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Multilateral Investment Treaties in the MENA Region: The Next Big Thing?

Mike McClure (Herbert Smith Freehills LLP) · Monday, April 27th, 2015 · Herbert Smith Freehills

The nation states of Middle East and North Africa (MENA) have long been active participants in the world of international investment protection and arbitration. Pakistan was a signatory to one of the first ever Bilateral Investment Treaties (BITs)[1] and of the estimated 2,750 BITs that exist today, 622 (approximately 22%) are with a MENA state;[2] this figure is commensurate with a number of other regions such as Latin America and the Caribbean (18%) and South East and Eastern Europe (23%).[3]

There is also a myriad of intra-MENA treaties. There are estimated to be at least 81 intra-MENA BITs (although only 29 are in force)[4] and, perhaps most interestingly (at least in the context of this blog), a number of multilateral regional treaties that, until recently, had seldom been used by investors to resolve disputes. This all changed in 2003 when an arbitral panel was instituted for the first time under the Arab Investment Agreement of the Arab League (*Tanmiah Co. v. Tunisia*) and then again in 2012 with the case of *Hesham al-Warraq v Indonesia* when an UNICTRAL tribunal seated in Singapore concluded that it had jurisdiction under the investment agreement of the Organisation of Islamic Cooperation (OIC), with the final award being rendered in December 2014.[5] On the back of the *Hesham al-Warraq* decision together with some recent cases filed under other multilateral MENA treaties, this blog looks at the relatively under-utilised investor protection mechanisms provided by some of the MENA multilateral investment treaties concluded and asks: *are multilateral investment treaties in the MENA region the next big thing*?

MENA multilateral investment treaties

There are two main multilateral investment treaties offering protections to MENA investors:

• The **Organisation of Islamic Cooperation (OIC)** is an intergovernmental organisation of 57 Muslim countries. It was founded in 1969 and asserts that it aims to be the "*the collective voice of the Muslim world*".[6] The OIC has produced an Agreement of Promotion, Protection and Guarantee of Investments (OIC Agreement)

which was signed in June 1981 and entered into force in February 1988; it has been ratified by 27 OIC states (including Asian countries such as Indonesia and Malaysia).[7)]

• The **Arab League** (formerly The League of Arab States) is another regional intergovernmental organisation. It was formed in formed in 1945 and currently has 22 member states.[8)] In 1986, the Arab League brought into force the Unified Agreement for the Investment of Arab Capital in the Arab States (Arab Investment Agreement). The Unified Agreement provides protections to "*Arab Investors*" when investing in other signatory states.

The OIC Agreement and Arab Investment Agreement are similar to traditional BITs in that they provide protections to certain qualifying investors from signatory states when making investments in another signatory state. However, there are some differences and, on the whole, both agreements are a little more limited in their investor protections than BITs. Nonetheless, in the absence of BIT protection, both agreements could be powerful tools for an investor seeking recourse against a state. The key provisions of each agreement are considered below.

Scope of the treaties

• **OIC Agreement**: The term "*investor*" is broadly defined and includes any corporate person that is established in accordance with the laws in any contracting state and is recognised by the law under which its legal personality is established (Article 1(6)). Of particular relevance is the fact the OIC Agreement does not specify any requirements as to the nationality of the owner(s) of the company. "*Investment*" is also broadly defined and includes any investment of capital in a state with a view to achieving a profitable return (Article 1(5)).

• **Arab Investment Agreement**: The criteria to be considered an investor who can take advantage of the protections of the Arab Investment Agreement are much more restrictive than the OIC. In particular, the protections in the Arab Investment Agreement are expressed to be available only to "*Arab Investors*" who in turn are defined as Arab individuals or body corporates who invest "*invests in the territory of a State Party of which he is not a national*" (Article 1(7)). Furthermore, the investment must contribute to the economic development of the host state (Article 2) or strengthen economic integration between the states.

Substantive protections

• **OIC Agreement**: The investment protections in the OIC Agreement include protection against measures amounting to a direct or indirect expropriation (Article 10), free transfer of money (Article 11) and access to the host state's judicial system (Article 16). However, in contrast to many BITs, the OIC Agreement does not guarantee fair and equitable treatment, nor does it provide that foreign investors must be treated no less favourably than investors from the host state. However, it does contain a most-favoured nation (MFN) clause (Article 8), guaranteeing that investors from a contracting party shall not be treated less favourably than investors from a non-contracting party. This raises the possibility that an investor claiming under the OIC Agreement may also be able to benefit from protections in other investment

agreements concluded by the host state;[9] indeed, in the Final Award in *Hesham al-Warraq*, the Tribunal found that, by virtue of the MFN clause in Article 8 of the OIC Agreement, Mr al-Warraq was entitled to rely on the fair and equitable treatment standard in Article 3 of the BIT between the United Kingdom and Indonesia.

• **Arab Investment Agreement**: The protections are broadly similar to those under the OIC Agreement and include protection against direct or indirect expropriation (Article 9) plus also an MFN clause (Article 5). Like the OIC Agreement, the Arab Investment Agreement does not contain a fair and equitable treatment clause. Interestingly, the Arab Investment Agreement also imposes a number of obligations on investors, including that they observe the host state's domestic laws (to the extent consistent with the agreement) and comply with national development programmes when administering and developing investment projects (Article 15); failure by an investor to observe such requirements could give rise to responsibility before the Arab Investment Court (see below).

Dispute resolution options

• **OIC Agreement**: The OIC Agreement provides that an "*Organ*" for the settlement of disputes will be established, but until such time as the "*Organ*" is established, disputes are to be resolved by conciliation and then arbitration (Article 17); no specific arbitral rules or institutions are mentioned in the OIC Agreement. No such "*Organ*" has yet been established and in the *Hesham al-Warraq* case, Indonesia argued that Article 17 of the OIC Agreement only provided for a state-to-state arbitration mechanism. However, the Tribunal rejected this interpretation and concluded that it also permitted investor-state arbitration. Given that the "*Organ*" had not yet been established, the Tribunal concluded that *ad hoc* arbitration remained available in the interim (which, in that case, was UNICTRAL arbitration seated in Singapore). Under the OIC Agreement, decisions of tribunals are final and binding and each contracting party is under an obligation to implement an award in its territory as if it were a final and enforceable decision of its national courts (Article 17(2)). The OIC Agreement also contains a "*fork in the road*" provision, meaning that an investor is precluded from bringing simultaneous proceedings before an arbitral tribunal and national courts (Article 16).

• **Arab Investment Agreement**: The Arab Investment Agreement provides for the establishment of an Arab Investment Court (AIC) (Articles 25 to 36). Unlike the "*Organ*" under the OIC Agreement, the AIC was established and is based at the permanent headquarters of the Arab League in Cairo. It is composed of at least five serving judges each with a different Arab nationality which must not be the same nationality as either of the parties to the dispute (Article 28). However, while the AIC has compulsory jurisdiction over disputes involving investors, recourse to the AIC is only permissible in cases where the parties failed to agree to submit the dispute to arbitration, the arbitrator(s) failed to make a ruling, or any arbitral award was not executed within three months of being rendered (Article 27). Judgments rendered by the AIC are final and binding and are enforceable in each of the contracting states in the same manner as a judgment delivered by their national courts (Article 34). In 2003, a panel of the AIC was instituted for the first time to hear the case of Arab

Investment Agreement in *Tanmiah Co. v. Tunisia*.[10] Since then, the docket of the Court has grown to seven pending cases. [11] In 2013, the AIC also awarded over US$900 million against Libya in *Al-Kharafi and Sons Co. v. Libya*.[12]

Conclusion

The protections in the OIC Agreement and the Arab Investment Agreements have been available to Arab investors since the 1980s, but they remained almost completely unused for over twenty years. However, after twenty years of silence, investors are starting to become aware of the options available to them. As noted above, after its first case in 2003, the AIC now has a docket of seven pending cases. The OIC Agreement was used for the first time in 2012, but in recent years reports have emerged of a number of new cases, including in March 2015 a case brought by a Tunisian investor against the state of Gabon.[13]

The OIC Agreement and the Arab Investment Agreement certainly have limitations and are unlikely to be an investor's preferred choice for protection if there is also a more traditional BIT in place. Nonetheless, if traditional BIT protection is not available, the OIC Agreement and the Arab Investment Agreement could be an invaluable source of investor rights and recourse to international arbitration. Indeed, given Indonesia's threat to terminate all its BITs,[14] investors looking to bring a claim against Indonesia may need to start looking to more obscure multilateral treaties such as the OIC. In any event, it is likely that the recent surge in cases will be just the beginning and that investors and practitioners in the MENA region (and beyond) are likely to see many more claims brought under the OIC Agreement and the Arab Investment Agreement in the coming years.

References

↑1 BIT between Pakistan and Germany dated 25 November 1959.

↑2, ↑3, ↑4 Evolution of International Investment Agreements (IIAS) in the MENA region: http://www.oecd.org/mena/investment/46581917.pdf.

↑5 *Al-Warraq v. Republic of Indonesia*, UNCITRAL Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims, subject to the APPGI, dated 21 June 2012; see also, Final Award dated 15 December 2014.

↑6 http://www.oic-oci.org/oicv2/page/?p_id=52&p_ref=26&lan=en.

↑7 http://www.oic-oci.org/english/convenion/Agreement%20for%20Invest%20in%20OIC%20%20En.pdf.

↑8 http://www.lasportal.org/Pages/Welcome.aspx.

↑9 There are a number of contrasting views as to how MFN Clauses should be interpreted; see the link here to a previous blog post from the author on the topic.

↑10 Walid Ben Hamida, *The First Arab Investment Court Decision*, 7 J. World Investment & Trade 699 2006.

↑11 Meriam Al-Rashid and Leonardo Carpentieri, *The Revival of Islamic and Middle East Regional Investment Treaties: a new way forward?* (TDM 2 2015): http://www.transnational-dispute-management.com/article.asp?key=2195.

↑12 *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*, Final Arbitral Award dated 22 March 2013, ad hoc arbitration subject to the Unified Agreement.

↑13 http://globalarbitrationreview.com/news/article/33625/gabon-faces-claim-obscure-islamic-treaty/.

↑14 http://www.ft.com/cms/s/0/3755c1b2-b4e2-11e3-af92-00144feabdc0.html.

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