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Investment Arbitration under Multilateral Treaties in the Middle East

Caline MOUAWAD & Lillian KHOURY*

ABSTRACT

Arab claimants seeking to resolve their investment disputes in the Middle East have found variable success in identifying bilateral investment treaties under which to bring their claims. The recent surge in investment arbitration following the political upheavals in the region has prompted unlucky investors to seek out other instruments that provide access to investor-state dispute resolution. Two regional treaties, long dormant as investment instruments, have recently emerged as potential alternatives: the Unified Agreement for the Investment of Arab Capital in the Arab States; and the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference. This article explores the dispute resolution processes, substantive protections, enforcement mechanisms, and availability of state claims and counterclaims under each treaty, as well as the reforms necessary to ensure their present and future viability.

1 INTRODUCTION

The recent wave of political upheavals and civil wars across the Arab world has left behind a trail of paralyzed investments and frustrated investors. The resulting surge in investor-state disputes has found its legal basis, to a large extent, in bilateral investment treaties ("BITs") to which Arab states are parties, and which guarantee foreign investors a certain standard of treatment. For potential claimants investing in host states that are parties to numerous BITs—such as Egypt, for instance, which has entered into over a hundred—this has proven to be an adequate legal framework. However, many Arab investors have been disappointed in their search for applicable BITs under which to bring a claim, owing to the dearth of intra-Arab BITs in certain economies. Arab investors in Iraq, for instance, are out of luck: the state's only intra-Arab BIT in force is with Kuwait, and the treaty lacks certain guarantees common in other BITs—such as full protection and

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security—that may be particularly important to the investor in politically-charged times. Similar concerns face Arab investors in Saudi Arabia, Libya, Palestine, and Djibouti.

To overcome this hurdle, some Arab investors have structured their investments in foreign jurisdictions (e.g. in Europe or the United States) that have BITs with the host state or, in the case of physical persons, tried to rely on their dual nationality to the same end. But this may be a complicated process and may raise jurisdictional concerns that can stall an otherwise meritorious claim.[1]

Until recently, many Arab investors were unaware of the existence of regional treaties that offer investment guarantees and dispute resolution procedures similar to those of BITs. This article discusses the two major regional treaties in the Arab world that have undergone a revival as investment protection agreements: the Unified Agreement for the Investment of Arab Capital in the Arab States (the "Arab Investment Agreement"), and the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference (the "OIC Agreement"). Signed in the early 1980s, both treaties remained dormant as investment protection instruments for over two decades.

Recently, however, Arab investors tentatively have begun to invoke these treaties, but not without some trepidation due to certain textual ambiguities in each treaty and the lack of a significant body of arbitral awards as guidance. On the whole, both treaties tend to be more limited in their investor protections than common BITs. Nonetheless, in the absence of BIT protection, both agreements have the potential to be powerful tools for an Arab investor seeking recourse against an Arab state.

This article attempts to provide a blueprint for navigating the Arab Investment Agreement and the OIC Agreement based on a review and analysis of relevant textual provisions and recent arbitral awards in investor-state arbitrations brought under these treaties. Sections 2 and 3 provide an overview of the substantive protections and dispute resolution proceedings under the Arab Investment Agreement and the OIC Agreement, respectively. Section 4 addresses claims and counterclaims that host states may be able to initiate against investors pursuant to

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[1] See e.g. *Champion Trading Company and Ameritrade International, Inc. v. Arab Republic of Egypt* (ICSID Case No. ARB/02/9), where the tribunal accepted jurisdiction over the corporate claimants incorporated in the United States, but declined jurisdiction over those claimants who were natural persons holding Egyptian as well as US nationality (which prohibited them from relying on the US-Egypt BIT). Attempts by physical persons to rely on their dual nationality to invoke a BIT also may be thwarted by differing definitions of nationality. See e.g. *Hussein Nuaman Soufraki v. United Arab Emirates* (ICSID Case No. ARB/02/7).

the terms of the treaties. Section 5 focuses on enforcement proceedings for awards rendered pursuant to each treaty.[2]

2 THE ARAB INVESTMENT AGREEMENT

2.1 Background

On November 26, 1980, the member states of the League of Arab States convened for the Eleventh Arab Summit Conference in Amman, Jordan, to sign the Unified Agreement for the Investment of Arab Capital in the Arab States, known as the Arab Investment Agreement.[3] Following a first wave of Arab regional conventions addressing arbitration in the context of judicial cooperation,[4] the Arab Investment Agreement sought to further develop arbitration in the Arab world by fostering inter-Arab investment and promoting arbitration as a means of resolving disputes in that field.[5] The Arab Investment Agreement entered into force on September 7, 1981.[6] It has been ratified by all member states of the Arab League, except Algeria and the Comoros.[7]

The Preamble to the Arab Investment Agreement describes its purpose as being to advance economic integration in the Arab world and create a favorable investment environment for Arab investors. It recognizes that this goal is contingent on the establishment of an integrated legal system that "facilitates the transfer and use of Arab capital within the Arab States," and that "is more conducive to a form of Arab economic citizenship sharing common features whereby the Arab investor, irrespective of nationality, may operate according to provisions identical to those applied by any State to its citizens."[8] The Agreement is organized in nine chapters plus an annex on conciliation and arbitration. The chapters and annex form inseparable parts of the Agreement.[9]

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[2] The instruments analyzed below also have been discussed in a recent article on investment arbitration in the region by Nassib G. Ziadé, "Arbitration under MENA Regional Investment Treaties," 83 *Arbitration* 47 (2017).

[3] Unified Agreement for the Investment of Arab Capital in the Arab States, in: UNCTAD, *International Investment Instruments: A Compendium*, UNCTAD/DTCI/30(Vol. II) 211 (1996).

[4] See e.g. Convention of the Arab League on the Enforcement of Judgments and Arbitral Awards, September 14, 1952; Riyadh Arab Agreement for Judicial Cooperation, April 6, 1983.

[5] *Fouchard Gaillard Goldman on International Commercial Arbitration*, ed. Emmanuel Gaillard & John Savage, p. 148 (1999).

[6] The following countries are parties to the Arab Investment Agreement: Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, UAE, and Yemen.

[7] Algeria signed the Arab Investment Agreement on November 26, 1980, but has not ratified it to date. The Comoros, which joined the Arab League in 1993, has not signed the Arab Investment Agreement.

[8] Arab Investment Agreement, Preamble.

[9] *Ibid*.

Chapter VI of the Arab Investment Agreement created the Arab Investment Court (the "AIC") for the settlement of investment disputes.[10] The statutes of the AIC came into force on February 22, 1988. The AIC heard its first case brought under the Arab Investment Agreement, *Tanmiah Co. v. Tunisia*, in 2003. The Court rendered its first decision on October 12, 2004.[11]

On January 22, 2013, during the Arab Summit for Economic and Social Development, the Arab Investment Agreement was amended to take account of recent developments in international investment law (the "Amended Agreement").[12] Among other things, the Amended Agreement expanded the meaning of investor, removed limitations on the free transfer of capital, and introduced additional substantive protections, including the guarantee of fair and equitable treatment absent in the original Agreement.[13] To date, only Iraq, Jordan, Kuwait, Oman, and Palestine have ratified the Amended Agreement, which entered into force in these five states on April 24, 2016. The Arab Investment Agreement (as unamended) still governs investment guarantees and protections in the territories of its seventeen other signatories.[14]

2.2 Scope of the agreement

The introductory chapter to the Arab Investment Agreement delineates the scope of its application to Arab investors and their capital. Article 1.7 defines an Arab investor as "an Arab citizen who owns Arab capital which he invests in the territory of a State Party of which he is not a national."[15] Citizenship extends to both natural and legal persons, so long as legal persons are owned, directly or indirectly, by Arab citizens. In states subject to the Arab Investment Agreement, full ownership by Arab citizens is required, while in the five states subject to the Amended Agreement, a 51% majority stake held by Arab citizens suffices.[16] Joint

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10 *Ibid.*, Ch.VI. See section 2.4 below.

11 The decision is available in Arabic on the website of the League of Arab States at http://www.lasportal.org/en/legalnetwork/Pages/Investment_CourtRulings.aspx. (All website addresses cited in this article were last accessed in April 2017.)

12 For a copy of the Amended Agreement see OECD, MENA-OECD Regional Working Group on Investment Policies and Promotion: *Supporting Investment Policy Reforms in the MENA Region* (December 11, 2014), https://www.oecd.org/mena/competitiveness/Amended%20Arab%20League%20Investment%20Agreement%20(Arabic%20and%20English)%20and%20Comparative%20Table.pdf.

13 See sections 2.2 and 2.3 below.

14 Ahmed Kotb, "Egypt: The Arab Investment Court," *Int'l Fin. L. Rev.* (March 21, 2016), available at http://www.iflr.com/Article/3539342/Egypt-The-Arab-Investment-Court.html.

15 Arab Investment Agreement, Art. 1.7.

16 Compare *ibid.*, Art. 1.4 ("Arab citizen: an individual or a body corporate having the nationality of a State Party, provided that no part of the capital of such body corporate belongs either directly or indirectly to non-Arab citizens.") with Amended Agreement, Art. 1.8 ("Arab investor: The natural or juridical person who/which owns Arab capital which it invests in the territory of a State Party of

Arab projects owned by Arab citizens also are covered, as long as they are not incorporated in another state.[17]

Unlike most investment treaties, the Arab Investment Agreement expressly protects states and their organs when acting as investors. Article 1.4 of the Agreement includes as investors "Arab States and bodies corporate which are fully State-owned, whether directly or indirectly."[18] The extension of protection to states and state-owned entities promotes public investment and recognizes the significant investments that several Arab states undertake by means of public structures—most notably, state-owned oil and gas companies.[19]

Defining Arab capital expansively as "assets owned by an Arab citizen comprising any material and immaterial rights which have a cash valuation, including bank deposits and financial investments,"[20] the Agreement appears to protect a wide range of operations. However, it adds a subjective requirement, namely "the use of Arab capital in a field of economic development with a view to obtaining a return in the territory of a State Party… or its transfer to a State Party for such purpose in accordance with the provisions of this Agreement."[21] Two conclusions follow: first, the investment must be made for the purpose of profit, to the exclusion of charitable or non-profit operations; and second, it must contribute to the economic development of the host state or serve another goal of the Agreement.[22]

2.3 Substantive protections

The Arab Investment Agreement guarantees investors most protections available under modern BITs, but its reluctance to use standard language justifiably may

which it is not a national, provided that the Arab investor holds directly at least (51%) of the share capital of the relevant juridical person.").

[17] Arab Investment Agreement, Art. 1.4.

[18] *Ibid.* Several bilateral investment treaties concluded by Arab States, including Egypt, Kuwait, Qatar, Saudi Arabia, and the United Arab Emirates, also expressly include governments in the definition of "investor." See e.g. Agreement for the Promotion and Protection of Investments between the Republic of Italy and the Arab Republic of Egypt, Art. 1(3) ("The term 'investor' shall mean any natural or juridical person, including the Government of a Contracting State who invests in the territory and maritime zones of the other Contracting State."); Agreement between the Government of the United Arab Emirates and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments, Art. 1(e) ("'[I]nvestors' means: any national or company of one of the Contracting Parties or the Government of one of the Contracting Parties, or the Government of any of the Emirates of the United Arab Emirates.").

[19] Prominent examples include the Saudi Arabian Oil Company (Saudi Aramco) and the Kuwait Petroleum Corporation, both state-owned entities that manage the hydrocarbon interests of their respective states throughout the world. See also Walid Ben Hamida, "The First Arab Investment Court Decision," 7 *J. World Investment & Trade* 699, p. 702 (2006). A more recent case based on the protection afforded to state-owned entities is *State General Reserve Fund of the Sultanate of Oman v. Republic of Bulgaria* (ICSID Case No. ARB/15/43).

[20] Arab Investment Agreement, Art. 1.5.

[21] *Ibid.*, Art. 1.6.

[22] Ben Hamida, *supra* note 19, p. 703.

give pause to potential claimants as to the precise scope of coverage.[23] For instance, Article 2 provides that "State Parties… shall undertake to protect the investor, safeguard his investment and its related revenues and rights and, to the extent possible, to ensure the stability of the pertinent legal provisions." Although akin in spirit to a full protection and security clause, tribunals interpreting the plain language may conclude that it provides a lesser degree of protection, and one contingent on a subjective assessment of the possibility of legal security.[24]

Similarly, Article 7 provides for the free transfer of capital, but allows host states to restrict transfers to prevent the outflow abroad of its citizens' assets.[25] In practice, this may include assets held by special vehicles created for purposes of performing investment projects and established under the laws of the host state.

Article 6 extends national and most-favored-nation treatment to Arab investors.[26]

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23 The standards of protection under the Agreement constitute a minimum standard applicable to the investments covered. Arab Investment Agreement, Art. 3.

24 For a discussion of the level of diligence required by states under various formulations of the full protection and security standard, see Mahnaz Malik, "The Full Protection and Security Standard Comes of Age: Yet Another Challenge for States in Investment Treaty Arbitration?" Int'l Inst. Sustainable Dev. (2011), available at http://www.iisd.org/pdf/2011/full_protection.pdf.

25 Arab Investment Agreement, Art. 7 ("The Arab investor shall have the freedom to make periodic transfers, both of Arab capital for investment in the territory of any State Party and of the revenues therefrom . . . The provisions of this article shall not prejudice any recourse which the State may have to procedures to prevent the outflow abroad of the assets of its citizens."). The Amended Agreement eliminates this restriction.

26 *Ibid.*, Art. 6:

1. In accordance with the provision of the preceding article, in the State Party where the investment is made, the capital of the Arab investor shall, without discrimination, be treated in the same manner as capital owned by the citizens of that State. It shall automatically acquire identical legal status in terms of rights, obligations, regulations and procedures, although this shall not apply to any additional concessions which the State Party may accord to an Arab investment.
2. The Arab investor shall, however, be entitled to opt for any other manner of treatment which is laid down in general provisions in force in the State where the investment is made under a law or an international agreement and which is applicable to a non-Arab investment in a similar field. This shall not include any privileged treatment accorded by the State in respect of specific projects which are of particular importance to that State.

Interestingly, certain bilateral investment treaties signed by Arab parties provide for most-favored-nation treatment that specifically excludes treatment granted to investors from Arab League countries. See e.g. Agreement between the Lebanese Republic and the Republic of Cuba on the Promotion and Reciprocal Protection of Investments, Art. 3(2) ("in case of Lebanon this subparagraph [providing for most-favored-nation treatment] does not apply to treatment granted to investors of countries members of the Arab League"). Under such treaties, foreign investors may not receive more favorable treatment granted under the Arab Investment Agreement. See Robert T. Greig, Claudia Annacker & Roland Ziadé, "How Bilateral Investment Treaties Can Protect Foreign Investors in the Arab World or Arab Investors Abroad," 25 *J. Int'l Arb.* 257, p. 264 (2008).

Article 9 protects investors against direct and indirect expropriation and against impairment of their investments, broadly prohibiting:

> any specific or general measures, whether permanent or temporary and irrespective of their legal form, which wholly or partially affect any of the assets, reserves or revenues of the investor and which lead to confiscation, compulsory seizure, dispossession, nationalization, liquidation, dissolution, the extortion or elimination of secrets regarding technical ownership or other material rights, the forcible prevention or delay of debt settlement or any other measures leading to the sequestration, freezing or administration of assets, or any other action which infringes the right of ownership itself or prejudices the intrinsic authority of the owner in terms of his control and possession of the investment, his right to administer it, his acquisition of the revenues therefrom or the fulfilment of his rights and the discharge of his obligations.[27]

Article 9 carves out an exception for expropriations taken for the "public benefit," "on a non-discriminatory basis," "according to the general legal provisions regulating the seizure of property for the purposes of the public benefit," and done "in return for fair compensation," such compensation being due "within a period not exceeding one year from the date when the decision to dispossess became final."[28] Taken literally, this provision does not require compliance with substantive principles of due process (as most investment treaties do), but merely with domestic laws addressing the taking of property. Compensation need not be prompt or adequate, and its due date seems contingent on the subjective finding of the point in time when the "decision to dispossess [becomes] final"—an exercise that may prove difficult for creeping expropriations with no evident tipping point.[29]

Most significantly, the Arab Investment Agreement contains no provision guaranteeing fair and equitable treatment to investors or their investments.[30] In response, the 2013 Amended Agreement added to Article 2 a provision stating that "Arab capital in the State Party shall benefit from fair and equitable treatment at all times."[31] However, the fair and equitable treatment standard under the Amended

27 Arab Investment Agreement, Art. 9.1.

28 *Ibid.*, Art. 9.2(a).

29 The Arab Investment Agreement makes no reference to computation of interest, most likely due to the prohibition of interest under Sharia law. Ben Hamida, *supra* note 19, p. 704.

30 However, the fair and equitable treatment standard, in principle, can be imported by means of the most-favored-nation clause, as was done in *Al-Warraq v. Indonesia* brought under the OIC Agreement (see section 3.3 below). In *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan* (ICSID Case No. AR/08/2), Jordan was found to have breached the fair and equitable treatment standard which, although not in the Turkey-Jordan BIT on which the case was based, was imported via the most-favored-nation clause from another BIT requiring Jordan to provide such treatment.

31 Amended Agreement, Art. 2.

Agreement is general and unqualified, affording tribunals broad discretion in determining what constitutes a breach of the standard.[32]

2.4 Dispute resolution procedure

Chapter VI of the Arab Investment Agreement sets out a legal framework for the settlement of disputes. Article 25 provides that "[d]isputes arising from the application of this Agreement shall be settled by way of conciliation or arbitration or by recourse to the Arab Investment Court." Parties also may elect to arbitrate their disputes on an ad hoc basis under Article 2 of the Annex on conciliation and arbitration.[33]

2.4[a] Ad Hoc Arbitration

Article 2.1 of the Annex to the Arab Investment Agreement provides that parties "may agree to resort to arbitration" if: (i) the parties do not agree to conciliation; (ii) the conciliator was unable to render his decision within a three-month period; or (iii) the parties do not agree to accept the solution proposed by the conciliator. Article 2.1 is, at best, ambiguous as to whether it constitutes advance consent of signatory states to ad hoc arbitration, or whether the submission of disputes to arbitration requires a separate agreement between the parties.[34] As discussed below, the tribunal in *Al-Kharafi v. Libya* took the latter view, finding the state's consent to arbitration in an investment agreement between the parties. A party seeking arbitration under the Arab Investment Agreement therefore should be prepared to show that state consent has been given in a separate agreement.

To initiate arbitral proceedings, the claimant dispatches a notice to the respondent, setting forth the nature of the dispute and the relief sought, and appointing an arbitrator. The respondent must appoint an arbitrator within thirty days of receiving notice of the dispute, and the two co-arbitrators must appoint a chair within another thirty days. If the respondent fails to appoint an arbitrator, or the co-arbitrators cannot agree on a chair, Article 2.3 provides that "the arbitral panel shall consist of one arbitrator or an uneven number of arbitrators, one of whom shall have a casting vote. Either party may ask the Secretary-General of the

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[32] See Meriam Al-Rashid & Leonardo Carpentieri, "The Revival of Islamic and Middle East Regional Investment Treaties: A New Way Forward?" *Transnat'l Disp. Mgmt* 2 (March 2015), p. 10.

[33] Arab Investment Agreement, Art. 26 ("Conciliation and arbitration shall be conducted in accordance with the regulations and procedures contained in the annex to the Agreement which is regarded as an integral part thereof.").

[34] Most academics adopt the latter position. See e.g. Ben Hamida, *supra* note 19, p. 709 ("the submission of such dispute to conciliation or arbitration is subordinated to an agreement between the parties").

League of Arab States to appoint the arbitrators." Article 6 recognizes the tribunal's authority to rule on its jurisdiction under the principle of *compétence-compétence*.

The tribunal must render its decision no later than six months after its first meeting, subject to a single extension by the Secretary-General of the League of Arab States. The tribunal's decision is final and binding, and may not be appealed.[35] The parties must comply with the decision "immediately."[36]

Article 11 of the Annex provides that "[w]here the decision of the arbitral panel fails to be implemented within three months of its rendering, the matter shall be brought before the Arab Investment Court for it to rule on such measures for its implementation as it deems appropriate."

One of the most notable ad hoc arbitrations brought pursuant to Annex 2 of the Arab Investment Agreement is *Al-Kharafi v. Libya*. It won notoriety both for its US$ 935 million award to a Kuwaiti investor for a canceled tourism project—the second-largest investment treaty award at the time—and for its award of US$ 30 million in moral damages against the respondent state.[37] Rejecting Libya's jurisdictional objection that it had not consented to arbitration in accordance with Article 2 of the Annex to the Arab Investment Agreement, the tribunal found express consent in the provisions of the investment contract between the claimant and the Libyan Tourism Development Authority. On the merits, the tribunal found that, by failing to hand over land necessary for the claimant's investment and by canceling the underlying contract, the state had breached Article 9 of the Arab Investment Agreement. With respect to damages, the tribunal took account of the amount of just over US$ 2 billion reported by the claimant's expert in its final calculation of lost profit, but used "its discretionary power to estimate compensation at its minimum" and reduced lost profit damages to US$ 900 million.[38] The tribunal justified its award of moral damages by referring to the Libyan Civil Code, rather than applicable principles of international law. Clearly desirous of encouraging investment in Arab countries, the tribunal expressed the hope "that this arbitration will serve as an incentive to government agencies in charge of following-up governmental investment projects in the Arab countries to

[35] Arab Investment Agreement, Annex, Art. 2.8.

[36] *Ibid.*

[37] *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*, Final Arbitral Award (March 22, 2013). The arbitration, governed by the Arab Investment Agreement and Libyan law, took place in Cairo under the Rules of Arbitration of the Cairo Regional Centre for International Commercial Arbitration. The tribunal upheld jurisdiction over the dispute, finding that the relevant contract established the parties' consent to arbitration under the Arab Investment Agreement when it provided that disputes "arising from the interpretation or performance of the present contract during its validity period . . . shall be settled amicably," failing which "the dispute shall be referred to arbitration pursuant to the provisions of the Unified Agreement for the Investment of Arab Capital in the Arab States . . ." Final Award, p. 6. See also Ziadé, *supra* note 2, p. 48.

[38] *Al-Kharafi* Final Award, p. 380.

support the completion of investment projects successfully and without any obstacles, in the best interest of all Arabs, and to prevent "the collapse of the Arab investment for generations to come" (as indicated in the final submission submitted by the Defendants …)."[39] Libya's appointee to the tribunal, Justice Mohamed El-Kamoudi El-Hafi, refused to sign the award.[40]

2.4[b] The Arab Investment Court

The Arab Investment Agreement provides the framework for the AIC until an Arab Court of Justice is established and its jurisdiction is determined.[41] First referred to in Article 19 of the Charter of the Arab League, the Arab Court of Justice has yet to see the light of day despite numerous attempts by member states to set it up. In the meantime, the AIC remains the proper forum for disputes arising under the Arab Investment Agreement. Several intra-Arab BITs also refer arbitration disputes to the AIC.[42]

The AIC is seated at the permanent headquarters of the League of Arab States in Cairo and is composed of at least five serving judges and several reserve judges, each of a different Arab nationality, chosen by the Economic Council of the Arab League from a list of Arab legal specialists drawn up specifically for that purpose.[43] Each state proposes two candidates for the list. The Economic Council appoints the Chairman of the Court from among the members of the Court. The judges serve on the Court for a renewable three-year term.

According to Article 29 of the Arab Investment Agreement, the AIC has broad jurisdiction over disputes (i) "[b]etween any State party and another State party or between a State party and the public institutions and organizations of the other

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39 *Ibid.*, p. 382

40 Abdel Hamid El-Ahdab sat as chairman of the tribunal, with Ibrahim Fawzi and Mohamed El-Kamoudi El-Hafi acting as co-arbitrators.

41 Arab Investment Agreement, Art. 28.1 ("Until such time as the Arab Court of Justice is established and its jurisdiction determined, the Arab Investment Court shall be established").

42 See e.g. Agreement between the Government of the Arab Egyptian Republic and the Syrian Arab Republic for the Promotion and Protection of Investment (providing for the resolution of disputes by "conciliation, arbitration, in the host State or by recourse to the Arab Investment Court in accordance with the provisions of Article 6 of the Unified Agreement for the Investment of Arab Capital in the Arab States"); Agreement for the Mutual Promotion and Protection of Investments between the Government of the Sultanate of Oman and the Government of the Republic of Yemen, Art. 11(2) (allowing investors to resort to the following fora for the resolution of disputes: (i) domestic courts of the host state; (ii) ad hoc arbitration according to the arbitration law of the host state; (iii) the Arab Investment Court; or (iv) ICSID arbitration). The first investment dispute between an Arab investor and an Arab host state to have led to a final award by an ICSID tribunal, *Desert Line v. Yemen*, was brought under the Oman-Yemen BIT. The claimant's choice of forum may be partially explained by the fact that, at the time, the AIC had yet to hear its first case. See *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award (February 6, 2008). See also Ziadé, *supra* note 2, p. 47.

43 No judge may be of the same nationality as any party to the proceedings.

parties or between the public institutions and organizations of more than one State Party;" (ii) between a State Party, or a public institution or organization of a party and an Arab investor; and (iii) between a State Party, a public entity or an Arab investor and the state agencies providing investment guarantees in accordance with the Arab Investment Agreement.[44]

To date, all decisions rendered by the AIC—whether on jurisdiction or the merits—have been made in favor of state parties, which has caused concern among Arab investors as to whether the Court provides an independent and neutral forum for the resolution of their disputes.

3 THE OIC AGREEMENT

3.1 Background

The arson attack on the Al-Aqsa Mosque in Jerusalem on the morning of August 21, 1969 sent shockwaves through the Muslim world.[45] This desecration of the third holiest shrine of Islam prompted calls for unity among Muslim states and led to the first Islamic Summit in September 1969 in Rabat, Morocco.[46] Attended by representatives of twenty-four countries, the Summit decided to "consult together with a view of promoting between themselves close cooperation and mutual assistance in the economic, scientific, cultural and spiritual fields, inspired by the immortal teachings of Islam."[47] The Organisation of the Islamic Conference, later renamed Organisation of Islamic Cooperation (the "OIC"), thus was born as a pan-Islamic platform for cooperation among Muslim states.[48] It is now one of the

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[44] Arab Investment Agreement, Art. 29.

[45] See UNESCO, *Burning of the Aqsa Mosque*, Eighty-Third Session of the Executive Board, 83 EX/34 (September 30, 1969), available at http://unesdoc.unesco.org/images/0019/001931/193149EB.pdf.

[46] See First Islamic Summit Conference, September 25, 1969, Declaration and Resolution, available at http://ww1.oic-oci.org/english/conf/is/1/DecReport-1st%20IS.htm.

[47] *Ibid*. The First Islamic Summit Conference was attended by the heads of state and representatives of Afghanistan, Algeria, Chad, Guinea, Indonesia, Iran, Jordan, Kuwait, Lebanon, Libya, Malaysia, Mali, Mauritania, Morocco, Niger, Pakistan, Saudi Arabia, Somalia, Southern Yemen, Sudan, Tunisia, Turkey, the United Arab Republic, the Yemen Arab Republic, and the Moslem Community of India. Representatives of the Palestinian Liberation Organization attended as observers.

[48] The OIC Council of Foreign Ministers decided, during their first official meeting on March 23–25, 1970, to establish in Jeddah, Saudi Arabia, a Permanent Secretariat headed by the Secretary General of the OIC. The OIC was renamed the "Organisation of Islamic Cooperation" during the Thirty-Eighth Session of the Council of Foreign Ministers held in Astana, Kazakhstan, on June 28, 2011. See Report of the Thirty-Eighth Session of the Council of Foreign Ministers, at ¶ 10, OIC/CFM-38/2011/REPORT/FINAL (June 28–30, 2011), available at http://ww1.oic-oci.org/38cfm/en/documents/rep/38CFM-REPORT%20-%20FINAL-%209-7-2011.pdf. The Charter of the OIC was signed on September 25, 1969, and was amended during the Eleventh Islamic Summit held in Dakar, Senegal, on March 13–14, 2008. See Charter of the Organisation of the Islamic Conference (March 14, 2008), available at http://www.comcec.org/wp-content/uploads/2015/07/OIC_Charter1.pdf (the "OIC Charter").

largest international organizations in the world, with fifty-seven member states spanning the Middle East, North and West Africa, and Central and Southeast Asia.

One year after the Arab League adopted the Arab Investment Agreement, the OIC adopted the Agreement for Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference to encourage trade and investment among OIC member states.[49] The OIC Agreement was opened for signature on June 1–5, 1981 by Resolution No. 7/12-E of the 21st Islamic Conference of Foreign Ministers held in Baghdad, Iraq. It entered into force on February 25, 1988. To date, the OIC Agreement has been signed by thirty-six states and ratified by twenty-eight.[50] Sixteen of these states are also party to the Arab Investment Agreement: Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Sudan, Somalia, Syria, Tunisia, and the United Arab Emirates.

For over twenty-five years after its entry into force, the OIC Agreement remained unused in investor-state arbitrations.[51] It was invoked for the first time in 2012, by a Saudi national in *Al-Warraq v. Indonesia*.[52] The case arose out of Indonesia's bailout of Bank Century, the country's third largest bank, which was alleged to have diverted bailout funds to the presidential election campaign.[53] The investor, a shareholder of the bank, brought claims against the state, alleging expropriation of his investment and denial of fair and equitable treatment in the pursuit and trial of his assertions of banking irregularities in connection with the bailout.[54] Indonesia brought a counterclaim alleging unjust enrichment and misuse of bailout funds by the claimant.[55] The tribunal rendered its final award on

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49 See http://ww1.oic-oci.org/english/convenion/Agreement%20for%20Invest%20in%20OIC%20%20En.pdf. The OIC Agreement was drafted in Arabic, English and French, the OIC's official languages and is equally authentic in all three. This paper uses the English language version as a reference, although the English text is grammatically flawed at times. It will be noted where such flaws are relevant to the determination of obligations under the OIC Agreement.

50 To date, the following countries have ratified the OIC Agreement: Burkina Faso, Cameroon, Egypt, Gabon, Gambia, Guinea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Mali, Morocco, Oman, Pakistan, Palestine, Qatar, Saudi Arabia, Senegal, Somalia, Sudan, Syria, Tajikistan, Tunisia, Turkey, Uganda, and the United Arab Emirates.

51 Academics explain this lapse as a result of a cultural preference for the amicable settlement of disputes by conciliation or mediation, as well as the general unawareness of the existence of the OIC Agreement as an investment treaty, partly because the Agreement was not published in widely read sources until that time. See Walid Ben Hamida, "A Fabulous Discovery: The Arbitration Offer under the Organization of Islamic Cooperation Agreement Related to Investment," 30 *J. Int'l Arb.* 637, pp. 638–9 (2013).

52 *Hesham T. M. Al-Warraq v. Republic of Indonesia* ("*Al-Warraq*"). The case was conducted as an ad hoc arbitration under the UNCITRAL Arbitration Rules (the "UNCITRAL Rules") and was seated in Singapore. Bernardo M. Cremades (Spain) presided over the tribunal, with Michael Hwang S.C. (Singapore) and Fali S. Nariman S.C. (India) sitting as co-arbitrators.

53 *Al-Warraq* Final Award, ¶ 99.

54 *Ibid.*, ¶ 458.

55 *Ibid.*, ¶ 453.

December 15, 2014, finding a breach of the fair and equitable treatment standard, but declaring the investor's claim inadmissible under the "unclean hands" doctrine.[56] The tribunal dismissed Indonesia's counterclaims on the merits and ordered the parties to bear their own legal expenses and share arbitration costs.

A second award under the OIC Agreement was rendered very recently in an arbitration brought by Tunisian investor Kontinental Conseil lngénierie SARL against Gabon, concerning the alleged destruction of a social housing construction investmemt. Although the award remains confidential, it has been reported that the tribunal affirmed its jurisdiction to hear the investor's claims, found Gabon liable for unfair treatment, but rejected the bulk of the compensation claimed.[57]

3.2 Scope of application

The OIC Agreement applies more broadly to investors and investments than the Arab Investment Agreement. Article 1.6 defines "investor" as "[t]he Government of any contracting party or natural corporate person, who is a national of a contracting party and who owns the capital and invests it in the territory of another contracting party." According to the same provision, the nationality criterion will be met, for a natural person, by "[a]ny individual enjoying the nationality of a contracting party according to the provisions of the nationality law in force therein,"[58] and for a legal person by "[a]ny entity established in accordance with the laws in force in any contracting party and recognized by the law under which its legal personality is established."[59] Importantly, this definition imposes no requirements on the owners of a legal person, suggesting that the Agreement may apply to subsidiaries of non-contracting party parent companies, so long as these subsidiaries are incorporated in contracting states.[60]

The OIC Agreement similarly defines "investment" broadly, referring to "[t]he employment of capital in one of the permissible fields in the territories of a contracting party with a view to achieving a profitable return, or the transfer of capital to a contracting party for the same purpose."[61] Capital is expansively defined as:

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[56] See generally *ibid*.

[57] See Luke Eric Peterson, "Investigation: New Developments in Investor-State Arbitration Claims under the OIC Investment Agreement," *IAReporter* (Aug. 10, 2017), available at https://www.iareporter.com/articles/investigation-new-developments-in-investor-state-arbitration-claims-under-the-oic-investment-agreement/ (subscription required). Pierre Mayer presided over the tribunal, with Nassib Ziadé and Mathias Audit sitting as co-arbitrators.

[58] OIC Agreement, Art. 1.6(a).

[59] *Ibid*., Art. 1.6(b).

[60] See Al-Rashid & Carpentieri, *supra* note 32, p. 5.

[61] OIC Agreement, Art. 1.5.

> All assets . . . owned by a contracting party to this Agreement or by its nationals, whether a natural person or corporate body and present in the territories of another contracting party whether these were transferred or earned in it, and whether these be moveable, immoveable, in cash, in kind, tangible as well as anything pertaining to these capitals or investments by way of rights or claims and shall include net profits accruing from such assets and the undivided shares and intangible rights.[62]

Like the Arab Investment Agreement, the OIC Agreement requires that investments be made with an eye to profits. Unlike the Arab Investment Agreement, however, it does not impose a requirement that the investment contribute to the development of the host state.

3.3 Substantive protections

On the whole, the OIC Agreement provides few substantive protections to foreign investors and their investments, but its most-favored-nation provision may allow investors to benefit from protections possibly contained in other investment agreements. For instance, like the Arab Investment Agreement, the OIC Agreement does not include a fair and equitable treatment clause. However, in *Al-Warraq*, the tribunal found that the most-favored-nation provision allowed the investor to import the fair and equitable treatment guarantee contained in the bilateral investment treaty between the United Kingdom and Indonesia.[63] It found that Indonesia violated the standard through its conduct during criminal proceedings against the investor, in which it failed to examine the investor properly, failed to inform him of the criminal charges against him, and conducted the prosecution in his absence.[64] Emphasizing that denial of justice constitutes a clear violation of the fair and equitable treatment standard, the tribunal concluded that "[f]ailure to comply with the most basic elements of justice when conducting a criminal proceeding against an investor amounts to a breach of the investment treaty."[65] Ultimately, though, the tribunal found that the investor, as a result of his own wrongdoing with respect to banking activities, was prevented from pursuing his claim for fair and equitable treatment, and that the doctrine of unclean hands precluded the award of damages.[66]

Unlike the Arab Investment Agreement, a host state subject to the OIC Agreement is under no general obligation to afford investors treatment no less favorable than that it accords to its own nationals. The national treatment standard

[62] *Ibid.*, Art. 1.4.
[63] *Al-Warraq* Final Award, ¶¶ 547, 555.
[64] *Ibid.*, ¶¶ 581–604.
[65] *Ibid.*, ¶ 621.
[66] *Ibid.*, ¶¶ 648–54.

in Article 14 of the OIC Agreement is restricted to "compensation of damage that may befall the physical assets of investment due to hostilities of international nature committed by any international body or due to civil disturbances or violent acts of general nature."

Article 10 protects investments against direct and indirect expropriation in the following terms:

> The host state shall undertake not to adopt or permit the adoption of any measure – itself or through one of its organs, institutions or local authorities – if such a measure may directly or indirectly affect the ownership of the investor's capital or investment by depriving him totally or partially of his ownership or of all or part of his basic rights or the exercise of his authority on the ownership, possession or utilization of his capital, or of his actual control over the investment, its management, making use out of it, enjoying its utilities, the realization of its benefits or guaranteeing its development and growth.[67]

The host state may, however, "[e]xpropriate the investment in the public interest in accordance with the law, without discrimination and on prompt payment of adequate and effective compensation to the investor in accordance with the laws of the host state regulating such compensation."[68] Whereas the Arab Investment Agreement only requires payment of "fair" compensation within a year of the final decision to dispossess (however difficult it may be to determine such date), the OIC Agreement sets a higher standard of "prompt," "adequate," and "effective" compensation.

The OIC Agreement, like the Arab Investment Agreement, provides for the free transfer of capital. Article 2 of the OIC Agreement adds that "[t]he invested capital shall enjoy adequate protection and security," although this standard is also likely to fall short of the full protection and security standard.

3.4 Dispute resolution provisions

The OIC Charter envisages the creation of its own judicial organ for the resolution of inter-Islamic disputes under Islamic law—an International Islamic Court of Justice (the "IICJ"), conceived as an Islamic alternative to the International Court of Justice.[69] The OIC's attempts to create the IICJ started at the Third Islamic Summit in Mecca, Saudi Arabia, in 1981.[70] Following a series of

[67] OIC Agreement, Art. 10.1.

[68] *Ibid.*, Art. 10.2(a).

[69] OIC Charter, Art. 14 ("The International Islamic Court of Justice established in Kuwait in 1987 shall, upon the entry into force of its Statute, be the principal judicial organ of the Organisation."); see also Art. 5 (listing the International Islamic Court of Justice as an organ of the OIC).

[70] Third Islamic Summit Conference, Resolution No. 11/3-P(IS) (January 25–28, 1981), available at http://ww1.oic-oci.org/english/conf/is/3/3rd-is-sum(political).htm; see also Katja L.H. Samuel, *The OIC, the UN, and Counter-Terrorism Law-Making*, p. 294 (2013).

revisions, the OIC finally approved the Draft Statute of the IICJ at the Fifth Islamic Summit in Kuwait in 1987.[71] Ratification by a two-thirds majority of OIC member states was required for the IICJ to enter into force.[72] Thirty years on, the IICJ still does not exist, and its statute has yet to be ratified by the requisite quorum.[73]

Articles 16 and 17 of the OIC Agreement contain its dispute resolution provisions. Article 16 is a fork-in-the-road provision that offers investors the right to resort to the national courts of the host state or, alternatively, to an arbitral tribunal, the choice between the two being final.[74] Article 17 adds that:

> Until an Organ for the settlement of disputes arising under the Agreement is established, disputes that may arise shall be entitled through [sic] conciliation or arbitration in accordance with the following rules and procedures:
>
> … Arbitration. a) If the two parties to the dispute do not reach an agreement as a result of their resort to conciliation, or if the conciliator is unable to issue his report within the prescribed period, or if the two parties do not accept the solutions proposed therein, then each party has the right to resort to the Arbitration Tribunal for a final decision on the dispute.[75]

Although the English text of Article 17 may be slightly confusing as to whether it allows investors to bring arbitration claims under the OIC Agreement,

[71] Fifth Islamic Summit Conference, Resolution No. 13/5-P(IS) (January 26–29, 1987), available at http://ww1.oic-oci.org/english/conf/is/5/5th-is-sum(political).htm; Draft Statute of the IICJ, IICJ /2-86.D1 (January 29, 1987), http://ww1.oic-oci.org/english/convenion/1987/statute_of_the_international_islamic_court_of_justice_en.pdf (the "IICJ Draft Statute").

[72] IICJ Draft Statute, Art. 49.

[73] The IICJ Draft Statute provides that the IICJ shall be composed of seven judges who must be nationals of OIC member states, Muslims of high moral standards, Sharia jurists of recognized competence, and experienced in international law. To date, no judges have been elected to the IICJ, nor has a registrar been appointed.

[74] OIC Agreement, Art. 16 ("The host state undertakes to allow the investor the right to resort to its national judicial system to complain against a measure adopted by its authorities against him . . . [p]rovided that if the investor chooses to raise the complaint before the national courts or before an arbitral tribunal then having done so before one of the two quarters he loses the right of recourse to the other.").

[75] No language in the OIC Charter, the IICJ Draft Statute, or the OIC Agreement explicitly provides that the IICJ is the "Organ" to which the OIC Agreement refers. Arbitration practitioners diverge on whether it is, especially as the jurisdiction of the IICJ is restricted to inter-state disputes, which would preclude investors from bringing their claims against offending states. Compare Alison Ross & Kyriaki Karadelis, "An Arab Spring of Treaty Arbitration?" *Global Arb. Rev.* (February 24, 2015), http://globalarbitrationreview.com/article/1034307/an-arab-spring-of-treaty-arbitration ("the [OIC Agreement] only ever envisaged arbitration as a temporary way of resolving investment disputes pending the creation of an Islamic International Court of Justice in Kuwait, which is still to be built") with Ben Hamida, *supra* note 51, p. 659 ("Arguing that the establishment of the Islamic Court replaces the arbitration provided in Article 17 is incorrect. The Islamic Court does not exist yet in law or in fact. And when it is established, it will not have jurisdiction to settle investor-state disputes under the OIC Agreement. Asserting the contrary frustrates the right of investors to access a neutral and independent forum to settle their disputes."). In any event, there is no doubt that the "Organ" has not yet been established.

the equally authentic French and Arabic versions strongly suggest that OIC member states indeed consented to arbitration of disputes with investors. According to the French version, "[e]n attendant la création d'un organisme pour le règlement des litiges résultant de cet Accord, les litiges qui pourraient se présenter seront réglés par consiliation ou par voie d'arbitrage conformément aux régles suivantes …" (sic). The Arabic version similarly provides:

وإلى أن يتم إنشاء جهاز لتسوية المنازعات الناشئة عن هذه الاتفاقية يحل ما يكون من المنازعات عن طريق التوفيق أو التحكيم وفقاً للقواعد والإجراءات الأتية.

The tribunal in *Al-Warraq* looked to all three versions before concluding that Article 17 of the OIC Agreement provides for investor-state arbitration.[76] The tribunal also noted that by using the terms "parties to the dispute," and not "contracting parties," the drafters of the OIC Agreement intended that the dispute settlement mechanism should cover not only inter-state but also investor-state disputes.[77]

In practice, the main obstacle that parties have faced when bringing claims under the OIC Agreement has been the respondent state's unwillingness to appoint an arbitrator.[78] Article 17(d) provides for the constitution of the tribunal as follows:

> The arbitration procedure begins with a notification by the party requesting the arbitration to the other party to the dispute, clearly explaining the nature of the dispute and the name of the arbitrator he has appointed. The other party must, within sixty days from the date on which such notification was given, inform the party requesting arbitration of the name of the arbitrator appointed by him. The two arbitrators are to choose, within sixty days from the date on which the last of them was appointed arbitrator, an umpire who shall have a casting vote in case of equality of votes. If the second party does not appoint an arbitrator, or if the two arbitrators do not agree on the appointment of an Umpire within the prescribed time, either party may request the Secretary General to complete the composition of the Arbitration Tribunal.

Several contracting parties to the OIC Agreement have failed to appoint arbitrators in accordance with Article 17(d) when faced with a request for arbitration. To date, the Secretary General of the OIC has not responded to the claimants' requests for a default appointment, thus paralyzing the proceedings and frustrating the claimants' attempts to resolve the dispute by arbitration.[79] For

[76] Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of Claims (June 21, 2012) (the "*Al-Warraq* Award on Preliminary Objections"), ¶ 38.

[77] *Ibid.*, ¶ 75.1.

[78] See Ross & Karadelis, *supra* note 75, pp. 4–5.

[79] See Jarrod Hepburn & Luke Eric Peterson, "Investigation: As New Cases Emerge Under Islamic Investment Treaty, Initial Viability of Claims Seems to Hinge on Willingness of Respondents to

instance, three arbitrations initiated by Saudi businessman Hesham Al Mehdar against Egypt in 2014 have been delayed for this reason.[80] In those cases where tribunals have been properly constituted, this has been because the states involved—for example, Jordan and Gabon—have cooperated in appointing arbitrators, thus eliminating any need for the OIC Secretariat to intervene.[81]

At the time of writing, one investor may have succeeded in breaking the stalemate by appealing to the Permanent Court of Arbitration (the "PCA") to designate an appointing authority after the OIC Secretariat failed to make a default appointment on the respondent state's behalf.[82] The claimant, Emirati construction company D.S. Construction FZCO, brought the claim against Libya in October 2016, alleging that the state had indirectly expropriated its nineteen construction projects during the Libyan Civil War.[83] When it met with silence from both the state and the OIC Secretariat, the claimant invoked the most-favored-nation provision in the OIC Agreement to argue that it could import Libya's consent to arbitration under the UNCITRAL Rules from the Austria-Libya BIT.[84] Under these Rules, the Secretary-General of the PCA may designate an appointing authority if the authority previously designated refuses to act or fails to appoint an arbitrator within thirty days after it receives a party's request to do so.[85] The claimant argued that, failing intervention by the PCA, it would face a denial of justice and the *de facto* termination of its arbitration against Libya.[86]

Appoint Arbitrators," *IAReporter* (Mar. 2, 2017), available at http://www.iareporter.com/articles/investigation-as-new-cases-emerge-under-islamic-investment-treaty-initial-viability-of-claims-seems-to-hinge-on-willingness-of-respondents-to-appoint-arbitrators (subscription required).

80 *Ibid.*

81 See *Kontinental Conseil Ingénierie v. Gabonese Republic*, ad hoc arbitration conducted under the UNCITRAL Rules (pending); *Ali Alyafei v. Hashemite Kingdom of Jordan*, ad hoc arbitration conducted under the UNCITRAL Rules (dismissed). The claimant in *Alyafei* initially initiated ICSID proceedings against Jordan pursuant to the OIC Agreement. They were dismissed due to the claimant's failure to pay its advance on costs. The claimant then initiated an ad hoc arbitration, again pursuant to the OIC Agreement, appointing Laurence Boisson de Chazournes as arbitrator. Jordan appointed Paolo Michele Patocchi. The co-arbitrators selected Pierre Mayer as chairman. The tribunal dismissed the case following the claimant's failure to submit its memorial within the agreed time limit. Both cases are referred to by Hepburn & Peterson, *supra* note 79.

82 See Sebastian Perry, "PCA Ends Standoff Over Islamic Treaty Claim," *Global Arb. Rev.* (April 3, 2017), http://globalarbitrationreview.com/article/1138857/pca-ends-standoff-over-islamic-treaty-claim; Luke Eric Peterson, "After Organisation for Islamic Cooperation Fails to Nominate an Arbitrator to Sit in Investor-State Case, PCA Breaks Stalemate by Designating an Appointing Authority," *IAReporter* (March 31, 2017), http://www.iareporter.com/articles/after-organisation-for-islamic-cooperation-fails-to-nominate-an-arbitrator-to-sit-in-investor-state-case-pca-breaks-stalemate-by-designating-an-appointing-authority/ (subscription required).

83 See Hepburn & Peterson, *supra* note 79.

84 Perry, *supra* note 82; Peterson, *supra* note 82.

85 1976 UNCITRAL Rules, Art. 7.2(b); 2010 UNCITRAL Rules, Art. 6(4).

86 Perry, *supra* note 82.

On March 27, 2017, the PCA held itself competent under the 1976 UNCITRAL Rules to designate a replacement appointing authority, and selected French academic Pierre-Marie Dupuy for this function.[87] In doing so, it overrode the state's objection that the OIC Agreement offered no grounds for the PCA to intervene.[88] The PCA's decision is expected to encourage future referrals to it when the OIC Secretariat fails to make a default appointment, but there is also a risk in this particular case that it might lead to an attempt to set aside a subsequent award.

4 CLAIMS AND COUNTERCLAIMS BY HOST STATES

Unlike most investment treaties, both the Arab Investment Agreement and the OIC Agreement may provide host states with the necessary treaty language for bringing claims and counterclaims against foreign investors, notwithstanding the general debate over the admissibility of counterclaims in investor-state arbitration.[89]

In *Al-Warraq*, Indonesia invoked Article 17 of the OIC Agreement to bring a counterclaim against the claimant, alleging unjust enrichment and misuse of state bailout funds and requesting the payment of "the full amount of the bailout" or a lesser amount that the investor "has been shown to have stolen" in domestic criminal proceedings.[90] The tribunal dismissed the claimant's objection to jurisdiction, finding that it had the authority to hear the dispute under the terms of the OIC Agreement.[91] To the authors' knowledge, this is the only case in which a tribunal has rejected an objection to its jurisdiction over counterclaims arising out of a violation of domestic laws.[92]

There is no explicit reference in the OIC Agreement to counterclaims by host states. Instead, the tribunal in *Al-Warraq* based its decision on the following provisions. First, it found that the broad wording of Article 17 allows the state to

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[87] *Ibid.*; Peterson, *supra* note 82. Professor Dupuy subsequently appointed Nassib Ziadé to serve as arbitrator. The claimant earlier had nominated Stanimir Alexandrov as arbitrator. The co-arbitrators selected Bruno Simma as chairman. See Luke Eric Peterson, "Libya Investment Treaty Claims: Another Claim Surfaces and Another Tribunal is Finalized," *IAReporter* (June 29, 2017), https://www.iareporter.com/articles/27731/ (subscription required).

[88] Peterson, *supra* note 82.

[89] For a discussion of this topic, see Ina Popova & Fiona Poon, "From Perpetual Respondent to Aspiring Counterclaimant? State Counterclaims in the New Wave of Investment Treaties," 2 *BCDR Int'l Arb. Rev.* 223 (2015); Anne K. Hoffmann, "Counterclaims in Investment Arbitration," 28 *ICSID Rev.* 438 (2013); Pierre Lalive & Laura Halonen, "On the Availability of Counterclaims in Investment Treaty Arbitration," 2 *Czech Y.B. Int'l L.* 141 (2011).

[90] *Al-Warraq* Final Award, ¶ 655.

[91] *Ibid.*, ¶¶ 661 et seq.

[92] See also Trisha Mitra & Rahul Donde, "Claims and Counterclaims in Asian Multilateral Investment Treaties" in Leïla Choukrane (ed.), *Judging the State in International Trade and Investment Law* 104, 121 (2016); Popova & Poon, *supra* note 89, p. 231.

bring claims or counterclaims against investors under the Agreement, pointing to the language used, namely "*each party* has the right to resort to the Arbitration Tribunal for a final decision on the dispute,"[93] and "*the investor against whom the decision was passed*" in relation to the state's obligation to enforce awards.[94] The tribunal also found support for its position in Article 9 of the OIC Agreement, which imposes positive obligations on foreign investors to observe certain norms of conduct:

> The investor shall be bound by the laws and regulations in force in the host state and *shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means.*[95]

The tribunal considered that the language of Article 9 "raises this obligation from the plane of domestic law (and jurisdiction of domestic tribunals) to a treaty obligation binding on the investor in an investor-state arbitration."[96] It upheld jurisdiction over the counterclaim, although it ultimately dismissed it on the merits.[97]

Article 14 of the Arab Investment Agreement similarly imposes obligations on Arab investors (emphasis added):

> 1. In the various aspects of his activity, the Arab investor must, as far as possible, liaise with the State in which the investment is made and with its various institutions and

[93] See also *Al-Warraq* Award on Preliminary Objections, ¶ 75.1 ("If resort to . . . arbitration were intended to be confined to State Parties . . . Article 17 would have made this explicit through the use of the defined expression 'Contracting Parties'. 'Investors' are clearly envisaged, as in clauses 3, 6 and 16 of the OIC Agreement. Accordingly, the Tribunal considers that the expression 'parties' in Article 17 includes both states and investors").

[94] *Al-Warraq* Final Award, ¶ 661 (emphasis in original). See OIC Agreement, Art. 17(2)(d) ("The contracting parties are under an obligation to implement [the tribunal's decisions] in their territory, no matter whether it be a party to the dispute or not and irrespective of whether the investor against whom the decision was passed is one of its nationals or residents or not, as if it were a final and enforceable decision of its national courts."). There is a degree of ambiguity in the term "decision": the tribunal could have understood it to mean the original decision of the host state that gave rise to the investor's claim.

[95] OIC Agreement, Art. 9 (emphasis added). This provision was removed in the 2013 Amended Agreement.

[96] *Al-Warraq* Final Award, ¶ 663. While acknowledging that counterclaims are "problematic in investment arbitration" because of the "inherently asymmetrical character" of a BIT which tends to favor the foreign investor, the tribunal nonetheless cited Prof. James Crawford's opinion that "tribunals should be able to hear closely connected investment counterclaims arising under the investment contract." *Ibid.*, ¶ 659. See James Crawford, "Treaty and Contract in Investment Arbitration," 2007 Freshfields Lecture, 24 *Arb. Int'l* 351, p. 368 (2008). The tribunal analyzed the connection in *Al-Warraq* and noted that "the counterclaim is closely related both to the investment and to the Claimant's claims" and that it was "also based on similar facts." *Al-Warraq* Final Award, ¶¶ 667–668.

[97] *Al-Warraq* Final Award, ¶¶ 669–672 (dismissing Indonesia's counterclaim because (i) the state failed to define the investor's liability separately from individuals and entities not parties to the arbitration, (ii) the state failed to provide a legal basis on which to recover its losses, and (iii) certain transactions on which Indonesia based its claim were subject to different dispute resolution clauses).

> authorities. He must respect its laws and regulations in a manner consistent with this Agreement and, in establishing, administering and developing Arab investment projects, must comply with the development plans and programmes drawn up by the State for the purpose of national economic development by employing all means which reinforce its structure and promote Arab economic integration. In so doing, *he shall refrain from any action which might violate public order and morality or involve illegitimate gains.*
>
> 2. *The Arab investor shall bear liability for any breach of the obligations set forth in the preceding paragraph* in accordance with the law in force in the State in which the investment is made or in which the breach occurs.

To the authors' knowledge, no state has ever brought a claim or counterclaim against a foreign investor under this Article. However, a tribunal may well look to the analogous language in Article 9 of the OIC Agreement and reach a conclusion similar to that of the *Al-Warraq* tribunal, finding that the Arab Investment Agreement similarly elevates the investor's domestic obligations to a treaty obligation and entitles the state to relief in the event of a breach.

5 ENFORCEMENT OF ARBITRATION AWARDS

Arbitral awards rendered under the OIC Agreement or the Arab Investment Agreement are enforceable as though they were final decisions of national courts of the state in which enforcement is sought. To that effect, Article 34(3) of the Arab Investment Agreement provides:

> A judgement delivered by the Court shall be enforceable in the States Parties, where they shall be immediately enforceable in the same manner as a final enforceable judgement delivered by their own competent courts.

If an award debtor fails to comply with the award within a period of three months, the award may be brought before the AIC, which will act as an enforcing authority and take any measures it deems necessary to ensure enforcement.[98] The statutes of the AIC confirm that its decisions shall be enforceable in the member states of the Arab Investment Agreement, in the same manner as a final enforceable judgment delivered by their own competent courts.[99] Its decisions are final and not subject to appeal.[100]

Similarly, Article 17.2(d) of the OIC Agreement provides:

> The decisions of the Arbitration Tribunal . . . shall have the force of judicial decisions. The contracting parties are under an obligation to implement them in their territory, no

[98] Arab Investment Agreement, Annex, Art. 2.11.

[99] AIC statutes, Art. 46. The AIC statutes are available in the original Arabic at http://www.lasportal.org/en/legalnetwork/Pages/Investment_CourtSystems.aspx.

[100] *Ibid.*, Art. 33(2).

> matter whether it be a party to the dispute or not and irrespective of whether the investor against whom the decision was passed is one of its nationals or residents or not, as if it were a final and enforceable decision of its national courts.

Most cases under the Arab Investment Agreement and the OIC Agreement are either pending or have not yet reached the enforcement stage. As a result, it is difficult to identify trends in the enforcement of arbitral awards rendered under their aegis. However, given the number of Arab states that are parties to both the New York Convention and the ICSID Convention, other avenues for enforcement may well be available.

6 CONCLUSION

For Arab investors seeking a gateway to arbitrate their investment disputes with host states within the Arab world, the Arab Investment Agreement and the OIC Agreement may provide a path where none had existed before. Both treaties provide a set of procedural and substantive protections that mirror, to a large extent, common protections in modern investment instruments, and that offer the prospect of easily enforceable awards.

However, given the legal uncertainty that may arise under each treaty—in terms of textual ambiguity and procedural unpredictability—it is perhaps unsurprising that investors continue to seek other instruments under which to bring their claims. Notwithstanding the increase in intra-Arab investment arbitration, the combined caseload under the Arab Investment Agreement and the OIC Agreement remains meagre at just over ten cases to date. It has now been fourteen years since the initiation of the first arbitration pursuant to the Arab Investment Agreement. As time goes by, it becomes increasingly difficult to attribute this meagre caseload to general unawareness of the existence of the treaties.

To encourage the settlement of disputes under the Arab Investment Agreement and the OIC Agreement, Arab states should be attentive to the proper conduct of proceedings and public perception of the resulting awards. The viability of these multilateral treaties will depend on the resolve of states to provide adequate substantive protections and ensure the effectiveness of the dispute resolution process, both of which may require some textual reform. For example, under the OIC Agreement, unless and until the OIC actively embraces its role as appointing authority in the event of the respondent state's refusal to appoint an arbitrator, states have the unilateral power to paralyze proceedings. The designation of an alternate appointing authority capable of constituting the tribunal in the event of the OIC's inaction may be necessary to allow new ad hoc cases to proceed and avoid the risk of a future set-aside action based on the designation of

an appointing authority by another body such as the PCA. Meanwhile, claimants may have no choice but to opt for administered proceedings under the auspices of a well-known arbitral institution[101] if they wish to be sure that their dispute will reach the adjudicatory stage.

[101] The role of regional institutions in this field is beginning to grow and they should not be overlooked. See Ziadé, *supra* note 2, p. 49.