

The First Arab Investment Court Decision

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For a long time, the idea of establishing a supranational tribunal in the field of investments was a dream. In 1948, the International Legal Association prepared draft statutes for a Foreign Investments' Court to provide a forum for the settling of investment disputes between States and foreign investors.¹ The Agreement for Promotion, Protection and Guarantee of Investment among Member States of the Organisation of the Islamic Conference also provided for the establishment of an organ for the settlement of investment disputes arising under the Agreement.² However, this organ was never established.

With the development of investor–State arbitration provided in bilateral and multilateral investment treaties (BITS and MITs), the creation of an international investment court seems to be outdated. Even if the establishment of a permanent court has the virtue of stability and predictability and would provide for relatively authoritative decisions, the creation of precedential effect is generally disliked. Indeed, such effect reduces the free hand of investors and States in settling investment disputes. Also, States may be particularly reluctant to accept such a mechanism when the substantive investment rules are unclear.³ This surely explains why, during negotiations for a multilateral agreement on investment (MAI) within the framework of the Organisation for Economic Co-operation and Development, a Norwegian proposal to establish an international investment tribunal was not seriously considered by the negotiators as a viable alternative to investor–State arbitration.⁴

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¹ International Law Association, Draft Statutes of the Arbitral Tribunal for Foreign Investment and the Foreign Investments Court, UNCTAD, *International investment instruments: A compendium*, Vol. III, p. 259; available at: <<http://www.unctad.org/sections/dite/iaa/docs/Compendium/en/72%20volume%203.pdf>>.

² Article 17. This Agreement was approved and opened for signature by Resolution 7/12-E of the Twelfth Islamic Conference of Foreign Ministers held in Baghdad, Iraq, on 1–5 June 1981. It entered into force on 23 September 1986. The Agreement is available at: <<http://www.unctad.org/sections/dite/iaa/docs/Compendium/en/38%20volume%202.pdf>>. See Hasan Moinuddin, *The Charter of the Islamic Conference and legal framework of economic co-operation among its member states: a study of the Charter, the General Agreement for Economic, Technical and Commercial Co-operation and the Agreement for Promotion, Protection and Guarantee of Investments among Member States of the OIC*, Oxford, 1984, pp. 138–183.

³ Yoshi Kodama, *Dispute Settlement under the Draft Multilateral Agreement on Investment. The Quest for an Effective Investment Dispute Settlement Mechanism and its Failure*, *Journal of International Arbitration*, 1999, pp. 58–59.

⁴ Documents DAFFE/MAI/EG1/RD (96)1, 26 January 1996; and DAFFE/MAI/EG1/RD (96)5, 5 March 1996.

The Arab World is an exception in this field. The Unified Agreement for the Investment of Arab Capital in the Arab States established in its Chapter VI an Arab Investment Court having jurisdiction to settle investment disputes.⁵ The Arab Investment Agreement was signed on 26 November 1980 in Amman, Jordan, during the Eleventh Arab Summit Conference. It entered into force on 7 September 1981. The Parties to the Agreement are Algeria, Bahrain, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libyan Arab Jamahiriya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Syrian Arab Republic, Somalia, Sudan, Tunisia, the United Arab Emirates and Yemen. The Agreement has been ratified by all these States except Algeria. Comoros, which joined the Arab League in 1993, did not sign this Agreement. The Statute of the Arab Investment Court came into force on 2 February 1985.⁶ The Court's internal rules were adopted by the General Assembly of the Court during its first session between 25 February and 3 March 1986.⁷

Although established in 1985, the Arab Investment Court only became operational in 2003 when a Saudi company, Tammiah for Consultancy Management & Marketing (Tammiah), decided to sue the Tunisian government. The Court rendered its first decision on 12 October 2004.

In addition to the *Tammiah* case, the Arab Investment Court has recently heard two other cases. In the first case, a Kuwaiti businesswoman—Mrs Ayada Baraket—filed a request against Egypt. The Kuwaiti investor sued the Egyptian Ministry of Finance complaining of abusive customs treatment. In the second case, an Egyptian businesswoman—Mrs Mounira Abdelhafedh—filed a request against the United Arab Emirates. She protested against a domestic judgment sentencing her partners to jail after an investment dispute with the Emirati government. These two cases are currently pending. Consequently, this article will only analyse the Decision rendered between Tammiah and Tunisia. After describing the Arab Investment Agreement (Section I), I will comment on the first decision of the Arab Investment Court (Section II).

I. THE ARAB INVESTMENT AGREEMENT

The Unified Agreement for the Investment of Arab Capital in the Arab States deals with all aspects of investment from admission to expatriation, including insurance against non-commercial risks. The Agreement contains, in addition to the Preamble, 46 Articles, apportioned under nine Chapters, and an Annex relating to conciliation and arbitration. The Chapters and the Annex form inseparable parts of the Agreement.⁸

⁵ An English translation of the Arab Investment Agreement is available at: <http://www.unctad.org/sections/dite/iia/docs/Compendium/en/36%20volume%202.pdf>. The Arab official version is available at: http://arablegalnetwork.org/InvestCourt/unitedaggrm/unitedaggrm_home.asp.

⁶ Available in Arabic at: http://arablegalnetwork.org/InvestCourt/systems/basicsys/basicsys_home.asp.

⁷ Available in Arabic at: http://arablegalnetwork.org/InvestCourt/systems/internalsys/internalsys_home.asp.

⁸ See Preamble, § 8. For a study on Arab investment law, see Ferhat Horchani, *L'investissement inter-arabe. Recherche sur la contribution des conventions multilatérales arabes à la formation d'un droit régional des investissements*, C.E.R.P., Tunis, 1992. This book is so far the most detailed and carefully researched analysis of Arab investment conventions and instruments.

The Arab Investment Agreement is intended to create a favourable context for Arab investment in accordance with the aims of the Charter of the League of Arab States,⁹ the Joint Defence and Economic Cooperation Treaty between Arab States,¹⁰ the principles and objectives set forth in the different Arab agreements on economic action, and the decisions issued by the Economic Council of the League of Arab States.¹¹ Thus, the drafters of the Arab Investment Agreement conceived it to be an instrument linked to the Arab League structure and a step in a progressive process to achieve Arab economic integration.

The Preamble clearly mentions that the objectives of the Arab Investment Agreement are to strengthen Arab economic integration, to promote joint Arab economic action and to support common development. The Preamble stresses that the signatory States are convinced that providing a suitable investment climate based on a well-established, coherent and integrated legal system will facilitate the transfer and use of Arab capital in such a manner as to further the development, freedom and progress of Arab States and to improve the living standard of their citizens.¹² The Preamble recognises also that such system will lead to a kind of “Arab economic citizenship” that grants any Arab investor an identical treatment, irrespective of its nationality and wherever it may operate.¹³ Finally, the Preamble insists on the fact that the provisions of this Agreement constitute a minimum standard to be applied in the treatment of investment.¹⁴

A. THE SCOPE OF THE AGREEMENT

The introductory Chapter lays down definitions of protected persons and protected operations under the Arab Investment Agreement. As for covered persons, Article 1(7)

⁹ The Charter was drawn up in Cairo on 22 March 1945. It consists of 20 Articles which define the aims that the League and its affiliate bodies should achieve and the shape of relations among Member States. The Charter is available at: <http://www.yale.edu/lawweb/avalon/mideast/arableag.htm>. For a comment, see, for example, Michel Mouskhely, *La Ligue des Etats Arabes: Commentaire du Pacte du 22 mars 1945*, *Revue Générale du Droit International Public*, 1946, p. 112. A large body of literature exists with respect to the Arab League. See, for example, Maurice Flory and Pierre-Sateh Agate (eds.), *Le système régional arabe*, Editions du CNRS 1989; Robert W. Macdonald, *The League of Arab States A Study of the Dynamics of Regional Organization*, Princeton University Press, 1965; Boutros Boutros-Ghali, *The Arab League*, *Revue égyptienne de droit international*, 1969, Vol. 25, pp. 67–118; *idem*, *La Ligue des Etats Arabes*, *Recueil des Cours de l'Académie du Droit International de La Haye*, 1972 (III), Vol. 137, pp. 1–82; Sirag G. Zamzami, *The Origins of the League of the Arab States and its Activities within the Member States: 1942-1970*, Thesis, Claremont Graduate School, 1978; Giovanni Iannettone, *La Lega Araba*, Edizioni dell'anteneo & bizzaarri, 1979; Maurice Borrmans, *La Ligue des Etats Arabes*, Pontificio istituto di studi arabi e d'islamistica, Rome, 1989; Istvan S. Pogany, *The League of Arab States: An overview*, *Bracton Law Journal*, 1989, pp. 41–68; and Rafaâ Ben Achour, *Institutions de la société internationale*, Cérés, Tunis, 1992, pp. 166–173. For the collection of Arab League instruments up until 1959, see Muhammed Khalil, *The Arab States and the Arab League. A Documentary Record*, Vols. 1 and 2, Khayats, Beirut, 1962.

¹⁰ The Treaty for Joint Defence and Economic Cooperation was concluded on 13 March 1950. It has been regarded as complementary to the Charter. All League Member States have become Parties to both instruments. The Treaty is available at: http://www.arableagueonline.org/arableague/english/details_en.jsp?art_id=736&level_id=272.

¹¹ The Economic Council is established pursuant to Article 8 of the Joint Defence and Economic Cooperation Treaty. It consists of the Ministers in charge of economic affairs or their representatives. The Council submits recommendations in order to fulfil economic cooperation between Arab States and concludes the necessary inter-Arab agreements to realize such aim.

¹² Preamble § 3.

¹³ Preamble § 4.

¹⁴ Preamble § 6.

defines the 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”. Under the Agreement, “Arab citizen” is defined as any natural person and/or legal entity bearing the nationality of a State Party. However, any such legal entity must be fully owned, directly or indirectly, by Arab citizens. Thus, like the majority of investment treaties,¹⁵ the Arab Investment Agreement covers two types of investors: natural persons; and corporate entities. In effect, the qualifying relationship that Article 1 sets forth between the natural person and the State Party to the Agreement is that of nationality. However, with regard to corporate entities, the criterion of nationality is combined with the criterion of integral control. To be protected, a company must not only have the nationality of an Arab State but must also belong entirely to Arab nationals.

Under the Agreement, Arab joint ventures, States and public entities are also deemed protected investors. Article 1(4) provides that “[j]oint Arab projects, which are fully owned by Arab citizens shall be deemed to be included within this definition [of protected investor] if they do not have the nationality of [a non-Arab State]”. The same Article extends the protection to Arab States and corporate entities that are fully State-owned, whether directly or indirectly.

This special mention of Arab joint ventures can be explained by the fact that many investment projects in the region are realized through inter-Arab joint ventures.¹⁶ It should be kept in mind also that one of the aims of the Arab Investment Agreement is to promote joint Arab action and inter-Arab investment. On the other hand, the extension of protection to the States and public entities promotes public or State investment. It takes into consideration the fact that some rich Arab countries carry on investment activities either directly or through public structures.¹⁷

As far as covered operations are concerned, Article 1 refers to two key notions: “Arab capital”; and “investment of Arab capital”. Arab capital means assets owned by an Arab citizen and any material and immaterial rights which have a *cash valuation*, including bank deposits, financial investments, joint shares and revenues accruing from

¹⁵ See, on this issue, *Scope and Definition*, UNCTAD Series on issues in international investment agreements, 1999.

¹⁶ As an example can be mentioned the Arab Investment Company S.A.A (TAIC). TAIC is a Pan-Arab joint stock company established in 1974 and has its seat in Riyadh (Saudi Arabia). TAIC is owned by governments of 15 Arab States. Its prime objective is to invest in Arab funds to develop Arab resources in different economic sectors. See Jean-François Rycx, *Droit des sociétés interarabes conjointes*, Publisud, Paris, 1991, p. 507; *idem*, *Les effets de la récession pétrolière sur le système de coopération financière de la Ligue Arabe*, in Flory and Agate (eds.), *supra*, footnote 9, pp. 171 *et seq.*; James J. Myers, *International Construction of Joint Ventures in the Middle East*, Arab Law Quarterly, 1990, Vol. 5, Issue 1, pp. 3–24; Fethi Kemicha and Jean-François Rycx, *Le cadre juridique de la collaboration financière et industrielles inte-arabe: De la coordination des initiatives à la hiérarchie des normes*, paper on the Colloquium “Le système institutionnel régional arabe”, Tunis Faculty of Law, Hammamet, 15–17 April 1985.

¹⁷ For Kuwaiti public investments, reference can be made, for instance, to the Kuwait Investment Authority, which is an autonomous government body that invests in the local, Arab and international markets (<http://www.kia.gov.kw/kia>); the Kuwait Petroleum Corporation, which is a State-owned entity responsible for Kuwait's hydrocarbon interests throughout the world (<http://www.kpc.com.kw>); and The Kuwait Investment Co., which is engaged in various local and international investment activities. For a study of Kuwaiti public investors, see Yosof Ali, *Les investissements gouvernementaux koweïtiens dans les pays industrialisés (Aspects juridiques)*, unpublished Ph.D. thesis, University of Paris II, 1994, pp. 99–152.

these assets. The concept of Arab capital is a static concept. It is large enough to equate with everything that can be evaluated in monetary terms.

The concept of investment of Arab capital, however, is a functional one. Investment of Arab capital means “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 this State for *such purpose* in accordance with the provisions of this Agreement” (emphasis original). Thus, in order to qualify as an investment, the Arab capital must satisfy two requirements: an objective requirement; and a subjective one. First, the Arab capital must be used or transferred into the territory of a Contracting Country with a view to achieve a return. Transfer of capital and its employment for purposes other than profits, such as charitable missions or not-for-profit activities, seem to fall outside the scope of the Agreement. As Horchani observed: “The prospect for a future income, for profit, for gain thus appears as inherent to the concept of investment of the Arab capital protected by the 1980 Convention.”¹⁸ It is, however, questionable whether the transfer of capital for the mere purpose of property ownership falls within the definition, even if the acquired property may yield a profitable return.¹⁹ Second, this capital must contribute to the economic development of the host State or must be used in accordance with the aims fixed in the Arab Investment Agreement.

B. *THE STANDARDS OF PROTECTION*

The Arab Investment Agreement covers the main area of the treatment of foreign investment. It provides Arab investors with a number of guarantees essential for the security and enjoyment of their investment.

Among the standards of treatment provided in the Arab Investment Agreement is the obligation to guarantee a free movement of Arab capital. Article 2 of the Agreement stipulates, *inter alia*, that State Parties to this Agreement shall, within the framework of its provisions, permit the transfer of Arab capital freely among them, promote and facilitate investment in accordance with their economic development plans and programmes and in a manner beneficial to both the host State and the investor. Furthermore, according to Article 5, the Arab investor shall be free to invest within the territory of any State Party in fields which are neither prohibited nor restricted to the citizens of that State and within the percentage limits for shared ownership as prescribed in the law of that State. By establishing a free transfer of capital between Arab countries, the Arab Investment Agreement regulates both home countries' and host countries' capital restrictions.²⁰ It should be noted that the majority

¹⁸ Horchani, *supra*, footnote 8, pp. 89–90.

¹⁹ See the same observation in the context of the Islamic Investment Agreement; Moinuddin, *supra*, footnote 2, p. 143.

²⁰ For home country measures that affect foreign investment, see UNCTAD, *Home Country Measures*, UNCTAD Series on issues in international investment agreements, 2001; available at: <http://www.unctad.org/Templates/webflyer.asp?docid=1567&intItemID=2322&lang=1&mode=downloads>.

of investment treaties deal with the movement of capital only through the guarantee of free transfer and the obligation of repatriation of capital that concerns mainly host States. That is why Vandeveldel argued that actual investment treaties are not neutral from the economic point of view because “they leave the home state with unlimited discretion to prohibit or regulate outward investment”.²¹ The Arab Investment Agreement takes into account the fact that home country measures may restrict capital outflows and tries to remove such obstacles.

The other standards include the obligation to protect the investor, to safeguard its investment and its related revenues and rights and, to the extent possible, to ensure the stability of the pertinent legal provisions (Article 2(1)); national treatment and most-favoured-nation treatment (Article 6); and the obligation to facilitate the entry, residence and departure of the Arab investor, the members of his/her family, and his/her employees (Article 12). However, unlike other investment treaties, the Arab Investment Agreement does not contain a reference to “fair and equitable treatment”.

As for protection against expropriation and equivalent measures, the Arab Investment Agreement contains a broad-scope expropriation clause according to which:

“Arab capital invested in accordance with the provisions of this Agreement shall not be subject to 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 divulgence of secrets regarding intellectual property or other rights *in rem*, 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 dividends or the fulfilment of his rights and the discharge of his obligations.”²²

Nevertheless, Article 9(2) sets forth that a Contracting State may expropriate an Arab investor’s assets in so far as such decision is taken on a non-discriminatory basis for the public benefit and in accordance with the authority vested in the State. Such decision must also be accompanied by fair compensation in accordance with general legal provisions regulating the seizure of property for the purposes of the public benefit. Compensation shall be made within a period not exceeding one year from the date when the decision to dispossess became final. In every case, the Arab investor shall be given the opportunity to challenge the legitimacy of any dispossession decision and the amount of compensation before domestic courts. It should be noted that the Agreement does not make any reference to the computation of interest. That is because charging interest is prohibited under the Islamic *Sharia*.²³ It seems that, as one

²¹ Kenneth Vandeveldel, *The political economy of a bilateral investment treaty*, A.J.I.L., 1998, p. 623.

²² Article 9(1).

²³ Yahya Adbullah Al-Sammaan, *The Legal Security of Private Foreign Investment in the Kingdom of Saudi Arabia*, thesis submitted to the Faculty of Law in the University of Dundee (Centre for Petroleum and Mineral Law and Policy), August 1993. That author said that in Saudi Arabia, interest is contrary to public order; p. 111.

commentator said, “the language of this provision indicates that it is left to the host country to determine the amount of compensation to be paid to the investor whose investment has been expropriated”.²⁴

Among the other guarantees, Article 10 contains a special provision entitling Arab investors to compensation for damages due to any one of the following actions by a State Party, one of its instrumentalities or local authorities and/or institutions:

- undermining any of the rights and guarantees conferred upon them under the Agreement or compromising any other decision issued pursuant thereto by a competent authority;
- breach of any international obligations or commitments arising from this Agreement in favour of the Arab investor or failing to take the necessary steps to implement them, whether deliberately or negligently;
- failure to enforce a legal judgment pertaining to an investment; or
- contravening, in any other manner, by action or by omission, the legal provisions in force within the State in which the investment is made.

In order to protect investments from non-commercial risk, the Agreement provides that the Inter-Arab Investment Guarantee Corporation²⁵ shall, within the framework of its governing rules and regulations, provide insurance for the funds invested pursuant to the Agreement.²⁶ Article 23 contains a subrogation clause that enables the Inter-Arab Investment Guarantee Corporation, public insurance entities and any other organisations to recover, by subrogation, what they have paid to Arab investors.

It should be noted finally that the treatment provided under the Arab Investment Agreement constitutes a minimum standard that Member States are committed to.²⁷ Likewise, in order to guarantee the stability and continuous enjoyment of this minimum treatment, Article 3(2) stipulates that “the provisions of the Agreement shall prevail over the laws and regulations of the States Parties, in case of conflict”. The other guarantee for the stability of the treatment accorded under the Arab Investment Agreement is laid down in Article 43 of the Agreement. Article 43 stipulates that withdrawal of any State which is a Party to the Agreement, the loss of its membership in the League of Arab States or the deferral and/or suspension of the provisions of the

²⁴ Ibid., p. 110.

²⁵ The Inter-Arab Investment Guarantee Corporation (IAIGC) is a Pan-Arab regional organisation with membership of all Arab countries (except Comoros Islands). It was established with the aim of promoting inter-Arab investments and trade. It commenced its operations in April 1975 from its main offices in Kuwait. The IAIGC provides insurance coverage against non-commercial risks for inter-Arab investments and against commercial and non-commercial risks for export credits. On the Arab investment insurance system, see, for example, Farhat Horchani, *Une projection universelle d'une convention régionale arabe sur la garantie des investissements contre les risques non commerciaux: la convention MIGA du 1er octobre 1985*, in Flory and Agate (eds.), *supra*, footnote 9, p. 189; *idem*, *La compagnie inter-arabe pour la garantie de l'investissement*, Ph.D. Dissertation, University of Dijon, France, 1980; and Ibrahim I. Shihata, *Arab Investment Guarantee Corporation*, *Journal of World Trade Law*, 1972, pp. 185–202. See also the Website of the IAIGC at: <http://www.iaigc.org/>.

²⁶ Article 22.

²⁷ Preamble § 6, Article 3 and Article 16.

Agreement shall not affect the rights and obligations acquired in accordance with the provisions of the Agreement.²⁸

The principal provisions of the Arab Investment Agreement address a State Party's obligations towards investors (host State, but also home State). However, in contrast with a large number of investment agreements, the Arab Investment Agreement provides some correlative obligations that investors must observe. First, according to Article 14(1), in the various aspects of its activity, the Arab investor must, as far as possible, coordinate with the host State and with its various institutions and authorities. Second, the Arab investor must respect the laws and regulations of the State that are "consistent with this Agreement". Third, in establishing, administering and developing Arab investment projects, every investor must comply with the host's State development plans and its national development programmes. The Arab investor must also employ all means which reinforce the structure of the host State and enhance Arab economic integration. Finally, the Arab investor shall refrain from any action which might violate public order and morality or involve illegitimate gains. After listing these obligations, Article 14(2) insists that 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". Article 15 adds that Arab investors shall be subject to the same obligations as are imposed on citizens of the State in which the investment is made. Despite the fact that the interpretation and scope of these provisions may raise interpretative controversies, failure of the investor to observe such requirements may give rise to responsibility before the Arab Court of Investment.

With regard to application and interpretation of the Arab Investment Agreement's provisions, Article 4 points out that:

"Conclusions and interpretations of the provisions of this Arab Agreement shall be guided by the principles on which it is based and the aims which inspired it, followed by the rules and principles common to the legislations of the States members of the League of Arab States and, finally, by the principles recognized in international law."

Finally, the Arab Investment Agreement empowers the Economic Council with the mission of implementation and supervision. The Council, *inter alia*, can interpret the provisions of the Agreement, issue regulations and the measures required to implement it. It can propose reforms to the Member States in order to achieve the objectives of the Agreement and, in cases of utmost necessity and urgency, may authorise competent authorities of a State Party to suspend the application of certain provisions of the Agreement, provided that this suspension does not affect guarantees previously accorded under the Agreement.²⁹ However, up until the time when all Arab States become Parties to the Agreement, the powers of the Council—except for the power to appoint

²⁸ See Al-Sammaan, *supra*, footnote 23, p. 109.

²⁹ Articles 18, 19, 29 and 21, respectively.

the Judges of the Court, which belongs exclusively to the Council—shall be exercised by the representatives of the Arab State Parties which are members of the Council through a board known as “The Arab Investment Agreement Board”.³⁰

C. THE DISPUTE SETTLEMENT PROCEDURE

The Arab Investment Agreement establishes in Chapter VI a complex and original system of investment dispute settlement. Article 28 provides that until an Arab Court of Justice is established and its jurisdiction determined, an Arab Investment Court shall be created.³¹

1. ORGANISATION OF THE ARAB INVESTMENT COURT

The Arab Investment Court shall be composed of at least five serving Judges and several reserve members, each having a different Arab nationality. The Judges and the reserve members shall be chosen by the Economic Council of the Arab League from a list of Arab legal specialists drawn up specifically for such purpose. Each State Party proposes two candidates from amongst those having the academic and moral qualifications to assume the highest judicial offices. The Council shall appoint the Chairman of the Court from amongst the members of the Court.³²

The members of the Court shall serve full-time whenever the work so requires. The term of membership is three years and may be renewed. The Council shall determine the remuneration of its Chairman and members, who shall be treated as members of the Council as regards diplomatic immunity. Their salaries, remuneration and allowances shall be exempt from all tax.³³ Members of the Court also enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions.³⁴

³⁰ Article 45.

³¹ See also Article 46 of the Arab Investment Agreement. It should be noted that the establishment of an Arab Court of Justice is provided by Article 19 of the Arab League Charter. Over the years, many projects have been discussed. However, no final decision has been taken on the establishment of such a court. A proposed 48-article statute of the Arab Court of Justice (ACJ) was submitted to the Arab leaders who met in the Sudanese capital on 28 March 2006. The ACJ, considered to be the major judicial body of the Arab League, would consist of a panel made of nine Judges, selected for six years non-renewable, via direct secret ballot by the Council of the League. The proposed ACJ would only have jurisdiction to settle disputes among Arab governments. Every Arab country would have the right to file a complaint with the ACJ. Conflicts would be resolved in accordance with the Arab League Charter, annexed Protocols and Agreements signed within the League. However, well-informed Arab diplomats ruled out the adoption of the ACJ draft resolution because of the reservations by many Member States. See Ezzeldin Foda, *The Projected Arab Court of Justice: A Study in Regional Jurisdiction with specific Reference to the Muslim Law of Nations*, Nijhoff, Leiden 1957; Sadok Chaabane, *Le projet de refonte du pacte de la Ligue des Etats Arabes et le projet des statuts de la Cour Arabe de Justice*, *Revue Affaires Arabes*, March 1982, No. 2; Horchani, *supra*, footnote 8, pp. 392–396; and Achouak Dachraoui, *La Cour arabe de justice: Etude de l'avant-projet de statut*, Master's dissertation, Faculty of Law and Political Sciences (Tunis III), Political Sciences, 1981–1982. See also the Arab League Website, at: http://www.arableagueonline.org/arableague/english/details_en.jsp?art_id=1175&level_id=10&page_no=8.

³² Article 28, al. 2 of the Arab Investment Agreement; and Article 1 of the Statute of the Court.

³³ Article 28 of the Agreement; and Article 8 of the Statute.

³⁴ Article 17 of the Statute.

Judges must conduct themselves in a way that is fair. They must observe high standards of integrity and independence. Article 3 of the Statute provides that Judges shall not have the same nationality as a party in the dispute. Article 11 prevents every Judge who acts in a dispute as a lawyer, adviser, counsel or consultant to participate in the proceedings.

One or several “Commissioners” assist the Court. The Commissioners are appointed for a renewable term of three years by the Council from a list of candidates proposed by States Parties.³⁵ The mission of the Commissioners is to manage the case assigned to them in preparation for the hearing.³⁶

The Court’s General Assembly is composed of the serving Judges of the Court. It is presided over by the Chairman of the Court. It shall gather at least once every year. Decisions are taken on a majority vote basis. The General Assembly has various missions. It directs the work of the Court. It decides on the disqualification of Judges. Finally, it produces rules and regulations relating to the procedure before the Court and the structure of its divisions.³⁷

On 2 April 1991, by its Decision no. 1122, the Economic Council of the Arab League appointed 10 serving Judges and 9 reserve Judges for the Court.³⁸ On 17 September 1999, by Decision no. 1148, the same organism delegated to the Secretary-General of the Arab League the choice of the Commissioners of the Court from the lists proposed by Member States.

The seat of the Court shall be at the permanent headquarters of the League of Arab States in Cairo and shall not be transferred unless the Court takes a substantiated decision to convene its sessions or undertake its functions in another location. The Court can decide in a plenary session or in a division that has not fewer than three members.³⁹

2. JURISDICTION OF THE ARAB INVESTMENT COURT

The jurisdiction of the Court is broad. In addition to State-to-State investment disputes, the Arab Investment Court has jurisdiction over investor-State disputes and disputes opposing two public entities of more than one State Party. Indeed, according to Article 29, the Arab Investment Court has jurisdiction over disputes:

- (a) between any State Party and another State Party, or between a State Party and a public entity of the other Parties, or between two public entities of more than one State Party;

³⁵ Article 8 of the Statute.

³⁶ Articles 24, 25 and 26 of the Statute; and Article 4 of the Internal Rules.

³⁷ Article 4 of the Statute.

³⁸ Before this decision, the Arab Investment Court was composed of 6 serving Judges and 6 reserve members, Decision of Council no. 978 issued on 29 August 1984.

³⁹ Article 28, al. 6 of the Agreement, and Article 7 of the Statute.

- (b) between a State party, public institution or organisation of a Party and an Arab investor; and
- (c) between a State, a public entity or an Arab investor and the State agencies providing investment guarantees in accordance with the Arab Investment Agreement.⁴⁰

The jurisdiction of the Court is, however, limited to disputes which relate to or arise from the application of the provisions of the Arab Investment Agreement.⁴¹

One of the significant features of the Arab Investment Court is its compulsory jurisdiction over disputes involving investors, States and public entities. Article 27 of the Arab Investment Agreement allows every party to an investment dispute to initiate judicial proceedings before the Arab Investment Court without requiring a prior specific consent.⁴²

However, even though compulsory, the jurisdiction of the Arab Investment Court is nonetheless subsidiary. Recourse to it is allowed only if the parties to the disputes failed to agree to submit the dispute to conciliation or arbitration, if the conciliator failed to conciliate the parties or if the arbitrator(s) failed to make a ruling within the specified period.⁴³ To these hypotheses provided in Article 27, Article 2, al. 11 of the Arab Investment Agreement Annex adds that “if the award of the arbitral tribunal was not executed within three months of its rendering, the matter shall be submitted before the Arab Investment Court for it to rule on such appropriate execution measures”.

It should be noted that if the parties decide to submit a dispute relating to the application of the Arab Investment Agreement to conciliation or arbitration, the procedure 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.⁴⁴ But, in contrast to the recourse to the Arab Investment Court, the submission of such dispute to conciliation or arbitration is subordinated to an agreement between the parties.⁴⁵

There is, in addition, a possibility to extend the jurisdiction of the Arab Investment Court by parties' special agreement. Indeed, according to Article 30:

“... if an international Arab investment agreement or any other agreement related to investment concluded with the auspices of the League of Arab States stipulates that a matter or dispute should be referred to international arbitration or to an international court, the parties involved may agree to regard it as being within the jurisdiction of the Court.”

⁴⁰ Mostly, these disputes oppose public and private parties to the IAIGC. According to Article 22 of the Arab Investment Agreement, this corporation shall provide insurance for the funds invested pursuant to this Agreement.

⁴¹ It should be noted, however, that the Council can suspend the application of Article 29 of the Agreement. But this decision requires a majority of two-thirds of its Members; Article 31.

⁴² Article 27(1): “Each party may seek recourse to legal action in order to settle a dispute in the following instances ...” See also Horchani, *supra*, footnote 8, pp. 398–400; Ryex, *Droit des sociétés interarabes conjointes*, *supra*, footnote 16, pp. 508–509.

⁴³ Article 27 of the Agreement.

⁴⁴ Article 26 of the Agreement.

⁴⁵ See Horchani, *supra*, footnote 8, p. 373.

Furthermore, some inter-Arab BITs provide, among the means for the settlement of investor-State disputes, recourse to the Arab Investment Court. This option is followed mainly by Syrian BITs with other Arab States. For example, the Syria-Jordan BIT provides, in Article 6, entitled "Settlement of Investment Disputes arising Between the Investor and Hosting Country":

"Disputes with respect to different aspects of investments and associated activities of either Contracting Parties or their nationals shall be settled through conciliation, arbitration, by competent judicial authority in the hosting country of investment or by recourse to the Arab Investment Court in accordance with the provisions of Chapter VI of the Agreement of Unifying of Investing Arab Capitals in Arab countries, and its annex which was agreed by the Arab Social and Economical Council, decision No. 841 dated on 10/9/1980."⁴⁶

The same provision is also found in the BIT between Syria and Egypt (Article 6).⁴⁷

Also, some BITs concluded by Bahrain and Jordan with other Arab countries, without referring specifically to the jurisdiction of Arab Investment Court, provide that disputes between States and foreign investors can be settled, among other means, "according to the provisions of the Chapter related to disputes settlement of the Arab agreement for Arab capital investment in the Arab country".⁴⁸

It should also be mentioned finally that some Arab States' investment laws refer, explicitly or implicitly, to the Arab Investment Court. Syrian Investment Law No. 10, issued on 4 May 1991 as amended on 13 April 2000, gives, in its Article 26b, Arab investors the right to resort to the Arab Investment Court in order to settle their disputes with Syrian bodies and institutions.⁴⁹ Besides, Article 6 of the Sudanese Investment Law of 1999 (as amended in 2003) refers to the Unified Agreement for the Investment of Arab Capitals in Arab States of 1980 to settle investment disputes between Sudan and Arab investors.⁵⁰ Article 61 of Yemeni Investment Law No. 22 of 2002 contains a similar provision.⁵¹

⁴⁶ BIT available in Arabic and in English on the UNCTAD Website.

⁴⁷ Available in Arabic on the UNCTAD Website. See also the Yemen-Oman BIT (Article 11); available in Arabic on the UNCTAD Website.

⁴⁸ Article 8 of the Bahrain-Lebanon BIT; available in Arabic on the UNCTAD Website; Article 7 of the Bahrain-Jordan BIT, available in Arabic and in English on the UNCTAD Website; Article 6 of the Jordan-Lebanon BIT, available in Arabic and in English on the UNCTAD Website; and Article 9 of the Jordan-Kuwait BIT, available in Arabic and in English on the UNCTAD Website.

⁴⁹ "b. investment disputes between investors of Arab and foreign countries' citizens whose projects are covered under the provisions of this law and the public Syrian bodies and institutions shall be settled according to the following:

- Through amicable solution
- Should both parties fail to reach an amicable solution within six months as of the date of submitting a written notice for the amicable settlement by either parties of the dispute, either of them shall have the right to resort to one of the following methods:
 - Resort to Arbitration
 - Resort to the Syrian jurisdiction
 - Resort to Arab Investment Court formed under the Corporate Agreement For The Investment of Arab Capitals in the Arab Countries in 1980
 - Or that dispute is settled according to the provisions of Investment Protection and Guarantee Agreement concluded between Syrian Arab Republic and country of the investor." Available at: <http://www.dcc-sy.com/law10/enlaw.htm>.

⁵⁰ Law available in English at: <http://sudaninvest.gov.sd/English/Sudan-Invest-Law.htm>.

⁵¹ Law available in English at: <http://www.giay.org/lawndx.htm>.

With regard to the relationship between the jurisdiction of the Arab Investment Court and national courts, Article 31 contains a “fork in the road clause” according to which the Arab investor cannot submit successively or simultaneously a matter which falls within the jurisdiction of the Court before the national courts and the Arab Investment Court. Article 32 provides also that when there is a conflict of jurisdictions between the Arab Investment Court and the courts of a State Party, the decision of the Court on the matter shall prevail.

The Arab Investment Court has jurisdiction to decide on interim measures to preserve the rights of the parties. The Court can order the joinder of a third party whose interests are affected and who is subject to the Court’s jurisdiction.⁵²

With regard to procedural rules, the Statute of the Court contains a set of rules relating to the filing of a request before the Court (Article 20), its contents (Article 21), its registration (Article 22, al. 1), the exchanges of statements (Article 22, al. 2), costs of proceedings (Article 23), appointment of experts (Article 31), confidentiality and audiences (Articles 35 and 36), rules of proof (Article 37), deliberation (Articles 38 and 39) and the judgment (Articles 39 and 40).

3. ENFORCEABILITY OF JUDGMENTS AND REMEDIES

As with awards of the International Centre for Settlement of Investment Disputes (ICSID), Article 34, al. 1 of the Statute of the Court provides that judgments rendered by the Arab Investment Court have binding force only with regard to the parties concerned and the dispute on which a decision is given. They are final and not subject to appeal.⁵³ Besides, according to Article 34, al. 3, a judgment delivered by the Court shall be enforceable in the States Parties, where they shall be so in the same manner as a final enforceable judgement delivered by their own competent courts.⁵⁴

However, three limited remedies are possible. First, where there is a dispute as to the meaning of a judgment, the Court shall provide its interpretation at the request of either party.⁵⁵ Second, Article 32 of the Statute provides that either upon the request of either party or *ex officio* the Court can rectify any clerical or arithmetical errors in a judgment. Finally, according to Article 35, the Court may admit an application for a review of a judgment that significantly violates an essential principle of the Agreement, due process principles or when a decisive fact, which was unknown at the time of judgement, is revealed. The ignorance of such fact must not, however, be attributable to the negligence of the Party. The Court must make a ruling on the opportunity of a review and set out the grounds on which a review is granted. The Court may suspend the judgment’s execution before the start of review proceedings.⁵⁶

⁵² Article 33 of the Arab Investment Agreement. See also Articles 33 and 34 of the Statute.

⁵³ Article 33, al. 2 of the Statute.

⁵⁴ See also Article 41 of the Statute.

⁵⁵ Article 34, al. 2, and Article 43 of the Statute.

⁵⁶ See also Articles 44-47 of the Statute.

II. THE *TANMIAH V. TUNISIA* CASE

A. *FACTS OF THE CASE AND ALLEGATIONS OF THE PARTIES*

The case involved a dispute over the sponsorship of the Mediterranean Games held in Tunisia in September 2001. The case was filed on 13 January 2003.

The Saudi Arabian company Tanmiah for Consultancy Management & Marketing asserted that in 1999 it signed an agreement with the Tunisian government giving the company the exclusive right to market the Games. Adel S. Al-Maddah, the only owner of Tanmiah, represented the company. He deplored a chain of violations to its contract with the Tunisian government. Mainly, Mr Al-Maddah said that a few months after the conclusion of the marketing contract, he found out that the Tunisian government, acting in violation of an exclusivity clause in the contract's preamble, had signed a similar contract with the Tunisian company Tunisair. The Claimant also argued that the sale of commercial space in the Olympic Village, the organisation of a disparagement campaign, the refusal to deliver the Olympic Village maps and the failure to enter into an insurance policy amounted to violations of the contract.

The Claimant's claims were mainly contractual. However, Mr Al-Maddah alleged, without further demonstration, that the breach of contractual obligations constituted a violation of Articles 2 and 10 of the Arab Investment Agreement. It should be remembered that Article 2 contains the obligation for every State Party to the Agreement to permit the free transfer of Arab capital and to promote and facilitate its investment according to economic development plans and in a manner beneficial to the host State and the investor. It also states that every Member State shall undertake to protect the investor, safeguard its investment and related revenues and rights and, to the extent possible, ensure the stability of the pertinent legal provisions. On the other hand, Article 10 entitles Arab investors to compensation for damages if a State Party or one of its public or local authorities undermines any of the rights and guarantees provided the investor in the Agreement or pursuant to a host State's domestic laws.

The Saudi investor named as Respondents the Tunisian government, represented by its Prime Minister, and the Comity of Organisation of Mediterranean Games (COMG). The investor claimed some US\$ 68 million in compensation for the monetary and moral damage incurred. To demonstrate the jurisdiction of the Arab Investment Court, the Claimant asserted that Tunisian local courts annulled the arbitration clause provided in its Contract with the Tunisian authorities and that this annulment made the Arab Investment Court competent.

Both the Tunisian government and the COMG appeared before the Arab Investment Court. They challenged the jurisdiction of the Court and the case on the merits.

The Office of State Litigation represented the Tunisian government. It argued that the Prime Minister was not the appropriate person to represent that government before

arbitral tribunals and courts. The Office pointed out that under Article 3 of Tunisian Law no. 13 issued in 1988, every action filed against Tunisia must be directed against the Office of State Litigation as the exclusive representative of the Government before the courts. The Office also asserted that the marketing contract was entered into between the investor and an independent and autonomous legal entity, the COMG. As a third party, pursuant to the principle of contract privity, the Tunisian government did not owe any obligations to the Claimant and must be excluded from the jurisdiction of the Court.

The COMG carried out its defence on three fronts: jurisdiction; procedure; and merit. With regard to jurisdiction, the COMG alleged that under Article 30 of the Arab Investment Agreement, any recourse to the Arab Investment Court requires a prior agreement between the parties conferring jurisdiction on that Court. The COMG argued, on the other hand, that Tanmiah did not make any effective investment as defined in the Arab Investment Agreement. It stressed that Claimant did not spend or introduce any money nor did it make any of the regular payments stipulated under the contract.

As to procedure, the COMG challenged the regularity of the composition of the Arab Investment Court. The COMG asserted that the Judges and the Commissioners were appointed after Tanmiah's suit. Or, according to this Defendant, the Arab Investment Agreement requires that these nominations must intervene prior to any recourse. The COMG argued, furthermore, that the Commissioner was not appointed by the Secretary-General of the Arab League as required by the decisions of the Economic Council.

Finally, with respect to the merits of the case, the COMG observed that even if it had begun to perform its obligations under the marketing contract, the Saudi investor did not make any of the five regular payments stipulated by the contract. The COMG contended that Tanmiah broke the very essence of the contract and therefore could not seek any compensation. According to the COMG, any contract is formed by an exchange of promises and, in application of the principle of *non adimpleti contractus*, it must be discharged. The COMG further insisted on the fact that it never signed a contract with Tunisair. It also claimed that its non-performance of certain obligations aimed to redress Tanmiah's anticipatory repudiation of the contract. The COMG concluded that it was entitled for losses because of the unlawful actions by the investor and filed, in return, a counter-claim to ask the Court to appoint an expert to evaluate the amount of damage.

B. *THE COURT DECISION*

The Decision was rendered on 12 October 2004 by a chamber chaired by Faiz Hassen El Mbiadh, President of the Arab Investment Court (from Jordan), and including Abdel Errahman Al Khalifa (from Sudan) and Moubrak Nacer El Hajeiri (from Qatar), members of the Arab Investment Court. The Decision was taken by

majority.⁵⁷ President El Mbiadh issued a Dissenting Opinion contesting the majority conclusion on the merits.

1. JURISDICTIONAL ISSUES

The Arab Investment Court examined first the objections to its jurisdiction raised by the Office of State Litigation and by the COMG. On the objection relating to the representation of the Tunisian government, the Court stated that the Arab Investment Agreement did not require that the representation of the parties be determined according to national laws. The Court observed that the Agreement is silent on this matter and this silence must be interpreted as conferring discretionary power on the Court members to determine the appropriate organ that may represent each State. In light of the above considerations, the Court rejected the Office of State Litigation's objections and considered well founded the recourse against the Tunisian Prime Minister.⁵⁸

On this issue, a similar conclusion was reached in the *Sedelmayer* Award rendered by a Tribunal formed under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce relating to the Russia–Germany BIT. The investor had sent all of its correspondences and other briefs to the Procurement Department, a State entity directly subordinated to the President of Russia and entrusted with certain executive powers. Before the Tribunal, Russia argued that the Procurement Department could not be regarded as the proper Respondent because it was not a Contracting Party under the Treaty and, in addition, because it did not have appropriate authority to represent the Russian Federation. The Tribunal rejected the Russian argument by pointing out that it “shares the view that a country can not rely on internal rules concerning who has and who has not the authority to represent the country in arbitrations as a defence against liability under international law.”⁵⁹

The Court also rejected the challenge of its jurisdiction over the Tunisian government. The Claimant in this case brought its action both against Tunisia and against the COMG. The Office of State Litigation argued that Tunisia was a third party to the marketing contract and the dispute concerned only the COMG and the Saudi investor. The Court ruled that the fact that the COMG is an association that has a proper personality under Tunisian law did not exclude the responsibility of the Tunisian State for the execution of the marketing contract. The Court founded its ruling on the Appointment Order of the President of the COMG (Order No. 338 of 1997). Under this Order, the President of the COMG is responsible for a mission under the authority of the Prime Minister and is authorised to enter into contracts necessary for the

⁵⁷ The text of this Decision is available in Arabic at: http://arablegalnetwork.org/InvestCourt/judgments/12_10_2004/1.asp.

⁵⁸ Page 40 of the Award.

⁵⁹ Award rendered on 7 July 1998, p. 80; available at: http://www.iisd.org/pdf/2004/investment_sedelmayer_v_ru.pdf. See, on this Award, Walid Ben Hamida, *Mr. Franz Sedelmayer v. The Federation of Russia*, *Stockholm International Arbitration Review*, 2005, No. 2, p. 76.

organisation of the Games. According to the Court, this link makes the Prime Minister responsible for the execution of the contract. Finally, the Court noted that the fact that the same Prime Minister issued another Order to the different Ministers demanding them to facilitate the activity and mission of the COMG confirmed the relationship between the COMG and the Prime Minister. The Court concluded that the investor could bring his action against both the Tunisian government and the COMG. It also ruled that these two entities must be regarded as jointly responsible for the execution of the marketing contract.

Without taking any position on whether the ruling on the issue of State responsibility is well founded, we regret that the Court did not ground its decision on any rule. The Court could have referred to the Articles on State Responsibility adopted by the International Law Commission, particularly its Article 9, according to which if a private person or entity acts on the instructions of the State, such conduct is attributable to the State. The Court could also have used BIT/MIT investment case law⁶⁰ where the question of State responsibility for an injury caused by private conduct was examined by arbitral tribunals.⁶¹

Whatever the basis of the solution adopted by the Arab Investment Court, its ruling, compared to those of other BIT/MIT tribunals, is too liberal for two reasons. First, by considering that the State is directly responsible for all contracts concluded by a State-controlled entity, the Court interpreted broadly the rule of attribution. BIT tribunals have explained that a private legal entity could be considered to be a State entity acting in the name of the State not only when both the structural (ownership of capital, control, management and administration) and functional tests (governmental character of the functions or the activities of the entity) clearly put it in that category but also if the special actions or omissions complained of by the claimant are not commercial but governmental in nature.⁶² Furthermore, in the *Salini* case, the Arbitral Tribunal considered that in the case where the State has organised a sector of activity

⁶⁰ On this issue, see, for example, Pierre-Marie Dupuy, *Les émanations engagent-elles la responsabilité des Etats? Etude de droit international des investissements*, European University Institute, 2006, available at: <http://cadmus.iue.it/dspace/handle/1814/4294>; Kaj Hobér, *State Responsibility and Investment Arbitration*, ILA Report, 2005, available at: <http://www.ila-hq.org/pdf/Foreign%20Investment/ILA%20paper%20Hober.pdf>; Abby Cohen Smutny, *State Responsibility and Attribution—When Is a State Responsible for the Acts of State Enterprises?* Emilio Agustín Maffezini v. The Kingdom of Spain, in Todd Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, London, Cameron May, pp. 17–45; Charles Leben, *La responsabilité internationale de l'Etat sur le fondement des traités de promotion et de protection des investissements*, *Annuaire Français du Droit International*, 2004, pp. 683–714; Yves Nouvel, *L'arbitre à la recherche du fait étatique (Etat, démembrements, personnes publiques et imputabilité à l'Etat)*, in *Nouveaux développements dans le contentieux arbitral transnational relatif à l'investissement international*, Anthemis, L.G.D.J., 2006, p. 25.

⁶¹ See, for example, *Maffezini v. Spain*, ICSID Case No. ARB/97/7 (Argentina–Spain BIT), Decision on Jurisdiction, 25 January 2000, available at the ICSID Website; *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Morocco*, ICSID Case No. ARB/00/4 (Italy–Morocco BIT), Decision on Jurisdiction, 23 July 2001, original French Decision in 129 *Journal du Droit International*, 2002, p. 19, English translation reproduced in 42 *I.L.M.*, 2003, p. 609; *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No. ARB/00/6 (Italy–Morocco BIT), Decision on Jurisdiction, 16 July 2001, available at the ICSID Website; *Nykomb Synergistics Technology Holding AB v. Latvia*, Stockholm Arbitration Institute Rules (Energy Charter Treaty), Award, 16 December 2003, available at: http://ita.law.uvic.ca/chronological_list.htm.

⁶² *Maffezini*, *ibid.*, § 75.

through a distinct legal entity, albeit a State entity, its jurisdiction does not extend to mere contractual breaches committed by this entity.⁶³

Second, by admitting its jurisdiction over both the Tunisian State and the COMG and by ruling that these two entities were jointly responsible, the Court adopted an innovative position. In the context of claims submitted under BITs and/or MITs, although arbitral tribunals have considered that, under some circumstances, the behaviour of State entities can be attributed to the State, they have never considered that a BIT or a MIT confer a right to binding arbitration against a State entity that committed a treaty violation. It should be noted, however, that the Court's position may be justified by the fact that Article 29 of the Arab Investment Agreement permits recourse directly not only against States but also against public entities.

The Court then examined the objections raised by the COMG. As for the requirement of a prior agreement in order to sue a State before the Arab Investment Court, the Court pointed out that the language of Article 26, according to which "disputes arising from the application of this Agreement shall be settled by way of conciliation or arbitration or by recourse to the Arab Investment Court", makes clear that no such requirement is applicable. The Court observed that Article 30 is a special provision that permits the extension of the jurisdiction of the Arab Court, by agreement of the parties, if an international Arab agreement or any other investment agreement within the scope of the League provides for the jurisdiction of an international arbitral tribunal or court. It ruled that Tanmiah's case was not submitted under such agreements. Implicitly the Court underlined that even if it asserted that Article 30 were applicable to Tanmiah's contract, it was competent to examine the case because the arbitration agreement provided in this contract was nullified by the Tunisian local jurisdictions.

On this issue, the Decision seems to be in line with the opinion of Arab investment specialists. A number of authors underlined the automaticity of the jurisdiction of the Arab Investment Court and considered that Article 30 can be used to extend the jurisdiction of the courts but not to restrict it.⁶⁴

The Court also rejected the COMG claim according to which the Saudi investor lacked standing because he did not make an effective investment within the meaning of the Arab Investment Agreement. The Court noted, without further development, that there was a protected investment because the disputed contract was entitled "investment agreement".

This reasoning is, however, somewhat surprising. First, it is admitted in contract law, in general, that the appellation of contracts given by parties does not bind judges.

⁶³ *Salini, supra*, footnote 61, §§ 60–61. See also *R.F.C.C. v. Morocco, supra*, footnote 61, §§ 68–69. It should be noted also that in *Nykomb v. Latvia, supra*, footnote 61, the Arbitral Tribunal pointed out that a contract for the purchase of electric power between the investor and a State enterprise that gave the investor a right to a double tariff price could not be regarded as a purely commercial contract. The Tribunal decided that the State must be found responsible for its entity's failure to pay this double tariff.

⁶⁴ See Horchani, *supra*, footnote 8, p. 396 ; Rycx, *Droit des sociétés interarabes conjointes, supra*, footnote 16, pp. 508–509.

Second, the Court did not examine Article 1 of the Arab Investment Agreement and did not try to determine if the operation submitted to it fell under the criteria of “Arab capital” and “investment of Arab capital” mentioned in this Article. Furthermore, the COMG raised explicitly in its defence the criteria of Article 1 and insisted on the fact that Tammiah did not spend or transfer any money nor did it make any of the regular payments stipulated under the contract and that the Arab Investment Agreement protected only “Arab capital that is transferred or used in the territory of a State Party with the view of achieving a return”.

It could be asserted, however, that the Arab Investment Court adopted a subjective theory to define the notion of investment. This theory has emerged in the context of ICSID jurisdiction. In the absence of definition of “investment” in the text of the ICSID Convention, some ICSID tribunals give greater importance to the will of the parties in defining an economic operation as an investment. According to this approach, the qualification of investment has been left to the parties’ disposition in framing their consent. The parties can freely determine the kinds of activity which could give rise to an investment dispute.⁶⁵ However, such an approach would be hardly justified in the context of the Arab Investment Agreement, mainly for two reasons. First, unlike the ICSID Convention, the Arab Investment Agreement provides for a detailed definition of protected investments.⁶⁶ Second, the application of a subjective approach to determine the jurisdiction of the Arab Court would render useless the definition of investment provided in Article 1 of the Agreement. By insisting on the fact that Arab capital must be used or transferred into the territory of a Contracting Country with a view to achieve a return and that this capital must contribute to the economic development of the host State or must be used in accordance with the aims set in the Arab Investment Agreement, the Agreement establishes an objective and autonomous limitation on the Arab Investment Court’s jurisdiction. The parties to a dispute cannot by contract define as investment, for the purpose of the Arab Investment Court’s jurisdiction, something which does not satisfy the objective requirements of Article 1. Unfortunately, the qualification of investment remains, in this case, a controversial issue to which the Court did not provide a convincing answer.

Finally, in responding to the COMG’s contention that the designation of the members of the Arab Investment Court was improper, the Court noted that the designation dated

⁶⁵ On this debate, see Walid Ben Hamida, *The Mihaly v. Sri Lanka case : some thoughts relating to the status of pre-investment expenditures*, in Weiler (ed.), *supra*, footnote 60, pp. 47–76; Noah Rubins, *The Notion of Investment in International Investment Arbitration*, in Norbert Horn (ed.), *Arbitrating Foreign Investment Disputes*, Kluwer, 2004, pp. 283–324; Martin Endicott, *The Definition of Investment in ICSID Arbitration: Development Lessons for the WTO?* in Markus W. Gehring and Marie-Claire Cordonier Segger (eds.), *Sustainable Development in World Trade Law*, Kluwer Law, forthcoming.

⁶⁶ It should be mentioned that the Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States justified this subjective theory by the absence of a definition of the notion of “investment” in the ICSID Convention. The Report states that : “[N]o attempt was made to define the term ‘investment’ given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25.4)”; Doc. ICSID/2, p. 9, no. 27.

on 3 April 1991 when the Economic Council adopted Decision no. 1122. The Court also rejected the argument relating to the appointment of the Commissioner of the Court. It ruled that the Council, in its Decision no. 1148 issued on 18 September 1992, delegated to the Secretary-General of the League the authority to choose one or more Commissioners and that the Commissioner who examined the *Tanmiah* claim was appointed by the Secretary-General of the League on 17 January 2003.

2. MERIT ISSUES

After rejecting the jurisdictional and procedural objections of Tunisia and the COMG, the Arab Investment Court examined the merits of the case. The Court determined first the law applicable to the case. To determine this law, the Court considered two kinds of provisions. First, Article 4 of the Arab Investment Agreement, which provides that:

“Conclusions and interpretations derived from the provisions of this Agreement shall be guided by the principles on which it is based and the aims which inspired it, followed by the rules and principles common to the respective legislation of the States members of the League of Arab States and, finally, by the principles recognized in international law.”

Second, the Court noted that the contract provided in its Article 14, that “every dispute relating to interpretation or execution of the contract must be resolved under equity principles”. Likewise, Article 15 of the contract required good faith from every party in the execution of the contract.

Nevertheless, the Arab Investment Court limited itself to the recitation of these Articles without any analysis of the relationships among them or a scrutiny of the scope of each provision. In the context of BIT/MIT arbitration, arbitral tribunals establish a distinction between treaty claims and contract claims. This distinction was described with clarity by the *ad hoc* Committee that examined the *Vivendi* case in its Decision on Annulment. The *ad hoc* Committee stated that breach of treaty and breach of contract are two independent issues. Indeed, according to the *Vivendi* Decision:

“... whether there has been a breach of the BIT [treaty] and whether there has been a breach of the contract are different questions. Each of these claims will be determined by reference to its own proper or applicable law—in the case of the BIT [treaty] by international law; in the case of the Concession Contract, by the proper law of the Contract ...”⁶⁷

The Court then noted that the basis of the claim submitted to its jurisdiction related to compensation for contract breach. It examined the different breaches allegedly committed by the Tunisian authorities and rejected the claim of *Tanmiah* on the merits.

After a factual analysis, the Court essentially observed that Tunisia did not commit a violation or that, even if there was a violation, Tunisia must be discharged

⁶⁷ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment of 3 July 2002, 41 I.L.M. 1135, at 1154 (paras. 95 and 96). On this issue, see Emmanuel Gaillard, *L'arbitrage sur le fondement des traités de protection des investissements*, *Revue de l'Arbitrage*, 2003, p. 853.

under the principle of *non adimpleti contractus*. Indeed, the investor did not make any of the regular payments stipulated by the contract. According to the Court, even if certain breaches had been committed by the Tunisian authorities, the marketing contact was bilateral and, as such, it authorises a party not to carry out its obligations in case of breach of the other party. This is, according to the Courts, a principle recognised by all Arab States' laws. Additionally, it should be observed that, in its analysis of the merits, the Court did not invoke any provision of Tunisian law, international law or equity principle. It founded its analysis on the facts of the dispute and, sometimes, on the provisions of the contract and the various documents and correspondence exchanged between the parties.

In its conclusion, the Arab Investment Court insisted on the non-performance by Tammiah of its obligation to pay Tunisian authorities. According to the Court, the non-performance of this obligation by the Saudi investor, despite the multiple requests addressed by Tunisian authorities, authorised the COMG to repudiate unilaterally the contract. The Court pointed out that a "review of Arab States contract laws shows that, in every bilateral contract all promises or performances on one side are made in exchange of promises and performances on the other".⁶⁸

Finally, the Court rejected the counter-claim filed by Tunisia. Without further justification, the Court invoked Article 33 of its Statute, which provides that any counter-claim must be authorised by the Court and must be introduced according to procedural rules governing the introduction of an initial claim. The Court noted that the counter-claim was presented by way of defence and decided to dismiss it.

The President of the Arab Investment Court did not concur with the majority opinion. In his Dissenting Opinion, Faiz Hassen El Mbiadh argued that under Article 4 of the Arab Investment Argument, the applicable law in this case is the Tunisian law because the contract was concluded in Tunisia. President El Mbiadh asserted that both Article 422 of the Tunisian Code of Obligation and Contracts and equity principles oblige every party to perform its contractual obligations in good faith. The President added that Tunisian law authorises a unilateral repudiation of contract only by judgment or by parties' agreement. In the absence of such judgment or agreement, the contract between Tammiah and Tunisia must be considered to be valid. The President concluded that there were contract violations committed by both parties. Consequently, he asked the Court to grant the counter-claim made by Tunisia and to appoint experts to evaluate damages suffered by each party.

3. THE REVISION RECOURSE

On 10 March 2005, the Claimant filed an application for a review of the Judgment. The Claimant invoked three reasons. First, the composition of the Court:

⁶⁸ Page 57 of the Award.

the Claimant asserted that under the Arab Investment Agreement the Court must be composed of five Judges and the fact that the decision was rendered by a chamber of only three Judges exceeds an essential principle of justice. Second, the Claimant alleged deficiencies in the formal appointment of the Defendant's counsel. Finally, he asserted that the Judgment rendered violated the provisions of the Arab Investment Agreement. Mainly, the Claimant claimed that the Court violated the protection, safeguard and stability of pertinent legal obligations guaranteed under Article 2. He argued that the Court did not take into consideration Article 3, according to which the Arab Investment Agreement shall constitute a minimum standard to be applied in the treatment of any investment and that this Agreement shall prevail over the laws of States Parties in case of conflict. The Claimant asserted that the Court was not guided in making its Decision by the principles stated in the Agreement and the aims which inspired it and did not apply, as required by Article 4, the rules and principles common to the respective legislations of the Member States of the Arab League and principles recognised in international law.

A three-member Court division presided over by the Syrian Judge Nael Mahfoudh has been formed to hear the revision case. Its Decision is expected to be rendered by the end of 2006. It will be the first review decision made by the Arab Investment Court. Hopefully, it will clarify the scope and the legal implications of this special recourse.

III. CONCLUDING REMARKS

The dispute resolution provisions of the Arab Investment Agreement have created a new and an innovative form of protection for the rights of Arab investors. In the time of the "impossible reform of the Arab League",⁶⁹ "[t]he political paralysis of the institution", "the illness of the Arab League organs" and "the successive crisis of the League and its chronological pathologies",⁷⁰ the emergence of the Arab Investment Court was unexpected. Arab newspapers reported that the first request submitted to the Arab Investment Court surprised even the Arab League Secretariat, which was unaware of the existence of this Court.

However, the vagueness of some of the Court's reasoning may leave the reader somewhat frustrated with a Decision which could have been more exhaustive in its analysis of the facts and application of the law. The Arab Investment Court lost an opportunity in its first Decision to set a coherent and structured framework of regional investment law.

⁶⁹ See Rafaâ Ben Achour, *L'impossible réforme de la Ligue des Etats Arabes*, in *The international legal system in quest of equity and universality: Liber amicorum Georges Abi-Saab*, 2001, pp. 807–821. On the reform of the Arab League, Taoufik Bouachba, *La Ligue des Etats Arabes et la question des réformes*, Etudes internationales, 2005, Issue 97, pp. 67–70; Adel Ben Nasr and Lamine Klai, *La Ligue des Etats Arabes et la question des réformes*, Etudes internationales, 2005, Issue 97, pp. 97–114; Chaabane, *supra*, footnote 31, p. 508.

⁷⁰ Ben Achour, *ibid.*, p. 808. Lebanese Prime Minister El Hoss said that the Arab League has a double immunity: immunity against death; and immunity against reforms.

We expect the Arab Investment Court to develop a true, dynamic and modern regional investment law. Its Judges and Commissioners should frame a coherent investment law doctrine and an Arab investment discipline without dominant national coloration. The Court must play a pivotal role in the push to spread legality and economic reform throughout the Arab world. The growing body of arbitral jurisprudence developed in the context of BITs and MITs has clarified many of the fundamental issues of investment law. This case law can provide the Arab Investment Court Judges, as well as its Commissioners and the counsel that appear before it, with some guidance.

We must recognise, however, that investment law in the Arab region is still at a rudimentary stage of development. The change cannot be immediate. It is an evolution. As this was its first decision, we should give the Arab Investment Court another chance. With the hope that characterizes Arabs over the years, we say: "Let's wait and see!"