

Protecting Foreign Investment Under International Law: Legal aspects of Political Risk

Paul E. Comeaux and N. Stephan Kinsella

(Dobbs Ferry, N.Y., Oceana Publications, 1997), 448 pages

This book addresses the question of government interference with the property rights of a foreign investor in the context of contemporary international law. It examines in a systematic manner such matters as international norms governing expropriation, responsibility of a foreign government to an investor, treaties protecting foreign investment, political risk insurance, immunity of States from suits in other States and international arbitration between States and investors. The authors integrate a wealth of material related to international law of expropriation from the perspective of assisting an investor in avoiding confiscation of property located in a host country. Many of the topics covered in this book have been addressed in various law books and journals, but not integrated under the theme of political risk. In this respect, the book is an up-to-date reference attempting to answer such questions as the type of protection against political risk that currently exists under international law; what an investor can do to measure political risk in a developing country prior to an investment; what investors can do to protect themselves against political risk once an investment has taken place; and what an investor can do after an event has materialized and has caused damage.

Political risk is broadly defined as the risk that the laws of a country will change to investors' detriment after they have invested capital in the country, thus reducing the value of their investment. It does not cover the related and important commercial risk that is involved in foreign direct investment (FDI). Commercial risk is defined as the risk 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.

According to the authors, the political risk of expropriation appears to have peaked in 1975, with 83 cases of expropriations in 28 different countries, but declined by 50 per cent the following year. Between 1980 and 1985, the rate of expropriation averaged three per year. Since then, according to the authors, many

developing countries have enacted liberal investment codes and have helped to create a network of bilateral and multilateral investment treaties, all of which give some guarantee to an investor contemplating a direct investment in a developing country.

In fact, since the mid-1980s, an overwhelming majority of developing countries have introduced measures to liberalize FDI frameworks, with positive effects on inward investment (UNCTAD, 1998, p. xxvi). These countries have enacted investment laws allowing for the settlement of disputes in a neutral forum using the facilities and procedural rules of arbitral institutions, such as the International Chamber of Commerce and the International Centre for Settlement of Investment Disputes. There have been a number of incentives offered by developing countries to attract FDI, including tax breaks, inexpensive financing and land at reduced prices (UNCTAD, 2000a, p. 3). Changes in government policies on FDI during the late 1990s confirm and strengthen the trend towards the liberalization, protection and promotion of FDI. Most of the restrictions on the ownership of land, real estate, employment of foreigners and foreign exchange controls have been reduced or has been removed totally. In many countries, legal guarantees on the protection of intellectual property rights and against expropriation have been strengthened (UNCTAD, 2000b, p. 7).

However, despite this change of attitudes towards FDI and the concomitant changes in the behaviour of investors, the authors feel that the current trends can change. The host country that welcomes FDI today can turn inward tomorrow, shunning liberal policies and nationalizing foreign interests. According to them, political risk should be a factor considered by any investor contemplating investing in a developing country. It is worth noting that FDI outflows reached a record of \$800 billion in 1999, an increase of 16 per cent over 1998. In the same period, developing countries received \$208 billion in FDI, which represents 24 per cent of global FDI inflows (UNCTAD, 2000b, p. xvi).

The book is divided into three parts. The first part of this book focuses on passive methods of minimizing risk, i.e. an awareness of the protections available to an investor under both customary international law and through treaties. The other two parts describe actions (contracts, insurance and arbitration) that can be taken by an investor prior to investing and once the investment is undertaken.

Part I of the book, the largest one, discusses the types of political risk affecting property rights of investors. It addresses the state of international law as it relates to political risk and as developed by case law, commentators, state practice and international organizations, including multilateral and bilateral investment treaties containing promises guaranteeing certain standards of treatment to both investors and investments.

Property rights, as used in the book, refer, in civil law terminology, to ownership of property, which comprises three elements or ingredients: *usus* (the right to use), *fructus* (the right to the fruits of the property, such as interest or rentals) and *abusus* (the right to dispose of, or sell, the property). Similarly the common law regards property rights as a "bundle" of rights, the major components of which are the rights to control, possess, use, exclude, profit and dispose of property. An example is provided as follows: for an investor who owns a manufacturing plant, property rights include: ownership of land, the factory on the land, and the inventory and equipment located in the factory; the right to use the factory to manufacture the goods that the investor deems profitable; the right to manage the business as the investor deems proper; the right to sell goods and capital assets; and the right to receive usable currency and to export the currency. Five types of political risk affecting these rights have been identified: expropriation (including confiscation and nationalization), *de facto* expropriation (including creeping and indirect expropriation), currency risk, the risk of political violence and the risk of breach of contract by the host State. However, the reader is warned that, while these distinctions are useful in understanding the nature of political risk and the various ways it can manifest itself, the lines between these types of political risk are often blurred in actual situations and usually involve elements from more than one of these five categories.

Whether or not actions of a host country result in expropriation is a matter of degree rather than of kind. Many regulations and taxes imposed by a State are lawful exercises of the power of government, but may nevertheless affect FDI. International law does not consider such measures to constitute expropriation because of the "legitimate" purpose behind such laws. For example, while an imposition of a requirement that 10 per cent of the workers be nationals of the host State would probably not be seen under international law as an expropriation, a requirement that 51 per cent of management be appointed by the host State may be an expropriation. Whether or not actions of a State are expropriatory depends upon the impact of such actions

on an investor's right to use the property. The form of expropriation, whether direct through violent seizure of assets or indirect through appointment of a manager to run the investor's partner in a joint venture, is not relevant. The Iran-United States Claims Tribunal largely ignored the question of the intent of the Government of the Islamic Republic of Iran when determining whether or not the appointment of temporary managers of United States investments should be considered expropriations.

Although the point at which regulatory actions by a host State become expropriatory under international law may not always be clear, an investor can attempt to avoid certain potential regulatory actions of a State in an agreement with the State through the use of "stabilization clauses". According to the authors, stabilization clauses mean that the law of a host State in effect on the date of the contract is the law that will govern the relationship between the parties, regardless of future changes to that law. Investors may also wish to negotiate more specific assurances from the host State regarding particular regulations that they do not want imposed or increased. If an investor is able to attain such assurances, then regulations imposed later in violation of such provisions would be, if not expropriatory, at least a violation of an "internationalized agreement", which may give rise to a claim for compensation, according to the authors.

While assumption of control over property by a government does not justify automatically and immediately a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of fundamental rights of ownership, and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.

An interesting discussion is related to the legal nature of this type of contract between a national of one State and another sovereign State. In this context, many issues arise concerning international law: Can a sovereign State bind itself by contract to an individual or corporation? May the State later breach that contract if necessary for the "public purpose"? Does the investor then have remedies that can be pursued against the State, or should the investor's home State pursue remedies? If the investor is a corporation, which State is the "home State" under international law?

Under international law, for a host State to take certain action, such as the expropriation of an investor's property without paying compensation, especially if the State has reinforced its "international obligations" in this regard by entering into a binding treaty or contract, the State will at least be reluctant to perform such an unlawful act. Under international law, a State may bind itself to a contract with a national of another State, and this does not infringe upon the sovereignty of the State. A State may engage its "responsibility" for acts that are considered illegal under international law.

After highlighting the main features of government intervention, the authors discuss the question that arises prior to investing: how an investor can measure all risks associated with an investment. A complete analysis of political risk requires the consideration of a number of factors. Of fundamental importance to investors is any treaty between the host State and the investor's home State regarding the protection of investment. These treaties, discussed in detail, are generally referred to as bilateral investment treaties. They usually cover, among other matters, the circumstances under which each State will allow investors from the other State to establish enterprises; whether there will be restrictions on the export of currency; under what circumstances one State may expropriate property of investors from the other State, and how compensation must be paid; and the manner and method of settlement of investment disputes between a State and investors from the other State.

The existence of multilateral and bilateral investment treaties is strong evidence that a State intended (at least at the time of the execution of the treaty) to treat FDI fairly. Furthermore, a State is less likely to interfere with an investor's property rights if such interference would also violate the terms of a treaty, in addition to possibly violating other principles of customary international law. If such a treaty is violated, the investor's home State would be permitted to bring an action against the offending State in an international forum, such as the International Court of Justice.

To facilitate a discussion of international law concepts in this respect, the authors explain in some detail the role of international law. International law has been defined as the body of rules governing the mutual relations of States, and it is founded on certain underlying principles. The first of these principles is that all States are sovereign in their own territory and that "*pari parim non habet imperium*", which means that no State could be expected to submit to the laws of another. This finds expression,

for example, in the claims of certain developing States that they have the absolute right to expropriate property of foreign investors located in their territory, and are not bound by any law external to their own with regard to the compensation to be paid to the investor.

The concept of absolute sovereignty is balanced by a set of rules and norms that are derived from the consent of sovereign States and that are said to bind all States. The sources of these rules are international conventions, such as treaties between States; international custom, as evidence of a general practice accepted as law; general principles of law; and, as subsidiary sources, judicial decisions and teachings of the most highly qualified publicists. One such rule is that a State is obligated to pay compensation to a foreign investor following expropriation pursuant to international standards. The concept of sovereignty is recognized, however, in that a State is not prohibited from expropriating property in its territory, so long as certain rules of international law, discussed earlier, are followed.

Another interesting point examined is conformity of the internationalization of a contract to international law, as referred above. The authors appear to favour the conformity of these contracts to international law. Mention is also made of arguments, which seem to be more prevalent, that these contracts are not covered by international law. Even if it is assumed that a State is "bound" under international law for its promises to investors made in an internationalized contract, it does not mean that the State cannot breach the contract — it merely means that the primary consequence of a breach is that the State is obligated to pay compensation in the amount of the value of the contract to the investor.

Reference is also made to European courts that began to develop the doctrine of "restrictive immunity", by which a State would not be immune to a suit based primarily on its commercial activities. Under this doctrine, a distinction is made between *acta jure imperii*, which refers to acts of a public authority for which there would still be immunity, and *acta jure gestionis*, which refers to commercial acts for which States would not be granted immunity. This is reflected in the European Convention on State Immunity, which, although it has not gained widespread acceptance, represents the views of many European States.

Many commentators draw the following conclusion concerning the international law of expropriation: a State may always expropriate property of investors within its borders;

however, for such an expropriation to be "legal", it must not be discriminatory against the investor, it must be for a public purpose and it must be accompanied by full compensation, which must be prompt, adequate and effective. Thus, an expropriation that is non-discriminatory and for a public purpose is legal, but the requirement of compensation rule makes this legality conditional. An expropriation not meeting these requirements is illegal. Expropriations that are discriminatory, or not for a public purpose, are considered illegal whether or not compensation is paid. This view of the law of expropriation has received considerable support from State practice and the jurisprudence of international tribunals.

While it is generally agreed under customary international law that an expropriating State must pay full compensation following a taking, there is no similar agreement regarding the method of valuing property to arrive at full compensation. Professor Amerasinghe has been quoted to say that "Full compensation has been arrived at by a variety of methods, depending on a variety of factors, including the nature of the property or interests taken and other circumstances relating to the property taken. No preference has been shown for a particular method, such as the discounted cash flow method It would seem that the assessment of full compensation is at the present time filled with variables and is certainly not a very scientific process" (p. 97).

Treaty provisions regarding the protection of investment address existing international laws protecting FDI from political risk. The proliferation of bilateral investment treaties and, to a lesser extent, multilateral investment treaties that generally uphold or bolster customary rules of international law protecting investment, is evidence of this trend. These treaties set forth the rules that affect investment by their nationals in each other's territory, sometimes merely repeating or clarifying rules of customary international law and sometimes adding to such rules.

Part II of the book describes actions that can be taken by an investor to reduce exposure to political risk prior to investing in a developing country. It analyses the various investment projects often undertaken in developing States and then it discusses both structures that can be used to reduce exposure to political risk and contract terms in investor-State contracts that can reduce further such risk. If an investor is able to negotiate directly with a host State to receive "internationalized" contractual assurances containing, for example, a "choice of law" clause,

choosing international law as the governing law and an international arbitration clause that provides for arbitration of disputes before neutral tribunals, places the investor in a good position to protect the investment, if loss due to government intervention ever occurs, or becomes a serious threat. There is also the possibility of taking up risk insurance. Such insurance typically provides coverage against non-commercial risks, such as currency inconvertibility, expropriation and war, and is available from a number of sources, including nationally sponsored insurance agencies.

Once an investor has decided to invest in a country where political risk may be faced, the investor should begin looking at methods to minimize that risk. This part of the book focuses on affirmative steps that can be taken by the investor to reduce exposure to political risk. It discusses investment insurance and provisions in investor-State contracts that can reduce political risk.

The purchase of political risk insurance is one of the most direct and simplest steps that an investor can take to reduce exposure to political risk. Political risk insurance is similar in many respects to ordinary business risk insurance. It typically provides coverage against political risks, such as currency inconvertibility, expropriation and political violence. Political risk insurance is available from a number of sources, including State-sponsored insurance agencies, such as the United States Overseas Private Investment Corporation (OPIC), private insurers such as Lloyds of London; and a multilateral agency, the Multilateral Investment Guaranty Agency (MIGA).

Almost all developed States sponsor political risk insurance agencies, most of which are members of the International Union of Credit and Investment Insurers, known as the Berne Union. A list of political risk insurers that are members of the Berne Union is provided in Appendix X of the book. The largest State-sponsored insurance agencies are OPIC, Treuarbeit (Germany) and the Export Insurance Division, Ministry of International Trade and Industry (Japan). Together, they represent over 80 per cent of all outstanding national insurance coverage.

Part III of the book describes what an investor can do when threatened with, or after suffering, loss due to government intervention. It mainly addresses how and when to resort to international arbitration. Several forms of arbitration, such as *ad hoc* arbitration using rules promulgated by the United Nations Commission on International Trade Law (UNCITRAL) and

arbitration conducted by the World Bank's International Centre for Settlement of Investment Disputes (ICSID), are discussed in detail.

Because international arbitration can be time consuming and costly, even when it is more efficient than litigation before courts, a decision to arbitrate should only be made after careful consideration of all other options, such as negotiation, mediation, or conciliation with a host country, diplomatic pressure, or other actions by an investor's home country. Two forms of arbitration are described that are of particular interest to an investor transacting business with a State: *ad hoc* arbitration under the rules of the United Nations Commission on International Trade Law and arbitration pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

The authors recognize that international law does not provide a complete solution for investors seeking to reduce the political risks of investing in a developing country. The investment climate, including the regulatory framework of the host country, as well as the investment organizational structure, also play important roles. Indeed, the core enabling framework for FDI consists of rules and regulations governing not only entry, but also operations of foreign investors, standards of treatment of foreign affiliates and the functioning of markets. Thus, the political risk is one of the factors that an investor considers when investing in a developing country. What is the most important is to separate political risk from economic development problems, and to ensure that the process of development is understood and addressed adequately in international law dealing with investment issues.¹ It is right to say that a solid understanding of the international law related to political risk by investors will contribute to reducing such risks and will likely play a role in avoiding misunderstandings between investors and host States. This book is a useful contribution in this regard. ■

Assad Omer

United Nations Conference on Trade and Development
Geneva
Switzerland

¹ For an in-depth discussion on FDI and development issues, see UNCTAD, 1999, part II.

References

United Nations Conference on Trade and Development (UNCTAD) (1998). *World Investment Report 1998: Trends and Determinants* (New York and Geneva: United Nations), United Nations publication, Sales No E.98.II.D.5.

_____ (1999). *World Investment Report 1999: Foreign Direct Investment and Challenge of Development* (New York and Geneva: United Nations), United Nations publication, Sales No. E.99.II.D.3.

_____ (2000a). *Tax Incentives and Foreign Direct Investment: A Global Survey* (New York and Geneva: United Nations), United Nations publication, Sales No. E.01.II.D.5.

_____ (2000b). *World Investment Report 2000: Cross-border Mergers and Acquisitions and Development* (New York and Geneva: United Nations), United Nations publication, Sales No E.00.II.D.20.