Protection of Human Rights in the International Investment Regime: A Critical Survey with a view into the Iranian Foreign Investment Experience

By

Elahe Falahi

A thesis submitted to the Graduate Program in Law

in conformity with the requirements for the

Degree of Master of Laws

Queen's University

Kingston, Ontario, Canada

October 2021

Abstract

Considering that the main purpose of attracting foreign investment is the economic development of the host states, as well as profit of the foreign investors, this purpose cannot be achieved, at least not over the long term, by infringing the human rights of the host states. The Islamic Republic of Iran is a large country with rich natural resources which require foreign investment to develop its resources. On this basis, exploring the economic development of the Iranian state, as an investment host state, and reflection of human rights protection in the investment law regime of Iran, have significant importance. For this aim, this research examines the provisions of the Iranian effective BITs and applicable domestic human rights laws on foreign investors to find out to what extent the existing Iranian investment law regime protects the human rights law obligations of the Iranian state vis-à-vis its obligations toward foreign investors. Iran, as a respondent state in investment arbitration, could take human rights arguments whether for justifying measures undertaken in compliance with international or domestic human rights law, or for invoking violations of its domestic human rights law by the foreign investors. This research finds out that refining the pro-investor approach of Iran's current treaties will effectively address the tensions between human rights and investment norms. Drafting a new model agreement with human rights consideration and renegotiating the existing investment treaties with counterparties—the major trading partners in priority—could help the Iranian state to establish an equilibrium between protection of foreign investors and its regulatory power for protecting the human rights of the Iranian citizens, and finally achieve its desired economic development in the long-term.

Table of Contents

Chapter 1

Introduction

Section 1: Background

When the pharaohs of Egypt mined tin to forge bronze far from their shores, or when the Phoenicians invested in ancient Israel, there was no recognizable global law to govern theses cross-border investments.[1] Not only was self-interest the first priority of the ancient citizens and their states, but also they felt that foreigners were their enemies, depriving them of access to natural resources. With the industrial revolution, the European states and the US started to control other countries as their colonies (formally or in effect), the protection of investors' rights and their access to their own justice, especially in colonies, become a vital necessity for the colonizers. Nevertheless, until the Communist Revolution in Russia in 1917, neither state practice nor the "teachings of the most qualified publicists" paid any special attention to rules protecting foreign investment.[2] It was only later, during the time of decolonization and thereafter, that a frank diplomatic exchange occurred requiring prompt, adequate and effective compensation of foreign investors.[3]

For regulating investment relations between host states, home states and foreign investors, International Investment Agreements (IIAs) were designed. IIAs, whether in the form of Bilateral Investment Treaties (BITs), regional investment treaties, or chapters of integrated trade and investment agreements, are instruments through which protection and promotion of foreign investments are created.[4] IIAs, generally, contain standards of treatment of foreign investors,

---

[1] Jose E Alvarez, *The Public International Law Regime Governing International Investment*, (Netherlands: Hague Academy of International Law, 2011) at 13.

[2] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment law*, (UK: Oxford University Press, 2008) at 11.

[3] *Ibid* at 13.

[4] Howard Mann, "International Investment Agreements, Business and Human Rights: Key Issues and Opportunities" (2008) at 3, online (pdf): *International Institute for Sustainable Development* <www.iisd.org/index.php/system/files/publications/iia_business_human_rights.pdf> [/web/20210404115643/https://www.iisd.org/index.php/system/files/publications/iia_business_human_rights.pdf].

including full protection and security, fair and equitable treatment, national treatment, most-favoured-nation treatment, the right to transfer funds, and perhaps most importantly—because it makes all of the other rights enforceable—the right of investors to directly claim against their host states. It is not in question that foreign investment inflows potentially involve substantial benefits for states. Increased levels of capital in the economy, the initiation of new infrastructure projects, increased employment levels, increased economic growth rates, and introduction of new and more efficient technologies all generate wealth and increase standards of living.[5] But, the vast majority of BITs contain no obligation for foreign investors to take into account the public or social impacts of their investments. Furthermore, if host states act to protect the public interest, investors can challenge host states' regulatory measures affecting their investments by raising an investment claim against the relevant state in arbitration.

A broad conflict may arise when a host state's obligations under an investment treaty restricts or interferes with the requisite policy space needed by states to comply with their obligations under human rights law. This may occur where a host state delays or abandons adoption of new regulations designed to protect the health of host state citizens due to the threat of investor-state claims. The generation of BITs now in force have resulted in tensions between human rights law obligations of states and their investment law obligations. While arguments based on human rights norms have steadily increased in investor-state arbitrations, until recently the language codified in BITs had no express provision to deal with this tension, and arbitral tribunals were reluctant to

[5] Kate Miles, *The Origins of International Investment Law, Empire, Environment and the Safeguarding of Capital*, (UK: Cambridge University Press, 2013) at 178-9.

accept respondent states' justifications in investor-state arbitrations for compliance with their human rights obligations.[6]

This tension led to a new approach seen in recently-enacted investment treaties. Provisions of recently negotiated and published treaties show that investment treaties are undergoing a transformation away from a sole and exclusive purpose of promoting and protecting foreign investors toward a balanced environment that takes into account both human rights obligations of states and their investment obligations. (For the purpose of this thesis, a "balanced" treaty or treaty provision is one that considers the regulatory interest of host state in areas such as the environment, labour rights, and public health, while maintaining protection for foreign investors from potential depredations by host states). In short, IIA reform has made significant progress in recent years.[7]

However, international investment law and human rights law are still perceived by a number of scholars and practitioners as two separate branches of international law with no substantial overlap. According to some authors, the current system of investment arbitration seems to be leaning toward separation of human rights and investor's rights like oil and water that do not mix.[8] They argue that superficial acknowledgement of human rights in an investment dispute context is unlikely to produce a harmonized set of rights and obligations.[9] For similar reasons, commentators

---

[6] Jesse Coleman, Kaitlin Y Cordes, & Lise Johnson, "Human Rights Law and the Investment Treaty Regime" in Surya Deva & David Birchall, eds, *Research Handbook on Human Rights and Business* (UK: Edward Elgar Publishing Limited, 2020) 290 at 295-7.

[7] UNCTAD, "UNCTAD's Reform Package for the International Investment Regime" (2018) at 70, online (pdf): *UNCTAD* <investmentpolicy.unctad.org/publications/1190/unctad-s-reform-package-for-the-international-investment-regime-2018-edition-> [web.archive.org/web/20210902164006/https://investmentpolicy.unctad.org/publications/1190/unctad-s-reform-package-for-the-international-investment-regime-2018-edition].

[8] Mehmet Toral & Thomas Schultz, "The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations" in Michael Waibel *et al*, eds, *The Backlash against Investment Arbitration Perceptions and Reality* (Netherlands: Kluwer Law International, 2010) 577 at 577-602. Bruno Simma, "Foreign Investment Arbitration: A Place for Human Rights?" 2011 60:3 ICLQ 573 at 573.

[9] Bruno Simma & Theodore Kill, "Harmonizing Investment Protection and International Human Rights: First Steps Towards A Methodology" in Christina Binder *et al*, eds, *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press, 2009) 678 at 678-707.

associated with investment arbitration practice often argue that international human rights may play no more than an ancillary role in the settlement of investor-state disputes.[10] In recent years, however, scholarly discussions of the interfaces between investment law and human rights law have blossomed.[11] Some scholars argue that no conflicts exist between obligations arising from international human rights law and investment law as these obligations can be interpreted harmoniously.[12] Some such scholars propose reforms that would include host states' international human rights commitments in the due diligence review to be conducted jointly by the investor with the host state. They suggest a "human rights audit" to survey the host state's human rights treaty commitments and domestic methods for implementing these commitments.[13]

This thesis will focus on the particular case of Iran. I intend to analyze the interactions between human rights obligations and investment obligations of the Iranian state under its effective BITs (Iran's IIAs have been concluded in the form of a BIT) and taking into account its domestic human rights laws. My intention is to find out the routes that the Iranian state could employ to solve the challenges arising out of foreign investors' claims regarding its regulatory measures undertaken to achieve public policy objectives. The ultimate goal of this thesis is to find out and suggest methods and steps to align the Iranian investment treaty regime with human rights law and strengthen the human rights narrative on BITs. Also, I intend to draw lessons from Iran's experiences and situations for other resource-rich developing countries.

[10] Mann, *supra* note 3 at 25-29.
[11] Pierre-Marie Dupuy, "Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law" in Pierre-Marie Dupuy, Francesco Francioni, & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) 45 at 45-62.
[12] Susan Karamanian, "Human Rights Dimensions of Investment Law" in Erika de Wet & Jure Vidmar, eds, *Hierarchy in International Law The Place of Human Rights* (UK: Oxford University Press, 2012) 236 at 236- 271.
[13] Simma, *supra* note 8 at 580.

The main reason that this research focuses on Iran is that Iran is a large developing country with rich natural resources with a highly-educated population and a religious government that is tackling the sanction regime imposed upon it. Iran's domestic technology does not suffice for its development requirements. Although Iran is believed to hold the world's second-largest natural gas reserves, it lacks the technology and know-how to exploit resources on its own. Sanctions have limited foreign investors' participation in Iran's development plans. Major trading partners of Iran are limited to China, Russia, Turkey, Korea, India, the UAE, Germany, and France. Faced with the US and international sanctions, Iran lacks access to foreign capital and expertise to develop the country. In this respect, Iran views its limited partners, particularly China, as a strong economic partner and a crucial provider of the investment and technology necessary for Iran's economic development and modernization.[14] Nonetheless, Chinese companies are not likely to invest huge amounts while vulnerable to sanctions. The US and international sanctions against Iran have prevented Iran from helping other countries meet their demand for energy and the broader pressure campaign on Iran has had an impact on partners' commercial interests to withdraw their operations from Iran.[15] Dependence on other countries' technologies, the impact of sanctions, and the limited number of foreign investors may make the Iranian state reluctant to enforce human rights law under its investment regime. Thus, this thesis intends to find out to what extent the Iranian investment law regime protects the human rights of Iranian citizens.

[14] Scott Harold & Alireza Nader, "China and Iran Economic, Political, and Military Relations" (2012) at 5, online (pdf): *Center for Middle East Public Policy* <www.rand.org/pubs/occasional_papers/OP351.html> [web.archive.org/web/20210916232033/https://www.rand.org/pubs/occasional_papers/OP351.html].

[15] Will Green & Taylore Roth, "China-Iran Relations: A Limited but Enduring Strategic Partnership" (2021) at 12, online (pdf): *U.S.-China Economic and Security Review Commission Staff Research Report* <www.uscc.gov/sites/default/files/2021-06/China-Iran_Relations.pdf> [web.archive.org/web/20210916233116/https://www.uscc.gov/sites/default/files/2021-06/China-Iran_Relations.pdf].

Very little has been written about Iran's international investment law practice or obligations. That majority of the few studies that have been published focus on the promotion of investment in Iran (as Iran being a capital-importing country), seeking solutions in order to improve the legal, contractual, financial and technical aspects of investment projects in Iran.[16] These commentaries are concerned primarily with the investment law obligations of Iran, rather than its human rights obligations in the context of foreign investment. To fill this gap in the literature, I intend to examine the interactions between human rights and investment obligations of the Iranian state and find out whether the Iranian investment regime is fit to balance the different obligations of the state, and suggest avenues for improvement.

Section 2: Thesis Questions, Methodology, and Structure

The tension between human rights obligations and investment obligations of an investment host state occurs when the relevant host state or its agencies adopt a regulatory measure in favour of its public policy objective which impacts an investor's rights under an investment treaty. If a foreign investor claims against the host state for violation of its rights under the investment treaty, an arbitral tribunal may order the state to pay damages, even though the regulatory measure at issue was made in compliance with the host state's human rights obligations.

[16] M S Labbani Motlagh, *International Investment Law*, (Iran: Mizan Legal Foundation, 2019). Abdolhossein Shiravi, *Oil and Gas Law*, (Iran, Mizan Legal Foundation, 2018). Behrooz Alishiri, *A Comparative Study of Foreign Investment Promotion and Protection Act of Iran and other Selected Countries*, (Iran: Tehran Chamber of Commerce, Industries, Mines and Agriculture, 2017). Ali Hatami & Esmaeil Karimiyan, *Foreign Investment Law in Light of Investment Act and Contracts*, (Iran: Teesa Publication, 2015). Hossein Piran, *The Law of International Investment*, (Iran: Ganj Danesh Publication, 2010). Behrooz Akhlaghi, "Improvement of Buy Back Contracts in Iran's Oil Industry" (2018) 3:1 Journal of Legal Research. Ardeshir Atai, "Iranian Bilateral Investment Treaties: Substantive Principles and Standards" (2013) 14:3 The Journal of World Investment and Trade. Abdolhossein Shiravi & Fatemeh Amin Majad, "Foreign Investment in Oil and Gas Upstream" (2013) 9:2 Journal of Private Law. Mostafa Elsan, "Legal Aspects of Transferring Technology via Foreign Investment" (2006) 9:1 Journal of Legal Research. Maryam Ebrahimi "Foreign Investment in Context of BOT Contracts and the Iranian Foreign Investment Promotion and Protection Act" (2006) 9:1 Journal of Legal Research. Behrooz Akhlaghi, "Iranian investment in future; An overview of the causes and obstacles to progress" (2000) 47:0 Journal of Law and Political Science of University of Tehran.

Under international human rights instruments, which have been ratified by Iran and codified into domestic law, states have obligations to respect, protect, and fulfill the human rights of individuals. These obligations include enacting effective legislative measures to restrain corporations (including foreign investors) from violating or denying the human rights of individuals. The state's failure to comply with its obligations could lead to liability under international human rights law treaties, even as its compliance could lead to liability under IIAs.

Part 1: Questions

As stated in Section 1 above, the primary aim of this thesis is to investigate the tensions between human rights law and investment law in the Iranian investment law regime. Accordingly, the main research questions of this thesis (which are descriptive) are:

- Do the Iranian BITs contain provisions to reduce or manage the tension between human rights obligations and investment obligations of the Iranian state?
- Do the Iranian domestic human rights laws that are applicable to foreign investments oblige foreign investors to protect labour rights, the environment, and public health of Iranians?
- What are the available routes under existing international and domestic law to resolve tensions between investment and human rights obligations of the Iranian state?

The question which embodies the ultimate goal of this thesis (which is prescriptive) is:

- How can the Iranian state best align the its investment treaty regime with its international human rights law obligations?

Part 2: Methodology

The methodology adopted to answer the above questions is doctrinal. I will focus on the provisions of the Iranian BITs to examine the interactions between investment law and human

rights law obligations under these treaties. The Iranian statutes and regulations that enact obligations of the Iranian state and foreign investors regarding labour rights, the environment, and public health will also be examined. Finally, I will analyse the interpretations and awards of investment arbitral tribunals and experiences and responses of other countries' multilateral and bilateral treaties to address interactions between international investment law and international human rights law.

Part 3: Structure

This thesis consists of 5 chapters.

Chapter 2 will examine human rights-related wording in the preambles and operative clauses of other countries' BITs and investment model agreements, in order to set a baseline to which to compare the provisions of Iranian BITs. The relevant awards of arbitral tribunals will be examined to realize the relations between these human rights issues to the kinds of claims and defenses that are raised in investor-state dispute settlement. This chapter will explore the extent to which the existing Iranian BITs protect the human rights law obligations of the Iranian state vis-à-vis its investment obligations.

Chapter 3 will deal with the regulatory and investigatory activities of the Iranian state and its agencies under labour, environmental, and public health laws and regulations in the Iranian foreign investment context. It will examine the relevant laws to explore the potential conflicts between investment obligations and domestic human rights obligations, which may lead to investors' claims against the state.

Chapter 4 of this thesis will examine the avenues that human rights arguments could enter into investment law regime of Iran: defenses Iran could invoke, by referring to the express terms of a BIT to avoid liability to foreign investors; defenses to liability under international human

rights law obligations of the Iranian state; and obligations of foreign investors to comply with domestic human rights laws of Iran, which could lead to non-liability for Iran in arbitrations launched by those investors, or alternatively ground counterclaims against those investors. For this examination, I will analyze arbitral tribunals' interpretations and decisions regarding the potential defenses and counterclaims of the Iranian state.

The findings of Chapters 2-4 will be employed in Chapter 5 to suggest methods and steps to align the Iranian investment treaty regime with human rights law and strengthen the human rights narrative on Iran's BITs. In parallel, I will draw lessons for other resource-rich developing nations from Iran's experiences and situations.

Section 3: An Introduction to Iran

Iran, officially the Islamic Republic of Iran, is located in Western Asia and is the second largest country in the Middle-East. Iran is bordered to the north by Turkey, Armenia, Azerbaijan, Turkmenistan and the Caspian Sea, to the east by Afghanistan and Pakistan, to the south by the Persian Gulf and the Gulf of Oman and to the west by Iraq. Iran was the earliest oil-producing country in the Middle East, with discoveries as early as the first years of the twentieth century.[17] Iran is a country with vast area of land and extremely rich natural resources and economic opportunities which stands as a major target for foreign investment. Iran's economic freedom score is 47.2, making its economy the 168th freest in the 2021 Index.[18] Traditionally, Iran has attracted

[17] N Nasrollahi Shahri, "The Petroleum Legal Framework of Iran: History, Trends and the Way Forward" (2010) 8:1 China and Eurasia Forum Quarterly at 111-112.

[18] See <www.heritage.org/index/country/iran> [web.archive.org/web/20210902181356/https://www.heritage.org/index/country/iran].

Chinese and Russian[19] investments, especially in the gas sector.[20] Currently, Germany, France, China, the UAE, Korea, India,[21] and Turkey dominate Iran's list of trading partners.

China is Iran's top trading partner and a top investor.[22] China's trade with Iran dates back to the ancient Silk Road in the first century BC. In recent years, the two countries have maintained bilateral economic and trade cooperation largely based on Iran's abundant natural resources and China's demand for oil. The biggest industry that China profits from in Iran is essentially oil and gas energy. China has also invested in Iran's energy, steel, petrochemical, transportation, power generation, and the auto industry. Today, China is Iran's largest trade partner and the major source of investment, although due to the US sanctions against Iran, the amount of trades between the two countries has experienced a sharp drop.[23]

China and Iran signed a 25-year strategic cooperation agreement, titled "Comprehensive Cooperation Agreement between the Islamic Republic of Iran and the People's Republic of China" in March 2021.[24] The agreement is just a framework and has no binding authority and does not

[19] For a long time, Russia was one of Iran's chief foreign partners. It shielded the Islamic Republic from harsh UN sanctions through its vote in the Security Council. But ties between Iran and Russia became severely strained after the Russian vote for UN Security Council Resolution 1929 in 2010. Russia appears to view Iran as a regional competitor rather than a true strategic partner. From Iran's perspective, the Russian leadership may be all too willing to trade Iran's interests in return for concessions from the United States. Harold & Nader, *supra* note 14 at 6.

[20] <www.objectif-import-export.fr/en/international-marketplaces/country/iran/country-risk-in-investment> [web.archive.org/web/20210902181611/https://www.objectif-import-export.fr/en/international-marketplaces/country/iran/country-risk-in-investment].

[21] India and Iran maintain cordial relations, but from Tehran's perspective, Indian interests are too closely aligned with those of the United States on important issues for New Delhi to support Tehran against Washington. Harold & Nader, *supra* note 14 at 6.

[22] Green & Roth, *supra* note 15 at 3.

[23] In 2019, bilateral trade between China and Iran amounted to US$23.2 billion, which was already a sharp drop of 34.5 percent from 2018. China Briefing, "China and Iran: Bilateral Trade Relationship and Future Outlook" (20 August 2021), online: *China Briefing* <www.china-briefing.com/news/china-and-iran-bilateral-trade-relationship-and-future-outlook/>[web.archive.org/web/20210917010559/https://www.china-briefing.com/news/china-and-iran-bilateral-trade-relationship-and-future-outlook/].

[24] This deal was reached on the 50th anniversary of the establishment of diplomatic relations between China and Iran. China Briefing, "The China-Iran 25 Year Cooperation Agreement: What is it and Should Investors be Encouraged?" (16 July 2021), online: *China Briefing* <www.china-briefing.com/news/the-china-iran-25-year-cooperation-agreement-what-is-it-and-should-regional-investors-traders-pay-attention/> [web.archive.org/web/20210917011246/https://www.china-briefing.com/news/the-china-iran-25-year-cooperation-agreement-what-is-it-and-should-regional-investors-traders-pay-attention/]

need to be approved by respective competent authorities. The text of the agreement has not yet emerged and is thought to involve the exchange of Iranian oil at a reduced price for 25 years in return for Chinese investing in Iran in diverse fields, including infrastructure, telecommunications networks, banking, hospitals, ports, and underground railways.[25] Chinese investment in infrastructure projects in Iran would assimilate Iran into the Belt and Road Initiative as a transit point between Asia, Europe, and the Middle East. In this respect, it is necessary to examine the interactions between human rights law and investment law obligations of the Iranian state to find out to what extent the Iranian state or its agencies could escape from liability toward foreign investors, including Chinese investors, when the state or its agencies regulate in favour of public policy objectives.

Part 1: An Introduction to Iranian Investment Regime

At the time of writing, the Government of Iran had signed 73 BITs, of which 58 were in force, 3 terminated, and 12 signed but not in force.[26] Iran's first BIT was signed with the Government of Germany in 1965 (Iran-Germany BIT 1965),[27] which was terminated and replaced with another investment treaty in 2002.[28] The last investment treaty signed was with the Government of Nicaragua, in 2019 (Iran-Nicaragua BIT).[29]

[25] *Ibid*.

[26] UNCTAD, "International Investment Agreements Navigator" (September 2021), online: *UNCTAD* <investmentpolicy.unctad.org/international-investment-agreements/countries/98/iran-islamic-republic-of> [web.archive.org/web/20210902181914/https://investmentpolicy.unctad.org/international-investment-agreements/countries/98/iran-islamic-republic-of].

[27] *Treaty between the Federal Republic of Germany and the Empire of Iran concerning the Promotion and Reciprocal Protection of Investments*, 11 November 1965 (06 May 1968).

[28] *Agreement between the Federal Republic of Germany and the Islamic Republic of Iran on Reciprocal Promotion and Protection of Investments*, 17 August 2002 (23 June 2005).

[29] *Agreement for the Promotion and Reciprocal Protection of Investments between the Government of the Republic of Nicaragua and the Government of Islamic Republic of Iran,* 10 August 2019.

Iran promulgated a Model BIT in 2001 (Iranian Model BIT (2001)). It is noteworthy that the Iranian Model BIT (2001) has not been reflected in recently signed BITs of Iran.[30] Other effective BITs have more detailed provisions than the Iranian Model BIT (2001).[31]

Iran adopted the Law for Attraction and Protection of Foreign Investment (LAPFI) in 1955, as its first foreign investment protection law. After the Islamic Revolution in 1979, the LAPFI was abolished and replaced with Foreign Investment Promotion and Protection Act (FIPPA), enacted in 2002. The main purpose of this Act is to ensure that foreign investors in Iran enjoy competitive and efficient incentives, in order to select Iran as a long-term investment platform in the dynamic global economy.

Part 2: Obligations Towards Foreign Investors

Host investment countries try to provide a favourable and safe investment context for investors by committing themselves to offer certain legal protections. The national treatment standard, which entitles foreign investors to receive treatment equal to domestic investors of the host state, is one of the core substantive obligations provided in IIAs. However, the Iranian Model BIT (2001) and some of the ratified Iranian BITs contain no national treatment standard.[32] For internal political and economic policy reasons, the Iranian state has been reluctant to grant the

[30] Reference is made to the Iran-Czechia BIT, Iran-Hungary BIT, Iran-Luxembourg BIT, Iran-Singapore BIT, Iran-Japan BIT, and Iran-Slovakia BIT.

[31] For example, based on article 6-2 of the Iranian Model BIT, "The amount of compensation shall be equivalent to the value of the investment immediately before the action of nationalization, confiscation or expropriation was taken." While the other BITs (Iran-Nicaragua BIT, Iran-Russia BIT, Iran-Cyprus BIT, and Iran-Qatar BIT) refer to "market value", "fair market value" and "real economic value" of investment. Or, the Iranian Model BIT contains no provision regarding the national treatment standard, while Iran-Germany BIT of 2002 (which was signed after the promulgation of the Iranian Model BIT) expressly refers to national treatment in article 3.1 and provides "Each Contracting Party shall accord to investors of the other Contracting Party and to their investments treatment no less favourable than that it accords to its own investors and their investments or to investors of any third country and their investments with respect to the management, operation, maintenance, use, enjoyment, sale and liquidation of an investment, whichever is more favourable to the investor."

[32] Iran-Malaysia BIT, Iran-Ukraine BIT, Iran-China BIT, Iran-Turkey BIT, and Iran-Qatar BIT are among the BITs that contain no provision regarding national treatment.

same advantages and concessions of national investors to foreign investors. Nevertheless, FIPPA recognizes the right of foreign investors to enjoy all the protections and facilities provided for domestic investors.[33] As the provisions of FIPPA apply to all foreign investments in Iran, foreign investors will enjoy the same rights and protections that Iranian investors benefit from regardless of whether there is an applicable BIT and what obligations it imposes.

The Iranian Model BIT (2001) and most of the BITs in effect have combined the fair and equitable treatment standard and the full protection and security standard into one clause. The Iranian Model BIT (2001) provides: "Investments of natural and legal persons of either Contracting Party effected within the territory of the other Contracting Party, shall receive the host Contracting Party's full legal protection and fair treatment not less favourable than that accorded to investors of any third state who are in a comparable situation."[34] The purpose of the fair and equitable treatment standard is to fill gaps that are left by the more specific standards to obtain the level of investor protection intended by the treaties.[35] On this basis, the criteria that investment arbitral tribunals have referred to for interpretation of this standard include meeting investors' legitimate expectations,[36] consistency and transparency,[37] stability and predictability,[38]

[33] Article 4 (a)(1) of the Implementing Regulation of FIPPA provides "Foreign Investors enjoy the same treatment as accorded to domestic investors."
[34] Article 4.1 of the Iranian Model BIT.
[35] Dolzer & Schreuer, *supra* note 2 at 122-3.
[36] There could be liability for breach of the fair and equitable standard in circumstances where the assurances made to the foreign investor both in the contract as well as in non-contractual documents, in the law of the host state and even possibly verbal communications of high officials of the state that give rise to legitimate expectations in the foreign investor. M Sornarajah, *The International Law on Foreign Investment*, 3rd ed (UK: Cambridge University Press, 2010) at 354.
[37] In *Metalclad v Mexico*, the absence of transparency in the rules applicable to the circumstances in which licenses were granted was said to violate the fair and equitable standard. *Ibid* at 350.
[38] In *Occidental v Ecuador*, the tribunal required stability of the legal and business framework as part of the fair and equitable standard. *Ibid* at 355.

compliance with contractual obligations,[39] procedural propriety and due process,[40] good faith,[41] and freedom from coercion and harassment.[42] Based on state practice, the general assumption is that "fair and equitable" must be considered a single and unified standard, such that there is no difference between "equitable" and "fair and equitable".[43] Consequently, the Iranian state is obliged to comply with the criteria of fair and equitable treatment in activities that relate to foreign investments.

Although the traditional understanding of the full protection and security standard was protection against various types of physical coercion or the threat of coercion, its contemporary meaning has extended to guarantees against infringements of investors' rights by the operation of laws and regulations of the host state.[44] The Iranian Model BIT (2001) and the Iranian BITs in effect all refer to this standard in parallel with "equitable treatment", to clarify that state will be liable if any of its measures violate this right of investors.

The next common standard of protection of foreign investments is the prohibition on illegal expropriations. In line with international standards, the Iranian Model BIT (2001) and its BITs in effect all prohibit expropriation except for a public purpose, in a non-discriminatory manner, with

[39] The tribunal in *SGS v Philippines* admitted the possibility that a violation of obligations under a contract may give rise to a claim for violation of fair and equitable treatment standard. Dolzer & Schreuer, *supra* note 2 at 141.
[40] In *Waste Management v Mexico*, the tribunal held that the standard of fair and equitable treatment is infringed when the conduct of the state involves a lack of due process leading to an outcome which offends judicial propriety. Sornarajah, *supra* note 36 at 358.
[41] Despite the resistance of states, arbitral tribunals have developed the fair and equitable standard in notions of good faith, even-handedness and justice. States and their agencies have resisted the idea that liability should be imposed and the regulatory powers of the state be stymied through the creation of doctrines that have no basis in the treaty itself or in the intention of the parties. *Ibid* at 356.
[42] In *Pope & Talbot v Canada*, a government regulatory authority had launched a verification review against the investor that was confrontational and aggressive. The tribunal held that this investigation was a violation of fair and equitable treatment. Dolzer & Schreuer, *supra* note 2 at 147.
[43] *Ibid* at 123.
[44] In *CME v Czech Republic*, the tribunal said that the host State is obliged to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued. *Ibid* at 149-152.

due process of law, and upon payment of prompt, adequate, and effective compensation based on the real value of the investment immediately before the expropriation. In addition, FIPPA forbids nationalizations and expropriations, unless conducted according to the same standards.[45]

Repatriation of capital and its profits from the host country into the investor's home country or a third country is one of the major business purposes of foreign investors. The Iranian Model BIT (2001) addresses the duty of the Iranian state, as the host state of the investment, to guarantee the investor's right to transfer the fruits of its investment abroad.[46] FIPPA has recognized this right under articles 13,[47] 14,[48] and 15.[49] Although the right to transfer profits is recognized under FIPPA, all such transfer of funds are subject to the payment of legal deductions (including taxes, dues, and statutory reserves) and approval of the Ministry of Finance. As Chapter 6 of the Implementing Regulation of FIPPA, which regulates repatriation of capital, has no provision regarding the approval of the Ministry of Finance, this approval is merely a formality rather than an authority for the Minister to refuse transfer of funds.

In short, and as will be discussed in more detail below, Iranian investment law recognizes the common standards of protection of foreign investment and obliges the Iranian state to protect

[45] Article 9 of FIPPA (under the "Repatriation and Transfer" title).

[46] Article 8 of the Iranian Model BIT (under the "Repatriation and Transfer" title) provides "1) Each Contracting Party shall, in accordance with its laws and regulations, permit in good faith the following transfers related to investments referred to in this Agreement, to be made freely and without delay out of its territory: (a) returns; (b) proceeds from the sale and/or liquidation of all or part of an investment; (c) royalties and fees related to transfer of technology agreement; (d) sums paid pursuant to Articles 6 and /or 7 of this Agreement; (e) loan installments related to an investment provided that they are paid out of such investment activities; (f) monthly salaries and wages received by the employees of an investor who have obtained in the territory of the host Contracting Party, the corresponding work permits related to that investments; (g) payments arising from a decision of the authority referred to in Article 12. 2) The above transfers shall be affected in a convertible currency and at the current rate of exchange in accordance with the exchange regulations prevailing on the date of transfer. 3. The investor and the host Contracting Party may agree otherwise on the mechanism of repatriation or transfers referred to in this Article."

[47] Article 13 of FIPPA refers to the transferability of the foreign capital and the accrued profits or the balance of capital remaining in the country.

[48] Article 14 of FIPPA is related to the dividends of foreign investment.

[49] Article 15 of FIPPA deals with revenues from contracts.

and respect the rights of foreign investors, if not through BIT text then through domestic legislation. For this reason, Iran is vulnerable to a finding that regulatory measures or other actions of the state or its agencies regarding the protection of labour rights, the environment, or public health could lead to violation of foreign investor's rights under an investment treaty. For this reason, Iran cannot avoid the confrontation between investor rights and human rights, and should plan accordingly to find ways to defend measures it takes in the public interest from curtailment through investor-state arbitration.

Chapter 2

Reflection of Human Rights Consideration in IIAs with a view into the Iranian Bilateral Investment Treaties

Introduction to Chapter 2

BITs, as the most numerous IIAs, protect and guarantee the rights of foreign investors in the investment host states. The pro-investor nature of most ratified BITs has led to tension between the human rights obligations of states, on the one hand, and their investment treaties obligations, on the other hand. Investment treaties do not prohibit states' ability to regulate, but they could act as an impediment which restrains host states from applying their regulatory powers or complying with their international human rights commitments. On this basis, in recent years states have added wording into their IIAs to balance the states' human rights obligations with their investment obligations. Such an approach to treaty drafting is intended to balance states' economic objectives with their other objectives, like protection of the environment and promotion of public health.

The international investment law policy elaborated by the European Union (EU) (in 2009) encouraged new formulations of old standards to respond to accusations articulated against international system of investment protection. The EU Minimum Platform on Investment, which was an internal document for negotiating the EU Free Trade Agreements (FTAs), served as a basis for negotiation of a number of FTAs between the EU and other countries. Its preliminary model indicated the general exceptions and articles targeting the avoidance of lowered environmental and social standards and laws concerning the protection of cultural diversity. In 2012, the European Commission considered that the principles that inspired the EU FTAs should also inspire a new EU investment policy. On this basis, the Commission suggested that future EU investment agreements should safeguard the "right to regulate" in the same manner as the EU FTAs.[50]

[50] Catharine Titi, "International Investment Law and the European Union: Towards a New Generation of International Investment Agreements" (2015) 26:3 EJIL 639 at 640-4.

In addition to EU investment agreements, human rights language has been placed in preambles and operative provisions of other countries' IIAs. As treaty preambles are often held to express the object and purpose of contracting parties, where human rights-related issues are mentioned in preambles, such wording implies that protection of foreign investment is not the sole object and purpose of the treaty, and contracting parties intend to achieve a benefit through such investments.

In addition to the preambles, in operative provisions of recently-negotiated IIAs, the customary international law concept of police powers is frequently invoked to balance rights and obligations of states. By referring to this right in IIAs, contracting parties demonstrate that the parties intend to follow their regulatory power to balance their sovereign right with their investment obligations. In addition to the right to regulate, negotiators of IIAs have excluded from the scope of expropriation or nationalization such regulatory measures of states as are taken in pursuit of their legitimate public policy objectives. In case a host state nationalizes the property of a foreign investor in the service of its public policies, the relevant state could escape liability towards that foreign investor by referring to the regulatory expropriation indicated in IIAs. General exceptions to liability are another space for entering human rights law into investment treaties. Exception provisions can limit the scope or applicability of substantive obligations or justify state interference in investment issues, or signify a willingness of the state to impair the foreign investment under prescribed circumstances.[51]

Some recent treaties refer to social responsibilities of foreign investors and require them to comply with the relevant standards. Social responsibility of corporations (Corporate Social Responsibility or CSR), including in the context of foreign investments, implies that corporations

[51] Barnali Choudhury, "Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements" (2011) 49:3 Colum J Transnat'l L 670 at 686-7.

respect the environment, public health, and other public interests in their conduct.[52] Although multinational corporations have no direct human rights obligations under international law and legal instruments impose no direct obligations on them, referring to such responsibility could have moral impact and act as guidelines for changing the law in the future.[53] Moreover, many investment treaties contain legality provisions which require foreign investors to comply with domestic laws of host states for their investments to be covered under the IIA. As human rights law is regulated mainly under the domestic laws of states, compliance with the laws of host states could open an avenue for human rights defenses in investment treaties. Although failing investor can still initiate a claim against host state, tribunals could order to lack of jurisdiction, inadmissibility of claims, or could give rise to a reduction in damage or counterclaim by host state. In addition, public or non-governmental organizations' participation in investment arbitration proceedings, through the submission of *amicus* briefs, could advance human rights law in the investment law regime.

As the Iranian investment law regime is the main subject matter of this thesis, this Chapter will explore extent to which the abovementioned human rights wording has been enacted into Iranian BITs. (Iran's IIAs have been concluded in the form of a BIT.) In this respect, human rights

[52] The European Commission defined the CSR as follow: "The actions of companies have significant impacts on the lives of citizens in the EU and around the world. Not just in terms of the products and services they offer or the jobs and opportunities they create, but also in terms of working conditions, human rights, health, the environment, innovation, education and training. For this reason, EU citizens rightly expect that companies understand their positive and negative impacts on society and the environment. And, therefore, prevent, manage and mitigate any negative impact that they may cause, including within their global supply chain. Living up to this duty is commonly known as 'corporate social responsibility' (CSR) or 'responsible business conduct' (RBC)." European Commission, "Corporate social responsibility & Responsible business conduct" (September 2021), online: *European Commission* <ec.europa.eu/growth/industry/sustainability/corporate-social-responsibility_en> [https://web.archive.org/web/20210917022106/https://ec.europa.eu/growth/industry/sustainability/corporate-social-responsibility_en].

[53] Eric De Brabandere & Maryse Hazelzet, "Corporate responsibility and human rights – Navigating between international, domestic and self-regulation" in Yannick Radi, ed, *Research Handbook on Human Rights and Investment* (UK: Edward Elgar Publishing Limited, 2018) 221 at 235-8.

wording of model investment agreements and bilateral and multilateral investment treaties of other countries will be examined to compare their provisions with the Iranian BITs. In addition, the relevant decisions of investment arbitration tribunals will be analyzed to realize the relations between these human rights issues to the kinds of claims and defenses that are raised in investor-state dispute settlement. By this comparison, I intend to find out to what extent the existing Iranian BITs protect the human rights law obligations of the Iranian state vis-à-vis its obligations toward foreign investors. On this basis, each section of this Chapter will analyze a different avenue for enacting human rights protections into the provisions of IIAs. In each section, I will first describe how human rights protections could be enshrined in that part of an IIA, and then describe the relevant provisions of Iranian BITs.

It is noteworthy that the few Iranian BITs that do contain human rights wording have all been concluded with European states. This may indicate that the concerns of the European Commission as to EU investment policy, and not any policy of Iran's government, have led to the insertion of human rights protections into the Iranian BITs with European states.[54] The absence of human rights consideration in the other Iranian BITs, even the most recent one, supports this argument.[55]

Section 1

Preambles of the IIAs

Preambular wording is an indication of treaties' object and purpose. It does not amount to substantive provisions and does not create rights or place obligations on state parties or investors. Under the rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties

[54] These BITs are concluded with Czechia, Hungary, Luxembourg, and Slovakia.

[55] The latest BIT of the Islamic Republic of Iran was concluded with the Government of Nicaragua, but has not entered into force at the time of writing this thesis.

(VCLT),[56] which normally apply to IIAs, tribunals must interpret treaty provisions "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", preambles and statements of objectives provide important interpretive tools in investor-state arbitration and contribute to the determination of context, object, and purpose of an investment treaty.[57]

A great number of tribunals have had recourse to preamble of treaties to elucidate the substantive content of investment protection obligations. They have done so by considering the object and purpose of the treaty as revealed in the preamble.[58] As an example, in *Siemens v Argentina*, the tribunal noted: "The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble."[59] Similarly, in *Saluka v Czech Republic*, the tribunal realized that "The "object and purpose" of the Treaty may be discerned from its title and preamble."[60] In the arbitrators' opinion, the wording of the preamble was a balanced statement attesting that the protection of foreign investment was not the sole aim of the treaty, although its overall aim was to encourage foreign investment and intensification of the economic relations of the parties. Based on this language, the tribunal concluded that an exaggerated interpretation in favour of protecting investment dissuades host states from admitting foreign investments and undermines the

[56] *Vienna Convention on the Law of Treaties*, 23 May 1969, article 31 (27 January 1980).
[57] Suzanne A Spears, "Making way for the public interest in international investment agreements" in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (UK: Cambridge University Press, 2011) 271 at 290.
[58] Zachary Douglas, *The International Law of Investment Claims,* (UK: Cambridge University Press, 2009) at 85.
[59] The tribunal, on the basis of the preambulatory language, concluded that "The intention of the parties is clear. It is to create favourable conditions for investments and to stimulate private initiative." *Siemens A.G. v The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, at para 81.
[60] In the preamble to the BIT, the Contracting Parties recognize that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties, and that fair and equitable treatment is desirable. *Saluka Investments BV v Czech Republic* (2006), UNCITRAL, Partial Award, 17 March 2006, at para 299.

intensification of economic relations of the contracting parties.[61] The following section examines the ways such language has been employed in IIA preambles.

Part 1

Human Rights Consideration in the Preambles of Modern IIAs

As mentioned above, one method for inserting human rights protections into investment agreements is to refer to human rights concerns in the preamble. As preambulatory clauses demonstrate the purpose and object of the contracting parties and the context of the treaty, they play an important role in the interpretation of the agreement.

Acknowledging host states' right to regulate in the preambles of investment treaties is an innovative approach seen in several recent IIAs. Some treaties contain a separate article regarding the contracting parties' right to regulate.[62] Numerous treaties expressly refer to the contracting parties' right to regulate in their preambles. For example, the preamble to the Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States (CETA)[63] and the Netherlands Model Investment Agreement (2019)[64] expressly refer to this right in their preambles. By employing such wording, the contracting parties of the IIAs expressly

[61] *Ibid* at para 300.

[62] See e.g. *Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the United Arab Emirates*, 15 March 2019, article 17. *Agreement between the Belgium-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments*, 2019, article 15.[63] *Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States*, 30 October 2016, (21 September 2017). The preamble of CETA provides "[..] the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives."

[63] *Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States*, 30 October 2016, (21 September 2017). The preamble of CETA provides "[..] the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives."

[64] The preamble to the Netherlands Model Investment Agreement provides "Considering that these objectives can be achieved without compromising the right of the Contracting Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment, public morals, labour rights, animal welfare, social or consumer protection or for prudential financial reasons." See *Agreement on Reciprocal Promotion and Protection of Investments between … and the Kingdom of the Netherlands*, 22 March 2019.

declare that they do not intend to give up their right to regulate. This language facilitates the interpretation of the object and purpose of the treaties to establish a balance between human rights obligations and investment obligations of states.

Furthermore, some investment treaty preambles refer expressly to a balance of rights and obligations of foreign investors and host states. The Slovakia-UAE BIT refers to the aim of the contracting parties "to secure an overall balance of rights and obligations between investors and the Host state".[65] The contracting states, through these phrases, demonstrate their desire to encourage tribunals to interpret the operative clauses of the investment treaties according to the aims and purposes indicated in the preamble.

The preambles also include references to CSR standards, by which governments encourage foreign investors to adhere to international standards of responsible investment and sometimes more specific codes of conduct.[66] The preamble to CETA expressly encourages the relevant enterprises "to respect internationally recognized guidelines and principles of corporate social responsibility, including Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises, and to pursue best practices of responsible business conduct."

Another example is the preamble of the US Model Bilateral Investment Treaty (US Model BIT (2012)), which expressly refers to the protection and promotion of internationally recognized labour rights.[67] Norway's Model Investment Agreement (Norway Model BIT (2015)) refers to the

[65] *Agreement between the Slovak Republic and the United Arab Emirates for the Promotion and Reciprocal Protection of Investments*, 22 September 2016 (05 February 2018).
[66] UNCTAD, "Investment Policy Framework for Sustainable Development" (2018) at 60, online (pdf): *UNCTAD* <unctad.org/system/files/official-document/diaepcb2015d5_en.pdf> [web.archive.org/web/20210907230359/https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf].
[67] *Treaty between the Government of the United States of America and the Government of [Country] concerning the Encouragement and Reciprocal Protection of Investment* 2012.

contracting parties' commitments under the United Nations Charter and the Universal Declaration of Human Rights and reaffirms the contracting parties' commitment to democracy, rule of law, human rights, and fundamental freedoms.[68] The Japan-UAE BIT refers to not-lowering standards in its preamble, stating that "these objectives can be achieved without relaxing health, safety and environmental measures of general application."[69] The preamble of the Japan-Morocco BIT not only expresses the contracting parties' right to regulate, but also refers to the conservation of living or non-living exhaustible natural resources.[70]

Undoubtedly, preambulatory wording expresses overall values and policy objectives for the treaty, rather than creating any particular right or obligation. Nevertheless, since investment arbitral tribunals interpret standards of treatment in light of the object and purpose of the treaties, specifying human rights protection or similar language in the preamble of the investment treaties helps to ensure that indeterminately-worded substantive treaty provisions will be interpreted in line with human rights goals.[71] In Part 2, below, the preambles of the Iranian BITs will be examined to find out whether they can reasonably be interpreted to establish human rights objectives and to realize balanced regulation of investment.

Part 2

Human rights Consideration in the Preambles of the Iranian BITs

The preamble of the Iranian Model BIT (2001) provides:

> "[..] Desiring to intensify economic cooperation to the mutual benefit of both States; Intending to utilize their economic resources and potential facilities in the area of investments as well as to create and maintain favourable conditions for investments of

[68] *Agreement between the Kingdom of Norway and […] for the Promotion and Protection of Investments* 2015.
[69] *Agreement between Japan and the United Arab Emirates for the Promotion and Protection of Investments*, 30 April 2018 (26 August 2020).
[70] *Agreement between Kingdom of Morocco and Japan for the Promotion and Protection of Investments*, 08 January 2020.
[71] Barnali Choudhury, "Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements" (2017) 38:2 U Pa J Int'l L 425 at 467.

the nationals of the Contracting Parties in each others' territory; Recognizing the need to promote and protect investments of nationals of the Contracting Parties in each others' territory."

The phrase "economic cooperation" (instead of "economic development") shows that the Iranian Model BIT (2001) does not pursue a balance between economic objectives and environmental, health or other public interest objectives.[72] Moreover, "the economic resources and potential facilities" of the parties should be utilized in favour of foreign investments and the parties have to create and maintain favourable conditions for foreign investors. Such pro-investor preambular wording will not aid tribunals to interpret the treaty in favour of the economic development of the Iranian state.

Among all the Iranian BITs, only four–all of them concluded with the European counterparties—refer to human rights issues in their preambles.[73] The Iran-Czechia BIT,[74] Iran-Hungary BIT,[75] and Iran-Luxembourg BIT[76] have the same language regarding economic

[72] As mentioned in Section 1 above, in *Saluka v Czech Republic*, the tribunal referred to the invocation of "economic development of contracting parties" in the preamble and concluded that the purpose of the treaty between the Kingdom of the Netherlands and the Czechia and Slovak Federal Republic was a balanced purpose that encompassed both encouraging foreign investment and improving economic development of the contracting parties.

[73] Examining the provisions of the Iranian BITs shows that only these four BITs contain any reference to human rights, and the other BITs of the Government of Iran are pro-investor in their preamble. The main reason for inserting human rights-related language in these BITs derives from an order of the European Parliament, which obliges the European states to include human rights protection in their investment treaties. The European Parliament, in the Paragraph 9 of its resolution of 6 April 2011 on the future European international investment policy, has urged the European Commission to develop the EU's investment strategy in a careful and coordinated manner drawing on the best practices of BITs and noted the divergence of content within Member State agreements and called on the European Commission to reconcile these divergences to provide a strong EU template for investment agreements, which would also be adjustable according to the level of development of the partner country. EC, *Sitting of Wednesday, 6 April 2011*, [2012] OJ, C 296 E at 9. <eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.CE.2012.296.01.0034.01.ENG&toc=OJ%3AC%3A2012%3A296E%3ATOC> [web.archive.org/web/20210909163340/https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.CE.2012.296.01.0034.01.ENG&toc=OJ%3AC%3A2012%3A296E%3ATOC].

[74] *Agreement between the Czech Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments*, 18 December 2017.

[75] *Agreement between the Government of Hungary and the Government of the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments*, 4 December 2017.

[76] *Agreement for the Promotion and Reciprocal Protection of Investments between Luxembourg and the Government of the Islamic Republic of Iran*, 14 February 2017.

prosperity, sustainable development, protection of health and safety, protection of the environment, promotion of consumer protection, and labour standards. The preambles of the Iran-Hungary BIT and Iran-Luxembourg BIT also contain references to the balance of rights and obligations between investors and the host states, as well as the Contracting Parties' right and obligation to regulate investment, while Iran-Czechia BIT makes no reference to these issues.

The other Iranian BIT that contains human rights wording in its preamble is the Iran-Slovakia BIT.[77] The preamble includes references to the protection of health and safety, labour rights, environment or sustainable development, the balance of rights and obligations between investors and host states, the right to regulate, and CSR standards. It should be noted that the preamble of Iran-Slovakia BIT also refers expressly to "the promotion and protection of internationally and domestically recognized labour rights", which has no precedent in the older Iranian BITs and is not repeated in the subsequent BITs. The remaining investment treaties of the Government of Iran have no human rights preambulatory language.[78] Their preambles contain the same wording as the Iranian Model BIT (2001) and focus on the protection and promotion of investment.[79]

As indicated above, such narrow wording implies that the operative provisions of the investment treaty should be interpreted in favour of the protection of foreign investment, and more generally that they prioritize economic policy goals above other policy goals. In one arbitration, the investment tribunal referred to the purpose of the applicable investment treaty as to "create

[77] *Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments*, 19 January 2016 (30 August 2017).

[78] Iran-Belarus BIT, Iran-China BIT, Iran-Turkey BIT, Iran-France BIT, Iran-Germany BIT, Iran-Georgia BIT, Iran-Russia BIT, and Iran-Nicaragua BIT have no human rights language.

[79] For instance, the preamble of Iran-China BIT expresses the intention of the parties "to create and maintain favorable conditions for investments of the investors of the Contracting Parties" and "the need to promote and protect investments of the investors".

and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other" and concluded that "it is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments".[80] Considering that the Iranian BITs contain similar language in their preambles, the interpretations of tribunals will likely tilt toward protecting the claims of investors.

As arbitral tribunals interpret investment treaties by applying the VCLT rules of interpretation, if a preamble of an investment treaty contains human rights-related objectives, the tribunal will likely interpret the operative clauses of the relevant treaty by referring to its purpose and object as expressed in the preamble. Otherwise, the preambular provisions, like those indicated in the Iranian BITs, provide grounds for a narrow interpretation of the intention of the contracting parties, and could not convince the arbitrators to consider other policy or public interest objectives of the Iranian state.

Section 2

The Right to Regulate

The United Nations Guiding Principles on Business and Human Rights make clear that states are expected to consistently fulfill their obligation to protect human rights in the context of investment agreements, and caution states to reserve and maintain adequate policy and regulatory flexibility to protect human rights.[81] States should regulate their economy, including the foreign investments embedded therein, in a manner consistent with their obligations to protect and

[80] *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004, at para 116.

[81] *Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework*, 2011, UN Human Rights Council.

promote human rights. The nearest equivalent in international investment law to the duty to protect in human rights is grounded in the notion of states' right to regulate.[82]

The right of states to regulate is an inherent aspect of state sovereignty. By referring to it in IIAs, states preserve space for policy-making despite concurrent obligations owed to foreign investors. The origin of the right to regulate in international investment law lies in the customary international law concept of "police powers".[83] Police powers have been defined as the power of a state to place restraints on personal freedom or property rights of persons for the protection of public safety, health, morals, or for the promotion of public convenience and general prosperity.[84]

In one case, the arbitral tribunal acknowledged the regulatory rights of states in the investment context and noted: "It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion."[85]

The award in *Clayton/Bilcon v Canada* demonstrated that tribunals are careful not to unduly restrict host states' liberty to regulate.[86] In this case, the tribunal stated: "[..] a NAFTA tribunal must be sensitive to the need to avoid "regulatory chill", including with respect to protection of the environment and under NAFTA, lawmakers in Canada and the other NAFTA parties can set environmental standards as demanding and broad as they wish."[87]

---

[82] Mann, *supra* note 3 at 17.
[83] *Ibid* at 18.
[84] *Ibid*.
[85] The Tribunal added "[…] As a matter of fact, any businessman or investor knows that laws will evolve over time. What is prohibited however is for a State to act unfairly, unreasonably or inequitably in the exercise of its legislative power." *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007, at para 332.
[86] Ursula Kriebaum, "Human rights and international investment law" in Yannick Radi, ed, *Research Handbook on Human Rights and Investment* (UK: Edward Elgar Publishing Limited, 2018) 13 at 29.
[87] *William Ralph Clayton, Willian Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, INC. v Government of Canada*, UNCITRAL, Award on Jurisdiction and Liability, 17 March 2015, at para 737-8.

Negotiators of more recent IIAs have included express references to the host state's right to regulate, to reinforce the customary international law concept of police powers and ensure a balance between the rights and obligations of host states. On this basis, in the next Part, the provisions of IIAs that refer to the host state's right to regulate will be examined to find out to what extent these provisions could meet the required balance between the policymaking powers of host states and their investment obligations.

Part 1

The Right to Regulate under Modern IIAs

Some investment treaties refer to the contracting parties' right to regulate in their preambles, in order to clarify that the purpose and object of the treaties are not merely the promotion and protection of foreign investments. Some of them insert the right to regulate in the operative clauses to align investment obligations with human rights obligations and to provide exceptions to states' liability.

The first instance of an express right to regulate is article 1114 of NAFTA, which provides: "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."[88] Article 12 of the Norway Model BIT (2015) applies a broader approach than NAFTA (which only contains the environmental concerns) and refers to regulatory measures, including health, safety, human rights, resource management, and the environment.[89]

[88] Under the "Environmental Measures" title. This article was added at the end of the negotiations, without any extensive discussion of its scope." David A Gantz, "Potential Conflicts between investor rights and environmental regulation under NAFTA's Chapter 11" (2001) 33:3-4 Geo Wash Intl L Rev 651 at 679.

[89] This article (under the "Right to Regulate" title) provides "Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety, human rights, labour rights, resource management or environmental concerns."

Although the purpose of these articles was to protect states' right to regulate—that is, to insulate them from liability to foreign investors when a statutory or regulatory enactment taken for a legitimate regulatory purpose also infringes upon an investor's rights—these provisions did not achieve their intended effect. The insertion of the phrase "consistent with this Chapter/Agreement" in some IIAs, like those mentioned here, renders the entire paragraph legally useless in terms of enforcing the right to regulate. Although the state's right to adopt, maintain, or enforce any measure at the sole discretion of the relevant state in favour of public policy objectives is recognized, this right is only meaningful when it is *inconsistent* with other obligations under the investment agreement. While the right to regulate should assure host states that they can take any measures that they consider appropriate (so long as they are nondiscriminatory and adopted according to due process), the adopted provisions condition such measures upon consistency with the investment agreement. In essence, the right to regulate for a public purpose may only be exercised in a manner consistent with the IIAs protections of a foreign investor.[90]

The arbitral tribunal in *Adel A Hamadi Al Tamimi v Sultanate of Oman* referred to this condition of the right to regulate and noted that the measures should not be inconsistent with the express provisions of the relevant agreement.[91] In this case, the tribunal concluded that application of the state's right to regulate is not absolute and is instead subordinated to the state's obligations

[90] Mann, *supra* note 3 at 19.

[91] The Tribunal noted "[…] The wording of Article 10.10 provides a forceful protection of the right of either State Party to adopt, maintain or enforce any measure to ensure that investment is "undertaken in a manner sensitive to environmental concerns, provided it is not otherwise inconsistent with the express provisions of Chapter 10."*Adel A Hamadi Al Tamimi v Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, at para 387.

under investment treaty.[92] Accordingly, the IIAs that contain such language may fail to provide adequate support for the regulatory measures taken by one host state.[93]

Some model agreements have omitted the limiting phrases and express in a less constrained manner the contracting parties' right to adopt appropriate measures. The Slovakia Model BIT (2019),[94] Colombia Model BIT (2017),[95] Netherlands Model Investment Agreement (2019),[96] and Canada Model BIT (2021)[97] are among the model agreements that employ such language.

Reference to the right to regulate through operative clauses of BITs guides arbitral tribunals when they intend to interpret provisions of agreements. The right to regulate in operative clause could insulate host state from liability to foreign investors when their regulatory measures violate

[92] Article 10.10 of the US-Oman Free Trade Agreement (under the "Investment and Enforcement" title) provides "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measures otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns."

[93] Contrary to abovementioned agreements, article 25 (B) of the Investment Model Agreement of the International Institute for Sustainable Development (IISD Investment Model) contains no limiting phrases and refers to the right of states to pursue their own development goals and objectives and related social, economic and other policy goals. Article 25 (B) provides "In accordance with customary international law and other general principles of international law, host states have the right to take regulatory or other measures to ensure that development in their territory is consistent with the goals and principles of sustainable development, and with other social and economic policy objectives."

[94] Article 4.1 of the Slovakia Model BIT (2019) provides "For the purpose of this Agreement, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity."

[95] The Colombia Model BIT (2017) provides "The Contracting Parties reaffirm their right to regulate within their territories, in order to achieve legitimate public policy objectives such as those enshrined in their Constitutions or in international agreements that promote and protect human rights, public health, safety and security, natural resources, the environment, sustainable development and other public policy objectives."

[96] Article 2.2 of the Netherlands Model Investment Agreement (2019) provides "The provisions of this Agreement shall not affect the right of the Contracting Parties to regulate within their territories necessary to achieve legitimate policy objectives such as the protection of public health, safety, environment, public morals, labor rights, animal welfare, social or consumer protection or for prudential financial reasons."

[97] Article 3 of the Canada Model BIT (2021) provides "The Parties reaffirm the right of each Party to regulate within its territory to achieve legitimate policy objectives, such as with respect to the protection of the environment and addressing climate change; social or consumer protection; or the promotion and protection of health, safety, rights of Indigenous peoples, gender equality, and cultural diversity."

investors' rights under investment treaties. Appropriate language in IIAs provides proper regulatory space for states and could provide a defense against liability for the relevant state.[98]

Part 2

The Right to Regulate under the Iranian BITs

As mentioned above, some Iranian BITs—all with European states—mention a right to regulate. European Parliament Resolution of 6 April 2011, regarding the future of European international investment policy, considered the necessity of achieving a balance between investor protection and the protection of the right to regulate and called on the European Commission to include the right to regulate in all future investment agreements.[99] As argued in the Introduction to this Chapter, the investment policy of the European Union is the main reason that the Iran-Czechia BIT, Iran-Hungary BIT, and Iran-Luxembourg BIT contain similar provisions regarding the right to regulate. (The Iran-Slovakia BIT only refers to the right to regulate language in the preamble.)[100]

These BITs, without employing any limiting or conditional phrases, provide: "For the purpose of this Agreement, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity." The right to regulate in these BITs could protect the regulatory capacity of the Iranian state, as an investment host state.

[98] It is noteworthy that while right to regulate clauses are likely to impact tribunals' decisions, they do not confer actual immunity from liability whenever a state regulates to achieve a legitimate policy objective. The decision of tribunal in *Adel A Hamadi Al Tamimi* demonstrates that the right to regulate of states is still subordinated to their investment obligations.

[99] Titi, *supra* note 50 at 645-6.

[100] Article 14.1 of Iran-Czechia BIT, article 4.1 of Iran-Hungary BIT, and article 13.4 of Iran-Luxembourg BIT.

As mentioned above, negotiators of BITs have recently inserted the customary international rule of police powers into investment treaties via right to regulate clauses. These states' intention is to protect their regulatory measures and to balance their policymaking right under the international human rights law with their investment obligations under investment law. The Iranian BITs that contain the right to regulate (although this appears to be due to their reliance on standardized wording among EU states) protect the regulatory measures of the Iranian state in case an investment dispute arises due to the implementation of this right. As the other BITs of Iran contain no reference to the right to regulate in their operative provisions, in an investor-state dispute, the Iranian state can only justify its regulatory measures by referring to its commitments deriving from outside international investment law, which will be discussed in Chapter 4 of this thesis.

Section 3

Not-Lowering of Regulatory Standards

There is a concern that international competition for attracting foreign investment may lead some countries to lower their environmental, human rights, or labour standards, which could start a "race to the bottom" in regulatory standards.[101] To respond to this concern, IIAs increasingly indicate that the contracting parties should not seek to encourage or attract foreign investments by lowering regulatory standards on social or environmental issues or through relaxation of labour or environmental standards.

Like the right to regulate, the origin of this clause goes back to NAFTA Chapter 11. This clause, either in NAFTA or in more recent treaties, is phrased in a non-binding manner. Nowadays, as environmental and health problems are increasing, it is critical to maintain a strong

[101] UNCTAD, *supra* note 7 at 112.

stance against lowering standards, and this provision can act as a mechanism to prevent the potential race to the bottom in environmental or other standards.[102]

In 2011, the United States requested the establishment of an arbitral panel under the dispute settlement chapter of the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) to address the apparent failure of the government of Guatemala to effectively enforce its domestic labour laws under CAFTA-DR.[103] In this case, US stated that Guatemala was failing to meet its obligations under this article concerning the effective enforcement of the right of free association, the right to organize and bargain collectively, and the right to acceptable conditions of work, which affected the trade between the contracting parties.[104] By referring to the provisions of CAFTA-DR, the US claimed that Guatemala had breached this article by failing to conduct in accordance with its labour code.[105] In this case, an enforcement plan was signed between the parties to improve the labour situation in Guatemala. Through this enforcement plan, Guatemala committed to effectively enforce its labour laws by complying with the obligations set out under the plan.

---

[102] Howard Mann *et al*, "IISD Model International Agreement on Investments for Sustainable Development Negotiators' Handbook" (2006) at 33, online (pdf*): International Institute for Sustainable Development* <www.iisd.org/publications/iisd-model-international-agreement-investment-sustainable-development-negotiators>[web/20210907233406/https://www.iisd.org/publications/iisd-model-international-agreement-investment-sustainable-development-negotiators].

[103] Article 16.2.1 (a) (under the "Enforcement of Labour Law" title) provides "A Party shall not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement."

[104] United States Trade Representative, "Guatemala-Issues Relating to the Obligations under Article 16.2.1(a) of the CAFTA-DR U.S. Initial Written Submission" (2014) at 2, online (pdf): <ustr.gov/sites/default/files/US%20Initial%20Written%20Submission.pdf> [web.archive.org/web/20210909180140/https://ustr.gov/sites/default/files/US%20Initial%20Written%20Submission.pdf].

[105] The United States demonstrated that Guatemala had breached article 16.2.1(a) of the CAFTA-DR in 3 ways: a) By failing to secure compliance with court orders requiring employers to reinstate and compensate workers wrongfully dismissed for union activities, and to pay a fine for their retaliatory action; b) By failing to conduct investigations in accordance with the Labor Code and by failing to impose the requisite penalties when the Ministry of Labor has identified employer violations; and, c) By failing to register unions or institute conciliation processes within the time required by law. *Ibid* at 3.

The arguments made by the US government demonstrate that the provisions of investment agreements regarding the obligations of states to not lower their human rights-related standards could open an avenue for states to justify regulatory measures that would otherwise give rise to liability to foreign investors. In other words, respondent states could justify their regulatory measures, which violate foreign investors' rights, by referring to their investment treaty obligation to not lowering labour, the environment, or public health standards. The obligation to not derogating from health, safety, or environmental measures implies that states regulate these measures in the context related to the admission, establishment or expansion of a foreign investment.

The important point is the wording of the not-lowering standards clause. Binding language rather than a statement of aspiration could more effectively justify the state's regulatory measures, or at least guide arbitrators in determining the context, object, and purpose of the agreement. In Part 1 below the provisions of IIAs referring to this provision will be analyzed.

Part 1

Not-Lowering of Regulatory Standards under Modern IIAs

As mentioned above, NAFTA is the first treaty that referred to not-lowering standards. Section 2 of article 1114 of NAFTA provides: "The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. [..]."[106]

[106] Under the "Environmental Measures" title.

As the provisions of this clause were non-binding ("should not waive or derogate"), negotiators of subsequent IIAs applied mandatory and binding commitments for environmental, labour, public health, and safety standards.[107] The Norway Model BIT (2015) uses broader language that refers to human rights measures under the not-lowering-standards clause.[108] The Colombia Model BIT (2017) applies all the above-mentioned concerns and provides:

> "The Contracting Parties recognize that they are not promoting investment by detracting from or diminishing environmental, human rights or labour standards. Hence, each Contracting Party shall not modify or derogate, or offer to modify or derogate its laws and regulations on these fields as a Measure to promote the establishment, maintenance or expansion of foreign investment in its Territory, in a way that such modification or derogation implies the detracts from their environmental, human rights or labour standards."[109]

It seems that expansive wording with obligatory language can justify legal defenses of the respondent state in investor-state dispute settlement. The wording of the Colombia Model BIT (2017) declares that the promotion of foreign investment is not the ultimate purpose of the contracting parties. The contracting parties have alternative purposes that should be achieved in parallel with the promotion of investment. They declare that they are pursuing a balanced environment in their investment context, which in principle should lead both to the attraction of foreign investment and to the protection of labour and the environment standards. In the next part, I will examine the provisions of the BITs of Iran to analyze the wording of the not-lowering standard in these BITs.

---

[107] Article 20 of the IISD Investment Model has binding language "The Parties recognize that it is inappropriate to encourage investment by relaxing domestic labour, public health, safety or environmental measures. They shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in their territories, of an investment."

[108] Article 11.1 of Norway Model BIT (under the "not-lowering standards" title) provides "The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, human rights, safety or environmental measures or labour standards. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention of an investment of an investor."

[109] Under the "Non-detraction from environmental, human rights and labour standards" title.

Part 2

Not-Lowering of Regulatory Standards under the Iranian BITs

Among all the Iranian BITs, only those signed with the governments of Hungary, Luxembourg, and Slovakia refer to not-lowering of regulatory standards. The language of these BITs is similar, and the clauses refer to the commitment of the contracting parties by using the phrase "shall", but they do not explicitly refer to human rights. Their provisions are the same as NAFTA, except that "should" is replaced with "shall" which demonstrates the developments of the investment treaties' text in indicating mandatory provisions.[110]

The wording of this clause in the mentioned BITs demonstrates that the purpose of the agreement is not restricted to the protection and promotion of foreign investments. Labour, public health, safety, and environmental standards have to be improved and modified in parallel with encouraging foreign investment. The main problem is that only three BITs contain this provision and the other BITs in effect have no similar content. If not-lowering of standards was entered in the Iranian BITs, it could help the contracting parties to implement their laws or modify their regulations without the fear of investment claims.

The US claims against Guatemala demonstrate that such wording in investment treaties can act as a tool for states to enforce human rights law. In the absence of such wording, host states face challenges to justify regulatory measures that impair the value of investments made by foreign investors. Investment treaty negotiators attempt to phrase this clause in a binding language to provide routes for the insertion of human rights justifications in investment arbitrations. As the majority of Iranian BITs do not contain not-lowering standards provisions, the existing investment

[110] These BITs provide "The Contracting Parties recognize that it is inappropriate to encourage investment by relaxing labor, public health, safety or environmental measures. They shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in their territories, of an investment."

treaty context may promote a race to the bottom in Iran and provide fewer treaty-based defenses for the Iranian state.

Section 4

Regulatory Expropriation

Under international law, states have a sovereign right to take property held by foreign nationals through nationalization or expropriation; however, they must provide compensation commensurate with the value of the property expropriated. Expropriation may be direct or indirect. Direct expropriation means a mandatory legal transfer of the title to the property or its outright physical seizure.[111] Indirect expropriation involves total or near-total deprivation of an investment's value but without a formal transfer of title or outright seizure.[112] To be legal under international law, an expropriation has to be undertaken for a public purpose,[113] on a non-

[111] When a direct expropriation or formal transfer of a foreign investor's property occurs, compensation will be due regardless of the purpose of the expropriation. *Santa Elena v Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, at para 71.

[112] A classical definition can be found in the *Starrett Housing case* (in Iran-United States Claims Tribunal) which noted "It is undisputed in this case that the Government of Iran did not issue any law or decree according to which the Zomorod Project or Shah Goli expressly was nationalized or expropriated. However, it is recognized in international law that measures taken by a State can interfere with property rights to such an extent that these rights are rendered so useless that they must be deemed to have been expropriated, even though the State does not purport to have expropriated them and the legal title to the property formally remains with the original owner." *Starrett Housing* Corporation, Starrett System, INC. and Others v the Government of the Islamic Republic of Iran, *Bank Markazi and Others*, Interlocutory Award (Award No. ITL 32-24-1), IUSCT (IRAN_US CLAIMS TRIBUNAL), 19 December 1983, at para 66. UNCTAD, "Expropriation" (2012) at 6-8, online (pdf): *UNCTAD* <unctad.org/system/files/official-document/unctaddiaeia2011d7_en.pdf> [web.archive.org/web/20210907234014/https://unctad.org/system/files/official-document/unctaddiaeia2011d7_en.pdf].

[113] In *Saluka*, the tribunal noted "In the opinion of the Tribunal, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police power of States' forms part of customary international law today. There is ample case law in support of this proposition. As the tribunal in *Methanex Corp. v USA* said recently in its final award, "[i]t is a principle of customary international law that, where economic injury results from a *bona fide* regulation within the police powers of a State, compensation is not required." *Saluka v Czech Republic*, *supra* note 60 at para 262.

discriminatory basis,[114] under due process of law,[115] and upon payment of prompt, adequate and effective compensation.[116]

An important issue regarding expropriation relates to the payment of compensation. The question is whether the non-payment of compensation, when all other requirements for a lawful expropriation are met, renders a measure unlawful, and further whether such non-payment provides the basis for a compensation claim beyond the compensation that would have been due to make the expropriation lawful.

Some arbitral awards suggest that non-payment of compensation in itself renders the expropriation unlawful. In *Vivendi v Argentina*, the tribunal declared that "If we conclude that the challenged measures are expropriatory, there will be violation of Article 5(2) of the Treaty, even if the measures might be for a public purpose and non-discriminatory, because no compensation has been paid."[117]

---

[114] In *Chemtura*, the tribunal referred to the non-discriminatory character of the adopted measures of the state and found no expropriation. The tribunal noted "A measure adopted under such circumstances [in a non-discriminatory manner] is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation." *Chemtura Corporation v Government of Canada*, UNCITRAL, Award, 2 August 2010, at para 266.

[115] Regarding the examination of the "due process of law", in one investment dispute, the tribunal expressly declared that in an expropriation context, due process of law demands the existence of an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. According to the tribunal, reasonable advance notice to the investor, a reasonable opportunity to invoke its legitimate rights, a fair hearing, and an impartial adjudicator to evaluate the dispute make the legal procedure meaningful. *ADC v Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, at para 435.

[116] Most of the treaties incorporate the standard of "prompt, adequate and effective compensation", known as the Hull standard. This kind of compensation was formulated by Cordell Hull (who was Secretary of State during the Mexican expropriations of US property of 1938). He stated "Under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate and effective payment thereof". Ever since, the standard has been espoused by the United States and has been referred to as the Hull doctrine of compensation. Sornarajah, *supra* note 36 at 36 & footnote 10.

[117] The tribunal continued that "Respondent's public purpose arguments suggest that state acts causing loss of property cannot be classified as expropriatory. If public purpose automatically immunizes the measures from being found to be expropriatory, then there would never be a compensable taking for a public purpose." *Vivendi v Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, at para 7.5.21.

By contrast, in *Santa Elena v Costa Rica*[118] and *SPP v Egypt*,[119] where otherwise legitimate takings were not accompanied by compensation, the tribunals never referred to the expropriation as being unlawful.[120] When the payment of compensation is a remedy that can be awarded by an arbitral tribunal, the tribunal needs to first characterize the impugned measure(s) and determine whether they meet the requirements for a legal expropriation. Then, the tribunal must look into the existence of a duty to pay compensation. In essence, an expropriation is a lawful act of states and the duty to pay compensation is the consequence of the exercise of that sovereign right.[121]

Some recently-negotiated treaties have carved out certain regulatory measures of states from being considered expropriatory.[122] The expropriatory measures of a state with legitimate public welfare objectives (in some treaties conditioned to *bona fide*) are excluded from the scope of indirect expropriation and therefore require no compensation.[123] As these objectives cover the human rights-related obligations of the states, such as public health, safety, and the environment, in the next Part, the provisions of the IIAs regarding regulatory expropriation and the relevant decisions of arbitral tribunals will be examined.

Part 1

[118] In this case, the tribunal noted "[…] the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid…."[…] where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains." *Santa Elena v the Republic of Costa Rica*, *supra* note 111 at para 71 and 72.

[119] The tribunal declared that "Clearly, as a matter of international law, the Respondent was entitled to cancel a tourist development project situated on its own territory for the purpose of protecting antiquities. This prerogative is an unquestionable attribute of sovereignty. The decision to cancel the project constituted a lawful exercise of the right of eminent domain. The right was exercised for a public purpose, namely, the preservation and protection of antiquities in the area. Nor have the Claimants challenged the Respondent's right to cancel the project. Rather, they claim that the cancelation amounted to an expropriation of their investment for which they are entitled to compensation under both Egyptian law and international law." *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992, at para 158.

[120] UNCTAD, *supra* note 112 at 44.

[121] *Ibid*.

[122] Also known as "regulatory taking" or "regulatory deprivation".

[123] In accordance with doctrine of police powers, certain acts of state are not subject to compensation.

Regulatory Expropriation under Modern IIAs

Some recent IIAs include provisions that exclude regulatory expropriation for legitimate public policy objectives from the scope of indirect expropriation. These treaties establish a presumption that non-discriminatory measures designed and applied by states to serve legitimate public objectives do not have an expropriatory nature. The US Model BIT (2012) is the origin of the regulatory expropriation exception, which carves out regulatory measures of a state for being expropriatory. Annex B of the US Model BIT (2012) provides "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations." Some model investment agreements require an assessment of the severity of the measures and/or refer to their *bona fide* nature. Netherlands Model Investment Agreement (2019) provides:

> Except in rare circumstance when the impact of a measure or series of measures is so severe in light of their purpose that it appears manifestly excessive, non-discriminatory measures of a Contracting Party that are designed and applied in good faith to protect legitimate public interests, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity, do not constitute indirect expropriation.[124]

With respect to distinguishing compensable indirect expropriations from non-compensable regulatory takings, the tribunal in *Fireman's Fund v Mexico* observed:

> To distinguish between a compensable expropriation and a non-compensable regulation by a host State, the following factors (usually in combination) may be taken into account: whether the measure is within the recognized police powers of the host State; the (public) purpose and effect of the measure; whether the measure is discriminatory; the proportionality between the means employed and the aim sought to realized; and the bona fide nature of the measure.[125]

[124] Article 12.8 of the Netherlands Model Investment Agreement (under the "Expropriation" title).
[125] *Fireman's Fund v Mexico*, ICSID Case No. ARB(AF)/02/01, Award, 17 August 2006, at para 176(j).

Furthermore, in *Chemtura*, when an agricultural insecticide was banned as harmful to human health and the environment, the investor claimed a breach of NAFTA by the Government of Canada. The tribunal rejected the investor's claim on the basis that the regulatory measures of the state constituted a valid exercise of police powers.[126]

Thus, by application of wording such as is found in the US Model BIT (2012), a good faith regulatory measure taken by an investment host state to public interest objectives, applied in a non-discriminatory and proportionate manner, is established as a non-compensable expropriation. Since some of the Iranian BITs contain regulatory expropriation, in the next part, the provisions of these BITs will be examined to find out whether the Iranian state could justify its regulatory takings in favour of legitimate public policy objectives by referring to the provisions of these BITs.

Part 2

Regulatory Expropriation under the Iranian BITs

Among the Iranian BITs, all the signed agreements of 2017 and one of the signed agreements of 2016 refer to regulatory expropriation.[127]

Under the Iran-Czechia BIT, non-discriminatory and proportionate measures adopted in good faith and designed to protect legitimate public welfare objectives, such as national security, financial stability, public health, safety, and the environment, are not expropriatory.[128] Adoption of different objectives mentioned in this BIT opens a broad avenue for the Iranian state to justify

[126] The tribunal noted "[..] the PMRA [Pest Management Regulatory Agency] took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation." *Chemtura Corporation v Government of Canada*, *supra* note 114 at para 266.

[127] Iran-Czechia BIT, Iran-Hungary BIT, Iran-Luxembourg BIT, and Iran-Slovakia BIT. As with the provisions discussed above, the investment treaty policy of the European states is the reason that regulatory expropriation is rendered in these BITs.

[128] Article 7.4 of the Agreement.

the regulatory measures it takes for observing the mentioned objectives. However, when the state decides to nationalize, expropriate, or confiscate a foreign investor's property, it should act in good faith, without discrimination between investors, and its actions should be in proportion with the objectives that the state intends to follow. The Iran-Hungary BIT, Iran-Luxembourg BIT, and Iran-Slovakia BIT provide that the adopted measures should be non-arbitrary as well as non-discriminatory and with legitimate public welfare objectives proportionate and in good faith.[129]

The other BITs of the Iranian state recognize the contracting parties' right to expropriation or nationalization so long as they also meet the requirements of public purpose, due process of law, non-discrimination, and payment of prompt, adequate, and effective compensation. In *Metalclad v Mexico*, when the land required for an investment project was nationalized, the tribunal found expropriation.[130] The Mexican regional government declared the land in question a national area for the protection of cactuses.[131] Although the measures pursued an environmental purpose, the tribunal considered them to constitute expropriation. According to the tribunal, deprivation of the benefit of the investment was sufficient to render the adopted measures expropriatory.

As the remaining Iranian BITs contain no provisions regarding regulatory expropriation, regulatory expropriate measures of the state for public purpose, with due process of law, without any discrimination should be compensated in an effective, adequate, and prompt manner. Under

[129] Article 5.4 of the Iran-Hungary BIT (under the "Expropriation and Compensation of Loss" title); article 7.6 of the Iran-Luxembourg BIT (under the "Expropriation and Compensation" title); and article 6.5 of the Iran-Slovakia BIT (under the "Expropriation" title).

[130] The tribunal noted "Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State." *Metalclad Corporation v The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, at para 103.

[131] Dolzer & Schreuer, *supra* note 2 at 99.

these BITs, Iran cannot justify its nationalized actions against foreign investors even for legitimate public objectives, because BITs do not recognize regulatory expropriation as a distinct and protected type of measure. The case law, such as *Metalclad* and *Vivendi*, attest that the public purpose of a measure is not on its own sufficient to justify nationalization of foreign investors' property. However, in *Philip Morris*, the tribunal applied the principle of proportionality and declared that the public health measures of Uruguay, despite their limited adverse impact on the investor, were proportionate to the objectives they meant to achieve. From the tribunal's point of view, the measures were potentially effective means to protect public health, and moreover were undertaken with due process and on a non-discriminatory basis; accordingly, they did not constitute an expropriation.[132]

Section 5

General Exceptions

Older IIAs contain no general exception clause. The general exception clause has assumed significance in more recent treaties largely because of changed circumstances. Once developed states became targets of foreign investment arbitrations, these states realized the need for sovereign regulation of certain areas of public concern. As a result, they began enacting exceptions to cover those areas of concern.[133] Most recently-concluded treaties include a general exception provision that exempts some host state measures from breaching treaty obligations.[134]

[132] *Philip Morris Brands SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay*, ICISD Case No. ARB/10/7, Award, 08 July 2016, at para 306-7.
[133] Sornarajah, *supra* note 36 at 222-23.
[134] Coleman *et al*, *supra* note 6 at 306.

These exceptions offer states the opportunity to defend the actions or regulations they apply, even if they impair the profitability of the foreign investment.[135] Where human rights measures are not explicitly addressed by general exception provisions, some legal scholars have argued that general exceptions can be used to shield a state's adoption or enforcement of measures necessary to respect or protect human rights.[136] On this basis, a broad interpretation of general exception provisions may be one of the most efficient means of linking investment law with human rights.

The interpretation of general exceptions in the cases arising out of Argentina's 2001 financial crisis and ensuing currency devaluation constitutes the most salient jurisprudence on the interpretation of exception provisions in IIAs.[137] Although in these cases the tribunals adopted different approaches regarding the necessity of measures adopted by Argentina, they referred to the social and political effects of the financial crisis on that country.[138] The tribunal in *Continental Casualty*, for example, found that the social hardships, unemployment, and poverty that had characterized the Argentinean financial crisis constituted a situation where the maintenance of public order was at stake.[139]

A crucial question in respect of the general exception clause is whether this clause has a self-judging nature or is subject to judicial review. Some tribunals in the Argentina cases found that general exceptions are not self-judging and that a state cannot personally evaluate its interest

[135] Emma Truswell, "Thirst for profit: Water privatization, investment law and a human right to water" in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (UK: Cambridge University Press, 2011) 570 at 584.
[136] Coleman *et al*, *supra* note 6 at 306.
[137] Choudhury, *supra* note 51 at 697.
[138] In *Sempra v Argentina*, the tribunal concluded that the measures of the government were not the only available measures for the state to address and resolve the economic crisis. While in *Continental Casualty v Argentina*, the tribunal took a widely different approach in interpreting the "necessary" term and concluded that as the government's measures and the aims it sought were related to each other, Argentina did not have any reasonably alternative measures to adopt and its measures were "necessary". *Ibid* at 700-1.
[139] *Continental Casualty Company v Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, at para 180. *Ibid* at 674-5.

or unilaterally determine whether maintenance of its public order is at risk.[140] These tribunals interpreted the relevant BIT and found a lack of textual support in the BIT to indicate that the responding state could evaluate its own interests.[141] Such judicial review was a substantive control on the adopted measures by the tribunal, which concluded that the state's discretion to determine an economic emergency (self-judging) was inconsistent with the provisions of the relevant investment treaty.

Generally, the IIAs contain two separate clauses covering general exceptions and national security exceptions. As national security exceptions are related to the protection of national security of states and therefore deal with political issues rather than human rights, in this Section, only the terms of general exception clauses will be analyzed. The intention is to identify the extent to which general exception clauses in different IIAs open up space for human rights protection within investment treaties.

Part 1

General Exceptions under Modern IIAs

General exception clauses in investment treaties are intended to balance investment protection with public policy objectives. Public policy exceptions foster coherence between investment agreements and other public policy objectives, and reduce states' exposure to claims

[140] In *CMS v Argentina*, the tribunal noted "[…] if the legitimacy of such measures is challenged before an international tribunal, it is not for the State in question but for the international jurisdiction to determine whether the plea of necessity may exclude wrongfulness." *CMS Gas Transmission Company v the Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, at para 373.

[141] The tribunals examined article XI of the US-Argentina BIT, which provides that "This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests." *Enron Corporation v Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, at para 339. Choudhury, *supra* note 51 at 703-4.

arising from conflicts between the interests of a foreign investor and the promotion and protection of public-interest objectives.[142]

The first type of general exception clause was mentioned in article XX of the General Agreement on Tariffs and Trade (GATT).[143] This article provided a long list of exceptions, including but not limited to the protection of public morals, protection of human, animal, or plant life, or protection of health.[144] In some IIAs, there must exist a necessary relationship between the adopted measures of the state and the relevant objectives.[145] Some other treaties require the adopted measures to be "directed to the protection of [the host state's] essential security interests".[146] Older treaties simply require that measures be "taken for reason of" some public-interest objective.[147] Among IIAs, those with a requirement of necessity are the most stringent and the other "looser" wording generally facilitate the ability of responding states to rely on exception provisions to justify derogations from their obligations under IIAs.[148]

---

[142] UNCTAD, "International Investment Agreements Reform Accelerator" (2020) at 26, online (pdf): *UNCTAD* <unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf> [web.archive.org/web/20210312160226/https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf].

[143] General Agreement on Tariffs and Trade (GATT), 15 April 1994 (1 January 1995).

[144] In accordance with this article, the authorized measures included measures required for the protection of public morals, protection of human, animal, or plant life or protection of health, the importation or exportation of gold and silver, the compliance with laws of monopolies, for products of prison labour, for protection of national treasures of artistic, historic or archaeological value, for conservation of exhaustible natural resources, for compliance with intergovernmental obligations and protection of domestic materials and local supply.

[145] As an example, article 24 of the Norway Model BIT (2015) (under the "General Exceptions" title) provides "[…], nothing in this Agreement shall be construed to prevent a Party from adoption or enforcing measures necessary [..]."

[146] Article 11 of China-Singapore BIT provides "The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants." *Agreement between the Government of the People's Republic of China and the Government of the Republic of Singapore on the Promotion and Protection of Investments*, 21 November 1985, Article 11 (07 February 1986).

[147] *Accord de commerce, de protection des investissements et de coopération technique entre la Confédération Suisse et la République Du Tchad*, 21 February 1967, Article 2 (31 October 1967).

[148] Choudhury, *supra* note 51 at 687.

Due to lessons learned from the Argentina cases, some treaties have expressly implemented a self-judging mechanism. The Colombia Model BIT (2017), by using the phrase "deem", refers to the discretion of contracting parties to determine the necessity of measures. This BIT provides: "Provided that such Measures are not applied in a manner that would constitute means of arbitrary and discriminatory treatment against a Covered Investor or Investment, nothing in this Agreement shall preclude a Contracting Party from adopting, maintaining or enforcing Measures that such Contracting Party deems necessary [..]"

By adopting the term "deems", contracting parties declare that they are the only persons empowered to determine the necessity of a measure. Such a mechanism could better protect the regulatory right of states and prevent regulatory chill, as the states can have confidence that their adopted measures will not be subject to the assessment of arbitrators.

The scope of the general exception provision (which determines whether the exception applies to the agreement, in whole or in part) is the second important issue in applying the general exception. The Norway Model BIT (2015) contains a broadly-worded exception: "[…]nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary [..]",[149] while CETA limits the scope of general exceptions to one particular chapter (Chapter Nineteen – Government Procurement) and indicates that "nothing in this Chapter shall be construed to prevent a Party from imposing or enforcing measures".[150] Thus, the specific

[149] Article 24 (under the "General Exceptions" title) provides "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international [trade or] investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary: i. to protect public morals or to maintain public order; ii. to protect human, animal or plant life or health; iii. to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; iv. for the protection of national treasures of artistic, historic or archaeological value; or v. for the protection of the environment."

[150] Article 19.3.2 (under the "Security and general exceptions" title) provides "2. Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail or a disguised restriction on international trade, nothing in this Chapter shall be construed to prevent a Party from imposing or enforcing measures: (a) necessary to protect public morals, order or safety; (b) necessary to protect human, animal or plant life or health; (c) necessary to protect intellectual property; or (d) relating to goods or services of persons with disabilities, of philanthropic institutions or of prison labour."

wording of a general exception provision has an important role in determining compliance of the measures that a state adopts to protect the interests indicated in the general exception clause.[151]

Moreover, most recently-concluded treaties list a set of public policy objectives to which the general exception clause applies.[152] Undoubtedly, an illustrative list of objectives, instead of a closed or exclusive list, could provide a better balance between investment protection and the public interests.

In the next Part, I will examine the general exception provisions in Iranian BITs to find out the extent to which these BITs could facilitate the adoption of measures intended to promote public policy objectives.

Part 2

General Exceptions under the Iranian BITs

Among the Iranian BITs, the investment treaties between the Government of Iran and Czechia, Hungary, Luxembourg, Singapore, Japan, and Slovakia contain a general exception clause, although the wording of the clauses differs. The remaining BITs have no exception provisions.

All of the mentioned BITs exclude from the scope of state obligations to investors non-arbitrary and non-discriminatory measures necessary for the protection of public morals, maintenance of public order, and protection of human, animal, or plant life or health. These BITs permit the application of the general exception to all the provisions of the investment agreements.

[151] The tribunals' approach regarding the "necessity" term in the Argentina cases is related to this issue. Some tribunals (in *Sempra* and *CMS*) applied a stringent standard in assessing the necessity of the measures adopted by the government of Argentina, while in the other case (*Continental Casualt*y) the tribunal granted a certain level of defense to the government for its adopted measures. Choudhury, *supra* note 51 at 701.

[152] These objectives include the protection of public morals or public order, protection of human life and health, protection of animal or plant life, protection of personal data, and protection of national treasures, as well as conservation of exhaustible natural resources.

In these BITs, to qualify under the exception, the adopted measures of the state must be necessary for protecting the objectives mentioned in the BITs.

The differences between the above-mentioned BITs lie in their lists of objectives. All of them include the protection of public morals, maintenance of public order, and protection of human, animal, or plant life or health. The Iran-Czechia BIT and Iran-Singapore BIT additionally refer to regulations necessary for preventing fraud and protecting personal data and safety.[153] The Iran-Hungary BIT, Iran-Luxembourg BIT, and Iran-Slovakia BIT refer to measures necessary for compliance with laws regarding conservation of living and non-living exhaustible natural resources.[154] The Iran-Japan BIT refers to necessary regulations for preventing fraud and protecting personal data and safety, as well as measures imposed for the protection of national treasures of artistic, historic, or archaeological value.[155]

General exception clauses balance states' investment protection obligations with their public policy obligations. By including such a clause in an investment treaty, the contracting parties restate their policymaking rights and demonstrate their intention to conclude a balanced treaty. The abovementioned Iranian BITs that contain a general exception clause could provide an application of human rights law in investment disputes and counterbalance the dominance of investors' rights. As the remaining BITs have no exception or other human rights-related wording, the Iranian state can only defend its measures by referring to its obligations arising from outside the investment law context, a possible basis for rationalizing human rights and investment obligations that will be discussed in Chapter 4.

[153] Article 13 of the Iran-Czechia BIT (under the "Exceptions" title) and article 13 of the Iran-Singapore BIT (under the "General Exceptions" title).
[154] Article 10.1 of the Iran-Hungary BIT (under the "General Exceptions" title), article 13.1 of the Iran-Luxembourg BIT (under the "General Exceptions" title), and article 11.1 of the Iran-Slovakia BIT (under the "General Exceptions" title).
[155] Article 13.1 of the Agreement (under the "General and Security Exemptions" title).

Section 6

Foreign Investors' Obligations

Many investment treaties refer to the social responsibilities of investors, but most employ language that is strictly voluntary; they contain "soft law"[156] obligations which only encourage investors to comply with best-practice standards, or they refer to states' actions to encourage investors to comply with standards and best practices. Other legal instruments, adopted to regulate the activities of corporations, do not impose direct obligations on corporations, as a consequence of the absence of corporations' international legal personality and inadequacy of traditional legal instruments to regulate such activity. Although soft law obligations are not binding under international law and cannot be interpreted as an acceptance of corporate human rights obligations, they can be guidelines for future changes in the law.[157]

Currently, in some IIAs, investors are expressly tasked with such responsibilities as establishing due diligence processes in accordance with international standards, in order to prevent, mitigate, and account for human rights and environmental impacts of their investments, and to contribute to sustainable development of the state's economy.[158] Scholars have proposed a "human rights audit" as part of an investor's due diligence, which would be a joint undertaking

[156] Soft Law is "a term used to refer to non-binding instruments or documents which have the appearance of law. [..] So, while not legally binding, soft law can be politically influential in setting down objectives and aspirations which may crystallize into custom or be adopted as treaties." John P Grant & J Craig Barker, *Encyclopædic Dictionary of International Law*, 3rd ed (UK: Oxford University Press, 2009) at 558.

[157] De Brabandere & Hazelzet, *supra* note 53 at 235-8.

[158] Reference is made to the Morocco-Nigeria BIT, which is notable because it explicitly imposes obligations on investors in binding language. This BIT requires investors to maintain environmental management system and engage in environmental and social impact assessment process and refrain them from managing or operating their investment in a way that circumvents the state's international environmental, labour, and human rights obligations. To safeguard these obligations, this BIT provides that home states can hold investors liable for any acts relating to their investment in the host state that causes significant damage, injuries, or loss of life. *Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria*, 03 December 2016, Articles 18, 19, & 20.

of foreign investor and host state to survey the host state's human rights treaty commitments and methods for implementing such commitments.[159]

Moreover, most IIAs contain a requirement of legality, which obliges foreign investors respect the domestic laws of host states; illegal investments are excluded from coverage of the IIAs. In this way, legality clauses can function as an entry point for human rights protection in investor-state dispute settlement. An investor who violates the laws of the host state, including its human rights laws, may be deprived of the protection of the investment treaty. If the investor initiates a claim, tribunal could find that it has no jurisdiction over a claim arising from a non-covered investment, or that the claim is inadmissible.[160]

Moreover, the investor's failure could give rise to counterclaims by host state. States may raise counterclaims in arbitrations initiated by investors for violation of domestic laws by investors. The tribunal in *Urbaser* accepted the counterclaim of the government of Argentina where Argentina claimed that the foreign investor had breached its investment obligations to make the necessary investments to guarantee the human right to water of the community affected by the relevant investment. In this case, the tribunal relied on article X (1) of the relevant BIT, which stated that the treaty applies only to "disputes arising between a Party and an investor of the other Party in connection with investments within the meaning of this Agreement."[161] The tribunal

[159] Simma, *supra* note 8 at 594.

[160] Jurisdiction focuses on investment tribunals and parties, while admissibility focuses on investment claims. Jurisdiction usually involves permanent defects which imply that tribunals are unable to exercise their mandate in line with the directions of the parties, whereas objections as to the admissibility of claims usually involve more transient circumstances which mean that a claim is not yet ready for adjudication. Michael Waibel, "Investment Arbitration: Jurisdiction and Admissibility" (2014) at 65, online (pdf): *University of Cambridge Faculty of Law Research Paper*<papers.ssrn.com/sol3/papers.cfm?abstract_id=2391789> [web.archive.org/web/20210908012027/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2391789].

[161] According to the tribunal "No distinction is made in respect of the party entitled with the rights that are at the basis of the dispute. Thus, they can be rights of the investor as they can be rights of the host State." *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, at para 1187.

specifically compared the provisions of article X (1) with article XI (1) (which relates to the settlement of disputes between the Contracting Parties). The latter article refers to "any dispute between the Parties relating to the interpretation or application of this Agreement", and does not include the limiting phrase found in article X (1), "in connection with investments within the meaning of this Agreement". The tribunal concluded that this particular difference in the provisions demonstrated that the drafters of the BIT intentionally omitted in article X (1) any required connection between the investment dispute and "the interpretation or application of this BIT".[162] Thus, to the extent that a violation of host state law by an investor affects the investment (and not the agreement), it will be considered as a dispute in respect of the investment over which a properly constituted investment tribunal will have jurisdiction.

Regardless of the legality requirements (that treaty drafters would have to agree to), investor obligations on good faith have been recognized by tribunals regardless of treaty language. In *Phoenix v Czech Republic*, the tribunal relied on the good faith principle, which, it held, not only requires contracting parties to deal honestly with each other, but also governs the legal rights and duties of those seeking to assert international claim under a treaty. Thus, no one (including foreign investors) may abuse the rights granted under treaties. Violation of the good faith principle does not give rise to compensation and results in a legal disadvantage, with the investor forfeiting the protection of the applicable IIA having its recoverable damages reduced.[163]

---

[162] *Ibid*.

[163] Karsten Nowrot, "The Other Side of Rights in the Processes of Constitutionalizing International Investment Law: Addressing Investors' Obligations as a New Regulatory Experiment" (2018) at 21-2, online (pdf): *Rechtswissenschaftliche Beiträge der Hamburger Sozialökonomie* <www.wiso.uni-hamburg.de/fachbereich-sozoek/professuren/nowrot/archiv/heft-21-nowrot-obligations.pdf> [web.archive.org/web/20210908011850/https://www.wiso.uni-hamburg.de/fachbereich-sozoek/professuren/nowrot/archiv/heft-21-nowrot-obligations.pdf].

Since human rights law is regulated not only under international law but also under the domestic laws of host states, the failure of foreign investors to comply with the laws could enter into investment arbitration through defense of host state as a question of jurisdiction or admissibility (or by a counterclaim, which will be discussed in Section 3 of Chapter 4 of this thesis). In the next Part, the wording of the IIAs and tribunals' approaches to the conduct of foreign investors will be examined.

Part 1

Foreign Investors' Obligations under Modern IIAs

Many recent investment treaties refer to social responsibility of foreign investors in both preambles and operative clauses. The Norway Model BIT (2015) is a model agreement that refers to this responsibility in the preamble and its operative clause. The preamble to this model agreement emphasizes the importance of corporate social responsibility. Under article 31 of the agreement, the parties agree to encourage investors to conduct their activities in compliance with the OECD Guidelines, the UN Guiding Principles on Business and Human Rights, and to participate in the UN Global Compact.[164] Morocco-Nigeria BIT obliges the companies in areas of resource exploitation and high-risk industrial enterprises to maintain a current certification to ISO 14001 or an equivalent environmental management standard.[165]

Separately and in addition to provisions invoking CSR, recent BITs and model agreements contain references to legality requirements, which oblige foreign investors to comply with all applicable domestic laws and regulations of the host states. This is typically accomplished by

[164] See also article 16 (A), (B), and (c) of the IISD Investment Model, under corporate social responsibility, which refers broadly to the obligation of investors to comply with all applicable laws and regulations of the host state, its development plans, and its priorities, and indicates that if standards of corporate social responsibility in the investment host state increase, the investor shall apply the higher standards.

[165] Article 18.1 (under the "Post-Establishment Obligations" title).

providing that any investments made without such compliance do not attract the protection of the treaty (are not "covered" investments). In this connection, the Netherlands Model Investment Agreement (2019) provides: "Without prejudice to national administrative or criminal law procedures, a Tribunal, in deciding on the amount of compensation, is expected to take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises."[166]

Human rights obligations are typically embedded in the domestic laws of states. Failure of an investor to comply with its obligations by violating the human rights laws of the host state could deprive the relevant investor of the protection of the investment treaty. Investor's misconduct, which impacts the jurisdiction of the tribunal or inadmissibility of its claim, prevents an investor from pursuing the fair and equitable standard protection or other rights indicated in an applicable IIAs. Such outcomes can come from application of express terms of the IIA or be derived by implication of the principle of good faith. Moreover, some treaties expressly include the host state's right to counterclaim against foreign investors for their failure to comply with laws and regulations; if proven, such counterclaims result in reduction of damages recoverable by the investor or other relief.[167]

The next Part will analyze the provisions of the Iranian BITs to realize to what extent the above-mentioned issues are reflected in the Iranian BITs.

[166] Article 23 (under the "Behaviour of the investor" title).

[167] See article 18 (E) of the IISD Model International Investment Agreement provides "A host state may initiate a counterclaim before any tribunal established pursuant to this Agreement for damages resulting from an alleged breach of the Agreement." Article 28(9) of the 2007 Investment Agreement for the COMESA Common Investment Area states "A Member State whom a claim is brought by a COMESA investor under this Article may assert as a defense, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, taken all reasonable steps to mitigate possible damages."

Part 2

Foreign Investors' Obligations under the Iranian BITs

Among the Iranian BITs, only the Iran-Luxembourg BIT and Iran-Slovakia BIT have provisions incorporating corporate social responsibility.[168] Although the wording in both treaties has an advisory character and imposes no binding obligations on foreign investors, the tribunal's realization in *Urbaser*, regarding the commitments of corporations to comply with human rights as their social responsibility, shows that a new approach may be forming.[169] Although corporations have no binding obligations at the international level, references to social responsibility in recent investment agreements are increasing and could change the laws in future.

The Iran-Luxembourg BIT and Iran-Slovakia BIT expressly provide: "For the avoidance of doubt, an investor may not submit a claim under this Agreement where the investor or the investment has violated the Host State law." Based on this clause, violating domestic laws results in the dismissal of the investor's right to raise a claim under the investor-state dispute settlement procedure. As the clause refers to "law", all the laws and regulations including those related to labour, the environment, or public health are covered by this clause. Failure of an investor to comply with the laws acts as a restriction on its ability to assert an international claim under the IIA. In addition, as the tribunal in *Phoenix* noted, the principle of good faith applies to investors, and violation of domestic laws by investors contradicts the good faith principle and will lead to the inadmissibility of an investment claim.

---

[168] These BITs provide "Investors and investments should apply national and internationally accepted standards of corporate governance for the sector involved in particular for transparency and accounting practices. Investors and their investments should strive to make the maximum feasible contributions to the sustainable development of the Host State and local community through appropriate levels of socially responsible practices." Article 11.3 of Iran-Luxembourg BIT (under the "Environmental and Labour Rights and other Standards" title) and article 10.3 of Iran-Slovakia BIT (under the "Environmental and Labour Rights and other Standards" title).

[169] *Urbaser v The Argentine Republic*, *supra* note 161 at para 1195.

Under the Foreign Investment Promotion and Protection Act of the Islamic Republic of Iran ("FIPPA"), admission (permission to make investments) of foreign investment shall be made in accordance with the law and with due observance of other prevailing laws and regulations.[170] Although FIPPA refers to the admission of an investment, the order of the Constitution of the Islamic Republic of Iran, which forbids any dominancy of foreign investors, imply that foreign investors shall comply with domestic laws during their operation.

Regarding the respondent state's right to counterclaim, only the Iran-Luxembourg BIT and Iran-Slovakia BIT expressly confer such a right. These BITs provide "The respondent may assert as a defense, counterclaim, right of set-off or other similar claim that the claimant has not fulfilled its obligations under this Agreement to comply with the Host State law or that it has not taken all reasonable steps to mitigate possible damages."[171] If an investor fails to comply with Iranian laws, including human rights law, the Iranian state could raise a claim against the claiming investor by referring to the violation of domestic law by the relevant investor.

For the BITs that contain no right to counterclaim, as mentioned in the previous Part, the case law shows that the provisions of the BITs could guide arbitrators to recognize a right to counterclaim. The dispute settlement clause of the Iranian Model BIT (2001) and some other effective BITs of the government of Iran states: "If any dispute arises between the host Contracting Party and investor(s) of the other Contracting Party with respect to an investment [..]."[172] While

[170] While the right to admission concerns the right of entry of the investment in principle, the right to establishment pertains to the conditions under which the investor is allowed to carry out his business during the period of the investment. Typical issue of admission concerns the definition of relevant economic sectors and geographic regions, the requirement of registration or of a license and the legal structure of an admissible investment. Dolzer & Schreuer, *supra* note 2 at 80.

[171] Article 16(a)(3) of the Iran-Luxembourg BIT (under the "Settlement of Disputes between an Investor of a Contracting Party and the Other Contracting Party" title) and article 14.3 of Iran-Slovakia BIT (under the "Governing Law" title).

[172] See article 12.1 of the Iranian Model BIT, article 12.1 of the Iran-China BIT, article 11.1 of the Iran-Belarus BIT, article 8.1 of the Iran-France BIT, article 11.1 of the Iran-Georgia BIT, article 10.1 of the Iran-Azerbaijan BIT, and article 9.1 of the Iran-Kuwait BIT.

the provision on settlement of disputes between contracting parties indicates: "All disputes arising between the Contracting Parties relating to the interpretation or application of this Agreement […]".[173]

Considering that the Spain-Argentina BIT has the same provisions for the settlement of disputes between an investor and a contracting party, on the one hand, and between the contracting parties, on the other hand, and that the tribunal in *Urbaser* case expressly referred to the provisions of the relevant articles and recognized the right of the host state to raise a claim against the alleged investor, it could be concluded that in an investor-state dispute settlement, the Iranian state could raise a counterclaim against a foreign investor who has failed to comply with its human rights obligations under Iranian law.

Although older BITs do not mention the social responsibility of investors or their obligation to comply with host states' laws, recent treaties contain provisions that expressly refer to these obligations. The question of how to hold international corporations accountable for violations of human rights could be answered by the recent tendency of investment agreements to refer to their compliance with domestic laws in parallel with tribunals' emphasis on the social responsibility of corporations, as well as tribunals' acceptance of counterclaims of host states regarding the violations by foreign investors. With respect to Iran's investment treaties, although only a few BITs contain social responsibility or legality requirements, the good faith principle may be invoked to the effect that investors' activities that violate host state laws could result in deprivation of investment protections.

Section 7

[173] See article 13.1 of the Iranian Model BIT, article 13.1 of the Iran-China BIT, article 12.1 of the Iran-Belarus BIT, article 11.1 of the Iran-France BIT, article 12.1 of the Iran-Georgia BIT, article 10.1 of the Iran-Azerbaijan BIT, and article 10.1 of the Iran-Kuwait BIT.

Amici Curiae

The other way in which human rights consideration can come into investment treaty arbitrations is through participation by non-disputing parties, *amici curiae*.[174] Investment-affected rights holders, civil society organizations, and academics have in some cases highlighted human rights issues that were not raised by disputing parties and so would not have come before the tribunal if not for *amicus* participation. Human rights argumentation by third parties plays an important role for the acceptance of an *amicus* submission, when investor-state dispute settlement tribunals acknowledge that public interests are at stake.[175]

Methanex was the first investment arbitration in which *amicus curiae* rights were accorded.[176] The tribunal declared its power to accept *amicus* briefs as it believed that issues of public interests were involved in this case.[177] According to the tribunal, the UNCITRAL Arbitration Rules granted it broad discretion to it to conduct the proceedings so long as it

[174] The concept of an "*amicus curiae*" was largely developed through the US courts. It has been utilized in different ways in different court systems, but generally speaking, *amicus curiae* submissions have for a long time been a mechanism by which national and international courts and tribunals have accepted interventions by third parties who are not directly involved in proceedings. James Harrison, "Human Rights Arguments in *Amicus Curiae* Submissions: Promoting Social Justice?" in Pierre-Marie Dupuy, Francesco Francioni, & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) 396 at 400.

[175] Vivian Kube & EU Petersmann, "Human Rights Law in International Investment Arbitration" (2016) 11:1 Asian J WTO & Int'l Health L and Pol'y 65 at 87.

[176] In this case, the tribunal interpreted the relevant UNCITRAL provisions and concluded "By Article 15(2) of the UNCITRAL Arbitration Rules it has the power to accept *amicus* submissions (in writing) from each of the Petitioners." *Methanex Corporation v United States of America*, Decision of the Tribunal on Petitions from Third Persons to Intervene As "*Amici Curiae"*, 15 January 2001, at para 47. Clara Reiner & Christoph Schreuer, "Human Rights and International Investment Arbitration" in Pierre-Marie Dupuy, Francesco Francioni, & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) 82 at 91.

[177] In 2000, the International Institute for Sustainable Development (IISD) submitted the first recorded petition for access to the investor-state proceedings and sought access to the parties' pleadings and oral hearing as an *amicus curiae*. In addition, the Bluewater Network of Earth Island Institute and the Center for International Environment Law submitted another petition. IISD noted that the issues in this case were matters of public interest: "The IISD approaches this issue from the perspective that, properly construed, investment agreements providing effective protection for foreign investors can be a significant component of a sustainable investment strategy. Nevertheless, such a strategy also requires the ability of governments to maintain an optimum environmental protection process. This requires an interpretation of the provisions of international investment agreements and of the applicable international law that reflects the commitment of the three NAFTA Parties, found in the Preamble to the NAFTA, to strengthen the development and enforcement of environmental laws, to maintain their flexibility to safeguard the public welfare and to proceed in a manner consistent with environmental protection." *Methanex Corporation v United States of America*, Petition to the Arbitral Tribunal, submitted by the International Institute for Sustainable Development, 25 August 2000, at para 3.4.

maintained procedural equality and fairness towards the disputing parties.[178] In *Glamis Gold v USA*, the tribunal accepted an *amicus* brief from an indigenous nation affected by the investment.[179] The petitioners argued that the provisions of NAFTA should be interpreted in accordance with the relevant international law of international protection of the rights of indigenous peoples, in particular with regard to their cultural, religious, and land rights.[180] The rationales of these tribunals for their decisions to accept *amicus* submissions were the public interest character of the issues in question.

The tribunal in *Biwater* accepted an *amicus* submission from international and national non-governmental organizations and cited the human rights expertise of the organizations as one of the grounds on which their petition was accepted. The tribunal in its award stated that the petitioners had provided a useful contribution to the proceedings through their specialized interests and expertise in human rights and environmental issues, which were materially different from the interests and expertise of the disputing parties.[181]

In particular because civil society, environmental, cultural, and other related organizations are third parties in investment disputes, their specific knowledge and information regarding the human rights-related issues have a significant role in attracting the attention of tribunals and the disputing parties to matters they are unaware of or where they do not have sufficient knowledge. In essence, organizations with particular human rights expertise can analyze and evaluate the

[178] *Ibid* at para 26.
[179] In this case, the claimant claimed damages in relation to a mining concession regarding the environmental regulations which imposed various obligations to clean up the mining area because it was in the vicinity of sacred sites belonging to the Quechan Indian Nation. Harrison, *supra* note 174 at 408.
[180] They argued that the tribunal is required to consider the ways in which the US Government was required under relevant international human rights law norms to safeguard the rights and interests of indigenous nations.
[181] Harrison, *supra* note 174 at 410-11.

human rights aspects and impacts of investments better than the disputing parties, and thereby help tribunals to reach balanced decisions.

Part 1

Amici Curiae in Modern IIAs

Acceptance of *amicus curiae* submissions by arbitral tribunals is mentioned in many recently-concluded IIAs. The Netherlands Model Investment Agreement (2019),[182] US Model BIT (2012),[183] Canada Model BIT (2021),[184] and Colombia Model BIT (2017)[185] all expressly accept the engagement of third parties in investment disputes.

The ICSID Arbitration Rules also expressly recognize the possibility of third-party intervention in investment disputes.[186] Under the ICISID Rules, although the tribunal is required to consult with the parties, it can receive *amicus* briefs even without their consent. Such wording shows the potential importance of third parties' participation in disputes. Although several states have expressed concern over the additional burden of time and expenses involved in *amicus* participation, hearing the views of human rights NGOs could open an avenue for human rights law to be considered in investment disputes. (Of course, given the obscurity of investor-state arbitrations and the cost of participation, *amicus* submissions may highlight views of wealthy

[182] Article 20.13 of the Netherlands Model Investment Agreement (under the "Constitution and functioning of the Tribunal" title).
[183] Article 28.3 of the US Model BIT (under the "Conduct of the Arbitration" title).
[184] Article 37 of the Canada Model BIT (under the "Participation of a Non-Disputing Party" title).
[185] Article [##] of the Colombia Model BIT (under the "Intervention by *Amicus Curiae* and Non-Disputing Party" title).
[186] Rule 37.2 provides "After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the "non-disputing party") to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:

(a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
(b) the non-disputing party submission would address a matter within the scope of the dispute;
(c) the non-disputing party has a significant interest in the proceeding."

western NGOs over other potentially interested persons or organizations).[187] While *amicus curiae* submissions have created marginal space for consideration of human rights issues during the course of investor-state proceedings, they cannot in themselves necessarily lead tribunals to rule in any particular way.[188]

Part 2

Amici Curiae in the Iranian BITs

Participation of third parties in investment disputes as *amici curiae* is not recognized in any of the Iranian BITs. Nevertheless, since the Iranian BITs refer the settlement of disputes under the UNCITRAL Arbitration Rules, based on article 17.3 of UNCITRAL Arbitration Rules tribunals could accept *amicus* submissions:

> If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

On this basis, the Iranian state could benefit from the participation of third parties in investor-state dispute settlement, in particular NGOs active in labour, environment, or public health.

Conclusion to Chapter 2

Undoubtedly, foreign investment can create positive conditions for improving people's lives through sustainable development in host countries. However, it can also have negative impacts on

[187] Mann *et al*, *supra* note 102 at 79.
[188] Nevertheless, in most cases, tribunals have declined to engage with human rights norms or arguments raised by host state respondents and given limited consideration to human rights issues raised by *amicus curiae* submissions. Coleman *et al, supra* note 6 at 308.

the environment, public health, and human rights. Accordingly, contracting states should attempt to strike a balance between the protection and promotion of foreign investments and protection and respect for the human rights of individuals.

In this Chapter, I have investigated the wording of the investment treaties and the discussions and decisions of arbitral tribunals relating to the various legal means by which human rights considerations can be inserted into investment law and investor-state arbitrations. I compared the provisions of the Iranian BITs with the provisions of other recent IIAs and tribunals' interpretations. The purpose of this Chapter was to find out to what extent the Iranian state could rely on the provisions of its BITs to justify measures it takes in favour of its human rights obligations that arguably conflict with its investment obligations.

The Government of Iran has adopted the major international human rights conventions, *inter alia*, International Covenant on Civil and Political Rights and International Covenant on Economic, Social, and Cultural Rights, and must comply with its duties under these documents. Where compliance with such obligations contradicts the Iranian state's commitments towards foreign investors under its BITs, the Iranian state will have to decide whether the potential for liability to foreign investors is a necessary or worthwhile cost to pay in order to observe its human rights obligations. The provisions of the BITs play a significant role in clarifying this issue. A BIT with human rights language in its preamble or operative provisions has the potential to safeguard the regulatory activities of the Iranian state. The stronger the consideration of human rights in the BITs, the better a host state such as Iran can justify and defend its regulatory measures affecting foreign investors.

Examination of the provisions of the Iranian BITs demonstrates that the current Iranian investment treaty regime does not safeguard the Iranian state's commitments under human rights law. The provisions of the majority of the BITs and the Iranian Model BIT (2001) do not even

attempt to balance human rights with investor rights. As mentioned above, fewer than 10 BITs include any human rights considerations, and the majority of Iran's BITs focus entirely on the protection and promotion of investment. On this basis, in any contradiction between human rights obligations and foreign investment obligations of the Iranian state, only a few Iranian BITs open an avenue for the Iranian state to justify or defend its adopted measures in any dispute settlement process.

The situation will get worse in case the Iranian state intends to derogate from its investment treaty obligations in the BITs with the countries with which Iran has the closest economic relations. As mentioned in the Introduction, most of foreign investors in Iran are from countries other than those examined above. Prolonged sanctions and COVID-19 have pushed the Iranian economy into dire straits. The sanctions have suffocated the Iranian economy and, in this scenario, China has emerged as a reliable and irreplaceable trade partner for Iran as China has the required technology for Iran's oil and gas industry. As western firms withdraw from the Iranian market following the imposition of financial sanctions, Iran increased trade with China as part of an effort to resist economic pressure.[189] The Iran-China BIT is based on guarantying the rights of Chinese investors and has no human rights concerns. Although due to sanctions most of the Chinese corporations are reluctant to deal with Iran, the Chinese corporations still constitute a large proportion of the foreign investors active in Iran. In case the Iranian state has to apply a domestic regulatory measure to comply with one of its international environmental treaties, the state will face political problems in its relations with China. Considering the new agreement between Iran

[189] Lucille Greer & Esfandyar Batmanghelidj, "Last Among Equals: The China-Iran Partnership in a Regional Context" (2020), at 3, online (pdf): *Wilson Center* <www.wilsoncenter.org/publication/last-among-equals-china-iran-partnership-regional-context> [web.archive.org/web/20210917140509/https://www.wilsoncenter.org/publication/last-among-equals-china-iran-partnership-regional-context].

and China, it is expected that the trade relations between the two countries and the investment of Chinese corporations in Iran increase. As the Iran-China BIT does not contain human rights wording, Iran will face challenges in justifying its measures against Chinese investors. This situation may also occur in investment projects with German, French, Turkish, and Russian investors, as the Iranian BITs with these countries contain no human rights consideration. In this situation, the Iranian state will have to rely on obligations arising outside of international investment law or renegotiate its BITs, which will be examined in the coming chapters.

Chapter 3

Human Rights Protection and Foreign Investment with a view into Iranian Legislation

Introduction to Chapter 3

Regardless of international attention to the importance of the protection of individuals' rights, some countries base their comparative advantage to attract foreign investment on low labour or environmental standards.[190] Since the main purpose of this thesis is investigating the protection of human rights law in the Iranian foreign investment context, this Chapter will examine the provisions of the relevant Iranian laws and regulations to find out whether the Iranian investment regime protects the human rights of Iranian society.[191] I will not look at all human rights or human rights in general, but will instead focus on those obligations of the Iranian state and foreign investors that are most widely relevant in the foreign investment context: labour rights, the environment, and public health.

Since investors' claims against host states mostly challenge the measures of governmental agencies that directly regulate foreign investors (as opposed to legislation), I will also examine the investigatory powers of the labour, environment, and public health organizations and the procedures that they have to follow in dealing with investors' activities. By this examination, I intend to find out to what extent such powers and procedures could result in claims by foreign investors against the Iranian state under Iran's BITs.

Sections 1-3 deal, respectively, with core labour rights, occupational health and safety, and the investigatory authorities and procedures in the area of labour rights. For the environment, the provisions of the Constitutions of the Islamic Republic of Iran and the environmental laws regarding the protection and inspection regulations will be examined in sections 4 and 5. Finally, Section 6 of this Chapter will deal with the regulations relating to public health, the obligations of

[190] Miles, *supra* note 4 at 180.

[191] As foreign investment projects are categorized under large-scale projects and plans, all the regulations governing large-scale projects apply to them and will be discussed in this Chapter.

the state and foreign investors, and the investigatory powers of the health inspectors. The purpose of examination of the relevant legislation is to explore the potential conflicts between investment obligations and domestic human rights obligations, so as to determine where investment claims are likely to arise against the Iranian state.

Section 1: Protection of Core Labour Rights

The interaction between trade and labour standards first arose in the 19th century, when concerns were expressed regarding the risk of unfair trade associated with competition from firms producing under socially unacceptable practices. These concerns were one of the motivations for the creation of the International Labour Organization (ILO) in 1919, which illustrated the growing importance of basic workers' rights.[192]

Nowadays, there exists another concern that relates to the competition between countries with different levels of labour standards, which might trigger a "race to the bottom", since low labour standards can create a competitive advantage in attracting inflows of foreign investment.[193] To respond to these concerns, states and enterprises should comply with internationally recognized labour rights. Of these, four rights are considered to be the core or fundamental labour standards: the prohibition of forced labour, non-discrimination in employment, freedom of association and the right to collective bargaining, and the elimination of child labour.[194] Observance of these labour standards, which embody basic human rights, can stimulate economic development, which is in the interest of all workers and the countries in the world and can secure

[192] OECD, "Employment, Labour and Social Affairs Committee and the Trade Committee, Trade, Employment and Labour Standards, A Study of Core Workers' Rights and International Trade" (1996) at 21 & 26, online (pdf): *OECD* <www.oecd-ilibrary.org/trade/trade-employment-and-labour-standards_9789264104884-en> [web.archive.org/web/20210908154755/https://www.oecd-ilibrary.org/trade/trade-employment-and-labour-standards_9789264104884-en].

[193] *Ibid* at 90.

[194] Agreement on the set of labour standards was reached at the World Social Summit in Copenhagen, Denmark in March 1995. The Government of Iran participated in the Summit. Furthermore, these principles are covered by the ILO Declaration on Fundamental Principles and Rights at Work (1998).

support for free trade.[195] Moreover, implementation of other labour rights may not be meaningful without observance of the core labour standards, as the core standards are required as a precedent condition to enable the individuals to benefit from the other standards. For example, working time standards will have little impact if the prohibition of forced labour is not respected.[196]

When states accede to international human rights treaties, they obligate themselves to proactively regulate to preserve the rights and standards referred under these instruments. The Government of Iran has voluntarily acceded to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and some of the Conventions of the ILO, and has thereby obligated itself to follow the commitments codified in these treaties. These labour rights and standards are regulated under the domestic laws of the Iranian legislation. The main law governing labour rights is the Labour Code, which sets out the obligations of the employers, irrespective of their nationality, to protect and respect their employees' rights. In this part, in addition to the provisions of the Constitution, which obligates the protection of labour rights, the Labour Code will be examined to realize the level of core labour rights protection this act provides for the Iranian workers.

Part 1: Prohibition of Forced Labour

The prohibition of forced labour requires states to take appropriate measures and impose legal obligations on private actors regarding the prohibition of forced labour, and to hold them responsible for violations. A clear national policy against forced labour provides a fundamental point of departure for action to prevent and suppress forced labour and protect its victims, with particular emphasis on identifying priority sectors and occupations, raising public awareness,

[195] OECD, *supra* note 192 at 9.
[196] *Ibid* at 28.

developing institutional capacity and coordination, protecting victims, and ensuring their access to justice and compensation.[197]

Nowadays, the prohibition of forced labour is considered a peremptory norm of modern international human rights law and is non-derogable. Although the Universal Declaration of Human Rights and the ICESCR have no provisions regarding the prohibition of forced labour, article 8.3 (a) of the ICCPR prohibits all forms of forced labour.[198] This article applies a broad notion of forced labour and does not require the labour to be unjust, oppressive, or harsh.[199] Under the ICCPR, contracting states are required to take appropriate measures to ensure the realization of this right by adopting laws and regulations applicable to enterprises.

The ILO Forced Labour Convention 1930 (No. 29) deals with the prohibition of forced labour and defines forced or compulsory labour. Article 2(1) provides:

> For the purpose of this Convention the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.[200]

The Abolition of Forced Labour Convention of 1957 (No. 105), which builds on Convention No. 29, commits member states to suppress any form of forced or compulsory labour as a method of mobilizing and using labour for purpose of economic development.[201] For this purpose, states are required to take effective measures to secure the immediate and complete abolition of forced or compulsory labour.[202]

---

[197] *Ibid* at 41.
[198] This article provides "No one shall be required to perform forced or compulsory labour." *International Covenant on Civil & Political Rights,* 16 December 1966 (23 March 1976).
[199] Christine Breining-Kaufmann, *Globalization and Labour Rights, The Conflicts between Core Labour Rights and International Economic Law*, (Portland: Hart Publishing, 2007) at 43.
[200] *Forced Labour Convention*, 28 June 1930 (1 May 1932).
[201] *Abolition of Forced Labour Convention*, 25 June 1957, article 1(b) (17 January 1959).
[202] *Ibid* at article 2.

As the prohibition of forced labour is an internationally recognized human right and is categorized as a core labour right, the Iranian state has regulated this prohibition under its national laws. Article 6 of the Labour Code prohibits forced labour and exploitation of others and article 172 imposes sanctions upon employers who fail to respect this right.[203] Under this article, a non-compliant employer has to compensate the injured labourer by paying damages in addition to remuneration for labour already performed. Furthermore, the non-compliant employer may be subjected to prison and payment of a fine. The provisions of this article and the penalties enacted under it attest to the importance of this right for the Iranian legislature. Iran has also ratified the ILO Conventions of Forced Labour Convention and the Abolition of Forced Labour. As mentioned above, these Conventions require contracting states to abolish forced labour, impose punishments for violations, and not make use of forced labour to develop the economy. Regarding forced labour, which is recognized as an *ius cogens* norm, the Iranian state could derogate from its investment obligations as necessary to comply with *ius cogens* without incurring liability to a foreign investor and the activities of foreign investor violating this core labour right will result in its liability.

Part 2: Prohibition of Non-Discrimination in Employment

As no society is free from discrimination, discrimination in employment and occupation is a universal phenomenon. Millions of people around the world are denied access to jobs, receive low wages, or are restricted to certain occupations based on their gender, colour, beliefs and other such characteristics. Freedom from discrimination is a fundamental human right and is essential

[203] Chapter XI (under the "Offences and Penalties" title) provides "In accordance with Article 6 of this Code, all forms of forced labour shall be prohibited. Any person who commits an offense on that account shall, with due regard to his situation and means and to the degree of the offense, be subject to a term of imprisonment ranging from 91 days to one year and/or to a fine of between 50 and 200 times the minimum daily wage, in addition to the payment of fair remuneration for work completed and compensation for damages".

for workers to be able to develop their capacities to improve their living conditions. States have to respect the principle of non-discrimination through affirmative legislation in order to protect the workforce from any distinction or preference made based on race, gender, colour, religion, etc. Moreover, employers must respect this principle and comply with the laws and regulations governing non-discrimination in employment and occupation. National laws should impose sanctions for failures to respect or observe this right.

The Universal Declaration of Human Rights recognizes the right to work, prohibits discriminatory wages, and affirms the right to equal pay for equal work.[204] Article 7(a)(i) of the ICCPR recognizes the right of just and favourable conditions of work for everyone including, in particular, fair wages and equal remuneration for work of equal value without distinction of any kind.[205] Section (c) of article 7 of the ICESCR includes the right to equal opportunity for promotion.[206]

The ILO Equal Remuneration Convention of 1951 (No. 100) deals more specifically with equal remuneration for men and women workers for work of equal value. This Convention

[204] Article 23 provides "1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. 2. Everyone, without any discrimination, has the right to equal pay for equal work. 3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. 4. Everyone has the right to form and to join trade unions for the protection of his interests." *Universal Declaration of Human Rights*, 10 December 1948.

[205] This article provides "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (1) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work."

[206] This article provides "Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence." *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966 (3 January 1976).

obligates ratifying states to do what they can, in good faith, to ensure the application of the principle of equal remuneration.[207]

Several articles of the Constitution of the Islamic Republic of Iran refer to the non-discrimination principle.[208] Article 28 of the Constitution refers specifically to non-discrimination in employment. The first part of this article contains the right to choose an occupation. The second section obligates the government to provide favorable and equal circumstances for employment for all.[209] Accordingly, all the laws and regulations, and employment policies in Iran shall be regulated in a manner to respect this right.

Article 6 of the Labour Code declares:

> […] Iranian, whatever their tribe or ethnic group, enjoy the same rights; skin color, race, language and the like do not constitute any privilege or distinction; all individuals, whether men or women, are entitled to the same protection of the law.

Regarding equal remuneration, article 38 of the Labour Code, in line with the ILO Equal Remuneration Convention, requires equal remuneration for men and women workers for work

[207] *Equal Remuneration Convention*, 29 June 1951 (23 May 1953). Moreover, ILO Discrimination (Employment and Occupation) Convention of 1958 (No. 111) defines "discrimination" as "any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation". *Discrimination (Employment and Occupation) Convention*, 25 June 1958, article 1.1 (15 June 1960).

[208] Section 9 of article 3 (under the "General Principles" title) provides "In order to achieve the objectives mentioned in Article 2, the Islamic Republic government of Iran is obliged to use all of its resources in the following areas: 9. the elimination of all unjust forms of discrimination and the creation of just opportunities for everyone, in all spiritual and material areas." Section 14 of article 3 provides "In order to achieve the objectives mentioned in Article 2, the Islamic Republic government of Iran is obliged to use all of its resources in the following areas: 14. the securing of all-inclusive rights for everyone, man and woman, […]." Article 19 (under the "Nation's Rights" title) provides "The people of Iran enjoy equal rights, regardless of the tribe or ethnic group to which they belong. Color, race, language, and other such considerations shall not be grounds for special privileges." Article 20 provides "Members of the nation, whether man or woman, are equally protected by the law. They enjoy all the human, political, economic, social, and cultural rights that are in compliance with the Islamic criteria."

[209] This article provides "People are free to choose whatever profession they wish as long as this profession is not against Islam, public interest, and the rights of others. In considering the needs of society for different occupations, the government is required to provide favorable circumstances for the equal employment of all persons."

with equal value and prohibits discrimination on any considerations.[210] Under article 174, an employer who fails to respect this principle is obliged to remedy the offense and/or pay any amounts due to the worker and will be subject to fines.

Article 2(a) of the Foreign Investment Promotion and Protection Act (FIPPA) identifies the expansion of employment opportunities as one of the bases for admitting foreign investments in Iran. This goal cannot be achieved without considering the obligation of foreign investors to comply with the non-discrimination principle as mentioned in the Constitution and Labour Code. Article 2 of FIPPA generally refers to increasing employment opportunities and provides no conditions or requirements for employing. By providing equal opportunities for all individuals, regardless of their race, gender, language, and religious or political beliefs, foreign investors could increase employment opportunities in Iran. From another point of view, any limitation or discrimination in employment procedures will result in a limited pool of qualified employees, which will not lead to increased employment opportunities.

One significant point that should be mentioned here is that a Cabinet Decree (which is known as Regulation of Employment of Human Resources, Insurance and Social Security in the Free-Trade-Industrial Zones) regulates labour relations in free-trade zones and special zones of the Islamic Republic of Iran, and the national Labour Code does not apply to labour relations in these zones. These zones patently violate the non-discrimination principle, especially the fact that the labour regulations of the zones assume an employer-employee relationship on a contractual basis, which gives the employer the right to freely select and dismiss employees under the

[210] This article provides "Equal wages shall be paid to men and women performing work of equal value in a workplace under the same conditions. Any discrimination in wage determination on the basis of age, gender, race, ethnic origin and political and religious convictions shall be prohibited."

provisions of the employment contract.[211] While the Labour Code limits employment termination to six grounds and makes it impossible for employers to dismiss a worker for any other reason,[212] the regulation applicable to free-trade zones and special zones take a more flexible view by permitting employers to stipulate other reasons for termination, for example for economic, technological, and organizational reasons.[213] Pursuant to the regulation, employees with permanent employment contracts may resign or be fired at any time without being entitled to any compensation. For temporary contracts, employees are not entitled to resign during the term of the contract, unless otherwise provided.[214]

Considering that the main purpose of establishing these zones is to promote and attract foreign investments, different labour regulations, especially those which violate the principle of non-discrimination, increase the risk of a race to the bottom. In practice, these kinds of employment regulations decrease costs for employers instead of protecting the rights of employees. These regulations create a legal environment that offers the least protection for labour in the context of the kinds of foreign investments that give rise to investment treaty disputes. Moreover, despite the incentives and facilities regulated in the free-trade zones and special zones, Iran has not been successful in achieving the other goal of establishing the zones, which was contributing to employment creation. The rate of employment (in general) and women

[211] Abdolhossein Shiravi, "The Legal Structure of Special Economic Zones in Iran" (2010) 2010:2 Int'l Bus LJ 161 at 167.
[212] These events are employee's death, retirement, total disability, resignation, the expiry of a fixed-term contract, or the completion of work under a contract concluded for a specified assignment.
[213] Hassan Hakimian, "Iran's Free Trade Zones: Back Doors to the International Economy?" (2011) 44:6 Taylor & Francis, Ltd. On behalf of International Society of Iranian Studies, 851 at 861 www.jstor.org/stable/41445182 [web.archive.org/web/20210917144429/https://www.jstor.org/stable/41445182].
[214] Shiravi, *supra* note 211 at 168.

employment (in particular) is very low in the zones, which demonstrates that the zones have failed to contribute to job creation.[215]

Part 3: Freedom of Association and Collective Bargaining

The desire to form a group is one of the inherent needs of human beings due to their social nature. Workers may form unions to defend their occupational interests and to improve their living conditions. Freedom of association ensures that workers and employers can associate to negotiate work relations effectively. Combined with freedom of association, collective bargaining ensures that both employers and employees have a voice in negotiations.[216] The right to collective bargaining allows both sides to negotiate a fair employment relationship and prevents costly labour disputes.[217]

Article 23.4 of the Universal Declaration of Human Rights establishes the right to form and join trade unions.[218] Article 22.1 of the ICCPR refers to freedom of association and trade unions and demonstrates that this right has a civil and political character in addition to its economic character.[219] The civil and political character of the right grants protection against state and private interference.[220] Article 8.1(a) of ICESCR regulates the right to form and join trade unions by

[215] Female employment creation is very weak in the Iranian experience. Although detailed employment figures by gender are not available, the limited graphic data indicates a highly skewed gender composition of the population in favour of males. Hakimian, *supra* note 213 at 865-8.
[216] ILO, "Rules of the game: An introduction to the standards-related work of the International Labour Organization" (2019) at 36 online (pdf): *ILO* <www.ilo.org/global/standards/information-resources-and-publications/publications/WCMS_672549/lang--en/index.htm> [web.archive.org/web/20210908155327/https://ajax.googleapis.com/ajax/libs/jquery/1.7.1/jquery.min.js].
[217] It is important to acknowledge that respecting collective bargaining rights is costly for employers. That's why they keep trying to circumvent them, often with the active or passive support of government officials who want to increase employment or are just corrupt.
[218] This article provides "Everyone has the right to form and to join trade unions for the protection of his interests."
[219] This article provides "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."
[220] Breining-Kaufmann, *supra* note 199 at 44.

obliging the member states to ensure this right for every worker.[221] The Constitution of the ILO refers to freedom of association as a basic principle. In addition to the Constitution, freedom of association is enshrined in the ILO Declaration of Philadelphia (1944), the ILO Declaration on Fundamental Principles and Rights at Work (1998), and in the ILO Freedom of Association and Protection of the Right to Organize Convention of 1948 (No. 87) and ILO Right to Organize and Collective Bargaining Convention of 1949 (No. 98).

Although the government of Iran has not ratified the relevant ILO Conventions regarding freedom of association and collective bargaining, the Constitution and the Labour Code both contain provisions protecting these rights. Freedom of association and the right to form and join trade unions are established under article 26 of the Constitution of the Islamic Republic of Iran.[222] Based on provisions of the Constitution, Chapter VI of the Labour Code recognizes employers' and employees' right to form organizations and associations.[223] Chapter VI protects the legitimate interests of workers and employers to improve their economic situation, in a manner guaranteeing the protection of the interests of society as a whole.[224] Chapter VII of the Labour Code defines the objective of collective bargaining as preventing or settling occupational and professional problems or improving the working conditions or welfare of workers.[225] Article 178, which is within Chapter VII, imposes sanctions upon persons who violate others' enjoyment of the right to

[221] This article provides "The States Parties to the present Covenant undertake to ensure: (a) The right of everyone to form trade unions and join the trade union of his choice […]."
[222] This article provides "The political parties, associations and trade unions, Islamic associations, or associations of the recognized religious minorities are free to exist on the condition that they do not negate the principles of independence, freedom, national unity, Islamic criterion, and the foundation of the Islamic Republic. No one can be prevented from participation in these gatherings or forced to participate in one of them."
[223] Under the "Workers' and Employers' Organizations" title.
[224] Article 131 Labour Code (Iran).
[225] *Ibid* article 139. This article is under the "Collective Bargaining and Agreements" title.

form trade unions. Under this article, the violating person will be subject to a fine or imprisonment or both.[226]

Article 142 of Labour Code deals with disputes between employees and employers regarding the provisions of collective agreements. Such disputes shall be settled by the Board of Inquiry (BOI).[227] The BOI consists of an employees' representative, a representative of the Ministry of Labour, and a representative from the employers' assembly.[228] The employer and employees have the right to object to decisions of the BOI, in which case the Dispute Board will investigate the dispute.[229] The decision of the Dispute Board is final and binding, except for disputes regarding collective agreements.[230] If the employees or the employer object to the decision of the Dispute Board, the Ministry of Labour decides the dispute. And as long as the dispute is not settled, the Council of Ministers may operate the workplace in question as it deems appropriate, at the cost of the employer.[231]

These provisions of Labour Code could result in an investment dispute in case the employer is a foreign investor. Considering that the decisions of the BOI are not final and the disputing parties (employees and employers) could refer dispute to the Dispute Board, it's argued that the

[226] This article provides "Any person who resorts to coercion or threats to oblige another to join a workers' or employers' organization or to prevent him from joining such organizations, and anyone who prevents lawful organizations from being established or their statutory functions form being performed shall, with due regard to his situation and means and to the degree of the offense, be subject to a fine of between 20 and 100 times the minimum daily wage applicable on the date of judgment, or to a term of imprisonment ranging from 91 to 120 days, or to both these penalties."

[227] The members of the BOI are determined in accordance with the Regulations for the Election of Members of the Board of Inquiry (December 2008). Under article 9, the Deputy of Labour Relations issues the credentials of the members of the BOI. The Deputy of Labour Relations operates under the direct supervision of the Minister of Labour of the Islamic Republic of Iran.

[228] Article 158 Labour Code (Iran).

[229] Based on article 160 of the Labour Code, the Dispute Board is composed of 3 workers' representatives, 3 employers' representatives, and 3 government representatives. The members of the Dispute Board are determined under the Regulations for the Election of Members of the Dispute Board (December 2008). Under article 16, the Deputy Labour Relations issues the credentials of the members of the Dispute Board. The Deputy of Labour Relations operates under the direct supervision of the Minister of Labour of the Islamic Republic of Iran.

[230] Article 166 Labour Code (Iran).

[231] *Ibid* at article 143.

BOI is a kind of mandatory arbitration.[232] Such procedure will take time and impose costs (legal and non-legal) on employers. Moreover, if the dispute between a foreign investor employer and its employees is not settled by the Dispute Board, the operation of the workplace by the Council of Ministers applies undetermined costs on investors that could contradict their legitimate expectations. Regarding the right to collective bargaining, it is noteworthy that the labour regulation of the free-trade zones and special zones does not cover issues relating to employees' organizations and collective bargaining and agreements. It seems that to have business-friendly zones, the regulation has no provision regarding this right. This is in contrast with the Labour Code, which recognizes the rights of the employees in the mainland.

Part 4: Child Labour

Child labour is a violation of fundamental human rights and hinders children's development, leading to lifelong physical or psychological damage.[233] Article 10.3 of ICESCR expressly refers to children's work and declares that execution of harmful work by children or employing them before the minimum age should be punishable by law.[234] The Convention on the Rights of the Child of 1989, which is almost universally ratified, applies to every human being under the age of 18 unless the law applicable to the child indicates an earlier age.[235] The ILO Minimum Age Convention of 1973 (No. 138) sets the minimum age of works.[236] The ILO Worst Forms of Child Labour Convention of 1999 (No. 182) requires states to eliminate the worst forms of child labour

[232] Seyed Mohammad Hachemi, *Droit du Travail*, (Tehran: Mizan Publication, 2018) at 279.
[233] ILO, *supra* note 216 at 42.
[234] This article provides "Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law."
[235] *Convention on the Rights of the Child*, 20 November 1989, article 1 (2 September 1990).
[236] Under this Convention, a minimum age of 13 years for light work, 15 years as the general minimum age for admission to employment or work, and a minimum age of 18 for hazardous work (16 under certain strict conditions) is regulated. *Minimum Age Convention*, 26 June 1973 (19 June 1976).

that are likely to harm the health, safety, or morals of children[237] and obliges the member states to take necessary measures to ensure the effective enforcement of the provisions of the Convention by application of penal sanctions.[238] Article 79 of Labour Code of Iran prohibits employing any person under 15 years of age and article 83 prohibits overtime work, shift work, or arduous, harmful, or dangerous work by young workers.[239] Failure to comply with these regulations can results in prison and fines.

Section 2: Right to Occupational Safety and Health

Improvement of environmental and industrial hygiene is internationally recognized under article 12.2 (b) of the ICESCR.[240] Also, one of the functions of the ILO, as mentioned in article 2 of its Constitution, is "to promote [….] economic or working conditions and other aspects of environmental hygiene." The ILO Occupational Safety and Health Convention deals with the obligations of states and employers to protect the workforce and keep working places safe and secure.[241]

Paragraph 15 of the General Comment No. 14 refers to article 12.2 (b) of ICESCR regarding the right to healthy natural and workplace environments.[242] The State parties have immediate

---

[237] *Worst Forms of Child Labour Convention*, 17 June 1999, at article 3 (19 November 2000).
[238] *Ibid* at article 7.1.
[239] Section V Labour Code (Iran).
[240] This article provides "The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (b) the improvement of all aspects of environmental and industrial hygiene."
[241] Article 4 of the Convention (under the "Principles of National Policy" title) commits member states to formulate, implement, and periodically review a coherent national policy on occupational safety, occupational health, and working environment. The purpose of the national policy is to prevent accidents and injuries to health arising out of work and the working environment. Articles 8, 9.1, and 9.3 (under the "Action at the National Level" title) oblige member states to regulate occupational safety and health under their national laws, secure the inspection of the implementation of regulations, and provide adequate penalties for violating the laws regarding occupational safety and health and working environment. Articles 16.1 and 16.3 (under the "Action at the Level of the Undertaking" title) encourage employers to ensure that workplaces, machinery, equipment, and processes under their control are safe and without health risk and provide adequate protective equipment to prevent the risk of accidents. *ILO Occupational Safety and Health Convention*, 22 June 1981 (11 August 1983).
[242] Under this paragraph, "the improvement of all aspects of environmental and industrial hygiene comprises, inter alia, preventive measures in respect of occupational accidents and diseases". Industrial hygiene refers to "minimization, so far as is reasonably practicable, of the causes of health hazards inherent in the working environment". UN Committee on Economic, Social and Cultural Rights (CESCR), "General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art.12)", 22nd Sess, 11 August 2000, UN DOC E/C.12/2000/4.

obligations to guarantee that this right will be exercised without discrimination of any kind and take steps towards the full realization of this right. These steps must be deliberate, concrete, and targeted toward the full realization. Moreover, states have an international obligation to prevent third parties form violating this right.

The Labour Code of the Islamic Republic of Iran, under "Occupational Safety and Health", provides:

> In order to protect the human and material resources of the Islamic Republic of Iran, all workplaces, employers, workers and trainees shall observe such instructions as may be drawn up by the High Council for Occupational Safety (with regard to occupational safety) and by the Ministry of Health (with regard to the prevention of occupational diseases and the maintenance of occupational health and workers' health and the work environment).[243]

Thus, all employers, including foreign investors, have to observe occupational health standards to protect human resources. Employers shall obtain all equipment required for the occupational safety and health of workers in the workplace and shall instruct them on the usage and operation of such equipment.[244] Furthermore, employers shall observe the relevant safety and health regulations for manufacturing, importing, supplying, installing, and operating any machinery, equipment, or tools.[245] The Labour Code establishes the criminal responsibility of the employer who fails to comply with the occupational safety and health provisions (imprisonment, fines, or both).[246] For proper implementation of these standards, the Labour Inspection Department (LID) was established to supervise the working conditions of the workers.[247] If an employer prevents a labour inspector or an occupational health officer from performing their

[243] Article 85 Labour Code (Iran).
[244] *Ibid* at article 91.
[245] *Ibid* at articles 88, 89, & 90.
[246] *Ibid* at articles 95, 171, & 177.
[247] *Ibid* at article 96.

duties, the employer will be subject to a fine and/or imprisonment.[248] In contrary to the Labour Code, the labour regulation applicable to free-trade zones and special zones only vaguely covers occupational safety and health of employees active in these zones. The regulation provides no sanction for the employers who fail to correct problems caused by malfunctioning of health and security standards.

The international obligations of states regarding the right to healthy natural and workplace environments could result in investment claims. A new regulation or modifications of laws could affect the legitimate expectations of a foreign investor and lead to investment claims against the investment host state. Based on the Labour Code of the Islamic Republic of Iran, the designated entities (High Council for Occupational Safety and the Ministry of Health) are authorized to regulate instructions for the safety of the employees and workplaces and the LID is responsible for observing the implementation of the instructions. Conflicts may arise between foreign investors and governmental entities based on these instructions and their implementation. New standards or instructions and their performance procedures could be claimed to be unfair or to affect the investor's expectations. In this situation, interactions will inevitably occur between the human rights obligations of the Iranian state and its investment treaty obligations.

Section 3: Labour Inspection

As discussed above, the Labour Code is the main law of the Government of Iran that regulates relationships between employers and employees and applies to all kinds of employers, national or foreign. Pursuant to the Labour Code, the Labour Inspection Department (LID), under the supervision of the Ministry of Labour, has been established to supervise the proper implementation of the law, to protect occupational safety, and to control the execution of labour

[248] *Ibid* at article 179.

standards by the employers. The LID may interfere in employers' activities to investigate whether they comply with the labour standards, and may make proposals to rectify and improve workplace practices.[249] In addition to the LID, the Ministry of Health is responsible for planning, control, evaluation, and inspection of occupational health and medicine.[250] Based on the Labour Code, the LID and the Ministry of Health are jointly responsible for inspecting the standards of occupation. Based on note 2 of article 96 of Labour Code:

> Inspection shall be carried out on a continuous and regular basis, and warnings shall be given in the request of problems, defects, and shortcomings, and where circumstances so require, the appropriate authority shall be requested to take legal action against violators and offenders.

Such inspections and other investigations, with the purpose of finding out whether employers (Iranians or foreigners) comply with their obligations to protect labour rights, could give rise to disputes between employers and inspectors. Since LID and the Ministry of Health are authorized "to take legal action against violators and offenders" and plan or make proposals related to the occupational standards, their measures could result in disputes or may increase employer's costs. In case the employer is a foreign investor and the dispute is not settled amicably, such investigating measures of governmental entities could lead to the investor's claim against the Iranian state. Enacting a new standard or modifying existing standards could be challenged by a foreign investor. Considering that the laws may contain limited descriptions regarding the procedures or the entities may apply their discretion in implementing the regulations, the rights of foreign investors and the obligations of Iranian entities may come into conflict with each other. It is noteworthy that the investment arbitral tribunals, in several cases have referred to the lack of fair procedure or serious procedural shortcomings of the actions of the host state or its agencies.

[249] *Ibid* at article 96.
[250] *Ibid* at note 1 of article 96.

Based on the tribunals, the failure of the regulatory authority to notify the investor or their failure to give the investor the opportunity to express its position result in a violation of the fair and equitable standard of treatment.[251]

Section 4: Protection of Environmental Rights

A healthy environment is a right to which all human beings are entitled, independent from other human rights. A poor environment may affect an individual's or a community's capacity to realize their human rights generally or impede a government's ability to protect the rights of its citizens.[252] On this basis, protection of the environment has been codified in international documents as well as in national laws. To protect the environment from abuse by multinational corporations, the regulatory power of the state is recognized.[253]

To implement the obligation of enterprises to protect and respect the environment, most states, including Iran, have established an environmental impact assessment process. This impact assessment serves two purposes; first, the authorities become notified of the negative environmental impacts of the implementation of a project; second the industries involved must consider how to deal with and reduce the impact of their activities on the environment.[254] Where one state finds that the environmental impact of a new project will be harmful, it can shut down the project. Considering that foreign investment projects are in the form of large-scale projects, under Iranian law the obligation of protecting and respecting the environment and compliance with the environmental impact assessment applies to foreign investment projects.

---

[251] Dolzer & Schreuer, *supra* note 2 at 143.
[252] Bridget Lewis, "Environmental Rights or a Right to the Environment? Exploring the Nexus between Human Rights and Environmental Protection" (2012) at 39-40 online (pdf): *Macquarie Journal of International and Comparative Environmental Law*
<papers.ssrn.com/sol3/papers.cfm?abstract_id=2673932>
[web.archive.org/web/20210908155625/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2673932].
[253] *Ibid* at 77.
[254] Shiravi, *supra* note 211 at 574-75.

Although protection of the environment has never been adopted in a universal human rights treaty, the absence of a globally recognized right to a healthy environment has not prevented the development of human rights norms relating to the environment.[255] The Declaration of the UN Conference on the Human Environment of 1972 (Stockholm Declaration), World Charter for Nature of 1982, the UN Conference on Environment and Development of 1992 (Rio Declaration), Hague Declaration on the Environment 1989, and the Framework Convention on Climate Change of 1992 are a number of the most significant instruments protecting the environment.

There exists a concern that multinational corporations, who are unable to continue environmentally damaging practices in developed states, will export those practices to developing states with significantly lower environmental protection standards or investigatory capacity.[256] Consequently, at the international level, numerous documents have been drafted to establish obligations of multinational corporations to protect the environment and to respect people's right to a healthy environment.

As mentioned above, the laws of almost all states have recognized the right to a healthy and clean environment. Iran has regulated the protection of the environment under the Constitution and other statutes and regulations. FIPPA, the Petroleum Act, the Development Plan Acts, the Law on Environmental Protection and Improvement of 1974 (as amended in November 1992), and the Criminal Code all contain provisions protecting the environment, as will be discussed below.[257]

[255] John H Knox & Ramin Pejan, *The Human Rights to a Healthy Environment* (Cambridge: Cambridge University Press, 2018) at 1-2.
[256] Miles, *supra* note 5 at 180.
[257] The rules and regulations for environmental protection in the Iranian free trade-industrial zones and special zones are similar to those in the mainland, and a unit of the DOE located in each zone is responsible for supervising the proper implementation of environmental laws and regulations in the zones.

Part 1: Right to a Healthy Environment

Article 50 of the Constitution of the Islamic Republic of Iran conveys the need to protect the environment. This article states:

> In the Islamic Republic, it is considered a public duty to preserve the environment where the present and the future generations may have an improved social life. Consequently, any activity, economic or other, that leads to the pollution of the environment or its irreparable damage will be forbidden.[258]

Article 50 seeks to establish a link between environmental protection and respect for the rights of present and future generations. The phrase "present and future generations" evokes the concept of sustainable development. The last part of the article prohibits economic, social, or other activities associated with the irreparable pollution and destruction of the environment. Moreover, the word "or" between pollution and irreparable damage confirms that both destruction and pollution are forbidden, as they have no way to be compensated.

Paragraph (b) of article 2 of FIPPA prohibits deterioration of the environment by foreign investments.[259] The provisions of this article demonstrate the importance of protection of the environment for the legislature, as damage to the environment and threats to national security and public interests have the same value. Thus, foreign investments must observe the protection of the environment as a condition of being admitted into the Iranian investment context.

The Law on Environmental Protection and Improvement of 1974 (as amended in November 1992) defines pollution of the environment and forbids any action that causes environmental pollution. Not only does the definition of pollution under this law protect humans, animals, and

[258] Chapter 4 the Constitution (Iran).

[259] This article provides "Admission of foreign investment shall be made, in accordance with the provisions of this Law and with due observance of other prevailing laws and regulations of the country, subject to the following basis: […] b. Does not threaten the national security and public interests, and deteriorate the environment; […]."

plants, it also applies to cultural heritage.[260] Articles 11 and 12 refer to the responsibility of the factories and workplaces which pollute the environment. Under article 12, the owners or managers of factories polluting the environment are obliged to abandon the prohibited activity. In case they fail to comply with the provisions of this law or the notice of the DOE (to abandon the activities), they will be sentenced to imprisonment, payment of a fine, or both.

The Petroleum Act (1987) defines petroleum operations as all operations relating to the conservation, protection, and exploitation of petroleum resources.[261] Under this law, all relevant activities shall observe the protection of the environment and shall comply with the standards and criteria laid down by the relevant organizations.[262] The Petroleum Act obliges the government to supervise and take due care, in the course of petroleum operations, to prevent environmental pollution.[263] All the Iranian Development Plan Acts contain provisions regarding the protection of the environment.

Environmental impact assessments were first required under the 2nd Development Plan Act (1995).[264] The government of Iran also enacted the Regulation of Environmental Impact Assessment of Large-Scale Production, Service and Development Projects and Plans in 2012. Under this regulation, the environmental impact assessment is defined as: "a study report that aims to predict and identify a set of probable environmental effects and consequences of a project and

[260] Per article 9 of this law "[…] Pollution of the environment means the diffusion or mixing of substances into water or air or soil to the extent that it alters its physical or biological quality in a harmful way to humans or other living inhabitants or plants or structures."
[261] Under this act, "Petroleum Resources shall mean and comprise every one of the inland territorial divisions of land and waters and coastal and international waters and continental shelf where discovery of petroleum reserves is probable and petroleum reserves may be found, and their specific technical and geographical specifications have been determined by the Ministry of Oil."
[262] *Ibid* at article 1.
[263] *Ibid* at article 7.
[264] According to section (A) of note 82, during the 2nd development plan, all economic and social activities had to observe the environmental requirements of the act. For this purpose, the act provided all the large-scale projects and plans to be accompanied by the environmental impact assessment.

is compiled in the form of an overview report and a detailed assessment report."[265] This regulation provides that if the DOE verifies the report, the environmental division of each project shall supervise the implementation of the report during the construction and operation of the project.[266] In case the report is rejected by the DOE, a new report, which should comply with the comments of the DOE, may be submitted for verification. If a project fails to comply with the environmental impact assessment report, the provisions of article 690 of the Criminal Code apply.[267] Under the Criminal Code, destroying the environment and natural resources is subject to imprisonment.[268]

Considering that investment projects are considered as large-scale projects and, according to FIPPA, foreign investments shall comply with all domestic laws relating to the protection of the environment, all the above laws and regulations are applicable to foreign investors operating in Iran, and the DOE is obliged to supervise and control the implementation of the projects to evaluate their compliance with the laws and the environmental impact assessment. The DOE is authorized to require the investor to abandon its activities if the DOE believes that they pollute the environment. Such a decision could contravene the legitimate expectations of a foreign investor and violate its investment rights.

Part 2: Right to Clean Water

In addition to article 50 of the Constitution, which refers to the protection of the environment, article 45 of the Constitution provides that the seas, lakes, and rivers are under the control of the Islamic government, which will treat them in accordance with the public interest.[269]

---

[265] Paragraph (C) article 1 Regulation of Environmental Impact Assessment of Large-Scale Production, Service and Development Projects and Plans (Iran).
[266] *Ibid* at articles 3 & 4.
[267] *Ibid* at article 8.
[268] This article declares "Anyone who [….] without the permission of the Department of Environment or other relevant bodies, resorts to an operation that destroys the environment and natural resources, [….] shall be sentenced to one month to one year of imprisonment. The court is obliged to order the elimination of the unlawful disruption or restoration of the previous status."
[269] Chapter 4 the Constitution (Iran).

Thus, the government of Iran is responsible for protecting water resources. The Law on Environmental Protection and Improvement of 1974 obliges the DOE to develop and enforce standards for protecting water and preventing its pollution.[270] More specifically, the Regulation on the Prevention of Water Pollution (1995) defines water pollution. Under this law, water pollution includes any change in water that makes its usage harmful or useless.[271] This law prohibits any activity which results in water pollution, and imposes a fine and a requirement of compensation for polluters. [272]

Prohibition of water pollution and compliance with the standards of DOE, managing water resources for sustainable development goals, and increasing public awareness regarding the value of water resources are emphasized in the Iranian Development Plan Acts.[273] Under the Criminal Code, polluting potable waters, distributing polluted potable water, and poisoning rivers are forbidden and the offenders will be sentenced to up to one-year imprisonment.[274] Where both the Criminal Code and some other law provide sentences for offenders, the most severe punishment will be applied. Reference to the most severe punishment attests to the importance of water pollution for the legislature.

According to the above rules, foreign investors active in Iranian water resource projects shall comply with the requirements provided in the relevant laws. The government also has an affirmative obligation to protect water resources for current and future generations and to ensure the proper implementation of water resource projects. Although the human right to water is not

[270] Section (B) article 6 the Law on Environmental Protection and Improvement (Iran).
[271] *Ibid* at section 3 article 2.
[272] *Ibid* at article 2.
[273] Note 83 1st Development Plan Act, article 17 4th Development Plan Act, and section (D) article 140 5th Development Plan Act (Iran).
[274] Article 688 Criminal Code (Iran).

universally accepted,[275] General Comment No. 15 defines the human right to water as everyone's entitlement to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses,[276] and obliges states to prevent third parties from interfering in any way with the enjoyment of the right to water, and to adopt necessary and effective laws to restrain third parties form polluting and extracting water sources, wells, and water distribution systems.[277] This right, like the other rights contained within the ICESCR, shall be realized progressively on the basis of the resources available.[278] The Iranian state has national and international obligation to protect the right to water of the Iranian individuals. In addition, while foreign private water consortiums have had limited success to date receiving compensation from international investment tribunals for breaching of BITs, no clear principle has emerged to govern such cases.[279] Accordingly, any regulatory or inspection measures of the Iranian state or its agencies could be claimed to violate the investment protections under a BIT.

Part 3: Right to Clean Air

The Constitution of the Islamic Republic of Iran makes no express reference to the protection of air or prohibition of air pollution. The right to clean air is implicitly recognized under article 50 of the Constitution, which refers to the environment in general. Article 1 of the Law on Prevention of Air Pollution (1993), while referring to article 50 of the Constitution, indicates that all legal persons shall comply with the provisions of this Law. Under note 1 to article 13 of this law, construction of power plants, refineries, petrochemical plants, military-industrial plants, airports, and loading terminals are subject to compliance with the standards of the DOE. Article

[275] Truswell, *supra* note 135 at 572.
[276] UN Committee on Economic, Social and Cultural Rights (CESCR), "General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)", 29th Sess, 20 January 2003, UN Doc E/C.12/2002/11, at para 2.
[277] *Ibid* at para (b) 23.
[278] *Ibid* at para 17.
[279] Truswell, *supra* note 135 at 579.

14 prohibits the activities of polluting projects and obliges the owners of such projects to eliminate the pollution or suspend work. In case any project fails to comply with the orders of the DOE, article 29 imposes imprisonment and payment of a fine.

Polluted air has a broader definition in the Law of Clean Air (2017). This law refers to pollution that damages the health of human beings and living things, ecosystems, heritages, or structures, or that harms public welfare.[280] The Law of Clean Air commits the relevant authorities to apply temporary restrictions for emergency cases to prevent damage from accruing.[281] All large-scale projects are obliged to install and maintain online monitoring systems and to report data to the DOE, and in case any project fails to comply with this law, its operation permit will be voided.[282] This law commits the corporations of the mainland, free-trade zones, and special zones to comply with its provisions.[283] It also refers to the government's obligation to cooperate with regional and international institutions to prevent air pollution and to increase public awareness to protect the right to clean air.[284]

Implementing the provisions of the Law of Clean Air by the DOE, as an authorized governmental entity, could violate the obligations of the Iranian state towards foreign investors. The DOE is authorized to shut down the activities of foreign investors where the DOE determines that an emergency case exists or the activities may cause environmental damages. Such decisions could have a direct impact on foreign investor's costs and the value of their investments. Invalidation of an operating license by the DOE could lead to an expropriation claim by a foreign

[280] Article 1.1 Law of Clean Air (Iran).
[281] *Ibid* at article 3.
[282] *Ibid* at note 3 article 10.
[283] *Ibid* at article 2.
[284] *Ibid* at articles 23 & 28.

investor, as such decision of DOE involves total or near-total deprivation of its investment's value without formal transfer of title.[285]

Section 5: Environmental Inspections

The Law on Environmental Protection and Improvement of 1974 deals with the obligations of the DOE.[286] The DOE is a governmental entity and operates under the control of the Presidency. Under this law, the DOE is obliged to investigate the activities related to the protection of the environment and prevention of pollution, to increase public awareness regarding the protection of the environment, and to cooperate with international organizations to protect the environment.[287]

If any project pollutes the environment, the DOE will inform the project owners of the polluting activities and provide a grace period within which the pollution must be eliminated, or else operations must cease. Based on article 11 of this law, in emergency cases, the DOE can order the stoppage of the activities of the project without prior notice. If an owner of a project fails to comply with the orders of the DOE, the law imposes imprisonment and/or a fine.[288] An owner may seek judicial review of decisions of the DOE, in which case the court's decision is final and binding.[289] Finally, article 20 of the Law on Environmental Protection and Improvement permits the DOE to delegate parts of its rights and duties (those mentioned in articles 11 and 12) to a municipality or any other relevant governmental entity.

The above-mentioned provisions of the law, in case the owner of a project is a foreign investor, could result in an investment dispute. The DOE is authorized to directly order the stoppage of the project without any prior notice, the owner is obliged to comply with the orders

---

[285] *Starrett Housing Corporation, Starrett System, INC. and Others v the Government of the Islamic Republic of Iran, Bank Markazi and Others*, *supra* note 112 at para 66. See above, Chapter 2.
[286] The DOE was established under this law.
[287] Article 6 Law on Environmental Protection and Improvement (Iran).
[288] *Ibid* at articles 11 & 12.
[289] *Ibid* at article 11.

of the DOE, the decision of the court is final and binding (in case the decision is against the investor and the stoppage continues), and the DOE has the right to delegate its responsibilities to local authorities. Each of these steps has the potential to lead to an investment treaty claim, on a basis such as indirect expropriation or breach of fair and equitable treatment. In *Middle East Cement v Egypt*,[290] the tribunal found that a matter as important as the seizure and auctioning of a ship belonging to the investor should have been notified by a direct communication; the procedure therefore did not meet the requirements of fair and equitable treatment and full protection and security.[291]

Equally, the Law of Clean Air, which obliges the owners of large-scale projects to install and maintain environmental monitoring systems, could lead to investment disputes. This law obliges the projects to eliminate pollution, including by changing production output, changing the production process, or ceasing work activities. Each of these obligations or potential interferences of the DOE or other entities in the operation of commercial projects could violate rights that a foreign investor holds under an applicable investment treaty. In these situations, the Iranian state has to defend the measures adopted by its agencies. I will discuss the defenses and routes regarding the intersections between investment law obligations and environmental obligations in Chapter 4 of this thesis.

Section 6: Protection of Public Health

Traditionally, there was a chasm between international law and health concerns, as health was long been considered a technical problem that has to be solved by a physician, rather than a

[290] In this case, one of the complaints concerned the seizure and auction of the claimant's ship and the lack of proper notification of the auction to the owner. *Middle East Cement Shipping and Handling Co. S.A. v Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, at para 143.
[291] Dolzer & Schreuer, *supra* note 2 at 143.

social or political issue to be resolved by the state.[292] Nowadays, the right to health is seen as a fundamental right of everyone.[293] At the international level, public health has been recognized by international law as a pillar of international peace and security. Several international law instruments have recognized the states' duty to protect public health and have set several standards clarifying the content of this duty.[294] At the national level, protecting public health has become one of the primary duties of states arising out of constitutional and statutory law. Many states have imposed on themselves an affirmative duty to protect and enhance public health.[295]

Foreign investment projects can have direct impacts on people's health, as seen by the tensions between tobacco controlling measures of states and interests of foreign investors active in this sector.[296] From human rights point of view, not only shall states regulate the protection of public health through the constitutions or other statutes, foreign investors have to protect and respect the health of investment-affected right holders.

The right to health was first formulated in the preamble of the WHO Constitution.[297] It defines health as "[…] a state of complete physical, mental and social well-being and not merely

---

[292] Valentina Vadi, *Public Health in International Investment Law and Arbitration*, (London: Routledge, 2013) at 25.
[293] The right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health. UN Committee of Economic, Social, and Cultural Rights, *supra* note 242 at para 1 (8).
[294] Vadi, *supra* note 292 at 32.
[295] *Ibid* at 30.
[296] *Philip Morris v Uruguay* and *Philip Morris v Australia* are the prime examples of cases that provoked significant public awareness of the critical implications of investor-state dispute settlement and investment treaties. In these cases, the investor challenged a good-faith regulation that sought to mitigate undisputed public health risks linked to tobacco consumption. In *Philip Morris v Australia*, the tribunal found that the investor's claims were inadmissible because the initiation of the arbitration by a newly-formed Hong Kong entity, to which the related intellectual property was conferred, constituted an abuse of rights for the sole purpose of gaining treaty protection. In Philip *Morris v Uruguay*, the tribunal recognized the state's right to regulate and a wide margin of appreciation for states in adopting measures concerning public health. The tribunal affirmed police power doctrine and set out that a state does not need to prove a direct causal link between the measure and any observed public health outcomes.
[297] Vadi, *supra* note 292 at 33.

the absence of disease or infirmity".[298] Article 25.1 of the Universal Declaration of Human Rights recognizes everyone's right to a standard of living adequate for the health and well-being of himself and his family. The most comprehensive right to health is provided by the ICESCR in article 12.1, which states that: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

In this article, the ICESCR enumerates several necessary steps to be taken by states to achieve the full realization of the right to health, including the improvement of all aspects of environmental and industrial hygiene, and the prevention, treatment, and control of epidemic, endemic, occupational, and other diseases. As the ICESCR is legally binding on ratifying states and they have to send periodic reports to the UN Committee on Economic, Social, and Cultural Rights on the measures adopted, the implementation of this right by states is controlled at the international level by the United Nations human rights body.[299]

Under General Comment No. 14 of the Committee on Economic, Social, and Cultural Rights, health is a fundamental right indispensable for the exercise of other human rights. The Committee has interpreted the right to health as an inclusive right, extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, adequate supply of safe food, nutrition, and housing, healthy occupational and environmental conditions, and access to health-related education and information.[300] This interpretation requires states to regulate the right to health in

[298] *Constitution of World Health Organization*, 22 July 1946 (7 April 1948).
[299] Vadi, *supra* note 292 at 34.
[300] UN Committee of Economic, Social, and Cultural Rights, *supra* note 242 at para 11.

their domestic laws or to improve their health regimes to meet international standards. Such regulatory measures could give rise to disputes between foreign investors and host states.[301]

The Constitution of the Islamic Republic of Iran obliges the government to acquire necessary resources and plan an economic system based on Islamic principles to remove all forms of deprivation in the area of health.[302] The Constitution requires the accessibility of health facilities for all individuals. Article 29 of the Constitution refers to the right to health and medical treatments for everyone. This article obliges the government to use the proceeds from the national income and public contributions to provide medical services for everyone. Furthermore, under the Constitution, providing the essential needs of health and medical care for everyone is one of the criteria on which the economy of the Islamic Republic of Iran is based.[303]

The Law of Food, Beverage, and Hygiene (1967) and the Regulation of Medical Equipment and Supplies (2015) provide that any industrial factory or corporation active in health sector are subject to the issuance of relevant permits by the Ministry of Health.[304] The Ministry of Health is responsible for the issuance of permits and for controlling the activities of health care businesses.[305] Enterprises that fail to comply with this Regulation are subject to fines.[306]

---

[301] V Sara Vadi, "Reconciling Public Health and Investor Rights: The Case of Tobacco" in Pierre-Marie Dupuy, Francesco Francioni, & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009) 452 at 452.

[302] Section 12 article 3 the Constitution (Iran).

[303] *Ibid* at section 1 article 43.

[304] The Law of Food, Beverage, and Hygiene (1967) provides that any industrial factory producing food, beverages, or hygiene products are is subject to the issuance of permits by the Ministry of Health. Under the Regulation of Medical Equipment and Supplies (2015), all the corporations active in procurement, construction, import, maintenance, transport, distribution, after-sales services, training, and quality control sections, shall apply for the permits required for starting and continuing business in the health business sector in Iran.

[305] Article 2 Regulation of Medical Equipment and Supplies (Iran).

[306] *Ibid* at article 25.

The Development Plan Acts of the Islamic Republic of Iran have referred to the right to health.[307] Any act which threatens public health is prohibited under article 688 of the Criminal Code and the committed person shall be subject to prison. The Ministry of Health, together with the DOE, can investigate whether an act affects public health.

Considering that the Constitution recognizes the right to a healthy life and obligates the state to provide health care for all individuals, regulating public health is an essential commitment of the state. The laws and regulations of the public health sector are conditioned on changes and modifications to cover all new and updated international rules and standards. The regulatory measures of the Iranian state for implementing these standards could result in disputes with investors, as investors have to align their activities with them. In addition, the investigatory powers of the Ministry of Health over investors' operations could lead to investment disputes. The implications of these interactions between human rights law obligations and investment law obligations will be discussed in the next Chapter.

National health standards were regulated under the 5th Development Plan Act of the Islamic Republic of Iran. National health standards are a set of guidelines, methods, and tools that systematically assess the potential impacts of a plan or project on people's health. They are the public health equivalent of environmental impact assessments. In parallel with feasibility studies, project owners must prepare a health report for their projects, which should be based on the national health standards and verified by the Ministry of Health. The report is intended to identify

[307] The 3rd Development Plan Act, by referring to public health, obliges the Institute of Standards and Industrial Research of Iran (ISIRI) to provide safety standards for food products. The 4th Development Plan Act obliges the government to improve public health, make continuous improvement of the quality of health services, evaluate of standards for improving the quality of health services, design and implement a comprehensive health information system for Iranian citizens, and ensure the provision of a minimum standard of health services across the country.

the probable impacts of an investment plan on public health. A committee from the Ministry of Health will assess the report and is authorized to modify the report.

The national health standards and national reports are new regulations that are adopted for protecting public health and improving health standards. Considering that large-scale development projects shall comply with these regulations, foreign investment projects that are among the large-scale projects have to prepare the reports and comply with national health standards. Investors have to provide a health report for the construction and operation period. Whenever national health standards incorporate new criteria regarding the protection of public health, the report should observe the new standards. This situation may contradict the expectations of a foreign investor, whether legitimate or not. On the other hand, protection of public health necessitates regulating new criteria and improving standards as the science of health develops. These new standards and their implementation may conflict with the rights of foreign investors, which can give rise to challenges in investor-state dispute settlement. These will be discussed in Chapter 4.

Conclusion to Chapter 3

The impact of foreign investments on the economic development of host states is widely acknowledged, but what worries the international community and human rights defenders is the indirect impact of investments on the community. Foreign investments, especially those that operate in the form of large industrial projects, contribute to polluting the environment and endangering people's health. Violation of workers' rights is as likely by foreign employers as by domestic employers. In addition, some countries facilitate the attraction of foreign investment and capital flows in their countries by lowering the standards applicable to foreign investments. While numerous international instruments refer to the protection of human rights by multinational corporations, many national laws impose sanctions on them.

In this Chapter, I examined the Iranian legal context regarding the protection of employees' rights, protection of the environment, and protection public health in the context of foreign investments, to determine whether this context protects and supports these rights. It also showed that the Iranian legislation commits itself and foreign investors to take active steps to protect labour rights, environmental rights, and public health. Moreover, the rights and obligations of governmental bodies in dealing, controlling, and inspecting investment projects were analyzed in this Chapter.

The core labour rights and the right to occupational safety and health are recognized under the Constitution and the Labour Code of the Islamic Republic of Iran. Employers, including foreign investors, are obligated to respect and protect these rights. Meanwhile, governmental entities are authorized to supervise the implementation of these rights in workplaces. Any failure of employers to follow these requirements may end in fines, workplaces may be closed, and employers may be obliged to pay wages during the suspension period. Although the Labour Code, which applies to foreign employers active in the mainland, obliges the relevant investor to respect the labour rights, the labour regulation applicable to free-trade zones and special zones have few such employee-protective provisions. Considering that these zones were established to attract foreign investment, the regulation provides flexible work arrangements and less generous entitlements in comparison with the Labour Code. This approach of the Iranian state regarding the labour regulation in the zones raises the question of whether the Iranian state intends to facilitate the attraction of foreign investment and capital flows in its free-trade zones and special zones by lowering the labour standards. As discussed above, the non-discrimination principle, freedom of bargaining, and occupational health and safety are not protected in the labour regulation of the zones.

Regarding the environment, the Constitution and other relevant laws oblige the government to protect the environment. The Constitution expressly refers to environmental protection and prohibits any kind of permanent environmental pollution. FIPPA, the Law on Environmental Protection and Improvement, the Law on Prevention of Air Pollution, the Law of Clean Air, the Law of Prevention of Water Pollution, and the Criminal Code all contain provisions protecting environmental rights. The DOE was established to regulate environmental rights and to control the implementation of these rights by corporations and large-scale projects, such as foreign investments. Failing to comply with these regulations results in imprisonment or a fine or both.

Similarly, public health is a recognized right in Iranian legislation. The government and private enterprises—foreign and domestic—are obliged to protect this right. Any action threatening public health is considered a crime and the offender may be punished under the Criminal Code. All large-scale development projects have to submit a health assessment to the relevant authorities, and any non-compliance with authorities' orders may result in punishment and invalidation of permits.

Although the Iranian laws applicable to foreign investors and investments oblige investors to protect and respect labour rights, environmental rights, and public health, these laws and regulations are subject to change, to conform to the latest international standards. These changes, as well as the regulatory or inspection measures of the state and its agencies, may lead to investors' claims under investment treaties. The legitimate expectations of foreign investors are based on the legal regime of the Iranian state, as an investment host state, and changes in this legal regime or interference of governmental agencies could violate investors' expectation. Instructions, orders, or decisions of governmental entities regarding the implementation of labour standards, protection of the environment, or public health could result in investment claims by foreign investors. I will

examine the interactions between the human rights obligations of the Iranian state and its investment obligations in the next Chapter.

Chapter 4

Interactions Between Iran's Investment Obligations and its Human Rights Obligations

Introduction to Chapter 4

The legitimate expectations of foreign investors in Iran are based on the undertakings and representations made by the Iranian state. The Iranian investment regime protects the commonly enacted standards of treatment, including fair and equitable treatment, national treatment, most-favoured-nation treatment, prohibition on illegal expropriation, and free transfer of capital. According to its treaty obligations, the Iranian state must protect the rights of foreign investors, even against the effects of its own policy choices.

On the other hand, the Iranian state owes human rights obligations towards Iranian nationals. It has ratified the major international human rights law instruments and established domestic laws and regulations to protect the human rights of its citizens and prevent violations of their rights by third parties. In some situations, foreign investors' rights and Iranian nationals' rights conflict. In case the state decides to comply with its human rights obligations, a foreign investor could raise a claim that the Iranian state has failed to comply with its obligations under the investment treaty and demand compensation. The resolution of these conflicts is the primary motivation for this thesis.

As described in Chapter 2, a minority of the Iranian BITs contain human rights considerations which could help the state to justify measures in compliance with its human rights law obligations and escape liability to foreign investors who are harmed by those measures. Chapter 3, through examination of the Iranian laws protecting labour rights, environmental rights and public health, demonstrated that modifications of the existing laws or regulatory or inspection measures of the state's agencies may lead to a violation of foreign investor's rights and result in claims by foreign investors under BITs.

This Chapter will explore how the Iranian state could resolve the interactions between its investment obligations and its human rights obligations. Generally, in international investment

law, host states rely on human rights argumentation as a respondent to an investor's claim, as very few BITs (and none concluded by Iran) allow for host states to initiate proceedings. Under Iran's BITs, human rights arguments by the Iranian state could enter into the investment arbitration as justifications for measures undertaken in compliance with international or domestic human rights law, or by invoking violations of domestic human rights law by the foreign investor. In the first avenue, international law outside the treaty context could open spaces for human rights argumentation. If an investor breaches human rights enshrined in domestic laws, the Iranian state could invoke the investor's misconduct either as a ground for finding that the investment is not covered by the applicable BIT or investor's claims are inadmissible, or could raise a counterclaim against the investor who claims investment obligation violation.

On this basis, in Section 1 of this Chapter, I will explain Iran's defenses for disputes arising under BITs that include human rights language. In Section 2, defenses regarding the implementation of international human rights obligations of the Iranian state from the outside of treaty context will be analyzed. And finally, Section 3 will deal with failures by foreign investors to comply with Iranian domestic law.

Section 1: Treaty-Based Defenses

The evolution of investment treaties from treaties that focused on foreign investment protection alone to balanced treaties that consider the regulatory interests of host states in areas such as the environment, labour rights, and public health, has led to the development of exceptions to liability in investment treaties. These exceptions have opened avenues for the states to justify their measures which are in favour of their public interests but against the foreign investors' interests, or to otherwise impose liability on investors that violate human rights laws (or at least set off any liability of the state).

Some of the Iranian BITs, which include specific reference to human rights-related issues, provide justifications for Iran, as investment host state, to escape from liability towards foreign investors for its regulatory actions. The mentioned human rights wording may be included in the treaty preambles and/or the operative clauses. Preambular wording has a significant role in interpreting the treaties as the arbitrators extract the object and purpose of the contracting parties from the wording of the treaties.[308] The Iran-Czechia BIT, Iran-Hungary BIT, Iran-Luxembourg BIT, and Iran-Slovakia BIT have human rights-related language in their preambles. The preambular wording of these treaties sets out a balanced object and purpose between the protection of foreign investment and the protection of labour, the environment, and the sustainable development of the contracting parties.

A space for human rights policy is also reflected in the operative clauses of some BITs. The customary international law concept of police powers has entered into the BITs under the label of the right to regulate. Under the Iranian BITs that refer to the right to regulate, Iran could avoid liability to foreign investors harmed by public interest regulations so long as the impugned measure reasonably relates to a legitimate policy objective.[309]

The concept of regulatory expropriation, which exempts the measures intended to protect legitimate public welfare objectives of the host state from being characterized as indirect expropriations, can also be invoked to avoid liability of the host state for acts that would otherwise violate its obligations to foreign investors. If Iran, when the applicable BIT is one that makes express references to regulatory expropriation,[310] applies its power to regulate the public welfare

[308] In *Siemens v Argentina*, the tribunal, by referring to the provisions of the preamble of the Argentina-Germany BIT, concluded "The intention of the parties is clear. It is to create favourable conditions for investments and to stimulate private initiative." *Siemens A.G. v The Argentine Republic, supra* note 59 at para 81.
[309] The Iran-Czechia BIT, Iran-Hungary BIT, and Iran-Luxembourg BIT contain references to the right to regulate.
[310] The Iran-Czechia BIT, Iran-Hungary BIT, Iran-Luxembourg BIT, and Iran-Slovakia BIT carve out certain measures from being considered expropriatory.

objectives of the society by considering all the processes of regulating the law,[311] without engaging in discrimination,[312] with legal reasoning and convincing facts,[313] it could justify its regulatory actions even though they result in harm to foreign investor that would otherwise be compensable under the BIT.[314]

An alternative means to avoid state liability is the general exception clause, which provides a treaty-based defense for a host state to adopt necessary measures to protect its public policies. This exception brings about a balance in such a manner as to preserve the regulatory function of the state.[315] Six Iranian BITs contain a general exception clause.[316]

In a nutshell, fewer than 10 BITs could limit or exclude liability of Iran towards foreign investors for measures adopted to protect public policy objectives. For the majority of Iran's BITs, where human rights protective language can be found in neither the preamble nor the operative provisions, the Iranian state must find some other way to justify its regulatory measures when these conflict with its investment commitments. Since the majority of foreign investors in Iran are from countries other than those mentioned above, the Iranian state is likely to face this kind of situation in most investment arbitrations launched against it.[317] There are generally two routes Iran might take: by referring to its international human rights obligations outside the treaty

[311] Reference is made to *ADC v Hungary*, which was mentioned under Footnote 115 of this thesis.
[312] Reference is made to *Chemtura Corporation v Government of Canada*, which was mentioned under Footnote 114 of this thesis.
[313] In *ADC v Hungary*, the tribunal rejected the respondent's argument for public interest and noted that the argument should be based on convincing facts and legal reasoning. *ADC v Hungary, supra* note 115 at para 430.
[314] In *Methanex v US*, the arbitral tribunal found that a Californian ban of the gasoline additive MTBE did not constitute an expropriation because the measure was adopted for a public purpose, was not discriminatory, and because no specific commitments had been given to the foreign investor. Dolzer & Schreuer, supra note 2 at 110.
[315] Sornarajah, *supra* note 36 at 223.
[316] Iran-Czechia BIT, Iran-Hungary BIT, Iran-Luxembourg BIT, Iran-Singapore BIT, Iran-Japan BIT, and Iran-Slovakia BIT.
[317] As mentioned in the Introduction, most of the foreign investors active in Iran are from China, Russia, South Korea, Germany, Turkish, or France.

or by referring to the failure of foreign investor to comply with Iran's domestic laws. These options will be explored in sections 2 and 3.

Section 2: Defenses to Liability under International Human Rights Law

Most IIA designate public international law as the applicable law of the treaty.[318] Article 42.1 of the ICSID Convention, which designates public international law as the default governing law, is applicable to all ICSID disputes where the treaty does not contain a choice of law provision. Among all the effective Iranian BITs, the Iran-Czechia BIT, Iran-Hungary BIT, Iran-Luxembourg BIT, Iran-Japan BIT, Iran-Slovakia BIT, Iran-Cyprus BIT, and Iran-Republic of Korea BIT refer expressly to the application of general rules and principles of international law.[319]

Wherever public international law constitutes the governing law of the treaty, whether by express choice in the treaty or by application of a default rule such as that contained in ICSID Convention article 42.1, international human rights law, as a part of international law, could enter into the investment settlement disputes, either by creating rights and obligations in addition to the rights and obligations of the investment treaty (which overtakes the obligations of the investment treaty) or by interpretation of agreements for determining the object, purpose, and context of the agreements, filling the gaps of treaties and interpreting ambiguous provisions, based on the interpretive rules of the VCLT.

[318] Simma, *supra* note 8 at 582.

[319] Article 11.9 of the Iran-Czechia BIT (under the "Settlement of Disputes between a Contracting Party and Investor(s) of the Other Contracting party" title). Article 14.9 of the Iran-Hungary BIT (under the "Settlement of Disputes between an Investor of a Contracting Party and the Other Contracting Party" title). Article 16.f of Iran-Luxembourg BIT (under the "Settlement of Disputes between an Investor of a Contracting Party and the Other Contracting Party" title). Article 18.5 of the Iran-Japan BIT (under the "Settlement of Disputes between an Investor of a Contracting Party and the Other Contracting Party" title). Article 19.1 of the Iran-Slovakia BIT (under the "Governing Law" title). Article 11.4 of the Iran-Cyprus BIT (under the "Settlement of Disputes between a Contracting Party and Investors of the Other Contracting party" title). Article 12.5c of the Iran-Republic of Korea BIT (under the "Settlement of Disputes between a Contracting Party and Investor(s) of the Other Contracting party" title).

One avenue for harmonizing international investment law with international human rights law is *ius cogens. Ius cogens* trump all other areas of international law, including the express provisions of investment treaties. Investment treaties cannot create obligations that require a party to violate *ius cogens* obligations or to take measures that violate such obligations.[320] Accordingly, treaties must be interpreted so as to be consistent with *ius cogens* obligations of states. Based on the VCLT, a *ius cogens* 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".[321]

A treaty, such as an investment treaty, is to the extent that it conflicts with a peremptory norm of general international law.[322] International human rights that embody *ius cogens* norms provide obligations for the state that are in addition to its international investment law obligations and overtake its investment obligations. Thus, the state could derogate from its investment obligations as necessary to comply with *ius cogens* without incurring liability to a foreign investor.

Although the list of *ius cogens* norms is far from settled, in *Phoenix v Czech Republic*, the tribunal observed: "[..] nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs."[323] Apart from genocide and racial discrimination, candidates for elevation to the status of *ius cogens* norms include self-determination and its corollary, states' permanent sovereignty over natural resources, the prohibition of torture, and possibly the causing of massive

[320] Sornarajah, *supra* note 36 at 465.
[321] *Vienna Convention on the Law of Treaties*, 23 May 1969, article 53 (27 January 1980).
[322] *Ibid*.
[323] *Phoenix Action LTD v The Czech Republic*, ICSID Case No. ARB/06/6, Award, 15 April 2009, at para 78.

pollution which affects the lives of a large number of people, their means of livelihood, and their habitats.[324] The activities of a foreign investor which violate one of these norms will result in the investor's inability to access investment treaty protections, along with potentially other sanctions unrelated to investment law. In situations where compliance with an investment obligation by the Iranian state results in violation of any of the *ius cogens* norm, the state should derogate from its investment obligations in order to protect these norms. Based on this avenue for entering human rights law obligations into the investment law context, the Iranian state could defend the derogations from its investment obligations for protecting *ius cogens* norm.

Another avenue for applying human rights law in investment law is via the interpretation of an investment treaty. Article 31 of VCLT lays down the general rule of interpretation, which adjudicators are obligated to apply. This article provides:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: a. any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; b. any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: a. any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; b. any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; c. any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.

This article encompasses of the elements of good faith, the ordinary meaning of treaty terms, their context, the object and purpose of the treaty, subsequent agreements between the parties, subsequent practice in the application of the treaty, and relevant rules of international law.[325] Even when considering according meaning of treaty language, the VCLT directs adjudicators to

[324] Sornarajah, *supra* note 36 at 469-70
[325] Trinh Hai Yen, *The Interpretation of Investment Treaties*, (Netherlands: Brill Nijhoff, 2014) at 43-4.

consider the circumstances surrounding the conclusion of the treaty, its drafting history, the treaty's broader political and legal context, the conduct of the state parties even not directly related to the treaty, as well as the full scope of international law rules applicable between the state parties.[326]

Based on article 31 (3) (c) of VCLT, at the time of interpreting an investment treaty by an arbitral tribunal, any relevant rules of international law which could be applicable in relations between the parties should be considered by the arbitrators. Arbitral tribunals in different investment disputes have noted that the relevant rules of international law could enter into consideration via the interpretation of the treaties. The tribunal in *Azurix Corp. v Argentina* declared that since an investment treaty is itself a source of international law, the applicable law for a breach of such a treaty could be the treaty itself, specifically, and international law generally.[327]

Both investment law and human rights law are parts of international law. When interpreting an investment treaty, human rights law could be taken into account, as a rule of international law. The tribunal in *Urbaser v Argentina* referred to the international human rights rules, as a part of international law.[328] It noted:

> [..] the BIT cannot be interpreted and applied in a vacuum. The Tribunal must certainly be mindful of the BIT's special purpose as a treaty promoting foreign investments, but it cannot do so without taking the relevant rules of international law into account. The BIT

[326] Joshua Karton, "Choice of Law and Interpretive Authority in Investor-State Arbitration" (2017) 3:1 Canadian Association of Comparative and Contemporary Law 217 at 259.

[327] *Azurix Corp. v The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, at para 147.

[328] *Urbaser* was a shareholder in a concessionaire that was in charge of the supply of water and sewage services in Buenos Aires, Argentina. Argentina's emergency measures led to financial losses of the concessionaire, resulting into its insolvency. *Urbaser* initiated arbitral proceedings against Argentina. For its part, Argentina filed a counterclaim in which it alleged that the concessionaire's failure to provide the necessary level of investment in the supply services led to violations of the human right to water. The tribunal found that there was no international law basis for the investor's putative obligation to protect a right to water.

> has to be construed in harmony with other rules of international law of which it forms part, including those relating to human rights.[329]

For the human rights obligations that are not recognized as *ius cogens* norm, the international human rights law, as part of international law, could be considered as relevant rules for the interpretation of substantive or procedural obligations of an investment treaty. When interpreting an investment treaty, the tribunals have to take into account that the BITs are *lex specialis* between the contracting parties. Based on the rules of VCLT, the *lex specialis* derogates from all *lex generali* except non-derogable *ius cogens*.[330]

In this respect, interpretation of the object and purpose of the investment treaties by arbitral tribunal plays an important role in integrating human rights law and investment law. Some tribunals have found the prominent purpose of protecting and promoting investments to justify their pro-investment interpretations.[331] In *Siemens*, the tribunal referred to the title and preamble of the treaty that, from the arbitrators' view, were in favour of investors.[332] Other tribunals have realized that investment treaties encompass other purposes, like economic cooperation between states and promotion of economic development by stimulation of capital and technology transfers.[333] The tribunal in *Salini v Morocco* truly noted that: "In reading the Convention's preamble, one may add the contribution to the economic development of the host State of the

[329] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (2016), *supra* note 161 at para 1200.
[330] Karton, *supra* note 326 at 264.
[331] Yen, *supra* note 325 at 91.
[332] The tribunal noted "[..] The preamble provides that the parties have agreed to the provisions of the Treaty for the purpose of creating favourable conditions for the investments of nationals or companies of one of the two States in the territory of the other State. […] the intention of the parties is clear. It is to create favourable conditions for investments and to stimulate private initiatives." *Siemens A.G. v The Argentine Republic*, *supra* note 59 at para 81.
[333] *Suez Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, at para 215-217.

investment as an additional condition."[334] Thus, special purpose of a BIT will be promoting foreign invest*ments*, not foreign invest*ors*. In this respect, the tribunal in *El Paso Energy International Company v Argentina* considered that: "a balanced interpretation is needed, taking into account both State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow."[335] Tribunals' frequent references to other purposes of investment treaties, aside from protection of foreign investors and acknowledging states' regulatory rights, attest that a balanced appraisal of states' investment obligations and human rights obligations is forming in investment arbitrations. Such a perspective also steers away from the investor-centric environment of international investment disputes and helps preserve the legitimacy of the investor-state dispute settlement regime.

In addition to the interpretation of the object and purpose of the investment treaties, the norms of human rights could be employed in investment arbitration to provide the meaning for a specific investment treaty term. Or, in assessing the objectives of the respondent states' conduct to be fair and equitable, promotion and protection of human rights could be considered as relevant considerations. Tribunals could take into account the human rights obligations of the state and the human rights of citizens when they have to determine whether an investor has been treated equitably. In case the contracting parties of an investment treaty are also the parties to a particular human rights treaty, human rights norms could be considered as relevant rules in the interpretation of investment treaty protection. The outstanding obligations under multilateral human rights treaties could represent an argument in favour of interpreting the investment treaty in a manner

[334] *Salini Costruttori S.P.A. and Italstrade S.P.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001, at para 52.
[335] *El Paso Energy International Company v The Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 October 2006, at para 70.

coherent with international human rights law.[336] This kind of interpretations could be helpful in investment treaties that do not make explicit provision for human rights.

As discussed in Chapter 3, the protection of human rights is regulated in the Constitution of Iran as well as other domestic laws and regulations. The obligations of the state to protect civil and political rights, and economic, social, and cultural rights, and to enforce the private parties to protect and respect these rights are indicated in the Iranian legal regime. It seems that the Iranian state does not intend to promote and protect foreign investors at the cost of environmental pollution, damages to public health, or physical or mental damages to workers, based on the fact that the Constitution and other laws commit the state, individuals, and corporations to respect and protect the human rights and prohibits violations of these rights. The analysis of domestic laws in Chapter 3 showed that the Iranian legislation implies the protection of and respect for labour rights, the environment, and public health. Moreover, under Foreign Investment Promotion and Protection Act of Iran (FIPPA), investments in Iran are required to help to create economic growth, upgrade technology, enhance the quality of products, increase employment opportunities, and they are prevented from threatening national security and public benefits and deteriorating the environment.[337] The labour law applicable in the free-trade zones and special zones takes a different approach. As discussed in Chapter 3, the legislature has ignored the principle of non-discrimination in regulating the labour rights in the mainland and the zones. The labour regulation of free-trade zones and special zones does not protect the freedom of bargaining; it has vague provisions regarding the right to occupational safety and health; it permits employers to terminate the employment contract at their discretion. The imposition of sanctions on Iran has decreased the number of Iran's trading partners. To encourage investment from its remaining trading partners,

[336] Simma & Kill, *supra note* 9 at 704-6.
[337] Article 2 (a) and (b) of FIPPA.

it seems that Iran has applied a pro-employer mechanism in regulating labour rights in free-trade zones and special zones.

At the international level, the Government of Iran ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1975. Consequently, the Iranian state is obliged to protect the rights mentioned in this document and prevent any form of violation or abuse of these rights by individuals or corporations, including foreign investors. Under article 2.1 of the ICESCR, the Iranian state is obliged to take steps toward the full realization of the rights recognized in the ICESCR by all appropriate means, including particularly the adoption of legislative measures. On this basis, the state is obliged to protect the right to work,[338] the enjoyment of just and favourable work conditions,[339] the right to form and join trade unions,[340] and the right of physical and mental health for all individuals[341] without discrimination.[342]

The right to an adequate living standard is protected under article 11.1 of ICESCR. Based on this right, General Comment No. 15 of the Committee on Economic, Social and Cultural Rights defines the human right to water as a right to sufficient, safe, acceptable, accessible, and affordable water for personal and domestic use.[343] Accordingly, the Iranian state, as a contracting state of the ICESCR, is obliged to protect, respect, and fulfill the right to water; in so doing, it must prevent corporations, including foreign investors, from polluting and unsustainably extracting water resources, wells, and water distribution systems.[344] Finally, the Iranian state is obligated to

[338] Article 6 of the ICESCR.
[339] *Ibid* at article 7.
[340] *Ibid* article 8.
[341] *Ibid* at article 12.
[342] *Ibid* at article 2.2.
[343] OHCHR, 29th Sess, UN Doc E/C.12/2002/11 (2003) at para 2.
[344] *Ibid* at para 23.

regulate independent monitoring, public participation, and imposition of penalties for non-compliance.[345]

On this basis, when regulatory measures of a state are under scrutiny by an investment tribunal, changes in public law for realization of human rights should be taken into consideration.[346] In *Parkerings v Lithuania*, the tribunal emphasized the changes of the laws and stated: "It is each State's undeniable right and privilege to exercise its sovereign legislative power. A State has the right to enact, modify or cancel a law at its own discretion […]".[347]

Methanex presents an example of the type of conflict potentially raised between investors' rights and environmental regulations. This case was raised under NAFTA regarding Article 1114 for adopting, maintaining or enforcing appropriate measures for environmental concerns. *Methanex*, a Canadian corporation, claimed against the United States and the State of California for a substantial interference and taking of business violating article 1105 (fair and equitable treatment) and 1110 (expropriation) of NAFTA.[348] According to the defence raised by the US, this case turned on the proposition that whenever a state takes action to protect public health or environment, the relevant state will be responsible for damages to every business enterprise affected by the regulation. The practical consequence of such a doctrine, carried out literally, is that no state could perform its fundamental governmental functions.[349] In this situation, balanced interpretation of the investment treaty which takes into account the human rights obligations and investment obligations of the relevant state, could justify regulatory measures of states and open an avenue for human rights arguments in investment disputes.

---

[345] *Ibid* at para 24.
[346] Kube & Petersmann, *supra* note 175 at 101.
[347] *Parkerings-Compagniet AS v Republic of Lithuania* (2007), *supra* note 85 at para 332.
[348] Gantz, *supra* note 88 at 657.
[349] *Methanex Corporation v United States of America*, Statement of Defense of Respondent United States of America, 10 August 2000, at para 2.

Considering that Iran has ratified the ICESCR, it has an international law obligation to realize the rights rendered under the ICESCR. Such realization requires Iran to adopt new regulations or modify the existing regulations to comply with its international obligations. Furthermore, the Government of Iran has other international human rights obligations as a member state of the ILO Conventions. Iran has ratified international and regional instruments and is obligated to comply with the commitments contained in these documents.

In *SPP v Egypt*, the tribunal took seriously the argument that a host state's failure to interfere with an investment might have been contrary to its other international law commitments. In this case, the tribunal referred to the binding international obligations of the respondent state under the one of the UNESCO Conventions (the Protection of the World Cultural and Natural Heritage Convention).[350] The tribunal's holding signaled that investment tribunals may take account of a state's broader international law commitments, in the course of assessing that state's compliance with its investment treaty commitments to foreign investors.[351]

Tribunals' references to the international commitments of states in parallel with their investment obligations (as indicated in *SPP*), the states' right to enacting, modifying, or changing the laws (as indicated in *Parkerings*), and the contribution of investments to the economic development of host states (as indicated in *Salini*) all show that a balanced context between rights and obligations of states is entering into the investment arbitrations. Such a balanced context

[350] The tribunal noted that from the date the UNESCO World Heritage Convention becomes binding, "a hypothetical continuation of the Claimants' activities interfering with antiquities in the area could be considered as unlawful from the international point of view." *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, *supra* note 119 at para 154.

[351] Luke Eric Peterson & Kevin R Gray, "International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration" (2003) at 29, online (pdf): *International Institute for Sustainable Development for the Swiss Department of Foreign Affairs* <www.escr-net.org/sites/default/files/Luke_Peterson___IHR_in_bilateral.pdf> [web.archive.org/web/20210908162327/https://www.escr-net.org/sites/default/files/Luke_Peterson___IHR_in_bilateral.pdf].

would still benefit investors to the extent that it creates greater certainty.[352] In a country where human rights laws are carefully regulated and properly implemented, the likelihood of frequent changes in the rules is low and investors will face fewer challenges in dealing with the regulatory and investigatory agencies of the state.

Thus, to the extent that regulatory measures of the Iranian state against a foreign investor are undertaken to comply with international human rights obligations, for the progressive realization of a human right, or for improving regulations in accordance with international standards, the Iranian state, as a member of international human rights treaties, could put forward a defense of its measures toward foreign investors with reference to its international human rights law commitments.

Nonetheless, in some investment disputes, tribunals were not convinced that the governmental measures of the respondent states to respect their human rights obligations that harmed foreign investors were proportionate. In *Suez v Argentina*, although Argentina and five NGOs, as *amici*, stressed the importance of the actions Argentina took to protect its citizens' right to water, the tribunal concluded that adopting measures in breach of investors' rights were not the only means available for Argentina, and the state could respect its human rights obligations as well as its BIT obligations.[353] The same situation occurred in *Urbaser*, where Argentina explicitly

[352] Karton, *supra* note 326 at 267-8.

[353] *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v the Argentine Republic*, *supra* note 333 at para 240-60. In 1993, in connection with a privatization program, Argentina granted a 30-year concession to operate water and waste-water services in and around the city of Buenos Aires to an Argentine company, AASA. Suez, Vivendi, AGBAR, and AWG (all foreign investors) were shareholders in AASA. In 2003, the investors claimed that Argentina's governmental measures breached the provisions of investment treaties (including expropriation, full protection and security, and fair and equitable treatment). The *amicus* brief argued that Argentina's human rights obligation to provide water to its people trumped its obligations under the investment treaty. The tribunal acknowledged that the provisions of water and sewage services (to the metropolitan area of Buenos Aires) was vital to the health and well-being people. Nevertheless, it concluded that Argentina had an obligation to apply more flexible means to assure the continuation of water and sewage services and the measures adopted by the state was not the only way to safeguard an essential interest. According to the tribunal, states must respect both its human rights and treaty obligations equally.

relied on human rights norms to defend its interference with investor rights. In this case, although the tribunal took Argentina's human rights obligations into account when interpreting the fair and equitable treatment provision of the relevant BIT, it concluded that "[..] the Argentine Republic can and should fulfil both kinds of obligations simultaneously. In doing so, the obligations resulting from the human rights to water do not operate as an obstacle to the fulfilment of its obligations towards the Claimant."[354]

Considering that the government of Iran is responsible for managing and protecting water resources, it may delegate construction or operation of water resources to foreign investors. The Iranian state and its agencies' regulatory or inspection measures for protecting the right to water of the Iranians (on any other human rights law) could lead to a violation of foreign investors' rights under the Iranian effective BITs and result in the state's liability towards foreign investors. By taking into consideration the investment tribunals' point of view in cases like *Suez* and *Urbaser*, if a foreign investor claims violation of investment treaty protection arising out of a regulatory measure of the Iranian state, the human rights arguments of the state may fail to convince the investment arbitrators that the state was in a position to comply with its international human rights law obligations. The inherent tendency of arbitration tribunals to place investment protection above other considerations may act as a hindrance to accommodation being reached in conflicts between human rights and investment obligations. It would be best if the Iranian investment treaty itself was to settle the disputes by ascribing priorities in the event of a conflict. This will accelerate the process of accommodating human rights in a manner that gives them precedence. Unless there is a clear defence based on human rights or environmental rights in the treaty, arbitration tribunals will continue to be reluctant to recognize the priority of the human

[354] *Urbaser v The Argentine Republic*, *supra* note 161 at para 720.

rights and environmental standards over investment law standards, since IIAs represent *lex specialis*.[355]

Although FIPPA provides a balanced context, the majority of the Iranian BITs are pro-investor and contain no human rights wording. They do not even refer to the economic development of the contracting states, only to the promotion of investment. As mentioned in Chapter 2 of this thesis, the preamble of the Iranian Model BIT (2001) and the other effective BIT refer to the "economic cooperation to the mutual benefit of the parties" rather than "economic development". In *Saluka*, the tribunal referred to the treaty purpose of economic development and concluded that the purpose of the contracting parties was to establish a balance between the promotion of foreign investment and economic development of states.

On this basis, it's required that the state renegotiate its BITs in order to apply a balanced approach in its investment treaties. By this approach, the state could ensure the promotion of foreign investors (balanced environment creates certainty), on the one hand, and protection of the human rights of its nationals and compliance with international human rights law, on the other. In this context, if an interaction occurs between its obligations arising out of investment law and human rights law, the state could justify its measures by relying on its international human rights law obligations.

Section 3: Investor Compliance with the Domestic Laws of Host States

It is a fundamental characteristic of investment treaties that foreign investors have the procedural right to commence international adjudication of a dispute directly against host states, without the participation and even over the objection of their home states. The exercise of this

[355] Sornarajah, *supra* note 36 at 338-9.

right can be abrogated or restricted based on an investor's conduct, such as non-fulfillment of preconditions or abuse of process.[356]

Numerous BITs require investors to comply with the internal legislation of host states. When the BIT is silent, tribunals have stated that the obligation of foreign investors to make their investments in accordance with the laws of host states is implicit even when not expressly stated in the relevant BIT.[357] Such compliance must begin at the time of establishing the investment and throughout its operation. Violation of domestic laws could be assessed as a question of jurisdiction, admissibility, or counterclaims by host states.[358]

Jurisdiction goes to the power of an investment tribunal to decide a case, while admissibility relates to the claims that are put forward in investment arbitration proceedings. Article 41(2) of the ICSID Convention, which refers to the "competence" of ICSID tribunals and does not use admissibility, provides: "Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute."

The misconduct of a foreign investor may act as a bar to the jurisdiction of an arbitral tribunal. To apply the procedural right covered by the investment treaty against the investment host state, a relevant set of requirements should be met. Through satisfaction of these requirements, the protection granted in the investment agreement becomes effective and available to the investor. The requirements that form the jurisdiction of an investment tribunal are *ratione*

[356] Anna Kozyakova, *Foreign Investor Misconduct in International Investment Law*, (Switzerland: Springer, 2021) at 66-67.
[357] *Phoenix Action Ltd v Czech Republic*, *supra* note 323 at para 101.
[358] While jurisdiction typically looks at the dispute as a whole, admissibility is concerned with particular claims. Michael Waibel, *supra* note 160 at 1-2.

voluntatis (consent),[359] *ratione personae* (subject),[360] *ratione materiae* (subject-matter),[361] and *ratione temporis* (time).[362] If an investment claim lacks any of these requirements, the investment will not be "covered" by the applicable investment treaties.

Tribunals could deny jurisdiction *ratione materiae* for lack of a legal investment. In *Fraport v Philippines*, when the definition of investment was subject to being "in accordance with the respective laws and regulations", the respondent state challenged the jurisdiction of the tribunal on the basis that the protections afforded by the applicable BIT did not extend to investments made in violation of Philippine law.[363] The state argued that an admitted investment may fall outside the scope of BIT's protection if it violates the host state's laws that directly regulate the investment or the investment's activities.[364] The tribunal agreed that the investment was not in accordance with the laws of Philippines and therefore that it lacked jurisdiction *ratione materiae*.

The same effect can be achieved by linking compliance with domestic law to the provision on admission of new investments. In *Inceysa v El Salvador*, tribunal declined jurisdiction on the basis that protection under the relevant treaty was limited to investments that were admitted in

[359] Is there unqualified consent to arbitrate the claim in question? There should be jurisdiction based on the consent of the parties.

[360] Is the dispute between a contracting state and a national of another contracting state? Based on article 25.1 of the ICSID Convention, the jurisdiction of the Center is limited to disputes between "[..] a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Center by that State) and a national of another Contracting State [..]."

[361] Is the subject matter of the claim within the scope of treaty? Or is there a covered investment? The first paragraph of article 25.1 of the ICSID Convention provides "The jurisdiction of the Center shall extend to any legal dispute arising directly out of an investment [..]."

[362] Was the treaty in force when the dispute arose?

[363] *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, August 16, 2007, at 285. Fraport had invested in a passenger terminal project in the Philippines. The tribunal referring to the definition of investment, concluded that as the management and control of investment project were accomplished by illegal secret shareholder agreements (which was in contrary to the Philippines law), the claimant investor could not claim to have made an investment in accordance with the laws to benefit from the protection rendered under the investment treaty. Tribunal found that in the event of a public utility franchise, the proponent and facility operator must, in case of a corporation, be duly registered and owned and controlled up to at least 60% by Filipinos, as further required by the Philippine Constitution.

[364] *Ibid* at para 286.

accordance with domestic laws. El Salvador argued that, as the claimant investor had obtained the investment authorization by defrauding the state, its consent to jurisdiction of tribunal *(ratione voluntatis)* was limited to differences related to investments made in accordance with the laws of El Salvador. The tribunal concluded that the BIT excluded from its scope of application any investments made illegally.[365]

In addition to the impact of a foreign investor's misconduct on the jurisdiction of the tribunal, it could also result in inadmissibility of investor's claims.[366] Admissibility refers to the power of the tribunal to examine a case at a given point in time.[367] Substantive admissibility arises after the establishment of jurisdiction. The general approach in international arbitration is that if tribunal has jurisdiction, then it should rule on the merits of the claim.[368]

The concept of admissibility has been particularly relied upon when claims are considered not to be "ripe", such as when local remedies have not been exhausted or when time limitations or negotiation periods before submitting a claim have not been respected. Admissibility arguments

---

[365] *Inceysa Vallisoletana v Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, at para 206. In this case, the claimant had obtained a concession contract for the operation of vehicle inspection services. The Ministry of the Environment and Natural Resources of El Salvador decided not to proceed with this contract and finally terminated the concession contract. El Salvador argued that the concession was obtained by defrauding the state during the public bidding process. Ursula Kriebaum, "Chapter V: Investment Arbitration – Illegal Investments" (2010) at 313-4, online (pdf): *Kluwer Law International* <law.yale.edu/sites/default/files/documents/pdf/sela/Kriebaum_Illegal_Investments.pdf> [web.archive.org/web/20210908163048/https://law.yale.edu/sites/default/files/documents/pdf/sela/Kriebaum_Illegal_Investments.pdf].

[366] One of the arbitrators (Highet) in *Waste Management v Mexico* described the difference between jurisdiction and admissibility as follows: "Jurisdiction is the power of the tribunal to hear the case; admissibility is whether the case itself is defective- whether it is appropriate for the tribunal to hear it. If there is no title of jurisdiction, then the tribunal cannot act." The Arbitrator (in footnote 45) explained "If the Claimant's case is inadmissible, the Tribunal has jurisdiction to hear it, but should decline it on grounds relating to the case itself—not relating to the role or powers of the Tribunal. An example of this might be where a claimant's nationality is questionable or double, but where the Tribunal otherwise has jurisdiction. Another example might be if the claim is time-barred or where there is a similar substantive defect on the face of the complaint which does not, however, invalidate or depreciate the Tribunal's jurisdiction as such." *Waste Management Inc. v Mexico*, ICISID Case No. ARB(AF)/98/2, Dissenting Opinion (of Keith Highet), 08 May 2000, at para 58.

[367] Waibel, *supra* note 160 at 5.

[368] Andrew Newcombe, "Investor misconduct: Jurisdiction, admissibility or merits?" in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (UK: Cambridge University Press, 2011) 187 at 194.

were used in situations where corruption or other illegality occurred in the making of an investment.[369] The tribunal in *World Duty Free v Kenya* dismissed the claims of the investor on the basis that relevant investor had paid a bribe to secure the investment.[370] For the tribunal, claims based on contracts obtained by corruption cannot be upheld by the arbitral tribunal as bribery was contrary to the international public policy of most states or in other words, to transnational public policy.[371]

In *Hesham v Indonesia*, the tribunal referred to the failure of the claimant investor to uphold the Indonesian laws and regulations and concluded: "[….] The Claimant having breached the local laws and put the public interest at risk, he has deprived himself of the protection afforded by the Organization Islamic Conference Agreement."[372] Based on article 9 of the Organization of the Islamic Conference Agreement, investors are bound by the laws and regulations in force in the host states and shall refrain from all acts that may disturb public order or morals or that may be

[369] August Reinisch, "Jurisdiction and Admissibility in International Investment Law" (2017) at 30-1, online (pdf): *Brill | Nijhoff* <brill.com/view/book/edcoll/9789004368385/BP000010.xml> [web.archive.org/web/20210908163645/https://brill.com/view/book/edcoll/9789004368385/BP000010.xml].

[370] This case concerned an exclusive concession to the World Duty Free to run the duty-free operations at Kenya's international airports in Nairobi and Mombasa. The tribunal found the bribery by claimant investor to be in violation of international public policy. Kriebaum, *supra* note 364 at 315.

[371] *World Duty Free Company Limited v Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006, at para 157.

[372] *Hesham Talaat M Al-Warraq v The Republic of Indonesia*, Final Award, UNCITRAL, 15 December 2014, at para 645. In 2004, Hesham Warraq became the sole shareholder in First Gulf Asia Holdings Limited, which had acquired shares in three Indonesian banks that eventually merged into Bank Century. In 2008, Bank Century experienced liquidity and asked Bank Indonesia liquidity support. In 2010, Warraq was charged with banking fraud, mismanagement and illegal transfer of banking funds. In this case, the tribunal found that Warraq engaged in six types of banking fraud and breached its obligation under article 9 of the OIC Agreement not to act in a manner "prejudicial to the public interest" by not having full awareness of his obligations under Indonesian law.

prejudicial to the public interest.[373] In the views of the arbitrators, the doctrine of "clean hands"[374] rendered the investor's claim inadmissible.[375] This doctrine has been defined as the principle that a party cannot seek equitable relief if that party has violated an equitable principle.[376] In this case, although the claimant did not receive the fair and equitable treatment as indicated in the relevant agreement, its actions (theft, corruption, and money laundering), which were prejudicial to the public interest and in violation of the relevant agreement, prevented it from pursuing a claim for breach of fair and equitable treatment and benefiting from the protection afforded by the relevant agreement.[377] The doctrine of clean hands has been characterized as a general principle of law and could be applied by investment tribunals according to article 38(1)(c) of the ICJ Statute. When an investor violates domestic human rights laws of the host state, tribunals may hold its claim to be inadmissible according to clean hands doctrine.

An investor's failure to comply with the laws of the host state can also be raised in a counterclaim by the host state. Counterclaims are distinct from the defenses of respondent states on the merits of investor's claims, and relate to state's own claims against the claimant investor for breach of the obligations it owes to the host state.[378] Whether a counterclaim is available under

---

[373] *The Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference*, June 1981. In this case, the tribunal referred to article 9 of the Agreement "[..] as an explicit provision that binds an investor to observe certain norms of conduct", which "prevents the investor from taking any actions that would disrupt the public interest." *Ibid* at para 631-32.

[374] "The clean hands doctrine is an important principle of international law that ha[s] to be taken into account whenever there [i]s evidence that an applicant State ha[s] not acted in good faith and it ha[s] come to court with unclean hands." ILC, 57th Sess, A/60/10 at para 236.

[375] *Hesham Talaat M Al-Warraq v The Republic of Indonesia*, *supra* note 372 at para 646.

[376] Patrick Dumberry, "When and How Allegations of Human Rights Violations Can Be raised in Investor-State Arbitration?" (2012) at 362, online (pdf): *The Journal of World Investment & Trade* <www.researchgate.net/publication/256021552_When_and_How_Allegations_of_Human_Rights_Violations_Can_Be_Raised_in_Investor-State_Arbitration> [web.archive.org/web/20210908163830/https://www.researchgate.net/publication/256021552_When_and_How_Allegations_of_Human_Rights_Violations_Can_Be_Raised_in_Investor-State_Arbitration].

[377] *Hesham Talaat M Al-Warraq v The Republic of Indonesia*, *supra* note 372 at para 647-48.

[378] Waibel, *supra* note 160 at 25.

a given investment treaty depends on the wording of the BIT. Broad adjudicative jurisdiction on tribunals to consider "all disputes arising out of an investment" (rather than the agreement) could end to acceptance of counterclaims by tribunals. As examined in Chapter 2, investment tribunals have accepted jurisdiction to counterclaims of states by interpreting the provisions of the investment treaties. In *Saluka*, the tribunal decided that where the consent to arbitration is expressed in wide terms in the investment treaty, the tribunal has subject matter jurisdiction over counterclaims by host state.[379]

In *Urbaser*, Argentina brought a counterclaim that the failure by the foreign investor to make the necessary investments make it impossible for the state to guarantee the human rights to water of the population.[380] The tribunal found that it has jurisdiction to deal with Argentina's counterclaim and send an encouraging message to Argentina that initiating counterclaims based on an alleged infringement of (human rights) obligation by foreign investors are not in principle inadmissible in the realm of investor-state arbitration proceedings.[381] Although the tribunal found no violation by investor, this is the first and only case in which a decision was rendered discussing a human right counterclaim by a state.[382] Accepting the counterclaim in this case could pave the way for more human rights counterclaims by host states, where the respondent state could argue that the investor itself committed human rights violations against individuals of host state in the context of its investment. Counterclaims could have effect on the merits of the claim or calculation

[379] *Saluka Investments BV v Czech Republic*, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, 17 May 2004, at para 81.
[380] Eric De Brabandere, "Human Rights and International Investment Law" (2018) at 5, online (pdf): *Leiden Law School Research Paper*
<papers.ssrn.com/sol3/papers.cfm?abstract_id=3149387>
[web.archive.org/web/20210908164043/https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149387].
[381] Nowrot, *supra* note 163 at 23.
[382] De Brabandere, *supra* note 380 at 12.

of damages payable by responding state to reflect the role of foreign investor in an investment context.

The Iranian Model BIT (2001) and other Iranian BITs define the term "investment" as "every kind of property or asset […] invested by the investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the other Contracting Party [..]." Based on this definition, in case a foreign investor fails to comply with the Iranian domestic laws (like the environment impact assessment), any investments of such investor will be considered illegal and deprived of investment treaty protection. In this situation, Iran would have the opportunity to challenge the jurisdiction of investment tribunal or the admissibility of the investor's claims.

In addition to the definition of the investment, article 3 of the Iranian Model BIT (2001) provides that the admission of investments should be in accordance with the laws and regulations of each contracting parties.[383] Based on case law, such provision results in illegality of an investment and affects the jurisdiction of tribunal.

Under article 2 of FIPPA, "Admission of foreign investment shall be made in accordance with the provisions of this Law and with due observance of other prevailing laws and regulations of the country, [..]." In this article, the legislature determines the criterion of foreign investments' admission, including among others, not threatening the national security and public benefits and deterioration of the environment. In case admission of an investment lead to the environment deterioration or endangering national security, the relevant investment will be considered an illegal investor and deprived from investment treaty protection.

[383] This article (under the "Admission of Investments" title) provides "1. Either Contracting Party shall admit investments of natural and legal persons of the of the other Contracting Party in its territory in accordance with its laws and regulations. 2. When an investment is admitted, either Contracting Party shall, in accordance with its laws and regulations, grant all necessary permits for the realization of such an investment."

Although this article refers to the admission (permission to make investments) of foreign investments, the words "with due observance of other prevailing laws and regulations" demonstrate that the legislature's purpose is not just related to the admission of the investment, and that the operation of foreign investments should also comply with the rules of the domestic law.[384] Otherwise, the legislature would have made a distinction between domestic and foreign investors, which is strictly prohibited under article 43.8 of the Constitution,[385] Article 2(c) of FIPPA,[386] and under Iran's investment treaties. As the Constitution, and generally the legal regime of Iran, emphasize the prohibition of any priority toward foreigners, the only conclusion that can be drawn from the provisions of article 2 of FIPPA is that the legislator intended that foreign and domestic investments must comply with domestic laws throughout the life of the investments.

Considering the doctrine of clean hands and its impacts on admissibility of investment claims, failure of foreign investors in compliance with human rights law could form the defenses of the Iranian state in an investor-state dispute settlement. As described in previous paragraph, deteriorating the environment, even at the time of admission or during the operation of an investment, is an obligation of foreign investors. In case an investor fails to comply with the environmental laws, the doctrine of clean hands could deprive the relevant investor from investment protection. As Hesham's conduct (theft, corruption, and money laundering) rendered its claims inadmissible as they disturb public order or public interest, investor's conduct violating

[384] While the right to admission concerns the right of entry of the investment in principle, the right to establishment pertains to the conditions under which the investor is allowed to carry out his business during the period of the investment. Typically, the issue of admission concerns the definition of relevant economic sectors and geographic regions, the requirement of registration or of a license and the legal structure of an admissible investment.

[385] This article provides "In order to secure the economic independence of society, to uproot poverty and deprivation, to fulfill the needs of human beings in process of growth, while also maintaining liberty, the economy of the Islamic Republic of Iran will be based on the following criteria: […] 8. Preventing the economic dominance of foreigners in the national economy."

[386] Article 2 of FIPPA provides "Admission of foreign investment shall be made […] subject to the following criteria: [..] c. Does not involve granting of concessions by the Government to foreign investors. The word concession as used herein means special rights which place the foreign investors in a monopolistic position."

the environment or threatening national security in Iran could also render the investor's claims inadmissible and result in deprivation of investment protection.

As stated in Chapter 2 and this Section, tribunals have recognized jurisdiction over counterclaims in case the provisions of the dispute settlement clause of a BIT refer to "disputes arising out of investment" (rather than agreement). Considering that the provisions of the Iranian Model BIT (2001) and other effective BIT in Iran contain the same wording, an investor's misconduct which prevent the state to guarantee the human rights obligations towards citizens, could base a counterclaim on damages suffered as a result of investor's failure to make the investment that it had undertaken to make. In this situation, tribunal could determine any effect the failure has on the merits of the claim or the damages.

Although the legality requirement could act as an entry point for human rights argumentation in investor-state dispute settlement, there exists no investment case applying human rights as part of legality requirement.[387] As discussed in Section 2 above, tribunals seems to be reluctant to give priority to any other international law rules (including human rights) over investment protection in disputes arising under an investment treaty. States' defenses for lack of jurisdiction or admissibility of claims due to failure of a foreign investor to comply with domestic human rights law may bring no decision or award in favour of the host state. The same may occur when the state counterclaims against the investor seeking damages.

Accordingly, it would be best if the investment treaty itself contains express obligations for foreign investors to respect human rights. Although multinational corporations have no direct human rights obligations under international law and legal instruments impose no direct obligations on them, referring to such an obligation could change the law in the future.[388] Article

[387] De Brabandere, *supra* note 380 at 14.
[388] De Brabandere & Hazelzet, *supra* note 53 at 235-8.

23 of Netherlands Model Investment Agreement (2019)[389] and article 15.2 of UAE-Brazil BIT[390] are examples of investment treaties that contain human rights obligations for foreign investors. The Iranian state could adopt the same approach to amending or replacing its existing BITs or drafting new ones.

Conclusion to Chapter 4

In the context of investment law, investment treaties play the most central and obvious role. They set out the rights of foreign investors, known as standards of treatment, and the corresponding obligations of the investment host states. Based on these treaties, a violation of the investor's rights results in the responsibility of the host state and entitles the foreign investor to raise a claim against the host state before a neutral arbitration tribunal. The pro-investor structure of the earlier investment treaties has given rise to an evolution in treaty text, such that in recently-concluded IIAs, exceptions to the responsibility of the host state in cases related to the regulation of public purpose are common.

Considering that the main purpose of attracting investment is the economic development of the host state, as well as profit of the foreign investor, this purpose cannot be achieved—at least not over the long term—by infringing the human rights of the host state. Violating labour rights, degrading the environment, and damaging public health are contrary to the economic development of a country. Moreover, it is not reasonable to permit foreign investors to violate the human rights of the host state and still recover damages from the host state.

[389] This article provides "Without prejudice to national administrative or criminal law procedures, a Tribunal may, in deciding on the amount of compensation, take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises."

[390] This article provides "The investors and their investment shall endeavor to comply with the following voluntary principle and standards for a responsible business conduct and consistent with the laws adopted by the Host State receiving the investment: a) Contribute to the economic, social and environmental progress, aiming at achieving sustainable development; b) Respect the internationally recognized human rights of those involved in the companies' activities; [..]."

In this Chapter, I investigated the interactions between Iran's obligations under investment law and human rights law. Considering that recent investment treaties include human rights provisions, in Section 1, I investigated the Iranian BITs that include such human rights consideration to find the potential defenses they provide for the state in an investor-state dispute. In fewer than ten BITs, the Iranian state could escape from its liability towards foreign investors. For investors' claims arising under these BITs, Iran could refer to the provisions of the BITs to justify its measures against the relevant foreign investor.

Most of Iran's BITs contains no human rights protections. For disputes arising under these treaties, the state would have to justify measures that give rise to an investor claim by applying and interpreting international human rights law outside the investment treaties. Where protecting an investor violates *ius cogens* norms, the Iranian state should derogate from its investment obligations to prevent such violation. Considering that not all human rights are peremptory norms, human rights law could also be applied and interpreted by tribunals as long as it is a relevant rule of international law to shed light on the object and purpose of the parties and generally the meaning of the investment treaty. Compliance with domestic laws (including domestic human rights) is regulated under investment treaties, as an obligation of foreign investors. A foreign investor's failure to comply with the laws could result in deprivation of rights and protections under the treaty. Investor obligations on good faith have been recognized by tribunals regardless of the treaty language. Thus, investor's failure to comply with domestic human rights law could be entered in international investment disputes.

Arbitration tribunals may be reluctant to place investment protection above other considerations and there exists no investment case applying human rights as part of compliance with domestic laws. This situation leads to the conclusion that inclusion of human rights consideration in IIAs is the only way to ensure that investment protection ceases to be the

overwhelming concern of investment treaties and international human rights law obligations of host states or foreign investors' obligations to respect the human rights could enter into investor-state dispute settlement to exempt states from liability towards foreign investors. If the Iranian state intends to promote its economic development to achieve its long-term goals, it must plan to renegotiate its effective BITs and draft a new model investment agreement to take into consideration not only the economic development of the state, but also the protection of its human rights obligations.

Chapter 5

Overall Conclusion and Recommendations

Section 1: Conclusion

Over the last few decades, states have concluded over 3000 BITs and numerous multilateral agreements to facilitate foreign investment. The sole or primary purpose of most if not all of these IIAs was the legal protection of foreign investors and their investments in the investment host country. Access to an effective international legal remedy, through the right to raise direct claims against host states without needing the participation of their home states, makes such legal protection effective. These treaties permit investors to hail host states into binding arbitration, including for alleged damages resulting from the implementation of legislation to improve domestic social and environmental standards. Broad and vague provisions of IIAs allow investors to challenge public policy and regulatory measures of host states, especially in the area of environment and public health. Even if a host state were to win its dispute with the foreign investor over such regulatory measures, the duration and expense incurred from the dispute may cause regulatory chill in the sense that the host states limit the possible measures by which they might have otherwise implemented international human rights obligations or other public policy objectives.[391] Moreover, investment arbitral tribunals have been reluctant to examine human rights arguments invoked by responding states in justifying regulatory measures that impact the investment rights and protections of foreign investors.

In light of these effects of international investment law on the human rights practices of host states, treaty negotiators began to include social or human rights language in investment agreements. Countries commenced drafting new model investment agreements that provide a balance between international investment law obligations of contracting parties and their international human rights law. The US, Canada and Norway are among the countries that have

[391] Simma, *supra* note 8 at 580.

started to draft and negotiate a new generation of BITs that add more detail concerning the obligations of the host state in regard to investor protection.[392] The purpose of this new language was to promote and protect host states' public interest goals, like the protection of human rights, labour rights, the environment, and public health coincident with their economic interests arising from the promotion and protection of foreign investments. References to human rights concerns have been included in the preambles and or operative clauses of recently-negotiated investment treaties and model agreements. Furthermore, provisions to exclude the liability of states towards foreign investors or to permit counterclaims by host states against investors have been introduced into investment treaties.

The main goal of this thesis has been to examine the interactions between the human rights law obligations and investment law obligations of Iran. To that end, I analyzed the relevant provisions of the Iranian BITs, laws, and regulations applicable to foreign investments, and the available routes for introducing human rights concerns into investment disputes. In Chapter 2, I compared the provisions of the Iranian BITs with the model investment agreements of other countries and their effective BITs. Investment arbitral tribunals' interpretations and decisions regarding the investment treaties and arguments of states were also examined. This analysis of the provisions of the Iranian BITs demonstrated that fewer than ten effective BITs contain any exceptions to liability or other provisions protective of human rights. All but a few of the Iranian BITs make no reference whatsoever human rights or social rights concerns. The situation gets

[392] UNCTAD, "Recent Developments in International Investment Agreements, IIA Monitor No. 2 (2005)", at 4 online (pdf): *UNCTAD* <unctad.org/system/files/official-document/webiteiit20051_en.pdf> [web.archive.org/web/20210908165544/https://unctad.org/system/files/official-document/webiteiit20051_en.pdf].

worse as the main foreign investors in Iran are from the countries with which Iran has concluded a markedly pro-investor investment treaty.

As explored in Chapter 3, the protection of human rights is regulated under Iran's investment laws and other laws and regulations that may apply to foreign investors. Domestic laws and regulations obligate the state itself, individuals, and corporations (nationals or foreigners alike) to respect and protect labour rights, the environment, and public health. The Islamic Republic of Iran is a member state of the major international human rights treaties and is under an obligation to realize international human rights law within the country.

As discussed in Chapter 3, the labour regulation applicable in the free-trade zones and special zones is more flexible and permissive than the Labour Code that applies to the mainland. Although the zones have experienced rapid employment growth, the contribution of the zones is very modest for a country the size of Iran with a high unemployment rate. Moreover, female employment creation is particularly weak in the zones. Although detailed employment figures by gender are not available, the limited demographic data on the zones indicates a highly skewed gender composition of the population in favour of males.[393] Therefore, despite the incentives of the free trade zones and special zones for foreign investors, these zones have not actually been successful in creating jobs.

In the current investment law regime in Iran, when the Iranian state decides to enact a new regulation or modify existing laws that impact foreign investors' interests, these measures could be claimed by a foreign investor as a violation of an investment treaty and lead to damages owing to the investor. As the provisions of most of the Iranian BITs contain no exceptions to the liability of the state towards foreign investors, Iran has to rely on its international human rights law

[393] Hakimian, *supra* note 213.

obligations in its defense for the regulatory measures affecting foreign investors. While compliance with an investment obligation by the state contradicts with its compliance with *ius cogens* norm, derogation of investment obligations is recognized under international law. Regarding human principles rights that are not *ius cogens*, or at least not indisputably *ius cogens*, human rights arguments could enter into investment disputes by interpretation of the provisions of the treaty. As investment law and human rights law are parts of international law, international human rights law could be applied as a relevant rule in the interpretation of its obligations under investment treaties to justify its adopted regulatory measures for compliance with its obligations under international human rights treaties. Although such interpretation could lead to a more balanced environment in the investment context, investment tribunals have been reluctant to take into account the human rights defenses of host states when the applicable investment treaty does not expressly permit them to establish (such as in the preamble) that the protection of human rights or the broader economic development of the contracting states is a purpose of the treaty.

Another human rights argument for the Iranian state in investment disputes could be invoking the violation of domestic laws by foreign investors. Where a foreign investor violates a domestic law, during the admission process or operation of the investment, arbitral tribunals have found that they lack of jurisdiction or that investors' claims are inadmissible. An investment claim should comply with the laws and regulations of host states, and a failure of compliance can and should result in deprivation of the protections of the treaty. Moreover, *bona fide* principle implies that an investor who acts in good faith should be protected under investment law and enjoy standard treatments. When the investment fails to comply with domestic laws or the investor's claims lack compliance with laws, the relevant investor would be deprived of its rights. Human rights law is embedded in domestic law and failure of compliance with this law could result in the state's arguments against the foreign investor. Moreover, states could claim against the claimant

investor for the damages the investor owes to the state for the failure of the investor which prevents the state to comply with its human rights obligations.

Section 2: Recommendations

Arbitration tribunals may tend to place investment protection above other considerations. Thus, to solve the challenges arising from the interactions between human rights and investment treaty norms, other steps (rather than defenses to liability under international human rights law and investor compliance with human rights law in the domestic laws of host states) are required to align the investment treaty regime with human rights law and to strengthen the human rights narrative on international investment. Investment host countries, like Iran, should look for an investment which creates jobs, contributes to economic growth, brings social benefits, promotes gender equality, and not harmful to the environment.[394]

BITs, like most other treaties, are a product of the time when they are negotiated. To effectively address the tensions between human rights and investment norms in BITs, the pro-investor approach of Iran's current treaties must be refined and narrowed. Treaty amendment and replacement can transform Iran's treaty regime from its current focus on the protection of foreign investment to a focus on establishing an equilibrium between protection of investors and the state's regulatory power. Reforming BITs to a balanced environment could help to reduce the risk of expensive and lengthy investment disputes proceedings, which challenge legitimate measures of the Iranian state.

In Iran, a new form of investment treaty that does not focus on the sole protection of foreign investment and contains a balanced perspective with exceptions to liability for the states to adopt

[394] UNCTAD, *supra* note 7 at 14-15.[395] Marc Jacob, "International Investment Agreements and Human Rights" (2010) at 33-34, online (pdf): *INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development*

measures in favour of public policy objectives (including human rights) is fundamental. The Iranian Model BIT was drafted in 2001. For such a modern investment treaty, the provisions of the model BIT are already outdated. A balanced model agreement containing statements that do not attract the liability of the state when it takes measures in the public interest which interfere with foreign investments should be drafted. Protection of human rights and economic development of the contracting parties should be added to the preamble of the model agreement. Provisions excluding the liability of the states towards foreign investors or permitting the states to counterclaim against investors should be introduced. An illustrative list of public policy objectives, to which a general exception to liability applies, should be included. The expropriatory measures of the contracting states with legitimate public welfare objectives should be excluded from the scope of indirect expropriation. Social responsibilities of foreign investors, their compliance with international human rights and business guidelines, or executing a human rights or environmental audit should be mentioned in the model agreement. Finally, the model agreement should be drafted to ensure more responsible and regulated investment activities with reference to the international human rights treaties. A new model agreement could then be the basis for investment negotiations with the states that Iran has not already concluded BITs.

Concluding new BITs with new treaty partners would not remedy the situation under Iran's many existing BITs, which are already in place with all or its major trading partners. A method of modifying the Iranian BITs would be for the contracting parties to leave the text of an existing investment agreement intact and issue binding joint interpretations of certain provisions.[395] IIAs

[395] Marc Jacob, "International Investment Agreements and Human Rights" (2010) at 33-34, online (pdf): *INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development* <www.uni-due.de/imperia/md/content/inef/mune_03.2010.pdf> [web.archive.org/web/20210908165918/https://www.uni-due.de/imperia/md/content/inef/mune_03.2010.pdf%3E.].

with broadly worded provisions can give rise to unintended and contradictory interpretations in investor-state dispute settlement proceedings. Joint interpretations, aimed at clarifying the meaning of treaty obligations, help reduce uncertainty and enhance predictability for investors, contracting parties, and tribunals.[396] Such interpretations could include the definition of investor and investment, national treatment, fair and equitable treatment, or expropriation clauses.[397] This method is less time-consuming than renegotiation BITs, even if it requires the same degree of consensus among the contracting states.[398] The Iranian state could benefit from the experience of Colombia and India joint interpretative declaration of 2018 which refined key clauses of the BIT to reflect sustainable development objectives and strengthen the right of the parties to regulate in the public interest.[399] Iran could plan for negotiating joint interpretative declarations with its current major trading partners. Moreover, applying this method to Iran's future trading partners will be beneficial. If Iran intends to promote trade and investment cooperation with a country other than its current trading partners, either under the current sanctions regimes or once it finally ends, it would be better to issue joint interpretative declarations with relevant states before admitting their investors.

For Iran, another method could be amending treaty provisions. When treaty parties are concerned only with certain specific provisions of treaties, discrete amendments might be preferred to the renegotiation of the whole treaty. The limit of an amendment-based strategy is that amendments do not affect the overall design and philosophy of a treaty, and would do less to shift existing pro-investor BITs toward a more balanced structure. In this method, by instance,

[396] UNCTAD, *supra* note 392 at 5.
[397] *Ibid* at 78.
[398] *Ibid* at 5.
[399] Other example is Colombia and France joint interpretative declaration with regard to their 2014 BIT, which clarifies that article 16 of the BIT should not be read as a stabilization clause and that a violation of a state contract between an investor and a party does not constitute a treaty violation. *Ibid*.

Iran can task a joint committee of the contracting parties with improving the investors-state dispute settlement provision to meet countries' objectives (such as how to resolve disputes and eliminate frivolous claims).[400] This method could be applied in the BITs with major trading partners, as it can decrease the number of investors' claims against the Iranian state.

Another method for Iran is renegotiating the investment treaties. The expansively formulated obligations in the Iranian BITs, which is common to old investment treaties, may sometimes be difficult to be fixed through a joint interpretation or amendment. By renegotiating treaty provisions, Iran can achieve a high degree of change and ensure that the new treaty reflects its contemporary vision.[401] Although renegotiation could be costly and time-consuming, for the Iranian BITs without any human rights language, which form the majority context of the Iranian BIT regime, renegotiation of treaties as a whole—not just towards joint interpretation or amendments—may be the most difficult to accomplish but ultimately most appropriate method. Shifting existing Iranian BITs from a pro-investor approach (that focuses on the protection of foreign invest*ors* rather than foreign invest*ments*) towards a balanced approach may necessitate that new treaties should replace old ones. Joint interpretation or amending some clauses may fail to completely accomplish the ultimate goal of a more balanced treaty regime, and should be accepted only as a second-best compromise. As the renegotiation method takes time and cost, Iran should prioritize the renegotiation of its BITs with the Government of China, Russia, Germany, France, South Korea, and Turkey, which currently dominate Iran's list of trading and investment partners.

[400] This is the experience of the United States and the Republic of Korea that signed an amendment (2018) to their free trade agreement of 2007.

[401] When entering into renegotiations, Iran needs to be mindful of termination provisions in the earlier BITs, including how to ensure an effective transition from the old to the new treaty regime and how to deal with any survival clause.

Chinese enterprises have initiated many large-scale construction projects in Iran, involving water conservancy, transportation, energy, steel, and petrochemical.[402] Iran's increasing economic relations with China are not a function of Chinese strategic interests in Iran, but rather the result of the imposition of multilateral sanctions.[403] Sanctions have weakened Iran's economy, hurt its prospects for economic growth by impeding the development of oil and gas resources, and limited its access to technology.

Iran holds great geographic and geo-political significance in the Middle East and the Persian Gulf, and benefits from rich natural and human resources. Iran has a developed educational infrastructure that offers abundant supplies of literate and technically trained personnel. Moreover, its rich culture and history as an ancient civilization enhance its potential as an important gateway between the East and West. Placed in this broad context, Iran could benefit from its potential attractions as a hub for regional business and commerce. Despite these opportunities, economic sanctions, and political and economic uncertainty have discouraged international investors from dealing in Iran.

By the analysis of the labour regulation applicable to free-trade zones and special zones of Iran, it was found that even though Iran has adjusted the labour regulation in these zones in favour of (especially foreign) employers, the rate of employment in the zones shows that Iran has not been successful in increasing job opportunities and employment creation in these areas. Today, investment host countries should look for investments that promote gender equality, among other benefits. The rate of employment of women in Iranian free-trade zones and special zones is very

[402] China Briefing, *supra* note 23.

[403] The case of Huawei, China's leading telecommunications company, offers a cautionary tale for Chinese multinationals. The arrest of Huawei's president on charges of fraud related to Huawei's Iran business is indicative of the ways in which the risks endemic to the Iranian market are increasingly seen as a liability by major Chinese enterprises. The Huawei case has inspired a culture of paranoia in the Chinese government and major enterprises when it comes to Iran. Greer & Batmanghelidj, *supra* note 189 at 7.

low, so much so that it calls into question whether Iran ever considered the promotion of gender equality when regulating labour in the zones. Countries similar to Iran, with a large and well-educated workforce but little access to capital, can learn from Iran's experience and adjust their labour laws so that the rights of workers and employers are protected in a balanced environment.

Moreover, sanction pressure on Iran has resulted many Asian and European countries abandoning their investments and made China the most important foreign investor in Iran (especially in the exploration and extraction of oil and gas resources).[404] For the Iranian regime, no country in the world is as important in ensuring its survival and helping to insulate it from international pressure as the People's Republic of China.[405] On the other hand, it is not clear to Iranian officials whether China has the necessary technology and know-how to help Iran exploit its oil and natural gas resources to the fullest extent possible.[406] Although more than a hundred years have passed since the establishment of Iran's oil industry, Iran has not yet been able to acquire the latest technology in oil extraction and still requires foreign investors' technologies.[407] Although Iran concluded its first bilateral investment agreement more than 50 years ago (Iran-Germany BIT 1965), Iran has not yet been able to localize the required technical knowledge and know-how of extraction and exploitation of its oil and natural gas resources or obligate foreign investors to transfer up-to-date technologies. This shortcoming in the Iranian investment regime can serve as a lesson for other resource-rich developing nations. The BITs of such countries should

[404] Japan has been designated by Tehran as its preferred foreign investor in Azadegan oil and natural gas fields, but Tokyo withdrew from the deal due to US pressure. Harold & Nader, *supra* note 14 at 10.
[405] From Beijing's perspective, Iran serves as an important strategic partner. Iran possesses vast reserves of oil and natural gas that could help fuel China's development and Iran is also a growing market for Chinese goods.
[406] Marybeth Davis *et al*, "China-Iran: A limited Partnership" (2013) at 50, online (pdf): *US-China Economic and Security Review Commission* www.uscc.gov/sites/default/files/Research/China-Iran--A%20Limited%20Partnership.pdf [web/20210917174442/https://www.uscc.gov/sites/default/files/Research/China-Iran--A%20Limited%20Partnership.pdf].
[407] Behrooz Akhlaghi, "Improvement of Buy Back Contracts in Iran's Oil Industry" (2018) 3:1 Journal of Legal Research at 24-7.

be drafted so that requiring foreign investors to transfer their technology and knowledge does not constitute treaty violations. By this means, the economic development of investment contracting parties by stimulation of technology transfers, as noted by the tribunal in *Suez*, will be achieved.[408] It is not in question that increased employment levels, increased economic growth rates, and the introduction of new and more efficient technologies, which generate wealth and increase standards of living, are substantial benefits of foreign investment for states.

[408] *Suez Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic, supra* note 333 at para 215-217.

Bibliography

LEGISLATION:

Criminal Code (1991).
Development Plan Acts.
Foreign Investment Promotion and Protection Act (FIPPA) (2002).
Implementing Regulation of FIPPA (2002).
Labour Code (1990).
Law of Food, Beverage, and Hygiene (1967).
Law on Environmental Protection and Improvement (1974).
Law on Prevention of Air Pollution (1993).
Law of Clean Air (2017).
Petroleum Act (1987).
Regulation of Employment of Human Resources, Insurance and Social Security in the Free-Trade-Industrial Zones (1997).
Regulations for the Election of Members of the Dispute Board (2008).
Regulation of Medical Equipment and Supplies (2015).
Regulation of Environmental Impact Assessment of Large-Scale Production, Service and Development Projects and Plans (2012).
Regulation on the Prevention of Water Pollution (1995).
The Constitution (1979).

JURISPRUDENCE:

ADC v Hungary, ICSID Case No. ARB/03/16, Award, 2 October 2006.
Adel A Hamadi Al Tamimi v Sultanate of Oman, ICSID Case No. ARB/11/33, Award, 3 November 2015.
Azurix Corp. v The Argentine Republic, ICSID Case No. ARB/01/12, Award, 14 July 2006.
Chemtura Corporation v Government of Canada, UNCITRAL, Award, 2 August 2010.
CME Czech Republic B.V. v The Czech Republic, UNCITRAL, Partial Award, 13 September 2001.
CMS Gas Transmission Company v the Argentine Republic, ICSID Case No. ARB/01/8, Award, 12 May 2005.
Continental Casualty Company v Argentine Republic, ICSID Case No. ARB/03/9, Award, 5 September 2008.
El Paso Energy International Company v The Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 October 2006.
Enron Corporation v Argentine Republic, ICSID Case No. ARB/01/3, Award, 22 May 2007.
Fireman's Fund v Mexico, ICSID Case No. ARB(AF)/02/01, Award, 17 August 2006.
Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines, ICSID Case No. ARB/03/25, Award, August 16, 2007.

Hesham Talaat M Al-Warraq v The Republic of Indonesia, UNCITRAL, Final Award, 15 December 2014.

Inceysa Vallisoletana v Republic of El Salvador, ICSID Case No. ARB/03/26, Award, 2 August 2006.

Metalclad Corporation v The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000.

Methanex Corporation v United States of America, Decision of the Tribunal on Petitions from Third Persons to Intervene As "*Amici Curiae"*, 15 January 2001.

Methanex Corporation v United States of America, Petition to the Arbitral Tribunal, submitted by the International Institute for Sustainable Development, 25 August 2000.

Methanex Corporation v United States of America, Statement of Defense of Respondent United States of America, 10 August 2000.

Middle East Cement Shipping and Handling Co. S.A. v Arab Republic of Egypt, ICSID Case No. ARB/99/6, Award, 12 April 2002.

Parkerings-Compagniet AS v Republic of Lithuania, ICSID Case No. ARB/05/8, Award, 11 September 2007.

Philip Morris Brands SARL, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay, ICISD Case No. ARB/10/7, Award, 08 July 2016.

Phoenix Action LTD v The Czech Republic, ICSID Case No. ARB/06/6, Award, 15 April 2009.

Salini Costruttori S.P.A. and Italstrade S.P.A. v Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001.

Saluka v Czech Republic (2006), UNCITRAL, Partial Award, 17 March 2006.

Saluka Investments BV v Czech Republic, UNCITRAL, Decision on Jurisdiction over the Czech Republic's Counterclaim, 17 May 2004.

Santa Elena v Republic of Costa Rica, ICSID Case No. ARB/96/1, Award, 17 February 2000.

SGS Société Générale de Surveillance SA v Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004.

Siemens A.G. v The Argentine Republic, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004.

Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt, ICSID Case No. ARB/84/3, Award on the Merits, 20 May 1992.

Starrett Housing Corporation, Starrett System, INC. and Others v the Government of the Islamic Republic of Iran, *Bank Markazi and Others*, Interlocutory Award (Award No. ITL 32-24-1), IUSCT (IRAN_US CLAIMS TRIBUNAL), 19 December 1983.

Suez Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v The Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010.

Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic (2016), ICISD Case No. ARB/07/26, Award, 8 December 2016.

Vivendi v Argentina, ICSID Case No. ARB/97/3, Award, 20 August 2007.

Waste Management Inc. v Mexico, ICISID Case No. ARB(AF)/98/2, Dissenting Opinion (of Keith Highet), 08 May 2000.

William Ralph Clayton, Willian Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, INC. v Government of Canada, UNCITRAL, Award on Jurisdiction and Liability, 17 March 2015.

World Duty Free Company Limited v Republic of Kenya, ICSID Case No. ARB/00/7, Award, 4 October 2006.

SECONDARY MATERIAL:

Akhlaghi, Behrooz, "Improvement of Buy Back Contracts in Iran's Oil Industry" (2018) 3:1 Journal of Legal Research.

Alvarez, Jose E, *The Public International Law Regime Governing International Investment*, (Netherlands: Hague Academy of International Law, 2011).

Breining-Kaufmann, Christine, *Globalization and Labour Rights, The Conflicts between Core Labour Rights and International Economic Law*, (Portland: Hart Publishing, 2007).

Choudhury, Barnali "Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements" (2011) 49:3 Colum J Transnat'l L.

— "Spinning Straw into Gold: Incorporating the Business and Human Rights Agenda into International Investment Agreements" (2017) 38:2 U Pa J Int'l L.

Coleman, Jesse & Kaitlin Y Cordes & Lise Johnson, "Human Rights Law and the Investment Treaty Regime" in Surya Deva & David Birchall, eds, *Research Handbook on Human Rights and Business* (UK: Edward Elgar Publishing Limited, 2020).

Davis, Marybeth & James Lecky & Torrey Froscher & David Chen & Abel Kerevel & Stephen Schlaikjer, "China-Iran: A limited Partnership" (2013), online (pdf): *US-China Economic and Security Review Commission* www.uscc.gov/sites/default/files/Research/China-Iran--A%20Limited%20Partnership.pdf /.

Dolzer, Rudolf & Christoph Schreuer, *Principles of International Investment law*, (UK: Oxford University Press, 2008).

Dupuy, Pierre-Marie, "Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law" in Pierre-Marie Dupuy, Francesco Francioni, & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009).

De Brabandere, Eric & Maryse Hazelzet, "Corporate responsibility and human rights – Navigating between international, domestic and self-regulation" in Yannick Radi, ed, *Research Handbook on Human Rights and Investment* (UK: Edward Elgar Publishing Limited, 2018).

Dumberry, Patrick "When and How Allegations of Human Rights Violations Can Be raised in Investor-State Arbitration?" (2012), online (pdf): *The Journal of World Investment & Trade* <www.researchgate.net/publication/256021552_When_and_How_Allegations_of_Human_Rights_Violations_Can_Be_Raised_in_Investor-State_Arbitration>.

De Brabandere, Eric "Human Rights and International Investment Law" (2018), online (pdf): *Leiden Law School Research Paper* <papers.ssrn.com/sol3/papers.cfm?abstract_id=3149387>.

Douglas, Zachary, *The International Law of Investment Claims*, (UK: Cambridge University Press, 2009).

Gantz, David A, "Potential Conflicts between investor rights and environmental regulation under NAFTA's Chapter 11" (2001) 33:3-4 Geo Wash Intl L Rev.

Grant, John P & J Craig Barker, *Encyclopædic Dictionary of International Law*, 3rd ed (UK: Oxford University Press, 2009).

Green, Will & Taylore Roth, "China-Iran Relations: A Limited but Enduring Strategic Partnership" (2021) *U.S.-China Economic and Security Review Commission Staff Research Report* <www.uscc.gov/sites/default/files/2021-06/China-Iran_Relations.pdf>.

Greer, Lucille & Esfandyar Batmanghelidj, "Last Among Equals: The China-Iran Partnership in a Regional Context" (2020), online (pdf): *Wilson Center* www.wilsoncenter.org/publication/last-among-equals-china-iran-partnership-regional-context.

Hachemi, Seyed Mohammad *Droit du Travail*, (Tehran: Mizan Publication, 2018).

Hakimian, Hassan "Iran's Free Trade Zones: Back Doors to the International Economy?" (2011) 44:6 Taylor & Francis, Ltd. On behalf of International Society of Iranian Studies.

Harold, Scott & Alireza Nader, "China and Iran Economic, Political, and Military Relations" (2012), online (pdf): *Center for Middle East Public Policy* <www.rand.org/pubs/occasional_papers/OP351.html>.

Harrison, James "Human Rights Arguments in *Amicus Curiae* Submissions: Promoting Social Justice?" in Pierre-Marie Dupuy, Francesco Francioni, & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009).

ILO, "Rules of the game: An introduction to the standards-related work of the International Labour Organization" (2019), online (pdf): *ILO* www.ilo.org/global/standards/information-resources-and-publications/publications/WCMS_672549/lang--en/index.htm.

Jacob, Marc "International Investment Agreements and Human Rights" (2010), online (pdf): *INEF Research Paper Series on Human Rights, Corporate Responsibility and Sustainable Development* <www.uni-due.de/imperia/md/content/inef/mune_03.2010.pdf>.

Karamanian, Susan, "Human Rights Dimensions of Investment Law" in Erika de Wet & Jure Vidmar, eds, *Hierarchy in International Law The Place of Human Rights* (UK: Oxford University Press, 2012).

Karton, Joshua "Choice of Law and Interpretive Authority in Investor-State Arbitration" (2017) 3:1 Canadian Association of Comparative and Contemporary Law.

Knox, John H & Ramin Pejan, *The Human Rights to a Healthy Environment* (Cambridge: Cambridge University Press, 2018).

Kozyakova, Anna *Foreign Investor Misconduct in International Investment Law*, (Switzerland: Springer, 2021).

Kriebaum, Ursula, "Human rights and international investment law" in Yannick Radi, ed, *Research Handbook on Human Rights and Investment* (UK: Edward Elgar Publishing Limited, 2018).

— "Chapter V: Investment Arbitration – Illegal Investments" (2010), online (pdf): *Kluwer Law International* <*law.yale.edu/sites/default/files/documents/pdf/sela/Kriebaum_Illegal_Investments.pdf*>.

Kube, Vivian & EU Petersmann, "Human Rights Law in International Investment Arbitration" (2016) 11:1 Asian J WTO & Int'l Health L and Pol'y.

Lewis, Bridget "Environmental Rights or a Right to the Environment? Exploring the Nexus between Human Rights and Environmental Protection" (2012), online (pdf): *Macquarie Journal of International and Comparative Environmental Law* <*papers.ssrn.com/sol3/papers.cfm?abstract_id=2673932*>.

Mann, Howard, "International Investment Agreements, Business and Human Rights: Key Issues and Opportunities" (2008), online (pdf): International Institute for Sustainable Development www.iisd.org/index.php/system/files/publications/iia_business_human_rights.pdf.

Mann, Howard & Konard von Moltke & Luke Eric Peterson & Aaron Cosbey, "IISD Model International Agreement on Investments for Sustainable Development Negotiators' Handbook" (2006), online (pdf): International Institute for Sustainable Development www.iisd.org/publications/iisd-model-international-agreement-investment-sustainable-development-negotiators.

Miles, Kate, *The Origins of International Investment Law, Empire, Environment and the Safeguarding of Capital*, (UK: Cambridge University Press, 2013).

Nasrollahi Shahri, N, "The Petroleum Legal Framework of Iran: History, Trends and the Way Forward" (2010) 8:1 China and Eurasia Forum Quarterly.

Newcombe, Andrew "Investor misconduct: Jurisdiction, admissibility or merits?" in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (UK: Cambridge University Press, 2011).

Nowrot, Karsten "The Other Side of Rights in the Processes of Constitutionalizing International Investment Law: Addressing Investors' Obligations as a New Regulatory Experiment" (2018), online (pdf): Rechtswissenschaftliche Beiträge der

Hamburger Sozialökonomie www.wiso.uni-hamburg.de/fachbereich-sozoek/professuren/nowrot/archiv/heft-21-nowrot-obligations.pdf.

OECD, "Employment, Labour and Social Affairs Committee and the Trade Committee, Trade, Employment and Labour Standards, A Study of Core Workers' Rights and International Trade" (1996) online (pdf): *OECD* www.oecd-ilibrary.org/trade/trade-employment-and-labour-standards_9789264104884-en.

Peterson, Luke Eric & Kevin R Gray, "International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration" (2003), online (pdf): International Institute for Sustainable Development for the Swiss Department of Foreign Affairs www.escr-net.org/sites/default/files/Luke_Peterson___IHR_in_bilateral.pdf.

Reiner, Clara & Christoph Schreuer, "Human Rights and International Investment Arbitration" in Pierre-Marie Dupuy, Francesco Francioni, & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009).

Reinisch, August "Jurisdiction and Admissibility in International Investment Law" (2017), online (pdf): *Brill | Nijhoff* <brill.com/view/book/edcoll/9789004368385/BP000010.xml>.

Simma, Bruno & Theodore Kill, "Harmonizing Investment Protection and International Human Rights: First Steps Towards A Methodology" in Christina Binder *et al*, eds, *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press, 2009).

Shiravi, Abdolhossein "The Legal Structure of Special Economic Zones in Iran" (2010) 2010:2 Int'l Bus LJ.

Sornarajah, M, *The International Law on Foreign Investment*, 3rd ed (UK: Cambridge University Press, 2010).

Spears, Suzanne A, "Making way for the public interest in international investment agreements" in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (UK: Cambridge University Press, 2011).

Toral, Mehmet & Thomas Schultz, "The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations" in Michael Waibel *et al*, eds, *The Backlash against Investment Arbitration Perceptions and Reality* (Netherlands: Kluwer Law International, 2010).

Titi, Catharine, "International Investment Law and the European Union: Towards a New Generation of International Investment Agreements" (2015) 26:3 EJIL.

Truswell, Emma, "Thirst for profit: Water privatization, investment law and a human right to water" in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (UK: Cambridge University Press, 2011).

UNCTAD, "UNCTAD's Reform Package for the International Investment Regime" (2018) online (pdf): *UNCTAD* <investmentpolicy.unctad.org/publications/1190/unctad-s-reform-package-for-the-international-investment-regime-2018-edition->.

UNCTAD, "Recent Developments in International Investment Agreements, IIA Monitor No. 2 (2005)", online (pdf): *UNCTAD* <unctad.org/system/files/official-document/webiteiit20051_en.pdf>.

UNCTAD, "Investment Policy Framework for Sustainable Development" (2018), online (pdf): *UNCTAD* <unctad.org/system/files/official-document/diaepcb2015d5_en.pdf>.

UNCTAD, "Expropriation" (2012), online (pdf): *UNCTAD* <unctad.org/system/files/official-document/unctaddiaeia2011d7_en.pdf>.

UNCTAD, "International Investment Agreements Reform Accelerator" (2020), online (pdf): *UNCTAD* <unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf>.

UNCTAD, "International Investment Agreements Navigator" (September 2021), online: *UNCTAD*<investmentpolicy.unctad.org/international-investment-agreements/countries/98/iran-islamic-republic-of>.

United States Trade Representative, "Guatemala-Issues Relating to the Obligations under Article 16.2.1(a) of the CAFTA-DR U.S. Initial Written Submission" (2014), online (pdf): <ustr.gov/sites/default/files/US%20Initial%20Written%20Submission.pdf>.

Vadi, V Sara "Reconciling Public Health and Investor Rights: The Case of Tobacco" in Pierre-Marie Dupuy, Francesco Francioni, & Ernst-Ulrich Petersmann, eds, *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009).

Vadi, Valentina, *Public Health in International Investment Law and Arbitration*, (London: Routledge, 2013).

Waibel, Michael "Investment Arbitration: Jurisdiction and Admissibility" (2014), online (pdf): *University of Cambridge Faculty of Law Research Paper <papers.ssrn.com/sol3/papers.cfm?abstract_id=2391789.*

Yen, Trinh Hai, *The Interpretation of Investment Treaties*, (Netherlands: Brill Nijhoff, 2014).

OTHER MATERIALS:

Abolition of Forced Labour Convention, 25 June 1957, (17 January 1959).

Accord de commerce, de protection des investissements et de coopération technique entre la Confédération Suisse et la République Du Tchad, 21 February 1967, (31 October 1967).

Agreement between the Federal Republic of Germany and the Islamic Republic of Iran on Reciprocal Promotion and Protection of Investments, 17 August 2002 (23 June 2005).

Agreement for the Promotion and Reciprocal Protection of Investments between the Government of the Republic of Nicaragua and the Government of Islamic Republic of Iran, 10 August 2019.

Agreement between the Belgium-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments, 2019.

Agreement on Reciprocal Promotion and Protection of Investments between … and the Kingdom of the Netherlands, 22 March 2019.

Agreement between the Slovak Republic and the United Arab Emirates for the Promotion and Reciprocal Protection of Investments, 22 September 2016 (05 February 2018).

Agreement between the Kingdom of Norway and […] for the Promotion and Protection of Investments 2015.

Agreement between Japan and the United Arab Emirates for the Promotion and Protection of Investments, 30 April 2018 (26 August 2020).

Agreement between Kingdom of Morocco and Japan for the Promotion and Protection of Investments, 08 January 2020.

Agreement between the Czech Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments, 18 December 2017.

Agreement between the Government of Hungary and the Government of the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments, 4 December 2017.

Agreement for the Promotion and Reciprocal Protection of Investments between Luxembourg and the Government of the Islamic Republic of Iran, 14 February 2017.

Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments, 19 January 2016 (30 August 2017).

Agreement between the Government of the People's Republic of China and the Government of the Republic of Singapore on the Promotion and Protection of Investments, 21 November 1985, (7 February 1986).

Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference, June 1981.

Comprehensive Economic and Trade Agreement between Canada and the European Union and its Member States, 30 October 2016, (21 September 2017).

Constitution of World Health Organization, 22 July 1946 (7 April 1948).

Convention on the Rights of the Child, 20 November 1989, (2 September 1990).

Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the United Arab Emirates, 15 March 2019.

Discrimination (Employment and Occupation) Convention, 25 June 1958, (15 June 1960).

Equal Remuneration Convention, 29 June 1951 (23 May 1953).

Forced Labour Convention, 28 June 1930 (1 May 1932).

General Agreement on Tariffs and Trade (GATT), 15 April 1994 (1 January 1995).

Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework, 2011, UN Human Rights Council.

International Covenant on Civil & Political Rights, 16 December 1966 (23 March 1976).

International Covenant on Economic, Social, and Cultural Rights, 16 December 1966 (3 January 1976).

Minimum Age Convention, 26 June 1973 (19 June 1976).

Occupational Safety and Health Convention, 22 June 1981 (11 August 1983).

Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, 03 December 2016.

Treaty between the Government of the United States of America and the Government of [Country] concerning the Encouragement and Reciprocal Protection of Investment 2012.

Treaty between the Federal Republic of Germany and the Empire of Iran concerning the Promotion and Reciprocal Protection of Investments, 11 November 1965 (06 May 1968).

UN Committee on Economic, Social and Cultural Rights (CESCR), "General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art.12)", 22nd Sess, 11 August 2000, UN DOC E/C.12/2000/4.

UN Committee on Economic, Social and Cultural Rights (CESCR), "General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)", 29th Sess, 20 January 2003, UN Doc E/C.12/2002/11.

Universal Declaration of Human Rights, 10 December 1948.

Vienna Convention on the Law of Treaties, 23 May 1969, (27 January 1980).

Worst Forms of Child Labour Convention, 17 June 1999, (19 November 2000).