

ICC ARBITRATION NO. 21371/MCP/DDA

**TEKFEN-TML JOINT VENTURE, and
TEKFEN INSAAT VE TESISAT A.Ş., and
TML INSAAT A.Ş.**

Claimants

-v-

STATE OF LIBYA

Respondent

FINAL AWARD

THE TRIBUNAL

**Gary Born
Gabrielle Kaufmann-Kohler
J. William Rowley QC, President**

TABLE OF CONTENTS

1.	INTRODUCTION.....	4
1.1	Overview	4
1.2	The Arbitration Agreement and Governing Law	4
1.3	The Parties.....	9
1.4	The Parties’ Representatives	11
1.5	The Arbitral Tribunal	13
2.	BACKGROUND DETAILS	14
2.1	Initial Pleadings and Proceedings	14
2.2	Subsequent Pleadings and Proceedings.....	16
2.3	The Oral Hearing.....	20
3.	THE RELEVANT FACTS	21
3.1	The Tribunal’s Approach to the Facts.....	21
3.2	Project Description – GMMRP Project.....	22
3.3	GMMRA	24
3.4	TTJV’s Contract with GMMRA	25
3.5	TTJV’s Security Measures	29
3.6	State Security Presence in the Project Area	31
3.7	Looting of TTJV’s Camps.....	32
3.8	Events Following TTJV’s Evacuation from Libya	36
4.	CLAIMANTS’ CASE.....	41
4.1	The Treaty is in Force	41
4.2	Claimants are Protected Investors Under the Treaty.....	44
4.3	Claimants Have Made Protected Investments Under the Treaty	48
4.4	The Parties Consented to Submit this Dispute to ICC Arbitration	51
4.5	The Tribunal has Temporal Jurisdiction Over Claimants’ Treaty and Customary International Law (“CIL”) Claims	52
4.6	The Tribunal has Temporal Jurisdiction Over Claimants’ Claims Because of Libya’s Continuous Violation of International Law	57
4.7	The Tribunal has Subject Matter Jurisdiction Over the Dispute and Jurisdiction to Consider Customary International Law Claim.....	58
4.8	The Dispute is Ripe for Arbitration.....	59
4.9	Claimants’ Claims Are Not Duplicative and Do Not Constitute an Abuse of Process..	59
4.10	Claimants’ Customary International Law Claims.....	60
4.11	Libya is Responsible for the Wrongful Conduct of its Military and the GMMRA	61
4.12	Libya’s Failure to Meet its Obligation of Due Diligence Under International Law	68
4.13	Facts Relevant to the Assessment of Libya’s Compliance with Its Obligations.....	72
4.14	Respondent’s Defence that Claimants Failed to Employ Properly Qualified Security Guards	76
4.15	Respondent’s <i>Force Majeure</i> and Necessity Defences Are Without Merit.....	76

4.16	Even if <i>Force Majeure</i> or Conditions of Necessity Existed, Claimants Remain Entitled to Compensation.....	80
4.17	Claimants’ Damages Were Directly Caused by Respondent’s Failure to Provide Security.....	81
4.18	Requested Relief	84
5.	RESPONDENT’S CASE	85
5.1	Claimants’ Treaty Claims Constitute an Abuse of Process and are Inadmissible	85
5.2	The Treaty has not Entered into Force	86
5.3	Claimants’ are not Protected Investors.....	87
5.4	The Tribunal Lacks Jurisdiction <i>Ratione Materiae</i>	88
5.5	The Tribunal Lacks Jurisdiction <i>Ratione Temporis</i>	91
5.6	The Alleged Conduct is Not Attributable to the State of Libya.....	96
5.7	Libya did not Breach its Obligation to Protect Under Customary International Law or the Treaty.....	100
5.8	Events of <i>Force Majeure</i> in February 2011 Prevented Libya from Complying with its Treaty Obligations.....	102
5.9	Any Non-Performance of Respondent’s Duty to Protect is Also Excused as a Result of “Necessity”	104
5.10	Libya Did Not Treat Claimants Arbitrarily.....	105
5.11	Lack of Evidence of Loss of a Causal Link Between Alleged Breaches and Alleged Loss	106
5.12	Relief Sought by Respondent.....	108
6.	APPROACH TO THE TRIBUNAL’S ANALYSIS	109
6.1	Overview	109
6.2	Approach to be Followed	110
7.	THE TRIBUNAL’S ANALYSIS.....	110
7.1	Has The Treaty Entered into Force?	110
7.2	Are Claimants Protected Investors?	114
7.3	Have Claimants Made Protected Investments in Libya?	117
7.4	Did the Dispute Arise Before the Treaty Entered into Force?	126
7.5	Does the Treaty Permit Arbitration of CIL Disputes?	138
7.6	Are Claimants’ Claims Admissible?.....	142
7.7	Has Respondent Violated Customary International Law by failing to Provide FPS? .	145
7.8	Has Respondent Violated Article 2(2) of the Treaty by Failing to Provide FPS?	185
7.9	Has Respondent Violated Article 2(2) or 3(2) of the Treaty by Arbitrary or Discriminatory Behaviour?	193
8.	COSTS	195
8.1	Introduction	195
8.2	Determination and Apportionment of the Costs of Arbitration	196
9.	FINAL AWARD	203
9.1	Tribunal’s Final Award	203

1. INTRODUCTION

1.1 Overview

1.1.1 This case concerns the responsibility of the State of Libya (“**Libya**” or “**Respondent**”) to Claimants for its alleged failures to observe its duty under International Law and the Agreement between the Republic of Turkey and the Great Socialist People Libyan Arab Jamahiriya on the Reciprocal Promotion and Protection of Investments of 25 November 2009 (“**Treaty**” or “**BIT**”) to provide protection to Tekfen-TML Joint Venture (“**TTJV**”), Tekfen İnşaat ve Tesitsat A.S. (“**Tekfen**”) and TML İnşaat A.S. (“**TML**”), (collectively, “**Claimants**”) for their alleged investments in Libya.

1.2 The Arbitration Agreement

1.2.1 Claimants assert that the Arbitral Tribunal has jurisdiction to arbitrate both investment and contract disputes under the following arbitration agreements:

(a) The Treaty:

“*Article 8:*

1. *Disputes between one of the Contracting Parties and an investor of the other Contracting Party, in connection with his investment, shall be notified in writing, including detailed information, by the investor to the recipient Contracting Party of the investment. As far as possible, the investor and the concerned Contracting Party shall endeavor to settle these disputes by consultations and negotiations in good faith.*
2. *If these disputes cannot be settled in this way within ninety (90) days following the date of the written notification mentioned in paragraph 1, the dispute can be submitted, as the investor may choose, to the competent court of the Contracting Party in whose*

territory the investment has been made or to international arbitration under:

- (a) the International Center for Settlement of Investment Disputes (ICSID) set up by the “Convention on Settlement of Investment Disputes Between States and Nationals of other States”, in case both Contracting Parties become signatories of this Convention,*
 - (b) an ad hoc court of arbitration laid down under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law (UNCITRAL).*
 - (c) The Court of Arbitration of the Paris International Chamber of Commerce.*
- 3. Once the investor has submitted the dispute to the one of the dispute settlement procedures mentioned in paragraph 2 of this Article, the choice of one of these procedures is final.*
- 4. Notwithstanding the provisions of paragraph 2 of this Article;*
- (a) only the disputes arising directly out of investment activities which have obtained necessary permission, if any, in conformity with the relevant legislation of both Contracting Parties on foreign capital, and that effectively started shall be subject to the jurisdiction of the International Center for Settlement of Investment Disputes (ICSID), in case both Contracting Parties become signatories of this Convention, or any other international dispute settlement mechanism as agreed upon by the Contracting Parties;*

(b) *the disputes, related to the property and real rights upon the real estates are totally under the jurisdiction of the Contracting Party in whose territory the investment is made, therefore shall not be submitted to jurisdiction of the International Center for Settlement of Investment Disputes (ICSID) or any other international dispute settlement mechanism; and*

(c) *With regard to the Article 64 of the “Convention on the Settlement of Investment Disputes between States and Nationals of other States”;*

5. *The Republic of Turkey shall not accept the referral of any disputes arising between the Republic of Turkey and any other Contracting State concerning the interpretation or application of “Convention on the Settlement of Investment Disputes between States and Nationals of other States,” which is not settled by negotiation, to the International Court of Justice.*
6. *The arbitration awards shall be final and binding for all parties in dispute. Each Contracting Party commits itself to execute the award according to its national law.*

Article 11:

If the legislation of either Contracting Party or rights or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain a provision whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favorable than is provided for by the

present Agreement, such provision shall, to the extent that it is more favorable, prevail over the present Agreement.”

- (b) The Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic conference (“OIC Treaty”):

“Article 8:

1. *The investors of any contracting party shall enjoy, within the context of economic activity in which they have employed their investments in the territories of another contracting party, a treatment not less favourable than the treatment accorded to investors belonging to another State not party to this Agreement, in the context of that activity and in respect of rights and privileges accorded to those investors.*
2. *Provisions of paragraph 1 above shall not be applied to any better treatment given by a contracting party in the following cases:*
 - (a) *Rights and privileges given to investors of one contracting party by another contracting party in accordance with an international agreement, law or special preferential arrangement.*
 - (b) *Rights and privileges arising from an international agreement currently in force or to be concluded in the future and to which any contracting party may become a member and under which an economic union, customs union or mutual tax exemption arrangement is set up.*
 - (c) *Rights and privileges given by a contracting party for a specific project due to its special importance to that state.”*

The MFN clause in Article 8.1 above is said to allow resort to the umbrella clause in Article 8(1) of the Austria-Libya BIT in (c) below.

- (c) The Agreement Between the Republic of Austria and the Great Socialist People's Libyan Arab Jamahiriya for the Promotion and Protection of Investments ("**Austria-Libya BIT**"):

"Article 8:

- (1) *Each Contracting Party shall observe any obligation it may have entered into with regard to specific investments by investors of the other Contracting Party.*

Article 11:

- (1) *For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party concerning an alleged breach of an obligation under this Agreement consultation shall take place between the parties concerned.*
- (2) *If the Consultations do not result in a solution within three months from the date of request for consultations, the investor may submit the dispute:*
- (a) *To the competent courts or administrative tribunals of the contracting Party in whose territory the investment has been made;*
- (b) *In accordance with any applicable previously agreed dispute settlement procedure; or*
- (c) *In accordance with this Article to:*

- (i) *The international Centre for Settlement of Investment disputes („the Centre“), established pursuant to the Convention on the Settlement of Investment disputes between the States and Nationals of other States („the ICSID Convention“), if the Contracting Party of the investor and the contracting Party, party to the dispute, are both parties to the ICSID Convention;*
- (ii) *The Centre under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre, if the contracting Party of the investor or the Contracting Party, party to the dispute, but not both, is a party to the ICSID Convention;*
- (iii) *An ad hoc arbitration tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (“UNICITRAL”)*
- (iv) *The International Chamber of Commerce, by a sole arbitrator or an ad hoc tribunal under its rules of arbitration.”*

1.2.2 Respondent contends that the Arbitral Tribunal lacks jurisdiction over Respondent and Claimants’ claims.

1.3 **The Parties**

1.3.1 Claimants

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1.3.2 Respondent

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THE STATE OF LIBYA
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Minister of Foreign Affairs of the State of Libya
Ministry of Foreign Affairs and International Cooperation
Al-Bayda, State of Libya

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1.4 **The Parties' Representatives**

1.4.1 Claimants are represented in this arbitration by:

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1.5 The Arbitral Tribunal

1.5.1 The Arbitral Tribunal (“**Tribunal**”)¹ has been constituted as follows:

Nominated by Claimants:

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Wilmer Cutler Pickering Hale and Dorr LLP
49 Park Lane
London W1K 1PS
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and

Nominated by Respondent:

Professor Gabrielle Kaufmann-Kohler
Levy Kaufmann-Kohler
3-5 Rue du Conseil-Général
P.O. Box 552
1211 Geneva 4
Switzerland

¹ On 24 March 2016, the ICC International Court of Arbitration decided to submit the arbitration to three arbitrators and agreed to the parties’ alternative method of nominating the President of the Tribunal. The Court also fixed Geneva (Switzerland) as the place (seat) of arbitration.

Tel: +41.22.80.96.200

Email: gabrielle.kaufmann-kohler@lk-k.com

Whose nominations as co-arbitrators were confirmed by the ICC International Court of Arbitration on 7 July 2016.

Nominated jointly as President by the co-arbitrators:

Mr J. William Rowley QC
Suite 900, 333 Bay Street
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Whose appointment as President of the Arbitral Tribunal, was confirmed by the Secretary General of the ICC International Court of Arbitration on 28 October 2016.

2. BACKGROUND DETAILS

2.1 Initial Pleadings and Proceedings

- 2.1.1 On 1 October 2015, Claimants submitted a Request for Arbitration dated 29 September 2019 with Respondent on the basis of the Treaty. Claimants' requested relief included requests for declarations relating to Respondent's international responsibility and a request for compensation on the basis of Respondent's alleged breaches of customary international law and Articles 2(2) and 3(2) of the Treaty for failing to provide full protection to Claimants and for arbitrary discrimination against them in the provision of protection and security. Claimants also requested relief in relation to certain contractual claims pursuant to the Most Favoured Nation Clauses (Article 11 of the Treaty or Article 8 of the OIC Treaty), invoking the so-called Umbrella Clause of Austria-Libya BIT ("Umbrella Clause Claims"). Part of the Umbrella Clause

claims mirrors a contractual claim against Respondent in a pre-existing ICC Arbitration claim.²

- 2.1.2 On 13 May 2016, Respondent submitted its Answer.
- 2.1.3 On 7 July 2016, pursuant to Article 13(2) of the ICC Rules, the Court confirmed Mr Gary Born as co-arbitrator upon the joint nomination of Claimants, and Professor Gabrielle Kaufmann-Kohler's nomination as co-arbitrator on the nomination of Respondent.
- 2.1.4 On 28 October 2016, and pursuant to Article 13(2) of the ICC Rules, the Secretary General confirmed Mr J William Rowley QC as President of the Arbitral Tribunal upon the joint nomination of the co-arbitrators.
- 2.1.5 On 20 December 2016, the parties and the Tribunal held a first procedural meeting to agree and/or fix a timetable for the arbitration and procedural measures to be followed. Due execution of the Terms of Reference dated as at 20 December 2016 was confirmed and the Tribunal consulted the parties on the procedural measures to be followed in this arbitration. It was agreed that the results of those consultations will be reflected in Procedural Order No. 1.
- 2.1.6 On the same date, following the first procedural meeting, the Tribunal ruled, for reasons of cost effectiveness and to avoid duplication of contractual claims advanced both in these proceedings and in the Contract Case, that:
- (a) the arbitration should proceed in phases, with the first phase ("**Phase I**") being restricted to a consideration only of Claimants' claims regarding Respondent's international responsibility (damages, if any, being reserved for a later phase) for its alleged failure to protect Claimants and their

² On 16 June 2015, Claimants had commenced ICC Arbitration Case No. 21137/MCP/DDA against the GMMRA (defined at 3.2.3 below) and the State of Libya under the arbitration clause contained in the Contract (defined at 3.4.5 below) (the "**Contractual Arbitration**" or "**Contract Case**") in which Claimants formulated a number of damages claims. These included a claim for "no less than" USD 96 million, on the basis that the GMMRA and the State had "fail[ed] to protect the work site, Claimants' equipment and assets, and the works or caus[ed], either directly or indirectly, damage to the work site, Claimants' equipment and assets, and the works, in breach of the Contract and their duties under Libyan and international law."

investments as outlined in their Request for Arbitration and in the Terms of Reference. The Tribunal also directed that Phase I was not to include a consideration of Claimants' contractual claims brought as Umbrella Clause claims³;

- (b) Claimants' Umbrella Clause claims, including any jurisdictional or other preliminary objections, and all claims for damages were reserved for a later phase ("Phase II") of these proceedings. If required, Phase II was directed to proceed following: (i) the Tribunal's Award in connection with the Phase I; and (ii) the issue of a Final Award in the Contractual Arbitration, expected not earlier than the second quarter of 2018.

2.1.7 The Tribunal instructed that "to the extent Respondent wishes to assert jurisdictional objections to Claimants' first phase claim, it should do so in its first memorandum, and the parties should provide in any proposed timetable, a date before which Respondent shall, if advised, bring an application for bifurcation of the first phase as between jurisdiction and liability."⁴

2.1.8 On 17 March 2017, the Tribunal issued its Procedural Order No. 1 fixing the timetable and procedures to be followed in the arbitration.

2.2 Subsequent Pleadings and Proceedings

2.2.1 On 26 May 2017, Claimants filed their Statement of Claim, which was accompanied by Witness Statements from Mr Mithat Caner, Mr Mushin Davarci, Mr Secuk Halicilar, Mr Vedat Hendekli, Mr Asil Özder and Mr Ersim Takla, as well as Expert Reports from Mr Mike Cross, Professor Rudolph Dolzer and Col. Wolfgang Pusztai.

2.2.2 On 2 August 2017, Respondent confirmed its intention to assert jurisdictional objections in its Statement of Defence, as well as to apply for bifurcation of jurisdiction from the merits as part of Phase I.

³ As matters developed, the admissibility of Claimants' Umbrella Clause claims was dealt with in Phase I.

⁴ Tribunal's email to the parties, 21 December 2016.

- 2.2.3 On 27 October 2017, Respondent filed its Statement of Defence, which was accompanied by Witness Statements from Mr Abdul Salam Belashar, Mr Richard Weeks, Mr Philip Douglas, Mr Ali Tayash, Mr Ezzedin Mabruk and Mr Hassan Ghafar, as well as the Expert Report of Mr Joseph Walker-Cousins. Respondent included within its Statement of Defence its foreshadowed Bifurcation Application
- 2.2.4 On 13 December 2017, Respondent requested the Tribunal to confirm the position as articulated in the procedural directions dated 21 December 2016 that Requests (e) to (i) in Claimants' prayer for relief at paragraph 303 of the Statement of Claim be reserved for a later phase of these proceedings, if a further phase is necessary.
- 2.2.5 Respondent also reserved its right to reply to Claimants' case on issues of causation, loss and quantum regardless of whether they had been addressed in this phase of the proceedings in a subsequent phase of these proceedings, should such a phase be necessary.
- 2.2.6 On 15 December 2017, Claimants responded to Libya's above request noting that any question of causation must be addressed in Phase I of the proceedings. Claimants sought the Tribunal's affirmation that causation issues must be so addressed in the Phase I and not the second or any further phase.
- 2.2.7 On 21 December 2017, the Tribunal, after having considered the parties' exchanges in connection with their requests for certain confirmations from the Tribunal regarding the scope of Phase I of these proceedings, issued a reasoned ruling indicating that all questions of causation were to be dealt with in Phase I.
- 2.2.8 On 17 January 2018, Claimants filed a detailed response to Respondent's Application for Bifurcation.
- 2.2.9 On 21 January 2018, in a reasoned ruling the Tribunal denied Respondent's Application for Bifurcation, (effectively to trifurcate) these proceedings to determine Respondent's jurisdictional objections prior to proceeding with the first merits phase of this arbitration.

- 2.2.10 On 9 February 2018, following earlier requests for further disclosure of documents, the Tribunal ruled on the party's disclosure requests.
- 2.2.11 On 29 March 2018, Claimants applied to the Tribunal for a re-consideration of several of its rulings concerning the parties' disclosure request and also sought a direction from the Tribunal in connection with the scope of the parties' second round of pleadings.
- 2.2.12 On 19 April 2018, having considered the parties' submissions in connection with above application, the Tribunal ruled that there was no proper basis for it to reconsider its rulings or to give additional directions as regards the limits of the second round of pleadings.
- 2.2.13 On 1 June 2018, Claimants filed their Statement of Reply, together with reply witness statements from Mr Mithat Caner, Mr Mushin Davarci, Mr Secuk Halicilar, Mr Vedat Hendekli, Mr Asil Özder and Mr Ersim Takla, as well as further Expert Reports from Professor Rudolph Dolzer, Ms Florence Gaub and Col. Wolfgang Pusztai.
- 2.2.14 On 29 June 2018, Claimants applied to the Tribunal for certain orders in connection with alleged deficiencies in Respondent's documentary disclosure.
- 2.2.15 On 13 July 2018, after consideration of the parties' submissions in connection with Respondent's above application, the Tribunal issued a reasoned ruling that the application should be denied.
- 2.2.16 On 2 August 2018, the Tribunal advised the parties that having considered the parties' pleaded cases to date, it had concluded that five hearing days at most would be required for the evidentiary hearing of the first phase and that the Tribunal would expect the hearing to conclude at the latest by the end of the day, on Friday, 5 October 2018.
- 2.2.17 On 1 September 2018, Respondent filed its Rejoinder, accompanied by a first witness statement of Mr Raymond Fellows and second statements from Mr Abdulsalam Belashar, Mr Richard Weeks, Mr Philip Douglas, Mr Ali Tayash and Mr Hassan Al Ghafar, as well as an expert report from Ms Sarah Pattinson and a second report from Mr Joseph Walker-Cousins.

- 2.2.18 On 5 September 2018, Claimants filed an application to strike untimely evidence submitted by Respondent with its Rejoinder and Respondent's arguments concerning causation in violation of P.O. No. 1 and the Tribunal's orders dated 21 December 2017, 19 April 2018 and 2 August 2018.
- 2.2.19 On 14 and 15 September 2018, the parties notified the names of the witnesses/experts to be cross-examined. Claimants indicated that they required the presence of Messrs Belashar, Al Ghafur, Fellows, Tayash, Walker-Cousins, Weeks, Mabruk and Ms Pattinson to attend the hearing to be cross-examined. Respondent indicated that it required the presence of Messrs. Ak, Davarci, Halicilar, Hendekli, Özder, Takla, Col. Pusztaï and Dr Gaub to attend the hearing and to be cross-examined.
- 2.2.20 On 17 September 2018, the Tribunal concluded a pre-hearing teleconference with the parties to finalise the timetable, schedule and other outstanding matters in relation to the conduct of the hearing. It also heard the parties' oral submission in relation to their prior written exchanges on Claimants' applications to strike certain evidence and submissions from Respondent's Rejoinder.
- 2.2.21 On 18 September 2018, for reasons to follow, the Tribunal directed that the issue of causation was no longer to be dealt with at the upcoming hearing but rather in a separate two-day hearing, to be held as soon as possible in 2019, based on the present pleadings and evidentiary/documentary record. All costs in relation to Claimant's motion to strike the separate hearing on causation were directed to be borne by Respondent on a full indemnity basis.
- 2.2.22 On 20 September 2018, at a further pre-hearing teleconference, the Chairman of the Tribunal settled differences between the parties as to their respective understandings of the Tribunal's directions of 18 September 2018. Thereafter, Claimants expressed a strong preference for the upcoming hearing to be vacated with a new hearing being fixed in 2019 which would also deal with submissions. Respondent was inclined to agree but required instruction. The pre-hearing conference was accordingly adjourned to 21 September to allow Respondent to take instructions.

- 2.2.23 Later on the same date Respondent confirmed its agreement to the upcoming hearing being vacated, following which the Tribunal directed that day the Phase I hearing be rescheduled to 7-12 May 2019 inclusive, in London.
- 2.2.24 On 21 September 2018, the Tribunal and the parties reconvened the previous day's pre-hearing conference to deal with allocation of time, schedules of witnesses and the like for the May 2019 hearing, and also to consider how Claimants could respond to the Respondent's late filed evidence and submissions.
- 2.2.25 On 24 October 2018, the Tribunal issued its Amended Procedural Order No. 1, which, *inter alia*, directed Claimants to file response submissions and evidence in relation to Respondent's late filed evidence and submissions.
- 2.2.26 On 15 January 2019, Claimants filed their Sur-Reply to Respondent's untimely evidence, together with witness statements from Messrs Halicilar, Ak, Takla, Hendekli and Özder.
- 2.2.27 On 18 March 2019, the parties filed the agreed bundle of documents for the Oral Hearing ("**AHB**" or "**Agreed Hearing Bundle**").
- 2.2.28 On 15 April 2019, the parties filed their respective Skeleton Arguments.
- 2.2.29 On 16 April 2019, the Chairman conducted a pre-hearing conference with the parties to settle the final procedures and timetable for the hearing.

2.3 **The Oral Hearing**

- 2.3.1 A five-day hearing was held between 7-11 May 2019 at the IDRC, 70 Fleet Street, London EC4Y 1EU, UK ("**Oral Hearing**"). The hearing was recorded and transcribed, and the transcripts were corrected after the hearing to the extent required by the parties.
- 2.3.2 At the hearing, the Tribunal heard oral testimony from Messrs Davarci, Halicilar, Hendekli, Özder, Takla, Ak, Douglas, Tayash, Al Ghafar, Walker-Cousins, Col. Pusztai and Dr Gaub.

- 2.3.3 The available time of the hearing was divided roughly equally between the parties, in accordance with the directions made by the Tribunal following the pre-hearing conference on 16 April 2019.
- 2.3.4 On 16 December 2019, the Tribunal notified the parties that it had on that date declared the proceedings closed as regards the filing by the parties of further evidence or submissions on the issues under consideration in the first phase of these proceedings.
- 2.3.5 The initial date fixed for rendering a Final Award of 31 January 2019 was extended by the Court from time to time under Article 30(2) of the Rules, with the last such extension being until 28 February 2020.⁵
- 2.3.6 In reaching its conclusions in this Award, the Tribunal has taken into account all of the pleadings, witness statements, expert reports, all testimony, documents and submissions filed, given or made in the case.
- 2.3.7 Throughout the course of these proceedings, the Tribunal has been greatly assisted by the submissions of counsel, who, in turn, were helped by many others whose names do not appear in the transcript of the hearing. It is therefore appropriate, at the beginning of this Award, to record the Tribunal's appreciation of the efforts that counsel to the disputing parties brought to bear during these proceedings together with their respective assistants and other advisors.

3. THE RELEVANT FACTS

3.1 The Tribunal's Approach to the Facts

- 3.1.1 A review of disputing parties' submissions, witness statements, expert reports and the oral testimony given at the Oral Hearing indicates that, with few exceptions, the factual matrix out of which this dispute arises is either agreed or not seriously disputed. Put another way, most of the differences between the parties in this Phase 1 of these

⁵ On 17 January 2019, 8 August 2019, 12 September 2019, 14 November 2019, 12 December 2019 and 16 January 2020, the Court extended the time limit to render the final award respectively until 30 August 2019, 30 September 2019, 28 November 2019, 31 December 2019, 31 January 2020 and 28 February 2020.

proceedings have to do with the true construction of the scope and application of the Treaty, the comparative safety of the Kufra region between 2006-2011 (prior to the commencement of the February 2011 revolt against the Gaddafi regime), whether and/or when Claimants sought protection and security for its investments prior to its evacuation from Libya in February 2011, Libya's ability to protect Claimant's alleged investments if and when protection was sought, and when a "dispute" between the parties in relation to their respective rights and obligations first arose.

3.1.2 We set out below a summary of the facts most relevant to the questions at issue in this phase of the proceedings – either as agreed, not disputed or as determined by the Tribunal. It would burden this document unduly, if indeed it were possible, for all relevant factual evidence, documents and testimony to be dealt with fully. It should be assumed that the Tribunal has considered all such factual evidence adduced by the parties in this arbitration, and further, that no evidence has been overlooked by the Tribunal by reason only of its omission from the summary below.

3.2 **Project Description – GMMRP Project**

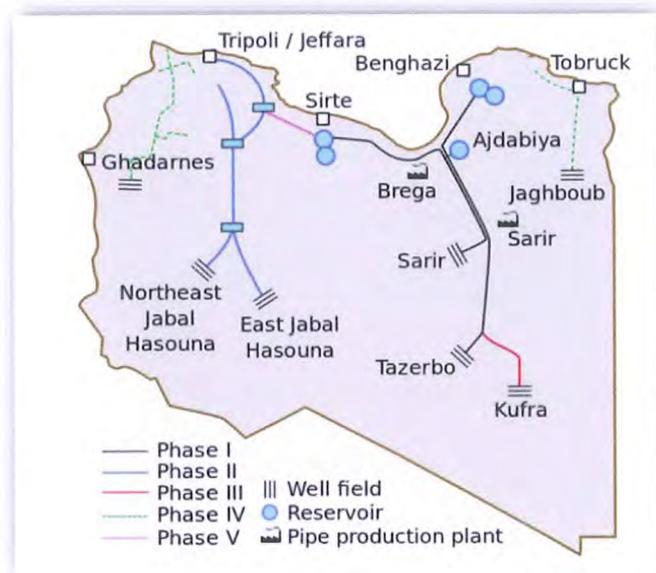
3.2.1 Libya is one of the driest countries on earth. In 1953, oil explorations in southern Libya revealed an enormous aquifer system containing hundreds of thousands of cubic kilometers of fresh water (the Nubian Sandstone Aquifer System).

3.2.2 After coming to power in 1968-69, Libya's former leader, Col. Muammar Gaddafi, embarked on a plan to move water from the southern aquifers in this system through a network of underground pipelines to the coastal populations. The plan was officially named the "Great Man-Made River Project" ("**GMMRP**" or "**Project**").

3.2.3 The Project, said to be one of the largest civil engineering projects in the world, required the construction of an elaborate underground network of thousands of kilometers of pipes and wells to transport the water from the aquifers in the south to northern Libya. After an initial feasibility study conducted by the Libyan government in 1970, in 1983 Libya's General People's Congress ("**GPC**") (which exercises legislative powers) passed laws No. 10 and 11. These laws established the Great Man-Made River Authority

(“GMMRA”) to implement and manage the Project. After the fall of Col. Gaddafi, the GMMRA’s name was changed to remove the reference to the Great Man, shortening the name to the Man-Made River Authority (“MMRA”) (the terms GMMRA and MMRA are generally used interchangeably in this Award).

3.2.4 The Project was divided into five phases. The five phases are depicted in the image below:



3.2.5 The first two phases involved the construction of something over 370 kilometers of pipeline to deliver about 4 ½ million cubic meters of water per day to the coastal cities of Benghazi and Sirte (Phase I) and Tripoli and Jeffara (Phase II). These phases were completed respectively in 1991 and 1996.

3.2.6 Phase III was intended to increase the water flow to Libya’s northern regions by constructing a pipeline to connect a large new well field to the Phase I cities in eastern Libya. The central element of this phase was the construction of Al Kufra-Tazerbo Water Conveyance System, a pipeline of 380 kilometers that connected a new well field in the Al Kufra district to a network tie-in point in Tazerbo which had been completed during Phase I. Creating this conveyance system would increase the flow of potable water from one

million cubic meters per day to 2.68 million cubic meters per day, an increase of approximately 134 percent.

3.3 GMMRA

- 3.3.1 The GMMRA was established by Law No. 11/1993 by the GPC to implement and manage the GMMRP. Article 1 of Law No. 11 indicated that the GMMRA was to be an independent organisation with its own legal personality.
- 3.3.2 Law No. 10 structured the GMMRA's finances. Law No. 11 established the GMMRA's administration and granted the GMMRA significant powers. Both laws contained provisions placing the GMMRA under the ultimate control and supervision of the GPC which exercises the State's legislative and executive authority.
- 3.3.3 Prior to 2011, the GMMRA was led internally by the People's Committee of the GMMRA (the "GMMRA People's Committee"). The GPC had the power to propose and appoint the members of the GMMRA Peoples' Committee.
- 3.3.4 On most issues of significance, the GMMRA People's Committee resolutions were not to be effective unless approved by the GPC.⁶
- 3.3.5 The GMMRA was established to have an independent budget. However, the Libyan Government exercised significant financial control over the Authority. The GMMRA was subject to periodic auditing by the Audit Department of the Libyan Government in the same manner as government agencies or ministries. The GMMRA's budget was approved annually within the State's general budget.
- 3.3.6 The GMMRA provided regular reports to the GPC, which would then give directions to GMMRA. One of these directions was that it was to "take guidance from instructions of Leader of Revolution [Col. Gaddafi]."⁷

⁶ Exhibit C-036, "Common Law No. 11 of 1983, Art. 5, "The Decisions of the Committee on the ¶¶ (2), (3), (4) and (5) of this article shall not be effective unless approved by the General People's Committee".

⁷ Exhibit CLA-193, General People's Congress' Law No. 02 of year 1374 Concerning Drafting of Basic People's Congress's Resolutions, Item 1.

- 3.3.7 The GMMRA was largely dependent on the State for funding. Pursuant to Law No. 10, the Central Bank of Libya collected monies for the account of the Project, lent monies to the Project and regularly transferred State funds to the GMMRA. It also established Letters of Credit to be used on the Project. The Central Bank also was required to consent before the GMMRA paid its accounts, including Claimants' accounts.
- 3.3.8 Under Law No. 11, the GMMRA was granted the capacity to require People's Committees of Municipalities and all other public authorities to exercise certain functions, including clearing of goods through customs, releasing imports, issuing visas, providing food and goods, transferring money, opening letters of credit, issuing motor vehicle permits, supplying local manufactured goods, etc. The GMMRA was also given the power to ensure that materials and equipment used in performance of the Contract could be imported free from duty.
- 3.3.9 Under Law No. 11, the GMMRA's consent was required for a citizen to resign from employment with the Authority. If the consent was not granted, and the citizen refused to continue working for the authority, the citizen could face imprisonment or fines. Law No. 11 also made it a crime, punishable by imprisonment for a Libyan citizen to abstain from any legal reason from appointment to the GMMRA work force. It was also punishable by imprisonment for any person to delay or hinder the execution of the Project.
- 3.3.10 Article 20 of Law No. 11 granted the GMMRA People's Committee the power to direct and supervise members of the military seconded to it by Col. Gaddafi to protect the GMMRA's assets and the Project. Thereafter, on 6 May 1991, Col. Gaddafi formed a light infantry detachment for the protection of the Project (sometimes referred to in the Award as the GMMRA Security Battalion).

3.4 **TTJV's Contract with GMMRA**

- 3.4.1 In 2001, the Japanese engineering consulting firm, Nippon Koei, and the UK engineering firm, Halcrow, jointly were awarded the contract to design Phase III. Throughout 2003

and 2004, the GMMRA worked with these contractors to conduct design work, including ground installations.

- 3.4.2 In 2004, the GMMRA issued a Request for Proposal (“**RFP**”) to construct Phase III.
- 3.4.3 On 1 October 2004, TML and Tekfen entered into a joint venture agreement (“**Joint Venture Agreement**” or “**JVA**”) to submit a bid to the GMMRA to construct Phase III of the Project.
- 3.4.4 On 2 April 2005, TTJV submitted a tender offer in response to the RFP. It was the lowest bidder.
- 3.4.5 On 6 June 2006, TTJV and the GMMRA entered into Contract No. 13315-A-530-00-CT-CT-1001-002 (“**Contract**”), whereby TTJV contracted to: (a) excavate and blast a pipeline trench 7 meters deep and prepare the bedding for the pipeline; (b) collect and transport the pipes that the GMMRA’s sub-contractor, SNC Lavalin, produced at the GMMRA’s Sarir Pipe Manufacturing Plant (“**Sarir Manufacturing Plant**”); (c) install and connect pipe segments including the installation of a cathodic protection system; (d) construct a road parallel to the pipeline route; (e) rehabilitate an existing road used to transport pipes from the Sarir Manufacturing Plant to the worksites; (f) construct two regulating stations; (g) construct two flow control stations; and (h) construct a tie-in at the junction between the Project and the existing pipeline from Phase I.
- 3.4.6 The Contract’s total price was a lump sum of LD 610,990,528 (US \$480,117,456, under the Contract exchange rate). The initial commencement date was 1 September 2006. However, the commencement date was pushed back several times, to a final date of 15 November 2006. Under the Contract, TTJV was scheduled to finish the Project in sixty (60) months, making the revised anticipated completion date 15 November 2011.
- 3.4.7 After the Contract was signed, the GMMRA appointed Al Nahr Company Ltd. (“**ANC**”) to act as the GMMRA’s Consultant Engineer. ANC played an important role in the execution of the Contract, acting as the GMMRA’s interlocutor with TTJV and managing the construction-related aspects of the Project on behalf of the GMMRA. In particular,

ANC was tasked with approving TTJV's systems, procedures and personnel, schedules and forecasts, and construction activities.

- 3.4.8 In order to perform its contractual obligations, TTJV had to acquire and import (from Turkey) a significant amount of construction equipment and materials, some of it specialised. These included heavy equipment, such as excavators, cranes, bulldozers with rippers, graders, and rollers, as well as machinery, spare parts, fuel and other supplies. TTJV also acquired and employed a considerable number of vehicles, including buses, cars, tankers, and dump trucks, as well as trucks and transporter trailers specially designed to carry large pipe segments across the desert.
- 3.4.9 The Phase III construction took place in the Great Saharan Desert in southeastern Libya, approximately 1200 km from Benghazi, in the Kufra District near Al-Jawf and Tazerbo. TTJV constructed camps at various locations along the conveyance pipeline route. In order to facilitate the contractual relations between TTJV, ANC, and the GMMRA, TTJV maintained an administrative office in Benghazi, where the GMMRA and ANC both had offices.
- 3.4.10 At any given time, Claimants engaged over 1,500 employees on the Project, both local and foreign workers, most of whom were in the field. TTJV's camps were constructed using prefabricated buildings and were equipped with living quarters, dining facilities, and warehouses. TTJV's principal camps and worksites were:

- (a) **Sarir Camp**: adjacent to the GMMRA's Sarir Manufacturing Plant, where the GMMRA's subcontractor, SNC Lavalin, produced the pipes for the Project. TTJV used the Sarir Camp to store transporter trailers and key materials;
- (b) **Tazerbo Camp**: located close to the main road leading to Tazerbo, an oasis in the Kufra District. The camp was used to store transporter trailers, trucks, machinery, materials and spare parts, and it is where TTJV serviced and repaired its vehicles. It had a total workforce of about 200-300 employees;

- (c) **Bozerik Camp**: situated in the vicinity of Bozerik, at km 250 of the pipeline route. It housed between 150-180 employees and was used as a refueling station. Additionally, it is where the water pumps were installed;
- (d) **Main Camp** (at Km 146 or “**Kufra Camp**”), situated about 140 km from the town of Al-Jawra (or Al-Kufra or Kufra City, the capital of the Kufra District). This was Claimants’ largest camp and where most of TTJV’s field personnel lived. The camp also housed the majority of TTJV’s equipment and the Project materials;⁸
- (e) **Camp at Km 90**: located next to a regulating station that TTJV was building for the Project;
- (f) **Pipe Laying Team 1 and Excavation Team 1 Worksite**: located at around km 80 of the pipeline route, where TTJV personnel were engaged in excavating the trench and laying the pipe;
- (g) **Pipe Laying Team 2 and Excavation Team 2 Worksite**: located at km 240 of the pipeline route, also carried out excavation and pipe-laying works;
- (h) **Blasting Team Worksite**: stationed at around km 80, this team was engaged in preparing the areas of the trench that required blasting, working together with the Pipe Laying Team I and Excavation Team I.

3.4.11 The GMMRA’s Sarir Manufacturing Plant was immediately adjacent to TTJV’s Sarir Camp, pictured in the aerial photograph below:

⁸ Kufra is the largest district of Libya (approximately 3,510 km²), sparsely populated with about 55,000 people (mainly from the Arab Al Zuwayya tribe with roughly 12,000 – 15,000 from the Toubou minority). The capital of the district Al Jawf (25,000 inhabitants), is part of the larger Kufra Oasis (in total 40,000 inhabitants). In a number of the witness statements, Al Jawf is referred to as Kufra town, Kufra City or simply as Kufra



Location of TTJV Sarir Camp

3.4.12 GMMRA's sub-contractor, SNC Lavalin, was located at the GMMRA's Sarir Manufacturing Plant, where it manufactured pipes for the Project. TTJV would transport the pipes from the Sarir Plant via specialised pipe transporter trailers to the work sites along the pipeline, where they would ultimately be installed in the trench.

3.5 TTJV's Security Measures

3.5.1 Libya and the Kufra region in which TTJV was to work was relatively secure and stable at the time the Contract was executed. This was because of the heavy control of the Gaddafi regime. However, the relative security that existed was not absolute security. The southern part of Libya near the Chad border was prone to car high-jacking and armed robbery. There were also tribal tensions in the Kufra region and violent clashes were not uncommon. The British Foreign and Commonwealth Office travel advisory for Libya in place at the time of the Contracts specifically warned against all but essential travel to areas bordering Chad and Sudan (*i.e.*, within the Kufra district but a considerable distance from the pipeline site).

3.5.2 Though the areas surrounding Claimants' camps and sites were generally stable and safe, as a precaution, Claimants put in place their own, private security measures. Claimants' camps and sites were protected by a combination of fences and trenches. As Mr Halicilar explained, "the camps had earthen barriers as well as trenches that were deep and wide to

make intrusion into the camp difficult, the camps also had some fences as well.”⁹ Additionally, TTJV had retained private guards (15-20 at each camp) to provide surveillance. The guards were unarmed because Libyan law only permitted government personnel to carry weapons, a restriction that applied to all foreign companies doing business in Libya.¹⁰ All TTJV, GMMRA and ANC personnel had identification that allowed them to enter the camps after being checked by the guards.

3.5.3 Considering the general stability that prevailed around the pipeline route before February 2011, the absence of any immediate threat, and the inability of non-government personnel to carry weapons, TTJV’s security measures do not, in hindsight, appear to have been unreasonable. However, the GMMRA itself and other Project contractors (SNC Lavalin for example) maintained tighter and more robust security.

3.5.4 The Sarir Manufacturing Plant which was operated by SNC Lavalin (and owned by GMMRA) had armed soldiers (members of the GMMRA Security Battalion) assigned to protect it well before any of the events at issue here. SNC Lavalin also employed its own unarmed security personnel (35 plus).

3.5.5 In 2009, after the theft of vehicles from one of its camps, TTJV considered the possibility of enhancing the security of its camps by having military personnel stationed at each camp in the same way the GMMRA camps operated. Following a meeting in Benghazi with Col. Naser who commanded the GMMRA Security Battalion (arranged by the GMMRA), TTJV was told that the military would provide the assistance requested, as long as TTJV sent an official letter explaining what was needed and agreeing to provide basic accommodation, food, vehicles and a monthly stipend of around 170 Libya Dinar per person (the same arrangement as with GMMRA).¹¹ After internal consideration, for a variety of reasons (including cost), TTJV decided against involving the army in this manner to help protect its sites.

⁹ Halicilar First Statement, ¶4.

¹⁰ Takla First Statement, ¶35; Davarci First Statement, ¶18.

¹¹ Exhibit C-06.

3.6 State Security Presence in the Project Area

- 3.6.1 Pursuant to Law No. 11, the GMMRA had military units (“**GMRRA Forces**” or “**GMMRA Security Battalion**”) seconded to it to protect and provide security supervision for the installations, equipment and assets of the GMMRA and for work carried out by or on behalf of the GMMRA.¹²
- 3.6.2 During the relevant period, the GMMRA had a battalion sized (approximately 1,000 soldiers) security force, made up of seconded members of the military. The commander of this force was Colonel (later Brigadier) Ramadan Naser Ramadan Salem.
- 3.6.3 A small, company sized, garrison (probably less than 100 troops), was stationed near Tazerbo. These troops were available to protect Phase III of the Project. The rest of the battalion was based in Benghazi and at other Project sites.
- 3.6.4 The GMRRA Forces assigned to the Phase III Project would regularly patrol sections of the pipeline route and, on certain occasions, would visit TTJV’s camps.¹³ A small number of these armed soldiers were permanently stationed at or in the vicinity of the GMMRA’s Sarir Manufacturing Plant and protected its operations.¹⁴
- 3.6.5 The GMMRA Forces also had a number of checkpoints in the area with at least three to four soldiers in each, including at Sarir, at the Kufra-Tazerbo tie-in, near Bozerik (which is near chainage km 250) and at Al-Hawari, a small town north of Kufra.
- 3.6.6 In addition, the Libyan military had an infantry battalion of three to four companies stationed at Kufra City, and distributed in different bases throughout the city. It is unclear (and was much disputed), how many soldiers were actually present in Kufra City in February 2011. The number is very unlikely to have exceeded 500, and was almost certainly smaller. In terms of “operational” armed troops, it became apparent at the Oral

¹² Law No. 11, **Exhibit C-036**, art. 20; *see also* Letter from Brigadier Salem to the GMMRA Department of Loss Prevention, 28 October 2010, **Exhibit C-066**. This is a letter authored by Brigadier Salem, as Commander of the GMMRA “Security Battalion”. The letterhead reads “Armed People Provisional Committee for Defense Staff for Conscripted Armed National Guard Great Man-Made River Security Squadron.”

¹³ Davarci First Statement, ¶¶19-21, 41.

¹⁴ Davarci First Statement, ¶41; Halicilar First Statement, ¶27

Hearing that the number was considerably smaller. The military forces at Kufra City were under the command of Colonel Şalah Zarruq, a senior army commander, who, until sometime between late February and mid-March 2011, remained loyal to the Gaddafi regime.¹⁵ Between the last week of February and mid-March 2011, Colonel Zarruq and his battalion joined the Revolution. There were also two or three Border Security Zones with Border Security Units and a half-platoon, which conducted regular patrols throughout the area, but these were located a long way south of TTJV's camps.¹⁶

3.7 Looting of TTJV's Camps

- 3.7.1 It is common ground that the violent revolution in Libya which led to the end of the Gaddafi regime had, as its immediate antecedents' protests in the coastal city of Benghazi, beginning on (or a bit earlier than) 15 February 2011. The outburst of violence in Benghazi had been preceded by sporadic protests elsewhere in the country. The uprising occurred during the so-called Arab Spring uprisings that occurred in the Arab world during that spring.
- 3.7.2 On 15 February 2011, TTJV's construction manager, Mr Selcuk Halicilar, heard reports of a conflict in Libya.¹⁷ There were rumours about a potential uprising. Because of the belief that Gaddafi's rule was still strong, Mr Halicilar did not believe the rumours.
- 3.7.3 However, a number of TTJV's truck drivers, who were responsible for transporting the pipes from the Sarir Plant to the work sites on the pipeline, drove TTJV's trucks north to Benghazi (where one of the drivers was arrested). TTJV's drivers were not allowed to take company vehicles for personal use without authorization.
- 3.7.4 Shortly thereafter, some of TTJV's workers failed to return from their annual leave. Mr Halicilar called the GMMR in Benghazi to advise them of these events taking place at the work sites. He proposed to suspend construction activities at night, out of concerns for

¹⁵ Puztai First Report, ¶54.

¹⁶ Puztai First Report, ¶54.

¹⁷ Mr Halicilar held the position of Construction Manager of the Project from 2006 until TTJV evacuated Libya in 2011. He was based in Benghazi for the first six months of his time in Libya. Thereafter he was based in the desert around the pipeline in the Kufra Camp. He would return from there to Benghazi when requested to attend progress and construction meetings with GMMRA and Al-Nahr.

the security of its workers. However, the GMMRA stated that this was unnecessary and that the drivers' departures were isolated incidences.

- 3.7.5 Around 17 February 2011, the serious protests that had by then erupted in Benghazi began to spread to other Libyan cities. The areas around Kufra City and TTJV's work sites, however, were not initially affected to the same extent as by the protests which were taking place in the eastern coastal region.
- 3.7.6 Nevertheless, on 17 February 2011, two of TTJV's truck drivers were stopped by looters who stole their vehicles. TTJV's personnel at Tazerbo also began hearing gun shots as night time. They thus took steps to protect TTJV's equipment and fortify the existing security at the Tazerbo Camp. Nevertheless, on the night of 17 February 2011, a small band of armed individuals in pick-up trucks appeared at TTJV's camps in Tazerbo and Bozerik and demanded supplies.¹⁸ Mr Halicilar described them as being from the Tabu tribe coming from the south of Libya.
- 3.7.7 From 17 February on, Mr Halicilar noticed that almost all of the GMMRA's and ANC's employees who had been based at TTJV's various camps had left or were in the process of leaving the camps.
- 3.7.8 Within one or two days after this, groups started coming during the daytime as well as night and began firing their guns into the air.
- 3.7.9 After this happened, Mr Halicilar instructed TTJV's employees to comply with whatever these armed looters requested at different camps. He also instructed his team to gather in the Main Camp at kilometer 146 of the pipeline. The incidents were reported to TTJV's headquarters in Istanbul and instructions were received to stop night shift activities.
- 3.7.10 During the evening of 20 February 2011, the compounds in Benghazi of both the GMMRA and TTJV were attacked and looted. The army personnel what had been assigned to secure the GMMRA compound (members of the GMMRA Security

¹⁸ Halicilar First Statement, ¶11.

Battalion) had all abandoned their positions a few days earlier when the uprising began. By this date, defections were also reported from the army unit at Kufra City.

- 3.7.11 On 21 February 2011, all TTJV personnel in Benghazi took temporary shelter at the farm of TTJV's custom's agent located outside of Benghazi as their Benghazi compound was not longer useable or safe. Mr Hendekli, TTJV's Deputy Project Manager (based in Benghazi) advised Mr Bubteina (the GMMRA Project leader) of the move.
- 3.7.12 On the same day, two groups of five men each, some wearing military attire, some in civilian dress, arrived at the Tazerbo Camp carrying AK-47 rifles. They demanded spare parts and attempted to take a number of trucks, but TTJV's employees were eventually able to dissuade them.¹⁹
- 3.7.13 Also on 21 February 2011, on the instructions of Mr Halicilar, TTJV's deputy construction manager, Mr Hasim Ozdemir, and one of Mr Halicilar's assistants, Mr Said Qadish, were sent to Kufra City to meet Colonel Zarruq, who controlled military forces in the area, to request that security be provided for TTJV's camps. It is unclear whether Messrs Ozdemir and Qadish met Col. Zarruq in person. In any event, the request for protection is said to have been declined and Colonel Zarruq is said to have advised that TTJV personnel should leave their camps.
- 3.7.14 Meanwhile, also on 21 February 2011, Tekfen Holdings AS issued a public disclosure statement in Turkey regarding the "extraordinary developments" in Libya which had caused it to suspend its work on the Project "due to *force majeure* reasons" and to evacuate its employees.²⁰
- 3.7.15 On 22 February 2011, Mr Halicilar received a call from the Tazerbo Camp from his work chief, Mr Musin Davarci, who advised that a unit of 10 to 12 soldiers armed with AK-47's had arrived at the camp, ostensibly to provide protection. They were identified as being part of the GMMRA forces stationed near Tazerbo. In exchange for protection, the commander requested food, diesel fuel, spare parts and tires. While these talks were

¹⁹ Davarci First Statement, ¶17.

²⁰ Exhibit R-42.

going on, a number of the soldiers began taking belongings of the workers. The commander said that this was in exchange for protection that might be provided in the future. On learning of this, Mr Halicilar instructed that all workers be brought to the Main Camp. The personnel stationed at Tazerbo departed for the Main Camp in the early hours of 23 February.

3.7.16 On 23 February, given the security situation in the desert camps, TTJV's head office in Istanbul tried to arrange special flights to evacuate its personnel from the desert by plane from Kufra City Airport to Istanbul, but could not do so.

3.7.17 A word search on Twitter results for "Kufra" for 23 February 2011 provided two tweets with links to videos on that date on YouTube. One of the videos shows protestors purporting to be from Kufra declaring the city and its airport had been liberated by revolutionaries on that date. The others purported to be from local rebel authorities, reporting that they had interdicted guns and money at Kufra airport destined for pro-Gaddafi elements.

3.7.18 On the afternoon of 23 February, TTJV's camps lost their internet connections and their regular communications connections. After that, TTJV's ability to communicate was limited to satellite phone connection.

3.7.19 On the evening of 23 February 2011, Mr Halicilar made the decision that TTJV personnel should leave the desert for Benghazi. It was not possible to secure TTJV's camps, equipment or machinery prior to their departure, with the result that TTJV's various camps and all of its supplies and equipment were left unattended. The convoy left in the early hours of 24 February 2011. As the convoy left the camp, rebels stopped them on the road to Sarir and seized a number of vehicles, mainly 4x4 trucks. On this date, defections from the armed forces unit in Kufra City were confirmed. That day's BBC live news feed also reported that Pan-Arab broadcaster, al-Arabia, was reporting that Kufra City had fallen to protesters.

- 3.7.20 The convoy stopped for an hour and half at TTJV's Sarir Camp to rest. Whilst there they saw that the neighbouring Sarir Manufacturing Plant was protected by about 10 to 12 soldiers and that the Sarir Power Plant was also protected by armed militia.
- 3.7.21 After leaving Sarir, the convoy headed north. The convoy was stopped on several occasions and, at times, detained, by rebels in different towns on the way to Benghazi: first in Jālū, then in Ojera, and then again in Ajdavia.
- 3.7.22 In Jālū, at a checkpoint, rebels in civilian clothing with guns stopped the vehicle carrying Mr Halicilar and took the occupants to a hotel for interrogation. They were released upon the intervention of Mr Saleh, one of TTJV's sub-contractors who had good relations with the rebels. The convoy again was stopped by rebels and TTJV personnel were interrogated in Ojera and Ajdavia. The convoy eventually reached Benghazi late in the night of 24 February and, from there, TTJV's personnel were evacuated by ship to Turkey on 25 February 2011.

3.8 Events Following TTJV's Evacuation from Libya

- 3.8.1 At Sarir and Jālū, the members of the Al Zuwayya and Mjābra tribes changed their allegiance to join the revolution in late February 2011.
- 3.8.2 On 27 February 2011, SNC Lavalin gave notice to the GMMRA of an event of *force majeure* in relation to its work at the Sarir Manufacturing Plant.²¹
- 3.8.3 On 7 March 2011, TTJV notified the GMMRA in writing of its evacuation, explaining that it was forced to leave the country due to the numerous threats to its personnel and property and the absence of any security.²² The letter, which was headed "Notification of Stoppage, Intervention and Suspension of Work due to Impossibility and Prevention to Continue the Works ...", was a *de facto* declaration of *force majeure*²³. TTJV requested

²¹ Exhibit R-48.

²² Letter from TTJV to the GMMRA, 7 March 2011, Exhibit C-043.

²³ TTJV's view that the events that caused it to evacuate Libya in February 2011 constituted *Force Majeure* under the Contract is confirmed by: (a) Tekfen's website, 21 February 2011 "At the moment, following extraordinary developments, our works in the Libya project have been suspended for an unknown period of time due to *force majeure* reasons." (Exhibit R-42); (b) TTJV's announcement, 14 March 2011, "[TTJV] hereby announces suspension of its work in Libya because of Force Major (sic) until the end of the current circumstances."; (c)

a meeting with the GMMRA to discuss the resumption of the works. It noted that in order to be able to do so it would have to be compensated for the loss and destruction of the equipment, machinery and other resources it employed. It urged the GMMRA to ensure the protection and the security of TTJV's remaining facilities, equipment and machinery that had been left behind. The letter referred to TTJV's repeated and frequent, but unsuccessful, attempts to contact the GMMRA (by phone, fax, internet and in-person) before and after TTJV's evacuation. The letter did not mention that TTJV had made requests for protection which had been denied. Nor did it mention that the Tazerbo camp had been looted by members of the GMMRA Security Battalion on 22 February 2011. The letter concluded with TTJV "reserve[ing] all our rights in relation to this matter under all applicable provisions of the Contract and at law."

- 3.8.4 After sending its letter of 7 March 2011 to the GMMRA, TTJV tried, without success, to contact the GMMRA through informal means.
- 3.8.5 In the first weeks of March, the violence and chaos in the country escalated. International sanctions were imposed. Large scale political and military defections from the government followed, leaving Libya in a totally disabled and inoperable state. Also, as noted earlier, sometime between late February and mid-March, Col. Zarruq and his battalion joined the revolution.²⁴
- 3.8.6 On 12 March 2011, the UN authorised military intervention in Libya and the French Air Force launched attacks on Col. Gaddafi's forces outside Benghazi on 19 March. Shortly thereafter, NATO coordinated a wide-reaching bombing campaign against the Gaddafi regimes forces and military infrastructure.
- 3.8.7 On 23 March 2011, five senior Al Zuwayya officers and one Toubou officer in the armed forces stationed in Kufra City made a televised statement about joining the revolution.

TTJV's notice of 5 April 2011 notifying employees that they are considered to be on unpaid leave "[d]ue to the internal uprising, conflict and chaos in Libya; a condition evaluated as outside the company's responsibility, and considered to be a cause of *force majeure*" (Exhibit R-52); and (d) meeting minutes of 23 January 2012 of TTJV acknowledging that the circumstances in February 2011 "stated as *force majeure*".

²⁴ Pusztai First Report, ¶ 54; Statement of Claim, ¶ 46 and FN 77.

From that moment, and until late April, the city was widely under the control of the revolutionaries.

- 3.8.8 Col. Gaddafi's forces occupied the Sarir oil fields on 4 April 2011 without a major fight but they were evicted approximately two weeks later by the local Arab tribes with some support from the Toubou.
- 3.8.9 On 28 April 2011, about 250 Gaddafi troops with about 60 armed pick-ups occupied Kufra City without a major fight. The revolutionaries escaped.
- 3.8.10 On 5 May 2011, a combined force of southern tribes with some reinforcements from the north retook Kufra City for the revolutionaries. From that date forward the revolutionaries maintained control of Kufra City.
- 3.8.11 On 26 May 2011, TTJV sent the GMMRA a preliminary damages assessment which included the residual value of equipment and machinery it had on site and requested compensation for those damages. TTJV received a verbal response from the GMMRA with an invitation to meet in Benghazi and discuss the status of works. The invitation was made in June 2011.
- 3.8.12 In June 2011, Gaddafi's forces conducted raids towards the Sarir oil fields but were unable to occupy them.
- 3.8.13 On 18 August 2011, the GMMRA wrote to TTJV, in reply to its letter of 7 March 2011, recognising that an emergency situation occurred in Libya starting in February 2011. It further stated that "...unfortunately *Force Majeure* Conditions are still prevailing"
- 3.8.14 On 20 October 2011, during the battle of Sirte, Col. Gaddafi was captured and killed.
- 3.8.15 In the late autumn of 2011, TTJV and the GMMRA began negotiations to discuss the resumption of works as well as the assessment of TTJV's damages. By letter dated 14

December 2011, TTJV advised the GMMRA that it was unable to resume works (“in absence of remedial action on [GMMRA’s] part.”)²⁵

- 3.8.16 In the following months, GMMRA and TTJV exchanged a series of letters discussing compensation and the resumption of the works.
- 3.8.17 Over the course of seven or eight months after the events of February 2011, the GMMRA hired local workers to collect some of TTJV’s machinery and equipment. What was collected was transported to the Bozerik Tazerbo Camps and secured thereafter by guards employed by the GMMRA.
- 3.8.18 TTJV and the GMMRA, together with ANC representatives, conducted two on-site inspections, in 2012 to assess the condition of existing equipment and to evaluate the extent of TTJV’s losses. The first inspection took place in April 2012. This was an initial inspection and not all pieces of equipment were properly accounted for. A second inspection was carried out in December 2012 to clarify open issues related to the first inspection. TTJV’s notes were transferred to inspection sheets which were signed by the GMMRA and ANC.²⁶
- 3.8.19 On 21 November 2012, after months of negotiations, TTJV and the GMMRA signed a Memorandum of Agreement (“MOA”).²⁷ In the MOA, the parties recorded their mutual understanding that the events of February 2011 “made it impossible for the Contractor to continue performance of its obligations under the Contract.”²⁸ TTJV and the GMMRA agreed to conduct a full, joint survey of the extent of TTJV’s damages and prepare a comprehensive damages report to be approved by the GMMRA.²⁹ The MOA also envisaged that, once the parties reached an agreement as to TTJV’s losses, TTJV would prepare and submit for the GMMRA’s approval a remobilisation plan to transport the remaining machinery and equipment and undertake repair works.³⁰ Under Article 4.1 of

²⁵ Letter from TTJV to GMMRA, 14 December 2011, Exhibit C-079, p.2.

²⁶ Signed inspection sheets, December 2012, Exhibit C-107; sample photos from December 2012 inspection, Exhibit C-015; TTJV equipment/machinery inspection sheet No’s 35-3, 208, 35-13, 11 December 2012, Exhibit C-016.

²⁷ Memorandum of Agreement, 21 November 2012, Exhibit C-072.

²⁸ *Id.*, Art. 1.

²⁹ *Id.*, Art. 1.2.

³⁰ *Id.*, Art. 1.3.

the MOA, the parties recorded that, once agreement had been reached on TTJV's losses, TTJV would submit a proposed cash flow proposal, for approval by the GMMRA, covering payments to it for achieving identified milestones in its proposed remobilisation plan.³¹

3.8.20 The 2012 and 2013 inspections revealed that most of TTJV's equipment had been stolen or damaged after TTJV's evacuation from Libya.

3.8.21 In June 2013 TTJV began to prepare a comprehensive damages report consolidating the information gathered by that date. Mr Asil Özder, TML's Machinery and Equipment Coordinator, was in charge of the assessment. In order to carry out a full damages evaluation, Mr Özder visited and inspected several sites and camps along the pipeline route in September 2013.³²

3.8.22 Between 11 and 14 May 2014, TTJV (represented by Mr Özder), the GMMRA, and ANC carried out a joint, official inspection of TTJV's camps and sites.³³ Mr Özder documented what he saw. For each vehicle, piece of equipment, or machinery, Mr Özder recorded TTJV's reference number, Tekfen's code number, the plate number, description, manufacturer, model and serial number, as well as the actual location where the piece was found.³⁴ He also took several pictures of the machinery and equipment and checked their serial numbers against TTJV's records. Mr Özder corroborated his records against those of the ANC, and together TTJV and ANC came to an agreement as to the location and condition of each piece of equipment and machinery. Based on the agreed-upon results of the inspection, Mr Özder prepared a comprehensive list of missing equipment and prepared a draft damages report. The report contained a break-down of the repair costs of the damaged machinery and equipment, as well as a fair market valuation of the missing machinery and equipment.³⁵

³¹ *Id.*, Art. 4.1.

³² Özder First Statement, ¶14.

³³ Özder First Statement, ¶16; *see also* Letter from TTJV to MMRA, 10 June 2014 (confirming May 2014 inspection Exhibit C-019).

³⁴ Özder First Statement, ¶¶16-17; List of TTJV's Machineries, Plant, Equipment, Vehicles, May 2014, Exhibit C-020.

³⁵ Özder First Statement, ¶13.

3.8.23 After the final inspection, in mid-March 2014, TTJV and the GMMRA reached a number of agreements which were memorialised in Minutes of the Meeting (“**MOM**”).³⁶ The MOM provided a revised, mutually agreed-upon plan for the resumption of the Contract works, and payment of certain contractual amounts.³⁷ However, TTJV’s claim for damaged/lost equipment was not agreed. The GMMRA undertook to evaluate TTJV’s final damages report and, if it agreed to the claim, to submit it to “the Libyan authorities in charge of consideration.”³⁸

3.8.24 In the event, TTJV’s claims for losses associated with its evacuation were not agreed, and the plan for the resumption of the Contract works was not implemented.

4. CLAIMANTS’ CASE

4.1 The Treaty is in Force

4.1.1 In response to Respondent’s jurisdictional defence that the Treaty pursuant to which this arbitration is brought never entered into force, Claimants’ contend that the Treaty became binding on Turkey and Libya on 22 April 2011. Claimants rely on UNCTAD’s summary information about the Treaty which states “Date of signature: 25/11/2009; Date of entry into force: 22/4/2011.”³⁹

4.1.2 Claimants point to Respondent’s own evidence to the effect that UNCTAD’s data base is populated with information provided by governments themselves to UNCTAD and is continuously verified with UN member states.⁴⁰

4.1.3 In addition, the Treaty itself, in its heading, further confirms that it entered into force on “22 April 2011 by notification in accordance with Article 12.”⁴¹

4.1.4 Claimants note that pursuant to Article 102 of the UN Charter, every treaty must be registered with the UN Secretariat. That Article is to be read in conjunction with Article

³⁶ Minutes of Meeting, 13-15 March 2014, Exhibit C-075.

³⁷ *Id.* Art. 1, attachment 1.

³⁸ *Id.* Art. 2(d).

³⁹ Libya-Turkey BIT (2009) Treaty Summary Information, UNCTAD (emphasis added), Exhibit C-064

⁴⁰ Exhibit R-061, extract from UNCTAD’s website.

⁴¹ Exhibit C-001, Treaty.

80(1) of the VCLT which provides that treaties must be transmitted to the UN's Secretariat for registration "after their entry into force."⁴²

4.1.5 Claimants say that the Treaty was registered with the United Nations Secretariat on 15 September 2001 with number 48938.⁴³

4.1.6 The Treaty was also published as part of Volume 2782 of the United Nations Treaty Series with the same number.⁴⁴

4.1.7 Claimants contend that registration and publication of the Treaty provide a clear indication that the contracting parties viewed it as binding and effective.

4.1.8 Claimants point out that Libya ratified the Treaty pursuant to Law No. 3 of 2010, which was published in the Libyan Official Gazette in March 2010. It subsequently communicated this fact to the Turkish government on 23 August 2010.⁴⁵ In turn, the Turkish National Grand Assembly ratified the Treaty on 8 April 2011, the Council of Ministers approved it on 11 April 2011 and it was published in the Turkish Official Gazette on 14 April 2011.⁴⁶ Finally, by letter dated 22 April 2011, the Turkish Embassy in Tripoli notified the Libyan government of the completion of the constitutional formalities of Article 12 of the Treaty in the following terms:

*"the Embassy, this time, notifies that with the publication of the Decision of Council of Ministers dated 11 April 2011 on the Official Gazette, dated 14 April 2011 and numbered 27905, the internal ratification process of the Turkish Republic has been completed as of 14 April 2011."*⁴⁷

⁴² Exhibit C-038, VCLT, Art. 80(1); Exhibit CLA-145, UN Regulations on the Registration on Publication of Treaties and International Agreements, Art. (1)(2).

⁴³ Exhibit C-091, Turkey-Libya BIT United Nations Certificate of Registration. *See also*, Exhibit C-090, Statement of Treaties and International Agreements registered with the STIARS during the month of September 2011, p. 7.

⁴⁴ Exhibit C-0092, p. 17.

⁴⁵ RLA-068A, Law No. 3 of the year 2010; R-39B, Note Verbale No. 1/5/60/523 issued by the Libyan Ministry of Foreign Affairs to the Turkish Embassy, 23 August 2010.

⁴⁶ C-123, Letter from the Turkish Embassy in Tripoli to the Secretariat of the General People's Committee of Foreign Relations and International Cooperation General Protocol Organization, 10 April 2011; *See also* C-124, Turkish Official Gazette, 14 April 2011.

⁴⁷ C-125, Letter from the Turkish Embassy in Tripoli to the Secretariat of the General People's Committee of Foreign Relations and International Cooperation of Administration and Immunities and Privileges, 22 April

- 4.1.9 Claimants say that the crux of Libya’s argument is that the National Transitional Council (“NTC”) was the official recognised government of Libya on 22 April 2011, and that it never received the Turkish Embassy’s letter of 22 April 2011 because this was sent to the government of Col. Gaddafi instead. Claimants argue that the unilateral declaration by the NTC made on 2 April 2011, 13 days after the outbreak of the civil war, proclaiming itself as the “sole legitimate representative of the Libyan people” does not alter the fact that the Gaddafi government continued to exercise sovereign powers, including the conduct of foreign and diplomatic relations in Libya, for months thereafter.
- 4.1.10 Claimants say that by 22 April 2011 only five countries (Gambia, Kuwait, Maldives, Qatar and France) had issued statements offering a limited form of recognition to the NTC as the “legitimate representative of the Libyan people.” However, international law differentiates between recognition of governments *de jure* and *de facto*. *De jure* is the acknowledgement of the foreign government as the depository of a State’s sovereignty, which encompasses the exercise of diplomatic and foreign relations.
- 4.1.11 *De facto* recognition implies a willingness on the part of the recognising government to maintain official relations with the foreign government, but does not entail an acknowledgement of the latter’s sovereign powers.⁴⁸
- 4.1.12 Claimants assert that contemporaneous evidence proves that the NTC was not recognised officially as the sovereign, *de jure* government of Libya until August or September 2011 at the earliest when a majority of states adopted that position. For its part, Turkey did not recognise the NTC until 15 July 2011 when it signed the Libya Contact Group’s Joint Declaration.⁴⁹
- 4.1.13 Claimants also point to the 2014 Joint Declaration by the Turkish and Libyan governments which referred to the Treaty in relation to their commitment to cooperate to

2011.

⁴⁸ CLA-225, S. Talmon, “*Recognition of the Libyan National Transitional Council*”, ASIL Insights, American Society of International Law, Vol. 15, Issue 16 (16 June 2011) p. 4.

⁴⁹ C-127, Libya Contact Group, Fourth Meeting of the Libya Contact Group, 15 July 2011.

“provi[de] equal treatment to Turkish and Libyan investors without discrimination.”⁵⁰
Claimants contend that the Joint Declaration is a further admission by Libya that the Treaty properly entered into force and remained in force in 2014.

4.2 Claimants are Protected Investors Under the Treaty

4.2.1 The Treaty defines “investor” as meaning:

“...
“

(b) corporations, firms or business associations incorporated or constituted under the law in force of either of the Contracting Parties and having their headquarters in the territory of that contracting party;

who have made an investment in the territory of the Contracting Party.”

4.2.2 Article 1.2 of the Treaty provides, in relevant part:

“the term ‘investment’, in conformity with the hosting contracting party’s laws and regulations, shall include every kind of asset in particular but not exclusively [...]”

4.2.3 It is not disputed that Tekfen and TML satisfy the incorporation and seat requirements of Article 1.1(b) of the Treaty.

TTJV is Headquartered in Istanbul

4.2.4 As regards Respondent’s defence that TTJV is not headquartered in Turkey, Claimants say that TTJV is a Turkish joint venture which qualifies as a “business association” as defined by Article 1.1(b). Further, being governed by Turkish law, TTJV is also headquartered in Turkey.

4.2.5 Claimants contend that the term “headquarters” or “seat” of an entity, as used in investment treaties, refers to the place where effective management of that entity takes

⁵⁰ Exhibit C-099, Joint Political Declaration on the Establishment of the High Level Cooperation Strategic Council Between the Republic of Turkey and the State of Libya, 3 January 2014.

place. In its ordinary meaning, the “headquarters” are the “administrative center of an enterprise” and the “place from which [...] a business [...] is controlled or directed.”⁵¹

4.2.6 To determine whether an entity is headquartered or seated in a given jurisdiction, tribunals look at the following elements (which are not cumulative):

- (a) the place where the entity’s administrative bodies (shareholders, directors or other administrative or governing bodies, as appropriate) hold their regular meetings;
- (b) the place where the top management of the company sits;
- (c) the place where the entity carries out its administrative activities, which include the signing of contracts and handling of its finances;
- (d) the place where the company keeps its ledgers and records; and
- (e) whether the company has a certain number of employees working at the seat.

4.2.7 As regards Respondent’s argument that the 2006 Joint Venture Agreement between Tekfen and TML provides that the Joint Venture’s address “shall be Alemein St. 26” in Benghazi, Claimants contend that this was TTJV’s local address in Libya at the time but it did not serve as TTJV’s headquarters. While the Joint Venture Agreement provides that TTJV’s address in Benghazi would serve as the default location for management committee meetings, in fact all of TTJV’s management committee meetings took place in Istanbul, Turkey, often at the Tekfen Tower. Claimants rely on the minutes of TTJV’s Management Committee meetings which record that the Committee has routinely held its meetings at the headquarters of the lead joint venture partner, in Istanbul.⁵²

⁵¹ C-162, Merriam Webster, Definition of the word “headquarters”. For the avoidance of doubt, Claimants confirm that the authentic Arabic and Turkish versions of the Treaty use the same term. The Turkish authentic version of Article 1(1)(b), for example, employs the words “yonetim merkezi” which literally translates as “headquarters” or “administrative center”. See C-163, Tureng Turkish English Dictionary, Definition of “yonetim merkezi”.

⁵² C-102, TTJV Board Meeting Minutes; See also Exhibit R-39A, Tekfen-TML Board of Directors Meeting, 18 August 2010.

4.2.8 Claimants submit that Respondent's argument that TTJV was headquartered in Libya is based on a document that is not reflective of TTJV's operations. Further, Respondent has not provided any evidence that any of the criteria that investment arbitration tribunals examine did, in fact, take place in Libya.

There is no "Libyan TTJV"

4.2.9 Claimants argue that there is no merit in Respondent's jurisdictional defence that a company called Tekfen TML Joint Venture "... which bears exactly the same name as Claimants' TTJV [...] has apparently employed workers in Libya and may even have collected payments from the MMRA."

4.2.10 Claimants note that in the Contract Case, Respondent admitted that TTJV (not some purported Libyan entity) was the proper claimant in that case and that no jurisdictional objection was maintained based on the existence of another Libyan entity.⁵³

4.2.11 As to the reference to such an entity in the so-called CRO Report, little or nothing is known about that report but it is clear that it is littered with errors and cannot serve as a basis of any credible objection.

Tekfen and TML's Investments in Libya Comply with the Legality Requirements of Article 1(2) of the Treaty

4.2.12 Claimants say that the Respondent's challenge to the Tribunal's jurisdiction *ratione personae* with respect to Tekfen and TML is without merit.

4.2.13 As regards Respondent's defence, that for a foreign investment to be covered by the Treaty it must also be an investment as defined by domestic law, Claimants say that Libya misconstrues the meaning of the term in conformity with the hosting Contracting Party's laws and regulations. Article 1(2) does not contain a *renvoi* to a domestic law standard. Rather, it provides an autonomous, self-contained definition of "investment that is governed by the Treaty." The Treaty's definition is "not dependent on or informed by what constitutes an investment" under Libyan law. As the *Salini* tribunal pointed out,

⁵³ Exhibit C-097, excerpt from the Contract Case hearing transcript, Day 10, pp. 43-44.

the provision “in accordance with the laws and regulations” of the contracting state refers to the validity of the investment and not its definition.⁵⁴

4.2.14 Investment treaty clauses of this sort are said to be known as “legality” clauses, the purpose of which are to prevent BITs from protecting investments that should not be protected, particularly because they would be illegal.”⁵⁵

4.2.15 In the circumstances, contrary to Respondent’s position, Claimants submits that a failure to register under a “promotional” investment regime or in a domestic registry does not constitute a circumstance that can preclude the jurisdiction of a tribunal, unless the applicable BIT specifically conditions protection on the admission, approval or registration of a particular domestic regime.⁵⁶

4.2.16 Claimants assert that a plain reading of Article 1.2 reveals that it does not require “investments” to be “admitted”, “registered”, “approved”, or use of any similar formula designed to extend coverage only to investments that have gone through a domestic review and registration process.

4.2.17 Claimants further argue that Law No. 9 which is the foundation of Respondent’s illegality claim is irrelevant to the legality of Claimants’ investment. This is because the legality requirement of BITs is only concerned with whether a particular investment was compliant with local law at the time the investment was made. Claimant refers to the words of the tribunals in the *Urbaser, ECE*, and the *von Petzold* cases.⁵⁷

4.2.18 In any event, Claimants’ investment in the Project do not fall within the ambit of Law No. 9 which does not apply to public works contracts which are financed through the

⁵⁴ Exhibit CLA-058, *Salini Costruttori S.p.A and Italstrade S.p.A v. Kingdom of Morocco* (ICSID Case No. ARB/00/4) Decision on Jurisdiction, 23 July 2001, ¶ 46.

⁵⁵ *Ibid.*

⁵⁶ CLA-184, *Desert Line Projects LLC v. Republic of Yemen* (ICSID Case No. ARB/05/17) Award, 6 February 2008, ¶¶ 116-117. CLA-239, *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, (ICSID Case No. ARB(AF)/04/6) Award, 16 January 2013, ¶¶ 165-167 (interpreting a clause that required an investment to be “in accordance with the Contracting Party’s laws.”) *See also* CLA-077, *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29) Decision on Jurisdiction, 14 November 2005, ¶¶ 106-110.

⁵⁷ Statement of Reply, ¶¶ 106-109.

State budget. Regardless, Law No. 9 does not place any mandatory obligation on foreign investors to register their investments as a pre-requisite to operating in Libya.

4.2.19 As regards Respondent's alternative argument that Claimants were not registered as investors under the previous investment legal framework of Law No. 5 and its Executive Regulation, Claimants maintain that Respondents have not established that:

- (a) Claimants' investments fell within the ambit of the law; or
- (b) Law No. 5 contains any mandatory registration obligations; or
- (c) Claimants failed so to register.

4.3 Claimants Have Made Protected Investments Under the Treaty

4.3.1 Claimants point out that the Treaty contains a broad and unqualified definition of the term "investments" as "every kind of asset", which encompasses virtually any asset of economic value. They contend that there can be no dispute that Claimants' commitment of resources, which included expensive equipment, construction materials and the physical camps that hosted TTJV's personnel on the ground to carry out the work under the Contract constitutes an investment. They contend that these are undoubtedly "assets" that fall under the species of "moveable and immovable property, as well as other rights [...] and any other similar rights related to investments." In addition, the Contract is a "business concession conferred by law or by an investment contract."

Tekfen and TFL Made Direct Investments in Libya

4.3.2 Claimants argue that while TTJV, as the Project company, signed the Contract, Tekfen and TML have an ownership interest in these investments as TTJV's Joint Venture partners. They say that the arbitral jurisprudence confirms that shareholders up the chain of control have individual standing to bring claims related to their indirect investments, even in the absence of a provision expressly covering such investments.⁵⁸

⁵⁸ Statement of Claim, ¶ 115 and Professor Dolzer's Expert Opinion, ¶ 51 and *Empresas Lucchetti v. The Republic of Peru*, ICSID Case No. ARB/03/4, Award, 7 February 2005, ¶ 48, Legal Exhibit CLA-074.

- 4.3.3 Claimants say that Libya’s attempt to restrict Tekfen and TML’s investments to their “share” ownership in TTJV is inapposite. This is because TTJV was formed as an *adi Şirket* under Turkish law – a common form of joint venture. Under Turkish law such joint ventures are contractual alliances regulated like a simple partnership. They do not possess a distinct personality or constitute a legal or judicial person. Instead, the rights and obligations of a joint venture come into existence in the personalities of its partners. Thus, the “Tekfen TML Joint Venture” does not represent or reflect a distinct legal person. It merely denotes that Tekfen and TML will carry out the Project in collaboration within the Joint Venture structure established through their contractual alliance.
- 4.3.4 In these circumstances, Claimants assert that Tekfen and TML’s investments in Libya are not “indirect”, but direct investments made by the Joint Venture partners. However, even if the Tribunal were minded to view such investments as indirect, arbitral jurisprudence overwhelmingly confirms that shareholders of the chain of control have individual standing to bring claims related to their indirect investments even in the absence of a provision expressly covering such investments.⁵⁹
- 4.3.5 In any event, Claimants point out that Article 1.2 is also worded in broad terms. It protects “every kind of asset” and explicitly mentions “shares”, “stocks”, “other forms of participation” as examples of covered investments. Unlike other treaties, the Treaty does not exclude indirect investments from its scope. Thus, Claimants contend that Article 1.2 must be interpreted to cover investments held indirectly by other investors up the chain of control.
- 4.3.6 Further, both Tekfen and TML contributed resources to the Project and financed TTJV’s activities in Libya, and, but for Libya’s breaches, they would have received a proportional share of the profits obtained from the Project. Accordingly, in their capacity as TTJV’s owners, Tekfen and TML are entitled to claim compensation for the damages to TTJV’s assets caused by Libya’s unlawful conduct.

⁵⁹ Claimants’ Reply, ¶¶ 127-128.

The Contract and Claimants' Machinery and Equipment Are Investments in the Meaning of Article 1(2)

- 4.3.7 Claimants say that the definition of investments in Article 1(2), which “shall include every kind of asset [...]”, is extremely broad and unqualified. It says that this definition would certainly encompass the Contract, Claimants’ equipment, machinery and assets on site and their claims for reimbursement of the value of those assets which were looted and destroyed.
- 4.3.8 Claimants point to an UNCTAD study which states that when treaties define “investment” to include “every kind of asset” they are signalling that “term embraces everything of economic value, virtually without limitation.”⁶⁰
- 4.3.9 Claimants contend that under any reasonable interpretation of the Treaty, their investments would fall within the non-exhaustive category of “any kind of asset” as well as the individual categories “movable and immovable property [and] [...] any other similar rights” and “returns reinvested, claims to money or any other rights having financial value related to an investment.”
- 4.3.10 Claimants say that Respondents assertion that they do not have title over the machinery employed on the Project is irrelevant. This is because the Treaty does not require ownership or legal title over property for there to be a protected investment. Moreover, Claimants contend that it is common practice for contractors on large projects to purchase equipment through a financial lease with all title passing upon the last payment. Claimants used this model and leased much of the equipment on the Project. Nonetheless, they bore the risk of damage, theft or loss and continued to pay off the full value of the equipment after the events of February 2011. In total, Claimants disbursed \$28,887,204.15 in lease payments from March 2011 through 2014. The title of all leased

⁶⁰ CLA-150, UNCTAD, “International Investment Agreements: Key Issues” (2004), I UNCTAD/ITE/IIT/2004/10, p. 119. *See also*, CLA-154, *Camuzzi v. Argentine Republic* (ICSID Case No. ARB/03/2) Decision on Objections to Jurisdiction, 11 May 2005, ¶¶ 80-81; CLA-159, J. Salacuse, *The Law of Investment Treaties* (2009), pp. 178-179, 182, 185-186; CLA-151, N. Rubins, *The Notion of ‘Investment’ in International Investment Arbitration* (2004), p. 292.

equipment therefore belongs to Claimants. Thus, the equipment utilised on the Project was fully owned by Claimants by the time this arbitration commenced.

4.3.11 Claimants also dispute Respondent's objection that the Contract is not an investment because the Treaty covers only "business concessions". Claimants rely on findings by the *Salini* and *Bayindir* tribunals which confirm that construction contracts of this type are the quintessential examples of protected investments. Regardless, Claimants argue that the Contract, in any event, is an "asset" within the meaning of the *chapeau* of Article 1(2).

4.4 The Parties Consented to Submit this Dispute to ICC Arbitration

4.4.1 Claimants point to Article 8 of the Treaty which contains Libya's unconditional consent to submit disputes "in connection with an investment" to arbitration administered by the ICC. Claimants say this consent became effective once the Treaty came into force on 22 April 2011. Claimants perfected Libya's consent on 8 April 2012 when it notified Libya of the existence of a dispute under the Treaty and announced its intention to initiate arbitration proceedings. Claimants confirmed its consent upon filing its Request for Arbitration on 29 September 2015.

4.4.2 Claimants refute Respondent's defence that its consent to arbitration was conditioned in this case on compliance by Claimant with the provisions of Article 8(4). Based on the language of that provision, Respondent argues that Claimants did not properly register their investment in Libya and the investment had not "effectively started".

4.4.3 Claimants' arguments that their investments were not subject to Libya's investment permission regime and that they were not required to seek permission for or to register their investments under Law No. 9 are set out at 4.2.12-4.2.19 [JWR check]. Law No. 9 merely extends foreign investors the option to register as a way to obtain tax exemptions and other benefits. The law does not establish a system requiring all foreign investments to be registered. In any event the Law No. 9 regime is inapplicable as it came into force only after Claimants had invested in Libya.

4.4.4 Claimants point out that Tekfen and TML were duly registered with the commercial registry in Libya and at no time during the tender or signing of the Contract or its execution did Libya ever object to Claimants standing as foreign investors in Libya.

4.4.5 Finally, Claimants say that Respondents claim that the assertion that Claimants have not “effectively started” their investments is not credible. Since 2006, TTJV mobilised close to 1,500 employees, set up a number of camps along the Project route, imported costly machinery and equipment and carried out the Contract works until February 2011 all at significant cost.

4.5 **The Tribunal has Temporal Jurisdiction Over Claimants’ Treaty and Customary International Law (“CIL”) Claims**

4.5.1 Claimant contends that its claims are within the scope of Article 10 of the Treaty. Article 10 provides:

“The present Agreement shall apply to investments in the territory of a Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party before or after the entry into force of this Agreement. However, this Agreement shall not apply to disputes that have arisen before its entry into force.”

4.5.2 Claimants point out that there are two separate prongs to limiting the Tribunal’s temporal jurisdiction. First, Article 10 covers investments made both before and after its entry into force. Here, it is common ground that all of Claimants’ investments were made before the Treaty entered into force on 22 April 2011. Second, the Treaty excludes from its scope “disputes that have arisen before” the Treaty’s effective date. Claimants say that the “dispute” arose after 22 April 2011.

4.5.3 Claimants contend that Article 10 must be construed according to the principles of interpretation set out in the Vienna Convention on the Laws of Treaties (“VCLT”), particularly Article 31(1) which reflects the existing customary international law. Pursuant to that article, the Treaty should be interpreted in good faith according to the

“ordinary meaning of its terms in their context and in light of the Treaty’s object and purpose.” The relevant context includes the Treaty’s text, preamble and annexes.

4.5.4 Claimants maintains that the ordinary meaning of Article 10 is readily discernible and indicates that the parties to the Treaty did not place a jurisdictional bar on disputes that arose after the Treaty’s effective date. Rather, only those that arose before such date are excluded. Thus, the meaning of the term “dispute” is the decisive element to determine the scope of the Tribunal’s temporal jurisdiction.

4.5.5 Claimants says that in its ordinary meaning, a “dispute” refers to a “disagreement or argument” or “an assertion of opposing views or claims; a disagreement as to rights, especially one that is the subject of proceedings for resolution (as arbitration).”⁶¹

4.5.6 Dispute therefore requires an exchange of communications where one party makes an affirmative claim that is denied or contradicted by the other – see the approach of the Permanent Court of International Justice (“**PCIJ**”) and the International Court of Justice (“**ICJ**”) which have consistently held that the term “dispute” requires an opposition of views. In the *Mavrommatis* case, the PCIJ coined a definition that has become the benchmark to determine when there is a dispute:

*“a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interest between two persons.”*⁶²

4.5.7 The effect of this, say Claimants, is that the dividing line for jurisdiction *ratione temporis* under Article 10 is when the dispute between the parties manifested, not when the relevant facts occurred, or when the claim arose. The Tribunal must distinguish between

⁶¹ Merriam Webster, Definition of the word “Dispute” (Noun and Verb), Exhibit C-053; See also Oxford English Dictionary, Definition of the word “Dispute” (Noun and Verb), Exhibit C-054 (defining “dispute” as “[a] disagreement or argument” (*noun*) and “[t]o question whether (a statement or alleged fact) is true or valid” (*verb*)).

⁶² *Mavrommatis Palestine Concessions* (Greece v. United Kingdom), Judgment of 30 August 1924 (Merits), 1924 P.C.I.J. (ser. A), No. 2 (“Mavrommatis”) Exhibit CLA-027, p. 11; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, Advisory Opinion of March 1950, I.C.J. Reports 1950, Exhibit CLA-032, pp. 74-75; *South West Africa*, Preliminary Objections, Judgment, I.C.J. Reports 1962, Exhibit CLA-033, p. 328 (“It must be shown that the claim of one party is positively opposed by the other.”); *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7) Decision on Jurisdiction, 25 January 2000 (“Maffezini v. Spain”), Exhibit CLA-052, ¶94; *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru* (ICSID Case No. ARB/03/4) Award, 7 February 2005 (“Lucchetti v. Peru”), Exhibit CLA-074, ¶48.

the dispute itself, understood as a disagreement on a point of law or fact and the facts on which the dispute is based.⁶³

- 4.5.8 Claimants contend that although some of the operative facts occurred prior to the Treaty's effective date, a dispute regarding those facts only arose thereafter, which was after the Treaty's effective date.
- 4.5.9 In the days before TTJV withdrew its personnel from Libya, its representatives say that it made several unsuccessful attempts to contact the GMMRA to appraise of the circumstances surrounding the evacuation.
- 4.5.10 It points to its letter of 7 March 2011 (Exhibit C-043). After having received no response, Claimants says that on 26 May 2011, it sent a second letter attaching a preliminary assessment of its loss (Exhibit C-044).
- 4.5.11 Claimants says that while these letters clearly articulated a claim against Respondent seeking compensation for Libya's failure to protect Claimants' machinery, equipment and facilities, Libya did not respond immediately to these claims. Thereafter, following meetings in June and November 2011 to discuss TTJV's claim it was not until 20 May 2012 that the GMMRA definitively rejected in writing its claim for compensation (Exhibit C-046).
- 4.5.12 Claimants says that that letter marks the first time that the GMMRA opposed TTJV's legal right to receive compensation for losses, but this only addressed what it perceived to be contractual claims. Claimants contend that they and Libya did not exchange views for compensation to protect its investment under international law until Claimants notified Respondent of the existence of a dispute under the Treaty.

⁶³ *S.A. Eduardo Viera v. Chile*, Exhibit CLA-087, ¶¶216-219; *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru* (ICSID Case No. ARB/03/4) Decision on Annulment, 5 September 2007, Exhibit CLA-088, ¶94.

4.5.13 Nevertheless, even under the most conservative approach, Claimants argue that there was no “disagreement on a point of law or fact” between the parties until 20 May 2012, a year after the effective date of the Treaty.

4.5.14 TTJV rejects Libya’s contention that all it takes for a “dispute” to “arise in the meaning of Article 10 is for a request for protection and security to go unanswered by the State or one of its organs.” It contends that the very conduct (omission) that configures a violation of international law cannot simultaneously give rise to a “dispute” under Article 10, noting that tribunals that have considered the issue have consistently ruled that for a dispute to arise, there must be, at the very least, an opposition of views which needs to be articulated or made known.

The Treaty Makes an Exception to the Principle of Non-Retroactivity

4.5.15 Claimants accepts that treaties are generally not applied retroactively, except where the treaty itself, or other applicable sources indicate that the parties intended differently. The principle of “non-retroactivity” is set out in Article 28 of the VCLT which provides, in pertinent part:

“unless a different intention appears from the Treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Treaty with respect to that party.”⁶⁴

4.5.16 Here, however, Claimants point to the language of the Treaty which explicitly extends protection for investments made “before or after the entry into force” of the treaty. Thus, the parties are said to have agreed expressly that the Treaty would, in fact, apply retrospectively to existing investments.

4.5.17 Claimants note that this does not necessarily mean that the Treaty’s substantive protections apply retrospectively. One possible interpretation is that the Tribunal’s jurisdiction *rationae temporis* is independent from the determination of the substantive

⁶⁴ Exhibit CLA-038.

law applicable to Libya's conduct both before and after 22 April 2011. Thus, Libya's failure to protect Claimants' investments before 22 April 2011 can be adjudicated on the basis of customary international law, while its unlawful conduct which continued subsequent to the Treaty's entry into force is to be weighed against the Treaty's substantive standards.

4.5.18 Claimants point out that a number of tribunals have drawn a distinction between the two different legal questions:

- (a) what is the tribunal's jurisdiction *rationae temporis* under the Treaty; and
- (b) what is the temporal scope of the application of the Treaty's substantive protections

4.5.19 Claimants argue that the first question determines the Tribunal's jurisdiction to hear its claims; the second relates to the merits of the dispute and the availability of the Treaty's protections before and after 22 April 2011.

4.5.20 Under the Treaty, Claimants say that Libya consented to arbitrate claims asserted by Turkish investors and the scope of that consent is broad and encompasses disputes for violations of customary international law.

4.5.21 They further say that Libya's inclusive consent to arbitration coupled with the fact that their customary international law claims are undoubtedly "in connection" with their investment, determines that they can avail themselves of the arbitration mechanism in the Treaty to assert those claims.

4.5.22 Claimants refer to the *Micula* and *Impregilo* cases in which the tribunals concluded on the facts before them that – pursuant to VCLT Article 28 – the substantive protections of the relevant BITs applied only after the BITs effective dates, and that the legality of the acts committed before such dates was to be determined according to the law applicable at the time of their performance.⁶⁵

⁶⁵ Statement of Claim, ¶¶ 138 – 140.

4.5.23 Claimants argue that the substantive standards of the Treaty may apply to disputes arising before it entered into force given the language of Article 10 it is sufficient to derogate from the presumption of non-retroactivity under the VCLT. However, they assert that the Tribunal should, in any event, adjudicate their claims related to the events of February 2011 based on “the law applicable at the time of performance” which was customary international law.

4.5.24 Claimants refute Libya’s defence that Article 28 of the VCLT applies equally to jurisdictional and substantive provisions. They say that it is clear, by virtue of the particular language of Article 10 of the Treaty, that only “disputes” – not facts – are excluded from the ambit of the Tribunal’s jurisdiction. They further contend that Respondent’s argument ignores the well-developed principle that distinguishes between so-called single exclusion clauses – those which exclude only “disputes” that arose before a treaty’s entry into force – and double exclusion clauses, which carve-out (disputes related to facts) which pre-date a treaty’s effective date.⁶⁶

4.6 **The Tribunal has Temporal Jurisdiction Over Claimants’ Claims Because of Libya’s Continuous Violation of International Law**

4.6.1 Claimants assert that the Tribunal has jurisdiction to entertain their claims arising from Libya’s continuous unlawful conduct which began in February 2011 and persisted once the Treaty was in effect.

4.6.2 Claimants refer to Article 14(2) of the ILC’s Draft Articles on State Responsibility which state that:

“the breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.”

⁶⁶ CLA-112, S. Blanchard, “State Consent, Temporal Jurisdiction, and the Importation of Continuing Circumstances Analysis into International Investment Arbitration”, Washington University Global Studies Law Review, Vol. 10, No. 3 (2011), pp. 430-431; CLA-087, *Sociedad Anonima Eduardo Vieira v. Republic of Chile* (ICSID Case No. ARB/04/7) Award, 21 August 2007, ¶¶ 216-219; CLA-088, *Industria Nacional de Alimentos, S.A. and Indalsa Peru S.A. v. The Republic of Peru* (ICSID Case No. ARB/03/4) Decision on Annulment, 5 September 2007, ¶ 94.

4.6.3 Thus, Claimants contend that Libya is accountable for its ongoing unlawful acts that began before the Treaty entered into force and “remain not in conformity with its [international] obligations,” whether these obligations exist as a matter of treaty or as a matter of customary international law.

4.6.4 To show that Libya’s failure to exercise its duty to protect continued after 22 April 2011, Claimants rely on the joint inspections conducted in 2012 which revealed extensive theft of and damage to Claimants’ assets, and that Libya had done nothing to protect its assets between February 2011 and March 2012. Given the extent of the damage, Claimants say it is reasonable to conclude that some of this theft and damage occurred after the Treaty’s effective date. Moreover, the inventory conducted in 2014 revealed that additional equipment and assets of Claimants were damaged, destroyed or missing since 2012. This also demonstrates that Libya failed to protect Claimants’ investments after the Treaty’s effective date.

4.7 **The Tribunal has Subject Matter Jurisdiction Over the Dispute and Jurisdiction to Consider Customary International Law Claim**

4.7.1 Claimants note that the Tribunal’s subject matter jurisdiction is found in Article 8 of the Treaty by use of the phrase “disputes [...] in connection with his investment.”. Claimants assert that this phrase comprises any kind of dispute, with the only limitation that it must have a nexus to the protected investment. Its says that the scope of this language is widely accepted by investment treaty scholars to empower tribunals to hear, *inter alia*, claims sounding under customary international law.⁶⁷

4.7.2 Claimants point to the observation of Prof Schreuer:

⁶⁷ Prof. Dolzer’s First Expert Opinion, ¶¶117-119; K. Parlett, “*Claims under Customary International Law in ICSID Arbitration*”, ICSID Review, Vol. 31, No. 2 (2016), Exhibit CLA-135, p. 437: “Thus, a treaty clause that provides consent for ‘all disputes relating to investments’ to be submitted to arbitration will provide the basis of a tribunal’s jurisdiction *ratione materiae*, extending beyond the claims based on the treaty, and could potentially cover claims based on other sources of rights and obligations, such as contracts, municipal law and customary international law”; Z. Douglas, *The International Law of Investment Claims* (2009), Exhibit CLA-100, pp. 234-235: “Where the consent to investment treaty arbitration takes the form of either the first [referring to broad-based formulations such as art. 8 of the Treaty] or the second prototype, it is evident that the tribunal’s *ratione materiae* jurisdiction extends further than claims founded upon an investment treaty obligation.”

“that under a wide jurisdictional clause of this nature [“any dispute relating to investments”] the tribunal is authorised to entertain claims based on other sources of law, such as domestic law, other treaties and customary international law.”⁶⁸

4.8 The Dispute is Ripe for Arbitration

4.8.1 Article 8 of the Treaty sets out its requirements for notification of any dispute and consultations and negotiations to settle the dispute.

4.8.2 Claimants refer to their letter of 8 April 2015 to the Libyan prime minister giving notice of dispute and Libya’s failure to consult, negotiate or make an offer of settlement as compliance with these provisions.

4.8.3 Claimants also point to the fact that Libya does not contest that the dispute is ripe for arbitration.

4.9 Claimants’ Claims Are Not Duplicative and Do Not Constitute an Abuse of Process

4.9.1 As regards Respondent’s objections that Claimants’ case based on breach of the Contract is duplicative, constitutes an abuse of process or should be barred by virtue of the contract’s exclusive jurisdiction clause, Claimants contend that Libya ignores the well-known test developed by investment treaty tribunals applicable to parallel treaty and contractual claims that:

- (a) their claims in the contract and treaty cases are fundamentally different;
- (b) the arbitration clause of the contract does not preclude the tribunal’s jurisdiction; and
- (c) in its pre-hearing submission in the contract case, Respondent argued that allegations that it had failed to provide security or protect Claimants’

⁶⁸ C. Schreuer, “*Jurisdiction and Applicable Law in Investment Treaty Arbitration*”, McGill Journal of Dispute Resolution, Vol. 1:1 (2014), Exhibit CLA-124, pp. 9-10.

assets should be pursued in Claimants' treaty case "which is the proper form to deal with these assertions."⁶⁹

4.9.2 Claimants point out further that they effectively withdrew their international law claims in the Contractual Arbitration, precisely to avoid a situation where these claims could be adjudicated before two different fora.⁷⁰ Respondent itself acknowledge the withdrawal of any claims based on alleged violations of international law.⁷¹

4.10 Claimants' Customary International Law Claims

4.10.1 For reasons summarised at 4.5.and 4.7 above, Claimants contend for the application of customary international law to their claims arising out of the facts of Libya's failure to protect their investments prior to 22 April 2012.

4.10.2 Additionally, Claimants point to Article 21 of the ICC Rules which they say was specifically amended to permit the application of customary international law to these types of disputes tailored for investor-state disputes under a treaty. Claimants say that the reference to "rules of law" in that article instead of "the law" of a given country, was a deliberate choice to signal that the parties and the Tribunal are not restricted to the application of domestic laws. The reference to "rules of law" therefore directs the Tribunal to apply international law (treaty or custom) that bears the closest connection to the dispute at hand.⁷²

4.10.3 Moreover, Claimants say that Respondent concedes that Customary International Law applies, stating that "Respondent accept[sic] that the Tribunal can refer to Customary International Law when considering claims over which it has jurisdiction."⁷³

4.10.4 Claimants rebuke Respondents reliance on the *Mondev* decision which, they say, is plainly inapposite because it arises under the NAFTA which expressly limits the type of

⁶⁹ Respondent's Rejoinder and Reply to Defence to Counterclaim, Contract Case, ¶669, Exhibit C-095.

⁷⁰ Statement of Defence, Contract Case.

⁷¹ Statement of Defence, Contract Case, ¶62 "Claimants Case in the Contractual Arbitration is no longer based on alleged violations of international law."

⁷² CLA-116, J. Fry et al., *The Secretariat's Guide to ICC Arbitration, International Court of Arbitration* (2012), ¶3-747, ¶ 3-761, ¶ 3-779.

⁷³ Statement of Defence, ¶318.

disputes an investor may raise to those concerning the obligations contained under that Agreement. Claimants assert that Respondents invocation of the *Generation Ukraine* phase must fail for the same reason.

4.10.5 Finally, Respondents reliance on the *Paushok* case is said to be inappropriate since the tribunal in that case observed that if it had jurisdiction (it concluded it did not because of the wording of the treaty) to consider a dispute that pre-dated the treaty's effective date which arose because of conduct that pre-dated the treaty's effective date, it would only have been able to assess that conduct under "customary international law, and not the substantive provisions of the treaty).⁷⁴

4.11 **Libya is Responsible for the Wrongful Conduct of its Military and the GMMRA**

Libya's Responsibility for the Acts and Omissions of its Military

4.11.1 Claimants point to Article 4 of the ILC Articles of State Responsibility ("**ILC Articles**") which provides that:

"the conduct of any State organ shall be considered to be an act of the State under international law,".

4.11.2 As the commentary to the ILC Articles explains, State organ "covers all the individual or collective persons or entities which make up the organization of the State and act on its behalf."⁷⁵

4.11.3 Claimants submits that the military of a State is unequivocally a State organ, as confirmed by numerous international courts, tribunals, and scholars as Professors Dolzer and Schreuer opine:

*"[...] actions by a variety of state organs were attributable to the State. These included [...] the armed forces and police."*⁷⁶

⁷⁴ RLA-14, *Sergei Paushok CJSC Golden East Company CJSC Vostokneftegaz Company v The Government of Mongolia* (UNCITRAL) Award on Jurisdiction and Liability, 28 April 2011, ¶¶ 471.

⁷⁵ ILC Articles, Exhibit CLA-056, Art. 4(1).

⁷⁶ Exhibit CLA-222, R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2012) at 217.

4.11.4 Claimants also refer to judgements to the same effect by the ICJ in the *Democratic Republic of Congo v Uganda* and *Prosecutor v the Duško and Tadic* cases.⁷⁷

4.11.5 In this case, Claimants assert that Libya must be held responsible for: (a) its military's failure to provide Claimants with adequate security immediately before, during and after the events of February 2011; and (b) acts of looting and ransacking Claimants' camps during the events of February 2011. Claimants assert that Libyan soldiers looted their camps and destroyed their property on multiple occasions including:

- (a) on or about 21 February 2011, two groups of men in military attire and carrying AK-47 rifles arrived at Claimants' Tazerbo camp and robbed Claimants of trucks and spare parts;
- (b) on or about 22 February 2011, a unit of 10-12 soldiers from the GMMRA Security Battalion led by Officer Abdul Selam visited Claimants' Tazerbo camp, after Claimants requested security assistance. They forced their way into the camp and robbed Claimants of items of value, including personal property of workers;
- (c) on or about 23 February 2011, 8-10 armed individuals, clad partially in military uniforms, ransacked Claimants' Main Camp. They fired AK-47 rifles into the air and seized several pick-up trucks from the camp; and
- (c) finally, when Claimants' convoy left the Kufra camp for Benghazi, it was intercepted by a group of armed men dressed in military uniforms and riding army trucks. They robbed Claimants' employees of their personal belongings and seized a number of Claimants' 4x4 vehicles at gunpoint.

4.11.6 Claimants say that these independently and collectively amount to a case of State responsibility under Article 4 of the ILC Articles.

⁷⁷ Statement of Reply, ¶¶240-241.

Libya's Ultra Vires or Contravention of Instructions Defence is Unavailing

4.11.7 Claimants rebut Libya's *ultra vires* defence, stating that it is well established under international law that a State bears responsibility for the conduct of its organs, even if such conduct is *ultra vires* or in contravention of instructions. This principle is enshrined in Article 7 of the ILC Articles which indicates that the conduct of a State organ must be considered an act of the State, "even if it exceeds its authority or contravenes instructions."

4.11.8 As regards Respondent's defence that "any looting of TTJV's investments is only indicative of ... private conduct,"⁷⁸ Claimants point to the definitive rule established by the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case:

*"[...] under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law."*⁷⁹

4.11.9 Claimants refer to paragraph seven of the Commentary to the ILC Articles which indicates:

"nor is any distinction made at the level of principle between the acts of "superior" and "subordinate" officials, provided that they are acting in their official capacity. That is expressed in the phrase "whatever position it holds in the organization of the state" in Article 4."

4.11.10 Thus, Claimants assert, Libya is responsible for its soldiers who use military equipment to loot Claimants as well as for Colonel Zarruq's refusal to exercise due diligence when refusing to supply Claimants with protection.

⁷⁸ Statement of Defence, ¶497.

⁷⁹ Exhibit CLA-240, *Velásquez Rodríguez v. Honduras*, Judgment of 29 July 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988) ¶170.

Libya is Responsible for the Wrongful Acts of the GMMRA

4.11.11 Claimants submit that Libya is responsible for the wrongful acts of the GMMRA, as it is a *de facto* State organ, pursuant to the principles articulated in the ILC Articles, Article 4. In the alternative, should the Tribunal conclude that the GMMRA is not a State organ, Libya is responsible for its conduct because the issues involved the GMMRA's exercise of a governmental function under Article 5 of the ILC Articles.

The GMMRA is a De Facto State Organ of Libya – Article 4 of the ILC Articles

4.11.12 The GMMRA was created by the GPC by the passage of Law No. 10 (which structured the GMMRA's financing from the State) and Law No. 11 (which established the GMMRA's administration and granted it government powers).⁸⁰

4.11.13 Claimants contend that under these laws, the GMMRA was placed directly under the control and supervision of the General Peoples Committee of Agriculture and Reclamation and Land Development (said to be the equivalent of a Ministry of Agriculture).

4.11.14 Claimants note that the GMMRA was led by the GMRRA Peoples Committee. Members of the latter were proposed and appointed by the GPC. On most issues of significance, Claimants contend that the GMMRA would pass resolutions which would then become binding only after approval by the GPC. Claimants argue that the GMMRA was thus a political body appointed by the government and subservient to it.

4.11.15 Unlike other State entities such as the Libyan Investment Authority, the GMMRA was not given its own independent financial capabilities.

4.11.16 Claimants contend that the Libyan Government exercised direct control over the GMMRA's budget and funds. The GMMRA was also subject to periodic auditing by the Audit Department of the Libyan Government like other government agencies or ministries.

⁸⁰ Exhibits C-035 and C-036.

4.11.17 Claimants draw attention to the decision of the Libyan Supreme Court in 2012, (Case No. 144/56JY) which holds that Libya is a proper party to a contractual dispute if one of its authorities is a party to the contract at issue, regardless of whether that authority has a separate legal entity. Claimants note that Case No. 144/56JY is consistent with a 2007 Libyan law which provides that if a public entity is funded by the State Treasury, Libya is liable for liabilities accrued resulting from a court judgment. It says that it is common ground that the GMMRA is funded by the State Treasury.⁸¹

4.11.18 Claimants rely on the GMMRA's wide array of governmental powers providing it with the right and ability to force Libyans to work for it, control criminal investigations into its officials and direct municipalities and supervise and direct military and peace forces assigned to it. Of particular importance to this dispute, say Claimants, is Article 20 of Law No. 11 which provides the GMMRA with the power to direct and control military forces that were assigned by Col. Gaddafi to protect the GMMRA's Project:

“By decision of the Commander in Chief of the Armed Forces an adequate number of the army forces may be seconded to carry out the activities of protection and security supervision of the installations, the equipment, the assets and the works areas of the organization under the supervision and direction of the People's Committee of the Organization and in accordance with the rules it shall lay down in this regard”.

4.11.19 In this connection, Claimants point to Col. Gaddafi's formation on 6 May 1999 of “[a] Light Infantry Detachment [...] for the protection of the Great Man-made River.”⁸²

4.11.20 Claimants refute Libya's defence that it bears no responsibility for the GMMRA because the latter enjoys a separate legal personality.

4.11.21 The Claimants point to the *Salini* Award which demonstrates that a separate legal personality does not preclude the finding of a State organ if the organ is in fact controlled

⁸¹ Statement of Reply, ¶¶279-280. *See also* Respondents' Rejoinder to Reply and Defence to Counterclaim, ICC Case No. 21137, ¶143, Exhibit C-153.

⁸² Exhibit R-25, Resolution of the High Commander concerning formation of Light Infantry Detachment, 6 May 1991, Art. 1.

and managed by the State and performs quintessentially governmental tasks, such as providing for infrastructure.

4.11.22 Here, Claimants submit that the GMMRA and the State are indistinguishable, noting that:

- (a) the GMMRA identifies itself as a “public entity;”⁸³
- (b) the GMMRA recognise that “[it] is a legal and administrative authority” and “has over-riding responsibility to safeguard the monies of the Libyan people which fund its budgets;”⁸⁴
- (c) the GMMRA exercise significant sovereign police powers under Law No. 11;
- (e) when the GMMRA wrote to Claimants’ during the execution of the GMMRP, it represented itself to be part of Libya on governmental letterhead;⁸⁵
- (f) Libya identifies the GMMRA’s obligations as Libyan State debts when reporting to the IMF;⁸⁶
- (g) Libya and the GMMRA shared a common financial identity;⁸⁷
- (h) under the Contract, the GMMRA gives tax benefits directly to Claimants, a benefit it could bestow only by exercising State authority and acting as the State;⁸⁸ and

⁸³ Exhibit C-032, Request for Proposal dated September 2004, Vol. 1, Art. 1.1.

⁸⁴ Exhibit C-192, Letter from GMMRA to TTJV, 28 June 2012 at 2.

⁸⁵ See C-116, Letter from GMMRA to TTJV, 15 October 2006; C-118, Letter from TTJV to GMMRA, 26 December 2006; C-119, Letter from GMMRA to TTJV, 22 January 2007; C-111, Letter from GMMRA to TTJV, 5 February 2006. E.g. C-111 used a government letterhead which states “Great Socialist People’s Libyan Arab Jamahiriya” has the seal of Libya during the Gaddafi era, and then states “Great Man-Made River Project.” Indeed, all letters GMMRA sent to Claimants, prior to the events of February 2011, included this letterhead.

⁸⁶ C-112, The Socialist People’s Libyan Arab Jamahiriya: Selected Issue - Medium-Term Economic Reform Strategy, and Statistical Appendix (2006) at 51.

⁸⁷ C-004, Contract – Volume 1, Special Conditions, Art. 2.6.7.

⁸⁸ C-004, Contract – Volume 1, General Conditions, Art. 2.9.4.

- (i) the GMMRA is entitled unilaterally to terminate the Contract if it concludes that it is in “the common public interest” to do so.⁸⁹

4.11.23 Claimants also rely on the fact that the GMMRA was financially dependent on Libya, Libya’s control of the GMMRA’s functioning and decision-making, Libya’s exercise of pervasive control over the GMMRA through the Dewan and the Central Bank of Libya and Libya’s continued exercise of control over the GMMRA in the post-Gaddafi era.⁹⁰

The GMMRA’s Conduct was an Exercise of Governmental Function – Article 5 of the ILC Articles

4.11.24 Article 5 of the ILC Articles provides that:

“The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.”

4.11.25 The commentary to Article 5 of the ILC Articles addresses the GMMRA’s ability to take “seconded” military forces and have them under its “supervision and direction.” It explains that:

“Thus, for example, the conduct of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it concerns the exercise of those powers, but not if it concerns other activities (e.g. the sale of tickets of the purchase of rolling-stocks).”

4.11.26 Claimants submit that applying Article 5 of the ILC Articles establishes Libya’s responsibility for the GMMRA’s failure to respond to Claimants’ repeated requests for protection. Claimants point to the *Salini, Nobel Ventures, Encana* and *Toto* awards which demonstrate that when an entity exercises sovereign powers, endowed to it by a

⁸⁹ C-004, Contract – Volume 1, Art. 3.8.1.

⁹⁰ Statement of Reply; ¶298, (b)(c)(d)(e)(f).

State, and the use or omission of those powers is an issue in dispute, its acts are attributable to the State.

4.11.27 Claimants rely on the GMMRA's power to manage military and police forces "under the supervision and direction of the Peoples Committee of the Organisation."⁹¹ They say this is the quintessential police power which, as the ILC Commentary states, will be regarded as an act of the State under international law if the conduct in question concerns the exercise of those powers.

4.11.28 Claimants submit that the GMMRA's failure to provide Claimants with protection, as demonstrated, is directly related to its power to exercise a governmental function, and is therefore attributable to Libya under the principles of Article 5 of the ILC Articles.

4.12 **Libya's Failure to Meet its Obligation of Due Diligence Under International Law**

Overview

4.12.1 Claimants contend that Libya's defence against its failure to provide protection relies on setting an artificially low standard for its legal duties; a minimalist formulation of the due diligence standard which would make a mockery of the doctrine.

4.12.2 As regards Libya's argument that the standard should be lowered where the State's security capacity has been degraded or compromised, Claimants point to jurisprudence which stands for the proposition that even where there is civil unrest, and perhaps all the more so when it arises, a State must provide a predictable, minimal level of security.

4.12.3 However, on the factual record, they say that Libya's security apparatus, including the military was robust and had ample capacity to provide protection in the region during the relevant period. It simply elected not to do so.

⁹¹ Law No. 11 of 1983, Art. 20, Exhibit C-036.

The International Law Obligation of Due Diligence

4.12.4 While the parties may disagree on the substance of the due diligence standard under the Treaty and customary international law, Claimants contend that, as to physical protection, the parties are in agreement that the standards under the Treaty and customary international law are the same.⁹²

4.12.5 Claimants point to the *AAPL* case as having established the modern standard:

*“[C]ontemporary international law authorities noticed the ‘sliding scale,’ from the old ‘subjective’ criteria that takes into consideration the relatively limited existing possibility of local authorities in a given context, towards an ‘objective’ standard of vigilance in assessing the required degree of protection and security to what should be legitimately expected to be secured for foreign investors by a reasonably well organized modern State.”*⁹³

4.12.6 Claimants note that the *APPL* tribunal endorsed Prof. Freeman’s statement that due diligence consists of the “reasonable measures of prevention which are well administered in which a government could be expected to exercise under similar circumstances” and that “[a]ccording to modern doctrine, the violation of international law containing the State’s responsibility has to be considered constituted by ‘the mere lack or want of diligence,’ without any need to establish malice or negligence.”⁹⁴

4.12.7 In response to Libya’s contention that references to a “well-organised” or a “well-administered” government in the standard concerns the “decision-making quality of the armed-forces/security infrastructure.”⁹⁵ Claimants argue that Respondent fails to provide any support for its assertion

⁹² Statement of Reply, ¶¶330-332.

⁹³ Exhibit CLA-049, *Asian Agricultural Products LTD (AAPL) v. Republic of Sri Lanka* (ICSID Case No. ARB/87/3) Final Award, 27 June 1990, ¶ 77 (emphasis added).

⁹⁴ *Ibid.*

⁹⁵ Statement of Defence, ¶531.

- 4.12.8 Claimants say that reasonable measures referred to by Prof. Freeman include “deploy[ing] its police force or to take other coercive measures to prevent others from disrupting the peaceful possession and enjoyment of the investment.”⁹⁶
- 4.12.9 As regards Respondent’s assertion that a state fulfills its obligation to provide protection, even when it does nothing, if the act of providing security would place “significant strains” on the military, Claimants rely on Prof. Dolzer’s opinion that the duty to protect exists, even though it may cause a “strain”. This is because the obligation is not one of convenience for the State; it is an obligation that the State undertakes to protect foreign investors even when it is inconvenient.
- 4.12.10 Claimants assert that, in assessing the exercise of the obligation, a tribunal may examine, *inter alia*:
- (a) the character of the action harming the foreigner;
 - (b) the extent of the damage;
 - (c) the foreseeability of the action;
 - (d) the causality of the lack of protection;
 - (e) the availability of resources of the host State for preventing the harm; and
 - (f) the effective use of these resources made by the host State to protect the foreigner’s interest.
- 4.12.11 Claimants note that Prof. Dolzer states that “[t]he most controversial point on this list may be the availability of resources to protect the foreign investment”. However, they say that there can be no controversy that such an assessment must be made by an “objective” analysis which asks the question of how the resources that the state commits

⁹⁶ Exhibit CLA-132, OI European Group B.V. v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/11/25) Award, 10 March 2015, ¶ 580.

to protection and security are compared against the benchmark of “the well organised modern state”.⁹⁷

4.12.12 Claimants observe that Respondent appears to endorse the modern objective standard.

However, they contend that Respondent reversed its course and relies heavily upon cases that are over 100 years old and which employ the old subjective criteria which were rejected in the *APPL* case and by subsequent tribunals. Claimants refer to the views of Prof. Dolzer who states in his First Expert Report, citing *Crystalex* and *Philip Morris*, that “recent jurisprudence after 2010 has been unanimous that the minimum standard has evolved [...] and has not been frozen.”⁹⁸

4.12.13 Nevertheless, Claimants observe that even under the old standards, conditions of civil strife do not absolve the state of its due diligence obligations.⁹⁹ More recently the issue has been addressed in the *AMT* and *AMPAL* awards. In the former, the tribunal explained “Zaire manifestly failed to respect the minimum standard required to it by international law” when claimants were looted by “soldiers in uniform with weapons of the army [...] belonging to the armed forces.”¹⁰⁰ In the *AMPAL* case, Egypt, specifically the Sinai Peninsula, was facing highly organised and well-trained insurgents. Nevertheless, in circumstances where the Egyptian security forces refused to mobilise although *AMPAL* personnel had made contact with Egyptian army patrols and sought assistance, the tribunal concluded that Egypt’s failure to provide protection “constitutes a breach of the obligation of due diligence that Egypt was required to exercise in ensuring the full protection and security of Claimant’s investment.”¹⁰¹

4.12.14 Claimants point out that although the *AMPAL* tribunal held that the first attack could not have been prevented by respondent (and thus its failure to do so could not amount to a breach of the full protection and security standard) it observed that after five attacks

⁹⁷ Exhibit CLA-049, *Asian Agricultural Products LTD (AAPL) v. Republic of Sri Lanka* (ICSID Case No. ARB/87/3) Final Award, 27 June 1990, ¶ 77.

⁹⁸ Dolzer ER I, ¶216.

⁹⁹ Statement of Reply, ¶350.

¹⁰⁰ Exhibit CLA-051, *American Manufacturing & Trading, Inc. v. Republic of Zaire* (ICSID Case No. ARB/93/1) Award, 21 February 1997, ¶¶ 6.10 and 7.06.

¹⁰¹ Exhibit CLA-141, *Ampal-American Israel Corporation and others v. Arab Republic of Egypt* (ICSID Case No. ARB/12/11), Decision on Liability and Heads of Loss, 21 February 2017, ¶ 284, ¶ 290.

occurred and numerous requests for security were lodged, it was foreseeable that there would be subsequent attacks.¹⁰²

4.12.15 In sum, Claimants contend that the relevant jurisprudence establishes that the appropriate standard for the exercise of due diligence is the reasonable measures that a well-administrated government could be expected to exercise under similar circumstances. In applying the standard, tribunal's focus on whether the State was put on notice as to the necessity to provide protection, whether it actually took actions to protect the investment, or whether the state declined to take action, and not merely whether it had intended or decided to do so. Importantly, Claimants argue, the State's obligation to provide security and protection continues to bind the State even in cases of significant and violent civil instability in and around the site of the investment as in *AMT*, *AMPAL*, and *APPL*.

4.13 Facts Relevant to the Assessment of Libya's Compliance with Its Obligations

4.13.1 Claimants point to five facts which, they contend, indicate that Libya failed to provide full protection and security. These are:

- (a) the Kufra district was stable, only the coastal cities were de-stabilised and the looters Claimants faced were either opportunistic *ad hoc* groups or military personnel;
- (b) Claimants requested security from Respondent seven times, and Respondent failed to provide any kind of security;¹⁰³
- (c) the looting Claimants suffered became foreseeable after Claimants put the State on notice that security was needed;

¹⁰² CLA-141, *Ampal-American Israel Corporation and others v. Arab Republic of Egypt* (ICSID Case No. ARB/12/11), Decision on Liability and Heads of Loss, 21 February 2017, ¶¶ 289-290.

¹⁰³ Claimants' assertion as to the number of times and how it requested protection changed during the course of their submissions. It is not necessary to deal with these changes here.

- (d) Libya failed to provide security although the Kufra district was stable, security personnel were nearby, and it had a functioning command and control system; and
- (e) Libya protected the Sarir Manufacturing Plant while failing to provide any protection to Claimants.

4.13.2 Claimants rely on the testimony of Mr Davarci and Mr Halicilar (which they point out remains effectively uncontested) that, as a result of incidents of looting, Claimants requested security assistance from Libya and GMMRA on at least seven separate occasions.¹⁰⁴

4.13.3 As regards Respondent's defence that the actions underlying Claimants' claims were unforeseeable (because of the different situation that existed in the coastal Libyan cities and in Kufra) Claimants argue that, in light of their numerous requests for assistance, the threats to Claimants were clearly foreseeable. Moreover, it is unreasonable and contrary to the conduct of a well-organised modern government for Respondent both to loot Claimants and deny their request for protection, while at the same time protecting the Sarir Manufacturing Plant. Claimants say that once they had been robbed at gun point and Respondent failed to respond, it became readily foreseeable that the looting would continue that Claimants could not remain exposed in the desert without protection and would have no choice but to evacuate. It was also foreseeable that Claimants would require protection to re-group their equipment and convey it to a site where it could be protected. The fact that Respondent's domestic legal regime did not allow Claimants to possess or independently contract people with weapons, made it even more foreseeable that future attacks could continue because Claimants were not able effectively to engage in self-help.

Libya Had Ample Security Forces in the Region to Provide Security

4.13.4 Claimants contend that when they requested security, Respondent had more than sufficient troops in the region that could have provided it. These included the GMMRA

¹⁰⁴ Statement of Reply, ¶393.

Security Battalion near Claimants' work sites and around the Project sites. As confirmed by Mr Tayash in the Contract Arbitration, the GMMR Security Battalion troops regularly patrolled the pipeline, had security check points at the Tazerbo junction, the Sarir Plant and in Kufra City. There was also a multitude of police stations, with 12 to 15 policemen in each station near Claimants' camp in Kufra City.

- 4.13.5 Claimants point to the fact that the GMMRA's Sarir Manufacturing Plant was protected by Libyan forces during the critical period in question – and apparently to the present day. This, it is said, demonstrates that if Libya had provided minimal protection to Claimants, the damage to their equipment would have been avoided. The fact of the Sarir Manufacturing Plant being protected is evidenced by the un-contradicted testimony from Mr Halicilar and Mr Davarci. This is also confirmed by the GMMRA's letter of 3 May 2012 in which it states that "Sarir and adjoining camp, was not damaged or attacked as it had been secured by the authority" through 2011 and into 2012.¹⁰⁵
- 4.13.6 Claimants say that this means that either: (a) a lightly armed number of 10-12 Libyan military troops (which Mr Walker's cousins described as being "severely reduced in capacity and capability"), were able to protect the Sarir Plant or; (b) if Respondent's contention is accepted, an unarmed private security team hired by SNC Lavalin was able to secure the facility.
- 4.13.7 The effect of this, say Claimants, is that the provision of protection at the Sarir Manufacturing Plant demonstrates that Libya: (a) had the ability to provide Claimants with protection but refused to act; and (b) chose either to protect the facility because the GMMRA owned it, or because SNC Lavalin paid bribes. Claimants submit that either justification for Libya's conduct is, on its face, discriminatory and/or arbitrary treatment. Finally, the fact that the Sarir Manufacturing Plant was unscathed demonstrates that had Claimants been provided security as they moved their equipment to that facility, the equipment would have been safeguarded.

¹⁰⁵ Exhibit R-075, Letter from MMRA to TTJV, 3 May 2012.

4.13.8 As regards Libya's defence that it did not have the ability to provide protection and security because of Col. Gaddafi's decision to undermine the military and security services, Claimants submit that Libya's protection of the Sarir Manufacturing Plant shows that it had ample security forces to provide the limited security that was required. In any event, Claimants submit that if it were true that the State deliberately weakened its military, this cannot relieve it of its duties under international law

A Small Amount of Security Provided by Libya would have Enabled Claimants to Gather Their Equipment at the Sarir Plant

4.13.9 When Claimants sought security from Respondent during the events of February 2011, they say they were in the process of planning to gather all their equipment at one location where the assets could more readily be protected. However, in order to do so security was needed to collect all the equipment and machinery.

4.13.10 After it became clear that Libya and the GMMRA would not provide any security or protection, management of TTJV decided that it had no choice but to evacuate the sites as soon as possible.

4.13.11 As Claimants were leaving Libya thereafter, they say, they organised the protection of their equipment as best as possible. This was initially done by engaging Mr Abdul Karim and Mr Hamad Labirish as well as certain individuals in Tazerbo to secure the equipment. Thereafter, on 17 March 2011, they gave authorisation to Mr Wazri, Mr Elhoni and Mr Zarruq to gather their equipment.¹⁰⁶

4.13.12 Claimants submit that when they were able to return to Libya, they began the process of collecting equipment where possible and determining what equipment had been looted, destroyed or damaged as a result of the events of 2011.

¹⁰⁶ Letter of Authority from TTJV Turkey to TTJV Libya, 17 March 2011, Exhibit R-053.

4.14 **Respondent's Defence that Claimants Failed to Employ Properly Qualified Security Guards**

4.14.1 Claimants rebut Respondent's defence that TTJV's security was inadequate. Claimants assert that they consistently employed between 45 to 50 guards and that there were 45 security guards on site during the events of February 2011. Claimants point to their weekly report to the GMMRA of 12 February 2011 which shows that Claimants had 49 guards protecting their work sites in and around the time the events of February 2011 unfolded.¹⁰⁷ Moreover, the GMMRA recommended the guards that Claimants ultimately used.¹⁰⁸

4.14.2 Claimants point out that each of their camps required entry through a non-armed security check point with the requirement to show identification. Each of the camps had earthen barrier, fencing and guards. Further, as the event of 2011 unfolded, Claimants say that they took additional precautions to safeguard the project sites. Equipment that could easily be moved from the pipeline area was gathered into the camps. A number of large trucks were moved to the entrance of the Tazerbo camp to block entry and exit of vehicles as much as possible and earth moving equipment was used to reinforce and expand earthen barriers and trenches surrounding the camp.

4.15 **Respondent's *Force Majeure* and Necessity Defences Are Without Merit**

4.15.1 For Respondent to be able to rely on *force majeure*, Claimants submit that it must prove the three elements required by Article 23 of the ILC Articles:

- (a) the occurrence of an irresistible force or an unforeseen event;
- (b) that is beyond the control of the State; and
- (c) which makes it materially impossible in the circumstances to perform the obligation.¹⁰⁹

¹⁰⁷ Exhibit C-206, letter from TTJV to GMMRA, 12 February 2011.

¹⁰⁸ See for example, GMMRA's letter of recommendation to TTJV of 2 August 2010.

¹⁰⁹ ILC Articles, Art. 23, Exhibit CLA-056.

4.15.2 Claimants point out that the defences of *force majeure* and necessity are narrowly interpreted and have seldom been applied.

4.15.3 Claimants refer to the text, *Principles of International Investment Law* where Professors Dolzer and Schreuer state that *force majeure* and other international law defences:

“allow a state to act in a manner that is not in conformity with existing obligations of customary, or even treaty, law. By their very nature, they are therefore of exceptional character in the general setting of the international legal order; their application must take their derogatory effect into account and must therefore place strict limitations on their negative impact on the operation of accepted international norms. This is of special importance when an investment treaty is affected which is meant to provide for long-term legal stability.”

Force Majeure Conditions Did Not Exist in the Relevant Locations

4.15.4 Claimants argue that Respondent seeks to apply the doctrine in a blanket manner without providing any geographic or temporal limits on the alleged *force majeure*. Claimants say that Respondent fails to explain:

- (a) when *force majeure* conditions began;
- (b) the specific conditions invoked;
- (c) what actions of the Libyan armed services were precluded;
- (d) where within Libya the conditions existed; or
- (e) when, if ever the conditions ended.

4.15.5 Claimants assert that Respondent admits that the initial *force majeure* condition did not exist in the area around the Project sites near Kufra City when it argues that, at the time

Claimants left the project, “the troubles ... were limited to the cities of Benghazi and Tripoli.”¹¹⁰

4.15.6 Indeed, as explained by Col. Pusztai “at and after the outbreak of the revolution the situation in Kufra City remained widely stable.”¹¹¹

Respondent Fails to Prove “Irresistible Force” or “Unforeseen Event”

4.15.7 Claimant submits that Respondent has failed to articulate with even a remote level of specificity what irresistible force or unforeseen event it believes prevented its various forces in and around Kufra City from protecting Claimants.

4.15.8 Claimants say that Libya cannot rely on the unfolding situation in Kufra having been unforeseen. This is because, once instability broke out, Claimants notified Respondent on at least seven occasions of their need for protection. Respondent was thus on notice that looting and damage such as the type that occurred was both foreseeable and a very real possibility.

The Alleged Situation of Force Majeure was Not Beyond Respondent’s Control

4.15.9 To the extent Respondent’s defence is that the events of *force majeure* included attacks on Claimants by lightly armed robbers in and around the Project sites, Claimants assert that it cannot prevail. This is because it was entirely within Respondent’s control to repel these small-time bandits.

Protection was not “Materially Impossible”

4.15.10 Claimants point to the analysis by the tribunal in the *Rainbow Warrior* case as instructive. There, as the tribunal explained:

¹¹⁰ Exhibit C-150, Statement of Defence and Counterclaim in Contract Arbitration, ICC Case No. 21137, ¶ 463 (emphasis added).

¹¹¹ Col. Pusztai First Expert Report, ¶ 26.

*“the test of its applicability is of absolute and material impossibility”
and “a circumstance rendering performance more difficult or
burdensome does not constitute a case of force majeure.”¹¹²*

4.15.11 Claimants argue that the protection they required was not materially impossible. Indeed, Claimants contend that there was a garrison near Kufra City of armed forces and that other forms of security forces were present and active in the area which could easily have controlled the small band of armed looters. Importantly, the Sarir Manufacturing Plant received protection and was unscathed by the events of 2011.

Respondent Misconstrues the Force Majeure Standard

4.15.12 Claimants state that the due diligence standard of protection and security is not an aspirational principle which allows a State to hide behind *force majeure* when the need for protection is most acute. To the contrary, the international obligation to protect was created to address precisely situations of civil unrest when the State’s protection is most required.

4.15.13 Claimants note that Respondent dedicates most of its argument citing cases from the nineteenth century or decisions relating to contractual *force majeure* provision. However, in most modern investment law jurisprudence, tribunals have rejected the defence of *force majeure*.

Respondent has Not Proven Necessity

4.15.14 To prevail on a necessity defence under Article 25 of the ILC Articles, Claimants say that Respondent must prove that its wrongful acts: (a) were the only means for the State to safeguard an essential interest against a grave and imminent peril; and (b) did not seriously impair an essential interest of the State towards which the obligation exists.¹¹³

¹¹² CLA-223, Rainbow Warrior Case, ¶ 77; *see also*, CLA-228, *Sempra Energy International v. Argentine Republic* (finding no force majeure where Argentina made changes to regulatory framework resulting from financial crisis).

¹¹³ Exhibit CLA-056, ILC Articles on State Responsibility, at 51, ¶ 2.

4.15.15 Unlike, *force majeure*, in the case of necessity, the act “in question is considered voluntary – a conscious act that the state takes to safeguard an essential interest”.¹¹⁴

4.15.16 Claimants note that, as with the *force majeure* defence, tribunals have construed the defence of necessity narrowly. As the *LG&E Energy Corp* tribunal found, necessity “should be only strictly exceptional and should be applied exclusively when faced with extraordinary circumstances.”¹¹⁵ Claimants contend that Respondent’s defence, that it could not provide protection because “most Libyan military would ... be occupied” with protecting civilians or safeguarding important national infrastructure,¹¹⁶ must fail, given the evidence that there were 500 regular army troops in Kufra alone and that the Sarir Manufacturing Plant was protected during the relevant period.

4.15.17 Claimants also note that the necessity defence is not available when Respondent has contributed to the occurrence of the state of necessity.¹¹⁷ Here, if as Respondent claims, it did not have sufficient forces to protect Claimants due to Col. Gaddafi’s policies, it cannot rely on the defence.

4.16 **Even if *Force Majeure* or Conditions of Necessity Existed, Claimants Remain Entitled to Compensation**

4.16.1 Claimants say that tribunals regularly provide compensation in circumstances where conditions of *force majeure* or necessity apply, based on Article 27 of the ILC Articles. That Article provides:

“[t]he invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to ... (b) the question of compensation for any material loss caused by the act in question.”

4.16.2 As Professor Kazczorowksa-Ireland explains in her treatise *Public International Law*:

¹¹⁴ Exhibit CLA-215, Newcombe Paradell book, Chapter 10, p. 14.

¹¹⁵ Exhibit CLA-006, pp. 90-91.

¹¹⁶ SOD, ¶ 676.

¹¹⁷ Exhibit CLA-192, *Gabcikovo-Nagymaros Project*, p. 40-41.

“exculpatory defences preclude the [legal] wrongfulness of an act, but not necessarily the responsibility of the perpetrator State.”¹¹⁸

This, she says:

“is especially true “in a situation of distress or necessity [where] there is no reason why a State, which acts for its own benefit should not pay compensation for any material harm or loss caused by its act.”¹¹⁹

4.16.3 Claimants refer to the *CMS* and *French Co. of Venezuela Railroads* cases in support.¹²⁰

4.17 Claimants’ Damages Were Directly Caused by Respondent’s Failure to Provide Security

4.17.1 Claimants’ position starts with the relevant causation standard, as articulated by the Draft Articles of State Responsibility, that Respondent is liable for all damages “resulting from and ascribable to the wrongful act (*i.e.*, Respondent’s failure to provide security and protection).

4.17.2 Claimants say that the following losses are encompassed within Respondent’s liability:

- (a) damages incurred by Claimants as a result of the theft of equipment, machinery and other assets;
- (b) damages incurred by Claimants’ equipment, machinery and other assets resulting from physical acts; and
- (c) damages incurred by Claimants as a result of the inevitable environmental degradation that occurs from equipment being left in the harsh desert conditions without a maintenance programme.

4.17.3 Claimants assert that these three types of damages are the natural and foreseeable results of Respondent’s failure to provide protection and security.

¹¹⁸ Exhibit CLA-242, Alina Kaczorowska-Ireland, *Public International Law*, p. 506 (5th ed. 2015).

¹¹⁹ *Id.*, p. 453.

¹²⁰ Statement of Reply, ¶¶ 613-614.

- 4.17.4 Claimants state that it is common ground that GMMRA's equipment at the Sarir Manufacturing Plant was protected during the course of the revolution and the civil wars. They say that, had TTJV's equipment been protected in Sarir, they could have ensured that it was properly maintained over time. Thus, the environmental damage of the machinery suffered at the work sites due to lack of attention flows directly from Libya's failure to protect the equipment.
- 4.17.5 Claimants contend that it is not seriously debated that they had to leave the work sites for safety reasons. They refer to the Memorandum of Agreement of 21 November 2012, between TTJV and GMMRA which records that "events resulting from the Revolution ... made it impossible for the contractor to continue performance of its obligations under the Contract and the contractor has, for safety reasons and attacks received, evacuated its work force from Libya ...".¹²¹
- 4.17.6 Claimants argue that this analysis is more than sufficient to demonstrate legal causation and liability.
- 4.17.7 Claimants reject Respondent's defence that Claimants are actually themselves liable for the losses suffered. They refer to Article 39 of the ILC Draft Articles which provides:
- "In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought."*
- 4.17.8 Claimants point out that Article 39 allows account to be taken of only those actions or omissions which can be considered as wilful or negligent, *i.e.*, which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights. Claimants say that Respondent has not come close to establishing that Claimants acted negligently.
- 4.17.9 With respect to Respondent's argument that Claimant was negligent in not having a "tailored emergency response plan" in place to address a breakdown in social order

¹²¹ Exhibit C-072.

and/or a decision by the State not to provide protection, Claimants contend that the critical ingredient to secure Claimants' equipment, with a plan or without a pre-existing plan, was the provision of security. Accordingly, Claimants did not exhibit a lack of due care.

4.17.10 Similarly, Claimants reject Respondent's defence based on Claimants' failure to request and pay for the deployment of members of the GMMRA Battalion at its sites. Claimants say that the defence is without merit having regard to Respondent's argument that the type of events that occurred in 2011 were "unforeseeable".¹²²

4.17.11 Claimants also say it is unreasonable for Respondent to assert that Claimants were negligent in not engaging the local population. They describe the argument as unsupported and absurd since the Claimants' sites were not near any "local population" and any "local population" could not provide the type of protection Claimants required.

4.17.12 As regards Respondent's contention that Claimants' failure to take certain steps after the events of February 2011 was causative or contributed to Claimants' loss, Claimants argue that:

- (a) the relevant period when security was needed to gather the equipment was between 20 February 2011 and 6 March 2011;¹²³ and
- (b) even if they could have paid for privately hired armed security, this would have been unlawful, and a defence of contributory negligence cannot be premised on a failure on the part of Claimants to engage in illegal conduct; and
- (c) the banking system was frozen by country conditions, and it was not possible to hire local sub-contractors to collect Claimants' assets from the Project sites, even if this had been possible.

¹²² Statement of Defence, ¶380.

¹²³ Claimants' Skeleton, ¶¶ 39, 40, 62(a) and 70 (v).

4.17.13 As regards Respondent's assertions that the GMMRA collected and protected Claimants' equipment for them, Claimants say that this encompasses less than seven percent of its equipment. The equipment collected in total (by the GMMRA and others) adds up to no more than nine percent of Claimants' equipment, none of which was maintained after it was collected.

4.18 Requested Relief

4.18.1 Claimants request that the Tribunal:

- (a) DECLARE that the Tribunal has jurisdiction to entertain all of their claims;
- (b) DECLARE that Respondent has violated customary international law, and in particular the Minimum Standard of Treatment, by virtue of its failure to protect Claimants' investments from looting and destruction by insurgents, as well as by Libyan military personnel between February 2011 and April 2011;
- (c) DECLARE that Respondent has violated Article 2(2) of the Treaty by failing to provide full protection to Claimants' investments after April 2011;
- (d) DECLARE that Respondent has violated Articles 2(2), and 3(2) of the Treaty, as well as the Minimum Standard of Treatment, by arbitrarily discriminating against Claimants in the provision of protection and security;
- (e) ORDER Respondent to pay Claimants the sum of USD 94,097,241.00 as compensation for its violations of international law and the Treaty;
- (f) ORDER, in the alternative, Respondent to pay Claimants the sum of damages incurred outside of Benghazi, in an amount to be determined during the damages phase of the arbitration, as compensation for its violations of international law and the Treaty;

- (g) ORDER Respondent to pay post-award interest at a commercially reasonable rate from the date of the Tribunal's Award until the date of actual payment, compounded semi-annually;
- (h) ORDER Respondent to reimburse Claimants the full costs of the Arbitration, including without limitation, all arbitrators' fees and costs, all of ICC administration fees, reasonable attorneys' fees and other fees and expenses incurred by Claimants, in an amount to be calculated at the conclusion of these proceedings and payable in US dollars;
- (i) DECLARE that the Tribunal's arbitral award shall be immediately enforceable notwithstanding any recourse filed against it;¹²⁴ and
- (j) ORDER such further relief as the Tribunal considers appropriate.

5. RESPONDENT'S CASE

5.1 Claimants' Treaty Claims Constitute an Abuse of Process and are Inadmissible

5.1.1 Respondent contends that Claimants are seeking to present the same facts and to recover for the same loss in the Contractual Arbitration and in the Treaty Arbitration.

5.1.2 Respondent accepts that Claimant's case in the Contractual Arbitration is no longer based on alleged violations of international law. However, it asserts that the losses claimed are virtually identical.

5.1.3 Thus, assuming that the claims are properly described as alleged breaches of customary international law and/or the treaty, Respondent submits that the same facts are relied on in each case and essentially the same compensation is sought, such that Claimants' claims in this arbitration constitute a serious abuse of process and are therefore inadmissible.

¹²⁴ In the event that the answers to these substantive questions may lead to an award in Claimants' favour, the Tribunal does not intend to make the declaration here sought, on the basis that the immediate enforceability of its awards are not questions for it, but for others.

5.2 The Treaty has not Entered into Force

- 5.2.1 Respondent's second jurisdictional defence is based on Claimants' alleged failure to prove that the Treaty has entered into force. Respondent says that Article 12 of the Treaty requires two steps to be taken for the Treaty to enter into force. First, each contracting party should comply with their local law requirements necessary for the Treaty's entry into force in the contracting parties' respective jurisdictions. Second, the contracting parties shall notify each other "in writing" that these requirements have been complied with.
- 5.2.2 Respondent states that under this provision, entry into force only takes place on the date of the latter of the two notifications.
- 5.2.3 Respondent notes that Turkey only started taking steps to ratify the Treaty after the beginning of the revolution and after TTJV left the State of Libya.
- 5.2.4 Following this process, Respondent says that it understands that the Turkish Embassy in Tripoli informed the General Administration of Protocol in the General People's Committee for Foreign Liaison and International Co-operation in the Government of the Gaddafi regime on 22 April 2011 that the formalities of the Treaty's entry into force had been completed. Respondent asserts that this notification was not valid for the purpose of Article 12. This is because:
- (a) Claimants have not produced any evidence of the written notification;
 - (b) the NTC, which was formed as the sole legitimate representative of the Libyan people on 2 March 2011 was not on notice of delivery of any notification; and
 - (c) at the time of Turkey's ratification of the Treaty, Libya was in a state of civil war and *force majeure* and therefore incapable of performing many constitutionally mandated governmental functions, including the formal exchanges of correspondence with other States. As such, it lacked the

capacity to receive any notification concerning the Treaty's entry into force.

5.3 Claimants are not Protected Investors

5.3.1 Respondent's third jurisdictional defence is that Claimants are not protected investors under the Treaty.

5.3.2 Article 1.1(b) of the Treaty defines "investor" as:

"corporations, firms or business associations incorporated or constituted under the law in force of either of the Contracting Parties and having their headquarters in the territory of that Contracting Party[.]"

5.3.3 Respondent says that Claimants must show that they are both incorporated or constituted under Turkish Law and headquartered in Turkey in order to receive protection under the Treaty.

5.3.4 As regards TTJV, the Joint Venture Agreement between Tekfen and TML provides that "... JOINT VENTURE Headquarters' address in "EL ALEMEIN STREET, 26 EL FYAFWAYHAT, P.O. BOX 1710, BEN GHAZI-G.P.P.L.A.J. ..." ¹²⁵

5.3.5 Further, it appears that there is more than one entity by the name of Tekfen TML Joint Venture. Respondent says that on 17 September 2006, a company called Tekfen TML Joint Venture ("**Libyan TTJV**") was formed in Libya under company registration no. 40257831.

5.3.6 Respondent further asserts that Claimants are not investors under Libyan law. This is because Claimants can only be "investors" within the meaning of the Treaty if they have made an investment in Libya in conformity with the hosting Contracting Party's laws and regulations. Respondent points out that under Libyan law, the name and other details of investors behind every legitimate investment must be registered with the Libyan authorities. However, it asserts that none of the so-called investors, TML, Tekfen or

¹²⁵ Exhibit C-034, p.4.

TTJV are appropriately registered with the Privatization and Investment Board (“Board”) or at the Commercial Registry Office. Respondent points to the letter from the State of Libya’s Department for Legal Affairs, dated 23 August 2017, which confirmed that at no time was any Turkish entity named TML, Tekfen or TTJV ever registered with the Board, nor were there investment projects ever listed in the Investment Record established by the Board.

- 5.3.7 Respondent further contends that Claimants appear to have engaged in or facilitated corrupt payments to government officials in order to acquire registrations with government ministries and departments necessary to operate as a commercial entity in Libya. Tekfen is said improperly to have used its own customs registration to clear equipment and materials for the Project through customs. And, Respondent asserts, Tekfen and TML performed the Contract themselves, via their Libyan branch offices, possibly using customs duty and income tax exemptions available only to TTJV.
- 5.3.8 In the result, Respondent argues that any alleged investments which Claimants claim to have made are tainted with illegality and are thus illegal and excluded from the Treaty’s protection.
- 5.3.9 In any event, Respondent rejects Claimants’ assertion that TTJV qualifies as a business association as defined in Article 1(1)(b) of the Treaty. Respondent further argues that TTJV was not headquartered in Turkey. Rather, in reality, its *de facto* headquarters was TTJV’s Benghazi office.
- 5.3.10 Finally, Respondent submits that neither Tekfen nor TML made any investment in Libya from which it follows that they are not protected investors.

5.4 **The Tribunal Lacks Jurisdiction *Ratione Materiae***

- 5.4.1 Respondent’s fourth jurisdictional defence is that the Tribunal lacks *ratione materiae* jurisdiction because Claimants do not have an investment within the meaning of Article 1(2) of the Treaty.

Claimants' Investments Were Illegal

- 5.4.2 Respondent argues that the Treaty protects only investments which are legal investments under Libya's laws and regulations. For the reasons noted above, it contends that Claimant's investments were unlawful.
- 5.4.3 Respondent rejects cases such as *Salini*, *Bayindir* and *Projects Management International* which suggest that provisions such as "within the framework of its laws and regulations" or "in accordance with its laws and regulations" relate to the validity of the investment, rather than its definition.
- 5.4.4 Here, in light of the fundamental and intentional nature of Claimants' breaches of Libyan law, Respondent submits that the Tribunal should reject Claimants' assertion that they have made protected investments.

Tekfen and TML Have Not Made Qualifying Investments

- 5.4.5 Respondent asserts that TML and Tekfen do not have standing to assert a claim under the Treaty because the only investment they held in Libya were shares of TTJV. However, there are at least two entities with the same name and it is not clear which entity performed the work under the Contract.
- 5.4.6 In any event, even if TTJV made investments in Libya, TML and Tekfen, as shareholders, lack standing to assert a claim for an alleged violation against the enterprise in which they hold shares.
- 5.4.7 Further, Respondent contends that TML's and Tekfen's shares in TTJV do not qualify as an investment when TTJV was not incorporated and constituted under the laws of Libya.
- 5.4.8 In any event, Respondent argues that TML and Tekfen have not established that they own equipment in Libya because they do not explain which specific category of asset (referred to in Article 1(2)(c)) covers the relevant equipment.
- 5.4.9 Further, the relevant equipment was leased by either TML or Tekfen and, under Turkish law, ownership of that equipment remained with the lessor until the end of the lease.

Moreover, some of the equipment was “rented”, which raises serious doubts as to whether Claimants’ rights can be viewed as “property”.

- 5.4.10 To the extent that Claimants rely on their claims for reimbursement falling within a form of “claims for money ... related to an assessment” as provided by Article 1.2(b), such claims are limited to certain rights to payment under a contract or a right established in a domestic court of law.”
- 5.4.11 As regards Claimants’ contention that the Contract falls within the Article 1.2(e) definition of “investment contract”, this category of investment is limited to “business concessions”. Here, Respondent asserts, the Contract is a simple construction contract for laying pipe which provides Claimants with a positive cash flow; not a concession. TTJV does not own or operate the pipe it lays, as would be the case in a concession.
- 5.4.12 Concessions in the context of an infrastructure project are generally considered to be instruments for the construction, financing and management of infrastructure and services of public interest, characterised by the existence of a long-term relationship between a public entity, be it a State or a State-entity (the conceding entity), and a private person, usually a company (the concessionaire).
- 5.4.13 A construction contract might or might not be part of the web of contracts involved in a concession. In the present case, Respondent argues that the Contract was simply a stand-alone agreement entered into by TTJV with the GMMRA to carry out construction work.

TTJV has Not Made a Qualifying Investment

- 5.4.14 In the present case, TTJV’s role was a narrow one, limited to performing the work and/or furnishing the services specified in the Contract. This comprised the transportation to site and installation of the conveyance pipeline and the construction of the regulating and flow control stations, tie-in structures and construction of the pipeline from the Kufra lift pump station to the Kufra tie-in point. Claimants did not themselves manufacture, procure or supply the pipes. This was done by GMMRA. Nor were Claimants involved in the financing, operation or maintenance of the pipeline.

- 5.4.15 With regard to Claimants' reliance on the *Salini* case, Respondent asserts that the *Salini* test has found little support outside the ICSID framework. In any event, it is to be noted that Claimants did not contribute any capital to the Libyan economy in connection with the Contract. Moreover, the Contract did not involve any permanent establishment or presence of the Claimants in Libya, the term of the Contract was for 60-months only and it involved no assumption of investment risk or operational risk.
- 5.4.16 As regards Claimants' assertion that their plant, equipment, materials and camps are "moveable and immovable property" protected under Article 1(2)(c). Respondent notes that Claimants Tekfen and TML obtained these assets under lease agreements and TTJV was not a party to any of those agreements. TTJV can therefore not claim Treaty protection for assets it did not lease or own.
- 5.4.17 As regards Tekfen and TML's lease interests, Respondents point out that there were no ownership rights under the applicable leases. Thus, since Tekfen and TML did not own the rights in the first place, there can be nothing of economic value and therefore no Treaty coverage.
- 5.4.18 Respondent also points out that the Treaty contains a territorial limit which stipulates that the investment must be made in the territory of the host state. Here, however, the leases were entered into in Turkey and subject to Turkish law and the obligations performed thereunder was in Turkey.
- 5.4.19 Finally, Respondent notes that moveable property, under Article 1(2)(c), must be related to investments in order to qualify as an investment. Although it concedes that the plant, equipment, vehicles, materials, facilities were used in the performance of the Contract, the Contract itself was not an investment. Therefore, Respondent contends that the individual assets deployed for the performance of the Contract cannot satisfy the criteria of investment.

5.5 **The Tribunal Lacks Jurisdiction *Ratione Temporis***

- 5.5.1 Respondent's fifth jurisdictional defence is that the Tribunal does not have jurisdiction *ratione temporis* to hear Claimants' claim.

5.5.2 Respondent submits that even if the Treaty entered into force on 22 April 2011 and Claimants establish that they are protected investors and have made protected investments under the Treaty, the Tribunal lacks jurisdiction *ratione temporis* under Article 10 of the BIT because the dispute arose before the BIT allegedly entered into force.

5.5.3 Article 10 of the BIT (“Scope of Application”) states:

"The present Agreement shall apply to investments in the territory of a Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party before or after the entry into force of this Agreement. However, this Agreement shall not apply to disputes that have arisen before its entry into force".

5.5.4 Respondent contends that Claimants have misinterpreted the second sentence of Article 10 and have put forward a very narrow interpretation of the term “disputes”. Further, the existence of a dispute under Article 10 does not require the formulation and positive opposition of legal claims as Claimants suggest. In any event, it is obvious that a disagreement as to the level of security afforded to Claimants started well before 22 April 2011.

5.5.5 Further, Claimants’ claims are based on events and an alleged violation which pre-date the entry into force of the Treaty and the principle of non-retroactivity is not displaced by Article 10. The first sentence of that article merely grants subject matter coverage to pre-existing investments, it has nothing to do with the Tribunal’s jurisdiction *ratione temporis*. It follows that the Treaty does not give jurisdiction to the Tribunal to hear claims related to alleged violations of customary international law which pre-date the treaty’s entry into force. In any event, customary international law consists of rights and obligations owed from one State to another State. Thus, even if Respondent had breached customary international law, the only recourse available would be under a diplomatic protection claim.

- 5.5.6 As regards Claimants' alternative position that the Tribunal has jurisdiction as a result of Libya's alleged continuous violation, Respondent contends that Claimants conflate the concept of a State's accountability and the concept of jurisdiction. Here, jurisdiction *ratione temporis* is governed by Article 10 of the Treaty which excludes the application of "the continuous act" doctrine as a jurisdictional basis.
- 5.5.7 Respondent also considers that Claimants misrepresent the effect of the doctrine of a "continuous act". It does not vest a tribunal with temporal jurisdiction to consider the entire course of conduct. It merely informs the extent to which the continuing act may be taken into account by a tribunal when considering whether such acts may give rise to a breach of the treaty after its entry into force.
- 5.5.8 Finally, the acts of looting upon which Claimants rely, and the alleged failure to protect Claimants' investments, both occurred instantaneously and simultaneously such they could not be and were not continuous.
- 5.5.9 Respondent notes that under Article 14(1) of the ILC's draft articles that an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue. By comparison, a continuing wrongful act is an act which occupies the entire period during which the act continues and remains not in conformity with the international obligation.
- 5.5.10 Respondent says that, when considering whether the acts relied upon by Claimants were continuous, the Tribunal should have regard to: (a) the nature of the primary obligation alleged to have been breached, *i.e.*, here, an obligation of full protection; and (b) the particular circumstances of the case. In this case, Claimants asserts that Respondent's failure to exercise its duty of protection continued after 22 April 2011. However, it notes that the acts of looting to which Claimants refer were isolated incidents which occurred at a certain moment and instantaneously, having regard to the nature of the alleged obligation and protection, the alleged failure to protect also incurred instantaneously and simultaneously, such that the obligation to protect could not be and was not continuous.

- 5.5.11 Respondent also points to the fact of Claimants' reliance on joint inspections which took place in 2012, and TTJV's inspection which take place in 2014. Respondent says that these inspections do not begin to establish the possible existence of a breach, or even the point in time in which that breach may have occurred or continued to occur. This simply records damage to equipment which could have been caused by any number of factors and include damage which occurred prior to the events of February 2011. The inspection reports certainly do not identify any damage which may have occurred after the Treaty's entry into force.
- 5.5.12 Respondent submits that the Tribunal lacks jurisdiction *ratione temporis* because disputes had arisen before the entry into force of the BIT. Accordingly, pursuant to Article 10 of the BIT the Treaty does not apply to such disputes.
- 5.5.13 Respondent agrees with Claimants that the ordinary meaning of the term "dispute" is generally defined as "a disagreement or argument". As to the meaning of the word "arisen" as used in Article 10, Respondent points out that Claimants equate arisen with when the dispute between the parties was "manifested". This, Respondent says, is more a stringent test than warranted by Article 10.
- 5.5.14 Respondent argues that the proper test is whether the disagreement between the parties as to a point of law or fact started before or after the entry into force of the BIT. Respondent says that the only requirement for a dispute to arise is for a party to present an issue to the other party and for the latter, directly or indirectly, to oppose it. Here Respondent argues that its non-performance of the alleged international obligation establishes the requisite opposition of view.
- 5.5.15 Respondent argues that in the context of a dispute relating to the protection of investments in the circumstances of violent acts or attacks, the point in time when the dispute has arisen is when a party makes a request for protection and there is evidence of a disagreement concerning the level of security.
- 5.5.16 Further, Respondent argues that on Claimants' own case, by February 2011, there was a clear disagreement in this respect. Respondent points to Colonel Zarruq's unwillingness

to protect Claimants' site, a denial of their request for protection on 21 February 2011, Claimants' assertion that soldiers from the GMMRA Security Battalion refused to protect TTJV's Tazerbo Camp on 22 February 2011 and Colonel Zarruq's refusal, on 23 February 2011 to speak to Mr Davarci, who was told that the Colonel refused to speak to him and that he would not send any protection.¹²⁶

5.5.17 In any event, at the latest, Respondent contends that a disagreement clearly existed by 7 March 2011, as evidenced by the letter which TTJV wrote to GMMRA which referred to the "absence of security to be maintained by the authorities."¹²⁷

5.5.18 Even if it is determined that the dispute arose after the entry into force of the Treaty, Respondent submits that the Tribunal does not have jurisdiction under Article 10 to entertain events and alleged breaches which preceded the Treaty's entry into force. Respondent argues that Claimants' position directly contravenes the principle of non-retroactivity which is not displaced by Article 10. Under that article, the Tribunal may only take into account facts which pre-date entry into force to the extent that these may inform a later breach, post-entry into force. Respondent says that Claimants' claims relate to facts that occurred before 22 April 2011. On Claimant's own case, Respondent says that the losses claimed arose in February 2011, two months prior to the entry into force of the Treaty. Respondent notes that Claimants' fair market value assessment of the value of assets which were allegedly lost or damaged is carried out on evaluation date of February 2011.¹²⁸

5.5.19 Respondent denies that the principle of non-retroactivity is displaced by the Treaty in so far as the Tribunal's jurisdiction is concerned. Respondent refutes Claimants' argument that the second sentence of Article 10 is a "single exclusion clause", as a result of which "the facts underlying the present dispute are within the Tribunal's temporal scope."¹²⁹ Respondent contends that the second sentence of Article 10 is a *ratione temporis* limitation and should not be interpreted otherwise.

¹²⁶ Statement of Defence, ¶223.

¹²⁷ Statement of Defence, ¶224, *see* Exhibit C-044.

¹²⁸ Statement of Claim, ¶289.

¹²⁹ Statement of Claim, ¶120.

- 5.5.20 Respondent points to the *Mondev* and *MCI* decisions as authority for the general approach adopted by investment tribunals only to take into account and consider facts that have occurred prior to the entry into force of a treaty to the extent that they may inform a later breach of the treaty, post-entry into force.
- 5.5.21 Respondent notes that Claimants draw a distinction between the Tribunal's jurisdiction *ratione temporis* and the temporal scope of application of the Treaty's substantive protection. They assert that the first sentence of Article 10, which they present as an exception to the non-retroactivity rule, does not always necessarily mean that the Treaty's substantive protection apply retroactively and that one possible interpretation is that the tribunal's jurisdiction *ratione temporis* is independent from the determination from the determination of the substantive law. On this basis, Claimants say that Libya's alleged failure to protect Claimants' investments before 22 April 2011 can be adjudicated on the basis of customary international law.
- 5.5.22 Respondent argues that this position does not account for the lack of jurisdiction of the Tribunal over events which pre-date entry into force. It says that the issue of the applicable law, *i.e.*, temporal scope of application of the Treaty standards and the possible application of customary international law, only arises if the Tribunal has jurisdiction *ratione temporis* over the claims in the first place.

5.6 **The Alleged Conduct is Not Attributable to the State of Libya**

- 5.6.1 Respondent submits that Claimants' reliance on Articles 4 and 5 of the ILC Articles to attribute the alleged acts, omissions and damages to Libya is unavailing for three reasons. First, Claimants have not demonstrated that the GMMRA is a State organ under Article 4. Second, Claimants have failed to show that the acts and omissions of defecting military personnel or insurgents and rebels are attributable to Libya under Article 4. Third, Claimants fail to establish that the conduct of the "GMMRA forces" in relation to TTJV's security can be attributable to Libya under Article 5.

The GMMRA is not a State Organ

- 5.6.2 Respondents submits that for Claimants to show that GMMRA is a *de facto* organ of the State under Article 4, they must prove that GMMRA was acting in complete dependence on the State (as that requirement was developed by the ICJ in the *Bosnian Genocide* and *Nicaragua* cases).
- 5.6.3 What these and other cases emphasise is the fact that the State may play a role in establishing the entity, appointing its directors and even supervising it at some level does not in itself make that entity's conduct attributable to the State. More is needed.
- 5.6.4 Respondent points out that the GMMRA is an independent organisation with its own legal personality. Indeed, Law No. 10 of 1983 was implemented with the intent of setting up a separate and independent budget specifically designed to fund the Project. Further, pursuant to Article 53 of the Libyan Civil Code, the GMMRA can act on its own behalf and has its own patrimony. The GMMRA also functions and operates independently of the State.
- 5.6.5 Respondent contends that Law No. 11 of 1983 contradicts Claimants' assertion that the GMMRA did not administer its own budget. Respondent asserts that although a budget for a particular project is approved by the General People's Congress, once that occurs there would be no more interaction between the GMMRA and the State. Respondent says that the fact that the GMMRA's funds are held in an account at the central bank was a standard procedure and evidences no financial control over the GMMRA, in the same way that the Dewan's administrative oversight does not obviate the GMMRA's legal and operational independence.
- 5.6.6 Respondent relies on the ILC's commentary under Article 4 of the ILC Draft Article which notes that the fact that the State initially establishes a corporate entity is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Prima facie the conduct of such entities is not attributable to the State unless they are exercising elements of government authority within the meaning of Article 5.

5.6.7 Respondent points out that GMMRA was structured and acted like a commercial entity and regularly sold water from the Project to municipalities and commercial entities.

5.6.8 As regards the GMMRA's right to exercise "significant police powers", Respondent argues that these were ancillary to its main task. Respondent refutes Claimants' assertion that GMMRA had the power to supervise and direct military forces. Respondent argues that the GMMRA Security Battalion was simply seconded to it but remained supervised and directed by the Ministry of Defence.

5.6.9 Respondent also contends that Libya did not control the GMMRA's functioning and decision-making and the Dewan did not exercise pervasive control over it.

The GMMRA's Conduct was not an Exercise of Governmental Function Under Article 5 of the ILC Articles

5.6.10 Respondent rebuts Claimants' contention that the GMMRA's actions in respect of protection and security are attributable to Libya under Article 5 of the ILC Draft Articles.

5.6.11 Respondent notes that Claimants' case for attribution under Article 5 is based on Article 20 of Law 11 which speaks about forces assigned to the GMMRA operating "under the supervision and direction of the People's Committee of the" GMMRA. However, Respondent relies on the testimony of Mr Tayash, who explains that Article 20 of Law 11 was not the operative framework under which the GMMRA Battalion worked. Rather, he testified that the Security Battalion was formed by Resolution 20 of the High Command on 6 May 1991 and that this resolution makes clear that the Battalion "would be subordinate to" the Minister of Defence.

5.6.12 Respondent further relies on Mr Tayash's testimony that the GMMRA only made requests for protection for its sites, and passed on requests for protection made by its contractors. The GMMRA is said to have had "no authority to direct these soldiers to do anything;".

5.6.13 Respondent also relies on the GMMRA Battalion's letter of 28 October 2010,¹³⁰ which is said to show, in the letterhead, that the Battalion was under the control of the "Armed People's Mobility Section" which in turn was controlled by the "General Interim Committee for Defence", which is subject to the control of the Libyan army.

5.6.14 Respondent further contends that even if any individuals from the GMMRA Security Battalion had participated in the alleged looting, such conduct would have been in direct contravention of their directives. Respondent relies on the principle in international law that State representative's *ultra vires* conduct not at the direction of the State cannot be attributed to the State. "Only *ultra vires* 'official' conduct is attributable to the State."¹³¹

5.6.15 Respondent contends in these circumstances the acts or omissions of the GMMRA's Battalion cannot be attributed to the GMMRA under Articles 5 of the ILC Draft Articles.

The Libyan Military was not Involved in any Wrongful Conduct Attributable to Libya

5.6.16 Respondent submits that there is no cogent evidence to show that the Libyan military ransacked and looted Claimant's camps. It describes Claimant's evidence as to this assertion as flimsy and vague at best, certainly not enough for this Tribunal to make a major finding that the military engaged in wrongful conduct towards Claimants.

5.6.17 Respondent points out that, in the Contractual Arbitration, Claimants admitted that they could not identify the individuals that looted TTJV.

5.6.18 Respondent asserts that during the period when Claimants say they were looted and ransacked there was mayhem. Rival factions were competing for power and rebel groups were present in towns and cities across the country. In these circumstances, the better explanation is that the people carrying out the looting and ransacking were not the military personnel, but individuals taking advantage of the Libyan revolution.

¹³⁰ Exhibit C-066.

¹³¹ Kaj Hober, *State Responsibility and Attribution*, Exhibit RLA-057.

5.7 **Libya did not Breach its Obligation to Protect Under Customary International Law or the Treaty**

- 5.7.1 Respondent does not dispute that the standard to be deployed by States in the exercise of their duties to protect is one of due diligence. Respondent asserts that there is no definitive set of rules defining such a standard. Rather, one must look to the individual facts.
- 5.7.2 As regards the customary international law standard and the Treaty standard, Respondent says that the distinction between the two is extraneous to Claimants' claims for a breach of physical protection as formulated. The due diligence standard they described is said to capture the standard applicable to the claims under customary international law and the Treaty.
- 5.7.3 As regards the standard, Respondent posits that the foreseeability of the action, the circumstances (or condition) and resources of the relevant State, and the effective use of the State's resources are the key considerations. A further consideration is how due diligence is to be exercised in times of rebellion or revolution.
- 5.7.4 Although Respondent accepts that there has been a move away from a subjective standard towards a "modified objective standard", it contends that Claimants' assertion that the "benchmark is the 'well-organised modern state'" is misleading and understates the importance of the particular circumstances in which the modern state is operating. Whilst having the means to protect is a relevant factor, Respondent argues that it cannot be considered in isolation.
- 5.7.5 In the event that it is determined that Libya had a judicable obligation to protect, and was required to exercise "due diligence" in affording that protection, Respondent says that a breach of that obligation cannot be established simply by pointing to alleged harm. It needs to be shown that it did not deploy the reasonable measures that are well-administrated government could be expected to exercise under similar circumstances.
- 5.7.6 Respondent notes that on any true appreciation of the factual circumstances underlying Claimants' claims (*i.e.*, during an unforeseeable scale of uprising, with allegations in

respect of unconnected acts of opportunistic looting and in disparate geographic locations), Libya did not breach its duty of due diligence. Respondent asserts that any well-administered government in such circumstances would have similarly been unable to take any action to prevent the alleged acts that Claimant suffered in February 2011.

- 5.7.7 Respondent argues that in the circumstances at the time, its resources were overwhelmed such that it was unable to deploy protection against the alleged acts. At the relevant times, Libya says it was in a state of chaos and that there were no resources to deploy or combat unforeseeable opportunistic acts, and that all resources that were still controlled by Libya were already deployed against targeted and known acts of aggression and rebellion.
- 5.7.8 Further, even if the GMMRA's conduct were attributable to Libya, Respondent contends that the GMMRA similarly exercised due diligence in compliance with any such obligations. Respondent asserts that, even if the alleged "plea for protection" to the GMMRA was made, at the time this occurred Libya was in the midst of a rampant uprising. The GMMRA did what it could when: (a) from 1 March 2011, its personnel and a team of local Libyans started to locate and move TTJV's equipment to the Tazerbo camp; (b) the GMMRA team brought the Bozerik camp back on line including moving accommodation units, reconnecting utilities and preparing that site as an equipment store; and (c) the GMMRA assigned additional personnel to collect Claimants' equipment in the Kufra area,
- 5.7.9 In any event, to the extent that Claimants were able to establish any breach of the protection duties under the Treaty, Respondent argues that the wrongfulness of such breach would be precluded as a consequence of the events of *force majeure*.
- 5.7.10 Further, to the extent that Claimants rely on allegations of breach after February 2011, they are made in vague and broad temporal terms. By way of example:

"The inventories conducted between 2012 and 2014 strongly suggest that the looting and pillaging of Claimants' camps, machinery and equipment around the

*pipeline route continued for months even after Claimants' evacuation, and well after April 2011."*¹³²

*"Given the extent of the damage, it is reasonable to conclude that some of this theft and damage occurred after the Treaty's effective date."*¹³³

*"during the events of February 2011, and even thereafter"*¹³⁴

*"had Libya complied with its duty to protect Claimants' assets in February 2011 and thereafter";*¹³⁵

5.7.11 In the absence of any specific acts or omissions after the entry into force of the Treaty to which it can respond, Libya reserves its position as to its exercise of due diligence after the entry into force of the Treaty.

5.8 **Events of *Force Majeure* in February 2011 Prevented Libya from Complying with its Treaty Obligations**

5.8.1 Respondent says that *force majeure* has been recognised as a general principle of law under international law as a circumstance precluding the wrongfulness of an act on behalf of a State, such as the breach of an obligation under a Bilateral Investment Treaty.

5.8.2 Article 23 of the ILC Draft Articles addresses circumstances of *force majeure* which excuses a state from failing to perform its international law duty.

5.8.3 Article 23 of the ILC Draft Articles provides:

¹³² Statement of Claim, ¶ 121.

¹³³ Statement of Claim, ¶ 150.

¹³⁴ Statement of Claim, ¶ 242.

¹³⁵ Statement of Claim, ¶ 256.

"Force majeure

1. *The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.*
2. *Paragraph 1 does not apply if: (a) the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or (b) the State has assumed the risk of that situation occurring."*

5.8.4 Respondent says that a state of *force majeure* can successfully be invoked by a State, providing the three following requirements are met: (a) first, the act committed during *force majeure* must be brought about by "irresistible force" or by an "unforeseen event". (the event of *force majeure* in question must be unforeseeable); (b) second, the external forces causing *force majeure* must be "beyond the control of the state" concerned (this condition is said to be met when a party demonstrates the sudden nature of the event falling outside the control of the State responsible to prevent it; a classic example is where a State loses control over part of its territory following an insurrection); and (c) third, due to the *force majeure* event, it must have become "materially impossible" for the State concerned to perform its international law obligations.

5.8.5 Respondent asserts that leading scholars agree that events such as "major internal upheavals" are tantamount to *force majeure*. In the context of insurgent movements, James Crawford indicates "there is no modern example of a state being held responsible for negligent failure to suppress insurrection."¹³⁶

5.8.6 Respondent submits that the events starting in February 2011 amounted to circumstances of *force majeure* under international law.

¹³⁶ J. Crawford, *Brownlie's Principles of International Law*, 2008, p. 5529, Exhibit CLA-093.

5.8.7 In support of its case that the events were unforeseen, Respondent refers to the testimony advanced by Claimants that the possibility of a real threat to the regime seemed improbable, given Col. Gaddafi's iron-fisted, totalitarian rule.

5.8.8 Respondent argues that the events that took place in February 2011 and which continued over the following months, qualify as riots, civil uprising, unrest and violence beyond the control of the State. In fact, the events were part of a revolutionary movement aimed at overthrowing the regime in place at the time. In these circumstances, Respondent argues that the security incidents which Claimants rely on were beyond Libya's control.

5.8.9 Respondent also contends that it was materially impossible for it to protect TTJV. It points to Colonel Zarruq's unwillingness to protect TTJV's sites because he wanted to use his resources to protect his own people. It also notes that the Libyan army was concentrated in war-ridden areas in the northern coastal region. It was thus impossible for an under-staffed military contingent to be deployed in the Kufra region. Respondent also points to the fact that Mr Bubteina advised Mr Hendekli that he could not do anything to assist TTJV.

5.8.10 Respondent says that this evidence shows that Libya was materially prevented from providing any level of protection or security to TTJV and its investment.

5.8.11 With respect to the two exceptions to *force majeure* contained in Article 23(2) that the *force majeure* situation may not be due to the conduct of the State invoking it and that the State has assumed the risk of the situation occurring (are inapplicable here). Respondent says that it clearly did not cause or contribute to its dire security situation, nor had it assumed the risk that a security crisis would occur.

5.9 Any Non-Performance of Respondent's Duty to Protect is Also Excused as a Result of "Necessity"

5.9.1 Respondent relies on Article 25 of the ILC Draft Articles in relation to necessity. That Article provides:

"Necessity

1. *Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.*
2. *In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) the international obligation in question excludes the possibility of invoking necessity; or (b) the State has contributed to the situation of necessity."*

5.9.2 Respondent says the defence of necessity is available and has been invoked to protect a wide variety of interests including safeguarding the environment, preserving the existence of the State and its people in times of public emergency or ensuring the safety of civilian population, Respondent contends that due to the state of necessity that was prevailing at the relevant time, protecting civilians was an utmost priority for Libya at the outset of the revolution. It asserts that in an unprecedented and ever-changing scenario such as existed in February 2011, most Libyan military would be occupied safeguarding civilians in the north and safeguarding important national infrastructure.

5.9.3 Respondent says that the conditions of Article 25 of the ILC Draft Articles were met at the time because: (a) the only way for the State to safeguard these essential interests of protecting civilians and safeguarding the integrity of its national infrastructure was for it to dispatch all its available military capacity in areas which would require the most protection; and (b) its failure to comply with its duty to protect under such exceptional circumstances did not impair an essential interest of Turkey or of the international community and Claimants have not provided any evidence to the contrary.

5.10 **Libya Did Not Treat Claimants Arbitrarily**

5.10.1 Respondent refutes Claimants' allegations that Libya's decision to deny them protection was completely arbitrary, as well as being discriminatory having regard to the protection

it provided to the SNC-Lavalin and the Sarir Manufacturing Plant. Any failure to protect Claimants was, as summarised above, because of Respondent's inability to do so.

5.10.2 As regards the assertion of discriminatory treatment, Respondent notes that discrimination requires not only a showing of differential treatment but that the comparison is made between the person asserting the claim and another whose is similarly situated. Respondent contends that Claimants cannot make this showing. They point out that the Sarir Manufacturing Plant was owned by the GMMRA and only operated by SNC-Lavalin, and as such, it was protected prior to the February 2011 events by soldiers who had long been assigned by the army to protect the GMMRA's assets.

5.11 **Lack of Evidence of Loss of a Causal Link Between Alleged Breaches and Alleged Loss**

5.11.1 Respondent says that establishing a causal link between an alleged wrongful act and claimed damages is a fundamental requirement in establishing liability for loss. It refers to Article 31 of the ILC Draft Articles which provides:

- “1. *The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.*
2. *Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.*”

5.11.2 Respondent points out that in their Statement of Claim, Claimants allege breach of customary international law and the Treaty, on the basis of an alleged failure to provide protection in February 2011. However, in their Statement of Reply, they allege a breach of the obligation to provide protection such as would have allowed them to collect their assets after the evacuation on 24 February 2011.

5.11.3 Respondent asserts that the alleged breach and any lack of security did not cause the loss asserted to arise from the failure to protect in February 2011.

5.11.4 Respondent notes that Claimants support the contention that they could have collected all of their assets in February 2011 and deposited them at the Sarir Camp had they been able to implement “TTJV [‘s] Emergency Demobilisation & Evacuation Plan-February 2011”.

The problem with this, says Respondent, is that the plan did not exist at the time but was created two years after the event. Even if it had existed, the plan is said to be based on assumptions that were totally unrealistic. These include the continued existence on site of TTJV's local Libyan work force and that all the vehicles which Claimant would have needed to use to transport the equipment were available for use at the time.

5.11.5 Respondent also argues that there is no evidence which proves that any of Claimants' equipment or materials suffered significant loss or damage in February 2011 or in the following several months. It cannot therefore be argued that a causal link exists between any failure to provide security in February and the losses asserted. Respondent points out that the allegation of looting and theft that occurred prior to Claimants' departure from Libya are wholly un-particularised.

5.11.6 Respondent also argues that there is significant evidence that large volumes of Claimants' assets survived the events of February 2011. Respondent submits that the true cause of Claimants' losses was that the equipment and other assets which had been left behind in February 2011 were not promptly collected or even when collected, properly stored, protected and maintained.

5.11.7 Respondent contends that the real cause of Claimants' alleged losses was their failure to:

- (a) have in place sufficient security provisions and emergency response planning prior to the events of February 2011;
- (b) respond appropriately to the events of February 2011 in a way that would have allowed them to protect their equipment properly; and
- (c) take the steps necessary after the events of February 2011 to protect, preserve and maintain their assets.

5.11.8 Thus, it is said that: (a) Claimants' acts and omissions constitute *novus actus interveniens* which break the chain of causation; (b) that Claimants materially contributed to their alleged losses through their negligent acts or omissions; and that (c) Claimants failed to mitigate their losses by acting reasonably when confronted with the purported injury.

- 5.11.9 As noted above, Claimants' failure to have an emergency response plan in place is said by Respondent to have contributed to Claimants' alleged losses.
- 5.11.10 Respondent submits that if Claimants had a valid insurance policy in place in February 2011 which included their assets and provided coverage for political risk, they would have avoided those losses resulting from the revolution. Respondent also contends that if Claimants had accepted the offered protection from the GMMRA Security Battalion during the earlier execution phase of the Contract, they would have had in place sufficient protection to gather in their assets.
- 5.11.11 Respondent relies on Claimants' failure to engage sufficiently with the local population to secure their support and for having inadequate physical security at its various work sites and camps.
- 5.11.12 While Claimants' failure to put in place sufficient plans to prepare for an emergency and their inadequate response to the events in 2011 are said to have been causative of some of the losses and damages alleged, Respondent contends that the most significant causative factor for Claimants' loss was their conduct after the events of 2011. Specifically, their failure to take steps to collect and protect their equipment, protect, repair and maintain their equipment.
- 5.11.13 Finally, although the point really does not relate to causation, Respondent submits that Claimants are prevented from advancing their claims for these assets as they have been compensated for them in accordance with the contractual payment mechanisms.¹³⁷

5.12 Relief Sought by Respondent

5.12.1 Respondent requests that the Tribunal:

- (a) order the dismissal of all of Claimant's claims for inadmissibility and/or lack of jurisdiction;

¹³⁷ Statement of Rejoinder, ¶930-951.

- (b) to the extent the Tribunal decides it has jurisdiction:
 - (i) declare that Respondent has not breached its obligation to provide protection and security under the Treaty and/or customary international law;
 - (ii) declare that Respondent has not violated the minimum standard of treatment under the Treaty and/or customary international law; and
 - (iii) dismiss, generally and in full, all claims of Claimants' claims in these proceedings;
- (c) order that Claimants pay Respondent all of its costs of these proceedings, including its legal costs, the administrative expenses of the ICC, the fees and expenses of the arbitrators and legal counsel and those of any experts and witnesses, plus interest to be determined at a later date;

6. APPROACH TO THE TRIBUNAL'S ANALYSIS

6.1 Overview

6.1.1 As a result of the Tribunal's earlier rulings that Phase I of the arbitration should:

- (a) be restricted to a consideration only of Claimants' claims regarding Respondent's international responsibility (including causation of any loss) for its alleged failure to protect Claimants and their investments; and
- (b) not include a consideration of Claimants' contractual claims brought as Umbrella Clause claims,

nine substantive issues require to be determined in this Award. These are:

1. whether Claimants have met their burden of showing that the Treaty has entered into force;
2. whether Claimants are protected investors under the Treaty;

3. whether Claimants have made protected investments under the Treaty;
4. whether the present dispute arose before the entry into force of the Treaty;
5. whether the Treaty's Article 8 dispute settlement provision provides the Tribunal with jurisdiction to hear and decide a "dispute in connection with [an investor's] investment" where the investor's claim for relief is based on an alleged breach of the minimum standard of treatment required under CIL which occurred before the Treaty came into force;
6. whether Claimants' claims are duplicative and therefore inadmissible;
7. whether Respondent has violated CIL by failing to provide protection to Claimants' investments;
8. whether Respondent has violated Article 2(2) of the Treaty by failing to provide protection to Claimants' investments; and
9. whether Respondent has violated Article 2(2) or 2(3) of the Treaty by arbitrarily discriminating against Claimants in the provision of protection and security.

6.2 Approach to be Followed

6.2.1 The Tribunal will deal with these nine substantive questions in Section 7.

6.2.2 The appropriate allocation of costs as between the parties is considered in Section 8 and the Tribunal's disposition is set out in Section 9.

7. THE TRIBUNAL'S ANALYSIS

7.1 Has The Treaty Entered into Force?

7.1.1 The Contracting Parties' agreement as to the entry into force of the Treaty is set out in Article 12.1 of the Treaty which provides, in pertinent part:

“Each Contracting Party shall notify the other in writing of the completion of the constitutional formalities required in its territory for the entry into force of this Agreement. This Agreement shall enter into force on the date of the latter of the two notifications ...”.

- 7.1.2 Thus, the Treaty requires two steps to be taken for it to enter into force. First, each Contracting Party must comply with the requirements of its law governing entry into force in its jurisdiction. Second, each Contracting Party must notify the other “in writing” that these requirements have been complied with.
- 7.1.3 Libya does not appear to dispute that it complied with these requirements by: (a) ratifying the Treaty pursuant to Law No. 3 f 2010, which was published in the Libyan Official Gazette in March 2010; and (b) its note Verbale No. 1/5/60/533 issued by the Libyan Ministry of Foreign Affairs to the Turkish Embassy in Tripoli on 23 August 2010 notifying that Libya had ratified the Treaty.¹³⁸
- 7.1.4 In the face of this evidence, and Respondent not having contended that it failed to comply with or notify completion of its own constitutional formalities for the entry into force of the Treaty, the Tribunal concludes that Libya’s formalities have been satisfied.
- 7.1.5 As regards, Turkey’s compliance with and notification in writing of the completion of its constitutional formalities, Claimants rely on a variety of facts, none of which are contested by Libya, and any of which Claimants submit satisfy their burden of proof on the point. These include:
- (a) UNCTAD’s summary information on the Treaty which states that the Treaty entered into force on 22 April 2011;¹³⁹
 - (b) the statement in the Treaty “Entry into force: 22 April by notification, in accordance with article 12”,¹⁴⁰

¹³⁸ Exhibit R-0398.

¹³⁹ Exhibit C-064.

¹⁴⁰ Exhibit C-001.

- (c) registration of the Treaty with the United Nations pursuant to Article 102 of the UN Charter on 12 September 2011;¹⁴¹
- (d) ratification of the Treaty by the Turkish General Assembly on 8 April 2011;¹⁴² and
- (e) the Turkish Embassy's letter of 22 April 2011, which notified the Libyan Government of the completion of Turkey's constitutional formalities on 14 April 2011 in the following terms:

“The Agreement Concerning the Reciprocal Promotion and Protection of Investments (RPPI)” signed between our Minister of State Zafer Çağlayan and the Libyan Minister of Industry, Economy and Commerce Huveyc has been published in the Official Gazette dated 9 April 2011 after its acceptance in the Turkish National Grand Assembly on 08.04.2011 and this situation has been notified to the esteemed Administration by the note dated 10 April 2011.

The Embassy, this time, notifies that with the publication of the decision of Council of Ministers dated 11 April 2011 on the Official Gazette dated 14 April 2011 and numbered 27905, the internal ratification process of the Turkish Republic has been completed as of 14 April 2011.”¹⁴³

7.1.6 Libya's only substantive attempt at rebuttal of this evidence was that, at the date of Turkey's notification; Libya was in a state of civil war; that it lacked the capacity to receive any notification concerning the Treaty's entry into force; and, in any event, the

¹⁴¹ Exhibit C-091. The Treaty was approved by the Turkish Council of Ministers on 11 April 2011 and published in the Official Gazette on 14 April 2011.

¹⁴² Exhibit RLA-068A and RLA-074.

¹⁴³ Exhibit C-125.

notification had not been made to the NTC which, Libya contends, was the sole legitimate representative of Libya as from 2 March 2011.

- 7.1.7 The Tribunal considers these contentions to be unpersuasive. The fact that the revolution against the Gaddafi regime was ongoing in April 2011 says nothing about whether notification was in fact made by Turkey as required by Article 12.1. As regards Libya's alleged lack of capacity to be notified, the defence was not particularised and no cogent evidence was led to support the defence. We turn therefore to whether notification was made to the *de jure* government of Libya.
- 7.1.8 International law identifies a difference between the *de jure* and *de facto* recognition by one government of another. *De facto* recognition implies a willingness to maintain official relations with a foreign government, but it does not entail an acknowledgement of its sovereign powers. *De jure* recognition accepts the exercise of diplomatic and foreign relations.
- 7.1.9 Claimants correctly point to the fact that at the time Turkey gave its notice under Treaty Article 12, the NTC had not been recognised generally, or by Turkey, as the *de jure* government of Libya.
- 7.1.10 This recognition did not occur until, at the earliest, August or September 2011, when a majority of States adopted this position. For its part, Turkey had not recognised the NTC, even informally, until 15 July 2011, when it signed the Libya Contract Group's Joint Declaration.¹⁴⁴ However, it was not until August 2011 that the NTC forces were able to take over Tripoli from the Gaddafi forces.
- 7.1.11 The Turkish Embassy, which suspended operations in Libya in May 2011 reopened in Tripoli on 1 September 2011. On 19 September 2011, the Turkish Ministry of Foreign Affairs stated that it recognised the NTC as "the sole legitimate representative of the State and people of Libya ...".¹⁴⁵

¹⁴⁴ Exhibit C-127.

¹⁴⁵ Exhibit C-133.

7.1.12 Accordingly, during the months of March and April 2011, Turkey continued to conduct diplomatic relations with the Gaddafi government. The NTC's unilateral declaration made on 2 March 2011 – less than two weeks after the outbreak of civil war – in which it proclaimed itself as the “sole legitimate representative of the Libyan people” does not alter the fact that the Gaddafi government continued to exercise sovereign powers, including the conduct of foreign and diplomatic relations at the time Turkey notified the completion of the Treaty Article 12 formalities.

7.1.13 In the result, the Tribunal concludes that Turkey's notification to the Libyan government of 22 April 2011 satisfies the terms of Treaty Article 12 for the coming into force of the Treaty on that date. The Tribunal finds the other facts relied upon above to be confirmatory of its conclusion.

7.2 Are Claimants Protected Investors?

7.2.1 The Treaty (Article 1.1(b)) defines “investor” as:

“...

(b) corporations, firms or business associations incorporated or constituted under the law in force of either of the Contracting Parties and having their headquarters in the territory of that contracting party;

who have made an investment in the territory of the Contracting Party.”

7.2.2 It is not disputed that Tekfen and TML satisfy the incorporation and seat requirements of Article 1.1(b) of the Treaty.

7.2.3 However, Libya argues that Claimants are not protected investors because:

- (a) TTJV does not qualify as a “business association” under Article 1(1)(b);
- (b) TTJV was not headquartered in Turkey as required under Article 1(1)(b);
- (c) Claimants have not made an investment in Libya within the meaning of Article 1(2) of the Treaty;

- (d) to be an “investor” within the meaning of the Treaty, Claimants have to have made an investment in Libya in conformity with Libyan law. Libyan law requires the registration of investments with the Libyan authorities and none of Claimants are appropriately registered; and
- (e) any alleged investments Claimants have made are tainted with illegality and are thus illegal.

7.2.4 The Tribunal considers that the issues raised in (c) – (e) above are dealt with more appropriately in Section 7.3 (below) “Have Claimants Made a Protected Investment.” They are dealt with there.

TTJV Qualifies as a Business Association

7.2.5 As to Libya’s contention that TTJV does not qualify as a business association under Article 1(1)(b), the Tribunal concludes that it is not sustainable.

7.2.6 It is not contested that TTJV was formed as an *adi Şirket* under Turkish law – a common form of Turkish joint venture – by Tekfen’s and TML’s entry into their Joint Venture Agreement of 6 June 2000.

7.2.7 As provided in the JVA, the joint venture was organised so as to allow Tekfen and TML jointly to bid for and to carry out Phase III of the Project. The JVA is governed by Turkish law. Under Turkish law, such joint ventures do not have a separate legal identity. Rather, they are contractual alliances which are regulated as simple business partnerships.

7.2.8 Having regard to the terms of the JVA, its purpose and its (Turkish) governing law, the Tribunal considers that it falls squarely within the ordinary meaning of the (undefined) term “business association” in Article 1.1(b).¹⁴⁶

¹⁴⁶ Exhibit C-034.

TTJV Was Headquartered in Turkey

7.2.9 Libya's contention that TTJV was not headquartered in Turkey, but rather within Libya, is unmeritorious.

7.2.10 The Tribunal considers the following factors as indicia of where an entity is headquartered:

- (a) where the entity's administrative bodies hold regular meetings;
- (b) where top management of the entity rests;
- (c) where the entity carries out its administrative activities (signs contracts, handles its finances and the like);
- (d) where the entity keeps its ledgers and records;
- (e) where the entity has a certain number of employees working at the seat.

This is because the term "headquarters" of an entity, as used in investment treaties, refers to the place where effective management of that entity takes place.¹⁴⁷

7.2.11 In this case, all of these factors point to TTJV's headquarters as being in Turkey.

Specifically, all of TTJV's management committee meetings took place in Istanbul, often at the Tekfen tower. Indeed, the minutes of TTJV's Management Committee meetings record that that committee routinely held its meetings at Tekfen's headquarters in Istanbul.

7.2.12 The Tribunal rejects Respondent's argument in favour of Libyan headquarters, based on the reference in the JVA to the joint venture's address as being "Alemein St. 26". The Tribunal concludes that this was simply TTJV's local address in Libya. The provision in the JVA which provides that TTJV's Benghazi address would serve as the default

¹⁴⁷ **CLA-238**, UNCTAD, "Scope and Definition", UNCTAD Series on Issues in International Investment Agreements II (2011), p. 82. **CLA-206**, K. Yannaca-Small, *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2010), p. 225; **CLA-222**, R. Dolzer, C. Schreuer, *Principles of International Investment Law* (2012), p. 49; **CLA-241**, Z. Douglas, *The International Law of Investment Claims* (2009), p. 318.

location for management committee meetings does not call for a different conclusion. This is because, as noted above, all of such meetings in fact took place in Istanbul.

7.2.13 The Tribunal also rejects Respondent's argument based on the alleged formation in Libya of a company called Tekfen TML Joint Venture – the so-called Libyan TTJV. The existence of the Libyan TTJV appears to have been based on the CRO Report (Exhibit R-122) for which there is no testimonial support. Moreover, in the Contractual Arbitration, Libya's and the GMMRA's jurisdictional objection (based on the fact that the Libyan TTJV was not a claimant in the case) was abandoned.¹⁴⁸

7.2.14 For these reasons, the Tribunal concludes that each of TTJV, Tekfen and TML satisfy the incorporation and headquarter requirements of Article 1.1(b) of the Treaty.

7.3 Have Claimants Made Protected Investments in Libya?

7.3.1 Article 1(2) of the Treaty, which defines the term "investment" states that:

"the term "investment", in conformity with the hosting Contracting Party's laws and regulations, shall include every kind of asset in particular, but not exclusively

- (a) shares, stocks or any other form of participation in companies,*
- (b) returns reinvested, claims to money or any other rights having financial value related to an investment,*
- (c) movable and immovable property, as well as any other rights as mortgages, liens, pledges and any other similar rights related to investments as defined in conformity with the laws and regulations of the Contracting Party in whose territory the property is situated,*
- (d) industrial and intellectual property rights related to investments such as patents, industrial designs, technical processes, as well as trademarks, goodwill, know-how and other similar rights,*

¹⁴⁸ Exhibit C-097, excerpt from the Contract Case transcript Day 10, pp 43-44.

- (e) *business concession conferred by law or by an investment contract, including concessions to search for, cultivate, extract or exploit natural resources in the in the territory of each Contracting Party;*

provided that such investments are not in the nature of acquisition of shares less than 10 percent of a company through stock exchanges which shall not be covered by this Agreement”.

7.3.2 By the time of the oral hearing, Libya’s case that Claimants had not made a protected investment had evolved into four essential positions:

- (a) the words “every kind of asset” which form part of the definition of investment in the Treaty cannot be read in isolation and interpreted to remove the relevance of the economic characteristic of an “investment”. TTJV’s Contract with the GMMRA is no more than agreement to carry out construction work and perform related services. Under the Contract, Claimants did not contribute capital to the Libyan economy, nor did the Contract involve a permanent establishment. It was also for a limited term. It thus lacked the fundamental economic characteristics of an investment;
- (b) the Contract does not qualify as a “business concession” under Article 1(2)(e);
- (c) as regards Claimants’ plant, equipment, materials and camps being “movable and immovable property”, these assets do not qualify as investments under 1(2)(c). This is because the equipment was merely leased by Tekfen and TML who thus did not own it, and TTJV had no rights to the assets; and
- (d) the Treaty protects only investments which are legal under Libyan law and any investments made by Claimants were illegal.

7.3.3 Originally, Libya also defended against Tekfen's and TML's claims on the basis that, even if TTJV was found to have made a qualifying investments, any claim in relation to such an investment belonged to TTJV and not its shareholders.¹⁴⁹ The argument was not pursued in Respondent's subsequent submission and need not be addressed here having regard to our finding that, under Turkish law, TTJV is a simple business partnership in which the joint venture parties have direct interests in the joint ventures' assets in proportion to their respective partnership interests. Indeed, there is no evidence whatever that Tekfen and TML were shareholders in an incorporated joint venture company.

7.3.4 The Tribunal thus turns to whether Claimants can be said to have made any investment in Libya, before turning to Respondent's illegality assertions.

Do Claimants' Commitments Related to the Contract Constitute an Investment?

7.3.5 It seems sensible to deal first with the question of whether Claimants' commitment of resources and equipment to carry out the works under the Contract constitutes an investment under the "every kind of asset" wording in the introductory clause of Article 1(2) of the Treaty. If the answer to this question is yes, (on the basis that Claimants' commitment of capital, resources and equipment to Phase III of the Project comprise "assets" "invested" in the State of Libya) it will not be necessary, except in passing, to consider the parties' submissions on the scope of the more specific sub-sections of Article 1(2).

7.3.6 It will be remembered that the Contract was entered into on 6 June 2006. Under its terms, which provided for completion of the works some 60 months (5 years) later, TTJV was to build a 380 km water conveyance system to connect the new well-field in Kufra to the network tie-in-point in Tazerbo (which had been completed in Phase I). The overall contractual consideration payable to TTJV was approximately USD 480,000,000.00 under the agreed exchange rate. By the time Claimants were forced to evacuate, approximately 75% of the contractual works had been completed.

¹⁴⁹ Statement of Defence, ¶¶124 et seq.

- 7.3.7 The works contemplated in building the system included: (a) digging and preparing the seven-metre deep pipeline trench; (b) collecting and transporting the pipe from the Sarir Manufacturing Plant to the trench; (c) installing and connecting the pipe segments; (d) building a road parallel to the pipeline route; (e) rehabilitating an existing road from the Sarir Manufacturing Plant to the worksites; (f) constructing two regulatory stations and two flow control stations; and (g) building the tie-in to the existing Tazerbo tie-in point.
- 7.3.8 TTJV's execution of the Contract was funded by the Joint Venture partners, Tekfen and TML. To fulfil TTJV's obligations under the Contract, and from its inception, Tekfen and TML purchased, leased and brought to Libya expensive heavy industrial and construction equipment. This included excavation machinery, blasting equipment, bulldozers, cranes, dump trucks, buses and utility vehicles, as well as materials (to construct its various work camps), spare parts for its construction equipment and fuel worth millions of dollars. TTJV also constructed camps with living quarters, dining facilities and warehouses at multiple points along the route of the intended pipeline. At any given time, TTJV engaged over 1,500 employees on the Project, both local and foreign workers, most of whom were in the field. On these facts, it is evident that Tekfen and TML committed substantial capital, equipment and other resources to the Project between late 2006 and February 2011.
- 7.3.9 Against this backdrop, Claimants say that under any reasonable interpretation of the Treaty, the contractual commitments and the investments they have made to ensure performance of the Contract falls within the non-exhaustive category of "any kind of asset" as well as the categories set out under Article 1(2)(c) and 1(2)(e).
- 7.3.10 Claimants point out that the definition of "investment" set out in Article 1(2) is extremely broad and unqualified. They refer to the conclusions of other tribunals that such wording is possibly the broadest among similar general definitions contained in BITs.¹⁵⁰ And they rely on a 2004 UNCTAD study of BITs which concludes that when treaties define

¹⁵⁰ **CLA-077**, *Bayindir Insaat Turizm Ticaret Ve Sanayi AŞ v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29) Decision on Jurisdiction, 14 November 2005, ¶ 113; **CLA-162**, *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic* (UNCITRAL) Decision on Jurisdiction, 30 April 2010, ¶ 157 (both citing **CLA-151**, N. Rubins, *The Notion of 'Investment' in International Investment Arbitration* (2004), p. 292.)

“investments” to include “every kind of asset”, they are signalling that “the term embraces everything of economic value, virtually without limitation.”¹⁵¹

- 7.3.11 The Tribunal agrees with Claimants that the general definition of “investment” in Article 1(2) is extremely broad and that it includes exactly the sort of commitment of capital, know-how, equipment, material and personnel Claimants brought to, and deployed in Libya in relation to the Contract over the five-year period before the evacuation of their personnel in late February 2011.
- 7.3.12 Although the decisions of other tribunals are obviously not binding on us, the Tribunal considers findings by the tribunals in *Bayindir* and *Salini*, that construction contracts similar to that here in issue constituted “investments”, to be persuasive and correct. Moreover, like the tribunal in *Jan Oostergetel*, we consider that the contracting parties here well understood that they could have chosen a narrower definition of investment had they wished to limit its scope to particular types of assets. But they did not.
- 7.3.13 In the circumstances, the Tribunal considers that it cannot plausibly be said that Claimants contribution of assets as described above were not intended to be included with the meaning of “every kind of asset”.
- 7.3.14 Having so concluded, it is not necessary to consider whether the Contract, and Claimant’s deployment of equipment in Libya fall within the categories set out in Article 1(2)(c) and 1(2)(e).
- 7.3.15 We turn next to Respondent’s legality argument.

Were Claimants’ Investments Made in Conformity with Libyan Law?

- 7.3.16 Respondent argues that Claimants’ compliance with all Libyan laws (not just those related to fundamental policy) is a condition to a holding that Claimants have made a protected investment in Libya. Even if the Tribunal were to consider that commitments of resources and equipment to carry out the Contract fall within the meaning of “every

¹⁵¹ **CLA-150**, UNCTAD, “International Investment Agreements: Key Issues” (2004), I UNCTAD/ITE/IIT/2004/10, p. 119.

kind of asset” as used in Article 1(2), Respondent says that the Tribunal lacks jurisdiction *ratione materiae* to consider Claimants’ claims if Claimants’ investment(s) was/were “illegal” under Libyan law.

7.3.17 Respondent submits that Claimants have committed a number of breaches of Libyan law in respect of their involvement with the Project, in particular:

- (a) the failure to register TTJV as a corporate entity in Libya;
- (b) the payment or facilitation of bribes to government officials in order to obtain registration numbers in the name of TTJV; and
- (c) the evasion of customs duties and taxes by Tekfen and TML through the use of exemptions which only TTJV was permitted to use as the signatory to the Contract.

7.3.18 The Tribunal turns first to the question of whether the inclusion of the clause “conformity with the hosting Contracting Party’s laws and regulations,” in Article 1(2), properly construed, constitutes a jurisdictional requirement that “Claimants must satisfy all Libyan laws and not just those that relate to fundamental policy.”¹⁵²

The Scope of Article 1(2)’s “Legality” Requirement

7.3.19 Article 31(1) of the VCLT requires the Tribunal to construe the Treaty’s “conformity” provisions in the light of the Treaty’s object and purpose. The Treaty’s preamble sets out the relevant aims of the Contracting Parties. These aims, coupled with a very broad definition of “investment”, point clearly to the intention to provide broad protection of investors in relation to their investments.

7.3.20 The scope of broadly similar “legality” clauses has frequently been considered by other tribunals. The findings on the point in *Salini, Inmaris, ECE Projectmanagement, Desertline, Tokios* and *Kim* all require a finding of what might be described as a

¹⁵² Statement of Rejoinder, ¶411.

“fundamental illegality” of the investment in order for the relevant treaty not to apply to the investment in question.¹⁵³

7.3.21 The Tribunal finds no reason to depart from such an understanding of generalised legality clauses and, in particular, in relation to the wording here employed.

7.3.22 The legality requirement contended for by Libya would not only deny access to arbitration by an investor but would also relieve the Host State from the obligations it assumed under the Treaty in order to promote and attract investments from nationals of its counterparty. Such a severe consequence cannot have been intended as the result of some minor non-conformity with the local law of the Contracting Parties.

7.3.23 The Tribunal concludes that the Treaty’s “legality” requirement referred to in Articles 1(2) – “conformity with ...”, Article 3 – “within the framework of ...”, and Article 10 – “made in accordance with ...” require an illegality of a particularly serious nature to have been committed by or on behalf of the investor when the investment was made before such an investment loses the protections afforded by the Treaty.

7.3.24 We turn next to the detail of Libya’s various allegations of legality.

TTJV’s Failure to Register

7.3.25 The first point to be made is that any failure by TTJV to comply with a Libyan registration requirement would not qualify as an illegality which would justify the loss of the Treaty’s protection.

7.3.26 However, the point does not arise on the factual record before us. This is because the Tribunal is satisfied that none of the provisions of the Libyan Commercial Code (Articles 88, 644 and 645) or its Executive Regulation Related to the Commercial Register (Articles 1 and 3) required TTJV to register its name in the Commercial Registry Office.

7.3.27 Contrary to Respondent’s assertion that Article 88 requires “any legal entity which carries on business in Libya to register with and obtain permission from the Ministry of

¹⁵³ See, respectively, Exhibits CLA-058, CLA-161, CLA-186, CLA-184, RLA-047 and CLA-258.

the Economy”,¹⁵⁴ that Article applies only to a “person who is considered a trader by virtue of this law ...” and the definition of trader set out in Article 9 of the Code clearly does not cover any of TTJV, Tekfen or TML.¹⁵⁵

7.3.28 Similarly, Articles 644 and 645 contain no requirement for TTJV to register (as asserted by Respondent). Rather, these provisions simply state that foreign “companies” and branches of foreign companies are subject to Libyan law.¹⁵⁶ Neither article requires TTJV, which is neither a “company” nor a “branch” to register with any Libyan authority.

7.3.29 These conclusions are confirmed by reference to the provision of Article 681 of the Commercial Code which, on a plain reading, states that Joint Ventures (such as a TTJV) are subject to no formal registration requirements. Article 681 provides:

Joint Venture: Joint Venture is an agreement that is not subject to formal registration procedures that are mandatory for other commercial companies. It is a contract in which a person partner with another person in a portion of profits from latter’s commercial activity or profits of a transaction or more against an agreed-upon contribution by the co-partner. (Tribunal’s emphasis)

7.3.30 Finally, as regards Articles 1 and 3 of the Executive Regulation Related to the Commercial Registry, they, like Article 88 of the Code, are concerned only with foreign traders and have no application to TTJV.

Bribery and the Evasion of Duties and Taxes

7.3.31 We turn next to Libya’s allegations concerning the payment of bribes and the evasion of customs’ duties and taxes.

7.3.32 The Tribunal considers that the serious allegations in this regard set out in Respondent’s Rejoinder and its Skeleton are without merit. Being entirely unsupported by cogent

¹⁵⁴ Statement of Rejoinder, ¶330.

¹⁵⁵ Exhibit RLA-114.

¹⁵⁶ Ibid.

evidence, either documentary or testimonial, Libya has not met its burden of establishing corruption based on the balance of probabilities standard of proof.

7.3.33 Dealing first with Libya's allegation that Claimants paid or facilitated bribes, its assertions are based entirely on Mr Al Ghafar's testimony in his Second statement. In essence, Mr Al Ghafar says that TTJV was not able to deal with a number of governmental departments in relation to its contract works because "all of the application processes required a Registration Number to be provided."¹⁵⁷ He then testifies that TTJV's Mr Zeren engaged a local businessman (unnamed) to act as TTJV's intermediary with various departments to assist it obtain such Registration Numbers as were necessary. He further states that this businessman was able to help TTJV register with the Social Security Fund office in Al-Marj after the Benghazi office of the Fund rejected TTJV's application.

7.3.34 This is the sum and substance of the evidence in support of Libya's allegation of bribery, and it is woefully deficient. Mr Al Ghafar never claims that Mr Zeren or the unnamed Libyan engaged in corruption and the Tribunal rejects Libya's assertion that TTJV's behaviour constitutes corruption such as would cause Claimants to lose the protection afforded by the Treaty.

7.3.35 Turning to the allegations that Claimants sought to evade customs duties and taxes, they too are unsustainable.

7.3.36 Relying again only on Mr Al Ghafar's Second Statement, Respondent accuses Claimants of engaging in "evasion of customs duties and taxes ... though the use of exemption which only TTJV was permitted to use as the signatory to the Contract with the GMMRA."¹⁵⁸

7.3.37 However, all that Mr Al Ghafar says in his Second Statement is that TTJV's customs clearance company used Tekfen's statistical code when filling-in two Customs Declaration forms in relation to goods shipped from Turkey by Tekfen to TTJV.

¹⁵⁷ Al Ghafar Second Statement, ¶3.4.1.

¹⁵⁸ Statement of Rejoinder, ¶387.

7.3.38 In circumstances where: (a) it is undisputed that TTJV used all of the equipment at issue to execute the works; (b) there is no evidence that Tekfen or TML benefitted improperly from their shipments to TTJV in Libya; and (c) Respondent has offered no evidence that the use of Tekfen's statistical code is improper or illegal Libya's allegation that Claimants evaded customs duties and taxes was not made out.

7.3.39 Based on this analysis, for the reasons set out above, the Tribunal concludes that Claimants made protected investments under the Treaty and that the Tribunal has jurisdiction *ratione materiae*.

7.4 **Did the Dispute Arise Before the Treaty Entered into Force?**

7.4.1 Setting aside (for separate consideration below) the question of whether or not the Treaty reflects an agreement by the Contracting Parties to arbitrate disputes directly with investors relating to the Contracting Parties' obligations under customary international law, the Tribunal's jurisdiction *ratione temporis* turns on whether the parties' "dispute" (regarding Libya's obligation to protect and the consequence of its alleged failure to do so) arose before the coming into force of the Treaty – i.e., before 22 April 2011 (as required by the provisions of Article 10.1).¹⁵⁹ The answer to the jurisdictional question depends on: (a) the proper construction of the word "dispute"; and (b) the parties' interactions before the Treaty became effective in relation to Claimants' evacuation from Libya.

7.4.2 The parties offer competing, although not markedly dissimilar, understandings as to the meaning of the word "dispute" as used in Articles 8 and 10.

7.4.3 Claimants say: (a) relying on *Maffezini*, that the existence of a dispute presupposes communication between the parties in which one party takes the matter up with the other, with the latter opposing the position advanced, either directly or indirectly; and (b)

¹⁵⁹ The Tribunal is in agreement with the conclusions reached by the tribunals in *Duke Energy*, *Rey Casado* and *Micula* that what is decisive (*i.e.*, the critical date) in terms of jurisdiction *ratione temporis* is the date at which the instant dispute between the parties arose, not the point in time during which the factual matter on which the dispute is based took place. The temporal application of the substantive provisions of the BIT is indeed different from the question of a tribunal's jurisdiction *ratione temporis*.

relying on *Railroad Development*, that in determining when a dispute starts (has arisen), the dispute must be distinguished from the facts leading to it, which naturally will have occurred earlier.

7.4.4 For Claimants, the dispute here in issue arose only after 8 July 2015, when they filed their Notice of Dispute. Prior to that, Respondent had never rejected Claimants' position.

7.4.5 Respondent contends otherwise. It says the test for a dispute is whether there is a disagreement between the parties as to a point of law or fact. In the context of a dispute relating to the protection of investments in circumstances of violent acts or attacks, Respondent contends that the point that the dispute has arisen is when a party makes a request for protection and there is evidence of disagreement, even though the request may have been met with silence.

7.4.6 The common ground between the parties as to the existence of a dispute is the need for some evidence as to disagreement. It should go without saying that the disagreement evidenced must relate to the parties' respective rights and obligations under the Treaty.

7.4.7 As to whether there was evidence of a relevant disagreement before the Treaty entered into force, Respondent points to the conclusion of the Tribunal in *Burlington Resources*, where the existence of a dispute was found to be evident from the wording of a letter from the investor to PetroEcuador which, although its main purpose was to request assistance, also manifested a disagreement over rights and obligations. Respondent relies on Claimants' letter of 7 March 2011 as evidencing that a dispute had arisen by that date.

7.4.8 It is helpful to set out extracts from the *Burlington* tribunal's analysis:

"319. *Claimant assessed that it first requested protection for Block 23 by letter of 4 December 2002 addressed to the Executive President of PetroEcuador. In the letter, CGC, the operator of the Block, wrote:*

"We seek your attention to notify you of the new violent acts that occurred today in Block 23 of the Ecuadorian Amazon region that have hampered

the development of the activities of the operator Compañía General de Combustibles S.A., CGC. In this regard, we manifest the following:

[Description of events, where it is mentioned that the seismic base was destroyed and eight employees were kidnapped].

.....

In light of these events, we insist, in the most self-restrained fashion, that you intercede with your good offices, and take the measures you deem necessary, with the purpose of ensuring that the Armed Forces and the National Police will act resolutely to procure the liberation of the hostages, as well as to facilitate the execution of the ongoing seismic project.....

It will not go unnoticed by you the constant willingness of my client, the Company CGC, to engage in dialogue and openness in order to achieve agreements and solutions beneficial for the aforementioned communities, moreover, it is the duty of the Ecuadorian state, and PetroEcuador in particular, to guarantee the safety of the operations, as stated in our contractual agreement and under appropriate constitutional norms" (Tribunal's translation for the portions where translation was not provided by Claimant) (emphases added) (CM, ¶ 58, Exh. C-153)."

320. *In the view of the Tribunal, the 4 December 2002 letter is sufficient to raise a "dispute" within the meaning of Article VI (3) of the Treaty. While the main purpose of the letter is to request assistance from PetroEcuador with the episodes of violence and the opposition met in the Block, the tone and the context of the letter do manifest a disagreement over rights and obligations.*

321. *Following the description of the facts giving rise to the request for assistance, CGC, the operator of the Block, "insist[s]" that the Armed Forces and the National Police act to ensure that the hostages be liberated and that*

operations in the Block can continue. The very use of the word “insist” suggests that the request was previously made without success.

322. Moreover, towards the end of the letter, Respondent is reminded that it is its “duty” to “guarantee the safety of the operations.” This reminder, in a context which suggests that previous security requests remained unheard, is indicative of a disagreement concerning rights and obligations.”¹⁶⁰

7.4.9 The Tribunal accepts’ as did the *Burlington* tribunal, that the existence of a dispute over the parties’ rights and obligations need not be stated explicitly, but can be inferred, based on the context surrounding, for example, a request for protection and security which also indicates disagreement with the way the State has discharged its obligation to provide protection and security.

7.4.10 With this in mind, the Tribunal turns to Claimants’ letter of 7 March 2011 to the GMMRA (and also copied to ANC and the Turkish Consulate in Istanbul). The text of the letter is set out below:

“Subject Unrest in Libya, extraordinary, unsafe and insecure conditions

...

Dear Sirs,

Starting from the day (night time) 19th of February 2011, our project facilities (camps, offices, accommodation quarters, stores, yards, etc ..) along the subject pipeline and our camp, office, warehouse and other facilities in Benghazi have been targeted by groups of armed people, insurgents, rioters or rebels acting in violence; looting, damaging, removing, robbing and taking away by force the Goods, Plant, Equipment, Machinery and Facilities brought by the Contractor for the execution of the project Works.

¹⁶⁰ Exhibit RLA-068, p.66, ¶¶319.

Additionally, always using force, personal belongings of our personnel were also robbed and looted by such groups of violence.

Due to the persistence of such situation for days, which is also characterized by lack of public order and further existence of severe public disorder, threatening also lives of our personnel, and due to complete absence of security to be maintained by the authorities, we have attempted to enter in contact with the Owner and the Owner's Consultant Engineer in order to decide on possible actions to be taken under the circumstances.

Unfortunately, neither the Owner's office, nor the Owner's Consultant Engineer offices were reachable either by phone, by fax, by internet or in personal presence.

Consequently, due to the persistence of unsafe and insecure conditions and to the great concern about the safety of and threats to lives of our personnel, the day of 24th of February 2011, we have been forced to decide the evacuation of all our expatriate personnel from the Country via the only apparent available way: Benghazi port.

On the 24th of February 2011, the expatriate personnel were transferred from Kufra camp (where all our personnel directly involved in the execution of the Works; approximately 1.100 people, were concentrated during the time) to Benghazi Port by trucks and any other means of transport available, including rented trucks. Unfortunately, during their journey to Benghazi, our personnel were again robbed and some more vehicles and personal belongings were stolen by insurgents, rioters or rebels.

Even after our forced decision to evacuate our personnel, we have repeatedly and often and by different means attempted, with no success, however to notify the Owner of the impossibility for the Contractor to continue performance of its obligations under the Contract for the reason of being prevented by the said looting, robbery, removal of/or damage to our properties, life threat received by

our personnel, the unsafe condition caused and created by the said violent actions of uncontrolled groups of people.

With this notice, please be informed that due to lack of safety and security and public order in the Country and specifically in and around the Sites, and due to threats to lives and property, we were prevented from and faced with the impossibility to continue with the Works, therefore our construction teams were compulsorily evacuated from the Country.

We hereby notify you of these extraordinary circumstances rendering it impossible for the Contractor to execute and continue with the Works, due to our compulsory absence from the Country and the Site, during this period of suspension, stoppage and/or intervention, as the Contractor, and consequently we are not in a position to properly care for and protect all Works, the subject of the Contract, in progress or already executed and Materials, supplies and Equipment that we had brought to the Site for performance of the Works and/or Services. We therefore invite and urge you to organize and take appropriate controls and measures for ensuring safety of the project Works already executed and of the existing or remaining Contractor's supplies, machinery, equipment and facilities.

In the meantime, we shall deliver to you copies of all outstanding purchase orders and subcontracts of the Contractor for Materials, Equipment and Services for the Works. We shall take necessary measures as may be directed by you with regard to such purchase orders and subcontracts. We shall further provide you in due course with the details and valuation of the Works already executed (including additional works and variations) as of the date of commencement of the said extraordinary circumstances with the evaluation of the pending credits and the estimation of the losses and damages that we incurred, including the Contractor's and personal property lost and damaged during such occurrences.

Under the present circumstances we do not know how long this de facto suspension, stoppage or interruptions to the Works/and or Services, that started on 19th of February 2011, will continue. However, the course of events

demonstrates that this suspension, stoppage or interruption is most likely to exceed applicable time period indicated in the Contract.

We request and we invite that once the present situation, which started on the 19th of February 2011, allows resumption of Works, which was interrupted, stopped, suspended, made impossible to carry on due to the existing circumstances in the Country, the Parties must come together to evaluate the situation and meet to discuss the proper resolution of the situation under the Contract in a fair and reasonable manner; without prejudice, as how to resume the Works and remobilize, including compensation of the pending amounts, of the damages to the existing Works as well as compensation for Contractor's actual losses and damages incurred during this period of unrest and for replacement of the lost, damaged and looted equipment and facilities.

We reserve all our rights in relation to this matter under all applicable provisions of the Contract and at law.

We are at your disposal should you require any further information or documents necessary to be submitted by us in accordance with the Contract.

*Respectfully Yours*¹⁶¹ (Tribunal's emphasis)

7.4.11 Based on Claimants' stated case, the context in which the letter was written must be understood to include the following facts:

- (a) beginning on 17 February 2011, small groups of two to three men started coming to TTJV's Bozerik and Tazerbo Camps during the night. They would arrive in a pickup truck, then come into the camp with guns on their shoulders demanding diesel, spare parts and food. Claimants informed the GMMRA about these incidents. GMMRA dismissed these as minor incidents. However, no request for protection was made at this time;¹⁶²

¹⁶¹ Exhibit C-043.

¹⁶² Halicilar First Statement, ¶¶11-12.

- (b) on the night of 20 February 2011, Claimants' office compound in Benghazi was invaded by looters, a number of whom were identified as former TTJV employees. At this stage, Benghazi was suffering severe unrest. The next day (during the morning of 21st February) TTJV moved all of its staff from the Benghazi camp to the farm of Claimants' custom's agent outside of Benghazi. During that morning Mr Hendekli called Mr Bubteina from the GMMRA to report the attack and advise that TTJV's employees would go to the farm of its custom's agent. Mr Bubteina expressed his concern and advised Mr Hendekli that the GMMRA's own compound had also been attacked and sacked at the same time. There is no suggestion in any of Mr Hendekli various statements or testimony that TTJV asked Mr Bubteina to provide it with protection for the Benghazi office compound during the call;¹⁶³
- (c) on 21 February 2011, based on the continuing unrest near their camps, Claimants' representatives went in person to Kufra city to request security for their camps from Col. Zarruq. Neither of the two employees who met with Col. Zarruq provided witness statements in these proceedings, and Mr Halicilar's testimony as what Col. Zarruq is said to have told them is contradictory. Based on the witness statement Mr Halicilar gave in the earlier Contract Arbitration (which the Tribunal finds likely to be the most reliable of his various statements), it would seem that Col. Zarruq told Claimants' representatives that: (i) he could not or would not be able to protect TTJV's camps because he planned to use his resources to protect his own people (the people of Kufra); (ii) because it was not safe in the desert, they should leave their camps and go to Benghazi; and (iii) to this end, he might be able to assist by providing some buses.¹⁶⁴ It is not suggested that the request for protection that was made at this time was anything but a general request for the TTJV's camps to be protected;

¹⁶³ Transcript, Day 2, pp. 74/128-76/5.

¹⁶⁴ Halicilar First Statement, 6 August 2016, Contract Arbitration, ¶17, Exhibit R-141, and ¶¶14-16.

- (d) on the night of 21 February, two separate groups of men arrived at the Tazerbo Camp with AK47s (some in military uniforms, some in civilian clothing), and demanded spare parts and attempted (unsuccessfully) to take a number of trucks. Mr Davarci, who was based at Tazerbo at the time, reported the incidents to Messrs Halicilar and Tumer at the Kufra Main Camp. One of the latter contacted the GMMRA seeking protection. They were advised that members of the military might come to the camp in the next few hours.¹⁶⁵ Again, it is not contended that this request was more than a request for protection of the Tazerbo Camp;
- (e) on 22 February 2011, an armed military unit assigned to the GMRA and led by officer Abdul Selam arrived at the Tazerbo Camp. There is a serious conflict between the evidence given by Messrs Halicilar and Mr Davarci as to what then happened. It is sufficient for purposes of the present context-setting to note that the soldiers in question were from the GMMRA security battalion, officer Selam was known to Mr Davarci, protection was offered in return for the provision of food, diesel and other similar items, but the soldiers then began to demand certain personal items from the workers. When officer Selam was confronted on the latter, it appeared that protection would not be provided nor the personal items returned. Mr Davarci reported the situation to Mr Halicilar at the main Kufra camp who directed Mr Davarci to bring his workers to the main camp. Mr Davarci and TTVJ's workers left Tazerbo camp at about 4:00 a.m. on 23rd February;
- (f) on 23 February 2011, Claimants assert that they made two further attempts to seek protection from the military based in Kufra City. However, the evidence in the written statements of Messrs Halicilar and Davarci in these proceedings is unsatisfactory in a number of respects (discussed further at 7.5 below), not least insofar as it suggests that Col. Zarruq was in Kufra

¹⁶⁵ Davarci First Statement, ¶¶17-18.

City at the time, that he refused to see Mr Davarci and that he refused to provide protection.¹⁶⁶ Regardless of the Tribunal's concerns over the quality of the evidence, on the assumption that these further attempts to request protection from Col. Zarruq were in fact made, it is not suggested that he was requested to provide sufficient troops necessary to protect TTJV's camps and, as well, to enable it safely to collect and move its equipment from the pipeline trench and the various pipeline worksites to the Sarir Camp;

- (g) in the afternoon of 23 February 2011, TTJV's Main Camp lost most of its communications connections with Benghazi. Mr Halicilar took the decision that evening that all TTJV workers should leave the desert for Benghazi. It was understood that TTJV employees would obtain onward transportation to Istanbul from Benghazi.¹⁶⁷ TTJV's Main Camp was evacuated in the early hours of 24 February 2011.
- (h) before their departure from their desert camps, TTJV personnel did not have time to gather TTJV's equipment and machinery to a safe location. TTJV's vehicles and the items of equipment that were deployed at various pipeline worksites were left where they were located.¹⁶⁸ Vehicles that had been used to move personnel from the desert to Benghazi were left in the Benghazi Port Customs area, also without protection.¹⁶⁹
- (i) on 25 February 2011, TTJV personnel were evacuated to Istanbul. After the evacuation, TTJV had no further communication with the GMMRA until it sent its letter of 7 March 2011.¹⁷⁰

7.4.12 Despite Claimants' assertion that: (a) they had made (and been denied) repeated requests for protection to Col. Zarruq; and (b) they had, in fact, been looted by members of the

¹⁶⁶ Davarci First Statement, ¶¶33-35.

¹⁶⁷ Ibid, ¶25.

¹⁶⁸ Ibid, ¶29.

¹⁶⁹ Hendekli First Statement, ¶15.

¹⁷⁰ Takla First Statement, ¶40.

GMMRA Security Battalion at their Tazerbo Camp on 22 February 2011, TTJV's letter of 7 March 2011 makes no reference to any request for protection having been made and denied, let alone to any inappropriate conduct by members of the Libyan military (the GMMRA Security Battalion) at the Tazerbo Camp on 22 February.

- 7.4.13 The letter is also quite different in tone from the one addressed in *Burlington* to PetroEcuador and quoted above. There is no "insist[ence]" that "the Armed Forces and National Police" act to protect the Project Works and TTJV's machinery, equipment and facilities, such as to suggest that previous requests had been made and been denied.
- 7.4.14 Rather, the letter simply: (a) "notifies" the GMMRA that TTJV, having had to evacuate from the country two weeks earlier (because of the extraordinary circumstances referred to in the letter), "was not in a position to protect" the Project Works and its materials and equipment; and therefore (b) "invite[s] and urge[s]" the GMMRA "to organise and take appropriate controls and measures" to ensure the safety of the Project Works and TTJV's equipment and facilities.
- 7.4.15 Unlike the letter to PetroEcuador, there is no reference to Libya's (or the GMMRA's) "duty" to "guarantee the safety" of TTJV's sites and equipment from which a prior request for protection, or a disagreement with the way Libya (or the GMMRA) has discharged its obligation to provide protection and security, might be inferred.
- 7.4.16 To the contrary, the letter states plainly that the various attempts that had been made to reach the GMMRA and ANC (initially to decide on possible courses of action and, later, to notify GMMRA of the impossibility for TTJV to perform its contractual obligations) had all been unsuccessful.
- 7.4.17 It is impossible to find evidence, direct or indirect, of disagreement between the parties from a letter which: (a) makes no reference to a request for protection having been made; and (b) also makes it clear that there has been no contact between the putatively disagreeing parties.
- 7.4.18 Properly construed, the letter simply constitutes a notice of *force majeure* under the Contract, a forward-looking request for the protection of TTJV's equipment which had

been left behind on its evacuation, and an invitation to meet in the future (once the present situation allows for the resumption of work) to discuss a resumption of work and compensation for losses suffered by TTJV during the period of unrest.

- 7.4.19 There being no other communication between the parties prior to the entry into force of the Treaty on 22 April 2011, the earliest date on which a dispute can be said to have arisen is after the Treaty came into effect. In the result, Respondent's assertion that the Tribunal lacks jurisdiction *ratione temporis* must fail.
- 7.4.20 Having reached this conclusion, we must address Respondent's argument that even if we determine that the dispute arose after the entry into force of the Treaty, we do not have jurisdiction under Article 10 of the Treaty to entertain events and alleged breaches which preceded the Treaty's entry into force. We do not agree. Article 10 of the Treaty provides that the Treaty applies to investments made before the Treaty's entry into force, but does not apply to disputes that have arisen before the Treaty enters into force. We have already seen above that Claimants have made a qualifying investment under the BIT and that the present dispute arose after the Treaty's entry into force. Thus, the BIT applies, and Claimants accordingly can resort to the dispute settlement clause found in Article 8 of the BIT. This provision does not impose any limitation on the scope of disputes that can be brought before an arbitral tribunal constituted under it, other than requiring that those disputes must be "in connection with his [the investor's] investment". This means that, as long as the dispute brought before a tribunal constituted under Article 8 is "in connection" with an "investment" of an "investor" as defined in the BIT, that tribunal would have jurisdiction to resolve that dispute.
- 7.4.21 The procedural right of an investor to bring a dispute before a tribunal constituted under Article 8 says nothing about the substantive rights which the investor may invoke before such a tribunal. Article 8 itself contains no limitation on the substantive rights that can be invoked by an investor. However, it is trite law that an investor must be entitled to the substantive rights it claims were breached by the State. An investor may not claim breaches of rights to which it was not entitled. In this case for instance, Claimants may not claim breaches of the substantive rights guaranteed by the Treaty before the Treaty's

entry into force – those substantive rights would apply to Claimants only after the Treaty’s entry into force on 22 April 2011. Claimants may well however claim breaches of other rights owed by the State to them before the Treaty enters into force. In fact, they do so here – Claimants claim damages for Libya’s failure to provide full protection and security to them prior to the Treaty’s entry into force. Whether Claimants are entitled to these particular rights is a separate question which the Tribunal addresses below.

7.5 Does the Treaty Permit Arbitration of CIL Disputes?

- 7.5.1 The question in the short heading above is better (and more fully) stated as follows: does the Treaty’s Article 8 dispute settlement provision provide the Tribunal with jurisdiction to hear and decide a “dispute in connection with [an investor’s] investment” where the investor’s claim for relief is based on an alleged breach of the minimum standard of treatment required under CIL which occurred before the Treaty came into force.
- 7.5.2 The question is of particular importance in this case because, for all intents and purposes, Claimants’ entire claim for monetary relief is based on damages which are said to have been caused by Libya’s failure to fulfil its full protection and security (FPS) obligation (arising under the minimum standard of treatment of aliens) required under CIL during the two-week period between 20 February – 6 March 2011.¹⁷¹ Indeed, Claimants concede that any analysis after early March 2011 is irrelevant.¹⁷²
- 7.5.3 The Contracting Parties consent to arbitrate with investors is found in Treaty Articles 8.1 and 8.2 which provide, in pertinent part, as follows:

- “1. *Disputes* between one of the Contracting Parties and an investor of the other Contracting party, *in connection with his investment*, shall be notified
2. *If these disputes, cannot be settled ..., the dispute can be submitted as the investor may choose, ... to international arbitration ...:*” (Tribunal’s emphasis)

¹⁷¹ Claimants’ Skeleton, ¶¶ 39 and 62(a).

¹⁷² Ibid, ¶ 70(v).

7.5.4 The provisions of Article 10, which describes the scope of application of the Treaty, are also relevant to the consideration of the question. They provide:

“the present Agreement shall apply to investments in the territory of a Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party before or after the entry into force of this Agreement. However, this Agreement shall not apply to disputes that have arisen before its entry into force”.

7.5.5 It is well understood that Contracting Parties to BITs can (and often do) restrict the type of investment disputes they are prepared to arbitrate, either on an investor-State basis or a State-State basis.

7.5.6 A common limitation on the consent to arbitrate is for the Contracting Parties to restrict their consent to disputes concerning an alleged breach of an obligation (or right) created or put in place by the BIT. This necessarily limits arbitration under such BITs to the consideration of acts or omissions occurring after the BIT has come into effect. Both Libya and Turkey required exactly this sort of limitation on their consents to arbitrate with other Contracting Parties in other BITs.¹⁷³

7.5.7 Other treaty parties confine their consents to arbitrate to, for example, expropriation disputes or to treaty and contract disputes.

7.5.8 Here, however, the only limitation to the Contracting Parties' consent is that the dispute must be “in connection with” the investor's investment. Because the Treaty also states that it applies to investments made prior to its entry into force, and because it is common ground that no obligations created by the Treaty come into existence before the Treaty comes into force, it follows that a claim that arises before the Treaty comes into force can only be based on the breach of an obligation which is additional to the Treaty.

7.5.9 The Tribunal concludes that the plain meaning of the words “a dispute” “in connection with [the investor's] investment”, when not otherwise limited, would at least include

¹⁷³ See Austria-Libya BIT of 2002, Switzerland-Libya BIT of 2003, Turkey-Romania BIT of 2008, Turkey-UK BIT (1991), Turkey-US BIT; Claimants' Closing Slides, pp. 59-62.

disputes concerning investments made pursuant to an investment contract, or made based on certain representations made by the State (or on its behalf).

- 7.5.10 While not binding on us, other investor-State tribunals have found that consents to arbitrate of this breadth confer jurisdiction over investment disputes which are not based on alleged breaches of treaty conferred rights. The most common are contractual disputes which, depending on the Treaty's wording may concern breaches in relation to investments made both before and after the particular treaty came into effect.¹⁷⁴
- 7.5.11 Bearing in mind the way Respondent, at least initially, argued its CIL jurisdictional objection, it is important to note that the tribunal decisions referred to above to hear contract based disputes had nothing to do with their ability to deny such a claim on the merits – including, for example, based on a finding that a particular claimant had no right to assert the claim, perhaps because the cause of action belonged to another.
- 7.5.12 A more limited number of tribunals have been asked to consider whether a consent clause similar to the one presently under consideration entitled them to hear disputes arising out of alleged breaches of CIL obligations said to have been owed to the relevant claimants. Some said yes,¹⁷⁵ a lesser number said no.¹⁷⁶
- 7.5.13 Of those that said yes, the question dealt with by each tribunal was simply whether the consent clause in question gave the tribunal the right to consider the CIL based claim asserted by the investor.
- 7.5.14 What is of importance for our purposes, is that the parties before us were unable (despite having been asked)¹⁷⁷ to point any case in which a tribunal, in considering its jurisdiction to hear such a case, had considered the merits of Respondent's argument made here (which we deal with at 7.8 below), that Claimants have no direct right (*i.e.*, lacked

¹⁷⁴ See *Salini v Morocco*, Exhibit CLA-058 ¶¶ 59 & 61; *SGS v Philippines*, Exhibits CLA-069, ¶ 131; *Vivendi v Argentina*, Exhibit CLA-061, ¶ 55; and *Jan de Nul v Egypt*, Exhibit RL-007, ¶ 137.

¹⁷⁵ *Chevron v Ecuador*, Exhibit CLA 99, ¶¶ 42-43; *Emmis v Hungary* Exhibit CLA 122, ¶¶ 82-84; *Micula v Romania*, CLA 98, ¶ 151 & 157.

¹⁷⁶ *Generation Ukraine v Ukraine*, Exhibit CLA 197, ¶ 11.3; *Mondev v USA*, Exhibit RLA-043; ¶74; and *MCI v Ecuador*, Exhibit RLA-056, ¶96.

¹⁷⁷ Transcript, Day 1, pp. 229/9-230/8 and pp. 231/21-232/23.

standing) to seek to enforce CIL rights or to assert claims in relation to CIL breaches – such rights being enforceable (by way of diplomatic protection) only by the alien investor’s State of nationality.

7.5.15 Put somewhat differently, the most that we can take from the cases to which we have been referred is that several tribunals have concluded that a broad consent clause, such as we have here, entitles a tribunal, in a jurisdictional sense, at least to hear and consider the merits of a dispute in which an investor asserts claims against a State for its alleged breach of CIL obligations which are said to have been owed to the claimant investor. And with such a conclusion, we agree. This conclusion is buttressed by a juxtaposition of Articles 8 and 9 of the Treaty. Indeed, while the latter limits inter-state arbitration to disputes concerning the interpretation and application of the Treaty, Article 8 of the Treaty contains no such limitation.

7.5.16 Importantly, by the time the parties presented their closing arguments, Respondent’s counsel expressed his agreement or, at least non-objection, to the Tribunal having jurisdiction under Article 8 to hear the parties on the question of whether Claimants have the right to assert a claim based on the alleged breach by Respondent of its CIL obligations. In response to questions from the Chairman, Mr Baloch made the following responses:

*“THE CHAIRMAN: You don't have to answer this now. And we're going to -- as soon as we can, perhaps even as early as this evening, give you some direction on what we want to hear from you both on Saturday, but it may be or it may not be right that the old rule that only States could assert a claim under customary international law, that may continue to exist, it may not. We will see. But that doesn't necessarily mean we don't have jurisdiction to hear the argument. That will depend on the jurisdiction *ratione temporis*, will it not?”*

MR BALOCH: Hear the argument –

THE CHAIRMAN: To hear the argument about whether there is a claim under international law.

MR BALOCH: We have no objection to you hearing that claim."¹⁷⁸

7.5.17 Having regard to the plain meaning of the wording of Articles 8.1, 8.2 and 10 of the Treaty, when considered together, the Tribunal concludes that it has jurisdiction at least to hear Claimants' claims which are based on Respondent's alleged failure to provide Claimants with FPS for their investments during the period between 20 February and 6 March 2011 (*i.e.*, in breach of the minimum standard of treatment under CIL).

7.5.18 Before turning to the substantive merits of those claims, we deal next with Respondent's contention that Claimants' claims are inadmissible, being: (a) duplicative of the claims in the Contract Arbitration; and (b) an abuse of process.

7.6 Are Claimants' Claims Admissible?

7.6.1 Respondent's original case against the admissibility of Claimants' claims in this arbitration (*i.e.*, for compensation arising, first, out of Respondent's alleged breach of its duty to protect under international law and, second, by reason of its alleged non-compliance with specific terms of the Contract) was that Claimants had already advanced exactly the same substantive case in the Contract Arbitration, and that to do so again in these proceedings constituted an abuse of process.

7.6.2 Since Claimants withdrew their international law claims in the Contract Arbitration (*i.e.*, those based on Respondent's alleged failure to provide FPS), Respondent could not (and cannot) properly continue to complain about this aspect of Claimants' claims in these proceedings.

7.6.3 However, the admissibility of Claimants' so-called Umbrella Clause claims, for compensation based on breach of the Contract remain to be considered. These are scheduled to be heard, if admissible, in Phase II of these proceedings, together with issues of quantum of loss arising from any liability of Respondent for Claimants' international law claims as may be established in this Phase I.

¹⁷⁸ Transcript, Day 1, pp. 79/23 – 80/12.

7.6.4 Claimants' Umbrella Clause claims are set out in paragraphs 94-173 of their Request for Arbitration. Five specific contractual claims are made. From a review of the Partial Final Award in the Contract Case it is clear that almost exactly the same five claims were made in these proceedings. The only difference has to do with so-called Contractual Claim Four.

7.6.5 With respect to Contractual Claims One, Two, Three and Five, each was considered and has been adjudicated upon by the tribunal in the Contract Arbitration. The Tribunal considers that the re-assertion of those claims in these proceedings constitutes an abuse of process, that is, an abuse of rights applied to a procedural right. The prohibition of abuse of rights, which is a general principle applicable in international as well as municipal law, prevents the exercise of a right for purposes other than those for which the right was established.¹⁷⁹ In the words of Hersch Lauterpacht, "there is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused".¹⁸⁰ Arbitration tribunals have often relied on abuse of rights or process to disregard corporate restructurings carried out for the sole purpose of treaty shopping.¹⁸¹ They have also applied the doctrine of abuse in connection with the duplication of claims brought in different fora. So, for instance, the tribunal in AMPAL held that "while the same party in interest might reasonably seek to protect its claim in two fora where the jurisdiction of each tribunal is unclear, once jurisdiction is otherwise

¹⁷⁹ Exhibit RLA-090, *Orascom TMT Investments S.á.r.l. v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/12/35), Award, 31 May 2017 ("Orascom"), ¶541 citing Robert Kolb, "Part Three Statute of the International Court of Justice, Ch.II Competence of the Court, General Principles of Procedural Law" in A Zimmermann, K Oellers-Frahm, C Tomuschat, CTams, M Kashgar, D Diehl (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 2nd ed. 2012), p. 904.

¹⁸⁰ *Orascom*, ¶541 citing Hersch Lauterpacht, *The Development of International Law by the International Court* (1958), p. 164.

¹⁸¹ RLA-147, *Phoenix Action Ltd v Czech Republic* (ICSID Case No. ARB/06/5), Decision on Jurisdiction and Admissibility, Award, 15 April 2009; CLA-213, *Mobil Corporation and others v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/27), Decision on Jurisdiction, 10 June 2010; CLA-119, *Pac Rim Cayman LLC v. The Republic of El Salvador* (ICSID Case No. ARB/09/12), Decision on Respondent's Jurisdictional Objections, 1 June 2003; *Renée Rose Levy and Gremcitel SA v Republic of Peru* (ICSID ARB/11/17), Award, 9 January 2015; *Philip Morris Asia Limited v The Commonwealth of Australia* (UNCITRAL, PCA Case No 2012-12), Award on Jurisdiction and Admissibility, 17 December 2015).

confirmed, it would crystallize in an abuse of process for in substance the same claim is to be pursued on the merits before two tribunals”.¹⁸²

7.6.6 The Tribunal therefore concludes that Contractual Claims One, Two, Three and Five are inadmissible and are to be excluded from Phase II of these proceedings, should that phase be required.

7.6.7 Contractual Claim Four raises a somewhat different question. That claim is described in Claimants’ Request for Arbitration as follows:

“Contractual Claim Four: Respondent owes compensation to Claimants Directly or in the form of a Contractual Adjustment for the Damages, Destruction, Requisitioning and/or Theft of Claimants’ Equipment, Facilities, Assets and Works.”¹⁸³ (Tribunal’s emphasis)

7.6.8 As noted above, Claimants withdrew their direct claim for damages (highlighted in the description of Claim Four above) under international law in the Contract Arbitration and sought only compensation for the damage to its equipment, etc. “in the form of a Contractual Adjustment”. It prevailed on that claim and the Contract tribunal indicated that it planned to adjust the Contract (on the basis that, absent adjustment, performing the Contract would threaten TTJV with exorbitant loss).¹⁸⁴

7.6.9 In these circumstances, the Tribunal considers that the assertion of the Contractual Adjustment component of Claim Four in these proceedings also constitutes an abuse of process and therefore, that component of Claim Four is also inadmissible and to be excluded from Phase II should that phase be required.

7.6.10 As regards the balance of Claim Four (the direct claim for compensation resulting from damage, destruction or loss of Claimants’ equipment, etc.), this is said to arise either

¹⁸² AMPAL, §331.

¹⁸³ Request for Arbitration, sub-heading (d), following ¶ 145, p. 32.

¹⁸⁴ Contract Arbitration, Partial Final Award, ¶¶ 11:435-11:437.

under Libyan law (Article 148 of the Libyan Civil Code) or under CIL by reason of a duty under both to protect Claimants' equipment and work sites.¹⁸⁵

7.6.11 Because the question of liability for the alleged breach of such a duty is already the subject of this phase of the proceedings, it will obviously be unnecessary to consider that question again on the basis of the Umbrella Clause in a second phase of the case should Claimant succeed on liability. The quantum of any damages can be assessed without reference to the Umbrella Clause claims as they are identical to those asserted for CIL or Treaty breach.

7.6.12 In these circumstances, the Tribunal concludes that Claimants' Umbrella Clause claims are for the most part inadmissible (*i.e.*, contractual claims One, Two, Three, Four – to the extent it seeks a Contractual Adjustment – and Claim Five). To the extent they are not inadmissible (*i.e.*, the direct claim for damages component of Claim Four describe at 7.6.7 and 7.6.8 above), it may dispense with reviewing these claims in a possible Phase II for reasons of procedural economy. Indeed, they coincide with claims based on a duty to protect that are resolved in this award and thus need not be heard.

7.7 Has Respondent Violated Customary International Law by failing to Provide FPS?

7.7.1 Bearing in mind that it is accepted that Respondent did not provide protection to Claimants' investments during the relevant period (*i.e.*, between 20 February and 6 March 2011), the following questions arise:

- (a) did Claimants seek protection from the State (or from those for which it was responsible) during or in relation to the relevant period;
- (b) is Libya responsible for the allegedly wrongful conduct of the GMMRA and its military, and specifically in relation to their alleged acts and omissions during the relevant period;

¹⁸⁵ Request for Arbitration, ¶¶ 154-156.

- (c) did Libya's military or the GMMRA fail to respond to Claimants' requests for protection in February and March 2011;
- (d) do Claimants have the substantive right (*i.e.*, standing) to pursue claims directly against Libya for breach of obligations imposed on States under CIL;
- (e) did Libya breach its due diligence obligation under CIL by a failure to provide FPS before the entry into force of the Treaty;¹⁸⁶ and
- (f) if so, was wrongfulness of such a failure precluded by *force majeure* or necessity.

The Scope of Full Protection and Security

7.7.2 Before turning to these questions, it is sensible to deal first with the parties' differing perceptions of the nature and scope of the FPS obligation under CIL, the so-called due diligence standard.

7.7.3 For Claimants, the applicable standard is the provision of protection and security expected of a well-organised modern State. Relying on Prof. Dolzer's opinion, they say this means a State which is capable of an organisation of security on its territory which provides adequate protection for its citizens.¹⁸⁷ Based on what other tribunals have found, Claimants assert that States must take "all measures necessary to ensure the full enjoyment of protection and security of [an] investment".¹⁸⁸ The standard of due diligence is described as being an objective one.

7.7.4 Respondent agrees that the key standard here is due diligence. It differs from Claimants in stating that the standard, both under CIL and the Treaty imports certain subjective

¹⁸⁶ In their various written submissions, Claimants asserted that Libya had treated them arbitrarily and had discriminated against them by providing protection to the Sarir Manufacturing Plant whilst refusing to provide them with protection. These claims are dealt with briefly in 7.9 below, where we conclude that they are without merit. In any event, they add nothing to Claimants' claims that Libya failed to provide FPS (whether under CIL or the Treaty), because there is no basis on which to conclude that any such behaviour, rather than a failure to protect Claimants' assets, was an independent cause of Claimants' alleged losses.

¹⁸⁷ Claimants' Skeleton, ¶ 25.

¹⁸⁸ Claimants' Skeleton, ¶ 28 and Dolzer First Report, ¶ 167 (citing *Al Warrag v Indonesia* and *Houben v Burundi*).

criteria (which it describes as a modified objective standard), including a consideration of the circumstances in which the duty is operating and the resources available to the State at the time the duty is operable.

7.7.5 The Tribunal considers that the difference between the parties' description of the relevant standard ("objective" or "modified objective") is of little consequence to the outcome on the facts of this case, given Claimants' acceptance that, in assessing the exercise of the due diligence obligation, the Tribunal may examine, *inter alia*, albeit objectively, "the availability of resources of the host state for preventing the [alleged] harm."¹⁸⁹

7.7.6 In the event, the Tribunal agrees with Respondent that the applicable standard may require different responses depending on the circumstances of the State that is called upon to exercise due diligence. The tribunal in *Lauder* rightly noted that the FPS obligation "obligates the Parties to exercise such due diligence in the protection of foreign investment as [is] reasonable under the circumstances."¹⁹⁰

7.7.7 The relevance of the circumstances in which the FPS obligation is required to be exercised, which necessarily imports an element of subjectivity, has been widely accepted by a variety of tribunals and scholars.¹⁹¹ Were it otherwise, an investor investing in State with limited resources, limited security facilities and where civil strife was widespread would be entitled to the same response by way of full protection and security as an investor investing in a highly developed economy with a well organised State and police apparatus. This cannot be right.

Question (a): Was Protection Sought by TTJV in the Relevant Period?

7.7.8 There was a serious difference between the parties as to the number, the nature of, and even whether Claimants made requests for protection and security from Libya (or from

¹⁸⁹ Statement of Claim, ¶ 178(e).

¹⁹⁰ Exhibit RLA-041, ¶308. See also the *Saluka Case*, where the tribunal there referred to OECD Working Papers on the FET standard in International Investment law which noted that the due diligence standard requested a State to adopt all reasonable measures to protect assets from threats or attacks which may particularly target foreigners.

¹⁹¹ See *AAPL v Sri Lanka*, Exhibit CLA-049, ¶77; *Pantehniki v Albania*, Exhibit RLA-12, ¶¶ 77-81; *Saluka v Czech Republic*, CLA-019, ¶484; *Al Warrag v Indonesia*, Exhibit CLA-130, ¶630; *MMS v Montenegro*, Exhibit CLA-140, ¶36-51; and *Ampal v Egypt*, CLA-141, ¶241.

those for which it is responsible) prior to the clear request made in TTJV's letter of 7 March 2011.

7.7.9 In their closing argument, Claimants itemised five requests for protection which they say were made before the 7 March letter.¹⁹²

Request 1: On or about 21 February, Claimants requested security directly from the GMMRA's Project Manager, Mr Nasser Bubteina (Hendekli Second Witness Statement, ¶7)

Request 2: On or about 21 February, Claimants requested security for the Tazerbo Camp from the GMMRA Security Battalion (members of the Battalion looted them instead). (Davarci First Witness Statement, ¶¶ 13-41; Halicilar First Witness Statement, ¶¶ 13-29)

Requests 3 & 4: Claimants requested security from Colonel Zarruq on two occasions, in and around 21 February and again on 23 February 2011. (Halicilar First Witness Statement, ¶¶ 14-16; Davarci First Witness Statement, ¶¶ 33-35).

Request 5: During the events (between approximately 21-24 February), Claimants requested security through the Turkish Embassy in Tripoli and the Turkish Consulate General in Benghazi (Takla First Witness Statement, ¶ 33).

7.7.10 Respondent contends that the first request for protection that was made is that set out in the 7 March 2011 letter. Briefly put, it says that Claimants have made up the earlier requests to support their current case based on Libya's alleged failure to protect before TTJV left the desert in the early morning hours of 24 February 2011. Had there in fact been earlier requests for protection made and refused or, worse, had there been an actual forceful looting of the Tazerbo Camp by the GMMRA's soldiers (who had been sent to

¹⁹² See Claimants' Closing Presentation, pp. 94-95. In their earlier pleadings, Claimants contended that seven requests for security had been made and refused. See, Statement of Claim, ¶ 10, 120, 231, 261 & 262; Statement of Reply, ¶¶ 574.

protect the camp) on 22 February, such failures to protect in response to those requests and the GMMRA's/military's failures to protect would have been mentioned in the 7 March letter.

- 7.7.11 **Request 1:** Dealing first with the requests for protection that Claimants allege were made from Mr Bubteina, the Tribunal accepts Mr Hendekli's written statements and oral testimony that he spoke on the phone to Mr Bubteina twice during the relevant period. However, a careful review of Mr Hendekli's evidence indicates that he never states that he requested protection from the GMMRA or the State either for TTJV's camps or protection such as would enable TTJV to collect and convey its machinery and equipment from the pipeline to the Sarir camp.
- 7.7.12 Mr Hendekli provided one witness statement in the Contract Arbitration and two in these proceedings. He also gave oral testimony before us.
- 7.7.13 In his statement in the Contract Arbitration, the relevant passages are found in paragraphs 126 and 127. There, he says (in summary) that: (a) he spoke to Mr Bubteina twice between 20-24 February; (b) he informed him of the attack on the Benghazi Camp and of TTJV's plan to leave the country; (c) Mr Bubteina apologised for the situation but said that he could not do anything; (d) he informed Mr Bubteina that TTJV had no transportation to move its workers from the pipeline camps to Benghazi and asked for buses to transport 1,000 workers; and (e) Mr Bubteina indicated he could not help with buses.
- 7.7.14 In his first statement in these proceedings Mr Hendekli deals with these calls at paragraphs 14 and 15. He says nothing more than what is summarised above, except he makes it clear it was only in the second call that he informed Mr Bubteina of TTJV's plan to evacuate all personnel from Libya and the fact that it had no transportation to evacuate its workers from the desert.
- 7.7.15 Mr Hendekli's second statement in the arbitration does not deal with this subject. However, in his oral testimony (Transcript, Day 2, pp. 74/18-75/15), Mr Hendekli clarified that the first call was during the morning of 21st February (the morning after the

Benghazi Camp had been looted the night before) and that the second call was on 23rd February. As to the call on the 21st he testified as follows:

*“And that morning I told him that certain attacks were being made. And – and he said to me that – and he checked with me and asked if there was a problem. And I told him that all of our valuables were taken away; that they were stolen. And I told him – I repeated to him that we would go to the farm of our custom’s agent. This is what I told him.”*¹⁹³

7.7.16 It is apparent from this review of Mr Hendekli’s evidence that Claimants’ submissions that they requested protection from Mr Bubteina (i.e., the GMMRA) during these two calls overstates matters. The most that can be said is that a request was made to the GMMRA on 23rd February to arrange buses to transport TTJV’s workers from the desert to Benghazi.

7.7.17 **Request 2**¹⁹⁴: The only evidence in support of Claimants’ second asserted request for protection is based on Mr Davarci’s hearsay statements. Moreover, his and Mr Halicilar’s evidence as to what he was told is inconsistent.¹⁹⁵ In his two witness statements, Mr Davarci testified that, following two incidents which occurred at the Tazerbo Camp on the evening of 21 February, he immediately reported what happened to Messrs Halicilar and Tumer at the Main Camp and asked if the Tazerbo Camp could secure some protection. Later on that day, or perhaps the next day, Mr Tumer is said to have advised Mr Davarci that some members of the military would arrive at Tazerbo in the next few hours.

¹⁹³ Day 1, Transcript, Hendekli; p. 75/5-11.

¹⁹⁴ The analysis and conclusions reached in connection with this request reflect the majority view of the President and Arbitrator Kaufmann-Kohler. The reference to the “Tribunal” in this regard should be understood as a reference to that majority. Arbitrator Born’s dissent on this point has been considered carefully by the majority but has not resulted in any changes to its conclusions.

¹⁹⁵ The question of whether or not Mr Tumer or Mr Halicilar contacted the GMMRA on 21 February with the asserted request for assistance was addressed indirectly in the evidence of Mr Ali Tayash. Mr Tayash, GMMRA’s Health and Safety Manager, was TTJV’s point of contact in relation to security concerns in the desert. He testified that he had never been contacted in connection with a request for protection for the Tazerbo camp on 21 February. Although he had received calls from Mr Anwar Sadiq, TTJV’s Safety manager at the Tazerbo camp on a deaily basis from 16-20 February (in relation to the theft of a number of trucks during that period) he had no further contact with him or any one else from TTJV after 20 February.

7.7.18 Mr Tumer gave no evidence in the case and his failure to do so was not explained.

However, in his four statements (three in this case; one in the Contract case), Mr Halicilar makes no reference whatever to Mr Davarci having requested him or Mr Tumer to contact the GMMRA or the military with a request for soldiers to be sent to the Tazerbo Camp on 21 February. Moreover, in his first statement in these proceedings, where he describes what happened at Tazerbo on 22 February, Mr Halicilar states that:

“On 22 February, 2011, ..., Mr Muhsin Davarci, called me and said that soldiers had come to the Tazerbo camp from Tazerbo city. Mr Davarci believed that these soldiers were from the army security forces assigned to protect GMMRA. I also believed these were military forces assigned to protect GMMRA because these GMMRA assigned soldiers control the route in the desert near the pipeline.”¹⁹⁶

(Tribunal’s emphasis)

7.7.19 The reason given by Mr Halicilar as to why the soldiers were from the GMMRA would make little sense if Mr Davarci had previously requested that Mr Halicilar contact the GMMRA and ask for these soldiers to be sent to the Tazerbo Camp. Had that been the case, it seems unlikely that Mr Halicilar would have said that he believed that the soldiers were part of the GMMRA Security Battalion because those soldiers were patrolling the area. He would have believed them to have been from the GMMRA because he and/or Mr Tumer had just been in touch with Mr Fallah and Mr Balashar at the GMMRA (as he testified for the first time at the hearing) and had requested that soldiers be sent immediately to protect the Tazerbo Camp.

7.7.20 The Tribunal’s uncertainty as to whether this so-called second request for protection was made is heightened by where Mr Halicilar places his description of the events at Tazerbo on 22 February in his first written statement in these proceedings. It is found between (but is not part of) Sections III (“Our First Attempt to Obtain Security from the Military”) and V (“Our Second Attempt to Obtain Security from the Military”) of his statement in which he deals with TTJV’s attempts to obtain security from the military. Rather, the events are described under Section IV entitled “Soldiers Assigned to Protect GMMRA

¹⁹⁶ Halilicilar First Witness Statement, ¶17.

Sites Loot the Tazerbo Camp”. Had Mr Halicilar believed that such a request had been made, he would have described three, not two attempts to obtain security from the military.

- 7.7.21 The consequence of this analysis of the evidence does not go to whether members of the GMMRA Security Battalion went to Tazerbo Camp on 22nd February. Indeed, the Tribunal is satisfied that they did and that they behaved reprehensibly when they demanded and kept a number of personal items belonging to employees of TTJV later that evening. However, we do not find the evidence before us to be sufficiently cogent and consistent to support a conclusion that the GMMRA soldiers that went to the Tazerbo Camp that day did so in response to a TTJV request for protection made the previous day.
- 7.7.22 Had our conclusion been otherwise, it would be relevant to note that it was not suggested that the alleged second request for protection amounted to a request that sufficient troops be sent to enable TTJV to collect its machinery and equipment from the pipeline worksite and trench and to move it in a series of convoys to the Sarir camp prior to TTJV’s evacuation to Turkey.
- 7.7.23 Regardless of our conclusion on whether or not the GMMRA soldiers attended in response to a request to protect, having regard to: (a) the behaviour of the members of the GMMRA unit that went to Tazerbo on 22 September; and (b) the question of whether what occurred there can properly be seen as causative of Claimants’ claimed damages, it is sensible to reach some conclusions as to what happened that evening.
- 7.7.24 As to this, there are again only two sources of evidence: the testimony set out in Messrs Davarci’s and Halicilar’s statements and that given by them orally at the hearing. Unfortunately, the testimony differed in important respects.
- 7.7.25 Dealing first with Mr Halicilar’s evidence on the point, in his statement in the Contract Case and his first statement in these proceedings, he recounts what he recalls having been told by Mr Davarci about the incident. The relevant evidence is that: (a) the officer in command of the GMMRA unit proposed to deploy one or two soldiers at the camp to assist with its protection; (b) in exchange, the officer requested food, diesel fuel, spare

parts and tires; (c) while this was being discussed, the soldiers began to take certain personal items from the workers by force; (d) although the soldiers did not aim their guns at TTJV personnel, based on their behaviour, Mr Davarci believed there was a threat that the soldiers would come back and take more items, especially vehicles on the next time the soldiers came through.

7.7.26 Mr Davarci's testimony was different. In his first witness statement, his evidence is, in part, the same as Mr Halicilar's. For example, he testified that "when Mr Selam and his units arrived ... Mr Selam asked for food, diesel and other items which we provided. Our initial conversations were friendly and cordial."¹⁹⁷ However, he also explained that when he tried to form a convoy to leave the camp (after the soldiers have taken some personal items from the workers), the soldiers stopped them and demanded some trucks, especially a large fuel truck. After negotiation, they gave the soldiers another large truck. The soldiers then demanded Mr Davarci's pick-up truck. When he refused, a soldier pointed his gun at him. The officer in command ordered the soldier to put his weapon down, and the soldiers took another truck instead of Mr Davarci's pick-up truck. There was no mention of a physical assault. The convoy then departed for Kufra camp at about 4:00 a.m. and the soldiers remained at the Tazerbo Camp.

7.7.27 In Mr Davarci's second witness statement, and during the hearing, he contradicted his earlier evidence. He testified that the soldiers had in fact taken his pick-up truck. This happened he said after a soldier physically tried to take his keys from him and then (with the butt of his gun) viciously struck down a fellow employee who had intervened. Mr Davarci also said that, after he threw his keys down, the soldier took his keys and left them alone. But in his oral testimony he said "at the same time they took my vehicle and I had to give them another vehicle."¹⁹⁸

7.7.28 The difference between the two men's testimony is important. Mr Davarci's description of what happened became more detailed each time the question was revisited, the threats

¹⁹⁷ Davarci First Witness Statement, ¶ 23.

¹⁹⁸ Transcript, Day 1, Davarci, p. 214/2-23.

and the physical abuse by the soldiers became much more serious and the forced taking of one truck (not his own) became a taking of two or three trucks, including his own.

7.7.29 The Tribunal was troubled by how Mr Davarci's account expanded over time and diverged from that given by Mr Halicilar. During cross-examination, the latter emphasised that he remembered very clearly who he spoke with, when and after which incident in the February 2011 period.¹⁹⁹ He said that Mr Davarci told him on the phone what had happened right after the attack²⁰⁰, and that he explained the details of what happened after he came to the Main Camp the next morning. Mr Halicilar confirmed that Mr Davarci had told him that the soldiers did not point their weapons at TTJV personnel and that he was 100% sure Mr Davarci told him exactly what he saw, and there was no mention of the violent attack on Mr Davarci's driver.

7.7.30 It is difficult to accept that Mr Davarci would not have told Mr Halicilar about the soldiers leveling of their guns, the serious physical violence employed and the theft of two or three trucks if these events had occurred that night. It is equally difficult to believe that Mr Halicilar would have forgotten such important events (or considered them not worth mentioning) when he gave his various witness statements, had they been recounted to him at the time. More relevant, however, is the fact that if Mr Davarci had told Mr Halicilar at the time what he now says occurred (i.e., the forced taking by the GMMRA's Security Battalion members at gun point of a number of TTJV's vehicles), it would have been so shocking (and relevant to the decision TTJV made the next day to evacuate all of its personnel from Libya) that there would almost certainly have been a reference to it in TTJV's letter to the GMMRA of 7 March 2011 (written only two weeks later), which provided TTJV's detailed explanation for its decision to evacuate Libya.

7.7.31 However, instead of saying in that letter, "we contacted the GMMRA on 22 February, sought and were promised protection, but TTJV's workers were physically attacked and looted rather than protected by members of your security battalion", TTJV said that it had

¹⁹⁹ Transcript, Day 1, Halicilar, p. 146/8-11.

²⁰⁰ During his testimony at the hearing, Mr Davarci said this call took place after the physical attack on his driver. See Transcript, Day 1, p. 214/9-24.

made many attempts, all unsuccessful, to contact the GMMRA during the period between 19th-23rd February and, as a consequence, it was forced to make the decision on 23rd February to evacuate all of its expatriate personnel from the country.²⁰¹

7.7.32 In these circumstances, the Tribunal considers: (a) Mr Davarci's evidence relating to the taking of TTJV's vehicles on that occasion to be questionable; and (b) that the most plausible description of what happened is contained in the testimony given by Mr Halicilar in his statement in the Contract Arbitration:

"Given the soldiers were armed, our workers gave them the food, diesel and spare parts they needed. Although the soldiers had not directly aimed their guns at our personnel, based on their behaviour, Mr Muhsim believed they would come back to take more items, especially vehicles and other essential materials, on their next visit. I told Mr Muhsim to bring all of the workers to the main camp because we feared that the next time the soldiers came through they would take all of the supplies."²⁰² (Tribunal's emphasis)

7.7.33 **Request 3:** This is the request for protection which is said to have been made and refused by Col. Zarruq on 21 February 2011. The only evidence as to what occurred on that date was given by Mr Halicilar who testified that on 21 February he sent Messrs Ozdemir and Qadish to Kufra City to see Col. Zarruq with a view to obtaining unspecified security. Neither Mr Ozdemir nor Mr Qadish testified, so what is recounted by Mr Halicilar suffers from being double hearsay (five years old in the case of his statement in the Contract case; six to eight years old in these proceedings).

7.7.34 The principal difficulty with Mr Halicilar's evidence is that: (a) it changed between the Contract Case and the present proceedings (becoming more supportive of Claimants' case in his later statement); and (b) it became apparent during the hearing that Mr

²⁰¹ Exhibit C-043. That there was no contemporaneous record produced from Claimants' crisis centre which supports Mr Davarci's evidence is relevant to the Tribunal's assessment bearing in mind Mr Davarci's testimony at the hearing that Mr Tumer and Mr Halicilar were in ongoing talks with the crisis centre between 21-23 February about the need to and manner of evacuation from the desert camps.

²⁰² Halicilar Witness Statement Contract Arbitration, 6 August 2016, ¶ 19.

Halicilar was prepared to testify as to the truth of something (in relation to Request 4) that could not have happened thus affecting his credibility generally.

7.7.35 It is convenient to deal first with the changing nature of his testimony. In his statement in the Contract Arbitration, Mr Halicilar stated that when Mr Ozdemir and Mr Qadish returned from the meeting the same day:

*“... they informed me that the colonel was unwilling to protect our sites because he wanted to use his resources to protect his own people. The Colonel told us we should leave our camps and move to Benghazi because he would not provide us any protection and it was not safe to stay in the desert.”*²⁰³ (Tribunal’s emphasis)

7.7.36 However, by the time Mr Halicilar gave his first statement in these proceedings he replaced the words “because he wanted to use his resources to protect his own people” with the words “and had declined our request”.²⁰⁴ He also added that Mr Qadish had told him that the Colonel:

*“was expecting us to leave because he did not want to get involved with any European nationals as that may complicate things for him and Libya.”*²⁰⁵

7.7.37 Bearing in mind that: (a) Mr Halicilar’s evidence on what Col. Zarruq may have said to Messrs Ozdemir and Qadish is entirely hearsay; (b) Mr Halicilar’s appeared willing to tailor his evidence in this case to suit the proceedings; and (c) Mr Halicilar testified later in the hearing to events that did not happen (dealt with under Request 4 below), the Tribunal considers that the most that can be taken from his testimony on this issue is what was originally stated in his Contract Case Statement. Even there, however, given the fact that we are dealing with double hearsay testimony, it is simply not safe to conclude that Col. Zarruq told Messrs Ozdemir and Qadish that he “would not” rather than “could not” provide the protection requested.

²⁰³ Ibid, ¶ 17.

²⁰⁴ Halicilar First Witness Statement, ¶ 16.

²⁰⁵ Ibid.

7.7.38 Based on our conclusions (above) on Requests 1 and 2, the Tribunal finds that TTJV's approach to Col. Zarruq on 21 February 2011 was the first time that TTJV's requested protection from a representative of the Libyan State. Further, the request was, at most, an un-particularised request for security for TTJV's Kufra district camps and certainly was not a request for troops to protect the collection and convoying of TTJV's machines and equipment from the pipeline transfer to the Sarir Camp 500 km distance from the Kufra military base.

7.7.39 **Request 4:** Not much turns on whether or not this request was actually made and denied. This is because if made, it was on 23 February, only two days after Claimants' first requested protection and the consequences of the failure to protect after the request on the 21st can safely be considered to be the same as the consequences of any failure to protect on the 23rd. Nonetheless, the inconsistency and, in some cases, the inaccuracy of the testimony given by Messrs Halicilar and Davarci on the matter is concerning.

7.7.40 For the reasons set out below, the Tribunal does not consider that the evidence on the question to be sufficiently reliable to conclude with any certainty that Mr Davarci travelled from the Kufra camp to Kufra City on 23rd February (for the second time in two days) to seek protection from Col. Zarruq for TTJV's camps.

7.7.41 The evidence as to whether Mr Halicilar requested Mr Davarci to make the trip is unreliable. In his statement in the Contract Case, Mr Halicilar speaks about sending Messrs Ozdemir and Qadish to see Col. Zarruq (on 21 February). He then deals with the GMMRA soldiers' conduct at the Tazerbo Camp on 22 February and Mr Davarci bringing his workers to the Kufra camp, on 23 February, but he says not a word about (supposedly) asking Mr Davarci to set off to Kufra City to seek protection from Col. Zarruq that same day. Instead, he explains about dealing with Istanbul to arrange an evacuation plan from Kufra City airport to Turkey and, when that proved impossible, about making the decision that evening to evacuate all of TTJV's workers through Benghazi the next morning.

7.7.42 The fact that no reference is made to sending Mr Davarci off to see Col. Zarruq on 23 February suggests strongly that Mr Halicilar made no such request. However, by the

time these proceedings were commenced, Mr Halicilar testified to having “recalled” that Mr Davarci had gone to see the Colonel on the 23rd, although he does not suggest that Mr Davarci went on his instructions.

7.7.43 In his first statement in these proceedings Mr Halicilar deals with the issue very briefly, saying only that: (a) he “... recall[s] that Mr Muhsim [Davarci] attempted to contact a Colonel Zarruq”; (b) Mr Muhsim [Davarci] reported to him that he had “failed to contact the Colonel because the Colonel refused to give him an audience; (c) but Mr Muhsim [Davarci] was able to deliver a message to the Colonel through a relative of his; however, (d) we never received a response from the Colonel.

7.7.44 During his cross examination at the hearing, despite having said earlier that “we never received a response in regards to Mr Muhsim’s [Davarci] attempts to contact the Colonel”, Mr Halicilar appeared to make-up a response from the Colonel. He said:

“And also when Mr Muhsim Davarci went to see him, again, [i.e., on 23 February], he said that he couldn’t – he didn’t want to be involved with the protection of foreigners. He said this very openly and – because we knew that, for sure, he had the means to protect – to protect us.”²⁰⁶ (Tribunal’s emphasis)

7.7.45 This testimony calls into question Mr Halicilar’s credibility on this issue. This is because, when Mr Davarci was cross-examined, he admitted that when he went to the military base on the 23rd, he was told that Col. Zarruq was not there, and that he never spoke to him. Rather, he said he later met elsewhere with a cousin and an uncle of the Colonel. One of them was said to have called the Colonel, to have advised him of Mr Davarci’s request for help, and to have relayed to Mr Davarci that the Colonel said “that he couldn’t help.”²⁰⁷ There is no suggestion that the Colonel refused to protect TTJV’s camps because TTJV was “foreign”.

7.7.46 When the totality of this evidence is considered, it raises real doubt as to whether Mr Davarci was actually sent, or went, to see Col. Zarruq on 23 February. More important,

²⁰⁶ Transcript, Day 1, Halicilar, p. 173/16-21.

²⁰⁷ Transcript, Day 1, Davarci, pp. 219/21-220/8.

the Tribunal is again asked to make a finding that Col. Zarruq refused a request for protection made by TTJV, again based on double hearsay (*i.e.*, based on what the Colonel supposedly said to his cousin or uncle on the phone who relayed the answer to Mr Davarci). The Tribunal considers it unsafe to make such a finding on the basis of evidence of this nature.

7.7.47 Finally, Mr Davarci's testimony also raises questions as to what he said happened to him and his co-workers at the Tazerbo Camp the day before. It seems improbable that he would be asked by Mr Halicilar to set off from the Kufra camp, unprotected, to go to Kufra City just hours after he and his workers had been subjected to physical violence and had had up to three vehicles taken by force by soldiers from the GMMRA Security Battalion that patrolled the road and manned checkpoints to Kufra City. The Tribunal considers that Mr Davarci's testimony as to what he did on 23 February raises real doubt about the reliability of his testimony about the severity of the physical assaults and the taking of vehicles at the Tazerbo Camp the previous day.

7.7.48 We turn now to Request 5.

7.7.49 **Request 5:** Here again, the evidence advanced in support of Claimants having requested protection and security from Libya, on this occasion through the Turkish Embassy in Tripoli and the Turkish Consulate General in Benghazi, is insufficient to support Claimants' claims.

7.7.50 Claimants rely entirely on the testimony of Mr Takla, who deals with the matter in his first statement at paragraph 33 as follows:

"I have reviewed certain points made by Raymond Fellows in his statement. I note that he disputes my statement that Libya was safe and stable before the events of 2011."

"From 17-24 February 2011, TTJV made numerous attempts to engage the help of GMMRA, ANC, and the government of the State of Libya, through our Project Management on the ground as well as by communicating through the Turkish

Embassy in Tripoli and the Consulate General in Benghazi, in order to receive some security and protection, all to no avail.”

7.7.51 In response to the Chairman’s question at the hearing, Mr Takla said that he was the one who had been in contact with the Turkish Embassy and the Consulate in Libya. He testified that:

“I phoned to our Ambassador in Tripoli. I called on our General Counsel [sic] at Benghazi available at that time. I have continued with the Ambassador, who was appointed [presumably after his evacuation from Libya] as the manager of the crisis management in Turkey, in order to provide security and have our finally people leave – brought back securely.”²⁰⁸

7.7.52 The problem with this evidence is that nowhere does it refer to the Turkish Ambassador or the Turkish Consul General actually having made any request to Libya for protection and security on behalf of Claimants, let alone when such a request or requests was or were made. This is sufficient to preclude a finding in Claimants’ favour on Request 5.

7.7.53 Mr Takla, also said, again in response to the Chairman’s question, that TTJV (or TML) had “internal notes” made during the period of 21 February – 19 April 2011 of meetings in Turkey, with *inter alia*, “the Ministries, with the crisis management, and so on.”²⁰⁹ However, no such notes were produced in these proceedings and no documents were produced which indicated that Turkey, its Embassy in Tripoli or its Consulate in Benghazi had made any request to Libya on behalf of Claimants for protection and security.²¹⁰

7.7.54 On this factual record, or rather because of the absence of any factual record that Turkey or its diplomats sought protection and security for Claimants, the Tribunal finds that such requests have not been proven.

²⁰⁸ Transcript, Day 2, p. 59/2-8.

²⁰⁹ Ibid, p. 59/9-19.

²¹⁰ Ibid, p. 59/22-24.

7.7.55 A final point requires to be made arising out of Mr Takla's testimony at the hearing. He said that TTJV's employees in Libya had been in contact with TTJV (or TML) in Istanbul prior to their evacuation:

"A. By emails, I believe, or telephone calls and so on, because we had a Project Manager in Turkey and reporting to us what was going on in Libya by contact them somehow."

The Chairman: And – so emails, telephone calls. Presumably you made notes of what you were building [sic - being] told or whoever was being told made notes?

A: Yes ... - we should have some notes, probably yes.

The Chairman: And, presumably, you said that a number of requests had been made for assistance, that – would those be recorded in your notes?

A: On the ground. All these actions on the ground were done by our local people there. For my actions in Turkey ... there are some notes --- circulations and documents, but they are, I believe, not within the documents, but we have.

The Chairman: They're not part of this record, is that correct?

A: I think no." (Tribunal's emphasis)

7.7.56 What Mr Takla's evidence (as well as that of TTJV's employees in Libya at the relevant time) makes clear is that TTJV's people on the ground in Libya were in touch with TTJV's crisis management centre in Turkey from 21 February onward and that they were reporting on what was happening in Benghazi as well as the pipeline camps. Yet even though Tekfen would appear to have documentary records in Istanbul of, at least, some of what was being reported, Claimants have produced nothing, despite having been ordered to do so.²¹¹

²¹¹ See Respondent's Document Production Requests 10 and 12 and the Tribunal's resulting orders; See also Respondent's Closing Slides, pp. 70 & 72.

7.7.57 Claimants' failure to produce any record of its Libya based employees' contacts with the crisis centre in Istanbul is consistent with three possibilities. The first is that no such documents exist. The second is that Claimants ignored the Tribunal's order to produce them. The third is that such documents do exist, but they show no record of: (a) TTJV having made claims for protection as asserted; (b) the GMMRA/the Libyan military having refused to provide the protection requested; or (c) the GMMRA soldiers having physically attacked TTJV workers at the Tazerbo Camp and having taken by force a number of their trucks on 22 February 2011.

7.7.58 As previewed above, the Tribunal considers that it would be surprising for TTJV's management at the camps not to have reported such facts to the TTJV crisis centre when they were discussing the need to evacuate, and for the crisis centre personnel not to have any record of these contacts. The fact that no records have been produced provides additional support for the conclusion that Claimants have overstated the number of claims for protection that in fact were made and have, improperly, sought to suggest a wrongful refusal to protect, rather than an inability to do so in the circumstances then prevailing.

7.7.59 Summary of Conclusions on Requests for Protection: The Tribunal considers that the evidentiary record can only support a finding that TTJV requested protection for its pipeline camps on one or possibly two occasions before its letter of 7 March 2011 – the first request being that made to Col. Zarruq on 21 February and (only possibly) a second, indirect, request to Col. Zarruq on 23 February. The possible second request, if made, took place approximately 12 hours before TTJV began its wholesale evacuation from the desert. The Tribunal also concludes that the evidence is insufficient to sustain Claimants' asserted Requests 1, 2 and 5. Finally, the Tribunal concludes that at no time did Claimants make a request for protection and security which even hinted at the need for Libya to provide security of such a nature as would enable TTJV to collect its machinery and equipment from the pipeline trench, the pipeline worksites, TTJV's four camps at the pipeline and to protect the transport of its machinery and equipment by multiple convoys to the GMRRA's Sarir Manufacturing Plant where it could be protected after TTJV evacuated to Turkey.

Question (b): Libya's Responsibility for any Wrongful Conduct of the GMMRA and the Military?

7.7.60 The question of Libya's responsibility for the wrongful conduct of its military can be dealt with shortly.

7.7.61 It is well established that the acts of an organ of the State are attributable to the State – see Article 4 of the ILC Articles on State Responsibility. Moreover, the military is unequivocally a State organ as confirmed by numerous courts,²¹² tribunals²¹³ and scholars.²¹⁴

7.7.62 Indeed, Respondent does not dispute the point in its pleadings, but relies instead on submissions that Claimants have not shown that members of the military participated in the alleged looting of TTJV's camps.

7.7.63 Whether or not members of Libya's military acted in breach of Libya's obligation under CIL or the Treaty is a matter for consideration under Question (c) below.

7.7.64 As regards Libya's responsibility for the acts or omissions of the GMMRA, for reasons explained below, the question ultimately turns on whether the GMMRA is an entity (for the purposes of Article 5 of the ILC Articles) which: (a) is empowered by the law of Libya to exercise elements of government authority; and (b) in the particular instance (of the alleged act or omission), was exercising or failing to exercise the relevant element of governmental authority.

²¹² See CLA-221, *Prosecutor v Dusko Tadic* (ICTY Case No. It-94-1-A) Judgment, 15 July 1999 (“It would [...] seem that in *Nicaragua* the Court distinguished between three categories of individuals. The first comprised those who did have the status of officials: members of the Government administration or armed forces of the United States.”); CLA-175, *Armed Activities on the Territory of Congo (Democratic Republic of Congo v Uganda)* Judgment, ICJ Reports 2005, ¶ 213 (“[...] by virtue of the military status and function of Ugandan soldiers in the DRC, their conduct is attributable to Uganda.”).

²¹³ See CLA-042, *Amco Asia Corporation and Others v The Republic of Indonesia* (ICSID Case No. ARB/81) Award, 20 November 1984, ¶ 172; CLA-049, *Asian Agricultural Products Ltd. (AAPL) v Republic of Sri Lanka* (ICSID Case No. ARB/87/3) Award, 27 June 1990 at 563.

²¹⁴ CLA-222, R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2012) at 217; CLA-[093], J. Crawford, *Brownlie's Principles of Public International Law* (2012); CLA-202, ICRC, “Rule 149. Responsibility for violations of International Humanitarian Law”, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rule_rule_149 (“The armed forces are considered to be a State organ, like any other entity of the executive, legislative or judicial branch of government.”).

7.7.65 The Tribunal focusses on Article 5 because we conclude that the GMMRA does not qualify as a State organ for the purposes of Article 4 of the ILC Articles.

7.7.66 Entities that are considered to be State organs automatically include “any person or entity which has that standing in accordance with the internal law of the State.”²¹⁵ However, this normally excludes entities, such as the GMMRA, that enjoy separate legal personalities.²¹⁶

7.7.67 Although it is true that the conduct of certain institutions may be attributed to the State even if those institutions are regarded in international law as autonomous and independent of the executive government, circumstances sufficient to connote the status of an organ of the State to a separate legal person must be extraordinary, involving functions and powers considered quintessentially powers of statehood, such as those exercised by police authorities.

7.7.68 The Tribunal is satisfied that the GMMRA is not considered to be an organ of the State under Libyan law; and that it instead enjoys a separate legal personality.²¹⁷ Here, when the GMMRA signed the Contract with TTJV, it did so under its own authority and not as part of, or on behalf of the State.

7.7.69 Nor can the GMMRA’s engagement in the development and exploitation of Libya’s national resources be considered as a purely governmental activity, as opposed to being also a commercial activity. Indeed, the GMMRA’s principal operations (as prescribed by Law No. 11) were not quintessentially those associated with powers of statehood, but rather concerned the oversight and management of the GMMR Project, including entering into commercial contracts for the various phases of the Project and supervising

²¹⁵ James Crawford, *The ILC Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), Article 4(2). See also Exhibit CLA-056, p. 39.

²¹⁶ Ibid, p. 112, Comment (6); See also for one example only, *Bayinder*, Exhibit CLA-077, ¶ 119. Law No. 11 of 1983 Article 1 Exhibit C-036. Libyan law recognises both private law legal persons, and public law legal persons. There are different kinds of public law legal persons, including independent authorities. See Mohammad Abdul Kader Bulifa, *The Legal System of Public Utilities in Libya*, Publications of the Council for the Development of Cultural Creativity – Al Jamahariya, First Edition 2004, at Exhibit RLA-044A at p. 319. The GMMRA qualifies as an independent authority under Libyan law. See Law No. 11 of 1983, at Exhibit C-036, Article 1.

²¹⁷ Pursuant to Article 53 of the Libyan Civil code, the GMMRA can act on its own behalf and has its own patrimony.

the management of the work carried out by various contractors. These, by their nature, are not governmental functions. The GMMRA was also engaged in commercial activities and sold water from the Project for municipal, agricultural and industrial use.²¹⁸ The revenues obtained from these water sales were re-injected to assist in funding the GMMRA and the Project.²¹⁹

7.7.70 For these reasons, amongst others which need not be set out here, the Tribunal considers that the GMMRA was not an organ of the Libyan State with respect to the Contract within the meaning of Article 4 of the ILC Articles.

7.7.71 Turning to Libya's responsibility for the acts or omissions of the GMMRA by reason of the application of Article 5 of the ILC Articles, the specific terms of the article bear consideration. Article 5 provides:

“the conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.” (Tribunal's emphasis)

7.7.72 For present purposes, the Tribunal must determine: (a) whether the GMMRA was empowered under Libyan law to exercise specific elements of governmental authority; if so (b) what elements of governmental authority it was empowered to exercise; and (c) whether its alleged acts or omissions which are at issue here were in the exercise of or failure to exercise that authority.

²¹⁸ Law No. 11 of 1983, Exhibit C-036, Article 1.

²¹⁹ In this respect the Claimants themselves in the Contractual Arbitration confirmed that the GMMRA was an independent organisation carrying out commercial activities. Indeed, the Claimants' allegations related to alleged failings by the GMMRA in its contractual obligations to provide free issue pipes as requested by Claimant TTJV, to provide contractual compensation for supposed additional works, in meeting its contractual requirements regarding the provision of geotechnical information, and regarding payment of invoices and costs allegedly owed under the Contract. These complaints relate solely to the conduct of a commercial entity, and do not concern governmental activity or the exercise of any special governmental authority in relation to public powers or interests (*See* Claimants' Statement of Defence in the Contractual Arbitration, at ¶ 144).

7.7.73 In its Statement of Reply, Claimants argued that the GMMRA had been granted a wide array of governmental powers, giving it the ability to force Libyans to work for the GMMRA, control criminal investigations into GMMRA officials, directing municipalities and others to assist it with tasks such as obtaining permits, customs clearances and the like.²²⁰

7.7.74 However, having regard to the breaches of CIL and the Treaty that are alleged in these proceedings, the only relevant powers concerns the GMMRA's purported right to direct military and police forces.

7.7.75 Of particular importance to this dispute is Article 20 of Law No. 11 which provides:

*“By decision of the Commander in Chief of the armed forces [Col. Gaddafi] an adequate number of the army forces may be seconded to carry out the activities of protection and security provision of the installations, the equipment and the assets and the work areas of the organization under the supervision and direction of the People's Committee of the Organization and in accordance with the rules it shall lay down in this regard.”*²²¹ (Tribunal's emphasis)

7.7.76 It is not in issue that on 6 May 1991, Col. Gaddafi formed “a Light Infantry Detachment ... for the protection of the Great Man Made River”,²²² or that the GMMRA used it for the purposes intended. However, Respondent argues that the GMMRA was not empowered by Article 20 of Law No. 11 to exercise “elements of government authority”. This is because, as Mr Tayash testified, the:

“MMRA did not supervise or direct the MMRA Security Battalion, we only made requests for protection for MMRA sites, and passed on requests for protection made by our contractors ... there was no doubt that the MMRA Security Battalion

²²⁰ Statement of Reply, ¶¶ 282-284.

²²¹ Exhibit CLA-036, Law No. 11 of 1983, Art. 20.

²²² Exhibit R-25.

was supervised and directed by the Ministry of Defence, and that it reported directly to the Ministry of Defence.”²²³

7.7.77 The Tribunal does not agree and Mr Tayash’s testimony is not to the point. The fact that the GMMRA Security Battalion continued to be part of Libya’s military, and that Mr Tayash or his department made “requests” to the Security Battalion’s commanding officer in relation to the protection of the GMMRA’s sites or those of its contractors in no way diminishes the legal force of Article 20 of Law No. 11.

7.7.78 Article 20 plainly provides that, if Col. Gaddafi decides to second troops to GMMRA, the latter would have the statutory authority to supervise and direct the activities of such troops, i.e. the light infantry detachment (or GMMRA Security Battalion) that was seconded to it in May 1991 and that is unquestionably an element of governmental authority.

7.7.79 Summary of conclusions on Libya’s responsibility for any wrongful conduct of its military and the GMMRA: Subject to Claimants establishing a wrongful failure by the military or the GMMRA to provide FPS in accordance with CIL or Libya’s obligation under the Treaty, the Tribunal concludes that Libya bears responsibility for such wrongful failure.

Question (c): Did Libya’s Military or the GMMRA fail to respond to Claimants’ requests for protection in February and March 2011?

7.7.80 This question can be answered shortly. As regards the military, the Tribunal has concluded that TTJV requested the commander of the Libyan military unit stationed in Kufra City to provide it with protection at its pipeline camps on 21 February 2011 (and perhaps again on 23 February). It is also common ground that the protection requested was not provided.

²²³ Tayash Second Witness Statement, ¶ 39.

7.7.81 As regards the GMMRA, the Tribunal has concluded that a request for protection was made to the GMMRA by TTJV in its letter of 7 March 2011.²²⁴ However, this was the first and only request for protection that Claimants made to the GMMRA prior to the entry into force of the Treaty. The request was made in the following terms:

*“... due to our compulsory absence from the Country ... we are not in a position to properly care for and protect ... Materials, supplies and Equipment that we had brought to the Site ... We therefore invite and urge you to organize and take appropriate controls and measures for ensuring safety ... of the existing or remaining Contractor’s supplies, equipment and facilities.”*²²⁵

7.7.82 On 26 May 2011, TTJV again wrote to the GMMRA. It noted that no response had been received to its letter of 7 March. It stated its understanding that: (a) the state of unrest was still continuing; (b) its “installations, plant equipment, facilities and properties have been vandalized, stolen or damaged.”; and (c) although the GMMRA may have recovered “some of our equipment within their yards”, “the region between Sarir and Kufra is still inaccessible and non-safe.”²²⁶

7.7.83 It is not disputed that the GMMRA did not respond to TTJV’s 7 March letter until 18 August 2011. The GMMRA’s response made no mention of the above request made in the 7 March letter. It simply acknowledged receipt of that letter, informed TTJV that *force majeure* conditions were still prevailing and recommended postponement of the meeting that had been requested until conditions became stable.

Question (d): Do Claimants have the substantive right to pursue claims directly against Libya for breach of obligations imposed on States under CIL?

7.7.84 We have concluded in 7.4 above that the Tribunal has jurisdiction *ratione temporis* under the provisions of the Treaty to hear a dispute in this case in which Claimants assert the right to pursue CIL claims directly against Libya. But that conclusion in relation to the

²²⁴ Although this letter is dated 7 March 2011, it would appear to have been sent only on 13 March 2011. See Claimants’ letter of 14 July 2011, Exhibit C-069, Reference line.

²²⁵ Exhibit C-043.

²²⁶ Exhibit C-044.

Tribunal's jurisdiction *ratione temporis* and the scope of Articles 8(1) and 8(2) of the Treaty says nothing in relation to whether Claimants can succeed substantively on (or have standing to assert) such a claim.

7.7.85 Respondent argues that “absent a *lex specialis*, the only way that an individual can obtain a remedy on the international plain [sic] for breach of a rule of customary international law is via the mechanism of diplomatic protection. And diplomatic protection can only be engaged by the individual State of nationality.”²²⁷ It further argues that Claimants have not established that “there [has] been a change in the customary international law of diplomatic protection so as to allow individuals such as the claimants to invoke customary norms without the enter session [sic] of the State.”²²⁸

7.7.86 We do not agree. Claimants are not seeking the exercise of diplomatic protection, nor are they exercising diplomatic protection themselves (nor can they). Neither are they claiming that customary international law on diplomatic protection has changed. What they are claiming is that: (a) individuals enjoy rights under customary international law; and (b) such rights can be invoked by these individuals in a competent forum. In the context of the case, Claimants are claiming that their right to the minimum standard of treatment of aliens can be invoked before this Tribunal.

7.7.87 On the first point, the International Law Commission has observed that individuals enjoy rights under customary international law:

“In the early years of international law the individual had no place, no rights in the international legal order. Consequently, if a national injured abroad was to be protected, this could be done only by means of a fiction- that an injury to the national was an injury to the State itself. This fiction was, however, no more than a means to an end, the end being the protection of the rights of an injured national. Today the situation has changed dramatically. The individual is the subject of many primary rules of

²²⁷ Transcript, Day 5, p. 58/18 - 22.

²²⁸ Transcript, Day 5, p. 57/1 - 4.

international law, both under custom and treaty, which protect him at home, against his own Government, and abroad, against foreign Governments (Tribunal's emphasis)".²²⁹

7.7.88 The International Court of Justice²³⁰ and other investment tribunals²³¹ have also concluded that individuals enjoy rights under international law. The Respondent appeared to concede as much.²³²

7.7.89 On the second point, *i.e.* that CIL rights can be invoked before us, we recall that Article 8(2) of the BIT does not impose any limitation on the scope of disputes before us other than requiring that those disputes must be "in connection with his [the investor's] investment". This means that, as long as the dispute before us is "in connection" with an "investment" as defined in the BIT (here it is), we have the jurisdiction to resolve that dispute, which is what we held above.

7.7.90 The Tribunal considers that Respondent was not able to substantiate its case that international law prohibits an individual from itself seeking relief directly from a State in respect of rights conferred on that individual in circumstances where a forum exists that has jurisdiction over such claims. Respondent cited the "law of diplomatic protection", but recognised that an investment treaty may provide an exception.²³³ Further, the rules on diplomatic protection provide that individuals may well resort to forums other than

²²⁹ Exhibit RLA-138, ILC Commentary to Article 1, ¶ 4.

²³⁰ Exhibit CLA-268, *Interhandel, Switzerland v United States*, Preliminary Objections, Judgment, ICJ GL No 34, [1959] ICJ Rep 6, ICGJ 171 (ICJ 1959), 21st March 1959, United Nations; International Court of Justice; Exhibit CLA-270, *Avena - LaGrand (Germany v. USA)*, Merits, Judgment of 27 June 2001, [2001] ICJ Rep. 466; Exhibit CLA-269, *La Grand - Avena and Other Mexican Nationals (Mexico v. USA)*, Merits, Judgment of 31 March 2004, [2004] ICJ Rep. 12.

²³¹ Exhibit CLA-064, *CMS Gas Transmission Company v. Republic of Argentina*, ICSID Case No. ARB/01/8, Award on Jurisdiction, 17 July 2003.

²³² Transcript, Day 5, p. 59/16 - 21 ("[Respondent:] I am not defending the proposition that international law has not changed and that there have not been examples where individuals now have rights directly that they can exercise under international law.").

²³³ Transcript, Day 5, p. 60/22 - 61/6 ("[Tribunal:] Where does customary international law say: but that investor that is entitled to that protection may not itself seek remedy directly from the State? [Respondent:] That is the law of diplomatic protection: that an individual cannot directly sue the State that it is being harmed by. It has to invoke - - it has to ask its home State to espouse a claim for diplomatic protection. Unless there is an investment treaty."); Transcript, Day 5, p. 61/15 - 23 ("[Respondent:] [I]t may be the harm to the individual, but the only party that has standing to bring that claim is a state, outside the investment treaty").

those available for diplomatic protection to seek redress for internationally wrongful acts.²³⁴

7.7.91 The Tribunal does not agree that the consequences of recognising Claimants' standing to bring their customary international law claims would mean opening the "floodgates" such that "interstate environmental obligations can now be prosecuted by the investor" or that "an investor can use international trade law disputes and bring them under the BIT". Article 8 of the BIT sets several criteria which must be satisfied before a CIL claim can be made before an investment tribunal constituted under Article 8: there must be a qualifying "investment" made by a qualifying "investor". The dispute between that investor and the host State of the investment must be in "in connection with" such an investment. Further, situations like the present one – where the claim relates to a wrongful act committed before the treaty's entry into force – will only arise if the claims are within the temporal scope of the treaty. Finally, the customary international law right being claimed must be one which is conferred on an individual. Rights in international trade law or international environmental law are usually conferred on States and not on individuals.

7.7.92 The Tribunal thus concludes that Claimants have the ability to bring CIL claims against Libya for alleged breaches that predate the entry into force of the Treaty. In the circumstances, the Tribunal will assess whether Claimants have established that Libya breached its due diligence obligation under CIL.

Question (e): Did Libya breach its obligation of due diligence under CIL by a failure to provide FPS before the entry into force of the Treaty?

7.7.93 Claimants say, in summary, that Respondent breached its CIL FPS obligation by its failure to provide security between 20 February 2011 and 6 March 2011 so as to enable

²³⁴ Article 16, Draft Articles on Diplomatic Protection: "The rights of States, natural persons, legal persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injuries suffered as a result of an international wrongful act are not affected by the present draft articles."

Claimants to collect and move their equipment (materials, supplies, etc.) to the Sarir Manufacturing Plant where it would have been safe and persevered from degradation.²³⁵

7.7.94 Claimants contend that:²³⁶

- (a) they made a number of requests for security during this period;
- (b) Respondent had sufficient levels of military and security personnel in the Kufra district that could have provided the required security;
- (c) during the time Claimants required security, the Kufra district in the vicinity of the Project was stable; and
- (d) Respondent's defence of *force majeure* lacks merit.

7.7.95 For its part, again in summary, Respondent says that it did not violate any obligation to provide security (whether under CIL, before the Treaty entered into force, or under the Treaty).

Stability of the Kufra District at the Relevant Time

7.7.96 In answering this question, it is sensible first to deal with Claimants' exaggerated claim that the Kufra district in and around Claimants' camps was stable during the last two weeks of February 2011. It clearly was not on Claimants' own evidence.

7.7.97 Without the need for a detailed reprise, Claimants testified to repeated visits to their camps (from 16 February onwards, first at night but then during the day) by groups of armed looters carrying AK 47's who demanded supplies, fuel and equipment. The looters fired their weapons to show their intention to get what they wanted. TTJV was forced to hand over supplies, personal possessions and vehicles. Claimants also testified that the very soldiers whose job it was to protect the Project and its facilities (*i.e.*, soldiers from the GMMRA Security Battalion), looted them, rather than protected them.

²³⁵ Claimant's Skeleton, ¶¶ 38, 52, 54 & 70(i).

²³⁶ *Ibid.*, ¶¶ 37-43, 50-54, 66-70.

- 7.7.98 In the face of a clear evidentiary record, the Tribunal is bound to reject the opinions expressed by Claimants' military experts, Col. Pusztai and Dr Gaub, who maintained that Kufra remained stable at this time and that the devastating effects of the revolution against the Gaddafi regime were limited to the North Eastern coastal cities and region. Their opinions were contradicted by the evidentiary record, not least by Claimants' own evidence.
- 7.7.99 Col. Pusztai was also asked by members of the Tribunal why (if the Kufra district in the vicinity of Claimants' camps was, in his own words "a very safe place" at the time),²³⁷ the military, the police, or the armed forces of any description, did not stop the looting immediately?²³⁸ In response, Col. Pusztai said that he could not understand why the military "did not stop this from the very beginning, it would have been easy."²³⁹
- 7.7.100 Col. Pusztai also sought to persuade the Tribunal that the looting that occurred at Claimants' camps was not caused by or directly connected to the revolution. Rather, he contended that Claimants were targeted because there was the opportunity.²⁴⁰ Col. Pusztai's testimony on the point, as well as on other matters, appeared closer to advocacy on behalf of Claimants than the provision of an independent expert opinion. Based on the evidentiary record, his contention that the looting Claimants suffered in February 2011 was not directly related to the revolution was absurd.
- 7.7.101 During her cross-examination, Dr Gaub's attention was drawn to an interview with Isa Abd-al-Majid, leader of Al-Tabu Front for the Salvation of Libya, reported on 25 February 2011 by the BBC's Middle East Monitoring Services. In the interview, Mr al Majid stated that the area stretching from Kufra City in the east to the border with Sudan was now virtually under the control of the Al-Tabu tribe, that there had been massive demonstrations in all of the regions towns, and, although the regime threatened to

²³⁷ Transcript, Day 3, Pusztai, p. 99/19-24.

²³⁸ Ibid, pp. 102/16-103/3.

²³⁹ Ibid, p. 103/2-3.

²⁴⁰ Ibid, pp. 100/12-102-4.

respond, “all of its security men and Revolutionary Committee’s henchmen fled the region.”²⁴¹

7.7.102 When Dr Gaub was asked by Mr Balloch, assuming that there were regime loyal troops still in Kufra, whether it would not have been reasonable to expect them to put down the demonstrators, she responded:

“it’s a mystery why they wouldn’t have done that: but it’s the same mystery for why, when they had the capacity, they didn’t provide security to TTJV, because they were in the region.”²⁴² (Tribunal’s emphasis)

7.7.103 Col. Pusztai’s and Dr Gaub’s inability to explain why the military unit in Kufra did not respond to Claimants’ request(s) for protection calls into question the reliability of their estimates of the number, capability and availability of troops based in Kufra City at the relevant time.

7.7.104 It seems to the Tribunal that the military’s failure to maintain order at the Project sites and Claimants’ camps, regardless of having been requested to do so, is consistent with the district having become highly unstable and lawless, and inconsistent with there being ample Libyan forces on hand who could easily have maintained or restored order.

Factual Context in which Respondent was Expected to Exercise Due Diligence

7.7.105 Before turning to the question of possible breach of the due diligence standard it is helpful to set out other relevant facts.

7.7.106 Mr Walker-Cousins testified that very shortly after the revolution began, and during the relevant period in February 2011, Libya’s ability to maintain stability and to provide protection and security had been fatally fractured, including in the Kufra district. He expressed his opinion that: (a) command and control of the Libyan Army in the east had rapidly deteriorated during the events of February; (b) the priorities of those armed forces that remained in the area (including Kufra) were rapidly changing; and that (c) except in

²⁴¹ Exhibit FG-049, pp. 1-2.

²⁴² Transcript, Day 4, Gaub, pp. 30/17-31/1.

military units that had been protected from coup-proofing, most soldiers literally melted away by deserting and going home.

7.7.107 The Tribunal considers Mr Walker-Cousins' statements to reflect closely the actual state of affairs in Libya at the time, not only in Benghazi and the coastal areas, but all the way south to Kufra City.

7.7.108 Col. Pusztai testified that: (a) the first defections from the army unit in Kufra City probably occurred on about 20 February; and that (b) defections in Kufra were confirmed on 24 February 2011. This supports Mr Walker-Cousins' assessment of the situation on the ground in Kufra at the relevant time.

7.7.109 In her testimony at the hearing, Dr Gaub sought to explain her earlier writing (in which she referred to massive desertions from the Libyan army in the first month of the revolution) by stating that she had been referring to what was happening in the coastal region (where there was heavy fighting from the start) and not Kufra. However, Mr Halicilar gave evidence about TTJV's convoy being attacked after it left the Sarir camp and being stopped by rebels at every major town, starting at Jālū, as it made the 600+ kilometer journey to Benghazi.

7.7.110 Mr Halicilar was on the ground, Dr Gaub was not, and Mr Halicilar's evidence not only shows that the revolution was affecting the south east (not just the north east at the time), but also that the revolutionaries had apparently taken control of the route north from Sarir by 25 February 2011.

7.7.111 On 21 February 2011, the day after both the GMMRA's and TTJV's compounds were attacked and looted in Benghazi (and the same day that Claimants sought protection for its camps from Col. Zarruq), the commanding officer of the GMMRA Security Battalion, Col. Ramadan Nasser abandoned his post and returned to his home.

7.7.112 On 22 February 2011, the Minister of the Interior, General Abd al-Fatah Younis Abed-Obaydi (who was also Libya's most senior Army General in the east) joined the rebels, assuming immediately the role of Chief of Staff of the armed forces under the authority of what was to become the NTC.

- 7.7.113 A word search on Twitter results for “Kufra” for the date of 23 February 2011 provided two tweets with links to videos on that date on YouTube. One of the videos shows protestors purporting to be from Kufra declaring that the city and its airport had been liberated by revolutionaries on that date. The others purported to be from local rebel authorities, reporting that they had interdicted guns and money at Kufra airport destined for pro-Gaddafi elements.
- 7.7.114 On 24 February, defections from the military unit in Kufra City were confirmed and the BBC live feed news service reported that the Arab broadcaster, Al-Arabiya, was reporting that Kufra City had fallen to protesters. Col. Pusztai testified that Col. Zarruq and his battalion joined in the revolution sometime between late February and mid-March 2011.
- 7.7.115 It is against this background (with fighting intensifying each day in the north, death tolls rising and foreigners being evacuated from all over Libya and with chaos rapidly growing) that Libya’s ability to respond to Claimants’ request(s)/requirements for security in the relevant period is to be analysed. This is because it is common ground that in assessing the exercise of the obligation of due diligence, a tribunal may examine the availability of resources of the Host State for preventing the harm.
- 7.7.116 At the relevant time, Claimants had no plan in place to deal with the need to evacuate their personnel from the desert, and to collect and protect their machines, equipment and supplies, etc. However, for the purpose of these proceedings, TML’s Machinery and Equipment Coordinator in Istanbul, Mr Asil Özder, was directed by Claimants’ counsel to determine how, had protection been available, Claimants could have collected TTJV’s equipment from the desert and relocated it at the Sarir Pipe Manufacturing Plant. Accordingly, in early 2017, Mr Özder, prepared what he and Claimants considered to be a feasible (albeit hypothetical) plan that could have been implemented in February 2011 (“**Özder Plan**”) which would enable the collection and protection of TTJV’s machinery and equipment. During his examination at the Oral Hearing, Mr Özder admitted that he had no previous experience in preparing an evacuation plan such as this for use in circumstances of a civil war or revolution. The Özder plan, had it been implemented,

would have required 14 days to complete the job. However, this assumed that it was put into operation on 20 February 2011. Having regard to Mr Özder's estimates of the number of TTJV personnel required to get the job done in 14 days and how long such personnel would have been available (see below), it is clear that to begin the task several days later would have required more than 14 days for its completion.²⁴³

7.7.117 To execute his plan, Mr Özder calculated that until 24 February, TTJV would have had 175 operators, 220 heavy transport drivers and a labour force of 700 to assist in these operations. After 24 February, since a significant number of personnel would have been evacuated, he assumed TTJV would have had available 260 heavy transport drivers and operators, 50 technicians and other (no number specified) personnel to work in two 12 hours shifts (*i.e.*, 24 hours a day).

7.7.118 Mr Özder calculated that 18 convoys would have been needed to move the machinery and equipment. Although he provides no separate estimate for the relocation of TTJV's non-fixed infrastructure, furniture, office equipment, tools, construction materials and spare parts to the Sarir Pipe Plant, he suggests that moving these materials would not have taken a long time.

7.7.119 What protection Claimants say they required to allow them to move their equipment to safety at the Sarir Pipe Plant, and for it to be guarded thereafter was something of a moveable feast, in the sense that the number of military personnel they say were needed became lower when it became apparent just how difficult it would have been for Libya to have been able to supply the numbers originally thought to be required.

7.7.120 In his first report (of 26 May 2017 - submitted two years before the hearing), Col. Pusztai provided his professional assessment on Claimants' requirements for the protection of their personnel and their property. His first assessment (which included an estimate of the number of troops required) was evidently made before he had seen Mr Özder's plan which showed the time required for dismantling, preparation and convoying the

²⁴³ Having regard to Mr Hendekli's testimony (Third Statement, ¶ 2(b)) that the job "to properly and safely gather all the equipment and transport it to Sarir ... would require a significant number of properly trained personnel" (Tribunal's emphasis), the task would likely have required significantly more than 14 days.

equipment to Sarir. Nevertheless, he considered that about three infantry platoons (86 soldiers) would have been required for convoy protection.²⁴⁴ On top of this, he was of the view that about eight troops per camp would be required to protect the camps themselves whilst the equipment was being collected from the pipeline.²⁴⁵ With five principal camps, this would have required about 40 additional soldiers. And to protect the equipment after TTJV evacuated to Turkey (i.e., once it had been transported to the safe site in Sarir), he considered that about a further 30-40 soldiers would be required throughout the revolution.²⁴⁶

7.7.121 Without counting the 30-40 soldiers that would need to be deployed at Sarir for the duration of the revolution, Col. Pusztai's estimates meant that Libya would have had to make available about 136 soldiers for as long as it would take to gather up TTJV's equipment and relocate it to Sarir.

7.7.122 When account is taken of the fact that Col. Zarruq was first asked by TTJV for protection at the camps on 21 February, the earliest possible start date for the Özder plan would have been 22 February. Had Col. Zarruq been asked to provide the protection Claimants now say was required, he would have been faced with providing 136 soldiers from his unit from 22 February through 8 March. Obviously, a very big ask at any time, let alone when the country was being engulfed by revolution.

7.7.123 Col. Pusztai filed a second report on 31 May 2018. In it, he repeated the exact same troop numbers required for Claimants' protection.

7.7.124 Respondent filed a statement from Mr Fellows (dated 30 August 2018) with its Rejoinder. Mr Fellows (a former UK infantryman with substantial convoy experience, who was currently employed as a security, crisis and emergency adviser), commented, *inter alia*, on the military presence in Kufra City and the Özder plan. Mr Fellows had been responsible for safety and security operations for Wintershall, a German contractor, on a remote drilling operation south of Kufra City, from October 2009 through January

²⁴⁴ Pusztai First Report, ¶¶ 69-70.

²⁴⁵ *Ibid*, ¶ 68.

²⁴⁶ *Ibid*, ¶ 71.

2011. He was based in Kufra City. As a former professional soldier and in his responsibilities for Wintershall, Mr Fellows organised and participated in multiple heavy equipment and vehicle convoys in harsh and hostile environments over many years. Having been asked to review the Özder plan, he considered that while the draft of a basic plan might have been sketched out in a few hours, it would have required a matter of days to put a fully implementable plan together.²⁴⁷ His own experience in conducting a rig move in Libya with approximately 100 vehicles had required an organisation time of about three weeks.²⁴⁸ Mr Fellows also questioned whether TTJV would have had the workforce to manage the convoys of the size assumed by Mr Özder in the last week of February having regard to Mr Halicilar's evidence about the number of TTJV staff that were leaving the camps at that time.

7.7.125 Claimants thereafter filed an expert opinion of Lt. Col. Matthew Johnson (Ret.) with their Sur-Reply on 15 January 2019. Col. Johnson, a former US infantry officer with experience organising convoys, commented on the witness statement of Mr Raymond Fellows. Amongst other points, Col. Johnson opined that: (a) a knowledgeable leader like Mr Halicilar could plan the requirements for the convoy operation in a matter of hours and certainly less than a day;²⁴⁹ (b) the time frame to implement the Özder plan (*i.e.*, 14 days) was not unreasonable;²⁵⁰ and (c) a small military team (or even police) could deter the threat faced by TTJV, made up of 4-5 soldiers in one vehicle per convoy or a squad of 10 soldier in two vehicles per convoy.

7.7.126 Before turning to the question of the availability of troops in the Kufra district that might plausibly have responded to a request for protection (of the nature that Claimants now say was required) in the last week or so of February, it is useful to set out the Tribunal's conclusions concerning the Özder plan and the troops that would have been required to protect the relocation of TTJV's materials and equipment to the Sarir Pipe Plant.

²⁴⁷ Fellows First Statement, ¶ 5.24.1.

²⁴⁸ *Ibid*, ¶ 5.24.2.

²⁴⁹ Johnson First Statement, ¶ 62.

²⁵⁰ *Ibid*, ¶ 64.

- 7.7.127 The Tribunal does not accept Col. Johnson's opinion that Mr Halicilar and his team could have put together in a matter of hours the sort of complex plan that was obviously needed if TTJVs machinery, equipment and other materials were to be collected from the pipeline work sites and the four principal camps at the pipeline for relocation to Sarir. The Tribunal considers that the task would have taken a couple of days planning at a minimum. There is no credible evidence that any thought had been given to the matter by Claimants before 21 February, or indeed after. Indeed, Claimants had initially hoped to evacuate TTJV's Turkish personnel by air from Kufra City on 22 February.
- 7.7.128 Second, even assuming a plan could have been put together by 23 February, Mr Özder's assumptions on the availability of an adequate workforce to carry out the plan seems overly optimistic having regard to the daily departures of Libyan workers from the camps. This would inevitably have meant that the 14 days allowed for the relocation would have been exceeded.
- 7.7.129 Third, while it is unrealistic to put a precise number on the troops that would have been needed to protect the camps and the convoys over the more than two weeks that would have been required, the Tribunal finds that the smaller numbers later put forward by Col. Johnson and Col. Puztai (in the former's statement and in the evidence both gave at the hearing) seemed designed to address the possibility that Col. Puztai's first estimates might have been out of reach in terms of the number of combat ready troops that were likely to be available in the area.
- 7.7.130 These conclusions are to be borne in mind in considering the question of whether Libya can be said to have breached its due diligence obligation by failing, in response to the non-specific request(s) made to Col. Zarruq on 21 (and possibly 23) February, in the circumstances then prevailing in Libya generally and the Kufra City region particularly, to provide Claimants with somewhere between 100-140 soldiers, starting on about 23 February (and more realistically, several days later), for something over two weeks, and 30-40 soldiers thereafter for the duration of the revolution.
- 7.7.131 The Tribunal concludes that the answer to this question must be no.

The Availability of Resources of Libya to Prevent the Harm Complained of

- 7.7.132 In an ideal world, Respondent would have presented testimony from Col. Zarruq, who could have testified as to the number of combat ready troops that actually were available to him in Kufra City at the time and why he did not respond positively to the request for protection made to him on 21st February.²⁵¹
- 7.7.133 But, as counsel for Respondent explained at the hearing, Respondent tried to contact Col. Zarruq during the course of these proceedings and was not able to do so.²⁵² Moreover, by the time cross examination was completed, of the four witnesses who professed to have some idea of troop numbers in Kufra City at the time (Col. Pusztai, Dr Gaub, Mr Walker-Cousins and Mr Fellows), there appeared to be general agreement that the number of combat ready troops was almost certainly no more than 300 and could well have been less.
- 7.7.134 Having regard to the number troops that were likely to have been available in Kufra City at the time, and based on an objective consideration of the prevailing circumstances in the region of Kufra City and Libya generally, the Tribunal considers that it would have been entirely unreasonable to have expected Col. Zarruq to deploy approximately half (perhaps more) of his operation-ready troops to enable Claimants to gather up and relocate their machinery and equipment as contemplated by the hypothetical Özder plan. But more to the point, no one representing the State, including Col. Zarruq, had ever been asked to provide protection of this nature.²⁵³

²⁵¹ The Tribunal does not consider the absence of testimony from Col. Zarruq to be of particular concern, given that: (a) there ended up being general agreement as to the likely number of troops available to him; and (b) the question of whether Libya failed to meet its due diligence obligations is to be assessed objectively under the circumstances. Thus, Col. Zarruq's subjective reasons for not responding to Claimants' request of 21 February is of secondary relevance.

²⁵² Transcript, Day 4, pp. 194/15 – 195/1.

²⁵³ Another way of looking at the question is to consider whether it would have been reasonable for Claimants to request protection and security from Libya in late February 2011 such as would have allowed TTJV to have collected up its equipment, machinery, etc., from its camps and from the desert and move it over 14 plus days to a safe location in Sarir. See *Lauder*, Exhibit RLA-041, ¶ 308 and *Saluka*, Exhibit CLA-019, ¶ 484. The answer to that question must also be no in the circumstances that existed at the time. To suggest that such a request for protection from a State engulfed in a revolution would have been reasonable is tantamount to converting the CIL obligation of due diligence into a State's strict liability for damage to a foreign investors' investments that may be foreseen to be at risk from unlawful behaviour.

7.7.135 As noted above, Claimants accept that, in assessing the exercise of the obligation of due diligence, a tribunal is entitled to examine, *inter alia*, the availability of resources of the host State for preventing the harm complained of. This we have done, and it is on this basis that we have reached the conclusion that Respondent cannot properly be held responsible for the damages now claimed by Claimants by reason of Libya's failure to meet the due diligence standard.

7.7.136 The Tribunal also rejects Claimants' assertion, to the extent it is made, that the due diligence standard requires any State, no matter what its resources or level of development, to provide the same degree of protection and security to that which should legitimately be expected to be secured for investors by a reasonably well organised modern state. There is ample authority for the proposition that there is no one universally applicable standard.²⁵⁴ As stated by Newcombe & Paradell:

“although the host state is required to exercise an objective minimum standard of due diligence, the standard of due diligence is that of a host state in the circumstances and with the resources of the state in question. This suggests that due diligence is a modified objective standard – the host state must exercise the level of due diligence of host state in its particular circumstances. In practice, tribunals will likely consider the state's level of development and stability as relevant circumstances in determining whether there has been due diligence. An investor investing in an area with endemic civil strife and poor governance can not have the same expectation of physical security as one investing in London, New York or Tokyo.”²⁵⁵ (Tribunal's emphasis)

7.7.137 In Brownlie's Principles of Public International Law, Crawford provides a useful summary of the principles of international responsibility that apply to a variety of situations involving revolution and civil war.²⁵⁶ He refers to (and endorses) the first of five principles extracted by McNair from the reports of the legal advisers of the British

²⁵⁴ See Statement of Rejoinder, ¶¶ 474-481.

²⁵⁵ *Law and Practice of Investment Treaties*, p. 310 (2009)

²⁵⁶ Exhibit CLA-093, 8th Ed. pp. 551-552.

Crown as the responsibility for the consequences of insurrection or rebellion – the exact issue here in question. The first principle is that:

“A state on whose territory an insurrection occurs is not responsible for loss or damage sustained by a foreigner unless it can be shown that the Government of that State was negligent in the use of, or in the failure to use, the forces at its disposal for the prevention and suppression of the insurrection.”

7.7.138 The Tribunal concludes there can be no question that Libya was negligent in its failure to provide the troops that would have been required to collect and move Claimants’ machinery and equipment to Sarir in circumstances where no such request had in fact been made and when Libya would not have had the required resources available if it had been made.

7.7.139 Crawford points out that the general rule of non-responsibility in such circumstances rests on the premise that even objective responsibility requires a normal capacity to act, and a major internal upheaval is tantamount to a *force majeure*. Although there is also general agreement that the rule of non-responsibility will not apply where the government concerned has failed to show due diligence, Crawford observes that if due diligence is taken to denote too high a standard of conduct, the due diligence exception would overwhelm the general rule of non-responsibility in such circumstances. Importantly he notes that “there is no modern example for the negligent failure to suppress insurgents.”²⁵⁷

7.7.140 We need to deal only briefly with Col. Pusztai’s assertion that Libya had ample other forces it could call on (other than army battalion based in Kufra) to provide the protection required to implement the Ózder Plan. The Tribunal rejects that assertion. In doing so, we accept Mr Walker-Cousin’s statement that the Kufra City police did not operate in the desert. As regards the availability of the limited number of the GMMRA Security Battalion (less than 100) that were assigned to protect the Project’s assets in the desert, it is clear from the record that, by 22 February, those forces could no longer be relied upon,

²⁵⁷ Ibid, p. 552.

other than the soldiers who were stationed at the GMMRA's Sarir Pipe Plant, and their role was to protect that plant. And in the conditions that then existed in the rest of Libya, the suggestion that Libya would have been able to deploy sufficient forces to the Kufra district from elsewhere is not credible.

7.7.141 The Tribunal's conclusion is that Libya did not breach its obligation to provide FPS when it failed after 21 February to provide the military forces required to collect and relocate Claimants' machinery, equipment and supplies applies equally to the only other request for protection that has been shown to have been made – the request contained in TTJV's letter to the GMMRA dated 7 March 2011 (but delivered on 13 March 2011). This is because, by that date, the circumstances in Libya (and in Kufra) had deteriorated even further and the ability of Libya to provide the protection now said to have been required was almost certainly non-existent.

Alleged breach of FPS obligation due to events at Tazerbo Camp on 21 February 2011

7.7.142 Finally, the Claimants further assert that Libya breached its FPS obligation as a result of the conduct of its military at the Tazerbo Camp on 21 February 2011. The Tribunal has assessed this assertion on the basis of the evidence on record in the context of its discussion of the requests for protection, specifically of Request No. 2 in paragraphs 7.7.23 to 7.7.32, to which it refers. It has concluded there that there was insufficient evidence to hold that a breach had been committed.

Question (f): Force Majeure and Necessity

7.7.143 Having concluded that Claimants have not established Libya's breach of its due diligence obligations it is not necessary for the Tribunal to address separately whether wrongfulness of such a breach is precluded due to *force majeure*, and the Tribunal does not do so. However, for completeness it may be helpful to the parties to indicate that the Tribunal considers that Respondent had the better side of the question such that the Tribunal would have concluded that the defence had been established. For the same reason, the Tribunal does not deal with Respondent's defence of necessity.

7.8 **Has Respondent Violated Article 2(2) of the Treaty by Failing to Provide FPS?**

7.8.1 In both their written submissions and at the Oral Hearing, Claimants' case in relation to Libya's alleged failure to provide FPS was focussed on the period of mid to late February 2011, *i.e.*, before the coming into force of the Treaty: hence the importance of their contended-for standing to bring a direct claim against Libya, based on alleged breach of CIL.

7.8.2 By the time Claimants filed their Skeleton Argument immediately before the Oral Hearing, they had come to a clear view of the relevant dates for the Tribunal's assessment of whether Libya had violated its duty to protect. They stated:

“the relevant dates for assessing whether Respondent violated its due diligence obligation is from 20 February 2011 to 6 March 2011 (the dates in which Claimants would have been able to move their equipment to Sarir had security been provided) or at the latest 19 March 2011 ...” (Tribunal's underlining – Claimants' Skeleton, ¶39)

“Thus, after receiving requests for protection, and at the very latest upon receipt of Claimants' letter of 7 March 2011, Respondent had a duty to provide protection,” (Tribunal's underlining - bolded word italicised in original – Claimant's Skeleton, ¶62(a))

“Ultimately, any analysis of the time period after early March 2011 is irrelevant: it is undisputed that Claimants' equipment would have been protected in Sarir by the troops that were already present.” (Tribunal's emphasis – Claimants' Skeleton, ¶70(v))

7.8.3 Given that these dates all precede the effective date of the Treaty, these submissions are fatal to Claimants' claims based on an alleged breach of Article 2(2) of the Treaty which came into force only on 22 April 2011. Essentially Claimants are saying: “Had we been

given the protection we needed in late February or early March, our machinery and other assets would not have been stolen or damaged, but we were not and this caused our loss.”

7.8.4 The reason Claimants paid so much attention to the period from 20 February to 6 March is not only because this is when the loss of its equipment could have been prevented, but also because it marks the start of a very short period in which virtually all of their machinery and equipment was stolen or damaged. Mr Hendekli testified that following Claimants’ evacuation to Istanbul, the GMMRA had been able to collect some of Claimants’ machinery and equipment and deliver it to the Bozerik Camp by about September/October 2011.²⁵⁸ It was on this basis that Claimants stated, “By the time these efforts were made, the damages to TTJV’s assets were already significant and there was little left to safeguard.”²⁵⁹ (Tribunal’s emphasis)

7.8.5 One argument Claimants advance in support of the breach of Article 2(2) is to suggest that the failure to protect before the Treaty came into force still counts as a Treaty breach on the basis that Libya’s allegedly unlawful failure to protect in February 2011 was of a continuing character which persisted until after the Treaty came into effect.²⁶⁰ Claimants rely on Article 14.2 of the ILC Articles which provides:

“The breach of an international obligation by an act of a State having a continuous character extends over the entire period during which the act continues and remains not in conformity with the international obligation.”

7.8.6 To show that Libya’s alleged failure to exercise its duty to protect continued after 22 April 2011, Claimants rely on the joint inspections conducted in 2012 which revealed extensive theft of and damage to Claimants’ assets, and that Libya had done nothing to protect its assets between February 2011 and March 2012. Given the extent of the damage, Claimants say it is reasonable to conclude that some of this theft and damage occurred after the Treaty’s effective date. Moreover, the inventory conducted in 2014 revealed that additional equipment and assets of Claimants were damaged, destroyed or

²⁵⁸ Hendekli First Statement, ¶ 17. *See also*, TTJV’s letter of 26 May (C-044), which notes that by then the GMMRA had recovered some of its equipment and taken it to its yards.

²⁵⁹ Statement of Claim, ¶ 226.

²⁶⁰ Statement of Claim, ¶¶ 137 and 144-147.

went missing after 2012. This also demonstrates that Libya failed to protect Claimants' investments after the Treaty's effective date.

- 7.8.7 There are two obvious difficulties with Claimants' case based on continuing breach; the first being that the Tribunal has already concluded that Respondent's failure to respond positively to the request(s) for protection made by Claimants during the relevant period did not contravene its obligation of due diligence. Thus, the predicate for there to be a breach of a continuing character does not exist.
- 7.8.8 The second difficulty is that, even if we had concluded that Respondent had breached its obligation of due diligence between 20 February and 6 March 2011, it is impossible to see a failure to provide the troops required to allow for the collection and movement of Claimants' equipment to safety in late February 2011 as "an act of a State having a continuing character" within the meaning of Article 14.2 of the ILC Articles.
- 7.8.9 As the ILC notes in its Commentary to Article 14(2), "a completed act occurs "at the moment when the action is performed [or not performed]", even though its effects or consequences may continue." A continuing act, on the other hand, occupies the entire period during which the act continues and remains not in conformity with the international obligation ..." (Commentary (3)).
- 7.8.10 Whether a wrongful act is completed or has a continuing character will depend both on the primary obligation and the circumstances of a given case. Commentary 3 provides a number of examples of continuing wrongful acts; *i.e.*, the maintenance in effect of legislative provisions incompatible with a treaty obligation of the enacting State; the (continuing) unlawful detention of a foreign official; the (continuing) unlawful occupation of embassy premises; the maintenance by force of colonial domination; the unlawful occupation of the territory of another State; or, stationing armed forces in another State without its consent. Each of these can readily be distinguished from the alleged wrongful failure of Libya to provide the protection Claimants say was required to enable them to move their assets to safety in February 2011.

- 7.8.11 The Tribunal is of the view that even if we had concluded that Libya had breached its obligation of due diligence in late February or early March, any such breach would have been completed when Libya failed to provide the protection required when so requested.
- 7.8.12 The consequences of the Tribunal's conclusion (that Respondent's failure to respond to Claimants' requests for protection prior to the entry into force of the Treaty was neither a breach, nor a breach of a continuing nature) is that, for Claimants to succeed on their Treaty based claim for breach of Article 2(2), they are required to establish: (a) an unlawful failure to protect after the 22 April 2011; and (b) that such a failure was the proximate cause of the losses for which they now claim compensation.
- 7.8.13 Before turning to whether the record provides sufficient support for any post-Treaty failure to protect, it is sensible to consider the evidence concerning the location and status of Claimants' assets which they say then required protection.
- 7.8.14 Perhaps the most obvious point to be made is that Claimants' machinery, trucks, equipment and supplies were left where they were to be found on 23 February 2011, when Claimants evacuated. Some of these assets were located in Claimants' desert camps and work sites, some in or near the pipeline trench, some assets had previously been left at the Benghazi office compound, some at TTJV's custom agent's farm outside of Benghazi and some trucks (those used to evacuate personnel from the desert) were left at the Benghazi docks.
- 7.8.15 Based on the testimony of Messrs Hendekli and Belashar, in the months that followed evacuation, some of the machinery and equipment was collected by the GMMRA and moved to the TTJV's Bozerik and Tazerbo Camps.²⁶¹ Mr Belashar also testified that the GMMRA employed guards to secure these two camps at this time and that they have continued in place until the present day. He was not cross-examined on these matters.
- 7.8.16 Mr Ödzer testified (although he had no personal knowledge of this at the time, having joined TML only in March 2013), that two representatives of TTJV from Istanbul

²⁶¹ Belashar, Statement in Contract Case ¶ 69; Hendekli Third Statement, ¶ 17.

(Messrs Akboga and Cingitas) made two short trips to Libya in April (2-3 days) and December (2 days) 2012 in order to assess the state of Claimants' camps, machinery and equipment and to see what was salvageable and what had been lost. Neither Mr Akbogaor nor Mr Cingitas gave evidence in these proceedings, but Mr Ödzer attached a copy of the latter's note book to his First Statement (in which Mr Cingitas recorded the details of his two visits). The notebook is found at Exhibit C-13.

7.8.17 Mr Cingitas' notebook records that by 2012, Claimants' equipment and machinery was spread out over 400 kilometers, located at each of TTJV's desert camps and work sites, as well as at the pipeline trench, at GMMRA's compounds or camps at Benghazi, Tazerbo and Sarir (the pipe manufacturing plant), in Kufra City, Tazerbo Town, Jalu Town and Ojera Town.

7.8.18 Thus, the second contextual point against which to assess any post-Treaty breach of duty by Libya to protect is that the assets which Claimants say should have been protected, were dispersed over many different locations spread out over more than 400 kilometers in the southern desert. This obviously goes to the reasonableness of any requests for protection that are said to have been made, as well as the likelihood of Libya having had available resources at the time to protect these assets, or to collect and protect them.

7.8.19 Against this backdrop, we turn to that assessment.

7.8.20 As regards such a failure to protect, the record is slight. In their written and oral submissions, Claimants say that the request for protection set out in their letter of 7 March 2011, was reiterated in their letter of 26 May 2011 (after the Treaty came into force) addressed to the GMMRA and copied, *inter alios*, to the Libyan Consulate in Istanbul. However, a careful reading of that letter reveals no reference whatever to any request for protection.

- 7.8.21 Three other requests are relied upon in Claimants' pleadings.²⁶² These are said to be found in letters sent to the GMMRA dated 3 July 2012 (C-135), 1 August 2012 (C-130), and 21 June 2014 (C-144).
- 7.8.22 The first two letters were written almost a year and a half after TTJV's evacuation, and about a year after the GMMRA had collected some of Claimants' machinery and equipment located at the trench work sites. They contain no request for protection of the sort Claimants said was required in February 2011, nor do they ask GMMRA for any help in locating, collecting or protecting any of the machinery and equipment that was left behind.
- 7.8.23 The first letter simply notes that the GMMRA was aware of the fact that TTJV's personnel were at that time staying in its Sarir Camp. It mentions that inspection works for the "machineries" in the area are ongoing and requests the GMMRA to provide two guards for TTJV's Sarir Camp gate – "one for the day one for the night time."
- 7.8.24 The letter of 1 August 2012 was simply a polite follow-up to the July letter. It refers to TTJV's earlier request for the two gate guards, and states that the guards have not yet been provided. The GMMRA is asked to give its attention to the matter.
- 7.8.25 Even if it is assumed that the two gate guards were not thereafter provided, any failure by the State in response to this request cannot possibly be said to have been causative of the loss for which compensation is now claimed, *i.e.*, compensation for the theft and environmental damage to over 1000 items of machinery and equipment (listed in Appendix A to Mr Ödzer's First Statement), most of which was then at other locations, and for damage to all of Claimants' camps and facilities.²⁶³
- 7.8.26 As regards the third letter, of 26 June 2014, which was sent during the advent of the "Second Libyan Civil War",²⁶⁴ it was written by TTJV in part to request the GMMRA for protection of its Benghazi office "and machinery, documents, etc. therein" (Tribunal's

²⁶² On further letter is referred to in Mr Ödzer's Second Statement (Exhibit C-120) who says it contains a request for protection for TTJV's asset in the period December 2012 – May 2014. However, it does not.

²⁶³ See Cross Expert Report on Quantum matters, ¶ 2.2.3.

²⁶⁴ Statement of Reply, ¶ 194.

emphasis), and in part to propose a new deadline for Change Orders to the Contract in connection with the stoppage of work in February 2011 and the plans for its resumption that had been under discussion between TTJV and the GMMRA for some months.

- 7.8.27 The request for protection was made, as the letter records, because security condition in Benghazi had again worsened, such that TTJV had felt obliged to close its office there and bring back its Turkish personnel from Benghazi to Turkey. The airport had also shut down at the time and the Turkish Consulate was again obliged to close.
- 7.8.28 While the letter clearly records a request by TTJV on that date seeking protection for its Benghazi office compound (and assets therein), there is no evidence on the record as to whether the requested protection was provided and, regardless of whether or not it was, whether any of the losses for which compensation is now claimed were the result of any such failure.
- 7.8.29 In the result, the Tribunal concludes that Claimants have failed to establish that any of the losses for which compensation is now claimed were caused by Libya's failure to respond to the only post-22 April 2011 requests for protection for which evidence was provided.
- 7.8.30 Although Claimants themselves say that the great majority of their loss occurred between February 2011 and September-October that year, the Tribunal accepts that Claimants suffered some further, relatively minor, loss of or damage to their equipment/machinery after that date. But in the absence of requests for protection which were denied without justification, this is not enough to call for a conclusion that such losses were the result of Libya's failure to provide FPS as required by Article 2(2) of the Treaty.
- 7.8.31 The difficulty in not linking a duty to protect to a reasonable, specific request to protect is illustrated by reference to Mr Ödzer's assertion in his second statement that: (a) 39 pieces of Claimants' equipment with a total value of \$1.9 million was stolen between the time the first inventory of Claimants' assets was prepared in 2012 and the May 2014 date of the last inventory; and (b) his review of the correspondence (between TTJV/GMMRA) indicates that this looting occurred when Libya had been requested to provide security.

- 7.8.32 The problem with Mr Ödzer's assertion is that the correspondence identified by him (Exhibit C-105, a letter from GMMRA to TTJV was written on 2 August 2010 (*i.e.*, pre-Treaty), refers to no request for protection having been made by TTJV but rather simply contains a request by the GMMRA to TTJV to consider renewing the employment contract of a Libyan citizen it had previously hired as one of its camp guards.
- 7.8.33 In addition, Mr Ödzer identifies the value for the 39 looted items by reference to his Appendix A spread sheet (Exhibit C-20 – the Ödzer Plan), but does not identify from which of the many locations the equipment was located in the 2012-2014 period the item was looted. And Exhibit C-20 provides no help, because it only identifies the location of the equipment listed as it was recorded in TTJV's records immediately prior to the evacuation.
- 7.8.34 Based on our conclusion that no breach of a duty to protect under international law occurred before the Treaty came into force, and that any failure to respond to the several post-Treaty requests identified above was not the cause of losses for which compensation is sought, it follows that the loss and damage to Claimants' equipment was not caused by any breach of duty by Libya. Rather, Claimants' loss arose as a result of their assets having been left where they lay (so-to-speak), where they were either subsequently pillaged by persons unknown or damaged by the desert environment.
- 7.8.35 It goes without saying that Claimants, and other foreign investors in Libya who found themselves in the same situation as a result of the 2011 Libyan revolution are entitled to the deepest sympathy for their losses. But in such a context, the applicable due diligence standard cannot be so broad as to require a State (whether or not requested to do so) to provide and direct its police or armed forces to locate, guard and maintain the assets of its various foreign investors (wherever they may have been left) after their owners were forced to flee the State in the face of a devastating civil war.
- 7.8.36 To define the scope of the obligation of due diligence in such a way would shift the onus onto a State facing civil war or revolution to show that it did not have available resources to locate and protect all of the assets belonging to foreign investors which, of necessity, had been left behind when they were forced to evacuate.

7.8.37 It is precisely because a foreign investor is not entitled to what would, in effect, be a State insurance policy in cases of civil war or revolution, that investors frequently take out commercial insurance policies to guard against such risk. A somewhat similar protection is occasionally found under a host State's law which provides for the possibility of a contractual adjustment to compensate for, or to off-set the effects of losses caused to the parties to a contract that were not anticipated at the time of contracting.

7.8.38 Indeed, Claimants sought (and the tribunal in the Contract Case plans to grant) a rebalancing of the Contract pursuant to Article 147(a) of the Libyan Civil Code²⁶⁵ so as to reduce to reasonable limits the obligations on TTJV that have become excessive because of the need to replace the equipment, facilities and materials that were lost, damaged and destroyed during the revolution and its aftermath. In doing so the Contract tribunal has concluded that any reasonable estimate based on the evidence before it would place the extra cost to be borne in completing the Contract at USD 68 million or more.²⁶⁶ In this manner, Claimants can expect to receive, albeit indirectly, some degree of compensation for their lost and damaged assets. However, they have no claim against Libya for direct compensation for their losses on the basis of their claims in these proceedings.

7.9 **Has Respondent Violated Article 2(2) or 3(2) of the Treaty by Arbitrary or Discriminatory Behaviour?**

7.9.1 Claimants' assertions that Respondent violated Articles 2(2) and 3(2) of the Treaty as well as the minimum standard of treatment under CIL because of arbitrary treatment and discrimination can be dealt with shortly.

²⁶⁵ Art. 147(2) provides: "When, however, as a result of exceptional or unpredictable events ..., the performance of the contractual obligation ... becomes excessively onerous in such a way as to threaten the debtor with exorbitant loss, the judge may, according to the circumstances, and after taking into consideration the interests of both parties, reduce to reasonable limits the obligation that has become excessive ...".

²⁶⁶ Partial Award, Contract Arbitration, ¶¶ 11.433- 11.436.

- 7.9.2 The basis for these claims is, essentially, that Libya protected its own Sarir Manufacturing Plant (which was operated by SNC Lavalin) at the same time as it failed to protect Claimants' camps and other assets.
- 7.9.3 The claims do not withstand scrutiny.
- 7.9.4 It is true that a small number of troops from the GMMRA Security Battalion were located at the GMMRA's camps. This had been the case since shortly after the GMMRA Battalion was established. Such postings were made on the basis that the GMMRA provided food, living accommodations and a small monthly allowance for the troops to be stationed at its camps. This was consistent with the legislative basis upon which the GMMRA could engaged "paid" security from army personnel on terms set out in GPC's Decree No.1186 of 1990 (Article 9).²⁶⁷
- 7.9.5 Messrs Mabruk and Mr Tayash (whose testimony on the point was not challenged) both gave evidence that in October 2008 TTJV requested the GMMRA to take steps to prevent the recurrence of a theft of a vehicle that had taken place from one of its pipeline worksites.
- 7.9.6 Mr Mabruk explained that at Mr Halicilar's request he met in Benghazi with Col. Ramadan Naser who commanded the GMMRA Security Battalion to discuss getting help and support for TTJV's own security guards.
- 7.9.7 In response to his inquiry, Col. Naser told Mr Mabruk that the military would be able to provide the assistance requested (the same as provided to the GMMRA's own camps, such as the Sarir Manufacturing Camp) as long as TTJV provided an official letter of request setting out what was needed. Col. Naser also told Mr Mabruk that TTJV would need to provide basic accommodations, food, vehicles and a monthly stipend of around 170 Libyan Dinars per person (the same terms as applied to the GMMRA for the military presence at their camps).

²⁶⁷ Exhibit RLA-118, Article 9 provides that a person to whom the guard is attached "shall pay his salary, allowances and the price of the uniform worn during the work and catering and transport expenses and any other expenses."

7.9.8 Mr Mabruk reported back to Mr Halicilar who passed on the information to Mr Hendekli. However, Mr Hendekli decided that TTJV did not want to involve the army in this way at TTJV's sites as he felt that having armed personnel on site might cause problems for TTJV having regard to the extra cost and inconvenience this would entail. In the result, the request was not pursued.²⁶⁸

7.9.9 Based on the uncontested testimony of Messrs Mabruk and Tayash, which we accept as truthful, there is no basis upon which to conclude that Claimants' claims of arbitrary treatment and discrimination have merit. Claimants could have had precisely the same protection at their sites as the GMMRA had at its sites. They knew that it was available, but decided not to request it at the time, or thereafter.

8. COSTS

8.1 Introduction

8.1.1 Pursuant to Article 37(4) of the ICC Rules of 2012 ("**ICC Rules**"), this Final Award shall determine the costs of the arbitration and decide the allocation of the costs incurred in connection with the proceedings.

8.1.2 Pursuant to Article 37(1) of the ICC Rules, the costs of the arbitration are composed of the fees and expenses of the Arbitral Tribunal and the ICC administrative expenses, as well as the reasonable legal and other costs of the parties.

8.1.3 Article 37(5) of the ICC Rules explains that in making decisions as to costs, the Arbitral Tribunal may take into account such circumstances as it considers relevant, including the extent to which a party has conducted the arbitration in an expeditious and cost-effective manner.

²⁶⁸ See Mabruk First Statement, ¶¶ 16-19 and Tayash First Statement, ¶¶ 13-18.

8.1.4 The parties are in agreement that the prevailing principle followed by both investment and commercial arbitration tribunals is that “costs follow the event” – in other words, costs are awarded to the winning party.²⁶⁹

8.2 Determination and Apportionment of the Costs of Arbitration

Fees and Expenses of the Arbitration Tribunal and ICC (“ICC Costs of Arbitration”)

8.2.1 On 7 July 2016, the ICC Court fixed the advance on the costs of EUR 590,000.00. On 22 November 2018, the ICC readjusted and increased the costs to EUR 1,000,000.00. Such an advance on costs has been paid by the Parties albeit unequally, i.e., Claimants EUR 926,300.00 and Respondent EUR 73,700.00, respectively.

8.2.2 The ICC fixed the Arbitral Tribunal’s fees and the ICC administrative costs respectively at EUR 857,000.00 and EUR 100,929.00. The Arbitral Tribunal’s expenses are EUR 22,571.00.

Therefore, the total amount of the costs of the arbitration, excluding the legal and other costs of the Parties, *i.e.*, the ICC Costs of Arbitration, are EUR 980,500.00.

8.2.3 The advance on costs, fixed by the ICC Court at EUR 1,000,000.00 was entirely paid by the Parties. Accordingly, the ICC Costs of Arbitration have been paid in full.

²⁶⁹ Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* at 686; José Rosell, Arbitration Costs as Relief and/or Damages, 28(2) *Journal of International Arbitration* at 116 (2011) (“Some arbitral decisions hold that the principle of ‘costs should follow the event’ is becoming a governing principle in international arbitration.”); *see also* Queen Mary, University of London, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process at 3, 38 (2012) (“Tribunals allocate costs according to the result in 80% of arbitrations” and “there is a desire for tribunals to allocate costs according to the result more frequently than they are currently doing.”).

Costs Claimed by the Parties, Including Legal Fees and Other Costs

- 8.2.4 In their submission on costs dated 29 May 2019, Claimants claim legal fees in an amount of USD 3,529,461.10, expert fees USD 446,370.20, expenses for travel, personnel, arbitration hearing and other related costs of USD 977,656.96 plus GBP 3,690 and ICC fees of €926,300 for a total of USD 4,953,488.26, €926,300 and £3,690.
- 8.2.5 In its submissions on costs dated 29 May 2019, Respondent claims legal fees and disbursements of Pinsent Masons LLP's in the amount of £3,813,749.70, external counsel fees and disbursements in an amount of £123,764.64, fees and expenses in relation to experts in the amount of £122,435.96, fees and expenses of UK-based witnesses in an amount of £25,964.64, expenses of Libyan-based witnesses in an amount of £19,323.13, hearing expenses in an amount of £26,645.33 and the portion it paid to the ICC for the advance on costs of the arbitrators' fees and administrative expenses of the ICC in the amount of £64,926.05 (converted from €73,700 as of 22 May 2019). Respondent also sought interest at LIBOR plus 4% for the Pound Sterling from the date of the award until payment, such interest to be compounded quarterly.

Assessment and Allocation of Costs

- 8.2.6 In the event that their claims should succeed, Claimants request that the Arbitral Tribunal make an award of costs in their favour.
- 8.2.7 In support of their request, Claimants point to the size and composition of Claimants' legal team, the time their counsel devoted to this matter, the length of the written submissions and the number of fact and expert witnesses Claimants presented. They contend that all of these components were required in light of their claims and the defences raised by Respondent and were proportionate to the factual, legal and technical complexity of the dispute. They note that this arbitration spanned three years. It entailed three rounds of submissions on the Merits for Claimants, Respondent's failed Bifurcation Application, additional submissions to address Respondent's improper late submittal of evidence and new argument, the cancelled Merits Hearing as a result of Respondent's improper submission of evidence, a one-week Jurisdiction and Merits Hearing and Oral

Closings. The dispute also included significant coordination with experts who had very specific and hard-to-find expertise as well as coordination with Libyan counsel.

- 8.2.8 Claimants argue that Respondent's conduct increased Claimants' costs and that when deciding the precise measure of the allocation of costs, the Tribunal should take into account the unreasonable ways in which Respondent submitted its defence which unnecessarily increased the work Claimants had to conduct in the arbitration. In particular, Claimants refer to Respondent's improper and untimely evidence and new arguments in the second round, its voluminous jurisdictional objections spanning hundreds of pages and a meritless bifurcation application. Claimants estimate their fees and expenses incurred as a result of Respondent's late submittal of evidence in an amount of USD 788,036. Although they do not provide a figure for their increased fees regarding Respondent's jurisdictional objections, they note that the Respondent does not address the merits of this case in its Rejoinder until page 202 out of 366 total pages. With respect to Respondent's second bifurcation application after its Statement of Defence was filed, Claimants incurred legal fees of USD 50,069.50 responding to the application;
- 8.2.9 In their Reply Submission on Costs dated 12 June 2019, Claimants point out that the total costs Respondent seeks are larger than Claimants' costs, despite the fact that Claimants incurred significant expenses as a result of Respondent's filing untimely evidence with its Statement of Rejoinder and the fact that Claimants were obliged to cover most of the deposit required by the ICC. Claimants note that when Respondent's legal and other costs of £4,284,342.13 are converted into US dollars for purposes of comparison, this amounts to USD 5,458,251.87 (converted at 1.274 USD to 1 GBP). By contrast, Claimants' legal and other costs are USD 4,953,488.26 and GBP 3,690. In addition, Claimants paid €926,300 of ICC advances on costs whereas Respondent paid only €73,700.
- 8.2.10 Claimants note that if Respondent had borne its share of the ICC costs and Respondent had not filed its untimely evidence, Respondent would have spent a total of USD 5,981,611.37 (legal costs, other costs and ICC costs) and Claimant would have spent

USD 4,688,811.76 and GBP 3,690 (legal costs, other costs and ICC costs). The difference is approximately 22%.

- 8.2.11 Claimants make the further points that Respondent's payment to the Libyan-based witnesses are excessive and raise concerns given that the travel allowance costs, which Respondent describes as "per diem" payments, appear to be cash payments paid directly to Messrs Mabruk, Tayash and Al Ghaffar. In total, each of these witnesses, individually received payments of approximately GBP 3,081.40 or USD 3,313.98 per diem. Payments of this size are said not to be recoverable. Respondent ought not to be able to recover costs that Mr Belasher incurred in his Visa application which was made after it was indicated that his presence was not required in London.
- 8.2.12 In the event that Respondent prevails in these proceedings whereby Claimants' claims are dismissed without the need to proceed to a quantum phase, it requests an award of costs in its favour for the full amount of its costs which are said to be reasonable and proportionate.
- 8.2.13 In its Reply to Claimants' Costs Submissions dated 12 June 2019, Respondent asserts that the submission filed by Claimants does not allow the Tribunal to make any proper assessment of the reasonableness of Claimants' costs. Claimants submissions do not comport with the Tribunal's request for information regarding the number of hours spent and by who. Nor is there any reliable information as to how the hours have been divided between the different levels of fee earners on Claimants' counsel team.
- 8.2.14 Respondent notes that the fees incurred by the Kabine law office and MKE are impossible to determine and that the Claimants have also included an unspecified sum for TML and Tekfen's in-house counsel. It asserts that it is inappropriate to categorise these latter costs as "legal fees" rather than internal costs to the Claimants. The claim for these fees is also non-compliant with Article 37(1) of the 2012 Rules given that these costs were incurred from a date some eight months before the arbitration commenced.
- 8.2.15 As regards expenses sought by Claimants, Respondent notes that they are simply presented as a claim for almost USD one million on single-line item on Table 5 of

Claimants' Costs Submission with no attempt to itemise these expenses even into broad categories. This is non-compliant with the Tribunal's direction that "we need to know your expenses, set out separately and so people can say: yes, that looks reasonable or perhaps it is not reasonable".²⁷⁰

- 8.2.16 Respondent contends that the fact that Claimants identify these costs separately from the costs incurred from travel and hearing-related costs suggests that the costs associated with witnesses do not include travel and accommodation costs for witnesses whilst they were in London. Beyond these costs, it is difficult to conceive of what these other costs might be unless they relate to payments made to witnesses for their testimony.
- 8.2.17 As regards Claimants' expert costs, Respondent notes that there appears to be a claim of approximately USD 102,218.78 for FTI in connection with the Quantum Report. These, it is said, should be disregarded given that quantum was reserved until Phase II and such costs may not have been required. In any event, Mr Cross's report is simply a recycling of the quantum reports he produced for the Contract Arbitration.
- 8.2.18 As regards Dr Dolzer's costs, it is said that his expert testimony was not required having regard to the Tribunal's knowledge and expertise of the subject matter which he covered.
- 8.2.19 As regards the security experts' reports, they are said to be grossly disproportionate and unreasonable when compared to the costs of the report prepared by Mr Walker-Cousins whose charges of USD 67,542.30 were some USD 67,000 less than the costs incurred by Col. Pusztai alone. The latter are said to be so high as to raise concerns as to Col. Pusztai's independence and therefore the reliability of his evidence. Dr Gaub's costs were for a report introduced in the second round of Claimants' pleadings. Her evidence was entirely derivative. Respondent points out that she admitted in her cross-examination that her interest in Libya started when the revolution started in February 2011 and that the research she says she undertook on Libya while working at NATO only started in March 2011.

²⁷⁰ Transcript, Day 5, p. 123/5-9.

8.2.20 Respondent rejects Claimants' allegation of filing improper and untimely evidence and thus Claimants' claim that USD 788,036 of their costs were incurred as a result of Respondent having filed such evidence and arguments.

8.2.21 Finally, Respondent rejects Claimants' assertion that its jurisdictional objections were tendentious and not raised in good faith.

Rationale for the Tribunal's Allocation of Costs

8.2.22 Having regard to our conclusion that Claimants' claims are to be dismissed in their entirety, and subject to making an adjustment to deal with the additional costs incurred by Claimants as a result of Respondent's filing of untimely evidence and additional arguments, the Tribunal sees no reason why not to apply the principle (although modified in part) of "costs follow the event". Thus, Respondent having prevailed on the question of liability it should be awarded compensation for its "reasonable" legal and other costs.²⁷¹

8.2.23 Dealing first with the overall quantum of Respondent's claim, while it is true that it is approximately 20% higher than Claimants' claim for costs (after taking into account Respondent's failure to bear its share of the ICC call for deposits equally), that, in and of itself does not make it unreasonable.

8.2.24 However, a substantial portion of Respondent's written submissions was devoted to its various jurisdictional defences, all of which were found to be and which were pretty clearly without merit. The Tribunal also sees force in Claimants' concerns regarding Respondent's claims for coverage of its external legal fees for the second bifurcation application and the costs incurred for Mr Belasher's visa application after notification was given that he would not be required to attend for cross-examination. In the circumstances, the Tribunal considers that it would be appropriate to reduce Respondent's legal and other costs (which total £4,196,809.40) by 25% to adjust for these matters (£4,196,809.40 - £1,049,202.35 = £3,147,607.05).

²⁷¹ Article 38(1) of the ICC Rules requires that the parties' legal and other costs be "reasonable".

8.2.25 The Tribunal has considered each of Claimants' other complaints as to the reasonableness of Respondent's costs claims and considers that they will be appropriately recognised by the above reduction.

8.2.26 As indicated above, the Tribunal has also decided that a slight modification of the "costs follow the event rule" is called for in this case. The Tribunal considers that Claimants should not have to bear the entirety of their own costs in circumstances where they were increased substantially as a result of Respondent having filed improperly new evidence and arguments in its Statement of Rejoinder which lead to the hearing scheduled for October 2018 being vacated. It is to be recalled that the Tribunal reached its decision on the impropriety of this filing on 18 September 2018 and directed that all costs in relation to: (a) Claimants' motion to strike this evidence; and (b) the need for a separate hearing on causation, be borne by Respondent.

8.2.27 The Tribunal considers that the amount said by Claimants to be attributable to this improper filing (USD 788,036), is too high. The Tribunal concludes that Claimants are entitled to be compensated for Respondent's improper late filings in the amount of £400,000. However, rather than making an order for it to reimburse Claimants for having incurred this unnecessary expense, we propose to account for it by reducing further the Respondent's allowable legal and other costs by this figure (*i.e.*, £3,147,607.05 - £400,000 = £2,747,607.05).

8.2.28 In the result, Respondent shall be reimbursed by Claimants for its legal and other costs in the following amounts:

Pinsent Masons' fees and disbursements	£3,813,749.70
External counsel's fees and disbursements	123,764.64
Experts' fees and disbursements	122,435.96
UK based witnesses' fees and disbursements	25,964.64
Libyan based witnesses' fees and disbursements	19,323.13

Hearing expenses	26,645.33
Respondent's advance on costs to ICC	<u>64,926.05</u>
	£4,196,809.40
Less: £1,049,702.35 and £400,000.00	<u>1,449,202.35</u>
	£2,747,607.05

8.2.29 The Tribunal agrees that Respondent's costs should bear interest. The Tribunal considers that interest should run commencing two weeks from the date of this award until Respondent's costs are paid. The Tribunal is of the view that LIBOR plus 2% on the Pound Sterling is the appropriate rate and that compounding half yearly would also be appropriate.

8.2.30 Claimants shall bear their own legal and other costs as well as the fees and expenses of the Arbitral Tribunal and the ICC's administrative expenses.

9. FINAL AWARD

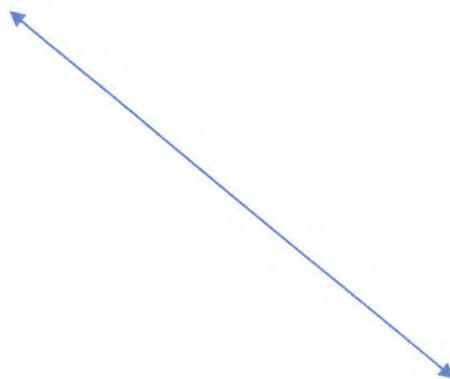
9.1 Tribunal's Final Award

9.1.1 Based on the foregoing, the Tribunal (by a majority marked thus "**") hereby **CONCLUDES, DECLARES, ORDERS and AWARDS** that:

- (a) the Tribunal has jurisdiction to entertain all of Claimants' claims;
- (b) Claimants' Umbrella Clause (Contractual) Claims One, Two, Three and Five as set out in paragraphs 94-173 of their Request for Arbitration are inadmissible, being an abuse of process in these proceedings. Claimant's Umbrella Clause Claim Four, to the extent that it seeks a Contractual Adjustment is also inadmissible for the same reason. To the extent that Umbrella Clause Claim Four constitutes a direct claim for damages, it is dismissed;

- (c) * Respondent has not breached its obligation to provide protection and security pursuant to Article 2(2) of the Treaty and/or customary international law;
- (d) Respondent has not violated its obligations under Article 2(2) and 3(2) of the Treaty or the minimum standard of treatment under customary international law by arbitrarily discriminating against Claimants in the provision of protection and security;
- (e) * all claims of Claimants that have been admitted in these proceedings are hereby dismissed, generally and in full;
- (f) Claimants shall pay to Respondent the sum of £2,747,607.05 on account of its reasonable costs of these proceedings including its legal costs, the administrative expenses of the ICC, the fees and expenses of the arbitrators and legal counsel and those of any experts and witnesses, such sum to bear interest from two weeks from the date of this Award at the London Inter Bank Offered Rate (LIBOR) plus two percent for the Pound Sterling until the date of full payment, such interest to be compounded half yearly; and
- (h) Claimants' claim for reimbursement of their costs shall be dismissed.

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Place of Arbitration: Geneva, Switzerland

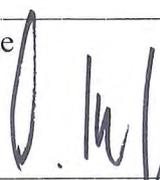
11 February 2020



Gary Born



J William Rowley QC
(President)

Date 

Gabrielle Kaufmann-Kohler