

**In the matter of an arbitration pursuant to the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference, dated June 1981:**

**BETWEEN**

**HESHAM TALAAT M. AL-WARRAQ  
(Claimant)**

**Vs.**

**THE REPUBLIC OF INDONESIA  
(Respondent)**

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**Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility  
of the Claims  
21/06/2012**

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*Members of the Tribunal:*

Mr. Bernardo M. Cremades  
Mr. Michael Hwang S.C.  
Mr. Fali S. Nariman S.C.

*Representing the Claimant*

Mr. George Burn  
Ms. Sophie Palmer  
Ms. Louise Woods  
Salans LLP

Ms. Ioana Petculescu  
SCP Salans & Associés

*Representing the Respondent*

Ms. Karen Mills  
Mr. Ilman F. Rakhmat  
KarimSyah Law Firm

Mr. Yoseph Suardi Sabda  
on behalf of the Attorney General  
of the Republic of Indonesia

Mr. Arthur Marriott, Q.C.  
Ms. Mahnaz Malik

## I. PARTIES.-

1. The Claimant is **HESHAM TALAAT M. AL-WARRAQ**, Riyadh, Saudi Arabia (hereafter the "**Claimant**").

2. The Claimant has authorised to act on its behalf and to receive communications and notifications in this arbitration:

(i) Mr. George Burn  
Ms. Sophie Palmer  
Ms. Louise Woods  
Salans LLP  
Millennium Bridge House  
2 Lambeth Hill  
London EC4V 4AJ  
United Kingdom  
Tel.: +44 (0)20 7429 6000  
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Email: [gburn@salans.com](mailto:gburn@salans.com); [spalmer@salans.com](mailto:spalmer@salans.com); [lwoods@salans.com](mailto:lwoods@salans.com)

(ii) Ms. Ioana Petculescu  
SCP Salans & Associés  
5 boulevard Malesherbes  
75008, Paris  
France  
Tel.: +33 1 42 68 93 12  
Fax: +33 1 42 68 71 70  
Email: [ipetculescu@salans.com](mailto:ipetculescu@salans.com)

3. The Respondent is the **REPUBLIC OF INDONESIA** (hereafter the "**Respondent**").

4. The Respondent has authorised to act on its behalf and to receive communications and notification in this arbitration:

Ms. Karen Mills  
Mr. Ilman F. Rakhmat  
KarimSyah Law Firm  
Level 7, Plaza Mutiara

Lingkar Mega Kuningan Kav. 1 & 2  
Jakarta 12950  
Republic of Indonesia  
Tel.: +62 21 577 1177  
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with copies to: [iswahjudi.karim@karimsyah.com](mailto:iswahjudi.karim@karimsyah.com), [yosephsuardi@yahoo.co.id](mailto:yosephsuardi@yahoo.co.id),  
[masoemar@gmail.com](mailto:masoemar@gmail.com), [almqc@12graysinn.com](mailto:almqc@12graysinn.com); [mm@12graysinn.com](mailto:mm@12graysinn.com)

5. The Claimant and the Respondent are jointly referred to as the "Parties".

## II. APPOINTMENT OF THE TRIBUNAL.-

6. In the Notice of Arbitration the Claimant appointed Mr. Michael Hwang as an arbitrator in this arbitration. His contact details are as follows:

Michael Hwang Chambers  
8 Marina Boulevard  
#06-02 Marina Bay Financial Centre, Tower 1  
Singapore 018981  
Tel.: +65 6634 6250  
Fax: +65 6834 3400  
Email: [michael@mhwang.com](mailto:michael@mhwang.com)

7. By letter dated 25 November 2011, the terms of which are set out in Paragraph 13 below, and subject to the terms of this letter the Respondent notified the Claimant of its appointment of Mr. Fali S. Nariman as an arbitrator in this arbitration. His contact details are as follows:

Bar Association of India  
F-21/22 Hauz Khas Enclave  
110016, New Delhi  
India  
Tel.: +91 (11) 2686 2980  
Fax: +91 (11) 696 4718  
Email: [falinariman@gmail.com](mailto:falinariman@gmail.com)

8. The Parties by agreement, subject always to the Respondent's 25 November 2011 letter, have appointed Mr. Bernardo M. Cremades as presiding arbitrator. His contact details are as follows:

B. Cremades y Asociados  
Calle Goya, 18, segunda planta  
28001 Madrid  
Spain  
Tel.: +34 91 423 72 00  
Fax: +34 91 576 97 94  
Email: [bcremades-mad@bcremades.com](mailto:bcremades-mad@bcremades.com);

9. The Parties, in the Terms of Engagement dated 12 March 2012, confirm that Messrs. Hwang, Nariman and Cremades (the “*Arbitral Tribunal*”) have been validly appointed for the purposes of the OIC Agreement and the UNCITRAL Arbitration Rules, subject always to the Respondent’s 25 November, 2011 letter.

### III. PROCEDURAL HISTORY.-

10. According to the Claimant, a dispute has arisen between the Claimant and the Respondent under the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference, approved and opened for signature by resolution 7/12-E of the Twelfth Islamic Conference of Foreign Ministers held in Baghdad, Iraq, 1-5 June 1981 (hereafter the “*OIC Agreement*”).

11. Article 17 of the OIC Agreement reads as follows:

*“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 of procedure:*

*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 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 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 Arbitral 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.”*

12. The arbitration commenced by means of a Notice of Arbitration filed on 1 August 2011 pursuant to Article 17(2) of the OIC Agreement and Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law, as revised in 2010 (the “**UNCITRAL Arbitration Rules**”).

13. By letter dated 25 November 2011, the Respondent informed the Claimant that:

*“[i]n order to bring a swift resolution to [the Claimant’s] claim, [the Respondent] is agreeable that a tribunal be constituted for the sole purpose of determining the threshold issue of [the Claimant’s] locus standi to bring this claim under the OIC Agreement and for hearing [the Respondent’s] preliminary objections to the claim. Such agreement by [the Respondent] is subject and limited only to the terms as set out herein, any variation thereto nullifying such agreement.*

*[The Respondent] will appoint Fali S. Nariman SC as its party nominated arbitrator; accept the appointment of Michael Hwang SC as [the Claimant’s] party arbitrator and agree to Dr. Bernardo Cremades to be the Chairman of the tribunal (collectively “the Tribunal”) provided [the Claimant confirms its] agreement to all of the following:*

*1. The Tribunal will first decide the threshold issue of whether Article 17 of the OIC Agreement contains an offer by each contracting party to arbitrate disputes with nationals of another contracting party, entitling the latter to accept such offer by commencing arbitration proceedings;*

*2. If the Tribunal decides that [the Claimant] does have locus standi to bring its claim under Article 17, it will decide [the Respondent’s] application containing preliminary objections and request for security for costs before issuing any directions for a hearing on the merits;*

*3. If the Tribunal rules in favour of [the Claimant] in relation to the preliminary objections’ application any further jurisdictional or admissibility objections, the merits*

*and any counterclaim will be submitted to the same Tribunal;*

*4. The UNCITRAL Arbitration Rules in effect on the date of this letter will apply to these arbitration proceedings, except to the extent the same varied by the term of this letter and without prejudice to the conditions for conciliation and arbitration imposed by Article 17 of the OIC Agreement. For the avoidance of doubt, the Chairman of the Tribunal will be, appointed by the agreement of the parties and will not act as an umpire as provided by Article 17.2 of the OIC Agreement. All decisions will be made by the majority of the Tribunal; and*

*5. The seat of the arbitration proceedings will be Singapore and any hearing on the preliminary objections shall be held in Singapore on 17 April, 2012 or thereafter. Any further hearings on the merits, if any, will be held in London at such later dates as shall be agreed by the parties and the Tribunal.”*

14. Following the appointment of the members of the Tribunal, the Tribunal and the Parties signed on 13 March 2012 the Terms of Engagement, setting forth the procedural rules to be applied to the present arbitration, as well as the procedural calendar for the jurisdiction phase.
15. On 13 February 2012, the Respondent filed its Preliminary Objections to Jurisdiction and Admissibility of Claims, together with supporting documents including the statement of Mr Syed Sharifuddin Pirzada and the expert opinion of Dr Ahmed El-Kosheri.
16. On 7 March 2012, the Claimant filed its Response to the Preliminary Objections to Jurisdiction and Admissibility of Claims, together with supporting documents, including the expert opinions of Mr Walid Ben Hamida and Mr Mohamed A H Madkour.
17. On 29 March 2012, the Respondent filed its Rebuttal to the Claimant's Response to Respondent's Preliminary Objections to Jurisdiction and Admissibility of Claims.



18. On 19 April 2012, the Claimant filed its Rebuttal to Respondent's Preliminary Objections.
19. A hearing on the Respondent's Preliminary Objections to Jurisdiction and Admissibility of Claims (hereafter "*Hearing*") was scheduled in Singapore, on 28 April 2012.
20. On 27 April 2012, the Claimant informed the Tribunal and the Respondent that Mr Walid Ben Hamida, one of the Claimant's expert witnesses (who was expected to participate in the Hearing via video link), would not be available for the Hearing.
21. On the eve of 27 April 2012, the Respondent filed a number of additional exhibits in relation to its Preliminary Objections to Jurisdiction and Admissibility of Claims. The Claimant initially objected to these documents, but did not pursue this objection at the Hearing.
22. The Hearing was held on 28 April 2012 in Singapore, and was attended by the Tribunal and the Parties' legal representatives, as well as two expert witnesses. Mr Pirzada, the Respondent's witness, attended in person, and Mr Madkour, the Claimant's witness, participated in the Hearing via video link. During the Hearing, each party had the opportunity to present its case on the issues of jurisdiction and security for costs before the Tribunal.
23. The Claimant's witness Dr. Ben Hamida did not appear at the Hearing by video-link to answer questions. The Respondent submitted at the Hearing that parts of Dr. Ben Hamida's evidence were highly controversial and would have been subject to questions, and that as he was unavailable to answer questions, then his evidence should be excluded. The Claimant conceded that Dr. Ben Hamida's unavailability might affect the weight of his evidence but did not justify the exclusion of his report.
24. The Tribunal notes that it is a practice in international arbitration to exclude the written statement or report of a witness or expert that does not appear, either in



person or by video-link, to answer questions. However, the arbitral tribunal has the discretion in this regard (see for example Article 27(4) of the UNCITRAL Arbitration Rules) and each case must depend on its circumstances, including the significance of the evidence and the reason for the non-appearance. In the present case, the Tribunal considers that Dr. Ben Hamida's reports are not decisive on any issue. The Tribunal has not relied on his evidence in making this award and therefore has not needed to decide whether his non-appearance justifies the exclusion of his reports, or only goes to their weight

25. On 2, 3 and 4 May 2012, the Parties filed additional documents for the Tribunal's consideration. On 1 June 2012 the Respondent submitted, in response to a question of a member of the Tribunal at the Hearing, Resolution N° 11/3-P (IS) of the Third Islamic Summit Conference, relating to the establishment of the Islamic Court of Justice.

#### **IV. THE OIC**

26. The Organization of the Islamic Cooperation (hereafter the "**OIC**") (formerly Organization of the Islamic Conference) is the second largest inter-governmental organization after the United Nations. The Organization was established upon a decision of the summit which took place in Rabat, Morocco on 25 September 1969. The Charter of the OIC (see below) was established at this time, and has been subsequently amended. The official languages of the OIC are Arabic, English, and French.
27. In 1970 the first meeting of the Islamic Conference of Foreign Minister (ICFM) was held in Jeddah which decided to establish a permanent secretariat in Jeddah headed by the organization's Secretary General.
28. The present Charter of the Organization was adopted by the Eleventh Islamic Summit held in Dakar on 13-14 March 2008 which set forth the objectives and principles of the organization and fundamental purposes to strengthen the

solidarity and cooperation among the Member States. Over the last 40 years, the membership has grown from its 25 founding members to 57 states spread over four continents.

#### **A. THE OIC AGREEMENT**

29. The OIC Agreement was signed by the Republic of Indonesia on 1 May 1983 and ratified by it on 3 December 1983. There was no dispute that Saudi Arabia is a party to the OIC Agreement, nor that the OIC Agreement has entered into force.
30. The preamble of OIC Agreement reads as follows:

*“PREAMBLE*

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

*In keeping with the objectives of the Organisation of the Islamic Conference as stipulated in its Charter,*

*In implementation of the provisions of the Agreement for Economic, Technical and Commercial Cooperation among the Member States of the Organisation of the Islamic Conference and particularly the provisions of Article 1 of the said Agreement,*

*Endeavouring to avail of the economic resources and potentialities available therein and to mobilize and utilize them in the best possible manner, within the framework of close cooperation among Member States,*

*Convinced that relations among the Islamic States in the field of investment are one of the major areas of economic cooperation among these states through which economic and social development therein can be fostered on the basis of common interest and mutual benefit,*

*Anxious to provide and develop a favourable climate for investments, in which the economic resources of the Islamic countries could circulate between them so that*

*optimum utilization could be made of these resources in a way that will serve their development and raise the standard of living of their peoples,*

*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.”*

31. Article 1 defines the terms used in the OIC Agreement. These definitions include the following:

*“4. Capital: all assets (including everything that can be evaluated in monetary terms) owned by a contracting party to this Agreement or by its nationals, whether a natural person or a corporate body and present in the territories of another contracting party whether these were transferred to or earned in it, and whether these be movable, immovable, in cash, in kind, tangible as well as everything pertaining to these capitals and investments by way of rights or claims and shall include the net profits accruing from such assets and the undivided shares and intangible rights.*

*5. Investment: the employment of capital in one of the permissible fields in the territories of a contracting party with a view to achieving a profitable return, or the transfer of capital to a contracting party for the same purpose, in accordance with the Agreement.*

*6. Investor: the Government of any contracting party or natural corporate person [sic], who is a national of a contracting party and who owns the capital and invests it in the territory of another contracting party.*

*Nationality shall be determined as follows.*

*(a) Natural Persons:*



*Any individual enjoying the nationality of a contracting party according to the provisions of the nationality law in force therein.*

*(b) Legal Personality:*

*Any entity established in accordance with the laws in force in any contracting party and recognized by the law under which its legal personality is established.”*

32. Articles 2 to 7 of the OIC Agreement set forth the general provisions regarding the promotion, protection and guarantee of capital and investments and the rules governing them in the territories of the Contracting Parties. The Contracting Parties are required to:
- 32.1. Permit the transfer of capital among them and their utilization among them in the fields permitted for investment in accordance with their law (Article 2);
  - 32.2. Endeavour to open up various fields and investment opportunities to the capital on the widest possible scale (Article 3);
  - 32.3. Endeavour to offer various incentives and facilities for attracting capital and encouraging their investments in their territories (Article 4);
  - 32.4. Provide the necessary facilities and grant the required permits for entry, exit residence and work for the investor and his family and those working in connection with the investment (Article 5);
  - 32.5. Encourage the local private sector to cooperate and participate in investments in contracting parties (Article 6);
  - 32.6. Recognise that the rights and obligations of the investor which were established prior to the notice of a withdrawal by a contracting party shall not be affected by the withdrawal. (Article 7)



33. Article 8 of the OIC Agreement contains a Most-Favored-Nation (“*MFN*”) clause as follows:

*“1. The investors of any contracting party shall enjoy, within the context of economic activity in which they have employed their investments in the territories of another contracting party, a treatment not less 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:*

- i. 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.*
- ii. 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.*
- iii. Rights and privileges given by a contracting party for a specific project due to its special importance to that state.”*

34. Article 9 provides:

*“The investor shall be bound by the laws and regulations in force in the host state and shall refrain from all acts that may disturb public order or morals or that may be prejudicial to the public interest. He is also to refrain from exercising restrictive practices and from trying to achieve gains through unlawful means.”*

35. Articles 10 to 15 provide for various investment guarantees as follows:

- 35.1. The host state must not adopt or permit the adoption of any measures that could affect directly or indirectly the ownership of the investor, except:

- i. when the expropriation is in the public interest in accordance with the law and without discrimination and on prompt and effective compensation.
- ii. when the preventive measure is issued in accordance with an order from a competent legal authority. (Article 10)

35.2. The host state shall undertake to guarantee the free transfer to any contracting party of the capital and its net proceeds in cash without the investor being subject to any banking, administrative or legal restrictions and without any charges or taxes on the transfer. The transfer shall also be effected in the currency in which the investment was made or any other convertible currency. Furthermore, the transfer must be effected within the period normally required for the completion of bank procedures and without delay. However, procedural measures instituted for exchange control in the host state for administrative purposes or to prevent the illegal transfer abroad of its national, shall not be considered as a restriction. (Article 11)

35.3. The host state shall guarantee for the investor the freedom to dispose of the ownership of the invested capital by selling it, wholly or partly, by liquidation, cession, or grant or by any other means. (Article 12).

35.4. The investor shall be entitled to compensation for any damage resulting from any action of a contracting party or one of its public or local authorities or its institutions in the following cases:

- i. Violation of any of the rights or guarantees accorded to the investor under this Agreement;
- ii. Breach of any of the international obligations or undertakings imposed on the contracting party and arising under the Agreement for the benefit of the investor or the non-performance of whatever is necessary for its execution whether the same is intentional or due to negligence;

- iii. Non-execution of a judicial decision requiring enforcement directly connected with the investment;
- iv. Causing, by other means or by an act or omission, damage to the investor in violation of laws in force in the state where the investment exists.

Furthermore, the compensation should be equivalent to the damage suffered by the investor and should be monetary if it is not possible to restore the investment. The assessment of monetary compensation should be concluded within six months from the date when the damage was sustained. (Article 13).

35.5. Article 14 of the OIC Agreement deals with the treatment accorded to investors in cases of hostility and civil disobedience.

35.6. Article 15 provides that the OIC shall establish, through the Islamic Development Bank, and in accordance with the provisions of its Agreements as a subsidiary of the Organisation, an Islamic Institution for the Guarantee of Investments which is to take charge of the insurance of property invested in the territories of the contracting parties.

36. Articles 16 and 17 refer to dispute resolution. Article 17 has already been quoted. Article 16 provides:

*“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 he loses the right of recourse to the other.”*



37. Articles 25 deals with the authentic language of the OIC Agreement and provides:

*“This Agreement is drawn up in Arabic, English and French languages, each version being equally authentic.”*

38. In this context, the Tribunal notes that there is a discrepancy in the language of the opening phrase of Article 17 between the Arabic and French version on the one hand, and the English version on the other hand, as follows:

The English version:

*“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 of procedure [...].” (emphasis added)*

The Arabic version:

*“و إلى ان يتم إنشاء جهاز لتسوية المنازعات الناشئة عن هذه الاتفاقية يحل ما يكون من المنازعات عن طريق التوفيق او التحكيم وفقا للقواعد و الاجراءات الاتية[...]” (emphasis added)*

The French version:

*“En attendant la création d'un organisme pour le règlement des litiges résultant de cet Accord, les litiges qui pourraient de présenter seront réglés [sic] par conciliation ou par voie d'arbitrage conformément aux règles suivantes [...].” (emphasis added)*

## **B. THE INTERNATIONAL ISLAMIC COURT OF JUSTICE**

39. The Charter of the OIC (hereafter the “**Charter**”) was signed with the establishment of the OIC on 25 September 1969. The Charter was later amended on 14 March 2008.

40. Article 5 of the amended Charter provides:

*“The Organs of the Organisation of the Islamic Conference shall consist of:*



1. *Islamic Summit*
2. *Council of Foreign Ministers*
3. *Standing Committees*
4. *Executive Committee*
5. *International Islamic Court of Justice*
6. *Independent Permanent Commission of Human Rights*
7. *Committee of Permanent Representatives*
8. *General Secretariat*
9. *Subsidiary Organs*
10. *Specialized Institutions*
11. *Affiliated Institutions”*.

41. Article 14 provides that:

*“The International Islamic Court of Justice **established** in Kuwait in 1987 shall, upon the entry into force of its Statute, be the principal judicial organ of the Organisation”*.  
(emphasis added)

42. Resolution No. 13/5 – P (IS) on the Establishment of the International Islamic Court of Justice provides:

*“The Fifth Islamic Summit Conference, the Session of Islamic Solidarity, held in Kuwait, the State of Kuwait, from 26-29 Jumada Al-Oula, 1407 H (26-29 January, 1987);*

***Recalling** Resolution No. 11/3-P adopted by the Third Islamic Summit Conference, approving the establishment of an International Islamic Court of Justice;*

***In harmony with** the provisions of the Charter of the Organization of the Islamic Conference and **desirous of establishing a principal judicial organ** for settling disputes in accordance with the Islamic Sharia and the general principles of the international law, with the view to further improving and consolidating the brotherly relations;*

***Expressing** appreciation for the efforts made by the Experts Committee, in collaboration with the General Secretariat, for preparing the final text of the Draft Statute of the Court, as directed by the Fourth Islamic Summit Conference;*

*Having studied the explanatory note by the text of the Draft Statute, submitted by the General Secretariat;*

*1 – Approves the Draft Statute of the International Islamic Court of Justice, on the basis of voluntary jurisdiction.*

*2 – Also decided to add a fourth paragraph (paragraph D) to Article Three of the OIC Charter, to read as follows:*

*“The International Islamic Court of Justice, exercising its functions according to its statute annexed to this Charter, which forms a complementary part of the Charter”.*

*3 – Invites Member States to ratify Article Three of the OIC Charter, as amended and to deposit instruments of ratification with the General Secretariat.*

*4 – Entrusts the General Secretariat to communicate with Member States for implementing this resolution”. (emphasis added)*

43. Resolution 11/3-P referred to in the Preamble of Resolution N° 13/-S-P (IS) dates from the Third Islamic Summit Conference in January 1981 and approves the establishment of an ‘Islamic Court of Justice’, and calls for a meeting of experts from member states to frame a statute for The Islamic Court of Justice.

## **V. POSITION OF THE PARTIES.-**

44. The Claimant commenced this arbitration by Notice of Arbitration dated 1 August 2011, pursuant to the OIC Agreement. The Claimant seeks damages and other relief arising from the alleged loss of his investment in PT Bank Century, Tbk, which became in October 2009 PT Bank Mutiara, Tbk (hereafter “**Bank Century**”).
45. The Claimant, through his involvement in a Bahamanian company originally called Chinkara Capital Ltd. and from 2005 called First Gulf Asia Holdings Ltd.

(“FGAH”), as well as personally, was a shareholder in Bank Century. As at November 2008, Bank Century was the thirteenth largest bank in the Republic of Indonesia. The Claimant states that he is an ‘investor’, and his investment in Bank Century qualifies as a protected foreign investment for the purposes of the OIC Agreement. On November 21, 2008 Bank Century was placed under the administration of the Republic of Indonesia’s Deposit Insurance Agency.

46. The Claimant alleges that the Respondent’s nationalisation of Bank Century and surrounding events on 21 November 2008 breached various standards of protection under the OIC Agreement, standards of protection provided by bilateral investment treaties applicable by virtue of the MFN clause in Article 8 of the OIC Agreement, as well as the Respondent’s obligations under customary international law. After the nationalisation of Bank Century, the Claimant was investigated, charged with, and convicted of various offences relating to alleged banking irregularities. The Claimant alleges there was misconduct, including the solicitation of bribes, within the investigating team, and during the prosecution. The Claimant also says that the criminal prosecution in the Central Jakarta District Court was so fundamentally unfair as to amount to a denial of justice, and that the prosecution in criminal proceedings has constituted repeated grave violations of the Respondent’s obligation to accord fair and equitable treatment to the Claimant’s investment. In any event, the Claimant’s contention is that he is the victim of an entirely unfounded criminal conviction and grossly disproportionate sentence which amounts to a violation of international law.
47. The Claimant states that the Respondent’s conduct has inflicted severe damage to his mental state, financial state, personal image and ongoing business affairs. He seeks damages for material losses in excess of USD 20 million, as well as moral damages to be quantified, declarative and other relief, as well as interest and costs.

**A. RESPONDENT’S POSITION ON JURISDICTION:**

48. The Respondent in its Preliminary Objections to Jurisdiction and Admissibility of Claims dated 13 February 2012, Rebuttal to Claimant’s Response dated 29 March 2012, and the Hearing held on 28 April 2012 requests an award declaring that the



Tribunal lacks jurisdiction over the Claimant's claims under the OIC Agreement; or alternatively that the Claimant's claims as set out in the Notice of Arbitration are inadmissible, and an award to the Respondent of legal fees and arbitration costs. Further, and in the event that the Tribunal finds that it does not lack jurisdiction, the Respondent requests an order for security of costs pursuant to Article 26 of the UNCITRAL Arbitration Rules on the basis that the Claimant is a convicted criminal and a fugitive from justice with an unpaid judgement debt against him. The Respondent states that the Claimant was sentenced to imprisonment and a fine of USD 300 million for embezzling funds from Bank Century.

49. The Respondent states that Article 17 of the OIC Agreement (which refers to conciliation and arbitration) does not contain the consent of a State Party to arbitrate disputes with a private individual. The Respondent submits that the preamble of the OIC Agreement focuses on inter-state relations and does not use the typical objectives found in preambles of BITs that address investment protection. The Respondent also submits that the OIC website does not mention the existence of investor-state arbitration because the OIC Agreement simply does not provide for such. The Respondent states that this position has been confirmed by two Secretaries General of the OIC. The Respondent also refers to the evidence of its two witnesses, Mr. Pirzada and Dr. El-Kosheri, and also to the principles of interpretation in the Vienna Convention on the Law of Treaties ("VCLT").
50. Further, the Respondent contends that the Secretary General of the OIC did not accept the arbitration when notified, because he contends that the OIC Agreement does not cover claims brought by private investors, that it only covers state to state claims. The Respondent submits that there have been instances in which a member state has been notified of a claim by a private investor, pursuant to Article 17 of the OIC Agreement. However, the Respondent states that these claims were refused by the member states and that *"the parties have then sensibly made informal arrangements to agree a settlement of their disputes, but the one thing they haven't done is to go through Article 17."* The Respondent also claims that there has been no record of any claims brought under Article 17, whether by a private investor or by a member state.



51. The Respondent states that the Tribunal has the obligation to consider the above as evidence in accordance with Article 31(3) of the VCLT.
52. It concludes that Article 17 of the OIC Agreement does not contain the consent of state parties to conciliate or arbitrate disputes “*but simply contains the procedure to be followed in case both state parties agree to refer their dispute to conciliation in a separate instrument or agreement*”. In the present case the Respondent has not agreed to refer the Claimant’s dispute to conciliation with either the Claimant or the Claimant’s State of nationality (Saudi Arabia).
53. Further, the Respondent alleges that Article 17 only provides recourse to conciliation (provided that both parties consent to conciliation) and arbitration (in the event the conciliation fails for the reasons stipulated within Article 17) until an OIC organ for the settlement of disputes has been established. The Respondent states that the relevant organ is the International Islamic Court of Justice (“*IICJ*”) which was “established” in 1987. Accordingly, recourse to the arbitration proceeding in the OIC Agreement is now excluded.
54. The Respondent alleges as follows: (i) that the Claimant is in any event denied the protection of the OIC Agreement because of his illegal conduct (referring in this context to Article 9 of the OIC Agreement); (ii) that the Claimant comes to the Tribunal with hands tainted with the theft of assets stolen from Bank Century and the Indonesian public; and (iii) that the Claimant has been convicted by an Indonesian court and sentenced to a term in prison for his corrupt and dishonest conduct. The Respondent also disputes that the Claimant had any ‘investment’ within the meaning of the OIC Agreement because it is not clear that he owns shares in FGAH. Respondent also contends that the claim of expropriation under Article 10 of the OIC Agreement is inadmissible because the intervention in Bank Century was a *bona fide* bank rescue (i) to safeguard the interests of depositors and (ii) to prevent a systemic risk to the entire banking sector during a major global financial crisis. The Respondent also alleges that the intervention was consented to by the Claimant, and was necessitated by actions for which the

Claimant and his partners were responsible, and that Bank Century shares were worthless at the time of the alleged regulatory expropriation.

55. The Respondent further contends that, given the limitations of the MFN clause in Article 8 of the OIC Agreement, the Claimant cannot rely on this clause to incorporate a fair and equitable treatment standard into the OIC Agreement; and, in any event, fair and equitable treatment would only apply to the Claimant's 'investment' and not to his person. The Respondent also rejects the Claimant's allegations relating to the denial of justice and states that Bank Century was in fact worthless at the time of the Respondent's intervention. Finally, the Respondent requests an order for security of costs by way of an interim order pursuant to Article 26 of the UNCITRAL Arbitration Rules in the amount of USD 3 million.
56. The Respondent, in its Rebuttal to the Claimant's Response to the Preliminary Objections, states that the Claimant has failed to discharge the burden to demonstrate an unequivocal consent to arbitrate under Article 17 of the OIC Agreement. The Respondent states that the Claimant's position is "*contradicted by the treaty's text, the intention of the state parties who signed it, the clear statement of the organisation that administers the treaty and two respected legal experts who have witnessed the genesis of this treaty and are renowned as leading jurists in the Islamic legal world*".
57. The Respondent refers to the principles of interpretation under the VCLT. It states also that the provisions of Article 17 need to be read in sequence, and, if so read, it is clear that there is no independent right to arbitration. "*The right to arbitration only arises if there is a written agreement by both parties to submit the dispute to conciliation. If that conciliation fails then a right to arbitration arises. It is common ground between the parties that there is no agreement to conciliate this dispute*" (the Respondent's Rebuttal to the Claimant's Response to the Preliminary Objections to Jurisdiction and/or Admissibility of Claims dated 29 March 2012, paragraph 30). The Respondent states that Article 17 of the OIC Agreement explicitly requires two parties to enter into a separate written



agreement to conciliate a specific dispute, with the right to arbitration only arising if conciliation in accordance with such a conciliation agreement fails.

58. Under the heading ‘Subsequent Practice’ the Respondent refers to the fact that the Secretary-General of the OIC has refused to register an investor’s request “on the express ground that there is no jurisdiction for any investor” and that the Statute of the Islamic International Court of Justice, demonstrates that “the intention of the State-parties was never to allow investors to submit claims under Article 17”; the Respondent also contends that the statements of Mr. Ben Hamida and Mr. Madkour (witnesses for the Claimant), who recount their personal experiences of unsuccessful attempts by investors to use Article 17, cannot be relied upon since they are unsupported by information on the identity of the potential litigants or the nature of the disputes. The Respondent states that the only forum for the Claimant’s dispute is the Indonesian court system, and states that the MFN clause cannot be used to introduce an investor-state arbitration provision, or to provide consent to arbitration when none in fact exists. It states that Article 9 of the OIC Agreement is very clear that not just illegality, but also immorality of an investor under the host state’s law, bars any rights arising under the OIC Agreement, and that the verdict of the Indonesian Court is determinative of the Claimant’s illegality and immorality under Indonesian law. The Respondent states that the Claimant’s alleged investment in Bank Century remains unclear and suspicious, and refers to claims made by the Claimant’s business partner in Bank Century, Mr. Arafat Ali Rizvi that the Claimant held shares in Bank Century on trust for Mr. Rizvi. Finally, the Respondent reiterates its request for security for costs.

***B. CLAIMANT’S POSITION ON JURISDICTION:***

59. The Claimant in its Response to the Respondent’s Preliminary Objections to Jurisdiction and Admissibility of Claims dated 7 March 2012, its Rebuttal dated 19 April 2012 and at the Hearing held on 28 April 2012 rejects the Respondent’s assertions. The Claimant states that Article 17 of the OIC Agreement does give the Tribunal jurisdiction to hear the Claimant’s claim. It refers to the Expert Opinions of Messrs Madkour and Ben Hamida. It refers to the principles of interpretation in the VCLT which, it states, demonstrate that Article 17 of the OIC



Agreement constitutes a plain offer to arbitrate, permits the investor to choose the forum, and does not require an additional consent expressed in a separate agreement. It refers to the principle of harmonisation under the VCLT, which (it states) supports the Claimant's interpretation of Article 17. The Claimant further submits that, not only does Article 17 of the OIC Agreement contain a valid and full consent to arbitration, but it also establishes the detailed procedure of an *ad hoc* investor-state arbitration. It refers to specific language in Article 17 of the OIC Agreement to support its interpretation, including the reference to "nationals" in Article 17(2)(d). It argues that conciliation is voluntary and not mandatory, and in any event should not be given a formalistic interpretation. It states that, if Article 17 does not contain the required consent to arbitrate, then the Claimant is entitled to seek resolution of disputes with the Respondent by virtue of the MFN clause in Article 8 of the OIC Agreement.

60. Concerning the Respondent's allegation that Article 17 of the OIC Agreement does not contain the consent of a State Party to arbitrate disputes with a private individual, the Claimant submits that, apart from reflecting the minimal nature of the benefits provided to investors by the OIC Agreement, the preamble says nothing concerning the existence or otherwise of investor-State arbitration.
61. The Claimant refers to the reports provided by its legal experts (Mr Mohamed Madkour and Dr Walid Ben Hamida) which confirm that the Claimant's claims have been made under the auspices of the OIC Agreement. However, it also confirms that familiarity with the OIC Agreement appears to be confined to investment arbitration specialists, while the governments of signatory States confess to being unaware even that the OIC Agreement exists. The Claimant states that this ignorance appears to extend even to the OIC Secretariat itself.
62. According to the Claimant, the Respondent has not been able to produce support from the OIC Secretary General or the OIC itself, since neither of the Respondent's experts participated in the negotiation and drafting of the OIC Agreement, and even Mr. Pirzada left the organization soon after the entry into force of the OIC Agreement. Furthermore, Mr Madkour has explained in his expert opinion that, following several phone calls with the OIC officials related to

personal work conducted by Mr Madkour, he discovered that they did not have any details regarding the OIC Agreement or minutes of meetings discussing the negotiation rounds of the OIC Agreement.

63. The Claimant also submits that the Respondent relies on subsequent practice in its submissions when there is no such practice within the meaning of Article 31(3)(b). According to the Claimant, a subsequent practice requires consistent actions. The Claimant states that the conditions are not met here where only a few cases have been reportedly brought pursuant to Article 17 of the OIC agreement and where state practice is divergent, as demonstrated by Mr Madkour.
64. Furthermore, the Claimant states that his criminal convictions are no bar to his claim. The Claimant alleges that there were fundamental flaws in the “indictment” and that he was in fact prevented from defending the charges against him. He states that the alleged illegal conduct is no bar to his claim, either in international law or under Article 9 of the OIC Agreement. The Claimant further alleges that he was an investor in FGAH, and that he did not consent to Bank Century being placed under administration. The Claimant states that (i) he does have a valid claim under Article 10 of the OIC Agreement; (ii) Bank Century was not worthless at the time of the expropriation; (iii) there is a claim for violation of the fair and equitable treatment standard under the OIC Agreement by virtue of the MFN clause in Article 8; (iv) the Claimant was not obliged to exhaust local remedies since local remedies were not effective; and (v) that the Claimant remains protected by the minimum standard of treatment in customary international law.
65. As regards Respondent’s application for costs, the Claimant states that the Respondent has not attempted to meet the standards internationally recognised as preconditions for these measures. The Claimant states that he has sufficient assets to meet any costs award against him, and the Respondent has failed to satisfy the test laid down in Article 26 of the UNCITRAL Arbitration Rules and therefore this application should be dismissed.



## **VI. THE DECISION OF THE TRIBUNAL:-**

### ***A. THE INTERPRETATION OF ARTICLE 17 OF THE OIC AGREEMENT***

66. Articles 16 and 17 of the OIC Agreement contain its dispute resolution provisions. Article 16 provides for the right of investors to resort to national courts. Article 16 is relevant in this case to the extent that it affects or assists the interpretation of Article 17.
67. Article 17 relates to conciliation and arbitration. The Claimant relies on Article 17 to commence this arbitration, stating in effect that, by ratifying the OIC Agreement, the Republic of Indonesia has made an offer to arbitrate to investors which the Claimant can accept and thereby establish a valid arbitration agreement without any additional consent on the part of the State. The Claimant in effect alleges that the OIC Agreement contains the mechanism familiar in bilateral investment treaties whereby the treaty contains an open offer to arbitrate which is accepted, and the jurisdiction established, by the commencement of the arbitration on the part of the investor. The recognition of this mechanism is well established in investment arbitration and has been recognised in many awards.
68. The Respondent states that Article 17 does not contain any offer to arbitrate or consent to arbitrate on the part of the State. The Respondent states that Article 17 establishes a distinct mechanism requiring first that the State and the investor enter into a separate agreement to conciliate a specific dispute, with the right to arbitration only arising if conciliation in accordance with this agreement fails. It is not disputed in this case that there is no separate agreement to conciliate (or arbitrate) the dispute between the Parties, nor has any conciliation taken place. Accordingly, the Respondent submits that the Tribunal has no jurisdiction.
69. The Parties have presented radically different interpretations of Article 17 of the OIC Agreement, and the jurisdiction of this Tribunal depends upon the correct interpretation of this Article. Accordingly, the Tribunal will first address the



applicable principles of interpretation, before applying these principles to Article 17.

**a) The Applicable Principles of Interpretation**

70. The OIC Agreement is a treaty between states. Indonesia is not in fact a party to the VCLT, but both Parties in this arbitration have relied upon and accepted the VCLT to support their interpretations of Article 17. The Tribunal considers that these arguments of the Parties, and the fact that the VCLT represents customary international law on treaty interpretation, means that the applicable law to the interpretation of Article 17 of the OIC Agreement is contained in Section 3 'Interpretation of Treaties' of the VCLT.

71. Section 3 VCLT contains 3 articles (Articles 31 to 33) which read as follows:

**Article 31: General Rule of Interpretation**

*"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 of 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**

*“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**

*“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.*”

72. The Tribunal makes the following preliminary observations regarding the application of these principles in the current arbitration:

72.1. **Articles 31(2)(a) and (b):** The Parties have not identified any agreement or instruments in relation to the conclusion of the OIC Agreement that form part of its context within the meaning of Articles 31(2)(a) and (b);

72.2. **Articles 31(3) and (4):** Although there is no subsequent agreement between the Contracting Parties to the OIC Agreement regarding its interpretation or the application of its provisions within the meaning of Article 31(3)(a), the Respondent relies on the OIC Charter and the establishment of the IICJ as relevant to the interpretation of the OIC Agreement. It also argues that the term ‘established’ in the opening phrase of Article 17 of the OIC Agreement has a special meaning intended by the Contracting Parties for the purposes of Article 31(4) VCLT. The Respondent also alleges that there is subsequent practice for the purposes of Article 31(3)(b) in the application of Article 17 of the OIC Agreement that confirms that there was never any intention by the State Parties to give advance consent to arbitrate disputes with investors.

72.3. **Article 31(3)(c): Other relevant rules of international law applicable to relations between the parties.** In respect of the interpretation of a treaty relating to a subject matter such as the settlement of investment disputes which has undergone a rapid transformation between the date of the Treaty and the date of interpretation, then the Tribunal must consider in this context the rule of inter-temporal interpretation.

72.4. **Article 32: Supplementary means of interpretation.** The Parties have not relied on any travaux préparatoires as supplementary means of interpretation within the meaning of Article 32.



72.5. **Article 33: Authentic texts:** The OIC Agreement is authenticated in three languages, “each version being equally authentic” (Article 25 of the OIC Agreement). This arbitration is being conducted in English, and the Parties and the Tribunal have worked with the English and (to a limited extent) French texts.

The opening phrase of the English text contains a clumsy and ambiguous use of the word ‘entitled’ in the phrase “...*disputes that may arise shall be entitled through conciliation or arbitration...*”. The French and Arabic texts, referred to earlier, translate to the English ‘resolved’, which is a much more natural and meaningful term in English than the term in fact used. The Tribunal considers that the interpretation of ‘entitled’ in the sense of ‘entitled to resolution’ gives the same meaning in each authentic text (Article 33(3) VCLT) and best reconciles the text in regard to the object and purpose of the OIC Agreement (Article 33(4) VCLT).

**b) Investor-State Dispute Resolution Pursuant to the OIC Agreement:**

73. The preamble of the OIC Agreement refers to the anxiety of the Signatories to develop ‘a favourable climate for investment’. The OIC Agreement contains typical investment protection provisions, including guarantees of adequate protection and security, incentives, freedom of movement of personnel, most-favoured-nation protection rights, protection against expropriation, free transfer and disposition of capital, compensation for the violation of rights, and national treatment. The object and purpose of the OIC Agreement is investment, promotion and protection by conferring a broad range of rights on investors, and Article 17 must be interpreted in good faith in light of this object and purpose.

74. Article 16 confers the individual right of investors to resort to the ‘national judicial system’ of the host state, with a proviso that the choice of national courts or an arbitral tribunal results in the loss of the right of recourse to the other forum. Article 16 is not an applicable law clause, but expressly contrasts the national judicial system with arbitration.

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

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

75.2. Article 17(2)(d) uses the terms ‘contracting parties’ and ‘parties’ in a manner that distinguishes the State parties to the OIC Agreement from the parties to the arbitration. It also explicitly refers to the enforcement of an award against an “investor” and therefore is based on the understanding that the arbitration procedure in Article 17 can be used by investors;

75.3. The proviso to Article 16 requires an investor to make an irrevocable choice between seeking recourse in national courts or before an arbitral tribunal. In modern investment law, this is known as a ‘fork-in-the-road’ clause. The proviso to Article 16 demonstrates that the investor has a right to arbitration under the OIC Agreement, and, logically, this right is pursuant to the arbitration provisions in Article 17. The proviso to Article 16, by creating an immediate right to arbitration and in accordance with the normal operation of a fork-in-the-road provision, also confirms that exhaustion of local remedies is not required as a pre-requisite to arbitration.

76. For these reasons the Tribunal concludes that Article 17 of the OIC Agreement effectively creates an investor-state arbitration clause.



**c) Consent to Arbitrate under Article 17 of the OIC Agreement:**

77. The Respondent argues that, if investor-state arbitration is possible under Article 17, then the express consent of the state party is required. Article 17 does not specifically refer to consent to arbitrate and in the Claimant's submission. Article 17 constitutes an offer to arbitrate by the state parties, which the investor can accept by commencing arbitration. In the Claimant's view, Article 17 does not require any separate consent to arbitrate by the State party after the dispute has arisen.
78. Article 17(1) does refer to an agreement to conciliate. The Respondent argues that Article 17 must be interpreted in a logical sequence. Conciliation under the OIC Agreement requires an express agreement between the investor and the State. The investor can only proceed to arbitration after conciliation, and therefore arbitration is also based on an express agreement after the dispute has arisen. It is not denied by the Claimant that no such agreement exists in this case.
79. The Tribunal does not accept that Article 17 mandates (or even requires) conciliation to precede arbitration, although the possibility of conciliation followed by arbitration is definitely contemplated by Article 17(2)(a). The opening phrase of Article 17 clearly refers to "arbitration or conciliation" as alternatives. The proviso to Article 16 also contemplates resorts to national courts or investment arbitration without any prior requirement of conciliation. Accordingly, on a correct interpretation of Article 17, conciliation and arbitration are separate forms of dispute resolution which may be used either sequentially or alternatively, and the fact that there is no prior conciliation agreement is not an obstacle to an investor-state arbitration.
80. The Respondent relies on "subsequent practice" of the State party that no claim by an investor has ever been registered by the OIC Secretariat. However, this simple negative assertion 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. Besides, it appears that the OIC Agreement has not



been widely known to its investors, although there are some indications from the evidence in the case that this might now be changing.

81. 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. However, the Respondent's expert, Mr. Pirzada, referred in his report to the fact that, at the time the OIC Agreement was made, there was no concept of investor-state arbitration based on an international investment treaty. Mr. Pirzada states that "*the members of the OIC did not visualise such a situation while sponsoring the treaty*" (Mr Pirzada's report, paragraph 17). Further, the modern mechanism whereby the arbitration provision in an investment treaty is interpreted as an open offer by state parties was only definitively established after 1981 (e.g. *Lanco v. the Republic of Argentina*, Award on Jurisdiction 40 ILM 457 (1998)). Nevertheless, in the opinion of the Tribunal, the VCLT requires interpretation of the *mens legis*, not the *mens legislatoris*. What the Members of the OIC did or did not visualise when sponsoring the Treaty has not been established on the evidence; it is only Mr. Pirzada's *bona fide* view; but the Tribunal considers this as irrelevant; what is relevant is not the intention of any one or more Members of the OIC, but what the language used in the OIC 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.
82. Article 17 is subject to only a single temporal limitation, being the opening phrase "until an Organ for the settlement of disputes arising under the Agreement is established", which the Tribunal considers below. Apart from this phrase, the text of Article 17, and particularly Article 17(2), describe an unexceptional arbitration procedure covering commencement of the arbitration, appointment of the tribunal, meetings, the final and binding effects of awards, and the obligation to enforce

awards. The subject matter of the clause is the generic and undefined term 'disputes'. The interpretation of Article 17 in good faith in accordance with the ordinary meaning to be given to the terms of the treaty and their context and in light of the object and purpose is to make a contemporary interpretation that favours the object of investment promotion and protection. The Tribunal considers that the intention of the Contracting Parties to the OIC Agreement was to create a dispute resolution mechanism that might develop with international law. This interpretation requires Article 17 to be construed as containing an open offer to investors by all state parties, including the Republic of Indonesia, which the Claimant in this case has accepted by commencing the arbitration.

83. The Tribunal notes 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 in the International Court of Justice.

**d) The Opening Phrase of Article 17**

84. The opening phrase of Article 17 provides that the conciliation or arbitration procedure applies "*until an Organ for the settlement of disputes arising under the Agreement is established.*" The Respondent submits that the relevant Organ is the IICJ which was established in 1987, and, therefore, since this time the dispute resolution procedure in Article 17 has had no further effect.
85. The Respondent's expert witness Mr. Pirzarda confirmed that the IICJ was the Organ for the settlement of disputes referred to in Article 17. He referred to 'Resolution N° 13/5-P (IS) on the Establishment of the International Islamic Court of Justice' from the fifth Islamic summit conference in Kuwait in 1987. Resolution N° 13/5 approves the Draft Statute of the IICJ, amends the OIC Charter to refer to the IICJ, and invites members to ratify this amendment of the OIC Charter.
86. Neither Resolution N° 13/5 nor the Draft Statute of the IICJ specifically designate the IICJ as the dispute resolution organ contemplated by Article 17. The Draft



Statute limits itself to stating that the IICJ is “the principle judicial organ of the Organisation of the Islamic Conference” (Article 1). No specific competence or jurisdiction in matters of investment promotion or protection is provided for in the Draft Statute although Article 25 provides the jurisdiction referred to in other treaties. The competence of the IICJ is expressly limited to inter-state disputes (Article 21) and so it is not competent to decide an investor-state dispute.

87. The Claimant presented evidence calling into doubt that the IICJ was the Organ contemplated in Article 17. A ‘Note Reviewing the OIC Agreement for the 25<sup>th</sup> session of the Standing Committee for Economic and Commercial Cooperation of the OIC’ from 2009 referred to the need to establish a Dispute Settlement Organ ‘to enhance the degree of confidence to guarantee the investment promotion and a better capital movement’.
88. The Tribunal finds that it has not been established in evidence that the IICJ is the Organ contemplated by Article 17. The IICJ is a judicial organ, and does not provide conciliation or arbitration services. It is not competent to decide investor-state disputes. There is no confirmation by the Contracting Parties to the OIC Agreement that the IICJ is the Organ referred to in Article 17.
89. Further, the IICJ was ‘established’ by Resolution N° 13/5 in name only. It is not operational. It does not have, and never has had, any Registrar or Secretariat, nor any facilities or Judges. In short, the IICJ is ‘established’ judicially (subject to an issue unresolved by the evidence regarding whether its establishment has received a sufficient number of ratifications for the legal purposes of the OIC Charter), but not in any physical or operational sense. The Respondent submits that this is sufficient for Article 17, which only provides that the organ for the settlement of disputes be ‘established’, not that it be operational or effective. The Tribunal rejects this formalistic interpretation of ‘established’. A purposive interpretation is to be preferred. The object and purpose of Article 17 is to provide a dispute mechanism for investment disputes, initially through a provisional mechanism of *ad hoc* conciliation and arbitration, which will be subsequently replaced by a permanent mechanism. A tribunal that does not physically exist or operate cannot



resolve investment disputes, and therefore is not 'established' for the purposes of Article 17.

**e) The Definition of Investor**

90. The nationality requirements for an 'investor' are set out in Article 1 of the OIC Agreement. The Claimant alleges its investment was made through FGAH as well as by the Claimant personally. FGAH is a company registered in the Bahamas. The Bahamas are not a Contracting Party to the OIC Agreement, and so FGAH is not an 'investor' for the purposes of the OIC Agreement.
91. The Respondent has called into question whether the Claimant personally held shares in Bank Century at the time it was placed in administration. The Claimant has referred to evidence that the Respondent treated the Claimant as a shareholder at the time, but has not identified the number of shares or the capacity in which he held these shares. The Tribunal requires further evidence and submissions on the Claimant's condition as an 'investor' for the purposes of the OIC Agreement, and this question is accordingly reserved until the merits phase of this arbitration.
92. The Tribunal notes that Respondent has also raised various other objections to the admissibility or merits of the claim, such as (i) whether Article 10 of the OIC Agreement has any application in respect of bona fide regulatory measures such as the rescue of a bank from insolvency; (ii) whether the Claimant provided its written consent to the Deposit Insurance Agency's takeover of Bank Century; or (iii) whether Bank Century's shares were worthless at the time of the alleged regulatory expropriation. These objections are reserved to the merits phase of the arbitration.

**f) Conclusions**

93. For these reasons, the Tribunal finds that Article 17 established an effective investor-state dispute provision between the Contracting Parties and investors of other Contracting Parties, and that the Respondent had consented, as a Contracting Party to the OIC Agreement, to arbitrate the dispute with the

Claimant. The Tribunal's jurisdiction and the admissibility of the claims depend on further findings, particularly the Claimant demonstrating that it is an 'investor' for the purposes of the OIC Agreement. The Tribunal reserves these questions to the merits phase of the arbitration.

**B. ALLEGED CORRUPTION OF THE CLAIMANT**

94. The Respondent submits that the Claimant has been involved in illegal and immoral conduct, and has been criminally convicted by Indonesian courts for allegations that include corruption and money laundering. The Respondent submits that the Claimant's conduct is to be considered illegal, not only under Indonesian law, but also under Islamic Shari'a and International Law. The Respondent therefore submits that pursuant to Article 9 of the OIC Agreement, the Claimant is excluded from any legal protection provided by the Agreement.
95. The Claimant submits that there were fundamental flaws in his "indictment" and that he was, in fact, prevented from defending the charges brought against him. The Claimant also submits that he has been prevented from defending the charges against him, in large part owing to misconduct within the team of police officers investigating Bank Century after the bailout and representatives within the Attorney General's Office, including several instances of their requests for bribes during the investigations.
96. The Claimant also submits that allegations of investor misconduct were brought in the present arbitration only with respect to the operation of the investment, not to its making. It submits that, at all times, the Claimant's investment in the banking sector in Indonesia was considered legal and approved according to the applicable legislation.
97. Article 9 of the OIC Agreement requires the investor to comply with the law of the host state in making the investment. It does not provide for the consequences of any breach of the law or conviction of a criminal offence on the part of the investor. It also does not provide that a criminal conviction occurring subsequent

to the initial investment results in the denial of all rights of the investor under the OIC Agreement, including the right to arbitration.

98. The Parties have not disputed the fact of the Claimant's original investment. As the investment was made, there is no question that this Tribunal has jurisdiction over disputes relating to the Investment, and the question becomes whether access to the Claimant's substantive rights is limited or prevented by Article 9.
99. The Tribunal considers that, for purposes of determining the effect of Article 9 of the OIC Agreement on the rights of the Parties in further proceedings in this arbitration, the Tribunal must look closely at the Parties' claims concerning the allegations of criminal conduct, which include the corruption and money laundering allegations against the Claimant on the one hand, and the solicitation of bribes allegations against the Respondent on the other hand. This is not a question of jurisdiction but of the merits, to be dealt with at the merits phase of this arbitration.

**C. *MOST-FAVoured NATIONAL PROVISION:***

100. The Claimant submits that, even if one accepts, for the sake of argument, that Article 17 might not contain the required consent to arbitration, the Claimant is entitled to seek resolution of his dispute with the Respondent by virtue of the MFN clause in Article 8 of the OIC Agreement.
101. The Claimant further submits that "treatment" of investment refers to substantive protections, which extends to all guarantees such as fair and equitable treatment. The Claimant states that several arbitral tribunals have relied on the MFN clause to allow for the application of provisions of other BITs containing more favourable clauses concerning substantive obligations. Accordingly, the Claimant states that, on the basis of the MFN clause, it is entitled to fair and equitable treatment by the Republic of Indonesia.
102. The Respondent contests the Claimant's interpretation of the MFN clause.



103. The Tribunal considers that, since it has been established that consent to arbitrate exists under Article 17 of the OIC Agreement, there is no decision required (and no decision is given) as to the application of the MFN clause, at the present stage of the proceedings.

**D. APPLICATION FOR SECURITY FOR COSTS:**

104. The Respondent requests for security for costs in the amount of USD 3 million pursuant to Article 26(3) of the UNCITRAL Arbitration Rules. The Respondent submits that, in light of the Claimant's criminal record, and the fact that he is a fugitive from justice, it is unlikely that the Claimant would pay any costs awarded to the Respondent. The Respondent submits that it meets the test in Article 26(3) of the UNCITRAL Arbitration Rules, in light of the Claimant's past conduct and the fact that "*it is evident that the Claimant's claim is hopeless and bound to fail*".

105. The Claimant submits that the Respondent has failed to provide evidence to support its application. The Claimant states that he "*is far from impecunious and has sufficient means to satisfy any unfavourable costs award should he be required to do so*". He states that the only reason he has not complied with the order of the Indonesian court is that he was prevented from defending himself and the verdict represents a manifest injustice. The Claimant referred to jurisprudence of the use of Article 26(3) to obtain an order for security of costs as interim measures, and states that these orders are of an extraordinary nature. In particular the Claimant refers to *Sergei Paushok v. Mongolia* (Order on Interim Measures dated September 2, 2008) and *RSM Production Corporation v. Grenada*, ICSID Case Arb 10/6 (Decision on Security for Costs dated October 14, 2010).

106. The Claimant further submits that the Respondent has failed to (a) identify any likely harm not adequately reparable by an award of damages and (b) demonstrate that that harm substantially outweighs the harm that is likely to result to the party against whom the order for security for costs is made. The Claimant submits that to grant security for costs in such situation might set a dangerous precedent which requires claimant investors to overcome unnecessary and disproportionate financial hurdles before their claim will be heard.

107. At the Hearing, the Respondent referred to the Claimant's own Notice of Arbitration as evidence of the Claimant's impecuniosity, and particularly paragraph 107 where the Claimant states that he "*cannot support himself and his family but is dependent on charity from other members of his family*". The Respondent states that where an impecunious Claimant is also a convicted criminal then an order for security for costs is justified.

108. Article 26(3) of the UNCITRAL Arbitration Rules provides:

*"The party requesting an interim measure under paragraph 2 (a) to (c) shall satisfy the arbitral tribunal that:*

*(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and*

*(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination".*

109. While it is true that the Claimant himself has raised doubts about his own resources, he did so in the context of demonstrating the injury he has suffered from the actions of the Respondent for which he seeks recourse in this arbitration. The Respondent relies on the Claimant's alleged impecuniosity and the criminal conviction in Indonesia, but both of these circumstances relate to substantive matters at issue in the arbitration. There is no evidence against the Claimant indicating a risk of non-payment outside the strongly contested matters in dispute between the Parties. The Claimant has paid the costs of the arbitration to date and the Claimant is not required to demonstrate sufficient financial standing to meet a possible adverse costs award, or to provide security for such a sum, as a precondition of pursuing an investor-state arbitration. The harm alleged by the Respondent in terms of Article 26(3)(a) of the UNCITRAL Arbitration Rules is



the non-payment of a possible adverse costs award, but it has not demonstrated that this alleged harm is likely to occur, or that this risk outweighs the harm to the Claimant, in terms of an additional financial burden that would be imposed on the Claimant if the measure proposed by the Respondent were granted.

110. The Tribunal is of the view that the Respondent has failed to satisfy the test required by Article 26(3) of the UNCITRAL Arbitration Rules. Therefore, the Tribunal rejects the Respondent's request to order the Claimant to pay security for costs.

#### ***E. COSTS OF ARBITRATION***

111. Articles 40(1) and 42(2) provide that the Tribunal shall fix the costs of the arbitration in the final award or, if it deems appropriate, in another award or decision. The Claimant at the conclusion of the hearing submitted that the 'loser pays' principle should apply to the jurisdictional phase on a summary basis, so that, if the Claimant were successful, then the award would be accompanied by a suitable costs order. It offered to provide details of its costs and submitted that it would be unfair for the Claimant to have to wait to the end of the arbitration "*to be compensated for a process that really ought never to have been initiated.*"
112. The question of whether Article 17 created an investor-State arbitration mechanism was a reasonable jurisdictional question for the Respondent to raise, and to be determined as a preliminary question. It should have been anticipated by the Claimant as a necessary step in the arbitration. The costs of the jurisdictional phase can be considered as part of the overall costs of the procedure at the conclusion of the merits phase; the Claimant having insisted that it is not impecunious, the Tribunal does not accept that this causes any injustice to the Claimant. Accordingly, the Tribunal reserves all questions relating to costs including costs involved in the proceedings relating to the preliminary objection to jurisdiction to the conclusion (merits- phase) of the arbitration.



## VI. AWARD

113. In light of the foregoing and having considered the claims, applications, objections and defences of the parties, and all the submissions and evidence relating thereto, this Tribunal decides and declares that:

1. Article 17 of the OIC Agreement establishes investor-State dispute resolution provisions between the Contracting Parties and investors of other Contracting Parties;
2. In accordance with the above paragraph, the Respondent has consented to arbitrate the dispute with the Claimant arising from the Claimant's avowed investment in Bank Century and as described in the Notice for Arbitration;
3. The Tribunal reserves the determination of its jurisdiction to the merits phase of the arbitration, where the questions to be determined include whether the Claimant can establish its status as an 'investor' within the meaning of the OIC Agreement;
4. The applications for security for costs by the Respondent is dismissed;
5. The costs of the jurisdictional phase of the arbitration are reserved for the merits phase of the arbitration.

Place of Arbitration: Singapore.

Date: June 21st, 2012 (21.6.2012)

**THE ARBITRAL TRIBUNAL**



\_\_\_\_\_  
Mr. Fali Nariman  
Arbitrator



\_\_\_\_\_  
Bernardo M. Cremades  
Chairman



\_\_\_\_\_  
Mr. Michael Hwang  
Arbitrator