Part IV

Making and Applying Investment and Trade Law
Chapter 32

Investments, Fair and Equitable Treatment, and the Principle of “Respect for the Integrity of the Law of the Host State”: Toward a Jurisprudence of “Modesty” in Investment Treaty Arbitration

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But even in those countries which every foreigner may freely enter, the sovereign is supposed to allow him access only upon this tacit condition, that he be subject to the laws ... The foreigner cannot pretend to enjoy the liberty of living in the country without respecting the laws ... ¹

The sovereign ought not to grant an entrance into his state for the purpose of drawing foreigners into a snare: as soon as he admits them, he engages to protect them as his own subjects, and to afford them perfect security, as far as depends on him.²

—Emer de Vattel

I. Introduction

Investment treaty arbitration “combines a public law system of State liability with private arbitration.”³ Some consider that adjudication of international investment disputes does not substantially differ from decision-making by public law courts at the domestic level: arbitrators review state action for unlawfulness and inappropriateness, and ascertain whether the political branches of government have not improperly sacrificed investors’ interests when pursuing the public interest.⁴

The adjudication of investor-state disputes calls for a delicate balance between investors’ expectations and the states’ quest to achieve the common good. As Craig notes, in the modern state, laws and regulations are constantly adopted with the ex-

² Id. at 313.
³ Wintershall Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/04/14, ¶ 160 (Dec. 8, 2008). Although the tribunal refers here to the ICSID Convention, we think the statement applies to all investment treaty arbitration.