The Phoenix of Multilateral Investment Treaties: The Agreement for the Promotion, Protection and Guarantee of Investments Among Member States of the Organisation of the Islamic Conference - What Impact on Sub-Saharan Africa?

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Executive summary

The Organisation of the Islamic Conference, a union of 57 Muslim States, has produced an agreement for the promotion, protection and guarantee of investments among its members. This little-known investment agreement was ratified by numerous States around the globe, including many in sub-Saharan Africa. It is now well-documented that this part of the world increasingly attracts foreign direct investment, notably from investors of other signatories to this investment agreement. However, very little, if anything, has been written about the impact this investment agreement could have on investor-state arbitrations involving a sub-Saharan African State. The purpose of this paper is to examine, in light of the first published award pertaining to this investment agreement, the protection it affords to investors and States, as well as the arbitration mechanism it sets forth. This agreement could play a meaningful role by providing investors with valuable protections and an avenue for redress they might not otherwise have, whilst binding them to certain norms of conduct applicable in the host State. However, this agreement could also lead to further forum shopping and the multiplication of arbitration proceedings against some of the least developed States in the world.

I. Introduction

It is no secret that sub-Saharan Africa (“SSA”) has become a land of opportunities for investment. Investors from all regions flock to SSA to make investments with an eagerness that would make Claire and Frank Underwood proud.[2] Whether it is investors from the West, such as North America or Europe, from new economic giants, such as China, India or Turkey, or cash-heavy countries such as the Gulf States, they all want a piece of the pie.[3] Furthermore, it will come as no surprise to the reader that investments from Africans in Africa are also on the rise, as they are waking up to the potential across borders in their own backyard. By way of example, Nigeria’s Dangote Cement, controlled by one of the continent’s richest men, Aliko Dangote, has invested USD 5 billion to build an African

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[2] Claire and Frank Underwood are the protagonists of the popular U.S. political drama television show “House of Cards” available on Netflix.com.

[3] *See* Makhtar Diop et al., *Africa Still Poised to Become the Next Great Investment Destination* (World Bank, June 30, 2015), available at http://www.worldbank.org/en/news/opinion/2015/06/30/africa-still-poised-to-become-the-next-great-investment-destination (explaining that foreign direct investment in the region has hit a record USD 60 billion and that it has become the second most attractive investment destination in the world); *see also* The Economist Intelligence Unit, *Beyond Commodities – Gulf Investors and the new Africa* (2015), available at https://www.eiuperspectives.economist.com/sites/default/files/BeyondCommodities_1.pdf (noting that investors from the Gulf invested USD 9.3 billion in foreign direct investment into SSA).

cement empire, with projects planned in Cameroon and Senegal among others.[4] Dangote's investment in Senegal is in fact at the origin of an investor-state arbitration initiated by Vicat, a French corporation, against Senegal on the ground that the Senegalese Government unfairly favoured its rival, Dangote Cement.[5]

What is less well-known is that a number of the aforementioned capital-exporting countries, as well as a number of SSA countries that are capital-importing countries, are Member States of the Organisation of the Islamic Conference ("OIC") and parties to the OIC's investment chapter: the Agreement for the Promotion, Protection, and Guarantee of Investments (the "Investment Agreement").[6]

The OIC was established on September 25, 1969, following a summit in Rabat, Morocco. It has now become the second largest intergovernmental organisation after the United Nations, with 57 Member States. Article 1 of the OIC Charter sets forth the organization's objectives and principles, which include, *inter alia*, strengthening economic and trade cooperation among the Member States, preserving Islamic social and economic values, and promoting cooperation in social, cultural and other fields.[7] Under the umbrella of the OIC, Member States have adopted 8 main agreements that span from traditional areas of cooperation such as trade, tariffs, and economic cooperation to areas such as civil aviation, telecommunications and meteorology.[8] The focus of this paper is the Investment Agreement, a multilateral investment treaty concluded in Baghdad in 1981. Of the 57 current Member States of the OIC, 34 have signed the Investment Agreement and 27 have ratified it.[9]

The Investment Agreement affords protection against measures tantamount to a direct or indirect expropriation (Article 10). Surprisingly, and at odds with many other investment agreements, it does not guarantee fair and equitable treatment. However, the Investment Agreement may in effect provide alternative causes of action to which investors can resort in order to challenge State measures that traditionally would have been challenged under the fair and equitable treatment standard (Article 13). Moreover, the Investment Agreement contains a most-favoured nation ("MFN") clause (Article 8), guaranteeing that investors from a contracting party to the Investment Agreement would not be treated less favourably than investors from a non-contracting party. This raises the possibility that an investor claiming under the Investment Agreement may also be able to benefit from protections in other investment agreements concluded by the host state. In addition, the Investment Agreement provides for broad obligations imposed on the investor (Article 9).

[4] AFRICA INVESTMENT – From FDI to AIA: Africans investing in Africa (Reuters, August 8, 2013), available at http://www.reuters.com/article/africa-investment-idUSL6N0G92SW20130808.

[5] Douglas Thomson, *Senegal's 'cement war' prompts ICSID claim* (GAR, August 7, 2014), available at http://globalarbitrationreview.com/news/article/32878/senegals-cement-war-prompts-icsid-claim/.

[6] The Agreement on Promotion, Protection, and Guarantee of Investments among Member States of the Organisation of the Islamic Conference (the "Investment Agreement") is available at the OIC website in Arabic, English, and French. The English version is available at http://www.oic-oci.org/english/convenion/Agreement%20for%20Invest%20in%20OIC%20%20En.pdf.

[7] The OIC Charter was adopted in Dakar, Senegal in March 2008 and is available at http://www.oic-oci.org/english/charter/OIC%20Charter-new-en.pdf.

[8] Walid Ben Hamida, *A Fabulous Discovery: The Arbitration Offer under the Organization of the Islamic Cooperation Agreement Related to Investment*, 30 J. Int'l Arb. 637, 637 (2013).

[9] List of Member States Who Signed/Ratified the Different Agreements and Statutes on Economic, Commercial and Technical Cooperation among OIC Member States (January 31, 2012), available at http://www.oic-oci.org/oicv3/upload/pages/conventions/en/accords_oct_30_en.pdf.

The Investment Agreement also contains dispute resolution provisions (Articles 16 and 17). The wording of these provisions has raised numerous issues of interpretation, including whether they provide for investor-state arbitration and, if so, whether a separately-expressed consent is required, whether conciliation is a precondition to arbitration, and whether the International Islamic Court of Justice ("IICJ") is the proper and sole forum for deciding investor-state disputes.

From its inception in 1981 until 2012, this multilateral agreement went almost entirely unnoticed and unused.[10] It was only in 2014 that an award rendered under this agreement was finally published. In *Hesham al Warraq v. Republic of Indonesia* ("*al Warraq*"), a Saudi national, Mr. al Warraq, commenced arbitration proceedings pursuant to the Investment Agreement for the alleged losses that stemmed from the nationalisation of his stake in an Indonesian Bank. Following this nationalisation, Mr. al Warraq was investigated, charged with, and convicted of various offences relating to alleged banking irregularities. The tribunal (the "Tribunal") first ruled in a jurisdictional decision that investors may directly invoke the protections set out in the Investment Agreement.[11] In a subsequent final award on the merits, the Tribunal provided much sought-after guidance on the manner in which the Investment Agreement's protections should be construed. It notably held that, while the host State, Indonesia, had breached its fair and equitable treatment obligations imported from another investment agreement via the MFN clause, the claims made by the foreign investor should be dismissed because its behaviour ran afoul of its obligations articulated in Article 9.[12]

Soon after the jurisdictional decision in *al Warraq*, a second case was brought on the basis of the Investment Agreement. This time, a Tunisian investor initiated arbitration proceedings against Gabon,[13] underscoring the impact this multilateral investment treaty could have on SSA.

Like the legend of the Phoenix, the Investment Agreement of the OIC has risen from the ashes to spread its wings above the Islamic world and, consequently, on a vast part of SSA. What impact this reborn treaty will have remains to be seen. Does it constitute another avenue for justice all should celebrate? Could it lead to the multiplication of proceedings, including against some of the poorest nations in the world? Whether a cause for celebration or concern, governments and investors of the OIC Member States alike would benefit from a better understanding of the manner in which arbitral tribunals may construe the language of the Investment Agreement, at a time when this agreement is attaining increasing visibility among practitioners and commentators.[14]

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[10] For further explanations about why the Investment Agreement remained unknown and unused for so long, *see* Walid Ben Hamida, *A Fabulous Discovery: The Arbitration Offer under the Organization of the Islamic Cooperation Agreement Related to Investment*, 30 J. Int'l Arb. 637, 638-639 (2013).

[11] al Warraq v. Republic of Indonesia, UNCITRAL, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims (June 21, 2012), available at http://www.italaw.com/sites/default/files/case-documents/italaw3174_0.pdf (hereinafter "al Warraq v. Republic of Indonesia, Jurisdictional Decision").

[12] al Warraq v. Republic of Indonesia, UNCITRAL, Final Award (December 15, 2014), available at http://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf (hereinafter "al Warraq v. Republic of Indonesia, Final Award").

[13] Kyriaki Karadelis, *Gabon faces claim under obscure Islamic treaty* (GAR, March 13, 2015), available at http://globalarbitrationreview.com/news/article/33625/gabon-faces-claim-obscure-islamic-treaty/.

[14] For decades, the Investment Agreement received little if no attention. Yet, in the last few years, one well-known academic, Dr. Ben Hamida, and one practitioner, Mr. George Burn, published two articles on this topic: *See* Walid Ben Hamida, *A Fabulous Discovery: The Arbitration Offer under the Organization of the Islamic*

The purpose of this paper is to introduce the reader to this little-known multilateral investment treaty, the protections it affords, the dispute resolution mechanism it sets forth and the impact it could have on investor-state disputes with an SSA component. A second section will set the scene by mapping the OIC Member States from SSA that are contracting parties to the Investment Agreement, as well as examining what investors and investments are eligible for protection under this agreement (II). A third section will then focus on the protections the Investment Agreement provides to both investors and host States (III), before analysing the dispute resolution provisions it contains (IV). In a final section, it will be considered how the advent of the Investment Agreement may simultaneously provide an avenue for justice to investors otherwise deprived of any recourse, all while leading to further forum shopping and multiple proceedings in a region of the world that harbours some of the world's least developed countries (V).

II. Setting the Scene

As detailed below, the Investment Agreement covers extensive parts of SSA, and affords protection to a wide array of investors and investments.

A. Geographical Coverage

The current status of signatures and ratifications of the Investment Agreement amongst OIC Member States in SSA is summarised in the table below:

OIC Member States from SSA that have signed or ratified the Investment Agreement[15]

OIC Member States from SSA	**OIC Investment Agreement**	
	Signed	Ratified
1. Burkina Faso	N/A	May 19, 1992
2. Cameroon	October 25, 1994	September 26, 1995
3. Gabon	N/A	January 21, 2008
4. Gambia	September 4, 1993	August 11, 2009

Cooperation Agreement Related to Investment, 30 J. Int'l Arb. 637, 647 (2013) and George Burn, *The Invisible MIT: The Curious Case of the Agreement for the Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference*, in The regionalization of international investment treaty arrangements (British Institute of International and Comparative Law, 2015), pp. 173 et seq. Also, trade publications such as Global Arbitration Review and IA Reporter have mentioned the Investment Agreement in several posts. S*ee* Kyriaki Karadelis, *Gabon faces claim under obscure Islamic treaty* (GAR, March 13, 2015), available at http://globalarbitrationreview.com/news/article/33625/gabon-faces-claim-obscure-islamic-treaty/; *see also* Luke Eric Peterson, *Analysis: Indonesia says 1981 inter-Islamic pact does not offer consent to investor-state arbitration, but tribunal uses "contemporary" interpretation and finds consent* (IA Reporter, September 19, 2012), available at https://www.iareporter.com/articles/analysis-indonesia-says-1981-inter-islamic-pact-does-not-offer-consent-to-investor-state-arbitration-but-tribunal-uses-contemporary-interpretation-and-finds-consent/.

[15] List of Member States Who Signed/Ratified the Different Agreements and Statutes on Economic, Commercial and Technical Cooperation among OIC Member States (January 31, 2012), available at http://www.oic-oci.org/oicv3/upload/pages/conventions/en/accords_oct_30_en.pdf.

5.	Guinea	November 8, 1995	June 20, 2003
6.	Mali	N/A	May 24, 1982
7.	Senegal	June 17, 1987	June 30, 1994
8.	Somalia	December 19, 1983	November 25, 1984
9.	Sudan	December 20, 1981	May 30, 2002
10.	Uganda	November 26, 1987	February 10, 1987
11.	Ivory Coast	November 7, 2009	N/A
12.	Djibouti	August 25, 1982	N/A
13.	Guinea-Bissau	November 11, 2009	N/A
14.	Nigeria	November 4, 1998	N/A
15.	Sierra Leone	November 17, 2007	N/A

Two observations are in order. First, not all Contracting Parties from SSA have both signed and ratified the Investment Agreement. Some, including Nigeria and Ivory Coast, have only signed it, while others, such as Gabon and Mali have ratified but not signed the Investment Agreement.

This unusual framework has implications on the scope of application of the Investment Agreement. In particular, Article 1.2 of the Investment Agreement defines 'Contracting Parties' as "[t]*he Member States of the Organisation of the Islamic Conference signatories to the Agreement and in respect of which the Agreement has become effective.*"[16] This raises the question of whether the term "Contracting Parties" in Article 1.2 extends to Member States who signed the Investment Agreement but did not ratify it, as well as whether it also extends to Member States who ratified the agreement but did not sign it.

The answer to these two queries may lie in the general procedure for adhesion to a treaty. Traditionally, States follow a two-step process to become party to a treaty: first signature and then ratification. Pursuant to the Vienna Convention on the Law of Treaties, ratifying a treaty is usually how a treaty signatory becomes party to the treaty, as ratification constitutes the international act whereby a State indicates its consent to be bound to a treaty. By contrast, signature is not enough to become a party to the treaty, as it does not establish the consent to be bound, although it has other legal consequences.[17]

[16] Article 1(2) of the Investment Agreement.
[17] Articles 2(1)(b), 10, 14(1), 16 and 18 of the Vienna Convention on the Law of Treaties 1969, available at https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf; *see also* James Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW (Oxford University Press, 2012), pp. 371-374.

Given the above, one may operate under the assumption that States such as Gabon and Mali that have ratified without first signing the Investment Agreement are, for all intents and purposes, Contracting Parties within the meaning of Article 1.2. As for States that have only signed the Investment Agreement, such as Nigeria and Ivory Coast, the situation seems trickier. Whilst ordinarily the signature is not sufficient by itself, one could argue that any '*signatories*' to the Agreement are also Contracting Parties. However, Article 1.2 adds that the Investment Agreement must have '*become effective*' for these signatories in order for them to be deemed Contracting Parties. This requirement could be construed as meaning that the signatory States must have also expressed their consent to be bound through ratification, i.e., have brought the Investment Agreement into force. The phrasing used in the Investment Agreement's French version tends to support this latter interpretation[18] but the question remains open.

<u>Second</u>, the above table shows that the Investment Agreement covers large parts of SSA, although not its largest economies.[19] West Africa is represented by Senegal, Burkina Faso, Gambia, Guinea, and Mali, Central Africa by Gabon and Cameroon, and East Africa by Somalia, Uganda, and Sudan - the latter two being members of the Common Market for Eastern and Southern Africa (COMESA).

All these States have experienced arbitrations in relation to foreign investments. For instance, Senegal is currently facing two ICSID cases,[20] Guinea is battling multiple claims brought by foreign investors,[21] as are Gabon,[22] Cameroon,[23] Uganda[24] and Sudan.[25] The only exception seems to be Somalia.

Given the increase in foreign direct investment in these States, more investor-state disputes are likely to surface, including ones that fall under the purview of the Investment Agreement.

B. Investors and Investments Eligible for Protection under the Investment Agreement

Article 1 defines the terms 'capital,' 'investment' and 'investor' as follows:

> *"4. Capital*

[18] Article 1(2) of the Investment Agreement in French: "Parties Contractantes: *Etats membres de l'organisation de la Conférence Islamique signataires de l'Accord et pour lesquels cet Accord est devenu effectif* », which would more exactly translate into « *the Member States of the Organisation of the Islamic Conference signatories to the Agreement and for which the Agreement has become effective"*.

[19] The largest economies of SSA are not covered by the Investment Agreement because either they have not ratified it, as is the case for Nigeria and Ivory Coast, or because they are not predominantly Muslim States and therefore not OIC Member States, as is the case of South Africa, Angola and Kenya.

[20] *See* Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal, ICSID Case No. ARB/15/21 (pending); *see also* VICAT v. Republic of Senegal, ICSID Case No. ARB/14/19 (pending).

[21] *See* BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SÀRL v. Republic of Guinea, ICSID Case No. ARB/14/22 (pending); *see also* Getma International and others v. Republic of Guinea, ICSID Case No. ARB/11/29 (pending).

[22] *See* Kontinental Conseil Ingénierie v. Gabon, UNCITRAL, PCA Case No. 2015-25 (pending).

[23] *See* Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon, ICSID Case No. ARB/15/18 (pending).

[24] *See* Total E&P Uganda BV v. Republic of Uganda, ICSID Case No. ARB/15/11 (pending).

[25] *See* Michael Dagher v. Republic of the Sudan, ICSID Case No. ARB/14/2 (pending).

> *All assets (including everything that can be evaluated in monetary terms) owned by a contracting party to this Agreement or by its nationals, whether a natural person or a corporate body and present in the territories of another contracting party whether these were transferred to or earned in it, and whether these be movable, immovable, in cash, in kind, tangible as well as everything pertaining to these capitals and investments by way of rights or claims and shall include the net profits accruing from such assets and the undivided shares and intangible rights."*
>
> *5. Investment*
>
> *The 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, in accordance with this Agreement."*
>
> *6. Investor*
>
> *The 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.*
>
> *Nationality shall be determined as follows:*
>
> *(a) Natural Person: Any individual enjoying the nationality of a contracting party according to the provisions of the nationality law in force therein.*
>
> *(b) Legal Personality: Any 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."*[26]

The *al Warraq* Tribunal was the first to examine the meaning of these terms and provided some guidance as to which investors and investments were eligible for protection.

The Tribunal noted that there was no explicit reference to direct or indirect investments in the Investment Agreement, and in particular in Articles 1(4) and 1(5). Article 1(5) requires the "*employment of capital*" in the territory of a Contracting Party (in that case, Indonesia) without requiring that the employment be in the investor's own name. Similarly, Article 1(4), which defines capital, requires the assets (in that case, the shares in the Indonesian bank, Bank Century) to be "*owned*" by a national of a Contracting Party (here, allegedly a national of Saudi Arabia) but does not require the shares to be owned personally or directly, leaving open the possibility of ownership through an investment vehicle (in that case, a Bahamian-incorporated company named FGAH).[27] The Tribunal found that the Claimant did not have a direct investment in Bank Century.[28] However, the Tribunal considered that the Claimant's ownership of shares in Bank Century did not have to be direct in order for the Claimant to own the capital within the meaning of an investor under Article 1(6). The Claimant's indirect ownership of shares in Bank Century through FGAH satisfied the investor requirement.[29] In

[26] Article 1(4), 1(5) and 1(6) of the Investment Agreement.
[27] al Warraq v. Republic of Indonesia, Final Award, ¶503.
[28] al Warraq v. Republic of Indonesia, Final Award, ¶510.
[29] al Warraq v. Republic of Indonesia, Final Award, ¶511.

that case, the "*employment of capital*" as defined in Article 1(5) took the form of the acquisition of shares by FGAH,[30] as the claimant had become in 2004 the sole legal owner and registered shareholder of FGAH.[31]

According to the Tribunal, Article 1(5) does not exclude indirect investments. This view, the Tribunal continued, is supported by contemporary arbitral jurisprudence, which adopts a broad definition of 'investment' (see, e.g., *Siemens v. Argentina*, *Ioannis Kardassopoulos v Georgia*, *Tza Yap Shum v. Peru* and *Mobil v Venezuela*).[32] Moreover, several contemporary commentators have confirmed that the definitions given to "capital" and "investment" in modern international investment treaties refer broadly – as is the case with Article 1 of the Investment Agreement – to "all assets."[33] For the aforementioned reasons, the Tribunal found Mr. al Warraq, the claimant, to be an investor within the meaning of the Investment Agreement.[34]

It results that there are very few restrictions to be eligible for protection under the Investment Agreement. The term "*investor*" is broadly defined. It includes (i) the Government of another Contracting Party, (ii) a natural person who is a national of a Contracting Party and (iii) a corporate person incorporated in a Contracting Party. Of particular relevance is the fact that an investor need not have direct ownership of the capital invested in the Contracting Party to own the capital within the meaning of Article 1(6). An investor's indirect ownership of capital (e.g., through an interposed company registered in a non-Contracting Party) satisfies the investor requirement under the Investment Agreement. "*Investment*" is also broadly defined and includes any "*employment of capital*" in "*one of the permissible fields*" in a Contracting Party with a view to achieving a profitable return (Article 1(5)). Article 1(5) does not exclude indirect investments, nor does it forbid any interposed companies between the investment and the ultimate owner of the capital.

III. Substantive Protections

Articles 2 to 7 of the Investment Agreement set forth the general provisions regarding the promotion, protection and guarantee of capital and investments and the rules governing them in the territories of the Contracting Parties. Article 8 contains an MFN clause. Article 9 imposes obligations on the investor, whilst Articles 10 to 15 provide for various investment guarantees. These provisions cover expropriation (Article 10), the free transfer of funds (Article 11), disposal of ownership (Article 12), rights to compensation for misconduct by the acts of Contracting Parties or their subsidiaries (Article 13), rights to treatment that is at least equivalent to that accorded to nationals of the host State or others in circumstances of international hostilities or civil disturbances (Article 14), and insurance of investments (Article 15). The Investment Agreement, however, ostensibly lacks a fair and equitable treatment provision.

[30] al Warraq v. Republic of Indonesia, Final Award, ¶512.
[31] al Warraq v. Republic of Indonesia, Final Award, ¶513.
[32] al Warraq v. Republic of Indonesia, Final Award, ¶¶514-515 (citing Siemens A.G. v. Argentina, ICSID Case No. ARB/0218, Decision on Jurisdiction (August 3, 2004), ¶137; Ioannis Kardassopoulos v. Georgia, ICSID Case No. ARB/05118, Decision on Jurisdiction (July 6, 2007), ¶ ¶123-24; Tza Yap Shum v. Republic of Peru, ICSID Case No. ARB/0716, Decision on Jurisdiction (June 19, 2009), ¶¶106-11; Mobil Corporation and Others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07127, Decision on Jurisdiction (June 10, 20l0), ¶¶162-66).
[33] al Warraq v. Republic of Indonesia, Final Award, ¶516.
[34] al Warraq v. Republic of Indonesia, Final Award, ¶517.

This section will focus on the following provisions: the obligations imposed on the investor at Article 9, the expropriation clause at Article 10, the lack of a fair and equitable provision and its possible substitution by Article 13, and the MFN clause at Article 8.

A. Obligations imposed on the investor

Article 9 provides an unusual combination of obligations on the investor:

> "*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.*"[35] (emphasis added)

It is rare, although not unprecedented, to find obligations imposed on an investor in an investment treaty, as the Tribunal in *al Warraq* expressly underscored.[36]

This means, at least in theory, that a Contracting Party could submit to conciliation or arbitration any disputes pertaining to Article 9, i.e., pertaining to an investor's behaviour.[37] The fact that an investor may have run afoul of its obligations, however, does not deprive it of the protection of the Investment Agreement.[38]

This tension between the investor's obligations and protection afforded by the Investment Agreement played out in *al Warraq*. The Tribunal found that Article 9 explicitly binds investors to norms of conduct, which Mr. al Warraq had breached by committing various offences relating to alleged banking irregularities.[39] Therefore, the Tribunal concluded, Mr. al Warraq's unclean hands rendered his fair and equitable claim inadmissible:

> "*647. As mentioned above, it is established the Claimant has breached Article 9 of the* [Investment] *Agreement by failing to uphold the Indonesian laws and regulations and in acting in a manner prejudicial to the public interest. The Claimant's actions were also prejudicial to the public interest. The Tribunal finds that the Claimant's conduct falls within the scope of application of the "clean hands" doctrine, and therefore cannot benefit from the protection afforded by the* [Investment] *Agreement.*

[35] Article 9 of the Investment Agreement.

[36] al Warraq v. Republic of Indonesia, Final Award, ¶631 ("*Unlike most BITs, the OIC Agreement contains an explicit provision that binds an investor to observe certain norms of conduct. That restriction is found in Article 9*").

[37] *See* Walid Ben Hamida, *A Fabulous Discovery: The Arbitration Offer under the Organization of the Islamic Cooperation Agreement Related to Investment*, 30 J. Int'l Arb. 637, 647 (2013).

[38] *See* Walid Ben Hamida, *A Fabulous Discovery: The Arbitration Offer under the Organization of the Islamic Cooperation Agreement Related to Investment*, 30 J. Int'l Arb. 637, 655 (2013) ("*Allegedly illegal conduct by an investor will not deprive the investor of the protection of the* [Investment] *Agreement. If such illegal act is proven on behalf of the investor, then the arbitral tribunal must deduce all the consequences, by awarding appropriate damages to the state. The mission of the arbitral tribunal is to uphold the provisions of the* [Investment] *Agreement and to evaluate the behaviour of the state and the investor. Illegal behaviour could be attributed to both parties. It is not enough for a party to assert that the other committed an illegal act to deny that party the protection of an investment agreement. The offer to arbitrate thereby covers all disputes that might arise in relation to that investment, including the illegal behaviour of the investor.*").

[39] al Warraq v. Republic of Indonesia, Final Award, ¶¶634-645.

648. The Tribunal concludes that, although it has been established that the Claimant did not receive fair and equitable treatment, as set out in paragraphs 555 to 603 above however, by virtue of Article 9 of the [Investment] *Agreement the Claimant is prevented from pursuing his claim for fair and equitable treatment.*"[40]

Another striking aspect of Article 9 is that it is drafted in broad and unusual terms. It does not only obligate the investor to abide by local laws and regulations, which is what some other investment agreements require,[41] but it also prohibits the investor from disturbing public order or morals, acting in a manner prejudicial to the public interest, as well as from exercising restrictive practices and from trying to achieve gains through unlawful means.

These atypical obligations raise interesting issues. For one, the obligation to refrain from disturbing public order or morals is a broad and subjective matter and is closely-dependent upon the idiosyncrasies of each Contracting Party. Surely, these obligations will differ depending on the host State in question. Public order or morals in Senegal are unlike those in Sudan, which is generally described as a much more conservative and pious country. Also, what does the notion of 'public interest' encompass exactly? The Tribunal in *al Warraq* considered that the investor's involvement in several offences relating to alleged banking irregularities was prejudicial to the public interest. But how does one determine what is in the public interest? What factors should be taken into account? Article 9 is silent on this matter. Similarly, what types of restrictive practices and unlawful means fall within the ambit of Article 9? Does it prohibit all types of practices that restrict competition? Does it encompass both corruption and influence peddling? Finally, should these obligations be construed in light of the OIC's objective to preserve Islamic social and economic values, as set forth in Article 1 of the OIC Charter?[42]

Given the vagueness of some of these concepts and the breadth of the formulation of Article 9, there is a risk that this provision sets too high a bar on the investor to be compliant with the obligations imposed on him and, in turn, allows host States to escape liability on that basis. As the lead counsel for the investor in *al Warraq* noted, the "*nature of this provision* [Article 9] *is certainly something that investors seeking to invoke the protection of the* [Investment] *Agreement would be well-advised to consider, since it almost invites States to make an Article 9 argument.*"[43]

B. Expropriation

As was the case with Article 9 above, Article 10 is also expressed in broad terms:

"*1. 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*

[40] al Warraq v. Republic of Indonesia, Final Award, ¶¶647-48.
[41] *See, e.g.*, the Indonesia – United Kingdom BIT, dated April 27, 1976, available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/1646.
[42] *See* Article 1 of the OIC Charter, available at http://www.oic-oci.org/english/charter/OIC%20Charter-new-en.pdf.
[43] George Burn, *The Invisible MIT: The Curious Case of the Agreement for the Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference*, in The regionalization of international investment treaty arrangements (British Institute of International and Comparative Law, 2015), pp. 173 et seq., at 180.

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.

> *2. It will, however, be permissible to:*
>
> *(a) Expropriate 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, provided that the investor shall have the right to contest the measure of expropriation in the competent court of the host state.*
>
> *(b) Adopt preventive measures issued in accordance with an order from a competent legal authority and the execution measures of the decision given by a competent judicial authority.*"[44]

This provision covers both the direct and indirect effect measures and thus includes those measures that may affect but not destroy the investor's capital or investment. Furthermore, this provision encompasses not only encroachments to the investor's ownership, but also to the investor's "*basic rights*," its actual control over its investment, its management, its use and enjoyment, etc. In other words, it goes well beyond ownership.

Article 10 also provides for familiar exceptions. The State is authorized to expropriate the investment in two situations: (i) when the expropriation is in the public interest, is made in accordance with the law and without discrimination, and is accompanied by prompt and effective compensation, and (ii) when the preventive measure is issued in accordance with an order from a competent legal authority.

As regards the reference at Article 10(2) that the investor is entitled to contest the measure of expropriation in the competent host State's court, it should not be construed as imposing on the investor the duty to resort to such court. It is a basic right of the expropriated investor to present his case before a competent court of the host State and such a provision can be found in many bilateral investment treaties ("BITs").[45] In accordance with the terms of Article 16 and 17, Article 10(2) is best understood as providing the investor with a choice to raise its claims before either the domestic courts of the host State or before an arbitral tribunal.

Article 10 also played out in *al Warraq* to the benefit of the host State, as the Tribunal found that the measure adopted by Indonesia, a financial bailout, was "*a permissible preventive measure under Article 10(2)(b) of the OIC Agreement*."[46]

C. No Fair and Equitable Treatment but Article 13

As noted above, one conspicuous feature of the Investment Agreement is that it does not contain a fair and equitable treatment provision.

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[44] Article 10 of the Investment Agreement.

[45] *See* Walid Ben Hamida, *A Fabulous Discovery: The Arbitration Offer under the Organization of the Islamic Cooperation Agreement Related to Investment*, 30 J. Int'l Arb. 637, 648, footnote 32 (2013).

[46] al Warraq v. Republic of Indonesia, Final Award, ¶539.

As a result of this omission, the MFN clause in Article 8 is slated to play a salient role, as investors may invoke this provision to argue that the fair and equitable guarantees offered by Contracting Parties to investors from non-Contracting Parties also apply to investors protected by the Investment Agreement.[47] Such an argument was successfully made in *al Warraq* wherein the investor relied on the MFN clause in Article 8 to incorporate the fair and equitable treatment protection contained in a BIT entered into between Indonesia, a Contracting Party, and the United Kingdom, a non-Contracting Party.[48]

Also, Article 13 may in effect provide an alternative cause of action to which investors can resort to challenge State measures, which have traditionally been brought under the fair and equitable treatment standard.

Article 13 provides as follows:

> "*1. The investor shall be entitled to compensation for any damage resulting from any action of a contracting party or one of its public or local authorities or its institutions in the following cases:*
>
> *(a) Violation of any of the rights or guarantees accorded to the investor under this Agreement;*
>
> *(b) Breach of any of the international obligation or undertakings imposed on the contracting party and arising under the Agreement for the benefit of the investor or the non-performance of whatever is necessary for its execution whether the same is intentional or due to negligence;*
>
> *(c) Non-execution of a judicial decision requiring enforcement directly connected with the investment;*
>
> *(d) Causing, by other means or by an act or omission, damage to the investor in violation of laws in force in the state where the investment exists.*
>
> *2. The compensation shall be equivalent to the damage suffered by the investor depending on the type of damage and its quantum.*
>
> *3. The compensation shall be monetary if it is not possible to restore the investment to its state before the damage was sustained.*
>
> *4. The assessment of monetary compensation shall be concluded within 6 (six) months from the date when the damage was sustained and shall be paid within a year from the date of agreement upon the amount of compensation or from the date when the assessment of the compensation has become final.*"[49]

[47] George Burn, *The Invisible MIT: The Curious Case of the Agreement for the Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference*, in The regionalization of international investment treaty arrangements (British Institute of International and Comparative Law, 2015), pp. 173 et seq., at 180.

[48] al Warraq v. Republic of Indonesia, Final Award, ¶555 ("[T]he Tribunal concludes that the Claimant is entitled to fair and equitable treatment protection through the OIC Agreement's MFN clause.")

[49] Article 13 of the Investment Agreement.

This is an interesting provision as it guarantees compensation under multiple scenarios, including where a Contracting Party is in breach of either the Investment Agreement, other international obligations or undertakings, or local law provisions, or has failed to execute a judicial decision. These violations may be voluntary or negligent, by an act or omission. The Investment Agreement is somewhat exceptional in offering the above-mentioned protections, as these are rarely found in other investment treaties.[50]

D. MFN

Drafted in a more orthodox fashion, Article 8 nevertheless includes an unusual feature:

> "*1. The investors of any contracting party shall enjoy, within the context of economic activity in which they have employed their investments in the territories of another contracting party, a treatment not less favourable than the treatment accorded to investors belonging to another State not party to this Agreement, in the context of that activity and in respect of rights and privileges accorded to those investors.*
>
> *2. Provisions of paragraph 1 above shall not be applied to any better treatment given by a contracting party in the following cases:*
>
> *a) Rights and privileges given to investors of one contracting party by another contracting party in accordance with an international agreement, law or special preferential arrangement.*
>
> *b) Rights and privileges arising from an international agreement currently in force or to be concluded in the future and to which any contracting party may become a member and under which an economic union, customs union or mutual tax exemption arrangement is set up.*
>
> *c) Rights and privileges given by a contracting party for a specific project due to its special importance to that state.*"

This raises the possibility that an investor bringing a claim under the Investment Agreement may also be able to benefit from protections in other investment agreements concluded by the host State. One interesting aspect of this provision is that it seems to restrict its application only to protections afforded in treaties entered into with non-Contracting Parties, while excluding those afforded in treaties entered into with fellow Contracting Parties. As seen above, Article 8 was successfully used by the investor in *al Warraq* to incorporate the fair and equitable protection contained in a BIT entered into by the host State, Indonesia, with a non-Contracting Party, the United Kingdom.[51] Following a strict textual approach, such incorporation would not have been possible had the BIT been entered into with another Contracting Party.

Another interesting area in which the MFN provision could come into play would be the investor's use of this provision to reach an umbrella clause in another treaty, so as to elevate a

[50] George Burn, *The Invisible MIT: The Curious Case of the Agreement for the Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference*, in The regionalization of international investment treaty arrangements (British Institute of International and Comparative Law, 2015), pp. 173 et seq., at 181.

[51] al Warraq v. Republic of Indonesia, Final Award, ¶555.

contractual breach into a violation of the host State's international obligations. Whilst the *al Warraq* Tribunal did not opine on this issue, such use of an MFN provision has been adopted by previous arbitral tribunals in other contexts.[52]

IV. Dispute Resolution Provisions: Article 16 & 17

Articles 16 and 17 of the Investment Agreement set out its dispute resolution provisions as follows:

Article 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, or to contest the extent of its conformity with the provisions of the regulations and laws in force in its territory, or to complain against the non-adoption by the host state of a certain measure which is in the interest of the investor, and which the state should have adopted, irrespective of whether the complaint is related, or otherwise, to the implementation of the provisions of the Agreement to the relationship between the investor and the host state.*
>
> *Provided 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.*"[53]
>
> Article 17:
>
> "*1. Until an Organ for the settlement of disputes arising under the Agreement is established, disputes that may arise shall be entitled through conciliation or arbitration in accordance with the following rules and procedures:*
>
> *1. Conciliation*

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[52] *See, e.g.*, Franck Charles Arif v. Moldova, ICSID Case No. ARB/11/23, Award (April 8, 2013), ¶¶ 395-396, available at http://italaw.com/sites/default/files/case-documents/italaw1370.pdf ("*395. The Tribunal agrees with Claimant that "umbrella" clauses are substantive in nature. A breach of specific undertakings covered by an "umbrella" clause will give rise to a substantive breach of the BIT. In this sense, the Tribunal rejects Respondent's argument that "umbrella" clauses are procedural in nature and cannot be imported through an MFN clause because they give a means of protection for contractual and other undertakings, rather than a unique standard of behaviour. 396. The MFN clause in Article 4 is broadly drafted and does not restrict its application to any particular kind of substantive obligation under the BIT. Therefore, the Tribunal finds that the MFN clause of the BIT can import an "umbrella" clause (which is substantive in nature), from either the Moldova-UK or Moldova-USA BIT, thereby extending the more favourable standard of protection granted by the "umbrella" clause in either one of these BIT's into the BIT at hand. Respondent's arguments to the contrary are rejected. The Tribunal therefore has jurisdiction over Claimant's "specific commitments" claim via the MFN clause of Article 4.*"); *see also* EDF International S.A., SAUR International S.A. et León Participaciones Argentinas S.A. v. Argentina, ICSID Case No. ARB/03/23, Award (June 11, 2012), ¶ 937, available at http://italaw.com/sites/default/files/case-documents/ita1069.pdf : « *937. The Tribunal thus concludes the MFN Clause in Article 4 of the Argentina-France BIT permits Claimants to incorporate the ―umbrella clauses from the Argentina-Luxembourg or Argentina-Germany BITs.*"); *but see* İçkale İnşaat Limited Şirketi v. Turkmenistan, ICSID Case No. ARB/10/24, Award (March 8, 2016), ¶326 et seq., available at http://www.italaw.com/sites/default/files/case-documents/italaw7163_1.pdf.

[53] Article 16 of the Investment Agreement.

a) In case the parties to the dispute agree on conciliation, the agreement shall include a description of the dispute, the claims of the parties to the dispute and the name of the conciliator whom they have chosen. The parties concerned may request the Secretary General to choose the conciliator. The General Secretariat shall forward to the conciliator a copy of the conciliation agreement so that he may assume his duties.

b) The task of the conciliator shall be confined to bringing the different viewpoints closer and making proposals which may lead to a solution that may be acceptable to the parties concerned. The conciliator shall, within the period assigned for the completion of his task, submit a report thereon to be communicated to the parties concerned. This report shall have no legal authority before a court should the dispute be referred to it.

2. 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.

b) 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.

c) The Arbitration Tribunal shall hold its first meeting at the time and place specified by the Umpire. Thereafter the Tribunal will decide on the venue and time of its meetings as well as other matters pertaining to its functions.

d) The decisions of the Arbitration Tribunal shall be final and cannot be contested. They are binding on both parties who must respect and implement them. They shall have the force of judicial decisions. The contracting parties are under an obligation to implement them 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."[54]

The poor wording of Article 17 raises a number of questions, for which Article 16 is relevant to the extent that it helps interpret the former. These questions include the following:

[54] Article 17 of the Investment Agreement.

- Does Article 17 provide for investor-state arbitration?
- Does Article 17 constitute an open offer by a Contracting Party to investors that can be accepted without any separate agreement by the Contracting Party?
- Are investors required to try to settle their claims by way of conciliation before they may invoke arbitration?
- Is the IICJ the judicial organ referred to in Article 17(1) and has it been established within the meaning of Article 17(1)?
- What role does the OIC's Secretary General have in the process and what happens if she or he fails or refuses to appoint an arbitrator when requested?
- What is the applicable enforcement mechanism?

The *al Warraq* jurisdictional decision touched on these various issues for the first time, paving the way for future arbitral tribunals to hear investor-state proceedings initiated under the Investment Agreement. Each of these questions will be addressed in turn.

A. Does Article 17 Constitute an Investor-state Arbitration Provision between the Contracting Parties and Investors of other Contracting Parties?

The Tribunal in *al Warraq* answered this question with a resounding yes. It considered that it was "*implicit in the language of Articles 16 and 17, and consistent with the object and purpose of the* [Investment] *Agreement, to conclude that Article 17 provides for investor-state arbitration.*"[55] In particular, it referred to the following elements:

- Article 17 used the undefined terms "*parties to the dispute*." If conciliation/arbitration were intended to be confined to States, Article 17 would have used the defined expression "*Contracting Parties*." 'Investors' are clearly envisaged (see, e.g., Articles 3, 6 and 16 of the Investment Agreement). Accordingly, the Tribunal considered that the term "*parties*" in Article 17 included both States and investors;[56]
- Article 17(2)(d) uses the terms "*contracting parties*" and "*parties*" in a manner that distinguishes the Contracting Parties to the Investment Agreement from the parties to the arbitration. Furthermore, Article 17(2)(d) explicitly refers to the enforcement of an award against an "*investor*" and therefore is based on the understanding that the arbitration procedure in Article 17 can be used by investors;[57] and
- The proviso of Article 16 is a fork-in-the-road clause, demonstrating that the investor has a right to arbitration under the Investment Agreement, and, logically, this right is pursuant to the arbitration provisions in Article 17. Furthermore, the proviso to Article 16, by creating an immediate right to arbitration and in accordance with the normal operation of a fork-in-the-road provision, also confirms that exhaustion of local remedies is not required as a pre-requisite to arbitration.[58]

[55] al Warraq v. Republic of Indonesia, Jurisdictional Decision, ¶75.
[56] al Warraq v. Republic of Indonesia, Jurisdictional Decision, ¶75.1.
[57] al Warraq v. Republic of Indonesia, Jurisdictional Decision, ¶75.2.
[58] al Warraq v. Republic of Indonesia, Jurisdictional Decision, ¶75.3.

For these reasons, the Tribunal concluded that Article 17 of the Investment Agreement effectively creates an investor-state arbitration clause.[59]

B. Does Article 17 Constitute a Unilateral Offer to Arbitrate Dispensing any Separate Agreement to Arbitrate?

Building on its finding that Article 17 constituted an investor-state arbitration provision, the Tribunal considered that nothing in this article was inconsistent with the modern practice to construe such provision as "*an open offer by the state parties to investors, that can be accepted and the arbitration initiated, without any separate agreement by the state party.*"[60] According to the Tribunal, the key to properly decide this issue was to find the meaning of the language used, not what the OIC Member States may have intended or envisioned when concluding the Investment Agreement: "*what is relevant is not the intention of any one or more Members of the OIC, but what the language used in the OIC means on an interpretation of the words used.*"[61] Adopting a contemporary perspective, the Tribunal considered that Article 17 "*constitutes an open offer to arbitration that can be accepted by an investor, such as the Claimant, without any separate express agreement to arbitrate by the Respondent. The Respondent, in effect, has provided its consent to arbitrate in advance in Article 17 itself.*"[62]

C. Is Conciliation a Pre-requirement to Arbitration?

A literal reading of Article 17(2)(a) may lead to the conclusion that an investor may only proceed to arbitration after having unsuccessfully completed a conciliation process.[63] However, the Tribunal in *al Warraq* rejected such an interpretation based on an analysis of the wording and interplay of Articles 16 and 17. According to the Tribunal, the "*opening phrase of Article 17 clearly refers to "arbitration or conciliation" as alternatives*" and the "*proviso to Article 16 also contemplates resorts to national courts or investment arbitration without any prior requirement of conciliation.*"[64] Thus, the Tribunal concluded that Article 17 offers an option to the investor, not a requirement: "*on a correct interpretation of Article 17, conciliation and arbitration are separate forms of dispute resolution which may be used either sequentially or alternatively, and the fact that there is no prior conciliation agreement is not an obstacle to an investor-state arbitration.*"[65]

D. Is the IICJ the Judicial Organ Referred to in Article 17(1) and Has It Been Established Within the Meaning of Article 17(1)?

The opening phrase of Article 17 provides that the conciliation or arbitration procedure applies "*until an Organ for the settlement of disputes arising under the Agreement is established.*"[66] In *al Warraq*, Indonesia argued that the IICJ constituted such an organ.[67] By way of background, the IICJ was established pursuant to Resolution No. 13/5-P (IS) on the Establishment of the International Islamic Court of Justice from the fifth Islamic summit

[59] al Warraq v. Republic of Indonesia, Jurisdictional Decision, ¶76.
[60] al Warraq v. Republic of Indonesia, Jurisdictional Decision, ¶81.
[61] al Warraq v. Republic of Indonesia, Jurisdictional Decision, ¶81.
[62] al Warraq v. Republic of Indonesia, Jurisdictional Decision, ¶81.
[63] Article 17(2)(a) of the Investment Agreement.
[64] al Warraq v. Republic of Indonesia, Jurisdictional Decision, ¶79.
[65] al Warraq v. Republic of Indonesia, Jurisdictional Decision, ¶79.
[66] Article 17(1) of the Investment Agreement.
[67] al Warraq v. Republic of Indonesia, Jurisdictional Decision, ¶84.

conference in Kuwait in 1987, which approved the Draft Statute of the IICJ, amended the OIC Charter to refer to the IICJ and invited members to ratify this amendment of the OIC Charter.[68]

The Tribunal dismissed Indonesia's arguments that the IICJ had supplanted investor-state arbitration under the Investment Agreement on the ground that there was no evidence that the IICJ had become operational, nor that it had competence over investor-state disputes. It first noted that "[*n*]*either Resolution No. 13/5 nor the Draft Statute of the IICJ specifically designate the IICJ as the dispute resolution organ contemplated by Article 17.*"[69] Then, the Tribunal established that the "*IICJ is a judicial organ and does not provide conciliation or arbitration services. It is not competent to decide investor-state disputes. There is no confirmation by the Contracting Parties to the* [Investment] *Agreement that the IICJ is the Organ referred to in Article 17.*"[70] Moreover, the Tribunal found that "*the IICJ was 'established' by Resolution No. 13/5 in name only. It is not operational. It does not have, and never has had, any Registrar or Secretariat, nor any facilities or Judges. In short, the IICJ is 'established' judicially* […] *but not in any physical or operational sense*." Therefore, the Tribunal concluded, a "*tribunal that does not physically exist or operate cannot resolve investment disputes, and therefore is not 'established' for the purposes of Article 17.*"[71]

E. What Role Does the OIC's Secretary General Have in the Process, and What Happens if He/She Fails or Refuses to Appoint an Arbitrator When Requested?

Pursuant to Article 17(2)(b), should the process for the composition of the arbitral tribunal fail for one reason or another, either party may request the OIC's Secretary General of the OIC to complete the composition of the arbitral tribunal.[72] The Secretary General does not have any role beyond appointing an arbitrator. By way of comparison, unlike under the ICSID Arbitration Rules, the OIC's Secretary General may not screen requests for arbitration.[73] The position is toothless in that regard.

What if there was a failure of the dispute resolution process as set out at Article 17(2)? For instance, what if the host State were to refuse the Secretary General's proposed party-appointed arbitrator or the president of the arbitral tribunal?

In *al Warraq*, the investor suggested that the UNCITRAL 2010 Arbitration Rules govern the procedural aspects of the arbitration and Indonesia accepted. One of the advantages of the UNCITRAL 2010 Arbitration Rules is that they provide for the possibility of asking the Secretary General of the Permanent Court of Arbitration ("PCA") at the Hague to designate another appointing authority should the one the parties have designated (here, the OIC's

[68] al Warraq v. Republic of Indonesia, Jurisdictional Decision, ¶84.
[69] al Warraq v. Republic of Indonesia, Jurisdictional Decision, ¶86.
[70] al Warraq v. Republic of Indonesia, Jurisdictional Decision, ¶88.
[71] al Warraq v. Republic of Indonesia, Jurisdictional Decision, ¶89.
[72] Article 17(2)(a) of the Investment Agreement.
[73] George Burn, *The Invisible MIT: The Curious Case of the Agreement for the Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference*, in The regionalization of international investment treaty arrangements (British Institute of International and Comparative Law, 2015), pp. 173e t seq., at 189.

Secretary General) fail to appoint the missing arbitrator within 30 days following the request.[74]

That said, as things stand, if the dispute were to be purely *ad hoc*, as opposed to an *ad hoc* arbitration under the UNCITRAL 2010 Arbitration Rules, either because the parties did not plan on any set of rules or the host State refused to agree on any, nothing would prevent the latter from delaying the composition of the tribunal and thereby frustrate the investor's right to arbitration under the Investment Agreement.

F. What is the Applicable Enforcement Mechanism?

Pursuant to Article 17(2)(d), the decisions of arbitral tribunals are final and binding and each Contracting Party is under an obligation to implement an award in its territory as if it were a final and enforceable decision of its national courts.[75] No recourse against these decisions may be commenced before another tribunal or domestic court by way of appeal, review or set aside proceedings.[76] This provision should make it extremely difficult for losing parties to oppose enforcement.

V. Concluding Remarks: a New Avenue for Justice, Forum Shopping and Multiple Proceedings

The Investment Agreement could play an important role by providing investors from Contracting Parties with valuable protections and an avenue for redress these investors might otherwise not have.

One illustration is the aforementioned claim brought by a Tunisian investor against Gabon.[77] In that case, given that no bilateral investment treaty exists between Tunisia and Gabon, the Investment Agreement constituted the sole avenue possible for the Tunisian investor to initiate investor-state arbitration proceedings against Gabon.

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[74] *See* Article 6(1) and 6(2) of the UNCITRAL 2010 Arbitration Rules: "*(1) Unless the parties have already agreed on the choice of an appointing authority, a party may at any time propose the name or names of one or more institutions or persons, including the Secretary General of the Permanent Court of Arbitration at The Hague (hereinafter called the "PCA"), one of whom would serve as appointing authority. (2) If all parties have not agreed on the choice of an appointing authority within 30 days after a proposal made in accordance with paragraph 1 has been received by all other parties, any party may request the Secretary-General of the PCA to designate the appointing authority.*" (emphasis added), available at https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf. According to the PCA website, "[*w*]*hen acting as the appointing authority and requested to appoint a sole or presiding arbitrator, the Secretary-General will generally follow the list-procedure as provided for under the UNCITRAL Arbitration Rules (Art. 6(3) of the 1976 Rules; Art. 8(2) of the 2010 and 2013 Rules). In accordance with the UNCITRAL Arbitration Rules, the Secretary-General will exercise his discretion when requested to appoint a second arbitrator. The Secretary-General's choice of arbitrators for the list-procedure or direct appointments is not limited to any list or panel, and the Secretary-General is therefore free to choose the most appropriate person for the matter at hand.*" (https://pca-cpa.org/en/services/appointing-authority/pca-secretary-general-as-appointing-authority/).

[75] Article 17(2)(d) of the Investment Agreement.

[76] George Burn, *The Invisible MIT: The Curious Case of the Agreement for the Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference*, in The regionalization of international investment treaty arrangements (British Institute of International and Comparative Law, 2015), pp. 173e t seq., at 191.

[77] Kyriaki Karadelis, *Gabon faces claim under obscure Islamic treaty* (GAR, March 13, 2015), available at http://globalarbitrationreview.com/news/article/33625/gabon-faces-claim-obscure-islamic-treaty/.

Similar situations may occur in the future as the main capital-exporting countries in SSA that have ratified the Investment Agreement have not entered into BITs with their SSA counterparts for the most part. For example, there are no BITs in force between Turkey and any of the SSA Contracting Parties, with the exception of Senegal.[78] Similarly, Egypt, Iran, Jordan, Lebanon and Oman have not entered into any relevant BIT with a SSA country, except with Sudan,[79] whilst Qatar has entered into only one BIT with Gambia.[80] As to Saudi Arabia, the United Arab Emirates and Kuwait, there are no BITs in force between these States and their SSA counterparts. Therefore, investors would do well to bear in mind the protections and recourse afforded in the Investment Agreement because this might constitute the only way to directly seek redress on the international plane.

Paradoxically, the study of the Investment Agreement and its membership also raise the not-so-theoretical issue of forum shopping and multiple proceedings, whether parallel or sequential.

The claim brought in *al Warraq* was in reality one leg of a larger strategy wherein parallel proceedings were brought against Indonesia for the same dispute but under different legal instruments. On the one hand, one ICSID claim was brought by UK national Rafat Ali Rizvi under the UK-Indonesia BIT, while on the other hand, Rizvi's former business partner in Bank Century, Saudi investor Hesham al Warraq, initiated arbitration proceedings under the OIC Agreement.[81]

Let us now take a slightly different hypothesis, one where an investor from the Middle East has invested in a SSA State that is a Contracting Party to the Investment Agreement. It so happens that the Middle-Eastern State of which the investor is a national has entered into a BIT with that same SSA Contracting Party. The investor is therefore in a situation where it could commence arbitration proceedings under the applicable BIT and/or under the Investment Agreement. With investment flows between countries such as Turkey, the Gulf States and SSA on the rise, it seems almost inevitable that such a situation will one day occur, if it has not done so already.

What are the strategic implications for the investor to take into consideration when contemplating this possibility? As seen above, the Investment Agreement provides for a broad expropriation clause. By contrast, it does not provide for any fair and equitable treatment provision, although Article 13 provides an alternative cause of action to which investors can resort. Moreover, the Investment Agreement provides for an MFN provision through which an investor could claim that it is entitled to fair and equitable treatment

[78] *See* the BIT between Turkey and Senegal, dated June 15, 2010, entered into force on July 17, 2012, available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2247.
[79] *See* the BIT between Jordan and Sudan, dated March 30, 2000, entered into force on February 3, 2001, available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/1759; *see* the BIT between Oman and Sudan, dated October 25, 1999, entered into force on May 28, 2002, available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2119; *see* the BIT between Lebanon and Sudan, dated March 9, 2004, entered into force on April 21, 2007, available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/1896; *see* the BIT between Iran and Sudan, dated September 7, 1999, entered into force on October 19, 2001 (no electronic version available); *see* the BIT between Egypt and Sudan, dated July 8, 2001, entered into force on April 1, 2003 (no electronic version available).
[80] *See* the BIT between Qatar and Gambia, dated May 17, 2002, entered into force on March 3, 2011, available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/1312.
[81] *See* Sebastian Perry, *Indonesia defeats bank bailout claim* (GAR, July 17, 2013), available at http://globalarbitrationreview.com/news/article/31749/indonesia-defeats-bank-bailout-claim/.

protection, as the investor successfully did in the *al Warraq* case.[82] Thus, depending on the language of the applicable BIT, the investor may decide to either initiate proceedings only under the Investment Agreement, or alternatively only under the applicable BIT. Should both instruments have their advantages and disadvantages, the investor may have an interest in commencing proceedings under both, either sequentially or in parallel.

One question that immediately comes to mind is whether there is anything that could thwart an investor's efforts to initiate multiple proceedings. It does not seem to be the case. Whilst the Investment Agreement contains a fork in the road provision,[83] this provision concerns the choice between initiating proceedings before local courts and arbitration, not between multiple arbitral fora on the basis of different legal instruments (e.g., one ICSID claim grounded on an applicable BIT and one *ad hoc* arbitration based on the Investment Agreement). Likewise, whilst the concepts of *lis pendens* and *res judicata* are generally accepted as principles of international law,[84] "[*i*]*t is broadly considered that both principles, in order to be relied upon, require identity between the parties involved, the object, and the cause of the actions*."[85] In the context of multiple arbitrations brought under different legal instruments – in spite of the similarity of treatment standards that may be contained in these instruments – the causes of action will be regarded as legally distinct in all likelihood. This could, in turn, lead to inconsistent outcomes that have arisen in other contexts, such as divergent views on legal issues,[86] divergent assessment of identical facts[87] and conflicting results in the same dispute,[88] as well as double recovery.

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[82] al Warraq v. Republic of Indonesia, Final Award, ¶555.

[83] *See* Article 16 of the Investment Agreement: "*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*."

[84] August Reinisch, *Part II Chapter 5: The Issues Raised by Parallel Proceedings and Possible Solutions*, in Michael Waibel, Asha Kausha,, et al (eds), THE BACKLASH AGAINST INVESTMENT ARBITRATION (Kluwer Law International, 2010), p. 120 (observing that "International Courts and tribunals have generally recognized both doctrines as binding in international law, either as customary law or as expressions of general principles of law").

[85] August Reinisch, *Part II Chapter 5: The Issues Raised by Parallel Proceedings and Possible Solutions*, in Michael Waibel, Asha Kausha,, et al (eds), The Backlash against Investment Arbitration (Kluwer Law International, 2010), p. 120 (citing Trail Smelter (U.S. v. Canada), 3 R.I.A.A. 1905, 1952 (1941)).

[86] *See* SGS Société Générale de Surveillance S.A. v. Pakistan, ICSID Case No. ARB/01/13, Decision on Jurisdiction (August 6, 2003), available at http://www.italaw.com/sites/default/files/case-documents/ita0779.pdf; *but see* SGS Société Générale de Surveillance S.A. v. Philippines, ICSID Case No. ARB/02/6, Decision on Jurisdiction (January 29, 2004), available at http://www.italaw.com/sites/default/files/case-documents/ita0782.pdf.

[87] *See* CMS Gas Transmission Company v. Argentina, ICSID Case No. ARB/01/8, Award (May 12, 2005), ¶¶320-321 (wherein the tribunal found that a state of necessity did not prevail in Argentina in the early 2000s), available at http://www.italaw.com/sites/default/files/case-documents/ita0184.pdf; *see also* Enron Corporation and Ponderosa Assets, L.P. v. Argentina, ICSID Case No. ARB/01/3, Award (May 22, 2007), ¶313, available at http://www.italaw.com/sites/default/files/case-documents/ita0293.pdf; Sempra Energy International v. Argentina, ICSID Case No. ARB/02/16, Award (September 28, 2007), ¶355, available at http://www.italaw.com/sites/default/files/case-documents/ita0770.pdf; *but see* LG&E Energy Corp., LG&E Capital Corp. and LG&E International v. Argentina, ICSID Case No. ARB/02/1, Decision on Liability (October 3, 2006), ¶257 (wherein the tribunal found that a state of necessity prevailed in Argentina in the early 2000s), available at http://www.italaw.com/sites/default/files/case-documents/ita0460.pdf.

[88] *See* Ronald S. Lauder v. The Czech Republic, UNCITRAL, Final Award (September 3, 2001), available at http://www.italaw.com/sites/default/files/case-documents/ita0451.pdf; *but see* CME Czech Republic B.V. v. The Czech Republic, UNCITRAL, Partial Award (September 13, 2001), available at http://www.italaw.com/sites/default/files/case-documents/ita0178.pdf.

Another concern that may be especially preoccupying in the case of SSA is the impact these multiple proceedings could have on the host State. As cliché as it may sound, some of these SSA States are too understaffed and underfunded to be able to properly defend themselves before different fora. One possible remedy is for the host State to resort to the PCA's Financial Assistance Fund, which aims at helping developing countries meet part of the costs involved in international arbitration or other means of dispute settlement offered by the PCA. However, this assistance covers only arbitration costs, like advance on costs, but excludes counsel and/or expert fees,[89] which constitute the largest cost in investment treaty arbitration.[90]

It seems inevitable that other decisions will be rendered under the Investment Agreement, and that a number of them will involve an SSA element. Investors and States alike would be mindful to monitor upcoming developments pertaining to this agreement. This is not a tale anymore: the Investment Agreement has been reborn.

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[89] Permanent Court of Arbitration, available at https://pca-cpa.org/en/about/structure/faf/.

[90] *See* Matthew Hodgson, *Counting the Costs of Investment Treaty Arbitration* (GAR, March 24, 2014), available at http://www.allenovery.com/SiteCollectionDocuments/Counting_the_costs_of_investment_treaty.pdf.