

# THE LAW BOOK REVIEW

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S O L I C I T O R S

## PROTECTING FOREIGN INVESTMENT UNDER INTERNATIONAL LAW - LEGAL ASPECTS OF POLITICAL RISK

Paul E Comeaux and N. Stephan Kinsella

Oceana Publications Inc., New York, ISBN 0-379-21371-0, xxix + pp. 448, Hardbound,  
Price Not Mentioned

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This rating and *Protecting Foreign Investment Under International Law* could not be more timely or a mere coincidence. The truth is that despite accepting the merits of foreign investment and privatization, several nations do not respect individual private and property rights and indulge in expropriation, confiscation and nationalization, fostering policies which are irrational, ad-hoc, uncertain, burdensome and against the norms of wealth creation, entrepreneurship and prosperity.

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This title seeks to discuss the legal aspects of Political Risk on the international plane - and certainly makes interesting reading. Of particular significance is the bringing together in one volume through a solid structure of the most important issues that a Foreign Investor should expect its commercial and legal departments to fully consider and advise on, before proceeding to invest in a host State: its role in promoting the rule of Law; its past record of interfering in foreigners' property rights; its international responsibility on such interference; whether there is any investment protection treaty between the host state and the investor's home State; political risk insurance; sovereign immunity in international litigation; arbitration to resolve disputes; the role of and assistance from international organizations to cure the wrong and the like.

The title is divided into 8 Chapters and 16 Appendices. The Introduction lays the foundation to the past of "direct and indirect interference by government action with private property" and why in times of a move to mature economies, there is still need to have a solid understanding of the international law related to Political Risk.

Chapter One commences by elaborating "property" and what can tantamount to "interference" with property rights. The term Political Risk includes expropriation (including nationalization/confiscation), de facto expropriation (including creeping and indirect expropriation), currency risk, risk of political violence and risk of breach of contract by a host State. Each is dissected and compared admirably, supported by up-to-date case law and international developments.

Factors to be considered in measuring Political Risk are also discussed in brief.

International Law Related to Political Risk is the subject of Chapter Two. It develops and illuminates settled principles, through an ideal marriage of theory and practical developments: (1) All States are sovereign in their own territory and no State could be expected to submit to the laws of another; (2) A State can enter into a future commitment; by doing so the State *is not alienating, but exercising sovereignty*; (3) International law of expropriation does not apply to property taken from nationals of the expropriating State; (4) For the host State to be responsible for a contract between itself and a national of another State, the contract must be "internationalized" (primarily achieved through the inclusion of international choice of law and stabilization clauses); (5) While the State is "bound" under international law for its promises made to investors under an internationalized contract, this does not mean that the State cannot breach the contract - it only means that the primary consequence of the breach is that the State is obligated to pay prompt, adequate and effective compensation to the investor; (6) If the host State causes injury to the national of another State, it incurs liability to that home State of the injured investor; the remedy to the home State would be in the form of reparation in kind, payment of damages, suspension of diplomatic relations, imposition of economic sanctions, freezing assets of the offending State, et al; non-sovereigns do however have direct remedies for economic injury under international law; (7) The Exhaustion of Local Remedies Rule; (8) the very important rules of "linkage" or connection between the claimant State and the injured investor; (9) the Doctrine of Restrictive Sovereign Immunity, in general as also with specific reference to the USA and the UK.

Chapter Three deals with the International Law of Expropriation. Starting on a historical note, it elaborates the patent conflict between the Industrialized Nations (whose assets are apparently the target - and which propagate the "Hull Formula") on the one hand and the Developing and New Nations (which often disregard individual property rights) on the other and the resultant compromise on account of subsequent developments, particularly international arbitration awards, treaties and negotiated settlements. The current view is that Expropriation is illegal if it is not for a public purpose, or is discriminatory or is unaccompanied by just compensation; otherwise it is legal. In any case, compensation shall be awarded under International law. A very important contribution by the authors is lucid explanation of how full compensation is computed - the methods of determining value, the inclusion of damages suffered and lost profits, and the calculation with respect to tangible property, a going concern (Discounted Cash Flow/Market value) and a concern which is not so. The unfortunate application by international tribunals, without logical justification, of "equity" and "equitable considerations" in granting ad-hoc compensation, is also studied with vigour.

Bilateral and Multilateral Investment Protection Treaties are dissected in Chapter Four. Their advantages, on account of *pacta sunt servanda*, are elaborated. Treaties are direct, specific and unambiguous, and do away with the interpretative confusion under customary international law; they offer enlarged remedies; they represent obligations by a State to another State and its nationals; they make States reluctant to breach obligations on flimsy grounds. The entire concept is studied through clauses in actual BITs, mirroring the strides that protection of investor rights has made worldwide.

Chapter Five is out and out, practical. The reader is transfixed from legalities to business acumen, stressing action and negotiations after appreciating the strengths and limitations of international law with respect to Political Risk. Suggestions on business structures and provisions in investor-State contracts to reduce Political Risk are made. Of special mention are [a] reduce the number and value of assets located in the host State; [b] diversify in different sectors, so that expropriation in one sector does not affect the Investor's overall investment; [c] ensure that the local population is fully integrated with the project - by employment, sharing of profits, taxation, etc.; [d]

maintain duplicate records of the entire activity outside the host State (essential in framing and justifying valuation and claims); [e] finance the project with participation from International agencies like IFC, EBRD etc.; [f] steps when indications of likely expropriation arise. Important clauses that should form part of the State-investor contract are explained. These include Arbitration before a Neutral Forum, Choice of Law, Stabilization, Damages, No Requirement to Exhaust Local Remedies, Waiver of Sovereign Immunity, Conversion of Currency, Force Majeure.

Insurance against Political Risk is elaborated in Chapter Six - through the eyes of OPIC (Overseas Private Investment Corporation, of the US), MIGA (Multilateral Investment Guaranty Agency (of the World Bank) and some national insurance agencies. Primary focus is on the risks that these institutions cover.

If such right is cemented either in the BIT or the State-investor contract, the aggrieved Foreign Investor can institute arbitration proceedings against the expropriating State on an expropriation. The importance of the contents of Arbitration agreements/clauses, their validity, effect and drafting, and the place of arbitration are highlighted in the penultimate Chapter. Arbitration with the UNCITRAL Rules or ICSID is studied. Various administrative and substantive issues are detailed.

Chapter Eight sets out the actions that the Investor's home State may take following expropriation or other interference with the Investor's property by the host State - diplomacy and settlement of claims, Economic Sanctions (freezing or vesting of the host State's Assets in the home State, trade embargoes, increased controls), Claims before International Tribunals (awarding restitution or specific performance), invoking the Invalidation of Title Rule, the illegality of use of Force. Some very important precepts are discussed.

The Appendices contain a wealth of information on MIGA, OPIC, Model BITs, ICSID, Sample State-Investor Contract, the New York Convention, the US Foreign Sovereign Immunities Act. Of immense interest is "Economic Calculation under Socialism".

A detailed index and a very exhaustive List of Authorities are other hallmarks of the title. Though based on US turf, the title has international appeal and relevance. The big flaw lies in proofreading the work - spelling errors, incomplete sentences, and repetitive footnotes - it is abominable, substantially hindering the ease in reading and grasping the subject.

Nonetheless, in our view, it is essential to possess the title. It succeeds in what it seeks to achieve - bringing together in an integrated whole, with an eye on practice, the legal aspects of Political Risk under International Law. It should certainly appeal to practitioners, MNCs and their in-house counsel, students studying international law and States contemplating expropriation (this title shall surely deter them from committing the wrong!).

*The LBR 1/98*

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Mr. Graham Vinter

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