

The Article 139 of the Constitution in BITs between Iran and other countries and its role in the investment contracts of the Ministry of Energy

Vol. 7 No. 1, 2019

Online ISSN 2308-2356

Print ISSN 2309-3439

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International
SAMANM Journal
of Finance &
Accounting (ISJFA)

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Abstract

From 1996, the ratification of the first agreement between Iran and Armenia until the end of 2012, 58 items of "bilateral investment agreement" to be concluded between Iran and other countries. These agreements, which govern the investment relations of the two Contracting States and their nationals, guarantee the rights and obligations that the Contracting Parties have agreed upon in detail during the initial consultations. These agreements will undoubtedly be the source of many effects and consequences, as they are the result of a conflict of interest between the Contracting Parties that defines the benefits, defines the guarantees, and determines the ways in which they are to be implemented. One of the guarantees provided by the Iranian legislature for the protection of the rights of the Iranian party in the said agreements is the observance of Article 139 of the Constitution in referring disputes to arbitration. This condition, which is contained in the single article of ratification of most agreements, in most cases is inconsistent with the content of the terms in the text of the agreement with respect to non-Iranian parties and the obligations arising from those conditions can not be considered as a compromise of the contracting parties. Not only is it not a guarantee for the rights of the Iranian side, but it sometimes becomes a tool for violating the rights of the Iranian side in referring disputes to arbitration. Therefore, accuracy in the text of the agreements and the provisions of the single article of their approval can be very important for users such as the Iranian legislator and investor or investor, especially the Ministry of Energy. This importance is the subject of analytical and descriptive studies in the present article.

Keywords: Foreign Investment, Article 139 of the Constitution, Bilateral Investment Agreement, BITs.

Introduction

More complex human relations, more complex social life than ever before, more diverse perspectives and more demands than ever, forcing most, if not all, countries around the world, at every level and of every color, religion and tribe, to Overcoming problems and mastering the challenges of modern social life are forward-looking and interact with each other. Agreements in various forms, bilateral or multilateral, political or economic, are the offspring of this futurist, who has been growing in the lap of society from time immemorial for years, and in the pursuit of perfection, is going through different periods of his life. In this transition, success is greater than a country that in the field of such interactions emerges a reasonable adaptability to national and international interests and interests.

In the wake of recent developments, and especially after the mid-1970s, a little later than in other countries, the Iranian legislature hastened to acquire a tool called the Foreign Investment Promotion and Mutual Support Agreement, which guarantees Iran's economic relations with the Contracting States. And he was their investor. The choice of this style is due to the fact that the prevailing presupposition among our country's economists and programmers indicates the fact that the country's economic prosperity depends on attracting foreign capital and distributing surplus domestic production in transnational markets. In a sense, one can argue that governments opposed to Iran's economic growth are trying to limit Iran's economic and trade relations through sanctions, and that mechanisms such as bilateral investment agreements can make that effort ineffective and, in the most optimistic, ineffective. Hiq. This fact can be easily deduced from the available news and statistics, as the Economic and Energy Service of the ISNA news agency quotes the Deputy Minister of Energy as saying: "Iran's \$ 3,500 million investment in the water sector" or the Iranian news news analytical site, which quotes The Deputy Minister of Energy stated: "In the affairs of water and water supply, announcing that foreign investors were present in the country's water sector for the first time in 1986, he said:" This year, the value of investments in the country's water sector was \$ 1.5 billion. ».

Literature Review



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In this regard, the esteemed legislator, in the single article of ratification of more than half of the agreements between Iran and other countries (34 out of 58 agreements) has stipulated the requirement of the Iranian government to comply with domestic laws and regulations, especially Article 139 of the Constitution. Outside the rules of conciliation and treaty, it is as if it is supposed to unilaterally change all the effects and consequences of the agreement. The latter condition is more for the illegitimate child, which is astonishing, because many do not know where, when and why he entered into an agreement in the pure world, the parties of which loved each other as needed and with profit and loss. They have made friends and made an agreement of honesty and cooperation. The fact is that in international law it is not possible to impose an excess obligation on a party to whom the excess obligation is not attributable in any way. Now, this reality wants to please the mood of the supporters of the conditions contained in the single article of ratification of agreements that are not able to keep pace with developments or not. From this perspective, the condition is a step beyond pure interpretation or a neutral constraint, a political and diplomatic self-harm. That is to say, bilateral investment agreements are an opportunity and a threat.

In fact, the terms contained in the text of the single article of some agreements merely limit the powers of the Government of Iran and do not relieve it of its obligation to implement some of the provisions of the contract (in recourse to arbitration) to the other contracting party or investor of another government. In particular, the right to stipulate is not relevant in bilateral treaties, and in some cases such stipulations can act as interpretative declarations. Therefore, it seems that the esteemed legislator has not paid due attention to some of the details, and due to this negligence, many problems have arisen due to the disputes arising from the agreements and the results of their consideration. Contrary to popular belief, fears of undermining national interests would put those interests at greater risk of being threatened and squandered. Thus, the present issues can be considered by the Islamic Consultative Assembly, the Guardian Council and the Cabinet during the preparation and approval of the BIT and can be helpful. It can also indicate in the contracts of the Ministry of Energy as an investor or investee the conditions that must be considered by the parties to the contract in order to clarify the ambiguity and conciseness as much as possible.

A: Review of the conditions contained in the text of the single article of ratification of bilateral investment agreements

So far, 58 BIT cases have been concluded between Iran and other countries, all of which have been approved in a single article. Out of the mentioned 58 cases, only 34 of the articles of the approval units are conditional. The terms in question are sometimes uniform in form and content, and sometimes evoke exceptional effects. Out of a total of 34 articles of the BITs ratification agreement between Iran and other countries that have a condition, 30 cases can be identified as uniform conditions in several groups. Existing categories are:

A-1: Condition of compliance with the relevant laws and regulations by the Government of Iran Pursuant to the conditions set forth in the single article of ratification of 34 agreements, up to 25 of them have required the Iranian government to comply with the relevant laws and regulations in referring disputes to arbitration. It follows from the above provisions that the said agreements have taken into account and referred to the observance of Article 139 of the Constitution and Article 457 of the Code of Civil Procedure. In the meantime, only the citations of each of the terms have been different according to the text of the agreement, which we examine below:

A-1-1: "Referral of disputes subject to Articles (12) and (13) of this Agreement to arbitration by the Government of the Islamic Republic of Iran is subject to compliance with the relevant laws and regulations." This phrase has been repeated under the single article of the approval of BITs between Iran and other countries in 13 cases out of a total of 34 single articles of approval. The agreements whose single article of ratification has this condition are as follows: 1) Law on the Agreement on Encouragement and Mutual Support of Investment between the Government of the Islamic Republic of Iran and the Government of Eritrea (approved on 01/18/2009). 2) The Greater Libyan Arab People's Socialist Republic (approved on 06/05/2012). 3) Republic of Greece (approved on 05/06/2012). 4) Islamic Republic of Afghanistan (approved on 28/05/2012). 5) Kingdom of Sweden (approved on 16/05/2012). 6) The Democratic Republic of Ethiopia (approved on 20/01/2011). 7) Serbia and Montenegro (approved on 20/01/2011). 8) Malaysia (approved 16/01/2011). 9) Algerian People's Democracy (approved on 05/08/1383). 10) Republic of Finland (approved on 23/10/2008). 11) Democratic People's Republic of Korea (approved on 23/10/2008). 12) Republic of Tunisia (approved on 23/02/2008). 13) Sultanate of Oman (approved on 02/18/1381).

A-1-2: "The referral of disputes subject to Articles (11) and (12) of this Agreement to arbitration by the Government of the Islamic Republic of Iran is subject to the observance of laws and regulations." This phrase has been repeated in 8 of the 34 single articles of the BITs ratification



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agreement between Iran and other countries that have a stipulation. The agreements whose single article of ratification has this condition are: Law on the Agreement on Encouragement and Mutual Support of Investment between the Government of the Islamic Republic of Iran and the Government of the Republic of Cyprus (approved on 08/26/2009). 2) The Republic of Zimbabwe (approved 04/06/2012). 3) Republic of Indonesia (approved on 03/05/2012). 4) The Bolivarian Republic of Venezuela (approved on 11/09/2010). 5) Kingdom of Bahrain (approved on 10/23/2008). 6) .The Kingdom of Spain (approved on 23/10/2008). 7) Turkmenistan (approved on 23/10/2008). 8) Republic of Georgia (approved on 23/02/2008).

A-1-3: "Referral of disputes subject to Articles (10) and (11) of this Agreement to arbitration by the Government of the Islamic Republic of Iran is subject to compliance with the relevant laws and regulations." This phrase is specified in the only article of the BITs approval agreement between Iran and other countries in only 2 agreements. Agreements whose single article of ratification has this condition are: Law on Encouragement and Mutual Support for Investment between the Government of the Islamic Republic of Iran and the Government of the Federal Republic of Germany (approved on 10/23/2008). 2) Republic of Macedonia (approved on 10/10/2002).

A-1-4: "Referral of disputes subject to Articles (9) and (10) of this Agreement to arbitration by the Government of the Islamic Republic of Iran shall be subject to the observance of the relevant laws and regulations." This condition is enshrined in the single article of approval of BITs in the law of the Agreement on Encouragement and Mutual Support of Investment between the Government of the Islamic Republic of Iran and the Government of Kuwait (approved on 06/05/2007).

A-1-5: "Referral of disputes subject to Articles (8) and (11) of this Agreement to arbitration by the Government of the Islamic Republic of Iran shall be subject to the observance of the relevant laws and regulations." This condition has been considered by the domestic legislator in the Law on the Agreement on Encouragement and Mutual Support for Investment between the Government of the Islamic Republic of Iran and the Government of the French Republic (approved on 07/15/2008).

According to what was stated in all 25 of the above-mentioned agreements, the referral of disputes to arbitration by the Government of the Islamic Republic of Iran is subject to the observance of the relevant laws and regulations. In this condition, it seems that the meaning of laws and regulations is Article 457 of the Code of Civil Procedure and Article 139 of the Constitution of the Islamic Republic of Iran. These laws provide as follows: Article 457 of the Code of Civil Procedure: "Whether the law deems it important, the approval of the Islamic Consultative Assembly is also necessary." The latter article relates to Article 139 of the Constitution, which provides: It is the ministers and it must be reported to the parliament. In cases where it is a party to a foreign lawsuit, and in important domestic cases, it must also be approved by the parliament. "Important matters are determined by law." Therefore, according to this condition, the Iranian government is required to comply with the relevant laws and regulations to refer to arbitration, not the investor or the foreign government.

A-2: Condition of observance of Article 139 of the Constitution by the Government of Iran
 According to the conditions contained in the single article of ratification of 34 agreements, only 2 of them have required the Iranian government to observe Article 139 of the Constitution in referring disputes to arbitration. It follows from the above provisions that the said agreements make the observance of Article 139 of the Constitution mandatory only for the Government of Iran and refer to it. This condition is stated in the text of the single article as follows: "Observance of Article 139 of the Constitution of the Islamic Republic of Iran regarding the referral to arbitration by the Government of the Islamic Republic of Iran is mandatory." The agreements whose single article of ratification has this condition are: Law on the Agreement on Encouragement and Mutual Support of Investment between the Government of the Islamic Republic of Iran and the Government of the Republic of Turkey (approved on 10/04/2002). 2) Kingdom of the Maghreb (approved on 04/10/2002).

A-3: The condition for observing Article 139 of the Constitution is the determination of the authority of obligation (the Government of Iran or the Contracting Party?)

According to the conditions contained in the single article of ratification of 34 agreements, in the single article of 3 of them, the condition is provided that according to it, "observance of Article 139 of the Constitution of the Islamic Republic of Iran regarding "Judgment is mandatory." In other words, 3 items of the single article of ratification of BITs between Iran and other countries have benefited from this condition in a uniform manner. The agreements whose single article of

ratification have this condition are: Government 1) Republic of Ukraine (approved on 23/02/2008). 2) The Republic of Uzbekistan (approved on 23/02/2008). 3) Swiss Confederation (approved on 22/01/2002).

Vol. 7 No. 1, 2019
Online ISSN 2308-2356
Print ISSN 2309-3439

Contrary to the above paragraphs, the above-mentioned condition in the above-mentioned agreements clearly states the meaning of the internal regulations and considers only Article 139 of the Constitution of the Islamic Republic of Iran as necessary and secondly, and secondly considering the application of the said condition, He did not believe in it and called on both parties to comply with this obligation. In other words, this condition has created a completely exceptional situation in which the manner and authority of observing Article 139 in relation to disputes arising from the agreement is in a state of ambiguity.

A-4: Check the conditions, with special expressions

Out of a total of 34 articles approving BITs between Iran and other countries that have a condition, 4 can be identified as conditions with special expressions. These terms have been written by the legislature only once and exclusively in the same agreement. The following are all the examples according to the condition in the single article of BITs approval:

A-4-1: "Implementation of Article (12) of the Agreement on the Islamic Republic of Iran requires compliance with Article 139 of the Constitution of the Islamic Republic of Iran." This condition is set out in the Law of the Agreement on Encouragement and Mutual Support for Investment between the Government of the Islamic Republic of Iran and the Government of the Comoros (approved on 1/16/2012). This condition refers only to the settlement of disputes between one Contracting Party and the investor of the other Contracting Party and has been taken into consideration and is therefore distinct from other conditions.

A-4-2: "The implementation of Article (11) of this agreement regarding the referral to arbitration by the Iranian side shall be subject to the observance of Article One Hundred and Thirty-Nine (139) of the Constitution." The last condition regarding the referral of the dispute is the subject of Article 11 of the Agreement on Encouragement and Mutual Support of Investment between the Government of the Islamic Republic of Iran and the Government of the Republic of Azerbaijan (approved on 09/27/2001). The parties to arbitration are required to comply with Article 139 of the Constitution. The latter condition, contrary to what was stated in condition (a-4-1), refers only to the settlement of disputes between the parties. Whereas in the previous case of the said articles, in the condition of a single article in relation to the settlement of disputes between a Contracting Party and the investor of the other Contracting Party, the observance of Article 139 of the Constitution was required.

A-4-3: "The referral of disputes subject to this Agreement to arbitration by the Government of the Islamic Republic of Iran is subject to compliance with the relevant laws and regulations." This condition is set out in the Law on the Agreement on Encouragement and Mutual Support of Investment between the Government of the Islamic Republic of Iran and the Government of Romania (approved on 10/23/2008). In relation to this condition, it should be noted that the condition does not contain emphasis on a specific part of the agreement and its exclusive article, but in the form of referring the dispute to the arbitrator subject to arbitration by the Iranian government, subject to compliance with the law and Indeed, Article 139 of the Constitution. There is no specification in the article on the settlement of the dispute, and it follows from its application that the condition relates to the settlement of disputes between a Contracting Party and the investor of the other Contracting Party, as well as the settlement of disputes between the Contracting Parties. 139 considered the constitution mandatory.

A-4-4: "... permission to exchange its documents is granted in compliance with Article 139 of the Constitution of the Islamic Republic of Iran." This condition in the Law of the Agreement on Encouragement and Mutual Support of Investment between the Government of the Islamic Republic of Iran and the Government of Qatar (approved on 22/01/2002), has been considered by the legislator of the time and from its appearance it can be inferred that Adherence to the provisions of the agreement is conditional on the observance of Article 139 of the Constitution, not merely the exchange of documents, the making of which is subject to the observance of Article 139 of the Constitution, the most incomprehensible possible inference from the text.

Conclusion

An agreement to encourage and support investment has been concluded to expand and strengthen





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economic cooperation between Iran and fifty-eight other countries. Of these, about thirty-four of the agreements mentioned in the single article of their ratification have conditions, most of which make the referral of disputes by the Iranian government to international arbitration subject to compliance with domestic laws and regulations, in other words, Article 139 of the Constitution. In contrast to the majority, there are some agreements, including agreements between Iran and Ukraine, Uzbekistan and Switzerland, which require the parties to abide by Article 139 of the Constitution.

The terms set forth in the text of the single article of ratification of the thirty-four agreements are not the result of an agreement between the parties to the agreement and have been unilaterally annexed by the Iranian side to the obligations arising from the agreement. These surplus obligations in the form of a condition often act as interpretative declarations to the Iranian side, interpreting the meaning of the rules and regulations set out in the text of the agreement that are discussed in the dispute settlement. On the other hand, this condition has no legal effect on the other party, since the agreement of the other party has no role in its formation. This is because in some agreements, especially in relation to disputes between the investor and the host in relation to the non-Iranian party, the conditions contained in the content and provisions of the agreement are inconsistent and require unwanted and out-of-agreement assignments for the non-Iranian party. Finally, according to the content of the condition contained in the single article and the text of the agreements that have this condition, it can be concluded that:

One: The nature of the conditions set out in the single article is by no means a right of condition, because in principle the right of condition is not conceivable in a bilateral agreement. In cases where this condition is consistent with the text of the agreement in relation to disputes between the investor and the host or in relation to the contracting parties, the interpretative declaration will be considered at the highest level.

Two: Terms inconsistent with the content of the BITs, whether in relation to disputes between the investor and the host or in relation to the contracting parties, are invalid and can only be considered as an annex if the non-Iranian side agrees. Because before the condition mentioned in the single article, the parties in their negotiations have agreed on the method of resolving the dispute in the prescribed manner and have included it in the treaty as a binding method.

Third: The condition of compliance with domestic law to resort to arbitration in resolving disputes between the parties to the agreement, not as a definite reason but as a counterpart, will be the non-acceptance of the arbitral tribunal stipulated in the text of the agreement or subject to the decision of the competent domestic authority.

Fourth: Obliging to comply with Article 139 of the Constitution when the Iranian side wants to sue and has not had the opportunity to obtain the consent of the Assembly and the Council of Ministers, or in principle the Assembly or the Council of Ministers has not allowed him to refer to arbitration, may cause the arbitral tribunal. This objection is definitely valid and the Iranian party must first apply the procedure prescribed in its laws in order to file a lawsuit in the arbitral tribunal. Also, if the Iranian party does not express the objection, there will be no problem, because this is the text of the agreement and the obligations stipulated in it, which will be the source of effect for the parties, so if the Iranian party refers directly to arbitration, the ruling Based on the dispute resolution materials, the parties to the dispute must comply.

Five: If the Iranian party is a litigant and can not obtain the consent of the Assembly or the Council of Ministers to refer to arbitration, this will not prevent the arbitral tribunal from considering, because the vast majority of the agreements in their provisions provide a situation according to which if Either party shall not appoint its own arbitrator within the prescribed period or the selected arbitrators shall not agree on the selection of the head of the arbitral tribunal within the said period. The review and the decisions of the arbitral tribunal shall be binding on the Contracting Parties.

Six: Up to twenty-four agreements have been concluded between Iran and other countries without the stipulation in the single article of ratification of some agreements that require the Iranian government to comply with Article 139 to refer disputes to arbitration, and have become law. This process has not caused any problems in practice, and even in these cases, it has been approved by the Guardian Council, and in this regard, it does not specifically conflict with the constitution.

Suggestions

The inclusion of the condition of observance of domestic laws and regulations, and especially Article 139 of the Constitution in the single article of the approval of BITs, is highly criticized in

view of the results obtained from it. This critique will be useful when the discussion has a constructive suggestion, so in order to achieve a useful scientific structure, the following suggestions are made:

One: In the case of investment promotion and mutual support agreements between the Government of the Islamic Republic of Iran and other countries that will be concluded in the future, it is necessary that the text of the single article of approval does not include the same conditions as in the case of concluded agreements. Because this condition has no practical legal effect.

Two: If there is an insistence on inserting such a condition, it is necessary for the government to address this issue during the negotiation of the agreement and include it in the provisions of the agreement.



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Vol. 7 No. 1, 2019
Online ISSN 2308-2356
Print ISSN 2309-3439



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