

THE LEGAL REGIME OF FOREIGN PRIVATE INVESTMENT IN SUDAN AND SAUDI ARABIA

Developing countries require foreign investment for the promotion of economic growth, yet in the existing economic order, investors often come across a range of obstacles. Dr Fath El Rahman El Sheikh draws on his experience both as a legal academic and international investment lawyer to detail the interaction between new and traditional understandings of investment insurance. This comparative study of two developing countries with a similar ethnic, religious and social make-up – Sudan and Saudi Arabia – considers how international and Islamic law have evolved in new directions in the years following the demise of the Soviet Union and the spread of market economy. Dr El Sheikh considers the rules, at both the domestic and the international level, for the protection and promotion of foreign investments, as well as the incentives and facilities provided for foreign investors. He also details investment treaties; national, regional and international investment insurance programmes; and the remedies for aggrieved investors.

This comparative study will interest both legal academics and business and legal professionals involved with investment in developing countries.

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FATH EL RAHMAN ABDALLA EL SHEIKH



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PREFACE

This book is mainly based on the previous works and concepts of the first edition. Since the publication of that edition in 1984 many developments in the international investment climate have taken place, especially the demise of communism, the disintegration of the Soviet Union and the disappearance of the Cold War. These developments have engineered new rules and theories with respect to economic and international relations which have become dominated by globalization, information technology and the free market economy, and these changes have produced new rules on the treatment of foreign private investments, especially after the increased role of these investments in the development process. These developments have necessitated considerable revision and updating of the rules on the subject.

At the same time the opportunity has been taken to revise the entire text. As far as possible the text reflects materials available as at 30 June 2001.

I should like to thank Dr El Fadil Nyle Hassan, the Legal Counsel of the Inter-Arab Investment Guarantee Corporation (Kuwait) and Mr Fahad Al Zamami, Kuwait Investment Authority, for checking the changes in the original manuscript. My thanks also go to Mrs Christine D'Souza and Bridget Fernandes for the care and consideration they have shown in typing the manuscript and preparing the text for the press.

Fath El Rahman Abdalla El Sheikh
Kuwait

PREFACE TO THE FIRST EDITION

This book deals with the legal regime of foreign private investment in Sudan and Saudi Arabia, countries which have similar ethnic, religious and social backgrounds, albeit many diverse political and economic characteristics. Yet both countries fall within the category of the ‘developing countries’, which have been for decades victims of an existing international economic order which heavily tilts the scale against these countries.

Sudan is the largest country in Africa. Economically, it enjoys a strategic location, lying in close proximity to the lucrative and rapidly growing Middle Eastern markets. Despite its numerous constraints, its untapped potential has attracted the attention of the Arabs, and the international business community, as a highly promising place for investment.

Because of lack of adequate capital and technical know-how, foreign private investment is of paramount importance for the economic development of Sudan. Public investment hitherto has hobbled the progress of the national economy by burdening the country with the accumulation of massive debts, now at astronomical proportions. Hence the obvious and urgent need of the country for foreign capital makes the legal study of foreign private investment a timely necessity. Saudi Arabia, on the other hand, being one of the richest countries in terms of financial resources, and having emerged as an influential international economic power, yet needs foreign investment to import the appropriate technology, expertise and know-how for the realization of its huge developmental goals.

This book is primarily concerned with the exposition of the legal regime pertaining to foreign private investment in the two countries within the framework of international law. The crucial question is that of the control and standard of treatment and protection furnished to foreign investment. This is examined in the context of the current international investment climate, reflected in the conflict between the developed and developing countries over the international law rules governing foreign

investment during the previous century, a conflict which appears, especially in the North–South dialogue, to fade away in the wake of the recent developments in the international investment climate, especially with respect to the waves of globalization and market economy.

The study falls into three parts. Part one, consisting of three chapters, deals with certain preliminary issues.

Chapter 1 provides an economic and political perspective on the needs of Sudan and Saudi Arabia, since the legal issues can hardly be properly understood except in this perspective. The chapter also describes the recent changes in the international investment climate.

Chapter 2 deals with the initial question of the definition of the term ‘foreign investment’, under both the investment laws and treaties, which necessarily also delimits the scope of the issues that properly fall within the purview of this study. This chapter, furthermore, sets out the formal and substantive rules governing the admission of foreign investment and the formation of business organizations which run the investment activities.

Chapter 3 addresses itself to the impediments that actually face foreign investors, with special consideration of those impediments which could be eliminated by legal reform. The purpose of this chapter is to shed light on the basic nature of the problem, and to show why it is necessary to have a legal regime for the encouragement and protection of foreign private investment.

Part Two is the core of the book. It deals specifically with the form and content of encouragement and protection. It is composed of Chapters 4 to 9, inclusive.

Chapter 4 outlines the legal incentives which are fiscal in nature. A critical analysis of the efficacy of the administrative mechanism endowed with the power of granting investment licences and incentives constitutes the cardinal approach in this chapter. The main purpose is to explore how far the incentives effectively combat the impediments.

Chapter 5 deals with the unilateral guarantees of constitutional clauses, legislation and policy statements which are designed for the protection of foreign private investment. The chief purpose of this inquiry is to elucidate their legal effects both under municipal law and international law.

Chapter 6 is confined to investment treaties. It examines, in particular, the standard of treatment to be accorded to foreign investments and the relation between the investment laws and treaties, as well as their legal effect both under municipal law and international law. The desirability of

concluding a multilateral investment convention and a survey of the suggested drafts therefor is embarked upon. Special attention is directed towards the legal effect of the Charter of Economic Rights and Duties of States and its impact on the international investment climate.

Chapter 7 investigates the insurance of foreign investments by some capital-exporting countries, notably by the United States and West Germany. On the regional and international levels, the Guarantee Programme of the Arab Corporation for Investment Guarantee sponsored by the Arab States, the Islamic Investment Insurance Scheme sponsored by the Islamic Development Bank, the COMESA scheme and the MIGA programme sponsored by the World Bank are also discussed in this chapter.

Chapter 8 is confined to the divisive issue of compensation in cases of nationalization of foreign investment. The Sudanese practice in this respect is examined at length, and comparatively evaluated.

Chapter 9 is the principal theme. It focuses on all legal aspects of economic development agreements between foreign investors and the State.

Part Three is designed for remedies. It consists of Chapters 10 and 11.

Chapter 10 explores the courses which an aggrieved foreign investor can pursue to obtain relief if his investment is destroyed or adversely affected.

Chapter 11 investigates the unilateral sanctions which may be taken by the home states of the investors against the investee state to secure redress for economic injuries of these investors, if other devices prove ineffective.

This book is the outcome of a study completed in 1979 for the PhD degree in the University of Cambridge on 'The Legal Aspects of Foreign Private Investment in the Democratic Republic of the Sudan'. The notion of expanding the study to include Saudi Arabia as well has been precipitated by the genuine desire to explore the regime regulating foreign investment in that country, in an attempt to proffer a vivid account of how far the prevailing Islamic practices have contributed in the development of international rules on the subject. The reader will find more material on Sudanese law than on Saudi law. The reason is obvious. Being a Sudanese lawyer, I am well acquainted with the Sudanese legal system, a facility which was not available to me in the system of Saudi Arabia.

In undertaking the study on which this book is based and in preparing it for publication, I have become indebted to many people. I owe an immense debt of gratitude to my supervisor, Professor R. Y. Jennings, Jesus College, Cambridge University, who both supervised the work when it was

in dissertation form and read the manuscript of the first edition. His sustained encouragement, suggestions and guidance were invaluable, without which this work would have been really difficult. I would like also to thank my colleague Mohammed Nour El Din El Tahir who kindly agreed to read the manuscript and who gave me the benefit of his advice. I would like also to thank Sayed Hussein El Sayed and Saud El Shawaf, Attorneys at Law, Riyadh, for their support and help in providing me with material on Saudi law.

As the original manuscript of the first edition of this book was prepared for publication in 1980, there have been since that time many changes in the law which warrant revising the book to update the work to great extent.

I wish to express my profound thanks to the Sudan government and the Ford Foundation for granting me scholarships and grants which made the preparation and publication of the first edition of this book possible.

I am also indebted to my colleagues, the people whom I interviewed and the staff of the Squire Law Library, Cambridge, for providing and assisting me in finding the required material.

My deep thanks go to my wife, Widad, for her patience and continuing support. I must, however, add that I alone bear the responsibility for anything mentioned in this book.

Finally, I wish to record my gratitude to the publishers for their co-operation in the production of this book.

Fath El Rahman Abdalla El Sheikh

ABBREVIATIONS

AAAID	Arab Authority for Agricultural Investment and Development
AALCC	African and Asian Legal Consultative Committee
ABAJ	<i>American Bar Association Journal</i>
ABSID	Arab Board for Settlement of Investment Disputes
AC	Appeal Cases (English Law Reports: Decisions of the House of Lords and the Privy Council from 1891)
ACP	African-Caribbean-Pacific countries
AD	Annual Digest of Public International Law Cases (now International Law Reports)
AECU	African Economic and Customs Union
AID	Agency for International Development
AJCL	<i>American Journal of Comparative Law</i>
AJIL	<i>American Journal of International Law</i>
All ER	All England Law Reports
Am Econ Rev	<i>American Economic Review</i>
Am Soc Int Law Proceed	<i>American Society of International Law Proceedings</i>
APIC	The Arab Petroleum Investment Corporation
Att. Gen.	Attorney-General
Bus Lawyer	<i>Business Lawyer</i>
BYBIL	<i>British Yearbook of International Law</i>
Calif L Rev	<i>California Law Review</i>
Camb LJ	<i>Cambridge Law Journal</i>
CBI	Confederation of British Industry
CBR	<i>Canadian Bar Review</i>

LIST OF ABBREVIATIONS

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CERDS	Charter of Economic Rights and Duties of States
CLP	Current Legal Problems
CM	Council of Ministers
Cmd and Cmnd	Command Papers (British)
Columb J Trans L	<i>Columbia Journal of Transnational Law</i>
Columb LR	<i>Columbia Law Review</i>
COMESA	Common Market for Eastern and Southern Africa
C Rev	<i>Criminal Review</i>
CRO	Central Records Office
CS	Civil Suit
DAC	Development Association Committee
DRSG	<i>Democratic Republic of the Sudan Gazette</i>
Econ J	<i>Economic Journal</i>
ECOSOC	Economic and Social Council (United Nations)
EEC	European Economic Community
ER	English Reports
FAO	Food and Agriculture Organization
FBJ	<i>Federal Bar Journal</i>
FCN	American Friendship, Commerce and Navigation Treaties
FCSC	United States Foreign Claims Settlement Commission
FILJ	<i>Foreign Investment Law Journal</i>
Ford L Rev	<i>Fordham Law Review</i>
GA	General Assembly of the United Nations
GATT	General Agreement on Tariffs and Trade
GCC	Gulf Co-operation Council
Grotius Society	<i>Grotius Society Transactions</i>
Harv Int LJ	<i>Harvard International Law Journal</i>
Harv LR	<i>Harvard Law Review</i>
IBRD	International Bank for Reconstruction and Development (World Bank)
ICC	International Chamber of Commerce
ICJ Rep	<i>International Court of Justice Reports</i>
ICLQ	<i>International and Comparative Law Quarterly</i>
ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association

IDB	Islamic Development Bank
IFC	International Finance Corporation
IIIA	International Investment Insurance Agency
ILC	International Law Commission
ILM	<i>International Legal Materials</i>
ILO	International Labour Organization
ILR	International Law Reports
IMF	International Monetary Fund
Indian JIL	<i>Indian Journal of International Law</i>
Int LL	<i>International Lawyer</i>
ITO	International Trade Organization
JAL	<i>Journal of African Law</i>
J of BL	<i>Journal of Business Law</i>
JMAS	<i>Journal of Modern African Studies</i>
JPL	<i>Journal of Public Law</i>
J Transn L	<i>Journal of Transnational Law</i>
JWTL	<i>Journal of World Trade Law</i>
KB	King's Bench (English Law Reports: 1901–52)
KHHC	Khartoum High Court
L of N	League of Nations
LNTS	League of Nations Treaty Series
LQR	<i>Law Quarterly Review</i>
LSDRSG	<i>Legislative Supplement to the Democratic Republic of the Sudan Gazette</i>
MIGA	Multilateral Investment Guarantee Agency
MJ	Ministry of Justice
Neth Int LR	<i>Netherlands International Law Review</i>
NIOC	National Iranian Oil Company
NYULR	New York University Law Review
OAPEC	Organization of Arab Petroleum Exporting Countries
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organization for Economic Co-operation and Development
OIC	Organization of the Islamic Conference
OPEC	Organization of Petroleum Exporting Countries
OPIC	Overseas Private Investment Corporation
PCIJ	Permanent Court of International Justice

LIST OF ABBREVIATIONS

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Petromin	General Petroleum and Minerals Organization
QB	Queen's Bench (English Law Reports: 1891–1900: 1952–?)
Rev Belge DI	<i>Revue Belge de Droit International</i>
RSG	Republic of the Sudan Gazette
SABIC	Saudi Arabia Basic Industries Corporation
SAMA	Saudi Arabia Monetary Agency
SDR	Special Drawing Rights (IMF)
SLJR	<i>Sudan Law Journal and Reports</i>
SLR	<i>Sudan Law Reports</i>
SLSDRSG	<i>Special Legislative Supplement to the Democratic Republic of the Sudan Gazette</i>
Tex Int LJ	<i>Texas Journal of International Law</i>
TIAS	Treaties and other International Acts Series
UN	United Nations
UNAAR	<i>United Nations Arbitral Award Reports</i>
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNIDO	United Nations Industrial Development Organization
UNRIAA	<i>United Nations Reports of International Arbitral Awards</i>
UNTS	United Nations Treaty Series
UNYBILC	<i>United Nations Yearbook of the International Law Commission</i>
USTIA	United States Treaties and International Agreements
WLR	Weekly Law Reports (English Law Reports)
YBIL	<i>Yearbook of International Law</i>
YLJ	<i>Yale Law Journal</i>

GLOSSARY OF ARABIC WORDS USED

<i>figh</i>	writings of Muslim jurists
<i>gezira</i>	island
<i>jizyah</i>	capitation tax
<i>omodias</i>	districts
Sunna	teachings of the Prophet Mohammed
<i>zakat</i>	alms tax

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