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Studying the support of international investment in the oil and gas industry with emphasis on the rules of international trade law (Iran and the UAE)

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Abstract

This study examines the support of international investment in the oil and gas industry and analyzes the rules of international trade law. Given that the oil and gas industry, as one of the main pillars of the global economy, accounts for about 80 percent of the world's energy supply and its turnover is more than 2 trillion dollars, there is a need for strong and coherent support frameworks in this area. The research methodology of this study includes document analysis and a review of international treaties, domestic laws and expert opinions. The findings show that the average investment risk in this industry is 40 percent higher than in other sectors, which doubles the need for effective support mechanisms. In this regard, more than 2,800 bilateral investment treaties and the Energy Charter Treaty have been identified as key tools for protecting investors. However, there are legal, economic and environmental challenges in the way of international investments. Recommendations for investors include risk diversification and the use of political risk insurance, and for governments include the creation of transparent laws and strengthening domestic institutions. Also, the international community should focus on updating treaties and strengthening arbitration mechanisms.

Keywords: International investment, oil and gas industry, international trade law, bilateral investment treaties.

Introduction

As a main pillar of the global economy and a major source of energy supply, the oil and gas industry plays a vital role in the economic development of countries in the 21st century. According to the International Energy Agency, more than 80 percent of the world's energy consumption is provided by hydrocarbon resources, and this figure will decrease to 75 percent by 2040 (IEA World Energy Outlook, 2023, p. 45). This industry, which has an annual turnover of over $2 trillion, requires huge investments and sophisticated technologies, which are mainly financed through international investments (Mommer, 2002, p. 156).

In addition to providing the necessary financial resources, foreign direct investment in the energy sector also brings technology transfer, managerial expertise and access to global markets. However, the strategic nature of oil and gas resources and the national security sensitivities associated with them have caused certain legal and political complexities in the field of international investments (Stevens, 2008, p. 23).

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According to studies by the International Monetary Fund, the average investment risk in the oil and gas industry is 40% higher than in other economic sectors (IMF Working Paper, 2022, p. 12). These high risks, mainly due to political uncertainties, regulatory changes and severe price fluctuations, reinforce the need for strong and reliable legal frameworks to protect investors.

According to Article 1 of the 1965 Washington Convention and the definition provided in bilateral investment treaties, investment is defined as “any type of asset held by investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of that Party” (ICSID Convention, Article 25). In the context of the oil and gas industry, this definition includes foreign direct investment, production sharing agreements, concession agreements and investments in energy infrastructure (Dolzer & Schreuer, 2012, p. 67). Supporting international investment in the oil and gas industry is important in several ways:

1. Economic and strategic importance

The oil and gas industry is one of the main pillars of the global economy, accounting for 4.1 percent of global GDP and creating more than 6 million direct jobs internationally. According to a report by British Petroleum, in 2022 alone, more than $480 billion was invested in upstream oil and gas projects, 35 percent of which was made by multinational companies (BP Statistical Review, 2023, p. 89).

In the meantime, developing countries face a particular challenge. While investment in infrastructure and national projects is an urgent need for these countries, they are usually unable to provide the necessary capital for such projects on their own (Iranpour, 2007, p. 26). Therefore, one of the new ideas in developing countries is to carry out partnerships by domestic and international contracting companies, and the presence of a foreign partner in these partnerships usually attracts investors and project financiers. Countries with oil reserves, due to their weakness in the financial, scientific and technological fields for conducting research, exploration and exploitation of oil resources, welcome the presence of international oil companies to carry out these activities (ibid., p. 26). According to World Bank statistics, more than 70 percent of countries with oil and gas reserves are developing countries that lack sufficient financial and technological resources to independently develop their energy resources (World Bank Energy Sector Report, 2023, p. 67).

From the perspective of energy security, the dependence of developed countries on energy imports doubles the importance of international investments in producing regions. According to the International Energy Agency, OECD countries will be dependent on imports for 65% of their energy needs by 2030 (IEA Energy Security Report, 2023, p. 34).

2. Legal Challenges and the Need for Protection

Investment in the oil and gas industry faces unique legal challenges. According to the International Centre for Settlement of Investment Disputes (ICSID), 28% of all cases brought before the Centre are related to the energy sector (ICSID Annual Report, 2023, p. 23). This figure shows that Hajj The above is a conflict and the need for strong support mechanisms.

Current contracts in the oil and gas industry have a certain diversity, which is affected by the level of risk-taking of the host government and the foreign oil company, the way in which the risks arising from the lack of exploration and extraction are divided, and ultimately the way in which profits and income are shared. Early contracts in the oil and gas sector were often in the form of "granting royalties" or "ownership interest", but later different methods such as purchasing services (with and without risk), participation in production, participation in profits, participation in investment and mutual sales were used (Iranpour, 2007, p. 27). In the meantime, oil contracts are the link between international companies and the contracting governments. A historical study of oil contracts shows the conflict of interests of foreign oil companies with the national interests of the host government in the form of oil contracts, an undeniable conflict that today is towards a kind of participation in decision-making as well as the division and sharing of profits and losses resulting from the activity (ibid.).

The principle of permanent sovereignty over natural resources, as enshrined in UN General Assembly Resolution 1803 (1962), is in tension with the rights of foreign investors (UN General Assembly Resolution 1803, Para. 4). Several factors, including the circumstances of the parties, their purpose in concluding the contract, and the manner in which their interests are secured, influence the choice of the type of contract. Therefore, international oil companies and oil-producing countries choose different contracts at different times and in different circumstances. This fundamental tension highlights the need to strike an appropriate balance between the sovereign rights of host countries and the protection of foreign investors.

3. The impact of international trade law rules

The Energy Charter Treaty, as the only international instrument specifically protecting energy investment, provides a comprehensive legal framework for this sector. Articles 10 to 17 of this treaty set precise standards for the protection of investment, energy transit, and trade in energy materials (Energy Charter Treaty, Articles 10-17). The General Agreement on Trade in Services (GATS) within the World Trade Organization also affects energy-related services. Various sectors of energy services, including petroleum engineering, drilling and facility maintenance services, are covered by this agreement (GATS Sectoral Classification List, Section 1.F).

4. Importance in the context of energy transition

Given the global trend of transition to clean energy and countries' commitments to reduce greenhouse gas emissions, the oil and gas industry is facing fundamental changes. The International Renewable Energy Agency (IRENA) report shows that investment in CCS projects and the production of hydrogen water requires $850 billion by 2030 (IRENA Global Energy Transformation Report, 2023, p. 112). This development raises the need to adapt existing legal frameworks to new needs and create appropriate support mechanisms for emerging technologies.

Theoretical foundations and research background

1. The concept of international investment

International investment, as one of the most important drivers of economic growth and development in the era of globalization, means the transfer of financial resources, technology, technical and managerial knowledge from one country (the country of origin) to another (the host country). The main goal of this type of investment is to earn profit, economic efficiency and create added value for the investor and the host country (Sornarajah, 2017: 45). This definition in international investment law is based on a set of key elements that include the element of foreignness, transfer of assets, a certain period of time and commercial risk (Sharifzadeh, 2019: 127).

1.1. Basic characteristics of international investment

International investment has certain characteristics that distinguish it from other types of investment. These characteristics include participation in capital, a certain period of time, expectation of profit and risk tolerance. The investor must provide significant financial, technical or material resources to the project, which indicates a commitment to the success of the project and its impact on the economy of the host country. Also, the investment must be made for a specific period of time and usually longterm, especially in the oil and gas industry, which requires planning and large investments (Mehdizadeh, 2022: 89). A reasonable expectation of economic returns is also another requirement of investment that helps finance projects and the economic growth of the host country. In addition, the investor must be willing to accept the commercial, political and legal risks associated with the investment, as these risks can include changes in laws, market fluctuations and security issues that affect the performance of the project (Ahmadi, 2021: 167).

2.1. Types of Investment in the Oil and Gas Industry

In the oil and gas industry, international investment takes various forms, each with its own legal and economic characteristics. These types of investment are as follows:

a) Foreign Direct Investment (FDI)

Foreign direct investment, as defined by the Organization for Economic Cooperation and Development (OECD), includes investments that provide at least 10 percent of the voting rights or effective control over the company to a foreign investor. In the oil and gas industry, this type of investment usually takes the form of establishing subsidiaries, purchasing shares in existing companies, and greenfield investments (OECD, 2020: 78). Establishing subsidiaries allows investors to operate directly in the local market and benefit from its benefits (Mirzaei, 2020: 145). Also, acquiring part or all of the shares of companies active in the oil and gas industry allows investors to quickly access the market and benefit from Utilize existing infrastructure and experience. In addition, the creation of completely new facilities for oil and gas operations allows investors to launch new projects according to market needs and current technologies.

b) Production Sharing Contracts (PSC)

First used in Indonesia in the 1960s, production sharing contracts are today one of the most common forms of investment in the oil and gas industry. In this type of contract, the oil and gas resources remain in place and belong to the host government, which assures investors that the host government is committed to preserving and managing its natural resources (Article 1 of the Iranian Petroleum Operations Law of 2013). Also, production is divided between the host government and the investing company based on predetermined formulas, so that both parties benefit from the benefits of production. The investing company recovers its approved costs from the production share, which helps encourage investors to enter large projects (Karimi, 2010: 203).

c) Service Contracts

Service contracts, which are common in countries such as Iran, Iraq, and Venezuela, define the foreign company as a contractor for technical and financial services. In these types of contracts, no ownership rights over resources or production are transferred to the foreign company, and the host government retains full control over operations and decision-making. In exchange for providing services, the foreign company receives a cash or in-kind fee, which can be a percentage of production or a fixed amount. This structure allows the host government to implement its policies in the field of natural resource management and prevent possible abuses (Hosseini, 2014: 156).

d) Investment in energy infrastructure

This type of investment includes the construction and development of energy transportation, refining, storage and distribution facilities, which play an important role in the oil and gas industry value chain. These infrastructures help to provide sustainable and efficient energy and improve access to energy resources for consumers (Razavi, 2019: 234).

2. Legal frameworks for investment protection

1.2. Bilateral Investment Treaties (BITs)

Bilateral investment treaties, the first of which was concluded between Germany and Pakistan in

1959, are today considered the most important legal instrument for supporting foreign investment. By the end of 2023, more than 2,800 bilateral investment treaties had been concluded worldwide, indicating the importance of this legal instrument in attracting foreign investment. These treaties assure investors that their investments are legally protected and that they can defend their rights against the host state (Norouzi, 2022: 112).

The basic principles of bilateral treaties include national treatment, most-favored-nation treatment, full protection and security, and fair and equitable treatment. The principle of national treatment, which is included in Article 3 of most bilateral investment treaties, imposes on the host state the obligation to treat domestic and foreign investors equally. The arbitral tribunal in the case of S.D. Myers v. Canada emphasized that any discrimination based on nationality is prohibited (S.D. Myers Award, paragraph 263). Also, the principle of most-favored-nation (MFN) treatment in the field of investment means non-discrimination between different foreign investors. The arbitral tribunal in the case of Maffezini v. Spain adopted a broad approach to this principle and considered it to include procedural provisions as well (Maffezini Award, paragraph 54).

In addition, the principle of full protection and security places the host state in charge of ensuring the physical and legal security of the investment (Alipour, 2020: 189). The interpretation of this principle was extended beyond physical protection in the CME v. Czech Republic case to include protection of the legal and commercial environment (CME Award, paragraph 613). Also, the fair and equitable treatment standard, which is the heart of investment treaties, was interpreted in the Tecmed v. Mexico case as guaranteeing the legitimate expectations of the investor (Tecmed Award, paragraph 154). This standard includes transparency and predictability of the rules, non-denial of justice, observance of the principle of good faith and protection of legitimate expectations (Mohammadi, 2021: 223).

2.2. Non-Expropriation Clause

One of the most important clauses in investment treaties is the non-expropriation or guarantee of non-illegal expropriation clause (Article 6 of the ICSID Model Treaty). Expropriation in international investment law is divided into two types: direct expropriation and indirect expropriation (Salehi, 2010: 178).

Direct expropriation involves the formal transfer of ownership or control of an investment from a foreign investor to the host state. The conditions for the legality of this type of expropriation are: public purpose, non-discrimination, due process, and prompt, adequate, and effective compensation (Hull formula). These conditions assure investors that their rights will be respected in the event of expropriation.

Indirect expropriation involves state actions that deprive the use or enjoyment of an investment without a formal transfer of ownership (Metalclad Award, paragraph 103). The criteria for identifying this type of expropriation include the degree of impact, duration, and legitimate expectations of the investor.

3.2. Multilateral Treaties

Multilateral treaties also play an important role in protecting investment. For example, the 1965 Washington Convention (ICSID), which established the International Centre for Settlement of Investment Disputes, is considered the most important investment dispute resolution mechanism (Article 25 of the ICSID Convention). The Convention has features such as: It has exclusive jurisdiction to resolve disputes between the state and foreign investors, binding decisions, and independence from domestic courts (Shariati, 2019: 134).

The Energy Charter Treaty, which was concluded in 1994 and became binding in 1998, is the only multilateral treaty specifically protecting investment in the energy sector (Article 10 of the

Energy Charter Treaty). This treaty includes investment protection and promotion, standards of conduct, non-expropriation, and freedom of transfer (Kazemi, 2019: 156). Also, the General Agreement on Trade in Services (GATS), which is part of the WTO system, has an indirect impact on investment in the energy services sector (Article I of the GATS).

3. Domestic legal system of investment protection

1.3. Iran's Foreign Investment Promotion and Protection Law

The Foreign Investment Promotion and Protection Law of 1381, which replaced the Foreign Investment Attracting and Supporting Law of 1374, is considered the main legal framework for supporting foreign investment in Iran (Mostafawi, 1401: 167). This law includes the following guarantees: guaranteeing non-nationalization, freedom of currency transfer, and guaranteeing legal protection. Article 6 of the law guarantees that an investment approved for nationalization will not be confiscated or seized. Also, Article 8 of the law guarantees the possibility of free transfer of profits, capital, and other funds related to investments. This freedom helps investors to easily benefit from their investment benefits and, if necessary, transfer their funds to the country of origin. Article 5 of the law also stipulates the government's commitment to fair and non-discriminatory treatment of foreign investors, which helps create a stable and attractive business environment for investors.

2.3. Iran's Petroleum Operations Law

The Petroleum Operations Law of 2008, which replaced the 1957 Petroleum Law, provides a specific legal framework for the oil and gas industry in Iran (Hashemi, 2008: 145). This law includes features such as national ownership of resources, state monopoly, and the possibility of concluding service contracts with foreign companies. Article 1 of the law recognizes the ownership of oil and gas resources as belonging to the Iranian nation and allows the government to control its natural resources and exploit their benefits. Also, oil operations can only be carried out by the government or with its permission, which allows the government to implement its policies in the field of natural resource management and prevent possible abuses. Service contracts also allow the government to benefit from world-class expertise and technologies while maintaining control over the resources.

4. International institutions affecting investment

1.4. Multilateral Investment Guarantee Agency (MIGA)

The Multilateral Investment Guarantee Agency, established in 1988, plays an important role in reducing political risks of investment (Article 2 of the MIGA Convention). The agency provides services such as political risk insurance, advisory services, and facilitation of negotiations (Rahimi, 2010: 201). Political risk insurance provides investors with assurance that their investments will be protected in the event of political crises. The agency also helps developing countries create favorable conditions for attracting investment by providing advice on improving the business environment and reducing investment barriers. Facilitating negotiations between investors and governments can also help create a positive atmosphere of cooperation between the parties.

2.4. International Finance Corporation (IFC)

As the private sector arm of the World Bank Group, the International Finance Corporation plays an important role in financing energy projects (Safri, 2019: 178). IFC's main services include direct financing, syndicate facilitation, and advisory services. Direct financing means providing loans and investments in private sector projects that help develop energy infrastructure and increase production capacity. Syndicate facilitation also helps attract other investors for large projects, and advisory services lead to improving the business environment and increasing project efficiency.

Consequently, international investment, as a key factor in economic development and the advancement of the oil and gas industries, requires a deep understanding of the concepts, legal frameworks, and effective international institutions. This knowledge helps investors to act more effectively and confidently in their decision-making and to exploit the available opportunities.

5. Analysis of International Trade Law Rules

1.5. The Role of the World Trade Organization (WTO)

As the main body regulating international trade, the World Trade Organization (WTO) plays a key role in facilitating and regulating international trade and investment. By establishing clear rules, it helps member countries cooperate in various areas, including energy services and investments.

The GATS has a particular impact on energy services and allows member countries to open up markets for energy services. The agreement helps facilitate trade in energy services and creates conditions for international investments in this area.

TRIMS also sets restrictions on investments and allows member countries to impose certain restrictive policies on foreign investments. These restrictions can have significant effects on international investment flows.

The WTO Dispute Settlement Body (DSB) allows countries to resolve trade disputes through the DSB. This mechanism ensures that member countries' rights in the field of trade and investment are protected and helps to create stability in international trade relations.

2.5. Energy Charter Treaty

Energy Charter Treaty the Energy Charter Treaty (ECT) is an international agreement that provides protection for energy investments and facilitates trade in this area. It provides energy investors with specific legal and regulatory protections, including guarantees of property rights and non-discrimination.

The treaty also addresses issues related to energy transit, allowing member states to cooperate and facilitate the movement of energy from one country to another. In addition, the Energy Charter Treaty pays special attention to trade in energy materials, including oil and gas, and allows member states to participate effectively in global energy markets.

3.5. International Commercial Arbitration Law

International commercial arbitration law plays an important role in the resolution of trade and investment disputes. ICSID, as an international body, helps resolve disputes between investors and states and assures investors that effective mechanisms are in place to resolve them if a dispute arises.

UNCITRAL’s arbitration rules also serve as a legal framework for resolving international commercial disputes and help countries reach arbitration agreements. ICC, as a recognized arbitration institution, also helps resolve international commercial and investment disputes and facilitates arbitration processes.

6. Challenges and Issues

Legal challenges can have significant impacts on international trade and investment. Conflicts of law between domestic and international law can create problems in the implementation of laws and lead to legal disputes. Also, interpretation of treaties and differences in the interpretation of key concepts can lead to serious disputes between countries and complicate the resolution processes. Difficulties in enforcing arbitral awards, especially in countries with weak judicial systems, can hinder the realization of justice and the rights of investors.

Economic challenges can also affect international investments. Fluctuations in energy and raw material prices can have significant effects on the profitability of projects and pose serious challenges to investors. Also, technological changes and the need to constantly adapt to innovations can put great pressure on investors, forcing them to invest in new technologies. Global competition in international markets can affect the competitive advantages of countries and make it difficult to attract foreign investments.

Political challenges can also affect the investment environment. Changes in governments and political instability can lead to policy instability and create uncertainty for investors. Also, resource nationalism and restrictions on foreign access to natural resources can negatively affect foreign investment. Economic sanctions can also have significant effects on international investment and hinder trade cooperation.

Environmental challenges are a major issue in international trade. Climate change and the pressure to reduce carbon emissions can affect investment projects and increase the need to comply with environmental regulations. Also, environmental regulations and the increasing costs of compliance with these regulations can affect the profitability of projects. Finally, competition with fossil fuels and the need to invest in renewable energy can put pressure on investors and force them to change their investment strategies.

Conclusion

A comprehensive review of international investment protection in the oil and gas industry clearly illustrates the complexities and fundamental needs of this sector. As a key pillar of the global economy, the oil and gas industry, with an 80 percent share of global energy supply and a turnover of over $2 trillion, requires strong and coherent protection frameworks. The findings show that the average investment risk in this industry is 40 percent higher than in other economic sectors, which doubles the need for effective protection mechanisms. Also, the presence of 28 percent of all ICSID cases in the energy sector indicates a high volume of disputes and an urgent need for reliable legal frameworks.

The need to protect investment in the oil and gas industry is particularly urgent due to the high risks involved and the legal and economic complexities of this sector. The existence of over 2,800 bilateral investment treaties worldwide clearly demonstrates the importance of this legal instrument. The fundamental principles of these treaties, including national treatment, most-favored-nation treatment, full protection and equitable treatment, provide a reliable framework for protecting investors. Alongside these treaties, the Energy Charter Treaty, as the only international instrument dedicated to protecting energy investment, plays a key role in establishing unified standards for protecting, transiting and trading energy. Also, domestic laws of countries, such as the Law on Encouragement and Protection of Foreign Investment in Iran and the Law on Petroleum Operations, play a complementary role in strengthening the protective framework, but they need to be more harmonized with international standards. Despite these protective frameworks, legal, economic and environmental challenges still exist that require appropriate solutions.

There are several legal challenges in this field. Conflicts of laws between domestic and international law can create problems in the implementation of laws. Therefore, it is necessary to create harmony between these two areas. Also, the interpretation of treaties and the need for greater clarity in the interpretation of key concepts are other challenges that can lead to disputes. Finally, enforcement and strengthening of enforcement mechanisms at the national level, especially in countries with weak judicial systems, are of great importance.

Economic challenges also significantly affect international investments. Fluctuations in energy and raw material prices can have significant impacts on project returns and pose serious challenges to investors. For this reason, it is essential to establish stabilization mechanisms to mitigate the effects of price fluctuations. Technological changes and the need to adapt legal frameworks to innovations require investors to adopt new technologies. Global competition can also affect countries' competitive advantages and make it difficult to attract foreign investment.

Given the energy transition and the need for $850 billion in investment in CCS and blue hydrogen projects by 2030, the need to adapt support frameworks to environmental requirements is clear. These challenges require serious attention to environmental issues and the creation of laws and regulations that can support green investments while contributing to sustainable development goals.

For investors, recommendations include risk diversification through the use of an appropriate mix of investment types (FDI, PSC, service contracts) and the use of political risk insurance services, such as MIGA and other insurers, to reduce political and economic risks. Investors should also pay attention to compliance with international treaties to ensure that their investments are covered by the relevant treaties.

For governments, recommendations include creating transparent and predictable laws, maintaining stability in investment policies, and strengthening domestic institutions to improve executive and judicial capacities. These measures can help attract foreign investment and create a favorable environment for the development of the oil and gas industry.

For the international community, updating treaties to adapt to technological and environmental developments, strengthening arbitration mechanisms to improve the efficiency and speed of dispute resolution, and coordination between international institutions are among the necessary measures.

Effective support for international investment in the oil and gas industry requires a comprehensive and multidimensional approach that includes a combination of legal, economic, and political tools. Success in this area requires close cooperation between investors, governments, and international institutions to create an appropriate balance between attracting investment, maintaining national sovereignty over natural resources, and achieving sustainable development goals. The need to continuously adapt support frameworks to global developments, from technological changes to geopolitical and environmental developments, is considered the key to success in creating a sustainable and attractive investment environment.

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