

GAR INVESTMENT TREATY ARBITRATION

Maldives

Henry Simpson and Afolarin Awosika
Stephenson Harwood LLP

SEPTEMBER 2021

Contents

Overview of investment treaty programme

- 1 What are the key features of the investment treaties to which this country is a party? 4

Qualifying criteria - any unique or distinguishing features?

- 2 What are the distinguishing features of the definition of "investor" in this country's investment treaties? 5
- 3 What are the distinguishing features of the definition of "investment" in this country's investment treaties? 6

Substantive protections - any unique or distinguishing features?

- 4 What are the distinguishing features of the fair and equitable treatment standard in this country's investment treaties? 6
- 5 What are the distinguishing features of the protection against expropriation standard in this country's investment treaties? 6
- 6 What are the distinguishing features of the national treatment/most-favoured-nation treatment standard in this country's investment treaties? 6
- 7 What are the distinguishing features of the obligation to provide protection and security to qualifying investments in this country's investment treaties? 6
- 8 What are the distinguishing features of the umbrella clauses contained within this country's investment treaties? 6
- 9 What are the other most important substantive rights provided to qualifying investors in this country? 7
- 10 Do this country's investment treaties exclude liability through carve-outs, non-precluded measures clauses, or denial of benefits clauses? 7

Procedural rights in this country's investment treaties

- 11 Are there any relevant issues related to procedural rights in this country's investment treaties? 7
- 12 What is the approach taken in this country's investment treaties to standing dispute resolution bodies, bilateral or multilateral? 7
- 13 What is the status of this country's investment treaties? 7

Practicalities of commencing an investment treaty claim against this country

- 14 To which governmental entity should notice of a dispute against this country under an investment treaty be sent? Is there a particular person or office to whom a dispute notice against this country should be addressed? 7
- 15 Which government department or departments manage investment treaty arbitrations on behalf of this country? 7
- 16 Are internal or external counsel used, or expected to be used, by the state in investment treaty

arbitrations? If external counsel are used, does the state normally go through a formal public procurement process when hiring them? 8

Practicalities of enforcing an investment treaty claim against this country

- 17 Has the country signed and ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)? Please identify any legislation implementing the Washington Convention. 8
- 18 Has the country signed and ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the New York Convention)? Please identify any legislation implementing the New York Convention. 8
- 19 Does the country have legislation governing non-ICSID investment arbitrations seated within its territory? 8
- 20 Does the state have a history of voluntary compliance with adverse investment treaty awards; or have additional proceedings been necessary to enforce these against the state? 8
- 21 Describe the national government's attitude towards investment treaty arbitration 9
- 22 To what extent have local courts been supportive and respectful of investment treaty arbitration, including the enforcement of awards? 9

National legislation protecting inward investments

- 23 Is there any national legislation that protects inward foreign investment enacted in this country? Describe the content. 9

National legislation protecting outgoing foreign investment

- 24 Does the country have an investment guarantee scheme or offer political risk insurance that protects local investors when investing abroad? If so, what are the qualifying criteria, substantive protections provided and the means by which an investor can invoke the protections? 10

Awards

- 25 Please provide a list of any available arbitration awards or cases initiated involving this country's investment treaties. 10

Reading List

- 26 Please provide a list of any articles or books that discuss this country's investment treaties. 10

Overview of investment treaty programme

1 What are the key features of the investment treaties to which this country is a party?

BIT contracting party or MIT	Substantive protections					Procedural rights		
	Fair and equitable treatment (FET)	Expropriation	Protection and security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts	Arbitration
<p>United Arab Emirates – Maldives BIT (not in force). Maldives signed its first BIT with the United Arab Emirates on 17 October 2017. The BIT is yet to come into force. Note the United Arab Emirates issued Federal Decree No. (64) of 2018, which ratified this BIT.</p>	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
<p>Maldives is not a party to any MIT. Maldives is a member of the Organization of Islamic Conference (OIC). The member states of OIC, at the Twelfth Islamic Conference held in Baghdad (Iraq) on 1-5 June 1981, established an Agreement on Promotion, Protection and Guarantee of Investments among member states of the Organization of the Islamic Conference (23 September 1986). However, Maldives has not, to date, signed or ratified the Agreement.</p>	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

FTAs	Substantive protections					Procedural rights		
	Fair and equitable treatment (FET)	Expropriation	Protection and security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts	Arbitration
<p>SAFTA (Agreement on South Asian Free Trade Area), 1 January 2006. SAFTA does not include an investment chapter.</p>	No	No	No	No[1]	No	No	No	No

FTAs	Substantive protections					Procedural rights		
	Fair and equitable treatment (FET)	Expropriation	Protection and security	Most-favoured-nation (MFN)	Umbrella clause	Cooling-off period	Local courts	Arbitration
China-Maldives Free Trade Agreement, 7 December 2017 (not in force). Recent press reports and comments from Maldivian government ministers suggest the legislature is unlikely to enact the domestic legislation required to give effect to the China-Maldives FTA.	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

Qualifying criteria - any unique or distinguishing features?

2 What are the distinguishing features of the definition of “investor” in this country’s investment treaties?

Issue	Distinguishing features in relation to the definition of “investor”
Maldives does not have an investment treaty regime. Thus for a definition of “investor”, Maldives’ domestic investment regime must be consulted. Article 12.1 of The Foreign Direct Investment Policy defines “foreign investor” as:	N/A
<ul style="list-style-type: none"> • a foreign national; or • foreign companies and partnerships: <ul style="list-style-type: none"> (i) owned 100 per cent by foreigners (ii) joint ventures having a stake by both Maldivians and Foreigners; or • the following types of businesses registered in the Maldives: <ul style="list-style-type: none"> (i) partnerships registered by foreign nationals or entities (ii) companies with foreign shareholdings (iii) companies re-registered under section 94 of Maldives Companies Act; or • any Maldivian or foreigner who submits a foreign investment proposal. 	

3 What are the distinguishing features of the definition of "investment" in this country's investment treaties?

Issue	Distinguishing features in relation to the concept of "investment"
<p>Maldives does not have an investment treaty regime. Thus, for a definition of "investment", Maldives' domestic investment regime must be consulted. Section 17(a) of the Foreign Investment Law defines "Foreign Investment" as follows: "Foreign Investment means the goods, money and services brought into the Republic of Maldives by foreign governments, bodies or nationals as are referred to in section 1 and 4 hereof, to undertake an economic activity in the Republic of Maldives, exclusive of those imported by them under Law No. 4/79 relating to Business undertakings of Foreign Nationals in the Republic of Maldives." An important aspect of the domestic regime is that 100 per cent foreign investment is permitted and foreign investment is permitted in all sectors of the economy, provided the government has given a prior approval.</p>	<p>N/A</p>

Substantive protections - any unique or distinguishing features?

4 What are the distinguishing features of the fair and equitable treatment standard in this country's investment treaties?

Issue	Distinguishing features of the fair and equitable treatment standard
<p>The Maldives does not have an investment treaty regime.</p>	<p>N/A</p>

5 What are the distinguishing features of the protection against expropriation standard in this country's investment treaties?

Issue	Distinguishing features of the fair and equitable treatment standard
<p>The Maldives does not have an investment treaty regime.</p>	<p>N/A</p>

6 What are the distinguishing features of the national treatment/most-favoured-nation treatment standard in this country's investment treaties?

Not applicable.

7 What are the distinguishing features of the obligation to provide protection and security to qualifying investments in this country's investment treaties?

Not applicable.

8 What are the distinguishing features of the umbrella clauses contained within this country's investment treaties?

Not applicable.

9 What are the other most important substantive rights provided to qualifying investors in this country?

Not applicable.

10 Do this country's investment treaties exclude liability through carve-outs, non-precluded measures clauses, or denial of benefits clauses?

Not applicable.

Procedural rights in this country's investment treaties

11 Are there any relevant issues related to procedural rights in this country's investment treaties?

Not applicable.

12 What is the approach taken in this country's investment treaties to standing dispute resolution bodies, bilateral or multilateral?

Maldives is not a party to any investment treaty.

13 What is the status of this country's investment treaties?

Maldives is not a party to any investment treaty.

Practicalities of commencing an investment treaty claim against this country

14 To which governmental entity should notice of a dispute against this country under an investment treaty be sent? Is there a particular person or office to whom a dispute notice against this country should be addressed?

Government entity to which claim notices are sent

The Office of the Attorney General is generally responsible for representing the government in international arbitrations.[1] The focal ministry for all matters pertaining to foreign investment in the tourism sector is Ministry of Tourism and for all other sectors it is the Ministry of Economic Development and Trade.

[1]<http://www.agoffice.gov.mv/#/About%20Us/Mandate>.

15 Which government department or departments manage investment treaty arbitrations on behalf of this country?

Government department that manages investment treaty arbitrations

The Office of the Attorney General is generally responsible for representing the government in international arbitrations.[1]

[1]<http://www.agoffice.gov.mv/#/About%20Us/Mandate>.

16 Are internal or external counsel used, or expected to be used, by the state in investment treaty arbitrations? If external counsel are used, does the state normally go through a formal public procurement process when hiring them?

Internal/external counsel	<p>The Attorney General of Maldives is the government’s chief legal adviser on all matters, including matters involving foreign investment, and is responsible for representing the government in international arbitrations. The Office of the Attorney General played a key role in the cancellation of two high-profile concessions awarded and the disputes that ensued. External counsel were engaged by the Maldives for various aspects of those disputes and in an recent commercial arbitration with an investor.[1] However, it is unclear whether there was a formal public procurement process, though the likelihood is that there wasn’t.</p> <p>[1]https://www.italaw.com/sites/default/files/case-documents/italaw10305.pdf.</p>
---------------------------	--

Practicalities of enforcing an investment treaty claim against this country

17 Has the country signed and ratified the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965)? Please identify any legislation implementing the Washington Convention.

Washington Convention implementing legislation	Not a signatory.
--	------------------

18 Has the country signed and ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the New York Convention)? Please identify any legislation implementing the New York Convention.

New York Convention implementing legislation	<p>The Maldives acceded formally to the New York Convention on 17 September 2019, which came into force for the Maldives on 16 December 2019. The Maldives has not made any declarations, notifications or reservations regarding the application of the New York Convention.</p>
--	---

19 Does the country have legislation governing non-ICSID investment arbitrations seated within its territory?

Legislation governing non-ICSID arbitrations	<p>Maldives enacted its first arbitration law, Arbitration Act (Law No. 10.2013) in July 2013, largely modelled on the UNCITRAL Model Law. A non-ICSID investment arbitration seated in Maldives would be subject to the Act (see section 3).</p>
--	---

20 Does the state have a history of voluntary compliance with adverse investment treaty awards; or have additional proceedings been necessary to enforce these against the state?

Compliance with adverse awards	<p>Maldives does not have investment treaty awards registered against it. However, the country has been subject to several adverse awards arising out of commercial arbitrations (whether directly or through state-owned corporations). The country has a generally positive record of compliance with these awards. For example, in 2016 an UNCITRAL tribunal ordered Maldives to pay US\$270 million to Indian infrastructure group GMR for cancelling a concession to modernise the country’s largest international airport. The Maldives paid the award later that year. Also in 2016, Platinum Blackstone (then Nexbis) was awarded US\$20 million by a SIAC tribunal against the Maldives arising from Maldives’ alleged non-payments relating to an immigration border control system. This award was settled by the Maldives in 2019.</p>
--------------------------------	--

21 Describe the national government's attitude towards investment treaty arbitration

Attitude of government towards investment treaty arbitration	The Maldives is not a signatory to the ICSID Convention, nor has it ratified any bilateral or multilateral investment treaty. This demonstrates the lack of appetite in the national government to provide investors access to investment treaty arbitration. There is little indication that the Maldives government is considering changing this approach.
--	--

22 To what extent have local courts been supportive and respectful of investment treaty arbitration, including the enforcement of awards?

Attitude of local courts towards investment treaty arbitration	Owing to the absence of an investment treaty regime involving Maldives, local courts have never been called upon to support investment treaty arbitration.
--	--

National legislation protecting inward investments

23 Is there any national legislation that protects inward foreign investment enacted in this country? Describe the content.

National legislation	Substantive protections			Procedural rights	
	FET	Expropriation	Other	Local courts	Arbitration
Law on Foreign Investments in the Republic of Maldives (Law No. 25/79) (the Act) Note the Protections available to an investor must be provided for in the agreement with the government. The agreement in respect of the investment sets out the terms and conditions and the manner of implementation of the investment scheme and programme.	No	Yes. Private property is 'inviolable' under the Constitution and can only be compulsorily acquired by the state under legislation for public benefit and on payment of 'just compensation'. See sections 6 to 9 of the Act for further details.	No	N/A	N/A

National legislation protecting outgoing foreign investment

- 24 Does the country have an investment guarantee scheme or offer political risk insurance that protects local investors when investing abroad? If so, what are the qualifying criteria, substantive protections provided and the means by which an investor can invoke the protections?

Relevant guarantee scheme	Qualifying criteria, substantive protections provided and practical considerations
Multilateral Investment Guarantee Agency (MIGA)	Maldives has ratified the Convention establishing the Multilateral Investment Guarantee Agency (MIGA). MIGA provides non-commercial guarantees (insurance) for cross-border investments into certain developing countries. MIGA's guarantees protect investors against the risks of transfer restriction (including inconvertibility), expropriation, war and civil disturbance, breach of contract and non-honouring of financial obligations. Investors who are citizens of or entities that are incorporated in MIGA member countries, other than the host country, are eligible for MIGA guarantees. However, MIGA can insure an investment made by a national of a host country if the funds to be invested come from outside the country and the application for coverage is made jointly by the investor and the host country. To be eligible for assistance, the investment must be medium to long term in nature (usually between three and 15 years), support the host country's development goals, comply with MIGA's Policy on Social and Environmental Sustainability and anti-corruption and fraud standards, and also be financially viable.

Awards

- 25 Please provide a list of any available arbitration awards or cases initiated involving this country's investment treaties.

Awards
None.
Pending proceedings
None.

Reading List

- 26 Please provide a list of any articles or books that discuss this country's investment treaties.

As the Maldives is not party to any active bilateral or multilateral investment treaties, there are no articles or books the authors can recommend at this time.



Henry Simpson
Stephenson Harwood

Henry is a lawyer in the international arbitration team, who advises on complex arbitrations for international clients.

Henry has advised and represented multinational corporations in international arbitrations under the rules of the major arbitral institutions, including the LCIA and ICC.

His practice often involves disputes in the Middle East and Africa.

Henry has helped draft the chapter 'The Recognition and Enforcement of Foreign Arbitral Awards: Through the African Looking-Glass', which examined the enforcement regimes of a number of African countries, part of the book on arbitration titled *International Arbitration Law & Practice: The Practitioner's Perspective* edited by Tolu Aderemi of Perchstone & Graeys.



Afolarin Awosika
Stephenson Harwood

Afolarin is an associate in Stephenson Harwood's international arbitration and commercial litigation practice groups. He has experience in high value international arbitration and multi-jurisdictional commercial litigation.

Afolarin has represented states, state entities and large multinational companies in international arbitrations conducted under the rules of the major arbitral institutions, including the LCIA, ICSID and ICC, in disputes arising from a range of industries including oil and gas, construction and telecommunications.

He has also represented clients in English High Court proceedings, particularly in relation to obtaining interim injunctions in support of foreign and arbitral proceedings and the enforcement of arbitral awards.

Afolarin was seconded to the firm's Dubai office, where he advised clients in the energy industry on international sanctions compliance and represented a client in a multi-jurisdictional dispute involving the purchase of gas oil in Nigeria.

Afolarin has contributed to publications on arbitration in Africa, the *Global Arbitration Review*, *Practical Law Arbitration Blog* and *Practical Law's* arbitration case updates.

STEPHENSON HARWOOD

Stephenson Harwood is a law firm with over 1100 people worldwide, including more than 180 partners. Our people are committed to achieving the goals of our clients - listed and private companies, institutions and individuals.

We assemble teams of bright thinkers to match our clients' needs and give the right advice from the right person at the right time. Dedicating the highest calibre of legal talent to overcome the most complex issues, we deliver pragmatic, expert advice that is set squarely in the real world.

Our headquarters are in London, with eight offices across Asia, Europe and the Middle East. In addition we have forged close ties with other high quality law firms and an integrated local law capability in Singapore and the PRC. This diverse mix of expertise and culture results in a combination of deep local insight and the capability to provide a seamless international service.

1 Finsbury Circus
London EC2M 7SH
United Kingdom
Tel: +44 20 7329 4422

www.shlegal.com

Henry Simpson
henry.simpson@shlegal.com

Afolarin Awosika
afolarin.awosika@shlegal.com