Iraq May Have Energy, But Can It Meet Agility with Resilience?

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Three decades, two wars, one occupation, and multiple democratic elections later, I found myself back in my country of birth, Iraq, in April 2017. I was invited to Baghdad by the Iraq Energy Institute (IEI) as a speaker at the 2017 Iraq Energy Forum (**IEF**), under the patronage of the Iraq government and the Iraq Ministries of Oil and Finance. The IEI is a non profit advisor to the Iraqi government on energy matters. Given the high proportion of foreign investors' interests in Iraq's mineral resources and the state's recently assumed international and contractual obligations under international bilateral and multilateral treaties for the protection of investments, it was a decisive moment at which to address an audience composed mainly of international oil companies, banks and government ministers on the legal risks of investing in Iraq.

And some investors don't waste time when they get burned. One year after Iraq's ratification of the 1965 Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (**ICSID Convention**), there are now two claims against Iraq. Hot on the heels of the pending claim by telecommunication company Agility Public Warehousing Company K.S.C.(**Agility**) against Iraq under the Kuwait-Iraq bilateral treaties of 1964 and 2013, I have learned that a new case has just been filed against the state in the same sector, this time by a different Arab investor under two treaties. The name of the company cannot be disclosed, but will likely appear on ICSID's site in due course if it is accepted. The floodgates have been opened; it remains to be seen whether other well-advised investors will know how to navigate through them.

A week before the IEF, a colleague and I conducted workshops on investment arbitration for Iraqi postgraduate business students as part of an annual diploma course, the Iraq Public Policy and Leadership Programme at the American University of Sharjah (currently sponsored by Crescent Petroleum). There, we sought to impress that there is a big difference between business confidence and legal confidence. I repeated this at the IEF, because it cannot be stressed enough. Business confidence is to do with having faith in the mechanics and economics of a project and those involved. Legal confidence is about having confidence in the regulatory framework surrounding the project and the ability to enforce one's rights if unexpected or unpalatable events happen. Lawyers should not be there to add more red tape and prevent you carrying out projects, but to assist you to get things done. If they're not, then you had better change your lawyer.

All developing countries with exploitable mineral wealth have different legal, cultural, and political structures. But they share one thing in common: the need to reassure foreign investors that the legal terrain is safe enough for them to enter and invest. As we know, these are long term projects in which there are a lot of sunk costs, the rewards for which will only be gained years later. Reduced security drives up expectations of return. Less legal risk equals greater negotiating power for Iraq. Iraq has

recognised this and has embarked on a course of reassuring investors through a sort of international treaty signing bonanza in recent months, with the the Convention Establishing the Multilateral Investment Guarantee Agency (**MIGA Convention**) and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (**Mauritius Convention on Transparency**) now activated. But this course can lead to problems of its own for Iraq, whose accountability is now triggered. Advising on dispute resolution is not just about fighting fires when differences arise. More often than not, and often in Iraq's case, it is about preparing for the battle and getting your ducks in a row, before a dispute crystallises.

Iraq's largest source of wealth is its oil resources

It is a well-known fact that since the 1950s, mineral wealth has been crucial to Iraq's development. Iraq is the fourth largest oil exporter and holds the fifth largest oil reserves. Yet we cannot ignore the cracks that are appearing. One of these is the emergence of competition from Iran, the unlocking of energy in North America through advanced extraction technologies, the reduced influence of OPEC, and the effect of falling oil prices. In addition, Iraq's oil wealth could be much better exploited in a sustainable way. Poor governance has led to a situation of dependence on oil. According to the most recent World Bank report, Iraq's reliance on oil revenues translates to 58 percent of the country's GDP, 99 percent of its exports, and more than 90 percent of central government revenue in 2015.

The Iraqi Investment Law of 2006 (as amended)

Before turning to the international regime as it applies to Iraq, we start with the country's own national laws. Before Saddam Hussein's overthrow in 2003, non-Iraqi foreigners were not allowed to invest directly in Iraq through shareholding or direct control of Iraqi-incorporated companies. This changed when foreign direct investment was permitted after 2003. Unsurprisingly, while many other laws did not receive much attention, after the upheaval of the political regime in Iraq, the laws that were updated and amended by the Bremer administration included the investment laws. The aim was to align these laws with Iraq's commitment to make necessary reforms to improve its business climate, making it more attractive to foreign investors.

Applying on a federal level, the Iraq Investment Law 2006 (as amended) (IIL) is the domestic law that regulates foreign investment in everything except the petroleum and banking and insurance sectors in Iraq. These are two important carve-outs. However, it is not inconceivable that the IIL will be updated in future to include these sectors, at the pressure of the oil companies, banks and insurance companies. Apart from this restriction, the scope of the IIL is wide: the definition of investment under Article 1 is "the investment of capital in any economic or service activity or project that results in a legitimate benefit for the country". Under Article 10, foreign investors are to have the same rights and privileges as Iraqi nationals. This provision, independently of any contract the public sector may have signed with a foreign investor or anything contained in a generic bilateral treaty, gives a foreign investor a basis in Iraqi law for the expectation that the investment will be treated fairly and without discrimination.

Iraqi bilateral investment treaties

What happens if the nature of a dispute falls outside the scope of the IIL (such as petroleum disputes) or the IIL does not contain adequate protection (for instance, the weak dispute resolution mechanism the IIL is known to have)? We can, if we meet certain relevant criteria, turn to bilateral investment treaties for financial recourse.

As far as I am aware, there are two bilateral investment treaties in force between third states and Iraq: with Kuwait and Japan. Possibly also Jordan; the status is unclear. A recent article by a Dubai-

based international law firm incorrectly referred to others (Germany and Belarus) having been ratified by both state parties but upon further verification these treaties are still dormant. In relation to the German BIT, upon enquiry, the German Ministry of Justice earlier this week confirmed that "*the treaty did not come into force after the responsibilities for all trade and investment agreements were taken over by the European Commission*". The government communication also confirmed that while Germany was re-authorized to ratify the treaty by the European Commission (as the negotiations pre-dated the Lisbon treaty), the ball was now in Iraq's court to decide whether certain amended clauses (which needed to be brought in line with EU requirements) were acceptable. The same is likely to be true of the other BITs that Iraq has signed with European countries, including France, Italy, Belgium and others, according to the Chairman of Iraq's National Investment Commission (**NIC**), who is the delegate of the Iraqi cabinet in this area. We shall have to wait and see.

Before the ICSID Convention was ratified, treaties were disused because the method of enforcement was uncertain, with Iraq having neither ratified the New York Convention nor the ICSID Convention. Iraq's ratification of the ICSID Convention has unlocked the power of the investment treaty protections, for better or for worse. The filing of a claim between the Kuwaiti subsidiary of Agility, a telecommunication company, and Iraq at ICSID earlier this year under the 2013 Kuwait BIT should have come as no surprise. At the time of writing, as mentioned above, I understand that there is a second claim to be filed at ICSID by another company, under different treaties. With other treaty ratifications on the horizon, there will be more claims down the line. There is expected to be a halt in the current 'signing spree' of treaties at the government level. But the awareness might have come too late. Deferment is only a temporary remedy, akin to trying to slow the spread of cancer.

Do bilateral investment treaties in fact attract foreign direct investment (FDI)?

Before the year 2000, investment treaties were thought to be relatively innocuous and likely to be used in only rare circumstances. By the end of 2010, this was no longer the case: treaty arbitration was becoming a commonly used tool for dispute settlement. Further, even if investors want to continue a business relationship, arbitration can be threatened to show they do in fact mean business.

As I outlined in a previous KAB post, it is surprising that Iraq ratified the ICSID Convention, or signed the various treaties it has, rather than taking what is likely to be the less economically impactful and more commercially advantageous route of entering into the New York Convention of 1958. Recent statements from the Chairman of the NIC have revealed that it is likely to have been in some part because of external investor pressure. However, it remains the case that there is no evidence that investment treaties attract FDI, or significantly more FDI such as to justify their onerous implications for host states. On the contrary, in fact. In 2003, the direct relationship BITs enjoyed with increasing investment flows was called into serious question with a study released by a World Bank economist. The study suggested that any effect of BITs in attracting investment into developing countries was at best minimal, and more likely did not exist. This was confirmed by later studies. There are many examples of countries with large FDI inflows and few, if any, BITs. Brazil, for instance, has been attracting FDI for years and it has never been a member of ICSID. The benefits of treaties from the Iraqi government perspective are, therefore, questionable and should be re-evaluated.

Why is the ICSID Convention important in Iraqi cases?

The usual investor protections guaranteed under Iraq's investment treaties (such as expropriation, FET, MFN and full protection and security) can now be given real force by international tribunals constituted under ICSID. They used to be dogs with a bark and no bite, because the courts of Iraq (where most of Iraq's assets are located) have get out of jail free cards under its arbitration law, from enforcing large awards against Iraq. ICSID takes the keys of enforcement away from the State courts

and into a private sphere in which arbitral awards cannot be appealed, and can only in very limited cases be annulled by an ad hoc ICSID committee.

It matters if Iraq does not comply with an award because there will be singeing consequences at the levels of the International Monetary Fund and the World Bank, under whose auspices ICSID functions. Iraq relies heavily for support on these institutions. IMF loans are important for Iraq, as well as the World Bank Iraq Trust Fund. Although it is now classed by the World Bank as a middle income country who borrows, and therefore no longer qualifies for International Development Agency aid, or the International Reconstruction Fund Facility of $1 billion, as it used to, there are still some grants that Iraq can access where it can justify it for specific World Bank projects, through other ad hoc trust funds. Therefore, politically and diplomatically, non-compliance with an ICSID award will have repercussions for Iraq's relationship with these entities.

Negotiation of future treaties with Iraq

Given Iraq's ratification of the ICSID Convention, and the importance of the substantive protections under bilateral investment treaties, the negotiation and drafting of future Iraqi bilateral treaties is extremely important. Treaty arbitration is a matter about which Iraq cannot afford to be complacent. Similarly, investors with potential claims are well advised to seek advice on their options from lawyers who are both culturally connected with the region and experts in the specialist issues concerned. Shrewd and well-advised foreign investors will increasingly start to capitalise on the benefits of treaty arbitration in all manner of cases under which a project could conceivably fall under the scope of the definition of 'investment'. Whether these claims will succeed or fail may come down to a simple matter of language, and words said here and there.