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Deciphering the OIC Investment Agreement in Light of the Itisaluna v. Republic of Iraq Award*

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Abstract

Promulgated in 1981, the purpose of the Agreement on Promotion and Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference (nowadays the Organization of Islamic Cooperation) (the "OIC Investment Agreement" or the "Agreement") is to provide guidelines for the treatment of investments between member States of the Organization. The Agreement provides for investor compensation if the State hosting the investment breaches the Agreement's substantive terms. Disputes arising under the OIC Investment Agreement are subject to the resolution provisions in Article 17, which provides for conciliation and arbitration. Although, since its entry into force, several investors have attempted to make use of its dispute resolution mechanism, since information on the outcome of these cases is limited. The two arbitral awards that are publicly available, in conjunction with recent practice followed by investors, reveal that the dispute settlement provisions of the Agreement are not free from ambiguity. In light of the recent Itisaluna Iraq LLC and others v. Republic of Iraq case, this article sets out to elucidate a series of problematic issues pertaining to the interpretation and the application of the Agreement's dispute settlement provisions, as they have risen from publicly availably arbitral awards and other decisions. These include whether: a) the Agreement provides for investor-State dispute settlement; b) conciliation is a precondition to arbitration; and c) investors can use the Most Favored Nation clause (MFN) of the Agreement for dispute settlement purposes. These issues are of significance for pending and future cases under the OIC Investment Agreement. Given the ambiguities of the language of the OIC Investment Agreement, it is preferable that future claimants follow the OIC dispute settlement process as faithfully as possible. Such an approach will immunize them to a great degree from jurisdictional pitfalls of importing separate dispute resolution frameworks via MFN.

Keywords: OIC Investment Agreement; Investor-State arbitration; Consent to arbitration; Conciliation; Most Favored Nation Clause (MFN)

*** The findings achieved herein are solely the responsibility of the author**

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فك رموز اتفاقية الاستثمار لمنظمة التعاون الإسلامي في ضوء قضية "اتصالنا" لجمهورية العراق*

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ملخص

صدرت "اتفاقية الاستثمار لمنظمة التعاون الإسلامي".عام 1981 بغرض تعزيز وحماية وضمان الاستثمارات بين الدول الأعضاء في منظمة المؤتمر الإسلامي (تعرف حاليًا بمنظمة التعاون الإسلامي). تقدّم الاتفاقية مبادئ توجيهية للتعامل مع الاستثمارات بين الدول الأعضاء، كما تنص على تعويض المستثمر إذا انتهكت الدولة المضيفة الاستثمار الشروط الموضوعية للاتفاقية. تخضع النزاعات الناشئة بموجب الاتفاقية لأحكام القرار الواردة في المادة 17، التي تنص على التوفيق والتحكيم.

على الرغم من أنه منذ دخولها حيز التنفيذ، حاول العديد من المستثمرين الاستفادة من آلية تسوية المنازعات الخاصة بها، إلا أن المعلومات المتعلقة بنتائج تلك القضايا محدودة. يكشف قرارا التحكيم المتاحان للجمهور، بالتوازي مع الممارسة الحديثة التي اتبعها المستثمرون، أن أحكام تسوية المنازعات في الاتفاقية لا تخلو من الغموض. في ضوء قضية "اتصالنا العراق المحدودة"، وقضايا أخرى ضد جمهورية العراق، توضح هذه الدراسة سلسلة من القضايا الإشكالية المتعلقة بتفسير وتطبيق أحكام تسوية المنازعات في الاتفاقية التي نشأت عن التحكيم المتاح للجمهور والقرارات الأخرى. وقد شمل ذلك ما يلي: أ- تنص الاتفاقية على تسوية المنازعات بين المستثمرين والدول؛ ب- التوفيق شرط مسبق للتحكيم؛ ج- يمكن للمستثمرين استخدام شرط الدولة الأولى بالرعاية (MFN) في الاتفاقية لأغراض تسوية المنازعات. هذه المسائل ذات أهمية بالغة للقضايا المعلقة والمحتملة بموجب اتفاقية الاستثمار لمنظمة التعاون الإسلامي. بالنظر إلى غموض لغة الاتفاقية الاستثمار، فمن الأفضل أن يلتزم أطراف النزاع مستقبلًا بإجراءات تسوية المنازعات في منظمة التعاون الإسلامي بأمانة قدر الإمكان؛ حيث سيحصّنهم هذا النهج إلى حد كبير من المزالق القضائية لاستيراد أطر منفصلة لتسوية المنازعات عبر الدولة الأولى بالرعاية.

الكلمات المفتاحية: التجسس الإلكتروني، التخريب الإلكتروني، السيادة، عدم التدخل

* يتحمل الباحث وحده نتائج هذه الدراسة.

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Introduction

The Agreement on Promotion and Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference (the "OIC Investment Agreement" or the "Agreement"),[1] is an important multilateral investment treaty signed in June 1981 and entered into force in 1986. So far, it has been ratified by 29 OIC member States.[2]

To date, few tribunals have shed light on the dispute settlement provisions of the OIC Investment Agreement. The most recent one is the tribunal constituted in the case *Itisaluna Iraq LLC and others v. Republic of Iraq*.[3] By way of background, a group of Jordanian telecom service providers, Itisaluna Iraq LLC ("Itisaluna"), Munir Sukhtian International Investment LLC, with Emirati-registered companies VTEL Holdings Ltd. and VTEL Middle East and Africa Limited, initiated arbitration proceedings against Iraq on 13 April 2017 before the International Centre for Settlement of Investment Disputes (ICSID) pursuant to the OIC Investment Agreement and the Japan-Iraq Bilateral Investment Treaty (BIT). In 2006, a joint venture, including Munir Sukhtian, paid £13.5 million to obtain a 15-year contract for Itisaluna to provide wireless services in Iraq, under which it provided payments of 33.4% of its gross revenues to the Iraqi government. The tribunal was chaired by Sir Daniel Bethlehem, with Dr. Wolfgang Peter and Professor Brigitte Stern serving as arbitrators. The tribunal held a hearing on Iraq's preliminary objections in October 2018, and the award on jurisdiction was rendered on 3 April 2020.[4]

This is the second publicly available award arising from a case under the OIC Investment Agreement. The *Itisaluna* Award, as well as recent practice, clearly demonstrate that critical questions regarding the interpretation of the Agreement remain unsettled. Following a presentation of the architecture of the OIC Investment Agreement (Part II), the present article attempts to decipher a series of contentious issues. Part III focuses on whether the Agreement constitutes an open offer to arbitrate investor-State disputes. Part IV examines whether there are preconditions to accepting this offer, including a need to pursue conciliation as presented in the relevant provision of the Agreement. Part V highlights that, in at least three cases brought under the OIC Investment Agreement, tribunals were not constituted pursuant to the Agreement's dispute settlement provisions. Rather, they were constituted via the Agreement's Most Favored Nation (MFN) clause. Will the tribunal's interpretation of the MFN clause in *Itisaluna* have an impact on pending and future cases pursuant to the OIC Investment Agreement? Finally, Part VI provides concluding remarks and recommendations.

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1 Reproduced in UNCTAD, International Investment Instruments: A Compendium Volume II (UN, 1981) 241. The full text of the OIC Investment Agreement is also available at https://ww1.oic-oci.org/english/convenion/Agreement%20for%20Invest%20in%20OIC%20%20En.pdf (last visited May 30 2021). For an overview of the OIC Investment Agreement, *see* Hossein Abedian & Reza Eftekhar, *Consent to Investor-State Arbitration in the Second Largest International Investment Protection Agreement: The Correct Interpretive Approach to Article 17 of the OIC Investment Agreement*, 35 Journal of International Arbitration 59 (2018); 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 173 (N. Jansen Calamita & Mavluda Sattorova eds., 2015); and Peter Rosher, *Accords multilatéraux de protection de l'investissement de la région du moyen-orient et de l'Afrique du nord: deux exemples d'instruments méconnus mais prometteurs*, 3 Cahiers de l'Arbitrage 437 (2017).

2 There is some inconsistency on the publicly available information as to the exact number of ratifications.

3 *Itisaluna Iraq LLC and others v. Republic of Iraq*, ICSID Case No. ARB/17/10, Award (3 April 2020) (hereinafter "*Itisaluna* Award"). Available at https://www.italaw.com/sites/default/files/case-documents/italaw11410.pdf (last visited May 30, 2021.

4 Lisa Bohmer, Breaking: Majority in Itisaluna v. Iraq Declines Jurisdiction over OIC Claims; Dissenter Would Have Granted Access to ICSID Arbitration through MFN Clause, Investment Arbitration Reporter, April 5, 2020.

1. Substantive protections and dispute resolution mechanism under the OIC Investment Agreement

Prior to entering into a detailed analysis of the ambiguities surrounding the Agreement in light of the *Itisaluna* Award, the present section aims at providing an overview of the substantive protections and the dispute resolution mechanism under the OIC Investment Agreement.

The substantive terms of the Agreement provide investment guarantees to investors from member States, who invest capital in another member State (the “host State”). The OIC Investment Agreement contains many, but not all, of the substantive protections commonly found in international investment agreement.[5] Article 2 sets out a guarantee of protection and security,[6] Article 8 sets out an MFN treatment guarantee,[7] Article 10 sets out guarantees in the event of expropriation,[8] and Article 11 sets out guarantees concerning the unrestricted repatriation of payments. The guarantee of national treatment[9] in Article 14 is limited in scope because it requires the host State to provide investors with “treatment not less than that accorded by the host state to its national investors or others” but only when compensating for “damage that may befall the physical assets of investment due to hostilities of international nature committed by any international body or due to civil disturbances or violent acts of general nature” (emphasis added).[10] Significantly, the OIC Agreement does not provide any guarantee for the fair and equitable treatment of investments,[11] which is an important protection contained in many international investment agreements.

Turning to the procedure for the arbitration of disputes, the dispute resolution provisions are contained in Articles 16 and 17 of the Agreement. Under Article 16, investors are given “the right to resort to [the host State’s] national judicial system”[12] to complain about the adoption or non-adoption of measures that adversely impact the investor. Article 16 also contains what is commonly known as a “fork-in-the-road” provision,[13] which mandates “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.”[14] Pursuant to Article 17, “disputes that may arise” under the Agreement can be resolved through either conciliation or arbitration. Unlike Article 16, Article 17 does not expressly reference

5 *See* Catharine Titi, Scope of International Investment Agreements and Substantive Protection Standards, in Research Handbook on Foreign Investment 173 (Markus Krajewski & Rhea Tamara Hoffmann eds., 2019).

6 *See* Rudolf Dolzer & Christoph Schreuer, Principles of International Investment Law 160-165 (2d Ed. 2012).

7 *See* Andreas Roland Ziegler, *Most-Favoured-Nation (MFN) Treatment*, *in* Standards of Investment Protection 59-86 (August Reinisch ed., 2008).

8 The protection from expropriation or nationalization without adequate compensation is a standard included in most investment protection agreements and is well established in customary international law. A State’s right to nationalize or expropriate is only accepted if it is lawful and accompanied by genuine and adequate compensation. *See* Audley Sheppard, *The Distinction between Lawful and Unlawful Expropriation*, 2, World Arbitration & Mediation Review 137 (2008).

9 *See* Sabina Sacco & Fernández-Fonseca Mónica C, *National Treatment in Investment Arbitration*, *in* WTO Litigation, Investment Arbitration And Commercial Arbitration 239 (Jorge Alberto Huerta-Goldman et al. eds., 2013).

10 OIC Investment Agreement, Article 14.

11 *See* Marc Jacob & Stephan W Schill, *Fair and Equitable Treatment: Content, Practice, Method*, *in* International Investment Law 700 (Marc Bungenberg et al. eds., 2015).

12 OIC Investment Agreement, Article 16.

13 Under the provisions of some international investment agreements, the investor may elect to submit its investment dispute either to a domestic court or an international arbitral tribunal. These elections have been held to be final and, once the investor has submitted the dispute to a domestic court, it cannot bring the same dispute before an international arbitral tribunal. The exact nature and consequences of these so-called “fork-in-the-road” provisions depend on the specific language of the relevant international investment agreement. *See* Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5. The Journal of World Investment & Trade 231 (2004).

14 OIC Investment Agreement, Article 16.

disputes brought by investors. It appears that Article 16 and Article 17 are intended to be understood together, such that the Article 16 limitation to "investors" applies to Article 17 as well. However, this drafting choice may provide the ability to argue that this provision is available for State-State resolution as well as investor-State disputes.

As noted above, disputes arising under the Agreement are subject to the resolution provisions in Article 17. Article 17 provides that "[u]ntil an Organ for the settlement of disputes arising under the Agreement is established, disputes that may arise shall be entitled through conciliation or arbitration."[15]

Article 17 appears to establish a two-stage dispute resolution process for claimants. Specifically, the claimant must first request conciliation of its dispute with the respondent State. The OIC Agreement does not provide any specific details about the efforts that need to be made in the conciliation process. Should conciliation be agreed by the respondent State, Article 17(1) establishes the specific procedures to be followed. During the conciliation process, the conciliator seeks to "bring the different viewpoints closer and make proposals which may lead to a solution that may be acceptable to the parties concerned," but does not make any binding determinations.[16] At the conclusion of the conciliation process – and assuming that the process did not achieve a satisfactory resolution – or if the respondent State does not assent to conciliation, the claimant can then submit a notice of arbitration as outlined in Article 17(2).

After a notice of arbitration is issued, the parties are required to appoint arbitrators, and the arbitrators must then agree on an umpire. If a party does not appoint an arbitrator within sixty days, the other party may request the OIC Secretary General to appoint one. Similarly, if the parties' arbitrators cannot agree on an umpire, one may be selected by the OIC Secretary General.

Although the OIC Investment Agreement has been in force for more than three decades, investment claims have infrequently been brought and arbitrated pursuant to its terms. The first investor-State arbitration under the OIC Investment Agreement – *Hesham al-Warraq v. Republic of Indonesia* – was brought in 2011.[17] In *al-Warraq*, an arbitral tribunal in Singapore – operating in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) – ruled that it had jurisdiction over the dispute between a Saudi national and Indonesia for claims arising under the OIC Investment Agreement.[18]

Since *al-Warraq* was decided in 2012 (preliminary objections to jurisdiction and admissibility), there have been at least eighteen subsequent investor-State arbitrations brought under the OIC Investment Agreement.[19] Despite the great number of cases, most of the proceedings remain confidential. As a result,

15 *Id.*, Article 17(1). The OIC has been making efforts to create such an institution. *See* Report of the Thirty Sixth Session of the Standing Committee for Economic and Commercial Cooperation of the OIC, 25-26 November 2020, ¶ 10, 21, 32, available at: http://www.comcec.org/en/wp-content/uploads/2020/12/36.-%C4%B0SEDAK-Toplant%C4%B1s%C4%B1-Rapor-proof.pdf (last visited May 30, 2021).

16 OIC Investment Agreement, Article 17(1) (b).

17 *Hesham al-Warraq v. The Republic of Indonesia*, UNCITRAL, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims, 21 June 2012 (hereinafter "*al-Warraq* Award").

18 *See* James MacDonald & Dyfan Owen, *The Effects on Arbitration of the Arab Spring*, Global Arbitration Review, April 20, 2016; Luke Eric Peterson, *Indonesia Says 1981 Inter-Islamic Pact Does Not Offer Consent to Investor-State Arbitration, but Tribunal Uses 'Contemporary' Interpretation and Finds Consent*, Investment Arbitration Reporter, September 19, 2012.

19 *Unknown Claimants v. Egypt* (2014): Investment Arbitration Reporter, Egypt Arbitration Round-up: Updates on U.S. and German Investor Claims at ICSID, and on Three Ad-hoc Claims under OIC Agreement, November 5, 2014; Jarrod Hepburn & Luke Eric Peterson, *Investigation: As New Cases Emerge under Islamic Investment Treaty, Initial Viability of Claims Seems to Hinge on Willingness of Respondents to Appoint Arbitrators*, Investment Arbitration Reporter, March 2, 2017. *Kontinental Conseil Ingénierie (KCI) v. Gabonese Republic*, PCA Case No. 2015-25 (2015): Damien Charlotin, *Foreign Investor Fails in Bid to Annul OIC Investment Treaty Award's Damages Holdings*, Investment Arbitration Reporter; Damien=

there is little guidance on the interpretation of a series of contentious provisions of the Agreement. With this in mind, the *Itisaluna* tribunal's findings constitute an important piece of an unsolved puzzle and are discussed in the subsequent parts of this article.

=Charlotin, *Revealed: the Reasons Why Arbitrators in Kontinental (KCI) v. Gabon case Saw Breach of Organisation for Islamic Cooperation (OIC) Investment Agreement, but Awarded Limited Compensation*, Investment Arbitration Reporter, July 9, 2019. *Ali Alyafei v. Hashemite Kingdom Jordan (II)* (2015): Global Arbitration Review, Swiss Court Affirms Jordan Award over 'Fraudulent' Share Sale", January 30, 2017. *Tekfen and TML v. Libya* (2015): Global Arbitration Review, Libyan Entity Ordered to Pay in 'Man-made River' Dispute, November 6, 2018; Luke Eric Peterson, *Libya Wins One and Loses One, as New Bilateral Investment Treaty Awards Are Rendered*, Investment Arbitration Reporter, February 18, 2020. *D.S. Construction FZCO v. Libya*, PCA Case No. 2017-21 (2016): Luke Eric Peterson, *After Organisation for Islamic Cooperation Fails to Nominate an Arbitrator to Sit in Investor-State Case, PCA Breaks Stalemate by Designating an Appointing Authority*, Investment Arbitration Reporter, March 31, 2017; Luke Eric Peterson, *Libya Investment Treaty Claims: Another Claim Surfaces and Another Tribunal is Finalized*, Investment Arbitration Reporter, June 29, 2017; Luke Eric Peterson, *Libya Claims Round-up: New Developments under OIC Treaty; Greenwood to Chair a Newly-Filed ICC BIT Case; Two Hearings Loom in Longer-running Arbitrations*, Investment Arbitration Reporter, May 7, 2018; Jarrod Hepburn & Luke Eric Peterson, *As Another Claim Is Filed against Libya under the OIC Investment Agreement, Government Goes to Court to Try and Block PCA-enabled Arbitrations under Treaty*, Investment Arbitration Reporter, January 13, 2019; Luke Eric Peterson, *Libya Round-up: New Tribunals, a Discontinuation, and further Details about a Number of Investment Arbitrations against the State*, Investment Arbitration Reporter, August 11, 2020. *Itisaluna Iraq LLC and others v. Republic of Iraq*, ICSID Case No. ARB/17/10 (2017): Investment Arbitration Reporter, *Daniel Bethlehem to Chair Iraq Case that Relies on Bilateral Investment Treaty and OIC Investment Agreement*, August 17, 2017; BOHMER, *supra* note 4. *Omar Bin Sulaiman Abdul Aziz Al Rajhi v. Sultanate of Oman*, PCA Case No. 2017-32 (2017): Luke Eric Peterson, *An Update on Investor Arbitration Claims under the Organization for Islamic Cooperation Investment Treaty*, Investment Arbitration Reporter, August 15, 2018; Luke Eric Peterson, *OIC Round up: An Update on Pending Arbitration Cases Lodged under the OIC Investment Agreement*, Investment Arbitration Reporter, August 11, 2020. *Hesham Al Mehdar v. Arab Republic of Egypt* (2018): Joel Dahlquist & Luke Eric Peterson, *Investigation: Four Previously-Confidential Claims under OIC Investment Agreement are Uncovered, as Controversy Continues over Treaty's Use in Arbitration*, Investment Arbitration Reporter, May 16, 2019; Lisa Bohmer & Vladislav Djanic, *Arbitrators Comings and Goings: One Newly-Revealed Tribunal in under-the-Radar OIC Treaty Case, and Two Tribunal Reconstitutions*, July 5, 2020. *Hilal Hussain Al-Tuwairqi and Al-Tuwairqi Holding and others v. Islamic Republic of Pakistan* (2018): Jack Ballantyne, *Pakistan Faces Treaty Claim over Steel Plant*, Global Arbitration Review, May 16, 2019. *Members of the Gargour Family v. Libya* (2018): Luke Eric Peterson, *Permanent Court of Arbitration Once Again Steps in to Designate an Appointing Authority after Investor Gets Silent Treatment from Organisation of Islamic Cooperation*, Investment Arbitration Reporter, November 6, 2019. *Navodaya Trading DMCC v. Gabonese Republic* (2018): Joel Dahlquist & Luke Eric Peterson, *Investigation: Four Previously-Confidential Claims under OIC Investment Agreement are Uncovered, as Controversy Continues over Treaty's Use in Arbitration*, *supra*. *beIN Corporation v. Kingdom of Saudi Arabia* (2018): *beIN Corporation v. Kingdom of Saudi Arabia*, UNCITRAL, Notice of Arbitration, 1 October 2018: Global Arbitration Review, *Saudi Arabia Faces Billion-Dollar Claim over TV Piracy*, October 1, 2018. *Trasta Energy Limited v. Libya* (2019): Jarrod Hepburn & Luke Eric Peterson, *As Another Claim is Filed against Libya under the OIC Investment Agreement, Government Goes to Court to Try and Block PCA-enabled Arbitrations under Treaty*, *supra*. *Qatar Pharma and Ahmed Bin Mohamed Al Haie Al Sulaiti v. Kingdom of Saudi Arabia* (2019): Tom Jones, *Saudi Arabia Faces Another Claim over Qatar Blockade*, Global Arbitration Review, March 29, 2019; Luke Eric Peterson, *Saudi Arabia Faces Another Investor Arbitration Claim under Organisation for Islamic Cooperation Investment Treaty – Brought by Qatar Pharma Firm Affected by Blockade*, Investment Arbitration Reporter, March 19, 2019. *Qatar Airways v. Kingdom of Saudi Arabia* (2020): Tom Jones, *Qatar Airways Launches Treaty Claims over Blockade*, Global Arbitration Review, July 22, 2020; Vladislav Djanic, *Qatar Airways Lodges Treaty-Based Arbitration Cases against Four Middle Eastern States*, Investment Arbitration Reporter, July 22, 2020. *Qatar Airways v. United Arab Emirates (*2020): Tom Jones, *Qatar Airways Launches Treaty Claims over Blockade*, Global Arbitration Review, July 22, 2020; Vladislav Djanic, *Qatar Airways Lodges Treaty-Based Arbitration Cases against Four Middle Eastern States*, Investment Arbitration Reporter, July 22, 2020.

2. Does the OIC Investment Agreement provide for investor-State dispute settlement?

Prior to 2012, it was unclear whether the OIC Investment Agreement provided a viable investor-State dispute mechanism. As noted above, this is because Article 16, which provides recourse to local courts, specifically mentions "investors," but Article 17, which provides the arbitration procedure, instead references the "parties to the dispute." In *al-Warraq*, the respondent argued that this language was properly understood to provide only for State-State dispute resolution, and not investor-State arbitration. Relying upon the general rule of treaty interpretation under Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT),[20] the tribunal disagreed, observing that:

The opening phrase of Article 17 is ambiguously drafted. The reference to 'disputes' lacks a subject, so it is not clear whether Contracting Parties or investors, or both, are entitled to seek to resolve their disputes through conciliation or arbitration. However, the Tribunal considers that it is implicit in the language of Articles 16 and 17, and consistent with the object and purpose of the OIC Agreement, to conclude that Article 17 provides for investor-State arbitration. In particular the Tribunal refers to the following:

Article 17 uses the undefined term 'parties to the dispute'. If resort to conciliation and arbitration were intended to be confined to State Parties alone as the Respondent argues, Article 17 would have made this explicit through the use of the defined expression 'Contracting Parties'. 'Investors' are clearly envisaged, as in clauses 3, 6 and 16 of the OIC Agreement. Accordingly, the Tribunal considers that the expression 'parties' in Article 17 includes both states and investors…[21]

In a similar fashion, the *Itisaluna* tribunal devoted a considerable portion of its reasons to the nature and scope of the dispute settlement provisions set forth in Article 17 of the OIC Investment Agreement. In doing so, the Tribunal made several holdings that could be of assistance to future – or even pending cases under the Agreement:

Throughout the award, the majority repeatedly confirmed that the OIC Investment Agreement contemplates and permits investor-State dispute settlement.[22] Citing the VCLT, the majority stated that a treaty must be interpreted "holistically". The majority cited the various references to investment facilitation, stable investment conditions, and investment protections in the preamble and the substantive provisions of the OIC Investment Agreement. It also cited that the investor-State dispute settlement modalities were widely considered as a central pillar of a stable investment regime at the time the Agreement was concluded in 1981.[23]

Moreover, in interpreting the reference to "an arbitral tribunal" in the second paragraph of Article 16, the majority was persuaded that the provision is a traditional fork-in-road provision.[24] This interpretation of Article 16 also supported the majority's finding that the OIC Investment Agreement contemplated "internationalised" investor-State arbitration.[25]

In the tribunal's view, the *chapeau* of Article 17 is drafted broadly to encompass both investor-State and inter-State disputes, as it considers "disputes arising under the Agreement."[26] That language, coupled

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20 Vienna Convention on the Law of Treaties, 1969, 1155 U.N.T.S. 331.

21 *Al-Warraq* Award, ¶¶ 75-75.1.

22 *Itisaluna* Award, ¶¶ 161, 165, 168.

23 *Id.*, ¶¶ 160-161.

24 *Id.*, ¶ 164. *See* also OIC Investment Agreement, Article 16(2) ("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").

25 *Itisaluna* Award, ¶ 165.

26 *Id.*, ¶ 168.

with the references in Article 17 to "parties to the dispute," signaled to the majority a consideration of investment disputes arising under specific substantive provisions of the OIC Investment Agreement. The majority also identified a reference to the "investor" as a "party" to the dispute at Article 17(2)(d) and contrasted that reference to the defined term "contracting parties."[27]

For this reason, the award, issued by a prominent tribunal, will likely be helpful to claimants, were respondents to seek to present a similar jurisdictional defense.[28]

3. Is conciliation a condition precedent to arbitration under Article 17 of the OIC Investment Agreement?

As noted in Part II, the plain language of Article 17 could suggest that conciliation maybe considered a mandatory precondition to arbitration. However, the first tribunal to have considered this question - the *al-Warraq* tribunal - concluded that conciliation and arbitration are alternative options, and that conciliation is not a prerequisite to arbitration:

The Tribunal does not accept that Article 17 mandates (or even requires) conciliation to precede arbitration, although the possibility of conciliation followed by arbitration is definitely contemplated by Article 17(2). The opening phrase of Article 17 clearly refers to "arbitration or conciliation" as alternatives. The proviso in Article 16 also contemplates resorts to national courts or investment arbitration without any prior requirement of conciliation. Accordingly, 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.[29]

While this interpretation is not binding on any subsequent tribunal constituted under the OIC Investment Agreement, it provides useful guidance. Contrary to the aforementioned analysis, the *Itisaluna* tribunal held that, based on the conditional if-then language of Article 17(2) (a), "the intended gateway to arbitration under this provision is prior resort to conciliation and, thereafter, the failure of the conciliation process."[30] The tribunal acknowledged that other language in Article 17 - like the chapeau's "conciliation or arbitration" phrasing, and Article 17(1)'s requirement of an agreement to conciliation - supported a reading in which conciliation and arbitration are alternative dispute resolution options. Nonetheless, it found the if-then phrasing to be controlling, creating a condition precedent to consent to arbitration.[31]

It is worthy of note that the parties in the case did not dispute that the *Itisaluna* claimants never attempted to resort to conciliation. The claimants rested their case on their rejection of such a requirement - they provided no suggestion of any meaningful endeavor or any agreement to resort to conciliation.[32] In future cases distinguishable on the facts, should tribunals agree with the *Itisaluna* majority and find that claimants were required to undergo conciliation before filing for arbitration, claimants could possibly try

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27 *Id.*, ¶ 168.

28 It is noteworthy that the OIC published a summary of the OIC Investment Agreement on its website, which states that the Agreement "provides for settlement of disputes that may arise between the contracting parties [to the OIC Investment Agreement]." This could evidence the OIC's view that the OIC Investment Agreement does not grant rights to private investors to bring claims, but instead provides these rights only to contracting State parties. *See* also *Al-Warraq* Award, ¶ 58 ("Respondent refers to the fact that the Secretary-General of the OIC has refused to register an investor's request 'on the express ground that there is no jurisdiction for any investor"). However, there is no indication that the summary was meant to be comprehensive, and the OIC itself is not endowed with the authority to render authoritative interpretations of the Agreement.

29 *Al-Warraq* Award, ¶ 79.

30 *Itisaluna* Award, ¶ 183.

31 *Id.*, ¶ 183.

32 *Id.*, ¶ 185.

meet the standards for futility and seeking to conciliate.[33]

After all, Article 17 does not specify the time period that must pass or the efforts that must be undertaken in order to satisfy this pre-arbitral conciliation requirement. Absent any specific requirements, pre-arbitral obligations to engage in negotiation or conciliation are not normally interpreted in an overly rigid or onerous manner, provided that the claimant can establish that a good faith effort was made to comply with this obligation prior to commencing arbitration.

4. Between a rock and a hard place: the MFN clause

The OIC Investment Agreement contains an MFN clause. The MFN guarantees that investors are entitled to treatment at least as favorable as treatment granted by the contracting State to other investors under other agreements. MFN clauses are commonly used in investment treaty arbitrations by claimants seeking to avail themselves of more generous protections than the ones granted in the international investment agreements under which their claims have been brought. The MFN in question reads as follows:

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 favorable 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.[34]

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33 Such an approach finds support in case law. *See, e.g., Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador,* ICSID Case No. ARB/06/11, Decision on Jurisdiction, ¶¶ 92-94 (9 September 2008) (noting that Occidental had "made a number of submissions [rebutting Respondents' actions], but to no avail" and stating that the tribunal "accepts…that attempts at reaching a negotiated solution were indeed futile in the circumstances."); *Loewen Group, Inc. and Raymond L. Loewen v. United States of America,* ICSID Case No. ARB(AF)/98/3, Award, ¶¶ 167-169 (26 June 2003) (finding that claimants' obligation to seek a remedy from higher courts was subject to "reasonable practical limitations" and noting that "[a]vailability [of a particular remedy] means reasonably available to the complainant in the light of its situation"); *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay,* ICSID Case No. ARB/10/7, Decision on Jurisdiction, ¶¶ 69, 234 (2 July 2013) (noting that "[t]ribunals have recognized that procedural prerequisites cannot be applied mechanically in situations where dismissing the case would have no effect other than to delay the proceedings and force the parties to incur additional costs" and finding futility where bringing a claim to a particular court "would have been a useless, time consuming and costly exercise"). For cases where tribunals have required "clear" or "definitive" evidence of futility, *See L.E.S.I v. Algeria,* ICSID Case No. ARB/03/08, Award, ¶ 32(iv) (10 January 2005); *Kiliç v. Turkmenistan,* ICSID Case No. ARB/10/1, Award, ¶ 8.1.4 (2 July 2013) ("[a] tribunal cannot properly come to a conclusion that an investor is not required to comply with mandatory prior recourse to a state's courts unless a *clear* case has been made out, *based on sufficient and 'best' evidence,* that recourse is not available to the state's court or, if available, the investor would not have been treated fairly before those courts") (emphasis added).

34 OIC Investment Agreement, Article 8. Article 8(2) enumerates three categories of terms which contracting states are not entitled to on MFN grounds: (a) terms given to one contracting party by another contracting party; (b) terms in an economic union, customs union, or mutual tax exemption agreement; or (c) terms relating to "a specific project due to its special importance to the state."

As explained in Part II, under the OIC Investment Agreement, if the respondent State fails to designate an arbitrator within sixty days of the receipt of the claim, then the claimant can request that the OIC Secretary General designate an arbitrator in the respondent State's place. This is a common provision in arbitration agreements and institutional arbitration rules. However, in the case of the OIC Investment Agreement, this provision has acted as a complete bar to arbitration for many years. This is because the respondent States would consistently fail to designate their arbitrators and the OIC Secretary General would subsequently refuse requests for an appointment.[35]

Whether the MFN "treatment" can – in appropriate circumstances – refer both to substantive rules of protection as well as to procedural rules, including dispute resolution provisions, is a controversial issue. Growing practice has led to a divided body of decisions from arbitral tribunals.[36] The current debate is eloquently summarized as follows: "[T]ribunals have reasoned that, because importation of standards of treatment is permitted, there is no reason to preclude importation of dispute resolution provisions. At the other end of the spectrum, some tribunals have reasoned that, even though importing standards of treatment is uncontroversial, importing dispute resolution provisions is different in nature and impermissible."[37] It is noteworthy that there is no language in Article 8 of the OIC Investment Agreement that clearly extends the scope of the MFN provision to apply to dispute resolution.

In light of the above mentioned obstacles to the constitution of tribunals under the OIC Investment Agreement, could claimants argue that dispute resolution is a key substantive right that is included in the scope of the Agreement's MFN provision, and, as a result, that the necessity of utilizing the MFN clause to secure the use of arbitral rules that provide for an alternate appointing authority – where the OIC Secretary General fails to act in order to fulfill the Agreement's purposes – is in line with the contracting parties' expressed consent? In other words, could claimants use the UNCITRAL Rules to fill the OIC Article 17 lacuna with a view to securing the constitution of an arbitral tribunal? Alternatively, could claimants

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35 *See* HEPBURN & PETERSON, Investigation: As New Cases Emerge under Islamic Investment Treaty, Initial Viability of Claims Seems to Hinge on Willingness of Respondents to Appoint Arbitrators, *supra* note 19.

36 A detailed analysis of the MFN debate lies beyond the scope of this article. For a detailed discussion of this topic, *see* International Law Commission, Final Report of the Study Group on the Most-Favored-Nation clause, UN Doc. A/70/10, Annex (2015) [hereinafter ILC 2015 Report]; Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, 2, Journal of International Dispute Settlement 97 (2011); Yas Banifatemi, *The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration*, *in* Investment Treaty Law: Current Issues III 241 (Andrea K. Bjorklund et al. ed., 2009); Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?: The 2006 Freshfields Lecture*, 23, Arbitration International: The Journal of LCIA Worldwide Arbitration 357 (2007); Kurtz Jürgen, *The Delicate Extension of Most-Favoured-Nation Treatment to Foreign Investors:Maffezini V Kingdom of Spain*, *in* International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties And Customary International Law 523 (Todd Weiler ed., 2005); Scott Vesel, *Clearing a Path through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties*, 32, The Yale Journal of International Law 125 (2007); Stephen Fietta, *Most Favoured Nation Treatment and Dispute Resolution Under Bilateral Investment Treaties: A Turning Point*, 8 International Arbitration Law Review 131 (2005); Simon Batifort & J. Benton Heath, *The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization*, 111 American Journal of International Law 873 (2017); Christopher John Greenwood, *Most Favoured Nations Clauses in BITs-What is Their Real Purpose (and Their Real Effect)?-3rd Annual Efila Lecture*, 3 European Investment Law and Arbitration Review 343 (2018); Stephan W Schill, *MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath*, 111American Journal of International Law 914 (2017); Hind Labidi, *Où va la clause de la nation la plus favorisée en droit international des investissements?*, *in* Ou va le droit international de l'investissement?: desordre normatif et recherche d'equilibre: actes du colloque organisé A Tunis les 3 et 4 mars 2006 31 (Ferhat Horchani ed., 2007); Kaj Hobér, *MFN Clauses and Dispute Resolution in Investment Treaties: Have we Reached the End of the Road?*, *in* International Investment Law For The 21st Century: Essays in Honour of Christoph Schreuer 31 (Christina Binder & Christoph Schreuer eds., 2009); and Mārtiņš Paparinskis, *MFN Clauses and International Dispute Settlement Moving Beyond Maffezini and Plama?*, 26 ICSID Review: Foreign Investment Law Journal 14 (2011).

37 BATIFORT & HEATH, *supra* note 36, at 888.

import via the Agreement's MFN clause an entirely separate dispute resolution provision? Is supplanting the OIC Investment Agreement's dispute resolution provisions and replacing them with those found in another BIT allowed?[38] In order to shed light on the above highly complicated questions in the specific context of the OIC Investment Agreement, it is indispensable to examine recent practice.

In 2016, D.S. Construction FZCO ("D.S. Construction"), an Emirati company, filed for arbitration against Libya alleging that it had suffered $525 million in damages due to alleged frustration and destruction of assets related to nineteen publicly-tendered construction projects as a result of unrest in the country in 2011. D.S. Construction selected Mr. Stanimir Alexandrov as its arbitrator in the case, but Libya failed to appoint an arbitrator in the sixty days required by the OIC Investment Agreement. The claimant filed a petition with the OIC Secretary General in January 2017, requesting the appointment of Libya's arbitrator, but the OIC Secretary-General failed to make a default appointment on Libya's behalf. The claimant was able to overcome this obstacle by incorporating UNCITRAL Rules, contained in the Austria-Libya BIT by reference to the MFN clause in the OIC Investment Agreement. Under the UNCITRAL Rules, the Permanent Court of Arbitration (PCA) has the authority to designate an "appointing authority" to choose an arbitrator in the face of the respondent State's failure to do so.

The UNCITRAL Rules are not included in the OIC Investment Agreement, but the claimant petitioned the PCA in reliance on the MFN clause and a more favorable treaty that specified the UNCITRAL Rules. The PCA agreed with the claimant's request and decided to act as the appointing authority, appointing an arbitrator on Libya's behalf. This allowed the arbitration to move forward and established a claimant's ability – at least *prima facie* – to rely on the MFN provision to import procedural rules under the OIC Investment Agreement, removing a significant obstacle to claims under the Agreement.[39] This is the first case filed under the Agreement in which the PCA has exercised its ability to serve as appointing authority. The tribunal upheld its constitution in an unpublished award that Libya challenged before the *Cour d'appel de Paris* ("Paris Court of Appeal"). On 23 March 2021, the Paris Court of Appeal issued its long-awaited decision.[40] In vacating the tribunal's award on its proper constitution, the Paris Court of Appeal found that the PCA had no authority to assist in the appointment of a tribunal to hear a claim against Libya after the OIC refused to appoint an arbitrator on the State's behalf. In its reasoning, the Paris Court of Appeal interpreted Articles 17 and 8 of the OIC Investment Agreement pursuant to the applicable interpretation rule of the VCLT. It underlined that the Agreement has a clearly defined and particular dispute settlement regime which does not make any reference to the UNCITRAL Rules.

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38 To the best of the author's knowledge, the only case in which a new dispute resolution forum is imported via MFN is *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20, Decision on the Objection to Jurisdiction (3 July 2013). However, this case may not be apposite to the present discussion because the MFN clause in *Garanti Koza* was explicit as to its application to dispute resolution, which is not the case of the MFN of the OIC Investment Agreement. Most of the cases cited for the proposition of allowing MFN to import dispute resolution provisions rely to some extent on *Emilio Agustin Maffezini v. Kingdom of Spain*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB 97/7 (25 January 2000). In that case, the tribunal held that the MFN clause allowed the investor to bypass the domestic litigation requirement in the applicable Argentina-Spain BIT. While accepting that the MFN clause could be used to access more favorable dispute resolution provisions, at least for purposes of avoiding procedural prerequisites to arbitration, the *Mafezzini* tribunal cautioned that this approach should not be applied indiscriminately. Notably, the tribunal distinguished this from the situation where "the agreement provides for a particular arbitration forum, such as ICSID." In such a case, the tribunal was of the view that "this option cannot be changed by invoking the clause, in order to refer the dispute to a different system of arbitration." *Id.*, ¶ 63. Other tribunals have embraced *Maffezini's* distinction (i.e., they have permitted the use of MFN to avoid procedural prerequisites to arbitration, but not to access entirely different arbitral mechanisms or fora).

39 Sebastian Perry, *PCA Ends Standoff over Islamic Treaty Claim*, Global Arbitration Review, April 3, 2017,

40 Cour d'appel de Paris, Recours en annulation de sentence arbitrale, 23 March 2021. The decision is available at https://www.cours-appel.justice.fr/sites/default/files/2021-03/23%20MARS%202021%20CCIP-CA%20N%C2%B0%20RG%201805756.pdf (last visited May 30, 2021).

Furthermore, according to the Paris Court of Appeal, the wording of Article 8 of the OIC Investment Agreement cannot support the view that the "rights and privileges" mentioned in Article 8 of the Agreement extend to procedural advantages relating to dispute settlement.[41]

In a similar fashion, in 2017, Saudi investor Sheikh Omar bin Sulaiman Abdul Aziz Al Rajhi brought a multimillion-dollar investment claim against the Sultanate of Oman ("Oman") pursuant to the OIC Investment Agreement and under the 2010 UNCITRAL Rules. It has been reported that both Oman and the OIC Secretary General failed to appoint an arbitrator on behalf of Oman. The claimant then requested that the PCA name an appointing authority. The PCA subsequently named Judge James Crawford as appointing authority who appointed Jean Kalicki as arbitrator on behalf of Oman. Although the specifics of the dispute are not known, it appears that the claimant used the MFN clause of the OIC Investment Agreement to access the UNCITRAL Rules, thus enabling the PCA to designate an appointing authority.[42] In both cases, and on the basis of press reports, it seems that claimants made a good faith effort to make use of the OIC Secretary General as appointing authority, and only invoked the MFN once that avenue proved unavailable.

Contrary to the previous cases, in *Itisaluna*, the claimant relied on Article 8 MFN clause to establish Iraq's consent to ICSID arbitration via the Japan-Iraq BIT. Specifically, the claimants asserted that the tribunal had jurisdiction under both the OIC Investment Agreement and the Iraq-Japan BIT.[43] As a result, the central question to be decided by the tribunal was in fact "whether the Claimants are able to incorporate into the OIC Agreement, by operation of its MFN clause, the ICSID arbitration clause in the Iraq-Japan BIT."[44] The tribunal highlighted that there was no previous publicly available award by an ICSID tribunal on the interpretation and application of the Agreement, and the decisions of other investment tribunals could be invoked "in support of virtually any position that any party in any arbitral proceedings may wish to advance."[45]

At the outset of the majority's MFN clause analysis, the *Itisaluna* tribunal made two important observations. *First*, the majority confirmed that MFN clauses are "capable of applying, as a matter of principle, to dispute resolution provisions."[46] *Second*, the majority rejected the respondent's contentions on the textual interpretation of the MFN clause contained in Article 8(1) of the OIC Investment Agreement. Iraq argued that Article 8 could not be used to import dispute resolution provisions because of its inclusion of language such as "within the context of economic activity" and "in the territories." The majority noted Article 8(1)'s specific reference to "rights and privileges" and recognized that the "right to resort to arbitration is a right or privilege accorded to investors," which "is an unarguably important component of the "favourable climate for investments" that is at the heart of the object and purpose of the OIC Investment Agreement."[47] Thus, the majority rejected Iraq's attempted limitations as being "excessively narrow and formalistic and at odds with the central place of dispute settlement in the scheme of the OIC Agreement and with its object and purpose."[48]

With these considerations in mind, the majority recognized that the "key question"[49] in that case was whether the specific MFN clause contained in Article 8(1) of the Agreement may be construed to incorporate

41 *Id.*, ¶¶ 95-101.

42 *See* PETERSON, An Update on Investor Arbitration Claims under the Organization for Islamic Cooperation Investment Treaty, *supra* note 19.

43 *Itisaluna* Award, ¶ 21.

44 *Id.*, ¶¶ 80, 146 (emphasis in original).

45 *Id.*, ¶ 66.

46 *Id.*, ¶ 195. On this point, Professor Stern clarified that "it is not entirely excluded that an MFN clause could apply to dispute settlement provisions, but only when so indicated in the treaty containing the MFN clause." *Id.*

47 *Id.*, ¶ 194.

48 Id.

49 *Id.*, ¶ 196.

into the OIC Investment Agreement written consent to ICSID arbitration. The *Itisaluna* tribunal, in a 2-1 decision,[50] concluded that the OIC Investment Agreement's MFN clause "cannot be relied upon by the Claimants to incorporate into the OIC Agreement the Respondent's consent to ICSID arbitration derived from Article 17(4)(a) of the Iraq-Japan BIT."[51]

In reaching this conclusion, the tribunal placed heavy emphasis on the Agreement's multilateral character, noting that it "is a multilateral investment facilitation and protection treaty that was concluded within the framework and amongst the members of the wider OIC architecture."[52] Because of its multilateral character, the tribunal approached the interpretation of the MFN clause with caution, explaining that:

…any interpretation of the OIC Agreement that the Tribunal may adopt by reference to the non-OIC bilateral treaty obligations of Iraq would inevitably colour the appreciation of the legal obligations of other OIC Agreement Contracting Parties under the OIC Agreement. In the Tribunal's view, the bilateral treaty practice of one party to a multilateral agreement, bilateral practice that is unrelated to the multilateral agreement, cannot be safely relied upon as a yardstick for the interpretation and application of that multilateral agreement. The OIC Agreement, interpreted in the present case, must carry the same meaning for all its Contracting Parties. This meaning cannot be shaped by the unrelated treaty practice of one Contracting Party only. An MFN clause in a multilateral treaty cannot be used as a foundation on which to construct (even if only potentially) a variable framework of application in respect of its individual Contracting Parties by reference to their distinct and unrelated bilateral treaty practice. That would be the very antithesis of the principle underlying the MFN clause.[53]

In explaining its deference to the multilateral nature of the OIC Investment Agreement and the structure that it created, the tribunal stated that "[t]he interpretative process cannot result in the fracturing of the multilateral character of a multilateral treaty. Courts and tribunals seized of a bilateral dispute cannot proceed in isolation of the systemic character of the instrument they are required to interpret."[54]

Article 8(1) of the Agreement sets forth the language of the MFN clause; Article 8(2) specifies exceptions to that provision, including based on rights and privileges arising from separate agreements between contracting parties; from membership in economic unions, customs unions, or mutual tax exemption arrangements; and from special projects of particular importance to a contracting State. The tribunal held that the Article 8 MFN clause was incapable of importing consent to ICSID arbitration via the Iraq-Japan BIT, but it did so based on a holistic, structural view of the Agreement rather than particular textual considerations of Article 8(1).[55]

Furthermore, according to the tribunal, the OIC Investment Agreement anticipates an as-yet-unavailable "bespoke mechanism to address investor-State disputes," and until that mechanism is available, it establishes "default procedure for the settlement of disputes," which comprises of conciliation and arbitration, the failure of the former constituting a condition precedent to the invocation of the latter.[56]

There can be no doubt that the *Itisaluna* tribunal's analysis of the scope and proper application of the MFN clause in the OIC Investment Agreement will have an impact on ongoing and future arbitrations pursuant to the Agreement. That said, certain holdings may give rise to different interpretations by other tribunals resulting in different approaches to the MFN issue. For instance, it is submitted that the

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50 Sir Daniel Bethlehem, Q.C., and Professor Brigitte Stern constituted the tribunal majority; Dr. Wolfgang Peter dissented.

51 *Itisaluna* Award, ¶ 223

52 *Id.*., ¶ 214.

53 *Id.*., ¶ 153.

54 *Id.*., ¶ 154.

55 It is important to note that the tribunal was not persuaded that the "economic activity" and "in the territories" language of Article 8(1) served to exclude dispute settlement from the MFN clause. *Id.*, ¶ 194.

56 *Id.*, ¶ 214.

tribunal's holding that an MFN clause in a multilateral treaty cannot result in differences in that treaty's application from member to member - based on their individual respective bilateral treaty practice - could be questioned. One could argue that this is exactly the effect of including an MFN clause in any multilateral treaty and that the tribunal's premise is not in line with the historical object and purpose of MFN clauses as included in a multitude of multilateral and bilateral international treaties in the field of international economic relations. Indeed, the purpose of MFN clauses in treaties concerning international economic relations is to promote trade and investment liberalization and to ensure equality of treatment between products, services, or foreign investors.[57]

Concluding remarks and recommendations

As pointed out by the *Itisaluna* tribunal, the OIC Investment Agreement "is not in every respect a model of clarity."[58] The *Itisaluna* Award is not binding on other arbitrations and is limited to the specific circumstances of the case. It will likely, however, have significant implications on pending and future proceedings brought under the OIC Investment Agreement. The reasoning of the *Itisaluna* Award and the reputation of the arbitrators in the majority should not be undermined.

Although the *Itisaluna* tribunal found that Article 17(2) provided for "consent to arbitration in general terms," it conditioned that consent "on the fulfilment of the condition precedent of prior resort to, and exhaustion of, the conciliation process."[59] Thus, for any claimants seeking to invoke State consent to arbitration under Article 17 of the OIC Investment Agreement, those claimants may now face a new jurisdictional objection if no efforts at conciliation had been attempted prior to invocation of arbitration under the OIC Investment Agreement. While this is likely to happen, claimants may invoke the futility argument in case respondent States refuse to engage in any discussions. It is important to note, however, that other tribunals have proceeded to arbitration without prior resort to conciliation, following the *al-Warraq* Tribunal's interpretation of the OIC Investment Agreement, which found the two processes as alternative rather than consecutive or cumulative.

As far as the use of the MFN clause is concerned, the *Itisaluna* Award confirms that claimants may face more skeptical tribunals were they to seek to rely on the MFN clause to access an alternative forum for dispute resolution than that provided under the OIC Investment Agreement. In particular, the *Itisaluna* tribunal's emphasis on the multilateral character of the OIC Investment Agreement and the bespoke dispute settlement process established therein, may prove to be persuasive in tipping the balance of consideration within tribunals against importation of dispute resolution mechanisms or procedures via the MFN clause. It should be noted, however, that the *Itisaluna* tribunal decided on the claimants' attempt to import consent to ICSID arbitration.

Consent to ICSID arbitration is qualitatively different because of the double-consent requirement of Article 25 of the ICSID Convention (i.e. the requirement of consent both under the ICSID Convention and separately under the investment instrument), and the bespoke nature of the dispute settlement

57 *See National Grid Plc v Argentine Republic*, UNCITRAL, Decision on Jurisdiction, dated 20 June 2006, ¶ 20. *See* also: *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No ARB/05/1, Award (22 August 2012), ¶ 242, which cited the ILC's work and stated that the point of MFN clauses is to ensure overall equality of treatment in the sense of creating a level playing field between foreign investors from different countries, even if this is sometimes accomplished through non-identical means. In addition, it shall be noted that, in the field of WTO law, it has long been universally accepted that the MFN clause of Article I of the General Agreement on Tariffs and Trade extends to treatment offered by individual Contracting Parties to non-Contracting Parties. Further, MFN clauses in investment treaties aim at preventing a distortion of the market by prohibiting competitive disadvantages for certain investors based on differences in the scope of investment protection that their respective home State BIT offers. *See* SCHILL, *supra* note 37, at chapter IV (A).

58 *Itisaluna* Award, ¶ 158.

59 *Id.*., ¶ 190.

arrangements under ICSID.[60] As a result, the holdings in *Itisaluna* can be distinguished from other cases under the OIC Investment Agreement not involving resort to ICSID arbitration. Based on reports, the great majority of the ongoing arbitrations under the Agreement do not operate under the ICSID Rules. In some of them, claimants use the MFN clause of the OIC Investment Agreement to access UNCITRAL arbitration, which does not have any such double-consent requirement and is similar in nature to the form of *ad hoc* arbitration provided under the OIC Investment Agreement. This may be the saving grace in terms of distinguishing themselves from the *Itisaluna* Award, despite the fact that the wholesale importation of a completely different dispute resolution clause via the MFN remains a controversial issue. In light of the analysis of this article, it is advisable that claimants wishing to commence arbitration proceedings under the OIC Investment agreement, follow as faithfully as possible Article 17 of the Agreement and employ the MFN clause for dispute resolution purposes Rules only in case of failure to constitute the arbitral tribunal.

The story of the OIC Investment Agreement is certainly an ongoing one. Questions pertaining to the use of Article 8 MFN to import dispute settlement provisions from another BIT will certainly be examined and assessed by tribunals in the near future. In assessing such an attempt, an arbitral tribunal will have to consider a plethora of key principles pertaining to treaty interpretation and the principle of *ejusdem generis*. Though the trend in jurisprudence and commentary seems to favor the view that dispute resolution is a substantive right, some tribunals have applied the principle of contemporaneity to assess what the parties understood the terms of the treaty to mean at the time of its ratification. In so doing, those tribunals have found that the meaning of "treatment" in the MFN clauses at the time of the relevant treaty's ratification generally did not include dispute resolution provisions.[61]

60 In their commentary on MFN treatment, Reinisch and Schreuer conclude that: "if one is willing to discount the divergent characterisations of waiting periods and domestic litigation requirements as admissibility-related or jurisdictional, one can still maintain the basic dividing line according to which most tribunals appear to accept that mere procedural/ admissibility obstacles may be overcome through reliance on a MFN clause, while it may not serve to establish a jurisdiction where no such jurisdiction would be available under the basic treaty." August Reinisch & Christoph Schreuer, International Protection of Investment Treaties: The Substantive Standards 811-812 (2020).

61 *See* ILC 2015 Report, ¶¶ 123, 176-78.

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