie 'the risk that a host government will interfere with the property rights of a foreign investor'. As is apparent from the subtitle (*A Practitioner's Guide*), the authors have approached their task with a practical viewpoint and the result is a book that will appeal to quite a wide audience.

It is divided into three parts. The first part focuses on what political risk is and the steps an investor may take to mitigate against it. Types of political risk – such as expropriation, regulatory interference, currency risk, civil disturbance, breach of state contracts, corruption and trade restrictions – are all clearly and succinctly explained as well as the common business structures used to reduce political risk. Anyone exposed to the medley of acronyms

used by people considering a structure for an infrastructure project in a developing country will find the authors' explanations helpful. The first part then concludes with a chapter on political risk insurance. The focus here is on state-sponsored insurance schemes such as the United States' Overseas Private Investment Corporation (OPIC) and the types of political risk such insurers will cover.

Part 2 concentrates on the international law framework of investment protection and political risk. A number of international law principles are explained such as whether a state can be bound by a promise it makes to a national of another state and state responsibility (ie the consequences of a violation of international law by a state). The consequences are explained in a section on the remedies available to an injured investor and how, practically, international law developed in the twentieth century enabling private party investors to pursue remedies against states without the involvement of their home state. As states have increasingly sought private investment, and also become more and more involved in commercial activities, the shield of sovereign immunity has had to develop alongside. The authors discuss this development with a focus on the United States' Foreign Sovereign Immunities Act 1976 and, to a lesser extent, the State Immunity Act 1978 in the United Kingdom.

Within part 2 there is also some attempt to give the reader a historical perspective on political risk. Prior to the twentieth century, expropriation was relatively rare and when it happened, it was commonly held that states had an obligation to pay full compensation. Indeed, the authors point to a study of 60 international tribunals set up between 1840 and 1940 dealing with injuries to aliens in which not a single one of the tribunals held that compensation should be anything less than the full value of the property taken. It is out of this tradition that Secretary Hull articulated the principle of full compensation mentioned above.

It is the story of the twentieth century that as radical changes in political and economic structures occurred – such as in, among others, the Soviet Union in 1917, Egypt in 1956, Cuba in 1959, Ethiopia in 1974 and Iran in 1979 – expropriations incrementally increased as well as states' tendency to try to avoid full compensation on the basis that they had an inalienable right to economic self-determination. The authors aptly explain these developments and their impact on international law, including the role of the United Nations, arbitral decisions in a number of early cases after the Second World War and how treaties have laid down a number of principles previously only found in customary international law. The importance of and protections provided by bilateral investment treaties, the North American Free Trade Agreement, the Energy Charter Treaty and other regional investment treaties are all also discussed.

Part 3 of this book is on dispute resolution itself and political risk. This section will appeal to the reader seeking an introduction to arbitration involving states or a practical first reference point on broad topics such as contractual arbitration with a state and the ICSID Convention. There is a useful discussion on the jurisdictional requirements under most investment treaties and the types of 'investments' protected under those treaties. Further areas of interest in this section include a quick canter through arbitration procedure and a chapter on the use of alternative dispute resolution procedures. By the final chapter, the authors have, in effect, come full circle with an examination of how states today can intervene to help obtain redress against wrongs committed against their own citizens by another state. In other words, they conclude with a modern explanation of a traditional role states have always played. Today, in addition to diplomacy (whether proper negotiating or with gun boats), states may bring claims before the International Court of Justice or the Permanent Court of Arbitration at the Hague or through mechanisms in bilateral investment treaties.

At ten chapters, this book is a manageable length with useful appendices but does not weigh down the reader with too much detail. This book should be a must read for any in-house counsel at a company investing in developing countries as well as for government officials in such countries. Students and practitioners in the field will also find it a useful first resource. If you fall into any of these categories, you should buy it.

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