Recent Developments in Investment Arbitration in the MENA Region

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Introduction

In much that is written today about international arbitration there is a distinction made between what is referred to as commercial arbitration - the arbitration of disputes between parties to contracts with arbitration clauses - and so called investment arbitrations, disputes between host nations and investors in those nations. The main difference is that the legal foundation for these disputes is different since commercial arbitration is usually decided under the contract and its governing law while investment arbitration deals with foreign investment protection standards stemming from international law. Ordinarily, parties to a relationship of an international business nature that may give rise to disputes agree to have their disputes resolved in arbitration, usually pursuant to the rules of certain recognized arbitral institutions. Investment arbitrations, on the other hand, may not involve agreements regarding investments made between a state and an investor. Instead, these disputes occur as a result of the operation of treaties between nations designed to encourage the flow of investments, usually from more developed nations to less developed ones. These treaties, frequently bilateral, of which there are thousands in existence, provide that if a national of one of the two countries to the treaty experiences certain kinds of problems in the course of its investment, notwithstanding the fact that the national may not have a direct contractual relationship with the country where it has made its investment, may present a claim in arbitration against the host country. This also means that, where an investor have a contract with the host state or any of its entities, he may have a choice between the remedies provided for under the contract and its governing law ("contract claim")[1], and the protection offered by the investment treaty between itw own country and the host state if available ("treaty claim"). Noting here that some investment treaties contain so-called "Umbrella Clauses", known also as "observance of undertakings", according to which each state commits to "*observe any obligation it may have entered into with regard to investments*", the effect of which may be to elevate a contract breach to the level of a treaty breach.

I. What is an investment dispute?

It is a dispute between a foreign investor and a host state which relates to an investment made in the territory of the host state. We need first to understand what these investment instruments are because they serve as the general framework of investment arbitration.

[1] This choice may be limited by the existence of a "fork in the road" provision in the investment treaty as it will be discussed later.

Investment treaties can take different forms. They can be multilateral treaties. They can be bilateral treaties “BITs”. They can be regional free trade agreements like NAFTA, or investment protection agreements. They can also be international treaties relating to a particular industry such as the Energy Charter Treaty, which is just focused on energy disputes.

Most investment treaties allow investors to refer disputes with the host state directly to binding international arbitration under different regimes. Some refer disputes to the International Court of arbitration of the International Chamber of Commerce (ICC). Others refer disputes to the Stockholm Chamber of Commerce (SCC). Some refer disputes to *ad hoc* arbitration under the UNCITRAL rules. Most of the BITs refer the dispute arising under their provisions to the International Centre for the Settlement of Investment Disputes Convention (ICSID). Also these BITs ususally provides for a six month “cooling off” period for the parties to try and reach an amicable settlement before the dispute can be referred to arbitration. ICSID was set up as an institution in 1965[2] within the World Bank Group to provide facilities for the neutral resolution of foreign investment disputes between states and foreign investors. What is important about ICSID is that most states will comply with the award for two fundamental reasons: (1) they do not want to risk losing any potential investors or investments, and (2) they do not want to risk damaging their relationship with the World Bank. More than 160 states have signed the ICSID Convention. Contracting and signatory states range from Afghanistan to the Bahamas to Mongolia and most of the Arab countries (with the exception of Iraq and Libya). What is unique about the ICSID Convention is that it contains special jurisdictional requirements which are set out in Article 25, and one of the requirements is that there must be a legal dispute arising directly out of an investment. The ICSID Convention left the term “investment” undefined and therefore left to the multilateral or bilateral investments treaties and to the subsequent jurisprudence of the arbitration tribunals.

We will now look at the substantive provisions commonly found in investment treaties.

(i) Fair and equitable treatment

Most of the investments treaties contain a provision which says that “*Each Contracting Party shall ensure fair and equitable treatment of the investments* . . .”. This is one of the most common standards found in investment treaties. In one case, *MTD v Chile*,[3] the tribunal stated that, in its ordinary meaning, the term “fair and equitable” means just, even-handed, unbiased and legitimate. In *Tecmed v Mexico*,[4] the tribunal stated that the foreign investor expects the host state to act in a consistent manner free from ambiguity and totally transparently in its relations with the foreign investor so that it may know beforehand any and all rules and regulations that will govern its investment. One more case I would like to share is *Occidental*

[2] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washigton, 1965 (the ICSID Convention)
[3] ICSID Case No. ARB/01/7
[4] ICSID Case No. ARB (AF)/00/2

v Ecuador, which took place in 2004. The tribunal found that Ecuador had breached the above standard when its tax agency decided that Occidental Exploration and Production Company was not entitled to claim reimbursement for VAT oil exports, despite the fact that it had been so entitled when it originally made its investment. The tribunal found that Ecuador's failure to provide a stable and predictable regulatory framework violated this treaty standard.

(ii) Full protection and security

Another common protection is the full protection and security guarantee, which concerns the protections afforded to the investors' property by the host state from damage caused to it by host state officials or others acting within the host state's jurisdiction. What is important to note about this provision is that it may be breached even if no physical violence occurs. In one case, *Wena Hotels Ltd. v Arab Republic of Egypt*,[5] the dispute concerned the seizure of a hotel by its employees. The tribunal found Egypt responsible for the failure to accord this investment full protection and security because it did not take any action to prevent the seizures or to immediately restore control over the hotel.

(iii) Protection against expropriation without just compensation

Another common protection is expropriation without just compensation.

What is interesting about international investment arbitration is that there can be direct expropriation and indirect expropriation. Direct expropriation is a taking by the state of property that belongs to the investor without just compensation. One case that dealt with expropriation was *Swembalt v Latvia* from 2000.[6] Swedish investors purchased a renovated ship to be used as a floating trade center and they docked it in Latvia. Without notice, the port authority subsequently moved the ship and sold it at an auction. The tribunal determined that the Republic of Latvia, by taking the ship away, preventing the investor from using it, and finally, by auctioning it and permitting it to be scrapped without any compensation to the investor, had breach the obligations under the BIT. As mentioned, there is something called "indirect expropriation". This is a measure that does not involve an overtaking of the tangible property, but it effectively neutralizes the enjoyment of the property. An example of this can be a disproportionate tax increase. A case that illustrates this protection is the NAFTA case *Feldman v Mexico*. The issue in this case was whether the Mexican government violated this provision by granting tax rebates to Mexican-owned exporters of cigarettes while refusing the same rebates for an American-owned exporter. The Mexican government argued that it rightfully denied the rebates because a U.S.-owned company could not produce itemized invoices showing the specific amount of tax paid for the cigarettes as required by Mexican law. The claimant, the U.S. company, showed that the Mexican companies, which purchased their

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[5] ICSID Case No. ARB/98/4
[6] UNCITRAL Case, Decision dated 23 October 2000

cigarettes from the same retail sources and could not have itemized invoices, nonetheless received rebates during this relevant time.

(iv) National treatment

National treatment is a basic component of investment treaties. It guarantees a minimum standard of treatment of foreign investments in like circumstances and like products vis-à-vis their domestic counterparts.

(v) Most Favoured Nation (MFN) clause

A Most Favoured Nation (MFN) clause requires the state party to one investment treaty to provide investors with treatment no less favourable than the treatment it provides to investors in like circumstances under other investment treaties.

II. Recent developments in the MENA region

Going back to the Middle East, although most of the Arab countries have entered into a fair number of BIT's with foreign countries, there are less BIT's entered into Arab states, and Arab investors in the Middle East countries will often find themselves bound to recourse to the local courts of the host state – or to commercial arbitration when available – in order to protect their investments in accordance with local the local domestic law (which may be less favourable than international protection).

The recent developments in the region show that the Arab investors in Arab or Islamic countries may in the absence of applicable BITs between their countries and the host country rely on two multilateral investment treaties (MITs) which may provide protection to their investmenst and allow them to bring their investment disputes before an international investment tribunal, these are: the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference (the 'OIC Agreement') and the Unified Agreement for the Investment of Arab Capital in the Arab States (the 'Arab Investment Agreement'). These two agreements also provide for mandatory international arbitration/litigation forums.

Both agreements date back to the 1980s, but only recently caught the attention of investors. I will briefly summarise how these two agreements work and their dispute resolution provisions.

(1) The OIC Agreement

The OIC is a union of 57 Islamic countries founded in 1969. The OIC Agreement, in force since 1986, has been signed by 33 member states and ratified by 27. It sets out the minimum standards applicable to incoming capital and investment between member states.

(i) Dispute resolution provisions

Until the establishment of a dedicated organ to settle investor-state disputes, Article 17 of the OIC Agreement refers to both conciliation and arbitration with a member state. Faced with the question of whether Article 17 constitutes a binding arbitration agreement, the first decision rendered by an arbitral tribunal constituted under the OIC Agreement on 21 June 2012 effectively concluded that Article 17 contains an offer by each member state to arbitrate disputes with investors of another member state, entitling the latter to accept an offer by commencing arbitration proceedings.[7] The arbitration was brought against Indonesia by a Saudi businessman, Hesham Al-Warraq, seeking $25 million in respect of the nationalisation of his stake in PT Bank Century tbk, which underwent a controversial $700 million bail-out in 2008.

In the al-Warraq case, Indonesia argued that Article 17 of the OIC Agreement only provided for a state-to-state arbitration mechanism. The Tribunal rejected this interpretation, finding that it also permitted investor-state arbitration. Whilst the Tribunal recognised that the OIC Agreement provides for the establishment of an organ for settlement of any investment disputes arising under it, they observed that since no such organ had yet been established, ad hoc arbitration remained available in the interim. The Award enables al-Warraq to proceed with his claim, which stems from the nationalisation of his stake in an Indonesian Bank.

On 15 December 2014, the Tribunal in *Hesham al-Warraq v Indonesia* issued its Final Award,[8] setting out its views on the merits of the case. Notably, the Tribunal found that, by virtue of the most-favoured nation 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 bilateral investment treaty between the United Kingdom and Indonesia.

The Tribunal considered that Indonesia’s treatment of Mr al-Warraq’s investment had breached the fair and equitable treatment standard, although it declined to award damages because it also found that Mr al-Warraq had himself breached the OIC Agreement. Notwithstanding Mr al-Warraq’s failure to obtain damages, this result underscores the potential value of the OIC Agreement to investors, particularly now that there is established arbitral precedent to support the efficacy of the most-favoured nation clause.

Under the OIC Agreement decisions of tribunals are final and binding. 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, irrespective of whether that contracting party is party to the dispute. The agreement contains a so-called "fork in the road" provision, meaning that an

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[7] *Hesham al-Warraq v Indonesia*, UNCITRAL Award on Jurisdictional Objections, 21 June 2012

[8] *Hesham al-Warraq v Indonesia* UNCITRAL Final Award, dated 15 December 2014

investor is precluded from bringing simultaneous proceedings before an arbitral tribunal and national courts.
Scope

The OIC Agreement has a broad definition of the term 'investor', which includes any corporate person that is established in accordance with the laws in any contracting party and is recognised by the law under which its legal personality is established. Importantly, the OIC Agreement does not specify any requirements as to the nationality of the owner(s) of the company. This means, for example, that its protections will extend to contracting party incorporated subsidiaries of non-contracting party parent companies.

'Investment' is also broadly defined, encompassing any investment of capital in a state with a view to achieving a profitable return, where capital comprises everything that can be evaluated in monetary terms.

(ii) Substantive protections

On its face the OIC Agreement contains a relatively limited range of investment protections. Whilst it does provide for protection against measures amounting to a direct or indirect expropriation, 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, the treaty contains a most-favoured nation (MFN) clause, 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 (and possibly the dispute resolution procedures) in other investment agreements concluded by the host state.

(2) The Arab Investment Agreement

Unlike the OIC Agreement, the Arab Investment Agreement has a body established for the purpose of hearing disputes brought under it. The Arab Investment Court (AIC) is seated at the permanent headquarters of the League of Arab States in Cairo and 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).

(i) Dispute resolution provisions

The AIC has compulsory jurisdiction over disputes involving investors, who may initiate proceedings before the AIC without prior consent. The jurisdiction of the AIC is, however, subsidiary; 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. Judgments rendered by the AIC are final and binding and are enforceable in each of the contracting parties in the same manner as a judgment delivered by their national courts. It heard its first case in 2003 when *Tanmiah* – a Saudi Company – sued the Tunisian government.[9] In 2013, pursuant to an agreement to arbitrate under the Arab Investment Agreement, an arbitral tribunal rendered an award in favour of *Al-Kharafi & Sons Co* (Kuwait), ordering Libya to pay damages in the amount of US$ 930 million in connection with a dispute over a land leasing contract for a tourism project.[10] The Paris Court of Appeal upheld the award. [11]

Contracting parties may expressly agree to extend the AIC's jurisdiction to their investment agreements. Some inter-Arab bilateral investment treaties provide for recourse to the AIC, as do some national investment laws.

(ii) Scope

The criteria for benefitting from the substantive protections of the Arab Investment Agreement are far more stringent than those for the OIC Agreement. The Arab Investment Agreement protects "an Arab citizen who owns Arab capital which he invests in the territory of a State Party of which he is not a national." To qualify as an Arab citizen a corporate entity must not only be located in an Arab state but also be fully owned by Arab nationals. Furthermore, to fall within the scope of the Arab Investment Agreement the investment must contribute to the economic development of the host state or strengthen economic integration between the states.

(iii) Substantive protections

The protections offered by the Arab Investment Agreement are broadly comparable to those under the OIC Agreement. The Arab Investment Agreement does not contain a fair and equitable treatment clause, however it does offer protection against expropriation and contains an MFN clause. In addition, unlike the OIC Agreement, it provides that the host state must not treat an investor less favourably than domestic investors.

Unusually, the Arab Investment Agreement also imposes a number of obligations on investors. Amongst other things, investors are required to 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. Failure by an investor to observe such requirements may give rise to responsibility before the AIC.

Conclusion

[9] *Tanmiah v Tunisia*, Arab Investment Court 1/1 Q, IIC 238 (2006), 12 October 2006
[10] *Mohamed Abdulmohsen Al-Kharafi & Sons Co v Libya*, 22 March 2013
[11] *Libya v Mohamed Abdulmohsen Al-Kharafi & Sons Co*, Paris Court of Appeal, October 28 2014

Multilateral investment treaties between Middle Eastern countries have received little attention from investors until recently. Whilst the OIC Agreement and the Arab Investment Agreement have limitations, they nevertheless provide useful legal protections, particularly where an investor is unable to benefit from treaty protection under a bilateral investment treaty.

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Marwan is a member of the panels of arbitrators of the Dubai International Arbitration Centre (DIAC) and of the GCC Commercial Arbitration Centre in Bahrain and of the Chartered Institute of Arbitrators in London. He is also a member of ICC Lebanon’s Arbitration Group, ICC Arab Arbitration Group, the ICC Commission on Arbitration and ADR in Paris and its Task Force on Maximizing the Probative Value of Witness Evidence in International Arbitration and acted as Rapporteur of the Arbitration and ADR Committee of the Beirut Bar. Since June 2016, on the proposal of the Government of Lebanon, he has been appointed as member of the panel of arbitrators and conciliators of the International Centre for Settlement of Investment Disputes at the World Bank Group (ICSID) in Washington DC.

In addition, Marwan teaches courses on project finance law, international commercial law and dispute resolution in various Master programs at *Université Saint-Joseph* in Beirut, Lebanon) and at the Beirut Bar Institute. He is a Faculty Member of the Chartered Institute of Arbitrators in London (International Arbitration) and currently sits on its Education and Membership Committee. Marwan is the author of a monograph on “*Non-signatories, Third Parties and the International Arbitration Agreement*” and of several book chapters, articles, reports, studies, chronicles and case notes and speaks extensively on these subjects.

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Marwan has been listed as a leading expert in the field of arbitration by WhosWho Legal 2016 and Legal 500.