

Protection Of Foreign Investments In Iran

In light of the anticipated lifting of most international sanctions in 2016,¹ this memorandum sets out avenues for securing protection of foreign investments in Iran.

The Iranian Foreign Investment Promotion and Protection Act ("FIPPA") accords foreign investors only limited protection. In particular, it refers investment disputes to the Iranian domestic courts. Investors should therefore structure investments such that they benefit from international investment protection.

Iran has concluded more than sixty bilateral investment treaties ("BITs"), of which more than fifty are currently in force. Iran is also a party to the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference ("OIC Investment Treaty"). However, some capital-exporting States or jurisdictions typically used for investment structuring purposes, such as the United States, the United Kingdom, Russia, Saudi Arabia, the United Arab Emirates, and the Netherlands, have not concluded an investment treaty with Iran.

Most, but not all of Iran's investment treaties, provide that investment disputes will be heard by an international arbitral tribunal. In addition, a number of Iranian BITs, such as the BITs with Cyprus, Spain, Switzerland and Turkey, accord protection only to companies that are managed from and have real economic activities in their State of incorporation, requirements that will often exclude special purpose vehicles incorporated for tax or investment structuring purposes.

It is therefore important for prospective investors to structure their Iranian investments so that they benefit from adequate investment treaty protection, including access to international arbitration. Securing the best protection for investments requires a thorough case-by-case analysis to identify the most robust international legal protections available.

I. Protection Of Foreign Investments In Iran Under Domestic Law

The 2002 FIPPA² establishes limited substantive protections for foreign investors, including protection against expropriation. However, pursuant to Article 19 of the FIPPA, disputes between foreign investors and Iran are to be settled exclusively by domestic Iranian courts, unless an applicable BIT provides other dispute settlement procedures.

¹ For a comprehensive report on the international sanctions regime against Iran, see CGSH Alert Memo of July 21, 2015, "Sanctions Against Iran: Changing, Not Gone," available [here](#).

² An English translation is available [here](#).

II. Protection Of Foreign Investments In Iran Under International Law

A. Under Iran's BITs

BITs offer the highest level of protection of foreign investments to be made in Iran. Countries that have a BIT with Iran in force include Austria, China, Cyprus, France, Germany, Italy, South Korea, Spain, Switzerland, and Turkey.³ No BITs have been concluded between Iran and the United States, the United Kingdom, Russia, and most Latin American countries, and certain countries frequently used for holding foreign investments, such as the Netherlands and Singapore.

Iranian BITs grant investors common investment treaty protections, such as the right to fair and equitable treatment, most-favored-nation treatment, national treatment, protection against expropriation, and a guarantee of free transfer of capital.

For a foreign investor to be protected under an Iranian BIT, it must qualify as a protected investor who has made a protected investment in Iran. Iranian BITs generally protect a wide range of assets invested in Iran, including shares and other participations in Iranian companies. However, a number of Iranian BITs only protect companies that are incorporated and have their seat, *i.e.* are managed from, and "real economic activities" in the other Contracting State.⁴ These requirements make it unlikely that special purpose vehicles would qualify as protected investors. By contrast, a number of other Iranian BITs, including the BITs concluded with Italy, South Africa, and South Korea, protect companies that are incorporated and have their headquarters or "real economic activities" in the other Contracting State.⁵ Special purpose vehicles are therefore protected as long as they maintain their headquarters in their State of incorporation. Finally, a third category of Iranian BITs, such as the BITs concluded with China, France and Germany, protect companies incorporated and having their seat in the other Contracting State.⁶ These BITs offer the most comprehensive coverage, notably for special purpose vehicles managed from their State of incorporation.

B. Under Multilateral Investment Treaties

Iran is a party to the OIC Investment Treaty, concluded under the auspices of the Organization of the Islamic Conference.⁷ Although the language of the dispute settlement

³ A list of BITs concluded by Iran is available [here](#). In addition, according to publicly available information, Iran is currently negotiating at least one other BIT, with Japan.

⁴ See, e.g., Iran-Cyprus BIT, Article 1(2)(b); Iran-Spain BIT, Article 1(2)(b); Iran-Switzerland BIT, Article 1(1)(b); Iran-Turkey BIT, Article 1(2)(b).

⁵ See, e.g., Iran-Italy BIT, Article 1(2)(b); Iran-South Africa BIT, Article 1(2)(b); Iran-South Korea BIT, Article 1(2)(b).

⁶ Iran-China BIT, Article 1(2)(b); Iran-France BIT, Article 1(2)(ii); Iran-Germany BIT, Article 1(2)(b).

⁷ The OIC Investment Treaty has been ratified by the following OIC Member States: Burkina Faso, Cameroon, Egypt, Gabon, Gambia, Guinea, Indonesia, Iran, Jordan, Kuwait, Lebanon, Libya, Mali, Morocco, Oman,

provision in Article 17 of the OIC Investment Treaty is not entirely clear,⁸ the first publicly available award rendered under the treaty, which was obtained by a Saudi investor in 2012, held that the investor may submit disputes with the host State directly to international arbitration.⁹ The so far little used OIC Investment Treaty could thus become a reasonable alternative for the settlement of investment disputes for foreign investors from an OIC Investment Treaty party.

As regards substantive protections, while the OIC Investment Treaty does not contain all of the protections usually found in BITs, foreign investors may rely on the most-favored-nation clause in Article 8 to import more favorable protections contained in Iranian investment treaties with third States, including the right to fair and equitable treatment.¹⁰

Iran has also ratified the Agreement on Promotion and Protection of Investments of the Economic Cooperation Organization (“ECO-APPI”). While the ECO-APPI has not yet entered into force, the ECO Secretariat has called upon ECO’s Member States¹¹ to ratify the treaty, which includes protections typically found in a BIT, as well as a broad dispute settlement clause providing for international arbitration. It should be noted that the ECO-APPI will only protect investments made in Iran after the date of its entry into force.

C. Resolution Of Investment Disputes

Most, but not all, of Iran’s BITs provide for settlement of investment disputes against Iran before independent international arbitral tribunals. Iran has ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, but is not a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”). ICSID arbitration is therefore currently not available, even if an Iranian investment treaty refers to ICSID arbitration. However, the majority of Iranian BITs provides for *ad hoc* arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (“UNCITRAL”). Some of Iran’s BITs also provide for international arbitration under the Rules of the International Chamber of Commerce (“ICC”).

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If you have any questions, please feel free to contact Claudia Annacker (+33 1 40 74 68 99, cannacker@cgsh.com), or any of your regular contacts at the firm.

Pakistan, State of Palestine, Qatar, Saudi Arabia, Senegal, Somalia, Sudan, Syria, Tunisia, Turkey, Uganda, and the United Arab Emirates.

⁸ The text of the OIC Investment Treaty is available [here](#).

⁹ See *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL, [Award on Jurisdiction of June 21, 2012](#), ¶ 93.

¹⁰ See *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL, [Final Award of December 15, 2014](#), ¶ 555.

¹¹ ECO’s Member States are: Afghanistan, Azerbaijan, Iran, Kazakhstan, the Kyrgyz Republic, Pakistan, Tajikistan, Turkey, Turkmenistan, and Uzbekistan.

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