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**FOCUSING ON THE LEGAL CHALLENGES OF THE FOREIGN INVESTMENT
SECTOR IN IRAN**

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ABSTRACT

The main purpose of this research is to investigate the legal challenges of foreign investment in Iran. There are some questions about the legal barriers of foreign investment and the market risk and capital of foreign trade companies in Iranian legal system. In this article, the authors with descriptive research method tried to answer these questions. As our prospective, the lack of agreements and deprivation of some foreign investment agreements, legislative barriers in the Iranian constitution and ordinary laws, challenges in the field of intellectual property and non-membership of Iran in foreign investment institutions can be considered as the most important reasons so that will be noted in the research.

**Keywords: Foreign Investment, Bilateral Investment Agreements, Forms Of Dispute
Resolution, Iran Constitution**

INTRODUCTION

With regard to the extent of the land and natural resources and reserves of Iran, the adequate use of these resources is very important. One of the solutions for correct use of resources and reserves is to attract foreign and domestic investment in different sectors of country. But this investment

encounter to different requirements and challenges. The current research aims to study the legal challenges of foreign investment in Iran and present certain solutions. These challenges have varied nature but we focus only the legal challenges of the foreign investment sector in Iran.

1-The lack of agreements and deficiency in some foreign investment agreements

The initial challenge for the foreign investment in Iran is the absence of agreement and deprivation of some foreign investment agreements. In a glance to agreements that were signed between Iran and other countries deal with investment, we conceive two major things. First, the Islamic Republic of Iran did not entered to any agreements with the countries which have enormous potential for investment in other countries. Second, the agreements resulted between Iran and foreign parties generally contain some shortcomings in investment agreements.

1-1The lack of agreement

According to the investment policy and attracting foreign investment and using technology (technical knowledge) and their cash and non-cash assets that can be used for better and more accurate use of national resources and the promotion of technical knowledge, identifying those which have ability to invest in required fields and sign agreements with them are in advance.

However, regarding to list of the country which invest in Iran , we can see that of the world, which are 195 and 192 United Nations member states, we only have contracts with 126 countries of those, only 51 of the Agreement enters into force (i.e. 51 countries)

not yet in force with 12 countries. We are also in the initial stages of agreements with some countries and are negotiating with Slovenia, the UK, Belgium, Thailand, Denmark, Singapore, Cuba, Slovakia, and remaining 48 countries we are in the process of exchanging texts at date 17/03/2014 and we do not have any agreements with about 66 countries in terms of investment and fundraising (From the site: 17/03/2014 <http://investinzejan.ir>).

In addition, the following countries , France, Germany, Switzerland, Sweden, Finland, China, Russia, North and South Korea, Malaysia and Turkey seems to have the ability to invest in industrial ,agricultural production in Iran and other countries are often among the investee countries for that other countries can invest (Ibid). As a result of foreign investment agreements, it is essential that is foreign investor has the ability whether to import capital and technical effective knowledge or to eliminate inefficiencies and opportunities to be with their disability. It seems, as a result of foreign investment agreements, we must be aware to sign contract with its co-investment at the area or areas where there are considerable success .In most investment agreements of the parties ,to be familiar with the domestic rules and regulations of the target country is required in terms of investment. To identify

potential foreign investor and to know the domestic rules and regulations of the country in case of laws conflict in the implementation phase is reasonable and to transfer funds from outside to inside and vice versa is unreasonable.

1-2 Deficiency in some foreign investment agreements

The deficiency and short come in collaboration outcomes of investment contract signed between Iran and other countries are obvious and some of these deficiencies are restrictions that leads to litigate disputes between foreign investors and host country. Other defects are more related to lack of support from investors in the host country as we briefly mentioned it. Some investment agreements restrictions leads to complaints about particular issues for investors, refer to the recourse obligation of the Internal expropriation disputes to host seats (Iran with Germany and Finland) before turning to international arbitration or impose some restrictions to investor to go to international arbitration subject to the approval of the host country because of previous rejection of these authorities. There are such recourse or lack of expected previous admission qualifications in most treaties, restrict investors direct recourse to international arbitration prescribed in the agreement for resolving disputes

arising from investment and the investor have no choice but to go the local authority and the exercise of diplomatic protection of the host state. Although his state can litigate directly against the host state in violation of the obligations contained in the agreements stipulated about the dispute resolution between the parties with reference to international arbitration [1].

There are other defects in some of the agreements and although the territorial domain of investor protection was specified, but all the supported treaty obligations are not specified. In other words, it is not clear that these defined obligations in territory are under protection or not.

Moreover, other defects are associated with the Sponsored investment, despite extension of investment evidences support in bilateral agreements and encouragement and reciprocal protection of investments between Iran and other countries, the scope of these protections have been numerous restrictions with regard to certain conditions and criteria and sometimes uncertain or ambiguity. For instance, in overwhelming agreement special benefits as the host has been appointed whereby two or multilateral agreements with third states for their nationals results, or in some cases, not required to grant to investors of the other Contracting Party on the basis of

criteria of national treatment or most favored nations or third countries (such as Iran and China agreements) [1]. Like some of the other agreements, granting special privileges to investors of the other Contracting Party shall not be applicable to national under the laws of the host, such as tax exemptions necessarily based on national treatment standard such as agreements with South Africa and China [1].

2-Legislative barriers to investment

Transparency International believes that one of the barriers to invest is the lack of transparency in laws and regulations, complexity and cumbersome as well as the frequency of these laws. So that extensive bureaucracy reigns on the administrative and executive system. However, volatility in macroeconomic policy and regulatory preferences contributes to the development of this disadvantage. This factor causes the increase cost of implementing investment projects until runtime and discouraged the investors. In comparison with some other countries can be cited of the business environment in which: starting a business in Iran takes 48 days while it takes only 3 days in Canada and property registration is equivalent to 5% of the value of assets in Iran. In Singapore, for dismissal of the additional workers in the downturn of economic activity, is paid salary for 4 weeks as this rate is 8

weeks in Belgium. So despite strict laws in this area (labor recruitment), the employer acts as a conservative in labor recruitment. Iran does not have a very good condition in other parameters [2].

Some of the principles of the constitution, including Article 81 is absolutely prohibited to score in the formation of companies and institutions in the commercial, industrial, agricultural, and mining and services to foreigners. Furthermore, some materials, labor law and social security law, in relation to the amount of holidays per year or inability of the employer in dismissal of workers with employer contribution rate of payroll and employee benefits was determined by article 28 of the Social Security Act, the amount equal to 20%. They are as legal and legislative obstacles in attracting foreign capital. If we add the state of Iran's economy and democracy over bureaucracy and high risk, we are aware of the obstacles to reform the laws and regulations on this subject [3]. Some of these defects were corrected in the "support and encouragement of foreign investment in 2002" but there are still shortcomings in the legal field, so in this article we will discuss the defects. Topics that we have discussed separately in two areas are: the constitutional and ordinary rules and regulations barriers.

2-1-Legislative barriers in the constitution

Three principles of constitution of Islamic Republic of Iran, explicitly or implicitly addressed the issue of foreign investment. These three principles, 144, 81, are each one an obstacle to foreign investment in Iran so that it expressed in the resolution.

2-1-1-Article 44 of the constitution

The article 44 provide " 1) the economy of the Islamic Republic of Iran is to consist of three sectors: state, cooperative, and private, and is to be based on systematic and sound planning. (2) The state sector is to include all large-scale and mother industries, foreign trade, major minerals, banking, insurance, power generation, dams, and large-scale irrigation networks, radio and television, post, telegraph and telephone services, aviation, shipping, roads, railroads and the like; all these will be publicly owned and administered by the State. (3) The cooperative sector is to include cooperative companies and enterprises concerned with production and distribution, in urban and rural areas, in accordance with Islamic criteria. (4) The private sector consists of those activities concerned with agriculture, animal husbandry, industry, trade, and services that is supplement of the economic activities of the state and cooperative sectors. (5) Ownership in each of these three sectors is protected by the laws of the Islamic Republic,

in so far as this ownership is in conformity with the other articles of this chapter, does not go beyond the bounds of Islamic law, contributes to the economic growth and progress of the country and does not harm society. (6) The scope of each of these sectors as well as the regulations and conditions governing their operation, will be specified by law".

It is believed that this article is a principle factor in the recession and the deadlock in the investment (both domestic and foreign) in Iran and forms a government monopoly and prevents the private sector in various fields of economic activity". Although , despite the government's heavy industries have been introduced in this article, but notice of the Revolution Leader in the case general policies of Article 44 of the constitution, possible legal action in the private sector provides the most important industries listed. However, according to the notice, the public and private sector activities should be defined in Article 44 of the constitution.

On the other hand, based on the support and encouragement of foreign investment, foreign direct investment is permitted only in industries where there is a private sector activity possibility; it is also uncertainty that despite the fact that it takes place in mind when the industry was created by the private

sector and become a major industry in the development, it will be exposed to the public. For example, in the automotive and aircraft parts, domestic or foreign investor has been missing in action due to production constraints. What seems to be important, it is a fundamental change of policy in this sector. In this regard, this policy started with the enforcement of privatization law.

In this regard, Iran's accession to TRIMS Agreement (Agreement on Trade Related Investment Measures) Act (1994 to 1995) is inevitable because that it is one of the most important agreements in the WTO " and its Member States are obliged to refrain from acts of administrative or economic measures which leads to restrictions for foreign investment" [4].

2-1-2-Article 81 of constitution

With regard to the stipulation of Article 81 of the constitution, which says "The granting of concessions to foreigners or the formation of companies or institutions dealing with commerce, industry, agriculture, service, or mineral extraction, is absolutely forbidden". This article is the most important obstacle in the way of foreign investment in Iran; it has created enormous procedural difficulties that the Guardian Council has repeatedly dealt with the interpretation of the original constitution. It can be noted that the

government has raised the question in 1981: are foreign companies contracting with state can be registered and their activities in the Islamic Republic of Iran for is legal or not? Guardian Council said: "Foreign companies that have signed a legal agreement with the Government of Iran, they must attempt to register their branches in Iran to carry out their legitimate activities in accordance with Article 3 of the Registration of Companies Act. This is not inconsistent with Article 81 of constitution "(collection of the opinion of Guardian Council, 1989, 37). Another opinion is also allowed foreign companies to register without a contract with the state and the establishment of foreign banks and insurance companies in free trade zones or external partnerships with the foreign private sector if their share i is not more than 49% of the total shares capital.

Unfortunately, there is not a correct interpretation of Article 81 and detailed explanation of the concept for granting of concessions or its prohibition to foreigners is necessary [5].

Since the government is responsible for public affairs in the country if we build an absolute ban to enterprises and foreign enterprises formed as any title and every kind (even factoring), while there is no local or state facilities in the country, this cause to

lose any kind of reconstruction. Therefore, the government can create the initiatives in arranging contracts not only by concessions to foreigners but also through other contracts (such as factoring) and using competitive procedures, bids and tenders. By this method, prevent from recession of both the development and prosperity of the country and by taking care preserve the interests of society [6]. Briefly, this article is prevented from participating in contract production especially in the oil industry as it has led to Iranian state oil companies to sign contracts with foreign companies involved by using the "redemption agreements" (Buy Back).

2-1-3-Article 139 of constitution

Article 139 provides" The settlement of claims relating to public and state property or the referral thereof to arbitration is in every case dependent on the approval of the Council of Ministers, and the Assembly must be informed of these matters. In cases where one party to the dispute is a foreigner, as well as in important cases that are purely domestic, the approval of the Assembly must also be obtained. Law will specify the important cases intended here".

This article obstacle in foreign investment due to the fact that businessmen and foreign investors have not good relations to national courts and law, and since actually

international commercial arbitration resolve disputes with less time and cost and more speed and in compliance with international rules and principles of international trade, foreign investors show more interest to this institution. But according to this article, there is a big obstacle in the way of concluding such contracts. However, a little step in the adjustment of this article and reference to the arbitration of claims arising out of commercial contracts and foreign investment is taken by accepting the International Commercial Arbitration Act adopted in 1997, and the Law on the Administration of Free Trade Zones - industrial approved on 07/06/11999 and Guardian Council approved on 93/6/21, but, its major difficulty (especially the latter law) is that it only refers to the three free trade zones (Kish, Qeshm and Chabahar). The Arbitration law is affected by UNCITRAL Model Law but in some cases it is inconsistent with this model law.

2-2-Legislative barriers in the statutes and regulations

With survey of laws and regulations applicable in the country, there are some cases that can be considered as legal or regulatory barriers to the statutes. We mention below some of the most important:

2-2-1-Labor Law

Labor laws and regulations governing the relations between workers and employers, including the barriers that can discourage foreign investment. Challenges such as how to end the employee's work by the employer, relationship between them and the mechanisms involved in the management of the company after the death of the employee are very important. Other items of discussion in this area are the days and hours of work in Iran. Under the labor law, the workers work 44 hours a week and their paid leave per year is 26 days, 52 days holiday weekend and 25 days official holidays. If we deduct the 103 days of the year, only 262 remain for days so that it is lower than many countries in South East Asia. This leads to an increase in production costs, because every holiday for the increased production will lead to higher costs production that will raise the prices and manufacturer cannot work in a competitive market in international trade and on the other hand, in the adjustment of labor and worker layoffs, he is faced with the difficulties imposed by the labor department and imposed decisions.

2-2-2-Social Security Law

According to the Social Security Law, the employer is obliged to pay 20% of salary for employees in the employer's share, labor's share is 7 percent and state share is 3 percent.

This rate is one of the highest rates in the lowest line services so that leads to an increase in the cost of production (Article 28 of the Social Security Law).

2-2-3-Tax system

By reforming the tax system in the form of direct tax Law enacted in 2001, a significant reduction has been created in the corporate income tax rate from 54 percent to 25 percent so that this rate is included in the income of private, governmental, public, profit or nonprofit, foreign and domestic enterprises. Also pursuant to Articles 132 and 141 of the said Law, joint Iranian and foreign companies are exempt from tax exemption of 100% of the proceeds from export their products; however, the product must be produced and sold in territory, which leads to an increase in the purchase price and the lack of internal sale and finally cause the loss of foreign investor manufacturer because of tax and VAT. If you want to create the desire and willingness of foreign investors in this regard, we should be awarded more points.

2-2-4-International Commercial Arbitration Law of 1997

In 1997 the United Nations Commission for International Trade (UNCITRAL) adopted the Model Law on International Commercial Arbitration; but in reason of lack of additional conditions, and deleting some notes while

ratifying the Basic law, it could not be effective and lead to many problems, especially in the field of foreign judgment recognition and enforcement of judgments [7].

2-2-5-Laws relating to the protection of intellectual property

Although Iran has adhered to the Paris Convention for the Protection of Industrial Property in 1958, but due to lack of accession to the International Convention for the protection of literary works, in Iran, the published literature in abroad practically does not support.

2-3-Law on support and promotion of foreign investment

The law, which passed in 2002, in fact it is an improved framework for the protection of foreign investment in Iran and so the Securities Market Act 2005 has not any order to support the foreign capital entering the capital market, we can conclude that the legislature put the responsibility to encourage of foreign investors in the field of indirect investment law to enacted Investment Promotion Act in 2002. Paragraph A and B of Article 3 of the above law only refer to foreign direct investment in the private sector, civil partnership, buyback, build, operate and transfer.

We know that foreign investment is either directly or indirectly and as such, there are some ambiguous due to the lack of reference to foreign indirect investment in Investment Promotion Act . Another thing that can be seen in Investment Promotion Act is that although the principle of national treatment in Article 8 is intended for foreign investment and foreign investors, but in relation to the admission of shares of foreign investors in exchange stock we are faced with an obstacle. On the other hand, the transfer of shares under article 10 of Investment Promotion Act for foreign investment is subject to ratification by the Supreme Council of foreign investment and Minister of Economy and Finance [8] while there is not debate about domestic investor. Another ambiguity in the Investment Promotion Act is how to supply of foreign exchange for repatriation of capital and profits accrued to foreign investors, as it is described in Article 17, but the foreign investor does not know which of the clauses in this Section shall be with him. In paragraph (d) of Article 2 of the Investment Promotion Act set a maximum for the value of goods and services produced by foreign investment so that this maximum equal to 25 per cent and 35 percent in each major economic sector and the share of goods and services produced by foreign investment refers to the value of

goods and services supplied to the domestic market at the time of issuance. The roof itself leads to restrictions for foreign investors.

2-4-Lack of Iran's membership in the support institutions of foreign investment:

Iran has no membership in the Multilateral Investment Guarantee Agency (MIGA), International Centre for Settlement of Investment Disputes between States and Nationals of Other States (ICSID) and also the WTO has also made a significant impact in reducing the confidence of foreign investors to invest in Iran. Since Iran has no membership in the any of these three institutions, which has led to a lack of willingness of foreign investors to invest in the Iran.

2-5-Existence of ILSA law (August 1996)

In August 1996 the government of United States of America passed a Law entitled "ILSA" whereby foreign companies that invest in Iran in the oil and gas fields more than 20 million dollars a year, they will be subject to sanctions by the United States of America. This is a serious threat to foreign investment and foreign capital inflows to the country, especially in the field of oil and gas and other sanctions against Iran. The factors such as the lack of banking transactions and boycott of foreign companies and freezes the assets of Iranian companies abroad that the

UN Security Council has approved it, will lead to create fear in the of investment companies that have concluded contracts with Iranian companies, because Iran will not be able to fulfill its financial and contractual obligations.

2-6-Insufficiency of authority who deal with disputes between foreign investors and the Iranian government

The main characteristic of foreign investment is providing investors direct access to international authorities to resolve disputes between the government and the investor. In the traditional international law, if the investor was faced with a breach of contract by the host country, he had no choice but to resort to the use of their country's diplomatic protection and political channels so that preferably this strategy had not priority for investor interest. In the first place, many investment contracts that are signed between the investor and the host state, for resolving the dispute may refer the domestic courts of the host state so that it is definitely unfavorable to foreign investors. In the connection with the observed difference between the Iranian government and foreign investors, Iran Foreign Investment Promotion and Protection Law Chapter VI provides in the Article 19: "Disputes between state and foreign investors about the investment of this

Law if not resolved through negotiation, it will be handled in the civil court unless otherwise agreed in the Law in Bilateral Investment Agreement with the state of the foreign investor agreed about other ways of resolving disputes (quoted in Khoram Farhadi, 2010).

2-6-1-Local authorities in proceedings the disputes

As Article 19 of "Investment Promotion Act" has stated, Iranian courts (local courts) are competent to deal with disputes arose between the state and foreign investors. This provision is consistent with Article 5 of the Civil Code so that is known to all the inhabitants of Iran as Iranian law abiding both internal and external. But the question that arises is that Iranian court to resolve the dispute decide and investigate and write their judgments in accordance with domestic law or country law of the foreign investor or the rules and regulations of the International law? Here, it seems, we must distinguish between two separate sets of laws, procedural and inherent.

First group is the rules relating to laws of procedure so that specify the protocols by which legal issue considered by the judicial authority to reach a legal solution" [9]. Relative to Procedure Code, based on Article 971 of the Civil Law in Iranian court, the law

applies civil and criminal procedure of Iran and second group is essential in the investigation of the case so that court may impose external or internal laws. In the definition of competent law or the law governing the contract, it is said that this law is a law that is a contract contracted by it" [10].

This can be noted in regard to Article 968 of the Civil Code so that it is known the obligations arising from contracts is subject to place of contract unless the parties are foreign and agreed to the contrary. So if the contract is taking place in Iran, Iranian law will apply and otherwise, the laws of state in which a contract concluded will apply. However, if foreign law is contrary to public order or morality or inconsistent with the law of Jus Cogens or Iranian good behavior, it would not be applicable. Nowadays, the investigation of claims arising from investment applies mainly in international institutions. Local institutions do not welcomed by foreign investors for the reasons stated above. Also, institution of diplomatic protection is very little used because of the limitations and the need for appointments to the civil courts. In the next section we will refer to international bodies dealing with disputes.

2-6-2-The International authorities in Proceedings Disputes

In the international system, method of resolving disputes is divided into two modes: negotiations which are a subsidiary method and basic methods (such as I recourse to international Court of Justice and arbitration).

2-6-2-1-International Court of Justice

According to the Regulations of the Court, only states have the right of recourse to the International Court of Justice. Reference to the Court requires that home country of an investor and host country to recognize the compulsory jurisdiction of the Court. The states can be referred to the International Court in the context of a bilateral treaty settled disputes between them. Currently, in some international investment treaties, while the dispute to international arbitration, the Court determined as authority of appointment the arbiters. This can be noted in regard to Article 12 of the Investment Agreement, Iran and Bahrain, Iran and Switzerland, Iran and Morocco.

2-6-2-2-Resolve disputes through arbitration

International arbitration to resolve disputes arising from foreign investment can be divided into two parts:

- Institutional arbitration formed the arbitration authority under the supervision and administrative rules of the arbitration institution such as the International Chamber

of Commerce (ICC) that is headquartered in Paris".

- Particular arbitration to be formed under certain conditions only one time and based on need and community of conditions. It is disbanded after the end of Proceedings Dispute.

The agreements have signed on foreign investment by Iran, all accepted international arbitration as a legal method to ending the disputes after negotiations; but in the case of arbitration or institutionalized arbitration and its rules there are differences between these agreements. In some agreements international rules of arbitration in addition to arbitration based on International center of settlement of Investment Disputes (ICSID) International Center have been accepted. Another group of agreements have not accepted arbitration based on the UNCITRAL rules otherwise the judgment would be by ICSID such as Croatia, Austria, Spain and a group of others have accepted only the judgment of UNCITRAL just like the French (Khoram Farhadi, 2010, 474).

ICSID Convention, which is known as the Washington Convention, is one of the most important international economic treaties so that it recognizes the rights of individuals as a subject of international law. The convention was founded by Act No. 214 dated 10

September 1964 of the World Bank and the UN Economic Commission. According to Article 5 of the Convention, the ICSID investigate the international disputes between States and foreign private entities.

CONCLUSION

The present research showed the most important legal challenges of foreign investment in Iran. They are the lack of agreements between Iran and some other countries and deficiencies in certain concluded agreements. There are also some legislative barriers in the Iranian constitution and ordinary laws and certain challenges in the field of intellectual property and non-membership of Iran in foreign investment institutions. The result is the insufficiency of authority who deal with disputes between foreign investors and the Iranian government. And finally the absence of enough general strategic plan relative to foreign investment, large state share and ownership in economy of the country and lack of productive investment policy in the private sector. Our recommendations for such challenges are as followed strategies:

RECOMMENDATIONS

- The Islamic Republic of Iran must with most countries who can invest in foreign investment, import technology, technical knowledge

and expertise in various fields conclude the bilateral cooperation agreement

- . Iran must engage with the investee countries and make in ease the entrance of investment into the country.
- The reformation of labor and social security laws and the elimination of legal restrictions on the ownership of private companies by foreign entities, transparency and accessibility of the rules on foreign investment investors can attract the foreign investment faster.
- Non-state actors should be informed of the legislative process and legal and regulatory changes associated with the activities before changes and amendments of laws. It is not only for using of their comments in new laws but also to coordinate their future plans with the new laws.
- It seems to be establishing a specific institution that can have the necessary technical and scientific potential in order to deal with disputes arising from foreign investment. The investigator authorities in above institution and their method of resolving the

disputes will be in a manner that the foreign investors refer their differences to this institution and don't worry about the sudden confiscation of their property and the closure of their companies.

- It is recommended to create a professional organization with a database for guidance of foreign direct investment in the national interest and provide an enhanced ability for local companies to negotiate with foreign investment companies.

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