Protecting foreign direct investment in the Middle East through investment treaties and international arbitration

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In our increasingly interdependent world, further development of any state's economy is reliant on attracting foreign direct investment (FDI). The Middle East is no exception. Attracting FDI is important for states like the United Arab Emirates (UAE), which has been a reliable destination for capital flows originating in and well beyond the Middle East, in order to grow an already robust economy. It is also essential for states like Iraq and Syria, which have been subjected to the crippling effects of war, as they must rebuild their economies.

Investors may take a myriad of factors into account when considering destinations for their investment – size of economy, population, and gross domestic product to name a few. Ultimately, they will decide on the basis of a risk and return trade-off. However, when investing in any economy – be it the Middle East or beyond – foreign investors are keen to protect their investments to the extent possible. In addition to the risks that come with war, insurgency, social unrest, economic crises, and other forms of instability, the value of an investment can be impacted by state-imposed measures, separately or in combination, that can have the effect of so-called indirect or creeping expropriation through the introduction of laws, regulations, taxation measures, or imposition of tariffs. Alternatively, states may treat certain FDI less favourably than promised which, potentially, may lower its value.

When making and managing investments in the Middle East, foreign investors should not overlook the protection that may be accorded to them or their investments under international investment treaties, in particular bilateral investment treaties (BITs) and multilateral investment treaties (MITs). Investors should recognise that investing in the absence of adequate investment treaty protections will make it far more difficult to recover the value of the investment if things go wrong as a result of state action (or inaction in certain cases).

The Growing Prevalence of Investment Treaties

A BIT is the most common form of international investment agreement with over 3,000 BITs in force around the world today. A BIT is an agreement concluded between two states establishing the terms and conditions for investment by nationals and companies of one (home) state in the territory of another (host) state.

The Middle East's recognition of the importance of BITs in attracting foreign investments is reflected in the growing number of concluded BITs. For example, states comprising the Gulf Cooperation Council have signed in excess of 285 BITs, almost 70% of which are already in force. In the last five years, the UAE has concluded a further 12 BITs (bringing the total number of signed UAE BITs to 57 of which 36 have been ratified) with the following states: Benin, Ethiopia, Greece, India, Kenya, Kyrgyzstan, Mauritius, Mexico, the Netherlands, Nigeria, Serbia, and Slovakia.

In addition to BITs, many states in the Middle East are parties to MITs that are also aimed at according protection to investors (and generally operate similar to BITs except that they are entered into by more than just two states). These MITs include the Unified Agreement of the Investment of Arab Capital in the Arab States and the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Cooperation.

The Energy Charter Treaty (ECT) is another international agreement that establishes a multilateral framework for cross-border cooperation in the energy industry. Originally created to facilitate flow of investments from Western Europe into the energy sector of Russian and the CIS states, the ECT is currently going through a modernization process aimed at attracting states outside Europe, Russia, and the CIS. Presently, no Middle-Eastern state is a contracting party to the ECT. However, Jordan, Morocco, Palestine, Syria, and Yemen (as signatories to the European Energy Charter of 1991), and Iran, Iraq and the UAE (as signatories of the International Energy Charter of 2015) are observers of the Energy Charter Conference – a governing decision making body for the Energy Charter process. These states thus may have a potential interest in becoming contracting parties to the ECT at some point in the future. Recently, the Energy Charter Secretariat's outreach team has been active in the Middle East.

Protections Afforded Under Investment Treaties

In order to access any of the protections available under a BIT, an investor first will be required to prove that both it and its investment satisfy the definition of "investor" and "investment" respectively pursuant to the relevant BIT. Not all apparent investors and investments will satisfy these definitions, which may vary from BIT to BIT.

A typical BIT includes provisions on the standards of treatment that such nationals or companies of one state can expect from the other state. The prevailing treatment standards and other protections in modern BITs concluded by Middle-Eastern states are:

- Fair and equitable treatment (FET): FET is a broad standard of treatment (determined by reference to specific circumstances of application and wording of a particular treaty, its context, negotiating history, and other considerations) that encapsulates various principles that generally require a state to (a) provide a transparent and stable legal framework consistent with an investor's reasonable expectations, (b) comply with contractual obligations, (c) afford procedural fairness and due process, (d) act in good faith, and (e) not coerce or harass investors;
- Full protection and security: A standard that requires host states to take reasonably-expected protective measures to ensure the physical integrity of an investor's property;
- National treatment: A state must accord treatment to foreign investors that is no less favourable than that accorded to its domestic investors;
- Most-favoured-nation treatment: A state must accord treatment to foreign investors no less favourable than that accorded to investors from any third country;
- Prohibition on expropriation without compensation: A host state must provide prompt, adequate, and effective compensation if it expropriates an investor's property; and
- Prohibition on unreasonable, arbitrary or discriminatory measures.

Dispute Resolution Under Investment Treaties

Should an investor consider itself or its investment mistreated as a result of a state violating one of the above mentioned standards or protections (whose scope may vary from treaty to treaty), most BITs provide a method for resolving such grievances – investor-state dispute settlement (ISDS). The ISDS mechanism provided in most BITs overwhelmingly provides a standing offer by host states to resolve differences with investors by way of arbitration. An investor may accept the host state's offer simply by commencing arbitration in accordance with the relevant provision(s) of a BIT.

The most common form of investment treaty arbitration found in ISDS provisions is arbitration through the International Centre for Settlement of Investment Disputes (ICSID), which is part of the World Bank and based in Washington, D.C. ICSID arbitration is available to an investor if that investor's home state and the host state are parties to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). There is a significant likelihood of this being the case as the ICSID Convention has been ratified by 153 states, including most of the countries in the Middle East: Bahrain, Egypt, Iraq, Jordan, Morocco, Oman, the Kingdom of Saudi Arabia, the UAE and Yemen.

One of the attractive features of ICSID arbitration for investors is the robust enforceability of ICSID awards. Under Article 54(1) of the ICSID Convention, which regulates ICSID and awards rendered by it, "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." This standard is even more stringent than the standards relating to the recognition and enforcement of commercial (and non-ICSID investment treaty) arbitration awards under the New York Convention of 1958.

Conclusion

The numerous investment treaties concluded by Middle-Eastern states provide treatment standards and ISDS mechanisms beneficial for the protection of qualifying investors and their investments. Thus, it would not be prudent to make investment decisions without considering the application of such international instruments and indeed it behoves investors to review and analyse the relevant investment treaties before making their investments. Such a review will inform the investors' decision on the optimal way of structuring the investment to prevent or, at the very least, limit any potential adverse effect on the value of the investment.