P-ISSN: 2709-6254	Journal of Development and Social Sciences	January-March 2022,Vol. 3, No. 1
O-ISSN:2709-6262	http://dx.doi.org/10.47205/jdss.2022(3-1)05	[52-63]

Journal of Development and Social Sciences

www.jdss.org.pk

RESEARCH PAPER

Protections and Facilitations for Foreign Investors: Legal Perspective under Pakistani Laws

[1] Wen Xuwu [2] Kashif Imran Zadi* [3] Usman Hameed

1. Professor, Department of Law, Zhejiang University of Finance & Economics, Hangzhou, China
2. Assistant Professor, Department of Law, University of Management & Technology, Lahore, Pakistan
3. Associate Professor, Department of Law, University of Management & Technology, Lahore, Pakistan

Funding: The Project Supported by the National Social Science Foundation of China (Project No.19BGJ072) and MOE Humanities and Social Sciences Fund (Project No.17YJA820032).

PAPER INFO

Received: October 16, 2021
Accepted: January 16, 2022
Online: January 21, 2022

Keywords: Economic development, Equal Treatment. Investment, Foreign Investors, Legal Protection

***Corresponding Author:**

kashif.zadi@umt.edu.pk

ABSTRACT

Foreign investment is essential for every country's survival and prosperity. It encourages societal welfare programs by boosting career possibilities, raising extra income, lowering poverty, promoting commerce, and expediting the country's economic progress (Waheed & Ghumman). Pakistan is indeed the world's fifth most populated nation with more than two hundred million people (Countries in the world by population, 2021). Each of its commercial industry, especially renewable energy, infrastructural facilities, agricultural production, textiles, spin, mines, petroleum, and gas, is accessible to foreign investors. International investors are able to invest directly in any field, and there are no restrictions on the amount of money they can bring in or take out. Pakistan's government wants to attract foreigners to boost investment initiatives in the country. Pakistan serves as a gateway for overseas companies aiming to develop their business in Central Asia. Keeping in view the importance of investment, specific laws are being made to promote foreign investment over time. This research aims to analyze the nature of laws and regulations available in Pakistan dealing with the protection and facilities of foreign investment. It will explore the safeguards provided under Pakistan's laws and regulations and the extent to which Pakistan provides ease of doing business to foreign investors. It will further elaborate the risks involved in the way of investors. Finally, some practical suggestions and recommendations will be made to improve the protection regime.

Introduction

Foreign investors can invest in Pakistan as an entrepreneur, a group of individuals, an incorporated entity, and a public or private corporation. Pakistan is abundant in mineral endowments and has the world's second-largest middle-class population, providing chances for investment in all sectors of the economy to meet rising demand. It is among the states that provide safe and secure investment options with full ownership and specific incentives for starting a business. The authorities has created Specific Economic Zones throughout the country and have offered exclusive tax advantages for importing machinery to start a business. Keeping in mind the national interest, the Federal Government of Pakistan welcomes, authorizes, and promotes investments based on particular motives in different sectors. The sector, which does not already exist and the investments in that field are desirable for the development and progress of the country. The investment in the sector, which is underdeveloped, and the contribution for the development is adequate to cope with the social and economic development of the country. The investment contributes to strengthening the infrastructure, economic development, and utilization of natural resources in Pakistan in a fruitful way. The investment is desirable to increase the employment opportunities in the country. The investment contributes to developing Pakistan's managerial, capital, and technical resources (Section3, 1976).

Foreign Investment Laws and Policies to Protect and Facilitate Foreign Investors in Pakistan

Since the creation of Pakistan, It has been making laws and regulations to attract foreign investors and facilitate them in their investment projects. Currently, the following Statutes and Policies are in force in Pakistan, which deal with foreign investment.

1. Foreign Exchange Regulation Act, 1947.
2. The Foreign Private Investment Protection and Promotion Act (FPIPPA), 1976.
3. The Protection of Economic Reforms Act, 1992.
4. Foreign Investment Policy, 2013

Foreign Exchange Regulation Act, 1947

This act aims to regulate the inflow and outflow of money from Pakistan. Certain permissions have been granted to foreign investors by the State bank of Pakistan, subject to specific requirements of procedural nature. Every foreign investments made in Pakistan should be documented with the State Bank in order to facilitate future easy returns of capital, material, and earnings (FERA, 1947).

Foreign Private Investment Promotion & Protection Act (FPIPPA), 1976

The primary purpose of this Act's promulgation is to promote, facilitate, and protect foreign private investment in Pakistan.

Government cannot acquire any Property of the Foreigner

Protection of foreign investment has been extended under the 1976 Act. The government can only obtain the property of foreign investor through due process, according to section 5 of this Act. A sufficient indemnification in the currencies of the investment's origination is also needed to pay to the foreign investor as soon as possible. Any arrangement between the Federal Government and the foreign investor will remain unaffected by the acquisition (FPIPPA, 1976).

Repatriation of Investments

Subject to the provisions of the 1947 Act, a foreign investor in a commercial venture endorsed by the federal government may claw back in the country's currency wherein the investment originally came to the level of the initial invested capital, benefits obtained through money, and any extra gains arising of the invested capital profits or recognition of the infrastructure at any time (FPIPPA s., 1976).

Tax Exemptions and The Prevention Of Dual Taxes

The Federal Government of Pakistan under section 8 offers favorable treatment to foreign investments by giving privileges in the taxes. This section prohibits double taxation. Foreign investors can also be granted further concessions in the agreements (FPIPPA s. , 1976).

Equal Treatment

Equal treatment for foreign investment has been provided under section 9 of this act. It ensures the same treatment of foreign investors as domestic investors (FPIPPA s. , 1976).

Protection of Economic Reforms Act, 1992

This act was enacted to enhance the protection of foreign investments. This statute supersedes the 1947 Act's general provisions on foreign funds and exchange, as well as the Section 3 of the Foreign Exchange Manual. Section 4 (1) enables any person, whether a Pakistani citizen or a non-resident, to bring, sell, hold, and take out foreign cash or foreign exchange in any form in or out of Pakistan's territory without making a foreign currency declaration or being subjected to any questioning about it. Section 4 (1), however, does not apply due to the enactment of the Economic Reforms Amendment Ordinance, 1999.

Immunities to Foreign Currency Accounts

Section 5 of this act provides immunity from any inquiry about the source of currency to all foreign currency account holders. This section exempts the foreign currency accounts from the wealth tax, income tax, and Zakat deductions. It also provides complete secrecy of transactions for foreign currency accounts; moreover, SBP or other banks of

Pakistan cannot impose any restrictions on withdrawal or deposit of money in the foreign currency accounts (PERA, 1992).

Protection of Fiscal Incentives

According to Section 6 of the Protection of Economic Reforms Act 1992, investment related fiscal incentives that have already been subsidized by the government through statutory orders or notifications shall remain in effect, as per the conditions stipulated therein, and would not be changed to the detriment of entrepreneurs (PERA S. , 1992).

Safeguarded of Transfer of Assets to the Private Business

According to section 7 of the same Act, the management, ownership, and control of any commercial, manufacturing, banking, or any other company, enterprise, or establishment which the government transferred to any person under any law cannot be reversed for whatever reasons (PERA S. , 1992).

Foreign Investment Protection

Section 8 of the 1992 Act provides vital protection for the investment of foreigners in Pakistan. Under this section, the government of Pakistan cannot take over or compulsorily acquire any foreign commercial and industrial enterprise owned or established by a foreigner under the law, or any investment in share or equity of any enterprise, company or firm, financial institution, or commercial bank acquired or owned by a foreigner in Pakistan (PERA S. , 1992). In the case of Suleman Daud. Vs. Lahore Development Authority, (2008 CLD [Lahore] 850) the petitioner, being a foreigner, challenged the acquisition of his land, which was purchased through the foreign exchange sent from the United States using the normal banking channels by a government land development authority. The petitioner relied on Section 8 of the Protection of Economic Reforms Act 1992, which prohibits the government from acquiring compulsorily:

a) Any foreign, commercial, or industrial enterprise owned or established by a foreigner for private gains under the law; and

b) Any investment in the shares or equity of any company, firm or enterprise, financial institution, or commercial bank owned, acquired, or established by any foreigner.

His petition was allowed. The Honorable Lahore High Court maintained the petitioner's stance and directed that the petitioner was entitled to the exclusion of his property from the acquisition process by the authorities.

Protection and Facilities of Foreign Investment in Pakistan under Investment Policy, 2013

Before investing in any foreign country, Investors give much consideration to the security and risk situation of the host country and the legal mechanism available in the country for protecting the same. The government of Pakistan is mindful of the security and safety of foreign investors and ensuring their fundamental rights through due process of law. Pakistan has followed very liberal framework concerning the facilitation of investors and the sectors available for investment under investment policy 2013. The government of Pakistan has lifted the ceilings for minimum and maximum investments. The investors are free to invest with confidence without limiting the minimum or total equity required to invest. It has facilitated the investors and has increased their confidence. Moreover, the foreign investors have been given equal status at par with the locals, and both enjoy the identical of the facilities provided by the government on an equal basis. Under investment policy 2013, Pakistan has given several advantages and attractions to provide an optimum environment for business and investment in Pakistan. Pakistan has ensured all those facilities that an investor looks for before investing in a foreign country. The government has shown the promising attitude under investment policy 2013 to shield the rights, protections and facilities for investors, which can be seen as below;

Rights of Investors

About the same set of circumstances, the transactions, including any operation of management, protection, establishment, or expansion, shall be accorded treatment no less favorable than that of national investors of Pakistan. This treatment shall be subject to the rules and regulations49 made in this regard. The treatment relating to any investment affair must be fair and equitable, and without discrimination (IPP, 2013).

Guarantee and Insurance

Pakistan has signed and ratified the MIGA and observes the principles formulated by MIGA in good faith. Board of Investment Pakistan provides easy and effective access to the risk management products offered by MIGA. Therefore, the initiative of investment by foreign investors is full of confidence and satisfaction owing to the insurance access to MIGA (C3.1.5, 2013).

Right to due process of law

Easy access to the due process of law plays a vital role in encouraging foreign investors. Subject to the contract provisions, an investor can approach the international Arbitration forum for the Settlement of Disputes if he has already exhausted the local remedies within six months (C3.2, 2013). Pakistan has recently reframed its arbitration laws to facilitate the arbitration. Under the Commercial Arbitration act 2011, an investor can go to the higher courts for arbitration if the same is provided in the agreement (C3.1.5, 2013).

Protection of Intellectual Property Rights

Policies focusing on Intellectual property rights have been upgraded in Pakistan after establishing the Intellection Property Organization. This up-gradation resulted in penalties for infringement and violations of intellectual property rights. The proper mechanism has been introduced for innovative investments of foreign investors to secure their innovations by providing copyright, patents, and trademarks (IPP C. , 2013).

Enhancement of Physical Security

Keeping in view Pakistan's law and order situation and the war on terrorism, the Board of Investment Pakistan provides airport security to foreign investors. It is arranged with the coordination of BOI and provincial investment promotion agencies. Any foreign investor may request the BOI to get security protection (IPP C. , 2013).

Reduction in the cost of doing business

Board of Investment Pakistan has taken various steps, focusing on reducing the cost of doing business and investment in Pakistan. Necessary information for starting a business in Pakistan, including investment opportunities, has been made online. The online visa application procedure has been introduced to facilitate the investors (IPP C. , 2013).

One Window Operation

Board of Investment Pakistan has considerable reduced bottlenecks and is still trying to ease out the process of starting a business in Pakistan. It has been done by eliminating all lengthy and formal procedures and making it easy for an investor to complete all necessary steps from one window and start the business conveniently (IPP C. , 2013).

Creation of special economic zones (SEZs)

SEZs have been established in the country. Under SEZs Act 2012, to meet the global challenges in the field of business and investment efficiently and effectively. Under the said Act, various exemptions and incentives have been granted to the industrialists, far beyond the regular political division of the tax system, to attract and encourage the investment. The subsequent governments cannot withdraw exemptions and incentives. The Federal Government of Pakistan has developed a better policy framework for Special economic zones. It has created cost-effective and efficient industrial areas to facilitate domestic and foreign investors (IPP C. , 2013).

Flexible Procedures for lease and Transfer of Land

An easy lease procedure has been adopted, circumscribing the restrictions imposed by the concerned authority. There is no limitation on the duration of the lease agreement for foreign investors. Limitations on the transfer of any land to or by the foreign investor have been removed, but the agreed-upon conditions between the parties will apply. Foreign and domestic real estate developers are subject to the same rules and regulations provided by the Provincial or Federal Government (IPP C. , 2013).

Pioneer Industry

The government of Pakistan is committed to bringing new and innovative technologies to the country. Special incentives and concessions are given to the new industries bringing innovative technology for the first time to Pakistan. The pioneering industry is also entitled to all benefits, incentives, and concessions provided to investors investing in Special Economic Zones (IPP C. , 2013).

Flexible Financial Procedures

To encourage foreign investment, the Government of Pakistan has made the financial procedure flexible. Foreign investors can freely exchange the local currency into any other foreign currency. Foreign investors have been allowed to get domestic loans and borrowings subject to the rules of SBP and SECP. Furthermore, there is no restriction on the use of foreign loans (IPP C. , 2013).

Research and Development

Board of Investment Pakistan is working to develop linkages between research institutes/universities and foreign investors to introduce the innovations or design the training programs as per the needs of foreign investors. The primary purpose of this facility is to provide the foreign investors an opportunity to find out the skilled staff necessary for carrying out their projects (IPP C. , 2013).

Visa Facilitation

Pakistan has made necessary amendments to its visa policy to facilitate foreign investors and businessmen. Business people of 69 countries, including china, can obtain multiple-entry business visas, valid for five years, within just 24 hours from the Pakistani Missions working abroad. Business people of these countries can also obtain visas on arrival with the validity of thirty days on arrival at the airport to produce necessary documents. All foreigners with work visas enjoy immunity from registration with the police except nationals of the countries on the negative list (IPP C. , 2013).

Flaws in Pakistani Laws Affecting the Foreign Investment and Their Remedies

For the proper and effective implementation and regulation of foreign investment, it is necessary to find out the flaws in Pakistani Laws which are detrimental to foreign investment in Pakistan. Although Pakistan has the most liberal investment regime in the region, some defects and deficiencies in investment and other laws may affect foreign investment flow. Analysis of these laws shows that the Following are the primary deficiencies in Pakistani laws which may influence foreign investment.

Multiplicity of Investment laws

Currently, three different Acts, namely the Protection of Economic Reforms Act, 1992, Foreign Investment Protection and Promotion Act, 1976, and the Foreign Exchange Regulation Act, 1947, are in force to deal with Pakistan's foreign investment. Foreign Investor remains confused about the different provisions of the Acts mentioned above, which may affect the decision of the Investor to make investment. The range of regulations, directions, and specific coinciding categorizations has often led to misperceptions.

Discordance “Arbitration (International Investment Disputes) Act, 2011” with “ICSID Convention”

The “Arbitration (International Investment Disputes) Act, 2011” (the AIDA) has implemented the “ICSID Convention” in Pakistan. It's worth noting that no rule in AIDA indicates the award's finality once it's been registered. It is irreconcilable with Articles 53 and 54 of the ICSID Convention, and it may raise questions regarding the ICSID awards' finality. It describes in article 54 as “the Contracting State shall recognize an award as if it were a final decision of a court” (Art54). The term "final" is omitted from Section 4 of AIDA, which states that an ICSID award will be carried out as if it were a High Court judgment. The absence of a comparable provision of the REFA Section 9 in AIDA, which overrides the “New York Convention, 1958” provisions over REFA provisions in circumstances of incompatibility, adds to this anxiety.

Delay in Courts

In disagreements between investors and the government, Pakistani courts take a pro-investor stance, which helps to build multinational investor trust. The Judiciary have autonomously delivered their judgment against the national government in the past. However, due to flaws in the Code of Civil Procedure of 1908, lawsuits can take a lengthy period to resolve. Even the implementation of an arbitral award can take a long time. Pakistani courts are overburdened with cases, causing delays in the dispensation of justice. Foreign investors have little faith in the judicial process, which they believe is incapable of providing prompt resolution in the event of a controversy. According to recent World Bank statistics, South Asia is the region with the slowest pace of court execution of arbitral awards.

Arbitral awards take more than two years to implement in Sri Lanka and Pakistan. The snail pace litigation and resultant delay in fulfillment of awards raises uncertainties in the eyes of international investors. As a result, investors are hesitant to invest in such a country (WB, 2010).

Conclusion and Recommendations

The diversity of laws regulating foreign investment confuses the external investors while deciding the investments of considerable amounts in Pakistan. It is somewhat necessary to solve these ambiguities by promulgating a unified foreign investment law to secure the confidence of foreign investors. Current investment laws deal with foreign and local investors simultaneously, which mixes up foreign investment regulations with local investment regulations. To avoid feeling confused while investing, there should be a separate investment law for foreign investors applying solely foreign rules and regulations. The latest development demonstrates that Pakistan's High Courts have a favorable stance toward foreign businesses. Nonetheless, due to flaws in the procedural laws, the courts are notorious for taking a lengthy time to reach a decision, draining away international investors' trust. Foreign investors and businesspeople do not have a lot of time to deal with a protracted legal procedure. As a result, it is need of the time to amend the Civil Procedure Code of 1908 to solve the issues of international investors like those of summary trial to protect them from costly and time-consuming litigations. Foreign investor issues should be adjudicated expeditiously in a shorter time span to ensure that justice is delivered promptly and without delay. Considering that Pakistani judges frequently rule in favor of foreign investors, it will be logical and in the best interests of investors to explore domestic resources before turning to ICSID, as Pakistani court decisions and judgments are easier to enforce in Pakistan. If the investor uses the local courts instead of the ICSID, it will have the right to appeal to Pakistan's higher courts, which is crucial in protecting the investor's rights. Pakistan possesses a large number of the skilled and semi-skilled workforce which is cheap compared to Chinese labor. Furthermore, local labor is well acquainted with the area and local circumstances. By engaging local labor in the investment projects, investors will gain the local community's confidence, which will provide the local community with a sense of ownership. In this way, they will be able to more vigorously protect the investor's interests. It will also help to mitigate the reservations of the Baloch community. Furthermore, the involvement of local labor will result in the safety and security of the project. All areas of the economy are open for foreign investment except restricted areas (IPP A. 2., 2013). Pakistan has great potential for investment in the below-mentioned fields because these fields of the economy are still in a transitional phase in Pakistan. Investment in any of these fields is likely to result in more profits. Therefore, investors are recommended to invest to maximize their profits in the areas of agriculture, Livestock and Poultry, Manufacturing, Pharmaceutical industry, Automotive industry, Industrial & Commercial Machinery, Electronics & Other Electrical Equipment, Infrastructure and Real State, Power Generation, Construction, Telecommunication & IT, Transportation, Oil and Gas exploration, Mining & Quarrying, Financial Services, Education, Tourism, Health, Food & Nutrition. The fields restricted to foreign investment for public safety and national security reasons are Arms and ammunition, Radioactive substances, Currency and mint, High explosives, Consumable alcohol and Securities (IPP A. , 2013). Therefore, foreign investors are advised to avoid making investment in the above fields to save themselves from any risk. In some cases, it has been observed that the foreign investors have secured agreements with the State of Pakistan by using illegal means, i.e., bribery, corruption, etc. Under the Constitution of Pakistan, High Courts and the Supreme Court of Pakistan have the authority to take *suo moto* action in suchlike cases, which are against the public policy as was the case with *Turkish Company karkey* (2012 SCMR 773). The Supreme Court Pakistan declared the agreements about the Rental power generation null and void on discovering the involvement of corruption between some officials of Electric Supply Company of Pakistan and officials of the said company (2012 SCMR 773). Therefore, it is recommended that while making a contract with public authorities, the investor should avoid illegal means such as corruption or bribery in securing that contract which may undermine their investment. Section 450 of the Companies Act, 2017 requires the foreign companies which establish a branch office in Pakistan to register their place of business (CA, 2017). Suppose a foreign company fails to fulfill the requirements for registering its place of business, it will not affect the validity of its transactions, including contracts and dealings done by the company, or its liability to be sued in this respect. However, the foreign company which fails to fulfill these requirements will not be able to bring any suit, claim, and counterclaim, set-off, or institute any legal proceedings concerning any such transaction, contract, or dealings until it satisfies all the requirements of the registration process (CA, 2017). Therefore, it is recommended that the foreign investor must fulfill the registration requirements to bring any legal claim to protect their rights and interests in Pakistan.

References

2008 CLD [Lahore] 850 (LAHORE).

2012 SCMR 773.

Countries in the world by population. (2021). Countries in the world by population (2021)https://www.worldometers.info/world-population/population-by-country

Art54. (n.d.). *ICSID Convention.*

C3.1.5, I. (2013). *Chapter 3, clause 3.1.5, Investment Policy of Pakistan.*

C3.2, I. (2013). *Clause 3.2, Investment Policy of Pakistan, 2013.*

CA, S. (2017). Section 450, Companies Act, 2017.

FERA. (1947). *Foreign Exchange Regulation Act.* https://www.sbp.org.pk/about/ordinance/ordinance-.pdf

FPIPPA, s. (1976). *Foreign Private Investment (Promotion & Protection) Act.*

FPIPPA, s. (1976). *Foreign Private Investment (Promotion & Protection) Act.*

FPIPPA, s. (1976). *Section 5, Foreign Private Investment (Promotion & Protection) Act, 1976.*

IPP. (2013). *Chapter 3, clause 3.1.1, Investment Policy of Pakistan.*

IPP, A. 2. (2013). Article 2.1.1, Investment Policy of Pakistan.

IPP, A. (2013). Article 2.1.1, Investment Policy of Pakistan, 2013.

IPP, C. (2013). *Clause 1.4(a), chapter 1, Investment Policy of Pakistan, 2013. .*

IPP, C. (2013). *Clause 1.4(b), chapter 1, Investment Policy of Pakistan.*

IPP, C. (2013). *Clause 1.5, chapter 1, Investment Policy of Pakistan.*

IPP, C. (2013). *Clause 2.10, chapter 2, Investment Policy of Pakistan.*

IPP, C. (2013). *Clause 2.3, chapter 2, Investment Policy of Pakistan.*

IPP, C. (2013). *Clause 2.4, chapter 2, Investment Policy of Pakistan.*

IPP, C. (2013). *Clause 2.6, chapter 2, Investment Policy of Pakistan.*

IPP, C. (2013). *Clause 3.3, Investment Policy of Pakistan.*

IPP, C. (2013). *Clause 3.4, Investment Policy of Pakistan.*

IPP, C. (2013). *Clause 5.1, chapter 5, Investment Policy of Pakistan.*

PERA, S. (1992). Protection of Economic Reforms Act.

PERA, S. (1992). Protection of Economic Reforms Act.

PERA, S. (1992). Protection of Economic Reforms Act.

PERA, S. (1992). Protection of Economic Reforms Act.

Section3. (1976). Foreign Private Investment (Promotion & Protection) Act, .

Waheed, M., & Ghumman, A. A. (n.d.). https://blogs.worldbank.org/endpovertyinsouthasia/improving-pakistan-s-public-and-private-investment

WB. (2010). *World Bank, Investing Across Borders, Indicators of Foreign Direct Investment Regulation in 87 Economies*. World Bank