

Protection of Outward UAE Foreign Investments under International Law

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1. Introduction

UAE investors have invested an enormous US\$55 billion into foreign markets over the past three decades, allowing the UAE to emerge as the largest Arab capital exporter, accounting for around one-third of Arab capital flows. The highest foreign direct investment ('FDI') outflows from the UAE were during 2006-2008, when they totalled nearly US\$41 billion. These outflows slowed in the following years to reach an average of US\$2 billion per year. Nonetheless, UAE FDI flows increased significantly to US\$ 4.4 billion in 2012.[\[1\]](#)

The key driver has been growth in intra-regional FDI in the Middle East, with recent reports of renewed investment by Gulf States in Egypt, while China, India and some Southeast Asian have become favoured destinations for UAE investors, who have also made significant investments into Europe.[\[2\]](#)

This investment activity is not without its risks, not least in the Middle East and North Africa, which has witnessed a wave of popular uprisings demanding freedom, jobs and social justice.[\[3\]](#) This article outlines the protection afforded under international and regional law to outward foreign direct investment by UAE nationals, companies and other entities in neighboring Arab States and elsewhere.

2. Bilateral and Multilateral Treaty-Based Protections

Investments by UAE nationals and entities, including sovereign wealth funds, are protected under international law as a result of a series of bilateral and multilateral treaties entered into by the UAE over the last three decades.

The UAE is a contracting party to the ICSID Convention and has signed 40 bilateral investment treaties ("BITs") with developed and developing countries, 29 of which are currently in force. The UAE has entered into BITs with:

- **Middle Eastern and African states**, including Algeria, Egypt, Jordan, Kuwait, Lebanon, Morocco, Mozambique, Sudan, Syria, Tunisia, Turkey, Yemen
- **European states**, including Austria, Belgium & Luxemburg, Czech Republic, Finland, France, Germany, Italy, Poland, Romania, Sweden, Switzerland, UK,
- **Asian states**, including China, Malaysia, South Korea, Vietnam
- **Eastern European/CIS states**, including Azerbaijan, Belarus, Mongolia, Tajikistan, Turkmenistan, Uzbekistan.

The UAE has also entered into a Trade Investment Framework Agreement (TIFA) with the United States (2004) to provide a framework for dialogue on economic reform and trade liberalization.

UAE BITs usually protect: (a) UAE nationals; (b) companies or enterprises constituted or organised under

UAE law; and (c) the UAE Government, where they have made an investment in the other Contracting Party's (or "host State's") territory (see, for example, the UAE-Austria BIT). UAE BITs do not share a common definition of the concept of an "investment", although the term is defined broadly in most BITs. UAE BITs also confer different degrees of investor protection according to their terms. However, generally speaking, most UAE BITs share the following common features:

- **Fair and equitable treatment (FET):** providing that each contracting party 'shall accord to investments by investors of the other Contracting State fair and equitable treatment' (Austria-UAE BIT).
- **Expropriation:** UAE BITs prohibit expropriation, although the relevant provisions vary.
- **Unreasonable, arbitrary or discriminatory measures:** UAE BITs prohibit government measures that are unreasonable, arbitrary or discriminatory and that impair or harm an investment.
- **Most-favored nation protection (MFN):** A number of the UAE BITs contain most-favoured nation (MFN) protection, whereby the UAE and the relevant contracting states agree to accord investments of their respective investors treatment no less favourable than the treatment which each accords to investments of its own investors or investors of any third state. In other words, if another State with whom the UAE has concluded a BIT affords preferential treatment to the investors of another State, UAE investors may claim such preferential treatment as well, where the relevant UAE BIT includes MFN protection.
- **Investor-State Dispute Resolution ("ISDS"):** Most UAE BITs provide for some form of dispute settlement mechanism between investors and the host State. In some cases, UAE BITs provide for international arbitration. For example, the UAE-Austria BIT provides that an UAE investor may refer an investment dispute to the International Centre for Settlement of Investment Disputes ("ICSID"), established pursuant to the Convention on the Settlement of Investment

Disputes between States and Nationals of Other States ("the ICSID Convention") provided that the UAE and Austria are parties to the ICSID Convention at the relevant time (which they currently are).

However, there are no general rules in relation to the settlement of investment disputes – for example, the UAE-Syrian BIT provides that "disputes relating to various aspects of Investments and related activities belonging to one of the two States or their nationals through conciliation or arbitration, recourse to the Arab Investment Court [AIC]...", which was established by the Unified Agreement mentioned above, as well providing for recourse to the local judiciary in a number of specified circumstances.

The AIC system differs significantly to ICSID arbitration (mentioned above): (a) whereas ICSID tribunals are appointed on an ad hoc basis, the AIC is seated at the permanent headquarters of the League of Arab States in Cairo; (b) whereas ICSID tribunals are largely composed of a mixture of practicing and academic lawyers, the AIC 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); and (c) whereas AIC judgments are final and binding, ICSID awards may be annulled. On the other hand, final and binding ICSID awards and AIC judgments alike are enforceable in each of the contracting parties in the same manner as a judgment delivered by their national courts.

In addition to the foregoing BITs, the UAE is a party to various multilateral agreements,^[4] as follows:

- ***The Convention on the Settlement of Investment Disputes between States Hosting Arab Investments and Citizens of Other States (1974):***

The 1974 Convention was ratified by numerous Arab countries, including the UAE, pursuant to UAE Federal Decree No. 36 of 1977 and entered into force on the 16 April 1977 (although the 1974 Convention has been superseded by the 1980 Unified Agreement for the Investment of Arab Capital in the Arab States). The Convention was modeled on the ICSID Convention and was intended to settle any legal dispute that may arise directly out of an investment between an Arab host State or any of its local agencies or corporations and the citizens of another Arab State whether an individual or corporate entity in order to provide a suitable climate that would stimulate Arab investment in Arab States. .

• ***Unified Agreement for the Investment of Arab Capital in the Arab States (1980):***

The Unified Agreement was signed on 26 November 1980 and entered into force on 7 September 1981. This Agreement established an Arab Investment Court, open to States and investors. The Court heard its first case in 2003 by a Saudi company, Tanmiah, against Tunisia. The Court agreed to hear the case and gave its decision on 12 October 2004.^[5] The Court has now seven cases pending where Arab investors have filed complaints against other Arab States. As noted earlier, some UAE BITs provide for recourse in investor-State disputes to the Arab Investment Court.

The Unified Agreement was amended recently in 2013.^[6] Among other things, the amendments expanded the scope of investors covered by the Agreement, such that the investor is only required to own “Arab capital” which the investor “invests in the territory of a State Party of which it is not a national, provided that the Arab investor holds directly at least 51% of the share capital”.

In addition, the amendments introduce a broad and unqualified Fair & Equitable Treatment provision, while removing limitations on the free transfer of capital, and an investor obligation to refrain from actions which might violate public order, morality or involve illegitimate gains.^[7]

The amended treaty is silent on its relationship with intra-Arab BITs. So while it is possible that Unified Agreement may be amended in time to consolidate the complex network of over 100 intra-Arab BITs in existence, it is to be assumed that such intra-Arab BITs continue in force in the meantime.

It is important to note, however, that the new version of the Unified Agreement (similar to the 1980 version) does not give prior State consent for investor claims to be brought to international arbitration.

• ***The Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Cooperation (“OIC Agreement”)(1980):***

The OIC agreement was approved and opened for signature in June 1981 and entered into force on 23 September 1986. It has been ratified by numerous Arab countries, including the UAE, Egypt, Libya, Morocco, Tunisia and Yemen. This agreement was the first multilateral agreement to afford foreign investors the right to initiate arbitration against their host country (in the event that the parties fail to settle their dispute by conciliation) – long before other treaties, such as the North American Free Trade Agreement or the Energy Charter Treaty, did so.

However, it wasn’t until recently, especially after the so-called “Arab Spring”, that claims were brought under the OIC Agreement. In June 2012, an arbitral tribunal constituted under the OIC Agreement held that the OIC Agreement contains an offer by each contracting party to arbitrate disputes with investors of another contracting party, entitling the latter to accept such an offer by simply commencing arbitration proceedings against the host state.

3. Conclusion

Investment arbitration and access to international courts in investment matters is an established practice in the Arab world under the foregoing bilateral and multilateral agreements. However UAE investors (and indeed foreign investors in the Arab region) may be unaware of the far-reaching investment protections and remedies such treaties can provide.

With the recent developments in the Arab region, especially the political events witnessed in Egypt, Libya, Syria, Tunisia, and Yemen, the protections afforded by these multilateral and bilateral agreements are set to play an increasing role, especially where post-revolution governments revoke investment contracts concluded by former regimes.

It is timely, therefore, for UAE investors (and indeed foreign investors in the Arab region), be they private investors or sovereign funds, to review with their legal advisors the extent of protections afforded to them

in relation to outward foreign direct investments in the Arab region and further afield, having regard to the persistent global crises and pressing financial, social and economic challenges faced around the world.

[1] UAE Yearbook 2013 (published by the National Media Council).

[2] UAE foreign direct investment has been led by the UAE's largest institutional investors, sovereign wealth funds, including The Abu Dhabi Investment Authority, Mubadala Development Company, and Abu Dhabi National Energy Company (TAQA).

[3] Hamed El-Kady, "The Amendments to the 1980 Arab League Investment Agreement: Implications on the Right to Regulate Investment in Arab Countries", *Transnational Dispute Management*, April 2014 ("El-Kady").

[4] In addition to the agreements listed below, the UAE is a party to the GGC Unified Economic Agreement (1981), but this contains no substantive rules on investment protection.

[5] For more details on the Arab Investment Court and its first decision, see Ben Hamida, "The First Arab Investment Court Decision", in *The Journal of World Investment and Trade* Vol. 7 No. 5 October 2006.

[6] See El-Kady, above.

[7] *Ibid.*