
THE FOREIGN INVESTMENT REGULATION REVIEW

EDITOR
CALVIN S GOLDMAN QC

LAW BUSINESS RESEARCH

THE FOREIGN INVESTMENT REGULATION REVIEW

Reproduced with permission from Law Business Research Ltd.

This article was first published in
The Foreign Investment Regulation Review, 1st edition
(published in September 2013 – editor Calvin S Goldman QC).

For further information please email
Adam.Sargent@lbresearch.com

THE FOREIGN INVESTMENT REGULATION REVIEW

Editor

CALVIN S GOLDMAN QC

LAW BUSINESS RESEARCH LTD

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

www.TheLawReviews.co.uk

PUBLISHER
Gideon Robertson

BUSINESS DEVELOPMENT MANAGERS
Adam Sargent, Nick Barette

MARKETING MANAGERS
Katherine Jablonowska, Thomas Lee, James Spearing

PUBLISHING ASSISTANT
Lucy Brewer

PRODUCTION COORDINATOR
Lydia Gerges

HEAD OF EDITORIAL PRODUCTION
Adam Myers

PRODUCTION EDITOR
Anne Borthwick

SUBEDITOR
Joanne Morley

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2013 Law Business Research Ltd
www.TheLawReviews.co.uk

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients.

Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of August 2013, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-907606-79-3

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ALI BUDIARDJO, NUGROHO, REKSODIPUTRO

ALRUD

AMARCHAND & MANGALDAS & SURESH A SHROFF & CO

BENTSI-ENCHILL, LETSA & ANKOMAH

BLAKE, CASSELS & GRAYDON LLP

CLEARY GOTTlieb STEEN & HAMILTON LLP

CONSORTIUM CENTRO AMÉRICA ABOGADOS

DARROIS VILLEY MAILLOT BROCHIER

ENGLING, STRITTER AND PARTNERS

FRESHFIELDS BRUCKHAUS DERINGER LLP

HENGELER MUELLER

KING & WOOD MALLESONS

MATHESON

MINTER ELLISON

MJLA LEGAL

SOŁTYSIŃSKI KAWECKI & SZŁĘZAK

STIBBE

URÍA MENÉNDEZ

VEIRANO ADVOGADOS

CONTENTS

Editor's Prefacevii
	<i>Calvin S Goldman QC</i>
Chapter 1	AUSTRALIA..... 1
	<i>Michael Wallin and David Moore</i>
Chapter 2	BELGIUM 14
	<i>Jan Bogaert and Peter Wytinck</i>
Chapter 3	BRAZIL..... 27
	<i>Bruno M Ferla</i>
Chapter 4	CANADA..... 39
	<i>Jason Gudofsky, Navin Joneja, Julie Soloway and Lucian Vital</i>
Chapter 5	CHINA..... 63
	<i>Jianwen Huang</i>
Chapter 6	EL SALVADOR..... 76
	<i>Diego Martín Menjívar</i>
Chapter 7	FRANCE..... 89
	<i>Didier Théophile</i>
Chapter 8	GERMANY..... 99
	<i>Jan Bonhage and Vera Jungkind</i>
Chapter 9	GHANA..... 114
	<i>Rosa Kudoadzi and Daniel Imadi</i>

Chapter 10	INDIA.....	123
	<i>Shardul Shroff, Anubhuti Agarwal, Anu Susan Abraham and Nandini Gangal</i>	
Chapter 11	INDONESIA.....	136
	<i>Theodoor Bakker, Chandrawati Dewi and Gustaaf Reerink</i>	
Chapter 12	IRELAND.....	147
	<i>Robert O'Shea and Sarah Jayne Hanna</i>	
Chapter 13	ITALY.....	161
	<i>Giuseppe Scassellati-Sforzolini and Francesco Iodice</i>	
Chapter 14	LUXEMBOURG	174
	<i>Dirk Leermakers, Claire-Marie Darnand and Valérie-Anne Demulier</i>	
Chapter 15	NAMIBIA	190
	<i>Axel Stritter</i>	
Chapter 16	NETHERLANDS.....	213
	<i>Hans Witteveen and Christof Swaak</i>	
Chapter 17	PAKISTAN.....	224
	<i>Mujtaba Jamal</i>	
Chapter 18	POLAND.....	233
	<i>Krzysztof Cichocki, Sławomir Uss and Radosław Waszkiewicz</i>	
Chapter 19	PORTUGAL.....	244
	<i>Joaquim Caimoto Duarte, Verónica Martins Mendes and Miguel Stokes</i>	
Chapter 20	RUSSIA.....	258
	<i>Vassily Rudomino and Natalia Raschevskaya</i>	

Chapter 21	SPAIN	270
	<i>Edurne Navarro and Alfonso Ventoso</i>	
Chapter 22	UNITED KINGDOM	284
	<i>Alex Potter, Mari Scimemi and Maryanne Angumuthoo</i>	
Chapter 23	UNITED STATES	302
	<i>Robert Schlossberg and Christine Laciak</i>	
Appendix 1	ABOUT THE AUTHORS.....	319
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS...	335

EDITOR'S PREFACE

This inaugural edition of *The Foreign Investment Regulation Review* aims to provide readers with a practical and comprehensive guide to foreign investment laws, regulations, policies and practices in key jurisdictions around the world. The topic of foreign investment has garnered significant attention in recent years, and is likely to become increasingly important as market barriers continue to fall, cross-border acquisitions continue to increase and national governments continue to regulate – or consider regulating – foreign investment in their jurisdictions. It is of particular interest to multinational companies seeking to expand the geographical scope of their operations through an acquisition, joint venture or other type of foreign investment. The number of foreign investment reviews of major transactions has grown in recent years, and this trend is expected to continue as the global economy becomes more integrated.

This book includes contributions from leading experts around the world from some of the most widely recognised law firms in their respective jurisdictions. It provides relevant information on and insights into the framework of laws and regulations governing foreign investment in each of the 23 featured jurisdictions, including the timing and mechanics of any required foreign investment approvals, and other practices that are specific to each jurisdiction. In describing the laws, regulations and policies related to foreign investment reviews, the focus is on practical and strategic considerations, including the key steps for foreign investors planning a major acquisition or otherwise seeking to do business in a particular jurisdiction. Recent trends and emerging issues include the growing role of national security considerations in the review of foreign investment, as well as the increasing scrutiny of foreign investments made by state-owned enterprises. In addition, given the fact that parallel regulatory reviews may indeed take place in a number of jurisdictions, the interface between foreign investment review and competition and other sectoral reviews is also discussed.

Foreign investment regimes face the difficult challenge of striking the right balance between, on one hand, maintaining the flexibility required to reach an appropriate decision in any given case and, on the other, creating rules that are sufficiently clear and predictable to ensure that the home jurisdiction offers the benefits of an attractive

investment climate. The reality faced by foreign investors is that without sufficient advanced planning, foreign investment reviews, which sometimes takes place in a politicised environment and under close media scrutiny, can potentially result in delay, increased costs and even the blocking or unwinding of a transaction. Given these risks, parties to a proposed investment are well advised to gain a thorough understanding of the regulatory regimes in each jurisdiction – particularly given the significant variation in the foreign investment review regimes in place in various countries – and to engage with regulatory counsel early in the planning process so that deal risk can be properly assessed and managed.

We hope this publication will provide a valuable guide for parties considering a transaction that may trigger a foreign investment review.

I would like to personally express my appreciation to each of the chapter authors and their firms for the time and expertise that they have contributed to this book, and also thank Law Business Research for its ongoing support and for taking the initiative to launch this publication.

Please note that the views expressed in this book are those of the authors, and not those of their firms, any specific clients, the editor or the publisher.

Calvin S Goldman QC

Blake, Cassels & Graydon LLP

Toronto

August 2013

Chapter 17

PAKISTAN

*Mujtaba Jamal*¹

I INTRODUCTION

Since 1997, Pakistan has had a liberal investment regime in terms of investor facilitation and sectors open to investment. The Investment Policy, 2013 (the 2013 Policy), announced by the federal government, allows investment in all sectors of the economy, unless specifically prohibited or restricted for reasons of national security and public safety. Restricted industries include arms and munitions, high explosives, radioactive substances, securities, currency and mint, and consumable alcohol.

There is no minimum requirement for the amount of foreign equity investment in any sector. Under the 2013 Policy, foreign investors are granted the same status as that of local and domestic investors, and all facilities available to local and domestic investors are extended to foreign investors on an equal basis. There is no upper limit on the share of foreign equity allowed, except in specific sectors, including airlines, banking, agriculture and media.²

II FOREIGN INVESTMENT REGIME

Generally, foreign investment in Pakistan is regulated by the Foreign Exchange Regulation Act, 1947 (the 1947 Act), the Foreign Investment Protection and Promotion Act, 1976 (the 1976 Act) and the Protection of Economic Reforms Act, 1992 (the 1992 Act). The government has signed investment treaties with 47 countries, and treaties for the avoidance of double taxation with 52 countries.³ The federal government has also

1 Mujtaba Jamal is an adviser at MJLA Legal. The author gratefully acknowledges the assistance provided by Ms Alina Amjad as a research associate.

2 www.pakboi.gov.pk/images/stories/Investment/INVESTMENTPOLICY.pdf.

3 www.pakboi.gov.pk/index.php?option=com_content&view=article&id=223&Itemid=144.

announced an investment policy that states the concessions and incentives available to foreign investors.

i 1976 Act

Under Section 2(1)(b) of the 1976 Act, 'foreign private investment' has been defined as investment in foreign capital by:

- a* a person who is not a citizen of Pakistan;
- b* a person who, being a citizen of Pakistan, is also the citizen of any other country;
or
- c* a company incorporated outside Pakistan.

Investment by a foreign government or foreign government agency is not included in this definition.

The term 'foreign capital' is defined in Section 2(1)(a) of the 1976 Act and covers investments made by a foreigner or by a person who, being a citizen of Pakistan, is also the citizen of any other country, in the form of foreign exchange, imported machinery and equipment, or in any other form that the federal government may approve for the purpose.

Under Section 2(1)(c) of the 1976 Act, an industrial undertaking means an industry, undertaking or establishment engaged in the production, distribution or processing of any goods; the providing of services specified in this behalf by the federal government; or the development and extraction of such mineral resources and products as may be specified in this behalf by the federal government. However, in the case of investments by persons who are citizens of Pakistan and are also citizens of any other country, the definition does not include an undertaking or establishment engaged in providing banking or insurance services.

In *Societe Generale De Surveillance SA v. Pakistan Secretary*,⁴ the Supreme Court of Pakistan, in the context of an arbitration claim and the applicability of a bilateral investment treaty, observed that the outlay of money in the acquisition of a property was a necessary ingredient to determine whether an entry or transaction was relatable to the investment. The Court held that the agreement with a foreign company through which mere services were acquired to evaluate goods, and mostly in foreign countries, was not an investment covered by the relevant investment treaty, and that such view of the investment is in consonance with the definition of foreign private investment stated in the 1976 Act.

Under Section 6 of the 1976 Act, a foreign investor in an industrial undertaking established after the first day of September 1954 and approved by the federal government, subject to the provisions of the 1947 Act, may at any time repatriate in the currency of the country from which the investment originated:

- a* foreign private investment to the extent of original investment;
- b* profits earned on such investment; and
- c* any additional amount resulting from the reinvested profits or appreciation of capital investment.

⁴ *Societe Generale De Surveillance SA v. Pakistan Secretary*, Ministry of Finance, Revenue Division, Islamabad, 2002 SCMR 1692.

Furthermore, a creditor of an industrial undertaking referred to above may repatriate foreign currency loans approved by the federal government and interest thereon in accordance with the terms and conditions of the loan.

ii The 1992 Act

The 1992 Act expressly overrides the general provisions regarding foreign currency and exchange contained in the 1947 Act and, by implication, the Foreign Exchange Manual (Section 3). Section 4(1) allows any person (resident or non-resident in Pakistan) to bring, hold, sell and take out foreign currency or foreign exchange within or out of Pakistan in any form without making a foreign currency declaration and being subject to any questions regarding the same. However, following the implementation of the Protection of Economic Reforms Amendment Ordinance, 1999, Section 4(1) does not apply to:

- a* any foreign exchange borrowed with the permission of the State Bank of Pakistan;
- b* any payment from abroad for goods exported from Pakistan, or any payment received from abroad for services rendered in or from Pakistan;
- c* earnings or profits of the overseas offices of Pakistani firms, companies and banks; and
- d* any foreign exchange purchased from any authorised dealer in Pakistan.

Under Section 6 of the 1992 Act, the fiscal incentives for investment provided by the government through statutory orders or notifications shall remain in force for the terms specified therein, and shall not be altered to the disadvantage of investors. Section 7 of the 1992 Act further states that the ownership, management and control of any banking, commercial, manufacturing or other company, establishment or enterprise transferred by the government to any person under any law shall not be compulsorily acquired or taken over again by the government for any reason whatsoever.

In *Amir Bakht Azam through Attorney v. Co-operative Model Town Society (1962) Ltd*,⁵ in adjudicating a petition filed by a member of a housing society challenging a land development project based upon foreign investment announced by the management of that society, the Lahore High Court observed that although foreign investment is to be encouraged, foreign investors are not above the law of Pakistan; they must conform to such laws, and exhibit sensitivities regarding the rights and privileges of the inhabitants of the area.

There have been several amendments in the statutes of Pakistan since the promulgation of the 1992 Act; some of these amendments expressly override the provisions of the 1992 Act.

iii The 1947 Act

The 1947 Act regulates the flow of money into and out of Pakistan. The State Bank of Pakistan has granted certain general permissions to foreign investments subject to

5 *Amir Bakht Azam through Attorney v. Co-operative Model Town Society (1962) Ltd*, Lahore, 2007 CLC [Lahore] 374.

procedural compliance requirements. All foreign investments into Pakistan may be registered with the State Bank of Pakistan to ensure the smooth repatriation of capital and profits at a later stage.

III TYPICAL TRANSACTIONAL STRUCTURES

i Company

The primary legislation governing companies in Pakistan is the Companies Ordinance, 1984, which envisages the following types of companies:

- a* single member company – a private company with a single member and a single director;
- b* private limited company – a company that, in its articles:
 - restricts the right to transfer its shares, if any;
 - limits the number of its members to 50 (not including persons who are in the employment of the company); and
 - prohibits any invitation to the public to subscribe for the shares, if any, or debentures of the company. Generally, where two or more persons hold one or more shares in a company jointly, they are treated as a single member;
- c* public limited company – a company that does not have the restrictions contained in the articles of association of a private company; and
- d* listed company – a company, a body corporate or other body whose securities are allowed to be traded on a stock exchange.

ii Branch office

Under Section 450 of the 1984 Ordinance, a foreign company may register a branch office with the Registrar at the Securities and Exchange Commission Pakistan (the SECP), in order to directly conduct business activities in Pakistan.

Section 450 requires a foreign company incorporated or formed outside Pakistan that establishes a place of business (a branch, management, share transfer or registration office, factory, mine or other fixed place of business) within Pakistan to register its place of business. The term ‘place of business’ does not include an agency, or the carrying out of business dealings through a *bona fide* broker or general commission agent acting in the ordinary course of his or her business as such; last it should be noted that the place of business of the company’s subsidiary (resident or incorporated in Pakistan) will not suffice as the place of business of the company itself.

Any failure by a foreign company to comply with the requirement to register the place of business does not affect the validity of any contract, dealing or transaction entered into by the company, or its liability to be sued in respect thereof; however, the company will not be entitled to bring any suit, claim any set-off, make any counterclaim or institute any legal proceedings in respect of any such contract, dealing or transaction until it has complied with the registration requirements.

iii Joint venture

The concept of joint venture is not statutorily recognised in Pakistan; however, private parties can enter into a partnership or a contractual relationship to the same effect. A

foreign investor may enter into a joint venture arrangement with a local partner through a contract. Often, parties agree to incorporate material terms of their joint venture agreement into the articles of association of the company. A joint venture may be in the form of a special purpose vehicle. Currently, Pakistan does not have a limited liability partnership law. The concept of partnership is well recognised in Pakistan under the Partnership Act 1932.

iv Acquisition of a business

Pakistan has a comprehensive regulatory framework for privatisation, and has generally been keen to encourage foreign investors to participate in the privatisation process. Under the Privatisation Commission Ordinance, 2000, the Privatisation Commission may carry out privatisation through any of the following modes:

- a* sale of assets and business;
- b* sale of shares through public auction or tender;
- c* public offering of shares through a stock exchange;
- d* management or employee buyouts by management or employees of a state-owned enterprise;
- e* public offering of shares other than through a stock exchange;
- f* sale of shares, assets, business and property to a person that has a pre-emptive right to acquire the same; and
- g* lease, management or concession contracts.

v Public-private partnership (PPP)

The federal and provincial governments in Pakistan have promulgated PPP laws to facilitate infrastructure development that envisage a range of contractual arrangements. Generally, such arrangements include contracts whereby:

- a* a private party undertakes the financing and construction of an infrastructure project and:
 - upon its completion hands it over to the relevant government agency, which will reimburse the total project investment on the basis of an agreed schedule;
 - upon its completion hands it over to the relevant government agency on a lease arrangement for a fixed period, after the expiry of which ownership of the project is automatically transferred to the government agency; or
 - accepts the operation and maintenance of the project for a fixed term during which it is allowed to collect appropriate tariffs, tolls, fees, rentals or charges from project users not exceeding those proposed in the bid or negotiated and incorporated in the PPP agreement, and transfers the facility to the relevant government agency at the end of the fixed term;
- b* a private party is authorised to finance, construct, own, operate and maintain an infrastructure project from which it is allowed to recover its investment and operating and maintenance expenses by collecting user levies from project users; the private party owns the project, and may choose to assign its operation and maintenance to a project operator;

- c* a contractual arrangement similar to that outlined in (b) above is agreed, except that the private party owns the infrastructure project during the fixed term prior to its transfer to the relevant government agency;
- d* a government agency contracts out an infrastructure project to the private party to construct it on a turnkey basis, assuming cost overruns, delays and specified performance risks; once the project is commissioned, the private party is given the right to operate the facility and collect user levies under the PPP agreement;
- e* a private party expands an existing infrastructure facility that it leases from a government agency to operate the expanded project and collect user levies until the recovery of the investment over an agreed period;
- f* favourable conditions that are external to an infrastructure project that is to be built by the private party are integrated into the PPP agreement, giving the private party the right to develop adjoining property and thus enjoy some of the benefits the investment creates, such as higher property or rent values;
- g* an existing infrastructure facility is handed over to the private party to refurbish, operate and maintain for a specified period, during which the private party collects user levies to recover its investment and operation and maintenance expenses. At the expiry of this period, the facility is returned to the relevant government agency;
- h* an existing infrastructure facility is handed over to the private party to refurbish, operate and maintain with no time limitation imposed on ownership. The private party is allowed to collect user levies to recover its investment and operation and maintenance expenses in perpetuity; and
- i* the operation and management of an infrastructure project is entrusted to the private party by a government agency for an agreed period on payment of specified consideration. The government agency may charge the user levies, and collect the same itself or entrust the collection for consideration to any person who shall pay the same to the government agency.

IV REVIEW PROCEDURE

In respect of the categories of business activities outlined below, approval is granted to foreign investors by the following departments:

<i>Type of company</i>	<i>Approval authority</i>
Company investing in a restricted sector (e.g., arms and munitions, security, printing, currency and mint, high explosives and radioactive substances)	Ministry of Industry and Board of Investment
Banking company	State Bank of Pakistan and the Ministry of Finance
Leasing company, investment company, asset Management and venture capital companies, insurance company	The SECP

Any acquisition of an existing business by any company in Pakistan is subject to approval by the Competition Commission of Pakistan (the CCP) if it gives rise to any competition concerns. This aspect is regulated by the Competition Act, 2010. In the case

of a merger or acquisition, where an undertaking intends to acquire the shares or assets of another undertaking, it must meet the pre-merger notification thresholds stipulated in Regulation 4 of the Competition (Merger Control) Regulations, 2007. Further, the undertaking must apply for clearance from the CCP. The Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Ordinance, 2002 also applies in the case of acquisition of more than 10 per cent of the voting shares in a listed company

V FOREIGN INVESTOR PROTECTION

In *Suleman Daud v. Lahore Development Authority through Director General*,⁶ a Pakistani American who had purchased immovable property in Pakistan through foreign exchange sent from the US through the normal banking channels challenged the acquisition of said property by a government land development authority. He relied on Section 8 of the 1992 Act, which prohibits the government from compulsorily acquiring:

- a* any foreign, industrial or commercial enterprise established or owned in any form by a foreign or Pakistani investor for private gain in accordance with law; and
- b* any investment in the shares or equity of any company, firm or enterprise, or commercial bank or financial institution, established, owned or acquired by any foreign or Pakistani investor.

The Lahore High Court upheld the contention of the petitioner and directed that the petitioner was entitled to the exclusion of his property from the acquisition process.

Section 5 of the 1976 Act also seeks to protect the rights of foreign investors by providing that foreign capital or foreign private investment in an industrial undertaking can only be acquired under the due process of law, which provides for adequate compensation thereof to be settled in the currency of the country of origin of the capital or investment, and specifies the principles on and the manner in which compensation is to be determined and given. The 1976 Act was promulgated prior to the 1992 Act. Therefore, applying the maxim *leges posteriores priores contrarias abrogant*,⁷ it may be argued that Section 8 of the 1992 Act supersedes Section 5 of the 1976 Act, and the government cannot take over any industrial undertaking under any circumstances.

Under Section 8 of the 1976 Act, foreign private investment cannot be liable to greater taxation than that applicable to citizens of Pakistan, and Section 8(3) allows for such tax concessions that the government of Pakistan may have entered into with the government of another country. Moreover, under Section 9 of the 1976 Act, industrial undertakings are accorded the same level of treatment as that afforded to industrial undertakings having no such investments. Section 9 particularly applies in the application of the laws, rules and regulations applicable in the importation and exportation of goods.

6 *Suleman Daud v. Lahore Development Authority through Director General*, 2008 CLD [Lahore] 850.

7 See *Tank Steel and Re Rolling Mills Pvt Ltd v. Federation of Pakistan*, PLD 1996 SC 77.

In *Wattan Party v. Federation of Pakistan*,⁸ the Supreme Court held that the process of privatisation of the Pakistan Steel Mills Corporation stood vitiated by acts of omissions and commissions on the part of certain state functionaries, reflecting violation of mandatory provisions of law and the rules framed thereunder that adversely affected the decisions regarding the pre-qualification of a member of the successful consortium, valuation of the project and the final terms offered to the successful consortium, which were not in accordance with the initial public offering given through advertisement. The letter of acceptance and share purchase agreement were declared void and of no legal effect.

Through the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 (the RE Act), the New York Convention has been incorporated into the municipal laws of Pakistan, thereby facilitating the enforcement of foreign arbitral awards in Pakistan. Previously, foreign awards were executed in Pakistan under the Arbitration (Protocol and Convention) Act 1937, which the RE Act has repealed, except for foreign arbitral awards made before 14 July 2005 or foreign arbitral awards made in a state that is neither a party to the New York Convention nor notified by the government of Pakistan for the purposes of the new Act.

Arbitrations arising from investment treaty arbitrations are covered by the ICSID Convention and are regulated by the Arbitration (International Investment Disputes) Act 2011, which specifically provides that the provisions of the Arbitration Act, 1940 (which is the principal legislation in Pakistan regarding arbitration) will not apply to proceedings pursuant to the ICSID Convention (Section 7).

VI OTHER STRATEGIC CONSIDERATIONS

A foreign investor interested in establishing business operations in Pakistan must ensure that it has a good understanding of the regulatory framework relevant to the area in which it is seeking to invest. The courts in Pakistan invariably uphold arbitration agreements, and usually stay legal proceedings in favour of arbitration proceedings provided the issues in dispute do not involve determination of criminality or matters of public policy. On more than one occasion, contracts relating to foreign investments have been struck down by the courts in Pakistan on account of illegality. The courts have consistently taken the view that matters involving questions of criminality (including allegations of violations of mandatory laws, corruption and fraud) or public policy are exceptions to the doctrine of sanctity of contract. Therefore, it is advisable that international businesses ensure full legal and regulatory compliance as part of their due diligence process, especially when entering into contracts with public entities, so that any inadvertent omission may not undermine their investment, frustrate their contractual rights, or both, if and when a dispute or difference between the parties arises.

8 *Wattan Party v. Federation of Pakistan*, PLD 2006 SC 587.

VII CURRENT DEVELOPMENTS

In the recent case of *Maulana Abdul Haque Baloch v. Government of Balochistan through Secretary Industries and others*,⁹ the Supreme Court of Pakistan held that any investments made in Pakistan against the country's laws will be treated as illegal, notwithstanding any bilateral investment treaty that the government may have entered into. The Court also held that even though foreign investment is encouraged, the investor must comply with the obligation enshrined in Article 5 of the Constitution of Islamic Republic of Pakistan, 1973, which states that obedience to the law and Constitution of Pakistan is an inviolable obligation of a citizen of Pakistan, and of any person for the time of his or her being within Pakistan.

The provincial government of Balochistan had entered into an agreement with a foreign company that the Court held to be *void ab initio* under Section 23 of the Contract Act, 1872, and all other contracts and agreements reached for the exploration were also held to void and illegal; therefore, the deal and the lease were struck down. Further, the case asserted the sovereignty of the state as the most paramount principle, which cannot be derogated from in any circumstance.

⁹ *Maulana Abdul Haque Baloch v. Government of Balochistan through Secretary Industries and others*, 2013 SCMR 511.

Appendix 1

ABOUT THE AUTHORS

MUJTABA JAMAL

MJLA Legal

Mr Mujtaba Jamal, a law graduate of the London School of Economics and a barrister-at-law, is an experienced corporate and commercial lawyer, having advised Fortune 500 companies on joint ventures, corporate governance, shareholders' rights, corporate restructuring and mergers, acquisitions and takeovers, and merger control and abuse of dominance. Mr Jamal also holds an EMBA degree from the Lahore University of Management Sciences, and attended Harvard Business School for executive education. Mr Jamal has been consistently ranked among the leading corporate and commercial lawyers in Pakistan by *Chambers Asia Pacific*, *Chambers Global* and *The Legal 500 Asia-Pacific*.

MJLA LEGAL

57-P Gulberg II

Lahore

Pakistan

Tel: +92 42 35778700-02

Fax: +92 42 35778703

legal@mjlalegal.com

www.mjlalegal.com