Treaties on Investment Protection Applying to Turkish Investments in Libya

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The chaos which struck Libya a year ago has also left its legal system shattered and in disarray. Most foreign investors, including Turkish ones, who have invested a huge amount of capital in Libyan infrastructure, saw their invested assets gradually evaporate in the Libyan desert. The question that looms in the aftermath of the disorder in Libya and the installment of the new Libyan government is how to regain the billions of dollars Turkish investors have placed in Libya. In order to shed light on the legal confusion which erupted after the civil war and has left a mark of destruction both on Libyan infrastructure and its political and legal system, this article examines the legal instruments through which Turkish investors could trace and retrieve their invested assets from Libya. In this article, the methods will be divided into national and international legal devices.

Libyan National Legislation

The most recent and specific piece of legislation was enacted by the previous government, "Law no. 9 on Investment Promotion," which entered into force on January 28, 2010. The purpose of this legislation is to promote investment, whether domestic, foreign or joint, in Libya, and for this reason it enacts many protective and encouraging rules for foreign investment. This legislation heralded the massive turn around in Libyan foreign policy the former Libyan leader Gaddafi began in 2003, which was characterized by intensive liberalization of the Libyan economy and opening to the world market[1].

The law assigns many duties to governmental institutions to promote foreign investment and grants many rights to investors, whether domestic or foreign, in order to promote the Libyan economy by increasing investments. But what should a foreign investor do if an investment dispute arises?

Although a new government has been installed, it is still far from certain whether bringing a dispute before the Libyan judicial system could offer adequate protection to an investor's interests. Since the whole political and legal system has been ruined by the war, addressing disputes by way of litigation in Libyan national courts is problematic. Furthermore, it must be taken into consideration that it is questionable whether the judicial system is even working properly.

For such cases, Law no. 9 Article 24[2] contains a dispute settlement clause whereby it allows the settlement of disputes by alternative means like mediation or arbitration, if the particular contract explicitly refers to it. The advantage of this is that it provides the investor the opportunity to find a solution to settle disputes outside the scope of a nation state, like Libya. On the other hand, this clause is not normative, but allows contracting parties to include such a clause in their contracts. For this reason, one might

1 Article 3(3) of Law no. 9

2 Article 24 - Settlement of Disputes: Any dispute that may arise between the foreign investor and the state, which may be attributed to the investor or due to procedures taken against him by the state, shall be forwarded to the appropriate courts of the state, unless if there are mutual agreements between the state and the investor's state or multilateral agreements to which the investor's state is a party thereof, including texts relating to reconciliation or arbitration or special agreement between the investor and the state stipulating arbitration as a condition.

say that it is very progressive legislation, but in practice it is less so.

Another important aspect of this provision is that it does not give multiple options or allow forum shopping, but rather offers a choice which excludes other options. For example, if the contracting parties make an explicit choice to submit the dispute to an arbitral tribunal, it will not be able afterwards to submit it to the national courts.

International Treaties

Importance of Investment Protection Treaties

The effects of globalization have also affected the former Libyan government, which had made great efforts to attract foreign investments since 2003. For this reason, international treaties constitute the cornerstone for the attraction and thus protection of foreign investment in any country. Since foreign investment has been considered the engine to power a country into modernity and prosperity, international treaties which protect foreign investment create the framework in which this process may be guided.

First, the importance of international treaties protecting investments will be explained, then the international treaties which protect foreign investments in Libya are addressed.

Until 50 years ago, international investment was part and parcel of national policies. Therefore, any dispute that arose between companies dealing with international trade was settled by diplomatic forces between the respective states, employing international law as their legal framework. This process was too costly and took too much time to determine a solution to disputes. This deterred foreign investors from investing in other countries.

In order to promote foreign investment, certain treaties were drafted by the end of the 1950s to elevate international investment above realm of national policies, providing it a supranational framework. International investments gained their own discourse through the application of different treaties promoting international investments, like the New York Convention, Washington Convention, UNICITRAL, and ICC Rules for Arbitration, among others. Nowadays any country wishing to attract foreign investment to boost their national economy is forced to ratify some of these multilateral or bilateral treaties, which transfer a part of their sovereignty to the authorities' disposition of the international trade environment.

Thus, international law used to be the primary and only legal source of dispute settlement arising from international investments, and diplomatic channels the only probable legal instrument to solve disputes. Now this role has been assumed by special treaties drafted with the aim of protecting international investments and autonomous arbitration courts and other frameworks which help to solve disputes.

Organization of the Islamic Conference

The "Agreement for Promotion, Protection, and Guarantee of Investments among Member States of the Organization of the Islamic Conference" is the only multilateral treaty to which Libya is a signatory, and from which one can distill certain legal instruments which can help in the retrieving the invested assets of Turkish investors.

However, it has to be stressed that this agreement does not contain any institutions where disputes can be settled. Instead, it provides guidelines and some directions to investors on resolving any disputes. Although Article 15 of the agreement does mention the creation of such a dispute resolution institution, it has not yet come into effect. Therefore, the main purpose of this agreement is to distill moral backing from common Islamic value systems in order to promote international investments among Islamic countries.

As a general framework for the promotion of international investment among Muslim countries, this agreement contains provisions to which Turkish (or other foreign) investors might refer. Although it contains normative clauses, the lack of any enforcement mechanism or institution leaves a gap in its effectiveness.

The agreement provides the possibility for the compensation of damages which have occurred and for which the authorities are to blame. The damages could be caused by a breach of certain rights given by international treaties or by local authorities.

But before that stage, the first question is where to refer a claim when a dispute arises. The first option would be the local courts of a member state, according to Article 16. But since Libya has just started to recover from the destruction caused by the war, as mentioned earlier, Libyan courts will not function properly. Instead, this agreement also provides the option of bringing the dispute to a court of arbitration, if the conciliation process was fruitless.

To summarize, at this stage this agreement cannot be enforced as a normative legal framework, although it does contain very stringent clauses which protect foreign investments. This does not mean that this agreement is useless. On the contrary, it can establish a decisive moral appeal during diplomatic negotiations to find solutions collectively, like in the case of Libya.

BIT between Libya and Turkey

The BIT agreement between Turkey and Libya, which entered into force last April, constitutes an essential legal document for Turkish investors to get redress of disputes. The advantage of such a treaty is that it is specific to the relationship between Turkey and Libya and contains special clauses which are normative and provide clear solutions. For example, it provides the possibility to submit disputes to the court of arbitration and the enforcement of the decision taken by the arbitrator.

There are three important articles regulating the scope and the forum where disputes may be settled. These articles are, respectively, Articles 3, 5 and 10.

Article 3 determines that disputes which arise after the entrance into force of this BIT fall within the scope of the treaty. Therefore, any dispute after April 22, 2011 will be covered by this BIT. This is the only treaty in which Turkish investors will find some concrete means to sort out their disputes with the Libyan state.

Article 5 contains clear rules about recovering damages that have been inflicted by one of the contracting parties. One has to bear in mind that the damage inflicted should not be collateral damage like harm occurring during a war. What can be claimed is a lack of care or protection from the Libyan government to protect foreign investments. Also, regarding the question of whether the current government will consider itself bound by treaties concluded by the previous regime, the newly appointed prime minister has stressed clearly that as long as there is no harm human rights, all treaties will be fully applicable.

This means conclusively that the current Libyan government could only be held responsible for the damages caused by a failure to protect the property of foreign investors. But if damages can be claimed, where should an investor then lodge the claim?

This treaty provides that in addition to national courts, and after a (failed) conciliation process, that arbitration courts like those of the ICSID, ICC and any other arbitration courts applying the rules of UNICITRAL would be eligible to hear these kinds of claims. Article 8(2) of this BIT makes an explicit reference to these courts of arbitration. The difference between the reference to the courts of arbitration in the agreement of the Organization of the Islamic Conference is that this treaty contains concrete measures and rules about where and how to proceed. Furthermore, in subsection 5 of the same article, it explicitly mentions that the decision of the court of arbitration is final and decisive and that both contracting parties should use all means to enforce such a decision. This treaty is therefore by far the most concrete and applicable treaty for Turkish investors to solve disputes arising regarding investments in Libya.

Conclusion

Before one can file a claim arising from an investment dispute, it would be illuminating to know on which legal materials one could rely, before going further into finding the appropriate legal instruments for this purpose. Therefore, this article outlines the diverse legal materials that are at our disposal and analyzes their applicability to this case. Despite the fact that there is a recent national law available and a multinational treaty providing a very clear provision for dispute settlement and damage repayment, the lack of enforcement procedures mean these legal devices will not provide the appropriate result. Instead, the BIT concluded between Libya and Turkey provides a clear and concrete solution to solving disputes over investments.

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