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“To the Centre”: Itisaluna v. Iraq and ICSID’s Entry into the OIC Debate

Craig D. Gaver · Monday, June 8th, 2020

The recent case of *Itisaluna Iraq LLC and Others v. Republic of Iraq* represents the first time that an ICSID tribunal had been constituted under the Agreement on Promotion and Protection and Guarantee of Investments among Member States of the Organization of Islamic Cooperation (the “OIC Agreement”). The tribunal affirmed that the OIC Agreement contains a general consent to arbitration on the part of the States Parties, but a majority found that that general consent did not extend to ICSID arbitration in particular, nor could the MFN clause operate to establish consent to ICSID arbitration through the invocation of a related BIT. As a consequence, the majority found that the respondent Iraq had not consented to submit the dispute “to the Centre,” as required by Article 25(1) of ICSID Convention. Although this decision seemingly forecloses future access to ICSID under the OIC Agreement, the award nevertheless will have important ramifications for other arbitrations arising under the treaty.

Background to the Dispute

The facts of the case, as asserted by the claimants and recounted by the tribunal, are straightforward. The claimants in June 2006 entered into an agreement with the Iraq national Communications & Media Center (“CMC”) whereby the claimants would receive a license to install, construct, and operate a public network of telecommunications services in Iraq, including the associated international gateway services. After paying a fee to secure the license, the claimants apparently invested hundreds of millions of dollars to fulfill the terms of the license.

According to the claimants, the CMC prohibited the claimants from exercising their right to operate the international gateways. This, in turn, deprived the claimants of an essential element of their investment in Iraq. The license subsequently expired and the CMC apparently continued to pressure the claimants into accepting a renewal of the expired license, albeit without any of its key terms, resulting in severe losses to the claimants.

In light of these alleged losses, the claimants invoked the OIC Agreement, as well as the Japan-Iraq BIT by operation of the OIC Agreement’s MFN clause, claiming unlawful direct and indirect expropriation, and violations of the minimum standard of treatment, national treatment, and fair and equitable treatment.

The OIC Agreement and the MFN Debate

Concluded in Baghdad in 1981, the OIC Agreement was predicted under the auspices of the 57-member Organisation of Islamic Cooperation, a multipurpose international organisation. The Agreement entered into force in 1988 for those Member States which had ratified it; it is presently in force for 29 OIC Member States, including Iraq, Jordan, and the UAE. Its coverage links a number of States which do not have BITs between them.

The Agreement's jurisdictional and procedural aspects, rather than its substantive protections, have attracted the most attention in commentary so far. Most prominently, Article 17 discusses the possibility and conditions of "conciliation or arbitration" under the Agreement. The Article 17 dispute resolution mechanism, however effectuated, is meant to function until such time that "an Organ for the settlement of disputes arising under the Agreement is established" (quoting the chapeau). No such organ has been created. Article 17 further provides that, in the event that the two disputants cannot agree on a presiding arbitrator, the OIC Secretary General shall appoint the president. In practice, the OIC Secretary General has declined to exercise this authority, thus thwarting the establishment of tribunals. Claimants have turned instead to the Permanent Court of Arbitration (PCA) through the operation of the Agreement's MFN clause and the UNCITRAL Rules, thereby bypassing the recalcitrant OIC Secretary General.

The OIC Agreement lay seemingly forgotten for years until it was successfully invoked by a successful claimant in the case of *Al-Warraq v. Indonesia*, applying the UNCITRAL Rules. Notably, the tribunal in Al-Warraq permitted the Saudi claimant to invoke the OIC Agreement, Article 8's MFN clause to import the FET clause from the UK-Indonesia BIT. The tribunal found an FET violation, but awarded no damages in light of the investor's unclean hands.

A robust debate has arisen concerning the Agreement's advance consent to ISDS, as well as the propriety of using the MFN clause to establish tribunals. This debate has not prevented at least a dozen known proceedings from arising under the Agreement.

The Tribunal's Analysis

The *Itisaluna* proceeding began much like its predecessors under the treaty, but this time with an added wrinkle. Whereas other claimants used the OIC Agreement's MFN clause to import dispute resolution mechanisms (in particular, the UNCITRAL Rules naming the PCA as appointing authority), the *Itisaluna* claimants invoked the Japan-Iraq BIT in an attempt to import Iraq's consent to ICSID arbitration in particular. Per Article 25(1) of the ICSID Convention, "the jurisdiction of the Centre shall extend to any legal dispute […] which the parties to the dispute consent in writing to submit *to the Centre*" (emphasis added). In other words, it would not suffice for the claimants to establish that Article 17 of the OIC Agreement provides consent to arbitration in general without providing additional evidence of consent to ICSID arbitration in particular. The tribunal, consisting of Sir Daniel Bethlehem, Q.C., Dr. Wolfgang Peter, and Professor Brigitte Stern, therefore very quickly identified this as "*the* critical question that requires decision by the Tribunal[.]" (Award, ¶ 80 (emphasis in original).)

A majority of the tribunal found that the claimants were precluded from using the MFN clause to

import from a tangential BIT the respondent State's consent to ICSID arbitration. To reach this conclusion, the tribunal made three important findings.

First, all three members of the tribunal confirmed that Article 17 provides general advance consent to ISDS in general. Iraq advanced the argument that unlike Article 16 (which offered aggrieved investors a choice between litigation in national courts and international arbitration), Article 17 governed inter-State disputes only. However, although Article 17(2)(a) spoke only of "parties," the reference to "the investor" in Article 17(2)(d) in the context of binding awards made clear that the article as a whole was meant to apply to ISDS, not simply inter-State disputes. The treaty when viewed as a whole clearly intended "to establish a bespoke mechanism for the settlement of disputes arising under the Agreement." (Award, ¶ 167.)

Second, notwithstanding this general consent to ISDS, the majority consisting of the President and Professor Stern, interpreted Article 17 to require conciliation as a condition precedent to arbitration. Recall that the Article 17 chapeau provides that "disputes that may arise shall be entitled [i.e., resolved] through conciliation or arbitration" (emphasis added). In the majority's view, the conditional language of Article 17(2)(a) meant that the treaty would not permit a disputant to proceed directly to arbitration without first attempting conciliation. Dr. Peter, in dissent, would have followed the *Al-Warraq* precedent, which rejected this approach and instead read the provision to offer a claimant the choice between conciliation or arbitration. (See Award, ¶¶ 226-242.)

Finally, notwithstanding the general consent to ISDS in Article 17, the majority decided that the claimants could not use the Article 8 MFN clause to import Iraq's consent to ICSID arbitration in particular from the Japan-Iraq BIT. The majority affirmed that "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 resolutions." (Award, ¶ 195.) Nevertheless, MFN clauses, as treaty law, must be interpreted carefully and are capable of express or implicit limitation. In the instant case, textual considerations in both the OIC Agreement and the Japan-Iraq BIT, and the interest of balance and "variable geometry" of overlapping treaties, counseled for limiting the effect of the Article 8 MFN clause. Moreover, the majority considered the import of the foundational *Maffezini v. Spain* case. Although *Maffezini* stands for the general proposition that an MFN clause can be used to import dispute resolution provisions from other BITs, the *Maffezini* opinion set forth four situations in which it would be inappropriate to do so. The *Itisaluna* majority observed that at least three of those factors applied in the instant case, not least of which was the limitation stating "if the agreement provides for a particular arbitration forum, such as ICSID, for example, this option […] cannot be changed by invoking the [MFN] clause, in order to refer the dispute to a different system of arbitration." (Award, ¶ 211 (quoting *Maffezini*, ¶ 63).) *Maffezini's* approach to an MFN clause, a sword for other claimants, here was a shield for the respondent.

Conclusions

The tribunal's award will play an important role in the continuing debate over the OIC Agreement.

First, the majority found that the general consent to investor-State arbitration established by Article 17 did not extend to ICSID arbitration in particular, nor could the claimants use the MFN clause to establish the respondent's consent to ICSID jurisdiction. Although future tribunals might take a

different view, they will likely have to address this decision, as it seems to foreclose access to ICSID under the OIC Agreement unless the parties specially consent to it.

Second—and paradoxically—the award might expand the use of the OIC Agreement for ad hoc investor-State disputes. Even though the majority found no consent to ICSID arbitration, all three members of the tribunal agreed that Article 17 establishes a general consent by States Parties to arbitrate investor-State disputes.

Third, the tribunal affirmed the availability of the OIC Agreement's MFN clause to dispute resolution mechanisms and procedural issues, albeit in a circumscribed manner. This will facilitate the constitution of tribunals using the UNCITRAL Rules (and the Rules' use of the PCA as an appointment authority) contained in BITs to which the respondent States are parties.

Fourth, and on the other hand, the majority supported the view of respondent States which have insisted on conciliation under Article 17 as a precondition to arbitration. This, in addition to the time delays occasioned by appealing to the PCA to act as an appointing authority, will compound the difficulties claimants face in constituting arbitral tribunals under the OIC Agreement.

Finally, the opinion will underscore the OIC's recent reform efforts. It has been reported that the OIC is drafting a protocol to the Agreement which would limit the type of substantive claims and would allow the OIC and its Member States to exercise more control over the adjudicatory process through the use of an inter-State negotiation stage and a standing dispute resolution body with appellate mechanism. Although the respondent Iraq defeated the *Itisaluna* ICSID claim, the award will remind the OIC Secretariat that similar claims will continue until its reform efforts are completed and adopted. In any event, the *Itisaluna Iraq LLC and Others v. Republic of Iraq* award represents an important contribution to jurisprudence under the OIC Agreement and ISDS more broadly.

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