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Checking in on the OIC Investment Agreement: New Arbitrations, But Slow Progress on Creating A Permanent Dispute Settlement Mechanism

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The OIC Investment Agreement (the "Agreement"), a multilateral instrument among certain members of the Organization of Islamic Cooperation, remains a potent tool for investment protection within the bloc. This post surveys developments concerning the Agreement since the authors' last updates in late 2019 and 2020. In particular, the post provides an update on the ongoing efforts to establish a permanent dispute settlement mechanism, which one of the authors of this post reported on in late 2019. Although little has been reported publicly on the fruits of that effort, quiet progress has occurred through the creation of the OIC Arbitration Centre in Istanbul. Below we provide brief background on the treaty, then discuss recent case activity, treaty reform efforts, and institution-building in Turkey.

Background

Signed in 1981 and in force since 1988, the OIC Investment Agreement languished in obscurity until 2012, when a Saudi investor successfully invoked it in the seminal case *Al Warraq v. Indonesia*. The Agreement likely grew out of the same discussions as the "Euro-Arab investment treaty that nearly was" – a draft "megaregional" treaty that was ultimately abandoned for political reasons. The Agreement is partly coextensive with the Unified Agreement for the Investment of Arab Capital in the Arab States under the auspices of the Arab League.

The value of the Agreement is that it provides protection to foreign investments between OIC Member States where no BIT exists. For instance, the Agreement may provide coverage where BITs have been terminated (e.g., Egypt-Indonesia), signed but not in force (e.g., Iraq-Iran), or never signed in the first instance (e.g., Saudi Arabia-Qatar). It is also frequently misunderstood. The OIC website does not list treaty parties (as opposed to OIC Member States generally), nor does a common copy of the treaty. According to a report from the OIC Secretary-General in November 2021 (see pp. 29-30), there are 29 parties and 15 further OIC Member States that signed but never ratified.

The dispute resolution provisions of the Agreement were only meant to be a temporary measure. Article 17 holds that disputes can be resolved through conciliation or arbitration "[u]ntil an Organ

for the settlement of disputes arising under the Agreement is established….” Article 17(2)(b) requires the respondent party to appoint its arbitrator; if it fails to do so, the claimant can ask the OIC Secretary-General to complete the composition of the tribunal. But the OIC Secretary-General has refrained from making default appointments in the past, reportedly under political pressure from some member states. To overcome this problem, claimants have used the Agreement’s MFN clause to import UNCITRAL Rules in other BITs where the Secretary-General of the Permanent Court of Arbitration (“PCA”) is the appointing authority. He has done so on several occasions, thus allowing arbitrations to proceed.

Recent Case Law on Jurisdiction

Claimants seeking the intervention of the PCA Secretary-General, however, were dealt a recent blow. In March 2021, the Paris Court of Appeal set aside a preliminary award of the tribunal in *D.S. Construction FZCO v. Libya*, which had concluded that it was properly constituted. Here, as elsewhere, Libya refused to appoint an arbitrator, and the OIC Secretary-General declined to make the appointment upon the claimant’s request. The investor successfully applied to the PCA to make the appointment. Yet, the French court reasoned that the MFN clause in the Agreement cannot import dispute-settlement procedure from another treaty.

The judgment is unwelcome news for other investors facing recalcitrant states. In at least two other pending cases under the OIC Investment Agreement, *Al Rajhi v. Oman*, and *Gargour v. Libya*, the PCA assisted with the appointments, but as the proceedings are seated in the UK and Switzerland respectively, the impact of the French court’s reasoning may be limited. In an alternative approach proposed by Hamid Gharavi, a claimant stymied by an unwilling OIC Secretary-General to constitute an arbitral tribunal may seek help from a French *juge d’appui* who is authorized to make arbitrator appointments when there is a risk of denial of justice, even when the case is not seated in France. To the authors’ knowledge, this approach is yet to be tested.

Outside of the discrete arbitrator appointment issue, the award in *Itisaluna v. Iraq* was a watershed moment. The tribunal found that parties to the OIC Investment Agreement had conveyed their advance consent to arbitration generally, but not to arbitration at ICSID in particular. The dispute thus fell outside of Article 25(1) of the ICSID Convention, which required that disputes be submitted “to the Centre.” Although future tribunals are free to find otherwise, the *Itisaluna* award seems to foreclose future OIC disputes at ICSID.

Newly Instituted and Looming Proceedings

It is too soon to tell whether the decisions in *D.S. Construction* and *Itisaluna* will dampen enthusiasm for the OIC Investment Agreement. At least two proceedings were initiated post-*Itisaluna* and remain pending. *Kamal Bahamdan v. Lebanon* involves the same factual and legal scenario as the ICSID case of *Abed El Jaouni and Imperial Holding v. Lebanon* in which the state prevailed. In *Primesouth International Offshore S.A.L. v. Republic of Iraq*, the claimant launched two parallel proceedings arising out of a dispute over a power plant in Baghdad – a contract-based claim at ICSID (Case No. ARB/22/7) and an *ad hoc* OIC Investment Agreement-based proceeding. Although the claimant proposed to consolidate the two proceedings, it is unclear whether this occurred.

In addition to these proceedings, two companies – one Saudi and one Kuwaiti – notified Pakistan of a dispute arising out of debt owed by the government to Karachi Electric, owned by the investors. In 2021 Pakistan announced its intention to terminate most of its BITs. This potential proceeding illustrates the continued value of the Agreement in providing jurisdiction and investment protection between two states where no BIT applies.

Treaty Reform

As previously reported, the OIC has undertaken an initiative to reform the Agreement. In 2019 the OIC's Council of Foreign Ministers issued Resolution No. 2/46-E, which requested the OIC Secretary General to submit a Concept Note to "an open-ended Intergovernmental Experts Group Meeting" and thereafter to the OIC's Standing Committee for Economic and Commercial Cooperation ("COMCEC") to advance several proposals. The initiative was delayed due to the COVID-19 pandemic. However, the first meeting of the Intergovernmental Experts Group on the Establishment of a Permanent Organ & Mechanism for Settlement of Investment Disputes was convened in October 2022 in Casablanca. That meeting considered a Draft Protocol and reached consensus on 6 articles out of 37. The group aims to finalize the Draft Protocol to present to the Member States by March 2023.

There have been few official public reports on the progress of the reform initiative. However, a legal advisor to the OIC, Dr. Mouhamadou Kane, gave a presentation in late 2019 sketching the broad contours of the efforts. An aggrieved investor would first have to exhaust local remedies in domestic court. Thereafter, the claimant would be entitled to file a denial of justice claim against the State, which would trigger an inter-state amicable settlement process. Only if that process failed could the investor commence an investor-state proceeding before a First Instance Panel subject to review by an Appellate Committee.

It is unclear whether this 2019 proposal has changed significantly in the subsequent years. Those undertaking the reform effort now have over three extra years of debate from UNCITRAL Working Group III, the ICSID Rules revision, and the ECT modernization program to bring to bear upon the Agreement.

Institution building

During the pendency of the treaty reform initiative, the OIC established a new OIC Arbitration Centre in Istanbul, Turkey in order to provide "trustworthy, quick, and efficient settlement of trade and investment disputes."

The centre's board of trustees held its first meeting in October 2021 and a board of directors with an executive mandate was established shortly thereafter. Pursuant to a host-state agreement signed with the OIC's Islamic Chamber of Commerce, Industry and Agriculture, the Turkish government undertook to cover the expenses of the centre for a period of 10 years. The statute of the OIC Arbitration Centre provides for the appointment of a Secretary-General who will manage the centre's day-to-day operations and a 21-member international supervisory board. The board of directors is currently in the process of appointing a Secretary-General and adopting the centre's arbitration rules.

The OIC Arbitration Centre's mandate is in flux. Despite a reference to investment disputes in its statute, the OIC Arbitration Centre does not appear to be the "Organ for the settlement of disputes" mentioned in Article 17—the Agreement is not mentioned in the host-state agreement or statute. However, the OIC should clarify whether the centre is meant to be the permanent "Organ" or whether such a body is still forthcoming.

According to Article 4 of its statute, the new centre will seek to "facilitate settlement of commercial and investment disputes." The latter option is expected to arise when BITs between OIC's member states refer to the centre as a possible forum. With respect to investment disputes, it could be seen as a competitor to the reformed OIC Investment Agreement procedure. If an investor bears the nationality of a party to both the OIC Investment Agreement and an intra-OIC BIT, he or she would more likely opt for arbitration before the Centre to avoid the narrowed procedural mechanisms of the reformed multilateral treaty. To the extent the Centre will administer purely commercial disputes among parties of different nationalities, it will face competition from other institutions residing in OIC Member States, such as Istanbul Arbitration Centre or the Qatar International Center for Conciliation and Arbitration, among others.

Conclusion

Despite its modest beginnings, the OIC Investment Agreement has proved to be an increasingly popular instrument in the last decade. According to IAReporter's database, 22 known arbitrations, 13 of which are currently pending, have been filed under the Agreement thus far. A common theme among many of these cases has been investors' reliance on the MFN clause of the Agreement on procedural issues. However, as noted above, several courts and tribunals have been unsympathetic to investors' efforts to use MFN to gain access to ICSID and to the PCA's assistance in default arbitrator appointments.

Arbitration was supposed to be a temporary vehicle to resolve disputes between OIC members and investors "[u]ntil an Organ for the settlement of disputes arising under the Agreement is established." More than 40 years after the signing of the Agreement, the organization has finally made progress in the establishment of this permanent adjudication body. Regardless of OIC's recent efforts, *ad hoc* arbitrations under the OIC Investment Agreement will likely continue to be a hot topic in the field of international arbitration.

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