



## **A law based study of settling the disputes arising from Iran's agreements with other countries about Reciprocal Investment**

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### **ABSTRACT**

*Economical and technical cooperation of Iran with other countries mentioned in bilateral agreements along with operating the agreements related to reciprocal investments is probable. Therefore, in order to perform the agreements, we may come across with some disputes. In these situations, we try offer some law - based solutions in order to prevent the disputes and also offer their resolutions. To do this, some jurists of Iran have done some researches. In this paper, we also aim to study and explore the legal aspects of resolving the disputes and finally prepare the appropriate bed for attracting the foreign investment in Iran through offering the related procedure and recommendations.*

**Key Words:** Settlement of Disputes, Reciprocal Investment, Bilateral Investment Agreement, Arbitration, ICSID

### **INTRODUCTION**

Investment is the most important economic issue. Lack of investment in economic argument has been considered as one of the most important factors of underdevelopment. Foreign investment increases the exports and helps the independency and economic structure of a country through generating of what should be entered into production. Moreover, most developing countries are facing a shortage of funds for economic development projects.

Therefore, the foreign investors help the host developing country to achieve the goals national development. It is done through investment in "capital receiving plan". The above mentioned issues make the developing countries much greedier about attracting the foreign investments. Increasing rate of attracting the foreign investments from one hand and occurring some events such as revolutions and riots in capital receiving countries and finally expropriation or nationalization of investors' property, lack of efficient and impartial law system for re-achieving the rights of foreign investors from the other hand, made the capital sending countries to support their citizens. To do this, along with having Bilateral Investment Agreement, they tried to impose some especial supportive actions to capital receiving countries. Therefore, in agreements, supporting the investment, there is a condition which makes the host country much more responsible and they must respect the contracts with investors. These agreements are called "Umbrella Contracts".

Iran is not an exception and it tries to improve and upgrade the economical situation through having Bilateral Investment Agreement and attracting the necessary foreign capitals. What will be mainly mentioned and focused in this paper is studying the settlements of disputes arising from these agreements. It will be followed with studying the roots of international disputes in investment and also some centers for resolving the international disputes.

### **Main Question of Research**

What is the problem solving mechanism related to agreements between Iran and the other countries in Reciprocal Investments? What are the resolutions and why?

Performing the arbitral reviews identified by juridical members of different countries is being considered and includes ambiguities and unknowns. Considering the teachings of dispute settlement in GATT and WTO has already explained as the issues rose in explaining the resolution of disputes.

### **Goals of Research**

Aim of this research is to offer the best mechanisms for resolving the disputes in international trades, in general meaning, and claims arising from disputes related to Reciprocal Investment agreements, in especial meaning. Their advantages have been recognized identified. In the way that they have much more capability to adopt themselves with Iran's Law system and also encourages the other countries to invest in Iran.

## **Capital Concept**

Capital refers to cash or non cash wealth which along with the other factors such as labor force and natural resources is used in economical activities such as production, trade and banking [3]. Concept of capital is usually synonym with "investment good" which is achieved through the land and work. Capital in the broadest sense is an economic commodity potentially or actually produces another economic. It includes some cases such as cash, plant, machinery and its parts, patent rights and technical services.

Foreign investment refers to getting the assets of companies, institutions and individuals in foreign countries and also transferring the funds from one country to another. In other words, it is also internationally defined as transferring the funds. The concept of investment leads to producing the investment goods such as machinery and transmission equipment. In addition, some parts of capitals are allocated to meeting the needs and desires of the consumers. According to Article 1 "Foreign Investment Promotion and Protection Act", foreign investor is "an individual or legal Iranian or non-Iranian person who has achieved the investment license mentioned in Article (6) through using the foreign capital".

Also, in accordance with Article 4 of the Law on Foreign Investment and based on parliament permission, foreign governments can invest in Iran.

## **Known forms of foreign investment in the provision of Iran**

Foreign investment can be divided into two kinds of investments: public and private foreign investment. Public investment is done through governments or international organizations and each investment by the government may have economical or political goal. International organizations such as reconstruction or Development International Bank, World Bank and related institutions such as companies and international financial institutions like the International Development Institution may invest in this way. Foreign private investment which roots in people's private investment is stronger than the public sector managed by transnational companies. The reason is that the private investors try to use the efficient and active management, technologies, patent right, trademarks and marketing the international organizations. Foreign investment methods are as follows: direct foreign investment and indirect foreign investment limited to contractual arrangements.

One of the procedures used by developed countries, for much more supporting their own citizens' properties in realm of capital taking countries, refers to committing some international and multilateral agreements on foreign investment with investing governments. What refers to guarantee of investment in these agreements is to identify the behavior of invest receiving countries with foreign investors, compensation for the expropriation of foreigners, offsetting losses from war, internal armed conflicts and situations of national emergency or territory, transferring the benefits of investment to foreign investors.

One of the basic features of bilateral investment treaties is that they are signed between countries that are not equal in terms of economic power. Usually one of the parties in the treaty is developed countries and the other party is developing countries. Although in these treaties, they talk about Reciprocal Investment of citizens in committed governments in each other's countries, but what really happens is that the developed countries invest in developing countries. Therefore, in practice, commitments aforementioned in the Treaty based on the observing the criterion in foreign investment is attributed to the developing parties of the commitment. In mutual agreement of the parties, even if the investment means a reciprocal investment, a country is actually called as investor and citizens of another state are considered (both natural and legal persons) under the agreement of the investment, receive the benefits of investing in mentioned countries. So the investment agreement is completely voluntary and there is no way of coercion and threats. Capital receiving Countries often see their interest in joining the agreement and grant some privileges or immunities beyond the price of investment and sustainable development in industry, agriculture, mining etc. Bilateral investment treaties are developed forms of former commerce and navigation treaties. Any trade resulting from implementation of these commitments has a significant role in shaping foreign investment treaties.

These agreements are one of the most reliable sources of international law and they are considered as reliable procedures by the government, so that it becomes law and is approved by the authority of each parties [5].

"Almost all bilateral investment agreements contain a set of protections available to foreign investors in accepting the investments, dealing with investors, expropriation and dispute settlement. This support may take the form of absolute standards such as "ensuring a fair and equal behavior" and "enjoying full protection and security" or the relative standards, such as "national treatment" which guarantees having the advantages available for local investors or investors of a country as a third party [6].

For example, we can mention the bilateral agreement between Iran and the Government of the Republic of France for encouraging and supporting mutual investment in 10/07/2003. It has been approved by the parliament. In accordance with Article 1 of this Agreement, investment includes any property or asset,

movable and immovable property, shares and intellectual property which can be used by investors of both parties.

Article 3 of this Agreement guarantees the fair and equitable treatment with investors. Paragraph (a) of Article 4 again guarantees the national and most favored nations treatment to investors of the each party. Paragraph (A) says:

“Every party of agreement, in issues related to management, operation, maintenance, performance, enjoyment, sale or disposal of the investment, must treat with the other investors in the way that it should not be unfavorable in comparison with the applied behavior with their own investors or investors of a third country”.

Under the provisions of paragraph (A) of Article 1, the following points regarded as less favorable treatments:

“Unequal behavior means restrictions on the purchase of raw materials or helping energy fuel or means of production, operations or marketing of any products, inside or outside the country, and other measures that have similar effects”.

In accordance with Article 5 of the agreement, expropriation of the investors' investment of the other Contracting Party is basically restricted and if this one is considered as an exception, it is subject to compensation. Article 5 says that:

1- Investments of investors of each Contracting Party will not be nationalized or expropriated by the other Party, unless they are effectively and appropriately done for public purposes and in accordance with the legal process, non-discriminatory manner and in the rapid damage Compensation.

2 - The amount of compensation shall be equal to the value of the investment immediately before nationalization, confiscation or expropriation.

3 - Compensation should be paid without delay. These losses include the costs of the delay. Compensation should actually be paid and must be freely transferable.

Article 7 of the Agreement has guaranteed the free movement of capital and the accrued profits. It also has ordered that the above transactions shall be done without delay, they should be convertible to currency and transferable to the official exchange rate.

Article 8 of the Agreement has predicted the settlement of disputes arising from foreign investments of one of investors with State of the other Party. This material is considered as one of the main ingredients of bilateral agreements, which has predicted the reference of dispute to arbitration. Article 8 resolves that:

1- If there is any problem between a Contracting Party and an investor of the other Contracting Party concerning an investment, both parties must try to resolve their differences through dialogue and consultation.

2 - If the dispute is not resolved within the six months from the date set in paragraph (1), the investor may choose the dispute to refer to:

A - Competent courts of invested party.

B- International Centre for Settlement of Investment Disputes (ICSID), founded in March 18 in 1965 for dispute settlement between states and nationals of other states, provided that the Contracting Party which is a party dispute, is attached to the Convention.

C - An arbitration tribunal case under The United Nations Commission on International Trade Law (U.N.C.I.T.R.A.L), provided that the Contracting Party should not be a member of the Convention ICSID.

Iran has not joint to International Centre for Settlement of Investment Disputes (ICSID). Therefore, any claim against the Government of the Islamic Republic of Iran by the investors of the Contracting Parties (in this treaty, France) shall be submitted to the courts of Iran or in accordance with paragraph (C) of Article 8 and provisions of ICSID, it may referred to arbitration the dispute will be resolved.

Article 8 of this Agreement is important because in Article 19, there has been focus and emphasis on Promotion and Protection of Foreign Investment. It has Provided that in the occurrence of failure to resolve the dispute through negotiations, the issue will be resolved in the Iranian courts unless "in bilateral investment agreement with the government receiving the foreign investment, there has been agreement on another method of resolving disputes."

### **Relationship between settling the disputes with investment**

Since the investment mainly includes economical, political, law, and cultural rights such as access to markets, availability and cost of production factors, health or administrative corruption, political stability, social attitude towards foreign investment, stability of legal environment and legislation, transparency of local regulations, states, receiving the assets, try to improve their local situation to attract more investment. To achieve this goal, there is no choice but the economical, political, legal reformations. They can ensure the satisfaction of investors.

Many developing countries have always tried to prepare a domestic legal framework through approving some specific legislation often called the law of foreign investment.

Investment law is designed to mix the transparency of investment rules with attractive conditions for foreign investors. In addition to the guarantees of civil rights, potential host countries that are investing in, guarantees the international investors. First and foremost case is the bilateral investment agreement. This agreement includes the form and substantive guarantees of invested country to foreign investors.

From foreign investor's view, his situation is not guaranteed in the invested country; in the way that, the host country has legislative power to change the game rules in different situations. Therefore, their dreams may be disappeared by the host country's action. That is the reason why, signing a contract, they emphasize on compensation of this inequality and some risk sharing instruments. Resolving the disputes is one of these risk-sharing instruments. If international way of resolving disputes is being accepted, disputes will be changed to an international level and an independent evaluation of investment will be formed against the sterilization of the investment. If the authority of resolving the disputes calls the host country responsible for breaching investment contract, the compensation will be carried out.

About disputes in bilateral investments, a completed series of methods are available for ways of resolving the disputes based on different issues. Among them we can name the national courts, arbitration, compromise and ICSID arbitration. Also, political support by governments sometimes leads to lawsuit in dispute resolving references such as International Court of Justice. Since the states are subject of international law, their dispute resolving system is also function of international law for the settlement of disputes between governments. Ways of resolving the disputes are divided into two general categories: political and judicial procedure (Shaw Malcom Nathan 1995: 268).

### **Political Practices**

The major political methods of resolving international disputes about the performance of mutual investments include negotiation and mediation. Negotiation is the most common way for settling the international disputes by peaceful means, which is called "a universally accepted, direct and friendly approach" by International Court of Justice. This Court also added that it does not need to emphasize the main characteristics of problem resolution in this method.

Manila Declaration on the Peaceful Settlement of International Disputes (1982) offers two features for a "dialogue" on counts: flexibility and effectiveness. Negotiation is the fastest, lowest cost and most satisfying way to resolve disputes outlined. Negotiation between governments is not limited to certain restrictions about form of resolution unless there may be predicted certain formalities in two or multilateral agreements. In order to use the benefits of these negotiations, the governments usually predict the probability of using these resolutions in two or multilateral agreements. After emergence of disputes, they offer the first resolutions in negotiations.

Most treaties of mutual investment, including investment agreements signed between Iran and other countries, have predicted negotiation as the first option for possible settlement of the dispute. Article 19 of the Investment Law in Iran enumerated negotiation as the first choice for resolution disputes.

Mediation is done to end the crisis or conflict between states or organizations, by governments or international competent authorities. This method is chosen if there has not been agreement on political bilateral negotiations. The task of mediator is to assess the demands of dispute parties. Mediation is voluntary, which means any natural or legal person is not obliged to accept mediation and parties are not forced to select a mediator. Sometimes governments in some contracts commit to refer the dispute to mediation, which is referred as "Mandatory Mediation".

Based on Article 8 of first part in Second Conference of The Hague in 1907, states can refer to mediators for settlement of their disputes. In this method, a third party is chosen by both parties to do as a mediator and help them to resolve their disputes. Parties often give their solutions to the mediator and he can offer a solution for their dispute. Through offering some suggestions, the mediator also tries to resolve the disputes. Mediation does not create binding and the mediator can not force the parties to settle the dispute. However, in practice, a convincing approach to dispute settlement is offered by mediator. One of the mediator's tasks is that he/she should attempt to close the views, interests and positions of countries to each other. Achieving consensus is one which is not found in any judicial and arbitration procedures. Mediation is naturally based on agreement to resolve disputes through and can help to preserve the parties' business relationship.

### **Legal practices**

Legal practices mean a Peaceful settlement of international disputes; methods which are based on the nature of international law. In this method, rules and norms of international law are used to resolve disputes. Methods include arbitration, international law and international justice. One of the oldest methods for settlement of dispute is arbitration which roots in state - cities of ancient Greek. They had many arbitration agreements in which arbitration has been accepted as one of the ways for resolving the disputes. International arbitration is known as one of the ways for settlement of disputes among the legal decisions on international law (national and Inter-governmental organizations) on international law

issues. According to rules of international law and legal or non-legal exceptionally other considerations, it is done by their elected judge or magistrate called "referees" or "reviewers" of either institutional or non-institutional one.

In many reciprocal investment agreements signed between different countries (including investment treaties between Iran and some other countries), arbitration has been predicted as a way of resolving disputes.

#### **International Court or International Court of Justice**

Fundamental principle which governs the international justice system (such as arbitration) is the fact that judging in international system is solely based on the will of the nation. Therefore, their consent and agreement is the previous condition for resorting to the rules of International Justice for resolving the disputes. Right of recourse to the International Court of Justice is especially for governments and persons cannot offer their claims in that court (Paragraph 1, Article 14, Statute of the Court).

In treaties and agreements between governments, it may be provided that resolution of disputes, arising from international documents, shall be referred to that court. Court's jurisdiction in this area results from agreement of contracting governments and it does not refer to compulsory qualification.

#### **Differences between the foreign investor and the capital acceptor state**

Capital acceptor state, because of its power and authority, may cause disorder or disturbance through imposition of new laws and regulations, expropriation of the investor by nationalization or confiscation or approving double tax legislations. On the other hand, it is likely that foreign investors may have deficiencies in performance of their duties in the host country. These cases will soon cause problems between the host state and the investor. Here one side is a legal person, and the other side is a state which has high power according to the internal sovereignty. Furthermore, according to the rules of international law, the government may rely on Immunity of State from prosecution. So, foreign investors, in referring to internal courts, may face some restrictions such as dominance of state on national courts or judges or national prejudice of judges. In this case, the situation is not so desirable. Resorting to international judicial bodies may be aborted because of state government principle. Because in these situations the states often refer to their own national courts and litigate against foreign investors. If they can presumably get a desirable vote against foreign investor, if the investment property is outside of the host country, it seems rarely possible to perform a local court issued vote in other countries.

Such differences, in comparison with two previously mentioned categories and also the above mentioned reasons, have great importance and it is considered very effective in the foreign investor's decision to invest in another country, because foreign investors call resorting to the appropriate ways of resolving disputes in investment contracts as risk sharing instruments and ways for lowering the risks of investment in the host country.

#### **Judicial style**

If the parties have not already agreed on settlement of disputes arising from investments, the resulting differences between them (nations and private entities) are usually placed in the national Courts jurisdiction. The fact that courts of which country are qualified, it will be determined by referring to the rules of conflicts. The above rules also emphasize on the jurisdiction of national courts of capital recipient country.

ICSID Convention's Article 16 prescribes that "consent of the parties by arbitration under this Convention, means putting away any other ways (to resolve the dispute), unless otherwise is stated. Each Contracting State, as a condition of consent to arbitration under this Convention, may call it necessary to use all means of local judicial arbitration (before offering the ICSID project). The considered Local courts can be host nation courts or courts of foreign investor country or a third country's courts.

If settling the disputes arising from the contract is awarded to the host country's courts, the application of guarantee by foreign investors will often be useless and unproductive.

Investors may have doubts about neutral identity of the host country courts, so they will try to get the parties' satisfaction in order to settle the disputes arising from non-national contract in a non-national court. In other words, he insists on Arbitration clause in the contract.

Therefore, foreign investors have tried to free their contracts with host governments from that law. Since, in all these probable cases, the host government does not accept to refer the agreement to another country's law, the goal of these efforts is to refer the contract to international law or "general principles of law".

According to Judicial approach, courts of countries, in operating the international law within domestic legal order, may automatically prefer national rights to international law, even if national law is clearly in contrast with international law. In addition to the above mentioned forms, performance bias, likely influence of government officials and civil court judges and also lack of the necessary expertise would

deprive the parties of the proceedings. These consequences causes that national courts lack enough attractiveness for the investors.

### **Courts of the Investor Country and the Third Countries**

Courts of investment recipient countries may be set aside as the result of explicit agreement on contract or agreement with the competent authority of the elected national courts of other countries including the country of origin or a third country investors.

resolving the disputes arising from investment by investment recipient countries or the third countries may be associated with practical problems, because in investment agreements, the governments do not just do as invested businesses (the office), but they show their sovereignty. Such differences will affect the country's sovereignty. Therefore, even in justice system which has a limited definition from the Sovereign Immunities, this situation is present. **Offering** Private trial against investment recipient countries has some formal problems. It is possible not to accept talking about these claims. This issue is particularly relevant to expropriation or confiscation order [7].

### **Arbitration procedures**

Arbitration is a standard approach to resolve international disputes. This method can actually be considered as a private or voluntary judicial settlement (whether legal, technical, commercial or combination of them). According to international commercial arbitration law in Iran, arbitration means conflict resolution between claimants out of court by a natural or legal person or appointed ones (Article 1 - A). Arbitration is generally an agreement for resolving disputes between natural or legal person who substitutes for resolving disputes is through referring the courts.

Arbitration may take the form of Institutional arbitration or especial form of arbitration (case one). Case Arbitration is the simplest type. In this way, the parties can agree on arbitrator or to assign him to a third party, for example, the head of civil society in London [1]. The parties also agree that arbitration take place under the rules of a particular country or based on arbitration regulations and principles.

Case arbitration is mainly used about disputes arising from International commercial transactions between private parties and it does not have predetermined form. Therefore, it has the maximum flexibility in shape and governing rules. This situation maximizes the process of choosing parties and proportion of arbitration and also the subject of dispute. The main advantages of case arbitration are possibility of combining rules, selecting the rules and doing some reforms in them based on proportionality with subject of dispute and measures identified by the parties [5].

Despite these advantages, case arbitration has numerous flaws resulting from extreme voluntarism. These disadvantages can be in different forms. For example, the parties' refuses of appointing their arbitrator: as in 1951 in dispute between Iranian Oil Company and England, Iran refused choosing the arbitrator.

The other form of disagreement may be due to the lack of a common intention of parties for choosing the arbitrator, the third arbitrator or the head arbitrator. Finally, resignation or dismissal of judges, usually not in the international arbitration but usually in the arbitration between the government and the foreign investor that is closer to arbitration between states, is present.

Before the advent of international arbitration organizations and institutions, the only way of resolving the disputes between governments and foreign citizens are referring to a particular case arbitration or an especial arbitration. Developing countries often prefer case arbitration to institution arbitration.

That is why the United Nations Economic Commission for Europe, Asia and the Far East from one hand and UNCITRAL from the other hand, states that it would be helpful to refer them in final completion of the trial rules that the parties refer to it in accepting the arbitration. Among reasons referring the disputes between governments and the foreign citizens to case or especial arbitration instead of organizations and arbitration institutions is that some institutions, like International Chamber of Commerce, calculate administrative costs and the jury's payments based on a percentage of the amount of the demanded amount. In some claims, in which one party is the government, the demand amount is mainly high and the costs of arbitration considerably increase.

In case arbitrations, it is recommended to use "UNCITRAL arbitration rules" in order to minimize disputes procedures and when the offender fails to determine his/her arbitration or when two arbitrators fail to determine the head, the elimination of the interruption is possible. In terms of special features mentioned for the case arbitration, it has been anticipated many of bilateral or multilateral agreements concerning investment on referring the dispute to arbitration. Such as the Free Trade Agreement between Mexico, Colombia and Venezuela protocol called "Cartagena."

### **Organizational or institutional arbitration**

In institutional arbitration, institution regulating the arbitration rules, not only provides the required administrative services, it also monitors the implementation of the rules. In this type of arbitration, the parties rely on the Comprehensive Arbitration Rules of the institution, which are typically updated. In addition to this, day affairs of the institution are also facilitated by the institution. This type of arbitration

guarantees the process for dispute settlement proceedings and even if key issues such as the appointment of arbitrators and the dominant rules remain in parties' authority. This kind of arbitration resolves the risks arising from the issues related to arbitration and imbalance or disharmony. It gives the equal bargaining party to parties. That is, even assuming that the parties do not consensus on choosing arbitrations or the dominant rules on arbitration and they do not cooperate in appropriate way in arbitration, in this situation the arbitration will stop until it will proceed through mediation of arbitration Institute of organizations.

Against the mentioned advantages, we can name some disadvantages for institutional arbitration as well. One disadvantage is that the cost of arbitration in comparison with case arbitration is high. The other disadvantage is that the parties cannot freely set aside some of the rules of the Arbitration Institute, because the institution may refuse the arbitration.

Among some valid and reliable arbitration Institutions, we can name International Court of Arbitration of the International Chamber of Commerce, arbitration organizations, American Arbitration Association, London Arbitration Centre, International Committee of Hong Kong, International Economic and Trade Arbitration of China, the International Centre for Settlement of Investment Disputes.

### **International Centre for Settlement of Investment Disputes (ICSID)**

"ICSID Convention" is one of the most important economic treaties of international law which recognizes the individual as a subject of international law. International Arbitration is located in main center of Reconstruction and Development International Bank in Washington. This center provides some facility based on which the contracting states and foreign investors can benefit those facilities in settling the investment disputes through the regulations mentioned in Convention.

Settling the disputes in ICSID system is done through the Compromise Commission and the anticipated Court of Arbitration in Convention. The center itself is not reference to resolve disputes. ICSID vote must be performed in all States Parties such as a final judicial decision of that country unless execution is considered against the law's passage of the administrative immunity of foreign country. Since in some regulations the foreign countries have absolute immunity, Arbitration or judicial enforcement of judgments against foreign states is no longer supported. This exception has lost its former importance.

ICSID courts are only qualified in investment disputes between government and foreign investors. But many of the investments in the host country are done through the local branch of a multinational company. Although these local branches have been established in accordance with the laws of the host State, however, agreed with the host government as a foreign investor, they have the right to refer to ICSID court.

This kind of external control may also include indirect foreign control, but this rule is not applied in the case that a foreign citizen does not exercise any control. It may also have local branches that may be established between a foreign investor and the host State as "profit participation". If this institution is given the right to refer to the court, not the foreign investor, the interests of the investor will be supported in the way that the mentioned investor also can monitor and control the "profit participation".

But if the host government has assigned their rights to this institution, for example monitoring the quality of manufactured goods, then the institution's control by the foreign investors, who are also the producers of the concerned goods, there will be irresolvable conflict in interests.

### **Court of Arbitration, Iran- United States**

Arbitration Court of Iran - United States established following the signature of Declaration of Algiers on January 19, 1981, to resolve disputes between citizens of Iran and the United States against the state. This arbitration has some features required for international arbitration organization. This judgment of the Court, like other arbitration organizations, prepares necessary services to judgments performed at different branches. At the start of activities, it prepares the required procedures with the correct Rules of Arbitration through UNSITRAL arbitration regulations. Court's judgment, like the International Center for Settlement of Investment Disputes between States and Nations of other States, is the autonomous organization with its issued voting and binding for the parties.

Aside from being a temporary character, the personal qualification of jurisdiction is limiter than the qualification of other permanent International Arbitration Court agencies. In Court, the natural and legal persons of Iran and the U.S. have the right to refer cases to the Court, while the personal jurisdiction of permanent international arbitration organizations are restricted to citizens and governments of organization members. Compared with the International Center for Settlement of Disputes arising from Investment, qualified subject of the Court is vaster than the qualified subject of the Center, While is exclusively jurisdiction claims arising from the investment is done in the center. Several issues such as nationalization, expropriation, contract, debt, payments, and interpreted claims are within the jurisdiction of the Court. It should be mentioned that since the establishment of court, there have been 3853 cases from which 3936 cases are closed and 17 cases have been open.

### **Other ways of settling the disputes**

Alternative or non-judicial ways for settling and resolving the dispute, called "ADR", refers to all procedures in which the settlement of disputes is carried out of court. In this way, which is also called "private justice", settlement of dispute is done by the party or third parties selected in accordance with the method and procedure agreed upon by the parties. Although using the informal ways of settling the disputes and using the Arbitrator or mediator has been so common before formation of the government or judicial organizations and they also have much more history and background than the formal ways of settling the disputes, implementing the alternatives for settling the disputes with especial rules and regulations have been prepared within framework of special institutions, in the way that they are used as alternatives for formal judicial ways in settling the disputes.

### **Hypotheses**

- 1) The law nature of the mutual investment agreements can be described based on Article 10 Iran's Legal System.
- 2) Bilateral investment agreements mechanisms for settling the disputes may be independent based on conditions of the agreement or contract.
- 3) Iranian legal system Approach in settling the disputes governing international investment agreements is in line with international conventions.

### **Civil Law and Procedure Act of public and revolution courts in civil matters**

Article 44 of the Constitution: "The state sector includes all large-scale industries, main industries, foreign trade, major mines, banking, insurance, power generation, dams and large-scale irrigation networks, radio and television, post, telegraph and telephone services, aviation, shipping, railroad etc. considered as the state properties.

Article 81 of the Constitution: "rating the companies and enterprises in commercial, industrial, agricultural, mining and services to foreigners is strictly forbidden."

Article 82 of the Constitution: "employment of foreign experts by the government is forbidden, except for urgent cases and with the approval of Parliament."

According to Article 2 of laws of Executive Regulations for supporting and attracting the foreign capitals, foreign capital is an exchange entered to Iran through authorized banking channels. Machinery, equipment and tools, spare parts and other raw materials of this kind, is based on this condition that the plant and implemented machinery must be accepted by the Auditory Board. Tools and spare parts of plant should be transferred as assets. It is possible that some non-original equipment imported to the country, provided that the objects and materials must typically be considered as capital not current expenses.

Patent, provided that the program is both relevant and accompanied with the production programs that it is the demand of foreign capital, Examination Board starts the evaluation and diagnosis of this issue.

Exchange rights of the specialists paid before the start of operation in order to establish the productive works mentioned in this regulations. The whole or part of the benefit in Iran which added to the basic asset or used in the other organization, is included in regulations about supporting and attracting the foreign capitals.

Article 77 of the Constitution, "treaties, protocols, conventions and international agreements must be approved by parliament."

Article 125 of the Constitution: treaties, conventions, agreements and contracts of Iran with other governments and also international treaties signed by the president or his legal representatives must be approved by parliament.

According to provisions of 77 and 125 of the Constitution and also doctrines of Guardian Council about the above-mentioned principles, we come to this conclusion that international contracts whose subject is about commercial operation between state and state organization of Iran and the foreign people don't have need to be approved by the parliament. However, based on Article 139 of the Constitution, if there has been any dispute about performing these contracts and agreements and also necessity of referring to the arbitration, in addition to approval of Ministers' Committee, we undoubtedly need the approval of the parliament.

According to Article 139 of the Constitution, "resolving the claims relating to public and state property or referring them to arbitration in any case is based on the approval of the Cabinet and Parliament must be informed, too, while in foreign cases and the inner most important cases, it must also be approved by parliament. More important cases are identified by the law."

New law of Foreign Investment Promotion and Protection Act is approved in seven chapters and eleven and twenty-five notes of the fourth session in June of 2002 by Expediency Council. It is one of the most important ways of attracting the foreign investors and can have main effects on development of economy of the country.

After the amendment of the Expediency Council, Ministry of Economic Affairs and Finance, this law was announced by the president. Article 25 forces to approve the regulations of this Act within two months by the Ministry of Economic Affairs and Finance will be prepared and approved by the Cabinet. In Chapter VI, according to Article 19 Foreign Investment Promotion and Protection Act, disputes about Expropriation or nationalization will be resolved according to the settlement regulations.

Also in Article (19) the legislator states "disputes between governments and foreign investors on investment mentioned in this law, if it is not settled through negotiation, it will be addressed in national courts, unless in bilateral investment agreement with the government, they have been agreed upon another method of dispute settlement".

Nationalization is considered the greatest threat to foreign investors. It is now generally accepted that a country has the right to nationalize the assets of foreigners. This has been an exception to priorities of the private property and it is accepted only in terms of the primacy of public interest over personal interest. So the government authority for expropriation of private property is not unlimited, but there are some necessary conditions for legitimacy and legality of it. If the criteria for legitimate expropriation are not used and investors are not supported against the risk of expropriation or nationalization, they will not have incentives for entering the capital to developing countries. Investors must be sure that if their investment faced nationalization risk, they can make adequate decisions. To do this, The Article 9 of Promotion and Protection of Foreign Investment Law resolves that "foreign investment will be expropriated or nationalized, except for the public interest, pursuant to legal process, non-discriminatory method and for paying the appropriate compensation on the basis of the real value of investment immediately before the expropriation".

## **MATERIALS AND METHODS**

Research method is descriptive, because this study aimed to analyze the current situation and discuss ways to resolve legal disputes and their characteristics regarding the regulations and studies their properties.

### **Data collection**

Method of collecting the data in this study is library one. In first step, we indexed a list of books and articles on international trade law and legal sources, after finding the references, in next step; we record the data and number the records regarding the appropriateness of any topics.

## **CONCLUSION**

1 - Most of the developing countries signed bilateral investment treaties with developed countries for their economic development. Most of these treaties are mainly signed for the protection of investor rights (natural or legal person) in the contracting States.

2 – In bilateral Investment Treaties, alternative dispute resolution is considered as a guarantee for the safety of the investment and Potential litigation.

3 - To resolve the disputes arising from mutual investment, it may be signed between three groups - the host state and the foreign investor, private natural or legal persons and the host country with the foreign investor. The third type of disputes, due to mixed and different nature of claims and their parties and also the most common form of investment, this type of investment is very important.

4- There are many possible ways including the use of all courts of justice and alternative methods (negotiation, mediation, compromise, etc.), diplomatic support from the investor government and arbitration for settling the disputes by the parties. However, due to lack of foreign investors' trust to the domestic courts for various reasons, they try to resolve their disputes in a non-judicial courts and mainly in transnational one from which because of the applicability of arbitral issues in addition to other advantages, it has much more chance to be chosen by the parties.

5 – The other alternative methods of resolving disputes in Iran are not considered and there have not been especial places and centers for this issue.

6 – among the different types of arbitration (ad hoc and institutional), due to its advantages such as supporting institutional arbitration disputes by arbitration center, providing a list of judges and juries, acceptability of awards issued by the arbitration agency etc. have mainly been considered by the parties.

7- among centers for institutional arbitral, international center for resolving the investment disputes due to having some circumstances such as speed in handling the cases, much more experience of the specialists, proper arbitral rules, effective support and acceptance of the center votes by Contracting governments are considered as the best option to solve the investment disputes arising from investing between government and the investor. Our country has not joined to ICSID Convention yet (1965, Washington).

8 - The proceedings of resolving the investment disputes in Iran courts are not acceptable for foreign investors because of the lack expertise of the judges in the fields of trade and investment, and rapid changes in laws and slow legal procedures in handling the cases.

9 - The Iranian legislator has had a positive step in improving the space provided for the international arbitration through passing the International commercial arbitration law in 1997. This law was based on ICSID legislation. However, through the manipulation by the legislator in some parts of it, this law has lost its attractiveness.

10 - Limitations due to 44, 80, 81 and 139 principles of the legislation in going to arbitration on the one hand and repeatedly invoke of the parties to Article 139 of international arbitration authorities on the other hand, has been considered as another serious obstacle in attracting foreign capital in Iran.

11 - Lack of obvious and clear texts related to the authority of Parliament members and bilateral investment agreements in approval or ratification of treaties and referring their dispute to arbitration in accordance with the 77, 125 and 139 principles of the Constitution on one hand and the shared comments of the Guardian Council on the other hand, have caused many ambiguities in the laws of Iran.

12 - In Promotion and Protection of the foreign investor Law in Iran, the only provision related to resolving the disputes (Article 19)- since it has accepted referring to the arbitration only if there is investment treaties between governments- is that investors whose governments have not signed bilateral investment treaties with Iran's government, they are deprived of the benefits of this law in international arbitration. That is why the foreign investors are not eager to invest in Iran.

13 - In Promotion and Protection of the foreign investor, there have not been any predicted procedures for settling the dispute between investors and invested countries and also between real or legal persons of both parties in private investment.

#### **Research proposals**

- Paying special attention to alternative ways of resolving disputes by compromise, arbitration and also supporting these centers.

- Training the specialist judges and lawyers in international investment treaties and use of investment professionals in contracting international investment agreements.

- Allowing the presence of foreign lawyers and experts in civil courts if they demand foreign investor.

- Joining to the 1965 Washington Convention (ICSID) and ensuring the participation of foreign investors in Iran.

- Reforming some laws of international commercial arbitration, including paragraph 1 of Article 11 and paragraph 2 of Article 27 on freedom of parties in choosing the governing law.

- Making correction and clarification of Article 968 of the Constitution in the way that Iranian citizens in contract have authority in choosing the contract rules.

- Trying to remove any ambiguities in interpretation of regulation 139 through exact and precise interpretation from its provisions.

- reforming the foreign investment laws in the way that if there has been any dispute between the parties, referring to the court must be the last choice for them. In this situation, the foreign investor should never be afraid of the occurrence of probable disputes and can invest in Iran without any obsessions.

- reinforcing and introducing the Regional Centre for Arbitration in Tehran in the way that foreign investment companies can refer to these centers in case of dispute as trustworthy and reliable reference.

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