



PROTECTION OF FOREIGN INVESTMENT

A Study in International Law

by

ZOUHAIR A. KRONFOL, Ph. D.

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PREFACE

One of the dominating problems of today is to create a satisfactory and stable climate for the flow of private foreign investment. This is because the economic development of the developing countries depends to a large extent on private foreign capital, and because they may not move to the areas where they are most needed unless reasonable conditions for security exist. Various measures have been taken recently to deal with the problem of providing legal security for foreign investment. The fundamental purpose of these measures is to promote the economic development of the developing countries. The protection of foreign investment is a means toward this end, and is by no means the only one.

The major assumption here is that if there is to be any increase in the amount of private foreign capital invested in the developing countries, some or all of the obstacles to its investments must be eliminated. Government action can affect most of these obstacles to various extents, especially those related to the "investment climate". A country's investment climate must be understood as referring not only to the present but also to the future. To the prospective investor, the existing legal situation regarding foreign investment is important enough, but it is even more important as an indication of the situation which will probably exist in the future.

In other words, the foreign investor must be reasonably certain of the future. He must be made to believe that there is little or no possibility of the creation of an unfavorable legal situation, at a later date, which will be harmful to his investment. He usually gains such assurance when a favorable legal situation has existed for a long time, or when the country's economic and political situation is so stable that there is little probability of any major change in the immediate future. In the case of the majority of the developing countries today, it is difficult, however, to predict with confidence that conditions of stability and security will exist during a period of change. Thus arises the need for legal guarantees for foreign investment.

The present study is addressed to the crucial question: how much

and how little protection does international law afford to foreign investment? In particular, it deals with one set of measures which are essential for the flow of private capital to the developing countries. The measures in question are legal guarantees given directly or indirectly by states to foreign investors assuring them of the safety of their investment insofar as the latter are affected by state action.

In addition, the present work deals with the problems which such guarantees raise in international law. It is therefore the international law aspects which are chiefly discussed and which receive the main emphasis. Since this is a legal study, it does not deal with matters from an economic or sociological point of view. However, this does not mean that the non-legal factors should be ignored. The problem of the protection of foreign investment is closely related to the political economic and social questions, so that any "isolated" legal study is both impossible and meaningless. Therefore, one should constantly be aware of the non-legal factors involved. The relationship of international law to the contemporaneous political, economic and social realities can not be neglected.

Chapter I is an attempt at a statement of the international law rules governing the treatment of aliens and their property. Chapter 2 is mainly descriptive in character. The forms under which legal guarantees are given to foreign investors are first discussed, and then their substantive provisions are dealt with in some detail. The main body of the study, Chapters 3 and 4, is devoted respectively to the analysis of the legal effects of the legal guarantees, and an examination of the legal problems involved in the question of compensation. Chapter 5 is concerned with the settlement of investment disputes and the remedies available to the investor against foreign states. The closing chapter contains conclusions and evaluations of the study.

This work was completed in the summer of 1970 and submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy, in the Faculty of the School of International Service, The American University, Washington, D.C.

I wish to express my gratitude to my supervisors, Dr. Lawrence Wadsworth, Dr. Theodore Couloubis, and Professor Howe Martyn, for their advice and guidance. I would like also to extend my gratitude to the U.S. National Science Foundation which awarded me the Dissertation Fellowship for the academic year 1969-1970. Last but not least, my deepest appreciation is expressed to my parents for all personal reasons they will understand, and to whom this book is dedicated.

Zouhair A. Kronfol

TABLE OF CASES

- Alsing Case*, International Law Reports (1956).
- Anglo-Iranian Oil Company Case*, International Court of Justice, Reports of Judgments, Advisory Opinions and Orders, 1952.
- Anglo-Iranian Oil Company Ltd. v. V.S.U.P.O.R.*, International Law Reports, (1955).
- Aramco v. Saudi Arabia* (1958), International Law Reports, Vol. XXVII.
- Atlantic Coast Line RR v. Goldsboro*, United States Supreme Court Reports 232 (1914).
- Buffalo Case* (1903), United Nations, Reports of International Arbitral Awards, Vol. XX.
- Barcelona Traction Company Case*, International Court of Justice, Reports of Judgments, Advisory Opinions and Orders, 1964.
- Cape Horn Pigeon Case* (1902), United Nations, Reports of International Arbitral Awards, Vol. IX.
- Chemical Natural Resources v. Republic of Venezuela*, Supreme Court of Pennsylvania, 1966, 215 Atlantic Reporter, 2nd Series.
- Chorzow Factory Case* (1928), Permanent Court of International Justice, Series A, No. 13 and Series A, No. 7.
- Corfu Channel Case*, International Court of Justice, Reports of Judgments, Advisory Opinions and Orders, 1949.
- Czechoslovakia v. R.C.A.* (1932), American Journal of International Law, Vol. XX (1936).
- David Goldenberg Case* (1928), United Nations, Reports of International Arbitral Awards, Vol. II.
- de Sabla Case* (1933), United Nations, Reports of International Arbitral Awards, Vol. VI.
- Delagon Bay Railroad* (1900), Marjorie M. Whiteman, Damages in International Law, Vol. II. Washington, D.C.: Government Printing Office, 1943.
- Dix Case* (1903), United Nations, Reports of International Arbitral Awards, Vol. IX.

German Interests in Polish Upper Silesia Case (1929), Permanent Court of International Justice, Series A, No. 7.

German Settlers in Poland Case (1923), Permanent Court of International Justice, Series B, No. 6.

Iraq Petroleum Company v. Deutsch Bank und Disconto Gesellschaft (1929), *Netherland International Law Review*, Vol. VI (July 1959).

Lena Goldfields Case (1930), *Annual Digest of Public International Law Cases*, Years 1929-1930.

Lighthouse Arbitration Case (1956), *International Law Reports* (1959).

Losinger and Company Case (1939), Permanent Court of International Justice, Pleadings, Oral Statements and Documents, Series C, No. 78.

Lusitania Case (1923), United Nations, Reports of International Arbitral Awards, Vol. VII.

Mavromatis Case (1924), Permanent Court of International Justice, Series A, No. 2.

Minority Schools in Albania Case (1935), Permanent Court of International Justice, Series A/B, No. 64.

Norwegian Shipowners Case (1923), United Nations, Reports of International Arbitral Awards, Vol. I.

Neer Case (1926), United Nations, Reports of International Arbitral Awards, Vol. IV.

Oscar Chinn Case (1934), Permanent Court of International Justice, Series A/B, No. 63.

Panevezys-Saldntiskis Railway Case (1939), Permanent Court of International Justice, Series A/B, No. 76.

Perry v. United States, United States Supreme Court 264 (1935).

Petroleum Development (Trucial Coast) v. Ruler of Abu Dhabi (1951), *International and Comparative Law Quarterly*, Vol. I (April, 1952).

Radio Corporation of America v. China (1936), United Nations, Reports of International Arbitral Awards, Vol. III.

Re Helbert Wagg and Company Ltd. Case, *All England Law Reports*, Vol. I (1956).

Rex v. International Trustee, *English Appeal Cases* (1937).

Rices Case (1868), J. B. Moore, *International Arbitration Digest*, Vol. IV. Washington, D.C.: Government Printing Office, 1898.

Robert Claim Case, United States—Mexican General Claims Commission, 1926.

Rudolf Case (1903), United Nations, Reports of International Arbitral Awards, Vol. IX.

Ruler of Quator v. International Marine Oil Company Ltd. *International Law Reports* (1953).

Russian Indemnity Case (1912), J. B. Scott, *The Hague Court Reports*. London: Oxford University Press, 1916.

- Serbian Loan Case* (1929), Permanent Court of International Justice, Series A, No. 20/21.
- S. S. Wimbledon Case* (1923), Permanent Court of International Justice, Series A, No. 1.
- Sapphire v. N I O C Arbitration Case* (1963), International and Comparative Law Quarterly, Vol. XIII (July, 1964).
- Shufeldt Case* (1930), United Nations, Reports of International Arbitral Awards, Vol. II.
- Sabbatino Case* (1962), American Journal of International Law, Vol. LVI (1962).
- (1964), United States Supreme Court Reports 376 (1964).
- Underhill Case* (1897), United States Supreme Court Reports 168 (1897).
- Upton Case*, United States—Venezuela Mixed Claims Commission, 1903.
- Walter Fletcher Smith Case* (1929), United Nations, Reports of International Arbitral Awards, Vol. II.

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