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ARTICLE

COMBATTING ECONOMIC SANCTIONS: INVESTMENT DISPUTES IN TIMES OF POLITICAL HOSTILITY, A CASE STUDY OF IRAN

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INTRODUCTION

Planes to Tehran are no longer only filled with Iranian expatriates, adventurous tourists, or curious journalists. As Jack Straw, former Foreign Secretary of the United Kingdom keenly observed, the planes are now becoming filled with businessmen looking for investment opportunities.[1] The revival of interest in doing business with Iran came after a historic deal was reached between Iran and five permanent members of the Security Council plus Germany.[2] In a nutshell, the deal offered a joint plan of action in which Iran pledged to reduce its nuclear enrichment activity in return for an ease of economic sanctions. As a first step, Iran suspended its advanced uranium-fuel enrichment and Western countries released some of its blocked assets.[3] The business community welcomed the deal, since Iran is a country with vast natural resources and economic opportunities. By some accounts, Iran has the largest reserve of gas and oil combined.[4]

The positive reaction of the business community raised a red flag for the United States. Following a visit to Iran by a trade delegation from France representing 100 French companies, Secretary John Kerry had to call his French counterpart to explain that the sanction regime is still in place.[5] This was followed by a strong warning by President Obama, reminding that the United States will go after violators of Iran sanctions.[6] Despite this, the Iranian President, Hassan

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1. Jack Straw, *Jack Straw: In Hassan Rouhani's Iran, You Can Feel the Winds of Change*, INDEPENDENT (Jan. 17, 2014), http://www.independent.co.uk/voices/comment/jack-straw-in-hasan-rouhanis-iran-you-can-feel-the-winds-of-change-9068260.html.

2. Anne Gearin & Joby Warrick, *Iran, World Powers Reach Historic Nuclear Deal*, WASHINGTON POST (Nov. 24, 2013), http://www.washingtonpost.com/world/national-security/kerry-in-geneva-raising-hopes-for-historic-nuclear-deal-with-iran/2013/11/23/53e7bfe6-5430-11e3-9fe0-fd2ca728e67c_story.html.

3. Rick Gladstone & Thomas Erdbrink, *Temporary Nuclear Deal with Iran Take Effect*, THE N.Y. TIMES (Jan. 20, 2014), http://www.nytimes.com/2014/01/21/world/middleeast/iran.html.

4. *See BP Statistical Review of World Energy 2013*, BP (June 2013), *available at* http://www.bp.com/content/dam/bp/pdf/statistical-review/statistical_review_of_world_energy_2013.pdf (last visited Mar. 4, 2014).

5. Kim Willsher & Saeed Kamali Dehghan, *US Warns France Against Business with Iran After Trade Trip to Tehran*, THE GUARDIAN (Feb. 5, 2014), http://www.theguardian.com/world/2014/feb/05/us-warns-france-business-iran-trade-tehran

6. Jeff Mason & Steve Holland, *Obama says U.S. will deal harshly with violators of Iran sanctions*, REUTERS (Feb. 11, 2014), http://www.reuters.com/article/2014/02/11/us-usa-iran-idUSBREA1A2B920140211.

Rouhani, shows determination to break the economic sanctions regime.[7]

Iran has faced an unprecedented web of economic sanctions in the history of international relations, a complex regime consisting of UN, US, and EU sanctions. Less widely known, Iran has concluded a multitude of investment treaties aiming to promote and protect foreign investment. Amidst the enthusiasm for investing in Iran,[8] companies remained baffled as to the legal analyses and consequences of their potential investment in Iran. In fact, Iran's investment case has posed unprecedented problems arising from the interplay between at least three legal regimes: Iran's domestic investment regulations, economic sanction regime, and international investment regime. The problem of investment in Iran is a paramount example of a fragmented feature of today's international law with conflicting regimes at play.[9] This Article is a first attempt to place the clash between sanctions and investment regimes under scrutiny employing Iran as a case study. In doing so, this Article portrays a holistic and analytic picture of investment in Iran, its history, trajectory, and current status.

Following the recent deal, Iran's bilateral investment treaties and foreign investment contracts have become ever the more important. The recent escalation between Iran and the West under the Ahmadinejad government that resulted in the aggravation of economic sanctions was preceded by a period of reconciliation and engagement in which mutual effort was set forth to construct a steady economic relationship. The reconciliation efforts prompted a series of bilateral as well as multilateral treaties and contracts. The legal and policy consequences of these treaties and contracts, however, have been often neglected in the subsequent time of sanctions and hostility. Many companies ceased their operations in Iran, especially subsequent to 2010 when economic sanctions started to show their teeth. Despite the possibility of pursuing international law claims for

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7. *Iran must break chains of sanctions: Rouhani*, TEHRAN TIMES (Feb. 25, 2014), http://www.tehrantimes.com/component/content/article/94-headline/114345-iran-must-break-chain-of-sanctions-rouhani.

8. Matt Clinch, *Iran: The next investment frontier?*, MSN MONEY (Oct. 30, 2013), http://money.msn.com/investing/iran-the-next-investment-frontier.

9. *See generally* International Law Commission, Fragmentation of International Law: *Difficulties Arising From the Diversification and Expansion of International Law*, A/CN.4./L.682 (Martti Koskenniemi ed.) (Apr. 13, 2006) (discussing the issue of fragmentation in international law).

compensation of losses caused by sanctions, Iran remained idle in suing these companies for reasons that are unclear. One explanation could be the lack of legal strategy from the Iranian side or fear of counter legal measures from investors or states. In general, neither side has paid enough attention to the treaties and contracts incorporating arbitration clauses. Arbitration clauses in bilateral investment treaties and investment contracts may be invoked at any time for compensation and expropriation, which will result in almost unprecedented international litigation. This will trigger new legal challenges, which this Article aims to analyze.

Iran has always been one of the most important countries in the Middle East in terms of foreign direct investment. A country with a vast area of land and extremely rich natural resources undoubtedly stands as a major target for foreign investment. As the history of foreign investment shows, Iran has undergone ebbs and flows due to its political and social situation. Some of the social and political unrest, which has prompted major changes, has also been directly or indirectly related to the issue of foreign investment. For instance, the successful attempt to nationalize oil by Prime Minister Mosaddegh was a reaction to several British oil concession contracts, which were deemed unfair in the public mind of Iranians.[10] Additionally, after the Iranian Revolution in 1979, one of the main challenges was related to the expropriation of foreign investment, which was eventually addressed in the Algiers Accords. As a result, Iran became involved in an unprecedented institutionalized legal dispute settlement mechanism, the Iran-US Claims Tribunal.

Following an eight-year war with Iraq, Iran decided to attract foreign investment in order to rebuild and reconstruct its economy and infrastructure. This dire need coincided with a surge of political strength from reformists that culminated in the election of a reformist president in 1997. In a period of expansion in foreign investment from 1995 to 2007, Iran drafted approximately 50 bilateral investment treaties ("BIT") with both developed and developing countries. Through this, Iran signaled its determination to attract foreign investment from developed countries. In addition, Iran hoped to prevent and undermine the effects of international sanctions with the help of its bilateral treaties with various countries.

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10. MOSTAFA ELM, OIL, POWER, AND PRINCIPLE: IRAN'S OIL NATIONALIZATION AND ITS AFTERMATH 81-182 (1992). The Oil Nationalization Act was passed by the Iranian Parliament in 1951. *Id.*

In particular, there are three legal issues, which pose almost unprecedented challenges in international law and international arbitration. Firstly, the Iranian Constitution and some of its internal laws impose some restrictions as to the authority of the executive branch to conclude international treaties.[11] This may complicate the enforcement of BITs in the case of disputes. Secondly, investors may invoke both international and national sanctions as an excuse for the breach of investment contracts. Thirdly, the issue is whether arbitral tribunals hold any reviewability power when dealing with international sanctions. This Article parses different aspects of international sanctions in the context of investment disputes and analyzes different scenarios in which international sanctions enter into the scene of international arbitration.

This Article is divided into three main sections. In the first section, a brief background of investment disputes and laws in Iran is presented. In the subsequent section, Iran's bilateral investment treaties are analyzed. Lastly, the effect of international sanctions in investment disputes is discussed. With the new dynamics resulting from the rapprochement of Iran and Western Countries on the one hand, and crippling sanctions on the other hand, the regime governing investment in Iran is more important—yet more challenging—than ever.

I. *FOREIGN INVESTMENT IN IRAN*

A. *A Brief History*

1. The Case of the Anglo-Iranian Oil Company

Iran, called Persia at the time, was subject to one of the earliest and most important investments in the modern era. In 1901, an agreement was reached between Royal Persia and a British investor named William Knox D'Arcy. This was a concession of several special rights concerning oil including exploration, exploitation, transport, and sales of gas and oil products. The concession was for 60 years with the obligation that the Persian government would

11. Farshad Ghodoosi, *Comprehensive Solution to an Agreement: How the New Iran Deal is Framed under Iranian Law?*, OPINIO JURIS (Jan. 22, 2014), *available at* http://opiniojuris.org/2014/01/22/guest-post-ghodoosi-comprehensive-solution-agreement-new-iran-deal-framed-iranian-law/. This was an issue in the recent deal concluded between Iran and five plus one countries. *Id.*

receive 16% of the profit as royalty. After a few years, D'Arcy discovered oil in Persia and thus opened a new page in Iranian as well as world history. In 1909, D'Arcy expanded his activities and a new company emerged out of this concession agreement. In 1909, D'Arcy and his co-workers incorporated the Anglo-Persian Oil Company, which later became British Petroleum. This company was the first oil company operating in the Middle East.

In 1907, Persia had been divided by two powerful countries at the time. In an Anglo-Russian convention of 1907, the British took control of the southern part of Iran while the Russians agreed to hold influence in the northern part. The agreement stipulated a neutral zone between the British and Russian spheres of influence.[12] Four years later, the British Government signed two agreements with Persia for investment and administration because "the progress and property of Persia should be promoted to the utmost."[13] These two agreements instigated anger and criticism. For the administration, the British Government supplied advisors with "adequate powers . . . at the cost of Persian Government to be involved in contracts."[14] Regarding the financial side of the property of Persia, the British Government "offer[ed] to provide or arrange a substantial loan for the Persian Government, for which adequate security shall be sought." The second agreement pertains to the loan of £2 million Pounds Sterling by the British Government at the interest rate of 7%. Security of the loans was mainly derived from the "revenues of the customs or other sources of income at the disposal of the Persian Government." Other parts of the agreement deal with railway construction and other forms of transportation.[15] Although Iran was never legally a protectorate of any country, some believe that the agreements of 1919 made Persia "*de facto* under the virtual control of Great Britain for an indefinite time to come."[16]

The most important agreement regarding oil, however, dates back to 1933 between the Anglo-Iranian Oil Company and the Persian Government. The reason for the importance of this agreement is that the dispute resulting from this agreement landed in the docket of the

12. Amos S. Hershey, *The New Anglo-Persian Agreement*, 13 AM. J. INT'L L. 749, 753 (1919).

13. *Id.* at 749.

14. *Id.* at 749-50.

15. *Id.* at 750.

16. *Id.* at 753.

International Court of Justice. Under this concession agreement, or convention, the Anglo-Iranian Company was granted the exclusive right to "search for and extract petroleum as well as to refine or treat in any other manner and render suitable for commerce the petroleum obtained by it."[17] The concession also included the transportation of petroleum, its refinery and other measures to "render it suitable for commerce" for sale whether inside or outside of Persia.[18] Iran's government, in return, would receive four shillings per ton of petroleum sold as an annual royalty in addition to 20% of either dividends or reserves.[19] The concession was, again, for sixty years ending on December 31, 1993. This agreement could not be annulled by the Iranian government, but incorporated an arbitration clause to which it conferred the right of annulment under certain circumstances.

Article 22 stipulated an *ad hoc* arbitration body consisting of three arbitrators, two of whom were to be selected by each party and the third one by agreement of the two arbitrators. If the arbitrators failed to reach a consensus apropos the third umpire, the President of the Permanent Court of International Justice would appoint the third arbitrator. Article 22 sets the scope of arbitration as well:

> "Any differences between the parties of any nature whatever and in particular any differences arising out of the interpretation of this Agreement and of rights and obligations therein contained as well as any differences of opinion which may rise relative to questions for the settlement of which, by the terms of this Agreement, the agreement of both parties is necessary, shall be settled by arbitration."[20]

The scope of the arbitration is wide and vague. Also, it requires the *ex post facto* consent of parties to the arbitration. Article 26 stipulated that if the oil company failed to pay "any sum awarded" to the Persian Government by the arbitration tribunal within a month after the award, then it would declare the Concession annulled.[21]

This Concession, however, was not rendered annulled by an *ad hoc* arbitration tribunal due to default or a similar incident. The

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17. *Revised Agreement: Persia and the Anglo-Persian Oil Company*, *in* THE MIDDLE EAST AND NORTH AFRICA IN WORLD POLITICS: A DOCUMENTARY RECORD: VOLUME 2: BRITISH SUPREMACY 1914-45 (J.C. Hurewitz ed., 1979).

18. W.W. Bishop Jr., *The Anglo-Iranian Oil Company Case*, 45 AM. J. INT'L L. 749, 750 (1951).

19. *Id.*

20. *Id.* at 751.

21. *Id.*

Iranian Government unilaterally revoked the Agreement. In 1951, the Iranian Parliament passed legislation on the nationalization of the oil industry in Iran. The legislation demands that the "entire revenue derived from oil and its products is indisputably due to the Persian nation."[22] Iran rejected the request for arbitration on the grounds that "the enforcement of the right of sovereignty of the Persian people, is not subject to arbitration, and no international authority in qualified to investigate this matter."[23] This denial led to a legal suit brought by the United Kingdom to the International Court of Justice. In the famous Anglo-Iranian oil case, the International Court of Justice accepted the preliminary objection of the Iranian government based on jurisdictional ground. The Court found no relevant treaty or convention between the United Kingdom and Iran and consequently "the court cannot derive jurisdiction in the present case from the terms of the Declaration ratified by Iran on September 19, 1932." The United Kingdom tried to establish jurisdiction based on the Iranian Declaration of Acceptance of the Court's compulsory jurisdiction. In this Declaration, Iran acceded to the International Court of Justice jurisdiction "in regard to situations of facts relating directly or indirectly to the application of treaties or conventions accepted by Persia and the subsequent to the ratification of this Declaration."[24]

The Anglo-Iranian Oil Company case posed a host of new challenges for international law. The Court correctly declined to recognize the concession agreement concluded between a private company and Iran as a sufficient basis for jurisdiction. Yet, interestingly enough, the Court did not enter into the international legal status of expropriation and property rights of the investor. This stirred a strong reaction from those who hoped the Court would recognize the *in rem* right of the investor in the case.[25] Reactions were

22. *Id.*

23. *Id.* at 752.

24. Charles G. Fenwick, *The Order of the International Court of Justice in the Anglo-Iranian Oil Company Case*, 45 AM. J. INT'L L. 723, 725-26 (1951). Some believe that the conflict here is about grammatical versus logical interpretation: "grammatically, taken, 'subsequent' appears to relate to 'treaties or conventions,' which, if it were the correct interpretation, would nullify the argument of Great Britain based upon the earlier agreement of 1928. The logical interpretation, however, is that the word 'subsequent' relates to 'situations or facts.' This is assumed by Great Britain to be the correct interpretation and it is consistent with the declaration made by a number of other states under Article 36 of the Statute." *See id.*

25. D.P. O'Connell, *A Critique of the Iranian Oil Litigation*, 4 INT'L & COMP. L. Q. 267, 268-69 (1955) (arguing "a concession may be regarded as analogous to an interested in land,

centered on the idea that the individual right to property should be respected vis-à-vis the sovereign right to natural resources.

Subsequent to the case, Iran negotiated with a consortium of eight international oil companies, including Anglo-Iranian Oil Company. The negations resulted in a new concession agreement on September 19, 1954, in which Iran agreed to pay net sum of £25 million Pounds Sterling to Anglo-Iranian Oil Company in ten installments.[26] Some scholars regard the new concession agreement as evidence that Iran admitted the property right and other privileges of the investors.[27]

B. *Iran-United States Claims Tribunal*

One of the significant consequences of the resolution of the Iran Hostage Crisis was the establishment of the Iran-US Claims Tribunal. This arbitral body has become a predecessor to the subsequent investment arbitration tribunals, including the International Centre for Settlement of Investment Disputes ("ICSID"). Its awards and approaches to issues such as expropriation, nationality, and contracts have been treated as authorities in later cases in NAFTA, ICSID, and other tribunals. For instance, Gibson and Drahzol[28] found that 17 ICSID arbitration awards have cited the Iran-US Claims Tribunal awards amounting to 44.7% of all the awards on merits. In the case of NAFTA, out of sixteen examples of awards, fourteen of them (87.5%) cited precedents from the Iran-US Claims Tribunal whether on issues related to merits or jurisdiction. Additionally, as some scholars believe, the Tribunal set the stage for succeeding UN bodies such as the United Nations Compensation Commission (UNCC) or the Claims Resolution Tribunal for Swiss Dormant Accounts.[29] These

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giving rise to rights in rem which cannot be unilaterally abrogated without importing an obligation to pay compensation").

26. Kenneth S. Carlston, *Concession Agreements and Nationalization*, 52 AM. J. INT'L L. 260, 273-74 (1958); Abolbashar Farmanfarma, *The Oil Agreement Between Iran and the International Oil Consortium: the Law Controlling*, 34 TEX. L. REV. 259, 261 (1955).

27. *Id.* at 274.

28. Christopher S. Gibson & Christopher R. Drahozal, *Iran-U.S. Claims Tribunal Precedent in Investor-State Arbitration*, *in* THE IRAN-U.S. CLAIMS TRIBUNAL AT 25, THE CASES EVERYONE NEEDS TO KNOW FOR INVESTOR-STATE & INTERNATIONAL ARBITRATION 22-27 (2007).

29. David D. Caron & John R. Crook, *Concluding Reflections*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE PROCESS OF INTERNATIONAL CLAIMS RESOLUTION 369 (2000).

clearly demonstrate the importance of one Iran-US Claims Tribunal and its continuing impact on arbitration and investment law.

The Tribunal was established pursuant to the Algiers Accords. The agreement was predicated on the release of the hostages who were held in Iran for 444 days. The United States, in return, agreed to return Iranian assets and withdraw from the prosecution of Iran in international courts on this matter. Following the agreement, the hostages were released and US$8.1 billion was transferred to an escrow account. Out of US$2 billion of unfrozen Iranian assets, US$1 billion were also kept in a security account from which sums awarded to US nationals by the Tribunal could be collected.[30] The main document establishing the Tribunal is the Claim Settlement Declaration. Article II sets the scope of the Tribunal:

"1. An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this Agreement, whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights…

2. The Tribunal shall also have jurisdiction over official claims of the United States and Iran against each other arising out of contractual arrangements between them for the purchase and sale of goods and services…

3. The Tribunal shall have jurisdiction, as specified in Paragraphs 16-17 of the Declaration of the Government of Algeria of January 19, 1981, over any dispute as to the interpretation or performance of any provision of that Declaration."[31]

The scope of the jurisdiction of the Tribunal is rather broad. It includes sales of goods and services, agency relationships, export and import, expropriation and state responsibility, corporation-related

30. CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 7-10 (1998).

31. *Iran-United States Claims Settlement Declaration*, IRAN-UNITED STATES CLAIMS TRIBUNAL, http://www.iusct.net/General%20Documents/2-Claims%20Settlement%20Declaration.pdf (last visited Mar. 3, 2014).

matters and many more. In some areas, such as joint venture, the Tribunal is the only international body that has systematically analyzed the legal treatment of joint ventures.[32] This broad jurisdiction was accompanied by the application of the United Nations Commission on International Trade Law (UNCITRAL) rules. Pursuant to Article III paragraph 2 "members of the tribunal shall be appointed and the Tribunal shall conduct its business in accordance with the arbitration rules of the UNCITRAL."[33] UNCITRAL rules were adopted in 1976, and the enforcement of the rules in the Iran-US Claims Tribunal was the first systematic use of them.[34] This is another important legacy of this Tribunal.

The Iran-US Claims Tribunal had an enormous impact on the issue of investor-state arbitration. For instance, on the issue of nationality and dual citizenship, it introduced the concept of dominant nationality. In case number A18, the Tribunal held that "it has jurisdiction over claims against Iran by dual Iran-United States nationals when the dominant and effective nationality of the claimant during the relevant period from the date the claim arose until 19 January 1981 was that of the United States."[35] As a result, it is the country in which the national is actively engaged that determines the effective nationality.

Another issue was expropriation. Arbitrators appointed by the Iranian government were inclined to narrowly construe the term expropriation to exclude shareholders and contractual rights. They referred to the Treaty of Amity between Iran and United States (1950). The Tribunal, however, concluded that expropriation should be interpreted based on customary international law and not the Treaty. Consequently, in the case of *Amoco International Finance*, the Tribunal treated an investor, in the interest of the joint stock company, as a property right, which became subject of Iran expropriation. In the *Mobile Oil Iran Case*, the Tribunal also treated take-away of contractual rights as expropriation.[36] These are some

32. Daniel Barstow Magraw, *The Tribunal in Jurisprudential Perspective*, *in* THE IRAN-UNITED STATES CLAIMS TRIBUNAL: ITS CONTRIBUTION TO THE LAW OF RESPONSIBILITY 23 (Richard B. Lillich et al. eds., 1998).

33. *Iran-United States Claims Settlement Declaration*, *supra* note 31.

34. BROWER & BRUESCHKE, *supra* note 30 at 16-17.

35. *Id*. at 32.

36. Mark R. Joelson, *The Contribution of the Iran-U.S. Claims Tribunal to the International Law on Expropriation*, *in* THE IRAN-U.S. CLAIMS TRIBUNAL AT 25, THE CASES

instances of the importance of the Iran-US Claims Tribunal in international investment law and arbitration.

C. *Recent Investment Disputes*

It seems that there are no investment arbitration cases involving the recent wave of conclusions of BITs by Iran. There have been a few cases related to investment before the Revolution involving arbitration. For instance, in *National Iranian Oil Company v. Ashland Oil Inc.*,[37] the respondent allegedly refused to pay the crude oil it received due to possible turmoil following the Iranian Revolution. Subsequently, the respondent did not participate in an arbitration proceeding in Iran (the place of arbitration according to the contract) due to the potential dangers for Americans. The National Iranian Oil Company then sought to compel arbitration in Mississippi arguing that commercial impracticability necessitated change of the arbitration forum. On appeal, the Fifth Circuit declared that the agreement to arbitrate is not severable from the contract and the court cannot compel arbitration in another forum besides that which the parties explicitly agreed.

In another case, Iran tried to compel arbitration in Delaware in *National Iranian Oil Co v. Mapco Int'l, Inc.*[38] In 1979, the National Iranian Oil Company entered into a contract with Mapco International for the sale of crude oil. According to the arbitration clause, laws of Iran should govern the award and the seat of arbitration should be in Tehran in case of disputes. The District Court as well as the Third Circuit dismissed the case because the petition was time-barred by the Delaware statute of limitation. Iran brought the claim six years after the respondent's refusal to arbitrate, which exceeded the Delaware state of limitation of three years.

Iran has filed other cases to compel arbitration in disputes in the US and elsewhere. As the *Ashland* and *Mapco* cases show, Iran did not follow a very thoughtful strategy for its investment disputes. For instance, Iran could have proceeded with arbitration in Tehran and later tried to enforce the award in US courts. In investment arbitration with Israel, Iran resorted to French Courts, which follow a

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EVERYONE NEEDS TO KNOW FOR INVESTOR-STATE & INTERNATIONAL ARBITRATION, *supra* note 28, at 221.

37. Nat'l Iranian Oil Co. v. Ashland Oil, Inc., 817 F.2d 326 (5th Cir. 1987).

38. Nat'l Iranian Oil Co. v. Mapco Int'l, 983 F. 2d 485 (3d Cir. 1992).

broader denial of access to justice doctrine. Iran entered into an agreement concerning construction and maintenance of an oil pipeline with Israel in 1968. The agreement contained an arbitration clause. Upon the refusal of Israel to appoint an arbitrator, Iran brought its case to French Courts on the ground of denial of access to justice pursuant to Article 1493 French new civil procedure code.[39] In *National Iranian Oil Co. v. Israel* the Court of Appeals of Paris agreed with the Iran National Oil Company that the claim was admissible in French Courts due to the denial of justice even when there was no reference to French law in the contract. It also declared that if either party failed to appoint an arbitrator by a certain date it would select one on behalf of the defaulting party.[40]

Iran is currently engaged in a controversial dispute over a gas contract it concluded with United Arab Emirates (the "UAE") involving allegations of bribery and corruption. Due to the investment of Iranian nationals in the UAE, Iran and the UAE have not concluded a bilateral investment treaty. The famous 25-year Crescent contract has been concluded with the UAE for the exportation of gas after five years of negotiation finishing in 2001. According to the contract, Iran is obligated to export 500 million cubic meters of gas to the UAE. The low contract price along with its long-term commitment persuaded the Iranian parliament to enter the scene and call the contract against Iran's national interest. Further investigation of Iran's parliament showed signs of bribery and corruption. In the meantime, Crescent petitioned the International Court of Arbitration claiming breach of contract by Iran.[41] This case is one of the highly politicized investment disputes involving Iran in recent years and as a result, public information is sparse. Based on the available information, if the deal was reached through fraud and bribery, Iran

39. Lindsay L. Chichester, *National Iranian Oil Co. v. Israel: France Reinterprets Its Code to Prevent "Denial of Justice," Leaving Israel Between Iran and a Hard Place*, 11 TUL. J. INT'L & COMP. L. 383, 384-85 (2003). Article 1493 of France's nouveau code de procedure provides: "The arbitration agreement may, directly or by reference to arbitration rules, appoint the arbitrator or arbitrators or provide a mechanism for their appointment. If a difficulty arises in the constitution of the arbitral tribunal in an arbitration which takes place in France or which the parties have agreed shall be governed by French Procedural law, the most diligent party may, in the absence of a clause to the contrary, apply to the president of the Tribunal de Grande Instance of Paris in accordance with procedures of Article 1457." *Id.*

40. *Id.* at 384-85.

41. Tamsin Carlisle, *Iran Cancels Gas Deals with Crescent Petroleum*, THE NATIONAL (Aug. 7, 2010), http://www.thenational.ae/business/energy/iran-cancels-gas-deal-with-crescent-petroleum (last visited Mar. 3, 2014).

might be able to cancel the contract. In all other cases, Iran cannot invoke its internal law prohibition on the public sector arbitration clause to justify its breach.[42]

Recently and after a long legal battle, Iran successfully challenged some of the US Courts decisions rendered against Iran, as violation of the Algiers Accords in Iran-US Claims Tribunal.[43] The Tribunal awarded Iran for expenses it reasonably incurred in the litigations in the United States.

D. *Investment Laws*

1. Background

After the revolution occurred in 1979, the Islamic Republic of Iran succeeded Pahlavi's kingdom as the government of Iran. Soon thereafter, Iran was engaged in the longest war of the 20th century with Iraq. This brought about a lot of devastation and claimed numerous lives in both Iran and Iraq. After the war, Iran was in urgent need of investment to rebuild, recover and construct new facilities and expand its infrastructure. The first comprehensive Iranian law pertaining to foreign investment dates back to 1955 before the Revolution. In the Law for the Attraction and Protection of Foreign Investment, foreign individuals had to obtain Iranian Government approval in order to benefit from its privileges. In this 7-article legislation, there is no reference to any alternative dispute resolution including arbitration.[44]

In 2002, Iran passed its second foreign direct investment-related law after almost 50 years. The Foreign Investment Promotion and Protection Act (FIPPA)[45] was a more comprehensive act

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42. In a long battle with a Turkish cellular company, Turkcell, Iran won its first investor-state arbitration under a bilateral investment treaty. *Iran Wins Landmark Investor-State Case*, GAR, *available at* http://globalarbitrationreview.com/news/article/33081/iran-wins-landmark-investor-state-case/ (last visted Mar. 3, 2014).

43. Islamic Republic of Iran v. United States, Award No. 602-A15(IV)/A24-FT, Iran – US Claims Tribunal, paras. 1-4, *available at* http://www.iusct.net/General%20Documents/AWARD/1-A-AWARD%20NO.%20602-A15%20(IV)A24-FT-EN.pdf.

44. *See The Law for the Attraction and Protection of Foreign Investment*, PARIS TIMES, http://www.parstimes.com/law/foreign_investment55.html (last visited Mar. 3, 2014).

45. *See* Ardeshir Atashi, *Comparative Analysis of the Iranian Foreign Investment Law and the World Bank Guidelines on Treatment of Foreign Direct Investment*, 12 Y.B. ISLAMIC & MIDDLE E. L. 111, 115-16 (2005-2006); *see also* The Foreign Investment Promotion and Protection Act of 2005 (Iran), *available at* http://gsi.ir/General/Lang_en/Page_26/Start_0/TypeId_All/LawsId_24/Action_MoreInfo/Foreign.Investment.Promotion.and.Protectio

compared to the earlier one. Upon admission of the investment, the investor enjoys some privileges and rights based on this Act. Iranians who invest "capital with foreign origin" are also deemed to be "foreign investor[s]" under Article 1.[46] Investment includes, *inter alia*, cash funds, machinery and equipment, tools and spares, patent rights, technical know-how, trademarks, transferable dividends of foreign investors and other permissible items approved by the Council of Ministers under Article 1.[47] Article 2, however, limits the scope of investment. It should "bring about economic growth, upgrade technology, enhance the quality of products, and increase employment opportunities and exports" (Article 2).[48] It also should not pose any threat to the national security and public interests. These qualifications, which remind us of the *Salini* Doctrine on Investment,[49] discourage investors who do not necessarily hold the intention of promoting economic growth in Iran.

FIPPA stipulates several benefits and privileges for foreign investors. For instance, Article 8 sets the principle of national and non-discrimination treatment towards foreign investors.[50] In the case of expropriation, pursuant to Article 9 the Iranian Government commits itself to providing compensation. Compensation is "on the basis of the real value of the investment immediately before expropriation." Furthermore, the Act provides some privileges regarding foreign currency exchange for foreign investors. For instance, foreign investors can collect their investment and interest in foreign currency.[51] Regarding arbitration, FIPPA is not very progressive. Although it recognizes the referral to arbitration by

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n.Act.(.Fippa).html. This act was considered to be inconsistent with Islamic law by Guardian Council. Eventually, it was ratified by Expediency Council, which has the authority to confirm legislations that have been passed by the parliament but were rejected by Guardian Council. *Id.*

46. The Foreign Investment Promotion and Protection Act of 2005, art. 1 (Iran).

47. *Id.*

48. *Id.* art. 2(b).

49. Salini Costruttori S.P.A and Italstrade v. Kingdom of Morocco*,* ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶ 52 (Jul. 31, 2001), 6 ICSID Rep. 400 (2004) ("one may add the contribution to the economic development of the host State of the investment as an additional condition"). In the *Salini* ICSID case, the Tribunal declared that investment should contribute to the economy of the host state, otherwise it cannot be considered an investment. *See id.*

50. The Foreign Investment Promotion and Protection Act of 2005, art. 8 (Iran).

51. *Id.* arts. 13, 14, 17(a). However, we should note that this privilege is subject to the approval of the investment board and confirmation of the minister of economic affairs and finance. *Id.*

bilateral investment treaties, there is no explicit consent to any specific arbitration body. Article 19 mentions:

> "Disputes arising between the Government and the Foreign Investors with regard to their respective mutual obligations within the context of investments under FIPPA, 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."[52]

This might be considered an achievement since it allows the referral to arbitration in the case of dispute between foreign investors and the Iranian Government. As we will see in the next section, one of the main obstacles of foreign investment is the Article on arbitration in the Constitution.

E. *Unfavorable National Laws to Foreign Investment*

The Iranian legal system has serious shortcomings regarding support of foreign direct investment. Some of them relate to the Constitution and some others to statutes. Article 81 of the Constitution, which concerns foreign business stipulates: "Granting of concessions to foreigners for the incorporation of companies or institutions dealing with commerce, industry, agriculture, service, or mineral extraction, is absolutely forbidden."[53]

The broad language of the Article is quite discouraging for foreign companies hoping to invest in Iran. Foreign companies have to establish subsidiaries in Iran because they cannot be the majority shareholders. The Council of Guardians, which is the interpretive authority of the Iranian Constitution,[54] specifies that in private sectors foreign companies can own up to 49% of companies' shares. Furthermore, companies that are involved in commerce with the Iranian Government can be incorporated in Iran for the purpose of their legal and operational activities.[55] It is also worth mentioning that

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52. *The Foreign Investment Promotion and Protection Act*, BRITISH IRANIAN CHAMBER OF COMMERCE, *available at* http://www.bicc.org.uk/downloads/fippa.pdf (last visited Mar. 3, 2014); Foreign Investment Promotion and Protection Act of 2002 (Iran).

53. Qanuni Assassi Jumhuri Islamai Iran [The Constitution of the Islamic Republic of Iran] 1358 [1980], art. 81.

54. *Id.* art. 98.

55. The interpretation of the Council of Guardians regarding Article 81 of the Constitution can be found at their official website: http://www.shora-gc.ir/Portal/Home/ShowPage.aspx?Object=News&ID=75c294c8-9fe5-4d8f-89a1-f77f7b1333c7&LayoutID=

Article 5 of Regulation on Investment in the Free Trade-Industrial Zones states: "Foreign investors may invest in the economic activities of the Zone up to any ratio (of the amount of investment)."[56] Therefore, in certain parts of Iran considered to be "free zones," some restrictive regulations such as the aforementioned Article are not enforced. Legally, however, this approach might not be very strong since the Constitution rules over all parts of the country in a uniform manner.

Another major obstacle in the Constitution concerning foreign investment is Article 44. This article defines the scope of the state sector, which should be publicly owned. In practice, the expansive and wide scope of this Article places many important sectors of the economy in the hands of the Government. Article 44 paragraph II states:

> "The state sector is to include all large-scale and mother industries, foreign trade, major minerals, banking, insurance, power generation, dams, and large-scale irrigation networks, radio and television, post, telegraph and telephone services, aviation, shipping, roads, railroads and the like; all these will be publicly owned and administered by the State."[57]

Article 44 of the Iranian Constitution poses yet another critical challenge for the Iranian Government in the area of foreign investment. The Government has desired to transfer its less lucrative businesses to the private sector so that better management would revive the businesses. For this reason, starting in 2005 under the supervision of the Expediency Council, the Iranian Government started to gradually transfer its businesses, including banking and communications, to the private sector.[58] The result was not as

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56. *Regulations on Investment in the Free Trade-Industrial Zones* (Iran), *available at* http://www.iran-investment.org/irsubpage11.html (last visited Mar. 3, 2014).

57. Qanuni Assassi Jumhuri Islamai Iran [The Constitution of the Islamic Republic of Iran] 1358 [1980], art. 44.

58. The Supreme Leader of Iran announced a new interpretation of Article 44 of the Constitution in order to initiate a strong momentum for privatization. EVALEILA PESARAN, IRAN'S STRUGGLE FOR ECONOMIC INDEPENDENCE: REFORM AND COUNTER-REFORM IN THE POST-REVOLUTIONARY ERA 136 (2011).

favorable as free trade advocates hoped, yet the movement has started in that direction.[59]

Lastly, it is Article 139 of the Constitution which is related to arbitration. Foreign investors, in general, are skeptical and reluctant to refer their disputes to Iranian domestic courts and tend to prefer arbitration. Article 139 of the Iranian Constitution, however, is a major obstacle in this regard:

> "The settlement of claims relating to public and state property or the referral thereof to arbitration is in every case contingent on the approval of the Board of Ministers, and the Parliament must be informed of these matters. In cases where one party to the dispute is a foreigner, as well as in important domestic cases, the approval of the Parliament must also be obtained. Law will specify the cases which are considered to be important."[60]

Article 139 is drafted in a way that seems to favor the Iranian side of the dispute. In other words, pursuant to an arbitration clause in a bilateral investment treaty, the Iranian Government is subject to this Article only if it decides to refer the matter to arbitration.[61] On the other hand, the foreign investors can refer the matter to arbitration and the Iranian side can appear in front of the arbitration body and defend its position. In this case, it seems there is no need for the approval of the Council of Ministry or the Assembly. Furthermore, the Iranian side cannot invoke the above-mentioned Constitutional requirement to challenge the jurisdiction of the Tribunal.[62]

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59. The reform did not result in the desired outcome due to several factors including lack of robust private sector, government interference, lack of necessary capital, and the intrusion of military sector. *Id*. at 161-89.

60. Qanuni Assassi Jumhuri Islamai Iran [The Constitution of the Islamic Republic of Iran] 1358 [1980], art. 139

61. United Nations Conference on Trade and Development. Division on Transnational Corporations and Investment, United Nations Conference on Trade and Development. Division on Investment, Technology, and Enterprise Development, *Agreement on Reciprocal Promotion and Protection of Investments between the Government of the Islamic Republic of Iran and the Government of _____*., *in* INTERNATIONAL INVESTMENT INSTRUMENT: A COMPENDIUM VOLUME VI 479, 479-484 (2002) [hereinafter IRANIAN MODEL BIT]. In some Iranian BITs, in the arbitration clause there is a phrase, which might be inserted due to this Constitution obstacle. Paragraph 2 of Article 12 of Iranian Model BIT declares: "either of them may refer the dispute to the competent courts of the host Contracting Party or with due regard to their own laws and regulations to an arbitral tribunal of three members referred to paragraph 5 below." *Id.* (emphasis added).

62. Ardeshir Atai, *Arbitration of Investment Disputes under Iranian Investment Treaties*, 14 J. OF MONEY LAUNDERING CONTROL 130, 130 (2011).

There are other domestic provisions that are not friendly to foreign investment. For instance, labor law in Iran, generally speaking, makes it difficult for employers to lay-off employees.[63] Furthermore, originally the tax imposed on corporations was 54%, and it has been reduced to 25%.[64] Still, this might be high taxation for corporations, which can choose to operate in countries with much lower income tax rates.

There are other obstacles in Iranian domestic law which make foreign investment difficult. Ownership of real property for foreign nationals requires a special process.[65] First, the local Registry Office should be adequately informed about the purchase. The transfer of ownership is then subject to approval by the office of Ministry of Foreign affairs on the condition of the principle of reciprocity.[66]

The fact that Iran is not part of major international institutions on investment further complicates the foreign investment. Iran is not part of ICISD, MIGA (Multilateral Investment Guarantee Agency), or the WTO (World Trade Organization). On the other hand, Iran has recently been active in the realm of arbitration. Iran has adopted the New York Convention[67] and has passed legislation on arbitration pursuant to UNCITRAL Rules.[68] However, internationally, the US and EU economic sanctions have made foreign direct investment incredibly difficult in Iran.

F. *The Effect of Iran's Investment Laws on Arbitration*

Considering the aforementioned constitutional restraints, the enforcement of awards can be problematic. The Iranian domestic legal system has recognized arbitral awards both in Civil Procedure

63. *See, e.g.*, Art 21-33 of Iran Labor Law, *available at* http://www.princeton.edu/irandataportal/laws/labor-law/laborcontracts/.

64. IRAN: COMPANY LAWS AND REGULATIONS HANDBOOK, VOLUME 1: STRATEGIC INFORMATION AND BASIC LAW 157-60 (2012).

65. Iran Export, *Investment Climates: Status of Foreign Nationals*, http://www.iran-export.ir/sections/investmentclimates/statusof.aspx (last visited Mar. 3, 2014).

66. *Id.*

67. The Iranian Parliament ratified the New York Convention for Recognition and Enforcement of Foreign Arbitral Awards in April 10, 2001. *The Law of Accession of Islamic Republic of Iran Government to the New York Convention for Recognition and Enforcement of Arbitration Award Drafted in 10 June, 1958*, ISLAMIC PARLIAMENT RESEARCH CENTER, http://rc.majlis.ir/fa/law/show/90503 (last visited Mar. 3, 2014).

68. Hamid Gharavi, *The 1997 Iranian International Commercial Arbitration Law: The UNCITRAL Model Law à L'Iranienne*, 15 ARB. INT'L 85, 85 (1999).

and International Commercial Arbitration Law.[69] In 2001, Iran also became a member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[70] However, all of these regulations include an exception concerning public policy or similar concepts.[71] In other words, the enforcement of arbitral awards is conditioned to the situation where the awards are not contrary to the public policy of the Government. In this situation, Article 139 of the Iranian Constitution looms over all the arbitral awards. Many of the arbitration awards that concern "settlement of claims relating to public and state property" belong to the public sector (Article 44) and require approval of the Assembly (Article 139).[72] This provision of the Constitution complicates the enforcement of arbitral awards.

On the other hand, once the Iranian Government signs a treaty or contract comprising an arbitration clause, it seems implausible to refuse its enforcement based on a public policy reservation related to constitutional provisions. In other words, once the government agrees to arbitration on certain issues, it clearly implies that referral to arbitration in that case is not against its public policy. Evidently, if the merits of the award violate "the most basic notions of morality and justice,"[73] Iranian courts can plausibly refuse to recognize and enforce the award.[74]

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69. *Id*. at 86-9; Aini Dadrasii Madani [Civil Procedure Code] Tehran 1379 [2000] arts. 454-501 (Iran); Qanuni Davari Tejari Beinolmelal [International Commercial Arbitration Code] Tehran 1376 [1997] (Iran).

70. *New York Convention Countries*, NEW YORK ARBITRATION CONVENTION, http://www.newyorkconvention.org/contracting-states/list-of-contracting-states (last visited Mar. 3, 2014).

71. Art. V (2)(b) of the New York Convention declares: "[t]he recognition or enforcement of the award would be contrary to the public policy of that country." Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. (hereinafter the New York Convention) Paragraph 2 of article 34 International Commercial Arbitration Code of Iran also enumerates public policy as a ground for invalidation of arbitral awards: "if the content of the award is contrary to public policy or public morality or the mandatory rules of this Act." Qanuni Davari Tejari Beinolmelal, *supra* note 64.

72. Qanuni Assassi Jumhuri Islamai Iran [The Constitution of the Islamic Republic of Iran] 1358 [1980], arts. 44, 139.

73. Parsons & Whittemore Overseas Co., Inc. v. Societe Generale (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974). The Second Circuit declared that the public policy exception to enforcement of the awards should be construed narrowly and only in cases related to the state's most basic notions of morality and justice. *Id.*

74. William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 HASTINGS L.J. 251, 297 (2006-2007). Constitutional requirement of due process, minimum contact, and *forum non conveniens* have prompted tensions with enforcement of foreign awards in American Courts as well. This

Although the bar for public policy reservation at the enforcement stage is high, the constitutional restraints can be invoked at the jurisdictional stage as well. The Iranian Government may invoke the constitutional prohibition as an objection to the jurisdiction of the arbitration tribunal in the case of investment disputes. In this regard, Article 27 of the Vienna Convention on the Law of Treaties provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.[75] This rule is without prejudice to Article 46." Article 46, on the other hand, declares that states can argue that their consent was flawed in cases in which "violation of internal law was manifest and concerned a rule of its internal law of fundamental importance."[76] Hence, it seems reasonable to argue that a constitutional prohibition amounts to a 'manifest violation' of internal law of fundamental importance. In our context, therefore, the Iranian Government can refer to the constitutional prohibition to prove its flawed consent to arbitration unless the Assembly approves the arbitration. However, this conclusion does not seem plausible both in international commercial and investment arbitration.

In the context of international commercial arbitration, it has been argued that it is the 'international *ordre public*' and 'common law of arbitration' which mandate that states cannot invoke their internal law to repudiate consent to arbitration. In the *Bentler v. Belgium* case, the Tribunal did not accept the jurisdictional objection raised by Belgium pursuant to Article 1672(2) of the Belgian *Code judiciaire* as to the capacity of the officials to agree to arbitration. The Tribunal argued that international public order rejected the jurisdictional objection whenever a State with knowledge and intent, consents to arbitration and later tries to nullify it with invocation of its internal law.[77] Therefore, even if internal law is essential for national public order,

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tension has been not been fully settled by precedents, which "all seem less than optimum in their articulation of guiding principles." *Id.*

75. Vienna Convention on the Law of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

76. Vienna Convention, *supra* note 75, art. 46 ("1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.").

77. Jan Paulsson, *May a State Invoke its Internal Law to Repudiate Consent to International Commercial Arbitration?*, 2 ARB. INT'L 90, 90 (1986).

the international public order dictates that states abide by their concluded arbitration clauses. Some scholars posit that this argument complements the modern rule of sovereignty immunity.[78] Agreement to arbitration is an implicit waiver of sovereign immunity and if a State can invoke its internal law to repudiate arbitration, it defeats the purpose of the waiver.[79]

Another argument might be that, at least, in cases where the internal law of one party governs all aspects of the contract, constitutional prohibition should prevent the arbitration from proceeding. A similar issue came up in a case involving Iran. In *Cementation International Ltd v. Republique Islamique d'Iran*,[80] Iran raised an objection pursuant to its constitutional prohibition. Based on a contract between the Iran Ministry of Health and a British Company, all related disputes should be resolved through conciliation or arbitration. The contract also provided that Iranian law is governed by the disputes and the arbitral tribunal should sit in Geneva. After Iran defaulted on appointing an arbitrator, the Court of Arbitration of ICC assigned an arbitrator for the defaulting party. The Tribunal proceeded notwithstanding Iran's objection on the ground that, *inter alia,* the tribunal had not been constituted lawfully pursuant to the contract and that the arbitration was against Iran's constitution. Iran challenged the award and sought its nullification in front of Swiss courts. Both the lower and court of appeals concluded that parties agreed to ICC award.[81] The Swiss courts ruled that parties could not invoke their constitutional provision in order to set aside the arbitration clause.[82] Although it is not obvious why the court (and the tribunal) applied ICC rules, the argument concerning constitutional provision is powerful. Once a state, short of cases of corruption and fraud, acquiesced to refer a matter to arbitration, it implicitly waives its right to invoke all internal conflicting provisions.

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78. *See, e.g.*, *id*. at 98.

79. *Id.*

80. *See* W. LAURENCE CRAIG ET AL., INTERNATIONAL COMMERCIAL ARBITRATION 60-63 (1986). The Court followed the Tribunal decision in the ICC Case no. 3526 (1982) and declared that "to admit the principle of the approval of recourse to arbitration by the government or legislature of a country that is party to the arbitration agreement is to allow that party to unilaterally avoid the obligations that it freely undertook." FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 324 n. 367 (Emmanuel Gaillard & John Savage eds., 1999).

81. STEPHEN M. SCHWEBEL, JUSTICE IN INTERNATIONAL LAW: FURTHER SELECTED WRITINGS 231-32 (2011).

82. *Id*.

In the context of international investment law, the same conclusion can be reached. Since the governing legal body of investment arbitration is international law, treaties have priority over domestic law and "a State would be in violation of international law if it gave effect to the conflicting rule of domestic law."[83] The conflicting rule of domestic law, however, might, arguably, affect the consent of the state. In *Brandes v. Venezuela,* the Venezuelan Government challenged its (unilateral) consent to arbitration based on its Constitution and the several decisions of the Venezuelan Supreme Tribunal of Justice.[84] The ICSID tribunal concluded that the consent of Venezuela cannot be inferred from the Constitution and further the decisions of the Supreme Tribunal of Justice are not binding on the ICSID Tribunal.[85]

The issue of unequivocal consent should not, however, be conflated with the issue of conflicting domestic laws. Consent, as the ICISD tribunal emphasized in the case of *Plama v. Bulgaria* "should be clear and unambiguous."[86] On the other hand, when a state clearly expressed its consent to arbitration, it cannot later invoke its conflicting internal law, including its constitution, to refuse to accept the arbitration jurisdiction. In Iran's case, it also seems that the constitutional prohibition is not of fundamental importance especially when the executive branch consents to arbitration. Lastly, it is important to note that, in cases of fraud and corruption, private parties cannot take advantage of contracts when the state officials are clearly acting beyond their authority.[87]

II. *BILATERAL INVESTMENT TREATIES*

A. *Legal Effects of BITs*

Bilateral Investment Treaties are gaining increasing importance in international law. BITs are, as some scholars believe,

83. Paulsson, *supra* note 77, at 99 n. 1.

84. Brandes Inv. Partners LP v. Bolivarian Republic of Venez., ICSID Case No. ARB/08/3, Award, ¶ 48 (Aug. 2, 2011), http://italaw.com/documents/BrandesAward.PDF.

85. *Id*. at ¶ 96-98.

86. "It is a well-established principle, both in domestic and international law, that such an agreement [of the parties to submit a matter to arbitration] should be clear and unambiguous." Plama Consortium Ltd. v. the Republic of Bulg., ICISD Case No. ARB/03/24, Decision on Jurisdiction, ¶ 198 (Feb. 8, 2005), *available at* https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC521_En&caseId=C24.

87. Paulsson, *supra* note 77, at 98.

the product of fear of developed countries of nationalization and expropriation.[88] Iran performed one of the earliest and significant nationalization processes in 1951.[89] The UN General Assembly also recognized this nationalization of rights of developing states.[90] This further complicated the scene for developed countries. This caused developed countries to search for and find alternative ways to protect their investment and obtain proper compensation such as in cases of expropriation. The first BIT dates back to 1959 between West Germany and Pakistan and since then approximately 2600 BITs have been concluded between different countries.[91]

As we saw, Iran has been the subject of foreign investment for almost hundred years. The past investment agreements have created cynicism towards foreign investment among Iranians. The Constitution of the Islamic Republic of Iran clearly shows the overall skepticism regarding foreign investment. One of the main concerns dealt with providing concession to foreign companies for an extended period of time as happened in the case of the Anglo-Persian Oil Company.

Surprisingly, however, Iran is a party to more than fifty BITs.[92] The United States, by way of comparison, has concluded around forty

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88. Kenneth J. Vandevelde, *A Brief History of International Investment Agreement*, 12 U.C. DAVIS J. INT'L L. & POL'Y 157, 167-169 (2005-2006).

89. In a battle with Anglo-Iran Oil Company (AIOC), Mossadegh, Iran's prime minister, announced that Iran would sell oil directly to customers. *See* MOSTAFA ELM, OIL, POWER, AND PRINCIPLE: IRAN'S OIL NATIONALIZATION AND ITS AFTERMATH 144 (1991). It was followed by the passage of Iran's nationalization act in Parliament and the evacuation of Brits and employees of AIOC from oil-rich area of Abadan, Iran. *See id*. at 156-60.

90. Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), ¶ 4(e), U.N. Doc. A/RES/S-6/3201 (May 1, 1974) ("Full permanent sovereignty of every State over its natural resources and all economic activities. In order to safeguard these resources, each State is entitled to exercise effective control over them and their exploitation with means suitable to its own situation, including the right to nationalization or transfer of ownership to its nationals, this right being an expression of the full permanent sovereignty of the State. No State may be subjected to economic, political or any other type of coercion to prevent the free and full exercise of this inalienable right.").

91. KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES 1 (2010).

92. *Bilateral Investment Treaties*, ORGANIZATION FOR INVESTMENT ECONOMIC AND TECHNICAL ASSISTANCE OF IRAN, http://www.oietai.ir/en/investmenguide/treaties (last visited Mar. 3, 2014). According to the website of Organization for Investment Economic and Technical Assistance of Iran affiliated with Ministry of Economic Affairs and Finance the list of the countries Iran has BITs with is as follows: Armenia (1995), Belarus (1995), Tajikistan (195) Georgia (1995), Pakistan (1995), Kazakhstan (1996), Turkmenistan (1996), Yemen (1996), Ukraine (1996), Kyrgyzstan (1996), Bosnia & Herzegovina (1996), Azerbaijan (1996), Turkey (1996), South Africa (1997), Lebanon (1997), Syria (1998), Switzerland (1998), Poland (1998), Poland (1998), South Korea (1998), Bulgaria (1998), Italy (1999), Zimbabwe

BITs.[93] This shows, despite cynicism towards foreign investment, sanctions and domestic problems, Iran has been quite active in the area of BITs. These BITs are with both developed and developing countries. They were signed primarily between 1995 and 2007, almost 5 years after the end of the Iran-Iraq war and extend until the aftermath of new sanctions.

However the question is what is the legal status of the investment treaties under Iranian Law? Do they bind the Iranian government? According to Article 77 of Iran's Constitution "International treaties, protocols, contracts, and agreements must be approved by the Islamic Consultative Assembly."[94] The broad language of this article includes almost every important international legal activity of the Iranian Government. If the Assembly passes a specific treaty, then pursuant to Civil Code Article 9: "Treaty stipulations which have been, in accordance with the Constitutional Law, concluded between the Iranian Government and other government, shall have the force of law."[95] Therefore, for BITs, it seems that the approval of the Assembly is required. After the ratification of the Assembly (Parliament), they are treated as municipal laws of Iran. According to the official website, almost all the 58 BITs have been ratified by the Iranian Parliament and roughly 50 of BITs are in force as of today.[96]

However, when it comes to arbitration and its jurisdiction, national municipal law is of secondary importance. In other words, when there is an explicit consent to arbitration, the resort to local authorities and municipal laws might not be accepted. For instance, two cases were brought to ICSID for the interpretation of a national law in Venezuela. Article 22 of the Law on the Promotion and

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(1998), Qatar (1998), Sudan (1998), Croatia (2000), Uzbekistan (2000), Macedonia (2000), China (2000), Srilanka (2000), Morocco (2001), Austria (2001), Tunisia (2001), Bangladesh (2001), Oman (2001), Romania (2002), Hellenic Republic (2002), Malaysia (2002), Germany (2002), North Korea (2002), Bahrain (2002), Spain (2002), Finland (2002), France (2003), Algeria (2003), Ethiopia (2003), Serbia & Montenegro (2003), Venezuela (2005), Indonesia (2005), Sweden (2005), Afghanistan (2006), Libya (2006), Kuwait (2007), Kuwait (2007), Union of the Comoros (2008), Eritrea (2008), Cyprus (2009). Vietnam (2009), Kenya (2009). Gambia (2007). *Id.*

93. MICHAEL REISMAN ET AL., FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 10 (2005).

94. Qanuni Assassi Jumhuri Islamai Iran [The Constitution of the Islamic Republic of Iran] 1358 [1980], art. 77.

95. Qanuni Madani [Civil Code] Tehran 1314 [1935], art. 9.

96. *See Bilateral Investment Treaties*, *supra* note 92.

Protection of Investment of Venezuela refers to the consent to ICSID. The Supreme Tribunal of Justice in Venezuela, however, reads the provision differently. In *Cemex v. Venezuela* and *Brandeis v. Venezuela*, the Tribunal believed that "a sovereign state's interpretation of its own unilateral consent to the jurisdiction of an international tribunal is not binding on the tribunal or determinative of jurisdictional issues."[97]

The above-mentioned cases are concerning interpretation of consent. In Iran's BITs, there is explicit consent to arbitration. But, in case of arbitration, the Iranian Government might challenge the jurisdiction of the arbitration based on the fact that the Assembly never ratified the BIT. In *CSOB v. Slovakia*, the BIT between the countries never came into force.[98] In this case, because there was a reference to arbitration in the investment agreement, the tribunal found sufficient ground for jurisdiction.[99] Some authors believe that the BITs consent clause is only "an offer to investors that need to be accepted."[100] Therefore, without an investment agreement referring to arbitration, the consent is not perfected. However, this approach does not seem be correct. As long as there is an unambiguous consent to arbitration, contrary domestic legal rules cannot constrain it. The approach is concordant with the *Pacta Sunt Servanda* principle.[101] Additionally, arbitration bodies tend to prioritize international law over national law. The reason is obvious. Investors rely on BITs and investment laws and are not necessarily aware of the intricacies of all domestic laws. With the act of investment, they already perfected the consent for referral of the disputes to arbitration. Therefore, it does

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97. Cemex Caracas Inve B.v. & Cemex Caracas II Inv. B.V v. Bolivarian Republic Venez., ICSID Case No. ARB/08/15, Decision on Jurisdiction, ¶ 70 (Dec. 30, 2010), http://www.italaw.com/sites/default/files/case-documents/ita0142.pdf; *see also* Brandes Investment Partners, LP v. Venez, *supra* note 84, ¶ 105.

98. Ceskoslovenska Obchodni Banka, A.S. v. the Slov., ICSID Case No. ARB/97/4 (1999). *Decision on Jurisdiction*, ¶ 27 (May 24, 1999).

99. Ceskoslovenska Obchodni Banka, A.S. v. the Slov., ICSID Case No. ARB/97/4 (1999). *Decision of the Tribunal on Respondent's Further and Partial Objection to Jurisdiction*, ¶ 27 (Dec. 1, 2000), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC558_En&caseId=C160.

100. Christoph Schreuer, *Consent to Arbitration*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, 830, 864-66 (Peter Muchlinski et al. eds., 2008).

101. *Pacta sunt servanda*, or the principle of sanctity of contracts is best reflected in Article 26 of the Vienna Convention on the Law of Treaties: "every treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention, *supra* note 75; *see also*, MARK EUGEN VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 363-68 (2009).

not seem that the barrier of Iran's Constitution can hinder the jurisdiction of the arbitration body.

1. Content Analysis

Precursors to BITs were the Friendship, Commerce and Navigation treaties (FCN).[102] The principal objective of FCNs was to facilitate trade and navigation. They were not specifically designed for investment. However, they contained three main components of modern BITs, namely treatment provisions, expropriation, and exchange control.[103] FCN, however, contained a broad range of issues including right of entry, access to local courts, tax issues, treatment of products, custom treatment, technical experts, and many more.[104] Gradually, these diverse issues became subject to different treaties and resolutions, and investment became the subject of BITs. Additionally, on August 15, 1955 the United States in signed a FCN treaty with Iran.[105]

According to some scholars, there are four possible ways that BITs relate to investment.[106] They protect, liberalize, promote, or regulate them. The majority of BITs, however, focus on protection of investment because it implicitly promotes investment as well. BITs rarely tend to regulate investment since it might defeat their purpose to encourage investment. Regulations of specific investments occur in the contract between the investor and the host state. BITs typically incorporate four major components:[107] 1) general treatment of investment and investors: in this part of the BITs, government commits themselves to national treatment, the most favorite nation, fair and equitable treatment and also the umbrella clause. 2) Standards related to expropriation: In these clauses, government usually commits themselves to compensate the investor in the case of

102. MUTHUCUMARASWAM SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 180-82 (2010).

103. Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 207 (1988).

104. Rudolf Dolzer & Margaret Stevens, *Bilateral Investment Treaties*, *in* FOREIGN INVESTMENT DISPUTES 47, 47 (Bishop et al. eds., 2005); REISMAN ET AL., *supra* note 93.

105. This FCN has been invoked in many occasions since the aftermath of Revolution in Iran. One of these occasions was in the case before International Court of Justice on US Navy attacks on some Iranian oil platforms. Both sides invoked this treaty to support their conduct. Oil Platforms (Iran v. U.S.), Judgment, 2003 I. C. J. 161, ¶¶ 31-34 (Nov. 6, 2003).

106. VANDEVELDE, *supra* note 91, at 5.

107. REISMAN ET AL., *supra* note 93, at 10-11; Vandevelde, *supra* note 103, at 202.

nationalization and expropriation. The compensation typically is calculated based on the fair market value of the investment. 3) Provisions related to the free transfer of currency, investment and its interests both in and outside the country: Countries impose different currency policies and limitations on the amount exported on foreign currencies. The BITs guarantee free transfer of foreign currency for investors. 4) Arbitration Clauses: an important part of almost all BITs, which is pivotal to the attraction of foreign investment, is the dispute settlement mechanism. Foreign investors tend to be skeptical about national courts deciding cases related to its government measures.[108] They prefer arbitration bodies to mainly adjudicate based on international laws and standards.

Iran's model BIT contains 15 articles and a preamble.[109] Article 1 concerns the definition of investment.[110] Investment includes: 'a) movable and immovable property b) shares or any kind of participation in companies c) money and/or receivables d) industrial and intellectual property such as patent, utility models, designs or models, trade marks and names, know-how and goodwill e) rights to search for, extract or exploit natural resources'. There are three ways investment can be enumerated in investment laws: asset-based model (which lists the assets subject to protection), transaction-based model (which lists the transactions investor make), and enterprise-based model (which lists business organizations investor can form).[111] The model Iranian BIT, according to the definition of investment, follows an'asset-based' approach. Article 1 also defines investors, which includes natural as well as legal persons.

Article 2 promotes investment.[112] As long as the investment is within Iran's law and regulations, the investment is subject to protection. Article 3 mentions admission of investment, meaning each contracting party shall provide necessary permits to investors.[113] Article 4 deals with protection of investment.[114] Paragraph One of Article 4 declares: "Investment . . . shall receive the host Contracting

108. Jeswald W. Salacuse, The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital, 151-52 (2013).

109. IRANIAN MODEL BIT, *supra* note 61, at 479-84.

110. *Id*. at 479.

111. Engela C. Schlemmer, *Investment, Investor, Nationality, and Shareholders*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, *supra* note 100, at 52.

112. IRANIAN MODEL BIT, *supra* note 61, at 480.

113. *Id*.

114. *Id*. at 480-81.

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."[115]

This provision sets two important treatment components of BITs: fair and equitable treatment and the most favorite nation (MFN) clause. In Paragraph Two, however, the special privileges conferred for free trade, custom union, and common market to other states are excluded from the MFN clause. Article 5 extends the MFN clause to the provisions of other agreements as well.[116] In other words, investors can "cherry pick" different favorable provisions from different agreements each contracting party concluded with other investors.[117] Article 6 is about expropriation:

> "1. 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 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."[118]

Hence, expropriation is allowed if it is for public purposes. This is in line with recent BITs of the United States.[119] The term 'public purpose' is rather vague in this context. But, Iranian BITs, similar to new generations of BITs, emphasize two aspects of due process and compensation without delay in the case of expropriation. The BIT model of the Islamic Republic of Iran does not explicitly refer to indirect expropriation. Indirect expropriation might occur in cases such as levying burdensome taxation. Some BITs, such as ones

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115. *Id*. at 480.

116. *Id*. at 481.

117. A few Iranian BITs have more detailed provisions on MFN and national treatment. For instance Iran-Germany BIT Article 3(b) mentions: "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."

118. IRANIAN MODEL BIT, *supra* note 61, at 481.

119. Vandevelde, *supra* note 103, at 231-32. Regarding compensation for expropriation it talks about US approach, which is derived from in Secretary of State Cordell Hull approach: "The BIT… incorporates the traditional United States view of international law, requiring prompt, adequate, and effective compensation for expropriated property." *Id.*

with Switzerland, Belarus, and Kazakhstan, the language of the BITs are more explicit regarding indirect expropriation: "Neither of the Contracting Parties shall take, either directly and indirectly, measures of expropriation or nationalization against investments . . . ."[120]

Article 7 deals with national treatment in losses caused by war, armed conflict, revolution, and similar state of emergency.[121] The third main components in BITs are referred to in Article 8, which is about repatriation and transfer.[122] Each contracting state should permit transfers related to investment in returns, proceeds from the sale, royalties, and loan installment among others. Article 9 sets the framework for cases of subrogation.[123] Article 10 talks about observance of commitment and Article 11 deals with the scope of the agreement.[124] The fourth component of BITs, which is dispute settlement, is discussed in Articles 12 and 13.[125]

2. Arbitration Clauses

Iranian BITs, similar to other leading countries BITs, stipulate two occasions for arbitration.[126] One is when the contracting parties disagree on the interpretation or application of the BIT. In this case, model BITs suggest that each contracting party appoint an arbitrator

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120. *Agreement Between the Swiss Confederation and the Islamic Republic of Iran on the Promotion and Reciprocal Protection of Investments*, Mar. 8, 1998, UNCTAD.ORG, http://www.unctad.org/sections/dite/iia/docs/bits/switzerland_iran.pdf (last visited Mar. 3, 2014); *see Agreement on Reciprocal Promotion and Protection of Investments Between the Government of the Republic of Belarus and the Government of the Islamic Republic of Iran*, July 14, 1995, UNCTAD.ORG, http://www.unctad.org/sections/dite/iia/docs/bits/iran_belarus.pdf (last visited, Mar 3, 2014); *see Agreement on Reciprocal Promotion and Protection of Investments Between the Government of the Republic of Kazakhstan and the Government of the Islamic Republic of Iran*, Jan. 1996, UNCTAD.ORG, http://www.unctad.org/sections/dite/iia/docs/bits/kazakhstan_iran.pdf (last visited Mar. 3, 2014).

121. IRANIAN MODEL BIT, *supra* note 61, at 481.

122. *Id*. at 481-90.

123. *Id*. at 482.

124. *Id*.

125. *Id*. at 482-84.

126. For instance Article 12 of the Iranian Model BIT deals with the arbitration for settlement of disputes between the host government and investor(s) while Article 13 stipulates arbitration for settlement of disputes between contracting parties as to interpretation and application of the treaty. *Id*.; *see also* Roberto Echandi, *Bilateral Investment Treaties and Investment Provisions in Regional Trade Agreements: Recent Developments in Investment Rulemaking*, *in* ARBITRATION UNDER INTERNATIONAL INVESTMENT AGREEMENTS 3, 24 (2010) ("These IIAs [i.e., international investment agreements] contain provisions that grant specialized competent authorities of the Contracting Parties the right to make interpretations of certain matters or provisions of the agreement, which will be binding for the arbitral tribunal.")

within sixty days. The parties' arbitrators appoint the umpire. In the case of the refusal of one party, upon request, the President of the International Court of Justice appoints the arbitrator for the failing party.[127] The cost of the arbitration will be split equally between the parties and the decision of the arbitration is binding.

Article 12 deals with cases of dispute between a contracting party and investor of the other contracting party.[128] In this case, each party has to wait six months "from the date of notification of the claim by one party to the other." This intervening period allows parties to think twice about their legal claims and possibly reach an amicable settlement. If a dispute refers to the tribunal prior to the six months, then the dispute is rejected based on an admissibility ground and not jurisdiction. The mechanism of appointing the arbitration tribunal resembles that of the Article 13. The only difference is that it is the Secretary of General of the Permanent Court of Arbitration that appoints the arbitrator for the failing party.[129] The arbitration clause of Iranian BITs also contains the fork in the road clause.[130] This clause basically requires the investor to choose between the domestic and arbitration tribunal. Investors cannot pursue their claims in both national and international tribunals. Paragraph 3 and 4 of Article 12 declare:

> "A dispute primarily referred to the competent courts of the host Contracting Party, as long as it is pending, cannot be referred to arbitration save with the parties agreement; and in the event that a final judgment is rendered, it cannot be referred to arbitration. National courts shall not have jurisdiction over any dispute referred to arbitration. However, the provisions of this paragraph

127. IRANIAN MODEL BIT, *supra* note 61, at 483-84. "In case the umpire is to be appointed by the President of the International Court of Justice, if the President of the International Court of Justice is prevented from carrying out the said function or if he is a national of either Contracting Party, the appointment shall be made by the vice-president of the International Court of Justice, and if the vice-president is also prevented from carrying out the said function or he is a national of either Contracting Party, the appointment shall be made by the senior member of the said court who is not a national of either Contracting Party." *Id.*

128. *Id*. at 482-83.

129. *Id.* at 483 ("In the event that each party fails to appoint its arbitrator within the mentioned period and/or the appointed arbitrators fail to agree on the umpire, each of the parties may request the Secretary General of the Permanent Court of Arbitration to appoint the failing party's arbitrator or the umpire, as the case maybe.").

130. *Id.* at 482-83.

> do not bar the winning party to seek for the enforcement of the arbitral award before national courts."[131]

The BITs Iran has concluded with countries is sometimes slightly different from the Model BIT. Starting from the waiting period, it ranges from three to six months.[132] Some Iranian BITs require a detailed notification of the claim from the investor to the contracting party.[133] Interestingly enough, for a few Iranian BITs, there is no fork in the road clause. For example, in Iran-Greece and Iran-Switzerland there is no specific provision in cases where disputes are pursued in national courts.[134] A few others, however, explicitly forbid national courts from investigating disputes between investors and other governments.[135] Iran has concluded a few BITs that stipulate a waiver of local proceedings clause.[136] This is similar to the NAFTA article 1121(1)(b), which requires written waiver of the right of investors to seek local remedies in case they pick NAFTA arbitration.[137] For instance, in the Iran-Germany BIT there is a waiver clause with similar requirement.[138]

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131. *Id.* at 483.

132. Atai, *supra* note 62, at 135. In the Iran-Croatia BIT, the waiting period is twelve months.

133. *Id.* at 136. *Agreement on the Promotion and Reciprocal Protection of Investments, Iran-Spain*, 2002, UNCTAD.ORG, http://www.unctad.org/sections/dite/iia/docs/bits/spain_iran.pdf (last visited Mar. 4, 2014) (declaring "Disputes that may arise . . . shall be notified in writing including a detailed information, by the investor to the former Contracting Party.").

134. *See Agreement on the Reciprocal Promotion and Protection of Investments Greece-Iran*, March 13, 2001, UNCTAD.ORG, http://www.unctad.org/sections/dite/iia/docs/bits/greece_iran.pdf (last visited Mar. 3, 2014).

135. *Agreement on Reciprocal Promotion and Protection of Investments, Austria-Iran*, Feb. 15, 2001, *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/193 [hereinafter AUSTRIA-IRAN BIT]. Paragraph Seven of Article 11 of Iran-Austria BIT, for instance, declares: "National courts shall not have jurisdiction over any dispute referred to arbitration. However, the provisions of this paragraph do not bar the winning party to seek for the enforcement of the arbitral award before national courts." *Id.* at 10.

136. Atai, *supra* note 62, at 137.

137. North American Free Trade Agreement, art. 1121(b), U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1983), *available at* http://www.sice.oas.org/trade/nafta/chap-112.asp (emphasis added) ("(b) The investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, *waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures*, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party").

138. Bilateral Investment Treaty, Iran-Ger. art. 11(3) (2005) ("In the event an investor of a contracting party has submitted a dispute to the local competent court the dispute may be

Arbitration clauses in BITs can take different forms depending on the forum parties choose for arbitration.[139] In general, there are two main types of arbitration tribunals: permanent and *ad hoc*.[140] ICSID, Permanent Court of Arbitration, and even Iran-US Claims Tribunal are examples of permanent arbitration bodies.[141] There is an increasing tendency to refer the disputes to ICSID in investment disputes.[142] Since Iran is not yet a member to ICSID, the arbitration clause primarily refers to *ad hoc* arbitration. However, there are a few BITs that refer to ICSID jurisdiction.[143] In Iran-Korea, Iran-France, Iran-Greece, Iran-Austria, and Iran-Italy BITs, investors have multiple options, including ICSID.[144] Article 11 of Iran-Austria BIT stipulates that:

"2. In the event that such a dispute cannot be settled as provided in paragraph 1 of this Article the investor in question may, at his choice, submit the dispute for settlement to:

(a) The competent court of the Contracting Party, which is a party to the dispute;

(b) An *ad hoc* Arbitral Tribunal, in compliance with the arbitration rules of the UN Commission on the International Trade Law (UNCITRAL);

(c) The International Chamber of Commerce under its rules of arbitration;

(d) The International Center for Settlement of Investment Disputes, for the implementation of the arbitration procedure under the Washington Convention of 18 March 1965, on the Settlement of Investment Disputes between States and Nationals of other States, if or as soon as both Contracting Parties have acceded to it;

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referred to international arbitration provided the party submitting the dispute to arbitration bears the costs of the proceedings so far incurred and the court has not yet rendered a judgment in substance, if so required.").

139. *See* REISMAN ET AL., *supra* note 93, at Chapter 4.

140. Cesare P.R. Romano et al., *Mapping International Adjudicative Bodies, the Issues, and Players*, *in* the OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 3, 10 (2013).

141. *Id*. at 11.

142. *Id*. at 298.

143. Atai, *supra* note 62, at 142-43.

144. *Agreement for the Promotion and the Protection of Investments, Iran-S. Kor.*, Oct. 31, 1998, UNCTAD.ORG, http://www.unctad.org/sections/dite/iia/docs/bits/rep%20korea_iran.PDF (last visited Mar. 3, 2014).; *Agreement for the Promotion and Protection of Decree No. 2004-1279, Fr.-Iran*, May 12, 2003, *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/1232; *see* AUSTRIA-IRAN BIT**,** *supra* note 135.

(e) Any other dispute settlement procedure agreed upon by the parties to the dispute.

4. Each Contracting Party hereby consents to the submission of investment disputes to the court and international Arbitrations mentioned above."[145]

Interestingly enough, the moment Iran decides to join ICSID, it will already have concluded BITs with a few countries that include ICSID arbitration. Also, it explicitly consents to ICSID jurisdiction.[146]

Ad hoc arbitration tribunal, furthermore, can have different arbitral regimes. Some are following UNCITRAL arbitration rules and some do not. In Iran, the majority of BITs cases do not refer to UNCITRAL arbitration rules. In a few, such as Iran-Poland, Iran-Belarus, Iran-Lebanon, Iran-Austria and Iran-Italy there is a provision on the governance of UNCITRAL.[147] The *ad hoc* arbitration tribunal should follow UNCITRAL arbitration rules in its procedure. In other Iranian BITs, however, there is no provision regarding the governing rules of the *ad hoc* arbitration tribunal. In this case, as Article 12 Paragraph Six of Iran-China BIT stipulates "the ad hoc tribunal shall determine its own procedure and the place of arbitration." [148] In other words, in these *ad hoc* arbitration tribunals, the arbitrators design the governing procedure rules.[149]

145. AUSTRIA-IRAN BIT, *supra* note 135.

146. Atai, *supra* note 62, at 142-43.

147. *Agreement on the Reciprocal Promotion and Protection of Investments, Iran-Leb., October 28, 1997*, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1654; *e.g.*, Paragraph B of Article 8 of Iran-Italy BIT ("b) an *ad hoc* Arbitral Tribunal, in compliance with the arbitration rules of the UN Commission on the International Trade Law (UNCITRAL); the host Contracting Party undertakes hereby to accept the reference to said arbitration."); *Agreement on the Reciprocal Promotion and Protection of Investments, Belr.-Iran, July 14, 1995*, http://investmentpolicyhub.unctad.org/Download/TreatyFile/302; *see* AUSTRIA-IRAN BIT, *supra* note 135.

148. *Agreement on Reciprocal Promotion and Protection of Investment, China-Iran*, June 22, 2000, *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/744 (last visited Mar. 3, 2014).

149. RESIMAN ET AL., *supra* note 93, at 435-43 (arguing Sapphire Int'l Petroleum v National Iranian Oil Co. 35 I.L.R 136 (1936) is an example of this type of *ad hoc* arbitration tribunal).

III. *COMBATTING SANCTIONS*

A. *The Nature of International Economic Sanctions*

International sanctions are a reality in international affairs and can be traced back to ancient Greece.[150] Economic Sanctions aim to discontinue the economic benefits, which a specific country is receiving from its foreign trade. Economic sanctions serve as an essential foreign policy tool to alter the behavior of a targeted state. Imposition of international sanctions is the most important form of countermeasures in international law for punishing a wrongdoing state. Since the collapse of the bipolar system, the world has witnessed a significant growth in economic sanctions, partially due to the unprecedented inter-connectedness of today's economy, which has facilitated the imposition of economic sanctions.[151]

Yet, there is an inherent conflict in the theory of economic sanctions. Scholars have attempted to justify it based on the theory of 'outcasting'.[152] International actors boycott a wrongdoing actor until it decides to change its behavior. However, the theory of economic outcasting remains at conflict with the mainstream perspectives on international dynamics and relations. The theory behind economic sanction is at odds from liberalism that endorses economic engagement as a principal means for conflict resolution.[153] Boycotting a state would likely result in aggravation of conflict since a downturn of economic factors weakens the middle class base required for pressure on states. On the other hand, following realism, another

150. KERN ALEXANDER, ECONOMIC SANCTIONS: LAW & POLICY 8 (2009) ("Athens, imposed economic sanctions in 432 BC when Pericles issued the Megarian import embargo against Greek city-states which has refused to join the Athenian-led Delian League during Peloponnesian War.").

151. P. EDWARD HALEY, STRATEGIES OF DOMINANCE: THE MISDIRECTION OF U.S. FOREIGN POLICY 5 (2006) ("American primacy gave the United States unprecedented freedom of action and brought coercive diplomacy and economic sanctions into the paradigm with much greater frequency . . . .").

152. Oona A. Hathaway & Scott J Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L. J. 252, 302 (2011-2012). Oona Hathaway and Scott Shapiro argue that international law is law because it enforces its obligations through outcasting: "very little of international law meets the Modern State Conception of international law—very little (if any) of it is enforced through brute physical force deployed by an institution enforcing its own rules. But what is interesting is not so much what international law is not, but what it is. And that is law that operates almost entirely through outcasting and external enforcement." *Id.*

153. JOHN MACMILLIAN, ON LIBERAL PEACE: DEMOCRACY, WAR AND THE INTERNATIONAL ORDER 114-24 (1998).

major paradigm of international relations, economic sanctions would not end in favorable results since sanctions eliminate cooperation by isolating the wrongdoer. Recurrent and long-tem interactions between states foster a rational-based cooperation even among hostile states, according to realism.[154] Following this logic, isolation of states reduces interaction between states and dis-incentivizes the isolated state to reciprocate. This eliminates the possibility of cooperation, a matter, which is in conflict with the end goal of economic, sanctions: to compel the targeted state to cooperate. Finally, from a constructivism standpoint, isolation would result in deprivation from international society norms. Constructivist paradigm emphasizes on the non-physical and ideational aspects of international relations.[155] Evidently isolation of a specific state prevents it from adopting or adhering to any of the shared values of international community. In short, it is not clear whether economic sanctions exert desired impact on targeted states and fulfill its promises. As shown, theoretically, economic outcasting suffers from internal incoherence.[156]

In the Iran case, the new deal has been cherished as a successful case of economic sanctions that brought a "rogue state" to the serious negotiation talks.[157] It is hard to measure the effectiveness of economic sanctions. Some studies find it to be an effective way of changing the behavior of states, if properly implemented.[158] Some do

154. ROBERT M. AXELROD, THE EVOLUTION OF COOPERATION 60-63 (1984). Axelrod offers an elaborate explanation of how cooperation merge in an international setting in which anarchy is the constitute logic. His question is under what conditions cooperation emerges in a world with no central authority and rationalist state-actors. In his seminal work he uses the prisoner dilemma game to show that long-term interaction would foster and stabilize cooperation. He refers to the "live-and-let-live system" of World War I, to show that even in times of war, long-term interaction would eventuate in some levels of cooperation. *See id.*

155. Constructivists endeavor to infuse the development of social sciences into the traditional rigid literature of international relations, Vendulka Kubalkova et al., *Constructing Constructivism*, *in* INTERNATIONAL RELATIONS IN A CONSTRUCTED WORLD 3, 36-38 (1998).

156. *See generally* Farshad Ghodoosi, *The Sanctions Theory: A Frail Paradigm for International Law?* (on file with the author).

157. Jim Sciutto, *Senators Propose New Iran Sanctions Bill: White House Opposed*, CNN (Dec. 19, 2013), http://www.cnn.com/2013/12/19/politics/iran-sanctions-senate/. For instance, Robert Mendez, a New Jersey Democrat Senator, declared "current sanctions brought Iran to the negotiating table." That was the reasoning behind his bi-partisan proposal to step up the level of pressure on Iran through enacting further economic sanctions. *See id.*

158. *See generally* GARY CLYDE HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED (2009).

not.[159] Iran's case is no exception. It is very hard to gauge the effectiveness of economic sanctions in Iran's case.

Yet, recent rhetoric has centered on the fact that economic sanctions have been working and that the change in Iran's behavior came as a result of crippling economic sanctions. However, before one can conclude such a general statement, it is helpful to look at following facts:

1. Sanctions showed their strongest teeth from 2010 onwards. A web of economic sanctions imposed by the UN, the US and the EU aimed to strangle the Iranian economy, provoked social unrests and halted the Iranian Government's enrichment activity.[160] The Iranian economy suffered tremendously as a result of sanctions. The Rial, the Iranian currency, lost almost 200% of its value.[161] The sale of oil also dropped from 2.5 million barrels per day in 2011 to 1 million barrels per day in 2013.[162] Yet, there is little evidence showing that the Iranian government suffered as result of these sanctions.[163] As a Rentier State,[164] those with special privileges continued to import and

159. *See generally* ERNEST H. PREEG, FEELING GOOD OR DOING GOOD WITH SANCTIONS: UNILATERAL ECONOMIC SANCTIONS AND THE U.S. NATIONAL INTEREST (1999).

160. Nader Habibi, *The Iranian Economy in the Shadow of Sanctions*, *in* IRAN AND THE GLOBAL ECONOMY: PETRO POPULISM, ISLAM AND ECONOMIC SANCTIONS 172, 172-74 (Parvin Alizadeh & Hassan Hakimian eds., 2014).

161. Steven Plaut, *The Collapse of Iran's Rial*, GATESTONE INSTITUTE (Feb. 21, 2013, 5:00 AM), http://www.gatestoneinstitute.org/3597/iran-rial-collpase.

162. *See Sanctions*, IRAN MATTERS: BEST ANALYSIS AND FACTS ON THE IRANIAN NUCLEAR CHALLENGE FROM HARVARD'S BELFER CENTER, *available at* http://iranmatters.belfercenter.org/sanctions (last visited Mar. 3, 2014) (providing a concise review of the impact of economic sanctions on Iran's economy).

163. *See, e.g.*, Oren Dorell, *Iran Nuclear Sanctions Hurt the Middle Class, not Guards*, USA TODAY (Nov. 17, 2011), http://usatoday30.usatoday.com/news/world/story/2011-11-17/iran-nuclear-sanctions-backfire/51275666/1; Beheshteh Farshneshani, *In Iran, Sanctions Hurt the Wrong People*, THE N.Y. TIMES (Jan. 22, 2014), http://www.nytimes.com/roomfordebate/2013/11/19/sanctions-successes-and-failures/in-iran-sanctions-hurt-the-wrong-people; Jamal Abdi & Trita Parsi, *Opinion: Sanctions Against Iran Hurt the People, Not the Regime*, NEWSDAY (Aug. 5, 2012), http://www.newsday.com/opinion/oped/sanctions-against-iran-hurt-the-people-not-the-regime-opinion-1.3881126; Eskandar Sadeghi-Boroujerdi & Muhammad Sahimi, *The Sanctions Aren't Working*, FOREIGN POLICY (July 5, 2012), *available a*t http://www.foreignpolicy.com/articles/2012/07/05/the_sanctions_aren_t_working.

164. "Rentier States are defined here as those countries that receive on a regular basis substantial mounts [sic] of external rent. External rents are in turn defined as rentals paid by foreign individuals, concerns or governments to individuals, concerns or governments of a given country…a moment's reflection will reveal that oil revenues received by the governments of the oil exporting countries can also be external rents…the governments of the oil exporting countries in the Middle East benefit from differential and monopolistic rents that arise from higher productivity of the Middle Eastern oilfields and price fixing practices of the oil companies." Hossein Mahdavi, *The Patterns and Problems of Economic Development in*

export from a black market, this time even without any strong competitors from the Iranian domestic market.

2. Since the Iranian Revolution in 1979, there have been several periods of social unrest,[165] the last of which followed the June 2009 election.[166] As far as analyses show, none of these social unrests had a strong economic motive behind them: the Reformist Movement of 1997-2001 has political goals including promotion of democracy, rule of law as well as establishing a robust civil society.[167] During student protests in 1999 the main request was political in nature too, i.e. request for freedom.[168] In 2009, the crowd gathered in the streets because of their objection to the result of the election.[169] However, no major social unrests have been reported since the 2010 implementation of "crippling sanctions."[170]

3. Economic sanctions also seem to be ineffective in halting nuclear enrichment activity of the Iranian Government. With 190 centrifuges before the sanctions, Iran extended its program to 19000 centrifuges following the 2010 sanctions.[171] It seems that the sanctions came nowhere close to crippling the enrichment activity of the Iranian government.

Rentier States: The Case of Iran, *in* STUDIES IN THE ECONOMIC HISTORY OF THE MIDDLE EAST: FROM THE RISE OF ISLAM TO THE PRESENT DAY 428, 428-29 (M.A. Cook ed., 1970) (footnote omitted).

165. *See generally* SIMIN FADAEE, SOCIAL MOVEMENTS IN IRAN: ENVIRONMENTALISM AND CIVIL SOCIETY (2012).

166. *See, e.g.*, Nazila Fathi & Michael Slackman, *Iran Stepping Up Effort to Quell Election Protest*, THE N.Y. TIMES (June 24, 2009), *available at* http://www.nytimes.com/2009/06/25/world/middleeast/25iran.html?_r=0; *Timeline: Iran's Post Eleciton Protests,* FIN. TIMES (June 11, 2010), *available at* http://www.ft.com/intl/cms/s/0/533d966e-755a-11df-a7e2-00144feabdc0.html#axzz3GN4X6ujT.

167. MAJID MOHAMMADI, JUDICIAL REFORM AND REORGANIZATION IN 20TH CENTURY IRAN: STATE-BUILDING, MODERNIZATION AND ISLAMICIZATION 184 (2008).

168. *Student Protests Shake Iran's Government*, THE N.Y. TIMES (July 11, 1999), http://www.nytimes.com/1999/07/11/world/student-protests-shake-iran-s-government.html.

169. Robert F. Worth & Nazila Fathi, *Protests Flare in Tehran as Opposition Disputes Vote*, THE N.Y. TIMES (June 13, 2009), http://www.nytimes.com/2009/06/14/world/middleeast/14iran.html?pagewanted=all&_r=0.

170. Akbar Ganji, *US Crippling Sanctions Against Iran: A New Wave of Anti-Americanism (Part I)*, HUFFINGTON POST (Sept. 3, 2013), http://www.huffingtonpost.com/akbar-ganji/us-crippling-sanctions-ag_b_3860933.html.

171. *See Iran's Nuclear Timetable*, IRAN WATCH: TRACKING IRAN'S UNCONVENTIONAL WEAPON CAPABILITIES (Feb. 21, 2014), *available at* http://www.iranwatch.org/our-publications/articles-reports/irans-nuclear-timetable (providing a quick overview of progress of Iran's nuclear program).

4. Long before the recent stringent sanctions, Western countries had a better deal with Iran in 2003: total suspension of enrichment activity, not for 6 months but indefinitely (*see* Tehran Declaration).[172] There was no discussion of the "right to enrichment" either. It was simply a better deal from the Western countries perspective.[173] After almost 10 years, with crippling sanctions in place, Iran is not suspending its entire enrichment,[174] and also in one reading, its "right to enrichment" is actually implicitly recognized.[175] After all, the comprehensive deal-to-come should "involve[] a mutually defined (uranium) enrichment program."[176]

This Section aimed to show that economic sanctions do not enjoy having a well-founded theoretical base. In Iran's case also there are serious doubts as to whether economic sanctions resulted in the desired outcome.

B. *International Sanctions Imposed on Iran*

In addition to some major legal shortcomings in the Iranian legal system, the sanctions imposed by the UN Security Council, European Union, and US Congress has complicated the investment in Iran even further. The increasing sanctions on Iran have mainly been due to it controversial nuclear program.[177] These sanctions are so broad and far-reaching that they might even cover minor transactions related to personal property located in Iran.[178] US sanctions on Iran apply to all

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172. *See Statement by the Iranian Government and Visiting EU Foreign Ministers*, INT'L ATOMIC ENERGY AGENCY (Oct. 21, 2003), http://www.iaea.org/newscenter/focus/iaeairan/statement_iran21102003.shtml. In 2003, a nuclear agreement reached between Iran and three European countries, *i.e.*, England, France, and Germany. In a trip to Tehran they signed a deal with Iran in which Iran pledged to suspend its nuclear enrichment, which it did. *Id.*

173. *See* Trita Parsi, *No, Sanctions Didn't Force Iran to Make a Deal*, FOREIGN POLICY (May 14, 2014), *available at* http://www.foreignpolicy.com/articles/2014/05/14/sanctions_did_not_force_iran_to_make_a_deal_nuclear_enrichment.

174. *See id.*

175. Mark Fitzpatrick, *Assessing the Iranian Nuclear Deal*, THE INT'L INSTITUTE FOR STRATEGIC STUD. (Feb. 3, 2014), http://www.iiss.org/en/events/events/archive/2014-0f13/february-e91c/assessing-the-iranian-nuclear-deal-076e.

176. Preamble, *Joint Plan of Action* (Nov. 24, 2013), *available at* http://eeas.europa.eu/statements/docs/2013/131124_03_en.pdf.

177. A brief history of Iran's Sanctions can be found at the Iran Matters website from Harvard's Belfer Center. *See Sanctions*, IRAN MATTERS: BEST ANALYSIS AND FACTS ON THE IRANIAN NUCLEAR CHALLENGE, *available at* http://iranmatters.belfercenter.org/sanctions (last visited Mar. 3, 2014).

178. Iranian Transactions Regulations, 31 C.F.R. § 560.204 (2012).

"560.206 Prohibited trade-related transactions with Iran; goods, technology, or services.

US persons and entities even abroad.[179] The violation of sanctions will have severe penalties including up to twenty years in prison and up to US$1,000,000 in fines.[180]

The United Nation Security Council has passed multiple resolutions regarding Iran's nuclear program. In 2006, resolution number 1696 basically urged Iran to conform to the Nuclear Proliferation Treaty and re-engage itself with the international community.[181] This resolution demands Iran to "suspend all enrichment-related and reprocessing activities, including research and development."[182] It expresses its intention to take further measures in the case of non-compliance to persuade Iran to change its behavior. Again in December 2006, the Security Council passed another resolution concerning Iran's nuclear program (Resolution number 1737).[183] This Resolution prevents supply, sale, and transfer of "all items, materials, equipment, goods, and technology which could contribute to Iran's enrichment-related, reprocessing and heavy water-related activities" of Iran.[184] This broad provision does not specify the criteria or the goods that might be employed in Iran's nuclear activities. Therefore, the decisions regarding the types of goods, which fall under this resolution, could be subjective. Paragraph

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(a) Except as otherwise authorized pursuant to this part, and notwithstanding any contract entered into or any license or permit granted prior to May 7, 1995, no United States person, wherever located, may engage in any transaction or dealing in or related to:

(1) Goods or services of Iranian origin or owned or controlled by the Government of Iran; or

(2) Goods, technology, or services for exportation, re-exportation, sale or supply, directly or indirectly, to Iran or the Government of Iran.

(b) For purposes of paragraph (a) of this section, the term transaction or dealing includes but is not limited to purchasing, selling, transporting, swapping, brokering, approving, financing, facilitating, or guaranteeing." *Id.*

179. Iran and Libya Sanctions Act of 1996, Pub. L. No. 104-172, § 14, 110 Stat. 1541 (codified as amended at 50 U.S.C. § 1701 note) ("(18) United States person. The term 'United States person' means "(A) a natural person who is a citizen of the United States or who owes permanent allegiance to the United States; and (B) a corporation or other legal entity which is organized under the laws of the United States, any State or territory thereof, or the District of Columbia, if natural persons described in subparagraph (A) own, directly or indirectly, more than 50 percent of the outstanding capital stock or other beneficial interest in such legal entity. ").

180. *An Overview of Office of Foreign Assets Control Regulations Involving Sanctions against Iran*, U.S. DEPT. OF THE TREASURY, http://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran.txt (last visited Mar. 3, 2014).

181. *See* S.C. Res. 1696, ¶ 2 U.N. Doc S/RES/1696 (July 31, 2006).

182. *Id*.

183. S.C. Res. 1737, ¶ 3, U.N. Doc S/RES/1737 (Dec. 27, 2006).

184. *Id*.

Twelve talks about the freeze of funds, assets and economic resources, which provide support to Iran's proliferation. An exception to this provision is Paragraph Fifteen, which declares, "measures in Paragraph Twelve shall not prevent a designated person or entity from making payment due under a contract entered into prior to the listing of such person or entity".[185] Even in this case, the contract should concern the materials, goods and assistance to Iran's enrichment activities.

Resolution 1747 (2007) does not entail significant general sanctions. It requests a report from the Director General of the IAEA (International Atomic Energy Agency) to make decisions regarding the implementation of further sanctions.[186] For the first time, it explicitly names entities that are involved in nuclear or ballistic missile activities.[187] The resolution promises many incentives including "improve[ement] of Iran's access to the international economy, market and capital" upon Iran's change of behavior in its nuclear program.[188] In Resolution 1803 (2008), the United Nation Security Council expands the measures in Resolution 1737 (2006) to more entities enumerated in the Annexes of the Resolution.[189] From paragraphs nine to thirteen, it also calls upon all states, to "exercise vigilance" for "public provided financial support for trade with Iran."[190] This includes exports, financial services and other pertinent services. Yet, this is a request for caution so that support and investment do not "contribut[e] to the proliferation of sensitive nuclear activities."[191] The latest resolution dates back to 2010 (Resolution number 1929).[192] It confirms that Iran has failed to comply with the requirement of IAEA.[193] It asks the states to require their nationals and legal entities to exercise full vigilance when it comes to "doing business" with Iran.[194] Furthermore, it calls upon states "to take appropriate measures that prohibit financial institutions"[195] to open offices and subsidiaries or banking account in

185. *Id*. ¶ 15.
186. S.C. Res. 1747, ¶ 12, U.N. Doc S/RES/1747 (Mar. 24, 2007).
187. *Id.* at Annex 1.
188. *Id*.
189. *See* S.C. Res. 1803, Annex I, II, III U.N. Doc S/RES/1803 (Mar. 3, 2008).
190. *Id.* ¶¶ 9-13.
191. S.C. Res. 1803, ¶¶ 9-13 U.N. Doc S/RES/1803 (Mar. 3, 2008).
192. *See* S.C. Res. 1929, U.N. Doc S/RES/1929 (June 9, 2010).
193. *Id*. ¶ 1.
194. *Id.* ¶ 22.
195. *Id*. ¶ 24.

Iran if they have information that these activities will contribute to Iran's proliferation-sensitive nuclear activities.[196] This Resolution establishes a 'Panel of Experts' to monitor the implementation of measures mentioned in Resolutions 1737 (2006), 1747 (2007), 1803 (2008).[197]

The US Congress also passed multiple acts concerning Iran's sanctions. From the Carter presidency until the Obama administration, sanctions have become increasingly all encompassing.[198] Both imports to and exports from Iran have become extremely legally restrictive.[199] Dealing in Iranian-origin goods by a US person is in violation of US sanctions.[200] Imports from Iran are limited to cases such as gifts valued at $100.[201] Exports to Iran, in the form of goods or services, are also banned.[202] Any new investment in any form including funds and assets are prohibited.[203] In certain cases, OFAC (Office of Foreign Asset Control) may issue a license for a limited period of time for a certain transaction.[204] However, it seems that this license might be issued for minor and personal-related investment.[205] If even, under these sanctions, the US citizen knows or has reason to know such items are intended specifically for supply, transshipment, or re-expropriation to Iran, then he is subject to these sanctions as well.[206]

As it is obvious, all the sanctions have made it extremely hard for countries to invest in Iran. The sanctions have made direct

196. S.C. Res. 1929, ¶¶ 21-24 U.N. Doc S/RES/1929 (June 9, 2010).

197. *Id*. ¶ 29.

198. Year by year the US sanctions expanded on Iran. *See* Jason Starr & Heila Ighani, *Timeline of U.S. Sanctions*, UNITED STATES INSTITUTE FOR PEACE: THE IRAN PRIMER, *available at* http://iranprimer.usip.org/resource/timeline-us-sanctions .

199. Trade Sanctions Reform and Export Enhancement Act of 2000, Pub. L. No. 106-387, §7207, 114 Stat. 1549 (2000).

200. *See* Iranian Transactions Regulations: Iranian-Origin Goods or Services; Goods or Services Owned or Controlled by The Government of Iran, 31 C.F.R. § 560.306 (1999).

201. *See* Iranian Transactions Regulations, 31 C.F.R. § 560.506 (1999).

202. *Id*. § 560.204

203. *Id*. § 560.207.

204. Licenses can be issued for exports, financial dealings with Iran, transactions as well as for humanitarian causes. *See An Overview of O.F.A.C. Regulations involving Sanctions against Iran*, DEP'T OF THE U.S. TREASURY (Jan. 23, 2013), http://www.treasury.gov/resource-center/sanctions/Programs/Documents/iran.pdf.

205. *Id*.

206. *Id*.

investment in Iran almost impossible (even though Iran is in dire need of foreign investment, especially in its energy sector).[207]

The European Union is a latecomer in the area of international sanctions in general and in the case of Iran as well.[208] The European Union realizes that the only major foreign policy tool it holds is economic pressure.[209] The European Union mainly enacts regulations based on the UN Security Council resolutions.[210] The main reason for this is that the EU desires to avoid any inconsistencies as to the interpretation given to the Security Council resolution by its individual members.[211] Furthermore, it is a faster process to implement Security Council resolutions via the EU legislative body.[212]

Western European Countries, in contract to the US, favored diplomacy and negotiation for a significant amount of time. In 2007, the first signs of standoff emerged.[213] In a joint statement in 2007, China, France, Germany, Russia, and the United Kingdom showed serious concern over Iran's nuclear program and agreed to finalize a text for a third UN sanction.[214] In April of 2007, the Council Regulation No 423/2007 was passed to provide a measure to implement the UN Security Council 1737 (2006).[215] In its annexes, the Regulation declares the prohibited goods and lists persons and

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207. Andrew Tochia, *Iran Hopes for End of Sanctions Boom but Investors Still Wary*, REUTERS (June 25, 2014), http://www.reuters.com/article/2014/06/25/us-iran-investment-analysis-idUSKBN0F018820140625.

208. *See* Michael Brzoska, *The Role of Sanctions in Non-Proliferation* in ARMS CONTROL, *in* THE 21ST CENTURY: BETWEEN COERCION AND COOPERATION 123, 132 (Oliver Meier & Christopher Daase eds., 2013) ("The EU is a new actor in the field of sanctions."). For long, EU preferred to simply support the UN Sanctions in forms of EU regulations. *See id*. However, under the pressure of the United States, EU started to implement regional sanctions against Iran from March 2007 onwards. *See id*.

209. Anthonius W. de Vries & Hadewych Hazelzet, *The EU as a New Actor on the Sanctions Scene*, *in* INTERNATIONAL SANCTIONS: BETWEEN WORDS AND WARS IN THE GLOBAL SYSTEM 95, 95 (Peter Wallensteen et al. eds., 2005).

210. *See* Brzoska, *supra* note 208.

211. *See* de Vries & Hazelzet, *supra* note 209, at 96.

212. *Id.* at 96.

213. Brzoska, *supra* note 208.

214. *Joint Statement on Iran Sanctions, China-Fr.-Ger.-Russ.-U.K-U.S.* (Sept. 28, 2007), *available at* http://www.iranwatch.org/sites/default/files/eu-p6jointstatementoniran-092807.pdf.

215. Council Regulation 423/2007, 2007 O.C. (L 103), *available at* http://trade.ec.europa.eu/doclib/docs/2007/april/tradoc_134553.pdf (concerning restrictive measures against Iran).

entities subject to sanctions.[216] Subsequently, the European Council updated and amended the regulation and expanded the list of goods and entities in the annexes.[217] A few entities, including banks started to fight back against the EU sanctions resulting in 30 cases in EU's General Court.[218] Recently, the largest bank in Iran convinced the Court to order its removal from the list.[219] The General Court agreed with *Bank Saderat* because there was not sufficient evidence proving the involvement of *Bank Saderat* with Iran's nuclear program.[220]

In sum, Iran is subject to sanctions at three levels: US sanctions, which are the oldest of the three, UN sanctions, and EU sanctions (which is basically an implementation of UN sanctions). Each level of sanctions poses different and new challenges for arbitral tribunals.

C. *Sanctions as Justification for Withdrawal*

As discussed earlier, the Islamic Republic of Iran is currently the target of the toughest sanctions since the Islamic Revolution.[221] Many multinational companies that mainly invested in the oil and gas section have withdrawn their businesses due to the sanctions.[222] It seems that Iran has not yet initiated any litigation invoking the arbitration clause in the bilateral investment treaties. Nevertheless, the question is whether the Security Council, the EU, and the US sanctions can exempt companies from fulfilling their obligations.

It is critical to distinguish between the national and international sanctions. In our context, both domestic legislation and the Security Council Resolutions affect the issue of investment in Iran. The current trend believes that the principal governing legal

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216. *See id*. at Annex II, III, IV.

217. *Restrict Measures (Sanctions) in Force*, EUROPEAN UNION (Feb. 9, 2014), *available at* http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf (providing an updated list of sanctioned entities and individuals).

218. ANTHONY H. CORDESMAN ET AL., IRAN: SANCTIONS, ENERGY, ARMS CONTROL, AND REGIME CHANGE 45-47 (2014).

219. *See EU Court Rules for Second Time Against Iran Bank Sanctions*, REUTERS (Feb. 6, 2013), http://www.reuters.com/article/2013/02/06/us-iran-sanctions-eu-idUSBRE91514220130206.

220. *Id*.

221. *See Timeline of U.S. Sanctions*, *supra* note 198.

222. *See Energy Firms to Quit Iran to Comply with US Sanctions*, BBC (Sept. 30, 2010), http://www.bbc.com/news/world-us-canada-11448952.

order of investment disputes is international law.[223] In international law, there are certain norms, so-called *jus cogens,* which are non-derogable and can trump other conflicting treaties.[224] Some scholars posit that *jus cogens* norms are similar to mandatory rules in investment disputes and are obligatory.[225] Moreover, the Security Council Resolutions are binding on member states regardless of other treaty obligations countries might have undertaken.[226] Therefore, if, for example, the Security Council declares a resolution sanctioning an individual's assets because he/she is funding piracy, the host state in which she invested should seize her assets regardless of its BIT provisions.[227]

Conceptually, *jus cogens* norms are clearly laid out in the Vienna Convention.[228] Practically, however, it is not obvious which norms fall under its category. As Reisman points out, "the only *jus cogens* upon which the drafters of the Vienna Convention could agree was the prohibition of the use of force in Article 2(4) of the UN Charter."[229] Hence, resolutions concerning Iran's nuclear program and the ensuing embargo hardly constitute any *jus cogens* norm, which companies can resort to in the case of a breach.[230] On the other hand,

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223. *See* Ole Spiermann, *Applicable Law*, in THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 89, 102-07 (Peter Muchlinski ed., 2008).

224. Vienna Convention, *supra* note 75, art. 53. "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id.*

225. Donald Francis Donovan, *Investment Treaty Arbitration, in* MANDATORY RULES IN INTERNATIONAL ARBITRATION 275, 278-79 (George A. Bermann et al. eds., 2011).

226. U.N. Charter art. 103. Article 103 of the UN Charter provides: "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." *Id.*

227. Donovan, *supra* note 225.

228. *See* Vienna Convention, *supra* note 75, at art. 53. ("A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.").

229. W. Michael Resiman, *Report: Law, International Public Policy (So-called) and Arbitral Choice in International Commercial Arbitration*, 13 ICCA CONGRESS SERIES 849, 855 (2007).

230. Several international law scholars and tribunals have been wary of separating *jus cogens* and Security Council Resolutions so that the resolutions remain subject to *jus cogens*

however, pursuant to Article 103 of the UN Charter, any inconsistent treaty with the UN Charter is considered annulled.[231] The Security Council resolutions are issued under the authorization of Chapter Seven of the UN Charter and possibly enjoy the same status as the UN Charter.[232] Thus, obligations arising out of the UN Charter, especially those essential for the peace and security of the world (Chapter Seven), are binding on all states.[233]

In the context of Iran's foreign investment, for instance, a company has to withdraw from performing its contractual obligation upon knowledge that its business contributes technology to Iran's heavy water-related activities.[234] The company can invoke Resolution number 1737 of the UN Security Council, which prohibits transfer of technology that could contribute to Iran's enrichment-related activities.[235] On the other hand, however, invoking EU or US sanctions, which are broader in scope, does not provide sufficient grounds for a company to discontinue its contractual obligations with Iran. Invoking US and EU sanctions is similar to invoking internal laws for justification of breach. As discussed earlier, neither party can resort to conflicting internal laws for the breach of a contract.[236]

D. *Arbitral Review of Sanctions*

Probably, the most important question for an arbitral tribunal adjudicating an investment dispute involving sanctions would be the extent of the reviewability of the sanctions. In other words, the issue is whether an arbitral tribunal can assess and review international sanctions. The United Nations Charter has strong language when dealing with obligations arising under Security Council decisions.

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norms. MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 184-86 (1999); STUFYAN DROUBI, RESISTING UNITED NATIONS SECURITY COUNCIL RESOLUTIONS 34-38 (2014); Erika De Wet, *Jus Cogens and Obligations Erga Omnes*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 541, 54-48 (2013).

231. U.N. Charter art. 103.

232. *See* ARTHUR WATTS & MICHAEL WOOD, THE INTERNATIONAL LAW COMMISSION 1999-2009: VOLUME IV: TREATIES, FINAL DRAFT ARTICLES, AND OTHER MATERIALS 749 (2011) (footnote omitted) ("Even if the primacy of Security Council decisions under Article 103 is not expressly spelled out in the Charter, it has been widely accepted in practice as well as in doctrine.").

233. *Id*.

234. S.C. Res. 1737, U.N., *supra* note 183, ¶ 3.

235. *Id*.

236. *See supra* notes 69-73 and accompanying text.

Article 25 declares, "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".[237] Article 103 also states "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[238]

The precedents in international tribunals, however, demonstrate more flexibility when dealing with Security Council decisions. Several decisions of International Court of Justice (ICJ) and European Court of Justice (ECJ) judgments suggest that limited review is allowable in international courts.[239]

The Security Council passed many resolutions entailing different levels of sanctions especially after the Cold War.[240] This raised an issue as to whether sanctions ratified by the Security Council are reviewable by the ICJ. This was one of the issues in two ICJ cases, *Lockerbie* (1992) and *Case Concerning the Application of the Genocide Convention* (1993).[241] In the *Lockerbie* case, Libya claimed that the United States and the United Kingdom are not entitled to request extradition of the two accused Libyan citizens who were involved in the *Lockerbie* event.[242] The US and UK request was based on Resolutions 731, 748 (1992) and Resolution 883 (1993), demanding Libya to cooperate fully with the United Kingdom and the United States in order to eradicate international terrorism.[243] Libya's argument was that it did not have an extradition treaty with neither the United Kingdom nor the United States.[244] Libya also argued that pursuant to the 1971 Montreal Convention it has jurisdiction to try the

237. U.N. Charter art. 25.

238. U.N. Charter art. 103.

239. *See* BYERS, *supra* note 230; De Wet, *supra* note 230; DROUBI, *supra* note 230; *see also* Jose Alvarez, *Judging the Security Council*, AM. J. INT'L L. 1, 1-4 (1996).

240. *See* JEREMY MATAM FARRALL, UNITED NATIONS SANCTIONS AND THE RULE OF LAW 3 (2007).

241. Questions of Interpretation and Application of 1971 Montreal Convention arising from the Ariel Incident at Lockerbie (Libyan Arab Jamahiriya v. United States), Preliminary Objections, 1998 I.C.J. 115; Application of the Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43.

242. Questions of Interpretation and Application of 1971 Montreal Convention arising from the Ariel Incident at Lockerbie (Libyan Arab Jamahiriya v. United States), Preliminary Objections, 1998 I.C.J. 115, 128-29.

243. *Id*.

244. *Id*. at 130-31.

accused Libyan citizens.[245] The United Kingdom and the United States raised preliminary objections stating, *inter alia*, that the ICJ does not have jurisdiction to adjudicate because the relevant Security Council Resolution trump rights arising out of the Montreal Convention.[246] They invoked Articles 25 and 103 of the UN Charter as applicable provisions in the case.[247] The Court, however, upheld its jurisdiction because "Security Council Resolutions 748 (1992) and 883 (1993) were in fact adopted after the filing of the Application on 3 March 1992. In accordance with its established jurisprudence, if the Court had jurisdiction on that date, it continues to do so."[248] In other words, the Court did not accept the argument that Security Council Resolutions can supersede the international convention, as a *jus cogen* norm would under similar circumstances.

Judge Schwebel, who was the president of the court at the time, wrote a dissenting opinion. He posited that the court lacks the power to review the decisions of the Security Council and cannot "determine the existence of any threat to the peace, breach of the peace, or act of aggression and to decide upon responsive measures to be taken to maintain or restore international peace and security."[249] One of his main arguments was that the Security Council could not be a party to the proceeding, which "would run counter to fundamental juridical principles."[250]

In the *Case Concerning the Application of the Genocide Convention (Bosnia and Herzegovina)* the Court also addressed the issue of the reviewability of Security Council decisions vis-à-vis states' rights.[251] In this case, the issue was whether the Security Council Resolution dictating arms embargo on Bosnia is reviewable

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245. *Id*. at 12-13. ("The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (23 September 1971). Article 5 (2) declares that "Each Contracting State shall likewise take such measures as necessary to establish jurisdiction over offenses mentioned . . . in case where alleged offender is present in its territory ad it does not extradite him pursuant to Article 8 to any of the States mentioned."

246. Questions of Interpretation and Application of 1971 Montreal Convention arising from the Ariel Incident at Lockerbie (Libyan Arab Jamahiriya v. United States), Preliminary Objections, 1998 I.C.J. 115, 10-11.

247. *Id*. at 17-18.

248. *Id.*

249. *Lockerbie* (Libyan Arab Jamahiriya v. United States), 1998 I.C.J. 155, 68-69 (Schwebel, Pres., dissenting).

250. *Id.* at 61.

251. Application of the Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 63.

considering the fact that the resolution has a potentially negative impact on Bosnia's right to self-defense.[252] The Court declared that the right to self-defense should not be impaired by the Security Council decision:

"That Security Council resolution 713 (1991), imposing a weapons embargo upon the former Yugoslavia, must be construed in a manner that shall not impair the inherent right of individual or collective self-defence of Bosnia and Herzegovina under the terms of United Nations Charter Article 51 and the rules of customary international law."[253]

These two cases clearly show that reviewability of international sanctions imposed by the Security Council is possible at least in a limited way. As John Dugard posits "total rejection of judicial review is unlikely to prevail."[254] There is also a recent highly controversial case that was litigated before the European Court of Justice. The so-called *Kadi* judgment was very provocative in the area of human rights and the Security Council decisions.[255] It involves a Security Council Decision, which identifies Kadi as one of the supporters of Al-Qaeda and, henceforth, subject to the imposed sanctions. The decision was followed by several Security Council Resolutions ordering the freeze of assets of individuals and entities associated with Al-Qaeda as determined by the Sanction Committee of the Security Council.[256] Following the decision of the Sanctions Committee, the Council of Europe adopted Regulation 881/2002 containing a list of individuals and entities including Kadi and the Al Barakaat International Foundation.[257] Kadi disputed the appearance of his name and his company on the sanctions list and brought a case in the Court of First Instance to challenge the regulation.[258] Mr. Kadi argued, *inter alia*, that his right to judicial review, his right to property and the principle of proportionality were violated in the

252. *Id*.

253. Application of Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugoslavia), Provisional Measures, 1993 I.C.J. 3, 6 (Apr. 8, 1993).

254. John Dugard, *Judicial Review of Sanctions*, *in* UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 85 (Vera Gowlland-Debbas ed., 2001).

255. Eur. Comm'n and Others v. Yassin Abdullah Kadi, Joined Cases C-584/10 P. C-593/10 P & C-595/10 P, [2008] ECR I–6351.

256. TERRORISM: COMMENTARY ON SECURITY DOCUMENTS, VOL 122: U.N. RESPONSE TO AL QAEDA DEVELOPMENTS THROUGH 2011 13, 15 (Kristen Boon et al. eds., 2012).

257. *Id*.

258. Eur. Comm'n and Others v. Yassin Abdullah Kadi, [2008] ECR I–6351 ¶ 46.

case.[259] The case also dealt with the supremacy of the Security Council Resolution over the EU law. The Court accepted the argument of Mr. Kadi with regards to the infringement of his fundamental rights. It concluded that the court should ensure the review of observance of the fundamental rights as stipulated by the European Community.[260] In a subtle way, the Court argued that reviewing the Community measure based on the Security Council measure did not amount to challenging the content and the primacy of the resolution itself.[261] The European Community, according to the Court, should take into account the object and purpose of the decisions of the Security Council but the implementation is still within the scope of domestic legal systems.[262] Pursuant to the Court's reasoning, the mere fact that a regulation is based on the Security Council Resolution does not immune it to review especially from the human rights perspective.[263]

It was not until the post-Cold War era that the international courts had to seriously grapple with the issue of the reviewability of international sanctions.[264] Yet, the decisions discussed above demonstrate that international courts have limited power to review

259. *Id.* ¶ 49.

260. *Id.* ¶ 326.

261. *Id.* "It must however be noted that the Charter of the United Nations does not impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order." *Id.* ¶ 298.

262. *Id.* ¶¶ 228, 256, 283, 284.

263. *Id.* European Court of Human Rights did not recognize the power of revieability in the context of international peacekeeping operations in *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* cases. The court found that the court should not interfere with the fulfillment of the restoration of peace measures as established and conducted by the United Nation Security Council (Behrami and Behrami v. France Application No. 71412/01 and Saramati v. France, Germany And Norway Application No. 78166/01 ¶ 149). However, the ECrHR distinguishes between this case and an earlier case, *Bosphorus*. The Court declares unlike the present case, there was a link between the action and the respondent state. Henceforth, in the *Bosphorus* case, the Court found the claim admissible as to the seizure of assets even though it was EC Council Regulation based on US Security Council: "The Court did not therefore consider that any question arose as to its competence, notably ratione personae, vis-à-vis the respondent State despite the fact that the source of the impugned seizure was an EC Council Regulation which, in turn, applied a UNSC Resolution." *Id.* ¶ 151.

264. FARRALL, *supra* note 240.

international sanctions imposed by the UN Security Council.[265] The Courts' judgments confirm that the very nature of the restoration of peace and order in international relations has been delegated to the Security Council and is not subject to review. However, the implementation of the sanctions especially vis-à-vis fundamental rights is reviewable.[266]

The question is whether an arbitral tribunal, constituted pursuant to bilateral investment treaties or other documents, can review international sanctions. Different types of international sanctions can be viewed in the following table:

	Individual Sanctions	General Sanctions
National Sanctions	Broad Review (no justification for breach)	Broad Review (no justification for breach)
International Sanctions (UN Security Council)	Limited Review (correspondence of regulation imposing sanctions)	Broad Review (legality of sanctions as applied)

This table briefly describes the different scenarios when international sanctions enter into the scene of international arbitration and the potential outcomes. The first relevant distinction is whether the source of an international sanction at question is internal or international. As discussed in the previous section,[267] invoking internal laws is generally not a valid argument in the context of international disputes. In other words, one party cannot resort to its

265. Questions of Interpretation and Application of 1971 Montreal Convention arising from the Ariel Incident at Lockerbie (Libyan Arab Jamahiriya v. United States), Preliminary Objections, 1998 I.C.J. 115; Application of the Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43.

266. *Id*.; Alvarez, *supra* note 239; BYERS, *supra* note 230; DROUBI, *supra* note 230; De Wet, *supra* note 230.

267. *See supra* Part III.C.

internal laws for justification of its breach of international obligations.[268]

The status of international sanctions imposed by the Security Council is more challenging. If the Security Council specifically names an individual, a company or an entity, the arbitral tribunal does not have much room to review. In this case, similar to the *Kadi* and *Bosphorus* cases, the arbitral tribunal could review the internal regulation ratified pursuant to the UN Security Council Resolution. The review in this scenario is restricted to ensuring that the internal regulation corresponds fully with the Security Council Resolution. On the other hand, if the Security Council Resolution has a broad language, as commonly is the case, the arbitral tribunal could hear arguments regarding the application of the Resolution. Borrowing from US Constitutional language, in this scenario the arbitral tribunal can review the UN sanctions "as applied" in the case before it. Evidently it does not have the power to rule on the "legality" (similar to "constitutionality" in US constitutional law) of international sanctions.[269]

Expanding the power of the reviewability of arbitral tribunals will ensure greater compliance as well as fairness when dealing with international sanctions. Even minor power of reviewability will create stronger legitimacy and, henceforth, more effectiveness. Jose Alvarez, who is among a few scholars who discussed this issue in the context of ICJ, stipulates the same possibility for arbitral tribunals. [270] In a footnote, he posits that the private right of actions should not be barred solely based on the existence of a Security Council decision.[271] The underlying policy is that "termination of such private rights of

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268. *See generally* George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1 (2012) (explaining that internal laws can have some effects on "gateway" issues such as consent to international arbitration).

269. Euclid v. Ambler Realty, 272 U.S. 365, 395 (1926) ("It is true that when, if ever, the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, including those of the appellee, or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable."). *See generally* Nectow v. City of Cambridge, 277 U.S. 183 (1928).

270. Alvarez, *supra* note 239 (contrasting two approaches to judicial review of Security Council decisions: realpolitik approach which argues that UN Charter is not a constitution and Security Council Decisions are not reviewable under any circumstance. The other side of the spectrum is those who are inspired by *Marbury v. Madison* decision and believe in the judicial reviewability over Security Council action. He concludes that judicial review is evolving in international law and reaching different modes of judicial review is possible).

271. *Id*. at 12.

action goes beyond protecting the Council's supremacy…absent remedial action by the Council, individual may have no remedy even when a state has applied the sanction too broadly, to the detriment of contractual or other rights."[272]

CONCLUSION

International investment law grew significantly since the end of the Cold War, as did the international sanctions regimes designed to change the behavior of recalcitrant states. Yet, inevitably, the overreaching scope of both regimes resulted in a clash between the two, creating unprecedented legal challenges. There has not been thorough research on the interplay of these two regimes. This piece is the first attempt to analyze this complex matter employing Iran an example. Iran has been subject to a web of economic sanctions, unparalleled in history. Yet, there is a new revival of interest in investment in Iran due to the recent thaw between Iran and the Western Countries.

The new nuclear deal with Iran has refreshed many thorny legal issues pertaining to investing in Iran. The complex regime of sanctions, Iran's unfavorable constitutional provisions and numerous investment treaties are all at play when it comes to investment in Iran. The effect of economic sanctions on potential investments in Iran poses the most complex challenge to the business community. On the other hand, hurdles related to Iran's constitution worry companies as to lack of sufficient protection. Conversely, a multitude of modern investment treaties Iran has concluded brings about international responsibility to the Iranian Government to provide protection for investment. These three dimensions (i.e. economic sanctions, constitutional hurdles, investment treaties) have created unprecedented questions, which this article tried to answer. By referring to Iran's example, this article specifically placed the clash between investment and economic sanctions under careful examination.

There is no doubt that economic sanctions, along with domestic legal obstacles in Iran's legal system, are major hindrances to foreign investment in Iran. One should bear in mind, however, that in the past two decades the Islamic Republic of Iran has enjoyed tremendous investment in its gas and oil industry as well as others. These

272. *Id*.

investments primarily occurred in the period when Iran was seeking reconciliation with the West from 1997 to 2003.[273] In the meantime, Iran concluded many bilateral investment treaties with different countries. These BITs, especially arbitration clauses, are becoming more important due to increasing interest in investment in Iran.

The BITs Iran has signed with different countries are generally progressive. All of them have arbitration clauses, which can adjudicate the cases based on either ICC rules or *ad hoc* rules they design.[274] Iran is also a member of the New York Convention, meaning that arbitral awards will be enforceable in Iran.[275] Furthermore, national laws in Iran recognize arbitral awards as an alternative method for local courts upon parties' consent.[276] All BITs have stipulated compensation in cases of nationalization and expropriation.[277] Henceforth, although Iranian BITs are not as comprehensive as, for example, US BITs, they include all of the major elements.[278] If at any point Iran becomes a member of the ICSID, pursuant to some of its BITs, the potential disputes could be referred to the ICSID as well.[279]

Generally speaking, the BITs Iran has concluded in the period between 1995 to 2007 will sooner or later be the platform from which arbitration cases arise. In other words, these BITs furnish a convenient alternative for Iran's national courts. Furthermore, it seems that neither the conflicting domestic national provisions of Iran nor the majority of sanctions will affect potential arbitration proceedings. The international sanctions, including UN Sanctions, do not elevate to the status of *jus cogens* norms, and thus are not preemptory.[280] On the other hand, the precedents in international courts including the International Court of Justice, European Court of Justice, and European Court of Human rights demonstrate the possibility of review of international sanctions. US and EU sanctions

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273. Energy and the Iranian Economy: Hearing Before the J. Econ. Comm., 109th Cong. 48 (2006).

274. *Id.*; *see also supra* Part I.D.

275. New York Convention, *supra* note 70.

276. *See* Qanuni Davari Tejari Beinolmelal, *supra* note 69; Aini Dadrasii Madani, *supra* note 69.

277. The Foreign Investment Promotion and Protection Act of 2005, art. 9 (Iran); Iranian Model BIT, art. 6.

278. *Supra* Part 1.B.

279. Atai, *supra* note 62.

280. *See* Alvarez, *supra* note 239; BYERS, *supra* note 230; De Wet, *supra* note 230; DROUBI, *supra* note 230.

cannot trump international obligations of companies and other states.[281] UN Sanctions are also subject to arbitral review to the extent that they address the issues of applicability and implementation of the sanctions.[282] The arbitral tribunals can review international sanctions in line with the object and purpose of bilateral or multilateral investment treaties. The mere fact of *prima facie* existence and the applicability of the UN sanctions do not preclude arbitral tribunals to review and adjudicate the relevance and implementation of the UN sanctions.

It is highly unlikely that the business community will hold from investing in Iran considering the new rapprochement, despite Obama's warning about sanctions. The companies might enter Iran through shell companies in order to avoid being directly subject to US sanctions. On the other hand, Iran has become part of the international investment regime, which, as described, to a great extent might attenuate the effect of economic sanctions. The international investment regime might serve as a platform for an unintended consequence, and that is combatting economic sanctions.

281. *Supra* notes 230, 239 and accompanying text.
282. *Supra* notes 230, 239 and accompanying text.