

**LAW AND PRACTICE OF INVESTMENT TREATIES.
STANDARDS OF TREATMENT**

A. Newcombe and L. Paradell.
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The last two decades have witnessed the exponential growth of the legal instruments on the protection of foreign investment, prominently international agreements (IIA's) and contracts, as well as the disputes between foreign investors and host States. These developments have been accompanied by a proliferation of textbooks, monographs and articles.

For several reasons *Law and Practice of Investment Treaties. Standards of Treatment* by Newcombe and Paradell is an important contribution to the understanding of the treatment of foreign investment.

As promised at the outset, the authors not only provide a critical analysis of IIA's but also examine their interaction with other multilateral economic treaties. While bearing in mind the primary role played by IIA's, they recognise the contribution to the protection of foreign investment made by rules contained in other agreements, including prominently the General Agreement on Trade in Services (GATS), the Trade-Related Investment Measures agreement (TRIMs), and the International Monetary Fund Articles of Agreement (IMF Articles).

The picture is then completed by discussion of the interaction between IIA's on the one hand and, on the other hand, national legislation or State contracts – and in particular the rules on observance of undertakings to which the authors dedicate a substantial chapter.

The book benefits from the experience of the authors - who are both scholars and practitioners - which allows them to discuss theoretical questions with a problem-solving approach. It also offers a balanced assessment of the main legal questions related to IIA's, constantly taking into account the fact that for the time being IIA's impose legal obligations upon the host State but not on the foreign investor.

The authors should further be commended for treating the legal protection of foreign investment as a continuous process of refining and clarifying rules and principles through legal instruments, national and international decisions,

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official documents and literature.

The opening chapter of the book contains a concise and instructive reconstruction of the historical evolution of IIA's which are put in the broader context of the variety of instruments, rules and institutes concurring in the legal protection of foreign investment. It culminates with an overview of the main critiques of IIA's and the settlement of related disputes. Unfortunately, the authors confine themselves to indicate the main critiques of IIA's and provide the essential bibliographical references. Although space restraint and the complexity of the issues underlying these critiques may justify such a decision, the entire chapter would have greatly benefited from the personal views of the authors on issues such as whether public regulatory disputes should be settled by investment tribunals, or whether IIA's should impose obligations upon the foreign investor, regulate corporate responsibility or include provisions on the protection of the environment, human rights or labour standards.

Chapter 2 contains a thorough treatment of the with the substantive law applicable in IIA disputes which are to a large extent modeled after international commercial arbitration, in spite of the fact that they oppose a sovereign State to a foreign investor. While recognising that IIA's remain the primary yet insufficient applicable substantive law, they stress and delimit the important role played by national law – especially in matters such as nationality of the investor, property and contractual rights.

The meticulous treatment highlights, on the one hand, the inappropriateness of a mechanic or rigid approach to the issues of applicable substantive law, and, on the other hand, the flexibility that arbitrators need in settling investment disputes. This is often reflected, for instance, in the decisions related to whether and if so, to what extent certain matters belong to the jurisdiction or the merits stage. The authors also seem to accept as unavoidable – although not necessarily negative – the delivery of inconsistent decisions.

The section of the chapter dedicated to the interpretation of IIA's is less thorough than the reader might have expected. It is undisputed that IIA's must be interpreted as any other treaties in accordance with the relevant articles of the Vienna Convention on the Law of Treaties (VCLT) which reflect customary international law. It must also be noted that investment tribunals have definitely adopted a balanced approach which favours neither the host State nor the investor. Nonetheless, the interpretation of IIA's has caused and continues to cause controversy in the settlement of investment disputes. Given the importance of the topic, the authors should have undertaken a systematic and detailed analysis of Articles 31-33 VCLT. It may also be argued that the authors overestimate the importance of systemic interpretation in accordance with Article 31 (3) (c) VCLT and underestimate subsequent practice of the parties for the purpose of Article 31 (3) (b).

After discussing the admission and establishment of foreign investment in Chapter 3, the authors deal with the substantive protection a foreign investor may expect in the host State, beginning with the contingent standards of national treatment and Most-Favoured-Nation treatment (MFN).

In Chapter 4, the application of the national treatment standard by various investment tribunals is carefully examined (most importantly in *Occidental v. Ecuador* and *Methanex v. United States*). They convincingly argue that the General Agreement on Tariffs and Trade (GATT) and GATS jurisprudence may be useful to establish whether there is a competitive relationship between the concerned investors and the investments. They nonetheless warn against the uncritical reliance on GATT and GATS jurisprudence due to the peculiar and normally long-term legal relationship between the host State and the foreign investor. This is particularly true in respect of the definition of “like circumstances” (or “like situations”) and the assessment of the exercise of regulatory powers.

In Chapter 5 the authors review the inconsistent decisions rendered by investment tribunal on MFN and conclude that uncertainty may result from insufficiently precise MFN clauses, in particular concerning their application to dispute settlement clauses. They also point out such uncertainty can be reduced if not eliminated through the negotiation or re-negotiation of MFN clauses precisely defining their scope of application (see, for example, the Protocol to the 2007 bilateral investment treaty (BIT) between Switzerland – Colombia).

With Chapter 6 the authors move to the non-contingent standards for the protection of foreign investment under customary and treaty law. They examine the relationship between the minimum standard of treatment existing in customary international law and the fair and equitable standard which is found in virtually all IIA's. Within NAFTA, the question has been definitively settled through the Free Trade Commission's interpretation of Article 1105 (1), in the sense of pegging this provision to customary international law. This interpretation has been endorsed by the member States, followed by tribunals, and transposed into the new United States and Canada model BIT, as well as in a few BITs and Free Trade Agreements (FTAs).

Outside NAFTA, however, whether minimum standard of treatment under customary international law and treatment required under a treaty coincide depends on the specific wording of the relevant treaty provisions. The authors rightly stress the evolving character of the minimum standard of treatment and the influence of treaty practice on it. Equally important, they point out that minimum standard of treatment and treaty protection consist of a series of interconnecting and largely overlapping elements including most prominently denial of justice, due process, due diligence, arbitrariness and discrimination.

Chapter 7 is dedicated to expropriation. The focus is on the most common form of expropriation, namely indirect (or creeping, or *de facto*) expropriation. Building on jurisprudence and treaty provisions, the authors identify a number of legally significant factors which determine whether the measures adopted by the host State are to be treated as an exercise of regulatory powers or amount to expropriation. Drawing the line between the two is crucial as in the latter case the host State must compensate the investor. The chapter is completed with a careful examination of the complex issue of compensation which highlights the considerable discretion enjoyed by investment tribunals.

In the following Chapter, the authors deal with some of the most common measures intended to promote an investor-friendly environment, namely transfer rights, prohibition on performance requirements and transparency (the latter are also discussed in relation to fair and equitable treatment and expropriation). In honoring the initial promise, the analysis goes beyond IIA's to consider other treaties such as IMF Articles, GATS and TRIMs.

When dealing with the observance of undertakings (or so-called umbrella clauses) in Chapter 9, the authors carefully address the most controversial and intriguing question, namely whether generally-drafted umbrella clauses cover both governmental breaches and commercial breaches of contract. After identifying substantial discrepancies in case-law, the authors rely on the interpretative principle of effectiveness to express their preference for the inclusion of both categories. Although plausible, such a conclusion does not seem compelling on the basis of this argument alone. In any case, as in the case of MFN treatment clauses, clearly and precisely drafted provisions would provide the simplest and most effective solution to the problem.

A Chapter on exceptions and defenses concludes the book. The added value of this Chapter lies in the broad and systematic approach taken by the authors in pointing out the interaction between investment treaties, on the one hand, and GATT and GATS, on the other hand. This approach is even more appealing after the award in *Continental v. Argentina* which was delivered too late for inclusion in the book. In this decision the tribunal heavily relied on GATT jurisprudence in order to apply the clause contained in a BIT and concerning the adoption of measures on grounds of necessity.

In sum, the book represents an important contribution to the study of foreign investment law. The meticulous and critical analysis of a wealth of decisions, legal instruments and literature provides a reliable guide to any academic or practitioner interested in this area of law. All readers will further enjoy the systematic approach and clear style of the authors as well as the balance they have managed to strike between theoretical and practical questions.