

Jeswald W. Salacuse

THE THREE LAWS OF INTERNATIONAL INVESTMENT

*National, Contractual, and International
Frameworks for Foreign Capital*

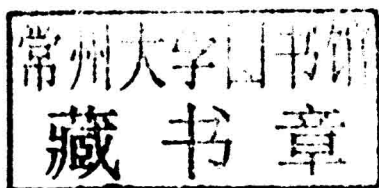


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*In Memory of William L. Salacuse,
Attorney & Counselor at Law*

Preface

International investment is an increasingly powerful force for economic growth and prosperity throughout the world. All countries, rich and poor, seek foreign capital and its associated technology and know-how as vital elements in their plans for national economic development. Accordingly, all governments have either explicitly or implicitly formulated policies about international investment and have incorporated them into their legal systems. At the same time, companies from both developed and developing countries are investing massive amounts of capital abroad in their search for markets, natural resources, production efficiencies, and knowledge. In connection with these efforts, investors and their legal counsel take great care in using a variety of legal devices to structure their investments in ways that will maximize investment returns and minimize investment risks.

While economic forces are the essential drivers of international investment, they are not the only factors that influence it. Legal rules and institutions also affect international investment flows. Law determines whether and how investments may be made in a particular country, the nature of the respective rights of investors and host country governments, the means by which governments and investors may adjust their legal relationships to changing circumstances, and the processes they may use to resolve their investment disputes.

The rules applicable to international investments are derived from three basic legal frameworks: (1) national laws, both of the host country and the investor's home country; (2) contracts, whether between investors and host governments or among investors; and (3) international law, consisting of applicable treaties, customs, and general legal principles developed by states. Any international investor must therefore understand the nature and complex interaction among these three legal frameworks—national, contractual, and international—in undertaking, managing and protecting a foreign investment. Thus, United Kingdom investors seeking to build a power plant in India to sell electricity to a state government's public utility must evaluate and use the Indian laws governing the ability of foreigners to enter the power sector, the state regulations concerning the production and sale of electricity to state power companies, the contract between the contemplated power company and the state corporation, and the international rules protecting investor rights embodied in a variety of sources, including treaties between India and the United Kingdom. For the UK investors, the economic success of the power project depends crucially on the content and application of the three frameworks. For the central government of India and the state government, the three frameworks are equally essential for securing and regulating a reliable and economical source of electricity so essential to their growth and development. In their operation, these frameworks are not isolated but interrelated. Thus, the content of the contractual framework is profoundly influenced by the applicable national law, and investor rights under international law are influenced by national legislation. For example, in the event of conflict with the Indian government, the ability of the UK investors to invoke treaty protection may require them first to avail themselves of remedies in the Indian courts, at least for a period of time.

This book examines the content of each of these three legal frameworks for international investment and explores how they influence the foreign investment process and the operation of international investment transactions, projects, and enterprises. The term "international investment law," so commonly used to describe the law applicable to foreign investments, contains an inherent ambiguity. It may refer either to the international law

governing investments or to all the law applicable to international investments. Thus, while many excellent books exist on the subject of “international investment law,” they focus primarily on the international law and thus tell only part of the legal story of foreign investment. Indeed, in their focus almost uniquely on the international law governing investment, one can say that such works tell only one-third of that story since they do not examine in depth the two other crucial legal frameworks—national laws and investment contracts. Consequently, they do not explain how host and home countries use their legal systems to encourage and regulate international investment, nor do they consider the various legal devices and techniques that investors and governments employ to structure investment projects and transactions. An understanding of both of these dimensions of the investment process is vital for lawyers, executives, and government officials working with foreign investment.

In taking a comprehensive view of the laws affecting foreign investment, this book is divided into five parts, each of which consists of three or more chapters. *Part I: International Investment and the Law*, after explaining the contemporary nature and significance of international investment, examines the theoretical and practical links between law and the investment process. It explores how and why law fosters or impedes investment and posits that the international investment process is influenced by the actions of three basic players: the host country, the investor, and the investor’s home country. It examines the interests and policies of each player and how those interests and policies influence the content and application of the laws of foreign investment. Part I concludes with an overview of the nature of the three principal legal frameworks for international investment resulting from the interplay of these interests.

Part II: The National Legal Framework explores the nature of a country’s national laws affecting foreign investment. It begins with a chapter examining the factors that influence national policies and laws on international investment, particularly governmental ideologies, popular attitudes, and accepted economic models of national development. Subsequent chapters explore state controls on the exit and entry of capital, national regulation of foreign investment, and the problem of legal and regulatory instability. Regardless of legal tradition and economic history, national regulatory systems are fundamentally influenced by two, often competing imperatives: the need to encourage the inflow and investment of foreign capital and the need to control that flow and its use once it has entered the country. The precise balance that the national legal framework strikes between these two imperatives varies from country to country and also changes over time.

Any foreign investment is basically a bargain between the foreign investor and the host country. Countries use their legal systems to maximize the perceived benefits and minimize the contemplated costs of that bargain. In doing so, all national regulatory frameworks must address four basic issues: (1) the nature of the foreign investment the country seeks or will accept; (2) the incentives that it is willing to grant to desired investments; (3) the regulatory controls to which desired investments will be subject; and (4) the governmental apparatus that will administer the foreign investment process. Part II considers each of these legal issues and their impact on foreign investments and investors. It then concludes with a consideration of the challenges of legal change and its impact on investors and governments.

In *Part III, The Contractual Framework*, the book explores the nature of the contractual framework for international investments, and the complex of rules that have been shaped by negotiated agreements between the parties. It begins by discussing the role of contracts in the investment process. Since any investment transaction is invariably the product of negotiation between the parties concerned and the host government, the following chapter

explains the process by which agreements are negotiated and the techniques employed by the foreign investors and governments to advance their respective interests in the process. Part III then examines in detail particular types of investment contracts employed in international investment, especially joint venture agreements, project finance arrangements, and international loans. A separate chapter is devoted to a special kind of contract that is part of many international investment transactions: political risk insurance. Since investment contracts are invariably long-term transactions subject to the vicissitudes of changing circumstances, Part III concludes with a chapter on contractual stability and renegotiation, subjects of vital concern for both investors and host governments.

Part IV: The International Legal Framework explores the international rules and institutions for investment to be found in the complex of treaties, customs, and general legal principles that have emerged to protect investment from certain types of injurious actions by host country governments. The international legal framework developed primarily because foreign investors and their home governments judged that the national and contractual legal frameworks in host countries did not afford foreign investments sufficient protection. This part of the book first explores the historical development of the international legal framework, then examines its contemporary elements and principles, and finally considers its effectiveness and the various ways these international rules are applied and investment disputes settled.

To conclude the volume, *Part V* considers how the three legal frameworks interact with each other.

I have worked in the field of the law of international investment for nearly forty years as teacher, scholar, legal consultant, and arbitrator. During that time, I have benefited from invaluable conversations with countless lawyers, economists, government officials, business executives, scholars, arbitrators, and international experts in many disciplines. They are too numerous to list here by name but I am deeply grateful to all of them for helping me understand this important area of law and its relationship to economic growth and development.

In writing this book, various persons have provided invaluable assistance for which I am grateful. In that regard, I especially want to thank Guarav Tiwari, Cecelia Vogel, and Hyejin Park for their research help.

Jeswald W. Salacuse

Medford, Massachusetts
August 2012

List of Abbreviations

AREAER	Annual Report on Exchange Arrangements and Exchange Restrictions
BATNA	Best Alternative to a Negotiated Agreement
BJP	Bharatiya Janata Party
BIT	bilateral investment treaty
BOO	build-operate-own
BOT	build-operate-transfer
BT	build-transfer
CAFTA-DR	Dominican Republic–Central America–United States Free Trade Agreement
CAO	contract, add and operate
CFIUS	Committee on Foreign Investment in the United States
COMESA	Common Market for Eastern and Southern Africa
DOT	develop, operate and transfer
ECGD	Export Credits Guarantee Department
ECT	Energy Charter Treaty
EPA	Economic Partnership Agreement
FCN	friendship, commerce and navigation
FDA	Food and Drug Administration
FDI	foreign direct investment
FIRB	Foreign Investment Review Board
FTA	free trade agreement
GATTs	General Agreement on Trade in Services
IAB	“Investing Across Borders”
ICC	International Chamber of Commerce
ICMA	International Capital Market Association
ICSID	International Centre for Settlement of Investment Disputes
IEEPA	International Emergency Economic Powers Act
IFC	International Finance Corporation
IIA	international investment agreement
ITO	International Trade Organization
LIBOR	London Interbank Offered Rate
MAI	Multilateral Agreement on Investment
MIGA	Multilateral Investment Guarantee Agency
MNC	multinational corporation
NAFTA	North American Free Trade Agreement
NIEO	New International Economic Order
OECD	Organization for Economic Cooperation and Development
OPIC	Overseas Private Investment Corporation
PPP	Public Private Partnership
PSI	pre-shipment inspection
QFI	“qualified foreign investors”
ROO	rehabilitate, own, and operate
ROT	rehabilitate, operate, and transfer
SEBI	Securities Exchange Board of India
SWF	Sovereign Wealth Fund
TEU	Treaty on European Union
TNC	transnational corporation
TRIMs	Trade-Related Investment Measures
UNCTAD	United Nations Conference on Trade and Development

Table of Cases

AGIP v Congo, Award, 20 November 1979, 1 ICSID Reports 306.....	155
Aguas del Tunari SA v Republic of Bolivia, ICSID Case No ARB/02/3 (Decision on Respondent's Objections to Jurisdiction) (October 21, 2005)	380, 381
Alasdair Ross Anderson v Republic of Costa Rica, ICSID Case No ARB/AF/07/3 (Award), May 19, 2010	369
Alex Genin, Eastern Credit Limited, Inc and AS Baltoil (US) v Republic of Estonia, ICSID Case No ARB/99/2 (Award) (June 25, 2001)	386
American Manufacturing and Trading, Inc v Zaire, ICSID Case No ARB/93/1 (Award) (February 21, 1997)	388
Amoco International Finance Corp. v Iran, Award, 14 July 1987, 15 Iran-US CTR 189 (1987)	153, 395
Anaconda Co and Chile Copper v OPIC (1975) 14 Int'l Legal Mat 1210	263
Asian Agricultural Products Ltd v Sri Lanka, ICSID Case No ARB/87/3 (Final Award) (June 27, 1990)	388, 396
Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) (1970) ICJ Rep 3	313, 329
Bechtel Enterprises International (Bermuda) Ltd; BEn Dabhol Holdings, Ltd; and Capital India Power Mauritius I (Claimants) against Overseas Private Investment Corporation (Respondent), September 3, 2003	247, 252, 257, 264
Beckman Instruments Inc v OPIC (1988) 27 ILM 1260	257, 264
Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana (Award on Jurisdiction and Liability) (27 October 1989) 95 ILR 184	395
Case Concerning Certain German Interests in Polish Upper Silesia (FRG v Pol) (1926) PCIJ Series A, No 7 at 22	312, 320, 395
Case Concerning Mavromatis Palestine Concessions (1924) PCIJ Series A, No 2 p 2	312
Case Concerning the American International Group, Inc./American Life Insurance Company & the Islamic Republic of Iran/Central Insurance of Iran (1984) 23 ILM 1-23	76
Case of the S.S. Lotus (France v Turkey) (1927) PCIJ Series A, No 10; 2 Hudson, World Ct Rep 20	42, 305
Channel Home Ct. v Grossman, 795 F 2d 291, 299 (3d Cir 1986)	282
CMS Gas Transmission Company v Argentine Republic, ICSID Case No ARB/01/8 (Annulment Proceeding, Decision of the Ad Hoc Committee) (September 25, 2007)	391
Compañía de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie Générale des Eaux) v Argentine Republic, ICSID Case No ARB/97/3) (Decision on Annulment) (July 3, 2002)	390
Delagoa Bay and East African Railway Co (US and Great Britain v Portugal) (1900)	318
De Sabla Case (United States v Panama) (1934) 28 AJIL 602	314, 318
Douglas G Collie MacNeill (Great Britain v United Mexican States) (1931) 5 RIAA 135	323
El Oro Mining and Railway Co (Great Britain v United Mexican States) (1930) 5 RIAA 191	323
Elettronica Sicula S.p.A. (ELSI) (United States v Italy), Judgment, 20 July 1989, ICJ Reports (1989) 15	138, 143, 340, 388
Factory at Chorzów (Germany v Poland) (Indemnity) (Judgment of September 13, 1928) PCIJ Series A, No 17 at 47	314, 318, 319, 395
Factory at Chorzów (Merits) 1928 PCIJ Series A, No 17	397
Fedax NV v Venezuela, ICSID Case No ARB/96/3; (1998) 37 ILM 1358 (Decision of the Tribunal on Objections to Jurisdiction) (July 11, 1997)	366, 372, 373
Fireman's Fund Insurance Company v United Mexican States, ICSID Case No ARB(AF)/02/1 (Award) (July 17, 2006)	395
Gruslin v Malaysia, ICSID Case No ARB/99/3 (Final Award) (November 27, 2000)	374
Hellenic Lines, Ltd v Embassy of Pakistan, 307 F Supp 947, 954 (SDNY 1969)	163
Hopkins (US) v Mexico (March 21, 1926), I Opinions of Commissioners, General Claims Commission (US and Mexico, 1923), 42, 50-1 (1927)	313
Howtek Inc v Reliys et al, 958 F Supp 46 (DNH 1997)	277, 282

Inceysa Vallisoletana SL v Republic of El Salvador, ICSID Case No ARB/03/26 (Award) (August 2, 2006)	369
Indonesia—Certain Measures Affecting the Automobile Industry (WT/DS54/15 of December 7, 1998)	352
International Bank v OPIC (1972) 11 Int'l Legal Mat 1216	263
International Fisheries Case (United Kingdom v Norway) ICJ Judgment of December 18th, 1951, Volume 4	323
International Tel & Tel Corp, Sud America v OPIC (1974) 13 Int'l Legal Mat 1307	263
Interoceanic Railway Case (Great Britain v Mexico) (1931) 5 RIAA 187	323
Jan de Nul NV and Dredging International NV v Arab Republic of Egypt, ICSID Case No ARB/04/13 (Decision on Jurisdiction) (June 16, 2006)	371
Kehinde v Registrar of Companies [1979] 3 LRN 213	40
Kuwait v American Independent Oil (AMINOIL) 21 ILM (1982) 976	154
Lena Goldfields v Soviet Union (1930) The Times, 3 September	321
LG&E Energy Corp v Argentina, ICSID Case No ARB/02/1 (Decision on Liability) (October 3, 2006)	365
Methanex v United States (Final Award) (August 3, 2005)	395
Mexican Union Railway (Great Britain v United Mexican States) (1930) 5 RIAA 115	323
Mihaly v Sri Lanka, 15 March 2002, 17 ICSID Review-FILJ (2002)	4, 171
MTD Equity Sdn Bhd & MTD Chile SA v Chile, ICSID Case No ARB/01/7 (Award) (25 May 2004)	397
Noble Ventures v Romania, ICSID Case No ARB/01/11 (Award) (12 October 2005)	149, 387, 389, 390
North American Dredging Company of Texas (United States v United Mexican States) (March 31, 1926) 20 AJIL (1926) 800	323
North Sea Continental Shelf (FRG v Den; FRG v Neth) [1969] ICJ Rep 3, 43	46, 307
Norwegian Shipowners Claims Case (Perm Ct Arb 1922) 1 RIAA 307	318, 395
Nykomb Synergetics Technology Holding v Latvia (Award) (December 16, 2003)	350
Occidental Exploration and Production Co v Ecuador, LCIA Case No UN3467 (Award) (July 1, 2004)	386
Petrobart Limited v Kyrgyz Republic (Award) (March 29, 2005)	350
Petroleum Development Ltd v Sheikh of Abu Dhabi, 18 ILR (1951) 144; Ruler of Qatar v International Maritime Oil Company 20 ILR (1953) 535	165
Philip Morris Brand Sàrl (Switzerland), Philip Morris Products SA (Switzerland) and Abal Hermanos SA (Uruguay) v Oriental Republic of Uruguay, ICSID Case No ARB/10/7	144, 145
Phillip Morris International Finance Corporation v OPIC (1988) 27 Int'l Legal Mat 487	253, 263, 264
Plama Consortium Limited v Bulgaria, Case No ARB/03/24 (Decision on Jurisdiction) (February 8, 2005)	350
Railroad Development Corporation v Guatemala, ICSID Case No Arb/07/23 (Award) (June 29, 2012)	351
Ramdas Nayak v Union of India, 1995 AIR 2	288
Revere Copper & Brass, Inc v OPIC (1978) 17 ILM 1321	263, 264, 316
Roberts (US) v Mexico (November 2, 1926), I Opinions of Commissioners, General Claims Commission (US and Mexico, 1923), 100, 105 (1927)	313
Rompotrol Group NV v Romania, ICSID Case No ARB/06/3 (Decision on Respondent's Preliminary Objections on Jurisdiction and Admissibility) (April 18, 2008)	377
Ruler of Qatar v International Marine Oil Company (1953) 20 ILR 535	165
Salini Construtorri SpA and Italstrade SpA v Morocco, ICSID Case No ARB/00/4 (Decision on Jurisdiction) (July 23, 2001)	368
Saluka Investments BV (The Netherlands) v Czech Republic (Partial Award) (17 March 2006)	359, 360
Sapphire International Petroleum Limited (Sapphire) v National Iranian Oil Co (1953) 35 ILR 136	319, 320
Saudi Arabia v Arabian American Oil Company (Aramco Case) 27 ILR (1963) 116	165

Scherk v Alberto-Culver, 417 US 506, 516 (1974)	161
Serbian Loans Case, Judgment, No 14 (1929) PCIJ Rep Series A, No 20	149, 160, 389
SGS Société Générale de Surveillance SA v Islamic Republic of Pakistan, ICSID Case No ARB/01/13 (Decision on Jurisdiction) (August 6, 2003)	373
SGS Société Générale de Surveillance SA v Republic of the Philippines, ICSID Case No ARB/02/6 (Decision on Jurisdiction) (January 29, 2004)	373
Siemens v Argentina, ICSID Case No ARB/02/8 (Decision on Jurisdiction) (August 3, 2004)	366, 367
SPP (Middle East) Ltd, and Southern Pacific Properties Ltd v The Arab Republic of Egypt, ICC Case No 3493 (ICC Award) (March 11, 1983) (1983) 22 ILM 752	28, 141, 165
Stilk v Myrick 2 Camp 317, 6 Esp 129 (1809)	287
Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v Argentina and AWG Group v Argentina, ICSID Case No ARB/O3/19 (Decision on Jurisdiction) (3 August 2006)	145, 168, 383
Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA v Argentina and AWG Group v Argentina, ICSID Case No ARB/O3/17 (Decision on Liability) (30 July 2010)	172
Sumitomo Shoji America v Avagliano, 457 US 176 (1982)	339
Tesoro Petroleum v Trinidad and Tobago, ICSID Review-Foreign Investment Law Journal 1 (1986), 340	217
Texaco Overseas Petroleum Company and California Asiatic Oil Company v Government of the Libyan Arab Republic (Preliminary Award) (27 November 1975) 53 ILR 389	165
Texaco Overseas Petroleum Company and California Asiatic Oil Company (TOPCO) v Government of the Libyan Arab Republic (Award on Merits) (1977) 17 ILM 1	320, 328
Tinoco Case (Great Britain v Costa Rica) 1 R Int'l Arb Awards 369, 375-85 (1923)	128-30, 408
Tokios Tokelés v Ukraine, ICSID Case No ARB/02/18 (Decision on Jurisdiction) (April 29, 2004)	368, 369, 376, 377
Upton Case (United States v Venezuela) (1903) 9 RIAA 234	314
Valentine Petroleum and Chemical Corp v AID, 9 Int'l Legal Mat 889 (1970)	263
Veracruz Railways Case (Great Britain v United Mexican States) (1931) 5 RIAA 221	323
Wena Hotels Ltd v Arab Republic of Egypt, ICSID Case No ARB/98/4 (Award on Merits) (December 8, 2000)	388
Williams v Roffey Bros & Nicholls (Contractors) Ltd [1991] 1 QB 1, CA	287
Wintershall, AG, et al v Government of Qatar (1989) 28 ILM 795	285, 286
World Duty Free v The Republic of Kenya, ICSID Case No ARB/00/7 (Award) (October 4, 2006)	408

Table of Legislation

ALGERIA

Ordinance No 70-10 of January 20 1970—	
Art 2	61

ANGOLA

Law No15/94, Foreign Investment Law, National Assembly, September 23, 1994	31
--	----

ARGENTINA

Convertibility Law No 23, 928 of 28 March 1991	142
Decree No 1,570/01 of December 3 2001	131, 142
Emergency Law No 25,561 of January 7 2002	131, 142
Law No 23,928 of March 27 1991	130

AUSTRALIA

Foreign Acquisitions and Takeovers Act 1975	90, 108
Foreign Acquisitions and Takeovers Regulations 1989	90

BOLIVIA

Constitution	322
--------------------	-----

BRAZIL

Corporations Law No 6.404/76	121
CVM Law No 6.385/86	121, 122
Foreign Capital Law No 4.131	75

CANADA

Investment Canada Act 1985	90
State Immunity Act 1980	152

CHILE

Decree having force of law No 523 of the Ministry of Economy, Development and Reconstruction of September 3, 1993	32
Foreign Investment Statute Decree Law 600, Restated, Coordinated and Standardized Text of Decree-law No 600, as of 1974 of the Foreign Investment Statute	32

COSTA RICA

Constitution 1871	128
Constitution 1917	128

CUBA

Constitution 1992	94
Law 77 on Foreign Investment 1995	94
Art 1	94

DEMOCRATIC PEOPLES REPUBLIC OF KOREA

Contractual Joint Venture Law	94
Equity Joint Venture Law	94
Foreign Enterprises Law	94
Foreign Investment Law	94
Free Economic and Trade Zone Law	94

DEMOCRATIC REPUBLIC OF CONGO

Law No 004/2002 of February 21, 2000 on the Investment Code	31
---	----

ECUADOR

Law of 1938—	
Art 26	322
Art 30	322

EGYPT

Law No 43 of 1974	96
Law No 32 of 1977	96
Law No 8 of 1997	95

EUROPE

Reg 593/2008 (Rome I)	162
-----------------------------	-----

FRANCE

Civil Code—	
Art 1101	159
Art 1134	26, 39, 160

GHANA

Investment Promotion Centre Act (No 478)	90
---	----

INDIA

Electricity Laws Act 1991	235
Energy Supply Act 1948	234
Foreign Exchange Regulation Act 1973	55
Industries (Development and Regulation) Act 1951	63

JAPAN

Foreign Exchange and Foreign Trade Control Law, Law No 228 of 1949	90
---	----

KENYA

Export Processing Zones Act 1990	101
Art 29	101

KUWAIT

Civil Code, Art 196	160
Law No 67 of 1980	160

NIGERIA

Companies Act 1968	40
Constitution	66, 98
Art XIII, s7	98
Enterprises Promotion Act (NEP) 1977	40
Enterprises Promotion Decree No 4 1972	138
Federal Military Government (Supremacy and Enforcement of Powers) Decree 1970	66

PERU

Constitution 1933	322
Art 31	322
Decree No 662 of 1991	154

PEOPLES REPUBLIC OF CHINA

Law of the PRC on Chinese-Foreign Equity Joint Ventures 1979	90, 207
---	---------

PHILIPPINES

Act No 7718, s 5-A, implementing E & Regs R 19	225
Constitution— Art XIII, s 2	98
Art XIII, s 7	98
Art XVI, s 11(1)	92, 93

REPUBLIC OF KOREA

Foreign Investment and Foreign Capital Inducement Act 1962	32
Foreign Investment Promotion Act 1998	32
Securities and Exchange Act 2004	122

REPUBLIC OF PANAMA

Tourism Incentive Investment Law No 8 1994	95
---	----

SAUDI ARABIA

Foreign Investment Law 5/1/1421	31
---------------------------------------	----

SENEGAL

Code des Investissements, Law No 2004 of February 6 2004	90
Law No 64-46 of June 17 1964	65
Law No 87-23 of 18 August 1987	114, 115
Preamble	114, 115

SOUTH AFRICA

Constitution— Art 25	38
Art 216	127

SOVIET UNION

Decree of October 26 1917	51, 320
Decree of December 14 1917	51, 320
Decree of January 26 1918	51, 320

SUDAN

Development and Encouragement of Industrial Investment Act 1974	217
Income Tax Act 1971	217
Organisation and Promotion of Investments Act 2009	211

TUNISIA

Decree of August 13 1956	64
--------------------------------	----

TURKEY

Constitution 1982— Art 166	61
Foreign Direct Investment Law No 4875 of July 5 2003	90, 107
Art 1	53, 107
Law Concerning the Encouragement of Capital No 8225 of January 18 1954	106
Art 8	106

UNITED KINGDOM

State Immunity Act 1978	152
State Immunity Act 1978 (Commencement) Order 1978 (SI 1978/1572)	152

UNITED STATES

Statutes

Agriculture Foreign Disclosure Act 1978	93
Constitution (Fifth Amendment)	38
Dominican Republic–Central America–United States Implementation Act 2005	350
Economic Cooperation Act 1948	249
Export Administration Act 1979	82
Foreign Assistance Act 1961	249
s 234(a)–(c)	250
s 235(a)(2)	250
Foreign Investment and National Security Act 2007 (FINSIA)	93, 94, 107
Foreign Sovereign Immunities Act 1976	152, 153
§ 1330	152
§ 1391	152
§ 1602–1611	152
§ 1605(a)(1)	153
International Claims Settlement Act 1949	322
International Emergency Economic Powers Act 1979 (IEEPA)	86
International Investment Survey Act 1976	6
Iran Sanctions Act 2011	32
New York General Obligations Law 2010— §5–1401	163
Omnibus Foreign Trade and Competitiveness Act 1988	93
Exxon-Florio Amendment 1988	93
Overseas Private Investment Corporation Amendment Act 2003 (OPIC)	250–65
s 2463(a)(4)	251
s 2702	250
Restatement of Foreign Relations Law (Third) 1987	128, 129, 305, 313, 315, 316, 318, 319
s 101	43, 305
s 102	46, 307
s 102(2)	45, 307
s 165	310, 312
s 208	129
s 712	315, 316, 318, 319
Restatement of Conflict of Laws (Second) 1971— s 1	159
s 187	162, 163
s 187(1)	162, 163
s 187(2)	163
s 188	164
s 188(1)	164

Codes, Rules and Regulations

Administration Regulations 2010	82
Executive Order No 12, 170, 3 CFR 457 (1980)	86
Regulations Pertaining to Mergers, Acquisitions and Takeovers by Foreign Persons 73 Fed Reg 70, 702 (2008)	107
Treasury Reg § 535.502, 31 CFR 535 (1980)	86
United States Code (USC)— 7 §§ 3501–08	93
22 § 2191	260
22 §§ 2191–93	249
22 § 2191(1), (2)	250
22 § 2191(3)(d), (h)	251
22 § 2191(3)(m), (n)	251
22 § 2191A	251
22 § 2193(b)	251, 252
22 § 2193(c)	252
22 § 2194	253
22 § 2194(1)	253, 258
22 § 2194(a)(1)(A)	253
22 § 2194(a)(1)(B)	255
22 § 2194(a)(1)(C)	257
22 § 2194(c)	264
22 § 2197(a)	260
22 § 2195(a)(2)	250
22 § 2197(b)	260
22 § 2197(c)	252, 263
22 § 2197(f)	257, 262
22 § 2198(a)	259
22 § 2198(b)	255
22 § 2198(c)	259
22 § 2198(c)(3)	259
22 § 2199	249
22 § 2199(d)	252
22 § 3102(10)	6
28 § 1330	152
28 § 1391	152
28 §§ 1602–11	152
28 § 1605(a)(1)	153
50 §§ 1701–06	86
50 § 2061	107
50 § 2170	93
50 § 2170(a)(3)	93
50 § 2170(b)(1)(A)	94
50 § 2170(d)(1)	94
50 §§ 2401–20	82

VENEZUELA

Decree No 727 Foreign Investment, Technology Licensing and Foreign Credit Regulations 1990— Art 68	57
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VIETNAM

BOT Regulation 1998	226
---------------------------	-----

Table of Agreements, Conventions, Rules, and Treaties

Abs-Shawcross Draft Convention on Investment Abroad 1959	341	Articles of Agreement of the Islamic Corporation for the Insurance of Investment and Export Credit 1992	265
Agreement between the Government of Sudan and Lonrho Limited 1972 (Sugar Agreement)	210, 211	Art 5(3)	266
Preamble	210	Art 19(2), (3)	266
Art 1	211	ASEAN Agreement for the Promotion and Protection of Investments 1987	346, 347, 390
Arts 5, 6	211	Art III(3)	390
Arts 10, 11	211	Belgo-Luxemburg Economic Union-Cameroon BIT 1980	379
Art 17	211	Art 2(3)	379
Arts 35, 36	211	Bolivia-Netherlands BIT 1992	380, 381
Agreement Establishing the African Trade and Insurance Agency 2000	266	Art 2	380
Agreement Establishing the European Bank for Reconstruction and Development 1990	47	Botswana-Peoples Republic of China BIT 2000	370, 400
Art 1	266	Art 14	370, 400
Art 2(a)	266	Brunei-Indonesia-Malaysia-Philippines- Singapore-Thailand BIT 1987	390
Andean Investment Code 1971	58, 65	Canada-Costa Rica BIT 2010	369
Argentina-France BIT 1993	359, 365	Art I(g)	369
Argentina-Spain BIT 1992	378	Canada Model BIT 2004	385
Articles of Agreement of the International Bank for Reconstruction and Development (IBRD Articles of Agreement) 1945	47, 54, 338	Art 5	136
Art 1	54	Canada-Peru BIT 2006	372
Art 1(ii)	16	Art 1	372
Articles of Agreement of the International Development Association (IDA Articles of Agreement) 1960	47	Capitulation Treaty (Turkey and France) 1536	334
Articles of Agreement of the International Finance Corporation (IFC Articles of Agreement) 1955	47	Convention Establishing the Inter- Arab-Investment Guarantee Corporation 1974	265
Articles of Agreement of the International Monetary Fund (IMF Articles of Agreement) 1944	43, 77-82, 338	Convention Establishing the Multilateral Investment Guarantee Agency 1985 (MIGA)	266-72, 319, 353
Art I(i)	77	Art 1	267
Art I(iii)	77	Arts 6-8	267
Art I(iv)	81	Art 11(a)	269, 319
Art IV— ss 1-3	77	Art 11(b)	270
Art VI, s 3	78, 87	Art 13	268
Art VII	82	Art 14	269
s 3(b)	78	Art 18	272
Art VIII	80-82	Art 31	267
s 2(a)	80	Art 57	272
s 2(b)	80, 84	Art 61	267
Art XI, s 2	80	Art 81	272
Art XIV	80, 81	Sch A	267, 269
s 2	78, 80, 81	Annex II	272
Art XXX	78, 79	Operational Regulations of the Multilateral Investment Guarantee Agency 1988	267-72
Art XXX(d)	78, 79	§§ 1.02-1.13	269
		§§ 1.23-1.28	270
		§ 1.36	270
		§§ 1.42-1.45	270

§§ 1.46–1.52	271	Art 27	218
§ 2.04	271	Art 28	217
§§ 2.07–2.10	271	French Model BIT 2006	341
§ 2.14	271	General Agreement on Trade	
§ 3.38	271	in Services 1995 (GATS)	23, 352
§ 3.43	271	General Agreement on Tariffs and	
§ 4.08	272	Trade 1994 (GATT)	43, 338, 340, 352
§§ 4.20–4.22	272	Art III	352
Convention on the Recognition and Enforcement		Art XI	352
of Foreign Arbitral Awards 1958 (New York		Germany–Antigua/Barbuda BIT 1998	380
Convention)	72, 152, 332, 398	Art 2(1)	380
Convention on the Settlement of Investment		Germny–Bosnia-Herzegovina BIT 2001	366
Disputes between States and Nationals		Art 1(1)	366
of Other States 1965 (ICSID		Germany–Jamaica BIT 1992	248
Convention)	4, 43, 44, 47, 72, 166,	Art 6	248
	306, 330, 332, 343, 344, 373,	Germany–Pakistan BIT 1959	342
	398, 407, 408	Germany–Peoples Republic of China	
Art 42(1)	150, 166	BIT 2003	249
Art 54	398	Arts 6, 7	249
Dominican Republic–Central America–		Germany–Poland BIT 1989	355, 378
United States Free Trade Agreement 2004		Germany–Swaziland BIT 1990	375, 396
(CAFTA–DR)	350–52, 385	Art 1(4)(a)	375
Chap 10	351	Art 3(c)	396
Arts 10.3–10.5	351	Havana Charter for an International	
Art 10.5	385	Trade Organization 1948	338–40
Art 10.5(a), (b)	351	Art 11(2)	339
Art 10.7	351	Art 11(2)(a), (c)	338
Art 10.9	351	Art 12(2)	339
Art 10.13	351	Host Government Agreement between	
Egypt–Belgo-Luxemburg Economic		the Government of Georgia and the	
Union BIT 1977	370, 371	Azerbaijan (2000)—	
Art III	370, 371	Art 7.2	154
Art III(1)	371	Art 9	154
Egypt–France BIT 1974	378	Art 20	154
Art 2	378	Host Government Agreement between the	
Egypt–Morocco BIT 1976	345	Government of Turkey and the MEP	
Energy Charter Treaty 1994 (ECT)	44, 45,	Participants (October 19, 2000)—	
	306, 349–52, 355, 362, 365, 370, 371,	Art 7.2	154
	375, 376, 390, 399	Art 10.1(iii)	154
Art 1	350	Art 21.1	154
Art 1(4)	371	ICSID Arbitration Rules 2006	344
Art 1(6)	371	ILC Articles on Responsibility of States for	
Art 1(7)(a)(i)	375	Internationally Wrongful Acts 2001	390
Art 1(7)(b)	376	Art 3	390
Pt III	349, 355	Indonesia–Algeria BIT 2000	370, 400
Art 10	378	Art 13	370, 400
Art 10(1)	390	Indonesia–United Kingdom	
Art 17	376	BIT 1976	355, 378
Art 24	399	International Chamber of Commerce	
Eritrea–Netherlands BIT 2004	370, 400	(ICC) Rules of Optional	
Art 13	370, 400	Conciliation 1995	203
European Convention on State		International Chamber of Commerce (ICC) Rules	
Immunity 1972	152	on the Adaptation of	
Additional Protocol	152	Contracts 1978	286
Founders Agreement, Kenana Sugar		International Convention for the Mutual	
Company Ltd, February 17, 1975	213–18	Protection of Private Property Rights in	
Arts 2–4	214	Foreign Countries 1957	341
Art 7	216	Investment Incentive Agreement between	
Arts 10, 11	214	the Government of the United States of	
Art 13	217	America and the Government	
Arts 19, 20	215	of India 1998	293

Investment Incentive Agreement between the Government of the United States of America and the Government of the Republic of Korea 1998	261	Sino-British Supplementary Treaty 1843	334
Arts 2, 3	261	Spain-El Salvador BIT 2006	369
Italy-Morocco BIT 1990	368	Statute of the International Court of Justice (ICJ Statute) 1945	43, 46, 305
Japan-Bangladesh BIT 1998	370, 400	Art 38	44-46, 306-8
Arts 1-14	370, 400	Art 38(1)	43, 44, 305
Japan-Vietnam BIT 2003	366, 397	Art 59	305
Art 1	366	Sweden-Malaysia BIT 1979	374
Art 13	397	Art 1	374
Jordan-Yemen BIT 1999	370, 400	Switzerland-Pakistan BIT 2003	373
Art 10	370, 400	Switzerland-Philippines BIT 2004	372, 373
Korea-Japan BIT 2002	399	Art II	372
Art 11	399	Trade Treaty of Nijmegen (Sweden and Holland) 1679	334
Art 16	399	Treaty Establishing the Common Market for Eastern and Southern Africa 1993 (COMESA)	348
Lithuania-Netherlands BIT 1994	376	Treaty Establishing the European Economic Community (Treaty of Rome) 1957	341, 382
Art 1(b)(iii)	376	Treaty of Amity and Commerce (USA and France) 1778	336
Lithuania-Ukraine BIT 2004	369	Treaty of Asuncion 1991	347
Marrakesh Agreement Establishing the World Trade Organisation 1994	338	Protocol of Buenos Aires 1994	347
Multilateral Agreement on Investment (MAI)	353, 354, 358, 362	Art 4	348
Netherlands-Cote d'Ivoire BIT 1965	343	Protocol of Colonia 1994	347
Protocol 1971	343	Art 11	348
Netherlands-Czech and Slovak Republic BIT 1991	359, 360	Treaty of Utrecht 1713	334
Netherlands-Indonesia BIT 1968	343	Treaty of Westphalia 1648	334
Netherlands-Romania BIT 2008	377	Treaty on the Functioning of the European Union (TFU) 2010	47, 382
Netherlands-Venezuela BIT 1997	372, 373	Art 3(j)	47
North American Free Trade Agreement 1994 (NAFTA)	44, 45, 77, 87, 98, 306, 307, 345, 348-51, 353, 357, 367, 383, 385, 386, 390, 392, 394	Art 43	341
Art 102(1)(b)	357	Art 47	341
Chap 11	45, 307, 345, 348, 351, 367, 385	Art 129	47
Art 1102	349, 357	Protocol on the Statute of the European Investment Bank (EIB Statute)	47
Art 1102(1)	77	Treaty on European Union 1992	341, 382
Art 1103	349, 357	Art 43	357, 382
Art 1105(1)	45, 307, 385, 394	Art 48	382
Art 1106	349, 383	Art 56	341, 382
Art 1110	394	Ukraine-Lithuania BIT 2001	368, 377
Art 1131	45, 307	Art 1(1)	368
Art 1139	367	UNCITRAL Arbitration Rules 1976	238, 344
Art 1146	98, 251	UNCITRAL Conciliation Rules 1980	203
Art 2001	47	Unified Agreement for the Investment of Arab Capital in the Arab States 1981	346
Peace Treaty (Spain and the Netherlands) 1648	334	United Kingdom-Albania BIT 1994	364, 365, 378
Peoples Republic of China-Bosnia-Herzegovina BIT 2002	380, 381	United Kingdom-Argentina BIT 1990	390, 398, 399
Art 2(1)	380	Art 7	398
Peoples Republic of China-Thailand BIT 1985	345	United Kingdom-Chile BIT 1996	54
Rome Convention on the Law Applicable to Contractual Obligations 1980	162	United Kingdom-Costa Rica BIT 1982	393
Art 3	162	Art 5	393
Art 11	162	United Kingdom-India BIT 1994	378
Saudi Arabia-Austria BIT 2001	367, 368	Art 3(1)	378
Art 1(1)	367	United Kingdom-Indonesia BIT 1976	370
		Art 2(3)	370