ACKNOWLEDGMENTS

I wish to express my special thanks of gratitude to Professor Malcolm Langford at the University of Oslo, Faculty of Law, for his constant supervision, patience and enthusiastic encouragement throughout the planning and development of this thesis.

I would also like to extend my thanks to all the members of the faculty of Law at University of Oslo for all the valuable assistance you have provided me throughout my studies at University of Oslo.

Finally, I wish to thank my parents for their support and encouragement throughout my study.

Thank you
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<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>APPI</td>
<td>Agreement on Promotion and Protection of Investment</td>
</tr>
<tr>
<td>BIT</td>
<td>Bilateral investment treaty</td>
</tr>
<tr>
<td>ECO</td>
<td>Economic Cooperation Organization</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>FCN</td>
<td>Friendship, Commerce and Navigation</td>
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<tr>
<td>FDI</td>
<td>Foreign Direct Investment</td>
</tr>
<tr>
<td>FET</td>
<td>Fair and Equitable Treatment</td>
</tr>
<tr>
<td>FIPPA</td>
<td>Foreign Investment Promotion and Protection Act</td>
</tr>
<tr>
<td>ICC</td>
<td>International Chamber of Commerce</td>
</tr>
<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
</tr>
<tr>
<td>IIA</td>
<td>International Investment Agreements</td>
</tr>
<tr>
<td>ICSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
</tr>
<tr>
<td>IRGC</td>
<td>Iranian Revolutionary Guard Corps</td>
</tr>
<tr>
<td>JCPOA</td>
<td>Joint Comprehensive Plan of Action</td>
</tr>
<tr>
<td>LAPFI</td>
<td>Law for the Attraction and Protection of Foreign Investment</td>
</tr>
<tr>
<td>MENA</td>
<td>Middle East and North Africa region</td>
</tr>
<tr>
<td>MIGA</td>
<td>Multilateral Investment Guarantee Agency</td>
</tr>
<tr>
<td>OECD</td>
<td>Organization for Economic Co-operation and Development</td>
</tr>
<tr>
<td>OIC</td>
<td>Organization of the Islamic Conference (Investment Agreement)</td>
</tr>
<tr>
<td>TRIIMS</td>
<td>Agreement on trade related investment measures</td>
</tr>
<tr>
<td>UNCITRAL</td>
<td>United Nations Commission on International Trade Law</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdoms</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>US</td>
<td>United States</td>
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CHAPTER 1

INTRODUCTION

1.1 Background

Since the nuclear program of Islamic Republic of Iran (Iran) became public in 2002, it has been isolated from the international community and its economy has been weighed down by the sanctions. With the 2013 election of President Rouhani who was considered as a moderate with whom international community could repair and build bridges, Iran’s relation with foreign countries began to assume a new form slowly. In 2015, nuclear sanctions on Iran were lifted after the conclusion of the nuclear deal framework.\(^1\) The nuclear deal, which was reached in 2015 between Iran and the five permanent members, plus Germany, has brought about numerous opportunities for the prospective foreign investor in Iran. Now with the international sanctions lifted the government is more eager to ease the way for the foreign investment in Iran and speed up the economic recovery by taking an open door policy. As stated by the government, the main policy of Iran is to attract investment in infrastructure and technology, which would lead to more production and export. The government requires at least USD 50 billion of foreign investment per year to achieve the 8% economic growth rate established in the Sixth Economic Development Plan (Iran Chamber of Commerce, Industries, Mines and Agriculture, 2016).

The recent of Iran’s proliferation of bilateral investment treaties (BITs) is evidence of the State’s efforts to attract foreign investment and accelerate growth and prosperity. For instance, Iran concluded three BITs during the first quarter of 2016 and one in the first quarter of 2017 (Investment Policy hub, 2017). International investment law emerged as a branch of international law for precisely this purpose- to make a framework specific to interplays between the States and foreign investors. It encompasses general rules of international law, standards peculiar to international economic law, and treaty based rules. Moreover, interactions between municipal laws of the host State, in areas such as tax law, labor law, etc., and international law has been of importance under international investment law. (Dolzer and Schreuer, 2012).

\(^1\) While the US government has agreed to lift the nuclear sanctions against Iran, it continues to impose other sanctions over Iran’s human rights policies and support for terrorism. These sanctions bar American citizens and companies from most forms of investment or trade with Iran.
Protections of foreign investment have always been a predominant part of foreign investment law. Generally, host States wishing to foster foreign investment inflows accept legal obligations towards the foreign investor under investment agreements, thereby providing an investment friendly climate to attract more foreign investment. The capability to offer more favorable facilities, legal rights, and protection as well as the degree of the government compliance with its obligations under international investment law are important criteria for a State to be considered as a favorable business and investment-friendly State in the eyes of the foreign investor. This is evident in the course of agreement negotiations in which the potential investor generally seeks legal and other guarantees on international level in order to protect its investment (ibid).

1.2 Research Questions

The objective of this study is to determine the legal obligations of Iran towards the foreign investor and the degree of conformity of Iran’s legal system with its obligations to comply with standards of international investment law, in particular in post-sanction era. It aims to develop better insights into the capability of Iranian legal system to offer a reasonable system of foreign investment protection, Iranian investment policy, and the applicable laws on foreign investment. It does so by looking at the nature of the rights and protections afforded to the foreign investor as well as legal obligations caused by investing in Iran for both the host State and foreign investors. In addition, it goes through the international investment agreements (IIA) in Iran, contemporary status of BITs signed and ratified by Iran, other legal investment related instruments, and Iran’s observance of its obligations.

1.3 Justification

However, in addition to above-mentioned factors, there are other criteria influencing potential foreign investors to invest in a country. According to the World Bank’s "Doing Business" report 2016, the rankings of economies on the strength investor protections are based on a review of three primary types of regulations: the extent of disclosure, the extent of director liability, the ease of shareholder suits which are examined through securities regulations, company laws, civil procedure codes and court rules of evidence in each country. Counties in which investors have the most protection are New Zealand, Singapore, Hong Kong, Malaysia, Canada, and Colombia, Ireland, Israel, US, UK. Six of the countries are part of the OECD, most are widely considered to be economically and politically stable and only one, Malaysia, is considered an emerging economy. Furthermore, With the exception of New Zealand, all are considered by the IMF to be part of the fifty largest economies.
A key reason for examining the legal framework for foreign investors is current uncertainties about investing in Iran. Political and legal barriers along with economic crisis subsequent to the imposing international sanctions on Iran have been the main sources of uncertainties for both the potential foreign investor and the government in Tehran. On one hand, Iran is currently a hot investment destination. A report by the Financial Times shows a dramatic increase of foreign investment inflows in 2016. According to the Financial Times, Iran received 22 foreign direct investment (FDI) projects in the first quarter that is the highest record of investment inflow to Iran (Lyttle, 2016). Since the agreement was implemented in January 2016, Iran ranked number three amidst Middle East countries for FDI in the first quarter of the same year (ibid). There have been therefore considerable successes in increasing the inflow of foreign investment to Iran in the post sanction era. Furthermore, the Economy Minister of Iran, Ali Tayebnia, reported that Tehran expects $15 billion FDI flows to the country until the end of the Iranian fiscal year (March 20, 2017). Different attractive factors affected the growth of foreign investment inflow. Iran is the second largest economy in the Middle East and North Africa region (MENA). It has the second largest population in the region that is 81,824,270 and over 60% of its population is under 30 years old with high educational level (ibid). The most educated workforce in the Middle East belongs to Iran and globally speaking this workforce low labor costs and wages is very economical compare to other countries. Despite the wide range of tensions after the revolution, war with Iraq, and other internal protestations, the government is still internally stable, secure, and powerful.

On the other hand, foreign investors might take cautious approaches toward this new emerging market. The reasons of foreign investors’ hesitation to invest in Iran can be explained due to the facts such as Iran’s position as 131 out of 176 countries on the Corruption Perception Index. In addition, as discussed further below, the complex political structure in Iran is dissuasive. The top and influential elites are driven often by political and not economical concerns, and it is one of the major sources of uncertainty for foreign investors (Transparency International, 2017). The Iranian Constitution and other investment related laws and regulations also have serious shortcomings regarding protecting foreign investment. Although various laws and regulations have been enacted in order to promote and protect foreign investment, they are mostly focused on promoting foreign investment instead of protecting it due
to political considerations. For instance, history has shown that the Iranian Revolutionary Guard Corps (IRGC) that is a branch of Iran’s Armed Forces is able to expropriate foreign investments and is empowered to terminate contracts for the reasons of Islamic system protection and prevention of external interferences (Douglas Robin, 2011). This decreases the level of foreign investment protection and is one of the main sources of uncertainty for foreign investors to invest in Iran.

Moreover, although the United States nuclear-related sanctions lifted by the full implementation of the Joint Comprehensive Plan of Action (JCPOA), other embargos related to human rights, terrorism and weapons of mass destruction, and US primary sanctions still remain in place (US Department of Treasury, 2016). Sanctions related to human rights, proliferation of restricted goods and technology and Iran’s support for terrorism are the United Nations sanctions. In addition, European Union sanctions are basically an implementation of the UN sanctions. The US primary sanctions mean that US persons including any US citizen or green card holder, entities organized under US law, any person located in the US regardless of citizenship, and US financial institutions and companies (but not their subsidiaries) cannot do business in Iran (ibid). Since the US and EU sanctions do not move at the same rate any more, foreign investors who have to conform with both sets of rules might have plenty of challenges ahead in order to avoid US sanctions or other penalties. Breaching sanctions is illegal and foreign investors need to carefully determine what risks they decide to take on the less clear-cut issues of political or reputational risk. Thus, the remained US and UN sanctions also increase uncertainty for foreign investors.

In sum, there would be a high level of uncertainties regarding compliance with all remaining sanctions regimes, complex legal and regulatory framework in Iran, the weakness of the law in providing equal rights and treatment towards the foreign investor, and the degree of conformity between the conduct required of the host State by its commitments under international investment law and the conduct actually adopted by Iran. It is therefore helpful to elucidate the existing uncertainties regarding investing in Iran for the foreign investors and the Iranian government to get a grasp of available opportunities in post sanction era.

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3 See O.F.A.C. Regulations involving Sanctions against Iran here:
https://www.treasury.gov/resource-center/sanctions/Programs/Pages/iran.aspx
[Accessed 5 October. 2016].
Furthermore, there has not been a comprehensive literature on the provisions of IIAs from the perspective of Iran, including, by reference to its investment policy, the terms of Iranian Model BIT and its practice in entering into IIAs, which have been revised over time. Therefore, this study is a new historical and statistical analysis of IIAs that has not been analyzed before, and makes an original contribution to the literature as well as our understanding of international investment law. As the outcome of this analysis, it shall be possible to determine whether Iran is able to offer a reasonable system of foreign investment protection and attract more foreign investors.

Moreover, according to the above, new generation of IIAs concluded between Iran and other countries have emerged following the lifting of international sanction. Hence, it is important to carry out a comprehensive analyze to contribute to the better understanding of these new investment treaties signed by Iran subsequent to the normalization of relations between Iran and the international community. In particular, Slovakia-Iran BIT, as one of the most radical and a new generation of investment treaties, has been concluded recently and it is important to provide the general scholarships on investment law with a close reading analysis in context of Iran that has signed this BIT.

1.4 Methodology and sources

In order to address the research questions, this study will adopt a legal desk research approach combined with descriptive statistical and historical analysis of Iranian model BIT and 58 BITs signed and ratified by Iran. Furthermore, treaties with investment provision and investment related instruments signed by Iran are reviewed. The desk research method will also be applied to collect the applicable domestic laws and review all the Iranian treaties in the context of international investment law. It will thus shed some light on the Iranian legislation and policies on foreign investment from an international perspective.

The legal sources that are used belong to the following categories: ordinary laws, domestic laws, international investment treaties, customary law as well as general principles of international investment law, and a rich source of authoritative sources such as scholarly writings related to the study topic.

1.5 Structure
The present study is divided into five chapters. The first chapter brings forward the background of the thesis, research questions, justifications, and applied research methodology and sources.

The second chapter deals with the position of Iran concerning international investment law. It gives an overview of different types of IIAs that are signed by Iran over the time.

In the third chapter a descriptive and historical analysis on BITs shall be carried out in order to clarify pre-existing and new Iranian BITs on a comparative based approach.

The fourth chapter aims to investigate and identify domestic barriers to attracting foreign investor to invest in Iran, assuming that political, legal, and administrative barriers prevent foreign investment. It thus paints a clear picture of the compliance landscape and probable risks associated with investing in Iran.

The fifth chapter makes a conclusion of the general capability of Iranian legal system to comply with its obligations and to offer a reasonable system of foreign investment protection for the foreign investor in particular in post sanction era.

CHAPTER 2

THE POSITION OF IRAN ON INTERNATIONAL INVESTMENT LAW

2.1 Background of International Investment Agreements

Before the early legal developments of international investment law and emergence of customary international law minimum standard for treatment of aliens, neither State practice nor scholarly work showed any particular consideration when it came to the particular rules on investment protection. Treaty practice was evidence of the undoubted dominance of municipal laws of the host State over protection of alien property. To show a pattern, Article 2(3) of the treaty between Switzerland and the US in 1850 states: “In case of … expropriation for purposes of public utility, the citizens of one of the two countries, residing or established in the other, shall be placed on an equal footing with the citizens of the country in which they reside in respect to indemnities for damages they may have sustained.” (Dolzer and Schreuer, 2012). In other words, the main assumption was that there was no autonomous standard other than national law of the host State providing foreign aliens with
protection. This assumption was followed in 19th and early 20th century respectively by the Calvo doctrine, Soviet Union position after the Russian Revolution, and Mexican position that attacked the traditional standard of protecting foreign citizens claiming that there is no absolute minimum standard in case of conflict between national treatment principle and the international minimum standard (ibid). However, despite these opposite positions, international minimum standards emerged in the aftermath of several disputes concerning the foreign alien’s status in the host State and it was widely accepted that aliens are protected by independent rules of international law. For instance, *Neer vs. Mexico* is a leading case on the subject matter, which dealt with a claim presented to the US-Mexico General Claims Commission alleging that the Mexican authorities had shown lack of diligence in prosecuting the armed men that killed Paul Neer, an American citizen, in Mexico. Although this case is not about international investment law and protection of foreign investor properties, it demonstrates development of customary law through arbitral practice and general tendency in case law to recognize international minimum standards of treatment of aliens (ibid).  

From the end of the Cold War (1990ish) with economic liberalization and the rise of globalization, a new climate of international economic relation emerged (Alvik, 2016). Within the new theme, States sought to re-establish ties with the rest of the world. Capital importing countries intended to attract foreign investment by pushing for a new regime of rights and protections afforded to foreign investors by the host State in addition to those required by customary international law. This new approach became definite in the Preamble of the World Bank’s Guidelines on the Treatment of Foreign Direct Investment (World Bank, 1992). In that sense, the Preamble recognized the importance of foreign investment for developing countries. The result of post-Cold War approach toward the foreign investor was proliferation of the BITs and multilateral agreements granting greater protection than the minimum standards to the foreign investor. Prior to the modern International Investment Agreements, foreign investment protection was provided through some general economic treaties

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4 The *Neer* case (1926): “[T] he treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”
such as the treaties on Friendship, Commerce and Navigation (FCN). However, FCNs were not specifically designed for investment. Those agreements did not grant foreign investors the same protection offered by the modern investment treaty rules. Henceforth, the development of IIAs was primarily a response to the inadequacies and inefficiency of the customary international law on State responsibility for injuries to aliens. Following the tendency of States to have specially negotiated rules, modern IIAs that are some of the most important sources of international investment law concluded in various levels including bilateral, multilateral, regional, and interregional. The modern era of investment treaties commenced since the conclusion of first BIT between Germany and Pakistan in 1959 that followed by the adoption of approximately 2960 BITs between different countries from 1959 until 2017 (Investment Policy Hub, 2017).

Generally speaking, the most common types of the IIAs that create legal relationships between the States and foreign investors are BITs. According to UNCTAD, the total number of IIAs was over 3,328 by the end of April 2017, of which 2960 were BITs (UNCTAD, 2017). Additionally, some efforts have been successfully made to achieve partial global agreements on legal frameworks of foreign investment among the States even though there is no comprehensive multilateral framework on international investment law yet. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) are two widely recognized multilateral investment treaties. ICSID, also referred to as Washington Convention, presents a procedural framework for dispute resolution between a State member of the Convention and a national of another State that is also a member State of the Convention. However, it is a multilateral IIA on processes for investment dispute settlement, and does not contain substantive rules on protecting the foreign investor. The New York Convention, likewise, provides for multilateral legal process to enforce non-ICSID arbitral awards and does not contain substantive rules. Hence, it is evident that there is no multilateral treaty on investment, but multilateral procedural framework based on international arbitration. Furthermore, there is a fragmented network of BITs

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5 As an illustration, the US negotiated a series FCN after 1919, followed by another series of treaties between 1945 and 1966 (Vandeveld, 1992).
worldwide. One therefore might conclude that BITs are still prominent sources of international investment law and the combined effect of the current investment law is an opt-in system with multilateral aspects, granting investors individual and direct rights under international law (Alvik, 2016).

2.2 International Investment Agreements in Iran

Iran as a resource-rich country has signed 67 BITs, which is quite significant. It can be compared to the US, a major capital exporting State, which has signed 46 BITs (Investment Policy Hub, 2017). Iran BITs proliferation in particular in post sanction era is overt by concluding three new BITs merely in the first quarter of 2016 and one in the first quarter of 2017 (ibid). The large number of BITs shows that Iran plays an active role in the area of BITs. Moreover, Iran is member of some multilateral agreements such as the Agreement on Promotion and Protection of Investment (APPI) between member states of Economic Cooperation Organization (ECO) and also the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference (OIC), and the New York Convention. Alongside with Iranian investment laws and regulations, all these BITs, multilateral investment agreements, and treaties with investment provisions provide legal basis for protection of the foreign investor in Iran.

In order to have a comprehensive understanding of the IIAs impact on Iran and the country’s contemporary investment climate, the following subsections firstly chart the historical context of foreign investment and BITs in Iran over time and, secondly, shed some light on the Iran’s position in the contemporary regime of multilateral investment related instruments and treaties with investment provisions.

2.2.1 A Brief history of Bilateral Investment Treaties in Iran

The number of BITs negotiated and signed by Iran is quite a lot: based on the data I gathered from UNCTAD, 67 BITs are negotiated and signed from 1995 to 2017, of which 52 are currently in force that is a sign of active role of Iran in signing BITs with other countries.6 A brief historical overview of Iran demonstrates that it has

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6 Iran has BITs with various European states, including Austria, Belarus, Croatia, Cyprus, Finland, France, Germany, Greece, Italy, Macedonia, Poland, Romania, Serbia, Slovakia, Spain, Sweden, Switzerland and Ukraine. Asian trading partners with which Iran has BITs include Azerbaijan, Armenia, China, Georgia, Indonesia, Kazakhstan, Korea, Lebanon, Malaysia, Singapore, Tajikistan,
undergone a series of ups and downs due to internal and external actors’ changes. Likewise, the treatments towards the foreign investor ebb and flow due to the country political and social situation. As figure 1 indicates, I calculate the number of BITs signed and ratified in Iran over the years based on the data provided by UNCTAD. Furthermore, I divide political history of the country into five periods based on major political changes occurred in Iran and each marked by different trends of BITs.

Figure 1 Iran/ BITs

<table>
<thead>
<tr>
<th>Period</th>
<th>Signed</th>
<th>Forced</th>
<th>Terminated</th>
</tr>
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<tbody>
<tr>
<td>1925-1979</td>
<td>2</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>1979-1990</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>1990-2005</td>
<td>54</td>
<td>35</td>
<td>0</td>
</tr>
<tr>
<td>2005-2013</td>
<td>8</td>
<td>14</td>
<td>0</td>
</tr>
<tr>
<td>2013-2017</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Source of Data: investmentpolicyhub.unctad.org

2.2.1.1 Pahlavi Dynasty (1925-1979)

The first period is Pahlavi dynasty, which starts from 1925 to 1980. Iran has been the subject of foreign investment for almost hundred years in that period. The most important agreement was a concession agreement concluded between the Government of Iran and the Anglo-Iranian Oil Company in April 1933, which also led to the famous Anglo-Iranian case (Hurewitz, 1979). Briefly, according to the agreement, the Anglo-Iranian Company was granted the right to “search for and extract petroleum as well as to refine or treat in any other manner and render suitable for commerce the

Turkey and Turkmenistan. On the African continent, Iran has signed treaties with; inter alia, Algeria, Tunisia, Kenya and South Africa. Iran is also party to BITs with the Persian Gulf states of Bahrain, Kuwait, Qatar and Oman. However, it is important to note that several capital exporting States such as the US, the United Kingdom, Saudi Arabia, the United Arab Emirates, Netherlands, and most Latin American countries have concluded no investment treaty with Iran
petroleum obtained by it” (ibid). However, the legal principle of nationalization of the Iranian oil industry was passed by Iran in March 1951. It became the Iranian Oil Nationalization Act in May of 1951 and established procedures for the enforcement of oil nationalization. Pursuant to Article 4 of the Act the “entire revenue derived from oil and its products is indisputably due to the Persian nation.” UK objected to these laws and in virtue of its right of diplomatic protection brought a dispute to the International Court of Justice (ICJ). The claimant argued that the property of the company was expropriated without any compensation and demanded that the 1933 agreement be upheld. In response, Iran denied that the Court had jurisdiction to entertain the merits of the case. The Court accepted the preliminary objection of Iran since it did not found a relevant treaty or convention between Iran and UK and consequently declared that it lacked jurisdiction (Anglo-Iranian Oil Co. UK v. Iran, [1952]). This case challenged the traditional system of international law that did not contain a branch peculiar to international investment law.

Subsequently, Iran concluded a concession with International Oil Consortium in 1954 that was one of the most important concession agreements or conventions at the time (Farmanfarma, 1955). Some scholars consider this concession agreement as an evident of granting foreign investors property and other rights by Iran. Moreover, the advice given by Sir Elihu Lauterpacht to the Anglo Iranian Oil Company in 1954 catalyzed the developments of BITs. He was within a group of lawyers representing UK and US oil companies negotiating the settlement of Iran’s nationalization of International Oil Consortium agreement in 1954 (Squire Law Library, 2017). In his advice he states: “any contract made between, on the one hand, the Company and such other oil companies … and NIOC and/or the Iranian Government on the other, shall be incorporated or referred to in a treaty between Iran and the UK in such a way that a breach of the contract or settlement shall be ipso facto deemed to be a breach of the treaty.” (ibid). He directly influenced the development of international investment law, particularly the occurrence of umbrella clause and investor-state dispute settlement in the Abs-Shawcross Draft Convention on Investment Abroad (Chernykh, 2016). Although the Abs-Shawcross Draft Convention did not come into force, it

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7 Article II of the draft text, which contains the first appearance of an umbrella clause, articulates: “Each Party shall at all times ensure the observance of any undertakings which it may have given in relation to investments made by nationals of any other Party.” The first proposal for an investor-state dispute settlement in article VII states: “2. A national of one of the Parties claiming that he has been injured by measures in breach of this Convention may institute
was the one of the most significant efforts to codify international investment law (Newcombe and Paradell, 2009). Moreover, it was presented to the Organization of Economic Cooperation and Development (OECD) and subsequently influenced many subsequent BITs (Chernykh, 2016). Most of the current BITs’ investor-state dispute settlement mechanisms and observance of undertakings clauses have been influenced by the Convention.

In later years during the Pahlavi era, Iran signed two BITs with Germany and Egypt in 1965 and 1977, respectively, but the former replaced by a new BIT in 2005 and the later have never come in to the force (UNCTAD, 2017).

2.2.1.2 Post-Islamic Revolution (1979-1990)

The Pahlavi regime collapsed following widespread uprisings against the last Shah of Iranian monarchy, Mohammadreza Pahlavi, in 1978 and 1979. The leader of the revolution, Ruhollah Khomeini, is the founder of Islamic Republic which is under the guidance of Islamic jurists. The pro-Western, pro-American foreign policy adopted by the king of Iran was altered. In particular after 1979 Revolution, the past investment agreements concluded in Pahlavi dynasty attracted increasing criticism and Iran tended to be skeptical about the foreign investment. This skepticism is evident in Iran’s unfavorable constitutional provisions discussed later. According to the figure 1, Iran has signed no treaty for about a decade from 1979 to 1990.

2.2.1.3 Post-War Reconstruction Era (1990-2005)

The end of the Iran-Iraq war in 1988 was the beginning of the reconstruction era in Iran. The Iranian government at the time of Rafsanjani’s presidential administration had several schemes to rebuild and construct new facilities and expand country’s infrastructure (KhabarOnline, 2011). Those government plans required billions of dollars of investment and could not be brought into action without attracting foreign investments. In other words, the country was starved for investment and began to offer investment guarantees with an eye toward restoring investor confidence and building a stable and cooperative relationship with the world from 1995 to 2005. This proceedings against the Party responsible for such measures before the Arbitral Tribunal referred to in paragraph 1 of this Article, provided that the Party against which the claim is made has declared that it accepts the jurisdiction of the said Arbitral Tribunal in respect of claims by nationals of one or more Parties, including the Party concerned.”
period of reconciliation and open policies to achieve post-war reconstruction of the Iranian economy prompted long-run increases in foreign investment and proliferation of BITs in Iran. Iran issued its Model BIT in 2001 that represents an expression of Iranian government’s policies for treatment of foreign investments. In other words, the Model BIT is an important instrument that declares a State’s investment policy, its negotiating position on the protection of foreign investment, and some times its reaction to the jurisprudence based on arbitral awards.

As figure 1 indicates, following the development of Iran Model BIT, 54 BITs were signed by Iran and predominantly European or Asian countries, of which 35 came into force in that period. The significant role of the reformist president, Mohammad Khatami, who pushed for Iran’s integration into the global economy and encouraged cooperation with foreign partners during his administration, was one of the important reasons of proliferation of BITs at that period.

2.2.1.4 Government of Mahmoud Ahmadinejad (2005-2013)

This fruitful period came to an end under the President Ahmadinejad government from 2005 to 2013. The policies and rhetoric of the President provoked negative reactions in the West and escalated the tensions between Iran and the international community. The nuclear program of Iran caused long-running disputes between Iran and the West over Tehran's nuclear program, with the US pushing for new international economic sanctions in addition to the other sanctions such as those imposed by the US Congress and EU due to Iran’s violation of human rights (Reuters, 2010). Following the 1696 Resolution passed by the UN Security Counsel, further economic sanctions were imposed on Iran at 2006 (UN, 2006). Since sanctions are, not surprisingly, one of the most perilous threats to foreign investment, there had been a considerable decrease in the volume of Iranian BITs. Based on the statistics, 8 new BITs were signed in this period. 14 BITs also came into the force in that period, of which 10 were signed, before 2006, in reconstruction era.

2.2.1.5 Post- Nuclear Deal (2013-2017)

With the 2013 election of President Rouhani who was considered as a moderate with whom international community could repair and build bridges, Iran’s relation with foreign countries began to assume a new form slowly (The Guardian, 2015). The
conclusion of nuclear agreement was central to ending Iran’s international isolation. Rouhani’s government has brought about an opportunity for Iran to strengthen its economy and overcome times of hardships due to confrontations with the West. Attracting foreign investment was prioritized in Iran’s economic policy (The Wall Street Journal, 2016). Although there was only a modest rise in the inflow of foreign investment to Iran from 2013 to 2015, while the country was negotiating over its nuclear program, the business community has subsequently embraced Iran after the implementation of nuclear agreement. Some examples to help explain the current climate are the trade trip of a delegation representing more than 100 French companies to Tehran as a result of interim nuclear agreement as well as conclusion of three BITs by Iran after the implementation of JCPOA during the first quarter of 2016 and one in 2017 (The Guardians, 2014).

In addition, EU has adopted a new approach under the 2009 Lisbon Treaty that transfers competence over foreign direct investment from national level to the EU. The Commission is aimed to replace the current extra EU-BITs (BITs concluded with non-EU members) with new ones, which might be more conservative and be negotiated by the commission on behalf of the EU (Dolzer and Schreuer, 2012). However, pursuant to the Regulation 1219/2012 of the European Parliament and of the Council of 12 December 2012, EU allows its member States to amend their existing investment treaties or conclude new ones (Investment Treaty News, 2016). In order to negotiate new BITs or renegotiate the existing ones, EU member States must seek authorization from the Commission and their outcome is subject to the Commission approval (ibid). Currently EU member States are more likely to utilize this procedure and to start renegotiating their existing BITs in order to adjust them to the new policies of the EU on investment. As figure 2 indicates, 34% of Iranian BITs are concluded between Iran and European countries, which is a large portion. Exclusive jurisdiction of the European Commission and the emerging trend among EU member States to commence renegotiation of the existing BITs might have potential consequences for the Iranian party in conclusion of BITs with Europe.

*Figure 2 Geographical Distributions of BITs*
2.2.2 Multilateral Instruments: OIC Agreement, New York Convention, the ICSID Convention, MIGA Convention, and ECO-APPI

Protection can be given to foreign investors through IIAs at various levels of IIAs, via bilateral, multilateral, regional, and interregional treaties. In addition to BITs, Iran is member of some multilateral agreements. The first multilateral instrument signed by Iran is Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference (OIC Agreement) adopted in 1981 and became effective in 1988. Interestingly enough, OIC Agreement was signed and ratified in the revolutionary period within which no BIT was concluded. Concluding this multilateral agreement in the revolutionary period might illustrate Iranian government’s firm commitment to the OIC and the State’s policy to prioritize its relations with the other Islamic States in the region. OIC Agreement articulates the primary principles governing the promotion of capital transfers among contracting parties. It also contains rules on investment protection against commercial risks whereas guaranteeing the transfer of capitals among States (The OIC, 2017). The first award under the treaty was rendered in Hesham Talaat M. Al-Warraq vs. Indonesia case in 2012 (Investment Policy Hub, 2017). The dispute was initiated by a Saudi businessman who sought compensation as a result of his stake in a bank that was nationalized (ibid). In this case, the arbitral tribunal held that the investor might directly arbitrate disputes with the host State (Italaw, 2017). Since Iran has concluded BITs with 27 out of 56 OIC Member State,
OIC Investment Agreement might offer an advisable option for investment dispute settlement. Furthermore, although the agreement does not afford the same substantive protections contained in most of the BITs, claimants might invoke the most favored-nation clause (MFN) under Art 8 of the OIC to enjoy more favorable protections provided in other Iranian investment treaties with third States.

Iran also adopted three important multilateral treaties between 1990 and 2005, a period in which the government focused on restoring investor confidence and reconciliation. First, Iran ratified the New York Convention in 15 October 2001. Foreign investors who wish to enforce non-ICSID awards against Iran can look to this Convention. It is noteworthy that Iran is not yet a member state of the ICSID Convention and the ICSID arbitration therefore is currently not available. Foreign investors thus in Iran might seek redress in arbitrations under ICSID Additional Facility Rules that govern dispute resolutions involving a country not party to the ICSID Convention. Secondly, Iran became a full member of the Multilateral Investment Guarantee Agency (MIGA) in 2003. That again demonstrates implementation of more open foreign trade policies by the Iranian government during the reforming period. The MIGA Convention was created under the auspices of the World Bank to facilitate foreign direct investment into developing countries. It does so by providing foreign investment with risk insurance, technical assistance, and advising (MIGA, 2017). It guarantees investment made by foreign investor against political and non-commercial risks in developing countries. Finally, Iran signed the Agreement on Promotion and Protection of Investments of the Economic Cooperation Organization (ECO-APPI) in 2005. ECO-APPI provides the foreign investor with typical protections found in BITs alongside with a broad dispute resolution clause making international arbitration available. However, it has not escaped our notice that the ECO-APPI has not yet entered into force and it will solely protect foreign investors after the date of its entry into force.

CHAPTER 3

BILATERAL INVESTMENT TREATIES ANALYSIS

3.1 Bilateral Investment Treaties: Attractive Means for Foreign Investors in Iran
The close textual resemblance of BITs around the world demonstrates the general structure of such agreements that focus on protection of foreign investor's interest. Iranian BITs contain protections commonly provided by the investment treaties under international law, such as the right to fair and equitable treatment, MFN treatment, national treatment, and protection against expropriation. Such standards are backed up by the possibility of bringing the dispute to arbitration against the host State regarding the treaty's substantive provisions. However, BITs often address the same issues in different ways, entailing important differences in legal consequences. For instance, each individual BIT may entail exceptions to or carve-outs from particular types of substantive protections or limitations on the types of covered investors or investments. To resolve disputes between the foreign investor and host States, tribunals in international arbitration have weighed the language in investment treaties carefully. Therefore, it is important to carefully scrutinize the language of all BITs concluded by Iran and the other countries.

In the following subsections, Iranian BITs will be examined based on the treaty wording of BITs gathered through both the UNCTAD database and the BITs found in Islamic Parliament Research Center translated from Farsi to English. This chapter is structured in a manner that I describe general characteristic of BITs provisions worldwide, and then I analyze related provisions under Iranian Model BIT 2001. Finally, I discuss related provisions in the BITs concluded by Iran in particular the recent ones.

3.1.1 Definitions of Investment

A BIT typically consist of three parts. The first part of the BIT usually includes definitions, in particular the definition of investment and investor. The term of investment defines the forms of engagement covered by investment protection offered by the BITs. In other words, applicability of a BIT requires the existence of an investment. Defining investment has two different functional consequences. First, the notion of investment determines the jurisdiction of an international tribunal; second, it determines whether the substantive standards guaranteed in a BIT apply to the claimed investment (Alvik, 2016). There are commonly three types of investment

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8 There is no information available about 9 out of 67 BITs concluded by Iran neither in UNCTAD database nor in the Islamic Parliament Research Center. Therefore, this analysis is based on 58 Iranian BITs.
rights: physical property, intangible rights, and administrative rights. The latter two are granted by the host State, although when it comes to an investment it is not within the discretion of the host State to withdraw these rights unilaterally. Otherwise, it will trigger the host State responsibility against the foreign investor. Although the parties of a BIT have been given discretion to define investment, the discretion is not absolute.

There are three models under which investment can be defined in investment laws. The first model is asset-based model that lists broad range of specified assets as a foreign investment such as the definition contained in the US Model BIT 2012. In some asset-based models, the list of specified assets contains the “right to claims money or any other performance having an economic value, associated with an investment”, which again makes it necessary to define the investment term per se. The second model is transaction-based model such as the model used in the OECD Code of Liberalization of Capital Movements, which does not define investment but lists capital movements to be liberalized, including direct investment in Annex A (UNCTAD, 2011). Under the transaction-based model, the transactions made by the investor are listed. Third, the enterprise-based model, such as the definition under the India Model BIT 2015, lists the business organization formed by the investor (Schlemmer, 2008). In a wide range of BITs and model BITs, investment is broadly defined in a general phrase to include “any asset” and contains a non-exhaustive list of specified assets that are protected under the BIT.

Furthermore, some BITs defining investment require that the investment must be in accordance with the host State law. Pursuant to arbitral tribunal jurisprudence, it does not mean that definition of investment must be in accordance with the host State law but it means that the validity and legality of the investment is examined under host State laws (Salini v. Morocco [2003]). However, it is widely accepted that if there are conditions attached to investment, non-fulfillment of conditions might justify the otherwise breaching act of the host State.

Most arbitral tribunals have invoked Article 31 of the Vienna Convention on the Law of Treaties (VCLT) in order to interpret investment treaties (Dolzer and Schreuer, 2012). According to Article 31 of the VCLT: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Generally speaking, an interpreter needs to look at the ordinary meaning of a word that might be found in
State practice, arbitral awards, and wording of the treaty in order construe the notion of investment applying the interpretation method of Article 31 of the VCLT.

Article 1(1) of the Iranian Model BIT follows an ‘asset-based’ approach to define protected investment. Likewise, almost all the BITs concluded by Iran follow the asset-based model. To give an example, the Iran-China BIT contains this clause within its illustrative list of specified assets. 51 out of 58 Iranian BITs also contain “in accordance with host State laws” requirement meaning that the validity and legality of the investment depends on the host State laws. The statistics thus show a common path of investment definition and its conditions under the Iranian BITs.

The Iran- Slovakia BIT signed in January 2016 is the only BIT which is a radical departure from Iran’s BIT practice. It employs a different method of investment definition. Pursuant to Article 1(2) of the BIT, the treaty uses the enterprise-based approach: investment is defined through the business organization of the investment as an enterprise. It also articulates that “for the avoidance of any doubt, that investment shall not include [among others]: … b) portfolio investment, which is 10% or less shareholding” henceforth limited investment to enterprises that were a direct investment. By the precise exclusion of portfolio investment there would be more certainty as to which investments are covered and which are not (UNCTAD, 2011). For instance, the BIT does not cover an investment with purely financial character, where the foreign investor remains passive and does not control the management of the investment. The BIT also includes the activities of non-profit development and research organizations as a protected asset for the first time.

Moreover, in order to control the scope of the notion of investment, the treaty sets out certain characteristics that an investment must meet to be considered an investment covered by the treaty. In other words, the parties tended to make sure that in case of a dispute a tribunal would consider objective characteristics of the investment. In accordance with Article 1 (2), these criteria include: “i. the commitment of capital or other resources; ii. the expectation of regularity of profit; iii. the assumption of risk; iv. a reasonable duration; and v. an effective contribution to the Host State's economy.” This approach is a narrow definition of investment and usually limits the protection provided for the foreign investment (Schlemmer, 2008). The approach, known as the Salini approach, adopted by the tribunal in Salini v. Morocco case in order to determine whether the contract involved was a covered investment under the BIT. The tribunal stated as follows:
“The doctrine generally considers that investment infers: contributions, a certain duration of performance of the contract and a participation in the risks of the transaction. In reading the Convention’s preamble, one may add the contribution to the economic development of the host State of the investment as an additional condition.”

In other words, the tribunal examined whether the contract in question had met the overall objective elements referred to above rather than analyzing the consent of the parties.

3.1.2 Definition of Investor

In addition to definition of investment, BITs include also a provision that determines who qualify as covered investors. Defining investor is relevant for two purposes. First the term of investor determines the scope of jurisdiction; second, it works as a substantive criterion of investors who have the right to protection under a BIT. Basically BITs require foreign nationality for an individual (natural person) or a legal entity (jurisdictional person) making an investment to be protected by the BIT. A natural person must be the national of one of the parties of BIT to be protected under that BIT. The requirement of foreign nationality was justified by jurisprudence stating:

“Non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption (...) although a taking of property must always be effected in the public interest, different considerations may apply to nationals and non-nationals and there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals.” (James v. UK, [1986, para. 63]).

Nationality of the natural person must be determined by the domestic law of the home State though it does not mean that in case of dispute about the nationality, an arbitral tribunal does not have competence to decide the case and pass up on the challenge (Soufraki v. United Arab Emirates [2004, para 50]). Some treaties have rules on how

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9 ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, para. 52.
to deal with dual nationality and exclude holders of more than one nationality from their coverage.

Article 1 of Iranian Model BIT defines investors and excludes the investors that have the nationality of the host contracting party from its scope. Moreover, 16 Iranian BITs exclude dual nationals from their scope. However, it might be problematic when a BIT does not regulate dual nationality i.e., the other 35 Iranian BITs. Although in the *Nottebohm* case the ICJ held that there must be a real connection between the State and the national, arbitral tribunals have not generally been impressed by the claim of effectiveness of a nationality. It has been held that a genuine link and application of effective link test to determine nationality are not necessary (*Micula v. Romania* [2015, para. 70]). In the modern world it would be very challenging to demonstrate effective nationality following the *Nottebohm* considerations (OECD, 2008). However, *Nottebohm* principles are still useful under BIT in cases of dual nationality when the nationality of the claimant in order to be accepted has to be “predominant”.

Moreover, there are other links mentioned in the BITS worldwide, such as permanent residence; domicile, residence or combinations of them that whether a natural person is covered by the BIT. The Iran- Slovakia BIT is the only Iranian BIT that, in addition to nationals/citizens of the home State, treats permanent residents of the home State as the investor protected under the BIT. This BIT is broader in this respect. But it is obviously constrained heavily by Article 3 that articulates: “A natural person that is a dual national of either Contracting Party or any non-Contracting Party, shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality”. Therefore, the applicable test in case of dispute about nationality, in addition to residency test, would be effective link test that is a departure from common treaty practices under international investment law. The test of dominant and effective nationality applied by the Iran-US Claims Tribunal in that it had to determine whether a plaintiff with dual US-Iranian nationality was to be regarded as American or Iranian in order to bring a dispute before the Tribunal. It held that “the claimant could claim before the Tribunal because his dominant and effective nationality at all relevant times [was] that of the US and the funds at issue in the present case related primarily to his American nationality, not his Iranian nationality” (*Esphahanian v. Bank Tejarat* [1983, para 85]).
BITs define the category of companies to include or exclude various types of legal entities. They might be excluded based on their legal form, their purpose, or their ownership. In addition, some BITs in the world cover only entities that engage in substantial business activities in the home State or those that have real economic activity. Thereby, only investors from that contracting party are protected under the BIT. There are three criteria determining nationality of a corporation: main place of business, place of incorporation or registration, and some combination of these criteria (Dolzer and Schreuer, 2012). The Iranian model BIT uses a combination of the place of incorporation and country of the seat as the criteria of nationality of legal entities. Likewise, Iranian BITs follow the same pattern, using a combination of the place of the registered office and the place of administration. The requirement of having real economic activities in the home State strengthens the main place of business test in order to avoid manipulation. Since the country of incorporation hardly changes and the main place of business is also relatively permanent, this definition might serve the aim of attracting investment by providing a stable investment (Alvik, 2011). On the contrary, there might be some who argue that the requirement of having real economic activities gives investors less flexibility. The Iran- Slovakia BIT, which is a radical departure from Iran’s BIT practice narrows the definition of investor by expressly excluding branches of enterprises and representative offices as well as entities without legal personality.

3.1.3 National Treatment and Most favored Nation Treatment

One of the major components of the BITs is its general treatment of investment and investors. Core to BITs in the world is the basic requirement that contracting parties not discriminate against foreign investors either compared to its own investors or investors from third countries. These provisions have been regularly addressed in the BITs through national treatment and MFN clauses (Dolzer and Schreuer, 2012).

Requiring that States do not discriminate based on the nationality of the foreign investment is one of the principal purposes of investment law. Based on the national treatment obligation, a host State shall accord investments of the investors of other Contracting Party in its territory a treatment which is no less favorable than that accorded to investments made by its own investors. The national treatment obligation is relative and requires a comparison between the host State's treatment of domestic
and foreign investors. The national treatment obligation applies once an investment established and/or before the establishment of a business. The national treatment obligation in pre-establishment phase provides foreign investors with a right of access to a national market (ibid). Put differently, national treatment provisions might cover either the post-establishment or pre-establishment phase of the investment or both. Two major questions must be answered in order to determine a violation of the standard (ibid). First, whether the claimant and the national investor are in a like situation or like circumstances. Second, whether the foreign investor is treated less favorable than the national investor. There is no particular practice to identify like situation or like circumstances. However, tribunals appear to be cautious in construing conditions such as “like circumstances” broadly in order to open the room for a full review of the measures under the national treatment clause (ibid). Moreover, there is an agreement that the overall legal context in which a measure is placed is important in the analysis of likeness and different treatment among the foreign investor and national investor (S.D. Myers v. Canada, [2000]).

Iran’s model BIT deals with national treatment only in Article 7 that is about national treatment obligation in losses due to war, any armed conflict, revolution or similar state of emergency and it only applies in these circumstances. In addition, BITs concluded by Iran followed various patterns. 47 Iranian BITs contain an express national treatment obligation, of which 9 refer to like circumstances. To give an example, Article 3 (1) of the Iran-Germany BIT states: “Each Contracting Party shall accord to investors of the other Contracting Party and to their investments treatment no less favorable than that it accords to its own investors and their investments”. Unlike the US and Canada BITs in which national treatment obligation applies to the full life cycle of an investment, including the investor’s entry and establishment in the host State and its participation in existing enterprises, none of Iranian BITs extend national treatment obligation to the acquisition and establishment of investments.

As with national treatment, MFN treatment is a relative standard. It prohibits host States from discriminating amongst foreigners or foreign investment of different nationalities. It links different BITs by ensuring that the parties to one treaty provide treatment no less favorable than that the treatment they provide under other treaties in areas covered by the clause. MFN clauses have therefore become a significant instrument of economic liberalization in the investment area (OECD, 2004). There is little State practice or opinio juris to support that a MFN obligation is required under
customary law and it exists only when created through a treaty clause. However, the context of MFN clauses varies from treaty to treaty and each of them must be interpreted on its own terms. For instance, MFN clauses vary in whether they apply to establishment, specify the activities to which the obligations apply, and provide an express comparator such as like circumstances. Many MFN clauses contain specific restrictions and exceptions, which exclude certain areas from their application. To name some examples, regional economic integration, matters of taxation, and country exceptions are among the exceptions. For instance, Article 3(3) of the Iran-Italy BIT articulates:

“If a Contracting Party has accorded or shall accord in future advantages, privileges or rights to investor(s) of any third state by virtue of its membership to existing or future agreements establishing a free trade area, a customs union, a common market, and/or by virtue of its signature of a regional or sub regional Agreement, and international multilateral economic Agreement or under Agreements signed in order, to prevent double taxation or to facilitate cross border trade, it shall not be obliged to accord such advantages, privileges or rights to investors of the other Contracting Party.”

MFN clauses might be invoked by the States in the context of substantive rights guaranteed by the BITs or matters of dispute settlement. In particular, when a treaty is drafted generally there is no explicit statement to what extent the MFN clause applies to the treaty provisions. With regard to substantive guarantees it has been accepted that MFN clause extends to substantive guarantees (Dolzer and Schreuer, 2012). However, there are distinct views on the exact extent of MFN clause effect for invoking another treaties. On the one hand, some hold that a MFN clause is applicable until it is compatible with negotiated scheme of a BIT and it does not change the regime created based on the parties’ interests (ibid). On the other hand, a different view would adopt an interpretation that a MFN clause covers all areas of the treaty including procedural rights and there is no need of determining computability (ibid).

Furthermore, practice in the field of applicability of MFN clause to dispute settlements is not consistent and straightforward. It has been held by some tribunals that procedural obstacles can be overcame by a MFN clause. They expressed the view that arbitration is an important way of protecting the investment and MFN clause should be applied to dispute settlements (Gas Natural SDG, SA v. Argentina [2005, para 65]). Nonetheless, these tribunals warned against treaty shopping, changing the
public policy consideration of States in accepting a BIT (Maffezini v. Spain, [2005, para]). In contrast, other groups of cases, concerning mostly the scope of the consent clauses in the question, do not accept that the MFN clause can be applied to make a jurisdiction that would not have otherwise existed (Plama v. Bulgaria [2005]). In support of tribunals that adjudicated these cases, Zachary Douglas note: “'MFN' is a term of art in international law and treaty obligations employing this term of art have an ancient pedigree and when state parties enter into modern investment treaties with an MFN clause, they surely do not intend to relegate the received wisdom on the nature, scope and effect of such clauses to the dustbin of history” (Douglas, 2011)

The Iran Model BIT contains an MFN provision, which relates to full legal protection and fair treatment. Article 4 specifically provides that: “Investments of natural and legal persons of either Contracting Party effected within the territory of the other Contracting Party, shall receive the host Contracting Party’s full legal protection and fair treatment not less favorable than that accorded to investors of any third state who are in a comparable situation.” Pursuant to Article 5, the MFN standard is extended to the provisions of other agreements. Foreign investors thus can pick and choose various favorable provisions from different agreements that each contracting party concluded with the third parties. It also contains specific restrictions and exceptions, which exclude economic integration agreements and taxation treaties from its application. A few BITs concluded by Iran have detailed provisions on national treatment and MFN standards though almost all Iranian BITs guarantee MFN standards and follow a same pattern. To name an example, pursuant to Article 3(b) of Iran-Germany BIT “The following shall, in particular, be deemed "treatment less favorable" within the meaning of Paragraph 1 of this Article: unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, unequal treatment in the case of impeding the marketing of products inside or outside the country, as well as any other measures having similar effects.”

Unlike MFN clauses in the US BITs, which cover both the establishment and post establishment phases, Iranian BITs typically cover the post-establishment phase. In other words, the MFN obligation does not extend to acquisition or establishment of investments. In addition, unlike MFN clauses in the US BITs that only apply in like circumstances, Iranian BITs contain no reference to the comparative context against which treatment is to be assessed (OECD, 2004). However, MFN obligations
contained in 51 out of 58 Iranian BITs do not cover advantages accorded to third country investors by virtue of economic integration agreements of various kinds, such as a customs union, economic union, monetary union, free trade agreement, regional integration agreement, etc. Likewise, 51 out of 58 BITs concluded by Iran also do not extend MFN obligation to advantages accorded by either contracting party to investors of a third State by virtue of a double taxation agreement or other agreements on a reciprocal basis regarding tax matters.

BITs concluded by Iran do not expressly state that the covered investors cannot invoke the MFN provision to access more investor-friendly provisions in the other BITs concluded by the host State with third countries. In other words, it is not clear whether MFN clause applies to interstate dispute settlements provisions found in other treaties. However, The Iran-Slovakia BIT, as a radical BIT, again introduces explicit and detailed guidance in the national treatment and MFN standard. Article 3(4) states that a determination of whether foreign investments or investors are in a comparable situation for the purpose of national treatment and MFN obligation is based on an assessment of the totality of circumstances related to the investor or the investment. It includes the effect of an investment on the local community where it is sited, and on the environment, including the cumulative impact of all investments within a jurisdiction. It seems to be inspired by treaty models such as the Model International Agreement on Investment for Sustainable Development developed by International Institute for Sustainable Development (IISD) and its emphasis on the environmental impact of investments in a given area (Eric Peterson, 2016).  

Moreover, Article 4.4 of Iran-Slovakia contains exceptions allowing treating investors or investments less favorably “if it is adopted and applied by the Contracting Party in pursuit of a legitimate public purpose”. A number of legitimate public purposes such as protection of health, safety, and the environment are then enumerated in the same provision.

3.1.4 Fair and Equitable Treatment

10 Article 5 of the Agreement states “For greater certainty, the concept of “in like circumstances” requires an overall examination, on a case-by-case basis, of all the circumstances of an investment, including, inter alia: a) its effects on third persons and the local community; b) its effects upon the local, regional or national environment, or the global commons; c) the sector the investor is in; d) the aim of the measure concerned; e) the regulatory process generally applied in relation to the measure concerned; and f) other factors directly related to the investment of investor in relation to the measure concerned.
Fair and equitable treatment (FET) is an autonomous and non-contingent standard, which originated in customary international law in relation to the protection of the property of aliens. FET is an obligation different from the host State’s domestic law, against which the behavior of the host State vis-à-vis foreign investor can be assessed. It might be violated even if the national and investor are treated equally or if the host State observes the MFN principle. The FET does not have a consolidated and precise meaning as such (Schill, 2009). Like other broad principles of law, FET can be specified through judicial practice depending on the particular circumstance of each case. So far it is settled that FET standard is a gap filler, reminiscent of the good faith principle and it might have interaction and overlap with other standards (Dolzer and Schreuer, 2012). However, there are two schools of thoughts about the nature and content of the FET. According to NAFTA tribunals and some ICSID decisions, the FET is an expression of the international minimum standard (United Parcel Service of America Inc. v. Government of Canada [2002, para. 83]/ CMS Gas Transmission Company v. Argentine [2005, Para. 46]).¹¹ In other words, the obligation to grant fair and equitable treatment requires no more than the international minimum standard, which forms part of customary international law.

In the view of other scholars, the FET is an autonomous standard and its purpose is to set a floor, not a ceiling, in order to avoid a possible interpretation of these standards below what is required by international law (Azurix v. Argentine Republic, 2006, para. 65). It means the FET is something different from the international minimum standard and it should be given its ordinary meaning. This results in applying an equity based test on a case by case basis in order to determine whether the standard has been breached. Despite the controversy about definition of FET standard, it is generally accepted by arbitral tribunals that the FET standard is an expression and part of the good faith principle recognized by international law although bad faith is not required for its breach (Tecmed v. Mexico, [2003, para. 51]).

The main rationale of FET is to place limitations on the arbitrary power of a host State relying on its supremacy power to disregard the legitimate expectations of an investor. The legitimate expectations of investors are those that are relied on reasonably to invest in the territory of the host State even if it is not contractual based. In order to show reasonableness, an investor must show that there is an effective

¹¹ This is partly because of the 2001 statement by the FTC, although there is a discussion about its effect.
understanding between the investor and a host State having the effect of contractual undertakings. A mere breach of contractual rights thus is not decisive for determining violation of the FET. According to arbitral jurisprudence, the FET obligation requires the host State to observe the principles of due process of the law and natural justice (Waste Management Inc. v. Mexico, [2004, para. 71]). Henceforth, an investor must have access to the courts, fair hearings and the right of appeal against judicial decisions. The obligation to treat foreign investors fairly and equitably extends to administrative decision-making and procedural fairness. It also includes the transparency, predictability, certainty and stability of the legal system of the host State (LG&E v. Argentina, [2006]). Therefore, the host State must inform a foreign investor concerning new laws and regulations, policies and judicial decisions affecting its foreign investment to promote investment, predictability and stability.

Potential controversies about the content of the FET obligation can be minimized depending on the specific language used in the BITs. Some BITs contain more precise wording than the others. The FET standard in modern BITs is used either by reference to standard of international law or as an independent standard. According to the Energy Charter (ECT), the most common view is that the FET is a self-contained standard. This understanding of the FET was in line with the 1994 Model Draft of the US. In other words, the BIT model adopted by the US led to the belief that the FET is additional to standards required by international law. The current US belief, later amended, reflected in the Interpretive Note issued by Free Trade Commission, is that the obligation is restricted to be equivalent solely to customary international law (Bronfman, 2005).

Article 4 (1) of Iranian Model BIT declares: “Investment . . .shall receive the host Contracting Party’s full legal protection and fair treatment not less favorable than that accorded to investors of any third state who are in a comparable situation”. This provision entails two important obligations of contracting parties namely the FET and MFN clause. One might argue that incorporating unqualified FET is based on the general view that vagueness of FET obligation is essential to enable arbitrators to invoke principles necessary to achieve the aim and purpose of the BIT in any particular dispute. Moreover, FET standard is almost always included in the BITs concluded by Iran.

Only in two recent BITs concluded with Slovakia and Japan is the FET clause qualified either by reference to international law or by listing the elements of the FET
obligation. The Iran-Japan BIT articulates that “the concept of full protection and security do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens”. The Iran-Slovakia includes an exhaustive list of more specific elements of FET such as denial of justice in criminal, civil or administrative proceedings, fundamental breach of due process, and manifest arbitrariness. Instead of connecting FET standards to customary international law, though it does not reach as far, the Iran-Slovakia follows the pattern of the Canada-Europe free trade agreement (CETA) by defining the concept precisely (Eric Peterson, 2016).\textsuperscript{12} This alteration in wording of FET obligation shows the concern of the States wishing to reduce the discretion of arbitrators in a dispute by providing more guidance.

3.1.5 Full Protection and Security

Many BITs, after providing for fair and equitable treatment, add that investment by the other contracting party should be provided with full protection and security. Although FET and full protection and security are often contained in the same phrase of a BIT provision, and some arbitral tribunals have equated them, the dominant approach considers that the two standards are separate (National Grid v, Argentina [2008, para. 121]). Unlike the FET standard, the content of the principle of full and security has been defined in BITs more precisely. The provision is applicable to more than physical security of a foreign investment that could be subject to harassment without being physically harmed (Vivendi II, [2007, para 51]). While this standard has been primarily used in violent situations, there have been some recent instances of its application in situation of non-violence, directly due to government acts or to a lack of adequate legal protection of the investment by government. As pointed out by UNCTAD the full protection and security obligation is an obligation of good faith efforts to protect foreign investment referred to as the due diligence rule (UNCTAD, 1998, p. 55). In this regard, it has been stated that the provision does not impose strict liability on the host State to provide foreign investors with protection. In essence, full protection and security standard does not represent a deviation from the due diligence

\textsuperscript{12} Compared to CETA, FET standard does not extend to discrimination on any “manifestly wrongful grounds such as gender, race or religious belief”, “abusive treatment of investors, such as coercion, duress and harassment”, and “legitimate expectations” referred to in CETA.
rule. Therefore, the term implies the assurance of full protection and security for foreign.

Article 4 of Iran Model BIT deals with protection of investment. It states: “Investment . . . shall receive the host Contracting Party’s “full legal protection and fair treatment” not less favorable than that accorded to investors of any third state who are in a comparable situation.” Almost all the BITs concluded by Iran contain an unqualified obligation to provide full protection and security in various formulations including “most constant protection”, “legal protection and security”. However, the recent Iran-Singapore omits the full protection and security clause. As mentioned earlier, since the full protection and security obligation imposes an obligation on the host States to act in a manner that protects the investment from adverse interference, it can be burdensome for developing States with limited resources in case of challenging conditions such as conflict situations. Thus, the recent BITs, in which the standard is not included, might reflect the growing concern among developing countries about this standard. To give an example, this concern is also reflected in the two key African regional investment treaties, Annex 1 (Investment) of the Southern African Development Community Finance and Investment Protocol and the Investment Agreement for the Common Market for Eastern and Southern Africa Common Investment Area that do not contain the full protection and security clause (Malik, 2011).

3.1.6 Expropriation

Expropriation has traditionally ranked as one of the most controversial issues in the development of international investment law. Expropriation can be the most severe form of interference with investor property but States retain the right to expropriate under certain conditions (Langford, 2016). There are three common types of expropriation including direct, indirect (recognized by PCIJ as early as 1928 in German Interests case in 1926), and creeping (which is a taking through a series of acts (Siemens vs. Argentina, [2004])). International legal doctrine has differentiated between the two first forms of expropriation. Direct or formal expropriation is an open taking of property including the loss of all or almost all useful control over property. Nowadays, direct expropriation has become rare because of its negative effect on State’s reputation in international relations (Dolzer and Schreuer, 2012). Indirect taking is a form of expropriation that deprives the owner of the substantial
benefits of the property, without formally touching the title: for instance, where a measure is taken for regulatory purposes but has an impact on the economic value of the investment sufficient to constitute an expropriation (UNCTAD, 2004).

According to the basic principles of customary international law on expropriation, a foreign investment may not be expropriated, or subject to a measure tantamount to expropriation unless the measure serves a public purpose, it is not arbitrary or discriminatory, procedure of expropriation follow due process, the measure is followed by ‘prompt, adequate and effective compensation’ (Antoine Goetz v. Republic of Burundi, [1999, para. 61]). These requirements are also contained in most of the BITs. Expropriation clauses contained in the BITs while protecting investment against unlawful expropriation or measures having an equivalent effect, do not define these terms or identify any condition to determine whether a particular situation constitutes an expropriation. Key controversies thus surround indirect and creeping expropriation. This is partly because unjust enrichment by the host State is often not required, only a substantial deprivation of investment. It is also because it is hard to distinguish between compensable and non-compensable forms of indirect expropriation and question remain about which elements establish an illegal taking under international law (Langford, 2016). Despite the above-mentioned analytical difficulties, there are principal requirements cited by arbitral tribunals in order to determine whether a host State is liable to compensate for an indirect expropriation. Those criteria include having a substantial effect which lasts for a significant period of time, the existence of investment-backed expectations based on explicit or implicit, and specific or general, undertakings by a State, and the effect of the measure on investor and its objective and whether the measure is proportional (Dolzer and Schreuer, 2012). Furthermore, if an investor continues to exercise control over an investment then it is less likely that indirect expropriation will be found (Azurix v. Argentine Republic, [2006, para. 89]).

Nonetheless, definition of expropriation varies between treaties and each treaty needs to be carefully analyzed against the backdrop of jurisprudence. Article 6 of Iranian Model BIT concerns expropriation. It articulates that “Investment of natural and legal persons of either Contracting Party shall not be nationalized, confiscated, expropriated or subjected to similar measures by the other Contracting Party except such measures that are taken for public purposes, in accordance with due process of law, in a non-discrimination manner, and effective and appropriate compensation is
envisaged. The amount of compensation shall be paid without delay.” This Article, like recent BITs, put emphasize on both due process and compensation without delay when taking occurs. However, it does not explicitly refer to indirect expropriation. Article 6 of the 2012 US Model BIT uses the same structure allowing expropriations for public purposes that are non-discriminatory, in accordance with due process of law, accompanied by compensation. Unlike the Iran Model BIT, the US Model explicitly refers to indirect expropriation stating: “Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”).

Just as in US Model BIT, almost all BITs concluded by Iran contain a definition of, or criteria for determining whether an indirect expropriation has occurred. Henceforth, they are different from the Iran Model BIT that makes neither explicit nor implicit reference to indirect expropriation. On the contrary, Article 6.5 of the Iran-Slovakia BIT carves out regulatory measures of general application undertaken to protect legitimate public welfare objectives from the notion of expropriation, such as health, safety and the environment. However, this Article is conditioned upon good faith and proportionality and it is formulated in a manner that allows for exceptions by using the language of “except in rare circumstances”. Pursuant to Article 6.6, the BIT also carves out compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights from the expropriation-related obligations.

3.1.7 Umbrella Clause

An umbrella clause guarantees the observance of obligations that a host State undertakes against the foreign investor. An example of typical umbrella clause is Article 10(1) of the Energy Charter Treaty that reads as follows: “Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.” However umbrella clauses vary in whether they are general or more detailed. The main issue about umbrella clauses is that they cover contractual and other individual commitments entered into by the State. However, there are various approaches to the interpretation of umbrella clauses. Some advocate the narrow approach that umbrella clauses are operative only if there is a shared intent of the parties that contract breaches are breaches of the BIT (SGS v. Pakistan, para 167[2003, para. 114]). This approach is based on the
uncontroversial rule that a breach of a contract is not a violation of international law and will be resolved in accordance with the law and forum specified in the contract. On the other hand, a different view would adopt an interpretation: that umbrella clauses effectively convert a contract related claim into a treaty-based claim (SGS v. Philippines [2004, para 127]). Finally, the last approach is that umbrella clauses do not transform a contractual claim into a treaty claim, but may serve as a basis for a substantive treaty-based claim. In other words, contractual claims remain contractual and are governed by their applicable law and the umbrella clause provides an additional mechanism for the enforcement of contractual claims (Dolzer and Schreuer, 2012). Arbitral tribunals’ jurisprudence and international legal doctrine thus has not been consistent in respect of the effect of the umbrella clauses yet. Accordingly, umbrella clauses are problematic both pertaining the scope of the obligation and regarding the possibility of parallel dispute settlement proceedings addressing the contractual claim and the alleged breach of the umbrella clause (World Investment Report, 2015).

Iran Model BIT contains an umbrella clause in Article 10 providing that: “Either Contracting Party shall guarantee the observance of the commitments it has entered into with respect to investments of natural or legal persons of the other Contracting Party.” Furthermore, 41 out of 58 of Iranian BITs contain umbrella clauses requiring the parties to respect or observe any obligation assumed by the BITs with regard to a specific investment, thereby bringing contractual and other obligations under the umbrella of the BITs. However, Iran concluded three recent BITs with Slovakia, Singapore, and Russian Federation and refrained from including umbrella clauses. As previously mentioned, umbrella clauses have proven challenging in application. Henceforth, omitting umbrella clauses in recent treaties might show the mutual policy of most of the States to increase legal certainty and improve investment dispute settlement through not including umbrella clauses that are controversial and susceptible to receive conflicting interpretations by arbitral tribunals (ibid).

3.1.8 Investor-State Dispute Settlement

Diplomatic protection has proved unsuited for investment protection. This is because diplomatic protection is a right and decision made by the State. Since it is not a decision of individual investors to sue a State, diplomatic protection results in the lack of certainty and credibility for foreign investors. It also leads to politicization of
disputes since diplomatic protection historically serves as pretext for coercion and use of power e.g. gunboat diplomacy (Dolzer and Schreuer, 2012). Domestic courts also have a limited usefulness to intervene in investor-state dispute settlement. Domestic courts are bound to apply municipal law even if it is in contradiction with international law rules protecting the right of foreign investors. Since mostly a State, against which a dispute is brought, is not impartial, the executive bodies wouldn’t enforce the ruling against the State even if domestic courts rule in favor of a claimant. This approach might violate the rights of investors and failed to offer effective remedies to them. Hence, the key feature of international investment law is providing a multilateral arbitral process giving foreign investors direct access to arbitration against host States. Put differently, international investment law provides a rights-based procedure that may be invoked by foreign investors against host State governments through an effective dispute settlement procedure (ibid). It is accepted that when it comes to arbitration and its jurisdiction, domestic law is of secondary importance and the resort to domestic authorities might not be accepted as a result of consent to arbitration. The multilateral procedural framework based on international arbitration is generally provided through two main parallel arbitral frameworks namely the ICSID Convention (specialized for investment disputes) and the New York Convention (commercial arbitration). The settlement of disputes between investors and the countries in which they are established has become a key aspect of investment protection under BITs. The bulk of the BITs contain provisions on investor–State dispute settlement proceeding. Despite the fact that it had been contained in the BITs for more than one century, only in the last decade foreign investors have used it predominantly to enforce the standards of treatment and protection granted by the BITs (UNCTAD, 2005).

It is noteworthy that Iran is not yet a member state of the ICSID Convention and the ICSID arbitration therefore is currently not available for dispute settlement proceeding. Henceforth, foreign investors in Iran might seek redress in arbitrations under ICSID Additional Facility Rules that govern dispute resolutions involving a country not party to the ICSID Convention. A foreign investor who brings a case before the arbitral tribunal according to the ICSID Additional Facility rules would not be able to rely on the ICSID Convention rules, which is a self contained procedure based on international law. As a result, the rule that ICSID awards shall be enforced
as a final court judgment in member States would not be applicable in cases of dispute settlement under Additional Facility rules. This means that awards rendered in Additional Facility cases are subject to the recognition and enforcement regime of the New York Convention. Foreign investors who wish to enforce non-ICSID awards against Iran can look to New York Convention, which Iran has ratified. However, of particular interest is that there are BITs concluded and entered into force between Iran and other countries that refer disputes to ICSID in investment disputes if or as soon as both contracting parties have acceded to it. Ratification of those BITs referring to ICSID jurisdiction by the Iranian parliament might make an assumption that Iranian legislator has a likelihood of acceding to the Convention in the future. In addition to ICSID, the so far little used OIC could become a suitable option for the investment disputes resolution for the foreign investor of OIC Member States. Lastly, although has not yet entered into force, ECO-APPI agreement provides dispute resolution provision making international arbitration available for foreign investors.

Iranian BITs, similar to most of the BITs concluded by the rest of the world, contains two occasions for arbitration. One offers arbitration between the contracting parties that disagree on the interpretation or application of the BIT. Another provides for arbitration between the host State and foreign investors. Article 12 and 13 of Iranian Model BIT, respectively, deal with the arbitration for settlement of disputes between the host States and the foreign investor, and arbitration for settlement of disputes between contracting States as to interpretation and application of the BIT. Article 12 dealing with investor-State dispute settlement provides that contracting States have to wait six months “from the date of notification of the claim by one party to the other.” This six month period allows parties to reconsider their legal claims and if possible settle the dispute in an amicable manner otherwise the dispute will be rejected based on an admissibility ground. Each contracting party shall appoint an arbitrator within sixty days. The appointed arbitrators within sixty days appoint the umpire. Upon the request of the parties, the Secretary General of the Permanent Court of Arbitration appoints the failing party’s arbitrator or the umpire. Moreover, the arbitration clause contains the fork in the road clause. It requires the foreign investor to choose between the domestic courts and international arbitration at the outset. Once an investor starts the domestic proceedings, it loses the right to resort to arbitration, and vice versa (Dolzer and Schreuer, 2012).
The Iranian BITs are sometimes distinct from the Iranian Model BIT. For instance, the intervening period ranges from three to six months. 20 of BITs concluded by Iran contains fork in the road clause (UNCTAD, 2016). It might be as a result of the contracting parties’ intention to limit an investor to choose only one of the agreed dispute resolution procedures in order to reduce inconsistent decisions. Moreover, since in the absence of a fork in the road provision, submission of a dispute to local courts will not preclude the investor from pursuing other dispute resolution options, some other BITs explicitly forbid national courts from ruling on disputes between the foreign investors and host States. Iran has concluded a few BITs that contain a waiver clause providing that once the investor has opted for international arbitration, it cannot shift back to domestic courts. It often requires a “waiver” from domestic litigation as a condition of submitting the dispute to arbitration. For instance, Article 17(d) (1) of Iran-Slovakia BIT state by submission of a claim to arbitration: “the claimant and the claimant’s investment has provided a waiver of its right to initiate any other legal measures or legal proceedings or any investment arbitration proceedings…”.

BITs contain various forum options depending on the wording of treaties including permanent such as ICSID or ad hoc arbitral tribunals. As previously mentioned, two main arbitral frameworks are ICSID Convention and New York Convention.

26 of Iranian BITs provide an option to submit an investment dispute to arbitration under the ICSID Convention though Iran is not a member of ICSID yet. Furthermore, ad hoc arbitral tribunals follow different arbitration procedures. Some BITs provide an option to submit an investment dispute to arbitration under the UNCITRAL Arbitration Rules. The majority of Iranian BITs do not refer to UNCITRAL arbitration rules. The others provide an option to submit an investment dispute to arbitration under any other arbitral rules such as Stockholm Chamber of Commerce (SCC), International Chamber of Commerce (ICC), Arab Investment Court, Cairo Regional Centre for International Commercial Arbitration, ICSID Additional Facility (if the treaty does not allow arbitration under the ICSID Convention) or other venue or arbitration rules. To name an example, the new Iran-Slovakia BIT permits a foreign investor to seek arbitration using the UNCITRAL rules or any other set of rules agreed by the disputing parties. A few Iranian BITs contain no provision in respect of governing regime of the ad hoc arbitration. In this case, the ad hoc tribunal determines its own arbitration regime (UNCTAD, 2016).
Given the fundamental principle of party autonomy in international arbitration, it is only in the absence of parties’ choice that the arbitrators must determine the law that will apply to the dispute.

In respect of transparency, Slovakia, but not Iran, offered an advance commitment to apply the UNCITRAL transparency rules to any investor-state dispute settlement proceeding (Eric Peterson, 2016). In addition to other strict ethical requirements, Article 18 (5) of the Iran-Slovakia BIT stipulates, “they [Arbitrators and their staff and assistants] shall refrain from acting as counsel or as party-appointed expert or witness in any pending or new investment protection dispute under this or any other agreement or domestic law”. It apparently for the first time, prohibits double hatting that is acting as an arbitrator in one case and as legal counsel or witness in another at the same time. Double hatting has been criticized widely, but rarely barred expressly in BITs (ibid). Those who are against double hatting believe that it might cause bias and conflict in international arbitration regime. However, while some scholars insisted that the practice of double hatting is not desirable, there are other arguments supporting the concurrent performance of two or three roles of arbitrator, counsel, and witness (Langford and Behn, and Lie, 2017). Furthermore, Article 21 of the Iran-Slovakia treaty also specifies the types of remedy that a tribunal may award as follows: “monetary damages or restitution of property; and any costs of the arbitration proceedings and attorneys’ fees in accordance with this Agreement and the applicable arbitration rules.

To sum up, BITs, in particular arbitration clauses, are becoming more important as a result of increasing interest in investment in Iran post sanction. More than 50 Iranian BITs and eight difference areas across a model BIT are analyzed in this chapter. Iranian BITs contain protections commonly provided by the investment treaties under international law, such as FET treatment, MFN treatment, national treatment, and protection against expropriation. Such standards are backed up by the possibility of bringing the dispute to arbitration against the host State regarding the treaty's substantive provisions. Nonetheless, some of Iranian BITs entail exceptions to or carve-outs from particular types of substantive protections or limitations, which shows the significant value of examining the language of all BITs, concluded between Iran and the other countries. Finally, although Iranian BITs are not as comprehensive as, for instance, US BITs, they entail more or less all the main criteria of a BIT (Ghodoosi, 2014). The Iranian BITs therefore are likely to be the main sources of
CHAPTER 4

THE LEGAL AND POLITICAL FRAMEWORK OF IRAN’S FOREIGN INVESTMENT REGIME

4.1 Iran’s Foreign Investment Promotion and Protection Act

There are two ways available for the foreign investor to make investment in Iran. The first can take place under the Iranian Companies Registration Act that authorizes foreign investors to either acquire ownership in the existing Iranian companies or to act as a partner with Iranian investors in order to establish a company. Compare to the other investment related instruments the foreign investment is more subject to constraints than privileges under the Iranian Companies Registration Act. The second and more attractive approach for foreign investors is to invest in Iran pursuant to the provisions Foreign Investment Promotion and Protection Act (FIPPA).

The first comprehensive Iranian law concerning foreign investment was the Law for the Attraction and Protection of Foreign Investment (LAPFI) which was introduced in 1955 before the Revolution. The primary steps to introduce LAPFI had been taken during the time that the Iranian politician, Mohammad Mosaddeq, had been appointed prime minister by the king of Iran in 1952, ensuring that LAPFI is enacted to protect Iran from economic exploitation by outside forces.

In accordance with the LAPFI, foreign private persons and companies needed permission of the Iranian government to bring into Iran their capital and benefit from the act (Parstimes, 2014). Furthermore, it did not entail dispute settlement mechanisms such as arbitration. For instance, only Article 3 states: “in case of disputes, consideration of the claims for fair compensation guaranteed by the Government, shall be undertaken by competent Iranian courts.”

In 2002, after nearly 48 years, following the election of a majority of reformist deputies in parliament, Iran enacted its second foreign investment law called the FIPPA. It has been introduced following the increasing willingness of Iranian pragmatists and reformists. They believed that promoting foreign investment through a more favorable foreign investment law was crucial for reconstruction of the Iranian
economy in the reconstruction era. FIPPA is a more comprehensive legislation in comparison with the LAPFI. It has further enhanced the legal framework and investment landscape for foreign investors in Iran (OIEFAI, 2005). According to the FIPAA, Iran welcomes foreign investments and encourages all the foreign investors to follow FIPPA and Implementing Regulations of FIPPA (Iran’s Foreign Investment Manual, 2017). Upon admission of the investment, foreign investors are granted rights and will be informed of the facilities and protections they may enjoy under the FIPPA and its executive bylaws (ibid).

Pursuant to Article 1 of the FIPPA, any Iranian person utilizing capital of foreign origin having obtained the Investment License is also considered as a foreign investor. Moreover, according to Article 1, investment includes “sums in cash, equipment and machinery, spare parts and tools, patent rights, technical know-how, trade names, trademarks and specialized services, transferable dividends of the foreign investors, and other authorized items with the approval of the Council of Ministers”. Nevertheless, Article 2 confines covered investment to foreign investments that “lead to economic growth, promote technology, promote quality of productions, increase employment opportunities and increase exports.” Furthermore, Article 2 states that foreign investment should not jeopardize national security and public interest. These limitations are aimed to deter foreign investors who are not intended to contribute to economic growth in Iran. However, concepts such as national security and public interest are not precisely defined. Threatening national security contained in Article 2 of the FIPPA is vague and could be used against foreign nationals by discretionary interpretations by the Iranian judicial system. For instance, discretionary interpretations of national security have been given widely by Iranian judicial system to suppress nonconformist voices, and could be used against foreign investors as well (JPR, 2014).

The FIPPA and its bylaws specify guarantees granted to the investors, such as their rights, access to facilities, and types or levels of protection. To name an example, Article 8 of the FIPPA entails national treatment and non-discrimination clauses stating: “Foreign investments subject to this Act shall enjoy the same rights, protections and facilities available to domestic investments in a non-discriminatory

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13 To name an example, Nasrin Sotoudeh, who has represented several political activists and protesters arrested in the aftermath of the disputed presidential election in 2009, was arrested and charged with “acting against national security”. Read more here: https://www.theguardian.com/world/2010/sep/06/iran-human-rights-activists-lawyers
manner”. Moreover, pursuant to Article 9, foreign investment is protected against nationalization or expropriation, and in such cases, Iranian government is obliged to provide foreign investors with compensation. Appropriate compensation is based on the real value of that investment immediately before the expropriation. In addition, The Foreign Investment and its profits may be transferred in foreign currency or goods according to Articles 13 and 18 of the FIPPA. However, based on Article 13, this privilege is subject to the approval of the Foreign Investment Board and confirmation of the Minister of Economic Affairs and Finance. The criteria for the minister to make a decision are ambiguous. This may impose a risk to foreign investors wishing to transfer revenue investments abroad. For instance, in case of war in Iran, transferring capital investment and profits abroad by foreign investors is not possible until the valid authorization of the Minister of Economic Affairs and Finance.

With respect to arbitration, FIPPA is not comprehensive. Article 19 entails the possibility of the referral of investment-related disputes to arbitration through if the law ratifying the BIT provides arbitration for the settlement of disputes. In other words, there is no express consent to a particular arbitral body pursuant to the FIPPA. However, Article 19 is deemed as an accomplishment since it makes it possible to refer investment-States disputes to international authorities.

To sum up, the above-mentioned shortages of FIPPA show the unstable and risky investment environment in Iran. Historical background of the foreign investment promotion and protection acts in Iran shows that the Iranian political elite has significant influence on the level of protection offered to foreign investors. Although new and more pro investor legislations have been approved, not all members of the Iranian political elite support the necessity of increasing inflow of foreign investment to the country to reach the aim of economic independence (Pesaran, 2011). Tus, FIPPA offers only limited protection to foreign investments to be made in Iran, while BITs accord foreign investors a higher level of protection.

4.2 National Laws on Foreign Investment

The Iranian legal system is immature in its protection of foreign investment and investors. In addition to political interference, this deficiency is partly related to The Constitution of Iran and partly to statutes and other related law (Ghodoosi, 2014). To put it differently, while a foreign investment is approved through FIPPA, the
application of the pertinent regulations and rules to the concerned foreign investment might face various challenges. Lack of balance and ambiguity of the rules and regulations mean that Iran remains an uncertain environment for foreign investors. Therefore, although the legal and regulatory landscape of Iran has moved towards a more hospitable approach to absorbing foreign investment, it has some restraints in terms of investment regulations.

Article 81 of the Constitution which is related to foreign business, prohibits multinational corporations from taking over certain businesses in Iran. It states, “It is absolutely forbidden to give foreigners the right to establish companies or institutions in commercial, industrial, and agricultural fields, as well as in mines and in the service sector.” Therefore, registration of Iranian companies by foreigners as well as the registration of branches and representative offices of foreign companies was first considered as being in violation of Article 81 of the Constitution (Akhlaghi, 2014). It represents the desire of Iranian post-revolutionary regime for the economy to be under the control of the government restricting the interference of private sectors (Pesaran, 2011). Henceforth, the Prime Minister of Iran at that time sent a letter, dated March 1981, to the Guardian Council, the interpretive authority of the Iranian Constitution, asking for an interpretation of Article 81. Through the opinion, dated April 1981, the Guardians Council replied: “foreign companies that have concluded legal contracts with Iranian governmental entities may register branches of their companies in Iran according to Article 3 of the Act on Registration of Companies in order to carry out their legal obligations and conduct their businesses within the limits set forth in the contracts concluded by them. Such registration shall not be in contravention of the provisions of the Constitution of the Islamic Republic of Iran.”(Guardian Council, 1981). Thus, the branches of foreign companies that had concluded contracts with Iranian government bodies could be registered in Iran. Furthermore, Article 5 of Regulation on Investment in the Free Trade-Industrial Zones stipulates: “Foreign investors may invest in the economic activities of the Zone up to any ratio (of the amount of investment).” Investment in Free Zones, including six areas, therefore is subject to especial regulations instead of aforementioned Articles. However, this Article might not be effective in case of application of provisions of Iranian Constitution which are uniformly applicable within the country.
Article 44 of the Iranian constitution is another indicator of the deficiency of Iran’s national law in respect of foreign business. Article 44 of the Constitution divides the economic system of Iran into three sectors namely public, cooperative, and private sectors. Article 44, defining public sectors, states: “The state sector includes all the national industries, foreign trade, major mines, banking, insurance, energy sources, dams and large water irrigation networks, radio and television, post, telegraph and telephone, aviation, navigation, roads, railroads, and others which are publicly owned and under the state’s control.” Thus, as outlined in the constitution, most major economic activities in Iran fall under a state monopoly. It demonstrates the leftist outlook of post-revolutionary groups favoring economic independence. As mentioned by Ayatollah Makarem “the philosophy of this article is clear to us all we wanted to create an Islamic economy that would be not Western capitalism and not Eastern socialism. On this basis, we created these three sectors.” (Pesaran, 2011).

However, following the amendments allowing for the privatization of the Iranian economy, there have been new interpretations to Article 44 by the Expediency Council (the Fourth Five-Year Economic Development Plan). New interpretations resulted in the developments of new conditions and new laws to pave the way for the economic privatization.

Finally, Article 139 of the Iranian Constitution, in respect of arbitration, might be another potential barrier for foreign investors wishing to invest in Iran. It stipulates:

“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.”

According to Article 139, foreign investors wishing to settle disputes arising out of contracts entered into with the Iranian State by arbitration must obtain the approval of

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14 According to the Plan, the Privatization Organization of Iran affiliated with the Ministry of Economic Affairs and Finance is in charge of setting prices and ceding shares to the general public and on the Tehran Stock Exchange.

Read more here:
http://irandataportal.syr.edu/the-general-policies-pertaining-to-principle-44-of-the-constitution-of-the-islamic-republic-of-iran
the Council of Ministers, which will submit the request to the Parliament. The Parliament’s decision will be referred to the Guardian Council. It should be noted that Iranian Parliament’s approval is required in disputes relating to public and State assets pertaining to the public sector under the Article 44 of the Iranian Constitution and in cases involving foreign nationals. Nonetheless, since Article 77 of the Constitution stipulates that all international agreements must be ratified by parliament, ratification of a BIT signed by the government that contain investor State arbitration clause satisfies the requirement for Parliament’s approval (Atai, 2011). Therefore, it would be sufficient to sign a BIT entailing an absolute consent to arbitration without reservation. In other words, when the Iranian parliament ratifies the treaty without making any reservations, the application of Article 139 does not pose as an obstacle for bringing a case before arbitral tribunal by the foreign investor (ibid). However, in case a reservation made by the parliament, failure to obtain the approval of Iranian Parliaments affects the recognition and enforcement of arbitral awards by the domestic courts. This is due to the requirement of the law ratifying the New York Convention that requires observance of Article 139 of Iranian constitution (ibid). In accordance with Article VI, New York Convention contains an exception that recognition and enforcement of an arbitral award may be refused if it would be contrary to the public policy of the country. Article 139 of the Iranian Constitution therefore might rule over the arbitral awards. Ambiguity of the term of public policy empowers the judicial system to exercise their discretionary power in order to interpret the term as they see fit. It thus might be shortage of the Iranian legislation to provide appropriate legal grounds for the recognition and enforcement of arbitral tribunals’ awards. It makes the assumption that the foreign investor would not be treated fairly in disputes such as nationalization, expropriation, or cancellation of contract.

In addition to general rules of Iranian Constitution, there are other legal barriers such as labor law and taxation. To name an example, Iran’s Labor Law is enacted in a way that poses obstacles even for local employers. In other words, it is employee friendly and contains idealistic promises to protect workers against their employers. According to Iranian labor law, there are regulations that limit the authority of employers to layoff employees easily though short-term contracts have been a way to
get around the Labor Law. (Nouripour and Zolgard, 2016)\textsuperscript{15}. In contrast, the general rule in the US that employees work at will and can be fired with or without warning, cause, or notice though there are exceptions to this general rule (U.S. Department of Labor, 2017). Moreover, legal obstacles posed by Iranian labor law limit foreign nationals activities. For instance, the law forbids foreign nationals to be employed in Iran until they obtain a work permit in accordance with the relevant statutory regulations.\textsuperscript{16} The other example is taxes imposed on corporations. According to Article 105 of Direct Taxation Act, the corporation tax of 25\% payable on the profits of corporations has been introduced to replace the previous corporation tax of 54\%. Yet the taxation rate is high for corporations that can be charged less in other countries such as Singapore with 17\% corporation tax or Poland, as an emerging economy, with 19\% (OECD, 2016). Moreover, possessing ownership is a complex procedure in Iran.\textsuperscript{17} According to Regulations Concerning Acquisition of Property by Foreign Nationals, foreign nationals who want to acquire a property first must submit a declaration to the local Registry Office and fill in the appropriate form. The transfer of ownership is then subject to approval by the Ministry of Foreign Affairs in accordance with the principle of reciprocity.

To conclude, the influences of political elites have always been significant in the attitude taken by Iranian investment related laws and regulations to treat foreign investment. Some of the shortcomings relate to the Constitution and some others to statutes. As outlined in Article 44 of the constitution, most major economic activities in Iran fall under a state monopoly that pose another critical challenge for the Iranian government. Moreover, the broad language of Article 81 of the Constitution that prohibits multinational corporations from taking over certain businesses in Iran is discouraging for foreign investors who have to establish subsidiaries in Iran because they cannot be the majority shareholders. Article 139 of the Constitution which is related to arbitration seems more favorable to the Iranian side. In addition to constitutional obstacles, there are other domestic provisions that are not friendly to foreign investors. The aforementioned legal and administrative criteria have direct effect on the attractiveness of Iran for foreign investors and are the main obstacles to

\textsuperscript{15} See, e.g., Art 21-33 of Iran Labor Law.
\textsuperscript{16} Ibid Art 120-129.
\textsuperscript{17} See, e.g., Art 1-4 of Iran Regulations on Acquisition of Real Property by Foreign Nationals (1948).
improve foreign investment in Iran. Although foreign investment law has improved in Iran, it still has some obscurities that may cause insecurity for the prospective foreign investors. Lack of comprehensive pro investor legislation makes foreign investors to carefully consider the constraints of Iran’s regulatory landscape.

CHAPTER 5

CONCLUSION

International sanctions are designed to pressure and encourage delinquent States into changing their behavior to maintain community order and the implementation of its law. Iran has been subject to various international economic sanctions for a long time. Nonetheless, following the nuclear agreement between Iran and Western Countries, the economic conditions in Iran are undergoing a major change and Iran is expected to witness more and more foreign investment inflows. Different categories of sanctions, Iranian laws, which are focused on encouraging rather than protecting foreign investment, and BITs concluded by Iran are at stake when one talks about investing in Iran to determine the legal obligations of Iran towards the foreign investor.

According to the background described above, Iran is still subject to various types of sanctions by the US, UN, and EU. Since these sanctions do not move at the same rate any more, foreign investors who have to conform with both sets of rules might have plenty of challenges ahead in order to avoid further US sanctions and penalties. Sanctions still remain a real challenge to foreign investment, and re imposition of them for different reasons is another source of uncertainty for investors.

Based on the data I gathered from UNCTAD, Iran is member of some multilateral agreements. Furthermore, Iran negotiated and signed 67 BITs from 1995 to 2017. BITs concluded by Iran and other countries impose duties on the Iranian side to protect foreign investors in Iran. They, except the radical one with Slovakia, often follow a same pattern which is more or less the same as most of the current model BITs worldwide. Alongside with Iranian investment laws and regulations, all these BITs, multilateral investment agreements, and treaties with investment provisions provide legal basis for protection of the foreign investor in Iran.
However, Iranian investment policy and the applicable laws on foreign investment are immature. Complex political structure in Iran and the significant influence of top elites who decide politically and not economically is one of the major reason. The legal system of the country is not completely ready to absorb new investments due to the lack of appropriate mechanisms providing foreign investors with protection. In other words, Iranian legal system does not have enough capability to offer a reasonable system of foreign investment protection. Unfavorable national laws make it difficult for the State to fully comply with its obligations under the BITs. For instance, although FIPPA has been enacted to present greater facilities to foreign investors, it still has shortcomings to grant benefits and privileges in order to ensure the foreign investor. Moreover, Iranian constitutional law as well as other investment related laws and regulations such as tax law and labor law have major drawbacks regarding support of foreign direct investment.

These three factors, namely international sanctions, BITs, and national laws and regulations have become a topic of hot debated after sanctions relief, which this study is aimed to scrutinize. These three factors have close correlation with foreign investment attraction and directly affect the rate of foreign investment inflows. Notwithstanding all the challenges discussed above, making investment in Iran is possible and it has become a hot destination for many countries and products recently and after the nuclear agreement in addition to positive steps taken by Iran to make a hospitable climate for foreign investors. Moreover, new BITs signed by Iran have brought about more international responsibility for the Iranian government to provide a secure and sustainable investment atmosphere. However, it is crucial for new entrants to learn legal landscape in Iran, different categories of sanctions, and real distinctions that might exist among mechanism discussed above in order to structure their investments in Iran so that they benefit from available protections.
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<td><strong>Abolbashar Farmanfarma</strong>, <em>The Oil Agreement Between Iran and the International Oil Consortium: The Law Controlling</em>, 34 Texas L. REV. 259 (1955)</td>
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<td><strong>Evaleda Pesaran</strong>, <em>Iran’s Struggle for Economic Independence: Reform and counter-reform in the post-revolutionary era</em> (Routledge) (2011)</td>
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## APPENDIX

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<th>Exemption</th>
<th>Jurisdiction</th>
<th>Provisional measures</th>
<th>Provisions relating to investment</th>
<th>Provisions relating to arbitration</th>
<th>Domestic courts of the host State/Kyrgyzstan/Other forum</th>
<th>Other provisions</th>
<th>Notes</th>
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<td>Kazakhstan</td>
<td>2011/03</td>
<td>2011/04</td>
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<td>Contain “in accordance with host State laws” requirement</td>
<td>FET included</td>
<td>Requirement of substantial business activity</td>
<td>FET included</td>
<td>NT or MEN</td>
<td>Post-establishment</td>
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