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The Arab Investment Court and Intra-Arab BITs: a Potential New Frontier?

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The past decade has witnessed a [surge in popularity](#) of the Organisation of Islamic Cooperation's [Agreement for the Promotion and Protection of Investment](#), which is a multilateral treaty that binds twenty-seven states and allows for the resolution of investor-state disputes by ad hoc arbitration. There has been [much scholarly discussion](#) about this treaty as cases under its aegis [continue to be filed every year](#). Another somewhat similar regional treaty has however kept a low profile, namely, the "Unified Agreement for the Investment of Arab Capital in the Arab States" (the "[Arab Investment Agreement](#)"), which is a treaty concluded by the members of the Arab League. This latter treaty appears to have garnered less interest and excitement.

Notwithstanding, this overlooked treaty possesses quite a unique feature; that is, it was the first investment agreement ever to establish a permanent forum for the settlement of investor-state disputes. The [Arab Investment Court](#) was established in 1983 and has been operational since 2003. [Critics](#) of Investor-State Arbitration who have [called](#) for the creation of a permanent investment court, have often neglected the fact that such a jurisdiction has existed for quite some time.

In light of this, one may wonder why this avant-garde treaty has been neglected and underutilised? The answer is perhaps that the proceedings of the Arab Investment Court are conducted entirely in Arabic, which might render international law firms advising on investment disputes less keen to recommend this option to their clients where others exist. Another possible answer is that investors and their counsel feel more comfortable resorting to arbitration [where they know they will be able to have a say in the identity of their adjudicators](#). But ultimately, the [main reason](#) for the Arab Investment Court's lacklustre popularity is the narrow definition of "investors" contained in the Arab Investment Treaty.

Indeed, in its original iteration, the Arab Investment Treaty, under Article 1, defined an Arab Investor as a "natural or juridical person who is a national of a contracting state, provided that no part of the juridical person is owned, directly or indirectly, by any person that is not an Arab national [...]." A [revised version](#) of the treaty, [adopted in 2013](#), somewhat relaxed this requirement by now only requiring a 51% ownership by Arab nationals for a juridical person to qualify for protection under the Treaty. The amendment has now entered into force between a [handful of member States](#) but the old language prevails where either or both of the host or home state have not yet ratified the revision. Whichever definition applies, however, a clear hurdle exists for the numerous multinational investors operating throughout the region through locally incorporated

entities.

However, there may well be a way to bypass this onerous requirement which has so far been overlooked. Article 30 of the Arab Investment Treaty (Article 25 in the amended version) provides that “*If it is stated in an Arab-international agreement establishing an Arab investment or in any agreement regarding investment within the scope of the Arab League or between its members that an issue or a dispute shall be referred to international arbitration or to international courts, the parties involved may agree to deem said issue or dispute falling within the jurisdiction of the Court.*”

What this effectively means is that investors may be able to access the Arab Investment Court through [one of the many Intra-Arab BITs](#) rather than relying upon the Arab Investment Treaty. Indeed, this possibility has been acknowledged in the [Amended Statute of the Arab Investment Court](#) under Article 21, which underlines the Court’s competence to consider cases arising out of Intra-Arab Investment Agreements.

A survey of Intra-Arab Investment Treaties reveals that no less than thirty-four of these agreements have pre-emptively provided the states’ consent for disputes under these agreements to be resolved by the Arab Investment Court. It is worth noting that another three treaties grant the investor prior consent of the State to resort to the Arab Investment Treaty’s [optional arbitration provisions](#) without however explicitly allowing recourse to the Arab Investment Court.¹⁾

These Intra-Arab Investment Treaties invariably define “investors” less restrictively than the Arab Investment Treaty. The question, however, remains as to whether the Court, in ruling on its *ratione personae* competence, would ultimately rely on the definition in the BIT, by virtue of the *lex specialis* or *lex posterior* rule, or that of the Arab Investment Treaty which may be deemed to have been incorporated by reference. None of the [twenty judgements](#) rendered by the Court to date offers an answer. Attention must therefore be given to the particular wording of the provisions in the different BITs that redirect the investor towards the Arab Investment Court and/or the Arab Investment Treaty.

Three BITs make a direct reference to the Arab Investment Court as a means of resolving investor-disputes, with no further mention of the Arab Investment Treaty.²⁾ If a dispute is brought under any of these agreements, it is therefore likely that the definition of investor within them would prevail over any language contained in the multilateral treaty and the Court should have no problem considering cases brought by foreign-owned locally incorporated corporations.

Twelve BITs give investors the option to resolve disputes through the Arab Investment Court “in accordance with Chapter 6 of the [Arab Investment Treaty].³⁾ A further two treaties use very similar language but refer to the “dispute resolution provisions” rather than to Chapter 6 specifically.⁴⁾ Fourteen treaties make no express mention of the Arab Investment Court but refer the investor to the Arab Investment Treaty’s dispute resolution provisions/chapter.⁵⁾ In each of these instances, the wording is restricted to only a specific part of the Arab Investment Treaty, the Court will therefore likely prioritise the language in the BIT over any part of the Arab Investment Treaty that falls outside of the dispute resolution provisions. In such cases, the distinction between the original and revised versions of the Arab Investment Agreement regains relevance. Article 29 of the original treaty, which falls under the abovementioned Chapter 6, refers back to the restrictive

definition of investor under Article 1, which means that the Court would have to grapple with the question of what definition overrides the other. The amended version of the Arab Investment Treaty however contains no such reference to Article 1 in its dispute resolution chapter which means that the definition of investor under the BIT is likely to prevail.

Finally, Three BITs redirect investors to the “authorities in charge of the resolution of disputes under the [Arab Investment Treaty] of 1980”. This wide and unspecific reference to the Arab Investment Treaty means that the definition of investor under Article 1 may apply in the Court’s view and override the definition in the BIT.⁶

Further ratifications of the 2013 amendment to the Arab Investment Agreement and an ever-growing awareness of investor-state dispute resolution in the region may lead to an uptick in popularity of the Arab Investment Court in the future. We will have to wait and see whether some adventurous investor might explore the road uncovered in this article, and if so, how the Court will rule on this conflict of treaties.


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The graphic features a black background with white text and a circular icon. The icon depicts a group of stylized human figures, with one figure in the center being magnified by a magnifying glass. The background is accented with horizontal lines in blue and green.

References

?1 Bahrain-Morocco BIT; Jordan-Oman BIT; Mauritania-Morocco BIT.

?2 Algeria-Yemen BIT; Oman-Yemen BIT; Syria-Tunisia BIT.

Algeria-Oman BIT; Algeria-Libya BIT; Algeria-Syria BIT; Bahrain-Sudan BIT; Bahrain-Syria
?3 BIT; Egypt-Syria BIT; Jordan-Syria BIT; Kuwait-Syria BIT; Morocco-Sudan BIT; Morocco-Syria
BIT; Sudan-Tunisia BIT; Sudan-UAE BIT.

?4 Jordan-Qatar BIT; Libya-Morocco BIT.

Algeria-Kuwait BIT; Algeria-UAE BIT; Bahrain-Jordan BIT; Bahrain-Lebanon BIT; Jordan-
?5 Kuwait BIT; Jordan-Lebanon BIT; Kuwait-Egypt BIT; Kuwait-Lebanon BIT; Kuwait-Morocco
BIT; Kuwait-Sudan BIT; Kuwait-Tunisia BIT; Lebanon-Morocco BIT; Lebanon-Sudan BIT;
Lebanon-Yemen BIT.

?6 Jordan-Palestine BIT; Lebanon-Oman BIT; Lebanon-Syria BIT.

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