



The Analysis of Legislative-Reciprocal-Treatment Condition on Foreign Investment in Immovable Properties and its Impact on Iranian Financial Markets along with a Comparative Study of this Condition in New Economic Powers such as Turkey and the UAE

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ABSTRACT

One of the most important topics in international private law and foreign investment is the possibility of acquiring immovable properties for a foreign investor as a tool and introduction to start an economic activity in the host country considering the impact of foreign investment on the growth of economic and industrial indicators of countries.

On the other hand, in order to maintain the national security and public order, imposing some restrictions on foreign investors is inevitable in this regard. In the meantime, some limiting conditions of immovable properties acquisition for foreign nationals are provided for interests of the investor's country than the country receiving the capital. One of these conditions is the "Reciprocal Treatment".

This article aims at inspecting the advantages and disadvantages of the aforementioned condition in legal sources and the way successful countries of the region function in attracting foreign investors for confronting the condition and also accommodating their legal status in comparison with Iran current regulations.

The present article has been done by the descriptive and analytical method and also by specialized scientific, library and electronic resources.

Keywords:

reciprocal treatment, foreign investment, immovable properties.

1. Introduction

Foreign nationals with various political, economic, social purposes and motives have always been present, residing and working in the foreign countries for many centuries that have been sensitively considered by the sovereignty and people of the host country due to the heterogeneity with living standards and the lack of national solidarity in relation to nationals.

The main reason for creating rules and passing restrictive laws for foreign nationals is the domination of a country's material and moral sources by those foreign nationals. Although the bitter experiences of residence and activity of foreign nationals in countries are undeniable, the issue of immigration and admission of foreign nationals in a purposeful way always eliminates the defects of countries intrinsically such as lack of financial and human resources. This issue is quite obvious in scientific and economic studies related to foreign investment.

Iranian legal system has various regulations regarding the legal status of foreign nationals, but this status is somewhat scattered and sometimes conflicting in relation to possibility or impossibility of acquiring immovable properties. If we consider the acquisition of immovable properties as an investment tool and introduction, these ambiguities have caused a high risk of foreign investment in Iran. This article examined the limiting conditions of foreign nationals' rights and particularly the "Legislative reciprocal treatment". The necessity of such a condition has been studied considering its direct and indirect impacts on foreign investment.

Presenting a precise answer to the questions that reciprocal treatment is provider of rights and interests for which one of the investor and investable countries, then the question that how are the results of observance or non-observance to reciprocal treatment in legal systems of successful countries of region in the field of foreign investment is one of the purposes of the present research.

2. The general principle "Enjoyment of Private Rights by Foreign Nationals"

In the Iranian legal system, the principle is that foreign nationals can enjoy private rights and civil rights unconditionally but there are some cases in which the legislator has made enjoyment of certain private rights subject to legislative reciprocity or

reciprocity or mentioning them in political contracts. Therefore, it is necessary to examine the general principle "enjoyment of civil rights" at first then investigate its exceptions due to considering the status of enjoyment of foreign nationals about civil rights.

We should refer to article 961 of civil code concerning the general principle of the enjoyment of civil rights by foreign nationals which states:

Foreign nationals will also enjoy civil rights except the following cases. Foreign nationals whether natural or legal persons have all the private rights in Iran according to this law barring when the legislator has explicitly or implicitly prohibited them from foreign nationals (Sohrabi, 2009).

The legislator has not stated any conditions in the mentioned article for the principle of enjoyment of civil rights by foreign nationals and in other words the legislator has not made it conditional on the existence of a treaty or reciprocal treatment but this provision is considered in some laws and regulations regarding the rights of foreign nationals such as article 8 of civil code. Therefore, regarding this general principle, three exceptions to this principle can be mentioned according to article 961 of civil code:

The first paragraph is related to the rights that law recognizes explicitly as belonging to Iranian nationals or deprives foreign nationals of the rights explicitly. One of the evident examples of the first paragraph is the issue of the right to apply for security from nationals of foreign governments according to article 144 of civil procedure code of public and revolutionary courts in civil matters in 2000. Some lawyers refer to the issue of the right to possess arable properties in Iran, which foreign nationals have been explicitly deprived of by the law of June 6, 1961 to provide another example from the first paragraph which has been criticized by some lawyers for not explicitly prohibiting the possession. The condition of citizenship is another example of the prerogative of Iranian nationals for employment in the executive board in accordance with paragraph "B" of article 42 of the Civil Management Code in 2007.

The second paragraph concerns the rights related to the personal status of foreign nationals that the law of the respective government of foreign nationals have accepted that because foreign nationals residing in Iran will be obedient to the laws and regulations of their respective governments in terms of issues related to personal status, competence and inheritance rights

around treaties according to article 7 of Civil Code(Sohrabi,2009) Thus, it can be acknowledged that according to legislator, the personal status of any government in relation to its nationals,even if they reside abroad is mandatory, from combining the two articles 6 and 7 of the Civil Code. In other words, as long as the laws related to the personal status of the Iranian government are mandatory according to article 6 of civil code, in relation to all Iranian nationals even if they reside abroad. The Iranian legislator has also accepted that the laws relating to the personal status of each state should be observed around treaties or with reciprocal treatment in relation to its nationals in Iran. Also, the existence of the condition “reciprocal treatment” in this topic has caused disagreement among jurists. Some jurists (like Katozian,2005:18-17, Saljuq,2007(B) 219 onwards. Shaykh al-Islami and Jabbari,2005:132) believe that stipulating the text of “Around treaties and reciprocal treatment” does not make sense. Some have even gone beyond this position (like Jafari Langroudi,2001,24) have claimed that there may not be a country that considers the personal status of foreigners subject to the law of their residence, which is the turn of reciprocal treatment. There is no binding treaty in international custom. Many common law countries such as the United States and the United Kingdom consider personal status to be subject to residence law. Thus, here the initial challenge to the condition of reciprocal treatment begins.

The third case: Special rights are created solely from the point of the view of Iranian society. The disagreement between jurists in specifying the example for the third paragraph of article 961 is too deep to reach a definitive conclusion because the legislator has not provided any examples for special rights of the Iranian society and there is no achievable instance in judicial precedent. Some jurists (for example Katozian,2009:557 Shaykh al Islami jabbari 2004:100) believed that the assumption of any example for this paragraph has already been covered by paragraph 1 of the mentioned article, but other jurists (Like Nasiri,2004:115. Saljuqi,2007(A)-324-325,...) believe in differences between the first and third paragraph of article 961 without stating any convincing reasons. Cases such as privileges and rights related to the law of Targeting Subsidies in 2008 are

considered as an example of the third paragraph,which are criticizable.¹

3. Foreign Investment-The Condition of Reciprocal Treatment in Immovable Properties

Considering the legal and economic context of Iran and the size of financial market in the field of immovable properties of general meaning including lands, properties and facilities, and because foreign investment is tied to acquisition of immovable properties and there are a lot of sensitivities concerning the acquisition of immovable properties by foreigner nationals and terms,provisions are predicted that they are not related to the economic indicators of country, these annoying and non-targeted laws, not only did not allow foreign investors to enter the country, rather, it is the main reason for the exit of the national capitals from the country.

For example, the term of reciprocal treatment in the acquisition of immovable properties, governments based their own interests on sometimes grant special rights to foreigners under certain conditions that the most important of them is the condition of reciprocal treatment. This principle cannot be assigned to the government as a task and it does not mean a state is obliged to consider any rights that another state considers for its nationals on its territory because the principle of reciprocal treatment does not create a right in any way and according to the political, social, legal and economic occasions of each country is described. The bases of reciprocal treatment should be examined first for a more detailed description.

3.1. Reciprocal Treatment Is Created in 3 Ways:

- 1) political reciprocal treatment
- 2) legislative reciprocal treatment
- 3) practical reciprocal treatment

Political reciprocal treatment is created in the form of a political treaty.

Likewise, the nationals of each party only enjoy the rights specified in the treaty explicitly.

¹ Reza Maboudi Neishabouri, Seyyed Jamaluddin Mousavi Taghiabadi(2012) interpretation of article 961 Of Civil Code of private law,tenth course,number 1,pages 113-138

Legislative reciprocal treatment means the law of a country makes enjoyment of a right for foreigners conditional on recognizing the same right in an explicit text of the law of foreign country. It is applicable only in relations between countries that have the positive laws since this right must be specified.

Practical reciprocal treatment means that foreign nationals practically enjoy certain rights in accordance with custom, judicial precedent and administrative procedure in the governmental territory and their respective governments have the same rights according to custom, judicial precedent and administrative procedure for implementing them for their citizens.

According to the law, foreigners (In general sense, including foreign nationals and stateless persons) who have resided in Iran for a long time in compliance with all legal standards and engage in certain professions and occupations, may need to purchase a home for residence or have other immovable properties to do their business, but foreigners face restrictions in this regard under Iranian law. Preventing the infiltration of foreign nationals in the country territory and controlling the development of their economic activities in terms of purchasing immovable properties and bitter experience of capitulation have been the sources of legislation in this regard that the law of immovable properties of foreign nationals in 1932, regulation regarding the acquisition of foreign nationals in 1949, the canon regarding the acquisition of foreign nationals in October 1964 and the executive regulation of this resolution are among the regulations related to this issue. Foreign nationals can also enjoy the right of acquisition under treaties between governments, for example, according to the treaty concluded between Iran and Germany which was agreed in 1929, German nationals can acquire immovable properties only for residence, occupation or industry and in this regard, similar treaties have been concluded between the governments of Iran and Poland, Belgium, Sweden, Egypt, The Czech Republic, Slovakia and France. However, in the case of governmental nationals who do not have a concluded treaty with Iranians and intend to acquire barren properties are entitled provided that:

- 1) The lack of criminal record
- 2) Their acquisition not incompatible and contradictory with public order, law and treaties of Iranian government

- 3) have permanent residence in Iran
- 4) not having the intention of investing in immovable properties and the intention merely to reside or acquire
- 5) the area of the demanded properties proportional to the social, financial and family status of the applicant
- 6) the demanded properties not restricted or prohibited in border areas or places where foreigners' properties are according to regulations.

They can acquire the barren properties in accordance with the conditions mentioned above, on the condition that their respective governments have reciprocal treatment with Iranian nationals (according to third paragraph of article 3 of regulation of foreign nationals acquisition in 1949 (Nasiri, 2004, page 282). but the issue of reciprocal treatment that is according to traditional principle of political philosophy and according to notion of exchanging justice and the theory of national standard or national treatment, defined equally². According to that, the foreigner have the same privileges and rights of nationals of host country instead of having treatment with special status (Nasiri, 2001, page 88) in order to prevent the host government's cruel behaviour with foreign nationals³ and governments act in order to expand foreign nationals' legitimate freedoms in competition for providing their nationals' welfare in other countries.

There is lower rate of challenges in political reciprocal treatment linked with concluding treaty because it usually considered all legal and economic dimensions of issue in political mutual agreements.

Practical reciprocal treatment is not applied because of its complexity for ascertaining the matter and absence of competent authorities for obtaining and certification but the topic in legislative reciprocal treatment specifically in economical areas is slightly different. The condition of reciprocal treatment is non-economic considering the low rate of immigration to Iran as one of the main factors of foreign capital. The exit of capital is completely detrimental to national economy because of unbalanced immigration from Iran to European and American countries or even countries of the region, for instance Turkey and UAE.

² Decaux, Emmanuel, "Reciprocité", Répertoire de droit international, Dalloz, 1998: n. 1.

³ Ibid.: n.

Imagine an assumption in which a foreign investor is willing to invest in Iran but Iranian investors are unwilling to invest in the foreign investor's country. If one-sided condition of legislator is reciprocal treatment of investor's respective country and this right is not considered in the law of opposite country for Iranian nationals, the chance of foreign investment will vanish whereas if the lack of legislative reciprocal treatment is with the prevention of exiting the internal capital, it is possible to provide the context of attracting foreign investment. The condition of reciprocal treatment in economical activities and investing in immovable properties was so non-economic and non-technical that the laws of recent decades are not considered and even if it is mentioned in the laws, it will be amended and deleted. For example, in the law of support for the rehabilitation and modernization of slums around the holy shrine of Imam Reza and Hazrat Masoumeh, 2005, the permission to purchase and acquire maximum 4 percent of lands located in approved ambit of holy sanctuaries emanated from their lands and properties or private sector or other sectors, in order to construct the residential project with observance of approved laws and regulations to Muslim foreign nationals (subject to the reciprocal treatment of respective country) but considering he mentioned condition, caused restriction and tardiness of foreign investment procedure with intention of removing obstacles and acceleration in the renovation of slums, the bill of amending mentioned law on the subject of deleting the provision "Subject to the condition of respective country's reciprocal treatment" from council of ministers in 2007 and presenting it to parliament and despite theoretical disagreement of research center of the parliament⁴, finally it was approved in the parliament in 2016 and the guardian council confirmed it. This law with following reforms, provides the possibility of direct investment of Muslim foreign nationals for constructing residential projects,

⁴ The condition of reciprocal treatment never means the practical action of Iranian investor for investment of similar foreign investment, it means only the respective country's permission of foreign investment for Iranian investment in similar cases. mentioned condition is reflective of a balance in relations between countries and their nationals' rights, so, the offer for deleting "reciprocal treatment" from the law is not acceptable in order to preserve the dignity of Iranian nationals and balancing the legal relations with other countries in international law.

considering the necessity of approving laws with similar nature is perceptible increasingly. The condition of reciprocal treatment, purchasing and acquiring the lands have been deleted in a comparative analysis of Turkish government with the reforms of article 35 of law of the registration of land in 2012, May, 18 and this led to growth of investment in residence sector. Other investable countries besides removing the annoying laws according to the rate of foreign nationals' investment in the field of residence or business, are ready to present privileges like residence or even citizenship to other countries nationals, it is possible name the countries such as Spain, USA, UAE, Ireland, Italy, Brazil, Belgium, Panama, Portugal, Switzerland, Latvia and Colombia⁵. We can refer to the UAE as the nearest successful country to this subject. First you should know that the worldwide 13th grade belongs to the UAE in attracting the foreign investment (Al Hashem, 2018:12)

Tourism played an important role in UAE economy and Dubai is big city after London, Paris and Bangkok for attracting tourists. Tourism industry helped about 200 billion dirhams to the economy of UAE in 2020 and is predicted that will create more than 750 thousand of occupations in this sector (John, 31, December, 2018), although the regulations related to acquisition of immovable properties is independently applicable in each Emirate of the UAE for foreign nationals, generally the acquisition of constructions without the possibility of acquisition of land accepted by local government of Abu Dhabi, Sharjah and Dubai, for example the law of number 19, 2005 permitted foreign nationals on the subject of acquisition of immovable properties have properties from following different kinds, acquisition only in the form of apartment except land. Abu Dhabi government enacted four constitutions that allow foreign nationals to have properties in the UAE. According to article 3 of the law of number 3, 2006 foreign nationals of Dubai are allowed to acquire: acquisition in the free zone, obtaining the right to acquire free and unlimited properties, the right to exploit the properties or the right to rent for more than 99 years in the regions specified by ministry of land. Dubai properties' deed emanates in Dubai notary office and there are no age conditions for acquisition in the UAE. Unproductive lands will be given to

⁵ Itours website, Reported by ISNA

foreign nationals under bounds and traits specified for construction and this subject besides creating occupations, caused prosperity in tourism and industry of the UAE.

The condition of reciprocal treatment is not significant for stating UAE regulations. the maximum profitable investment is done by foreign nationals who their countries fundamentally doesn't give any right for foreign nationals' acquisition or making it conditional to the condition of reciprocal treatment.

In the recent years, the approval of assignment regulations and lengthy exploitation decreased in the UAE resulting in not requiring the sources of foreign investment in this area or the considerations are related to national security and public order.

Considering all the national legal and economic aspects of the issue, and the need to review the general economic policies which are based on national production and strengthening the country's economic strength using the large domestic capacities such as skilled manpower and abundant labor as well as plentiful natural resources and raw materials, which are of interest for foreign investors to expand their activities in Iran, providing basic facilities such as the possibility of buying and selling immovable properties seems inevitable. the mentioned topic was with emphasis on contradiction and deleting the annoying conditions like legislative reciprocal treatment or enacting double taxation in investment of immovable properties. The conditions of geographical settlement and restrictions related to national security and public order for instance strategic lands, border lands, military lands and predicting the maximum rate of acquisition according to each profession's necessity or the industry considered more important by the approval of legislative, and also if foreign investor breaches the laws of countries or takes advantage of them, it is necessary to create restrictions for them in order to enjoy the foreign nationals of interests of investment and required confidence for constant, secure and safe investment.

Therefore, it will be very helpful to re-examine the undeniable fact that the promotion of national production capacity, job creation and money circulation in society go through the removal of legal and political barriers and earning the trust of domestic and foreign investors.

3. Conclusion

The importance of foreign investment and its impact on the economic growth of any country have been proven.

The combination of the interests and expedients of foreign investors with country's national security and public interest, provides the basis for economic prosperity and public welfare, and the enactment or amendment of regulations in accordance with economic conditions of the country and international environment is an undeniable necessity.

Legal gap and to attach importance to provisions and conditions for instance reciprocal treatment as a principle against foreign nationals volunteering productive investment in the country cannot be defensible in any way and it is illogical to rationalize it by creating an apparent conflict with the category of exchange justice because the condition for the reciprocal treatment of investor's respective government is an unjust discrimination in relation to private persons with foreign nationality that its source is the behavior of their respective governments towards the Iranians, and in fact, implicit justice in the law of conciliation will be illusory interests. On the other hand, the realization of reciprocal treatment is always in doubt, due to the complexity of legal system of different countries and its definitive proof is almost impossible. However, countries that have defined this issue solely on the basis of their national interests and not the will of their respective investor governments, have had greater dominance in attracting foreign investment for instance Turkey and UAE.

Of course, governmental absolute control is still emphasized over the issue of temporary acquisition or utilization of immovable properties in the possession of foreign nationals for economic purposes.

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