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Studying the nationalization of foreign property investment in Iran and Iraq law

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ABSTRACT

Nowadays, the countries do not take the progressive form without attracting the foreign investment. So, one would say that the study of the factors contributing to the motivation of foreign investment is considerable. Of the most important elements of such an issue is the laws having to do with foreign investment domain such as the quality of expropriation or nationalization of foreign property investment in the host country. Another important factor is the quality of it where such a legal license is taken into account as the significant difference of laws relevant to countries which is also the confusion element of the free will in terms of the legal status. Hence, based on the result of the studies one would claim that foreign investment covers the neighborhood countries leading to the experts as well as lawyers and countries after choosing the assumed area. The country getting the most advantages in different factors such as legal discussion and assumed low in the relevant domain is identified and suggested. This study focuses on the attitude toward the historical trend of legal, criteria and opinions issued by the court of arbitration having to do with nationalization of foreign property investment in one hand, and comparative study of the two neighborhood countries i.e. Iran and Iraq as one of the efficient research tools where the foreign property investment law including the synergistic status on the other, are studied in this research. Based

on the obtained results of the study, the principle is predicted as lack of nationalization during the comparative study of both countries' foreign property investment law in terms of nationalization of foreign property investment in both countries. The study relies on the exception condition of Iraq's law against the international standard of the rule "otherwise based on the judicial court's definite ruling" and Iran's law "otherwise for public interest". It predicts Iran's law as more qualified one to attract and motivate the investor. In general, both laws have the capability to be considered as the element to attract distinguished and common investment through standardizing the laws according to the custom in relation to international appropriate behavior taking into account the area capacity.

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1. Introduction

Direct foreign investments have turned out to be bargaining in the domain of international economy because of the advantages and profits derived from it and countries seek their shortcut ways of development in the literature of foreign investments and the relevant affective factors. Conference of National Department of Development and Commerce relying in its newest report (2013) relying on the global investment reports in 2012 has reported that the developing countries are ahead of the developed countries in attracting direct foreign investments. Three economics to be developing in five countries ranked as superior ones fall into the same year. Anktad has reported in its provided foreign investment in the world as 1.35 trillion dollars in the year 2012 and based on this report, the developing countries have attracted 702 milliard dollars equal to 25% of total direct foreign investments during the year 2012 to be ahead of the developed countries in this domain. The share of the developed countries from this value is 560 million dollars equal as to 41%. The other countries have attracted 560 milliard dollars equal to 41% in the year 2012. All these cases reveal that foreign investment is purely developed in economic competition at the international level relying on this efficient tool and technology transformation. (UNCTAD ,2013). Foreign investments are developed by the contribution of a number of factors and are affected by declining elements leading it to static status which might be decreased. The role of law factors among the elements contributing to the increase of foreign investment is unmatched. one would say that different subcategories affect the foreign investment among which are national and international criteria in relation to aliens' behavior, admission and expulsion of aliens., executive guarantee to assure their laws as well as the governments' future in intervening economic activities of aliens, capturing the properties of aliens and governing rules of the settling the inequalities. These elements are more highlighted in the rules of legal status relevant to foreign investment of countries and they are under the scope of foreign investors as well as their experts and lawyers. All countries draw their attention on this very issue in discussing nationalization or expropriation of foreign properties investment which have considered them legally. the importance of considering reasonable law-determining in "nationalization and capturing foreign property investment and its legal recordings" is the benchmark of basic discussions to remove the impedes for investing and is the element of bringing about safety in view of foreign investor and professional lawyers in studying the legal discussions prior to foreign investment in the host country whose lack of consideration would lead to the destroying element for foreign investment from different point of views since non-logic and static laws cause insecurity of investment which is taken as demotivating factors and interests for foreign investment(Fetras and colleagues, 1389, pp. 40-43) This leads to the way the foreign investor would have interest to invest in the same countries of the region. (Abzary and colleagues, 1386, p 72).Security in legal term and related issues is highly valuable in ensuring any individual, particularly foreign investors, and overweighs other components. Thus, some regulations are needed in place at both national and international levels to ensure that foreign investors can work with being subject to any prejudice or injustice (Rostamzadeh, 1391). So, extraction, the latest new of foreign investment as well as the comparative analysis of legal system of foreign investment lead to the clarification of sharing and differences as well as the to the

identification, distinguishing and standard index troubleshooting relevant to foreign investment in the region. Hence, the attempt to aligning and developing as well as removing the rules for countries are of great importance.

Nationalization of properties disturbs ownership of people, particularly in case of foreign investors in a host state, and is a serious concern of foreign investors because any owner in any legislative system is empowered by law to have full control and right of exploitation on his possessions. However, property rights are not defined in civil law and may be described by three collective attributes of being absolute, exclusive and permanent which have lost their original sense (katozian, 1377).

As any rule has exceptions, the law of respecting the properties has some exceptions, too. In fact, what highlights the respect to properties concept is the determination of properties right range and the quality of its proof as well as its execution. (katozian, 1379). It is worth noting that the properties right is considered as individuals' human rights according to the universal declaration act on December 1948. In other words, the mentioned declaration takes this right as the indigenous rights which values it as "sacred and untouchable" (ghazi, 1380). International Rights Institute in 1953 has defined nationalization as one of the forms of expropriation titled as the transform of properties and rights of specific group from private section to the government in line with public interest so as to use and control it or to the new use of it determined by the government. undoubtedly, the kind of nationalization license and the quality of loss compensation as well as the quality of indemnification by means of property confiscation done by the government for its national area are different from the foreign investment where the host country attempts to motivate it investing in the country since experiencing such an affair for a foreign investor would stop ten other investments of foreign investor. A number of countries having free economy consider the aliens properties as absolute non-violable right. Basically, they are dissent to the nationalization issue of foreign property investment and other countries taken into account the nationalization as the indispensable right of the government. They believe that the government is free in confiscating the foreign investments and properties (Mandegar, 1384). So, they think that the investment-inviting government is responsible for compensating justice loss to be made on the foreign investor. like common international rights, two-party treaties of investment considers properties nationalizations right of the host country as the fundamental right through observing the specific conditions whose repercussions are predicted. in addition to the assumed reason in law for governments' licenses to nationalize the foreign investors' properties, the quality of indemnification is so important in discussing nationalization which is the core of arguments among the countries, however, the quality of indemnification in legitimate and illegitimate conditions is taken as important issue. The international judging procedure as one of the legal sources of indemnification is so important in international rights. The most important procedures have been generated following the World War II. Since the indemnification has been confirmed by the judging procedure, determining criteria of indemnification depend on the kind of expropriation in terms of legitimate or illegitimate status. So, the most important and the only judicial procedure in the field of indemnification is the vote of international permanent court in Korzov theorem. Specifically, complete indemnification followers have stick to this vote and have tried to form it as one international rights act. Such a relying is not appropriate since such a vote having to do with expropriation is illegal (Mohebbi, 1385, p20). Based on the out provisions, "compensation should at least remove any illegitimate acts and set the situations in which there is no command of illegal act". The common principle is known as Hal formula to be famous in 1938. Regarding the quality of indemnification, Hal formula has mentioned "immediate sufficient indemnification" which is interpreted as "appropriate indemnification" after the revolutions made in 1960s and 1970s. This one is welcomed by capital-exporting countries and is disregarded by developing countries and they believe that this formula should be determined based on the criteria of internal rights (Hasibi, 1390, p 148). However, there are other votes to rely on such as the judicial court's vote in oil claims having to do with the quality of indemnification in nationalization discussion relevant Amoko theorem about the criteria of indemnification which includes legal innovations and important points as well as valuable insights. From the judicial court point of view, the effect of distinguishing between expropriation of legitimate and illegitimate status is reflected in indemnification. the court mentions act 2 of rule 4 in the agreement between Iran and the United States as one specific rule saying that based on this act, the criteria of indemnification in expropriation as legitimate is as "justice indemnification" which should be equal to the whole value of the properties. The innovation of court relevant to indemnification criteria is the one to be derived from "properties whole value". The court announces that the "properties whole value" is defined as its value in the time of expropriation and its building blocks are the value of objective and subjective components in addition to one general value at the same time as the future prospect of

properties (Mohebbi, 1385). The literature mentioned the issued act where it extricated lack of prospect from the building blocks of property value.

The aim of this study is to focus on the investment law of Iran and Iraq having to do with the licenses of nationalizing the expropriation of foreign investors as well as its quality answering the question of what is the quality of foreign investment law in both countries in line with legal licenses and the expropriation of foreign investors' properties and indemnification and that what are the similarities and differences when comparing such issue from the relevant act's point of view.

Research question and hypothesis

The law of Iran and Iraq does not allow for the nationalization and expropriation of foreign investors' properties

The legal license of the exception having to do with foreign investors' properties lack of nationalization is the same in Iran and Iraq law

2. Materials and methods

The quality of research study is applied in terms of goal and is qualitative as well as documentary and library. In the following stage, comparative method is used to study and survey the similarities and differences between the law relevant to foreign investment in Iran and Iraq which include the act of "encouraging and supporting foreign investment in Iran (1381)" and act of "No. 13 investment law of Iraq in 2006 by latest modifications to act no.2 in 2010 (11)¹" in the important issue of "nationalizing and expropriating foreign investors' properties as well as the quality of indemnification and relevant issues" to be mentioned in act 9 of Iran law and in section 3 of Iraq's investment law for act 12.

2.1. Literature review

Neumayer and Wapis (2005) evaluated provisions in investment agreements and their role in increasing foreign direct investment to developing countries. The authors report that many investors are uncertain about the quality of domestic legal institutions and legal restrictions in developing countries. They suggest realization of approaches offered in bilateral agreements for resolving disputes arising from foreign investments (such as real protection of rights of owners) as the key to removing this uncertainty (Neumayer, 2005).

Dehdar (2006) stressed on influential role of foreign direct investment on economic growth, particularly developing countries, in parallel with developing rights of foreign investment. He studied foreign investment law in Iran and concluded that it is in some aspects unique and supports foreign investment and ownership interest in investee country. However, he observed lack of investment in stock portfolio, inconsideration of employment of foreign nationals in investment projects, and refusal of Washington Convention as a reliable way to resolve dispute arising from foreign investment as biggest weaknesses of Iranian law (Dehdar, 1385).

Fetros and Najjarzadeh (2010) studied effect of intellectual property rights on foreign direct investment in D8 countries and stressed on the role of intellectual property rights in long-term development with reference to international institutes like WTO and WIPO. The authors reported gap in intellectual property rights systems of developing and developed countries as the main cause of differences in foreign direct investment flow and international flow of private capital. The study indicated that relationship between intellectual property rights and foreign direct investment differs in D8 countries based on infrastructural capacities and level of development. The authors introduce ownership as a means of authenticating innovators by which they can prevent any illegal use of their innovations for a certain period. As a result, incentives and returns on foreign investment increase in research and development and bring about considerable profit which, in turn, leads to growth and dynamism of national economy. It is also reported that shortcomings in intellectual property rights system turns the investee country to a temporal, rather than permanent, host of foreign investment flows. In the meanwhile, it is known that postwar developed countries fundamentally rely on intellectual property rights for growth and development and have been successful in attracting foreign investment.

In the final section of the article, the authors assert a positive relationship between increased support of intellectual property rights and foreign direct investment in Turkey, Indonesia, and Egypt. Results of their study on

2010.¹ . <http://www.iraq-ig-law.org>

Iran shows that, compared to average D8 countries, Iran has a lower level of foreign direct investment. This implies weak performance of law and lack of legal infrastructures for influencing foreign investors (Fetras et al., 1389).

Riyahi (1999) investigated effects of foreign investments on investment risks and maintaining possessions and assets in a foreign state and reported that if laws on crucial issues of foreign investment are not effectively identified and implemented, investors will surely opt for other countries that have better and more qualified laws to protect their properties and ownership interests (Riyahi, 1387).

Haddadi (1997) examined national support measures for foreign investment, particularly those which provide for opportunities for attracting foreign investment. He also examined international measures in support of foreign investment which he asserts to be highly influential (Haddadi, 1376).

Alidousti (2011) studied ownership as respected by important systems and addressed conflict of interests between foreign investors and host states in terms of the rule of respecting ownership as a matter of supporting the investor or preserving national interests. He concluded that when the nature of this rule is identified, any disputes between the investor and the host state can be resolved according to priority of the two above-mentioned interests of the parties. Alidousti discusses general recognition of this rule and related issues of foreign investment and criticizes some existing procedures. In particular, he addresses creeping expropriation as a new concept in rights of foreign investors that includes various components neither of which is the sole fault of host state. Nevertheless, he introduces failure to pay on termination of access to the courts, real performance on prejudice, non-compliance with rules of trades, and conflict in legal custody as measures that lead to soft expropriation. The author creeping expropriation is not traditional. As an example, he draws on harassing and exhausting measures of Somalia against foreign ownership. Alidousti refers to the sentence of Article 19 of the Foreign Investment Promotion and Protection Act as in line with the mechanism for reparation, asserting that if the three conditions are satisfied, the action of expropriation is legal. He adds, "Illegal expropriation happens rarely and the authorities in charge hardly ever deem expropriation of states as illegal unless it clearly asserts non-economic incentive unrelated to national interests." (Alidoosti, 1390).

Asgari (1994) questioned basis of state responsibility in compensation and its scope. He offered that expropriation is a legal act, but the state needs to pay for full compensation of the injured owner. However, basis of state responsibility differs according to definition of expropriation. State responsibility is justified in case expropriation is legal and, considering nature of expropriation as a transfer of ownership in terms of unfair possession and acquired rights, the state is obliged to pay for lost property. But, if expropriation is illegal, which is internationally wrong, the state is responsible for any losses inflicted as a result of this action. Asgari reviewed ideas offered by proponents of each of the above postulations and elaborates on full and partial compensation which are not defined well in the literature. He also examined legal bases and measures for evaluating value of confiscated properties and reported that in case there is no active market for these properties, their value will be calculated based on current market price. Otherwise, it will be estimated by what a reasonable trader offers for them. However, this trader considers profitability and future expectations of a certain enterprise and asset value will not be equal to future profits for him. The study suggests that, in legal expropriation, market price and the price offered by the trader are estimated based on date of expropriation and information available on that time, as well as currency of depriving state. But, in illegal expropriation, this may be done based on date of either expropriation or judgment which is closer to former condition, as well as currency of the state of injured investor. Additionally, in this case, the investor is compensated for winning no profit from date of expropriation up the date of judgment. Finally, the author analyzes different ways of evaluation observed in international courts. Here, it is asserted that because there is no active market for confiscated properties, there needs to establish fair methods for valuation (Asgari, 1373).

Jalali (2004) described basics of jurisprudence that allow the state to restrict and expropriate foreigners which is applicable in Iran with no religious drawback (Jalali, 1383).

Sadrzadeh (1974) studied expropriation for national interests in France and compared it with other concepts of dispossessions and confiscation in substance and form, interpretation of public interest in judicial procedures, and the extent to which expropriation of immovable property is allowed by law (Sadrzadeh, 1353).

Mohebbi (2006) evaluated compensation of nationalization of foreign investment in international arbitrations and reported that compensation of nationalization of foreign investment or termination/cancellation of investment contracts between a state and foreign investor has transformed from partial compensation to appropriate compensation based on reasonable mutual expectations of the parties. Disregarding judgments of minor courts or arbitrations which are likely to have different schemes of compensation, he suggests that international arbitration

procedures affirm reasonable expectations of the parties as the standard of appropriate compensation (Mohebbi, 1385).

3. Results and discussion

Comparative study of confiscation and nationalization of foreign investor properties from Iran and Iraq law point of view

In general, one would claim that the discussion of non-commercial risks of developing and attracting foreign investment as the main road of constant development of countries, the issue of nationalizing foreign investor properties or the actions leading to the expropriation of the investor are taken into account as the most important concerns of investor. That is why foreign investors know the risk of nationalization or expropriation as the biggest risk for their properties. (Piarn, 1389). In legal procedures, some countries have different positions in regard to expropriation, however, several countries have banned any expropriation of foreign investor which do not provide any permission to nationalize aliens' properties under any condition. For example, one would mention Vietnam's foreign investment law in the category of such countries (Bagheri, et al., 1383). Other countries take nationalization as the indispensable right of the government and basically believe that the government is free in expropriating foreign investments as well as nationalizing the properties. So, they believe that investment-taking government is free in nationalizing and expropriating the properties. The investment-taking government is responsible for indemnification to be determined for foreign investor (Mandegar, 1384). Considering this introduction, we compare the laws of two countries in nationalizing issue of foreign investor from foreign investment point of view.

One should note in the discussion of comparative analysis of neighborhood countries for foreign investment regarding the nationalization issue of foreign investor property that Iraq government based on act 3 of rule 12 does not have the right to expropriate or nationalize foreign investor project. The mentioned difference in the exception is revealed in the legal rule of the countries. The exception and condition are similar whose quality differs. For example, most part of the country knows "benefits and public goals of the country" as the condition of not observing such a principle and they add limitations to this condition in order to attract the investor and that there is less probability of its flourishing. Iran law has determined "public benefits" without any limitations as the only condition, however, the Iraq legislator has predicted this condition as the exceeding custom of countries "based on the determined rule of the judicial court". It seems that the governments themselves decide the development of exception condition "immediate public interest or immediate public goal" without any specific judicial vote because of the relevance of this issue to national interest. If there is argument, the foreign investor can refer to legal center. However, the latest issue has been predicted in some countries such as Iran. So, nationalization of foreign investment is of great importance and is considerable when accompanied by definite vote of the judicial center. It seems that Iraq legislator has exceeded Iran law and has acted more interestingly to the considerations of any foreign investor in order to motivate him invest in that country. although Iran law has taken into account the term "as the legal process" which can somehow overlap the assumed trend of Iraq law, this term is more general and different from "based on the definite vote of judicial center" when compared with it. The main disadvantage of this law of Iraq is that the Iraq legislator has not determined any condition to make permission for the government and the concept of the rule implies that the Iraq government can expropriate any foreign investors' properties even if there is definite vote of judicial center. That is, Iraq law has not taken into account the minimum soft standard of most countries as the only reason of expropriation which is considered a negative weakness imposed on Iraq law since this rule has violated legal safety of foreign investor when compared to Iran law and is taken as recession boom of investment in terms of issue importance. Based on the previous review, nationalization and expropriation are considered as four fundamental indexes assumed by foreign investor and as one of the important and main discussions of foreign investment either in terms of theory or practice. It necessitates that the countries show higher sensitivity to determine the rules and run the legal aspects on them delicately. Generally, this issue is one of the argumentative points and excellence of Iran on Iraq law. Another point is that Iran law has determined some conditions to develop the issue among which is "based on the legal process" for which many point of views have been developed. The matter is defined in Iraq law as one sentence and more specific as "otherwise based on the determined rule of the judicial center". This mandate should be based on legal process to be led to legal rule. So, the difference or chasm between the two acts related to two countries is not visible. the difference can only be found in the type of license law where to be mentioned in Iran law as "as

legal process” while Iraq law calls it “determined law of judicial center”. This means that even if it’s based on the legal process and preliminary ruling or the one at the similar level is issued and not determined, one is not allowed to nationalize foreign investment. Unlike Iran law included in act 2 of rule 9 having to do with the rule of encouragement and support of Iran foreign investment which elaborates on the arguments derived from expropriation and nationalization, Iraq law has not drawn attention on this issue since in view of Iraq law, finance is definitely nationalized and expropriated when the arguments and reconsiderations are implemented legally and when the issue is highlighted. It seems that definite rule is used which is not reconsidered, hence there is no need to predict the reconsideration of center. That is why no mention has been directed toward the place of arguments’ referring in issued rule of properties’ nationalization of foreign investor. What Iraq legislator means is that all these stages and argument settling are prior to the issue of definite rule and one is not able to nationalize the properties easily on the part of the executive branch or other executive ones. If this happens, the properties of foreign investor are not nationalized, rather it seems that the properties of foreign investor are expropriated when are based on act 27 of Iraq law based on which the judicial center is able to issue the expropriation and nationalization of foreign investors’ properties. This can be regarded as one of the strong points of Iraq law although the discussion of developing the range of nationalizing based on this act of Iraq is considered as the drawbacks. This affects the recent case and one would say that Iraq law cannot in any way fill the chasm in order to be excellent over Iran law. The last point is the compensation for the loss caused by expropriation and the quality of indemnification calculating which is one of the most important factors in foreign investment rules of the countries. The quality of calculating the value and nationalized property value in order to compensate the loss, which is very important in this study, has been mentioned in Iran law last section. The legislator determines “the appropriate indemnification to the real value of that investment immediately prior to expropriation”. This one has not ever been mentioned in Iraq law. The important point is the time of calculating the property and national property. Considering that each finance loses its initial value after being expropriated whose value decreases later, this is the value other than the one to be in the market, however, when finance or property is expropriated, the benchmark is defined cost and this cost is even decreased. The time of calculation is important, too. This issue has been elaborated in Iran law as precise and detailed. Act 9 of Iran law states “immediately prior to expropriation” while this is not mentioned in Iraq law. The Iraq legislator keeps silence in this regard since investment rules of the region such as Azerbaijan have somehow elaborated on the issue while Iraq law does not provide any discussion. It has not taken into account important legal procedure which is not definitely in the interest of foreign investor. This can refer to the previous issue in which all arguments are settled prior to definite issue of judicial center. Generally, one can conclude that Iraq law has conditioned its exception as the inclusion of “one definite rule used by judicial center” in discussing the nationalization of foreign investment. One of the main disadvantages of it is the lack of mention to the inclusion of transnational exception condition. This condition, in its predicted status in Iraq law, has extension to all domains and can include all cases. Hence, nationalization and expropriation of foreign investor’s properties are less limited by government in Iraq law compared to that of Iran which is taken as disintegrating element of legal safety and the attribute which caused safety-attacking of foreign investor leading to the decrease in foreign investor rate of investing. This issue is considered as lower than the usual legal limit compared to Iran law and the soft standards well as the minimum of criteria having to do with most countries’ foreign investment law. It was mentioned in the discussion of indemnification quality and argument settling center that the Iraq government keeps silence which has not considered any legal regards to such issues. So, the research hypotheses are correct titled as Iran and Iraq laws do not permit any nationalization and expropriation of foreign investor expropriation in initial stages. The second hypothesis is rejected relying on the issue that the legal license of the exception of foreign investor property’s lack of nationalization in Iran and Iraq laws. One would conclude based on the comparative study of both laws that the two laws differ in terms of the license of nationalization and that they are different in the field of technical discussions of the quality of indemnification and argument settling. Iraq law is incomplete in this sense and Iran law advantages are more in this regard. They can use their strong points to cover the weak points using managed planning accompanied by legal considerations and the region is converted to economic main road based on the countries’ potentials which is beneficial to both countries. The reason is that legal safety is important for the foreign investor. One of the intervening indexes and contributive one to objective and subjective safety for foreign investor is the discussion of countries rules approach as the quality and style of foreign investor’s property expropriation. We can assume ourselves as witnesses of the increase in foreign investment through removing such concerns by means of technical approach to the relevant areas. Intact and potential market of Iraq has in it the attraction of foreign investor. In addition to the attraction of investor to the

country, Iran can pave the way for Iraq to attract foreign investors in the country or to invest more based on the exclusive potentials it has in it. This can further be reached through making common investments which are demanding but not existing in Iraq. Consequently, this can lead to the development of foreign investment boom in Iran through running ways such as legal incentives or the complements not existing in Iran current law.

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