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Summary (in English) of article "Multilateral Investment Protection Agreements in the Middle East and North Africa: Two Little Known but Promising Instruments"

The article provides an analysis of the existing tools available to investors in the Middle East, given the recent investment boom that is still taking place in the area.

As far as these 'tools' are concerned, there are a number of investment protection treaties, most of which are bilateral treaties. There are also regional agreements that offer specifically Islamic and Arabic solutions.

Of note, and the main focus of the article, are the following regional agreements: the Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organisation of the Islamic Conference (the OIC Agreement) (**I**) and the Unified Agreement for the Investment of Arab Capital in the Arab States (the Unified Agreement) (**II**).

Although dating from the 1980s, these tools continue to provide protection to investors in a region that is notorious for its periods of instability.

The article analyses both agreements, and the protection offered to investors within each, notably in light of a recent arbitral tribunal award in *al-Warraq v. Indonesia*, where the applicable investment treaty was the OIC Agreement.

Through an analysis of the above-mentioned agreements, it can be said that the OIC Agreement and the Unified Agreement offer a series of procedural and substantive protections that may prove more beneficial than traditional bilateral investment treaties. However, investors need to be familiar with certain particularities of these instruments.

I. The OIC Agreement

The ambit of this agreement was brought to the forefront in the recent al-Warraq v. Indonesia arbitration. The decision of the arbitral tribunal has offered some insight into the protection afforded to investors by the OIC Agreement.

On the subject of the OIC Agreement, the article deals with the two following headings:

a. Interpreting the use of international arbitration
b. The protection granted by the OIC Agreement

(a) Interpreting the use of international arbitration

The decision provides some guidance relating to the use of international arbitration with regard to the OIC Agreement, notably:

i. The direct access to arbitrate against the host State that is open to investors
ii. The broad concept of 'investor' that has been drawn from the OIC Agreement

(i) Direct access of the investor to arbitration against the host State

There has been a discussion as to whether Article 17 of the OIC Agreement amounts to an arbitration agreement. It was held implicitly by the Arbitral Tribunal in *al-Warraq* that article 17 of the OIC Agreement does indeed offer investors a direct right of recourse to arbitrage against a State Party.

There exist no prerequisites to this right of recourse. The OIC Agreement contains a bifurcation clause, and as such, the exhaustion of domestic remedies before being able to arbitrate is not required. It is also of note that initiation of arbitration proceedings is not subject to the obligation to attempt conciliation.

The Tribunal went on to consider that, in conformity with the rules on treaty interpretation of Article 31 of the Vienna Convention, the language of Article 17 can be accepted by an investor without any separate agreement to arbitrate by the State party.

(ii) Broad concept of 'investor'

The OIC Agreement provides the following definition of an investor:

"the Government of one of the Contracting Parties or any natural or legal person belonging to a Contracting Party and having capital invested in the territory of another Contracting Party" (Article 1.6)

This reference to a public body is not unheard of in investment law; however, it is severely limited by the prerogatives of public authorities.

Article 1.6 states that physical persons must have the nationality of a Contracting State in order to qualify as an investor under the OIC Agreement, whereas legal entities are not subject to such a requirement; they must simply be established in conformity with the laws of a Contracting State. The above mentioned case dealt with a physical person, and as such no light was unfortunately shone upon this particular topic. However, it is interesting to note the contrast with international law, whereby even legal entities are affiliated with the notion of nationality (see the Barcelona Traction case).

Be that as it may, the award on jurisdiction in the al-Warraq case has significantly opened up access to international arbitration, making the OIC Agreement a complete instrument that provides for both clear dispute resolution mechanisms and investment protection provisions.

(b) Investments protection granted by the OIC Agreement

The protection granted by the OIC Agreement can be surmised from the following headings:

i) A protection for direct and indirect investments
ii) A lack of a fair and equitable treatment clause

iii) Obligations borne by the investor
iv) Extended protection against expropriation

(i) Protection of direct and indirect investments

Given that the OIC Agreement adopts a general definition of what constitutes an investment, the arbitral tribunal in *al-Warraq* held that both direct and indirect investments must be covered. This is not particularly exceptional; however, through the application of *al-Warraq*, it is clear that the protection afforded by the OIC Agreement has been extended to a wider range of economic operations.

(ii) Lack of a fair and equitable treatment clause

A particular feature of the OIC Agreement is that it does not contain a fair and equitable treatment clause. This noticeable absence must be borne in mind by investors.

That being said, this void can most often be filled by a most-favoured-nation clause, one of which is contained in the OIC Agreement.

By virtue of this clause, an investor may essentially 'import' a fair and equitable treatment clause from another treaty signed by the Contracting State, on the condition that the other treaty to which the investor refers relates to the same object.

In *al-Warraq*, the arbitral tribunal held that there were several BITs that Indonesia had signed and that contained fair and equitable treatment clauses.

Furthermore, the tribunal held that the definition of the standard of fair and equitable treatment must be observed through the prism of the 1966 International Covenant on Civil and Political Rights (ICCPR), which, although emblematic of human rights law, cannot be 'restricted' to this specific field and may apply to investment law:

> "The State Party undertakes to ensure that it does not cause any harm to the individual. It is the failure to honor this obligation that amounts to a violation of the principle of good faith. And the role of the Civil Society - a role played by international arbitral tribunals - is to keep the state in mind, and if the State has failed to do so, to so declare in its arbitral award."

Thus, the Arbitral Tribunal not only considered that the ICCPR was applicable in the field of investment law for assessing the fair and equitable treatment of the host State's treatment of the investor, but that the host state had to report any breach of the principle of good faith, due to a violation of the obligations of the ICCPR.

(iii) Obligations borne by the investor

The general rule that an investor involved in serious breaches of domestic law cannot rely on the protections afforded by investment protection instruments is not new by any means. However, the OIC Agreement differs from conventional investment treaties in that it contains provisions that explicitly impose obligations on the investor.

Article 9 of the Agreement states that:

> "The investor agrees to respect the laws and regulations in force in the Host Country and shall abstain from anything that is likely to disturb public order and morality and to undermine the public interest. It should also refrain from engaging in restrictive activities or making gains by illicit means."

Unfortunately, neither 'public order', nor 'morality' is defined by the OIC Agreement; therefore, we must refer to domestic law.

This particular article was brought to the forefront in the al-Warraq case as the claimant was accused of having certain bank irregularities. It was held by the arbitral tribunal that the host state has committed a flagrant denial of justice. However, the Claimant was prevented from pursuing his claim for fair and equitable treatment, as he had not come with 'clean hands'.

(iv) Extended protection against expropriation

Article 10 of the OIC Agreement provides relatively broad protection against expropriation. However, in *al-Warraq*, Indonesia's intervention had not had the effect of expropriating the investor of his investment

II. The Unified Agreement

This is another regional agreement, signed in 1980, and applies to Member States of the Arab League, except for Algeria and the Union of the Comoros.

Two particular areas are worth mentioning:

a. The creation of an Arab Investment Court
b. The protection available under the Unified Agreement

(a) The creation of an Arab Investment Court

Article 28 of the Unified Agreement provides for the creation of a permanent court whose aim is to deal with international investment disputes. It has a rather unique composition.

The existence of the Court itself calls into question the legitimacy of investment arbitration, given the ever-increasing number of investment arbitrations (notably ICSID arbitrat). There is even a large group of authors who advocate for the creation of permanent courts for investment disputes, in preference to investment arbitration.

The Court itself is an appeal body; the Unified Agreement offers a procedural guarantee against the risk of non-completion of the arbitration procedure. Its decisions are final and enforceable in the territory of the Contracting States of the Unified Agreement without the need for *exequatur*.

A recent example highlighting the finality of the Court's decisions can be seen in the al-Kharafi & Sons case.

The Unified Agreement also allows for the jurisdiction of the Court to be extended to other agreements, but only where this is agreed upon by both parties.

NB: An amendment to the Unified Agreement was adopted in 2013.

(b) Protection of investments under the Unified Agreement

It is worth studying the protection available under the Unified Agreement. The following shall be briefly discussed:

i. The definition of 'investor'
ii. The definition of 'investment'
iii. Obligations borne by the investor
iv. Fair and equitable treatment
v. Protection against expropriation
vi. Transfer of capital

(i) The definition of investor

An investor is defined by the Unified Agreement as follows: "an Arab citizen, who has Arab capital, invested in the territory of a Contracting State of which he is not a national".

This is a relatively restricted definition. However, the 2013 amendment has made the following modification: investors are only required to have 51 per cent Arab capital, as opposed to the previously required 100 per cent.

(ii) The definition of investment

Investment is defined by the Unified Agreement as follows: "the use of Arab capital in a developing economic sector, with the aim of obtaining a return to the territory of the Contracting Party, other than the State of which the investor is a national, or of transferring that return to a Contracting Party".

Once again, this is a relatively restricted definition. It is also worth noting that the notion of investment is linked directly to the economic development of the host State.

(iii) Obligations borne by the investor

Like the OIC Agreement, the Unified Agreement imposes obligations on the investor.

It is interesting to note that, under the initial text, in addition to an obligation to comply with the law, public order and morality, investors were required to participate in the economic development of the host state. As such the Unified Agreement clearly went considerably further than the OIC Agreement. However, this requirement has since been removed by the 2013 amendment.

(iv) Fair and equitable treatment

The text that was initially adopted in 1980 did not contain a clause on fair and equitable treatment. However, much like the OIC Agreement, the Unified Agreement contained a most-favoured-nation clause.

As such, it is entirely possible to import a fair and equitable treatment standard through the mechanism described above, much like in the al-Warraq case.

In addition, it should be noted that the 2013 amendment added a fair and equitable treatment clause.

(v) Protection against expropriation

Protection is more restrictive than that generally provided by BITs or even by the OIC Agreement, as expropriation is entirely possible, provided that there is 'just' compensation.

(vi) Transfer of capital

The 2013 amendment now provides that investors may freely transfer capital relating to their investments, with the exception of transfers in the context of banking services, without discrimination, taxation or time constraints, subject to their compliance with applicable law.

In conclusion, the OIC Agreement and the Unified Agreement offer a series of procedural and substantive protections that may prove more beneficial than traditional BITs. However, investors need to be familiar with the particularities of these instruments.

Multilateral treaties in the MENA region appear as an attractive, strong and viable alternative to national legislation and BITs.