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The Curious Incident of Iraq and the ICSID Convention

Noor Kadhim (Armstrong Teasdale) · Monday, November 23rd, 2015

The Middle East is undergoing a period of extreme political, economic and social unrest. In modern Iraq, the chaos wrought by Da'esh is causing major difficulties for the government and for ordinary businesses and individuals. However, in the midst of this turmoil, on 18 November 2015, Iraq finally made good its promise by ratifying the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (the ICSID Convention). In accordance with its Article 68(2), the ICSID Convention will enter into force for Iraq on 17 December 2015. Notably, this development is in tandem with the other major development in Iraq in October 2015, being the amendment to the Iraqi Investment Law No. 13 of 2006 (Investment Law). The questions are, why now, and what next?

Before analyzing the effect of this important legal development, it would be interesting to consider whether the change is surprising, or whether it has always been on the cards. And if the latter, then why now?

It is worth noting, perhaps, that at the time of writing, the price of crude oil is reported to have dropped a further 10% from an already all-time low. This will undoubtedly affect the state of Iraq's economy, and may provide the impetus for improving its investment regime, so as to attract the maximum level of inward foreign direct investment (FDI).

In March 2014, I published an article in Transnational Dispute Management journal, in which I stated that in as far back as 2013, the Iraqi parliament was alleged to have approved a resolution permitting entry by the Iraqi executive into the ICSID Convention. At that time, a ministerial communication issued by the National Investment Commission of the Council of Ministers of Iraq supported the reports. Furthermore, the Commercial Law Development Program (CLDP) of the U.S. Department of Commerce had reported on its website that the Iraqi State Shura Council (ISSC) was in the process of reviewing two laws, one on ICSID membership and another on international arbitration. The ISSC approached the CLDP in the same year, to devise and implement a seminar focused on bilateral investment treaties and ICSID State/investor dispute resolution mechanisms. As such, the decision to sign and ratify ICSID does not come out of the blue. It is a strategic decision, and comes at a time when Iraq is most in need of inward FDI and international resources and expertise.

I leave aside the issue of whether there is a proven direct correlation between ratification of ICSID and the level of inward FDI, of which I am skeptical. What does the entry into the ICSID Convention mean, in concrete legal terms, for Iraq? To understand this, we should briefly consider

the current regime for investment disputes in Iraq.

Investors have recourse to arbitration in Iraq through two principal methods: under contracts, for which the Investment Law usually applies, or under investment treaties entered into with other States, for which either the Investment Law, international law, or a combination of the two may apply. In relation to the first, the author currently understands that Iraq is signatory to thirty-two bilateral, and nine multilateral agreements within the Arab League, with respect to Investment Promotion and Protection (IPPA). BITs also exist with India, Iran, Japan, Jordan, Kuwait, Mauritania, Republic of Korea, Sri Lanka, Syria, Tunisia, Turkey, the United Kingdom, Vietnam and Yemen amongst others. In addition, Iraq has bilateral free trade area (FTA) agreements with the United Arab Emirates (UAE), Oman, Qatar, Algeria, Egypt, Jordan, Lebanon, Syria, Tunisia, Yemen, and Sudan. Interestingly, of these, only the Japanese agreement has been registered with UNCTAD, as well as a Kuwaiti agreement. Conversely, an online search further revealed treaties with France and Germany. Of the four treaties that are found online (whether on UNCTAD's website or otherwise), only the Kuwaiti agreement is in force. According to a Ministerial Communication, there are agreements pending with Lithuania, South Korea, Sudan, Jordan, Slovakia, Iran, the UAE, the Czech Republic, Belarus, Bahrain, China, Lebanon, Macedonia, Vietnam, Italy, Netherlands, and Poland.

Without entering into an in-depth analysis, certain provisions of the Investment Law are worthy of note. Article 1 of the Investment Law defines an "investment" as "the investment of capital in any economic or service activity or project that results in a legitimate benefit for the country". Article 10 of the Investment Law bestows the same rights and privileges to foreign investors as it does to Iraqi nationals. Importantly, the Investment Law, at the time of verification, did not apply to the petroleum sector. Lastly, the Investment Law regulates national and foreign investments in Iraq exceeding USD 250,000.

The Investment Law indirectly permits arbitration to be used as a method to settle international investment disputes because in its specific reference to the Iraqi law, it implies acceptance of the Iraq's domestic arbitration law (Arbitration Law). Article 27 of the Investment Law states:

> "Disputes arising between parties who are subject to the provisions of this law shall be subject to the Iraqi law unless otherwise agreed".

In the Public Government Contracts Law No.1 of 2008 (PGCL), arbitration is expressly permitted in relation to contracts entered into between foreign entities or persons, and the Iraqi government. Article 11 expressly states:

> "The contracting agency may select international arbitration to settle disputes provided that the contract shall provide for this facility, and when one of the parties is a foreigner, taking into account the procedural mechanism agreed upon in the contract when using this method, and one of the international arbitration associations shall be selected to settle the dispute".

The substance of the Investment Law or the PGCL themselves are perhaps not so problematic. After all, these were post-occupation laws that were largely driven and shaped by, amongst others,

sophisticated lawyers trained abroad. Rather, it is what happens to the investor's claim in the unsophisticated Iraqi courts that is of concern. The theoretical permissibility of arbitration in Iraq in relation to investment disputes may not be enough to displace the government's attitude towards the process. The attitude was unfortunately, historically, distrustful. This is an attitude that has likely spread to the Iraqi judges.

As such, the Iraqi courts could conceivably continue to refuse, or complicate the avenues to, recourse to arbitration under contractual disputes with the State or Iraqi private parties. This is because of the barriers to enforcement under its current Arbitration Law, and the fact it is still surprisingly not a party to the New York Convention (see below). The key difference in this scenario being that without the ICSID option, the investor will end up in the Iraqi national courts when attempting to enforce its award. This is a scenario that investors will wish to avoid, and that which makes ratification of ICSID of prime importance for foreign investors.

Under the ICSID Convention, Iraq will be forced to accept the so-called de-localised effect of eligible treaty-based disputes or contract-based disputes with an ICSID provision, and the direct enforcement of ICSID awards under pressure from the World Bank. The related and much-vaunted advantages of ICSID are that it provides investors with a direct access to a form of settlement of a dispute they may have with a host State, investors do not need to rely on the unreliable mechanism of diplomacy, and the enforcement provisions of the ICSID Convention make it highly probable that final ICSID awards will be effectively enforceable.

But what will ICSID not solve?

For one, the legalities of ownership by investors of Iraqi property under the revised Investment Law, where it applies, which is a matter for Iraqi law alone. In this regard, many foreign companies are still hesitant to provide FDI to Iraq, because of fears that the security situation is too unstable in Iraq. Notably, the revised Investment Law does not give investors the right to full ownership rights over property in relation to international projects.

Furthermore, under international law, whether or not the ICSID path is taken, there may be 'escape' routes. Notably, in Iraq's case, this could include invocation of the state of necessity defence under international law, preventing Iraqi government action from breaching its investment treaty commitments. For an example of how this defence is characterized and applied, the annulment decision regarding the award in CMS Gas Transmission v Argentine Republic (ICSID Case No. ARB/01/8) is worth reading. Wider margins of appreciation in this context may serve to exempt Iraq from otherwise expropriatory or other violations under investment treaties which are brought under the ICSID Convention.

Finally, a word should be said about the strange fact that in all of this 'progess', the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) has been left by the wayside. This treaty is arguably more important for foreign investors than the ICSID Convention, and has been on the Iraq's radar for a long time.

The New York Convention is more significant than ICSID, for three reasons. First, because many transactions entered into with the Iraqi government under a treaty may not satisfy the requirements of the ICSID Convention (such as the "nationality" or "investment" requirements). This would mean that, if anything, only the ICSID Additional Facility Rules would be available, and without ratification of the New York Convention an award rendered under the Additional Facility Rules

would face the same problems in the Iraqi courts as that of an ad hoc or institutional international arbitration.

Second, many transactions are concluded under contract and not treaty, and barring the application of an umbrella clause in an applicable treaty or specific provisions for ICSID dispute settlement, such claims cannot be brought under the ICSID Convention.

The third problem is a practical one. ICSID is currently an empty shell, where Iraq is concerned. As explained above, currently there are few known examples of eligible treaties that are in force between Iraq and third States and I do not have any specific knowledge of contracts concluded with ICSID provisions. It will be a question of time before Iraq develops a sophisticated network of treaties that would trigger claims under the ICSID Convention. Needless to say, Iraq must be wary to exercise great drafting caution going forward, in this respect.

Finally, foreign investors should take note that ICSID is not necessarily the most efficient and neutral method of resolving conflicts with the Iraqi State. In this regard, it is perhaps not surprising that Brazil, one of the most important of the South American countries for inward investment, has deliberately chosen not to ratify the ICSID Convention. It is a well known fact amongst users that there are major flaws with ICSID's annulment system, and the appointment process, which on many occasion has resulted in inconsidered and/or extremely delayed appointments, leaves much to be desired. On the other hand, the suitably of arbitration institutions traditionally designed for commercial disputes, such as the ICC, may prove to be a better alternative to ICSID. The 2012 ICC Rules, for example, contain clauses that make the process for appointment of arbitrators involving a party that is a State or State entity much more rapid and efficient, such as Article 13(4), which allows the Court to bypass National Committees in finding candidates. Accordingly, these are just some of the considerations an investor should have in mind when evaluating their options.

To conclude, Iraq's favourable attitude towards ICSID, on the one hand, and reticent stance towards the New York Convention, on the other, is illogical for two main reasons. First, international arbitration is arguably just as, if not more, suited to international private trade relationships as it is to disputes involving State interests. Second, greater risk is arguably inherent in subjecting the Iraqi State's organs to investment disputes under the wide range of treaties that it entered into with third States, which it may have done without proper guidance. That Iraq should accede to the ICSID Convention and relinquish power and authority in relation to such disputes to the autonomous organs of ICSID, but apparently exhibit greater caution in relation to the New York Convention, is indeed curious.

In any event, it is clear that time (and the nature of future claims) will reveal the real effect that ratification of the ICSID Convention will have on the Iraqi economy and its people. From the point of view of foreign investors however, it can only be a positive step.

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