

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**ITISALUNA IRAQ LLC AND OTHERS**

Claimants

and

**REPUBLIC OF IRAQ**

Respondent

**ICSID Case No. ARB/17/10**

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**AWARD**

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*Members of the Tribunal*

Sir Daniel Bethlehem, Q.C., President of the Tribunal  
Dr Wolfgang Peter, Arbitrator  
Professor Brigitte Stern, Arbitrator

*Secretary of the Tribunal*

Ms Aurélie Antonietti

*Date of dispatch to the Parties: 3 April 2020*

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## TABLE OF CONTENTS

I.	INTRODUCTION AND OVERVIEW .....	1
A.	<i>The commencement of proceedings and relevant procedural history</i> .....	1
B.	<i>Overview of the case</i> .....	6
II.	THE CLAIMANTS' MERITS CASE IN OUTLINE.....	7
III.	RELEVANT TREATY PROVISIONS .....	15
A.	<i>ICSID Convention</i> .....	15
B.	<i>The OIC Agreement</i> .....	18
C.	<i>Iraq-Japan BIT</i> .....	24
D.	<i>Iraq-Jordan BIT</i> .....	27
E.	<i>VCLT</i> ... ..	29
IV.	THE PARTIES' ARGUMENTS ON THE ISSUE OF JURISDICTION <i>RATIONE VOLUNTATIS</i> .....	29
A.	<i>Preliminary observations</i> .....	30
B.	<i>The Parties' pleadings and the Claimants' jurisdictional case in outline</i> .....	32
(1)	The Parties' pleadings on jurisdiction.....	32
(2)	The Claimants' jurisdictional case in outline.....	34
C.	<i>The Respondent's ratione voluntatis objection</i> .....	37
(1)	Article 17 of the OIC Agreement.....	38
(2)	The MFN clause cannot be invoked to show consent to ICSID arbitration .....	43
(3)	As a matter of proper interpretation, the MFN clause does not permit the importation of a dispute resolution clause from another treaty .....	47
(4)	The Al-Warraq Award .....	51
D.	<i>The Claimants' Reply to the Respondent's ratione voluntatis objection</i> .....	54
(1)	Article 17 of the OIC Agreement.....	55
(2)	The Respondent's consent to ICSID arbitration can be imported from the Iraq-Japan BIT by operation of the MFN clause in the OIC Agreement .....	59
(3)	The Claimants' alternative contention .....	67
(4)	The Al-Warraq Award .....	68
V.	THE TRIBUNAL'S ANALYSIS AND CONCLUSIONS.....	69
A.	<i>Introduction</i> .....	69
B.	<i>Analysis</i> .....	72

(1) The OIC Agreement..... 72

(2) Striking the balance..... 89

(3) Conclusions..... 94

VI. DISSENTING OPINION OF ARBITRATOR PETER..... 94

VII. COSTS..... 98

    A. *The Parties' costs submissions*..... 98

    B. *The Tribunal's decision on costs*..... 103

VIII. AWARD..... 105

**TABLE OF SELECTED ABBREVIATIONS/DEFINED TERMS**

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Claimants’ 6 September costs submission	Claimants’ costs submission filed on 6 September 2019
Claimants’ 20 September costs submission	Claimants’ Submission on Allocation of Costs filed on 20 September 2019
Hearing	Hearing on jurisdiction held on 2-3 October 2018
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
IICJ	International Islamic Court of Justice, established by the Charter of the OIC
Iraq-Japan BIT	Agreement between the Republic of Iraq and Japan for the Promotion and Protection of Investment, entered into force on 1 February 2014
Iraq-Jordan BIT	Agreement on the Encouragement and Protection of Investment Between the Government of the Republic of Iraq and the Government of the Hashemite Kingdom of Jordan, entered into force in November/December 2016
Itisaluna	Itisaluna Iraq LLC, exempted limited liability company incorporated under the laws of Jordan
Jordan	Hashemite Kingdom of Jordan
Memorial	Claimants’ Memorial filed on 6 March 2018
MFN Clause	Article 8(1) of the OIC Agreement
MSI	Munir Sukhtian Investment LLC, exempted private shareholding organised under the laws of Jordan

New York Convention	The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted on 10 June 1958, entered into force on 7 June 1959
Notice of Arbitration	Correspondence from the Claimants to the Respondent dated 8 January 2017, described as Notice of Arbitration or “trigger letter”
OIC Agreement	Agreement on Promotion and Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference, which the Claimants aver entered into force for Iraq on 21 July 2015
PO No.1	Procedural Order No. 1 dated 21 November 2017
Preliminary Objections	Respondent’s Preliminary Objections to Jurisdiction <i>Ratione Voluntatis</i> and Request for Bifurcation filed on 25 May 2018
Reply	Claimants’ Reply to Respondent’s Preliminary Objections filed on 16 August 2018
Request	Request for Arbitration dated 13 March 2017
Respondent’s 6 September cost submission	Respondent’s Submission on Costs filed on 6 September 2019
Transcript, Day [#], [page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on 16 August 2017
The Republic, Iraq or the Respondent	The Republic of Iraq
UAE	United Arab Emirates
VCLT	Vienna Convention on the Law of Treaties, 1969
VTEL MEA and VTLE Holdings	VTEL Middle East and Africa Limited and VTLE Holdings, companies limited by shares incorporated in the Dubai International Financial Center and organised under the laws of Dubai in the UAE

## I. INTRODUCTION AND OVERVIEW

### A. The commencement of proceedings and relevant procedural history

1. This Award (“**Award**”) is made in the case of arbitration proceedings instituted before the International Centre for the Settlement of Investment Disputes (“**ICSID**” or “**the Centre**”) against the Republic of Iraq (“**the Republic**”, “**Iraq**” or “**the Respondent**”) by Itisaluna Iraq LLC (“**Itisaluna**”), Munir Sukhtian Investment LLC (“**MSI**”), VTEL Holdings Ltd. (“**VTEL Holdings**”) and VTEL Middle East and Africa Limited (“**VTEL MEA**”) (together “**the Claimants**”). Itisaluna is an exempted limited liability company incorporated under the laws of the Hashemite Kingdom of Jordan (“**Jordan**”).<sup>1</sup> MSI is an exempted private shareholding organised under the laws of Jordan.<sup>2</sup> VTEL Holdings and VTEL MEA are companies limited by shares incorporated in the Dubai International Financial Center and organised under the laws of Dubai in the United Arab Emirates (“**UAE**”).<sup>3</sup> The proceedings were initiated by a Request for Arbitration dated 13 March 2017 (“**Request**”) transmitted to the ICSID Secretary-General in accordance with Article 36(1) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“**ICSID Convention**”).
2. Article 36(3) of the ICSID Convention provides that “[t]he Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.”
3. By letter dated 23 March 2017 addressed to the Claimants, the Centre, as part of its review of the Request for purposes of Article 36(3) of the ICSID Convention, raised a number of questions going to the issue of the Centre’s jurisdiction. By letter dated 30 March 2017

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<sup>1</sup> Request for Arbitration, paragraph 14.

<sup>2</sup> Request for Arbitration, paragraph 15.

<sup>3</sup> Request for Arbitration, paragraphs 16-17.

addressed to the Centre, the Claimants provided the requested information, elaborating on and clarifying their asserted basis of the Centre's jurisdiction and related matters.

4. The Claimants' asserted basis of the Centre's jurisdiction is the Agreement on Promotion and Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference, which the Claimants aver entered into force for Iraq on 21 July 2015 ("**OIC Agreement**"),<sup>4</sup> read together with the Agreement between the Republic of Iraq and Japan for the Promotion and Protection of Investment, signed in Baghdad on 7 June 2012 ("**Iraq-Japan BIT**"), which entered into force on 1 February 2014.<sup>5</sup> The Iraq-Japan BIT is said by the Claimants to be applicable through the most-favoured nation ("**MFN**") clause in Article 8(1) of the OIC Agreement ("**MFN clause**").
5. The Request concerns a dispute arising from investments that the Claimants claim to have made in Iraq after MSI was awarded a national Wireless Local Loop license in 2006 to launch voice data and internet services. The Claimants contend that the Respondent, by its actions and omissions, breached its obligations under the OIC Agreement and the Iraq-Japan BIT.
6. On 13 April 2017, the Request was registered by the ICSID Secretary-General pursuant to Article 36(3) of the ICSID Convention.
7. On 16 August 2017, the Tribunal was constituted in accordance with Article 37(2)(b) of the ICSID Convention, its members being Dr Wolfgang Peter (Swiss), appointed by the

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<sup>4</sup> Request, paragraph 112. The OIC Agreement entered into force on 25 February 1988 for those States that had ratified it by that point. By Decree No.25 of 25 June 2015, the President of Iraq decreed the promulgation of Law No.24 of 2015 which, by Article 1, provided that Iraq "hereby effects accession" to the OIC Agreement. Article 2 of Law No.24 provides that "This Law shall come into force on the date of its publication in the Official Gazette." The date of publication in the Official Gazette was 21 July 2015, the date given by the Claimants for the entry into force of the OIC Agreement for Iraq. This said, Article 21 of the OIC Agreement provides, *inter alia*, that "The Agreement ... shall come into force, with regard to each new state that may join it, after three months from the date of depositing its instrument of ratification." If Decree No.25 constituted Iraq's instrument of ratification, it appears that the OIC Agreement would have entered into force for Iraq on the international plain, in accordance with the terms of the treaty, on 25 September 2015, rather than 21 July 2015, even if, pursuant to Article 2 of Law No.24, Law No.24 would have come into force in Iraq's domestic legal system on 21 July 2015. As nothing turns on this point for purposes of this phase of the proceedings, the Tribunal has not sought clarification from the Parties on this issue.

<sup>5</sup> The Parties' pleadings refer both to the "Iraq-Japan BIT" and the "Japan-Iraq BIT". When citing to a Party's pleading, the Tribunal herein uses the nomenclature used in the pleading. When addressing the treaty itself, the Tribunal uses the standard format of "Iraq-Japan BIT". Nothing is intended or turns on the different nomenclature.

Claimants, Professor Brigitte Stern (French), appointed by the Respondent, and Sir Daniel Bethlehem, Q.C. (British), President, appointed by agreement of the Parties. Ms Aurélia Antonietti, an ICSID Senior Legal Adviser, was appointed Secretary of the Tribunal. With the agreement of the Parties, Dr Kate Parlett was appointed as Assistant to the Tribunal. She notified her resignation on 23 August 2018.

8. In anticipation of the First Session of the Tribunal, the Respondent wrote to the Tribunal on 27 October 2017 addressing various issues on the agenda of the First Session. In the course of that correspondence, addressing the (then) draft procedural calendar, the Respondent indicated that it intended to raise what it described as “dispositive jurisdictional objections going to the fundamental requirement of the Republic’s consent to ICSID arbitration”, notably, that “there is no basis to conclude that the Republic has consented to arbitrate disputes under the OIC Agreement pursuant to the ICSID Convention.”

9. Following the First Session on 30 October 2017, in response to a request by the Tribunal to do so, the Respondent wrote to the Tribunal on 31 October 2017 on the scope of “the agreed preliminary phase on objections to jurisdiction and admissibility” in, *inter alia*, the following terms:

As we stated in the Republic’s letter to the Tribunal of 27 October 2017 and during the First Session, the Republic intends to object, at the least, to the Tribunal’s jurisdiction *ratione voluntatis* and *ratione temporis*. Based on the Claimants’ Notice of Arbitration of 8 January 2017 and Request for Arbitration of 13 March 2017, the Parties agree that the Republic’s objection to the Tribunal’s jurisdiction *ratione voluntatis* and any other preliminary objections that turn solely on legal questions should be addressed in a separate preliminary phase.

10. The Tribunal issued Procedural Order No.1 on 21 November 2017 (“**PO No.1**”). Paragraph 15.2 of PO No.1 provides as follows:

The Respondent having indicated that it intends to raise objections to jurisdiction and/or admissibility, any such objection that the Respondent contends should be heard as a preliminary matter shall be made as soon as possible following receipt of the Claimants’ Memorial and in any event not later than 2 months after receipt of that

Memorial. Such objection shall include a reasoned application for the matter to be addressed in a preliminary procedure.

11. Following an extension request,<sup>6</sup> and in accordance with the procedural schedule established by the Tribunal, the Claimants filed their Memorial on 6 March 2018 (“**Memorial**”).
12. Following an extension request,<sup>7</sup> and in accordance with the procedural schedule established by the Tribunal, the Respondent filed its *Preliminary Objections to Jurisdiction Ratione Voluntatis and Request for Bifurcation* on 25 May 2018 (“**Preliminary Objections**”). In that pleading, the Respondent requested, *inter alia*, the bifurcation of the proceedings “so as to hear the Republic’s challenge to jurisdiction *ratione voluntatis* before considering other issues.”<sup>8</sup>
13. By correspondence addressed to the Tribunal dated 6 June 2018 on the question of bifurcation, the Claimants affirmed their previously stated position, namely, that “addressing any discrete, consent-based jurisdictional objections in this ICSID case is in the interests of procedural efficiency and economy.”
14. By correspondence addressed to the Tribunal dated 28 June 2018, the Respondent, noting that the Claimants consented to bifurcation, requested an order confirming that the Respondent’s “objection *ratione voluntatis* to the Tribunal’s jurisdiction will be heard in a preliminary phase.”
15. By correspondence addressed to the Parties dated 29 June 2018, the Tribunal directed that “the proceedings should now be bifurcated to enable the objections raised in the Respondent’s 25 May 2018 submission to be addressed as a preliminary matter.”

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<sup>6</sup> Email from the Tribunal to the Parties, 27 February 2018.

<sup>7</sup> Email from the Tribunal to the Parties, 19 April 2018.

<sup>8</sup> Preliminary Objections, paragraph 112(a).

16. In accordance with the procedural schedule established by the Tribunal, and agreed by the Parties, the Claimants submitted their *Reply to Respondent's Preliminary Objections* on 16 August 2018 (“**Reply**”).
17. A two-day Hearing on the Respondent’s preliminary objection *ratione voluntatis* was held in London on 2-3 October 2018, during which submissions were made on behalf of the Respondent by Mr Donald Francis Donovan and Ms Catherine Amirfar, of Debevoise & Plimpton LLP, and on behalf of the Claimants by Ms Amal Bouchenaki and Ms Liang-Ying Tan, of Herbert Smith Freehills, and Mr Lawrence Shore, of BonelliErede.<sup>9</sup>
18. On 26 October 2018, at the direction of the Tribunal at the close of the Hearing, the Parties submitted a number of documents to the Tribunal. These included, *inter alia*, the following:
- By the Parties jointly:
    - agreed charts indicating ICSID membership by OIC Member States and ISDS and ICSID investor-State commitments assumed by each OIC Member State;
    - an agreed document setting out the differences between the Parties on the certified translations of the OIC Agreement;
    - agreed reference documents relevant to other reported OIC investor-State arbitration proceedings.
  - By each Party separately:
    - a proposed Decision Tree;
    - a note addressing other reported OIC investor-State arbitration proceedings;
    - other relevant authorities cited to the Tribunal during the Hearing.
19. At the direction of the Tribunal, the Parties filed submissions on costs and costs allocation on 6 and 20 September 2019.

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<sup>9</sup> The oral submissions at the Hearing are hereinafter referred to as Transcript, Day 1 or Day 2, as the case may be.

## **B. Overview of the case**

20. The central issue in dispute in this phase of the proceedings is whether the Tribunal has jurisdiction having regard to the requirement in Article 25(1) of the ICSID Convention that the Parties to the dispute must have consented in writing to submit the dispute to ICSID arbitration. The Respondent's contention is that the Tribunal does not have jurisdiction in respect of this dispute. The core of the Respondent's case is that the OIC Agreement, and in particular Article 17 thereof, does not provide for ICSID arbitration. The Respondent says, further, that consent in writing to submit a dispute to ICSID arbitration cannot be derived or inferred from another instrument (in this case, the Iraq-Japan BIT) by operation of the MFN clause in the OIC Agreement.
21. The Claimants' case is that the Tribunal has jurisdiction *ratione voluntatis*. The core of the Claimants' case is that Article 17 of the OIC Agreement constitutes the Respondent's consent in writing to submit a dispute to arbitration in general terms and that, by operation of Article 8(1) of the OIC Agreement (the MFN clause), the Respondent's consent in writing to submit the dispute to ICSID arbitration in Article 17(4)(a) of the Iraq-Japan BIT can be read into the OIC Agreement. In the alternative, the Claimants rely to found the Tribunal's jurisdiction on Article 8(1) of the OIC Agreement, together with Article 17(4)(a) of the Iraq-Japan BIT, alone, in other words, eschewing, for purposes of their alternative argument, any reliance on Article 17 of the OIC Agreement.
22. Although the issues and arguments elaborated by the Parties are more complex than this bare-bones summary, this is the essence of the Parties' dispute over the Respondent's objection to jurisdiction *ratione voluntatis*.
23. As set out more fully below, in addressing this jurisdictional dispute, the Tribunal has had careful regard to all aspects of the Parties' arguments. The fact that the Parties' arguments are not recited in every aspect and in full detail does not detract from this. The summary of the Parties' arguments set out below is intended to capture the issues that are central to the Tribunal's Award.

24. The remainder of this Award proceeds as follows. For purposes of providing necessary background and context to these preliminary proceedings, **Part II** sets out the Claimants’ merits case in outline. **Part III** then sets out, and makes some passing observations on, the core provisions of the treaties that are principally in issue in this phase of the proceedings. In **Part IV**, the Tribunal sets out more fully the Parties’ arguments on the Respondent’s preliminary objection to jurisdiction. **Part V** contains the Tribunal’s analysis and conclusions. **Part VI** contains the dissenting opinion of Arbitrator Peter. Issues of costs are addressed in **Part VII**. Finally, the *dispositif* of the Tribunal’s Award is set out in **Part VIII**.<sup>10</sup>

## II. THE CLAIMANTS’ MERITS CASE IN OUTLINE

25. The Claimants’ merits case is set out in three documents: first, correspondence from the Claimants to the Respondent dated 8 January 2017 that is variously described as a Notice of Arbitration or a “trigger letter”<sup>11</sup> (“**Notice of Arbitration**”); second, the Claimants’ Request, as supplemented by their letter to ICSID of 30 March 2017;<sup>12</sup> and, third, the Claimants’ Memorial.

26. As the detailed facts and substantive claims advanced by the Claimants are not directly material to this Award, which turns on preliminary questions of law, it suffices for present purposes to describe the Claimants’ case in outline in the terms set out in the Notice of Arbitration. This states, *inter alia*, as follows:

[The Claimants] qualify as investors under Article 1, Paragraph 6 of the [OIC Agreement].

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<sup>10</sup> For completeness, to fill out the procedural and historical context of this Award, the Tribunal recalls two further issues. First, reflecting a proposal by the Tribunal that was accepted by the Parties, paragraph 14.1 of PO No.1 provided for the bifurcation of the liability and damages phases of the proceedings. Second, by an application dated 14 November 2017, the Claimants’ requested provisional measures. The procedure that followed is set out in the Tribunal’s *Order on Interim Provisional Measures Under ICSID Arbitration Rule 39(3)* dated 11 January 2018 and its *Order Vacating the Tribunal’s Order on Interim Provisional Measures Under ICSID Arbitration Rule 39(3), dated 11 January 2018, and Certain Consequential Matters*, dated 31 January 2018. As neither of these issues is relevant to the questions engaged by this Award, no further elaboration is required.

<sup>11</sup> Transcript, Day 1, p. 127.

<sup>12</sup> Paragraph 3 *supra*.

On June 11, 2006, the Iraq national Communications & Media Commission (the “**CMC**”) and MSI entered into a National Licence Agreement for the provision of telecommunications services in the Republic of Iraq (the “**Licence**”). Under the terms of the Licence, MSI was entitled to install, construct, operate, manage, and otherwise provide a public network for the purposes of providing telecommunications services in Iraq. MSI was also entitled to establish, operate, or otherwise provide international gateway services as are necessary to transit telecommunications traffic.

Following payment of USD 20 million to acquire the Licence, the Investors expended hundreds of millions of dollars in carrying out the terms of the Licence in Iraq.

The Investors’ rights pursuant to the License include (but are not limited to) the right to operate their own international gateways. The Investors repeatedly attempted to exercise this right. However, the General Secretariat of the Council of Ministers prohibited the Investors from operating their own international gateway under the License. This prohibition occurred without any form of compensation, and prevented the Investors from using and benefiting from an essential element of their investment in Iraq.

Further, the Investors held the legitimate expectation that amongst other things, (i) they would be subject to reasonable License and revenue sharing fees, (ii) they could use the appropriate technology to operate their network, and (iii) they would be able to enjoy their License fully, including with regard to the provision of international gateway services. Unfortunately, despite the Investors’ repeated pleas to various organs of the Iraqi state, these expectations were not met.

The License having now expired, the Investors’ attempts to negotiate in good faith its renewal have been rejected by the CMC, which continues to pressure the Investors into accepting a renewal of the expired License stripped of its key terms. This untenable situation has caused the Investors severe losses, such that Itisaluna Iraq is no longer in a position to sustain its operation financially.

The Investors’ rights under the License and their operations in Iraq are entitled to, amongst other international law protections, fair and equitable treatment, and quiet and full use and enjoyment of their investment. The Investors benefit from these guarantees pursuant to, on the one hand, the OIC Agreement and, on the other hand, under the Agreement between Japan and the Republic of Iraq for the Promotion and Protection of Investment (the “**Japan-Iraq BIT**”), which protections are available to the Investors by operation of Article 8(1) of the OIC Agreement.

The measures that the Government of Iraq has taken against the Investors are directly inconsistent with the standards of protection to which the Investors are entitled under these treaties. The highest State officials, including the Office of His Excellency the Prime Minister, have ignored the Investors' repeated letters seeking redress.

While the Investors remain open to any good faith attempt by the Iraq Government to address the substantial violation of their rights under the OIC Agreement and the Japan-Iraq BIT, the extent of the Investors' resulting losses are such that they must now avail themselves of all the protections accorded to them. Accordingly, the Investors respectfully submit this letter as a formal notice of the existence of an investment dispute under the OIC Agreement and the Japan-Iraq BIT.

The Investors hope and most respectfully expect that the Government will take no steps to further deprive them of their rights following this notification. The Investors' representatives are prepared to meet with the Government of Iraq for immediate consultations under Article 17 of the Japan-Iraq BIT. To that end, and in light of the dire situation of the Investors' Iraqi operations, we would be most grateful if your Excellencies could please contact the undersigned at your earliest convenience.

27. For purposes of the narrative contextualising the present phase of the proceedings, the Tribunal notes that, in their Request, the Claimants develop the factual aspects of their case, alleging, *inter alia*, as follows:

- “Starting in 2008, and after Claimants had invested heavily in Itisaluna’s Network, the CMC and other Iraqi authorities, through various acts and omissions, started stripping the Licence of its value.”<sup>13</sup>
- “In 2008, after Claimants had invested significantly in developing the Itisaluna Network in Iraq, Iraq prohibited Itisaluna from exercising its right to build and operate an international gateway.”<sup>14</sup>
- “Around the same time as the decision to prohibit Itisaluna from operating its own international gateways, the Minister of Communication informed Itisaluna that the only way it could operate an international gateway was to subscribe to a new licence

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<sup>13</sup> Request, paragraph 46.

<sup>14</sup> Request, paragraph 48.

agreement with the [State-owned Iraqi Telecommunications and Post Company (“ITPC”)].”<sup>15</sup>

- “However, shortly after the ITPC Licence was signed and a few months after Itisaluna had installed the relevant switch to operate the gateway, Itisaluna’s management was summoned by the Ministry of Communications and special security forces surrounded Itisaluna’s offices located at the Baghdad airport at the time. The Iraqi authorities demanded that Itisaluna cease the operation of the gateway and terminate immediately its licensing contracts with the ITPC. Itisaluna complied.”<sup>16</sup>
- “In October 2008, and pursuant to the same Government decision that prohibited Itisaluna from building and operating its own international gateway, the CMC also prohibited Itisaluna from laying optical fiber cables in Iraq.”<sup>17</sup>
- Referencing the increasingly hostile security situation in Iraq from January 2014, that “[t]he security situation rendered Itisaluna unable to operate in many governates”,<sup>18</sup> and that, “[a]mid the violence, the Government of Iraq also directed an internet shutdown for approximately two months in 2014, which resulted in the loss for Itisaluna of many users.”<sup>19</sup>
- Also in 2014, that the CMC “failed to fulfil its obligations as regulator because it failed to attribute frequencies to Itisaluna”<sup>20</sup> and “refused to address its failure to properly attribute frequencies”.<sup>21</sup>

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<sup>15</sup> Request, paragraph 52.

<sup>16</sup> Request, paragraph 54.

<sup>17</sup> Request, paragraph 57.

<sup>18</sup> Request, paragraph 68.

<sup>19</sup> Request, paragraph 70.

<sup>20</sup> Request, paragraph 74.

<sup>21</sup> Request, paragraph 75.

- Contrary to the terms of the Claimants’ Licence, the CMC informed Itisaluna in April 2012 that it would be imposing higher fees, fees which Itisaluna, under protest, paid on 17 January 2013.<sup>22</sup>
- Starting in 2009, the CMC imposed and Itisaluna paid, additional fees for the attribution of microwave frequencies, over and above what was provided for in the Licence.<sup>23</sup>
- In the period 2014-2016, the CMC refused to negotiate in good faith the renewal of the Claimants’ Licence.<sup>24</sup>

28. As regards the legal elements of their claim, the Claimants, in their Request, contend, *inter alia*, that “Iraq’s acts and omissions in relation to Claimants’ investments ... are in direct breach of Iraq’s commitment to extend to Claimants the protections of the OIC Agreement.”<sup>25</sup> Citing Article 10 of the OIC Agreement, the Claimants contend that Iraq expropriated Claimants’ investment without prompt, adequate, and effective compensation.<sup>26</sup> Citing Articles 2, 4, and 8(1) of the OIC Agreement, and Articles 3 and 5 of the Iraq-Japan BIT, the Claimants contend, *inter alia*, that:

- “Iraq’s conduct has frustrated Claimants’ legitimate expectations that they would be able to develop and benefit from their investment under the protection of the Iraqi State, and that the Government would seek to encourage the commercial and financial success of the investment – as it committed to do under Article 4 of the OIC – rather than thwart Claimants’ efforts to keep their investment afloat.”<sup>27</sup>
- “Iraq undertook to ‘protect’ Claimants under Article 2 of the OIC Agreement, which entitles Claimants to a minimum standard of protection. By virtue of Article

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<sup>22</sup> Request, paragraphs 90-91.

<sup>23</sup> Request, paragraphs 94-97.

<sup>24</sup> Request, paragraphs 105-109.

<sup>25</sup> Request, paragraph 112.

<sup>26</sup> Request, Section IV.A, paragraphs 113-122.

<sup>27</sup> Request, paragraph 131.

8(1) of the OIC Agreement, Claimants are entitled to the even more favourable degree of protection offered to Japanese investors through the standard of fair and equitable treatment in Article 5.1 of the Japan-Iraq BIT.”<sup>28</sup>

- “Iraq also breached its legal obligations and specific commitment with respect to Claimants’ investment by, *inter alia*, withdrawing the international gateway rights in violation of Article II.C of the Licence, extending the performance bond beyond its terms in violation of Article IV.C [of the Licence]; refusing to negotiate the renewal of the Licence in violation of Article VI.B; and imposing a high fee for the assignment of numbering blocks in violation of Article XV.A. Such breaches by Iraq of its contractual undertakings constitute a direct violation of the protection laid out in Article 5.3 of the Japan-Iraq BIT, to which Claimants are entitled by virtue of Article 8(1) of the OIC Agreement.”<sup>29</sup>
- “Iraq also breached its national treatment obligation under Article 3 of the Japan-Iraq BIT, owed to Claimants under Article 8(1) of the OIC Agreement, when it treated Itisaluna less favourably than it treated national telecommunications companies.”<sup>30</sup>

29. In respect of these claimed breaches, the Claimants request, *inter alia*:<sup>31</sup>

- an award of monetary damages for the full measure of the compensation owed to the Claimants as a result of Iraq’s expropriation of the Claimants’ investment;
- compensation for the direct losses sustained by Claimants as a result of Iraq’s violations of the guarantees invoked by the Claimants under the OIC Agreement and the Japan-Iraq BIT; and

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<sup>28</sup> Request, paragraph 132 (footnotes omitted).

<sup>29</sup> Request, paragraph 134 (footnotes omitted).

<sup>30</sup> Request, paragraph 135.

<sup>31</sup> Request, paragraph 182; also paragraphs 137-140.

- compensation equal to any tax consequences of the award, in order to maintain the award's integrity.
30. The Claimants defer particularising their claim for damages to a later phase of the proceedings.<sup>32</sup>
31. The Claimants set out the factual underpinnings of their case in detail in their Memorial in terms that, unsurprisingly, go beyond what is said in the Request although also at times in terms that do not appear always to be fully consistent with what is said in the Request.<sup>33</sup> In addition to referencing developments in 2008 and the period following,<sup>34</sup> as elaborated in the Request, the Memorial sets out the Claimants' contention, not advanced in the Request, that it was a 7 October 2015 decision of the Board of Appeal of the CMC that "definitively depriv[ed] Itisaluna of the right to operate an international gateway and the right to lay out fiber."<sup>35</sup> This decision of 7 October 2015 by the CMC Boards of Appeal followed a decision by the CMC's Board of Commissioners on 8 July 2015.<sup>36</sup>
32. Following this development, the Memorial sets out attempts by the Claimants to engage with the Respondent through the remainder of 2015 and into 2016 to negotiate "in good faith ... terms and conditions" for the renewal term of the Licence, in accordance with Article VI of the Licence.<sup>37</sup>
33. The Memorial elaborates on the Claimants' legal claims relatively briefly.<sup>38</sup> The legal submissions are framed as follows:

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<sup>32</sup> Request, paragraph 140.

<sup>33</sup> Memorial, pp. 3-46. By way of small example on the issue of potential inconsistency, paragraph 54 of the Request, which addresses the alleged Iraqi demand that Itisaluna cease operation of the gateway and terminate immediately its licensing contracts with the ITPC, dates this to "shortly after the ITPC Licence was signed" in September 2008. In contrast, paragraph 111 of the Memorial dates these events in 2010. Given a signalled but putative objection to jurisdiction *ratione temporis*, discrepancies on dates are potentially material.

<sup>34</sup> Memorial, paragraphs 99-154.

<sup>35</sup> Memorial, paragraph 160 *et seq.*

<sup>36</sup> Memorial, paragraphs 161-164.

<sup>37</sup> Memorial, paragraphs 170-180.

<sup>38</sup> Memorial, pp. 88-101.

Iraq has engaged in a series of actions, policies, omissions, and abdication of responsibility that progressively eroded the Claimants' investment in Itisaluna. After having gradually crippled Itisaluna's operations and revenue streams, Iraq's acts and omissions culminated in the final deprivation of Itisaluna's core Licence rights, effected through the final decision of the CMC's Board of Appeal of October 7, 2015. The October 7, 2015, forced amendment of the Licence was followed by Iraq's complete refusal to enter into a good faith negotiation for the renewal of the Licence. In a culmination of its unlawful acts and omissions beginning in 2008, Iraq made it clear to the Claimants that any renewal of the Licence would be pursuant to the truncated terms imposed by the October 7, 2015 decision.<sup>39</sup>

34. The Claimants' legal claims set out in the Memorial include (a) allegations of expropriation (both direct and creeping), (b) minimum standard of treatment and other treaty violations, including interference with use and enjoyment of ownership rights, and the Claimants' asserted entitlement to the "necessary facilities and incentives" of their investment, (c) breaches of adequate protection and security commitments, (d) breaches of national treatment commitments, and (e) breaches of fair and equitable treatment commitments. These claims refer expressly to alleged breaches of Articles 2, 4, 10 and 14 of the OIC Agreement and of customary international law. There is no reference in this discussion to alleged breaches of the substantive provisions of the Iraq-Japan BIT.<sup>40</sup> The Prayer for Relief in the Memorial, set out in materially the same terms as in the Request, provides as follows:

For the reasons set out above, Claimants respectfully request that the Tribunal:

- a. Award monetary damages for the full measure of the compensation owed to Claimants as a result of Iraq's expropriation of Claimants' investment;
- b. Order Iraq to compensate Claimants for the direct losses sustained as a result of Iraq's violations of the guarantees invoked by Claimants under the OIC Agreement and the Iraq-Japan BIT;
- c. Award Claimants the full costs of these proceedings, including arbitrators' fees and costs, reasonable legal fees and experts' costs and fees;

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<sup>39</sup> Memorial, paragraph 346.

<sup>40</sup> There is, of course, detailed discussion of the Article 17 of the Iraq-Japan BIT, the investor-State dispute settlement clause that makes reference to ICSID arbitration, in Section III of the Memorial, addressing jurisdiction.

- d. Order Iraq to pay pre-Award and post-Award interest at a rate to be fixed by the Tribunal;
- e. Order Iraq to pay a sum of compensation equal to any tax consequences of the Award, in order to maintain the Award's integrity; and
- f. Order and award such further relief as the Tribunal may deem just and appropriate.<sup>41</sup>

### **III. RELEVANT TREATY PROVISIONS**

35. Before turning to set out some further procedural background and, thereafter, the Parties' arguments on the Respondent's preliminary objection to jurisdiction, it is convenient to set out, and as appropriate make some passing observations on, the core provisions of the three treaties and associated documents that are principally in issue in this phase of the proceedings, namely, the ICSID Convention and the ICSID Arbitration Rules, the OIC Agreement, and the Iraq-Japan BIT. For purposes of the discussion to come, and reflecting the Parties' submissions, it is also useful to set out at this stage a number of provisions of the 2015 Agreement on the Encouragement and Protection of Investment Between the Government of the Republic of Iraq and the Government of the Hashemite Kingdom of Jordan ("**Iraq-Jordan BIT**") and the Vienna Convention on the Law of Treaties, 1969 ("**VCLT**").

#### **A. ICSID Convention**

36. The Tribunal is constituted in accordance with Article 37(1) of the ICSID Convention. Pursuant to Article 41(1) of the Convention, the Tribunal shall be the judge of its own competence. Article 41(2) of the Convention provides:

Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

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<sup>41</sup> Memorial, paragraph 403.

37. Article 41(2) of the ICSID Convention is to be read together with Rule 41 of the ICSID Arbitration Rules. Insofar as is directly engaged in these proceedings, Rule 41(1), (2) and (6) provide as follows:

(1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder – unless the facts on which the objection is based are unknown to the party at that time.

(2) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre or within its own competence.

[...]

(6) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect.

38. Relevant to issues of the jurisdiction of the Centre, and of the Tribunal, as an ICSID Tribunal, is Article 25(1) of the ICSID Convention:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

39. Iraq, as well as Jordan and the UAE (the States of nationality of the Claimants), are all Members of ICSID, Iraq having become a Contracting State to the ICSID Convention on 17 December 2015, Jordan having become a Contracting State to the ICSID Convention on 29 November 1972, and the UAE having become a Contracting State to the ICSID Convention on 22 January 1982. No issue of the entitlement of any claimant to bring proceedings on grounds of nationality has been made to the Tribunal.

40. By reference to Article 25(1) of the Convention, the issue at the heart of these proceedings is whether the jurisdiction of the Tribunal is established by the Parties in these proceedings having consented in writing to submit the dispute to ICSID arbitration. As noted in paragraphs 20-21 above, the Respondent contends that jurisdiction is not established as Article 17 of the OIC Agreement makes no reference to ICSID arbitration and written consent cannot be imported from the Iraq-Japan BIT by operation of Article 8(1) of the OIC Agreement, the MFN clause. In contrast, the Claimants' case is that consent to ICSID jurisdiction can be imported, via the OIC Agreement MFN clause, from Article 17(4)(a) of the Iraq-Japan BIT.
41. Although the detail of these provisions is not central to this Award, the Tribunal recalls also the following additional provisions of the ICSID Convention, which are relevant to the Tribunal's analysis in Part V below:
- Articles 50-52 establish a bespoke regime in respect of the interpretation, revision and annulment of ICSID awards, distinct and materially different from post-award arrangements under other arbitration rules.
  - Articles 53-55 establish a bespoke regime in respect of the recognition and enforcement of ICSID awards, distinct from arrangements under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") or other regimes and arrangements for the recognition and enforcement of international arbitral awards.
  - Beyond these provisions, although there is some symmetry between the ICSID Arbitration Rules and other frequently adopted international arbitration rules, such as the UNCITRAL Arbitration Rules, the ICSID Convention and ICSID Arbitration Rules establish a self-contained and *sui generis* arbitration regime for the arbitration of investment disputes between Contracting States and the nationals of other Contracting States.

## **B. The OIC Agreement**

42. The OIC Agreement is a multilateral treaty. It was concluded in 1981 under the auspices of the (then) Organisation of the Islamic Conference (now the Organisation of Islamic Cooperation) and entered into force on 25 February 1988 for those States that had ratified it by that point. Of the 57 Member States of the OIC, the OIC Agreement has been ratified by 29, including Iraq, Jordan and the UAE. A further 14 OIC Member States have signed but not ratified the Agreement and 14 others are non-signatories.
43. Before setting out the core provisions of the OIC Agreement relevant to this phase of the proceedings, a preliminary observation is required on the authentic text of the OIC Agreement and the challenges of interpretation and translation that became apparent during the course of these proceedings.
44. The procedural language of this arbitration is English.<sup>42</sup> Documents filed in other languages, notably in Arabic, have been accompanied by translations into English.<sup>43</sup>
45. Pursuant to its Article 25, the OIC Agreement is drawn up in Arabic, English and French, each version being equally authentic.
46. The text of the OIC Agreement has been provided to the Tribunal in all three authentic languages. The English text of the Agreement provided to the Tribunal is that published by the General Secretariat of the Organisation of the Islamic Conference (1981).
47. Notwithstanding the equal authenticity of each of the language versions of the OIC Agreement, the Parties disagree on the coincidence of the various language versions and, accordingly, on the meaning of key provisions as they have been rendered into each language. Both the Claimants and the Respondent have sought to invoke the French and Arabic language versions of the Agreement in support of their arguments about the proper meaning of the Agreement as recorded in English. To this end, reference was made to the rule of customary international law – uncontested as such – reflected in Article 33 of the

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<sup>42</sup> PO No.1, paragraph 11.1.

<sup>43</sup> PO No.1, paragraph 11.2.

VCLT, which addresses the interpretation of treaties authenticated in two or more languages.<sup>44</sup> In support of their positions, both the Claimants and the Respondent submitted certified English translations of the OIC Agreement derived from the Agreement's other authentic languages. Those certified translations have been materially different.

48. At the Tribunal's request, following the hearing, the Parties endeavoured to reach agreement on a certified English language translation, derived from the Agreement's other authentic languages, of the core provisions in issue in these proceedings. Despite their best efforts, they only had limited success in doing so. In a joint submission to the Tribunal dated 26 October 2018, the Parties provided to the Tribunal an agreed certified English translation of Article 17(2)(b) of the OIC Agreement, but competing certified English translations, containing what the Parties describe as "material differences", of Article 17(2)(c) and Article 17(2)(d). The Parties also provided to the Tribunal competing certified English translations, containing what the Parties describe as "non-material differences", of Articles 8(1), 8(2), 16, 17(1) (chapeau), 17(1)(a) (conciliation), 17(1)(b) (conciliation), and 17(2)(a) (arbitration). These certified English translations do not accord with the authentic English language text of OIC Agreement published by the General Secretariat of the OIC.
49. Given this, the Tribunal refers below to the authentic English language version of the OIC Agreement. Where necessary for interpretative purposes, the Tribunal has had regard to the certified English translations provided by the Parties, both agreed and competing, and to the other original language versions.
50. The OIC Agreement is arranged under five headings as follows:
- The opening Preamble of the Agreement.
  - Chapter One, which contains only Article 1, setting out definitions.

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<sup>44</sup> See paragraph 61 *infra*.

- Chapter Two, headed “General provisions regarding promotion, protection and guarantee of the capitals and investments and the rules governing them in the territories of the contracting parties”. This chapter comprises Articles 2 to 9 of the Agreement. Of material relevance in this phase of these proceedings, Article 8 is situated in Chapter Two.
- Chapter Three, headed “Investment guarantees”. This chapter comprises Articles 10 to 17 of the Agreement. Of material relevance in this phase of these proceedings, Articles 16 and 17 are situated in Chapter Three.
- A section headed “General and final provisions”. This section comprises Articles 18 to 25 of the Agreement. Of material relevance in this phase of the proceedings, Articles 18 and 20 are situated in this section.

51. Of material relevance, or potentially so, to the present phase of the proceedings are a number of preambular paragraphs and Articles 8, 16, 17, 18, 19 and 20 of the OIC Agreement. They read as follows:

#### **PREAMBLE**

The Governments of the Member States of the Organisation of the Islamic Conference signatory to this Agreement,

[...]

*Have approved* this Agreement,

*And have agreed* to consider the provisions contained therein as the minimum in dealing with the capitals and investments coming in from the Member States,

And have declared their complete readiness to put the Agreement into effect, in letter and in spirit, and of their sincere wish to extend every effort towards realizing its aims and objectives.

[...]

## **Article 8**

1. The investors of any contracting party shall enjoy, within the context of economic activity in which they have employed their investments in the territories of another contracting party, a treatment not less favourable than the treatment accorded to investors belonging to another State not party to this Agreement, in the context of that activity and in respect of rights and privileges accorded to those investors.

2. Provisions of paragraph 1 above shall not be applied to any better treatment given by a contracting party in the following cases:

a) Rights and privileges given to investors of one contracting party by another contracting party in accordance with an international agreement, law or special preferential arrangement.

b) Rights and privileges arising from an international agreement currently in force or to be concluded in the future and to which any contracting party may become a member and under which an economic union, customs union or mutual tax exemption arrangement is set up.

c) Rights and privileges given by a contracting party for a specific project due to its special importance to that state.

[...]

## **Article 16**

The host state undertakes to allow the investor the right to resort to its national judicial system to complain against a measure adopted by its authorities against him, or to contest the extent of its conformity with the provisions of the regulations and laws in force in its territory, or to complain against the non-adoption by the host state of a certain measure which is in the interest of the investor, and which the state should have adopted, irrespective of whether the complaint is related, or otherwise, to the implementation of the provisions of the Agreement to the relationship between the investor and the host state.

Provided that if the investor chooses to raise the complaint before the national courts or before an arbitral tribunal then having done so before one of the two quarters <sup>[45]</sup> he loses the right of recourse to the other.

### Article 17<sup>[46]</sup>

1. Until an Organ for the settlement of disputes arising under the Agreement is established, disputes that may arise shall be entitled <sup>[47]</sup> through conciliation or arbitration in accordance with the following rules and procedures:

1. Conciliation

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

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

2. Arbitration

a) If the two parties to the dispute do not reach an agreement as a result of their resort to conciliation, or if the conciliator is unable to issue his report within the prescribed period, or if the two parties do not accept the solutions proposed therein, then each party has the right to resort to the Arbitration Tribunal for a final decision on the dispute.

b) The arbitration procedure begins with a notification by the party requesting the arbitration to the other party to the dispute, clearly explaining

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<sup>45</sup> On the basis of their certified English translation of the other authentic languages of the Agreement, the Claimants propose that the phrase “one of the two quarters” should be read as “one of the two fora”. On the same basis, the Respondent proposes that the phrase should be read as “one of these two bodies”.

<sup>46</sup> The paragraph numbering in this Article is as in the original.

<sup>47</sup> On the basis of their certified English translation of the other authentic languages of the Agreement, the Parties agree that the word “entitled” should be read as “resolved”.

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

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

d) The decisions of the Arbitration Tribunal shall be final and cannot be contested. They are binding on both parties who must respect and implement them. They shall have the force of judicial decisions. The contracting parties are under an obligation to implement them in their territory, no matter whether it be a party to the dispute or not and irrespective of whether the investor against whom the decision was passed is one of its nationals or residents or not, as if it were a final and enforceable decision of its national courts.

### **General and final provisions**

#### **Article 18**

Two or more contracting parties may enter into an agreement between them that may provide a treatment which is more preferential than that stipulated in this Agreement.

[...]

#### **Article 20**

The General Secretariat will follow up the implementation of this Agreement.

52. The Parties' arguments on the interpretation and application of, in particular, Articles 8 and 17 are summarised in Part IV below.

### **C. Iraq-Japan BIT**

53. The Iraq-Japan BIT is a bilateral treaty. It was signed on 7 June 2012 and entered into force on 1 February 2014.
54. Although the Claimants allege a breach of a number of substantive provisions of the BIT, the principal focus of the Parties' submissions in this phase of the proceedings has been on Article 17 of the BIT. This provides as follows:

#### **Article 17**

#### **Settlement of Investment Disputes between a Contracting Party and an Investor of the Other Contracting Party**

1. For the purposes of this Article, an "investment dispute" is a dispute between a Contracting Party and an investor of the other Contracting Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any obligation of the former Contracting Party under this Agreement with respect to the investor of that other Contracting Party or its investments in the Area of the former Contracting Party.
2. Subject to subparagraph 7(b), nothing in this Article shall be construed so as to prevent an investor who is a party to an investment dispute (hereinafter referred to in this Article as "disputing investor") from seeking administrative or judicial settlement within the Area of the Contracting Party that is a party to the investment dispute (hereinafter referred to in this Article as "disputing Party").
3. Any investment dispute shall, as far as possible, be settled amicably through consultations between the disputing investor and the disputing Party (hereinafter referred to in this Article as "the disputing parties").
4. If the investment dispute cannot be settled through such consultations within three months from the date on which the disputing investor requested in writing the disputing Party for consultations, the disputing investor may, subject to subparagraph 7(a), submit the investment dispute to one of the following international conciliations or arbitrations:
  - (a) conciliation or arbitration in accordance with the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington, March 18, 1965 (hereinafter referred to in this

Article as “the ICSID Convention”), so long as the ICSID Convention is in force between the Contracting Parties;

- (b) conciliation or arbitration under the Additional Facility Rules of the International Centre for Settlement of Investment Disputes, so long as the ICSID Convention is not in force between the Contracting Parties;
  - (c) arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law, adopted by the United Nations Commission on International Trade Law; and
  - (d) if agreed with the disputing Party, any arbitration in accordance with other arbitration rules.
5. (a) Except for investment disputes regarding the obligation of the disputing Party under paragraph 3 of Article 5, each Contracting Party hereby consents to the submission of investment disputes by a disputing investor to conciliation or arbitration set forth in paragraph 4 chosen by the disputing investor.
- (b) For investment disputes regarding the obligation of the disputing Party under paragraph 3 of Article 5, necessary consent for the submission to the conciliation or arbitration will be given by the disputing Party on a case-by-case basis.
6. Notwithstanding paragraph 5, no investment disputes may be submitted to conciliation or arbitration set forth in paragraph 4, if more than five years have elapsed since the date on which the disputing investor acquired or should have first acquired, whichever is the earlier, the knowledge that the disputing investor had incurred loss or damage referred to in paragraph 1.
7. (a) In the event that an investment dispute has been submitted to courts of justice or administrative tribunals or agencies or any other binding dispute settlement mechanism established under the laws and regulations of the disputing Party, any conciliation or arbitration set forth in paragraph 4 can be sought only if the disputing investor withdraws, in accordance with the laws and regulations of the disputing Party, its claim from such domestic remedies before the final decisions are made therein.
- (b) In the event that an investment dispute has been submitted for resolution under one of the conciliations or arbitrations set forth in paragraph 4, the same dispute shall not be submitted for resolution under courts of justice,

administrative tribunals or agencies or any other binding dispute settlement mechanism established under the laws and regulations of the disputing Party.

8. The disputing Party shall deliver to the other Contracting Party:
    - (a) written notice of the investment dispute submitted to the arbitration no later than thirty (30) days after the date on which the investment dispute was submitted; and
    - (b) copies of all pleadings filed in the arbitration.
  9. The Contracting Party which is not the disputing Party may, upon written notice to the disputing parties, make submissions to the arbitral tribunal on a question of interpretation of this Agreement.
  10. Unless the disputing parties agree otherwise, the arbitration shall be held in a country that is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958.
  11. The award rendered by the arbitral tribunal shall be final and binding upon the disputing parties. This award shall be executed by the applicable laws and regulations concerning the execution of award in force in the country where such execution is sought.
55. A wider review of the provisions of the Iraq-Japan BIT discloses a material differences in the scope, coverage and detail of the BIT by comparison to the OIC Agreement. By way of example, Article 19 of the Iraq-Japan BIT addresses intellectual property rights. There is no similar provision in the OIC Agreement.
56. The Tribunal also draws attention to the MFN clause in the Iraq-Japan BIT, which provides, *inter alia*, as follows:

**Article 4**  
**Most-Favoured-Nation Treatment**

1. Each Contracting Party shall in its Area accord to investors of the other Contracting Party and to their investments treatment no less favourable than the treatment it accords in like circumstances to investors of a non-Contracting Party and to their investments with respect to investment activities.

[...]

3. It is understood that the treatment referred to in paragraph 1 does not include treatment accorded to investors of a non-Contracting Party and their investments by provisions concerning the settlement of investment disputes such as the mechanism set out in Article 17, that are provided for in other international agreements between a Contracting Party and a non-Contracting Party.

57. The Parties submissions on, in particular, Article 17 of the Iraq-Japan BIT are summarised in Part IV below.

#### **D. Iraq-Jordan BIT**

58. The Iraq-Jordan BIT is a bilateral treaty. It was signed on 25 December 2013. It was ratified by Iraq on 21 January 2015 but appears only to have entered into force in November / December 2016, following Jordan's ratification.<sup>48</sup>

59. The relevance, or potential relevance, of the Iraq-Jordan BIT in these proceedings arises for three reasons. First, Itisaluna and MSI are both organised under the laws of Jordan and may therefore have been in a position to avail themselves of the protections of this treaty. Second, the BIT was invoked by counsel for both the Claimants and the Respondent in the hearing to illustrate, respectively, Iraq's post-OIC Agreement treaty practice to ICSID dispute settlement, on the one hand, and the limitation adopted in respect of the application of the MFN principle to dispute settlement, on the other. Third, the relationship between the BIT and the OIC Agreement, *inter alia*, in consequence of Article 18 of the OIC Agreement was the subject of submissions in the course of the hearing going to the allegation of forum shopping by the Claimants.

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<sup>48</sup> Iraq ratified the BIT by Law No. (1) of 2015; Respondent's Exhibit RL-0084. Counsel for the Claimants put ratification (by implication, by Jordan) in December 2016 (Transcript, Day 2, p. 69). Public sources suggest that the BIT may have entered into force in November 2016.

60. The provision of the Iraq-Jordan BIT relevant for present purposes is Article 9, and in particular Article 9, paragraphs (II)(b), 9(VI) and 9(VIII), which provide as follows:

**Article 9**  
**Settlement of Disputes**  
**between an Investor and a Contracting Party**

- I. Settlement of any dispute arising from an investment between a Contracting Party and an investor of the other Contracting Party shall be resolved by way of the amicable means of mediation and conciliation.
- II. If such a dispute cannot thus be settled in accordance with item (First) above, and means of internal review have been exhausted within (180) one hundred and eighty days after the submission of a written application for resolution, either of the parties to the dispute may submit the dispute to:
- a) to the competent courts of the Contracting Party in whose territory the investment was made;
  - b) the International Centre for Settlement of Investment Disputes (ICSID) (hereinafter referred to as “the Centre”), established pursuant to the Convention on the Settlement of Investment Disputes between States and nationals of other States signed in Washington, D.C., on 18 March 1965 if the Contracting Parties are both parties thereto;
- [...]
- VI. The investor shall not be entitled to file a claim against the host Contracting Party in the manner provided in this Article after the lapse of (5) five years from the date on which the actual or presumed investor becomes aware of the subject of the dispute.
- [...]
- VIII. Most favoured nation status shall not be applicable to the provisions of this Article.

## E. VCLT

61. Iraq is not a party to the VCLT. The Convention does not, accordingly, bind Iraq qua treaty obligation. It is, however, uncontroversial that the provisions of the VLCT setting out the rules on treaty interpretation reflect customary international law. The texts of Articles 31-33 of the VCLT are therefore usefully recalled as an iteration of the content of relevant and applicable customary international law that guides the Tribunal in its task.<sup>49</sup>

## IV. THE PARTIES' ARGUMENTS ON THE ISSUE OF JURISDICTION *RATIONE VOLUNTATIS*

62. Against the background of the preceding, the Tribunal turns to the Parties' arguments on the Respondent's objection to jurisdiction *ratione voluntatis* that is the focus of this Award.

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<sup>49</sup> **Article 31 (General Rule of Interpretation)** provides: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) Any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended."

**Article 32 (Supplementary Means of Interpretation)** provides: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable."

**Article 33 (Interpretation of Treaties Authenticated in Two or More Languages)** provides: "1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail. 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree. 3. The terms of the treaty are presumed to have the same meaning in each authentic text. 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

## A. Preliminary observations

63. Two preliminary observations are warranted. First, as noted above by reference to the Respondent's correspondence of 31 October 2017,<sup>50</sup> the Respondent indicated at an early stage that it intended "to object, at the least, to the Tribunal's jurisdiction *ratione voluntatis* and *ratione temporis*". In the event, the only objection that the Respondent advanced as a *preliminary* objection is its objection to jurisdiction *ratione voluntatis*, and this is the only objection that is addressed in this Award. This said, shades of a putative objection to jurisdiction *ratione temporis* were apparent in the Parties' pleadings, both written and oral, in the present phase. This is most evident in the Respondent's arguments referencing Article 17(6) of the Iraq-Japan BIT, which provides for a five year limitation period for investment disputes under the BIT from the date on which the disputing investor "acquired or should have first acquired, whichever is the earlier, the knowledge that the disputing investor had incurred loss or damage". As noted in paragraph 27 above, the Claimants' case as set out in their Request was heavily rooted in developments on which it relied that took place in 2008 and the period immediately following, i.e., more than five years before these proceedings were instituted on 13 March 2017.
64. In raising Article 17(6) of the Iraq-Japan BIT in the context of its objection *ratione voluntatis*, the Tribunal does not take the Respondent to have been advancing a stalking horse for its putative objection *ratione temporis*. The contention being advanced was rather that the Claimants, in seeking to rely on the ICSID consent clause in Article 17(4)(a) of the Iraq-Japan BIT, were seeking to parse up Article 17 of the BIT for purposes of relying on some parts of it while disregarding others. This is a wider point of some relevance to the Tribunal's consideration of the issues with which it is presented in this phase of the proceedings. The same point arises by reference to Article 9(VI) of the Iraq-Jordan BIT, of which two of the claimant companies may, at least presumptively, have been in a position to avail themselves. This is an issue to which the Tribunal returns in its discussion in Part V below. For the avoidance of doubt, however, the Tribunal emphasises that nothing in this Award can be taken as expressing a view on the merits of the

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<sup>50</sup> Paragraph 9 *supra*.

Claimants' case or on the issue of jurisdiction *ratione temporis*, whether under the Iraq-Japan BIT, the Iraq-Jordan BIT or any other instrument.<sup>51</sup>

65. The second preliminary observation is that both the Claimants and the Respondent have prayed in aid of their contentions a considerable number of arbitral awards and decisions, and wider jurisprudence, going to the interpretation and application of MFN clauses, both in general and in respect of dispute resolution jurisdiction. Having reviewed that jurisprudence, the Tribunal is struck by two appreciations. The first is that the present case, being one of the early cases involving the interpretation and application of the OIC Agreement, does not fit comfortably into the mould of wider investment treaty jurisprudence. Apart from the case of *Al-Warraq v. Indonesia* (“*Al-Warraq*”),<sup>52</sup> neither Party was able to point the Tribunal to any published awards or decisions addressing the interpretation and application of the OIC Agreement and its interaction with bilateral investment treaties by the operation of its MFN clause. There is therefore virtually no useful jurisprudential guidance that is on point for purposes of the present proceedings. In this regard, the Tribunal notes also that the *Al-Warraq* proceedings were subject to the UNCITRAL Arbitration Rules 2010. There is to this point no award or decision of an ICSID arbitral tribunal on the interpretation and application of the OIC Agreement.
66. The Tribunal's second appreciation follows from the first. As the Tribunal reads the cases cited to it, the sweep of jurisprudential opinion, both majority and dissenting, is open to invocation in support of virtually any position that any party in any arbitral proceedings may wish to advance. The Tribunal does not accordingly apprehend a reliably consistent vein of readily applicable legal analysis that would serve as bellwether guide to the Tribunal in the present proceedings. Nor does the Tribunal consider that the historical antecedents of the MFN clauses found in either multilateral investment agreements, such as the OIC Agreement, or in bilateral investment treaties, such as the Iraq-Japan BIT, shine a light on the approach that ought to be adopted in a case such as this.

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<sup>51</sup> For completeness, the Tribunal notes that the Claimants set out their case on the Tribunal's jurisdiction *ratione temporis* in their Memorial, at pp. 65-81, a case to which the Respondent has not replied, given the bifurcation of the proceedings to address the *ratione voluntatis* objection.

<sup>52</sup> *Hesham Talaat M. Al-Warraq v. The Republic of Indonesia*, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims, 21 June 2012.

67. This is not to say that the Tribunal has not found assistance in jurisprudential opinion. It is simply to sound a note of caution about the duelling emphasis and heavy weight that the Parties have placed on the MFN *acquis*. In the end, this case turns on the interpretation and application of, and interaction between, the two principal instruments relied upon by the Claimants, the OIC Agreement and the Iraq-Japan BIT, in the specific circumstances of this case.
68. The reason for highlighting this issue at this point in the Award is that, as the Tribunal turns to summarise the Parties' submissions, it will forbear from detailed recitation of the multitude of cases to which it has been directed.

**B. The Parties' pleadings and the Claimants' jurisdictional case in outline**

**(1) The Parties' pleadings on jurisdiction**

69. With this said, the Tribunal turns to the Parties' arguments on the issue of jurisdiction *ratione voluntatis* and begins by recalling the pleadings which engaged with this matter.
70. The Claimants invoked the Iraq-Japan BIT in their Notice of Arbitration of 8 January 2017. No mention is made in that document, however, of ICSID arbitration. The substantive protections of the Iraq-Japan BIT are referenced, said to be "available to the investors by operation of Article 8(1) of the OIC Agreement", and "consultations under Article 17 of the Japan-Iraq BIT" are requested, but the Claimants did not at that point signal an intention to invoke, or the averred availability of, ICSID arbitration pursuant to Article 17(4)(a) of the Iraq-Japan BIT. In this regard, it is recalled that Article 17(4) of the Iraq-Japan BIT sets out four arbitration options, including, arbitration under the UNCITRAL Arbitration Rules and, "if agreed with the disputing Party, any arbitration in accordance with other arbitration rules."
71. ICSID arbitration is expressly invoked by the Claimants in their Request, which states, *inter alia*, that "[b]y virtue of Article 17(1) and 17(2)(a) of the OIC Agreement, Iraq expressly and unequivocally consented to arbitrate any 'disputes that may arise' with an

investor of an OIC member State or to settle such dispute through conciliation.”<sup>53</sup> The Request continues: “Additionally, as explained below, Claimants are entitled to benefit from Iraq’s consent to ICSID jurisdiction by virtue of the MFN clause at Article 8(1) of the OIC Agreement. Claimants meet all the other applicable jurisdictional tests for their claims to be heard.”<sup>54</sup> This proposition is elaborated upon later in the Request,<sup>55</sup> *inter alia*, in the following terms:

Because (i) ICSID offers an institutional framework that guarantees the parties procedural safeguards that the general terms in which Article 17(2)(b) of the OIC Agreement is worded do not offer; and (ii) because Iraq is a party to the ICSID Convention, but has not yet signed or ratified the 1958 Convention on the Recognition and Enforcement of Arbitral Awards (the “New York Convention”), Article 17 of the Japan-Iraq BIT offers, undisputedly, Japanese investors rights, privileges, and protections that are more favourable than those accorded under Article 17(2)(b) of the OIC Agreement.<sup>56</sup>

72. Following the institution of arbitral proceedings, the Respondent signalled in correspondence at an early stage its intent to raise a preliminary objection to jurisdiction *ratione voluntatis*. As, by agreement between the Parties, and reflected in PO No.1, the first pleading was to be the Claimants’ Memorial, the Claimants addressed the issue of the Tribunal’s jurisdiction at some length in their Memorial, including as regards the Respondent’s consent to ICSID arbitration. In so doing, the Claimants relied heavily on a lengthy and erudite Opinion by Dr Mahnoush H. Arsanjani dated 21 February 2018 which had been prepared for purposes of the Claimants’ case and was annexed to the Claimants’ Memorial. That Opinion, covering almost 100 pages, addressed the scope of the MFN clause in Article 8 of the OIC Agreement and the consent to arbitration in that Agreement as it pertained to jurisdiction.
73. Following the Claimants’ Memorial, the Respondent filed its Preliminary Objections in which its objection *ratione voluntatis* was set out. The Claimants thereafter submitted their Reply on the issue of jurisdiction *ratione voluntatis*. That Reply was accompanied by, and

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<sup>53</sup> Request, paragraph 141.

<sup>54</sup> Request, paragraph 142.

<sup>55</sup> Request, paragraphs 163-169.

<sup>56</sup> Request, paragraph 167.

again relied heavily on, a further extensive and scholarly Supplementary Opinion by Dr Arsanjani which took issue with the Respondent's contentions.

74. These written pleadings were followed by a two-day hearing devoted to the *ratione voluntatis* objection during the course of which, and subsequently,<sup>57</sup> the Tribunal was presented with additional materials not otherwise addressed in the Parties' written submissions.
75. Over the course of these submissions, unsurprisingly, the contours and nuance of both Parties' positions evolved in the face of the arguments of the other side and detailed enquiry by the Tribunal. This being the case, the Tribunal's summary of the Parties' arguments that follows does not endeavour to capture every shade and detail of the Parties' submissions but sets out the core and essential elements of each side's case as is necessary for purposes of the Tribunal's analysis and decision. The Tribunal has already addressed above the issue of the jurisprudence to which it has been directed.<sup>58</sup> The Tribunal does not consider that clarity of argument and reasoning is assisted by the lengthy reproduction in this Award of the Parties' pleadings. This said, the Tribunal has considered with care the detail of the Parties' contentions. That an argument or issue is not reflected in the summary of argument in this Part, or in the analysis and conclusions that follow in Part V, is not an indication that they were overlooked.

**(2) *The Claimants' jurisdictional case in outline***

76. The Claimants' case on jurisdiction *ratione voluntatis*, as set out in their Memorial, follows that set out in their Request. It is in essence that "Iraq's consent to ICSID arbitration is contained in Article 17(4) of the Iraq-Japan BIT, as imported into Article 17 of the OIC Agreement by virtue of the MFN provision (Article 8) of the OIC Agreement."<sup>59</sup> As captured in this formulation, the Claimants' case is essentially that Article 8(1) of the OIC Agreement, the MFN clause, operates to incorporate into the OIC Agreement the ICSID

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<sup>57</sup> In supplementary information (but not post-hearing briefs) filed by the Parties on 26 October 2018.

<sup>58</sup> Paragraphs 65-68 *supra*.

<sup>59</sup> Memorial, paragraph 230.

arbitration consent clause contained in Article 17(4)(a) of the Iraq-Japan BIT. The fulcrum of the Claimants' jurisdictional case is the MFN clause in Article 8(1) of the OIC Agreement. On this analysis, the OIC Agreement is the predicate agreement on which the Claimants' must rely for purposes of establishing both that they are investors and that they are entitled to MFN treatment, but thereafter the basis for prosecuting their claim, and the mechanism through which to do so, is found elsewhere, in the investor-State arbitration clause in the Iraq-Japan BIT.

77. Beyond the headline formulation, the Claimants' case rests on two tracks, advanced in the alternative, although each is predicated on the incorporation into the OIC Agreement, by operation of the MFN clause in that Agreement, of the ICSID arbitration clause in the Iraq-Japan BIT. These alternative arguments were expressed by the Claimants' counsel in response to enquiry by the Tribunal at the close of the Claimants' oral submissions in the following terms:<sup>60</sup>

**[Claimants' Counsel:]** Our position is: here Article 17 [of the OIC Agreement] provides an access to arbitration. We've qualified for that access to arbitration. However, it is a cumbersome and inefficient forum. And we have therefore operated Article 8 [of the OIC Agreement], which we further submit covers dispute settlement, and therefore enables us to read into Article 8 [of the OIC Agreement] Article 17 of the Japan-Iraq BIT.

**[Tribunal:]** ... from what you say now, it's Article 17 [of the OIC Agreement] for purposes of consent [to arbitration] and Article 8 [of the OIC Agreement] for purposes of ICSID. So you need both limbs to get you over the threshold?

**[Claimants' counsel:]** Our principal case is that we do have to operate Articles 17 and 8 [of the OIC Agreement]. However, it could be argued that 17 [of the OIC Agreement] is unnecessary.

**[Tribunal:]** ... that's because 17 [of the OIC Agreement] would be unnecessary because you would say you would found jurisdiction for ICSID on Article 8 alone, by reference to the Japan-Iraq BIT?

**[Claimants' counsel:]** Correct.

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<sup>60</sup> Transcript, Day 2, p. 90, l. 18 - p. 91, l. 20.

[**Tribunal:**] So you have two alternatives, but the alternatives both involve Article 8?

[**Claimants' counsel:**] Correct.

78. This two-track approach accords with the Claimants' jurisdictional case as initially set out in their Notice of Arbitration, which did not advance a claim rooted in consent to arbitration founded in general terms in Article 17 of the OIC Agreement, and the case subsequently developed, which averred and prioritised a consent to arbitration claim founded in Article 17 of the OIC Agreement, supplemented by a consent to ICSID arbitration incorporated into the OIC Agreement from the Iraq-Japan BIT by operation of the MFN clause in the OIC Agreement.
79. For ease of reference, these two contentions will be referred to below as the Claimants' "**principal contention**", i.e., that which is rooted in a claim to a general consent to arbitration founded in Article 17 of the OIC Agreement, supplemented by consent to ICSID arbitration, derived, via the OIC Agreement MFN clause, from the Iraq-Japan BIT, and their "**alterative contention**", i.e., that which derives the Respondent's consent to arbitration, both general and specific, from the Iraq-Japan BIT, via the OIC Agreement MFN clause, without regard to Article 17 of the OIC Agreement.
80. It is helpful to identify at the outset these two strands of argument as this assists both in untangling the issues and in shining a light on *the* critical question that requires decision by the Tribunal in these proceedings, namely, 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. If the Claimants cannot succeed on this point, their jurisdictional case fails, notwithstanding any other points on which they may prevail. While there are additional obstacles along the way that the Respondent seeks to construct, going to the interpretation and application of Article 17 of the OIC Agreement, as well as to the interpretation and application of the Article 8(1) MFN clause in that Agreement, each of which has the capacity to derail the Claimants' jurisdictional case, the heart of the Claimants' case, however it is viewed, is that the ICSID arbitration clause in the Iraq-Japan BIT can be incorporated into the OIC Agreement by operation of its MFN clause.

### C. The Respondent's *ratione voluntatis* objection

81. Having identified the essence of the Claimants' jurisdictional case, before elaborating further on the detail of their argument as expressed in their Memorial and other pleadings, it is useful to set out the Respondent's objection. These proceedings are triggered by the Respondent's jurisdictional challenge and it is its detailed case that is properly the starting point.<sup>61</sup>
82. Distilled to its essence, the Respondent's counsel summarised its case on Article 17 of the OIC Agreement in his closing oral submissions in the following terms:

It's our submission that unless the OIC Agreement itself contains consent to this Tribunal's jurisdiction, the Tribunal doesn't even get to whether the MFN clause applies. Put another way, an MFN clause cannot be used to "import" dispute resolution provisions unless, at a minimum, jurisdiction *ratione voluntatis* is established in the original agreement.<sup>62]</sup>

[...]

Now, the Claimants purport to locate consent here in Article 17 of the OIC Agreement. But there are three independently dispositive obstacles, which I identified yesterday, that prevent looking past Article 17 to get to the MFN in Article 8. Specifically, there's no agreement to arbitrate in Article 17, because Article 17 requires a separate agreement to opt into its provisions. Secondly, Article 17 contemplates state-to-state rather than investor-state arbitration. And finally, even assuming that Article 17 could be read as contemplating investor-state arbitration generally, it does not contain any agreement to ICSID arbitration. It doesn't even mention ICSID.

On each of these core aspects of jurisdiction *ratione voluntatis*, consent must be clear and unequivocal: the existence of an agreement; that the agreement is for investor-state arbitration; and that the agreement is for ICSID arbitration. If the Claimants fail to establish any one of these points, that means they have not established jurisdiction *ratione voluntatis*, the Tribunal lacks jurisdiction and there's no basis to consider the MFN clause at all.<sup>63]</sup>

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<sup>61</sup> This is without prejudice to any issue of which Party has the burden of proof on the issue of jurisdiction, a matter addressed further below.

<sup>62</sup> Transcript, Day 2, p. 2, ll. 12-19.

<sup>63</sup> Transcript, Day 2, p. 6, l. 23 - p. 7, l. 20.

83. On the operation of the MFN clause in Article 8 of the OIC Agreement, if (*arguendo*, from the Respondent’s perspective) the Respondent’s arguments on Article 17 of the OIC Agreement fail, the Respondent’s case in summary is that Article 8, “by its plain terms and under ordinary rules of treaty interpretation, simply does not extend to matters of dispute resolution.”<sup>64</sup> In support of this proposition, the Respondent invokes the language of Article 8, the historical circumstances of the OIC Agreement, and the subsequent practice of the Parties. It also relies on its appreciation of the weight of jurisprudential opinion on the issue of the operation of MFN clauses to found jurisdiction.
84. At bottom, the Respondent’s objection *ratione voluntatis* is that “the Republic never entered into an agreement with Claimants to submit this dispute to ICSID”<sup>65</sup> and that “[n]o tribunal has ever allowed an MFN clause to create consent to arbitrate where none exists, or to replace the Treaty’s dispute resolution mechanism with an entirely new and different one, unless the MFN clause expressly refers to dispute resolution (which is not the case here).”<sup>66</sup>

**(1) Article 17 of the OIC Agreement**

85. As a preliminary matter, the Respondent’s opening contention is that the burden of proving jurisdiction rests with the Claimants.<sup>67</sup>
86. Turning to Article 17 of the OIC Agreement, and its reference to arbitration, the Respondent advances three separate but related contentions in its Preliminary Objections: first, even if, *arguendo*, Article 17 contains an offer to arbitrate, it does not contain an offer to submit to ICSID jurisdiction;<sup>68</sup> second, Article 17 does not in any event provide any consent to arbitration unless there is a separate agreement between the disputing parties to opt into the OIC Agreement’s dispute resolution procedure;<sup>69</sup> and, third, Article 17 in any

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<sup>64</sup> Preliminary Objections, paragraph 8.

<sup>65</sup> Preliminary Objections, paragraph 1.

<sup>66</sup> Preliminary Objections, paragraph 6.

<sup>67</sup> Preliminary Objections, paragraphs 5 and 63 *et seq.* Transcript, Day 1, pp. 7 and 11-13.

<sup>68</sup> Preliminary Objections, Section II.A, paragraphs 16-23.

<sup>69</sup> Preliminary Objections, Section II.B, paragraphs 24-30.

event only provides for State-to-State arbitration, not for investor-State arbitration.<sup>70</sup> These contentions, advanced in the Respondent's written pleadings, mirror the Respondent's oral submissions, although the sequence in which it developed its arguments during the hearing varied.<sup>71</sup>

87. As a codicil to these contentions, and the bridge to its submissions on the interpretation of Article 8 of the OIC Agreement, the Respondent contends that the Claimants cannot invoke the MFN clause in Article 8 of the OIC Agreement to show consent in ICSID arbitration.<sup>72</sup>
88. The contention that Article 17 of the OIC Agreement does not contain an offer to submit to ICSID arbitration, even if (which the Respondent contests) it contains an unrestricted offer to arbitrate that avails investors, is straightforward. Article 17 makes no mention of ICSID arbitration. Rather, it provides its own bespoke arbitration procedures which leave no room for any role for ICSID.<sup>73</sup> Further, the Claimants have not accepted the claimed Article 17 offer to arbitrate but have expressly disavowed it as dysfunctional.<sup>74</sup> Citing extensively to arbitral jurisprudence and commentary, the Respondent contends that offers to arbitrate set out in a treaty must be accepted as formulated and cannot be rewritten by investors.<sup>75</sup> Finally, on this point, the Respondent submits that, if the Claimants had concerns with the procedures that they identify in Article 17 of the OIC Agreement, they were free to pursue other available remedies, including litigation in the Iraqi courts, a recognised avenue of recourse in Article 16 of the OIC Agreement, or diplomatic protection.<sup>76</sup>
89. In its oral submissions on these issues, which develop each of the arguments just noted, the Respondent, again citing extensively to arbitral jurisprudence, makes, *inter alia*, the following further points:

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<sup>70</sup> Preliminary Objections, Section II.C, paragraphs 31-41.

<sup>71</sup> Transcript, Day 1, pp. 7-8; Transcript, Day 2, pp. 6-7 and 29-32.

<sup>72</sup> Preliminary Objections, Section III.A, paragraphs 43-62; Transcript, Day 1, pp. 7-8 and 56-63.

<sup>73</sup> Preliminary Objections, paragraph 16.

<sup>74</sup> Preliminary Objections, paragraph 17.

<sup>75</sup> Preliminary Objections, paragraphs 18-21.

<sup>76</sup> Preliminary Objections, paragraph 22.

- The Claimants must establish that Iraq provided “clear, unequivocal consent to arbitrate under the ICSID Convention.”<sup>77</sup>
  - Consent may not be presumed or inferred, noting in particular that, under Article 25(1) of the ICSID Convention, consent in writing is specifically required to establish ICSID jurisdiction.<sup>78</sup>
  - The Claimants’ argument “confuses consent to arbitrate with the scope of arbitration, once agreed to.”<sup>79</sup>
  - The fact of an MFN clause “does not eliminate the requirement to prove consent.”<sup>80</sup>
90. The contention that Article 17 of the OIC Agreement does not in any event provide consent to arbitration unless there is a separate agreement between the disputing parties to opt into the OIC Agreement’s dispute resolution procedure turns on the language and structure of Article 17.
91. The Respondent begins by recalling the opening paragraph, or *chapeau*,<sup>81</sup> of Article 17, and in particular, that until an organ for the settlement of disputes arising under the OIC Agreement is established, “disputes that may arise shall be [resolved] through conciliation and arbitration in accordance with the following rules and procedures”. In the Respondent’s contention, the rules and procedures that follow make it clear that “there is no obligation to arbitrate unless the parties first separately agree to, and complete, conciliation.”<sup>82</sup> Resort to conciliation is therefore, on the Respondent’s case, a predicate condition for resort to arbitration. Further, resort to the conciliation process requires a

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<sup>77</sup> Transcript, Day 1, p. 9, ll. 21-24.

<sup>78</sup> Transcript, Day 1, p. 10.

<sup>79</sup> Transcript, Day 1, p. 10, ll. 22-24.

<sup>80</sup> Transcript, Day 1, p. 21, ll. 19-21.

<sup>81</sup> In the authentic English language version of the OIC Agreement, Article 17 has two numbered paragraphs 1. It is apparent from its terms, however, that the opening paragraph (numbered 1) is a *chapeau* to the whole of the article, i.e., to the two paragraphs that follow, numbered 1 and 2.

<sup>82</sup> Preliminary Objections, paragraph 24.

separate agreement.<sup>83</sup> This submission turns on the language of numbered paragraph 1 of Article 17, under the title conciliation, which provides, *inter alia*, that “[i]n case the parties to the dispute agree on conciliation, the agreement shall include ...”<sup>84</sup> The language of Article 17(2), in the Respondent’s contention, affirms conciliation as a predicate condition to arbitration, viz., “[i]f the two parties to the dispute do not reach an agreement *as a result of their resort to conciliation*, or *if the conciliator is unable to issue his report within the prescribed period*, or *if the two parties do not accept the solutions proposed therein*, then each party has the right to resort to the Arbitration Tribunal for a final decision on the dispute.” In the Respondent’s contention, “[t]he use of the conditional terms ‘if ... then’ indicates that one of the three scenarios listed in Article 17(2) must arise before a party has the right to resort to arbitration”.<sup>85</sup> It follows, therefore, in the Respondent’s contention, that if, as in this case, “there was no agreement to conciliate, and therefore no conciliation, then there can be no arbitration.”<sup>86</sup> The Respondent further contends that this reading, which places conciliation as a gateway or a precondition to arbitration, is consistent with Iraq’s wider investment treaty practice.<sup>87</sup> These points are developed in the Respondent’s oral submissions.<sup>88</sup>

92. The Respondent’s contention that Article 17 of the OIC Agreement only provides for State-to-State arbitration, and not for investor-State arbitration, rests on the language of Article 17 which refers only to “disputes” and says nothing about claims by investors.<sup>89</sup> This contrasts with the approach adopted in other investment protection agreements which refer expressly to investor disputes.<sup>90</sup>

93. On this point, the Respondent takes issue with the *Al-Warraaq* award, contending that it “erred in holding that Article 17 of the OIC Agreement provides for investor-[S]tate

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<sup>83</sup> Preliminary Objections, paragraphs 24-25.

<sup>84</sup> Preliminary Objections, paragraph 25.

<sup>85</sup> Preliminary Objections, paragraph 26.

<sup>86</sup> Preliminary Objections, paragraph 26.

<sup>87</sup> Preliminary Objections, paragraph 28.

<sup>88</sup> Transcript, Day 1, pp. 27-37.

<sup>89</sup> Preliminary Objections, paragraph 35.

<sup>90</sup> Preliminary Objections, paragraphs 33-34.

arbitration” on the ground that “when contracting States have intended to authorise non-parties bring claims, they have taken care to do so with the utmost explicitness.”<sup>91</sup>

94. Further, on this point, the Respondent refers to “the application of the OIC Agreement in practice” which, it says, “appears to confirm that the OIC Agreement does not provide for investor-State arbitration”:

In accordance with this common understanding of the parties to the OIC Agreement, the Secretary-General of the OIC has consistently declined to act as appointing authority in investor-State cases on the ground that Article 17 provides no jurisdiction for such disputes.<sup>92</sup>

95. This point was developed in the Respondent’s oral submissions,<sup>93</sup> although, when pressed on it by the Tribunal, counsel for the Respondent acknowledged that the reasons given by the Respondent for what it described as the refusal of the OIC Secretary-General to register claims was only “the prevailing assumption” on the basis “that cases haven’t gone forward”, and that the Respondent did not “have information ourselves about what has happened within the OIC Secretariat.”<sup>94</sup>

96. Finally, on the issue of the absence, in its contention, of investor-State dispute settlement under the OIC Agreement, the Respondent points to Article 16 of the Agreement, which “confirms that a different remedy is provided for investors to vindicate their rights, namely litigation in the host State’s courts.”<sup>95</sup> In the Respondent’s submission,

Article 16 shows why Article 17 can’t be read as an offer to arbitrate with investors. That provision expressly refers, as I said a moment ago, to the investor’s right to resort to national courts. Article 17 could have but did not speak in the same terms in regard to resort to arbitration or conciliation.<sup>96</sup>

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<sup>91</sup> Preliminary Objections, paragraph 36. Transcript, Day 1, p. 42.

<sup>92</sup> Preliminary Objections, paragraph 38.

<sup>93</sup> Transcript, Day 1, pp. 52-54.

<sup>94</sup> Transcript, Day 2, pp. 21-22.

<sup>95</sup> Preliminary Objections, paragraph 39.

<sup>96</sup> Transcript, Day 1, p. 45.

97. The Respondent further avers that the proviso in the second paragraph of Article 16, which refers to “an arbitral tribunal”, does not refer to arbitration under Article 17, the two articles being “vastly different in scope”. The proviso, the Respondent contends, “only clarifies that the host State has no obligation to allow an investor to resort to a national court if the investor exercises a right to arbitration (from whatever source that right may arise) and that the investor waives any right to arbitration if it sues in a national court.”<sup>97</sup> The source of a putative right to arbitration, in the Respondent’s contention, must be located in a separate applicable agreement.<sup>98</sup> The proviso in Article 16 does not itself, either alone or by reference to Article 17, give rise to a right to arbitrate.
98. In its oral submissions, addressing the reference to “the investor” in Article 17(2)(d) of the OIC Agreement, the Respondent, praying in aid both the French and Arabic language versions of the Agreement, contends that the arbitral decision there referred to is one that would be rendered in the context of a diplomatic espousal claim in State-to-State proceedings.<sup>99</sup> In the Respondent’s submission, Article 17(2)(d) is a recognition and enforcement of arbitral awards provision that operates vis-à-vis all the OIC Agreement Contracting Parties in cases in which a State has brought a claim on behalf of an investor.<sup>100</sup>

**(2) *The MFN clause cannot be invoked to show consent to ICSID arbitration***

99. Addressing the codicil to its Article 17 arguments, that the Claimants cannot invoke the MFN clause in Article 8 of the OIC Agreement to show consent in ICSID arbitration, the Respondent contends:

While some arbitral tribunals have allowed the use of an MFN clause to expand the *scope* of disputes subject to arbitration, no tribunal has ever allowed an MFN clause to create consent to arbitrate where none exists, or to replace the Treaty’s dispute resolution mechanism with an entirely new and different one, unless the MFN clause has expressly referred to dispute resolution.<sup>101</sup>

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<sup>97</sup> Preliminary Objections, paragraph 40.

<sup>98</sup> Preliminary Objections, paragraph 40.

<sup>99</sup> Transcript, Day 1, pp. 45-47.

<sup>100</sup> Transcript, Day 1, pp. 48-49.

<sup>101</sup> Preliminary Objections, paragraph 43. Also, Transcript, Day 1, pp. 85-92.

100. Citing extensively to jurisprudence and commentary, the Respondent contends that “[t]he requirement that an MFN clause cannot create jurisdiction where none exists has been widely accepted”<sup>102</sup> and that “[n]o tribunal has ever gone so far as to extend an MFN provision to import consent to ICSID jurisdiction in the absence of express language in the MFN clause stating that it *shall apply* to dispute resolution”.<sup>103</sup> Reviewing the jurisprudence, the Respondent breaks down the circumstances in which investors have invoked MFN provisions with regard to dispute resolution into a number of categories and contends:

Tribunals are arguably evenly divided in their views only in cases in the first category: cases where the investors invoked an MFN clause to avoid preconditions to arbitration such as the 18-month local litigation requirements in Argentina BITs. In all other circumstances, in the absence of express language applying the MFN clause to dispute resolution, tribunals have consistently rejected the application of an MFN clause to modify a treaty’s arbitration provisions, with only two exceptions: *RosInvest v. Russia* and *Le Chèque v. Hungary*. Both of those cases fall within the second category, *i.e.*, use of an MFN clause to submit additional breaches to a tribunal that ***already had jurisdiction under the basic treaty without the MFN clause***. Neither of those cases supports jurisdiction here, where an underlying consent to ICSID arbitration under the OIC Agreement is lacking.<sup>104</sup>

101. Contrasting *RosInvest*<sup>105</sup> and *Le Chèque Déjeuner*<sup>106</sup> with the present case, the Respondent further contends that “the dispute settlement clause in the OIC Agreement provides no consent to ICSID arbitration at all.” Unlike *RosInvest* and *Le Chèque Déjeuner*, the Claimants in the present case are asking the Tribunal “to discard the OIC Agreement’s arbitration clause entirely and replace it with a submission to ICSID jurisdiction that appears nowhere in the OIC Agreement. There is no precedent for that extraordinary leap.”<sup>107</sup>

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<sup>102</sup> Preliminary Objections, paragraph 47.

<sup>103</sup> Preliminary Objections, paragraph 48.

<sup>104</sup> Preliminary Objections, paragraph 50.

<sup>105</sup> *RosInvest v. Russia*, SCC Case No. V079/2005, Award on Jurisdiction, 1 October 2007 (“*RosInvest*”).

<sup>106</sup> *Le Chèque Déjeuner and C.D. Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016 (“*Le Chèque Déjeuner*”).

<sup>107</sup> Preliminary Objections, paragraph 54. Also, Transcript, Day 1, pp. 89-91.

102. The Respondent adduces two further points of distinction between the present case and the rationale in *RosInvest* and *Le Chèque Déjeuner*: first, that the BIT relied upon in those cases to expand the tribunals’ jurisdiction demonstrated a broad commitment to arbitrate *any* disputes with foreign investors that may arise, whereas the dispute settlement clause in the Iraq-Japan BIT “contains no such far-reaching commitment” but only a commitment to arbitrate in the case of disputes arising out of an alleged breach of an obligation arising under the Iraq-Japan BIT itself. Because the claims in the present case “arise under the OIC Agreement, and not under the Japan-Iraq BIT, the arbitration clause in the Iraq-Japan BIT simply would not apply to the parties’ dispute even if it could be imported into the OIC Agreement.”<sup>108</sup>
103. The second point of distinction between the present case and *RosInvest* and *Le Chèque Déjeuner* advanced by the Respondent, described as “more important”, is that the Claimants in this case “are seeking to put themselves in a *better position* than Japanese investors, by cherry-picking provisions from the Japan-Iraq BIT that they regard as working in their favour, and ignoring others.” In support of this contention, the Respondent contends that the Claimants seek to disregard the limitation period and waiver provisions in the Iraq-Japan BIT dispute resolution clause.<sup>109</sup> Distinguishing jurisprudence relied upon by the Claimants,<sup>110</sup> the Respondent submits that “[a]llowing Claimants to use the MFN clause to pick and choose which provisions of the Japan-Iraq BIT will apply to them – and thus obtain advantages unavailable to a Japanese investor – flies in the face of the MFN clause’s plain text.”<sup>111</sup> In support of the proposition, the Respondent relies on the dissenting opinion in *Garanti Koza v. Turkmenistan* to the effect that “[i]n the absence of a mutual agreement to ICSID arbitration, a claimant will not be in a position to invoke more favourable treatment under [the MFN clause] with respect to ICSID arbitration under other BITs concluded by [the host State].”<sup>112</sup>

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<sup>108</sup> Preliminary Objections, paragraph 55.

<sup>109</sup> Preliminary Objections, paragraph 56.

<sup>110</sup> Preliminary Objections, paragraphs 57-62.

<sup>111</sup> Preliminary Objections, paragraph 56.

<sup>112</sup> Preliminary Objections, paragraph 60; citing to the dissenting opinion of Laurence Boisson de Chazournes in *Garanti Koza LLP v. Turkmenistan* (ICSID Case No. ARB/11/20), 3 July 2013, at paragraph 43 (“*Garanti Koza*”).

104. Developing this analysis, the Respondent, in the course of the hearing, handed up copies of the Decision on Jurisdiction in *AIYY Ltd v. Czech Republic*, which addressed the application of an MFN clause to a more favourable dispute resolution provision in another treaty.<sup>113</sup> While the Respondent cited in particular to paragraph 98 of this Decision, it is helpful for present purposes to set out a fuller extract. Material for present purposes, the *AIYY* Decision held, *inter alia*, as follows on the scope of the MFN clause:

95. The Tribunal is of the view that an MFN clause can, *a priori*, apply to dispute settlement.

[...]

97. A review of arbitral decisions on the issue of the scope of the MFN clause reveals that, where tribunals have declined to apply the MFN clause to dispute settlement, the *ratio decidendi* was either that (i) the MFN clause was invoked to override public policy considerations such as a substitution of the consent to arbitrate where none exists in the basic Treaty, and/or (ii) its scope of application was limited by the wording used in the applicable Treaty. This is consistent with the ILC Study Group's conclusion that "*dispute settlement provisions by definition are almost always capable of being incorporated into an investment agreement by virtue of an MFN provision.*"

98. Arbitral rulings draw a distinction between the application of an MFN clause to a more favourable dispute resolution provision where the investor has the right to arbitrate under the basic treaty, albeit under less favourable conditions, and the substitution of non-existent consent to arbitration by virtue of an MFN clause. While case law confirms that the former is possible, it has almost consistently found that the latter is not.

[...]

103. In the present case, it is clear that the Contracting Parties' consent to arbitrate expressed in Article 8 of the Treaty is limited. The Contracting Parties explicitly agreed in this provision that they would consent to arbitrate disputes arising out of a certain and limited number of articles of the Treaty. The Tribunal is therefore of the view that, under the Treaty, the Contracting Parties

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<sup>113</sup> Transcript, Day 1, pp. 87-88; also, Transcript, Day 2, pp. 3-4. *AIYY Ltd v. Czech Republic* (ICSID Case No. UNCT/15/1), Decision on Jurisdiction of 9 February 2017 ("*AIYY*").

have not provided their consent to arbitrate disputes arising out of any provisions of the Treaty not explicitly mentioned in Article 8.

104. The arbitral jurisprudence cited above confirms that where there is no consent to arbitrate certain disputes under the basic Treaty, an MFN clause cannot be relied upon to create that consent unless the Contracting Parties clearly and explicitly agreed thereto.
105. Addressing what it contends is the Claimants' burden of establishing that the requirement of consent to arbitrate is express and has been met,<sup>114</sup> the Respondent submits that this "applies with particular force in the case of ICSID arbitrations", referring to the language of Article 25(1) of the ICSID Convention for "consent in writing" to submit a dispute to the Centre.<sup>115</sup> The Claimants cannot, in the Respondent's contention, rely on any "express", "certain" or "unequivocally clear" consent to ICSID arbitration in this case.<sup>116</sup>
106. Elaborating on this issue in its second round oral argument, the Respondent submitted that, given the enforcement provisions of the ICSID Convention, compliance with the written consent requirements in Article 25(1) of the Convention engages the responsibility of every Contracting State to the Convention – "a finding of jurisdiction here would impose requirements on states that are not represented here but are part of the multilateral universe established by the ICSID Convention."<sup>117</sup>
- (3) *As a matter of proper interpretation, the MFN clause does not permit the importation of a dispute resolution clause from another treaty***
107. The third string to the Respondent's *ratione voluntatis* bow is the contention that, as a matter of proper interpretation, Article 8 of the OIC Agreement (the MFN clause) does not permit the Claimants to import into the OIC Agreement a dispute resolution clause from another unrelated treaty.<sup>118</sup> Under this heading, the Respondent advances seven separate but related contentions resting, as appropriate, on the text and context of Article 8 in the

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<sup>114</sup> Preliminary Objections, paragraphs 63 *et seq.*

<sup>115</sup> Preliminary Objections, paragraph 65.

<sup>116</sup> Preliminary Objections, paragraph 66.

<sup>117</sup> Transcript, Day 2, p. 26, ll. 5-9.

<sup>118</sup> Preliminary Objections, paragraphs 71 *et seq.*

light of the object and purpose of the OIC Agreement, having regard as well to relevant “supplementary means of interpretation that confirms the ordinary meaning of the terms in Article 8.”<sup>119</sup> These contentions address the following issues:

- (a) the meaning and effect of the phrase “within the context of economic activity” in Article 8(1) of the OIC Agreement;<sup>120</sup>
- (b) the meaning and effect of the phrase “in the territories” in Article 8(1) of the OIC Agreement;<sup>121</sup>
- (c) the meaning and effect of the terms “treatment” in Article 8(1) of the OIC Agreement;<sup>122</sup>
- (d) the carve-outs in Article 8(2) of the OIC Agreement;<sup>123</sup>
- (e) the “historical context behind the meaning of the MFN standard when the OIC Agreement was negotiated in 1981”, which constitutes supplementary means of interpretation that confirms the ordinary meaning of Article 8;<sup>124</sup>
- (f) the object and purpose of the OIC Agreement;<sup>125</sup> and
- (g) the treaty practice of Contracting States to the OIC Agreement.<sup>126</sup>

108. Highly abbreviated, the Respondent’s contentions in respect of each of these issues are as follows:

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<sup>119</sup> Preliminary Objections, paragraph 94.

<sup>120</sup> Preliminary Objections, paragraphs 73 *et seq.*

<sup>121</sup> Preliminary Objections, paragraphs 79 *et seq.*

<sup>122</sup> Preliminary Objections, paragraphs 83 *et seq.*

<sup>123</sup> Preliminary Objections, paragraphs 91 *et seq.*

<sup>124</sup> Preliminary Objections, paragraphs 94 *et seq.*

<sup>125</sup> Preliminary Objections, paragraphs 98 *et seq.*

<sup>126</sup> Preliminary Objections, paragraphs 101 *et seq.*

- (a) Article 8 was not meant to cover dispute resolution.<sup>127</sup> The phrase “within the context of economic activity” cannot be read to mean “related to economic activity” or “related to investments”. Dispute resolution is not “*within* the context of economic activity” in which the Claimants have employed their investments. “Nothing in Article 8 requires that OIC investors be treated as favourably as investors from other countries in the context of dispute resolution; it only imposes that requirement in the context of the economic activity in which they invested.”<sup>128</sup>

Under the *ejusdem generis* rule, the application of an MFN clause is limited to provisions of the kind that were contemplated in the original agreement. Because the text and context of Article 8 demonstrate that the MFN clause was meant to apply only to substantive protections, Article 8 cannot operate with regard to dispute resolution.<sup>129</sup>

- (b) Article 8 only applies to treatment “in the territories” of the other Contracting Party, which excludes ICSID arbitration, which “takes place in a venue outside of Iraq or that is not linked to any territory.”<sup>130</sup>
- (c) The reference to “treatment” in Article 8 is qualified and limited by the requirement that the treatment must be “within the context of economic activity” and “in the territory”, and in any event (the Respondent invoking jurisprudence for the proposition) is insufficiently clear to allow investors to invoke dispute settlement provisions through an MFN clause.<sup>131</sup> Further, even if the term “treatment” in Article 8 includes dispute resolution, the Claimants “have failed to establish that the OIC Agreement provides ‘less favourable’ treatment than the Japan-Iraq BIT.”<sup>132</sup>

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<sup>127</sup> Preliminary Objections, paragraphs 73-77. Also, Transcript, Day 1, pp. 66-72.

<sup>128</sup> Preliminary Objections, paragraph 75.

<sup>129</sup> Preliminary Objections, paragraph 78.

<sup>130</sup> Preliminary Objections, paragraph 79. Also, Transcript, Day 1, pp. 72-73.

<sup>131</sup> Preliminary Objections, paragraphs 83-89. Also, Transcript, Day 1, pp. 73-74.

<sup>132</sup> Preliminary Objections, paragraph 90.

- (d) The exceptions in Article 8(2) relate to substantive investment rights, not to procedural matters. In such circumstances, as the International Law Commission noted in its 2015 Report of the *Study Group on the Most Favoured Nation Clause*, “[i]f only exceptions relating to substantive treatment are listed, that may imply that the parties did not believe MFN to be relevant to procedural or dispute settlement matters.”<sup>133</sup> If OIC Contracting Parties had intended to allow ICSID arbitration to be imported into the OIC Agreement “they could have and would have indicated as such” in the Agreement.<sup>134</sup>
- (e) At the point at which the OIC Agreement was being negotiated, “the application of MFN clauses had focused entirely on substantive rights, not [on] matters of arbitral procedure.”<sup>135</sup> Citing to arbitral jurisprudence, “in the absence of explicit terms to the contrary, MFN clauses referring to more favourable ‘treatment’ are meant to cover substantive protections only.”<sup>136</sup>
- (f) General statements in the OIC Agreement to the effect that it intends to encourage inter-Islamic States investment and cooperation, or develop a favourable climate for investments, “cannot justify an expansive reading of the MFN clause that would override that clause’s plain terms and the parties’ evident intentions.”<sup>137</sup>
- (g) The treaty practice of the Respondent, as well as of other OIC Contracting States, does not support the importation of an ICSID arbitration clause into the OIC Agreement. The OIC Agreement is a multilateral instrument the interpretation of which must be informed by the practice of other Contracting Parties. “[T]o the extent that any trends can be discerned, the Republic’s treaty practice and that of other OIC States shows that Claimant’s unprecedented use of Article 8 is inconsistent with the wider foreign policy goals of the Republic and the other OIC

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<sup>133</sup> Preliminary Objections, paragraph 91, citing to the 2015 Report of ILC Study Group on the Most Favoured Nations Clause, at paragraph 188 (“**ILC Study Group Report**”).

<sup>134</sup> Preliminary Objections, paragraph 93.

<sup>135</sup> Preliminary Objections, paragraph 95.

<sup>136</sup> Preliminary Objections, paragraph 97. Also, Transcript, Day 1, pp. 77-81.

<sup>137</sup> Preliminary Objections, paragraph 98. Also, Transcript, Day 1, pp. 81-82.

States, which have striven to limit their exposure to binding investor-State dispute resolution provisions.”<sup>138</sup>

109. Developing its written submissions on the “context” of Article 8, the Respondent, in its oral submissions, contends “the context of Article 8, and specifically the placement of Article 8 within the OIC Agreement, confirms that it is not intended to apply to dispute resolution.”<sup>139</sup>

**(4) *The Al-Warraq Award***

110. As noted in paragraph 65 above, the only published award or decision addressing the interpretation and application of the OIC Agreement, and its interaction with bilateral investment treaties by the operation of its MFN clause, to which the Parties were able to point the Tribunal is the *Al-Warraq* case. In that case, subject to the UNCITRAL Arbitration Rules 2010, the tribunal held, *inter alia*, as follows:

- It is implicit in the language of Articles 16 and 17 of the OIC Agreement, and consistent with the Agreement’s object and purpose, to conclude that Article 17 provides for investor-State arbitration,<sup>140</sup> and “effectively creates an investor-[S]tate arbitration clause.”<sup>141</sup>
- Article 17 of the OIC Agreement does not mandate or even require that conciliation precedes arbitration, even if the possibility of conciliation followed by arbitration is contemplated.<sup>142</sup>

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<sup>138</sup> Preliminary Objections, paragraph 103. Also, Transcript, Day 1, pp. 82-83.

<sup>139</sup> Transcript, Day 1, pp. 76-77.

<sup>140</sup> *Al-Warraq*, at paragraph 75.

<sup>141</sup> *Al-Warraq*, at paragraph 76.

<sup>142</sup> *Al-Warraq*, at paragraph 79.

- The fact that no claim by an investor under the OIC Agreement have ever been registered by the OIC Secretariat does not amount to evidence of subsequent practice by the Contracting Parties to the OIC Agreement.<sup>143</sup>
- There is nothing in Article 17 of the OIC Agreement that is “inconsistent with the modern practice to interpret [investor-State arbitration clauses] as constituting an open offer by the state parties to investors, that can be accepted and the arbitration initiated, without any separate agreement by the state party.” Further, “what is relevant is not the intention of any one or more Members of the OIC, but what the language used in the OIC [Agreement] means on an interpretation of the words used.”

The Tribunal considers that the language of Article 17 can and should be interpreted from a contemporary perspective and that it constitutes an open offer to arbitrate that can be accepted by an investor, such as the Claimant, without any separate express agreement to arbitrate by the Respondent. The Respondent, in effect, has provided its consent to arbitrate in advance in Article 17 itself.<sup>144</sup>

- The tribunal further noted “that an interpretation of a treaty that recognises the evolution of international law since the signature of the treaty is recognised in the rule of inter-temporal law, accords with the interpretation provisions of the VCLT, and has also been recognised [by] the International Court of Justice.”<sup>145</sup>
- Addressing the claimant’s contention, in *Al-Warraq*, that, even if Article 17 did not contain the required consent to arbitrate, this could be imported into the OIC Agreement by operation of the MFN clause in Article 8 of the Agreement,<sup>146</sup> the tribunal concluded that, since it had established that consent to arbitrate exists under

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<sup>143</sup> *Al-Warraq*, at paragraph 80.

<sup>144</sup> *Al-Warraq*, at paragraph 81.

<sup>145</sup> *Al-Warraq*, at paragraph 83.

<sup>146</sup> *Al-Warraq*, at paragraph 100.

Article 17, no decision was required on the issue of the application of the MFN clause.<sup>147</sup>

111. Given its potential importance, the Tribunal, in the hearing, invited the Parties to address the relevance and authority of the *Al-Warraq* analysis and decision for purposes of the present proceedings. The Respondent’s observations on the case were, in summary, that “*Al-Warraq* came to the wrong conclusion”,<sup>148</sup> it “made two threshold errors” and is wrong for all the reasons going to the interpretation of Articles 16 and 17 already addressed.<sup>149</sup> The Respondent observes, further, that the fact that *Al-Warraq* was an UNCITRAL, rather than an ICSID, case, is also material.<sup>150</sup> The threshold errors made by the *Al-Warraq* tribunal, in the Respondent’s contention, were, first, that it placed inappropriate emphasis on the perceived object and purpose of the OIC Agreement of developing a favourable climate for investment through investment promotion and protection.<sup>151</sup> Second, notwithstanding the tribunal’s conclusion that Article 17 was “ambiguously drafted”, it nonetheless concluded that it was implicit in the language of Articles 16 and 17 that Article 17 provides for investor-State arbitration.<sup>152</sup>

So the tribunal, by implying a right to arbitration by finding jurisdiction, just ignores what I think is the conceded standard to apply here, which is ‘clear and unequivocal’. So it seems to me that those are two threshold errors in approach.<sup>153</sup>

112. Beyond these asserted “threshold errors”, the Respondent also contends that *Al-Warraq* misread Article 16 and erred in its interpretation of both Articles 16 and 17, for the reasons given in the Respondent’s core submissions (as set out above).<sup>154</sup>
113. Addressing the *Al-Warraq* observation in favour of an evolutionary interpretation, the Respondent contends that “the terms [of the OIC Agreement] in question simply do not

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<sup>147</sup> *Al-Warraq*, at paragraph 103.

<sup>148</sup> Transcript, Day 2, p. 16, ll. 7-9.

<sup>149</sup> Transcript, Day 2, p. 19.

<sup>150</sup> Transcript, Day 2, p. 20.

<sup>151</sup> Transcript, Day 2, pp. 16-17.

<sup>152</sup> Transcript, Day 2, p. 17.

<sup>153</sup> Transcript, Day 2, p. 17, ll. 20-24.

<sup>154</sup> Transcript, Day 2, pp. 18-19.

indicate they should be interpreted in an evolutionary way. In particular, the specific form of the MFN clause in Article 8 is all but generic. In fact, in a context where MFN clauses fall into distinct categories, it is not the repeated MFN formulation where ‘treatment’ is then qualified or modified in respect of or in connection with ‘investment’.”<sup>155</sup> In the Respondent’s contention, the OIC Agreement MFN clause is markedly different from that in other treaties, such as, for example, was in issue in the *Le Chèque Déjeuner* case.<sup>156</sup>

**D. The Claimants’ Reply to the Respondent’s *ratione voluntatis* objection**

114. The Claimants’ headline case on jurisdiction *ratione voluntatis* is summarised in paragraphs 76-77 above. They essentially advance two parallel arguments, in the alternative, although, as noted above, the two streams of argument were only clearly distinguished in the course of the Claimants’ concluding oral submissions in response to enquiry from the Tribunal. The principal contention is that Article 17 of the OIC Agreement contains the Respondent’s consent to arbitrate and, rooted in this foundation, the Respondent’s consent to ICSID arbitration can be imported into the OIC Agreement, by operation of the MFN clause in Article 8(1) of that Agreement, from Article 17(4) of the Iraq-Japan BIT. The alternative contention is that there is no need to found the Respondent’s consent to arbitrate in Article 17 of the OIC Agreement. Rather, consent to arbitrate can be founded on Article 8(1) of the OIC Agreement (the MFN clause) together with the ICSID arbitration clause in Article 17(4) of the Iraq-Japan BIT alone. Described in these terms, the Claimants advance essentially the same headline arguments as were advanced by the claimant in *Al-Warraq*.
115. The central contention in both of these lines of argument is that the Claimants are entitled to incorporate into the OIC Agreement, by operation of its MFN clause, the ICSID arbitration clause in the Iraq-Japan BIT.
116. The Claimants’ submissions, unsurprisingly, go beyond this headline summary. As noted in paragraphs 72-73 above, the Claimants’ submissions on jurisdiction are heavily

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<sup>155</sup> Transcript, Day 2, p. 48, l. 20 - p. 49, l. 2.

<sup>156</sup> Transcript, Day 2, p. 49.

informed by the detailed Opinion and Supplementary Opinion of Dr Mahnoush H. Arsanjani, the first annexed to the Claimants' Memorial, the second annexed to the Claimants' Reply. The views expressed in these expert opinions are adopted and advanced in the main body of the Claimants' written pleadings. As noted above, Dr Arsanjani's Supplementary Opinion took issue directly with, and addressed, the contentions advanced in the Respondent's Preliminary Objections.<sup>157</sup>

**(1) Article 17 of the OIC Agreement**

117. As a preliminary matter, the Claimants contend that “‘burden of proof’ has no relevance to the jurisdictional objection lodged by Respondent in this case, and the ‘well-established principle’ of ‘express and certain’ consent does not exist.”<sup>158</sup> On burden of proof, the Claimants contend that this operates in respect of allegations of fact and that, as there are no factual circumstances to be established at this stage of the proceedings, “the notion of burden of proof does not impinge on the present legal issue, which is to be decided on the basis of the relevant provisions of the OIC Agreement and the Iraq-Japan BIT.”<sup>159</sup> Citing the International Court of Justice in *Fisheries Jurisdiction (Spain v. Canada)*, the Claimants aver that “there is no burden of proof to be discharged in the matter of jurisdiction.”<sup>160</sup>
118. On the issue of the standard of proof, the Claimants contend that the Respondent is mistaken in its submission that “consent to ICSID arbitration must be ‘express’, ‘certain’, or ‘unequivocally clear’.”<sup>161</sup> Contrary to the Respondent's contention, citing to both the interpretative provisions of the VCLT and to arbitral jurisprudence, the Claimants contend that “state consent through an MFN clause requires an interpretation of that clause, not an

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<sup>157</sup> The summary of the Claimants' submissions that follows refers simply to “the Claimants”, rather than differentiating between the views expressed by Dr Arsanjani and the submissions advanced by the Claimants. Where the Claimants pleadings adopt and reference Dr Arsanjani's opinions, citations are to the Claimants' pleadings, which cross-refer to Dr Arsanjani's opinions, rather than to Dr Arsanjani's opinions directly.

<sup>158</sup> Reply, paragraph 34.

<sup>159</sup> Reply, paragraph 36.

<sup>160</sup> *Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment*, I. C.J. Reports 1998, p. 432, at paragraph 38. Transcript, Day 2, p. 87, ll. 16-17.

<sup>161</sup> Reply, paragraph 39.

application of an invented burden of persuasion to be discharged by ‘clear and convincing’ evidence.”<sup>162</sup>

119. On Article 17 of the OIC Agreement, the Claimants’ principal contention is that the Respondent, “has consented, in Article 17 of the OIC Investment Agreement, to arbitrate its investment disputes. Article 17(2) of that Agreement provides rights and privileges to a disputing party, including a disputing investor, to resort to a basic, non-specific, unexceptional arbitration procedure.”<sup>163</sup> Addressing the Respondent’s reliance on the OIC Secretary-General’s failure to act as an appointing authority, the Claimants contend that this “must be firmly rejected”:

The argument that the OIC Secretary General’s arbitrary refusal to perform its duties could have any relevance to the interpretation of Articles 16 and 17 has rightly been dismissed by the *Al-Warraaq* tribunal, precisely because such conduct “does not amount to evidence of ‘subsequent practice’ by the contracting parties to the OIC Agreement as to the need for State party consent to investor-State arbitration.”<sup>164</sup>

120. On the interpretation of Article 17 of the OIC Agreement, the Claimants contend that this cannot be read in isolation from Article 16 of the Agreement, and that it is not limited to State-to-State arbitration.<sup>165</sup> “Contrary to Respondent’s position, the ordinary meaning of the terms used in Article 16 and 17, read in their context, demonstrates that the OIC Agreement provides for investor-State arbitration, not for inter-State arbitration”.<sup>166</sup> The Claimants advance five propositions in support of this contention:<sup>167</sup>

- (a) The use of the terms “party” or “parties”, rather than “contracting parties”, in Articles 16 and 17, in contrast to the use of the latter term elsewhere in the OIC Agreement, points to an absence of intention by the Contracting Parties to the OIC Agreement to limit the application of Articles 16 and 17 to the Contracting Parties only.

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<sup>162</sup> Reply, paragraph 46.

<sup>163</sup> Memorial, paragraph 234. Also, Reply, paragraph 48.

<sup>164</sup> Reply, paragraph 49.

<sup>165</sup> Reply, paragraph 52 *et seq.*

<sup>166</sup> Reply, paragraph 58.

<sup>167</sup> Reply, paragraphs 58.1-58.5.

- (b) Article 17(2)(d) of the OIC Agreement distinguishes between the OIC Agreement Contracting Parties and the parties to the arbitration, and specifically refers to investors as parties to the arbitration.
- (c) Article 17(2)(d) of the OIC Agreement “contemplates the possibility that an award be rendered and enforced against an investor.”
- (d) The Respondent’s contention that Article 17(2)(d) refers to diplomatic espousal circumstances is “far-fetched”, the OIC Agreement making no mention of diplomatic protection.
- (e) Article 17(2)(d) of the OIC Agreement closely tracks Article 54(1) of the ICSID Convention on the enforcement of an investor-State award.

121. The Claimants take issue with the Respondent’s interpretation of Article 17 of the OIC Agreement for the following additional reasons:

- There is no basis to exclude investor-State arbitration from the scope of Article 17 of the OIC Agreement simply because Article 17 is structured differently from the provisions to this effect in other treaties. “[T]he forum clause in the OIC Agreement must be interpreted in accordance with its own terms and not by making inappropriate comparisons with other agreements.”<sup>168</sup>
- The Respondent’s reading of the OIC Agreement dispute resolution provisions relies on irrelevant authorities and a flawed approach to treaty interpretation.

[T]he OIC Agreement contemplates no other arbitral process outside of Article 17(2): Article 17 is the arbitration provision under the Agreement. Moreover, given that the term “Arbitration Tribunal” in Article 17(2) is not

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<sup>168</sup> Reply, paragraph 61.

defined, there is no basis for the proposition that arbitration as referred to in Article 16 and Article 17 points to distinct categories of processes.<sup>169</sup>

- Conciliation is not a prerequisite to arbitration under Article 17 of the OIC Agreement:
  - the disjunctive conjunction “or” in the Article 17(1) chapeau, in all three official languages, makes it clear that arbitration and conciliation are independent alternatives;<sup>170</sup>
  - Article 17(2)(d) provides that “arbitration may be commenced by simply filing a request for arbitration, no separate arbitration agreement being required”;<sup>171</sup>
  - a textual interpretation of Article 17(2)(a) of the OIC Agreement supports the conclusion that conciliation is not a pre-requisite for arbitration;<sup>172</sup>
  - the Respondent’s reliance on the conditional terms “if” and “then” in Article 17(2)(a) to advance the proposition that conciliation is a necessary pre-requisite to arbitration is not assisted by a reading of the equally authentic French version of the OIC Agreement.<sup>173</sup> In support of their contention, the Claimants rely on *Al-Warraq*, which concluded that, “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 investor-[S]tate arbitration.”<sup>174</sup>

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<sup>169</sup> Reply, paragraph 68.

<sup>170</sup> Reply, paragraph 73.

<sup>171</sup> Reply, paragraph 75.

<sup>172</sup> Reply, paragraphs 80-84.

<sup>173</sup> Reply, paragraphs 85-86.

<sup>174</sup> Reply, paragraph 87. Also, Transcript, Day 1, pp. 122-125.

- The Respondent’s invocation of its wider investment treaty practice in respect of dispute settlement clauses, which the Respondent contends requires disputing parties to attempt to amicably settle the dispute before resorting to arbitration, is both flawed and, in any event, “should be disregarded in the present case because compliance with it would serve no useful purpose, and would be both futile and unduly burdensome.”<sup>175</sup>

122. Summarising, in the hearing, their position on Article 17 of the OIC Agreement, the Claimants contended that the Article provides for investor-State arbitration for four main reasons: (a) there is no express limitation in the Article to State-to-State arbitration; (b) it is inconsistent with the spirit of the OIC Agreement, and its focus on the promotion of regional investment, that it would have provided only for State-to-State arbitration; (c) a good faith reading of Article 17(2)(d) of the OIC Agreement is that it contemplates the enforcement of investor-State awards against an investor; and (d) the fact of a fork-in-the-road provision affirms that investor-State arbitration was contemplated.<sup>176</sup>

**(2) *The Respondent’s consent to ICSID arbitration can be imported from the Iraq-Japan BIT by operation of the MFN clause in the OIC Agreement***

123. On either the Claimants’ principal or their alternative contention, an essential component on which the Claimants need to succeed is that the Respondent’s consent to ICSID arbitration can be incorporated into the OIC Agreement from Article 17(4)(a) of the Iraq-Japan BIT by operation of the MFN clause (Article 8(1)) in the OIC Agreement. On the Claimants’ principal contention, the Respondent’s consent to arbitration in general is derived from Article 17 of the OIC Agreement. This general consent to arbitration is then supplemented by its consent to ICSID arbitration derived from Article 17(4)(a) of the Iraq-Japan BIT by operation of the OIC Agreement’s MFN clause. On the Claimants’ alternative contention, it matters not whether a general consent to arbitration can be derived from Article 17 of the OIC Agreement. Both a general consent to arbitration and a specific

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<sup>175</sup> Reply, paragraphs 88-89.

<sup>176</sup> Transcript, Day 1, pp. 118-120.

consent to ICSID arbitration can be derived from Article 17(4)(a) of the Iraq-Japan BIT by operation of the MFN clause in the OIC Agreement.

124. Addressing the issue of the scope and effect of the MFN clause in the OIC Agreement, the Claimants' opening proposition is that, "[a]s a matter of principle, MFN clauses are capable of applying to dispute resolution provisions".<sup>177</sup> Looking beyond this, having regard to the terms of Article 8 of the OIC Agreement (the MFN clause), properly construed, is that it "applies to the option of ICSID arbitration set out in Article 17(4) of the Japan-Iraq BIT."<sup>178</sup>
125. Developing the contention that Article 17 of the OIC Agreement contains a general consent to arbitration which is supplemented by the specific consent to arbitration derived from the Iraq-Japan BIT, the Claimants submit as follows:

Since the mechanism of *ad hoc* arbitration under OIC Article 17 has proved to be dysfunctional, due to the OIC Secretary-General's arbitrary refusal to act as appointing authority, Claimants are entitled, by virtue of the MFN clause in Article 8 of the OIC Agreement, to rely on the option for ICSID arbitration contained in Article 17(4) of the Iraq-Japan BIT. This is consistent with Iraq's clear acceptance of ICSID arbitration in having ratified the ICSID Convention and entered into other investment treaties providing for ICSID arbitration. This is equally consistent with the OIC Members States' intent "to provide and develop a favourable climate for investments" among Islamic countries.<sup>179</sup>

126. The point was made more succinctly in the hearing:

Iraq's consent to ICSID arbitration in the Japan-Iraq BIT constitutes written consent under ICSID Article 25(1) and may be incorporated into the OIC [Agreement] or read into the OIC [Agreement] through Article 8. There is no particular form required for written consent under ICSID Article 25(1), as many decisions have commented on. Form can take any sort of written consent.<sup>180</sup>

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<sup>177</sup> Reply, paragraph 90.

<sup>178</sup> Reply, paragraph 90.

<sup>179</sup> Reply, paragraph 91.

<sup>180</sup> Transcript, Day 1, p. 142, ll. 5-11; also pp. 174-175.

127. Citing to arbitral jurisprudence and commentary,<sup>181</sup> in particular *Le Chèque Déjeuner* and *Garanti Koza*, the Claimants contend that consent to arbitration can be established by one treaty being read into another by virtue of an MFN clause.<sup>182</sup> On this basis,

Iraq's offer of arbitration "as made," which Claimants accepted, is formed by Articles 16 and 17 of the OIC Agreement, supplemented by Article 17(4) of the Japan-Iraq BIT, which is applicable through the MFN clause. ...

Applying the ICSID arbitration option in the Iraq-Japan BIT does not somehow defy the architecture of investment treaties. Nor does it impermissibly expand the scope of Iraq's consent to ICSID arbitration of investor-state disputes with investors from OIC Member States. ... Article 8 [of the OIC Agreement] invites an investor who is a national of an OIC member state to avail itself of "*treatment not less favourable than the treatment accorded to investors belonging to another State not party to this Agreement*" – i.e., non-OIC Member States.<sup>183</sup>

128. Still on their principal contention, the Claimants explain that they

are not seeking to replace the entire forum clause in the OIC Agreement. Nor are Claimants invoking the MFN clause to broaden the scope of the forum clause to encompass claims that would otherwise fall outside the Tribunal's jurisdiction, or to avoid mandatory pre-arbitration requirements – given that there are none under the OIC Agreement. Claimants are invoking the MFN clause simply to substitute an efficient procedure for a defective one and an effective appointing authority for a dysfunctional one.<sup>184</sup>

129. Developing their argument on the alleged dysfunctional OIC Agreement process, the Claimants, in the hearing, contended that "the Secretary General of the OIC has been unresponsive to a number of requests from investors to either act as an appointing authority or to even take a position, when asked, regarding the intent of the OIC contracting parties or even the meaning of certain provisions, when asked."<sup>185</sup> The Claimants averred further:

It does seem to us, therefore, to lead to a dysfunction in the process where the Secretary General would be involved: it would lead to a delay. And parties who have

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<sup>181</sup> Reply, paragraphs 95-112.

<sup>182</sup> Reply, paragraphs 95-96.

<sup>183</sup> Reply, paragraphs 98-99.

<sup>184</sup> Reply, paragraph 114.

<sup>185</sup> Transcript, Day 1, p. 106, ll. 7-12.

chosen to go the route of the Secretary General have been delayed by sometimes two or three years in their attempt to invoke Article 17.

Accordingly, we do think it is unreasonable for the Claimants to have to go through such a cumbersome process in order to -- and the Secretary may or may not respond at some point in time.<sup>186</sup>

130. The Claimants further contend that the MFN clause in the OIC Agreement is not limited or constrained in scope, as the Respondent contends, but that, properly construed, by reference to all of its authentic language versions, it encompasses both procedural and substantive rights, including the right to arbitration.<sup>187</sup> Addressing the Respondent's arguments on the construction of Article 8 of the OIC Agreement, the Claimants make, *inter alia*, the following points (described here in summary form):

- (a) The right to arbitration is both a right and a privilege, within the meaning of these terms in Article 8(1) of the OIC Agreement, and the clause therefore applies to arbitration.<sup>188</sup>
- (b) The phrase "within the context of economic activity", in Article 8(1), is simply descriptive of the general context in which an investor is entitled to invoke the more favourable treatment in contemplation. There is nothing in the phrase to suggest that the MFN clause should not apply to the resolution of investment disputes, such as in the present case. This reading is supported by other language in Article 8(1), not addressed by the Respondent, including the phrase "in respect of rights and privileges accorded to those investors", which unequivocally includes dispute settlement.<sup>189</sup>
- (c) Arbitral jurisprudence affirms that the term "treatment", in Article 8(1), is of itself sufficient to include dispute settlement,<sup>190</sup> and "there is no meaningful, principled

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<sup>186</sup> Transcript, Day 1, p.106, ll. 13-22.

<sup>187</sup> Reply, paragraphs 118-132.

<sup>188</sup> Reply, paragraph 125.

<sup>189</sup> Reply, paragraphs 127-133. Also, Transcript, Day 1, pp. 145-148.

<sup>190</sup> Reply, paragraphs 133-136.

basis to distinguish these cases [including, amongst others, *RosInvest* and *Le Chèque Déjeuner*] from the present case, given that they all involved the operation of an MFN clause with no specific reference to dispute resolution.”<sup>191</sup>

- (d) There is no basis to distinguish ICSID arbitration from UNCITRAL arbitration by reference to the form of consent that is required as “[b]oth the ICSID Convention and the UNCITRAL Arbitration Rules require written consent.”<sup>192</sup> As regards the UNCITRAL Arbitration Rules, the Claimants cite to Article 1(1) of the 1976 Arbitration Rules in support of the proposition.<sup>193</sup> The Tribunal notes, however, in this regard, that the reference to agreement in writing in the 1976 UNCITRAL Arbitration Rules is omitted from the 2010 revision of these Rules.
- (e) Addressing the Respondent’s contention that the Claimants have failed to establish that the OIC Agreement provides less favourable treatment to investors than the Iraq-Japan BIT, the Claimants contend:

It cannot seriously be denied that ICSID arbitration is a better option than *ad hoc* arbitration under the OIC Agreement, if only because ICSID arbitration is administered by the ICSID Secretariat, which is an experienced, professional and reliable appointing authority, while the administration of the *ad hoc* arbitration under Article 17 [of the OIC Agreement] is left in the hands of the OIC Secretary General, which refuses to perform its duties as an appointing authority under the OIC Agreement. Moreover, as the *Garanti Koza* tribunal recognised, having a choice is more favourable than not having any other options.<sup>194</sup>

- (f) The phrase “in the territories” in the MFN clause does not impose a territorial limitation on treatment. Rather, it shows that “the *investment* must be made or

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<sup>191</sup> Reply, paragraph 135. Also, paragraphs 137-140. Also, Transcript, Day 1, pp. 149-155. Addressing this jurisprudence, the Claimants stated as follows: “... the position for us is not *Chèque Déjeuner*, it’s not A11Y territory, it’s not *Garanti Koza*. The position is that there’s no restriction in the OIC on claims that may be submitted to arbitration, and [Claimants’ counsel] has shown there’s an unconditional consent to arbitration of all disputes.” Transcript, Day 1, p. 180, ll. 17-22.

<sup>192</sup> Reply, paragraph 141.

<sup>193</sup> Reply, fn. 174.

<sup>194</sup> Reply, paragraph 143.

employed within the territory of the host [S]tate. However, the MFN *treatment* is accorded within the context of a claimant's economic activity in which the investment was made, regardless of any territorial limitation."<sup>195</sup>

- (g) Contrary to the Respondent's submissions, the exceptions to MFN set out in Article 8(2) make no distinction between substantive and procedural issues and, in any event, does not expressly exclude dispute settlement.<sup>196</sup>
- (h) The placement of the MFN clause, in Chapter Two of the OIC Agreement, which contains broad provisions regarding investment promotion and protection, supports the conclusion that it applies to dispute settlement. The Respondent's *ejusdem generis* argument is simply wrong.<sup>197</sup>
- (i) The Respondent's argument that the Claimants are cherry-picking parts of the Iraq-Japan BIT while disregarding others misses the point. The Claimants' case has been brought in a timely manner. Further, the terms of Article 17(1) of the Iraq-Japan BIT do not take the ICSID consent to arbitration provisions beyond the reach of the MFN clause.

Claimants are entitled to the more favourable treatment under the Japan-Iraq BIT not because they qualify as Japanese investors or because their dispute has arisen under the Japan-Iraq BIT, but because they are protected investors under the OIC Agreement and the MFN clause in the OIC Agreement entitles them to treatment no less favourable than that accorded by Iraq to Japanese investors.<sup>198</sup>

131. Addressing the Respondent's contention that State practice, both by the Respondent and by other OIC Contracting Parties, does not support the importation of an ICSID arbitration clause into the OIC Agreement, the Claimants contend, *inter alia*:

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<sup>195</sup> Reply, paragraph 151. Also, Transcript, Day 1, pp. 165-166.

<sup>196</sup> Reply, paragraphs 156-164.

<sup>197</sup> Reply, paragraphs 165-173.

<sup>198</sup> Reply, paragraph 176.

- “Iraq’s subsequent practice demonstrates its intent to consent to ICSID arbitration with foreign investors, as evidenced by the terms of its bilateral treaties with other states as well as its domestic legislation.”<sup>199</sup> In support of this proposition, the Claimants point to six bilateral investment treaties concluded by Iraq since 2010 that include ICSID dispute settlement provisions.<sup>200</sup> They note, further, that Iraq ratified the OIC Agreement on 25 June 2015 without reservations and went on to sign and ratify the ICSID Convention shortly thereafter. Iraq also signalled its intention to accede to the New York Convention.<sup>201</sup> Additionally, 56 of the 57 OIC Member States have concluded investment treaties that contain ICSID dispute settlement clauses.<sup>202</sup>
- Iraq’s investment treaty practice does not support a conclusion that it is intent on excluding ICSID arbitration or that dispute settlement is excluded from the operation of MFN clauses. On the contrary, in the case of only two of the six bilateral investment treaties concluded by Iraq does the MFN clause exclude dispute settlement.<sup>203</sup>

132. Responding to an enquiry from the Tribunal during the hearing about the relevance of bilateral investment treaties for the construction of a multilateral treaty, i.e., the OIC Agreement, the Claimants contend that the Respondent’s practice in concluding its various bilateral investment treaties shows what it would have had in contemplation when ratifying the OIC Agreement.<sup>204</sup>

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<sup>199</sup> Reply, paragraph 180.

<sup>200</sup> Reply, paragraphs 180-194. Transcript, Day 1, pp. 103-104.

<sup>201</sup> Reply, paragraphs 199-201.

<sup>202</sup> Reply, paragraphs 202-207. Transcript, Day 1, pp. 97-105 and Claimants Day 1 Hearing Slides, pp. 4, 8-12. Post-hearing agreed *List of OIC Member States ISDS and ICSID Commitments*.

<sup>203</sup> Reply, paragraphs 195-198.

<sup>204</sup> Transcript, Day 1, pp. 136-137.

133. Addressing the effect and consequence, if any, for their case of Article 18 of the OIC Agreement,<sup>205</sup> read together with Article 8(2)(a) of the OIC Agreement,<sup>206</sup> the Claimants acknowledged that these provisions “create a sort of parallel channel of treatment when we are within the OIC universe and then we are outside of the OIC universe.”<sup>207</sup> This was the subject of further enquiry from the Tribunal, and response by the Claimants, during the hearing as follows:

**[Tribunal:]** The Jordanian investor in Iraq cannot rely on the Jordan-Iraq BIT under the OIC MFN clause.

**[Claimants’ counsel:]** ... Yes, that’s correct.

**[Tribunal:]** But the Japanese investor in Iraq could rely on the Jordan-Iraq BIT, if it gives a higher standard, by virtue of the MFN clause in the Iraq-Japan BIT. So you’re creating a variable geometry between what the Japanese investor can rely upon vis-à-vis Iraq and what the Jordanian investor can rely on vis-à-vis Iraq.

**[Claimants’ counsel:]** Yes, I see your point. Yes.

**[Tribunal:]** Isn’t there a kind of oddity? Isn’t this almost counterintuitive to what an MFN clause, you say, is supposed to do?

**[Claimants’ counsel:]** I don’t think so, in relation to what these -- there are two tracks. There’s clearly the Article 18 track and the Article 8(2)(a) track, on one side, in which the OIC drafters want to create as much economic activity internally as they can and give that encouragement. But I take your point that it does create a variable situation. But the key point for the OIC investor is still the opportunity to avail itself of treatment not less favourable in the non-OIC treaties, to the extent that that’s deemed to be advantageous.

So that variable geometry, still, for example, -- taking this specific instance, whether it matches up in terms of what the OIC drafters had in mind for 18 and 8(2)(a) -- it still provides the OIC investor with that non-OIC/OIC advantage; even if, when you look

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<sup>205</sup> Article 18: “Two or more contracting parties may enter into an agreement between them that may provide a treatment which is more preferential than that stipulated in this Agreement.”

<sup>206</sup> Article 8(2)(a): “Provisions of paragraph 1 above [the MFN clause] 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.”

<sup>207</sup> Transcript, Day 1, p. 139, ll. 11-14.

at it from the way that you've looked at it, sir, it is depriving potentially -- it's not depriving; it is putting another non-OIC investor in arguably a favourable position.<sup>208</sup>

134. Responding to a question from the Tribunal as to why the Claimants had not sought to proceed under the Iraq-Jordan BIT, given its apparently facilitating terms and that two of the claimants were incorporated in or organised under the laws of Jordan, the Claimants stated that the Iraq-Jordan BIT had only been ratified in December 2016, less than a month before they sent out in their Notice of Arbitration. "It would not have made any sense for them to delay any further any consideration of another treaty that had entered into force in Jordan essentially 20 days before their notice of arbitration was finalised and sent to the state."<sup>209</sup> The Claimants also observed that, proceedings under the Iraq-Jordan BIT could not have availed two of the claimants, which were incorporated under the laws of the UAE.<sup>210</sup>

**(3) *The Claimants' alternative contention***

135. The Claimants' alternative contention is that, were the Tribunal to conclude that Article 17 of the OIC Agreement does not contain a general consent to investor-State arbitration on the part of the Respondent, such consent can be founded independently on Article 8(1) of the OIC Agreement (the MFN clause) together with the ICSID arbitration clause in Article 17(4) of the Iraq-Japan BIT.
136. As noted in paragraph 77 above, this alternative contention was only identified as such with clarity at the close of the Claimants' oral submissions in response to enquiry from the Tribunal. The point was not developed in argument beyond the stated proposition, although it follows logically from the Claimants' contention about the scope of the MFN clause. This notwithstanding, aspects of the Claimants principal contention appear to be at odds with the alternative proposition. By way of example, in the course of their first round oral submissions, the Claimants stated as follows:

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<sup>208</sup> Transcript, Day 1, p. 162, l. 24 - p. 164, l. 6.

<sup>209</sup> Transcript, Day 2, p. 69, l. 25 - p. 70, l. 4.

<sup>210</sup> Transcript, Day 2, p. 70.

Importantly, an MFN clause cannot change that supplementary condition, which is the condition *ratione voluntatis* in the basic treaty. So the MFN clause can't change the fundamental conditions of access to arbitration in the basic treaty.

Thus, the Claimant must qualify to go to arbitration under the terms of the basic treaty before the Claimant can seek to avail itself of an arbitration provision in the third-party treaty. And the Claimant can only apply that third-party provision if the intention to incorporate is expressly stated or clearly ascertained in the MFN clause.

So the test is: an MFN clause can't alter the requirements *ratione personae*, *ratione materiae*, *ratione temporis* and *ratione voluntatis* under the basic treaty. That means for *voluntatis* that the Claimant must be able to go to arbitration under the terms of the basic treaty.<sup>211</sup>

137. On its face, this submission appears to be at odds with the Claimants' alternative contention as it appears to condition the operation of the MFN clause, and the incorporation into the OIC Agreement of the ICSID dispute settlement provision in Article 17(4)(a) of the Iraq-Japan BIT, on a finding that Article 17 of the OIC Agreement does indeed contain a general consent to investor-State arbitration on the part of the Respondent.

#### (4) *The Al-Warraq Award*

138. Unsurprisingly, the Claimants are content to adopt the outcome in *Al-Warraq* award, although they "take a more nuanced view regarding the award's wording [as regards] its reference to Article 17 being 'ambiguous'. We don't think that Article 17 is particularly 'ambiguous'."<sup>212</sup>
139. The Claimants also read into the silence of the OIC Contacting States or Secretary-General following the *Al-Warraq* award a measure of acquiescence in the result, viz: "without any official reaction, for example, from the contracting states, that the findings in *Al-Warraq* that Article 17 of the OIC Agreement provides for investor-state arbitration, if that was something that was shockingly in contradiction with the intent of the contracting states, or

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<sup>211</sup> Transcript, Day 1, p. 170, l. 13 - p. 171, l. 5.

<sup>212</sup> Transcript, Day 2, p. 78, ll. 22-25.

any of the contracting states, one would have expected that there would be some form of official expression of disagreement with that.”<sup>213</sup>

## **V. THE TRIBUNAL’S ANALYSIS AND CONCLUSIONS**

### **A. Introduction**

140. The analysis and conclusions in Part V of the Award are those of Presiding Arbitrator Bethlehem and Arbitrator Stern, save insofar as Arbitrator Peter expressly indicates his agreement. The dissenting opinion of Arbitrator Peter follows in Part VI of the Award from paragraph 226 below. The majority has had careful regard to the dissenting opinion of Arbitrator Peter but remains of the view expressed in this Part.
141. Having set out the Parties’ principal contentions, the Tribunal turns to its analysis and conclusions. It warrants emphasis that, in what follows, the Tribunal addresses the issues that it considers essential to its decision in this phase of the proceedings. The Tribunal is not drawn to reaching conclusions on issues which, even if advanced by the Parties, are not necessary for purposes of its decision. That an issue is not addressed, or is not the subject of a dispositive finding by the Tribunal, does not mean that it has not been weighed carefully by the Tribunal for purposes of arriving at its decision in this case.
142. The Parties have advanced a wide array of arguments in support of their respective positions. At the request of the Tribunal at the close of the oral proceedings, they each submitted a proposed “decision tree” to guide the Tribunal’s analysis. That of the Claimants comprises two enquiry steps: first, does the OIC Agreement provide for investor-State arbitration; second, reflecting the Claimants’ alternative contentions, whatever the answer to the first question, does the MFN clause in the OIC Agreement permit recourse to ICSID arbitration derived from consent to this effect in another treaty?
143. The Respondent’s decision tree is more complex. It, too, begins with the question of whether Article 17 of the OIC Agreement provides for investor-State arbitration, but it

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<sup>213</sup> Transcript, Day 1, p. 100, ll. 2-10.

moves from there through five further stages that reflect the Respondent's multi-layered argument outlined above: (a) does the OIC Agreement require a separate agreement to conciliate? (b) can Article 17 of the OIC Agreement be interpreted to provide written consent to ICSID arbitration for purposes of Article 25(1) of the ICSID Convention? (c) if Article 17 cannot be so interpreted, can jurisdiction *ratione voluntatis* be derived from the MFN clause? (d) if yes, can the MFN clause be interpreted to allow the Claimants to import dispute resolution provisions from another treaty? (e) if so, can the MFN clause be interpreted to provide the written consent required by Article 25(1) of the ICSID Convention? At each stage, the response to the questions posed leads to alternative on- or off-ramps to the conclusion that the Tribunal has, or does not have, jurisdiction.

144. Alongside these decision trees are a host of other propositions that the Parties have advanced in support of their interpretative contentions, such as the conclusions that may or may not be drawn from the conduct of the OIC Secretariat in response to requests to take steps to constitute an arbitral tribunal, and whether the dispute settlement provisions of the OIC Agreement are to be regarded as dysfunctional.
145. The Tribunal is mindful of all of these questions and that, through them, it is in effect being invited by the Parties to reach a comprehensive assessment of the interpretation and application of the dispute settlement provisions of the OIC Agreement.
146. As noted in paragraph 80 above, however, *the* critical question that requires decision by the Tribunal in these proceedings is 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. If the Claimants do not succeed on this point, their jurisdictional case fails, notwithstanding any other points on which they may otherwise prevail along the way. The operation of the MFN clause to incorporate into the OIC Agreement from another treaty “consent in writing to submit [the dispute in question] to the Centre”, as required by Article 25(1) of the ICSID Convention, is *the* essential bridge that the Claimants must cross if they are to succeed. This is the pivot of the case advanced by both the Claimants and the Respondent. While there are other obstacles advanced by the Respondent that, if upheld, would dispose of the case – such as the contention that the OIC Agreement does not provide

for investor-State arbitration at all, or that prior resort to conciliation is a precondition to arbitration – the scope of the MFN clause as regards the incorporation of ICSID consent to arbitration is the unavoidable question in these proceedings.

147. Seen in this light, the Tribunal considers that its responsibility is most appropriately and efficiently acquitted by focusing on this issue. While, as follows below, the Tribunal considers that it is useful, for purposes of informing its overall assessment, for it to make a number of observations on some of the anterior questions raised by the Parties, it forbears from reaching definitive conclusions on issues that are not ultimately essential to its decision on the question of the incorporation into the OIC Agreement, via its MFN clause, of consent to ICSID arbitration found in another treaty.
148. On this key question, the Tribunal has concluded that Article 8 of the OIC Agreement cannot be relied upon by the Claimants to incorporate into the OIC Agreement the consent in writing to submit the present dispute to ICSID arbitration derived from the Iraq-Japan BIT. Given this, the Respondent's *ratione voluntatis* jurisdictional objection must be upheld and the Claimants' case fails for want of jurisdiction. The reasons for this conclusion are set out below.
149. Having regard to the Parties' wider dispute – on the merits; on other potential jurisdictional impediments; and potentially on the availability of other dispute settlement modalities, whether rooted in domestic law or treaty, including potential fork-in-the-road considerations – the Tribunal emphasises that its conclusion on recourse to ICSID arbitration under the framework of the OIC Agreement is without prejudice to the availability and sustainability of any other point. Such points are not engaged by these proceedings and nothing in this Award can be taken as expressing any conclusion by the Tribunal on such issues.
150. The Tribunal notes as well that, for purposes of this Award, it has proceeded on the basis of an assumption that the Claimants are or would be able to satisfy other threshold jurisdictional requirements in the OIC Agreement, such as the definition of “investment” and “investor” in Article 1 of the OIC Agreement, which are relevant to the construction and application of the substantive provisions of the OIC Agreement on which the Claimants

rely. For the avoidance of doubt, however, the Tribunal considers it axiomatic that a predicate condition for invoking, *inter alia*, the dispute settlement and MFN provisions in an investment treaty is that a (putative) claimant must satisfy the *ratione personae* and *ratione materiae* scope of the treaty in question. In other words, a claimant cannot bring itself within the personal and material scope of an investment treaty by purporting to import the definitions of “investment” and “investor” from another treaty by operation of an MFN provision in that treaty. The assumption, for purposes of this Award, that the Claimants are or would be able to satisfy the personal and material jurisdictional requirements of the OIC Agreement is simply for the reason that the only issue before the Tribunal in this phase of the proceedings is that of the Respondent’s consent to ICSID arbitration.

## **B. Analysis**

151. As an initial matter, the Tribunal observes that nothing in its analysis turns on any question of burden or standard of proof. These evidential principles address the responsibility of parties to establish the evidential case on which they rely, and typically shift between claimant and respondent to adduce a sufficiency of evidence to establish facts germane to their case. These principles do not operate in respect of contentions of international law addressed to an international tribunal which, as in this case, has a responsibility for determining the content and application of international law. Still less do they operate in respect of legal questions going to the jurisdiction of a tribunal, which a tribunal is required to address *proprio motu*, even if not raised by a party. In any event, both sides in these proceedings have ably and exhaustively canvassed the issues. Nothing in this Award, accordingly, turns on a failure by either Party to meet any sufficiency of proof threshold as may exist.

### **(1) The OIC Agreement**

152. Turning to the OIC Agreement, it is a trite but nonetheless important observation that the Agreement is a multilateral treaty to which 29 of the 57 OIC Member States are party, with a further 14 OIC Member States being signatories. The multilateral character of the OIC Agreement is important in the circumstances of this case as it is relevant to an assessment

of the Claimants' contention that the terms of the Agreement, opposable to each of its 29 Contracting Parties, can and should properly be read in a manner that would enlarge the jurisdictional reach of its dispute settlement provisions, having regard to its express terms, by reference to a bilateral treaty concluded between one of its Contracting Parties only (Iraq) and a non-party (Japan). Although both Parties pray in aid of their respective contentions the practice of OIC Agreement Contracting Parties generally, the Respondent is the only OIC Agreement Contracting Party that is before the Tribunal in these proceedings.

153. In these circumstances, it is incumbent on the Tribunal to exercise considerable caution when it comes to a (proposed) interpretation of the Agreement that neither follows clearly and necessarily from the plain and ordinary meaning of its terms nor derives from the clear and dispositive practice of all of its Contracting Parties, resting rather on the contested practice of one of its Contracting Parties alone. The reason for such caution is 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.
154. While this appreciation cannot be said to give rise to a presumption against an interpretation of a multilateral treaty advanced by reference to the unrelated bilateral treaty practice of one of its parties, for the reason that the multilateral treaty must be interpreted by reference to its terms, it does caution a tribunal from adopting an interpretation of a

multilateral treaty that cannot with confidence be reliably said either to be properly opposable to all of its Contracting Parties or to reflect a special regime applicable by agreement between some of its parties alone. The interpretative process cannot result in the fracturing of the multilateral character of a multilateral treaty. Courts and tribunals seised of a bilateral dispute cannot proceed in isolation of the systemic character of the instrument they are required to interpret.

155. The multilateral treaty point just outlined also serves to distinguish the present case from other cases on which the Claimants principally rely to give momentum to their MFN contention, such as *RosInvest* and *Le Chèque Déjeuner*, which respectively derived and enlarged the (then) respondent's consent to arbitration from the bilateral treaty practice of that State. There is a self-evident difference between relying on the practice of a respondent, in one or more of its bilateral treaties, to derive or enlarge its consent to arbitration in another of its bilateral treaties by operation of an MFN provision, and the situation in the present case, in which the Respondent's bilateral treaty practice is invoked to derive consent to arbitration in a multilateral treaty. In similar vein, in *Garanti Koza*, on which the Claimants also rely, the majority read consent to ICSID arbitration into a BIT from both other bilateral treaties of the respondent in that case invoked by the claimant and from a multilateral treaty to which the respondent was a party, i.e., the Energy Charter Treaty. This is the obverse of the approach that is urged upon the Tribunal in the present case, namely, to construe a multilateral treaty by reference to the unrelated bilateral treaty practice of one of its parties.
156. Moving beyond this point, there are three other issues that warrant comment regarding the interpretation and application of the OIC Agreement: the relationship between Article 16 and Article 17 of the Agreement; the interpretation of Article 17 of the Agreement; and the interpretation and application of Article 8 of the Agreement. The Parties are divided on each of these issues. The Tribunal's appreciation of these points bolsters its conclusion that the MFN clause in the OIC Agreement cannot be relied upon to incorporate into the OIC Agreement the consent in writing to submit the present dispute to ICSID arbitration derived from Article 17(4)(a) of the Iraq-Japan BIT.

(a) *The relationship between Article 16 and Article 17 of the OIC Agreement*

157. Turning, first, to the relationship between Article 16 and Article 17 of the OIC Agreement, the Claimants contend essentially that these provisions must be read together and that, read as such, Article 16 affirms that the OIC Agreement clearly had investor-State dispute settlement in contemplation and that such dispute settlement encompasses international arbitral proceedings. In contrast, the Respondent contends essentially that Article 16 and Article 17 address distinct issues, Article 16 affirming the availability to an investor of the domestic dispute settlement modalities of the host State, with the arbitral tribunal reference in the provision being to domestic arbitration, in contrast to proceedings before domestic courts. Article 17, on the other hand, in the Respondent's contention, addresses inter-State diplomatic protection proceedings, rather than investor-State proceedings, and conditions such proceedings on prior resort to conciliation, pursuant to an express agreement to this end.
158. Reflecting on these contentions, the Tribunal observes as an initial matter that the OIC Agreement is not in every respect a model of clarity. Furthermore, leaving aside the text of the Agreement, aids to interpretation to which a court or tribunal may otherwise often be able to turn for interpretative assistance are not readily apparent. Apart from chapter headings, individual articles do not contain descriptive headings. The Tribunal has been able to derive little interpretative guidance from a reading across the three authentic language versions of the Agreement and their often duelling certified English language translations produced by the Parties. There is scant relevant practice of the OIC Secretariat and similarly scant relevant subsequent practice of the Contracting Parties, in the sense of this term in Article 31(3)(b) of the VCLT. No reliable *travaux préparatoires* have been cited to the Tribunal. The Tribunal is accordingly compelled to address the scope and meaning of, and relationship between, Article 16 and Article 17 by reference simply to their terms, read in the context of the Agreement as a whole and its object and purpose.
159. Simply by reference to the terms of Articles 16 and 17, there is support to be found for the contentions of both Parties. Investment agreements often address access to domestic

dispute settlement modalities separately from the availability of investor-State dispute settlement mechanisms, and Article 16 is capable on its face of sustaining the construction placed upon it by the Respondent.

160. This said, a treaty must be interpreted holistically. The reference to “context”, in the general rule on treaty interpretation reflected in Article 31(1) and (2) of the VCLT, is to the treaty as a whole, including its preamble and annexes, as well as agreements and instruments made in connection with the treaty. In keeping with this injunction, Article 16 cannot be detached from Article 17 and read in isolation from it.
161. It is plain from its terms that Article 16 has investor-State dispute settlement in contemplation. This follows not only from the words of the provision but also from the wider OIC Agreement context in which it is placed, including a preambular reference to the object and purpose of the Agreement being “to provide and develop a favourable climate for investments” and the substantive provisions of the Agreement focused on the facilitation of investment, on stable investment conditions, and on investment protection. In the Tribunal’s view, it is beyond contention that, at the point at which the OIC Agreement was concluded in 1981, the provision in investment agreements of investor-State dispute settlement modalities that could avail investors was widely perceived as a central pillar of a favourable and stable investment regime.
162. It is plainly apparent that the first paragraph of Article 16 addresses host-State domestic dispute settlement remedies. This follows from its terms. The question is whether the reference to “an arbitral tribunal”, in the second paragraph of the Article, is to be construed as a reference to an arbitral tribunal of domestic law, in keeping with the reach of the remainder of the Article, or whether it should be construed as a free-standing fork-in-the-road provision, operating between the first paragraph of Article 16, with its focus on the national judicial system, and treaty-based arbitration, which the Claimants say is addressed in Article 17(2) of the Agreement.
163. The placement of the second paragraph of Article 16 suggests that the “arbitral tribunal” reference should be construed as a reference to a domestic arbitral tribunal, contrasted with a domestic court. This said, it may be expected that the relationship between a domestic

court and a domestic arbitral tribunal, and the jurisdictional reach and overlap of each, would be a matter regulated in granular detail by domestic law rather than addressed in broad-brush terms in a multilateral treaty.

164. While the arguments are balanced, and (the Tribunal emphasises) the language of Article 16 is not as clear as it might be, the Tribunal is persuaded that the better construction of the second sentence of Article 16 is that it is a fork-in-the-road provision that differentiates between domestic proceedings, via national courts or arbitral tribunals, and available international arbitral proceedings.
165. It follows from this appreciation that, in the Tribunal's estimation, the reference to "an arbitral tribunal" in the second sentence of Article 16 of the OIC Agreement supports the contention that the OIC Agreement has in contemplation the possibility of internationalised investor-State arbitration.
166. The questions that follows are whether this internationalised investor-State arbitration is what is addressed in Article 17 of the OIC Agreement, and, if so, whether Article 17 can be said to constitute consent to investor-State arbitration. It is to the interpretation of Article 17 that the Tribunal now turns.

*(b) The interpretation of Article 17 of the OIC Agreement*

167. As a preliminary matter, the Tribunal notes that the Contracting Parties to the OIC Agreement evidently intended to establish a bespoke mechanism for the settlement of disputes arising under the Agreement. This is clear from the *chapeau* of Article 17, which provides that "[u]ntil an Organ for the settlement of disputes arising under the Agreement is established ..."
168. The reference, in this provision, to "disputes arising under the Agreement" may be contrasted with the more abstract formulae that are usually employed when referring to disputes between Contracting Parties to a treaty, such as disputes "as to the interpretation or application" of the treaty in question (this being the language used in Article 16(2) of the Iraq-Japan BIT). While the language in the *chapeau* is broad enough to encompass

both investor-State and Contracting Party disputes, the Tribunal considers that disputes *arising under* the Agreement, particularly when coupled with the phrase “parties to the dispute” elsewhere in Article 17, contemplates investment disputes arising under specific substantive provisions of the Agreement rather than potentially more abstract inter-State disputes. This, of course, does not exclude diplomatic protection, or espousal, claims, but there is nothing to suggest that Article 17 is limited to addressing inter-State disputes only, whether espousal claims or otherwise. This appreciation is supported by the language of Article 17(2), notably sub-paragraph (d) thereof, the terms of which are plain in their reference to the “investor” as a party to the dispute, and contrasting a “party” to the dispute with the “contracting parties” to the Agreement, a term that is defined in Article 1(2) of the OIC Agreement.

169. Having regard to these factors, the Tribunal considers that, whatever else may be included within the scope of Article 17, the provision contemplates and addresses investor-State disputes.
170. It was not suggested to the Tribunal in these proceedings that the contemplated dispute settlement Organ has been established. The Tribunal notes the suggestion in *Al-Warraq*, however, that the International Islamic Court of Justice (“**IICJ**”), established by the Charter of the OIC, is the Organ in contemplation in the *chapeau* of Article 17 of the OIC Agreement.<sup>214</sup>
171. As did the *Al-Warraq* tribunal,<sup>215</sup> the Tribunal finds no basis for the suggestion, if it be made, that the IICJ is the dispute settlement Organ in contemplation in the *chapeau* of Article 17. Whatever the case, it is incontrovertible that no OIC Agreement dispute settlement Organ is presently operational and available to address investor-State claims. The fallback dispute settlement rules and procedures of Article 17 thus apply.
172. Three questions of relevance to the present proceedings follow: first, is resort to conciliation a condition precedent to resort to arbitration; second, if so, have the Claimants

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<sup>214</sup> *Al-Warraq*, paragraphs 39-43 and 84-89.

<sup>215</sup> *Al-Warraq*, paragraph 88.

fulfilled that requirement; third, if resort to conciliation is not a condition precedent to arbitration, or if it is and the Claimants have fulfilled the requirement, does Article 17(2) constitute a consent to arbitration in general terms?

173. On the question of whether resort to conciliation is a condition precedent to resort to arbitration, the terms of Article 17 are not free from ambiguity. The *chapeau* of Article 17 refers to “conciliation or arbitration”. While, on one reading, this may be taken as an indication that these modalities of settlement are available in the alternative, and are neither necessarily associated nor necessarily consecutive, the phrase may also be read simply as an expression of the available modalities of settlement, i.e., neutral on the issue of association.
174. In contrast, the terms of Article 17(1)(a) suggest that conciliation is not mandatory, viz. “[i]n case the parties to the dispute agree on conciliation ...” The marginally different certified English translation of the equally authentic Arabic and French versions of the Agreement submitted by the Respondent does not diverge materially from the authentic English text, namely: “If the parties to the dispute agree on conciliation, ...”
175. In support of its contention that conciliation and arbitration are sequential settlement modalities, and that resort to conciliation is a condition precedent to resort to arbitration, the Respondent relies on the terms of Article 17(2)(a), notably its “if ... then” language:
- If** the two parties to the dispute do not reach an agreement as a result of their resort to conciliation, **or if** the conciliator is unable to issue his report within the prescribed period, **or if** the two parties do not accept the solutions proposed therein, **then** each party has the right to resort to the Arbitration Tribunal for a final decision on the dispute. [Emphasis added]
176. Although there are differences between the Parties’ certified English translations of Article 17(2)(a) produced by reference to the authentic Arabic and French language versions of

the Agreement, the Parties agree,<sup>216</sup> and the Tribunal considers, that these differences are not material for present purposes:

Claimants' Certified Translation	Respondent's Certified Translation
<p><b><u>If</u></b> the two parties to the dispute do not reach an agreement by virtue of their resort to conciliation ... <b><u>or if</u></b> the conciliator is unable to issue his report within the prescribed period, <b><u>or if</u></b> the two parties do not agree on accepting the solutions proposed therein, <b><u>then</u></b> each party can resort to the Arbitration Tribunal to issue the final decision in the dispute.</p>	<p><b><u>If</u></b> the two parties to the dispute do not reach an agreement through conciliation, <b><u>if</u></b> the conciliator is unable to issue his report within the prescribed period, <b><u>or if</u></b> the two parties do not accept the solutions proposed therein, <b><u>then</u></b> each party shall have the right to resort to the arbitral tribunal for a final settlement of the dispute.</p>

[Emphasis added]

177. The conditional “if ... then” language appears to support a conclusion that resort to conciliation is a condition precedent for resort to arbitration.
178. In their written and oral submissions, the Claimants contested this interpretation largely by reference to the Arabic and French texts of the Agreement, drawing support also from the reasoning in the *Al-Warraq* award.<sup>217</sup> As just noted, however, in the Parties’ joint post-hearing submission on the certified English translations of Article 17(2)(a) produced by reference to the authentic Arabic and French texts of the Agreement, the Claimants appear to row back from their earlier contention. Further, a review of the *Al-Warraq* award suggests that the tribunal in that case was not presented with the issue of, or at least did not

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<sup>216</sup> In their joint post-hearing submission of 26 October 2018 on *Material and Non-Material Differences in the Parties' Certified Translations of the OIC Agreement*, the Parties address their certified translations of Article 17(2)(a) under the heading of *non-material differences*, with the following explanation:

Claimants consider that the certified translations do not differ materially in relation to the provisions below for the purposes of the present phase of this arbitration. Claimants nonetheless find it relevant to provide what they understand to be the most proper translations of the provisions listed below.

Respondent notes that the Tribunal asked for material differences in the Parties’ respective translations, and Claimants’ claim of relevance of the below “non-material” differences makes no sense. In the interest of cooperation, Respondent has confirmed that Claimants’ representations of Respondent’s certified translations below are accurate, but maintains its position that the provision of this information is outside the scope of the Tribunal’s request.

<sup>217</sup> See paragraph 119 above.

visibly weigh in the balance, the “if ... then” language of Article 17(2)(a).<sup>218</sup> The *Al-Warraq* award is therefore of only limited use on this aspect of the issue.

179. In the face of these seemingly different, or at least ambiguous, pointers, the question is what conclusions are the Tribunal to draw about the relationship between conciliation and arbitration.
180. It is common, in international investment agreements, that the availability of arbitration is predicated on the prior resort to, and exhaustion of, non-binding dispute settlement procedures that have as their object the facilitation of agreement between the parties. In the Iraq-Japan BIT, on which the Claimants rely, Article 17(3) requires resort, in the first instance, to “consultations”. By Article 17(4) of that BIT, it is only if the investment dispute cannot be settled through such “consultations” within three months that the disputing investor may submit the dispute to “conciliation” or “arbitration”. These provisions attest to a practice of conditioning resort to arbitration on the prior resort to, and failure, of some non-adjudicatory process. This said, the use of term “consultation” in the Iraq-Japan BIT to describe the mandatory prior process, with the subsequent follow-on dispute settlement options being either “conciliation” or “arbitration”, clouds the picture of the approach in this treaty as a potential analogue for the approach in the OIC Agreement as it may support the contention that conciliation and arbitration are alternative dispute settlement procedures to which the disputing investor may elect to resort.
181. The Iraq-Jordan BIT, also potentially available to two of the claimants, is clearer on this issue. Pursuant to Article 9 of this treaty, disputing parties must first have resort to mediation and conciliation and, only if this fails, may a party submit the dispute to the adjudicatory mechanisms available under the treaty. In the case of this treaty, however, there is a comingling of reference to domestic adjudicatory mechanisms and international adjudicatory mechanisms in the same provision. While, therefore, the Iraq-Jordan BIT supports an approach that conditions resort to arbitration on the prior resort to and

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<sup>218</sup> *Al-Warraq*, paragraph 79.

exhaustion of a non-adjudicatory settlement process, it is also not a pristine guide to the Respondent's practice on this issue.

182. The Tribunal does not consider that a wider review of practice in this area, or even an exhaustive review of the approach taken in the Respondent's BITs, could lead to controlling authority on this point. The issue is ultimately one of how, in good faith, Article 17 of the OIC Agreement is to be construed in the face of terms, context, and object and purpose that are not dispositive either way.
183. Having regard to the conditional "if ... then" language of Article 17(2)(a), language that is not disputed, the Tribunal considers that the intended gateway to arbitration under this provision is prior resort to conciliation and, thereafter, the failure of the conciliation process. While the *chapeau* of Article 17 addresses "conciliation or arbitration", and the terms of Article 17(1) suggest that resort to conciliation requires agreement between the parties, there is no avoiding the "if ... then" language of Article 17(2). It necessarily follows from this language that resort to arbitration is conditional on the prior resort to conciliation. The Tribunal observes, as well, that such an interpretation is not per se inconsistent with the rest of the Article and is not at odds with any settled approach to dispute settlement provisions in international investment treaties.
184. While, given the wider basis of the Tribunal's Award in this case set out below, a conclusive finding on this issue is not essential, the analysis and conclusion just noted are relevant to the Tribunal's appreciation, in the balance, of the issues presented by the Parties.
185. The second of the questions identified in paragraph 172 above is, if resort to conciliation is a condition precedent to resort to arbitration, have the Claimants fulfilled the requirement to resort to conciliation. The Respondent says the Claimants have not satisfied this requirement. The Claimants' case rests on their rejection of such a requirement. There is no suggestion of any meaningful endeavour to resort to conciliation, and no suggestion of any agreement to resort to conciliation. The Tribunal accordingly need not dwell further on this point.

186. On the assumption, *arguendo*, that resort to conciliation is not a condition precedent to arbitration, or if it is and the Claimants have fulfilled the requirement, the third question identified in paragraph 172 above is whether Article 17(2) of the OIC Agreement constitutes consent to arbitration in general terms. In the light of what has been said above, the Tribunal emphasises the *arguendo* character of the discussion that follows.
187. Subject to its conditional “if ... then” language, Article 17(2)(a) of the OIC Agreement establishes a “right” to resort to arbitration. This is the term used in the authentic English-language text of the Agreement. Although the two sides have each presented their own certified English-language translations of the equally authentic Arabic and French texts of the Agreement, the Parties agree, and the Tribunal considers, that the differences between their certified translations are not material. The relevant texts are set out at paragraph 176 above. Whether the language is that each party “can resort” to arbitration or that each party “shall have the right to resort” to arbitration, the meaning is the same: a party is entitled to resort to arbitration.
188. This entitlement to resort to arbitration is supported by the succeeding provisions of Article 17(2) of the OIC Agreement. Article 17(2)(b) prescribes the modalities for commencing proceedings. Article 17(2)(c) prescribes the initial steps that the arbitration tribunal so constituted must follow. Article 17(2)(d) mandates that the decisions of the arbitration tribunal shall be final and binding, and cannot be contested. It also provides for the implementation of such decisions by the OIC Agreement Contracting Parties.
189. These provisions are binding upon the OIC Agreement Contracting Parties. They constitute the consent of these Contracting Parties to investor-State arbitration. In their reference to “each party” having the right to resort to arbitration, contemplating the possibility of a Contracting Party bringing arbitration proceedings against an investor, the Tribunal considers that these provisions also constitute the consent to arbitration of an investor who has agreed to conciliation. In other words, the “if ... then” language of Article 17(2)(a), coupled with its reference to “each party”, supports the conclusion that both the putative State party and the putative investor party to arbitration must be taken to have consented to arbitration pursuant to the terms of Article 17(2)(a). This appreciation

bolsters the assessment given above that resort to conciliation, and the failure of the conciliation process, is a condition precedent to resort to arbitration.

190. The Tribunal considers that it follows from the terms of Article 17(2) of the OIC Agreement, in all of its parts, that it constitutes consent to arbitration in general terms, subject (on the Tribunal's analysis) on the fulfilment of the condition precedent of prior resort to, and exhaustion of, the conciliation process.
191. It warrants emphasis that the conclusion that Article 17(2) constitutes consent to arbitration *in general terms* is precisely that, i.e., this general consent to arbitration does not constitute consent to ICSID arbitration, as required by Article 25(1) of the ICSID Convention. On this issue, on the Claimants' case, we need to turn to Article 8 of the OIC Agreement, its MFN clause.

*(c) The interpretation and application of Article 8 of the OIC Agreement*

192. The Claimants' case is that the Respondent's consent to ICSID arbitration contained in Article 17(4)(a) of the Iraq-Japan BIT can be imported into the OIC Agreement by operation of Article 8(1) of the OIC Agreement. In reply to the Respondent's argument that the terms of Article 8(1) – notably (but not limited to) its language of “within the context of economic activity” and “in the territories of another contracting party” – the Claimants contend that there is nothing in Article 8 which excludes its application to dispute settlement provisions. On the contrary, the right to resort to arbitration falls squarely within the phrase “in respect of rights and privileges accorded to” investors in Article 8(1). They further contend that nothing in Article 8(2) excludes dispute settlement.
193. The Respondent puts up an array of obstacles against the Claimants' interpretation and application of Article 8 to dispute settlement. International arbitration does not take place “in the territories” of a Contracting Party, whether actually or in the sense that it is delocalised. Resort to dispute settlement does not arise “within the context of economic activity” in which the investors have employed their investments. The Claimants have not established that the OIC Agreement accords “less favourable” treatment than that accorded

under the Iraq-Japan BIT. The Claimants are cherry picking from the Iraq-Japan BIT, seeking to rely on its ICSID consent to arbitration provision but wanting to avoid other elements, notably the temporal limitation in Article 17(6) of the BIT. The gamut of the Parties' arguments is set out more fully above.

194. The Tribunal is not persuaded by the Respondent's contentions on the textual interpretation of Article 8(1) of the OIC Agreement. The right to resort to arbitration is a right or privilege accorded to investors. Indeed, it is a right that is an unarguably important component of the "favourable climate for investments" that is at the heart of the object and purpose of the OIC Agreement, as it is for other investment facilitation and protection treaties. While language such as "within the context of economic activity" and "in the territories" may admit of the possibility of the interpretations advanced by the Respondent, the Tribunal considers the interpretations advanced to be 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.
195. Further, notwithstanding the debate about the scope of application of MFN clauses, there is a sufficiently settled body of consistent investment treaty law in favour of the proposition that MFN clauses are capable of applying, as a matter of principle, to dispute settlement provisions. Arbitrator Stern wants to be more precise on this point, considering indeed 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. As mentioned in her Dissenting and Concurring Opinion in *Impregilo*, she considers that there is a "presumption that dispute-resolution provisions do never fall within the scope of an MFN provision in a BIT, unless the contrary is plainly demonstrated."<sup>219</sup>
196. The key question, for present purposes, is not whether MFN clauses in the abstract are *capable* of applying to dispute settlement *as a matter of principle* but rather whether the particular MFN clause in issue in this case, the MFN clause in the OIC Agreement, is properly to be construed as incorporating into the OIC Agreement written consent to ICSID

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<sup>219</sup> See Dissenting and Concurring Opinion, *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, 21 June 2011 ("**Impregilo**"), paragraph 14.

arbitration. In this regard, the Tribunal notes that the most-favoured nation principle is not, at least in its investment-treaty guise, a customary international law principle of non-discrimination writ large that is implicitly applicable even if not expressly stated. It is, rather, a principle of treaty law that must be expressly stated and is amenable to limitation, whether expressly or implicitly, having regard to the terms in which the principle is expressed and its purpose in the context of the instrument in which it is found.

197. It is on this ground that the Tribunal departs from the Claimants' narrative on Article 8. In the Tribunal's view, Article 8(1) of the OIC Agreement is subject to exception and limitation, both express and by necessary implication, that exclude its application to incorporate an ICSID consent to arbitration clause from another treaty.
198. Two related points warrant comment. First, Article 8(2) of the OIC Agreement sets out express limitations on the application of the MFN clause. Sub-paragraph (a) is relevant in the circumstances of this case. It provides that the MFN clause shall not be applied to any better treatment given by a Contracting Party in the case of "[r]ights and privileges given to investors of one contracting party by another contracting party in accordance with an international agreement, law or special preferential arrangement." The effect of this exception is that the MFN clause does not apply to differential treatment by one OIC Agreement Contracting Party to investors of other OIC Agreement Contracting Parties pursuant to the terms, *inter alia*, of some other international agreement.
199. Article 8(2) is complemented by Article 18 of the OIC Agreement, which provides that OIC Agreement Contracting Parties "may enter into an agreement between them that may provide a treatment which is more preferential than that stipulated in this Agreement." The effect of Articles 8(2)(a) and 18, read together, is that OIC Agreement Contracting Parties may adopt a variable investment framework in respect of investors from OIC Agreement Contracting Parties and that the OIC Agreement MFN clause cannot be used as a leveller to circumvent such differential treatment.
200. What is notable in this case is that two of the claimant companies come presumptively, and (it might be said) more naturally, within the scope of another Iraq BIT, i.e., the Iraq-Jordan BIT. This BIT, in its Article 9(II)(b), also contains an express ICSID consent to arbitration

clause. The Claimants, however, by invoking the Iraq-Japan BIT, and basing their case on the claim of differential treatment vis-à-vis investors of a *non*-OIC Agreement Contracting Party, are endeavouring to take themselves outside the framework of the Article 8(2)(a) / Article 18 exception to the OIC Agreement MFN clause.

201. When pressed, in the hearing, on their reasons for not resorting to the Iraq-Jordan BIT, the Claimants both noted that two of the claimant companies were not qualifying investors under the BIT and advanced convenience and delay arguments for not relying on this treaty.<sup>220</sup> There appear, however, to be at least two other, perhaps more compelling, reasons why the Iraq-Jordan BIT would not avail the Claimants. First, reliance on the Iraq-Jordan BIT appears to be excluded by the terms of Article 8(2)(a) of the OIC Agreement. Second, Article 9 of the Iraq-Jordan BIT, the investor-State dispute settlement clause, provides expressly that “[m]ost favoured nation status shall not be applicable to the provisions of this Article.”
202. In the Tribunal’s view, this is not an abstract or hypothetical matter that can be swept aside by saying either that this does not undermine the Claimants’ right to invoke the Iraq-Japan BIT or that this assessment leaves two of the claimant companies out of account. While there is something in both points, they ignore a wider picture that the Tribunal considers relevant to a grounded appreciation of the scope of the OIC Agreement MFN clause. That picture is of an MFN clause in a multilateral investment treaty that is intentionally limited in its scope of application and is rooted in, and sensitive to, the systemic framework of the instrument in which it is found.
203. The second observation leads in the same direction. The Respondent has suggested that the Claimants are cherry-picking from the Iraq-Japan BIT, seeking to adopt its ICSID consent to arbitration clause but bypassing other provisions of the BIT. Principally in the Respondent’s focus under this head is the limitation period provision in Article 17(6) of the Iraq-Japan BIT. But the point goes wider.

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<sup>220</sup> See paragraph 134 *supra*.

204. The MFN clause in the Iraq-Japan BIT is found in Article 4(1). It is in reasonably straightforward terms. Article 4(3) of the BIT goes on to provide as follows:

It is understood that the treatment referred to in paragraph 1 does not include treatment accorded to investors of a non-Contracting Party and their investments by provisions concerning the settlement of investment disputes such as the mechanism set out in Article 17, that are provided for in other international agreement between a Contracting Party and a non-Contracting Party.

205. The effect of this provision is to preclude a qualifying investor under the Iraq-Japan BIT from relying on the MFN clause in the BIT to invoke the dispute settlement provisions in some other investment treaty. A Japanese investor in Iraq, for example, could not rely on the MFN clause in the Iraq-Japan BIT to incorporate into the Iraq-Japan BIT the dispute settlement provisions of, for example, the Iraq-Jordan BIT or of the OIC Agreement or of any other international agreement.

206. As with Articles 8(2)(a) and 18 of the OIC Agreement, this issue points to the variable geometry that applies in respect of recourse to investor-State arbitration under the instruments that are at the heart of these proceedings. The OIC Agreement excludes from its MFN clause preferential treatment accorded pursuant to BITs concluded between Contracting Parties to the OIC Agreement. The Iraq-Japan BIT excludes from its MFN clause preferential treatment in respect of dispute settlement accorded pursuant to international agreements concluded between one of its Contracting Parties and a non-Contracting Party.

207. While these points are not *directly* engaged by the case at hand, they are, in the Tribunal's estimation, relevant to the Tribunal's appreciation as they shine a light on the intent, effect and limitations of the MFN clause, and what might be described as its public policy framework, on which the Claimants are seeking to rely. They also raise the question of whether investors of a non-contracting party are at liberty to ignore the bargain that was struck in the treaties to which they wish to have resort, but by which they are not bound, to put themselves (even if only hypothetically) in a more privileged position than qualifying investors under those treaties. To crystallise the point, if the Claimants' invocation of the Iraq-Japan BIT were to be accepted, they would (at least hypothetically) be in a more

privileged position than Japanese investors in Iraq relying on the Iraq-Japan BIT. They would also have circumvented the constraints that apply under the express terms of the home-State BIT of their principal contractors, i.e., the Iraq-Jordan BIT.

208. Put in these terms, it is difficult to escape the whiff of overreach that casts a pall over the Claimants' case. This said, the point is not quite so straight-forward, as such reasoning may also be deployed to challenge the very essence of the MFN principle as it will always (or almost always) be possible to say that those seeking to rely on an MFN clause to incorporate a principle from another treaty do so without regard to the bargain that was struck when that other treaty by which they are not bound was adopted. And it cannot properly be an outcome of proceedings such as this to call into question a principle that has been a cornerstone of friendship and commerce treaties for centuries. A balance must be struck that preserves the principle but guards against the risks of overreach. It is to this issue that the Tribunal now turns.

## (2) *Striking the balance*

209. In seeking to strike this balance, the Tribunal finds useful guidance in the decision that is the jurisprudential font of the application of the MFN principle to dispute settlement rights, *Maffezini v. Spain*.<sup>221</sup>
210. As is well known, *Maffezini*, resting on an analysis of the issues going back to first principles, concluded that the claimant could invoke the dispute settlement provisions in one BIT by operation of the MFN clause in another BIT, in respect of which he was a qualifying investor. This is the principle for which the decision in that case is most frequently cited. The tribunal went further, however, cautioning about the risks of overreach in the principle that it had just crystallised, viz: "This operation of the most favoured nation clause does, however, have some important limits arising from public policy considerations ..."<sup>222</sup>

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<sup>221</sup> *Emilio Augustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000 ("*Maffezini*").

<sup>222</sup> *Maffezini*, paragraph 56.

211. The tribunal addressed these public policy considerations in two paragraphs of some importance that warrant full recitation, paragraphs often overlooked in the glare of the application of the MFN principle to dispute settlement:

Notwithstanding the fact that the application of the most favored nation clause to dispute settlement arrangements in the context of investment treaties might result in the harmonization and enlargement of the scope of such arrangements, there are some important limits that ought to be kept in mind. As a matter of principle, the beneficiary of the clause should not be able to override public policy considerations that the contracting parties might have envisaged as fundamental conditions for their acceptance of the agreement in question, particularly if the beneficiary is a private investor, as will often be the case. The scope of the clause might thus be narrower than it appears at first sight.

Here it is possible to envisage a number of situations not present in the instant case. First, if one contracting party has conditioned its consent to arbitration on the exhaustion of local remedies, which the ICSID Convention allows, this requirement could not be bypassed by invoking the most favored nation clause in relation to a third-party agreement that does not contain this element since the stipulated condition reflects a fundamental rule of international law. Second, if the parties have agreed to a dispute settlement arrangement which includes the so-called fork in the road, that is, a choice between submission to domestic courts or to international arbitration, and where the choice once made becomes final and irreversible, this stipulation cannot be bypassed by invoking the clause. This conclusion is compelled by the consideration that it would upset the finality of arrangements that many countries deem important as a matter of public policy. Third, if the agreement provides for a particular arbitration forum, such as ICSID, for example, this option cannot be changed by invoking the clause, in order to refer the dispute to a different system of arbitration. Finally, if the parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure, which is the case, for example, with regard to the North America Free Trade Agreement and similar arrangements, it is clear that neither of these mechanisms could be altered by the operation of the clause because these very specific provisions reflect the precise will of the contracting parties. Other elements of public policy limiting the operation of the clause will no doubt be identified by the parties or tribunals. It is clear, in any event, that a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand.<sup>223</sup>

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<sup>223</sup> *Maffezini*, paragraphs 62-63 (internal footnotes omitted).

212. These are wise words that should be well heeded in the sometimes headlong rush to push the boundaries of investor-State dispute settlement and broaden the reach of the MFN principle as an instrument to this end. The Tribunal considers them a touchstone in the context of the present case. As will be readily apparent, three of the situations expressly envisaged in abstract terms by the *Maffezini* tribunal 20 years ago as limiting the application of the MFN principle to dispute settlement arrangements on grounds of public policy either address or approach the situation with which the Tribunal is faced in the circumstances of the present case.
213. In the light of the Tribunal's wider analysis set out above, but for its conclusion on resort to conciliation as a condition precedent to resort to arbitration under the OIC Agreement, there would be a reasoned basis on which the Tribunal could justify a conclusion that Article 8(1) of the OIC Agreement avails the Claimants, enabling them to invoke the ICSID consent to arbitration clause in the Iraq-Japan BIT. There is, however, a compelling basis for, and indeed to prefer, a different conclusion, namely, that Article 8(1) cannot properly be relied upon to incorporate into the OIC Agreement the consent to ICSID arbitration found in an unrelated bilateral treaty concluded by an OIC Agreement Contracting Party and a non-contracting party. While the "but for" conclusion is insurmountable for the Claimants' case, and the Tribunal could rest there, it is important to proceed down the *arguendo* path both to complete and supplement the Tribunal's analysis and in the event that the Tribunal is wrong on its conciliation conclusion.
214. The OIC Agreement is a multilateral investment facilitation and protection treaty that was concluded within the framework and amongst the members of the wider OIC architecture. This point is addressed more fully in the analysis above. The Agreement is not a model of clarity in all of its terms, leaving some uncertainty about elements of its interpretation and application. There is particular debate about the operation of the dispute settlement provisions of the Agreement, in respect of which there has so far, such that the Tribunal is aware, been no attempt at clarification by the OIC General Secretariat, Secretary General, Member States or OIC Agreement Contracting Parties. The Agreement envisages a bespoke mechanism to address investor-State disputes, but one that has yet to be enacted

or enter into operation. In these circumstances, a default procedure for the settlement of disputes is expressly laid down, comprising conciliation, with particular characteristics, and arbitration. Although not free from contention, the Agreement addresses the relationship between conciliation and arbitration, which the Tribunal has concluded conditions and sequences the latter on the prior resort to the former, in the sense of a prior exhaustion of remedies provision.

215. Beyond these elements, although the Agreement does not lay down detailed rules of procedure in respect of arbitration, it contains a number of procedural provisions applicable to arbitration. These address the commencement of proceedings, the constitution of the arbitration tribunal, the default procedure for the appointment of arbitrators, if the first order rules have been ineffective, elements addressing the authority of the “Umpire”, the finality and binding character of the decisions of the arbitration tribunal, and rules addressing the implementation and enforcement of such decisions by OIC Agreement Contracting Parties.
216. Seen in sharp focus, the OIC Agreement thus establishes a clearly defined and particular dispute settlement regime with institutional elements that include an arbitration forum with bespoke characteristics. It nowhere provides for ICSID arbitration, although it very easily could have done so. The necessary implication is that this omission was a matter of conscious decision.
217. Added to this, the MFN clause (Article 8(1)) and associated exceptions (notably, Article 8(2)(a)) and related provisions (Article 18) of the OIC Agreement establish an MFN framework that is essentially designed to operate as a floor, in the absence of preferential treatment arrangements between OIC Agreement Contracting Parties, rather than as a leveller of principle of wider application.
218. It follows inescapably from the preceding that the OIC Agreement establishes a systemic framework for investor protection and facilitation with unique characteristics, as its Contracting Parties were entitled to do. The choices made are appropriately described, in the language of the *Maffezini* tribunal, as “public policy considerations”.

219. Looking beyond the OIC Agreement to other instruments engaged by this case, the home-State BIT (the Iraq-Jordan BIT) that may have been expected to have been the natural recourse of the two principal contractors amongst the claimant companies, contains an express exclusion of the application of the MFN principle to its dispute settlement arrangements, which includes an ICSID consent to jurisdiction clause. Further, the BIT to which the Claimants wish to resort, the Iraq-Japan BIT, contains an express exclusion in its MFN clause that would preclude Japanese investors in Iraq from relying on intra-OIC Agreement Contracting Party preferential dispute settlement arrangements.
220. In the circumstances, the Tribunal considers that there are manifest public policy considerations going to issues of systemic overreach that compel a conclusion that the MFN clause in the OIC Agreement cannot be relied upon to incorporate into the OIC Agreement an ICSID consent to arbitration clause from an unrelated bilateral investment treaty concluded by one of the OIC Contracting Parties alone. In the words of the *Maffezini* tribunal, with which this Tribunal is happy to agree, “a distinction has to be made between the legitimate extension of rights and benefits by means of the operation of the clause, on the one hand, and disruptive treaty-shopping that would play havoc with the policy objectives of underlying specific treaty provisions, on the other hand.”<sup>224</sup>
221. Beyond this public policy driven conclusion, the Tribunal is of the view that there are also textual considerations that require the same conclusion. While it is axiomatic that consent to arbitration can be derived from more than one instrument, it is equally axiomatic that such consent must be clear, specific and intended. This is particularly the case with regards to consent to ICSID arbitration, which requires, in Article 25(1) of the Convention, “consent in writing to submit [the dispute] to the Centre.” While, for example, it may be said (as in *Le Chèque Déjeuner*) that the MFN principle is capable of enlarging the reach of ICSID arbitration to which consent has already been given in the principal treaty, the Tribunal does not consider that the MFN principle can properly be used to derive from another treaty consent to ICSID arbitration that is not only absent from the principal treaty

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<sup>224</sup> *Maffezini*, paragraph 63.

but evidently intentionally so, given the bespoke nature of the dispute settlement arrangements in the principal treaty.

222. As regards the OIC Agreement, it follows that there is no basis whatsoever to establish clear, specific and intended consent to ICSID arbitration.

**(3) Conclusions**

223. For all the foregoing reasons, the Tribunal concludes that the MFN clause in the OIC Agreement 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.
224. The analysis and conclusions above go to both the Claimants' principal contention and their alternative contention. Although more might be said on the latter, it is unnecessary to do so and the Tribunal accordingly forebears from further comment.
225. It follows from the Tribunal's conclusion that the Respondent's objection *ratione voluntatis* must be upheld and that the Claimants' case fails for want of jurisdiction.

**VI. DISSENTING OPINION OF ARBITRATOR PETER**

226. The analysis and conclusions in Part V of the Award above reflect the views of the majority of the Tribunal. Save insofar as Arbitrator Peter expressly agrees with the analysis and conclusions in Part V above, he dissents from that analysis and those conclusions.
227. While the majority of the Tribunal has concluded that it does not have jurisdiction over the present dispute, Arbitrator Peter reaches the opposite conclusion having analyzed the key question of this stage of the arbitral proceedings as defined in paragraph 146 of the present Award: 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.
228. Indeed, whether the MFN clause operates or not constitutes a question of jurisdiction, which is a fundamental question, i.e., whether an arbitration agreement exists. Whether

procedural rights are encompassed in the scope of an MFN clause included in a bi- or multi-lateral investment agreement remains a disputed issue in investment arbitration. Arbitrator Peter's view is that Claimants' case is compelling. The Tribunal is therefore entitled to assume jurisdiction by operation of the MFN clause included in Article 8(1) of the OIC Agreement.

229. In reaching their decision, the majority has decided not to follow the *Al-Warraaq* award, which is so far the only award dealing with this MFN issue under the OIC Agreement. The concern of the majority appears to be that giving effect to the MFN clause would – as a matter of policy – create an excessively far-reaching basis for jurisdiction by accepting the importation of the arbitration clause included in the Iraq-Japan BIT into the OIC Agreement. However, just as the majority of the Tribunal here considers that they are not bound by the *Al-Warraaq* award, the arbitral tribunals in subsequent cases that will deal with a similar issue will not be bound by this award, because this award does not set a precedent for similar situations.
230. An arbitral tribunal has freedom of interpretation. This includes not only the provisions of the OIC Agreement, but also the impact of other investment treaties on the application of the OIC Agreement. In any event, a concern that the interpretation in this particular case may open up a general rule of interpretation would be unfounded. Arbitrator Peter considers that priority should be given to the specific facts and circumstances of the case.
231. In Arbitrator Peter's view, the Tribunal has jurisdiction in the case at hand on the basis that Article 17 of the OIC Agreement contains a general consent to arbitration, that is supplemented by ICSID arbitration through the incorporation of Article 17 of the Iraq-Japan BIT via Article 8(1) of the OIC Agreement. This mechanism corresponds to Claimants' "principal contention" and satisfies, in Arbitrator Peter's opinion, the written consent requirement under Article 25(1) of the ICSID Convention.
232. It is true that no award or decision of an ICSID arbitral tribunal has been rendered so far on the interpretation and application of the OIC Agreement. As a result, the Tribunal in this case has a large measure of appreciation regarding the relationship between the OIC Agreement and the BITs the Parties referred to. However, this should not deter this

Tribunal from taking guidance from previous case law dealing with MFN clauses, in particular the *Al-Warraq* award that dealt with some of the issues raised in this case. Notably, Arbitrator Peter observes that the tribunal in the *Al-Warraq* award has interpreted the wording of Article 17 of the OIC Agreement from a practical and contemporaneous perspective, and concluded that it “effectively creates an investor-state arbitration clause”.<sup>225</sup> In the words of the *Al-Warraq* tribunal, with which Arbitrator Peter aligns:

From a contemporary perspective, the Tribunal finds that Article 17 constitutes an investor-state arbitration provision, and there is nothing in this Article inconsistent with the modern practice to interpret these clauses as constituting an open offer by the state parties to investors, that can be accepted and the arbitration initiated, without any separate agreement by the state party.<sup>226</sup>

233. In addition, the OIC Agreement is an investment agreement as it is obvious from its full name (“Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference”) and its preamble (“Anxious to provide and develop a favourable climate for investments...”), along with the material protections it offers.

234. As a result, while Arbitrator Peter agrees with the majority that Article 17 “contemplates and addresses investor-State disputes”, he goes further and accepts the conclusion reached in the *Al-Warraq* award that:

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.<sup>227</sup>

235. In a second stage, Arbitrator Peter considers and agrees with the majority that “the right to resort to arbitration is a right or privilege accorded to investors” and “MFN clauses are capable of applying, as a matter of principle, to dispute settlement provisions”.<sup>228</sup>

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<sup>225</sup> *Al-Warraq*, paragraph 76. For the interpretation of Article 17 of the OIC Agreement see paragraphs 75 *et seq.*

<sup>226</sup> *Al-Warraq*, paragraph 81.

<sup>227</sup> *Al-Warraq*, paragraph 79.

<sup>228</sup> See *supra*, paragraphs 193-195.

However, he disagrees with the application of these principles in connection with Article 8(1) of the OIC Agreement.

236. First of all, multilateral treaties can have different bases: geographical, political, cultural and others. Here, the common bond between the Contracting Parties is “Islamic” as the OIC Agreement gives rights and privileges and therefore protection, to investors from Islamic states and assures them, as this Tribunal has found, recourse to investor-State arbitration.
237. Against this background, Japanese investors from a non-Islamic state can invoke jurisdiction under the Iraq-Japan BIT, whereas investors from Islamic states are, according to the result of the interpretation of the majority, not allowed to invoke the MFN clause of the OIC Agreement in order to avail themselves of the same protection. Faced with the exact same facts and circumstances for which Japanese investors would be entitled to protection, investors from Islamic states cannot invoke the MFN clause in order to avail themselves of the legal protection given to the Japanese investors.
238. Arbitrator Peter agrees with the Claimants’ submission that indeed, the provisions of Article 17 of the Iraq-Japan BIT offer “undisputedly, Japanese investors rights, privileges, and protections that are more favourable than those accorded under Article 17(2)(b) of the OIC Agreement.”<sup>229</sup>
239. While it is true that Article 8 provides very clear limitations in its second paragraph, Arbitrator Peter observes that none of these limitations should be applied to the case at hand, very obviously not to Articles 8(2)(b) and (c), nor to Article 8(2)(a) which includes a limitation that refers to treatment between two Contracting Parties to the OIC Agreement, as Japan is not such a party.
240. Further, whether there are “material differences in the scope, coverage and detail” between the OIC Agreement and the Iraq-Japan BIT, as the majority notes,<sup>230</sup> has, in Arbitrator Peter’s opinion, no bearing on this case. The application of the MFN clause of Article 8(1)

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<sup>229</sup> Request, paragraph 167.

<sup>230</sup> See *supra*, paragraph 55.

of the OIC Agreement, or of any MFN clause in general, does not seem to require as a condition precedent that the two agreements in question have the same “scope, coverage and detail”.

241. Also, Arbitrator Peter observes that giving effect to the MFN clause included in Article 8(1) of the OIC Agreement is consistent with an active and straightforward interpretation and application of this clause. Arbitrator Peter notes further that all the examples given in the *Maffezini* decision refer to situations where clear rules regarding arbitration have been included in the agreement that the parties relied on.<sup>231</sup> On the contrary, in the present case, as also acknowledged by the majority,<sup>232</sup> the OIC Agreement sometimes lacks clarity, and difficulties of interpretation and application arise in the analysis of its dispute resolution provisions which are far from detailed or clear. As a result, for a treaty that is not a model of clarity, the freedom of interpretation of the Tribunal should be used.
242. Therefore, Arbitrator Peter holds that Claimants’ argument that “Iraq’s consent to ICSID arbitration is contained in Article 17(4) of the Iraq-Japan BIT, as imported into Article 17 of the OIC Agreement by virtue of the MFN provision”<sup>233</sup> should be retained. In the end, in the Claimants’ words, the MFN clause is invoked “simply to substitute an efficient procedure for a defective one and an effective appointing authority for a dysfunctional one.”<sup>234</sup>

## VII. COSTS

### A. The Parties’ costs submissions

243. Pursuant to the Tribunal’s directions, the Parties filed their respective costs submissions on 6 September 2019 (respectively, “**Claimants’ 6 September costs submission**” and “**Respondent’s 6 September costs submission**”). By email of 16 September 2019, noting that the Respondent’s 6 September costs submission contained “an argument on the

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<sup>231</sup> See *supra*, paragraphs 209 *et seq.*

<sup>232</sup> See *supra*, paragraph 214.

<sup>233</sup> Memorial, paragraph 230.

<sup>234</sup> Reply, paragraph 114.

allocation of those costs”, whereas the Claimants’ 6 September costs submission had not, the Claimants requested an opportunity “to state their full position in this regard”.

244. Responding to the Claimants’ request, the Tribunal, also by correspondence of 16 September 2019, afforded the Claimants an opportunity to address the issue of “cost allocation” by no later than 20 September 2019, with an opportunity for the Respondent to submit any observations on the Claimants’ submission by no later than 27 September 2019.
245. As directed, the Claimants filed their Submission on Cost Allocation on 20 September 2019 (“**Claimants’ 20 September costs submission**”).
246. By email of 27 September 2019, the Respondent indicated that it “sees no need to submit further comments on [the issue of costs]” other than to observe that the Claimants’ 20 September costs submission “inappropriately includes (in paragraph 15) additional argument and authorities in support of the Claimants’ position on jurisdiction”, the Respondent objecting to what it characterised as the Claimants’ “attempt to continue to brief the parties’ jurisdictional dispute and requests that the Tribunal disregard any portion of the Claimants’ submissions that goes beyond the issue of allocation of costs.”
247. By email of the same date, the Claimants rejected the Respondent’s complaint, stating that the submissions of which the Respondent complained were “directly responsive to Respondent’s argument” and “well within the scope of briefing permitted by the Tribunal’s order of 17 September 2019”.
248. On quantum, in their 6 September costs submission, the Claimants state their total legal fees incurred at US\$1,702,035.55 and their total costs and disbursements incurred at US\$2,451,143.27, which includes a line item amount of US\$150,000.00 attributed to “ICSID Filing Fees and Advance on Costs”.<sup>235</sup> In their 20 September costs submission, the Claimants breakdown their “fees and costs associated with the phase on Respondent’s

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<sup>235</sup> Claimants’ 6 September costs submission, tables E and F, respectively. Both Parties in fact paid US\$325,000 to ICSID as an advance on costs.

objection to the Tribunal's *ratione voluntatis* jurisdiction" to an amount of US\$439,244.87.<sup>236</sup>

249. In its 6 September 2019 costs submission, the Respondent states its total legal fees incurred at US\$1,120,000.00 and its total expenditure at US\$53,330.24.<sup>237</sup> The Respondent also claims reimbursement of an amount of US\$325,000.00 "paid to ICSID for the costs of the arbitration."<sup>238</sup>

250. In their respective requests for relief, the Parties request as follows:

**Claimants**<sup>239</sup>

32. For the reasons set out above, and if the Tribunal upholds its jurisdiction *ratione voluntatis*, Claimants respectively request that the Tribunal:

32.1 Order Respondent to bear Claimants' share of their fees and costs associated with the phase on Respondent's objections to the Tribunal's *ratione voluntatis* jurisdiction as identified in Claimants' Statement of Costs (a total of \$439,244.87); and

32.2 Postpone its determination of the allocation of the parties' fees and costs associated with all other procedural phases to date, until a final award is rendered in this Arbitration.

33. If the Tribunal finds in favour of Respondent in this phase, Claimants' respectively request that the Tribunal:

33.1 Dismiss Respondent's request that their fees and costs be borne by Claimants, and order that each of Claimants and Respondent bear its costs.

33.2 Reduce significantly Respondent's share of the fees and costs to be borne by Claimants; and

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<sup>236</sup> Claimants' 20 September 2019 costs submission, paragraph 32.1 and footnote 36.

<sup>237</sup> Respondent's 6 September 2019 costs submission, paragraph 13 and Annex.

<sup>238</sup> Respondent's 6 September 2019 costs submission, paragraph 15.

<sup>239</sup> Claimants' 20 September 2019 costs submission, paragraphs 32-33.

- 33.3 Order that Respondent bear Claimant's share of their fees and costs associated with the Provisional Measures phase.

**Respondent**<sup>240</sup>

17. The Republic requests that, if it prevails on its jurisdictional objections, the Tribunal include the following provisions in its Award dismissing the proceedings:
- a. Ordering Claimants to bear the costs of the arbitration in full, including reimbursing the Republic in the amount of \$325,000 that the Republic previously advanced to ICSID in connection with the arbitration, with interest at an appropriate rate from the date of the Award to the date of payment;
  - b. Awarding the Republic its expenses, including attorneys' fees, incurred in connection with the arbitration in the amount of \$1,173,330.24, with interest at an appropriate rate from the date of the Award to the date of payment;
  - c. In the alternative, awarding such other amount as the Tribunal determines to be justified.
18. In the event that the Republic does not prevail on its jurisdictional objections, the Republic requests that the Tribunal's consideration of costs await the Final Award on the merits.
251. On the issue of the allocation of costs, the Claimants submit that there is no general rule in international law of shifting costs to the non-prevailing party.<sup>241</sup> Addressing the allocation of costs more fully, the Claimants (in summary) submit as follows:
- (a) If the Claimants prevail at the jurisdictional stage, they should be awarded their costs and fees on the grounds of the conduct of the Respondent in the proceedings, which caused unnecessary costs and delay.<sup>242</sup>

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<sup>240</sup> Respondent's 6 September 2019 costs submission, paragraphs 17-18.

<sup>241</sup> Claimants' 20 September 2019 costs submission, paragraphs 2, 5, 8-13.

<sup>242</sup> Claimants' 20 September 2019 costs submission, paragraph 2.

- (b) If the Respondent prevails, the circumstances of the case do not justify cost-shifting in the Respondent’s favour.<sup>243</sup>
- (c) At a minimum, the Respondent should bear its own costs and fees, were it to prevail, on the grounds, *inter alia*, that the Claimants’ position on jurisdiction is well-founded and far from unprecedented, and the Respondent’s conduct in the arbitration does not justify an award of costs in its favour.<sup>244</sup>
  - (i) There is ample precedent to support the Claimants’ jurisdictional case.<sup>245</sup>
  - (ii) The Respondent should not recover costs and fees associated with the provisional measures phase of the case, which was only initiated after failed attempts by the Claimants “to reach a party-agreed *status quo*”.<sup>246</sup>
  - (iii) The Respondent was responsible for significantly and unnecessarily expanding the scope of the preliminary objections phase.<sup>247</sup>
- (d) The Respondent’s fees and costs are in any event unreasonable.<sup>248</sup>

252. On the issue of the allocation of costs, the Respondent (in summary) contends as follows:

- (a) The usual rule in international arbitration, “which has regularly been applied in ICSID proceedings”, is that the prevailing party is entitled to recover its costs.<sup>249</sup>
- (b) The Claimant’s jurisdictional position was unsupported and unprecedented.<sup>250</sup>

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<sup>243</sup> Claimants’ 20 September 2019 costs submission, paragraph 5.

<sup>244</sup> Claimants’ 20 September 2019 costs submission, paragraphs 6-7.

<sup>245</sup> Claimants’ 20 September 2019 costs submission, paragraphs 14-17.

<sup>246</sup> Claimants’ 20 September 2019 costs submission, paragraphs 19-20.

<sup>247</sup> Claimants’ 20 September 2019 costs submission, paragraphs 21-24.

<sup>248</sup> Claimants’ 20 September 2019 costs submission, paragraphs 25-30.

<sup>249</sup> Respondent’s 6 September 2019 costs submission, paragraphs 1, 8-10.

<sup>250</sup> Respondent’s 6 September 2019 costs submission, paragraph 2.

- (c) The Respondent's costs are reasonable.<sup>251</sup>

**B. The Tribunal's decision on costs**

253. Article 61(2) of the ICSID Convention provides:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

254. This provision does not state a default presumption in favour of awarding costs to the prevailing party. It does, however, give the Tribunal a wide measure of discretion to allocate the costs of the arbitration, including legal fees and other expenses, between the Parties as it considers appropriate in the circumstances of the case.

255. As a matter of principle, the Tribunal considers that it is sound that the costs of arbitral proceedings should, as a general matter, be borne by the losing party. The costs associated with resorting to arbitration are not insignificant and it is fair and reasonable that a party that is found not to have a meritorious case has the burden of covering the costs not simply of its own legal fees and expenses but also those of the opposing side, as well as the costs of the tribunal. The Tribunal sees no reason to distinguish the application of this principle in the case of proceedings which are concluded by an award on jurisdiction as opposed to those that are concluded by an award on the merits.

256. This principle must, however, be exercised in the light of all the circumstances of the case, including the conduct of the Parties in the proceedings. In other words, the Tribunal must exercise its judgement when allocating costs. It is not the case that costs simply follow the event, i.e., that they are attributable to the losing party simply by operation of a pre-ordained rule.

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<sup>251</sup> Respondent's 6 September 2019 costs submission, paragraphs 12-14.



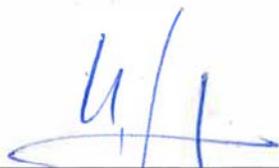
260. The above costs have been paid out of the advances made by the Parties in equal parts.<sup>253</sup>
261. It follows from the preceding that the Tribunal finds and decides that the Claimants must pay to the Respondent an amount of US\$897,383.41 being comprised of US\$724,662,94, in respect of legal fees and expenses incurred, and US\$172,720.47, in respect of the costs of the arbitration. The Tribunal further decides that no interest shall be levied on the payment of this amount within a period of three months from the date of this Award but that a *pro rata* interest rate of 1.00% per annum shall be levied on any amount unpaid after three months from the date of this Award until the date of payment.

### **VIII. AWARD**

262. For all the foregoing reasons, the Tribunal finds that it does not have jurisdiction under the Agreement on Promotion and Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference, whether read alone or together with any other treaty, and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.
263. The Tribunal accordingly upholds the Respondent's objection to jurisdiction *ratione voluntatis* and dismisses the Claimants' case for want of jurisdiction.
264. The Tribunal awards costs in an amount of US\$897,383.41 to be paid by the Claimants to the Respondent, such payment to be free from any interest charge within a period of three months from the date of this Award but subject to a *pro rata* interest charge of 1.00% per annum on any amount unpaid after three months from the date of this Award until the date of payment.
265. All other claims are dismissed.

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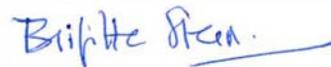
<sup>253</sup> The remaining balance will be reimbursed to the Parties based on the payments that they advanced to ICSID.



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Dr. Wolfgang Peter  
Arbitrator

Date: 3 April 2020



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Professor Brigitte Stern  
Arbitrator

Date: 3 April 2020



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Sir Daniel Bethlehem QC  
President of the Tribunal

Date: 3 April 2020