Centre for Energy, Petroleum
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University of Dundee

Most Favoured Nations in the Middle East and North Africa: A treaty shopping paradise for foreign investors or *caveat emptor*?

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Research Paper

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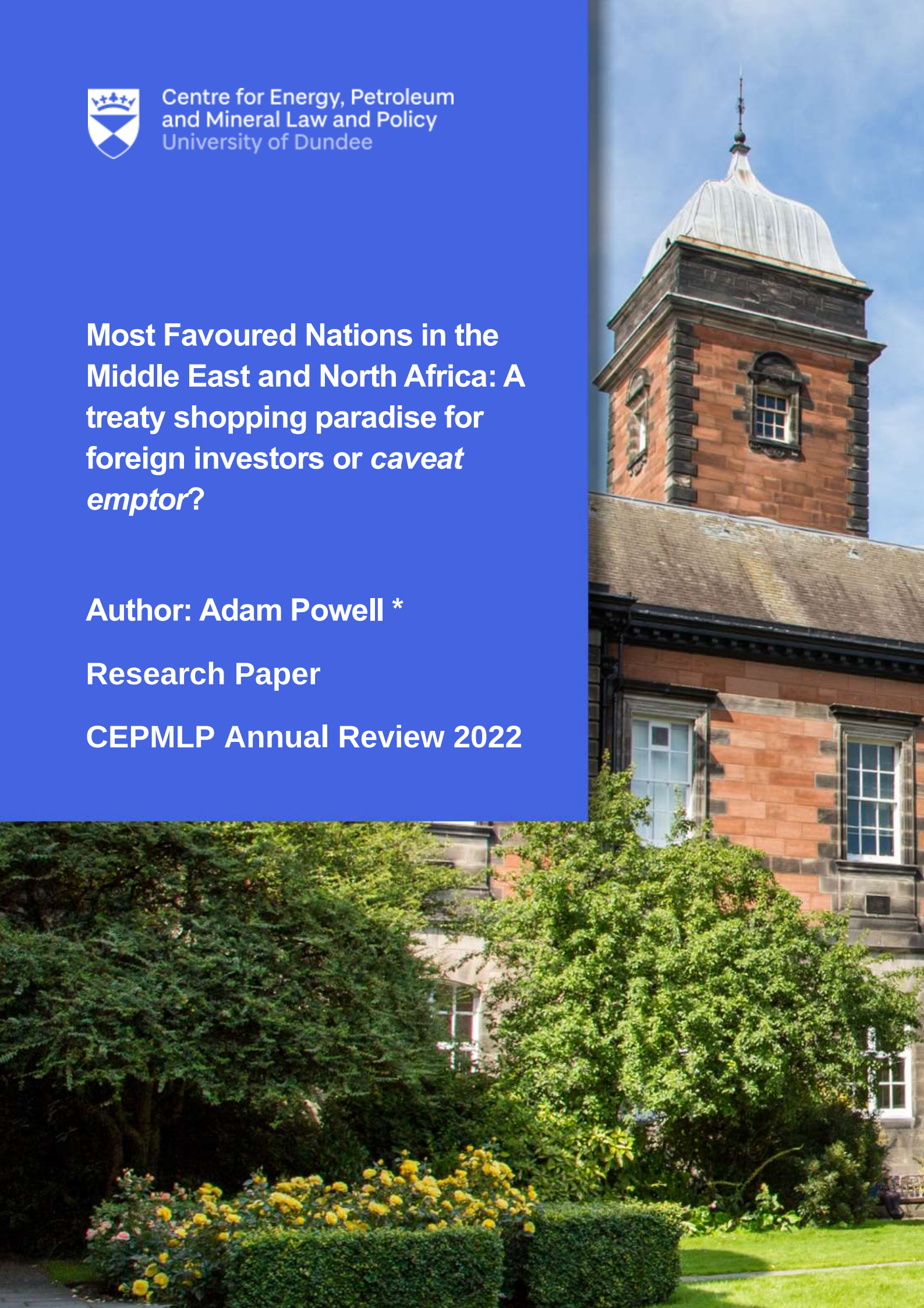

Abstract

Foreign Direct Investment ("FDI") is important for the development of economies, particularly in developing nations. Foreign investors are particularly attracted to the Middle East and North Africa (MENA) due to its significant hydrocarbon resources. Risks for investors in the extractive industries can be high due to the nature of exploration and development of such projects, with an added risk to foreign investors of both direct and indirect (creeping) expropriation by the Host Country (HC), or by war, conflict or other forms of 'above ground risk'.

The enforcement of international institutional arbitration awards on behalf of International Oil Companies ("IOCs") may be hindered in developing nations due to objections by the State, or contracting State companies, including for reason of public policy and/or sovereign immunity. Therefore, foreign investors should seek to take advantage of Host State guarantees under Bilateral or International Investment Treaties ("IITs") entered into by the project's HC and other States to promote FDI by way of investment protection.

IITs provide for substantive and procedural guarantees for nationals of the contracting States in relation to defined investments. Procedural guarantees can include an option for access to arbitration at the International Centre for Dispute Settlement of Investment Disputes ("ICSID") and such awards are directly enforceable against a contracting State without review. Accordingly, it is crucial for IOCs to ensure that such procedural option is available under the relevant IIT and Most Favourable Nations (MFN) provisions, which are provisions within IITs which seek to equalise rights between states and foreign investors, may import such rights from other IITs in certain circumstances.

This paper will analyse the position of extractive industry investors from the United Kingdom ("UK"), the Netherlands and Singapore with regards to seeking to use best procedural guarantees, to protect FDI, under BITs and IITs in HCs such as the United Arab Emirates ("UAE"), Iraq, Iran, Saudi Arabia, Syria and Qatar.). This paper will demonstrate some of the difficulties for such investors to gain access to directly enforceable arbitration against the HCs. It will also demonstrate the importance of, but difficulty using, and relying upon, MFN clauses for access to arbitration.

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Contents

Abbreviations

In this research paper the following abbreviations shall have the following meanings:

AS MIT	Unified Agreement for the Investment of Arab Capital in the Arab States
CEPMLP	Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee
DNs	Developed Nations
EU	European Union
F&E	Fair and Equitable
FDI	Foreign Direct Investment
GATT	Marrakesh Agreement Establishing the World Trade Organisation (WTO) : General Agreement on Services and Trade 1994 (including Additional Protocols)
GCC	Gulf Cooperation Council, or Cooperation Council for the Arab States of the Gulf
HC	Host Country
IC	International Community
ICJ	International Court of Justice
ICSID	International Centre for Dispute Settlement of Investment Disputes
IITs	International Investment Treaties
IOC	International Oil Company
ILC	International Law Commission
IMC	International Oil Company
IPR	Intellectual Property Rights
KSA	Kingdom of Saudi Arabia
LDNs	Less Development Nations
MENA	The Middle East and North Africa
MFNs	Most Favoured Nations
MNCs	Multi-National Companies, including both IOCs and IMCs
MITs	Multilateral Investment Treaties
NGO	Non-Governmental Organisation
NMC	National Mining Company

NOC	National Oil Company
OIC MIT	Agreement on Promotion, Protection and Guarantee of Investment among Member States of the Organisation of the Islamic Conference ("OIC")
NT	National Treatment
UAE	United Arab Emirates
UK	The United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law

1. Introduction

FDI is important for the development of economies in developing nations[1]. The 2008 financial crisis[2], relatively low oil prices (at the time of writing, in 2018, compared with the highs experienced in 2014)[3] and instability, including prolonged and bloody civil wars across the MENA region, including in Iraq, Yemen and Syria make the MENA region no exception to the importance of FDI.

The MENA region has significant hydrocarbon resources[4] and is, therefore and all other things being equal, attractive to foreign players in this industry[5]. However, risks associated with the extractive industries can be high, in both mining and petroleum extraction. The process of exploration and development of a mine or an oil field is expensive and speculative[6]. In addition, commodity price volatility effects long-term investments of this nature[7].

Furthermore, such an investment brings with it the additional risk of direct or indirect (creeping) expropriation by the HC where the activity is conducted,[8] and/or disruption and economic losses due to war and conflicts[9].

Due to perceived local court jurisdictional bias in developing countries, preferred legal recourse for Multi-National Companies (MNCs) in the event of disputes with the HC is by way of institutional arbitration, with the arbitration agreement typically set out in the joint venture, production sharing or other such arrangements with the National Oil Company (NOC) or National Mining Company

[1] The International Monetary Fund (IMF) (1999) Available at: http://www.imf.org/external/pubs/ft/fandd/1999/03/mallampa.htm (accessed on 5 July 2022)
[2] The Economist (2015) Available at: https://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article (accessed on 5 July 2022)
[3] Statista: Average Brent Crude oil prices from 1976-2022 Available at https://www.statista.com/statistics/262860/uk-brent-crude-oil-price-changes-since-1976/ (accessed on 5 July 2022)
[4] GeoEXPro magazine (2014) Available at: https://www.geoexpro.com/articles/2014/02/how-much-oil-in-the-middle-east (accessed on 5 July 2022)
[5] Shell Corporate Website, demonstrates the level of Shell's joint ventures in the Middle East Available at http://www.shell.ae/ (accessed on 5 July 2022)
[6] PWC Financial Reporting in the Oil and Gas industry; International Financial Reporting Standards Publication (2011) Available at https://www.pwc.com/id/en/publications/assets/eumpublications/financial-reporting-in-the-oil-and-gas-industry.pdf (accessed on 5 July 2022)
[7] US Energy Information Administration (2010) Available at https://www.eia.gov/naturalgas/weekly/archivenew_ngwu/2003/10_23/Volatility%2010-22-03.htm (accessed on 5 July 2022)
[8] The Yearbook on International Investment law and policy (2008/2009); New York/Oxford University Press 2009; Edited by Karl P Sauvant (Chapter 10; The Argentine crisis and foreign investors); Available at http://www.law.nyu.edu/sites/default/files/ECM_PRO_065328.pdf (accessed on 5 July 2022)
[9] The World Bank (2016) Available at: http://www.worldbank.org/en/news/press-release/2016/02/03/economic-effects-of-war-and-peace-in-the-middle-east-and-north-africa (accessed on 5 July 2022)

(NMC).[10] Notwithstanding the application of the New York Convention[11], issues of enforceability of institutional arbitration awards arise due to challenges at, and reviews, by domestic HC courts, including for reasons of domestic public policy or good and/or sovereign immunity[12]. Therefore, a foreign investor, e.g. an IOC equivalent mining company, may seek to protect its investment further by "treaty shopping" to gain access to directly enforceable arbitration under international law using IITs.

This paper will analyse certain IITs in the MENA region. Firstly, BITs (if any) between (i) the UK, the Netherlands and Singapore, representing foreign investors, and (ii) Qatar, the Islamic Republic of Iran, Iraq, the Kingdom of Saudi Arabia ("KSA"), Syria and the UAE, representing the HCs analysed in this paper (together referred herein as the "MENA HCs"), and secondly two regional MITs entered into by the MENA HCs.

The paper will focus on availability to legal recourse of directly enforceable arbitration and how MFN provisions in IITs may import procedural guarantees. The paper will demonstrate the importance of considering international investment treaties (pre-investment) for a foreign investor in the extractive industries in the MENA region and the difficulty of relying on MFN provisions to import required procedural guarantees.

[10] International Petroleum Exploration & Exploitation Agreements; Messrs Duval, LeLeuch, Pertuzio and Waeaver; 2009; Page 358

[11] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("New York Convention") - to date 157 Nations have signed the New York Convention. Available at: http://www.newyorkconvention.org/countries (accessed on 5 July 2022)

[12] Ibid 8

2. IITs and Treaty Shopping

International customary law protection for foreign aliens has been developed into international treaties, which are either bilateral (two States) or multinational (more than two States)[13] and binding under international law[14]. IITs protect and promote FDI by the contracting States reciprocally guaranteeing a level of protection to the investments of each other and each other State's nationals, generally including corporations[15].

A foreign MNC may benefit under the IIT (if any) entered into by the HC and the MNC's home country ("Home State") if the MNC satisfies the definitions of "investor" and "investment" under the relevant IIT[16].

The guarantees under an IIT include both substantive[17] and procedural (i.e., dispute resolution) provisions[18] but are freely negotiated treaties between the contracting States and, accordingly, there are no standard or prescribed forms which apply and, therefore, detailed analysis, on a case-by-case basis, if required[19].

A foreign investor may be able to position itself more advantageously under non-Home State IITs entered into by a HC by 'Treaty Shopping' which may enable access to directly enforceable arbitration. So called 'Treaty Shopping' involves careful consideration of these instruments (before any investment is made) to understand best available substantive protections and arbitral recourse options, and it may involve the MNC incorporating a subsidiary in a third State ("Third State") to use as the investing entity. In such circumstances, the "investor" is the subsidiary and relevant IITs are those entered into by the Third State and the HC.

Moreover, MFN provisions within IITs are useful tools in Treaty Shopping to position an investment favourable, particularly if an investment has already been made. IITs contain MFN provisions

[13] UN Conference on Trade and Development (UNCTAD) Investment Policy Hub; International Investment Agreements Available at https://investmentpolicy.unctad.org/international-investment-agreements (accessed on 5 July 2022)
[14] Binding by reference to the Vienna Convention and Article 38(1) of the Statute of the ICJ
[15] Ibid 13
[16] Ibid 13
[17] Non-discriminatory Treatment (Protection from arbitrary/discriminatory measures, National and MFNs treatment) General Standards (F&E treatment, Full Protection and Security) and Specific Standards (No Expropriation without compensation/Free transfer of funds): Prof P Bekker, Chair of International Law, CEPMLP lecture notes October 2017 – the "International Investors Bill of Rights"
[18] Ibid 13
[19] Ibid 13

which are aimed to create fairness and equality in a competitive environment[20]. Such provisions entitle the investor to rely upon provisions within other IITs (entered into by the HC) which are more favourable than those in the IIT directly applicable to it, for instance more favourable compensation[21] or a more favourable dispute resolution procedure[22]. IITs generally contain specific MFN treatment and more general broad treatment, for example the UK/ UAE BIT (reviewed below) provides broadly at Article 3 (1) that "*neither contracting party shall….subject investments, associated activities or returns…to treatment less favourable that it accords to investments, associated activities or returns of…investors of any third state"*.

MFN treatment and dispute resolution is hotly contested with numerous tribunal cases appearing in the late 1990's and throughout the next century[23]. However, the application of MFN provisions by tribunals is inconsistent and unreliable. Arbitral decisions do not create binding precedents and the formulation of MFN provisions between States is far from uniform, creating issues of interpretation. Tribunals would appear to be more willing to import substantive provisions[24] than procedural provisions[25], although the application by tribunals depends on the drafting and wording of the IITs in question[26].

Critics argue that Treaty Shopping is a misuse of IITs and an abuse of process under which arbitral tribunals interfere with domestic governmental public policy and sovereignty issues[27]. However, and

[20] Amsterdam Law Forum; Most-Favoured Nation Treatment in International Investment Law: Ascertaining the Limits through Interpretative Principles; PR Thulasihass; Summer Edition 2015

[21] CME Czech Republic BV v Czech Republic (UNCITRAL) 2003; imported "fair market value" from USA/Czech BIT into Netherlands/Czech BIT (which referred to just compensation) Available at https://www.italaw.com/sites/default/files/case-documents/ita0180.pdf. (accessed on 5 July 2022)

[22] In Siemens v Argentina (ICSID 02) (decision 2004) tribunal determined the German/Argentina BIT enabled the investor to import the Chile/Argentina BIT dispute resolution process to by-pass pre-conditions to arbitrate. Similarly in Maffezini v Spain (ICSID Case No AR13/97/7) (decision 2000), the tribunal held that procedural provisions should be capable of import under MFN provisions. The tribunals relied upon broad scopes of MFN clauses.

[23] Ibid 20

[24] Ibid 20. EDF International SA v Argentina (ICSID Case No ARB/03/23 2012) and Franck Charles Arif v Moldova (ICSID Case No ARB/11/23 2013). An umbrella clause (enabling an investor to use treaty protection against the State itself under a breach of contract) imported under MFN clauses. In CME Czech Republic BV v Czech Republic (UNITRAL) 2003 the tribunal allowed a more favourable definition of "compensation" from another BIT.

[25] Ibid 20

[26] In Garanti Koza v Turkmenistan (ICSID Case No Arb 11/20) the tribunal imported the right for ICSID arbitration under MFN treatment and deemed the state had consented to ICSID arbitration based on MFN provisions.

[27] Treaty Shopping in International Investment Law; Jorun Baumgartner; Oxford Scholarship Online; January 2017

on the other hand, forum or treaty shopping may be prudent corporate structuring on the part of the MNC to protect its investment, as will be demonstrated below.

3. Overiew

3.1 ICSID

ICSID Arbitration awards are credible World Bank awards, capable of direct enforcement against the HC[28] - that is, without such awards being reviewed, or ratified for enforcement, by local HC courts[29]. Furthermore, the ICSID Convention allows only limited circumstances for the annulment of any award and such circumstances (unlike under the NY Convention[30]) do not include for reason of public policy[31].

In order to commence an ICSID arbitration against a State, such State's consent is required under the ICSID Convention (by ratifying the convention). 162 Nations (as of 11th January 2018)[32] have signed the ICSID Convention.

Out of the case study States, the Netherlands, Qatar, Iraq, KSA, Singapore, Syria, UAE and the UK have all ratified the ICISD Convention. Iran has not[33]. States may also make notifications and KSA has notified that questions pertaining to oil and pertaining to acts of sovereignty are excluded from ICSID arbitration[34].

ICSID also requires further consent from the HC under the IIT and the investment should satisfy the "Salini Test"[35], the latter of which may prove problematic, particularly investors operating under Technical or other types of Services Agreements, which may not meet the required duration qualification.

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[28] Ibid 10, page 357

[29] Article 54 (1) of the ICSID Convention – an award shall be recognised by a contracting state as a final judgment of a court in that state

[30] Article 5 (2) (b) of the NY Convention

[31] Article 52 of the ICSID Convention

[32] ICSID The World Bank Group at: https://icsid.worldbank.org/about/member-states/database-of-member-states (accessed on 5 July 2022)

[33] Ibid 14. The UK has designated certain of its overseas territories, namely Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Guernsey, Jersey, Isle of Man, to apply the ICISD Convention

[34] Ibid 32

[35] The "Salini Test"; requires investments to have (i) certain duration of the investment (ii) regularity of profit (iii) risk assumption (iv) substantial commitment from investor and(v) significance for HC's development [from Salini Costruttori, S.P.A. v Morocco, ICSID Case, 2001]
The Harvard International Law Journal; VOLUME 51, NUMBER 1, WINTER 2010; The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law; Julian Davis Mortenson. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1911364 (accessed on 5 July 2022)

Therefore, and although the ICSID Convention has been ratified by the vast majority of States, and is the preferred arbitration option, it will not always be available regardless if it is included within the IIT. In fact, only three of the MENA HCs have present and historic ICSID cases registered against them (UAE, under Italian and Turkish BITs, KSA, under South Korean, French and German BITS, and Iraq, under Kuwaiti BIT and the Organisation of the Islamic Conference (OIC) Multilateral Investment Treaties (MITs)) and none of the cases relate to the extractive industries[36], which demonstrates the importance of treaty analysis to understand the restrictions and consider other options to ICSID.

3.2 BITs

The UK has signed 105 BITs worldwide (95 in force) but has only one BIT in force with the MENA HCs, namely the UAE (in force in 1992). It has signed a BIT with Qatar (in September 2009) but it is not in force to date and the details of such BIT are not publically available[37].

The Netherlands has signed 95 BITs worldwide (90 in force) but it has no BIT yet in force with any of the MENA HCs, although it has signed a BIT with the UAE (in November 2013)[38].

Singapore has signed 44 BITs worldwide (36 in force) but has only one BIT in force with the MENA HCs, namely KSA (April 2006). It has also signed BITs with the UAE (June 2011) and Iran (February 2016, details not publically available), but neither are in force to date[39].

The reviewed BITs[40] contain the substantive "Bill of Rights" provisions [41] and "investors' include individuals and corporations. However, salient distinctions include:

(a) Rights and concessions in relation to natural resources are specifically excluded from the Netherlands (Article 1 (a)) and Singapore/UAE BITs (Article 2 (4));
(b) The reviewed BITs all have an option of ICSID Arbitration but the Singapore/ UAE BIT also provides an option of UNCITRAL arbitration;
(c) Pre-conditions to arbitration vary: (i) the Netherlands and Singapore/UAE BIT require

[36] Ibid 13
[37] Ibid 19
[38] Ibid 19
[39] Ibid 19
[40] UAE and UK/Netherlands/Singapore and KSA and Singapore. Ibid 19
[41] Ibid 17

submission to domestic legal procedures before arbitration (ii) the Singapore/KSA BIT includes a "*fork in the road*" of either domestic courts or ICSID Arbitration and (iii) the UK/UAE BIT imposes an initial threemonth period to attempt to settle before applying under ICSID;

(d) The initial duration of the BITs range between 10 – 15 years from ratification, and each BIT continues at the end of the initial term unless terminated by notice. Investments made prior to termination remain protected for between 15 – 20 years ("sun-set clause")[42];

(e) MFN treatment is not restricted to a single broad clause and there are a number of instances of MFN treatment relating to specific substantive protections, for example in the UK/UAE BIT under Article 4 (compensation for losses)[43];

(f) MFN treatment is specifically exempt in relation to existing or future customs union or similar agreements or international agreements and domestic laws relating to tax; and

(g) The Netherlands/UAE BIT and the Singapore/UAE and KSA BIT contain further MFN exceptions for rules relating to Free Trade/Zone Areas, which were not as prevalent at the time of signing the UK/UAE BIT in 1992, and the UAE / Netherlands[44] and Singapore[45] BITs specifically exclude MFN treatment relating to procedural provisions, meaning that investors must submit to domestic legal procedure before ICSID arbitration, since they would be unable to import more a favourable process.

Therefore, investors from the UK, the Netherlands and Singapore appear to have limited options to access directly enforceable ICSID arbitration against the MENA HCs, with only two direct BITs currently in force and restrictions on importing more favourable terms under MFN exemptions meaning local courts will need to be involved under those BITs (when in force).

Specific exemptions under the BITs in relation to extractive industry related investments and notifications under ICSID further prohibit tribunal cases in this sector, thus protecting sovereign assets for the HC. Broadly, and provided the investment satisfies the Salini Test, the only option to access directly enforceable arbitration under the reviewed BITs for extractive industry investments is for an investor (MNC or its subsidiary) from the UK in relation to an investment in the UAE.

[42] Ibid 13
[43] Ibid 13
[44] Added by way of protocol to the BIT
[45] Article 4 (3) of the Singapore/UAE BIT

This may appear concerning at first instance, however, States in the MENA region have signed in excess of 640 BITs (out of *circa* 2,951 worldwide[46]) and therefore a full and thorough pre-investment review of all BITs entered into by the MENA HC's may establish a suitable BIT (which is in force) with a stable Third State[47] in which an investment subsidiary may be incorporated.

3.3 MITs

The MENA HCs have also entered into a variety of other IITs and investment related treaties, including the EU/ Gulf Cooperation Council ("GCC") Co-operation agreement 1990, GCC and United States of America Framework Agreement 2012 and the Marrakesh Agreement Establishing the World Trade Organisation (WTO) : General Agreement on Services and Trade 1994 (including Additional Protocols) ("GATTS").[48] Since free trade or customs agreements are excluded from MFN treatment under the reviewed BITs, a tribunal would not import any favourable provisions from these types of agreements. However, there are two specific regional MITs which shall be considered as part of this exercise, namely the Agreement on Promotion, Protection and Guarantee of Investment among Member States of the Organisation of the Islamic Conference ("OIC MIT") and the Unified Agreement for the Investment of Arab Capital in the Arab States ("AS MIT"), in which persons and companies from the contracting States may seek protection thereunder. Iran is not a party to the AS MIT.

The OIC MIT and AS MIT contain the substantive "Bill of Rights" (except for fair and equitable treatment for discriminatory measures and including certain specific obligations on investors[49]). In particular:

(a) the OIC MIT definition of "investor" includes entities established under the relevant laws of the contracting parties, with no specific requirements for the nationality of the owners of the companies[50]. Therefore, subsidiary entities (of a foreign MNC) established within a contracting party State (e.g., the UAE) shall fall into the definition of "investor". In contrast, the AS MIT has narrowly defined the term "investor", making the AS MIT only available to Emirati citizens

[46] Ibid 13
[47] Ibid 13. The author notes that although certain free trade and co-operation agreements are in place, neither the USA nor Australia (who would be deemed, amongst others, to be stable Third party states) are party to any BITs with any of the MENA HCs, whereas Germany and France are party to BITs with a number of the MENA HCs
[48] Ibid 13
[49] Article 9 of the OIC MIT
[50] Article 1 (6) of the OIC MIT

(using Emirati capital) and unavailable to such foreign owned subsidiaries. Accordingly, the AS MIT will not be considered any further herein.

(b) any State party may withdraw from the OIC MIT with only one years' notice to the Secretary-General[51] at any time, making it less reliable than the BITs referred to in 4.2 above; and

(c) for procedural provisions, the OIC MIT includes a "*fork in the road*" meaning the investor must decide between local courts or the Investment Court (or arbitral tribunal). Considering the potential layers of jurisdictional uncertainty to achieve a final award in the prospective local courts, the Investment Court or tribunal would appear quicker and more reliable.

Until such a specific Investment Court is established, disputes may be settled by final and binding ad hoc arbitration, awards of which cannot be contested by the HC. The awards are stated to have the force of a final judicial decision of the relevant States national courts[52], confirmed in the tribunal case of Hesham Al Warraq v Indonesia 2014[53], and the "final judgment" wording is similar to that under Article 54 (1) of the ICSID Convention. Therefore, these awards should be directly enforceable without local court review and, unlike ICSID, there appears no requirement to satisfy any form of "Salini Test" nor would any ICSID notifications prevent cases against KSA. However, such awards do not hold the same credibility as an ICSID award and local court interference may still be required to ratify such awards for enforcement against the HC.

Interestingly, an ICSID tribunal is currently considering the case of Itisaluna Iraq LLC and others (Jordanian and UAE corporations) v. Republic of Iraq (ICSID Case No. ARB/17/10)[54]. These arbitration proceedings were instituted before ICSID against the Republic of Iraq by Itisaluna Iraq LLC ("**Itisaluna**"), Munir Sukhtian Investment LLC ("**MSI**"), VTEL Holdings Ltd. ("**VTEL Holdings**") and VTEL Middle East and Africa Limited ("**VTEL MEA**") (together "**the Claimants**"). Itisaluna and MSI are entities organised under the laws of Jordan.

Both UAE claimants (VTEL Holdings and VTEL MEA) are registered with the DIFC, an established financial free zone in Dubai in which 100% foreign ownership is permitted[55]. The claimants are seeking to rely on the broad MFN provisions within the OIC MIT (Article 8 therein) to import ICSID arbitration from the Iraq/Japan BIT (dated 2014). The tribunal has been constituted and issued an interim order on 11th January 2018[56].

[51] Article 23 of the OIC MIT
[52] Article 17 (2) (d) of the OIC MIT
[53] https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/426/al-warraq-v-indonesia
[54] https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/17/10
[55] The DIFC Available at https://www.difc.ae/
[56] https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/17/10

The Itisaluna case appears to be post-investment treaty shopping, since otherwise the investor may have incorporating a Japanese subsidiary to access ICSID against Iraq. However, following this case, a foreign MNC may have access to directly enforceable arbitration awards under the OIC MIT by using an UAE (or another OIC MIT contracting State) subsidiary for the investment. The available arbitral processes are then either 'ad hoc' under the OIC MIT or, if the investment satisfies the Salini Test and the HC has ratified ICSID, ICSID arbitration using the OIC MIT MFN provisions (which do not exclude procedural provisions), as in the Itisaluna case. However, the MFN provisions in the OIC MIT do exempt "special projects of special importance" to the HC[57], which may create an argument for the HC to oppose importing ICSID arbitration for certain key investments.

Hypothetically, and if the Salini test could not be satisfied, a UK investor could also attempt to import the arbitration process under the OIC MIT into the UK/UAE BIT using its broad MFN provisions, (this could not be the case for the Netherlands/Singapore UAE BITs due to the specific MFN treatment for procedural matters).

[57] Article 8 (2) (4) of the OIC MIT

4. Conclusions

States in the MENA region appear to be seeking to retain sovereignty over their rich natural resources, with BITs including specific exclusions relating to the extractive industries and the non-ratification of (in the case of Iran) and notifications under (in the case of KSA) ICSID. In addition, in the case of KSA, its NOC (i.e. Saudi Aramco) is the holder of all concessions in the Kingdom[58] and the author is aware that arbitration rules and choice of law generally imposed on contractors are KSA based[59].

Therefore positioning an extractive industry related investment in the MENA region to allow access to directly enforceable arbitration may require careful consideration under subsidiary investment vehicles to allow such access under Third State BITs or regional MITs. However, this introduces an additional layer of risk since effectively two investments are being made, one from the MNC home state into a Third State (housing the subsidiary) and another from the Third State into the HC.

The regional MITs provide useful options but include a 12-month "sunset" clause, thus creating long-term planning difficulties. It will be interesting to note the reaction of contracting States under the OIC MIT after the determination of the Itisaluna case. It may be that some contracting-States serve notice to exit the treaty citing abuse of process.

The use of IITs to protect extractive industry FDI in MENA is complex and no size fits all. Of fundamental importance is pre-investment Treaty Shopping, rather than seeking to solely rely on unreliable MFN treatment, but a foreign investor should, with careful planning, find suitable options to mitigate investment risk.

[58] Aramco Corporate Website; Available at https://www.aramco.com (accessed 5 July 2022)
[59] Arbitration Regulations, Council of Ministers Decision No 164 dated Jumada II 1403 and the Rules for Implementation of the Arbitration Regulations 10 Shawwal 1405 (KSA)

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