

Article 139 of Iranian Constitution and Foreign Investment Disputes Settlement

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Abstract

With regard to promotion and protection of foreign investment and settlement of disputes arising out of it, Iran has enacted special law titled Foreign Investment Promotion and Protection (FIPPA) and also has signed more than 60 Investment Treaties which refer investment disputes to international arbitration subject to certain conditions. On the other hand, Article 139 of Constitution of the Islamic Republic of Iran has conditioned referral of disputes on public and state properties (including foreign investment) to arbitration to permission and approval of Board of Ministers and the Parliament of Iran. These supposedly conduce to incongruity of rules and legal environment of Iran for foreign investment.

Keywords: Foreign Investment, Article of 139 of constitution, Arbitration

1. Introduction

Lifting of sanctions against Iran, as a result of Joint Comprehensive Plan of Action (JCPOA) between Iran and P5+1 countries, has created many opportunities for foreign investment. In this new atmosphere, as a first step to do needy studies for foreign investors to enter Iran's huge market, a careful thought should be given to the different aspects of foreign investment including legal environment of Iran.

Considering varying theories and practices on determining the impacts of the Article 139 on foreign investment dispute settlement provisions in FIPPA and Iranian investment treaties, should a dispute arise between foreign investor (FI) and Iranian government, the scope of application and consequences of the article 139 has created a sort of uncertainty with regard to future of investment disputes for FIs. This paper endeavors to clarify these ambiguities and provide a clear direction for future potential disputes on foreign investment in Iran by considering existing practices as much as possible.

2. Article 139 of Constitution law, FIPPA and Iranian Investment Treaties

The constitution of the Islamic Republic of Iran, in force since 1979, has a significant provision on resolution of disputes over public and state properties. Article 139 reads as following:

"The conciliation n¹ 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 Islamic Consultative Assembly (Parliament) 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 Parliament must also be obtained. Law will specify the important cases intended here."

According to the Article 139, conciliation or referral to arbitration of disputes between the state of Iran and foreign nations, including disputes between the state or the state entity of Iran and the FIs, must be approved by both Board of Ministers and the Parliament of Iran. It should also be noted that disputes between the parties must be over the public and state properties. In other words, this article is only intended to protect public and state property and has no such restriction in other cases.

Since Article 139 doesn't touch the negotiation, negotiation as the first step to settle disputes in terms of most contracts does not need to be approved by the Board of Ministers and the Parliament. Likewise, the approval of aforesaid authorities to refer disputes to Iranian domestic courts is not required. It should also be noted that the settlement of disputes by negotiation or domestic courts which is being offered by the article 19 of FIPPA is in the same line with given article of Constitution.

Considering Article 139 of the Constitution, article 19 of FIPPA², and dispute settlement provisions in investment treaties of Iran, which introduces arbitration as a method of dispute settlement between the State of

¹ - In translation the article 139 from Persian to English has been made a mistake and instead of "conciliation" were used "settlement" in some reference.

² - Article 19 of FIPPA: "Disputes arising between the Government and the foreign investors with regard to their respective mutual obligation within the context of investments under this act, if not settled through negotiations, shall be referred to domestic courts, unless the law ratifying the bilateral investment agreement with the respective government of the foreign investor provides for another method for settlement of disputes."

Iran and FIs, the question is when the FIPAA and investment treaties refer disputes to arbitration, the limitation under the Article 139, i.e. acquiring permission of the Board of Ministers and Parliament of Iran, could be applied before referring disputes to arbitration and or even thereafter to determine competence of arbitration tribunal?

In response to above question, at first sight the wording of investment treaties between home state of FI and Iran or investment contracts between Iran and FI should be taken into account. If any provision in these documents subjects referring disputes to arbitration directly or indirectly to the Article 139, then the approval under said Article should be acquired. Otherwise, with regard to the Article 139, the Article 19 of FIPPA, and the dispute settlement provisions (arbitration and conciliation) of investment treaties, four scenarios could be considered:

- A) There is no investment treaty between the home state of FI and Iran which includes arbitration or conciliation clause; however, an investment contract¹ was made by the FI and state of Iran or its entities contains such clause. In such case, the article 139 shall be observed.
- B) In addition to arbitration or conciliation clause in the investment contract, there is an investment treaty between Iran and the home state of the FI containing such clause. This case falls under article 19 of FIPPA and doesn't need to be approved by the Board of Ministers and the Parliament according to the Article 139. It should be noted that the FIPPA and the investment treaty containing arbitration clause has been already approved by the parliament and so the purpose of Article 139 has already been acquired and readdressing the issue would be null and void. In such cases, since Iran bears an international commitment, seemingly it would not breach this obligation by resorting to the Article 139.
- C) Settlement of disputes through arbitration or conciliation clause has not been mentioned in the investment contract; however, such clause is included in the investment treaty between Iran and the home state of FI, in such circumstances of standing offer, arbitration agreement could be finalized via written acceptance by foreign investor or referring disputes to arbitration therewith. Similar to clause B, this case also falls under article 19 of FIPPA and is not required to be approved in accordance with the Article 139.

With respect to clauses B and C above, one may argue that the Article 139 should be applied to every dispute. This means that a separate permission must be obtained for the settlement of each dispute. In contrast, it does not seem that the Article 139 has been established for such purpose, because the term "claims" has been written in the plural form and a general permission would suffice. This general permission may be issued by laws like the FIPPA or an investment treaty. It should also be noted that this interpretation would be more consistent with the principle of protection of the FI.

D) Neither investment contract nor investment treaty between Iran and the state of the FI includes arbitration or conciliation clause. This case shall be treated according to the article 19 of FIPPA - primarily the negotiation and then domestic courts of Iran- and therefore the Article 139 will not be applied.

3. Free Trade and Special Economic Zones and Application of Article 139

Free Trade and Special Economic Zones of Iran, due to their advantages, are known as good opportunities to enter Iran's huge and attractive investment market. It would be useful to mention related disputes settlement provisions of Free Trade and Special Economic Zones and the possibility of application of the Article 139 of Constitution.

Article 8 of the Law on the Administration of Free Trade-Industrial Zones of Iran which approved in 1993, defines the disputes settlement mechanism as follows:

"The Authority and its affiliated companies are permitted to conclude the necessary contracts with natural or legal persons, whether foreign or domestic, and to participate with domestic or foreign investors for the implementation of development and productive projects, in compliance with the due provisions of the Constitution. Disputes and claims arising out of the concluded contracts, shall be examined and settled in accordance with the mutual agreements and the contractual commitments of both parties concerned."

Article 8 deems the agreement between parties referring disputes to the settlement mechanisms like arbitration as valid. In the first section Article 8 makes conclusion of contracts subject to compliance of due provisions of the Constitution. The question here is: which articles of the Constitution should be complied? According to subtle reading of content and wording first sentence of Article 8 which refers any participation agreement to the Constitution, prima facie answer to the above question would be the articles governing the participation agreements between state or state entities of Iran and foreign counterparts, i.e. article 81 of the

¹ - We intend any agreement in any form to settle foreign investment disputes, and as investment contract is the dominant form in which the host state and the foreign investor agree how to settle their disputes we mentioned that.

Constitution¹, and second section of the Article 8 in a separate sentence expressly deals with the settlement of disputes which has been conceded to the "*mutual agreements and the contractual commitments of both parties concerned.*" Therefore, any subjection of the issue to the Article 139 of the Constitution deems invalid.

In the same manner, article 16 of Council of Ministers decree (1994) entitled "*Investment Regulations in Free Trade - Industrial Zones of Islamic Republic of Iran*" also affirms abovementioned argument and explicitly provides that: "*Disputes between foreign investors and Iranian party will be resolved on the basis of written contracts and agreements.*" So, in resolving disputes, article 8 like article 19 of FIPPA provides a general permission and does not contravene the Article 139, since the Parliament has already passed Article 8 of Free Trade Zones Law and is fully informed of its cause and content.

The Special Economic Zones of Iran is governed by a specific law known as "*The Law on the Establishment and Administration of Special Economic Zones in the Islamic Republic of Iran*" enacted in 2005. It has no specified clause in terms of dispute settlement in the Special Economic Zones. In the meantime, Article 21 of the said law provides that: "*Intra-zone activities except for the items, described by the said Law, shall be subject to other rules and regulations of Islamic Republic of Iran.*" Therefore, unlike the Free Trade Zones laws, Disputes arising from investments in the Special Economic Zones are subject to the mainland investment law, i.e. Article 19 of FIPPA and accordingly the related interpretation in this paper.

4. Conclusion

To sum up, if foreign investment treaties or foreign investment contracts directly or indirectly made settlement of disputes subject to the article 139 of Constitution, the article 139 should be complied in referring foreign investment disputes to arbitration. Otherwise, two interpretations could be considered that as follow:

A) According to Iranian domestic and international laws, if there are special laws (e.g. FIPPA or Free Trade Zone Law) or investment treaties containing arbitration clause, referring arising disputes under these instruments to arbitration do not need to be approved by the parliament under the Article 139, since the parliament has already passed those law and is informed of the their content, hence given the general consent enshrined in the Article 139. Otherwise the Article 139 should be complied.

B) According to international prevailing arbitration practices including the cases Iran has been involved, arbitral tribunals usually decide about their competence based on arbitration clause in the investment contracts or investment treaties and do not rely much on adverse domestic laws of the host state, like the Article 139 of Constitution in Iran.

The arbitral tribunals usually in rejecting recourse to the consent provisions contained in the national laws such as Article 139, resort to general principle of law such as: International public order, Good Faith, Necessity to Fulfill Promise, Principle of Non-Contradiction or Rule of Estoppel as well as the need to provide information and clarification of the legal authority.

Disclaimer: This paper aims to analyze the legal environment of foreign investment in Iran in the view of the contributors only and does not intend to provide any legal advice to foreign investors. Any specific request for investment in Iran is recommended to get legal advices by case.

¹ - Article 81: "The granting of concessions to foreigners or the formation of companies or institutions dealing with commerce, industry, agriculture, service, or mineral extraction, is absolutely forbidden."