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The MFN clause under the OIC Agreement:

Analysis of *Itisaluna Iraq LLC and Others v Republic of Iraq*

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Abstract: *The Most Favored Nation (MFN) clause is one of the core protections envisaged in international investment agreements. It is intended to provide equal treatment among foreign investors and guarantee that they receive the same level of protection from the host state. Nevertheless, there is a lack of jurisprudence constante on the scope of its application in investment treaty arbitration (ITA). While extending the scope of the MFN clause to substantive protection is preponderantly accepted in ITA, albeit increasingly criticized, the debate on its application to dispute resolution provisions remains progressively heated. This article delves into the nuanced debate surrounding the scope of the MFN clause, particularly in relation to dispute resolution provisions. First, it begins by examining the controversial dichotomy of the MFN application to procedural matters. Afterwards, it explores the common principles of interpretation that play a pivotal role in shaping the interpretation of the MFN clauses. Second, it analyzes the recent Award rendered in Itisaluna Iraq LLC v the Republic of Iraq whereby the tribunal, by majority, declined its jurisdiction on the ground that the MFN clause as stipulated in the Organization of Islamic Co-operation Agreement (OIC) cannot be used to import dispute resolution provisions from bilateral investment treaties concluded between Iraq and other countries.*

Introduction

The Most Favored Nation ("MFN") clause is one of the core protections provided in several international investment treaties.[1] It has been defined in the Draft Articles of the International Law Commission as 'a treaty provision whereby a State undertakes an obligation towards another State to accord most-favoured-nation treatment in an agreed sphere of relations'.[2] While access to justice and the MFN clause are both important principles in international investment agreements ("IIAs"), they can be in tension with each other. The MFN clause is intended to promote equal treatment

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[1] Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012), 186; UNCTAD, *Most-Favored-Nation Treatment, UNCTAD Series on Issues in International Investment Agreements*, vol 3 (United Nations 1999).

[2] International Law Commission, 'Draft Articles on Most-Favoured-Nation Clauses with Commentaries' (1978) 2 UNYBILC 16.

among investors, regardless of their nationality and guarantees that investors receive the same level of protection and rights as those granted to investors of other countries. On the other hand, access to justice is a fundamental principle in investment law, ensuring that investors can challenge states' actions that may be in violation of their rights. The tension arises because the MFN clause can be used by investors to cherry pick the preferred dispute resolution mechanism from a third treaty or to circumvent certain procedural prerequisites stipulated in the basic treaty. For instance, an investor may invoke the MFN clause to escape the host state's legal system by bypassing the precondition of resorting to national courts. This can be problematic because it deprives the host state of its right to regulate, limits the ability of its courts to exercise its jurisdiction over investment disputes involving foreign investors and exposes developing countries to the risk of costly investment arbitrations. Therefore, access to justice and the MFN clause are deeply intertwined and require careful balancing.

While the MFN clause is intended to promote equal treatment and protect investors, it must be balanced against the need for access to justice to ensure that investors are able to protect their rights and interests in investment disputes without rewriting the host states' consent as expressed in the Bilateral Investment Treaties (BITs) or the Multilateral Investment Treaties (MITs). This requires a nuanced approach that considers the specific circumstances and interpretation of each BIT, as well as the need to maintain a balance between investor protection and the host state's right to regulate. As such, identifying the scope of the MFN clause under BITs toward procedural matters such as dispute resolution is widely contested.

While extending the scope of the MFN clause to substantive protection is preponderantly accepted in investment treaty arbitration, albeit increasingly criticized,[3] the debate on its application to dispute resolution remains progressively heated. Since the *Maffezini* decision,[4] there has been a vigorous debate about the scope of application of the MFN clause to dispute resolution provisions.

[3] In identifying the scope of application of the MFN clause to substantive matters, some scholars warned about the risk of utilizing an overly wide teleological approach to interpretation and underscored the existence of some limitations that follows the application of the MFN clause to substantive matters. However, this jurisprudence falls outside the scope of this paper. See Tony Cole, 'The Boundaries of Most Favored Nation Treatment in International Investment Law' (2012) 33 Mich J Int'l L 537, 559–560; Anqi Wang, *The Interpretation and Application of the Most-Favored-Nation Clause in Investment Arbitration* (Brill Nijhoff 2022) 74.
[4] *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Decision on Jurisdiction, 25 January 2000.

Tribunals are split into two schools of thought – the first school adopts a restrictive approach that limits the application of the MFN clause to substantive protection and accordingly, the MFN clause cannot be invoked to import dispute resolution provision from a third treaty, unless otherwise unequivocally stipulated.[5] The second adopts an expansive approach that extends the MFN clause to dispute resolution provisions regardless of the textual analysis of the respective BIT.[6]

In its award of 3 April 2020, the tribunal in *Itisaluna Iraq LLC and Others v the Republic of Iraq* (*Itisaluna v Iraq* or *Itisaluna* case) advanced a mixed approach between the first and the second school that is the focus of this note.[7] This is because even though the majority contended that an MFN clause could be used to import procedural matters as a matter of principle,[8] they underscored the uniqueness of the provisions of the Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference 'OIC Agreement' and rightly noted that it '*does not fit comfortably into the mould of wider investment treaty jurisprudence*'.[9]

In the case beforehand, the Claimants invoked the OIC Agreement and the Japan-Iraq BIT by operation of the MFN clause in Article 8 of the OIC Agreement. Additional allegations were made against Iraq's unlawful direct and indirect expropriation, its violations of the minimum standard of treatment, national treatment and Fair and Equitable Treatment (FET). The tribunal held that it lacks jurisdiction ratione voluntatis and ruled in favor of the Republic of Iraq. In reaching its decision, the tribunal addressed two major issues, (1) the state consent to resort to the International Centre for Settlement of Investment Disputes (ICSID) by virtue of Article 17 of the Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference (OIC Agreement) and, (2) the applicability of the MFN

[5] Alejandro Faya Rodriguez, 'The Most-Favored-Nation Clause in International Investment Agreements: A Tool for Treaty Shopping?' (2008) 25(1) J Int'l Arb 89; Emmanuel Gaillard, 'Establishing Jurisdiction Through a Most-Favored-Nation Clause' (2005) 233(105) NYLJ 3; Zachary Douglas, 'The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails' (2011) 2(1) JIDS 97.
[6] *Maffezini* (n 4); *Gas Natural SDG, SA v The Argentine Republic*, ICSID Case No ARB/03/10, Decision of the Tribunal on Preliminary Questions on Jurisdiction, 17 June 2005; *Suez, Sociedad General de Aguas de Barcelona SA & Inter Aguas Servicios Integrales del Agua SA v Argentine Republic*, ICSID Case No ARB/03/17, Decision on Jurisdiction, 16 May 2006; *National Grid plc v Argentine Republic*, UNCITRAL, Decision on Jurisdiction, 20 June 2006; *Siemens AG v The Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004.
[7] *Itisaluna Iraq LLC and Others v Republic of Iraq*, ICSID Case No. ARB/17/10, Award, 3 April 2020.
[8] ibid, paras 193–195.
[9] ibid, para 65.

clause in Article 8 of the OIC to import the state consent to resort to ICSID.[10] This paper focuses only on the latter matter and delves into the tribunal analysis in interpreting the scope of the MFN clause. It begins by examining the controversial dichotomy of the MFN applicability to procedural matters (Part 1). Afterwards, it summarizes the parties' pleadings before addressing the analysis of the *Istisaluna* tribunal concerning the scope of application of the MFN clause under the OIC Agreement and argues that the scope of the MFN clause does not intrinsically extend to dispute resolution provisions unless provided otherwise. As such, it concludes that even though the majority rightly rejected to import Iraq's consent to ICSID from Iraq-Japan BIT by virtue of the MFN clause as embedded in the OIC Agreement, they could have been more emphatic on the correct textual interpretation of the MFN clause (Part 2).

1. The application of the MFN clause to dispute resolution provisions under investment treaty arbitration

Although there is a lack of jurisprudence constante on its scope, the MFN standard is a public international law matter that must be interpreted in *'conformity with principles of justice and international law'*.[11] This section depicts the controversial debate on the scope of the MFN provisions on dispute resolution. It examines the divergent jurisprudence between an expansive approach and a restrictive one. It argues that the MFN clause, in essence, cannot be used to import dispute resolution mechanisms unless otherwise unequivocally stipulated.

1.1. The vexed question of the MFN interpretation on procedural matters

There is an eternal dichotomy in identifying the scope of application of the MFN standard to dispute resolution provisions. On the one hand, many scholars and tribunals adopted an expansive

[10] Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference (OIC Agreement), signed in 1981, EIF in 1988, Article 8 provides that: "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".

[11] Douglas (n 5) 100.

approach, whereby the MFN provision is perceived as the standard of protection that equally applies to substantive and procedural matters.[12] On the other hand, others adopted a restrictive approach confining its application to substantive matters[13] unless otherwise expressly provided.[14]

1.2.The expansive approach

This approach emerged after the famous *Maffezini* decision in 2000,[15] which triggered the debate on the scope of MFN provisions in investment treaty arbitration.[16] In this case, the tribunal permitted the Argentinian investor to use the MFN clause to bypass the requirement of an 18-month litigation period in Spain-Argentina BIT.[17] The *Maffezini* decision is a departure from the common understanding of the MFN function and proper operation under international law.[18] In identifying the MFN scope of application, the tribunal first relied on the Anglo-Iranian case whereby the International Court of Justice (ICJ) emphasized that the basic treaty created a juridical link between the investors' state and a third party treaty and granted the rights envisaged in the third treaty to the home state.

Otherwise, the basic treaty is completely isolated and independent from the third treaty and the latter has no legal effect on the state parties to the basic treaty pursuant to the principle of res inter alios acta.[19] As such, the tribunal stated that the subject matter of the MFN clause in the basic

[12] *Maffezini* (n 4); *Gas Natural SDG v Argentina* (n 6); *Suez, Sociedad General* (n 6); *National Grid v Argentina* (n 6); *Siemens AG v Argentina* (n 6).
[13] Douglas (n 5) 97, 105.
[14] Rodriguez (n 5); Gaillard (n 5); Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 344, 362; Campbell McLachlan et al., *International Investment Arbitration: Substantive Principles* (2nd edn, OUP 2017) 256; *Garanti v Turkmenistan*, ICSID Case No. ARB/11/20, Dissenting opinion of Laurence Boisson de Chazournes, 3 July 2013, para 63; *Impregilo SpA v The Argentine Republic*, ICSID, ARB/07/17, Concurring and Dissenting Opinion of Prof Brigitte Stern, 21 June 2011, para 80; *Telenor Mobile Communications AS v Republic of Hungary*, ICSID Case No ARB/04/15, Award, 13 September 2006 paras 90-91; *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v Turkmenistan*, ICSID Case No ARB/10/1, Award, 2 July 2013, para 7.3.9; *Hochtief AG v The Argentine Republic*, ICSID Case No ARB/07/31, Separate and Dissenting Opinion of J Christopher Thomas, 7 October 2011, para 17; *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Award, 22 August 2012; *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005; *H&H Enterprises Investments, Inc v The Arab Republic of Egypt*, ICSID Case No ARB/09/15, Excerpts of the Award, 6 May 2014, para 358; *Salini Costruttori SpA and Italstrade SpA v Hashemite Kingdom of Jordan*, ICSID Case No ARB/02/13, Decision on Jurisdiction 29 November 2004, para 119; *Vladimir Berschader and Moïse Berschader v Russian Federation*, SCC Case No 080/2004, Award, 21 April 2006, para 181; *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No. ARB/04/14, Award 8 December 2008, paras 160, 167; *A11Y LTD v Czech Republic*, ICSID Case No. UNCT/15/1, Decision on Jurisdiction, 9 February 2017, paras 104-107.
[15] *Maffezini* (n 4).
[16] Douglas (n 5) 101.
[17] *Maffezini* (n 4) paras 53–54.
[18] Douglas (n 14).
[19] *Maffezini* (n 4) para 44.

treaty must first be determined before invoking the MFN to import third treaty provisions.[20] Afterwards, it referred to the ejusdem generis principle to underscore that the MFN clause must be applied to the same category of rights by referring to the *Ambatielos* case and established that dispute resolution provisions are *'inextricably related to the protection of foreign investors'*.[21] Nevertheless, it cautioned about the risk of treaty shopping[22] and that the MFN provision cannot be invoked to bypass specific considerations, inter alia, public policy.[23]

In reaching its decision, the tribunal misunderstood the finding of the Commission in the *Ambatielos* case that it did support the operation of the MFN clause to import jurisdictional matters from a third treaty.[24] On the contrary, in the *Ambatielos* case, the MFN clause was invoked to establish a denial of justice claim for the prejudice Mr Ambatielos alleged to have suffered before the English courts.[25] Other tribunals exposed this interpretation.[26] For example, in *Plama v Bulgaria*, the tribunal noted that: *'in the Ambatielos Case … that ruling relates to provisions concerning substantive protection in the sense of denial of justice in the domestic courts. It does not relate to the import of dispute resolution provisions of another treaty into the basic treaty'*.[27] Following the *Maffezini* decision, there has been a surge of cases against Argentina that repeatedly adopted the *Maffezini* expansive approach.[28]

Allowing this expansive approach to continue would be difficult for states to predict the scope of their liability. Further, not only will it put states at risk of potential dispute resolution mechanisms to which they did not consent in the basic treaty, but it will also give carte blanche to all foreign investors to re-write the treaty's provisions. This is because public policy consideration construes a wide spectrum of interpretation and thus, it is left in its entirety to the discretionary power of the

[20] ibid para 45.
[21] ibid para 54.
[22] ibid para 63.
[23] ibid paras 62, 64–65.
[24] ibid para 50.
[25] *Greece v United Kingdom (Ambatielos)*, Award, 6 March 1956, 12 Reports of International Arbitral Awards 107; *Salini* (n 14) paras 106-112.
[26] *Berschader* (n 14) para 175; *Salini* (n 14) paras 106–112.
[27] *Plama* (n 14) paras 215, 217.
[28] *Maffezini* (n 4).

Queen Mary Law Journal, Vol. 4, pp. 53-69

respective adjudicators leaving respondent states vulnerable to the threat of costly potential investment disputes.

1.3.The restrictive approach

Although tribunals' analysis might vary in this approach, all confirm that the interpretation of an MFN provision shall not exceed what the contracting states consented to as expressed in the basic treaty.[29] Therefore in this approach, an MFN clause cannot extend to dispute resolution provisions unless there is unequivocal evidence to the contrary.[30] For example, in *Daimler v Argentina*, the tribunal provided that:

> *... as international treaties, BITs constitute an exercise of sovereignty by which States strike a delicate balance among their various internal policy considerations. For this reason, the Tribunal must take care not to allow any presuppositions concerning the types of international law mechanisms (including dispute resolution clauses) that may best protect and promote investment to carry it beyond the bounds of the framework agreed upon by the contracting state parties. It is for States to decide how best to protect and promote investment. The texts of the treaties they conclude are the definitive guide as to how they have chosen to do so.*[31]

In this line of argument, Douglas rightly observed that:

> *a most favoured nation (MFN) clause in the basic investment treaty does not incorporate by reference provisions relating to the jurisdiction of the arbitral tribunal, in whole or in part, set forth in a third investment treaty unless there is an unequivocal provision to that effect in the basic investment treaty.*[32]

Further, in her concurring and dissenting opinion in *Impregilo v Argentina*, Stern asserted that *'[a]n MFN clause cannot enlarge the scope of the basic treaty's right to international arbitration, it cannot be used to grant access to international arbitration when this is not possible under the*

[29] Christopher Greenwood, 'Reflections on "Most Favoured Nation" Clauses in Bilateral Investment Treaties' in Stephan Schill et al. (eds), *Practising Virtue: Inside International Arbitration* (OUP 2015) 559–61.
[30] Rodriguez (n 5); Gaillard (n 5); Douglas (n 14); McLachlan et al (n 14); *Impregilo SpA* (n 14); *Telenor Mobile* (n 14); *Daimler* (n 14); *Plama* (n 14); *H&H Enterprises Investments* (n 14); *Salini* (n 14); *Berschader and Berschader* (n 14); *Wintershall Aktiengesellschaft* (n 14).
[31] *Daimler* (n 14) para 164.
[32] Douglas (n 14) 344.

conditions provided for in the basic treaty'.[33] This position conforms with the majority adopted in *Itisaluna v Iraq*.[34] Even though the two approaches are extremely divergent in their views, both adopt the same principles of treaty interpretation and customary international law in interpreting the notion of the MFN clause.

1.4.The MFN and the principles of interpretation

This part first discusses the primary treaty interpretation instrument, the Vienna Convention on the Law of Treaties of 1966 (VCLT). Second, it examines the core principles of customary international law adopted in interpreting the MFN provisions, ejusdem generis and effet utile. Then it highlights the principle of separability that a few tribunals adopted in limiting the scope of application of the MFN clause to substantive matters.

1.5.The Vienna Convention on the Law of Treaties

The principles of treaty interpretation are set out in Articles 31 and 32 of the VCLT, which reflect principles of customary international law. Thus, in interpreting the MFN clause in investment treaties, tribunals usually consider both Articles.[35] Article 31 of the VCLT provides the 'General Rule of Interpretation'.[36] It provides that:

> *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 …*

This Article contains three distinctive principles of interpretation. The first is the interpretation must be in good faith, which follows directly from the pacta sunt servanda rule, *i.e.* Article 26 of the VCLT.[37] Second, it must consider the text's ordinary meaning as an expression of the parties'

[33] *Stern* (n 14) para 80.
[34] *Itisaluna* (n 7) para 195.
[35] ILC Draft Articles 1978 (n 2) 2.
[36] Romesh Weeramantry, 'Treaty Interpretation, the ICSID Convention and Investment Treaties' in Crina Baltag (ed), *ICSID Convention after 50 Years: Unsettled Issues* (Kluwer Law International 2016) 481–98.
[37] Article 26 provides that: 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

intentions. Third, this interpretation is to be made in the context of the treaty in light of its object and purpose.[38] A further resort to supplementary means of interpretation is applicable through Article 32 of the VCLT.[39] Nevertheless, because most MFN provisions are vague, they can give several interpretation scenarios. Unlike the MFN clause in the OIC, which expresses limitations that exclude importing dispute resolution.[40] However, the majority in the *Itisaluna* case decided not to emphasize the textual interpretation of the MFN clause under the OIC.[41]

1.6.The expression of consent

It is viewed that the provisions of a treaty represent the states' consent to the texts as given, not as assumed, which shall not be altered without prior consent. To illustrate, many scholars view the dispute resolution mechanism in investment treaties as demonstrating an 'offer to arbitrate'[42] that foreign investors cannot alter via the MFN clause.[43] For example, in his dissenting opinion, Thomas asserted that:

> *it is common ground between the parties, agreed by all members of the Tribunal, and well accepted in investment treaty arbitration that the State's prior treaty-based offer must be accepted by the claimant[44]… I find it difficult to see that the Claimant's invocation of a dispute settlement mechanism found in another treaty in order to vary the terms of the present Treaty is an acceptance of the offer to arbitrate on the terms on which the offer was made.[45]*

Therefore, in interpreting the scope of the MFN clause, a tribunal must consider the clear offer that the state parties made in the basic treaty. This is what the majority in the *Itisaluna* case asserted in analysing that the offer to arbitrate in Article 17 of the OIC agreement does not contain the ICSID arbitration. Thus, it cannot be imported from the Iraq-Japan BIT.[46]

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[38] International Law Commission, 'Draft Articles on the Law of Treaties with Commentaries' (1966) 2 UNYBILC 221.
[39] ibid.
[40] *Itisaluna* (n 7) para 197.
[41] ibid para 194.
[42] Christoph Schreuer, 'Consent to Arbitration' in Peter Muchlinski et al. (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 1412–13.
[43] Douglas (n 5) 108; Stern (n 14) para 53; Jan Paulsson, 'Arbitration without Privity' (1995) 10(2) FILJ 232.
[44] *Hochtief* (n 14) para 17.
[45] ibid para 26.
[46] *Itisaluna* (n 7) paras 110–111.

Ejusdem generis principle

A further significant rule of customary international law that is consistent with Article 31(3)(c) of the VCLT is the ejusdem generis.[47] Under this rule, an MFN clause shall be applied to the treatment of the same kind as the treatment stipulated in the MFN clause.[48] This principle is stated in the ILC draft articles on the MFN clauses. Article 9(1) provides that: *'under a most-favoured-nation clause, the beneficiary State acquires, for itself or for the benefit of persons or things in a determined relationship with it, only those rights which fall within the limits of the subject matter of the clause*'.[49] Tribunals have adopted the ejusdem generis rule when deciding the scope of an MFN clause.[50] For example, in the *Al-Warraq* case, the tribunal stipulated that the MFN clause in the OIC agreement can be used to import the FET from UK-Indonesia BIT. It said: *'the Tribunal is of the view that the MFN clause applies to import other clauses as long as the ejusdem generis rule applies*'.[51]

In conclusion, the principle of ejusdem generis is a significant rule of interpretation that must be applied not to extend the scope of the MFN clause beyond what the state parties have agreed. However, the majority in *Itisaluna* case decided not to address any rule of textual interpretation in determining the scope of the MFN clause under the OIC Agreement.

1.7.The principle of effet utile

Under international law and in the jurisprudence of the ICJ, it is undoubted that the provisions of a treaty, i.e. the MFN clause, must be effectively interpreted rather than ineffective.[52] Many tribunals asserted this doctrine.[53] For example, in *Eureko v Poland*, the tribunal stated that:

[47] Article 31(3)(c) provides that: '… any relevant rules of international law applicable in the relations between the parties'; International Law Commission, Draft Articles 1978 (n 2) 27; *Ambatielos* (n 25) 107.
[48] Stephen Fietta, 'Most Favoured Nation Treatment And Dispute Resolution Under Bilateral Investment Treaties: A Turning Point?' (2005) Int ALR 132; Andrew Newcombe and Lluis Paradell, *Law And Practice Of Investment Treaties: Standards Of Treatment* (Kluwer Law International 2009) 193–232.
[49] International Law Commission, Draft Articles 1978 (n 2) 30; International Law Commission, 'Final Report of the Study Group on The Most-Favoured-Nation Clause' (2015) 2 UNYBILC 212.
[50] *Ambatielos* (n 25) 107; *Hesham Talaat M Al-Warraq v The Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014, paras 541, 551; *ICS Inspection and Control Services Ltd v Argentina*, PCA Case No 2010-9, Award on Jurisdiction, 10 February 2012, para 297; *Daimler* (n 14) paras 211–12, 215–16; Plama (n 14) para 189; Berschader (n 14) para 195.
[51] *Al-Warraq* (n 50) para 551.
[52] *ICS* (n 50) para 317.
[53] *ICS* (n 50) para 317; *Eureko BV v Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, para 248; *Noble Ventures Inc v Romania*, ICSID Case no ARB/01/11, Award, 12 October 2005, para 50.

Queen Mary Law Journal, Vol. 4, pp. 53-69

> *it is a cardinal rule of the interpretation of treaties that each and every operative clause of a treaty is to be interpreted as meaningful rather than meaningless. It is equally well established in the jurisprudence of international law, particularly that of the Permanent Court of International Justice and the International Court of Justice, that treaties, and hence their clauses, are to be interpreted so as to render them effective rather than ineffective.*[54]

1.8.The separability of the arbitration agreement

Although this principle is not commonly adopted in interpreting the MFN clause, a few tribunals noted that an MFN clause, unless otherwise explicitly agreed, is a substantive protection that must be separated from the procedural protections in the Investor-State Dispute Settlement provision (ISDS).[55] To illustrate, importing a dispute resolution mechanism from a third treaty by virtue of an MFN clause will disrupt the principle of separability of the arbitration provisions.[56] For example, in *H&H v Egypt*, the tribunal asserted that:

> *[d]ispute resolution provisions are separable from the remainder of the treaty and "constitute an agreement on their own"; accordingly, "an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them".*[57]

2. Factual background of *Itisaluna v Iraq*

This section summarizes the factual background of the case, the parties' arguments and the analysis of the majority of the Tribunal.

2.1. Overview of the facts and the tribunal decision

This case concerns two companies, Itisaluna Iraq and MSI, incorporated under the laws of the Kingdom of Jordan, and two other entities, VTEL Holdings and VTEL MEA incorporated under the laws of Dubai UAE ('the Claimants' or 'the Investors'). In 2006, MSI paid USD 20 million to

[54] *Eureko* (n 53) para 248.
[55] *Douglas* (n 5) 97; *Stern* (n 14) para 31.
[56] *Plama* (n 14) para 212.
[57] *H&H* (n 14).

conclude a licensing agreement with Iraq's National Communications and Media Commission (CMC) to launch voice data and internet services in Iraq.[58] The Investors filed a request for arbitration in 2017.[59] They claimed that their right to operate their international gateways under the licensing agreement was impaired by the Iraqi Council of Ministers' decision to prohibit such operations in 2008.[60] In 2014, as the security situation in Iraq deteriorated, the Investors objected that they were banned from laying optical fibre cables. Consequently, Iraq's CMC increased the Investors' fees, despite the latter's various pleas. Thus, it violated its obligation as a regulator and eventually failed to negotiate the renewal of the Investors' licenses.[61] Against this background, the Investors initiated their case claiming that the Republic of Iraq ('the Respondent' or 'Iraq') breached its obligations under the OIC Agreement of national treatment, expropriation, full protection and security (FPS), and FET.[62]

In June 2018, the tribunal bifurcated the proceedings pursuant to the parties' agreement to address Iraq's objection ratione voluntatis as a preliminary matter.[63] The core issue of the award was whether the tribunal had jurisdiction under Article 25(1) of the ICSID Convention, which provides that both parties must consent in writing to submit their dispute to the ICSID arbitration.[64] On the one hand, Iraq contended that the tribunal lacks jurisdiction ratione voluntatis because Article 17 of the OIC Agreement,[65] concerning the dispute resolution mechanism, does not comprise ICSID

[58] *Itisaluna* (n 7) para 5.
[59] ibid para 25.
[60] ibid para 26.
[61] ibid para 26.
[62] ibid para 28.
[63] ibid paras 14–15.
[64] *Itisaluna* (n 7) paras 20-21, 40; Convention on the Settlement of Investment Disputes between states and nationals of other states, Ch II, Article 25 stipulates that: "(1) 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*…" 18 March 1965.
[65] OIC Agreement, Article 17 provides that: "1. Until an Organ for the settlement of disputes arising under the Agreement is established, disputes that may arise shall be entitled through conciliation or arbitration in accordance with the following rules and procedures: (1) Conciliation: a) In case the parties to the dispute agree on conciliation, the agreement shall include a description of the dispute, the claims of the parties to the dispute and the name of the conciliator whom they have chosen. The parties concerned may request the Secretary General to choose the conciliator. The General Secretariat shall forward to the conciliator a copy of the conciliation agreement so that he may assume his duties. B) The task of the conciliator shall be confined to bringing the different viewpoints closer and making proposals which may lead to a solution that may be acceptable to the parties concerned. The conciliator shall, within the period assigned for the completion of his task, submit a report thereon to be communicated to the parties concerned. This report shall have no legal authority before a court should the dispute be referred to it. (2) Arbitration: a) If the two parties to the dispute do not reach an agreement as a result of their resort to conciliation, or if the conciliator is unable to issue his report within the prescribed period, or if the two parties do not accept the solutions proposed therein, then each party has the right to resort to the Arbitration Tribunal for a final decision on the dispute. b) The arbitration procedure begins with a

arbitration. Furthermore, it asserted that its written consent to ICSID arbitration could not be derived from a comparator treaty, Iraq-Japan BIT, by operation of Article 8(1) of the OIC Agreement.[66] On the other hand, the Investors argued that the tribunal has jurisdiction under Article 17 which constitutes written consent to resort to arbitration, and by virtue of the MFN clause in Article 8(1) of the OIC Agreement, Iraq's consent to ICSID arbitration provided in Article 17 (4)(a) of the Iraq-Japan BIT is invoked.[67]

On 3 April 2020, the tribunal, by majority,[68] declined its jurisdiction and upheld Iraq's objections to jurisdiction ratione voluntatis under the OIC Agreement.[69] Nevertheless, Dr Wolfgang Peter, the arbitrator appointed by the claimants, dissented the award. He contended that the MFN clause could be used to import Iraq's consent, provided in Iraq-Japan BIT, to resort to ICSID arbitration.[70]

2.2. The Claimants' pleadings on jurisdiction

The Claimants rested on Article 8(1), MFN clause, of the OIC Agreement to establish Iraq's consent to ICSID arbitration given in Article 17(4)(a) of Iraq-Japan BIT. They argued that this article contains a more favourable dispute resolution clause than the one stipulated in Article 17(2)(b) of the OIC Agreement.[71] They premised their pleadings on establishing the tribunal's jurisdiction on two contentions. The first is that Iraq's general consent to arbitration is established in Article 17 of the OIC Agreement. This consent is supplemented by importing Iraq's consent to ICSID arbitration in the Iraq-Japan BIT operation of the MFN clause of the OIC Agreement. The second is that Iraq's consent to arbitration and consent to the ICSID can be imported from the Iraq-

notification by the party requesting the arbitration to the other party to the dispute, clearly explaining the nature of the dispute and the name of the arbitrator he has appointed. The other party must, within sixty days from the date on which such notification was given, inform the party requesting arbitration of the name of the arbitrator appointed by him. The two arbitrators are to choose, within sixty days from the date on which the last of them was appointed arbitrator, an umpire who shall have a casting vote in case of equality of votes. If the second party does not appoint an arbitrator, or if the two arbitrators do not agree on the appointment of an Umpire within the prescribed time, either party may request the Secretary General to complete the composition of the Arbitration Tribunal. c) The Arbitration Tribunal shall hold its first meeting at the time and place specified by the Umpire. Thereafter the Tribunal will decide on the venue and time of its meetings as well as other matters pertaining to its functions. d) The decisions of the Arbitration Tribunal shall be final and cannot be contested. They are binding on both parties who must respect and implement them. They shall have the force of judicial decisions. The contracting parties are under an obligation to implement them in their territory, no matter whether it be a party to the dispute or not and irrespective of whether the investor against whom the decision was passed is one of its nationals or residents or not, as if it were a final and enforceable decision of its national courts."

[66] Itisaluna (n 7) para 20.
[67] *Itisaluna* (n 7) para 21.
[68] Sir Daniel Bethlehem QC (the President of the tribunal) and Professor Brigitte Stern (the arbitrator appointed by the Respondent).
[69] *Itisaluna* (n 7) 105.
[70] ibid paras 226–242.
[71] ibid paras 71, 76.

Japan BIT by operation of the MFN clause in Article 8(1) of the OIC Agreement without regard to the ISDS clause in Article 17 of the OIC Agreement.[72]

2.3. Iraq's objection to jurisdiction ratione voluntatis

In response, Iraq's objection to jurisdiction was premised on the lack of consent to arbitrate under the OIC; Article 17 of the OIC considers only state-to-state dispute resolutions, and even assuming, arguendo, that it contemplates ISDS mechanism, it does not refer to ICSID arbitration.[73] Therefore, the tribunal lacks jurisdiction ratione voluntatis to decide on the possibility of importing Iraq's consent by operation of the MFN clause in the OIC Agreement.[74] The argument being advanced was that the MFN clause could not be used either to establish a non-existent consent[75] or be interpreted in a way to substitute the dispute settlement provision in the OIC with a completely new mechanism unless otherwise expressly stipulated in the MFN clause, which does not apply to Article 8.[76]

2.4. The tribunal analysis and award

The majority of the tribunal concluded that the MFN clause, Article 8, of the OIC Agreement could not import the Respondent's consent in writing to bring a claim before the ICSID stipulated in the Iraq-Japan BIT and thus, upheld Iraq's objection to jurisdiction ratione voluntatis.[77]

The majority began their analysis by addressing the central issue of whether the Claimants can import ICSID arbitration from Article 17 (4)(a) in Iraq-Japan BIT by operation of the MFN clause in the OIC Agreement.[78]

2.5. On the interpretation of the OIC Agreement

The majority of the tribunal highlighted that since the OIC Agreement is a multilateral treaty, 'considerable caution' must be given to any proposed interpretation that 'neither follows clearly

[72] ibid paras 78–80, 114–115.
[73] ibid paras 82, 92–96.
[74] ibid paras 83–85.
[75] ibid paras 99–106.
[76] ibid paras 83–87, 107–113.
[77] ibid paras 148, 223–235.
[78] ibid para 146.

Queen Mary Law Journal, Vol. 4, pp. 53-69

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'.[79] They rightly asserted that the practice of one party to the OIC, *i.e.* Iraq, in a bilateral context *'cannot be safely relied upon as a yardstick for the interpretation and application of that multilateral agreement'*.[80] Therefore, operating the MFN clause in a way that will create a 'variable framework' for the entire multilateral treaty would be *'the very antithesis of the principle underlying the MFN clause'*.[81] In this context, the majority highlighted that the interpretation of a multilateral agreement must neither fracture its multilateral character nor be done in isolation of its systemic nature.[82]

Against this background, the majority observed no connection between the interpretation of the OIC Agreement and the precedents raised by both parties.[83] Following this critical issue of interpretation, the majority illustrated prominent appreciations upon which they premised their final decision; the interpretation of Article 17 and the scope of application of the MFN clause in Article 8 of the OIC Agreement.[84]

2.6. On the interpretation of Article 17 and the consent to arbitration

In interpreting Article 17, the majority established that state parties of the OIC Agreement contemplated creating *'a bespoke mechanism'* for settling investor-state disputes arising under this Agreement.[85] This appreciation necessitates identifying the reference to *'conciliation'* provided in Article 17 and whether it is a mandatory prerequisite to arbitration or optional, as well as the question of consent to arbitration under the OIC. The majority concluded that conciliation is a condition precedent to resort to arbitration,[86] unlike the *Al-Warraq* tribunal. Article 17(2) constitutes the Respondent's consent to resort to arbitration, but not the ICSID arbitration.[87]

[79] ibid para 153.
[80] ibid.
[81] ibid.
[82] ibid para 154.
[83] ibid para 155.
[84] ibid para 156.
[85] ibid paras 167–168.
[86] ibid para 183.
[87] ibid paras 188–190.

2.7. On the interpretation and scope of application of the MFN clause

The majority noted that the essence of the dispute is whether the MFN clause in the OIC Agreement permits the incorporation of Iraq's written consent to ICSID from Iraq-Japan BIT.[88] In this respect, the majority's analysis here was sound because they relied on the terms used in the MFN clause to identify the possibility of importing Iraq's consent to resort to ICSID by virtue of the MFN clause as expressly stipulated in the OIC Agreement. In this view, they elucidated the essence of the proper application of an MFN clause by emphasizing that the MFN clause 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'.[89]

In this, the majority rested on the tribunal's analysis in the *Maffezini* case.[90] Although the *Maffezini* tribunal adopted an expansive approach, it warned about some significant public policy considerations that the operation of an MFN clause cannot bypass.[91] These limitations are the exhaustion of local remedies, fork in the road and the choice of a particular arbitration forum.[92]
In particular, the majority meticulously noted that despite the lack of clarity in many parts, the OIC Agreement constructed a *'clearly defined and particular dispute resolution regime'* that did not incorporate ICSID arbitration. This reveals that the state parties made a *'conscious decision'* to omit the ICSID arbitration.[93] They further added that the reading of Article 8(1) and (2)(a) together with Article 18 of the OIC Agreement create *'an MFN framework that is essentially designed to operate as a floor … rather than as a leveller of principle of wider application'*.[94] Therefore, they considered the OIC Agreement as establishing a unique *'systemic framework'* for the protection of investors, which they described as *'public policy considerations'*.[95]

Finally, in their concluding remarks, the majority warned about the risks of permitting treaty shopping by investors. It quoted the *Maffezini* analysis that *'a distinction has to be made between*

[88] ibid para 196.
[89] ibid.
[90] ibid paras 210, 212–222.
[91] ibid para 210.
[92] ibid para 211.
[93] ibid para 216.
[94] ibid para 217.
[95] ibid paras 218 and 220.

Queen Mary Law Journal, Vol. 4, pp. 53-69

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'.[96]

In conclusion, the award of the *Itisaluna* case is sound. While the majority's analysis was sharp, it could have been more emphatic by interpreting the text of the MFN clause in light of the customary international law rules instead of rejecting the Respondent's textual analysis in its entirety.[97] Although the majority warned about overcoming public policy considerations, they did not refer to Article 16 as a fork-in-the-road provision in the OIC Agreement, a public policy consideration that the MFN clause cannot circumvent.

Conclusion

Although the MFN standard exists in numerous investment treaties, its interpretation raises many issues. In deciding whether it can import dispute resolution mechanisms, jurisprudence has split between restricting and expanding approaches. In reaching their decisions, tribunals tend to apply rules of customary international law to reach a compelling interpretation of the MFN in question. Since the text of any treaty expresses how the state parties have chosen to promote and protect foreign investment, unless otherwise stipulated, the MFN clause in any treaty cannot be used by foreign investors as a carte blanche to cherry-pick dispute resolution provisions and incorporate them in the basic treaty. Allowing such behaviour to proliferate without proper scrutiny of the text will affect the equilibrium of the treaties and disrupt the whole investment treaty system. More attention must be paid to multilateral treaties, as the majority in *Itisaluna* illustrated. Although the majority in *Itisaluna* case provided significant analysis, they overlooked giving a proper interpretation of the MFN clause under the OIC Agreement. Against this background, the MFN debate will last so long as the current poor treaty provisions exist.

[96] ibid para 220.
[97] ibid para 194.