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Investment Dispute Settlement Body of the Organisation of Islamic Cooperation: A Dead End for Claims under the OIC Investment Agreement?

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As part of International Investment Law and Policy Speaker Series, on November 14, 2019, the Columbia Center on Sustainable Investment hosted Dr. Mouhamadou Kane, Project Lead and Manager for the Organisation of Islamic Cooperation ("OIC") Investment Dispute Settlement Organ. During the program, Dr. Kane explained the text of a draft investment protocol for the OIC Investment Dispute Settlement Organ, which is not yet available publicly. He anticipates that the protocol will be adopted by foreign ministers of OIC Member States in March 2020. Once adopted, the protocol will provide an institutional mechanism for investor-State dispute settlement ("ISDS") among the OIC Member States. OIC's efforts to reform the *ad hoc* arbitration mechanism under the OIC Investment Agreement aim, among other things, to limit investors' access to arbitration and address concerns for transparency of proceedings and accountability of arbitrators. This blog post provides background information on the OIC Investment Agreement, explains the structure of the proposed Investment Dispute Settlement Organ and conveys the authors' views on the future of ISDS within the OIC.

Background of the OIC Investment Agreement

Adopted in 1981 and effective since 1988, the OIC Investment Agreement is a so-called old-generation international investment agreement. Signed by 36 OIC Member States and ratified by 29, the treaty provides for several classic investment protections, such as prohibition of unlawful expropriation, protection and security and most favored nation treatment. It also includes an *ad hoc* investor-state arbitration provision (Article 17), which will operate "[u]ntil an Organ for the settlement of disputes arising under the Agreement is established."

Due to the general unawareness as to the very existence of the agreement (notably, OIC made the text available on its website only in 2009),[1)] the first known OIC investment arbitration was initiated only in 2011 by the Saudi businessman Hesham Al-Warraq against Indonesia ("Al-Warraq"). Amusingly enough, Dr. Kane disclosed

that, unaware of the existence of the OIC Investment Agreement, in 2011, he himself made a proposal for the adoption of a multilateral investment agreement among OIC Member States.

Since Al-Warraq, approximately ten investors have initiated arbitrations under the OIC Investment Agreement. In some of these cases, respondent States refused to appoint arbitrators and the OIC Secretary-General, the appointing authority under the OIC Investment Agreement, refrained from assisting the constitution of tribunal, reportedly because of the lack of time limits for appointment and supposed political pressure from some OIC Member States, which claimed that they had not consented to arbitration under the treaty. As a result, the Permanent Court of Arbitration intervened in several proceedings as appointing authority upon claimant's request, as discussed in a prior blog post.

A major development came in April 2019, when Investment Arbitration Reporter reported that OIC Member States had made progress toward establishing a permanent dispute settlement organ, in part because of their concerns arising out of increasing numbers of OIC arbitrations.

The Proposed Structure of ISDS through the OIC Investment Dispute Settlement Organ

The new ISDS mechanism set out by the draft protocol requires an aggrieved investor to go through several intermediary steps before it may commence investment arbitration proceedings. As Dr Kane explained, this structure is consistent with the rationale of the draft protocol, namely to reduce the number of cases brought against the OIC Member States. Investors who wish to bring claims under the OIC Investment Agreement will first be required to exhaust local remedies in the domestic courts of the host State until a final decision is reached. After having done so, the investor would be entitled to file a denial of justice claim against the State. This would begin a State-to-State amicable settlement process. Only if this process fails the investor will be entitled to commence an investor-state proceeding before the First Instance Panel. After those proceedings have concluded and an award is rendered, the First Instance Panel's award could be challenged before the Appellate Committee. Members of the First Instance Panel and the Appellate Committee would be appointed by the OIC States, and the appointees may include citizens of non-OIC states. Only after the two-tier dispute settlement process is concluded will the decision become final and enforceable. A secretariat for the Dispute Settlement Organ will be established to support the parties and the tribunal throughout the entire process.

It is anticipated that, at the ministerial level, a separate policy forum will have the mandate to issue binding interpretations of the substantive provisions of the treaty. The draft protocol also envisages the establishment of an independent advisory center that will offer legal assistance to respondent Member States and will potentially provide capacity building advice in dispute prevention and management. Lastly, Dr. Kane reported that the issues of third-party funding and frivolous claims will be regulated by the rules of the Dispute Settlement Organ and not by the draft protocol.

The Path Towards a Comprehensive OIC Dispute Resolution Mechanism

In the upcoming months, the 57 OIC Member States will negotiate the draft protocol which will be adopted – with or without modifications – at the March 2020 meeting of the Council of Foreign Ministers. While the country that will host the Dispute Settlement Organ's seat has not yet been decided, Dr. Kane explained that one option that the OIC is currently contemplating is to affiliate the organ to the Islamic Development Bank based in Jeddah, Saudi Arabia, an arrangement that could be considered akin to the relationship between the World Bank and the International Centre for Settlement of Investment Disputes (ICSID).

The proposed Dispute Settlement Organ is not the only example of the OIC's recent efforts to reform international dispute resolution mechanisms among OIC Member States. The OIC is also in the process of establishing the OIC Arbitration Center in Istanbul, which will handle commercial arbitration disputes between the business entities of OIC Member States. The OIC Arbitration Center is also expected to administer investment arbitration claims that do not arise out of the OIC Investment Agreement, such as those under bilateral investment treaties between OIC Member States that may refer to the center as a possible forum.

The Future of OIC Investment Agreement Disputes

As emphasized by Dr. Kane, the reform proposal addresses sovereignty, legitimacy and capacity concerns affecting ISDS. While these concerns are also currently under the scrutiny of the UNCITRAL Working Group III, Dr. Kane highlighted that the reform proposal for the OIC Investment Dispute Settlement Organ constitutes a "South-South" contribution to ISDS, and promised an early implementation of these reforms.

The proposed OIC ISDS mechanism represents an important step in modern ISDS reform and echoes certain recent developments in this field (see, *e.g.*, the investment agreements concluded by the European Union that provide for two-tier mechanism composed by members appointed by contracting parties). However, the mechanism significantly restricts access to OIC investment arbitration and will likely dissuade investors from invoking the OIC Investment Agreement in the first place. On the one hand, exhausting local remedies and going through the State-to-State amicable settlement process may constitute an overlong exercise for most investors. On the other, the requirement for an investor to present a denial of justice claim might result into an unsurmountable gateway for most claims.

Further, it may be argued that these restrictions exceed the mandate to establish a permanent organ under Article 17 of the OIC Investment Agreement and would *de facto* amend the treaty without the required approval of four-fifths of the Member States to the treaty.

It will be interesting to observe if and to what extent Member States will confirm the

current draft protocol and whether the final version will clarify the regime to which pending arbitrations will be subject following the establishment of the Dispute Settlement Organ. As things stand, however, future OIC investment claims will hardly pass the hurdles of the proposed dispute settlement mechanism.

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References

↑1 Walid Ben Hamida, 'A Fabulous Discovery: The Arbitration Offer under the Organization of Islamic Cooperation Agreement Related to Investment' (2013) 30 Journal of International Arbitration 637, 639.

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