Investment Arbitration in the Middle East: A Brief Overview[1]

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Investment protection has become a linchpin of investment policies adopted by both developing and developed Middle Eastern jurisdictions over the past two to three decades. In the light of steadily diminishing oil reserves, the oil-rich nations in particular have become acutely aware of the need to attract foreign direct investment or FDI for their sustained economic development in a post-oil era. As a result, most Middle Eastern countries have concluded both bi- and multi-lateral investment treaties, i.e. BITs and MITs, as well as free trade agreements or FTAs of regional and international reach. Some, in particular Kuwait, Oman, Qatar, Saudi Arabia and the UAE have adopted foreign investment laws. Investment laws typically afford foreign investors a number of:

(i) basic, yet fundamental, *investment guarantees*, such as protection from expropriation, free transfer of the investment and repatriation of income; and

(ii) *investment incentives*, such as tax exemptions and exemptions from custom duties.

Despite their generally favourable, pro-investment language, these investment laws are not as advanced as competing BITs and MITs. Importantly, few of them contain provisions on equal and non-discriminatory treatment between local and foreign investors. In addition, not all of them provide for investor-State arbitration in the traditional sense of that term and to the extent that they do, there is a marked preference for arbitration ad hoc, i.e. outside a designated institutional framework.

By contrast, most countries in the Middle East have concluded a number of BITs, both with other MENA countries, so-called "intra-MENA BITs", and with countries further afield. Most of these BITs follow some form of a standard model and contain the following minimum substantive protections:

- Unlawful expropriation;
- fair and equitable treatment or FET;
- a guarantee of national treatment;
- free transfer of funds; and
- umbrella clauses, under which States must comply with their commitments or obligations undertaken in respect of the foreign investor, including the performance of contractual obligations and which allow a foreign investor to "elevate" a claim under an investment contract to the level of a claim under a BIT.

One of the principal procedural benefits afforded by these BITs is the foreign investor's right to resort to arbitration against the host State in the event of a dispute. Mostly, these BITs lay down a multi-tier dispute resolution procedure, providing for:

- Amicable dispute resolution in a first instance (whether through of negotiation, conciliation, consultation, or otherwise); and if no settlement is reached

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- Investor-State arbitration (under the ICSID Convention, UNCITRAL Arbitration Rules, or otherwise).

There are two main multi-lateral investment agreements for investor protection in the Middle East apart from membership of the ICSID Convention[2], which allows a foreign investor to resort to arbitration directly against an ICSID host State.

OIC Agreement

The OIC Agreement[3] has been in force since 23rd September 1986 and seeks to encourage mutual investment between its member States, guaranteeing the investment adequate protection and security in the host State. Similar to traditional BITs, it confers a number of substantive benefits upon qualifying investors, but is overall more limited in the protections that it offers. In summary, the OIC Agreement provides for:

- Protection from expropriation;[4]
- repatriation and free transfer of the invested capital and net proceeds flowing therefrom in any convertible currency at the rate fixed by the IMF;[5]
- a free right of disposal of the investment in whole or in part;[6]
- a right to compensation for any damage done to the investment by the host State by violation of any of the protective guarantees granted to the investor under the OIC Agreement;[7]
- national treatment in relation to compensation of any physical damage done to the investment as a result of civil unrest or violent acts of a general nature;[8] and
- most-favoured nation (MFN) treatment.[9]

Unlike traditional BITs, the OIC Agreement does not provide for an FET standard, nor a guarantee of non-discriminatory national treatment. That said, it has been found that the MFN clause in article 8 of the OIC Agreement entitles an investor to rely upon the FET standard contained in United Kingdom-Indonesia BIT.[10]

The investor is afforded a right to take recourse to the national courts of the host State or arbitration in the event of any complaints about measures adopted or the failure to adopt certain measures in the host State; recourse to one will foreclose recourse to the other (*fork in the road*).[11] Disputes arising from an investment under the OIC Agreement more generally are subject to conciliation and arbitration pending the establishment of the *"Organ for the settlement of disputes"*[12]. In the event that conciliation does not succeed, the parties are at liberty to resort to arbitration[13]. Each party will be entitled to the appointment of an arbitrator and the two party-appointed arbitrators will elect an *"umpire"*, who has a casting vote in the

[2] See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington, 1965.
[3] See Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference 1981.
[4] Art. 10, OIC Agreement.
[5] Art. 11, OIC Agreement.
[6] Art. 12, OIC Agreement.
[7] Art. 13, OIC Agreement.
[8] Art. 14, OIC Agreement.
[9] Art. 8, OIC Agreement.
[10] See *Hesham Al-Warraq v. Republic of* Indonesia, UNCITRAL Final Award, dated 15 December 2014.
[11] Art. 16, OIC Agreement.
[12] Art. 17, OIC Agreement.
[13] Art. 17(2), OIC Agreement.

event that the two party-appointed arbitrators fail to agree. Default appointments are the responsibility of the OIC Secretary General. The Tribunal's decisions are final and binding on the parties.

The body of case law precedent under the OIC Agreement is very limited. To date, there has only been one single reported case although it is possible that others are pending, concealed from the public eye, under the cloak of confidentiality. *Al-Warraq*[14] implicitly confirmed that article 17 of the OIC Agreement allowed an investor directly to proceed against a host State in arbitration and that investor safeguards granted by the OIC Agreement applied both to direct and indirect investments. As mentioned in Part 1, *Al-Warraq* also confirmed that the MFN clause contained in the OIC Agreement allowed to import FET protection from other, more favourable treaty sources signed by Indonesia, including relevant BITs. In addition, even though the tribunal found that Indonesia had committed various instances of denial of justice, it dismissed the investor's claims for FET protection given considerations of inequity ("clean hands" doctrine). The tribunal also denied claims of expropriation and the adequate protection and security standard under the OIC Agreement on the basis of the evidence before it (and in particular given that the measures adopted by the Indonesian Government qualified as a permissible preventive measure under article 10(2)(b) of the OIC Agreement).

Arab Investment Agreement

The Arab Investment Agreement[15] pursues objectives broadly similar to those of the OIC Agreement. Following its amendment in January 2013, the Arab Investment Agreement makes provision for the following minimum substantive protections:

- Protection from unlawful expropriation, whether direct or indirect;[16]
- national non-discriminatory treatment;[17]
- a right to FET;[18]
- free transfer of capital and revenues in a convertible currency recognised by the International Monetary Fund;[19]
- MFN treatment;[20]
- a right to fair compensation in the event of damage caused by the host State;[21] and
- a right to unimpeded entry to, residence in, relocation within and departure from the host State, including family members and to some extent staff.[22]

Under the Arab Investment Agreement, disputes are to be resolved by recourse to the Arab Investment Court (AIC)[23] unless the investor resorts to the national courts of the host State[24] or the parties have agreed to resort to alternative dispute resolution in the form of conciliation, mediation or arbitration instead[25]. Like the OIC Agreement, the Arab Investment Agreement also operates a fork in the road[26]. In the event that the

[14] *Ibid*.
[15] See Unified Agreement for the Investment of Arab Capital in the Arab States, signed in Amman, Jordan, on 26 November 1980.
[16] Art. 8, Arab Investment Agreement.
[17] Art. 5(2)-(3), Arab Investment Agreement.
[18] Art. 2, Arab Investment Agreement.
[19] Art. 6, Arab Investment Agreement.
[20] Art. 5(2)-(3), Arab Investment Agreement.
[21] Art. 9, Arab Investment Agreement.
[22] Art. 11, Arab Investment Agreement.
[23] Art. 22, Arab Investment Agreement.
[24] Art. 21, Arab Investment Agreement.
[25] Art. 24, Arab Investment Agreement.
[26] Art. 21, Arab Investment Agreement.

parties' chosen method to resolve a dispute fails, the AIC will be competent by default[27]. For the avoidance of doubt, despite the restrictive wording of article 24 of the Arab Investment Agreement, it has been found that the Arab Investment Agreement gives rise to investor-State – and not only inter-State – arbitration, dispensing with the need for a stand-alone arbitration agreement[28]. Finally, it should be cautioned that at the time of writing, the 2013 amendment to the Arab Investment Agreement has not yet entered into force, awaiting ratification by at least 5 member States in total. In its original, 1980 version, which presently remains in force, the substantive protections under the Arab Investment Agreement are limited to free transfer of capital, unlawful expropriation and national treatment[29]. Exclusive jurisdiction over disputes arising from the Agreement is granted to the AIC bar express agreement by the parties to conciliation and/or arbitration or failure of a tribunal to render an award within the prescribed time-limit[30].

The Arab Investment Agreement has given rise to a greater number of cases than the OIC Agreement although case law precedent overall remains limited. To date, there have been around six instances at least in which the Arab Investment Court (AIC) or a tribunal appointed under the Arab Investment Agreement has rendered a decision. A further seven have been reported to be pending at the time of writing.

In what is believed to be the very first reference to the AIC,[31] a Saudi investor brought proceedings against the Tunisian Government, in the person of the Tunisian Prime Minister, and the Committee of Organisation of Mediterranean Games (COMG), claiming compensation in a total amount of $68 million, including moral damages. In support of its application to the AIC, the investor alleged the nullification by the Tunisian local courts of the original arbitration clause contained in its marketing contract with the Tunisian authorities. In response, the Tunisian Government and the COMG raised jurisdictional objections, challenging the *locus standi* of the Tunisian Prime Minister, it being the Office of State Litigation that represented the Government in litigation before the courts pursuant to article 3 of the Tunisian Law No. 13/1988. The COMG challenged the investor's status as a person making a qualifying investment within the meaning of the Arab Investment Agreement. In any event, even if there was competent jurisdiction, Tanmiah had failed to make payments under the underlying contract and the COMG was therefore excused by virtue of the application of the principle *non adimpleti contractus*, which was a binding contract law principle throughout the Arab world. On the question of jurisdiction, the AIC found that given the silence of the Arab Investment Agreement on the subject, the AIC had discretion to decide on the point of proper representation on a case-by-case basis and concluded that in the present circumstances, the case was properly brought against the Tunisian Prime Minister. In addition, on the basis of Order No. 338/1997, the President of the COMG, who concluded the underlying marketing contract with the Saudi investor, did so under the authority of the Tunisian Prime Minister, which in turn bound the Tunisian Government and made it ultimately responsible for the execution of the contract. Further, the AIC found that there was an investment within the meaning of the Arab Investment Agreement given that the marketing contract was entitled "investment agreement", without, however, examining whether the investor's activities under the contract satisfied the requirements of investment under article 1 of the Arab Investment Agreement. On the merits, the majority of the AIC concluded that Tanmiah having failed in its own payment obligations, the Tunisian Government was excused on the basis of the application of the principle of *non adimpleti contractus* even though the President of the AIC found, in a dissenting opinion, that both parties were in breach of contract.

[27] Art. 24, Arab Investment Agreement.
[28] See *Hesham Al-Warraq v. Republic of Indonesia*, UNCITRAL Award on Jurisdiction, dated 21st June 2012.
[29] Arts 5 *et seq*., Arab Investment Agreement.
[30] Arts 25-27, Arab Investment Agreement.
[31] See *Tanmiah v. Tunisia*, decision of the AIC, 12 October 2004.

In a second case arising under the Arab Investment Agreement,[32] the AIC found that it lacked competence to hear the case on the ground that the expulsion of the Claimants was motivated by the Claimants' violation of drug regulations prevalent in the UAE. Upon review of the decision by the AIC pursuant to the Arab Investment Agreement, the Court found that Mr. Mustapha's end of service did not amount to an investment, nor did Mrs. Abdelhafedh's shop, restaurant and farm as they did not involve a qualifying transfer of capital contrary to the terms of the Arab Investment Agreement.

In *Lido Hotel Jizza v. Egyptian Minister of Finance*,[33] Lido Hotel Jizza - a partnership between Mrs. Aida Barakat, a Kuwaiti national, and Mr. Muhammad Barakat, an Egyptian national – brought a claim against the Egyptian Minister of Finance in his capacity as the Head of Customs for compensation, including moral damages, in a total amount of 1 million Egyptian pounds for civil and criminal actions initiated by Customs against Lido Hotel Jizza in relation to equipment imported from abroad for its hotel business. Dismissing the Minister of Finance's jurisdictional objections, the AIC found itself competent to hear the case on the basis of Mrs. Barakat's Kuwaiti nationality (even though Mrs. Barakat was, strictly speaking, not the claimant, but only a shareholder in the claimant). On the merits, the AIC found that there was no evidence that Customs had abused their right to litigate under Egyptian law.

In *Said Al Khoury in his capacity as Chairman of Consolidated Contractors Company v. The Arab League*,[34] the AIC declined jurisdiction on the basis that The Arab League did not qualify as a member State within the meaning of the Arab Investment Agreement, only disputes between investors and member States qualifying for resolution before the AIC.

In *Horizon Tourism Company v. Egypt*,[35] the AIC dismissed Egypt's jurisdictional objections on the basis that the owner of the Egyptian claimant company was a Saudi national and that capital for investment in the hotel project in dispute had been transferred from Saudi Arabia. The Court also rejected a "fork in the road" argument advanced by Egypt given that the claimant's election to resort to the local Egyptian courts was in relation to elements of the dispute that were not before the AIC. The case was subsequently reported as having been dismissed on the merits.

Finally, in *Mohamed Abdulmohsen Al-Kharafi & Sons Company v. Libya*,[36] which is believed to have produced the first arbitral award under the Arab Investment Agreement, a Kuwaiti investor, who had entered into a Built-Operate-Transfer (BOT) contract with the Libyan Tourism Development Authority in 2006 to establish a tourism complex in Egypt, was awarded $930 million in damages. This case sets an instructive example of how arbitration can serve as an alternative to proceedings before the AIC for the resolution of disputes under the Arab Investment Agreement. Subsequently, the Award was successfully enforced before the Egyptian courts[37].

FTAs

Some Middle Eastern countries, such as Bahrain and Oman, have concluded free trade agreements (FTAs) with countries outside the MENA. One of the most common contracting counterparties is the United States of America (US), Canada and a number of European countries.

[32] See *Munira Abdelhafedh and Rashed Mustapha v. United Arab Emirates*, decision of the AIC, 30 August 2006.
[33] Decision of the AIC, 21st August 2007.
[34] Decision of the AIC, 6 December 2010.
[35] Decision of the AIC, 27 April 2011.
[36] Award, 22nd March 2013.
[37] See decision of the Cairo Court of Appeal, 5 February 2014.

The FTAs with the US are essentially based on the US Model FTA[38]. These typically include the common minimum substantive protections known from other international investment agreements, such as unlawful expropriation and compensation, national treatment, FET, full protection and security, free transfers of all monetary investments and investment returns. FTAs with other countries contain similar provisions.

At the procedural level, FTAs typically provide for arbitration as a means to resolve disputes arising between an investor and the host State under them, following an unsuccessful process of consultation and negotiation. Arbitration may be initiated under the ICSID Rules, the ICSID Facility Rules or the UNCITRAL Rules (or any other rules the parties may agree). An FTA will usually include detailed provisions on the conduct of the arbitration procedure, including the transparency of the proceedings.

Conclusion

By way of conclusion, it is safe to say that international and regional investors can nowadays rely upon a range of instruments for the protection of their investments in the Middle East. The OIC Agreement and the Arab Investment Agreement stand out as specific to the region. Even though these have not always been interpreted in ways consistent with international investment law, they do offer promising avenues to qualifying international investors for recourse against Middle Eastern host States. In the history of international investment law, these instruments have remained comparatively muted, but deserve full attention by qualifying investors in their pending and future investment endeavours.

[38] See e.g. US-Oman FTA.