

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES  
(ADDITIONAL FACILITY)**

In the arbitration proceeding between

**STRABAG SE**

Claimant

and

**LIBYA**

Respondent

**ICSID Case No. ARB(AF)/15/1**

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**AWARD**

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***Members of the Tribunal***

Professor John R. Crook, President  
Professor Antonio Crivellaro, Arbitrator  
Professor Nassib G. Ziadé, Arbitrator

***Secretary of the Tribunal***

Ms. Frauke Nitschke

*Date of dispatch to the Parties: 29 June 2020*

**REPRESENTATION OF THE PARTIES**

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**TABLE OF ABBREVIATIONS / DEFINED TERMS**

Additional Facility Rules	Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes (10 April 2006)
Al Hani	Al Hani General Construction Co., a joint venture company between Strabag SE and LIDCO
Arbitration (Additional Facility) Rules	Arbitration (Additional Facility) Rules (10 April 2006)
BIT or Treaty	Agreement between the Republic of Austria and the Great Socialist People's Libyan Arab Jamahiriya, which entered into force on 1 January 2004
BOQ	Bill of Quantities
BRVZ	Bau- Rechen- und Verwaltungszentrum (accounting and financial entity in Strabag's group of companies)
C-[#]	Claimant's Exhibit
Cl. Mem.	Claimant's Memorial on the Merits dated 6 July 2016
Cl. PHB	Claimant's Post-Hearing Brief dated 31 October 2018
Cl. Rej.	Claimant's Rejoinder on Jurisdiction dated 15 March 2018
Cl. Reply	Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction dated 9 September 2017
CL-[#]	Claimant's Legal Authority
GPC	General People's Committee

Hearing	Hearing on Jurisdiction and the Merits held from 9 to 20 July 2018
HIB	Housing and Infrastructure Board
IBCP	General People's Committee for the Implementation of Communications Projects
ICSID or the Centre	International Centre for Settlement of Investment Disputes
LIDCO	Libyan Investment and Development Company
MO 2	Modification Order No. 2
NTC	National Transitional Council
NJS	NJS Consultants Limited
Parties	Strabag SE and Libya
R-[#]	Respondent's Exhibit
REKABA	Libyan General People's Committee for the People's Inspection and Control Authority
Resp. C-Mem.	Respondent's Counter-Memorial on the Merits and Objections to Jurisdiction dated 9 March 2017
Resp. PHB	Respondent's Post-Hearing Brief dated 1 November 2018
Resp. Rej.	Respondent's Rejoinder on the Merits and Reply on Jurisdiction dated 16 January 2018
RFP	Requests for Proposal
RL-[#]	Respondent's Legal Authority
RBA	Roads and Bridges Authority

TPB	Transportation Projects Board
TR. [Day #]:[page:line]	Transcript of the Hearing
Tribunal	Arbitral tribunal constituted on 7 December 2015

## **I. INTRODUCTION**

1. This case involves multiple claims under the bilateral investment treaty between the Republic of Austria and the State of Libya (“Treaty” or “BIT”)<sup>1</sup> for losses allegedly suffered by Claimant, Strabag SE (“Strabag”), a major international construction firm. Claimant alleges multiple violations of the Treaty by Libya, primarily related to construction work performed under several large road and infrastructure contracts prior to the revolutionary violence that began in Libya in February 2011. Claimant also asserts claims under the Treaty for property lost or damaged during the course of the revolutionary violence in 2011 and subsequently.
2. In a nutshell, Respondent, Libya, denies the Tribunal’s jurisdiction to hear these claims and denies all liability. Respondent further contends that, should the Tribunal find any liability, any amounts found due to Claimant under its contract-based claims should be set off against the unrecovered balances of advance payments made to Claimant at the outset of contract performance, but that were not subsequently paid back during the course of contract performance.
3. As will be seen below, the Tribunal finds that it has jurisdiction over Claimant’s claims and that Claimant has established breaches of the Treaty with respect to some of its claims. The Tribunal finds that other claims fail, *inter alia*, because Claimant has not established that particular damage for which it sought compensation was caused by conduct for which Respondent is responsible under the Treaty.

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<sup>1</sup> The BIT was signed on 18 June 2002 and entered into force on 1 January 2004.

## II. THE PARTIES

### A. CLAIMANT

4. Claimant Strabag SE is a large international construction firm incorporated in Austria. It operates utilizing a network of wholly owned entities that specialize in different aspects of its construction business (such as procuring equipment, engineering, financial management), as well as special purpose business vehicles created in some of the countries in which Strabag carries on business. As described *infra*, following the relaxation of international sanctions against Libya beginning around 2003, Strabag saw opportunities to pursue large construction projects there.
5. Claimant's wholly owned German subsidiary, Strabag International Ltd. ("Strabag International"), initially secured contracts in its own name for two major road projects in Libya. The first involved works on the coast road in the vicinity of Benghazi; the second involved works on the coast road in the central part of the country in the vicinity of Misurata.
6. In 2006, after Strabag established its presence and began work on the Benghazi and Misurata road projects, Libya adopted a decision requiring that foreign firms engaged in construction carry on business in conjunction with a Libyan partner.<sup>2</sup> Accordingly, Strabag International entered into a joint venture<sup>3</sup> with the Libyan Investment and Development Company ("LIDCO").<sup>4</sup> LIDCO was a subsidiary of the "Libyan Social Development Fund," described by Claimant as "[t]he largest Libyan fund, under the direct control of the Cabinet."<sup>5</sup>

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<sup>2</sup> C-11, General People's Committee Decision No. 443 of 2006 for Specifying Certain Provisions for Performance of Foreign Companies for their Activities in the Great Jamahiriya.

<sup>3</sup> Claimant's Memorial ("Cl. Mem.") ¶33 et seq.

<sup>4</sup> LIDCO is owned by the Economic and Social Development Fund, which is in turn owned by the Libyan Investment Authority, which Claimant describes as "an integral part of the Libyan State." TR 1:14:12-13 (Mr. Claypool).

<sup>5</sup> C-21, Travel Report, Libya – 7-8 September 2007.

7. On 12 July 2007, Strabag International and LIDCO created a joint venture company, Al Hani General Construction Co. (“Al Hani”).<sup>6</sup> Claimant indirectly owns 60% of Al Hani<sup>7</sup> through its 100% ownership of ILBAU (a German company), which owns Strabag International (also a German company).<sup>8</sup> The Benghazi and Misurata Contracts were assigned by Strabag International to Al Hani in 2009, with the approval of the Roads and Bridges Authority (“RBA”). All other contracts were concluded by Al Hani, after being incorporated in 2007.

**B. RESPONDENT**

8. Claimant alleges that Libya is responsible under the Treaty for actions by its armed forces and by several state agencies or instrumentalities. Some of these underwent organizational and name changes over time. Claimant contends that all of the agencies concerned are Libyan State organs.<sup>9</sup> They are:

- The “Housing and Infrastructure Board (“HIB”).<sup>10</sup> Following various bureaucratic realignments, HIB became a subordinate entity of the Ministry of Housing and Utilities.<sup>11</sup> It was the Libyan party in the large Tajura Contract to build infrastructure for an urban development. HIB was established under Libyan law pursuant to Resolution No. 60/1374 of the General People’s Committee. Article 1 of this resolution provides that HIB “shall have legal personality and independent financial liability and shall perform its competences set forth” in the Resolution. HIB is in charge of preparing urban planning schemes and engineering designs for the development of towns and

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<sup>6</sup> C-19, Memorandum of Association of Al Hani dated 12 July 2007.

<sup>7</sup> Cl. Mem. ¶29. The joint venture agreement with LIDCO is C-13.

<sup>8</sup> Cl. Mem. ¶30 et seq.; Claimant’s Reply (“Cl. Reply”) ¶33 et seq.

<sup>9</sup> Cl. Mem. ¶36 et seq.

<sup>10</sup> C-6, Resolution establishing the Housing and Utilities (Infrastructure) Board. Under Article 5 of the Resolution, key decisions of the Board (designing action plans, preparing regulations, and the budget) require approval of the General People’s Committee. Under Article 8, the “fund of the Board” includes “the funds allocated from the State’s general budget ...”

<sup>11</sup> Cl. Mem. ¶47 et seq. (status of HIB as a State organ).



villages, as well as rural or slum areas, and to set forth the necessary budget for such projects.<sup>12</sup>

- The Roads and Bridges Authority (“RBA”). The RBA was part of the Ministry of Transport and was Al Hani’s initial Libyan contracting party for the Benghazi and Misurata Contracts.<sup>13</sup> RBA was established under Libyan law pursuant to Resolution No. 143 of the General People’s Committee, which was later amended by Resolution No. 273/1378, dated 2010. Under these founding resolutions, RBA has “legal personality and independent financial liability” and is mandated to “perform its competences” designated in the resolutions, which include a wide range of responsibilities relating to land transportation, design and maintenance of roads and transportation infrastructure, traffic control and monitoring.<sup>14</sup>
- The Transportation Projects Board (“TPB”) is also part of the Ministry of Transport.<sup>15</sup> From July 2010 the TPB assumed RBA’s rights and obligations under RBA’s contracts with Al Hani.<sup>16</sup> TPB entered into the other road contracts at issue with Al Hani, the TIAR, TIAR-NE, and Garaboulli Contracts. TPB was established under Libyan law pursuant to Resolution No. 199/1378 of the General People’s Committee. Article 1 of this resolution provides that TPB “shall be a financially independent legal entity and shall exercise its competencies set out” in the resolution. TPB implements transportation infrastructure projects such as roads, bridges and civilian airports, including the preparation of technical and economic studies, design, engineering specifications and financial estimates.<sup>17</sup>

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<sup>12</sup> Respondent’s Counter-Memorial (“Resp. C-Mem.”) ¶27.

<sup>13</sup> Cl. Mem. ¶41.

<sup>14</sup> Resp. C-Mem. ¶21.

<sup>15</sup> Cl. Mem. ¶42.

<sup>16</sup> Cl. Mem. ¶46.

<sup>17</sup> Resp. C-Mem. ¶24.

- The General People's Committee (equivalent to the Council of Minister before the 2011 Revolution).<sup>18</sup>
- The Libyan police and armed forces.<sup>19</sup>

### **III. PROCEDURAL HISTORY**

9. On 24 June 2015, the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") received from Strabag an Application for Access to the ICSID Additional Facility and a Request for Arbitration, including Exhibits 1 through 21 ("Request").
10. On 20 July 2015, the ICSID Secretary-General approved access to the Additional Facility and registered the Request pursuant to Article 4 of the Additional Facility Rules and Articles 4 and 5 of the Arbitration (Additional Facility) Rules and notified the Parties of the registration. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Article 5(e) of the Arbitration (Additional Facility) Rules.
11. By letter of 18 September 2015, Claimant informed ICSID that it opted for the formula provided in Article 9(1) of the Arbitration (Additional Facility) Rules as the method of constituting the Tribunal in this proceeding. In accordance with that provision, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party, and a presiding arbitrator appointed by agreement of the parties. In that same letter, Claimant appointed Professor Antonio Crivellaro, a national of Italy, as arbitrator in this case; Professor Crivellaro subsequently accepted his appointment.
12. On 20 October 2015, Claimant requested that the Chairman of the ICSID Administrative Council appoint the arbitrators not yet appointed pursuant to Article 6(4) of the Arbitration (Additional Facility) Rules and designate one arbitrator to serve as the President of the Tribunal.

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<sup>18</sup> Cl. Mem. ¶36(a).

<sup>19</sup> Cl. Mem. ¶36(d).

13. On 23 October 2015, Respondent appointed Professor Nassib G. Ziadé, a national of Lebanon and Chile, as arbitrator in this case; Professor Ziadé subsequently accepted his appointment.
14. By letters of 2 November 2015, the Parties agreed that the President of the Tribunal would be appointed by the Parties using a list ranking procedure.
15. Following further correspondence from the Parties regarding the appointment of the presiding arbitrator, Professor John R. Crook, a national of the United States of America, was appointed as President of the Tribunal pursuant to the Parties' agreed procedure for the constitution of the Tribunal.
16. On 7 December 2015, the ICSID Secretary-General, in accordance with Article 13(1) of the Arbitration (Additional Facility) Rules notified the Parties that all three arbitrators had accepted their respective appointments and that the Tribunal was therefore deemed to have been constituted on that date. Ms. Frauke Nitschke, ICSID Legal Counsel/Team Leader, was designated to serve as Secretary of the Tribunal.
17. On 3 February 2016, in accordance with Article 21 of the Arbitration (Additional Facility) Rules, the Tribunal held a first session with the Parties by video-conference.
18. Following exchanges between the Parties and the Tribunal, the Tribunal issued Procedural Order No. 1 recording the agreements of the Parties on procedural matters on 10 March 2016. Procedural Order No. 1 provides, *inter alia*, that the language of the arbitration be English, and that the place of proceeding would be determined at a later date. Procedural Order No. 1 also sets out a schedule in the event that Respondent files a request for bifurcation of the proceeding.
19. Following observations from the Parties regarding the place of proceedings, on 8 April 2016, the Tribunal issued Procedural Order No. 2, determining that the place of proceedings is Washington, D.C.

20. On 6 July 2016, in accordance with Procedural Order No. 1, Claimant filed a Memorial on the Merits (“Claimant’s Memorial”), together with: Exhibits C-1 through C-385, Legal Authorities CL-1 through CL-89, a Witness Statement of Mr. Richard Napowanez dated 28 June 2016, a Witness Statement of Mr. Christian Knaack dated 30 June 2016, a Witness Statement of Mr. Jürgen Penkhues dated 30 June 2016, an Expert Opinion of Dr. Faraj Ahnish dated 4 July 2016, and an Expert Report of FTI Consulting LLP dated 6 July 2016, with Exhibits FTI-1 through FTI-150 and Appendices 1 through 9.
21. On 29 July 2016, Respondent filed a request to address the objections to jurisdiction as a preliminary question (“Request for Bifurcation”), together with Appendices 1 through 27.
22. On 22 August 2016, Claimant filed observations on the Respondent’s Request for Bifurcation, together with Appendices 1 through 16.
23. On 8 September 2016, the Tribunal issued Procedural Order No. 3 rejecting Respondent’s Request for Bifurcation, and inviting the Parties to consult and submit an agreed proposed procedural calendar for the remainder of the proceedings, or, in the absence of an agreement, set out each Party’s view on the procedural schedule for the arbitration.
24. Following correspondence between the Parties, and absent an agreement by the Parties, the Tribunal issued Procedural Order No. 4 on 4 October 2016, setting forth the procedural calendar for the joined proceedings on jurisdiction and the merits.
25. On 9 March 2017 (one day later than contemplated in the procedural calendar set forth in Procedural Order No. 4), Respondent filed a Counter-Memorial on the Merits and Objections to Jurisdiction (“Respondent’s Counter-Memorial”), together with: Exhibits R-1 through R-242, Legal Authorities RL-1 through RL-179, a Witness Statement of Eng. Ali Hassan Ali Turki dated 4 March 2017, a Witness Statement of Eng. Mohamed Bisher dated 5 March 2017, a Witness Statement of Eng. Mokhtar Mohamed Jmiel Baryon dated 4 March 2017, a Witness Statement of Eng. Sami Nasar El-Abesh dated 5 March 2017, a Witness Statement of Mr. Al Kelani Al Shooda dated 5 March 2017 with Annexes 1 through 9, a Witness Statement of Mr. Abdul-Rahman Abdul-Hafeez Al-Naas dated 8 March 2017, an Expert Opinion of Dr. Al-Koni Ali Abuda dated 7 March 2017, an Expert

Report of Mr. Ian Michael Osbaldeston of Blackrock dated 8 March 2017, and an Expert Report of Mr. Richard Lee Edwin of Blackrock dated 8 March 2017.

26. On 10 March 2017, Claimant wrote to the Tribunal noting the time of submission of Respondent's Counter-Memorial and requested that the Tribunal "disregard the Counter-Memorial pending the Respondent's explanation of the special circumstances that might justify its failure to have met the [8 March 2017] deadline fixed by the Tribunal" further to Article 33 of the Arbitration (Additional Facility) Rules. Respondent responded by letter of that same date, asking the Tribunal to deny Claimant's request and providing an explanation of the circumstances leading to its late filing.
27. By letter of 15 March 2017, the Tribunal informed the Parties of its decision to admit Respondent's Counter-Memorial into the record, in view of the circumstances described in Respondent's 10 March 2017 letter.
28. Following exchanges between the Parties, on 17 May 2017, the Tribunal issued Procedural Order No. 5 concerning document production.
29. On 29 June 2017, Claimant wrote to the Tribunal with reference to "a number of material omissions in Respondent's production of documents as ordered by the Tribunal in Procedural Order No. 5," requesting that the Tribunal order Respondent to produce certain responsive documents.
30. Upon invitation from the Tribunal, on 11 July 2017, Respondent filed a response to Claimant's 29 June 2017 letter. In its letter, Respondent stated that it had "made extensive, diligent and thorough efforts to search for and produce documents responsive to Claimant's Requests [for document production]" and had "duly produced documents that it has been able to locate promptly and in good faith."
31. By email of 13 July 2017, Claimant informed the Tribunal that it did not wish to maintain its 29 June 2017 requests at this time. On 14 July 2017, the Tribunal took note of the Parties' correspondence and informed the Parties that it "consider[ed] the matter closed."

32. On 9 September 2017, Claimant filed a Reply on the Merits and Counter-Memorial on Jurisdiction (“Claimant’s Reply”), together with: Exhibits C-386 through C-839, Legal Authorities CL-90 through CL-172, a Witness Statement of Mr. Ahmed Akasha dated 8 September 2017, a Witness Statement of Mr. Luca de Maria dated 5 September 2017, a Witness Statement of Mr. Andre Döhring dated 31 August 2017, a Witness Statement of Mr. John McDevitt dated 5 September 2017, a Second Witness Statement of Mr. Christian Knaack dated 4 September 2017, a Second Witness Statement of Mr. Richard Napowanez dated 3 September 2017, a Second Witness Statement of Mr. Jürgen Penkhues dated 25 August 2017, a Second Expert Opinion of Dr. Faraj A. Ahnish dated 10 August 2017 with Exhibits A through P, and a Second Expert Report of FTI Consulting dated 8 September 2017 with Exhibits FTI-151 through FTI-167 and Appendices 1 through 19.
33. On 13 October 2017, Claimant filed a Request for Provisional Measures, asserting that representatives of Respondent had attempted to contact family members of a witness of Claimant and that they had allegedly attempted to “place undue pressure on [the witness] in respect of the evidence that he has given in this proceeding.” Upon invitation from the Tribunal, on 16 October 2017, Respondent filed observations on Claimant’s Request for Provisional Measures, denying Claimant’s allegations. Upon further invitation from the Tribunal, Claimant filed a response to Respondent’s 16 October observations on 20 October 2017; Respondent then filed further observations on Claimant’s Request for Provisional Measures on 22 October 2017.
34. By letter of 31 October 2017, the Tribunal noted that, in taking into account the Parties’ submissions on the Request for Provisional Measures, both Parties “view any effort by either Party in these proceedings to influence the testimony of any witness offered by the opposing Party to be wholly improper and unacceptable.” In this regard, the Tribunal highlighted Respondent’s 22 October 2017 statement that it “denies that it has engaged in any wrongful conduct and confirms that it has no intention to engage in such conduct to influence, intimidate or otherwise interfere” with any of Claimant’s witnesses or family members. The Tribunal concluded that “no further action is required at this time in connection with the matters addressed in the Parties’ recent correspondence.”

35. On 16 January 2018, Respondent filed a Rejoinder on the Merits and Reply on Jurisdiction (“Respondent’s Rejoinder”), together with: Exhibits R-245 through R-367, Legal Authorities RL-180 through RL-283, a Second Witness Statement of Mr. Al Kelani Al Shooda dated 11 January 2018, a Second Witness Statement of Eng. Sami Nasar El-Abesh dated 11 January 2018, a Second Witness Statement of Eng. Mohamed Bisher dated 11 January 2018, a Second Witness Statement of Eng. Mokhtar Mohamed Jmiel Baryon dated 11 January 2018, a Second Witness Statement of Eng. Ali Hassan Ali Turki dated 10 January 2018, a Second Expert Opinion of Dr. Al-Koni Ali Abuda dated 11 January 2018, a Second Expert Report of Mr. Ian Michael Osbaldeston of Blackrock dated 15 January 2017 with Exhibits 1 through 5 and Appendices 1 through 7, and a Second Expert Report of Mr. Richard Lee Edwin of Blackrock dated 15 January 2018.
36. On 15 March 2018, Claimant filed a Rejoinder on Jurisdiction (“Claimant’s Rejoinder”), together with: Exhibits C-840 through C-862, Legal Authorities CL-182 through CL-216, and a Third Witness Statement of Mr. Christian Knaack dated 14 March 2018.
37. On 17 April 2018, the Tribunal issued Procedural Order No. 6 concerning the organization of the hearing on jurisdiction and the merits.
38. On 29 May 2018, the President of the Tribunal held a pre-hearing organizational meeting with the Parties by telephone conference.
39. On 15 June 2018, the Tribunal issued Procedural Order No. 7 concerning further matters related to the organization of the hearing.
40. On 21 June 2018, Claimant filed a request with the Tribunal to introduce new documents into the record. Upon invitation from the Tribunal, Respondent filed observations on Claimant’s 21 June request on 27 June 2018.
41. By email of 29 June 2018, Respondent requested that the Tribunal exclude certain party representatives of Claimant from attending the upcoming hearing. Upon invitation from the Tribunal, Claimant responded by letter of 2 July 2018, objecting to Respondent’s 29 June request.

42. By letter of 2 July 2018, the Tribunal denied Claimant's 21 June 2018 request to introduce new documents into the record.
43. By letter of 3 July 2018, the Tribunal denied Respondent's 29 June 2018 request to exclude certain party representatives of Claimant from attending the hearing.
44. By letter of 4 July 2018, Claimant objected to the Tribunal's 2 July ruling on Claimant's request to introduce new documents into the record and requested that the Tribunal reconsider its decision. Upon invitation from the Tribunal, on 5 July 2018, Respondent filed observations on Claimant's 4 July request.
45. By letter of 6 July 2018, having considered the Parties' correspondence of 4 and 5 July 2018 and the circumstances of Claimant's request for reconsideration, the Tribunal informed the Parties that it "is not now minded to reconsider its July 2 decision" concerning the introduction of new documents into the record.
46. A hearing on jurisdiction and the merits was held in Paris from 9 to 20 July 2018 ("Hearing").
47. In addition to the Members of the Tribunal and representatives of the ICSID Secretariat (Ms. Frauke Nitschke and Ms. Jara Mínguez Almeida), the following persons were present at the Hearing:
  - For Claimant: Mr. Charles Claypoole, Dr. Sebastian Seelmann-Eggebert, Mr. Philip Clifford, Q.C., Ms. Catriona Paterson, Mr. Robert Price, Mr. Thomas Lane, Ms. Ciara Faughnan-Moncrieff, Ms. Chiraz Kmar Turki, Mr. Philippe Pierlet of Latham and Watkins as counsel; Mr. Boris Solibieda and Mr. Hannes Truntschnig of Strabag SE, Mr. Martin Wolfbauer and Ms. Galina Braeunlich of CML Construction Services GmbH, Mr. Jörg Wellmeyer and Mr. Robert Murgatroyd of Strabag International GmbH as party representatives; Mr. Richard Napowanez, Mr. Christian Knaack of Ed. Zublin AG, Mr. Jürgen Penkhues of BMTI-Baumaschinentechnik International GmbH, Mr. Luca de Maria of CMC (Cooperativa Muratori e Cementisti) di Ravenna, Mr. Andre Döhring, and Mr. John McDevitt as witnesses; and Mr. Chris Osborne,



Mr. Patrick A. McGeehin, Mr. William Berkowitz, and Mr. Ivan Jerram of FTI Consulting LLP, and Dr. Faraj A. Ahnish of Hadeef & Partners as experts.

- For Respondent: Ms. Miriam Harwood, Mr. Hermann Ferré, Mr. Walid El-Nabal, Ms. Zeynep Gunday, Mr. Carlos Guzman Plascencia, Ms. Loujaine Kahaleh, Mr. Andrew Larkin, Ms. Katiria Calderón, Mr. Tim Moore, and Mr. Majed Alotaibi of Curtis, Mallet-Prevost, Colt & Mosle LLP as counsel; Mr. Mahfoud El-Foghi, Foreign Disputes Department, and Mr. Salah Aldeen Alajeeli Mohammed Wrayjeegh, Head of Legal Department, Housing and Infrastructure Board (HIB), as party representatives; Mr. Al Kelani Al Shooda, Mr. Sami Nasr El-Abesh, Mr. Ali Hassan Ali Turki, Mr. Mohamed Bisher (via video-conference), Mr. Mokhtar Mohamed Jmiel Baryon, and Mr. Abdul-Rahman Abdul-Hafeez Al-Naas as witnesses; and Mr. Richard Lee Edwin, Mr. Ian Michael Osbaldeston and Mr. Igor Corelj of Blackrock and Dr. Al-Koni Ali Abuda as experts.

48. During the Hearing, the following persons were examined:

- On behalf of Claimant: Mr. Richard Napowanez, Mr. Christian Knaack, Mr. Jürgen Penkhues, Mr. Luca de Maria, Mr. Andre Döhring, and Mr. John McDevitt as witnesses; and Mr. Chris Osborne, Mr. Patrick A. McGeehin, Mr. William Berkowitz, Mr. Ivan Jerram and Dr. Faraj A. Ahnish as experts.
- On behalf of Respondent: Mr. Al Kelani Al Shooda, Mr. Sami Nasr El-Abesh, Mr. Ali Hassan Ali Turki, Mr. Mohamed Bisher (via videoconference), Mr. Mokhtar Mohamed Jmiel Baryon, Mr. Abdul-Rahman Abdul-Hafeez Al-Naas as witnesses; and Dr. Al-Koni Ali Abuda, Mr. Richard Lee Edwin, Mr. Ian Michael Osbaldeston, and Mr. Igor Corelj as experts.

49. Ms. Radhia Hassine-Zribi, Ms. Asma Benyagoub and Ms. Anne Marie Arbaji were present at the Hearing to provide English/Arabic interpretation. The Hearing was recorded and a transcript was prepared by Mr. David Kasdan of B&B Reporters.

50. Pursuant to the Tribunal's invitation during the Hearing, Claimant filed Exhibits C-863 through C-905 and Respondent filed Exhibits R-368 through R-385 and Legal Authorities RL-284 through RL-287, on 17 August 2018.
51. Claimant filed a Post-Hearing Brief on 31 October 2018; Respondent filed a Post-Hearing Brief on 1 November 2018.
52. The Parties filed their Submissions on Costs on 3 September 2019.
53. The Parties filed their observations on the other Party's Submission on Costs on 19 September 2019.
54. By letter of 29 October 2019, the Tribunal invited the Parties to provide any clarifications they wished to offer in relation to the matter of the guarantees established and maintained by Claimant as security for the advance payments received by Al Hani. In response to the Tribunal's invitation, each Party filed its clarifications on 15 November 2019. Each Party filed observations on the other Party's clarification on 10 December 2019.
55. The proceeding was closed on 2 June 2020.

#### **IV. FACTS**

##### **A. STRABAG'S INVOLVEMENT IN LIBYA PRIOR TO THE 2011 CONFLICT**

56. Below, the Tribunal provides a brief summary of the factual background to the dispute as set out in the Parties' submissions. This summary is not exhaustive and does not constitute any finding by the Tribunal on any facts disputed by the Parties.
57. Beginning in 2004, Strabag managers had conversations with senior Libyan officials regarding the possibility of doing construction work in Libya. Claimant alleges that Libyan officials sought them out for this purpose, and the record includes the minutes of a 2004

meeting attended by Mr. Saif El Gaddafi promoting Strabag's involvement in construction ventures in Libya.<sup>20</sup>

58. After exploratory visits by Strabag personnel, Claimant decided to proceed with work in Libya, and was authorized to open a branch office by a 2006 decree.<sup>21</sup> Strabag International entered into the two substantial Benghazi and Misurata road contracts in October 2006 and April 2007, respectively.
59. Pursuant to a subsequently adopted Libyan decree, Strabag in July 2007 entered into a joint venture with LIDCO, and the joint venture partners then created Al Hani to carry on the construction business in Libya. Strabag International's Benghazi and Misurata Contracts were then assigned to Al Hani with the written consent of the Libyan authorities,<sup>22</sup> and Al Hani subsequently entered into several additional contracts. Claimant alleges that substantial amounts are due to it under all of these contracts on account of multiple alleged failures by Libyan entities to meet their contract obligations.
60. At the outbreak of the Revolution in Libya in February 2011, Al Hani was party to six relevant contracts:
  - The "Benghazi Contract" dated 18 October 2006 between Strabag International and RBA was concluded for the maintenance of 230km of dual carriageway coastal road between Ajdabiyah and Al Marj.<sup>23</sup> This sector of road runs on either side of Benghazi in the east of Libya.<sup>24</sup> Performance of the Benghazi Contract was essentially completed and the road was opened for use prior to the Revolution, but final acceptance never occurred.

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<sup>20</sup> Cl. Reply ¶¶36, 53; Cl. Mem. ¶56.

<sup>21</sup> C-1, Minutes of 24 September 2004 Meeting and C-4, Decree No. 13 of 2006 Permitting the Opening of a Branch of a Foreign Company in the Great Socialist People's Libyan Arab Jamahiriya.

<sup>22</sup> C-65, Assignment of Benghazi Contract to Al Hani; C-45, Misurata Contract assigned to Al Hani.

<sup>23</sup> C-9, Benghazi Contract.

<sup>24</sup> Cl. Mem. ¶¶5-6, 62 et seq.

- The “Misurata Contract” dated 19 April 2007 was concluded by Strabag International and LIDCO with RBA for the maintenance of the coastal road in the Misurata/Sirte sector.<sup>25</sup>
- The “TIAR Contract” dated 2 November 2008 was concluded between Al Hani and RBA for the reconstruction and upgrade of the Tripoli International Airport Road.<sup>26</sup>
- The “TIAR NE Contract” dated 4 August 2009 was a much smaller contract between Al Hani and RBA for technical studies and designs for the northern extension of the Tripoli International Airport Road.<sup>27</sup>
- The “Garaboulli Contract” dated 24 August 2010 was concluded between Al Hani and TPB for the maintenance of the coastal road between Ras Ejdir and Garaboulli and upgrading of Tripoli Western Access Road. Ras Ejdir is close to the Tunisian border, west of Tripoli.<sup>28</sup>
- The “Tajura Contract” dated 18 May 2008. This was a much larger contract between Al Hani and HIB for design and construction work in connection with a major new urban development in the city of Tajura, a suburb of Tripoli. The initial estimated contract value was over 778 million Libyan Dinars (“LYD”). As the Tajura project evolved, Al Hani was tasked to design and construct various utilities (water, wastewater, gas, electricity) as well as road and other infrastructure.<sup>29</sup>

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<sup>25</sup> C-16, Misurata Contract; Cl. Mem. ¶¶5-6, 72 et seq.

<sup>26</sup> C-32, TIAR Contract and C-24, General People’s Committee Act No. 74 of 2008; Cl. Mem. ¶¶6, 77 et seq.

<sup>27</sup> C-53, TIAR-NE Contract; Cl. Mem. ¶¶6, 77.

<sup>28</sup> C-108, Garaboulli Contract; Cl. Mem. ¶¶77-78.

<sup>29</sup> C-27, Tajura Contract; Cl. Mem. ¶79.

**(1) Features of the Contracts**

61. These contracts varied in their particulars, but included common features; the payment and approval mechanisms in the several road contracts are described in the First Witness Statement of Mr. Al Kelani Al Shooda, Director of the Accreditation Department of the TPB.<sup>30</sup> They all provided for payment by the employer within a specified number of days upon presentation of payment certificates prepared by the contractor. These certificates stated the amount of work performed during the covered period against quantities and work indicated in the contracts. Prior to submission, they had to be reviewed and approved by the engineering firm that served as the employer's on-scene representative.
62. As described in Mr. Al Kelani's Witness Statement and *infra*, the Libyan agencies involved then had elaborate multi-stage, multi-participant procedures for review and approval of the payment certificates. Each payment also had to be approved by the Finance Ministry and by REKABA,<sup>31</sup> an entity of the Libyan parliament that had, and sometimes exercised, the power to disapprove or modify payments. Payments could only be made if the employing agency was allocated sufficient funds through Libya's parliamentary budget process. Delays and deductions associated with the approval processes contributed to some of Claimant's claims.
63. The contracts authorized the employer to withhold from amounts due under approved payment certificates a 5% retention against final completion and approval of the works, as well as an additional 2% as a final guarantee of the works following their acceptance.
64. Claimant seeks a total of €37,116,842 for payment certificates said to have been approved by the employer's representative and submitted for payment, but not paid.<sup>32</sup> Respondent counters that Claimant should not ask for compensation for unpaid payment certificates and additional works when Al Hani retains advance payments, which are monies received

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<sup>30</sup> 1<sup>st</sup> Al Kelani Witness Statement ("WS") ¶2.

<sup>31</sup> 1<sup>st</sup> Al Kelani WS ¶19.

<sup>32</sup> CH-3, Claimant's Quantum Experts' Presentation ("FTI Quantum Hearing Presentation"), p. 4.

for work that it did not perform.<sup>33</sup> Respondent also contends that there were many errors in the accounting of the amounts outstanding under the payment and bitumen certificates.<sup>34</sup>

65. Under the contracts, the contractor was entitled to receive an advance payment of an agreed percentage of the contract value from the employer (15% for the road contracts; 20% for Tajura).<sup>35</sup> The advance payments were to be progressively repaid by withholdings from amounts due to Al Hani for approved payment certificates.<sup>36</sup> Advance payments were made to Al Hani against irrevocable bank guarantees to be released only after completion of all work under the Contracts and the expiry of the remedial period under the guarantee period.<sup>37</sup>
66. Article 10 of the Tajura Contract illustrates this mechanism. It describes the advance payment as a “credit” in the amount of 20% of the value of the contract, with the amount of the credit to be deducted from payments to Al Hani “up to its total refund.” The terms of the Contract do not specify or limit the purposes for which this credit may be used. The credit is secured by an irrevocable and unconditional letter of guarantee provided by Al Hani, which could be reduced as the credit was paid down.<sup>38</sup> The Tajura guarantee arrangement appears to have partially lapsed through an administrative error by a Libyan bank involved in the process of renewing it. After 2011, HIB insisted that Al Hani restore the guarantee as a precondition for any agreement on partial payment and resumption of work at Tajura. The reasons why this did not occur are disputed.
67. As discussed *infra*, except for the apparently lapsed portion of the Tajura guarantee, other contractually required guarantees have remained in force in the years since Claimant’s departure from Libya; Claimant alleges that they remain a significant potential liability. Its

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<sup>33</sup> Resp. Post-Hearing Brief (“PHB”) ¶¶124, 209, 224, 236.

<sup>34</sup> Resp. PHB ¶261.

<sup>35</sup> 1<sup>st</sup> Al Kelani WS ¶12; Resp. C-Mem. ¶44.

<sup>36</sup> 1<sup>st</sup> Al Kelani WS ¶12 et seq.; Resp. C-Mem. ¶46.

<sup>37</sup> Resp. C-Mem. ¶45.

<sup>38</sup> Sample letters of credit are at C-30, C-31, and C-35.

claims for compensation include significant amounts in respect of fees paid to banks to maintain the guarantees. While the “fronting” guarantee for the Tajura guarantee apparently was allowed to lapse through a Libyan bank’s administrative error,<sup>39</sup> the evidence indicates that a related counter-guarantee, securing the Libyan bank for the foreign currency portion of the advance payment, remains in effect between the Libyan bank and ABC International Bank.<sup>40</sup>

68. Strabag’s joint venture partner, LIDCO, was not required to provide guarantees. At the Hearing, Respondent’s witness Mr. Al-Naas testified that LIDCO was exempt pursuant to a resolution of the General People’s Committee. When asked why this resolution was adopted, he testified that he believed “that that Resolution was because LIDCO is part of the Libyan Government; and, therefore, the Government of Libya is the one who guarantees LIDCO, or provides the Guarantee for LIDCO.”<sup>41</sup>
69. Article 31 of the Tajura Contract gives the employer “the right to cancel the Contract and to confiscate the guarantee” in various situations of non- or poor performance by Al Hani. In response to the Tribunal’s inquiry at the Hearing, Respondent confirmed that it has not called the guarantees in any of the contracts to cover its unrecovered advance payments. However, Mr. Al-Naas indicated at the Hearing that HIB intended to call the guarantees in its favor.<sup>42</sup> The situation of the guarantees is further addressed *infra*.
70. At the time Claimant ceased its activities in Libya, the advance payments on the Benghazi and Misurata road projects had been completely repaid.<sup>43</sup> Indeed, more than was required was withheld; Respondent’s witness Mr. Al Kelani stated in his First Witness Statement that there was a balance in Al Hani’s favor for overpayments under both contracts.<sup>44</sup>

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<sup>39</sup> 1<sup>st</sup> Knaack WS ¶37; 2<sup>nd</sup> Knaack WS ¶15.

<sup>40</sup> Cl. PHB ¶92(c).

<sup>41</sup> TR 7:1564:11-15 (Mr. Al-Naas); 1<sup>st</sup> Al-Naas WS ¶12.

<sup>42</sup> TR 7:1588-1589 (Mr. Al-Naas).

<sup>43</sup> 1<sup>st</sup> Al Kelani WS ¶14 (“... Al-Hani has fully earned the Advance Payment under the Mis[u]rata and Benghazi Contracts ...”)

<sup>44</sup> 1<sup>st</sup> Al Kelani WS ¶31.

71. Mr. Al Kelani's First Witness Statement includes a table setting out his calculation of the unrecovered amounts of advance payments on the five road contracts;<sup>45</sup> the Tribunal refers to his evidence in this regard for purpose of illustration and makes no decision regarding its correctness. The table indicates that approximately LYD349,000 remained on the small TIAR-NE Contract guarantee, approximately LYD1.534 million on the TIAR Contract, and a considerably larger amount about LYD25.9 million on the Garaboulli Contract, where work had just begun when the conflict began in 2011.<sup>46</sup> This table indicates that of LYD54,980,401.927 in advance payments on the five road contracts, slightly over half – LYD27,786,195.53 – was not recovered.
72. The largest advance payment was for the Tajura Contract, Al Hani's largest project in Libya. According to Mr. Al-Naas's First Witness Statement, the total advance payment under this contract was over LYD155.7 million, divided between over LYD62 million and almost €90 million.<sup>47</sup> (The Tribunal again refers to this evidence for purposes of illustration, and makes no decision regarding its correctness.) As presented in Mr. Al-Naas's First Witness Statement, LYD20 million was deducted from the advance payment to pay contract registration tax and stamp tax, leaving a net advance payment to Al Hani of approximately LYD56 million and €89 million. According to his First Witness Statement, "[b]y the time Al-Hani declared *force majeure* under the Tajura Contract on March 3, 2011, it had performed less than 5% of the works under the Tajura Contract, and repaid only approximately LYD2,962,008 of the Advance Payment."<sup>48</sup>
73. At the Hearing, Mr. Al-Naas introduced what was characterized as a "correction" to the figures given in his First Witness Statement. He revised his table to increase the amount of the advance payment to Al Hani by approximately LYD20 million, reflecting a payment by HIB to the Libyan tax authorities in connection with registration of the Tajura Contract.<sup>49</sup>

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<sup>45</sup> 1<sup>st</sup> Al Kelani WS Table 1 at ¶14.

<sup>46</sup> 1<sup>st</sup> Al Kelani WS Table 1 at ¶14.

<sup>47</sup> 1<sup>st</sup> Al-Naas WS Table 1 at ¶11.

<sup>48</sup> 1<sup>st</sup> Al-Naas WS ¶13.

<sup>49</sup> TR 7:1554-1555, TR 7:1612:4-9 (Mr. Al-Naas).



74. As discussed *infra*, Respondent does not counter-claim for these unpaid balances, but asks that they be set off against any recovery on Strabag's contract-based claims.

**B. LOSS AND DAMAGE TO AL HANI PROPERTY DURING THE 2011 CONFLICT<sup>50</sup>**

75. Armed conflict between Government forces and rebel forces seeking control of Libya broke out in February 2011, beginning in the Benghazi area in the east of the country. In response to these events, a NATO-led coalition began a military intervention in Libya and enforced a no-fly zone. Al Hani suffered significant losses of equipment and facilities in the ensuing months of conflict.
76. As of the end of December 2010, Al Hani's equipment manager, Mr. Penkhues, calculated that Al Hani had equipment in Libya valued at more than LYD100 million.<sup>51</sup> As the conflict intensified and spread, Al Hani sought to protect this property, moving vehicles and equipment used on the Benghazi project to locations further west, and assembling and attempting to secure vehicles and equipment at its sites, particularly at its large Tweisha yard in the vicinity of Tripoli.<sup>52</sup>
77. The mounting conflict between rebel forces and troops loyal to the regime and other supporters was accompanied by a widespread breakdown of law and order. Al Hani's vehicles being evacuated from the Benghazi region were stopped on the coastal road and were taken at a checkpoint. In February 2011, Al Hani's large construction camp at Tajura was overrun by a mob, looted, and partially burned. Appeals to police were unavailing.
78. On 3 March 2011, Al Hani invoked *force majeure* as of 20 February 2011 in letters to its employers. Al Hani's employers demanded that the company continue work, but Al Hani declined to do so. Along with other international companies and foreign embassies, Al Hani evacuated and demobilized its expatriate personnel in early March 2011.<sup>53</sup>

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<sup>50</sup> Cl. Mem. ¶148 et seq.

<sup>51</sup> 1<sup>st</sup> Penkhues WS ¶13.

<sup>52</sup> Cl. Mem. ¶¶149-150.

<sup>53</sup> Cl. Mem. ¶¶151-152.

79. As discussed *infra*, beginning in March and April of 2011, and continuing for several months thereafter, some Al Hani sites were occupied for varying lengths of time by organized military units loyal to the regime. Al Hani's major facility at Tweisha was occupied for substantial periods by soldiers of the 32<sup>nd</sup> Reinforced Brigade, who requisitioned numerous vehicles and a great deal of equipment, some of it against receipts.<sup>54</sup> Military forces occupying the camps are said to have stolen other equipment, and looted and damaged structures and equipment.<sup>55</sup>
80. Misurata, located on the coastal road between Benghazi in the east and Tripoli in the west, was the scene of intense conflict between regime forces and rebels. Al Hani's construction camp in the region suffered heavily in this fighting. The record includes photographs taken by a surveyor analyzing the damage for insurance purposes in 2012; these include photographs of buildings at the camp destroyed by fire, damage attributed to splinters from NATO bombing, and cartridge cases of varying calibers.
81. As discussed *infra*, during this period, while Al Hani's expatriate staff had left the country, some of Al Hani's local employees remained on duty and provided intermittent reports on the state of Al Hani's facilities and property. This information was used by Al Hani's equipment manager, Mr. Penkhues, to prepare reports to management.
82. In about August 2011, as the regime neared collapse, the elements of the 32<sup>nd</sup> Brigade that had occupied the Tweisha camp withdrew. Before doing so, they are said to have extensively vandalized the premises and remaining equipment.
83. On 27 August 2011, Al Hani sent its personnel to report on the Tawarga site. By this time, the majority of the equipment in the Tawarga yard was reported as having "disappeared."<sup>56</sup> The report by Claimant's insurance surveyors, Sadaoui Surveyors Group, dated 12 June

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<sup>54</sup> Cl. Mem. ¶157; Akasha WS ¶6 et seq.

<sup>55</sup> Cl. Mem. ¶153 et seq.

<sup>56</sup> C-220, Email from Mr. Azouz to Mr. Boromisa and others dated 21 September 2011.

2012, stated that the damage at the Tawarga site was “essentially cause[d] by NATO bombardment and rebels attacks.”<sup>57</sup>

84. Following the end of active hostilities in the fall of 2011, the evidence indicates that widespread violence and breakdown of law occurred in the areas of Al Hani’s camps.

**C. EVENTS AFTER THE 2011 CONFLICT**

85. In the months after the 2011 conflict, Strabag explored the possibility of returning to work in Libya. In September 2011, Claimant’s witness Mr. Napowanez and other senior Strabag officials visited Libya to determine the state of Al Hani’s facilities and equipment and to assess if it was possible to restart operations. They determined that it should be possible.<sup>58</sup> Mr. Napowanez and a team returned the following month to begin to assess what equipment was left and what was needed to restart operations. They saw that much equipment had been taken or damaged, including an asphalt plant that soldiers had used for target practice.<sup>59</sup> In late 2011, representatives of Claimant met with officials from HIB and TPB to explore the possibility of restarting work and of obtaining compensation for loss and damage suffered during the war.<sup>60</sup>
86. In the ensuing months, Strabag and Al Hani and their pre-Revolution contracting partners engaged in extensive discussions regarding the possibilities for securing payment for unpaid work done prior to the Revolution; compensation for wartime damage; and resuming work on major uncompleted contracts.<sup>61</sup> These efforts were ultimately unsuccessful.
87. Discussions between Strabag and Al Hani and their pre-Revolution contracting partners were shaped by the new Libyan authorities’ actions requiring review of pre-war contracts and establishing uniform standards for restoring contract relationships. A central body

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<sup>57</sup> C-290, “Survey Report covering damages of equipment of Strabag Company in Libya during War Period 2011,” prepared by Mohamed Adouni dated 12 June 2012 (“Sadaoui Report”), p. 35.

<sup>58</sup> 1<sup>st</sup> Napowanez WS ¶21.

<sup>59</sup> 1<sup>st</sup> Napowanez WS ¶¶22-24.

<sup>60</sup> 1<sup>st</sup> Napowanez WS ¶29.

<sup>61</sup> Cl. Mem. ¶200 et seq.

called the “Twenty Committee” played a role in this process. As discussed *infra*, the Parties disagree regarding the nature and authority of this body, and the extent to which it exercised supervision or control over resumption negotiations. In any case, the evidence shows that through some mechanism, a uniform practice came to be applied allowing for partial payment of pre-war claims for firms that resumed work on pre-war contracts and agreed to a separate procedure for addressing claims for wartime losses.<sup>62</sup> On 19 February 2012, Al Hani wrote to the Secretary of the Implementing Board of the Transportation and Projects Board stating that it was willing to recommence and resume the execution of all the remaining works; and that it expected to receive 50% of the outstanding payments while the remaining 50% shall be paid in instalments within five months after resuming the works.<sup>63</sup> On 12 March 2012, NJS and HIB met with Al Hani to discuss the Preliminary Damages Report regarding losses sustained in the Tajura Project.<sup>64</sup>

88. The security situation deteriorated during and after the summer of 2012; the U.S. Ambassador and other U.S. personnel died in an attack in Benghazi in September, and Al Hani’s equipment was stolen.<sup>65</sup> The minutes of a 5 September 2012 Al Hani Board meeting describe a difficult and politically uncertain situation.<sup>66</sup> Nevertheless, Al Hani continued to discuss possible resumption of work with its contract partners.
89. In February 2013, Al Hani signed agreements with the TPB providing for Al Hani to resume work on the Misurata, TIAR and Garaboulli road contracts. The TPB agreed to pay 50% of the amounts due for previously executed works, and to pay the balance within 6 months. Al Hani’s claims for wartime damages were to be settled by a committee in which the Government had ultimate decision authority.<sup>67</sup> The TPB would not agree to any

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<sup>62</sup> Cl. Reply ¶352 et seq.

<sup>63</sup> Cl. Mem. ¶207; Resp. C-Mem. ¶¶308-309.

<sup>64</sup> Resp. C-Mem. ¶328.

<sup>65</sup> Cl. Mem. ¶224.

<sup>66</sup> Cl. Mem. ¶219.

<sup>67</sup> Cl. Mem. ¶¶233-234.

payments other than on approved payment certificates, including on war damages.<sup>68</sup> Al Hani accepted TPB's conditions, except for waiver of its right to make claims for damages during *force majeure*.<sup>69</sup>

90. For reasons that are disputed, Al Hani and HIB did not agree on resumption of work at Tajura.<sup>70</sup>
91. In March 2013, Gumhouria Bank, which had previously extended a substantial line of credit to Al Hani, secured a freeze of Al Hani's funds.<sup>71</sup> The security situation continued to deteriorate and Al Hani's staff at the Tweisha site were assaulted.<sup>72</sup>
92. In June 2013, Al Hani received some payment for work previously performed on two projects, but did not receive payment for work on the Garaboulli project.<sup>73</sup> Al Hani's financial and security situation was precarious in the face of a deteriorating security situation<sup>74</sup> that included assaults upon Al Hani's employees and taking some of them hostage. Al Hani was unsuccessful in seeking assistance and protection from Libyan authorities.<sup>75</sup>
93. On 27 February 2014, Al Hani wrote to HIB and TPB informing them that if they did not pay Al Hani's claimed arrears, Al Hani would cease work in Libya. There was no response. On 16 May 2014, Strabag gave notice of a dispute under the Treaty and requested consultations, but received no response.<sup>76</sup> Strabag filed its request for arbitration on 23 June 2015.<sup>77</sup>

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<sup>68</sup> Cl. Reply ¶¶359-360.

<sup>69</sup> Cl. Mem. ¶¶207, 211-212.

<sup>70</sup> Cl. Reply ¶361 et seq.

<sup>71</sup> Cl. Mem. ¶¶236-237.

<sup>72</sup> Cl. Mem. ¶¶238-241.

<sup>73</sup> Cl. Reply ¶¶387-389.

<sup>74</sup> Cl. Mem. ¶¶245-246.

<sup>75</sup> Cl. Reply ¶378 et seq.

<sup>76</sup> Cl. Request for Arbitration ¶4.

<sup>77</sup> Cl. Request for Arbitration.

94. At some point subsequent to the initiation of the arbitration in June 2015, a large quantity of Al Hani's vehicles and construction equipment were removed from the Tweisha yard. Claimant's claim with respect to these missing vehicles and equipment is considered *infra*.
95. As discussed *infra*, the evidence shows that since the revolutionary hostilities began in the late winter of 2011, conditions in Libya have been marked by recurring armed conflicts between rival groups, widespread events of violence and breakdown of law, and the absence of effective State authority in large areas. This has led to the absence of security and safety at many times and in in many areas of the country.
96. The absence of law and order and of effective government control has implications for some of Claimant's claims. These issues are considered *infra*.

## V. JURISDICTION

### A. INTRODUCTION AND OVERVIEW

97. Claimant contends that the Tribunal has jurisdiction under the Treaty and the Additional Facility Rules to entertain its claims. Respondent denies that the Tribunal has jurisdiction.
98. To establish the Tribunal's jurisdiction, Claimant relies on Chapter Two of the Treaty, and in particular Articles 10-12. Article 10 provides that Chapter Two of the Treaty, setting out the procedures for settling disputes, applies to disputes between a Contracting Party and an investor of the other Contracting Party "concerning an alleged breach of an obligation of the former under this Agreement which causes loss or damage to the investor or his investment." Article 11 of the Treaty then authorizes, among different means of settlement, compulsory arbitration of alleged breaches of obligations under the Treaty. In Article 12(1), each Contracting Party "gives its unconditional consent to the submission of a dispute to international arbitration in accordance with this Part."
99. Article 1 of the Treaty defines "investor" and "investment," stating in relevant part:

(1) "investor of a Contracting Party" means:

...

(b) an enterprise constituted or organised under the applicable law of a Contracting Party; making or having made an investment in the other Contracting Party's territory.

(2) "investment by an investor of a Contracting Party" means every kind of asset in the territory of one Contracting party, owned or controlled, directly or indirectly, by an investor of the other Contracting Party, including:

(a) an enterprise constituted or organised under the applicable law of the first Contracting Party;

(b) shares, stocks and other forms of equity participation in an enterprise as referred to in subparagraph (a), and rights derived therefrom;

(c) bonds, debentures, loans and other forms of debt and rights derived therefrom;

(d) any right whether conferred by law or contract, including turnkey contracts, concessions, licences, authorisations or permits to undertake an economic activity;

(e) claims to money and claims to performance pursuant to a contract having an economic value;

...

(g) any other tangible or intangible, movable or immovable property, or any related property rights, such as leases, mortgages, liens, pledges or usufructs.

100. Claimant denies Respondent's jurisdictional objection and requests the Tribunal to find jurisdiction on the following grounds:<sup>78</sup>

(1) The Tribunal's jurisdiction is founded on the dispute resolution provisions of the BIT, in particular Article 10.

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<sup>78</sup> Cl. PHB ¶233 et seq.

- (2) Accordingly, for the Tribunal to assert jurisdiction, it must be satisfied that: (a) Claimant is an investor and made an investment in Libya as defined by the BIT; (b) there is a dispute concerning an alleged breach of Libya's obligations under the BIT; and (c) the alleged breach has caused loss or damage to the investor or his investment.
- (3) In Claimant's submission, each of these requirements arising from Article 10 is satisfied:<sup>79</sup>
  - Claimant is an investor in Libya pursuant to Article 1(I)(b) of the BIT and made, directly or indirectly, an investment in Libya as defined in Article 1(2) of the BIT.
  - Several breaches of the BIT by Libya have undoubtedly been alleged (and also established) by Claimant.
  - Those breaches have caused damage or loss to Claimant.

101. Respondent counters that the Tribunal lacks jurisdiction because:

- (1) Claimant does not have an "investment" for purposes of the treaty;<sup>80</sup>
- (2) Claimant is not an "investor" for purposes of the Treaty, because it did not make any investment in Libya;<sup>81</sup>
- (3) Claimant's indirect interest in Al Hani does not grant it any rights in Al Hani's assets;<sup>82</sup> and
- (4) Claimant's claims are contractual claims that are outside the Tribunal's jurisdiction.<sup>83</sup>

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<sup>79</sup> Cl. PHB ¶¶220 et seq.

<sup>80</sup> Resp. C-Mem. ¶¶410-455.

<sup>81</sup> Resp. C-Mem. ¶¶456-472.

<sup>82</sup> Resp. C-Mem. ¶¶473-484.

<sup>83</sup> Resp. C-Mem. ¶¶349-409.



102. The Tribunal considers the Parties' arguments regarding jurisdiction in the order of Respondent's objections given above.

**B. WAS THERE AN INVESTMENT?**

103. Respondent contends that there was no investment protected by the Treaty, emphasizing arguments to the effect that Claimant's case ultimately involves no more than claims for non-performance of road building and construction contracts. As such, Respondent contends, there was no investment protected by the Treaty. (Respondent's related contention that the Treaty does not create jurisdiction over such claims involving contracts is addressed *infra*.)
104. Respondent argues in this regard that Claimant's activities in Libya did not have the essential characteristics of an investment,<sup>84</sup> characteristics often referred to as the *Salini* criteria, derived from *Salini v. Morocco*.<sup>85</sup> First, Respondent contends that Strabag assumed no "investment risk" of the kind it understands to be required by the *Salini* criteria. Al Hani had contractual guarantees that it would be paid for its work. These insulated Strabag from the risk that the venture would turn out not to be profitable, and shielded it from the sort of risk characteristic of a true investment.<sup>86</sup> Second, in Respondent's view, Strabag made no significant capital contribution to its activities in Libya. It instead looked to advance payments from Libyan entities and to periodic payments to Al Hani for completed work to fund its activities.<sup>87</sup> Third, Respondent contends that Claimant's activities in Libya involved a series of limited-term construction contracts, and so was of insufficient duration to constitute an investment.<sup>88</sup> Finally, Respondent contends that the purported investment did not make sufficient contribution to Libya's economic development, as the road contracts were merely service contracts for road maintenance,

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<sup>84</sup> Resp. C-Mem. ¶¶416 et seq.

<sup>85</sup> RL-43, *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 ("*Salini v. Morocco*").

<sup>86</sup> Resp. C-Mem. ¶¶419-437.

<sup>87</sup> Resp. C-Mem. ¶¶438-443.

<sup>88</sup> Resp. C-Mem. ¶¶444-447.

while it completed only a slight percentage of the work required under the Tajura Contract.<sup>89</sup>

105. Claimant counters that it indeed had a protected investment satisfying the Treaty's definition of investment,<sup>90</sup> notably in the form of its 60% interest in Al Hani. Claimant observes that it also made substantial loans to Al Hani, constituting claims to money under the Treaty definition;<sup>91</sup> had rights and claims to money under contracts;<sup>92</sup> and had substantial physical assets in Libya.<sup>93</sup>
106. In Claimant's view, it made a multiyear commitment to projects in Libya, intending to stay for the long term. In pursuit of this objective, Al Hani bought real property for its facilities in Libya and imported heavy equipment that only made sense for a long-term investment. Claimant contends that through all of these actions, it fully satisfied the Treaty's definition of investment.
107. Further, in Claimant's view, the *Salini* criteria, whatever their relevance in other settings, are not relevant here. The *Salini* criteria had their genesis in the requirements of Article 25 of the ICSID Convention, which limits ICSID Convention jurisdiction to legal disputes "arising directly out of an investment." In this context, some may see a need for a definition of "investment" to determine whether an ICSID Tribunal has jurisdiction. This, however, is not an ICSID Convention case. Claimant therefore submits that the only relevant definition of "investment" is that contained in the Treaty.<sup>94</sup>

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<sup>89</sup> Resp. C-Mem. ¶¶448-450.

<sup>90</sup> Cl. Reply ¶395 et seq.

<sup>91</sup> Cl. Mem. ¶265.

<sup>92</sup> Cl. Mem. ¶266.

<sup>93</sup> Cl. Mem. ¶267.

<sup>94</sup> Cl. Reply ¶414.

**(1) Was There an Investment? The Tribunal's Decision**

108. The Tribunal finds that there was a protected investment within the meaning of the Treaty. The Tribunal recalls in this regard that Article 1(2) of the Treaty defines “investment” as “every kind of asset ... owned or controlled, directly or indirectly” by an investor. Claimant’s activities in Libya conformed to the literal definition of investment under the Treaty. *Inter alia*, Claimant had indirect ownership of a 60% majority of the shares in Al Hani, a substantial enterprise carrying on a construction business in Libya, holding and carrying out significant construction contracts, owning real property, and maintaining a substantial physical footprint in the territory of Libya over several years. Indeed, as time went on, LIDCO, Claimant’s co-shareholder in Al Hani, failed to respond to cash calls or otherwise to contribute to Al Hani, requiring Claimant to provide significant financial support in the form of loans.
109. Respondent calls for the Tribunal to give weight to the *Salini* criteria, which in its view show that there was no investment. Claimant denies their relevance in a case where jurisdiction does not rest on Article 25 of the ICSID Convention, the context in which the *Salini* criteria were first articulated. The Tribunal notes that pursuant to Article 3 of the Additional Facility Rules, none of the Convention provisions, including its Article 25, are applicable to Additional Facility arbitrations. However, the Tribunal does not need to decide whether the *Salini* criteria have legal relevance here to determine whether an investment for the purposes of Article 2(a) of the Additional Facility Rules exists, because the record shows that if they were to be applied in assessing whether there is an investment for the purposes of the Additional Facility Rules, they are satisfied. The Tribunal notes in this regard the very substantial similarities between the activities at issue in this case and those found to constitute investments in *Salini v. Morocco* and *Toto v. Lebanon*.<sup>95</sup>

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<sup>95</sup> RL-31, *Toto Costruzioni Generali S.p.A. v. Lebanese Republic*, ICSID Case No. ARB/07/12, Decision on Jurisdiction (“*Toto v. Lebanon*”), 11 September 2009, ¶¶86-87.

110. The evidence shows that Claimant committed substantial amounts of material and human capital to its investment over a period of several years, acquiring property in Libya, building large facilities, and importing large quantities of heavy equipment, including material such as rock crushers that only made economic sense in the context of a long-term presence in Libya.<sup>96</sup> This level of effort is on a par with that identified by the *Salini* tribunal.<sup>97</sup> Claimant's venture was hardly free from risk, as the events underlying this arbitration show, events that involved risks far greater than those found sufficient in *Salini*.<sup>98</sup> Claimant clearly expected its efforts in Libya to be of a substantial duration, beginning from its first exploratory visits in 2006 and effectively ending eight years later with Mr. Napowanez's departure in 2014. The *Salini* tribunal found that that claimant's three years of road work in that case showed the existence of an investment.<sup>99</sup> And, in the case at hand, Claimant's work provided a social benefit to Respondent in the form of roads that were significantly improved prior to the Revolution, although other improvements to infrastructure were not completed due to the Revolution. The *Salini* tribunal found that the roads built by those claimants likewise had contributed to economic development; as the tribunal there observed, "[i]t cannot be seriously contested that the highway in question shall serve the public interest."<sup>100</sup>

111. Accordingly, Respondent's first jurisdictional objection is dismissed.

**(2) Is Claimant an Investor?**

112. Claimant contends that it clearly is an "investor" for purposes of Article 1(1)(b) of the Treaty. It is an enterprise "constituted or organised under the applicable law" of Austria, a Contracting Party to the Treaty, and it had made an investment in the territory of Libya, the other Contracting Party.

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<sup>96</sup> 2<sup>nd</sup> Napowanez WS.

<sup>97</sup> *Salini v. Morocco* ¶53.

<sup>98</sup> *Salini v. Morocco* ¶55.

<sup>99</sup> *Salini v. Morocco* ¶54.

<sup>100</sup> *Salini v. Morocco* ¶57.

113. Respondent, however, denies that Claimant was an investor within the meaning of the Treaty. In Respondent's contention, Article 1(1)(b) of the Treaty requires that an investor be "making or having made" an investment. Respondent observes in this regard that Strabag's investment was made indirectly through two layers of wholly owned subsidiary companies, a German company ILBAU, which in turn owned a second German company, Strabag International, which owned 60% of Al Hani.<sup>101</sup>
114. Relying heavily on the analysis of *Standard Chartered v. Tanzania*,<sup>102</sup> Respondent urges that the Treaty requires that Strabag itself directly provide any funds or other elements of investment into Libya, without utilizing intermediate vehicles. By using ILBAU and Strabag International as conduits for these purposes, Claimant Strabag did not itself "make" an investment as required by Article 1(1)(b)'s definition of investor, because it did not itself take direct action to bring the investment into being.<sup>103</sup> Instead, Strabag International, a German company "made" the investment, but it is not covered by Austria's treaty with Libya.<sup>104</sup>
115. In reliance on *Standard Chartered*, Respondent submits that Article 1(1)(b) of the Treaty requires that the claimant itself be the active party in the making of an investment. The Claimant here did not itself directly carry on the activities involved in creating the investment; it merely "held" an investment made through subsidiary companies, rather than "making" one. Hence, it was not an "investor" within the Treaty's definition. In Respondent's submission, the fact that the Treaty extends protection to investments owned or controlled directly or indirectly is irrelevant. The issue is whether Claimant Strabag was a covered investor because it "made" an investment. It did not.<sup>105</sup>

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<sup>101</sup> Resp. C-Mem. ¶¶3, 16, 456.

<sup>102</sup> RL-75, *Standard Chartered Bank v. United Republic of Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012 ("*Standard Chartered v. Tanzania*").

<sup>103</sup> Resp. C-Mem. fn 862.

<sup>104</sup> Resp. C-Mem. ¶¶456-472.

<sup>105</sup> Respondent's Rejoinder ("Resp. Rej.") ¶92 and fn 151.

116. Claimant disputes Respondent’s contention, pointing to significant differences between the treaties and investments involved in *Standard Chartered* and its present claims. Claimant notes that the *Standard Chartered* tribunal in fact acknowledged that an investment could be made indirectly utilizing an entity to channel an investor’s contribution to the host State,<sup>106</sup> and points to the broad definition of investment under the Treaty, emphasizing that the definition expressly includes “every kind of asset ... owned or controlled, directly or indirectly” by an investor. In Claimant’s submission, this confirms that the Treaty does not require that an investor directly “make” an investment. Instead, the Treaty is clear that it can do so through intermediate vehicles, such that its ownership or control can be indirect.<sup>107</sup> Claimant urges in this regard that investment jurisprudence makes clear that investments include investments made indirectly through subsidiaries, as the Treaty expressly authorizes.<sup>108</sup>

### **(3) The Tribunal’s Analysis and Decision**

117. Under Article 14 of the Treaty, the Tribunal is to decide disputes in accordance with both the Treaty and “applicable rules and principles of international law.” The Tribunal therefore recalls that under the general rule of treaty interpretation set out in Article 31(1) of the Vienna Convention on the Law of Treaties (“VCLT”), a treaty’s terms are to be interpreted “in good faith in accordance with the[ir] ordinary meaning ... in their context.” Under Article 31(2) of the VCLT, context includes the other words of the treaty. In light of these principles, the Tribunal believes that the Treaty’s definitions of “investor” and “investment” should be understood in their ordinary meaning and in a manner that renders them consistent.

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<sup>106</sup> Cl. Reply ¶¶402-403.

<sup>107</sup> Cl. Mem. ¶268.

<sup>108</sup> Cl. Reply ¶425 et seq.

118. Thus, the fact that Article 1(2)'s definition of an "investment" includes assets "owned or controlled ... indirectly"<sup>109</sup> by an investor necessarily informs what it means to "make" an investment for purposes of Article 1(1)(b)'s definition of "investor." It is difficult to understand how an investor could "make" an investment that is "owned or controlled ... indirectly" given the narrow conception of "making" an investment urged by Respondent.<sup>110</sup>
119. The Tribunal finds that Claimant Strabag qualifies as an investor as defined by Article 1(1)(b) of the Treaty. It was, and remains, an Austrian corporation that satisfies the Treaty's definition of an investor. The Tribunal does not accept Respondent's contention that Strabag was not an investor because it utilized wholly owned German subsidiary companies as the vehicles for implementing its investment plans. Claimant indeed "made" an investment within the ordinary meaning of the term. That it made it through an intermediate corporate vehicle does not disqualify it as an investor under the Treaty, which explicitly covers "every kind of asset ... owned or controlled, directly or indirectly" by the Claimant.
120. Respondent's second jurisdictional objection is accordingly dismissed.

## **C. CLAIMANT'S STANDING TO BRING SHAREHOLDER CLAIMS**

### **(1) Respondent's Position**

121. Respondent's third objection is that Claimant is not entitled to seek compensation for the value of losses incurred by Al Hani, including claims under Al Hani's contracts and for loss or damage to its property. In Respondent's view, Claimant is asserting claims to the property of a separate juridical entity, property that belongs to Al Hani and not to Claimant. As summarized in Respondent's Counter-Memorial:

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<sup>109</sup> TR 1:252:16-21 (Presiding Arbitrator Crook, Ms. Harwood); TR 1:253:12-13 (Ms. Harwood).

<sup>110</sup> Other articles of the BIT are also part of the context of Article 1 for purposes of VCLT Article 31 and also caution against giving excessive weight to "make." Thus, Articles 2, 3 and 8 speak of "investments by investors" of a Party, and Article 7 refers to "an investment by an investor." These provisions do not speak of investments "made by investors." The treaty-makers apparently did not see any need to limit these provisions to investments "made" by investors.

Thus, Claimant is effectively arguing that by virtue of its indirect 60% interest in Al-Hani, through ILBAU and Strabag International, all of Al-Hani's assets (the loan, contractual rights, machinery, equipment etc.) are transformed into investments made by Claimant in Libya and protected under the Treaty.

There is no basis for that argument under the Treaty and international law. While Claimant's indirect holding of the 60% equity interest in Al-Hani might qualify as investment under Article 1(2)(a) of the Treaty, that interest would not grant standing to assert any rights with respect to the assets of Al-Hani (and *a fortiori* over the loan extended by Strabag International, a German entity not covered under the Treaty). In such circumstances, arbitral tribunals have consistently held that indirect holding of shares in an entity that may qualify as an investment under a BIT does not grant rights over the assets of that entity.<sup>111</sup>

122. Citing *Poštová Banka v. Hellenic Republic*<sup>112</sup> and cases cited therein, Respondent concludes that “all the claims relating to rights under the Contracts as well as to the right to recover damages for alleged loss of machinery and equipment fall outside of the jurisdiction of this Tribunal, because they relate to rights and property that belonged to Al-Hani, not to Claimant.”<sup>113</sup>

## (2) Claimant's Position

123. Claimant counters that Respondent's objection “ignores the wording of the Treaty, in particular the express inclusion of indirectly held assets and loans” in Article 1(2)'s definition of investment. Claimant refers as well to Article 10 of the Treaty, which in its view provides standing to bring a claim.<sup>114</sup> Claimant disputes Respondent's reliance on *Poštová Banka*, which in its view relies on “strained analogies” and cannot assist the Tribunal because it involves a different investment, in a different country, under a different treaty.<sup>115</sup>

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<sup>111</sup> Resp. C-Mem. ¶¶474-475.

<sup>112</sup> RL-66, *Poštová Banka, a.s. and Istrokapital SE v. Hellenic Republic*, ICSID Case No. ARB/13/8, Award, 9 April 2015 (“*Poštová Banka v. Hellenic Republic*”).

<sup>113</sup> Resp. C-Mem. ¶480.

<sup>114</sup> Cl. Reply ¶418.

<sup>115</sup> Cl. Reply ¶420.



124. Claimant's response emphasizes the broad definition of investment in Article 1(2) of the Treaty, including its coverage of assets "owned or controlled, directly or indirectly" by an investor:

As the Claimant has demonstrated, the *chapeau* of Article 1(2) is extensive. It covers all types of assets, including those that are owned or controlled by the Claimant indirectly. This treaty-based conception of investment inevitably encompasses assets that belong to Al Hani. That is entirely consistent with the object and purpose of the Treaty, and many other arbitral tribunals have assumed jurisdiction over claims in similar circumstances.<sup>116</sup>

### **(3) The Tribunal's Analysis and Decision**

125. As the Parties observe, this is not the first investment case in which a claimant seeks compensation on the basis of its shareholding interests in a locally incorporated entity. In Respondent's view, in such circumstances, the claimant may recover only for the diminution of the value of its shareholding interest caused by measures by the host State contrary to a treaty.<sup>117</sup>
126. In this case, however, Strabag does not claim on the basis of the diminution of the value of its interest in Al Hani. It rather calculates and claims its losses by reference to losses and damage incurred by Al Hani itself, such as unpaid payment certificates, costs for additional works, costs for delays caused by Respondent's authorities and the like, plus losses to equipment said to be requisitioned, damaged or destroyed by Respondent's armed forces.<sup>118</sup> In other words, Strabag seeks 60% of the compensation that it contends Respondent's authorities should have paid to Al Hani pursuant to the contracts for its contract claims, or, pursuant to the Treaty for its treaty claims for war damages.<sup>119</sup>

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<sup>116</sup> Cl. Reply ¶421.

<sup>117</sup> Resp. Rej. ¶105 (quoting *Poštová Banka* ¶245).

<sup>118</sup> Cl. PHB ¶386.

<sup>119</sup> Cl. PHB ¶¶389-390.

127. Claimant bases this argument upon the broad definition of investment in Article 1(2) of the Treaty: “investment by an investor of a Contracting Party means *every kind of asset* in the territory of one Contracting party, *owned or controlled, directly or indirectly*, by an investor of the other Contracting Party ...” (emphasis added.) The definition continues with an illustrative list of covered assets, many of which Claimant maintains are at issue here. In Claimant’s submission, Article 1(2) of the Treaty allows it to claim for loss and injury sustained by Al Hani and its property, which Claimant views as “assets” that it “owns or controls, directly or indirectly.”
128. The Tribunal finds force in this understanding of Article 1(2) of the Treaty in the unusual factual context of this case. The evidence shows that, in reality, Al Hani was not in fact an autonomous entity. It was instead controlled, and its operations directed, in all practical respects by Strabag. Al Hani depended upon personnel and resources provided by Strabag or its wholly integrated subsidiaries to carry out its business. Strabag, the Claimant here, “retained ultimate control of [the] investment.”<sup>120</sup>
129. While Al Hani was formally the offshoot of a joint venture between Strabag and LIDCO, the uncontested evidence showed that the joint venture was concluded in order to comply with Libya’s domestic law requirements. Thereafter, LIDCO disregarded calls to inject funds into Al Hani and seems to have played no significant role in its operations. In particular, according to Mr. Knaack’s undisputed testimony:

I understood that LIDCO, Strabag’s joint venture partner, was a governmental organisation which had responsibility for promoting foreign investment – Al Hani was one of a number of joint ventures that LIDCO had with foreign partners on infrastructure projects. The problem we faced with LIDCO, a State-owned infrastructure company, was that it failed to contribute its share of the funds required by Al Hani. As a result of this, Strabag had to provide significant amounts to Al Hani to finance its works with the result that there was a significant disparity between Strabag and LIDCO’s contributions.<sup>121</sup>

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<sup>120</sup> Cl. Rej. ¶5.

<sup>121</sup> 1<sup>st</sup> Knaack WS ¶10.

130. Mr. Knaack pointed to LIDCO's recurring failures to respond to calls to contribute funds required for Al Hani's viability, ignoring a call for LYD24 million in October 2010<sup>122</sup> and another for €14 million in December 2010.<sup>123</sup> LIDCO's failures to provide its share of necessary funding, combined with delays and difficulties in obtaining payment for Al Hani's work, forced Strabag to itself fund Al Hani in order to continue operations: "As a result, Strabag had provided significant amounts to Al Hani, and in 2010 was paying in particular the salary costs of Strabag's management team and technical experts deployed to Al Hani."<sup>124</sup> As Mr. Knaack explained to LIDCO in December 2010, "Al Hani had been granted credit by Strabag to cover services, supplies, technical assistance and the deployment of expatriate workers, which by then amounted to approximately €36 million ..."<sup>125</sup>
131. There is also extensive undisputed evidence showing that Strabag or its integrated subsidiaries were at the heart of Al Hani's day-to-day operations. Strabag companies provided key personnel. Al Hani's equipment manager Mr. Penkhues identified himself as an employee of BMTI, a Strabag subsidiary that acts as a service department and provides procurement and logistics services for Strabag projects in many countries. According to Mr. Penkhues, "[i]n November 2008, I was seconded to work for Al Hani within its central equipment and machinery division known as BMTI-Libya."<sup>126</sup> BMTI-Libya operated Al Hani's main workshop at its large Tweisha facility.<sup>127</sup> Mr. Penkhues' requests to procure new equipment were sent to BMTI "who would liaise with Strabag's head office in Vienna and check the availability of the asset within the Strabag group." If the item was not available, its procurement had to be approved by Strabag's head office in Vienna.<sup>128</sup>

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<sup>122</sup> 1<sup>st</sup> Knaack WS ¶15.

<sup>123</sup> 1<sup>st</sup> Knaack WS ¶18.

<sup>124</sup> 2<sup>nd</sup> Knack WS ¶8.

<sup>125</sup> 1<sup>st</sup> Knaack WS ¶18.

<sup>126</sup> 1<sup>st</sup> Penkhues WS ¶2.

<sup>127</sup> 1<sup>st</sup> Penkhues WS ¶5.

<sup>128</sup> 1<sup>st</sup> Penkhues WS ¶6.

132. Any income received from the Libyan project, and Strabag's contributions to the project, were reflected in Strabag's inter-company account.<sup>129</sup> The record also indicates that Strabag made substantial capital investments to establish permanent facilities in Libya, including purchasing land, yards and offices; purchasing a fleet of heavy vehicles and other heavy equipment and machinery; opening quarries; and establishing large facilities such as concrete and asphalt plants.<sup>130</sup>
133. Al Hani's interconnection with Strabag was evidenced by the 2008 minutes of an internal meeting between Strabag and its subsidiary Dywidag International, a Strabag entity with expertise in infrastructure development.<sup>131</sup> At that meeting, the two companies addressed creation of a consortium for the Tajura Contract. Their minutes recorded:

It was acknowledged that the Al Hani General Construction Co. was a nonprofit entity [...] Al Hani, respectively the Joint Venture STRABAG LIDCO, and its service departments shall not be operating as a profit centre. All costs incurred by this organization as well as all other costs of the service departments like, Accounts, Camp, Workshop, laboratory, shall be allocated to the actual Project executed by DIG and SI.<sup>132</sup>

134. The record thus shows that Al Hani did not in fact operate as a separate company, but instead operated under the clear control of Strabag and relevant subsidiaries. It was in all but name a Libyan subsidiary of Strabag with full transparency, in which costs and expenses, on the one hand, and revenues, on the other hand, pertained to Strabag, which expected the return of its expenses through payments received by Al Hani, not through dividends. There was no separation between Strabag and Al Hani, but rather economic identity: the economic harm or shortfall in Al Hani was equivalent to the harm or shortfall of Strabag pro rata commensurate to its share ownership.

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<sup>129</sup> 3<sup>rd</sup> Knaack WS ¶6.

<sup>130</sup> 3<sup>rd</sup> Knaack WS ¶7.

<sup>131</sup> Cl. Rej. ¶4.

<sup>132</sup> C-656, Minutes of 8 January 2008 Meeting, ¶1.3.

135. In the Tribunal’s view, these circumstances clearly satisfy the requirements of Article 1(2) of the Treaty. The investment here included a variety of assets, in addition to Strabag’s 60% interest in Al Hani, that were owned or controlled, directly or indirectly, by Claimant. The Tribunal accordingly denies Respondent’s jurisdictional objection to the effect that Claimant improperly asserts claims for injuries to Al Hani’s property and interests. The Tribunal will consider the implications of this decision *infra*.

136. Accordingly, Respondent’s third jurisdictional objection is dismissed.

**D. ARTICLE 8(1) – THE UMBRELLA CLAUSE AND CLAIMANT’S CONTRACT-BASED CLAIMS<sup>133</sup>**

137. A significant portion of Claimant’s overall claim involves claims arising out of alleged breaches of obligations under contracts, claims that Claimant contends can be decided by the Tribunal pursuant to Article 8(1), the Treaty’s “umbrella clause.” Article 8(1) of the Treaty provides: “Each Contracting Party shall observe any obligation it may have entered into with regard to specific investments by investors of the other Contracting Party.”

**(1) Respondent’s Position**

138. Respondent maintains that the claims related to Al Hani’s contracts do not fall within the scope of Article 8(1) of the Treaty and are therefore outside the Tribunal’s jurisdiction. Respondent advances four lines of argument in this regard.

139. Respondent first maintains that the claims asserted “are contractual claims that are outside the scope of the Tribunal’s jurisdiction under the Treaty and are instead subject to the dispute resolution clauses of the Contracts, which provide for submission of disputes to the Libyan courts.”<sup>134</sup> Respondent stresses throughout that it sees the core of Claimant’s case to be contract disputes<sup>135</sup> that have no place in international arbitration and should be resolved in Libyan courts applying Libyan law pursuant to the terms of the relevant contract. For Respondent, these contracts are ordinary commercial contracts, and the

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<sup>133</sup> Cl. Mem. ¶354 et seq.

<sup>134</sup> Resp. C-Mem. ¶348.

<sup>135</sup> Resp. PHB ¶60.

claims raised by Claimant result from “run of the mill” disagreements between a contractor and its employers regarding payment and performance. These are the sorts of disputes that often occur in commercial life; they do not involve violations of international law and “have no place in arbitration under the Austria-Libya Treaty.”<sup>136</sup>

140. Citing the views of Professor Georges Abi-Saab,<sup>137</sup> Respondent urges that under international law, a tribunal must objectively assess the nature of a claim to determine if it is a “self-standing treaty claim” as a matter of international law. Respondent reviews Claimant’s specific allegations related to the contract, finding that they do not constitute treaty violations<sup>138</sup> and must be dismissed.<sup>139</sup>
141. Second, Respondent contends that the Article 8(1) umbrella clause does not transform contractual breaches into treaty breaches. Respondent contends in this regard that “the majority of tribunals have held that an umbrella clause such as Article 8(1), does not transform simple contract claims, such as those in this case, into treaty breaches.”<sup>140</sup> In support of its arguments, Respondent cites cases such as *Joy Mining v. Egypt*,<sup>141</sup> *Toto v. Lebanon*,<sup>142</sup> *El Paso v. Argentina*,<sup>143</sup> *Pan American v. Argentina*,<sup>144</sup> and *SGS v. Pakistan*.<sup>145</sup>

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<sup>136</sup> Resp. C-Mem. ¶350.

<sup>137</sup> Resp. C-Mem. ¶358.

<sup>138</sup> Resp. C-Mem. ¶369.

<sup>139</sup> Resp. C-Mem. ¶356.

<sup>140</sup> Resp. C-Mem. ¶362.

<sup>141</sup> RL-30, *Joy Mining Machinery Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 (“*Joy Mining v. Egypt*”), ¶¶75, 82.

<sup>142</sup> RL-31, *Toto v. Lebanon* ¶¶200-202.

<sup>143</sup> RL-19, *El Paso Energy International Company v. Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006 (“*El Paso v. Argentina*”), ¶82.

<sup>144</sup> RL-20, *Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006 (“*Pan American Energy v. Argentina*”), ¶110.

<sup>145</sup> RL-18, *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003 (“*SGS v. Pakistan*”), ¶168.

142. Third, Respondent maintains that the umbrella clause does not apply because Libya was not a party to the contracts; there was no privity between Claimant and Respondent, which Respondent views as essential to bring an umbrella clause into play. Respondent refers to the majority opinion in *Burlington Resources v. Ecuador*<sup>146</sup> and the cases cited therein as showing the need for privity of contract and as reflecting the dominant strain of case law.<sup>147</sup>
143. Respondent emphasizes in this regard that the contracts were entered into not with Libya, but with RBA, TPB or HIB “all of which have their own legal personality, separate from the State.” In Respondent’s view, [t]hese entities were acting exclusively within Libya’s internal legal order, carrying out commercial obligations they undertook under the contracts, which were governed by Libyan law.”<sup>148</sup> These activities cannot give rise to responsibility of the Libyan state under international law.
144. Respondent emphasizes that each of the contracts was the product of bargains struck between Al Hani and its counterparty to which the State was not a party. Hence, Al Hani’s claims lie against its counterparties, citing in this regard the decision in *EDF v. Romania*.<sup>149</sup> Respondent finds misplaced Claimant’s reliance on cases such as *Eureko v. Poland*<sup>150</sup> and *Noble Ventures v. Romania*.<sup>151</sup> Respondent maintains in this regard that, unlike the entity involved in *Noble Ventures*, HIB and TPB “are independent bodies whose actions are not directed by the Libyan government.”<sup>152</sup>
145. Respondent further contends that there is no allegation that Libya “unjustly or improperly annulled, modified or otherwise interfered with the contracts” so there was no relevant conduct by the State that might lead to liability under international law.<sup>153</sup> Respondent

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<sup>146</sup> RL-34, *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability, 14 December 2012 (“*Burlington Resources v. Ecuador*”).

<sup>147</sup> Resp. C-Mem. ¶¶384-386.

<sup>148</sup> Resp. C-Mem. ¶370.

<sup>149</sup> RL-33, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009 (“*EDF v. Romania*”), ¶¶50-52.

<sup>150</sup> CL-37, *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005 (“*Eureko v. Poland*”), ¶¶119-127.

<sup>151</sup> CL-56, *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 (“*Noble Ventures v. Romania*”), ¶79.

<sup>152</sup> Resp. C-Mem. ¶382.

<sup>153</sup> Resp. C-Mem. ¶372.

reiterates in this regard that the State of Libya was not party to the contracts, there is no privity of contract, and Libya did not enter into obligations under them.

146. Respondent emphasizes the need to consider the specific wording of the Treaty, highlighting in this regard the word “it”, which in Respondent’s view demonstrates that the only relevant obligations are those directly entered into by the State.<sup>154</sup> Respondent finds support for this view in cases such as *EDF v. Romania*, and again disputes Claimant’s reliance on *Eureko v. Poland* and *Noble Ventures v. Romania*,<sup>155</sup> stressing that HIB and RBA “are independent bodies whose actions are not directed by the Libyan government.”<sup>156</sup>
147. Respondent adds that, even if RBA, TPB and HIB are State organs which Respondent denies the international law rules of attribution are irrelevant, pointing to the ILC’s Commentary on its State Responsibility Articles, which takes the view that international responsibility cannot arise from a breach of contract, even if the breach is by an entity whose actions are attributable to the State.<sup>157</sup> Respondent finds support for this view in *Maffezini v. Spain*<sup>158</sup> and *Jan de Nul v. Egypt*.<sup>159</sup> In Respondent’s view, there is no showing that it exercised sovereign powers (*puissance publique*) in relation to non-performance of the contracts. “Merely failing to make payments ... is not a sovereign act.”<sup>160</sup>
148. Fourth and finally, Respondent contends that all of the claims are subject to the contracts’ forum selection clauses or to the relevant provisions of Libya’s Contracting Regulations, and must therefore be submitted to Libyan courts, not to the Tribunal, referring, *inter alia*,

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<sup>154</sup> Resp. C-Mem. ¶374.

<sup>155</sup> Resp. C-Mem. ¶¶376-381.

<sup>156</sup> Resp. C-Mem. ¶382.

<sup>157</sup> Resp. C-Mem. ¶¶389-90.

<sup>158</sup> RL-150, *Emilio Augustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000 (“*Maffezini v. Spain*”).

<sup>159</sup> CL-45, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008 (“*Jan de Nul v. Egypt*”).

<sup>160</sup> Resp. C-Mem. ¶394.



to the views of Professor Abi-Saab supporting this understanding.<sup>161</sup> Respondent contends that “investment tribunals have consistently ruled that an investor may not use an umbrella clause to circumvent the forum selection clause in the relevant contract, which is an essential part of the parties’ contractual bargain.”<sup>162</sup> Respondent adds that international dispute resolution should not be “misused” by claimants to avoid their contractual obligations, citing *SGS v. Philippines*<sup>163</sup> and other cases.<sup>164</sup> Respondent refers as well to the writings of Professors James Crawford and Zachary Douglas, the latter warning that forum selection clauses exist to provide legal certainty and failure to observe them “subverts this contractual certainty to the detriment of one of the parties.”<sup>165</sup>

## (2) Claimant’s Position

149. Claimant’s Reply contains a substantial examination of the history of umbrella clauses, which in Claimant’s submission establishes they exist precisely to create international jurisdiction over claims such as those involved here.<sup>166</sup> Claimant contends in this regard that Respondent fails to acknowledge the basis in the Treaty for these claims and indeed misrepresents Claimant’s case by repeatedly characterizing the claims as “breach-of-contract claims.”<sup>167</sup>
150. In Claimant’s view, claims under Article 8(1) of the Treaty are treaty claims, not contract claims, contending in this regard that Article 8(1) confers rights on a claimant and obligations on a respondent State, so that its claims here are founded on international law, not contract or Libyan law. Claimant points in this regard to Article 14(2) of the Treaty, which provides that “[i]ssues in dispute under Article 8 shall be decided, absent other

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<sup>161</sup> Resp. C-Mem. ¶397.

<sup>162</sup> Resp. C-Mem. ¶395.

<sup>163</sup> CL-74, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004 (“*SGS v. Philippines*”).

<sup>164</sup> Resp. C-Mem. ¶¶398–401.

<sup>165</sup> Resp. C-Mem. ¶405.

<sup>166</sup> Cl. Reply ¶438 et seq.

<sup>167</sup> Cl. PHB ¶¶251-252.

agreement, in accordance with the law of the Contracting Party, party to the dispute, the law governing the authorization or agreement and such rules of international law as may be applicable.”<sup>168</sup> Claimant further maintains that the Tribunal has jurisdiction over the claims pursuant to Article 11(2) of the Treaty, which establishes international jurisdiction to address claims under the Treaty. In Claimant’s view, the choice of Libyan courts in the contracts cannot give those courts jurisdiction over the claims here, which are international law claims founded on the Treaty.<sup>169</sup>

151. Claimant thus insists that the Treaty’s Article 8(1) umbrella clause does bring its contract-based claims before this Tribunal. Claimant urges in this regard that limitations on umbrella clauses urged by Respondent, such as the privity requirement invoked by Respondent, are not imposed by Article 8, and there is no textual basis to add them.<sup>170</sup> In this regard, Claimant emphasizes the clear and broad wording of the clause, which covers “any obligation.”
152. Claimant points to multiple cases, including *SGS v. Philippines*,<sup>171</sup> *Eureko v. Poland*,<sup>172</sup> *Micula v. Romania*<sup>173</sup> and *Enron v. Argentina*<sup>174</sup> that give broad effect to similarly worded umbrella clauses. In Claimant’s view, the phrase “with regard to investments” further demonstrates that investments owned by foreign investors are covered.<sup>175</sup> In any case, Claimant regards contracts entered into by Respondent’s public authorities as attributable to Respondent under international law’s attribution rules.<sup>176</sup>

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<sup>168</sup> Cl. Reply ¶451.

<sup>169</sup> Cl. PHB ¶253.

<sup>170</sup> Cl. Reply ¶463.

<sup>171</sup> CL-74, *SGS v. Philippines* ¶¶ 127–128.

<sup>172</sup> CL-37, *Eureko v. Poland* ¶¶ 246–250.

<sup>173</sup> CL-42, *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Final Award, 11 December 2013 (“*Micula v. Romania*”), ¶415.

<sup>174</sup> CL-35, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (“*Enron v. Argentina*”), ¶274.

<sup>175</sup> Cl. Mem. ¶366, citing *Enron v. Argentina*.

<sup>176</sup> Cl. Mem. ¶373 et seq.; Cl. Reply ¶486 et seq.

153. With respect to Respondent's invocation of *puissance publique*, Claimant refers to its substantial historical review of the development of umbrella clauses,<sup>177</sup> which in Claimant's view shows that there is no requirement that a contract breach involve the exercise of sovereign powers in order to be covered by such a clause.<sup>178</sup> In any case, Claimant contends that the course of events here was shaped by exercises of *puissance publique*, *inter alia*, in the role of the Twenty Committee, which in Claimant's view determined the limited extent to which Respondent would recognize pre-existing claims and provide compensation for wartime damage.<sup>179</sup>
154. Claimant disputes the view that international jurisdiction can only be exercised with respect to a violation of international law, contending instead that the provisions of the Treaty create an international obligation that must be respected and that violations of Article 8 are arbitrable violations of the BIT.<sup>180</sup> In Claimant's view, the weight of international jurisprudence supports this view.<sup>181</sup>

### (3) The Tribunal's Analysis and Decision

155. The Tribunal is of course mindful that the interpretation and application of umbrella clauses is a much discussed and disputed subject, and that tribunals have taken varying positions regarding these clauses. In the wake of *SGS v. Pakistan*,<sup>182</sup> some tribunals—including many cited by Respondent—have interpreted these provisions narrowly, for example by limiting their effectiveness to a narrow range of obligations involving sovereign conduct, or by limiting them to agreements concluded directly between the State and the investor. Such awards often involve tribunals' rejection of alternative interpretations, either because they are thought to have unacceptably broad practical implications, or because they would expand the scope of international jurisdiction to matters that should be left to national law and courts.

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<sup>177</sup> Cl. Reply ¶428 et seq.

<sup>178</sup> Cl. Reply ¶443.

<sup>179</sup> Cl. Reply ¶502.

<sup>180</sup> Cl. Reply ¶432.

<sup>181</sup> Cl. Reply ¶456 et seq. and ¶469 et seq.

<sup>182</sup> RL-18, *SGS v. Pakistan*.

156. *SGS v. Pakistan* offers a familiar statement of such concerns. In that tribunal's view:

Considering ... that under general international law, a violation of a contract entered into by a State with an investor of another State, is not, by itself, a violation of international law, and considering further that the legal consequences that the Claimant would have us attribute to Article 11 of the BIT are so far-reaching in scope, and so automatic and unqualified and sweeping in their operation, so burdensome in their potential impact upon a Contracting Party, we believe that clear and convincing evidence must be adduced by the Claimant. Clear and convincing evidence ... that such was indeed the shared intent of the Contracting Parties to the Swiss-Pakistan Investment Protection Treaty in incorporating Article 11 in the BIT.<sup>183</sup>

157. As Respondent observes, other tribunals have likewise understood umbrella clauses to have a narrow scope, *inter alia*, for the reasons identified by Respondent in its objections described *supra*.<sup>184</sup>

158. However, there is also a substantial cohort of cases that comes at the matter differently, and gives broader effect to umbrella clauses. Soon after *SGS v. Pakistan*, a second investment tribunal addressed the same issue in *SGS v. Philippines*. In its Decision on the Objections to Jurisdiction,<sup>185</sup> the *SGS v. Philippines* tribunal emphasized the specific language of the umbrella clause in the Swiss-Philippines BIT. Comparing it with the analogous provision in the Swiss-Pakistan BIT, the *SGS v. Philippines* tribunal found the umbrella clause in the Swiss-Philippines BIT to be much clearer. Article X(2) of the latter treaty did indeed offer treaty protection to “any obligation [each Contracting Party] has assumed with regard to specific investments in its territory by investors of the other Contracting Party.” The tribunal found these terms to be “clear and categorical” and to require an “effective interpretation” consistent with the object and purpose of the treaty, which was made for the promotion and reciprocal protection of investments. It also found

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<sup>183</sup> RL-18, *SGS v. Pakistan* ¶167.

<sup>184</sup> Among the cases declining or restricting the application of the umbrella clauses, see *Joy Mining v. Egypt*, ¶¶81-82; RL-29, *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29 November 2004, ¶¶126-130; RL-19, *El Paso v. Argentina*, ¶¶70-81; RL-20, *Pan American Energy v. Argentina*, ¶¶96-116.

<sup>185</sup> CL-74, *SGS v. Philippines* ¶¶127-128.

that the corresponding clause in the Swiss-Pakistan BIT simply provided for a “vaguer” and less specific guarantee.

159. In the Tribunal’s view, this issue cannot be resolved by comparing the number of awards expressing one view or another. As both Parties acknowledged in their arguments, it is the words of a particular treaty that matter. Hence, the meaning of Article 8(1) of the Treaty is ultimately a question of treaty interpretation.
160. As stated above, Article 31 of the VCLT requires that a treaty’s words must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” The Tribunal therefore starts from the perspective that treaty language should in principle be taken at face value, and its ordinary meaning should not be altered or conditioned without clear justification. Further, the language must be assessed in light of related provisions of the Treaty, and of its stated purpose in its Preamble of “desiring to create favourable conditions for greater economic co-operation between the Contracting Parties ...”
161. The Tribunal begins with Respondent’s first objection, its recurring argument to the effect that Al Hani’s claims are ordinary commercial contract claims under private – and not international law that are outside the Tribunal’s jurisdiction. For its part, Claimant deems this a mischaracterization of its claims. In Claimant’s view, these are treaty claims, predicated upon Article 8(1) of the Treaty. They have been properly brought before the Tribunal and made subject to its jurisdiction under Articles 10 and 11. Under Article 14, they stand to be decided by the Tribunal under Libyan law “and such rules of international law as may be applicable.”<sup>186</sup>
162. The Tribunal understands Respondent’s first objection to be closely linked to its second, that Article 8(1) of the Treaty does not have the transformative effect asserted by Claimant, so that it does not transform claims rooted in Al Hani’s contract disputes into claims arising

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<sup>186</sup> Cl. PHB ¶253.

under international law. Respondent advances several arguments that in its view mean that Article 8(1) cannot be given the effect advocated by Claimant.

163. Thus, at the Hearing, Respondent argued that interpreting Article 8(1) of the Treaty as urged by Claimant would “open the floodgates to allow every commercial dispute in contracts with States or State entities to find its way to an international tribunal convened under a bilateral investment treaty.”<sup>187</sup> (As noted *supra* this is similar to the view of the tribunal in *SGS v. Pakistan*.) However, such policy-based arguments do not fit into the VCLT’s rubric of treaty interpretation. These are policy issues for treaty-makers to consider in selecting the words of their treaty; they cannot later be imported to limit the meaning of the chosen words.
164. In a different vein, Respondent argues that Article 8(1) of the Treaty can operate only where the State acts in a sovereign capacity involving some exercise of sovereign authority – *puissance publique* – or that it can only apply to conduct involving breaches of international law. Hence, Article 8(1) of the Treaty cannot apply to ordinary commercial acts. The difficulty is that such arguments in effect call for the Tribunal to introduce limits or conditions to Article 8(1) that do not appear in its language or necessarily follow from its ordinary meaning. Respondent’s contention that Article 8(1) of the Treaty only covers contractual disputes involving some exercise of *puissance publique*, for example, has no foundation in the text of the article. Similarly, the argument that Article 8 can only apply where there is a claimed breach of international law – one arising on some basis other than Article 8(1) – has no basis in the text. Such arguments would limit Article 8(1) in ways that have no foundation in its text and would, indeed, appear to deprive the provision of effectiveness in all but rare situations.

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<sup>187</sup> TR 1:229:19-22, TR 1:230:1-3 (Ms. Harwood).

165. While the Tribunal has great respect for the proponents of such views, it is not able to agree that arguments regarding *puissance publique* or on the perceived inherent limits of international jurisdiction can amend or condition the plain language of the treaty-makers in Article 8(1). In any case, although the requirement of *puissance publique* is absent in Article 8(1) of the Treaty, as discussed more fully *infra*, the factual circumstances clearly show that Al Hani's contracts were all made for significant public infrastructural projects in the interest of Libya. Contracting for such public works contracts is in fact a typical State function, not a commercial activity carried out *jure privatorum*. Further, their performance involved actions by a range of State organs exercising their governmental powers.
166. Accordingly, the Tribunal finds that Respondent's first and second objections to jurisdiction under Article 8(1) of the Treaty must be rejected.
167. Respondent's third objection revolves around the idea that there is no privity between the Claimant here – Strabag – and the Respondent, Libya. In considering this objection, the Tribunal recalls the elements of Article 8(1) of the Treaty (quoted *supra*, paragraph 137). The first three elements require that a State party to the Treaty shall observe (1) "obligation[s]," that are (2) "with regard to specific investments" by (3) "investors" of the other Party. These three are met here. The contracts at issue contain "obligations" in the ordinary sense of that term. They exist "with regard to specific investments" as outlined above. And the Tribunal has found that Claimant is an "investor" for the purposes of this Treaty. What is left to be determined is whether Libya, acting through RBA, TPB and HIB, "entered into" these "obligation[s]." The issue, then, concerns the ordinary meaning of the phrase "it [each contracting Party] may have entered into" of Article 8(1) of the Treaty.
168. In Respondent's view, whether Libya "entered into" any obligations is a question to be determined under Libya's domestic law. Thus, as neither Claimant nor the State of Libya are named parties to the contracts at issue, Libya did not enter into any relevant obligations. The Tribunal, however, believes that the matter requires a more searching analysis and involves more than asking "who is the formal party to the contract" under Libyan law. VCLT Article 31 dictates that whether Respondent "entered into" the obligations at issue

is to be determined as a matter of international law in accordance with the words' ordinary meaning, in their context, and in light of the object and purpose of the BIT.

169. The Tribunal believes that an interpretation of the phrase “it [each Contracting Party] may have entered into” in light of these factors leads to the conclusion that Respondent has indeed entered into the obligations at issue.
170. The Tribunal first turns its attention to the term “it.” The ordinary meaning of this term refers to “each Contracting Party.” The “Contracting Party” that is relevant to the Tribunal’s analysis on this point is Libya. While it may be possible to argue that “Libya” means exclusively the Government of Libya, such an interpretation would fail to take account of the fact that, as noted by the commentary on Article 5 of the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts (“ILC Articles”), States may operate through “parastatal entities, which exercise elements of governmental authority in place of State organs [...]”<sup>188</sup> The Tribunal therefore believes that the term “it” does not mean *only* the Government of Libya, but may also include other Libyan bodies.
171. The Tribunal now turns to the question of whether, for the purposes of Article 8(1) of the Treaty, the RBA, TPB and HIB, by entering into contracts with an investor, are to be taken as if Libya itself “entered into” the contracts.
172. The words of Article 8(1) of the Treaty must be assessed in light of the purpose and structure of the Treaty and the relevant circumstances, including the nature of the entities involved, of the contracts, and the manner in which they were concluded and implemented.

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<sup>188</sup> International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, Art. 5, Commentary ¶1.



173. First, as suggested *supra*, the nature of the entities involved and of the contracts is relevant to the assessment. The RBA, TPB and HIB were mandated to carry out functions deeply bound up with important State interests and that are normally exercised by State organs. They were vested for that purpose with elements of governmental authority. As confirmed by Article 5 of the ILC Draft Articles, their conduct has to be considered as an act of the Libyan State.
174. RBA is the Libyan administrative authority officially in charge of the Libyan road sector including the planning, programming, budgeting, and implementation of road investments; TPB is responsible for the implementation of the State's general policies in the field of terrestrial transportation; and HIB funds and executes the country's infrastructure investment program, and is the owner of all projects awarded and administered under the program, which will improve housing, roads, bridges, water and utilities to Libyan residents.
175. The contracts were concluded to carry out significant public projects important to Respondent: rehabilitating major roadways in the TPB contracts, and the design and construction of a major urban development project under the contract with HIB. These were significant projects deeply bound up with important State interests. Their public character is underscored by the fact that they were administrative contracts; under Article 3 of Respondent's Administrative Contract Regulations<sup>189</sup> such contracts must "target realization of the public interest."<sup>190</sup> These same regulations give the public agency offering the contract unusual powers to terminate or alter contract provisions. While the Tribunal is fully aware that the fact that the contracts concluded were administrative contracts is not of itself dispositive for purposes of Article 8(1) of the Treaty, their legal character underscores their connection with the State's interests and is a relevant element in the web of factors bearing on interpretation of Article 8.

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<sup>189</sup> C-17, Libya's Administrative Contract Regulations.

<sup>190</sup> Further contracting requirements are set out in C-18, the Contracting Regulations for Housing and Utilities Projects.

176. Second, the circumstances surrounding the conclusion and implementation of the contracts are relevant, and reveal that RBA, TPB and HIB acted at the direction of Libyan State organs. As confirmed by Article 8 of the ILC Draft Articles, their conduct has to be considered as an act of the Libyan State.
177. Respondent cites the separate legal personality and supposed budgetary independence of RBA, TPB and HIB, but the evidence, including the Hearing testimony of several of Respondent's witnesses, paints a different picture. It shows that RBA, TPB and HIB could not in fact act with full independence free of the State's direction and control in a way that makes them distinguishable from the State. Each of these entities was a sub-unit of a Libyan Ministry.<sup>191</sup> RBA forms part of the Ministry of Transport, and prior to the Revolution, was subordinated to the General People's Committee for Transportation and Road Transport. TPB also forms part of the Ministry of Transport. HIB forms part of the Ministry of Housing and Utilities, and, prior to the Revolution, was subordinated to the General People's Committee. Their staff were subject to instructions from elsewhere in the Government. Mr. Bisher of TPB tellingly testified that "I work within a governmental body, and I get instructions from either the Chairman of the TPB or from the General People's Committee."<sup>192</sup> In this regard, Mr. Bisher cited a letter from the General People's Committee authorizing TPB to make a substantial partial payment on a design contract.<sup>193</sup>
178. Moreover, while in formal terms these bodies had their own budgets, they were entirely dependent on funding provided to them by other State organs. This transpired from the evidence of Respondent's legal expert on Libyan law, Dr. Abuda.<sup>194</sup> This was further confirmed by Mr. Al Kelani's evidence:

Q. Once REKABA approved, you could instruct payment, and my question is: Where would that money come from to pay the Payment Certificates?

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<sup>191</sup> Cl. Mem. ¶¶36-42; Cl. Reply ¶¶43-50.

<sup>192</sup> TR 5:1243:18-20 (Mr. Bisher).

<sup>193</sup> TR 5:1242:11-13 (Mr. Bisher).

<sup>194</sup> TR 8:1886:6-21 (Dr. Abuda). Dr. Al-Koni Al Abuda was variously referred to by the Parties during the proceedings as either Dr. Al-Koni or Dr. Abuda. However, both Parties referred to him as Dr. Abuda in their Post-Hearing Briefs, and the Tribunal does so in this Award.

A. We have credits from the Finance Ministry. From the Finance Ministry, we have the funds.

Q. So, the Finance Ministry sends funds to TPB to pay these Payment Certificates; is that correct?

A. We have -- at the end of every year, we request a budget, so we use those funds.

Q. So, this was money that was allocated from the general State budget to TPB; is that correct?

A. Yes, that's correct.<sup>195</sup>

179. Further, conclusion of these contracts required the approval of senior Government authorities, and several of them (although not the TIAR-NE Contract) received separate high-level approval. The General People's Committee ("GPC") separately authorized conclusion of the TIAR Contract in a specified amount by a separate legislative act;<sup>196</sup> the copy of the TIAR Contract in the record includes the GPC's decision authorizing the Contract.<sup>197</sup> A variation order for the Benghazi Contract was approved by the "Secretary of the General People's Committee for Transport."<sup>198</sup>

180. Moreover, both the terms of their contracts and payments thereunder required approval by REKABA, Respondent's witness Mr. Al-Naas, describes REKABA as "a control, an autonomous independent body whose task is to supervise the projects and the funds"<sup>199</sup> that "reports directly to Parliament."<sup>200</sup> Mr. Al Kelani, who is Respondent's principal witness on the road contracts, describes it as being "linked to the legislative."<sup>201</sup> While the mere oversight by REKABA does not of itself lead to the conclusion that the State entered

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<sup>195</sup> TR 6:1412:10-21 (Mr. Al Kelani).

<sup>196</sup> C-24, General People's Committee Act No. 74 of 2008.

<sup>197</sup> C-870, TIAR Contract (Arabic version), p. 47.

<sup>198</sup> R-4, Benghazi Variation Order No. 1 dated 27 October 2008, p.15.

<sup>199</sup> TR 7:1562:10-12 (Mr. Al-Naas).

<sup>200</sup> TR 7:1562:16-17 (Mr. Al-Naas).

<sup>201</sup> TR 6:1411:15-16 (Mr. Al Kelani).

into the contracts, as found by the Tribunal in this case, the evidence shows that REKABA exercised these powers of supervision vigorously. Mr. Al Kelani describes in detail in his First Witness Statement how all payments required REKABA's approval, making clear that REKABA could and did exercise this authority to block or modify payments to Al Hani.<sup>202</sup>

181. The record is replete with instances where contracts were altered, payments were denied or revised, and other aspects of contract performance altered by REKABA or other entities in a manner showing RBA's, TPB's and HIB's limited autonomy. As Mr. Al Kelani's evidence makes clear, TPB and HIB could pay only amounts approved by REKABA, and the record shows that REKABA reduced or delayed payment of amounts claimed by Al Hani. Mr. Turki acknowledged in this regard that the entity he identified as REKABA criticized Al Hani's work on the 11<sup>th</sup> of June Road, triggering reductions in the amount to be paid.<sup>203</sup> New contracts also required REKABA's approval,<sup>204</sup> and the agency also exercised its powers to revise the terms of contracts and to add conditions or requirements. The Tajura Contract thus had to be revised and then signed a second time because of demands by REKABA.<sup>205</sup> REKABA imposed a limit on the number of variation orders that contractors could submit, thereby limiting or delaying Claimant's compensation for work performed.<sup>206</sup>
182. REKABA was not the only constraint on these agencies' autonomy. The Ministry of Finance was also deeply involved in their financial operations. Mr. Al-Naas confirmed that payments under the Tajura Contract also required approval by "the financial auditor, a

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<sup>202</sup> 1<sup>st</sup> Al Kelani WS ¶¶19-22.

<sup>203</sup> TR 7:1662:10 – 1665:21 (Mr. Turki).

<sup>204</sup> REKABA's approval of the revised Tajura Contract is at C-873.

<sup>205</sup> TR 1:139:11-16 (Mr. Claypool); Cl. PHB ¶172.

<sup>206</sup> TR 3:785:11-19 (Mr. Napowanez).

representative of the Finance Ministry.”<sup>207</sup> Mr. Al Kelani confirmed that payments required approval of both REKABA and the Finance Ministry:

Q. And you could only pay (a) if you received those funds from the Finance Ministry in the budgetary process, and (b) if REKABA approved the payment by sending a yellow or green sheet?

A. Yes, that’s true.<sup>208</sup>

183. Following the Revolution, the Tribunal understands the evidence to show that TPB and HIB did not have independent authority to resume dealings with Al Hani, but could do so only under the guidance, and possibly the direction, of a Government body called the Twenty Committee. This entity established limiting conditions within which work might be resumed and past work paid for. In its Counter-Memorial, Respondent described the Twenty Committee as established to “(i) study development contracts entered into by Libya with foreign companies; (ii) study claims for losses submitted by companies; (iii) determine losses due to the 2011 Revolution; and (iv) determine whether these contracts should be terminated, renewed, or modified.”<sup>209</sup>

184. The Parties disagree regarding the significance of the Twenty Committee, and Respondent provided no documentation concerning its activities in response to Claimant’s requests during the document production phase. There was evidence that the Twenty Committee played a substantial role in, for example, decisions regarding possible resumption of the Tajura Contract. Mr. Turki thus testified at the Hearing that in considering terms for resuming work at Tajura, “we dealt here with an administration that was in a higher – that had a higher status, and it gave us instructions, and this was some of the instructions that were given to us at the time with regards to our dealings with the Contractors.”<sup>210</sup>

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<sup>207</sup> 1<sup>st</sup> Al-Naas WS ¶17.

<sup>208</sup> TR 6:1412:22 – 1413:2-5 (Mr. Al-Naas).

<sup>209</sup> Resp. C-Mem. ¶324.

<sup>210</sup> TR 7:1694:15-20 (Mr. Turki).

185. At the Hearing, Respondent introduced a number of “corrections” to previously filed witness statements that often appeared intended to lessen the relevance of the Twenty Committee. As noted *infra*, Respondent offered the Chair of the Twenty Committee as a legal expert (without disclosing his earlier role to the Tribunal), but not as a fact witness able to clarify the disputed matters. Claimant criticizes Respondent’s reluctance or inability to provide any documents in document phase and calls for adverse inferences.<sup>211</sup>
186. The Tribunal considers it helpful to point to the reasoning of the tribunal in *Toto v. Lebanon*, which, in not dissimilar circumstances, held as follows:

51. The Contract was initially made with the CEGP [*Conseil Exécutif des Grands Projets*], which was established by Decree no. 6839 of June 15, 1961. Article 1 of this Decree provided that the CEGP is in charge of studying and implementing the projects entrusted to it by the Council of Ministers. The CEGP was attached to the Ministry of Public Works and Transport which monitored the execution of the projects entrusted to the CEGP. The CEGP had a distinct legal personality and enjoyed administrative and financial autonomy. However, it operated under the control of the aforementioned Ministry and the authority of the Council of Ministers, and was also subject to the disciplinary authority of the Central Inspectorate. The CEGP had its own funds, which originated from the amounts allocated in the State budget to the projects to be performed by the CEGP.
52. Based on the foregoing, the CEGP, being an *établissement public administratif* linked to the Ministry of Public Works and Transport and operating under the authority of the Council of Ministers, was a public entity (“*personne morale de droit public*”) that was created and mandated by Lebanon to exercise elements of governmental authority.
53. In brief, the CEGP, with projects funded by the State budget, and in charge of implementing the decisions of the Council of Ministers, exercised Lebanese governmental authority when it entered into the Contract with Toto. As also confirmed by Article 5 of the ILC Draft Articles, its conduct has to be considered as an act of the Lebanese state.<sup>212</sup>

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<sup>211</sup> Cl. Reply ¶¶18-19.

<sup>212</sup> RL-31, *Toto v. Lebanon* ¶¶51-53.

187. Reviewing the overall circumstances cumulatively, including the public importance of the functions carried out by RBA, TPB and HIP and their vesting with governmental authorities, their lack of administrative and financial economy, the nature of the contracts and their being deeply bound with state interest, and the existence of overwhelming evidence that demonstrates that an array of public authorities had a major hand in the conclusion and performance of the contracts, the Tribunal is of the view that, in this case, there is an exceptional combination of circumstances compelling the conclusion that the Respondent did, indeed, “enter into” the obligations in the disputed contracts within the meaning of Article 8(1) of the Treaty.
188. Accordingly, the Tribunal finds that the several contracts between Al Hani and RBA, TPB and HIB fall under Article 8(1) of the Treaty.

**E. RECOURSE TO LIBYAN COURTS**

**(1) Respondent’s Position**

189. Respondent’s fourth objection to jurisdiction is that, should the Tribunal elect to consider Claimant’s claims predicated upon its contracts, Claimant cannot pick and choose which contract provisions to apply. The contracts provide that the governing law is Libyan law, and that disputes are to be resolved in Libyan courts. In Respondent’s view, any disputes related to the contracts must therefore be addressed by Libyan courts, not by this Tribunal.
190. The Tribunal received varying translations of the relevant contract clauses; the differences among them appear to reflect differences of translation and not of substance. All appear similar in substance to Article 53 of the Tajura Contract, which provides that “the Libyan Court is the competent court to settle any disputes arising from this Contract.”<sup>213</sup> Respondent adds that under Libyan law, State entities like RBA, TPB, and HIB cannot enter into arbitration agreements. Hence, under the terms of the contracts, and as a matter of Libyan law, Claimant’s claims must be determined by Libyan courts.

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<sup>213</sup> C-873, Tajura Contract, Art. 53.

**(2) Claimant's Position**

191. Claimant offers several responses. As discussed *supra*, it urges that its claims related to the contracts are treaty claims based on Article 8(1) of the Treaty. They thus exist on the plane of international law and are not contract claims under private law.<sup>214</sup>
192. Claimant adds that the Treaty gives it an express right to arbitrate its claims based on Article 8(1) through the dispute settlement mechanism created by the Treaty. Respondent expressly consented to such arbitration in Article 12(1) of the Treaty, where Libya gave “unconditional consent to the submission of a dispute to international arbitration ...” In Claimant’s view, requiring recourse to Libyan courts would deprive it of this right under the Treaty. Claimant points out in this regard that in Austrian treaty practice, where Austria intends for umbrella clause claims to be determined through contracts’ dispute settlement procedures, it does so expressly.<sup>215</sup>
193. Claimant disputes Respondent’s contention that Libyan domestic law supersedes its treaty right to arbitration. In this regard, its post-Hearing submission of additional materials includes Libyan legal authorities<sup>216</sup> said to show that in Libya’s domestic law treaty obligations have domestic legal effect and have a status superior to statutes. Hence, Claimant’s treaty right to arbitrate prevails over any Libyan laws or regulations claimed to limit recourse to international arbitration under the Treaty.
194. Finally, Claimant points to the poor security situation in Libya, contending that it could not expect secure conditions or a fair hearing should it be required to pursue its claims in Libyan courts.<sup>217</sup> Claimant’s Post-Hearing Brief points in this regard to the testimony of Libya’s witnesses at the Hearing regarding the poor state of Libya’s legal system under current conditions.<sup>218</sup> And, in response to the Tribunal’s request to both Parties, its post-

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<sup>214</sup> Cl. Reply ¶508.

<sup>215</sup> Cl. Reply ¶¶509-510.

<sup>216</sup> C-901, Draft Libyan Constitution (2017); C-902, Draft Libyan Constitution (2014).

<sup>217</sup> Cl. Reply ¶511 et seq.

<sup>218</sup> Cl. PHB ¶6.



Hearing submission of additional evidence includes multiple reports by human rights groups and other independent observers sharply critical of the current state of Libya's courts.<sup>219</sup>

### (3) The Tribunal's Analysis and Decision

195. The Tribunal is mindful that whether an umbrella clause carries with it the duty to give effect to contract provisions requiring recourse to local courts is a disputed question on which tribunals have taken varying views. It is also mindful that both Parties have offered substantial arguments in support of their positions.
196. However, the Tribunal believes that in this case, this issue must be considered in light of the protracted conditions of insecurity in Libya since 2011. A compelling body of evidence, adduced by both Parties, shows that since the revolutionary hostilities in 2011, conditions in Libya have been characterized by recurring events of intensive fighting between rival groups, widespread violence, and the widespread breakdown of State authority. As a practical matter, there is not today, and has not been for some years, the possibility for Claimant to pursue its claims in Libyan courts in tranquility and safety. Indeed, during the July 2018 Hearing, one witness was unable to travel to Tunis by air due to the suspension of Libyan Airlines Service precisely because of a conflict between rival factions seeking control of the airline.<sup>220</sup>
197. As discussed *infra*, Respondent itself introduced evidence highlighting these conditions, *inter alia*, in contesting Claimant's claims related to its alleged failure to provide full protection and security, both generally and in the specific context of the removal of a large quantity of Al Hani's equipment from the Tweisha yard in 2014.

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<sup>219</sup> C-874, Interview with minister of Justice Salah Marghani (2015); C-886, *Searching for Justice in Post-Gaddafi Libya*, Leiden University (2013).

<sup>220</sup> TR 2:697 et seq. *See also* "Division in Libyan Airlines' administration causes a full halt of flights to Tunisia," in *Libya Observer*, 7 July 2018.

198. Claimant similarly cited the “dangerous situation and the undeniable existence of *force majeure* conditions” when it gave notice of *force majeure* to its employers in March 2011, followed by departure of Al Hani’s expatriate staff from Libya.<sup>221</sup> Claimant’s witness Mr. Napowanez described a deteriorating security situation in 2013, as Strabag and Al Hani sought to resume operations, leading him to conclude “[w]ith increased physical danger, and the lack of protection that we were getting from Libyan police and security forces, we could not guarantee the safety of the sites or our employees.”<sup>222</sup> Mr. Napowanez left Libya in early 2014.<sup>223</sup>
199. Later in 2014, the September Report of the UN Secretary-General to the UN Security Council on political and security developments in Libya observed, *inter alia*:
2. The reporting period witnessed the most serious outbreak of armed conflict, in Tripoli, Benghazi and elsewhere in the country, since 2011. The use of heavy weaponry in densely populated areas by all sides, in particular in the capital, resulted in an unprecedented movement of population as civilians tried to escape the fighting. An estimated 100,000 people were displaced in Tripoli, with an additional 20,000 in the east. At least 100,000 are known to have crossed the borders into neighbouring countries ...
  - ...
  4. Following six weeks of armed hostilities in the capital in July and August, Libya appeared to be descending into a period of instability and uncertainty.<sup>224</sup>
200. The UN Secretary-General’s report from February 2015 described a worsening situation:

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<sup>221</sup> Cl. Mem. ¶152.

<sup>222</sup> 1<sup>st</sup> Napowanez WS ¶60.

<sup>223</sup> 1<sup>st</sup> Napowanez WS ¶62.

<sup>224</sup> RL-102, UN Secretary-General Report on UN Support Mission in Libya, UN Doc. No. S/2014/653, 5 September 2014 ¶¶2, 4.

2. ... [D]uring the reporting period, the overall security in the country continued to deteriorate sharply. Armed hostilities spread to the country's north-west, the eastern oil crescent area and the southern region. In the east, fighting intensified in Benghazi, causing the breakdown of much of the city's public services, resulting in severe shortages in the supply of food and medicine. The continued indiscriminate shelling and use of air assets against targets in heavily populated areas and strategic installations across the country underscores the growing plight of the civilian population and the systematic destruction of much of the country's vital infrastructure.
3. The closure of much of Libyan airspace to commercial flights, combined with an escalation in fighting across different parts of the country and diminished State capacity to provide basic services, aggravated the humanitarian crisis triggered over the summer months by the outbreak of violence in July 2014 and the gradual breakdown of law and order across the country.<sup>225</sup>

201. Other reports by the UN Secretary-General of record in this case are to like effect. His December 2016 report observes, *inter alia*:

12. The security situation in Tripoli remained fragile. The Presidency Council partially moved from the Abu Sittah naval base to the office of the President of the Council in the city centre and installed itself in a number of ministries and other government buildings. The Council faced serious obstacles in implementing its mandate to govern. With only limited control on the ground and in the absence of security forces at its disposal, the Council was compelled to rely on armed groups committed to the Libyan Political Agreement for its security. Civil servants were divided between the Council and its political opponents, further complicating efforts to improve service delivery. The provision of public services in the capital, including water and electricity, deteriorated, giving rise to public protests.
13. Tripoli remained under the control of a patchwork of armed groups with differing agendas and loyalties, from both Tripoli and the surrounding areas, including Misratah.

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<sup>225</sup> RL-101, UN Secretary-General Report on UN Support Mission in Libya, Doc. No. S/2015/144, 26 February 2015 ¶¶2-3.

Rivalries over funding and territorial control between the groups regularly led to clashes. In June and September, elements of the Salah al-Burki brigade and the Abu Salim armed group clashed in central Tripoli, leaving at least 10 people dead. Further clashes in October, close to Tripoli's Mitiga airport, between the Tripoli Revolutionaries Brigade and the Yusuf al-Buni brigade, caused a number of fatalities.<sup>226</sup>

202. At the Hearing, the Tribunal sought the views of the Parties' legal experts as to whether Claimant's claims could have been properly adjudicated in Libyan courts had Al Hani sought relief in that forum rather than the Treaty forum. Both testified that, due to poor security conditions, the courts are not regularly operating in Libya since the Revolution of 2011. Their oral evidence was that some judges were killed, others are impeded from going to office or, in most cases, impeded from exercising their judicial function, *inter alia*, due to lack of personnel employed by courts to provide clerk services.<sup>227</sup>
203. At the Tribunal's request, after the Hearing the Parties, especially Claimant, produced multiple reports and reliable information from outside sources on the current security situation and the conditions of the judiciary in Libya. In the Tribunal's understanding, this evidence, some of which is cited above, confirms that the state of the Libyan courts remains very critical.
204. The Tribunal thus understands, on the basis of the evidence adduced, that the Claimant had no viable mechanisms for settling disputes with the Libyan State entities involved here other than resorting to Treaty arbitration.
205. In international law, the issue of whether a contractual forum selection clause is "capable of being performed" is not new. By way of illustration, Article 6(1)(d) of the 2005 Hague Convention on Choice of Court Agreements<sup>228</sup> provides that an exclusive choice of court agreement may not be enforceable when "for exceptional reasons beyond the control of the

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<sup>226</sup> RL-103, UN Secretary-General report on UN Support Mission in Libya, Doc. No S/2016/1011, 1 December 2016 ¶¶ 12-13.

<sup>227</sup> *See, e.g.*, TR 8:1844-1845; TR 8:1943 (Drs. Ahnish and Abuda).

<sup>228</sup> Although Libya is not party to the Convention, it reflects established international practice.

parties, the agreement cannot reasonably be performed.” The Explanatory Report on the Convention comments on this exception in its Article 6(1)(d), explaining that “one example” of the impossibility to enforce the choice of court clause is the case “where there is a war in the State concerned and its courts are not functioning.”<sup>229</sup> This is exactly the current situation of the judiciary in Libya, starting from 2011 onwards.

206. On the same matter, Professor Born comments as follows:

Authorities in some jurisdictions have indicated that forum selection clauses will not be enforced where doing so would be “unreasonable” or “unjust.” This potentially broad exception has included claims that the contractual forum would be a substantially less convenient place for legal proceedings, or that the contractually chosen courts cannot grant effective relief or are closed to one party.<sup>230</sup>

207. Accordingly, from an international law perspective, the Tribunal concludes that its treaty-based jurisdiction is not barred by the provisions in the several contracts or Respondent’s Administrative Contracts Regulations referring disputes arising from or connected with the contracts to the jurisdiction of the Libyan courts.

208. The Tribunal concludes that, given the conditions in Libya existing at relevant times in this dispute, Claimant could not pursue its contract-related claims in Libyan courts in safety or with any reasonable expectation of a considered and expeditious outcome. Claimant is entitled to a forum in which to pursue its claims, whether in this Tribunal pursuant to the Treaty (as Claimant would have it) or in Libyan courts (as Respondent contends). The evidence shows that Libyan courts are not a practicable and safe option. The Tribunal therefore decides that, in the circumstances presented, Respondent’s further objection to jurisdiction is denied.

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<sup>229</sup> T. Hartley & M. Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements, Explanatory Report*, Intersentia (2013), p. 821.

<sup>230</sup> G. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing*, Kluwer Law International, (5<sup>th</sup> ed., 2016), pp. 115-120.

**F. CONCLUSION CONCERNING JURISDICTION**

209. The Tribunal dismisses Respondent's objections that the Tribunal does not have jurisdiction under the Treaty.

210. However, before turning to the merits of the dispute, the Tribunal must also consider whether the present dispute falls within the scope of the Additional Facility Rules. The dispute is between Strabag, a juridical person incorporated under the laws of Austria, i.e., a national of an ICSID Contracting State, and a State Party which is not an ICSID Contracting State, Libya. The Tribunal has concluded that Strabag has made an investment for the purposes of the Treaty and hence for the purposes of Articles 2(a) and 4(2) of the ICSID Additional Facility Rules. The prerequisites for Libya's consent to ICSID Additional Facility arbitration as set out in Articles 10, 11 and 12 of the Treaty are fulfilled, i.e., consultations were requested prior to the institution of the arbitration proceedings in accordance with Article 11 but there was no solution to the dispute within the prescribed time-period. In accordance with Article 10 of the Treaty, the dispute refers to alleged breaches by Libya of the Treaty, which is said to have caused loss and damage to Claimant's investment. Claimant's written consent to ICSID Additional Facility arbitration is found in the Request for Arbitration. The dispute is therefore of a legal nature arising directly out of an investment in accordance with Article 2(a) of the Additional Facility Rules. Access to the Additional Facility was granted by the Secretary-General of ICSID on 20 July 2015. The Tribunal, therefore, concludes that it has jurisdiction under the Treaty to address Claimant's claims.

## VI. CLAIMANT’S TREATY CLAIMS

### A. INTRODUCTION AND OVERVIEW

211. Claimant alleges that Respondent’s conduct violated at least six articles of the Treaty, listed here in the order in which they were introduced in Claimant’s Memorial.<sup>231</sup>

(1) Article 5(2) – requisition or damage to property in the course of armed conflict;<sup>232</sup>

(2) Article 3(1) – failure to provide full and constant protection and security;<sup>233</sup>

(3) Article 8(1) failure to respect specific obligations entered into by Respondent, contrary to an “umbrella clause;”<sup>234</sup>

(4) Article 3(1) – failure to accord Fair and Equitable Treatment;<sup>235</sup>

(5) Article 4 – Indirect expropriation, in that Respondent took measures that in the aggregate were “tantamount to expropriation;”<sup>236</sup> and

(6) Article 3(2) impairment of Claimant’s management, operation, use and enjoyment of its investment by unreasonable or discriminatory measures.<sup>237</sup>

212. The Parties disagree regarding the correct interpretation and application of some of these articles of the Treaty. The Tribunal addresses certain of these disagreements in the following paragraphs; it will provide more detailed comments on others in the context of the facts of particular claims.

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<sup>231</sup> Cl. Mem. ¶19 et seq.

<sup>232</sup> Cl. Mem. ¶19.

<sup>233</sup> Cl. Mem. ¶20.

<sup>234</sup> Cl. Mem. ¶21.

<sup>235</sup> Cl. Mem. ¶22.

<sup>236</sup> Cl. Mem. ¶23.

<sup>237</sup> Cl. Mem. ¶478 et seq.

**B. ARTICLE 5(2) – REQUISITION OR DAMAGE TO PROPERTY IN ARMED CONFLICT**

213. Article 5 of the Treaty provides:

(1) An investor of a Contracting Party who has suffered a loss relating to its investment in the territory of the other Contracting Party due to war or to other armed conflict, state of emergency, revolution, insurrection, civil disturbance, or any other similar event, or acts of God or force majeure, in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or any other settlement, treatment no less favourable than that which it accords to its own investors or to investors of any third state, whichever is most favourable to the investor.

(2) An investor of a Contracting Party who in any of the events referred to in paragraph (1) suffers loss resulting from:

(a) requisitioning of its investment or part thereof by the forces or authorities of the other Contracting Party, or

(b) destruction of its investment or part thereof by the forces or authorities of the other Contracting Party, which was not required by the necessity of the situation, shall in any case be accorded by the latter Contracting Party restitution or compensation which in either case shall be prompt, adequate and effective and, with respect to compensation, shall be in accordance with Article 4(2) and (3).

214. There appears to be no significant difference between the Parties regarding the interpretation of Article 5(2)(a) as it relates to requisitioning. Instead, the issues involving this provision are factual. Claimant alleges that a significant quantity of property was requisitioned by Libyan Government forces and not subsequently returned. Respondent counters that Claimant has not met its burden of proof to show that this occurred. The Tribunal addresses these issues *infra* in its assessment of Claimant's requisition claims.



**(1) The Parties' Positions Regarding the Meaning of "Military Necessity" in Article 5(2) and the Burden of Proof**

215. The Parties disagree regarding application of the other provisions of Article 5(2) of the Treaty, dealing with property allegedly destroyed by Libyan State forces "which was not required by the necessity of the situation." Their principal disagreement involves which of them bears the burden of proving that the destruction of particular property was not required by military necessity.
216. In Respondent's view, the plain text of Article 5(2) places the burden on Claimant, as the Party asserting a claim for destruction of property, to prove a key element of its claim. Hence, Claimant must show that the destruction of particular property was not required by military necessity. Respondent refers to the 1990 award in *AAPL v. Sri Lanka*,<sup>238</sup> as showing that this burden demonstrating the absence of military necessity falls on Claimant.
217. As to the meaning of military necessity, Respondent refers to the 1948 U.S. Military Tribunal decision in *Von Leeb*, where the tribunal allowed a defense of military necessity. In Respondent's view, *Von Leeb* shows that a tribunal assessing military necessity must recognize the uncertainties and pressures involved in armed conflict; as the Military Tribunal observed, "the factual determination as to what constitutes military necessity is difficult."<sup>239</sup> Thus, for Respondent, military necessity "must be determined based on the totality of the circumstances at the relevant time and place, without the benefit of hindsight."<sup>240</sup>

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<sup>238</sup> CL-21, *Asian Agricultural Products Ltd. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990 ("*AAPL v. Sri Lanka*").

<sup>239</sup> Resp. C-Mem. ¶600, quoting RL-82, *United States of America v. Wilhelm von Leeb, et al.*, Official Transcript of the Judgement of the American Military Tribunal, 27 October 1948 ("*Von Leeb*"), p. 541.

<sup>240</sup> Resp. C-Mem. ¶618, fn 1173.

218. Claimant counters that the burden of proving military necessity must fall on Respondent, whose troops allegedly caused damage and which is best able to explain the surrounding circumstances.<sup>241</sup> Claimant contends that under accepted principles of evidence, if Respondent claims the military necessity of its troops' actions, it has the burden of proving that claim. Claimant maintains in this regard that Respondent offered nothing to rebut what Claimant sees as a *prima facie* case of liability.<sup>242</sup> Claimant adds that the result in *AAPL* has been heavily criticized,<sup>243</sup> referring as well to an opinion by Professor Schreuer analyzing the effect of investment treaties in wartime that rejects Respondent's view.<sup>244</sup>
219. In Claimant's view, Respondent advocates an overbroad and outdated conception of military necessity that does not reflect the evolution of the law of armed conflict since 1948, citing in this regard academic writings and jurisprudence of the International Criminal Tribunal for the Former Yugoslavia emphasizing the general prohibition on targeting civilians and civilian property.<sup>245</sup> This jurisprudence, Claimant contends, establishes that the prohibition against attacking civilians and civilian objects may not be derogated from, except in narrow cases where civilian property has been transformed into a military objective that makes an effective contribution to a combatant and where attack would offer a definite military advantage proportionate to the destruction caused.<sup>246</sup>
220. These issues of the burden of proof and determination of military necessity are bound up with the facts and the evidence of Claimant's specific claims for the destruction of property by Respondent's forces. As examined *infra*, a key threshold issue in these claims is to determine *who* caused particular damage, before turning to more nuanced and factually complex questions of military necessity. These matters are assessed *infra* in connection

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<sup>241</sup> Cl. Reply ¶¶529-530.

<sup>242</sup> Cl. Reply ¶532.

<sup>243</sup> Cl. Reply ¶526.

<sup>244</sup> Cl. Reply ¶527; RL-80, C. Schreuer, *The Protection of Investments in Armed Conflicts*, 9(3) Transnational Dispute Management (April 2012).

<sup>245</sup> Cl. Reply ¶537 et seq.

<sup>246</sup> Cl. Reply ¶540 et seq.

with the Tribunal's consideration of Claimant's specific claims involving property allegedly damaged or destroyed by Libyan Government forces.

**(2) Is Article 5 *Lex Specialis*, Ousting Other Treaty Provisions?**

221. Respondent contends that Article 5 of the Treaty constitutes a *lex specialis* and, in accordance with the maxim *lex specialis derogat legi generali*,<sup>247</sup> prevails over and supplants other Treaty provisions invoked by Claimant in claiming for injury related to military operations. In Respondent's view, Article 5 thus renders the Treaty's provisions dealing with full and constant protection and security, fair and equitable treatment, and expropriation inapplicable with respect to injury of the kind identified by Article 5(1) of the Treaty.<sup>248</sup> Thus, in Respondent's view, "any alleged losses relating to harm suffered by Claimant at the hands of Libyan armed forces during the 2011 Revolution should be examined exclusively under Article 5 of the Treaty."<sup>249</sup>
222. In support of its position, Respondent refers to *Venezuela Holdings and others v. Venezuela*<sup>250</sup> and *ConocoPhillips and others v. Venezuela*,<sup>251</sup> both of which held that a treaty article dealing specifically with fiscal measures excluded the operation of a second provision requiring fair and equitable treatment, as to matters covered by the tax article.<sup>252</sup> Respondent argues further that the maxim *lex specialis derogat legi generali* is a supplementary rule of treaty interpretation that should be applied, citing Aust's *Modern Treaty Law and Practice*.<sup>253</sup>

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<sup>247</sup> Resp. C-Mem. ¶¶604-609.

<sup>248</sup> Resp. Rej. ¶462.

<sup>249</sup> Resp. C-Mem. ¶609.

<sup>250</sup> RL-87, *Venezuela Holdings B.V. and others v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Award, 9 October 2014 ("*Venezuela Holdings v. Venezuela*").

<sup>251</sup> RL 88, *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, 3 September 2013 ("*ConocoPhillips v. Venezuela*").

<sup>252</sup> Resp. C-Mem. ¶608.

<sup>253</sup> Resp. C-Mem. ¶605, citing RL-84, A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press (2<sup>nd</sup> ed., 2007), p. 248.

223. Claimant disputes Respondent’s contention, maintaining that it is incorrect and oversimplifies the principle reflected in *lex specialis derogat legi generali*.<sup>254</sup> In Claimant’s view, Article 5(2) of the Treaty sets the standard of compensation for the damages it covers, and can operate consistently with other provisions of the Treaty. Citing the work of the International Law Commission, Claimant maintains that such a clause in a treaty does not preclude claims for injury involving other treaty provisions.<sup>255</sup> Claimant adds that Article 5(2) of the Treaty covers only a narrow range of circumstances: property destroyed by Respondent’s armed forces where the destruction was not required by military necessity.

### (3) The Tribunal’s Analysis and Decision Regarding *Lex Specialis*

224. The Tribunal finds that Article 5 does not have the preclusive effect urged by Respondent. Article 31(1) of the VCLT directs that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Nothing in the language of Article 5(2) or in other provisions of the Treaty indicates that it operates in the limiting manner urged by Respondent.

225. In this regard, the Tribunal does not accept the contention that *lex specialis derogat legi generali* operates as a supplementary rule of interpretation capable of altering the ordinary meaning of the words of Article 5(2). Article 32 of the VCLT gives a limited and precisely defined role to supplementary means of interpretation. They can confirm a meaning that is clear from the text (which presumably is not Respondent’s position here) or they can be considered if plain meaning leaves a text “ambiguous or obscure” or “[l]eads to a result which is manifestly absurd or unreasonable.” Respondent has not shown how these conditions exist here, and they do not. Moreover, as Professor Aust observes, such maxims “need to be used with special care. They are no more than aids to interpretation, and might well produce the wrong results if followed slavishly.”<sup>256</sup>

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<sup>254</sup> Cl. Reply ¶596.

<sup>255</sup> Cl. Reply ¶¶596, 598.

<sup>256</sup> RL-84, A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press (2<sup>nd</sup> ed., 2007), p. 249.

226. The Tribunal does not find that the cases cited by Respondent provide persuasive support for its interpretation. In *ConocoPhillips v. Venezuela*, the tribunal’s careful parsing of the relevant treaty language led it to conclude that a provision involving general obligations and a second provision dealing with taxation could not simultaneously operate without generating unacceptable results or rendering the tax provision largely devoid of effect.<sup>257</sup> The tribunal in *Venezuela Holdings v. Venezuela* similarly found that these two provisions could not both apply without rendering portions of the tax article meaningless and duplicating other provisions.<sup>258</sup> Thus, the same treaty text was found by both tribunals to contain persuasive indications that the tax article created a separate regime that conflicted with, and therefore operated instead of, the more general treaty regime. Respondent has not shown that Article 5 has corresponding characteristics. In the Tribunal’s view, it does not.
227. Finally, in considering the plain meaning of the text, the Tribunal recalls that in international treaty practice, States that intend certain provisions to have limited effect or operate to the exclusion of other provisions have the means to make this clear.<sup>259</sup> Had the treaty Parties intended Article 5 to operate to the exclusion of other provisions, they could have said so. They did not.
228. Accordingly, the Tribunal finds that Article 5 of the Treaty does not preclude the possibility of claims based on other provisions of the treaty with respect to the matters that also fall under Article 5 of the Treaty.

**C. ARTICLE 3(1) – FAILURE TO PROVIDE FULL AND CONSTANT PROTECTION AND SECURITY**

229. Article 3(1) of the Treaty requires each Contracting Party to accord to investments by investors of the other “full and constant protection and security.” Claimant contends that Respondent failed to meet this obligation in multiple respects.

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<sup>257</sup> RL-88, *ConocoPhillips v. Venezuela* ¶¶309, 315.

<sup>258</sup> RL-87, *Venezuela Holdings v. Venezuela* ¶¶243-246.

<sup>259</sup> RL-88, *ConocoPhillips v. Venezuela* ¶300.

**(1) The Parties' Positions**

230. The Parties disagree regarding the standard of conduct required under this provision. As expressed in Claimant's Memorial, "[t]he obligation to provide full and constant protection and security in accordance with this provision obliges a State to provide physical protection and security to an investment in its territory which was made by an investor of the other contracting party."<sup>260</sup> The State must exercise due diligence to this end.<sup>261</sup>
231. Claimant denies that a State's obligation to accord security depends upon the resources available to it, instead maintaining that the due diligence standard "is nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances."<sup>262</sup> Citing multiple authorities, Claimant concludes, in the words of Professors Dolzer and Schreuer, that "[l]ack of resources to take appropriate action will not serve as an excuse for the host state."<sup>263</sup>
232. For its part, Respondent contends that international law affords the State "a particularly wide measure of deference" in relation to the duty of protection,<sup>264</sup> and that a "State will only breach its obligations if 'what was done shows such a degree of negligence, defective administration of justice or bad faith, that the procedure falls below the standards of international law'."<sup>265</sup> Respondent makes particular reference to the award in *Pantechniki v. Albania*,<sup>266</sup> where the sole arbitrator found there was no failure to accord full protection

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<sup>260</sup> Cl. Mem. ¶318.

<sup>261</sup> Cl. Mem. ¶319.

<sup>262</sup> Cl. Reply ¶587, citing RL-93, A.V. Freeman, *Responsibility of States for Unlawful Acts of their Armed Forces*, 88 Recueil Des Cours 263, pp. 277-278.

<sup>263</sup> Cl. Reply ¶592, citing CL-7, R. Dolzer and C. Schreuer, *Principles of International Investment Law*, Oxford University Press (2<sup>nd</sup> ed., 2012) ("Dolzer and Schreuer"), p. 162.

<sup>264</sup> Resp. Rej. ¶473.

<sup>265</sup> Resp. C-Mem. ¶631.

<sup>266</sup> RL-99, *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009 ("*Pantechniki v. Albania*").

and security in a situation of social tumult and lawlessness in a remote area.<sup>267</sup> Respondent observes in this regard:

The situation in Libya, in terms of the gravity and the extent of the civil war, was equally bad and perhaps far worse than the situation of the civil unrest in *Pantechniki*. If the *Pantechniki* tribunal found the civil disturbance in that case to be so out of control and so severe that the State could not be held liable for breach of [full protection and security], then, a *fortiori*, given the circumstances in this case, the Tribunal should dismiss Claimant's allegations of breach of [full protection and security].<sup>268</sup>

233. Respondent concludes:

Although the [National Transitional Council] proclaimed itself as the legitimate government of Libya on October 23, 2011, the situation in Libya remained unstable. Various armed groups claiming to be the legitimate government exercised control over different areas of the country since 2011. In such a situation, it was impossible for the Libyan authorities to guarantee full protection and security, as they would normally do in peacetime. The internationally recognized government has not been in continuous direct control of much of the territory where the property in question was located, such as the areas of Tweisha and Tajura.<sup>269</sup>

## (2) The Tribunal's Analysis and Decision

234. In assessing the Parties' competing views, the Tribunal believes that the duty of due diligence cannot be viewed in the abstract and in isolation from the conditions prevailing in Libya during 2011 and for much of the time since. Respondent's obligation under the Treaty to accord constant protection exists in a setting of weak and uncertain State authority, recurring armed conflict, and widespread breakdown of the law in wide areas of the country. The reality of these circumstances cannot be ignored in assessing

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<sup>267</sup> Resp. Rej. ¶482.

<sup>268</sup> Resp. Rej. ¶482.

<sup>269</sup> Resp. Rej. ¶496.

Respondent's obligations. As the *Ampal v. Egypt* tribunal concluded with respect to a troubled security situation in an adjoining country:

[T]he duty imposed upon the host State by [the standard of full protection and security] is not one of strict liability. Rather the State is obliged to exert due diligence in order to protect a claimant's investment – a standard that must be assessed according to the particular circumstances in which the damage occurs.<sup>270</sup>

235. As Dolzer and Schreuer maintain, the standard of liability under the full protection and security standard requires a host State “to take such measures to protect the foreign investment as are reasonable in the circumstances.”<sup>271</sup>
236. In light of both Parties' extensive evidence showing circumstances of widespread conflict, violence and disorder in Libya at relevant times, the Tribunal is compelled to agree with the thrust of Respondent's assessment: In the circumstances prevailing in Libya during and since the Revolution, it was not reasonably possible for the Libyan authorities to take consistent and effective measures to protect Claimant's investment.<sup>272</sup> The Tribunal has accordingly assessed Claimant's claims of failure to accord full protection and security in light of what both Parties' evidence shows regarding the security situation existing at the relevant place and time.

#### **D. ARTICLE 8(1) – THE UMBRELLA CLAUSE**

237. Claimant advances substantial claims on the basis of Article 8(1) of the Treaty, the umbrella clause. Interpretation and application of this provision are discussed *supra*, in connection with Respondent's objections to the Tribunal's jurisdiction.

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<sup>270</sup> CL-152, *Ampal-American Israel Corp., and others v. Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶241 (“*Ampal v. Egypt*”).

<sup>271</sup> CL-7, Dolzer and Schreuer, p. 161.

<sup>272</sup> Resp. C-Mem. ¶646.



**E. CLAIMANT’S OTHER TREATY CLAIMS**

238. Claimant also asserts that Respondent’s conduct violated Article 3(1) of the Treaty, requiring fair and equitable treatment; Article 3(2) of the Treaty, precluding impairment of investors’ “management, operation, maintenance, use, enjoyment, sale and liquidation” of an investment; and Article 4 of the Treaty, barring indirect expropriation.
239. These claims drew much less attention by the Parties in their written and oral submissions and involve the same conduct and facts as the Tribunal considers in connection with Claimant’s other claims under the Treaty dealing with full protection under Article 3, compensation for losses under Article 5, and other obligations under Article 8. The Tribunal finds that they overlap or duplicate claims more fully developed by the Parties under these other provisions of the Treaty, without adding clarity to the case or providing bases for additional relief.
240. As other tribunals have observed, considerations of economy – both jurisprudential and financial – may lead a tribunal to conclude it need not consider in detail issues that are duplicative and do not contribute to a full and proper decision, or that would not alter a decision reached on other grounds.<sup>273</sup> This is such a case.
241. The Tribunal has been guided by these considerations in assessing Claimant’s additional claims under Articles 3(1), 3(2) and (4) of the Treaty. The Tribunal has taken these claims into account, but does not assess that they alter the outcome or the quantum of compensation to be awarded to Claimant.

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<sup>273</sup> See *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29, Award, 10 February 2012, ¶161; *Micula v Romania* ¶874; *Eiser Infrastructure Ltd. and Energia Solar Luxembourg S.à.r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Award, 4 May 2017, ¶¶352-356.

**VII. CURRENCY IN WHICH THIS AWARD IS DENOMINATED – EXCHANGE RATE**

242. Originally, Al Hani’s claims were submitted to its employers in Libyan Dinars (“LYD”). However, during the course of the present treaty-based arbitration, in their pleadings and evidence both Parties and their respective quantification experts have interchangeably valued the investor’s claims in LYD, Euros, or both currencies. Neither Party has raised objections to this method, and conversion from LYD to Euros has become a practice widely utilized by both Parties in their pleadings. This was also a practice shared by experts and witnesses at the Hearing. The Tribunal finds this justified in the circumstances of the case.
243. The Tribunal accordingly denominates each of its quantum determinations and the resulting Award in Euros.
244. This raises the issue of the exchange rate or rates to be applied in assessing a multitude of transactions under multiple contracts over multiple years. The Tribunal notes that both FTI (Claimant’s quantification expert) and Blackrock (Respondent’s quantification expert) have used very similar, if not the same rates of exchange for purposes of developing the Euro-denominated figures and “figures-as-figures” comparisons presented to the Tribunal at the Hearing. The Tribunal accepts this as an appropriate and reasonable approach, and has been guided by the evidence presented by the Parties’ respective experts in this regard.

**VIII. CLAIMANT’S SPECIFIC CLAIMS FOR LOSS AND INJURY**

245. Claimant presented a complex multi-part damages claim, with numerous separate sub-claims for loss of or damage to particular assets, various forms of nonpayment under various contracts, and for other injuries for which Respondent is said to be liable. For purposes of its analysis of these claims, Claimant’s quantification experts from FTI grouped them into twelve categories. Respondent’s experts from Blackrock utilized these same categories in their responses, an approach that the Tribunal has found to greatly assist its work. The Tribunal will utilize these categories, which have been accepted by both Parties’ experts, as the framework for its analysis. The categories, as numbered by both Parties’ experts, are:

- 1.a Equipment requisitioned in 2011;
- 1.b Equipment destroyed/lost in 2011;
- 1.c Equipment damage repair;
- 1.d Site facilities and materials damaged;
- 2. Equipment removed from Tweisha in 2014;
- 3. Amounts owed to Al Hani under payment certificates;
- 4. Amounts owed to Al Hani for additional work done;
- 5. Retention amounts due to be repaid to Al Hani;
- 6.1 Equipment – immobilized;
- 6.2 Evacuation;
- 6.3 Stand-by of staff; and
- 6.4 Financial charges.

246. The four elements of Claim 1 (items 1.a – 1.d) are related to Article 5 of the Treaty, addressing “Compensation for Losses” in times of armed conflict, emergency and the like. Claim 2 is primarily related to Respondent’s obligation to provide “full and constant protection and security” under Article 3(1) of the Treaty. Claims 3, 4 and 5 are based on the provisions of Al Hani’s contracts, and relate to Article 8’s umbrella clause. Claims 6.1-6.4 involve losses said to stem from the period of disorder and conflict in 2011. These are again based on provisions in Al Hani’s contracts dealing with allocation of risk in times of disturbance.

**A. CLAIM 1.A. EQUIPMENT REQUISITIONED IN 2011**

247. This claim is based on Article 5(2) of the Treaty, which provides:

- (1) An investor of a Contracting Party who has suffered a loss relating to its investment in the territory of the other Contracting Party due to war or to other armed conflict, state of emergency, revolution, insurrection, civil disturbance, or any other similar event, or acts of God or force majeure, in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or any other settlement, treatment no less favourable than that which it accords to its own investors or to investors of any third state, whichever is most favourable to the investor.
- (2) An investor of a Contracting Party who in any of the events referred to in paragraph (1) suffers loss resulting from:
  - (a) requisitioning of its investment or part thereof by the forces or authorities of the other Contracting Party, or
  - (b) destruction of its investment or part thereof by the forces or authorities of the other Contracting Party, which was not required by the necessity of the situation, shall in any case be accorded by the latter Contracting Party restitution or compensation which in either case shall be prompt, adequate and effective and, with respect to compensation, shall be in accordance with Article 4(2) and (3).

248. Articles 4(2) and 4(3) of the Treaty then specify the requirements for compensation in cases of expropriation, requiring that such compensation shall reflect fair market value, be paid without delay, and include interest at a commercial rate.

**(1) Claimant's Position**

249. Claimant points to a substantial body of evidence showing that numerous vehicles, generators, fuel tanks and other valuable Al Hani equipment was requisitioned by personnel of Libya's 32<sup>nd</sup> Reinforced Brigade, an elite security unit commanded by Col. Gaddafi's youngest son, Khamis Gaddafi. At the Hearing, Claimant's valuation experts from FTI assessed the value of Al Hani's property that was requisitioned and not recovered to be €6,134,891.<sup>274</sup>

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<sup>274</sup> Cl. PHB chart at ¶381.

250. While Al Hani's expatriate personnel left the country in March 2011, locally engaged staff remained. They frequently recorded serial numbers and other identifying information on trucks and other major equipment being removed by Libyan Government forces. They also secured multiple documents signed by officers of the 32<sup>nd</sup> Brigade evidencing requisitions on particular dates. Claimant also submitted reports of Interior Ministry personnel who were engaged by Al Hani to provide perimeter security but were not able to prevent officers and personnel of the 32<sup>nd</sup> Brigade from removing Al Hani's property.
251. Claimant introduced 30 documents signed by 32<sup>nd</sup> Brigade officers evidencing the requisition of numerous vehicles, generators, and other equipment.<sup>275</sup> In addition, a December 2011 letter to Al Hani from Libya's Ministry of the Interior/Security Board of Utilities and Facilities (which provided security guards for Al Hani's Tweisha yard under contract with Al Hani) describes incidents involving equipment being removed from the yard by 32<sup>nd</sup> Brigade personnel over the objections of the security guards. The letter records, *inter alia*, that "our members tried to prevent the armed forces getting the equipment out, but under the threat of weapons they have seized some equipment," that "the seizure of the equipment, Tires, Tanks and other articles has been repeated," and that "a group of soldiers from Brigade no. 32 leaded [sic] by Captain Mohamed Yousif stayed and accommodated at the Mob. Area and they were seizing equipment and material daily."<sup>276</sup>
252. Reports from the local branch of the "General People's Committee for Public Security/Facility and Establishment Security Authority" responsible for security at the Tweisha site also describing requisitions of equipment<sup>277</sup> add further detail. An 11 April 2011 telegram reports on two visits to the Tweisha site by Major Elkhairiat and soldiers from the 32<sup>nd</sup> Reinforced Brigade during which they "withdrew" numerous Al Hani vehicles. The report

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<sup>275</sup> See C-187 – C-189, C-193, C-203, and C-206 – C-215.

<sup>276</sup> C-237, Letter to Al Hani from the Ministry of the Interior / Security Board of Utilities and Facilities dated 13 December 2011.

<sup>277</sup> C-178, Requisitioning Report dated 3 April 2011.

includes a document signed by Major Elkhairiat and another listing serial and license numbers of equipment taken, including 13 ACTROS Mercedes trucks and a low trailer. A second similar document dated 4 April 2011 lists license and serial numbers of 20 pickup trucks that were also taken.<sup>278</sup> A similar report from the Interior Ministry security personnel at Tweisha dated 26 July 2011 reports additional equipment removed by soldiers of the 32<sup>nd</sup> Reinforced Brigade, this time including several generators, fuel tanks, and two Mitsubishi Fuso Canters.<sup>279</sup>

253. Al Hani's Libyan Procurement and Logistics Manager remained at the Tweisha site after the Strabag expatriates left. His witness statement describes multiple visits by 32<sup>nd</sup> Brigade soldiers to take vehicles and equipment and the efforts of Al Hani staff to get Brigade officers to sign and stamp reports identifying equipment being removed: "[B]y the end of July or the start of August, the 32<sup>nd</sup> Reinforced Brigade had taken everything they wanted from the site."<sup>280</sup>
254. Although communications between Al Hani's local personnel and expatriate personnel in Europe were difficult, local personnel were able to pass much information to Strabag personnel regarding lost and stolen equipment. A report prepared for a July 2011 Strabag management meeting based on reports from Strabag's on-site staff refers to multiple removals of equipment from Al Hani sites by Libyan Army personnel. The document lists equipment known to be lost or stolen as of that time, including 24 trucks, 31 prime movers, 6 buses, and 31 Toyota pickups.<sup>281</sup>

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<sup>278</sup> C-179, Requisitioning Report dated 4 April 2011.

<sup>279</sup> C-213, Requisitioning Report dated 26 July 2011.

<sup>280</sup> Akasha WS, ¶¶6-14.

<sup>281</sup> C-204, International Management Meeting UB3G. BMTI/Current Status Libya, 30 June – 1 July 2011.

255. Claimant contends that Respondent's arguments disputing its evidence of requisitions were either wrong, or involved formalistic nitpicking.<sup>282</sup> Claimant also noted that Respondent does not address the additional evidence showing the occurrence and extent of requisitions.

**(2) Respondent's Position**

256. Respondent's defense to this claim primarily involves attacks on the credibility of the documents said to have been signed by 32<sup>nd</sup> Brigade officers and to show requisitions. Respondent denies the probative value of these documents, disputing the authority or identity of purported signers, the lack of official seals, and otherwise questioning the weight to be given to them.<sup>283</sup> Respondent thus argues, for example:

Valid requisitioning reports of Brigade 32 should be on the brigade's official form, signed and stamped by an authorized officer, and contain the identification number of the requisitioning officer. However, only one of the twenty requisitioning reports introduced by Claimant is on the official form; even this report does not have an official stamp or the identification number of the officer who allegedly signed it.<sup>284</sup>

**(3) The Tribunal's Analysis and Decision**

257. The Tribunal finds that the evidence submitted by Claimant in support of this claim is credible and sufficient to show that a significant amount of Al Hani's property was lost to requisition by regular Libyan armed forces during the events of 2011. The evidence regarding the value of the requisitioned equipment is also detailed and is largely accepted by both Parties' valuation experts.

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<sup>282</sup> Cl. Reply ¶559 et seq.

<sup>283</sup> Resp. C-Mem. ¶610 et seq.

<sup>284</sup> Resp. C-Mem. ¶612.

258. The starting point for assessing the extent of loss is an Excel spreadsheet constructed by Al Hani's equipment manager, Mr. Penkhues, prior to the Revolution. This spreadsheet was prepared in the ordinary course of business for readily apparent business reasons. It contained a detailed listing of all of Al Hani's plant, machinery, and equipment in Libya, including information such as serial numbers, acquisition and transportation costs, and depreciation.<sup>285</sup> Following the Revolution, Mr. Penkhues returned to Libya to inventory Al Hani's assets. He then updated the spreadsheet to reflect equipment remaining on hand or that was recovered by Al Hani personnel.
259. Respondent's Post-Hearing Brief contends that the Penkhues spreadsheet is based on uncorroborated hearsay evidence and cannot be relied upon.<sup>286</sup> The Tribunal is not persuaded. The spreadsheet was prepared by a knowledgeable and experienced senior staff member, in the ordinary course of business, for purposes of determining Al Hani's position in the aftermath of the Revolution. The Tribunal accepts it as a proper basis for assessing the value of Al Hani's property that was requisitioned and not recovered. The Tribunal notes in this regard that Respondent's quantification expert, Mr. Osbaldeston, accepted that he had no reason to question the accuracy of Mr. Penkhues's inventory.<sup>287</sup>
260. Proceeding from Mr. Penkhues's spreadsheet, Claimant's quantification experts from FTI assessed the net book value of 119 items of equipment requisitioned and not subsequently recovered, adjusted for depreciation and inflation, to be €6,134,891 (as updated at the Hearing).<sup>288</sup>
261. In his Second Report, Mr. Osbaldeston of Blackrock assesses the value of the requisitioned property to be €5,791,932. Blackrock's assessment is thus €342,959 below FTI's final figure.<sup>289</sup> Thus, the conclusions of the two Parties' valuation experts are substantially similar.

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<sup>285</sup> See 1<sup>st</sup> Penkhues WS; 2<sup>nd</sup> Penkhues WS ¶3.

<sup>286</sup> Resp. PHB ¶134.

<sup>287</sup> TR 10:2274:22 – 2275:2.

<sup>288</sup> Cl. PHB ¶381.

<sup>289</sup> 2<sup>nd</sup> Blackrock Quantum Report, p. 115.



262. However, there is also force in Claimant's argument that Respondent's lower number is not justified. The difference between the two largely reflects Blackrock's assessment of a lower depreciated net book value. Mr. Osbaldeston's Second Report was not entirely clear to the Tribunal in this respect, but Claimant's Post-Hearing Brief attributes the difference between the experts to the fact that Mr. Osbaldeston did not account for all "costs directly attributable to bringing the asset to the location and condition necessary for it to be capable of operating in the manner intended by management as required by International Accounting Standard 16."<sup>290</sup>

263. Considering all above arguments and counterarguments and balancing the available evidence, the Tribunal awards the value of requisitioned equipment as assessed by Blackrock, plus approximately half of the difference between Blackrock's and FTI's assessments. The Tribunal accordingly concludes that, under the present head of claim under Article 5(2)(a) of the Treaty for uncompensated requisitioning, Respondent owes €5,963,000.

**B. CLAIM 1.B. EQUIPMENT DESTROYED / LOST IN 2011**

264. The previous section addressed Claimant's claim for property requisitioned by Respondent's armed forces. Claimant also seeks significant sums for other assets that it contends were "taken or destroyed for reasons attributable to Libya"<sup>291</sup> on the basis of Article 5(2)(b) of the Treaty as quoted in paragraph 247.<sup>292</sup>

265. This Article of the Treaty provides that an investor who suffers losses due to events such as those that occurred in Libya in 2011 involving:

(2)(b) destruction of its investment or part thereof by the forces or authorities of the other Contracting Party, which was not required by the necessity of the situation, shall in any case be accorded by the latter Contracting Party restitution or compensation which in either case shall be prompt, adequate and

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<sup>290</sup> Cl. PHB ¶383.

<sup>291</sup> 1<sup>st</sup> FTI Quantum Report ¶6.1.1.

<sup>292</sup> 1<sup>st</sup> FTI Quantum Report ¶6.1.2.

effective and, with respect to compensation, shall be in accordance with Article 4 (2) and (3).

**(1) Claimant's Position**

266. Claimant's Memorial summarizes this claim:

292. Article 5(2)(b) is ... applicable in this case ... during the disturbances and violence of 2011, not only did the Respondent's armed forces requisition property belonging to Al Hani (some of which is recorded in contemporaneous records), but Libyan armed forces also damaged and destroyed property which constituted part of Strabag's investment in Libya.

293. Article 5(2)(b), unlike Article 5(2)(a), contains a qualification that the provision applies to destruction of an investment "which was not required by the necessity of the situation." The Claimant submits that the facts and circumstances of the destruction and damage to Al Hani's property by the Respondent's armed forces (including acts of vandalism and intentional damage inflicted by the armed forces when they abandoned the Al Hani sites) are such that the Respondent cannot credibly maintain that such destruction and damage was required by the necessity of the situation.<sup>293</sup>

267. Claimant seeks €10,560,869, primarily for lost vehicles and other portable property. Claimant's quantum experts' reports do not address whether Respondent's forces were in fact responsible for particular damage. FTI's First Report makes clear that their role was limited to assessing the fair market value of assets "which, we are instructed were requisitioned by the Libyan military forces, or otherwise taken or destroyed for reasons attributable to Libya, in 2011."<sup>294</sup>

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<sup>293</sup> Cl. Mem. ¶¶292-293.

<sup>294</sup> 1<sup>st</sup> FTI Quantum Report ¶6.1.1.

268. Mr. Osbaldeston of Blackrock largely accepts Claimant’s assessment of the value of this lost or damaged property, but again does not address the issue of causation. Blackrock finds that the value of the lost or destroyed property is €10,291,610, a difference of €262,959 from the total found by FTI. While this is not an inconsequential amount, the difference between the two sets of experts arises in the context of a claim for more than €10.5 million.

**(2) Respondent’s Position**

269. Claimant presents evidence in support of this claim, but – not surprisingly, given the nature of the events involved – this does not include eyewitness evidence of the circumstances resulting in particular loss or damage. Respondent does not offer evidence addressing specific locations or events in rebuttal, arguing instead that Claimant failed to meet its burden of proof. In its Post-Hearing Brief, Respondent expands its argument to contend that it has shown that Libya’s forces did not cause any of the damage and that it was all caused by NATO, looters, Al Hani employees, or other actors.<sup>295</sup>

**(3) The Tribunal’s Analysis and Decision**

270. A claimant can recover under Article 5(2)(b) of the Treaty only for losses from “destruction of its investment or part thereof by the forces or authorities of the other Contracting Party, which was not required by the necessity of the situation.” Thus, two conditions must be met. First, the claimant must demonstrate that its property was destroyed “by the forces or authorities” of the respondent State. Second, it must be shown that such destruction “was not required by the necessity of the situation.” Article 5(2)(b) of the Treaty thus presents the challenge of establishing responsibility for wartime damage by forces of the State party to the investor’s property in violent and often chaotic circumstances.

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<sup>295</sup> Resp. PHB ¶140. The Tribunal does not accept Respondent’s statement. The passages cited in the Post-Hearing Brief to support it do not establish that Libyan armed forces caused no damage. To the contrary, the evidence shows that there was damage attributable to Libya’s forces.

271. It is Claimant's burden to establish sufficiently the basis of its claim for compensation. Claimant's starting point in this regard is again the evidence of Mr. Penkhues and his spreadsheet. In the spreadsheet, Mr. Penkhues allocated various types of property loss and damage to various causes. In his First Witness Statement, Mr. Penkhues explains that he created categories on the final version of his spreadsheet for:

“[M]ilitary force”, where it was apparent that the asset had been destroyed or damaged by the military during the conflict in 2011; [and] (c) “other”, where the asset was either stolen, destroyed or damaged during the course of 2011, including during the period when the sites were occupied by the military or when the military abandoned the sites.<sup>296</sup>

272. Mr. Penkhues's First Witness Statement explains how he assigned particular lost or damaged property to particular classifications. He states that in doing so “I relied on the updates received from our Libyan colleagues during the revolution and my site inspections.”<sup>297</sup> The spreadsheet thus does not reflect first-hand knowledge on his part.

273. Mr. Penkhues's statement then describes relevant categories that he used in a refined version of the spreadsheet:

- c. “Stolen”: Some of our machinery and equipment had gone missing at the time the military had occupied our sites or sometime after the soldiers had left. If I did not have a requisition report from Mr. Kadri or one of our other employees, I listed the item as “stolen”.
- d. “Military force”: If it was clear that the item in question had been damaged during fighting (for example, it had bullet holes in it or had been damaged by tanks), I included “military force” in this column.
- e. “Vandalism”: Some of equipment and machinery was also vandalised. Sometimes the graffiti was the name of the unit that had occupied our sites, so it was obvious that this had been done by soldiers.

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<sup>296</sup> 1<sup>st</sup> Penkhues WS ¶31.

<sup>297</sup> 1<sup>st</sup> Penkhues WS ¶25.

274. While they may have been appropriate for the purposes for which they were created, Mr. Penkhues's categories provide limited assistance regarding the threshold question of Respondent's responsibility under Article 5(2) of the Treaty. The spreadsheet does not separately identify damage attributable to Respondent's "forces or authorities," as opposed to e.g. rebels, NATO air strikes, or other causes. Claimant's valuation experts from FTI analyze and generally endorse the valuations Mr. Penkhues places on lost or damaged equipment, but their reports do not address this key question of the likely cause of particular damage.<sup>298</sup>
275. A second source of evidence regarding the cause of particular damage is a report prepared for the projects' insurers by Mr. Adouni, a loss surveyor from the Tunisian branch of Sadaoui Surveyors Group.<sup>299</sup> This report (the "Sadaoui Report") was issued in June 2012.<sup>300</sup> In preparing his report, Mr. Adouni, who was accompanied by Mr. Penkhues, visited Al Hani's facilities and camps at multiple locations in Libya and physically inspected and photographed the sites visited. His assessments of the monetary value of lost and damaged property are in line with Mr. Penkhues's.
276. Respondent's Post-Hearing Brief dismisses the Sadaoui Report as "unreliable."<sup>301</sup> The Tribunal does not agree. The Report's analysis and photographs provide relevant evidence bearing on Claimant's losses relevant to this claim. The Report was prepared by a credentialed and apparently thorough and experienced loss surveyor, working for an established surveyors firm,<sup>302</sup> and acting on behalf of major insurers with an interest in a reliable assessment of Al Hani's damages. It thus offers an objective outsider's assessment.

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<sup>298</sup> 1<sup>st</sup> FTI Quantum Report ¶¶6.1.1-6.2.8; 2<sup>nd</sup> FTI Quantum Report ¶¶313-367.

<sup>299</sup> Cl. Mem. ¶¶191-192.

<sup>300</sup> C-290, Sadaoui Report.

<sup>301</sup> Resp. PHB ¶135.

<sup>302</sup> See <http://www.sadaoui.net> ("We are acting as expert surveyors on behalf of all the German, Austrian, Swiss and French Insurance Companies without exception as well as we are accredited by most of the Western European and previously Eastern European Underwriters in the remaining European countries.").

277. Mr. Adouni's descriptions of what he saw and learned indicate the frequent difficulty of establishing responsibility for particular loss of or damage to Al Hani's property. In some instances, damage to property cannot clearly be linked to Government forces. For example, at the Ras al Afa Quarry site southwest of Tripoli, the Report observes that "the site was left without security guards, therefore it was exposed to the attacks of the armed robbers [w]ho thieved the portable tools and equipment and damaged the heavy machineries."<sup>303</sup>
278. However, at three of Al Hani's major sites, the Sadaoui Report describes damage to equipment that Mr. Adouni connected to the presence and actions of government troops.

*A. Equipment Damage and Losses at the Tweisha Site*

279. The Tweisha site, in the vicinity of Tripoli's international airport, was Al Hani's main mobilization area, workshop, office, and warehouse. Many vehicles and a large amount of other equipment was assembled there in February 2011; the Sadaoui Report includes photographs taken on 21 February 2011 showing numerous buses, heavy trucks, and other pieces of heavy construction equipment at the site.
280. The Report cites multiple causes of damage to Respondent's equipment at the Tweisha site, including requisitions by military forces and post-Revolutionary looting by unidentified "armed people." However, it also cites other damage inflicted by military forces of Respondent in circumstances not involving combat, and therefore not posing the question of military necessity. According to the Report:

[W]e can attribute the damages and losses affecting the [Tweisha] site and its equipment to the following causes:

...

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<sup>303</sup> C-290, Sadaoui Report, p. 25.

The occupation of the site by the military troop “Reinforced Brigade 32” belonging to Gaddafi regime, starting from the mid of April 2011 till the beginning of September 2011. According to the Annex VI (last paragraph), the military troop seized and used the equipment of the site either against or without receipts on daily basis.

The fierce exploitation of the site including equipment, offices and camps by the military troop during the war period (about 5 months) which resulted in the damage of the equipment and site furniture.<sup>304</sup>

***B. Equipment Damage and Losses at the Tajura Site***

281. The Sadaoui Report again identifies damage from multiple causes at Al Hani’s Tajura site east of Tripoli, the location of Al Hani’s largest infrastructure project, where there was significant damage caused by actors other than Government forces. The Report thus records that on 21-23 February 2011, the Tajura facilities “were looted by rioters and robbers, benefitting from the disturbance and perturbation which affected the regime at the beginning of unrests.”<sup>305</sup> These events were described at the Hearing by Mr. Knaack, who was present at the time of these events and confirmed that the individuals he saw entering and looting the camp were civilians.<sup>306</sup>
282. Other damage at the Tajura site was attributed to NATO bombing, presumably directed at a nearby military camp. The Sadaoui Report identifies “[b]reaking of glasses caused by NATO bombs splinters” and “[d]amages of asphalt plant caused by bomb splinters.” Neither the looting and burning of the Tajura camp, or damage due to NATO bombing can be attributed to Respondent under Article 5(2) of the Treaty.

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<sup>304</sup> C-290, Sadaoui Report, pp. 13-14.

<sup>305</sup> C-290, Sadaoui Report, p. 27. *See* Cl. Mem. ¶¶308-309; Cl. Reply ¶324.

<sup>306</sup> TR 3:1001:11-22 – 1002:1-3 (Mr. Knaack).

283. However, the Sadaoui Report also identifies other damage to Al Hani's equipment from the presence of military forces supporting the regime. Government forces occupied Al Hani's facilities for several months beginning in April 2011.<sup>307</sup> According to the Report, this resulted in "[d]amages of equipment caused by the fierce and unskilled exploitation of military troop; such damages were ascertained on the heavy equipment (bulldozers, trucks, forklifts ...) and light equipment and furniture like cars, spare parts, generators, tires, computers and air-conditioners ..."<sup>308</sup>

***C. Equipment Damage and Losses at the Tawarga (Misurata) Mobilization Area***

284. The Misurata area was the scene of intense fighting between Government and rebel forces and of NATO air attacks on Government forces. These events resulted in damage at Al Hani's mobilization site at Tawarga, which supported the Misurata Road project. The Sadaoui Report states that Government forces occupied Al Hani's site "because of its strategic location" and its "logistics facilities supply." The Sadaoui Report continues that "during the war, this site was a target to the NATO bombardment and to rebels attacks." As to the "[c]auses of damages and losses," it concludes:

According to our inspection, we evidenced that the damages which affected the site were essentially caused by NATO bombardment and rebels attacks. The exploded work shop, containers, camps, vehicles, asphalt tanks, asphalt plant and the bullets and their holes all over the site affirming the warriors attacks.<sup>309</sup>

285. Claimant's Reply acknowledges that Al Hani's property at Tajura and the Tawarga/Misurata sites was damaged by NATO bombardment. Claimant maintains, however, that "the relevant point is that the Libyan armed forces had first occupied, and expropriated, this site following which Al Hani's site would have become a legitimate military target."<sup>310</sup> Claimant's characterization of the site as a legitimate military target seems appropriate, but it does not assist Claimant's claim under Article 5(2) of the Treaty.

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<sup>307</sup> Cl. Mem. ¶308.

<sup>308</sup> C-290, Sadaoui Report, p. 28.

<sup>309</sup> C-290, Sadaoui Report, p. 35.

<sup>310</sup> Cl. Reply ¶328.



In light of the Sadaoui Report, the Tawarga site's location in an area of heavy fighting between rebel and Government forces, and the presence of NATO aerial bombardment, the Tribunal has no basis to attribute any of the damage there to the actions of Government forces, as opposed to rebel or NATO forces, or to conclude that any damage was not occasioned by military necessity.

286. Additional evidence in the record indicates Government forces' responsibility for some of the loss of or damage to Al Hani's property. This evidence appears reliable, as it reflects information contemporaneously gathered by responsible Al Hani employees in the course of business and not in anticipation of litigation. For example:

- Mr. Napowanez states that

[a]lthough there were frequent communication difficulties between March and September 2011, our staff managed to provide us with updates as to what was happening on the ground in Libya. For example, they informed us that some of our sites were occupied by Libyan armed forces and that Libyan soldiers confiscated vehicles and other property from the sites.<sup>311</sup>

- Mr. Penkhues states that

Mr. Kadri had reported to us that the Tweisha camp and office had been taken over by the Libyan military and that the military had on several occasions confiscated several pieces of machinery.<sup>312</sup>

- Mr. Penkhues states further that after leaving Libya in February 2011, he

received updates from time to time on the situation from our employees on the ground ...When [these employees] first called to tell us that the military had come to take away our equipment, we did not know what to do. We realised quickly that we needed some record of what was being confiscated by the military, so when the military came again, [our employees] prepared lists of the equipment that was taken away and, if possible, got a member of the

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<sup>311</sup> 1<sup>st</sup> Napowanez WS ¶20.

<sup>312</sup> 1<sup>st</sup> Penkhues WS ¶20.

military to sign the list. [Our employees] would then email the lists to me if or when they could. We received emails containing these reports, including on 5 April 2011, and 27 April 2011 ... During this time, I also received updates by phone from [our employees], who would tell me what equipment had been taken by the military. I recorded this information in my asset inventory.<sup>313</sup>

- The witness statement of an Al Hani employee describes his first-hand observations of military personnel from the 32<sup>nd</sup> Brigade removing equipment from the Tweisha site over the course of several months.<sup>314</sup>
- An e-mail to Mr. Penkhues from an employee in Libya in April 2011 lists tires “taken by the military” from Al Hani’s site in Sirte.<sup>315</sup>

287. As noted *supra*, the Parties’ experts are substantially in agreement regarding the total value of Al Hani’s equipment lost during the Revolution. However, as Respondent contends, and as the Sadaoui Report confirms, responsibility for particular damage is often not clear. In the chaotic conditions of the Revolution, Al Hani’s vehicles and equipment were taken, destroyed, or damaged by multiple actors. Losses sometimes involved Government forces in non-combat situations in circumstances that fell under Article 5(2) of the Treaty, but there were also losses attributable to looters, rebels, and NATO bombing.

288. Respondent advances two principal lines of argument in light of this situation. Respondent first contends, based on *AAPL v. Sri Lanka*<sup>316</sup> construing a treaty’s war damages clause, that in situations involving combat damage, the claimant must establish both that damage was inflicted by government forces and that their actions were not required by military necessity.<sup>317</sup> In Respondent’s submission, Claimant has failed to meet this evidentiary burden; given the weak and ambiguous evidence, there can be no recovery.

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<sup>313</sup> 2<sup>nd</sup> Penkhues WS ¶9.

<sup>314</sup> Akasha WS, *passim*.

<sup>315</sup> C-186, Email from Mr. Kadri to Mr. Penkhues dated 27 April 2011.

<sup>316</sup> CL-21, *AAPL v. Sri Lanka*.

<sup>317</sup> Resp. C-Mem. ¶592.

289. This argument does not prevail. The Tribunal finds that there is sufficient evidence that some of Al Hani's vehicles and equipment were damaged or destroyed by Government forces in circumstances not involving combat, so that the issue of military necessity does not arise. The difficulty lies in determining how much of the claimed damage is attributable to Government forces, as opposed to rebels, looters, NATO bombing, or other possible causes.
290. At the Hearing and in its Post-Hearing Brief, Respondent developed a further argument to the effect that, correctly analyzed, the data assembled by Mr. Penkhues shows that the amount of loss and damage attributable to Government forces is appreciably less than the amount claimed, and involves only 113 pieces of equipment with a value of LYD5.223 million.<sup>318</sup> Respondent arrived at this conclusion by applying filters to Mr. Penkhues's data that Respondent understands to identify the equipment damaged by Government forces.
291. In its Post-Hearing Brief, Claimant disputes Respondent's choices of filters to exclude large amounts of lost or damaged equipment, objecting, *inter alia*, that Respondent "cannot eliminate particular items, for example because items classified as 'vandalised' in the inventory lacked 'bullet holes,' or because items classified as damaged by 'Military Force' did not indicate the party exercising military force."<sup>319</sup>
292. The Tribunal thus faces a difficulty. Claimant has established to a sufficient degree that a substantial amount of Al Hani's equipment was destroyed or damaged by the actions of Libya's armed forces. This included, not least, equipment that was damaged or destroyed by soldiers of the 32<sup>nd</sup> Brigade while its units occupied Al Hani's facilities under conditions not involving impending or actual combat and thus not raising the issue of military necessity. However, the evidence also shows that much of Al Hani's equipment was lost to looters, disgruntled employees, rebels, and even NATO air bombardment.

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<sup>318</sup> Resp. PHB Annex 1, p. 4.

<sup>319</sup> Cl. PHB ¶308.

293. Thus, whatever Respondent's liability may be for property loss attributable to the regime's forces or authorities under Article 5(2) of the Treaty, it is necessarily less than the €10,560,869 sought by Claimant for all of its lost equipment. The Tribunal also considers the figure of LYD5.223 million introduced by Respondent very late in the proceedings, based on its selective application of filters on Mr. Penkhues's spreadsheet data, to be unrealistically low.
294. Accordingly, the Tribunal must consider the principles of evidence applicable in this situation. As a starting point, the Tribunal observes that under Article 41(I) of the ICSID Arbitration (Additional Facility) Rules, it "shall be the judge of the admissibility of any evidence adduced and of its probative value." In its 20 July 2018 letter to the Parties following the Hearing, the Tribunal asked that they further address "[u]nder the applicable law, what power does the Judge have to determine compensation if the evidence does not admit of precise assessment?" In its Post-Hearing Brief, Claimant responds:

The Parties agree that the relevant law for the assessment of compensation in this case is public international law, which clearly provides the Tribunal with such power. Similarly, as a matter of Libyan law (whether in the context of assessing compensation for exceptional circumstances or more generally), the Supreme Court has confirmed that "proving the occurrence of damage or its nonexistence and assessing the compensation therefor is a factual matter, that is at the discretion of the matter judge."<sup>320</sup>

295. Respondent's Post-Hearing Brief offers a less detailed conclusion:

Pursuant to the Treaty and the Contracts, Claimant's contractual claims are subject to international law and Libyan law. Under both, Claimant has the burden of proving the legal and factual bases for its claims and the proper quantum of damages. Claimant has failed to carry this burden (footnotes omitted).<sup>321</sup>

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<sup>320</sup> Cl. PHB ¶380 (footnotes omitted).

<sup>321</sup> Resp. PHB ¶126.

296. In the Tribunal's view, in the circumstances in Libya in 2011, international law does not require an accountant's precision in determining damages. Instead, as the *Crystallex v. Venezuela* tribunal observed:

[A]n impossibility or even a considerable difficulty that would make it unconscionable to prove the amount (rather than the existence) of damages with absolute precision does not bar their recovery altogether. Arbitral tribunals have been prepared to award compensation on the basis of a reasonable approximation of the loss, where they felt confident about the fact of the loss itself.<sup>322</sup>

297. In addition, in the *Sapphire v. Iran* award the tribunal held:

It is not necessary to prove the exact damage suffered in order to award damages. On the contrary, when such proof [of exact damage] is impossible, particularly as a result of the behaviour of the author of the damage it is enough for the judge to be able to admit with sufficient probability the existence and extent of the damage.<sup>323</sup>

#### ***D. The Tribunal's Decision***

298. The Tribunal finds the derivation of Respondent's figure of LYD5.22 million to be difficult to understand. The evidence shows that Claimant has certainly incurred significant damages covered by Article 5 of the Treaty. The Tribunal recalls, however, that at the time of the 2011 events, the situation in Libya was chaotic, dangerous and unsettled. This is a situation in which international law does not require precise proof of the quantum of the loss, provided the occurrence and significance of the loss are established. Furthermore, when the amount of damages is impossible to prove with precision, as reflected in the cases, the predominantly accepted rule does not lead to a draconian rejection of the overall claim. On the contrary, partial recovery can be allowed to the extent that a tribunal deems proper and fair. The Tribunal observes in this regard that a portion of the loss at issue in this claim was inflicted by rebel or NATO forces; another portion involved losses due to looting by civilians and thefts by Al Hani's own employees; and a third portion resulted from actions

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<sup>322</sup> CL-30, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016 ("*Crystallex v. Venezuela*"), ¶871, citing *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶686.

<sup>323</sup> *Sapphire International Petroleum Ltd. v. National Iranian Oil Company*, 35 ILR 136 (1963) ¶¶187-188.

by Libyan military personnel in non-combat situation. The Tribunal accordingly determines that approximately one-third of the claimed losses are attributable to the actions by State forces not involving military necessity, actions for which Respondent is liable pursuant to Article 5(2)(b) of the Treaty. The Tribunal accordingly awards in respect of this claim approximately one-third of the amount claimed (namely €10,560,869), i.e. €3,520,000.

**C. CLAIM 1.C. EQUIPMENT DAMAGE REPAIR UNDER ARTICLE 5 OF THE TREATY**

299. Claimant also seeks €1,705,750 pursuant to Article 5(2)(b) of the Treaty for the repair of damage to assets for which Respondent is alleged to be responsible. The claim does not reflect costs actually incurred. Instead, it reflects Mr. Penkhues's estimate of what repairs would cost if they were carried out. As explained in Claimant's Memorial:

In respect of the assets which Mr. Penkhues recorded in his inventory as damaged (i.e., which had some residual value), Mr. Penkhues determined the cost of repair of these assets by reference to the replacement parts and labour costs required to repair the items in question. FTI have relied on Mr. Penkhues's assessment of the cost of repair of these items to calculate the value of the loss to Al Hani caused by damage to these assets by the Respondent's armed forces or for which the Respondent is otherwise responsible at EUR 1,705,750 as of February 2011.<sup>324</sup>

300. Thus, Claimant does not connect these purported losses to actions by Libyan armed forces or otherwise demonstrate Libya's liability for them under the Treaty.

301. In his First Report, Respondent's quantification expert Mr. Osbaldeston of Blackrock points to the lack of clear evidence regarding the cause of this damage, and concludes that he could not assess the quantum of this claim.<sup>325</sup> In their Second Report, FTI's experts do not address the attribution point, but do confirm that the claim is "based on the witness

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<sup>324</sup> Cl. Mem. ¶527.

<sup>325</sup> 1<sup>st</sup> Blackrock Quantum Report ¶61.

statement of Mr. Penkhues and is not independently verified by FTI,” and that “the repairs to the damaged equipment have not been made.”<sup>326</sup>

302. In his Second Report, Mr. Osbaldeston also notes that the repairs have not actually been carried out, and raises a variety of other objections. He notes, *inter alia*, the risk of duplication between this and other claims, notably Claimant’s large claim for equipment removed from the Tweisha yard in 2014 (see *infra* Section VIII. E.); that the claim includes €248,500 for repairs to an asphalt plant in Misurata that was sold; and the lack of any substantiation for Mr. Penkhues’s estimates of repair costs.<sup>327</sup>

**(1) The Tribunal’s Decision**

303. This is a claim exclusively based on Mr. Penkhues’s estimates of the cost of hypothetical repairs that were never made, for damage that is not shown to be the responsibility of Libya’s armed forces or for which Respondent would otherwise be responsible under Article 5(2)(b) the Treaty.
304. Claim 1.c., for equipment damage repair, is dismissed for failure to establish both proof of loss and Respondent’s responsibility under the Treaty.

**D. CLAIM 1.D. SITE FACILITIES AND MATERIALS DAMAGED**

305. This claim is again based on Article 5(2)(b) of the Treaty and alleges damage to or destruction of Al Hani’s construction sites, vehicles, equipment and material by Libyan Government forces.

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<sup>326</sup> 2<sup>nd</sup> FTI Quantum Report ¶337.

<sup>327</sup> 2<sup>nd</sup> Blackrock Quantum Report ¶¶466-469.

**(1) The Parties' Positions**

306. As ultimately presented by Claimant's quantification experts from FTI at the Hearing, Claimant seeks €2,573,186 for such loss or damage for which Claimant alleges Respondent bears responsibility. The largest component of the claim is €1,439,660 for lost materials and spares, roughly 56% of the total. The second largest component is €924,097 for replacement furniture and equipment (about 36%). Damage to buildings is claimed to be €200,305 (roughly 8%).<sup>328</sup>

307. Mr. Osbaldeston, Respondent's quantification expert from Blackrock, assesses that €1,697,343 of the claimed losses were sufficiently documented. The principal difference (€875,843) involves Blackrock's valuation of lost spares at Tweisha and the Ras Al Lafah Quarry to be zero.<sup>329</sup> As explained by FTI at the Hearing, this difference:

[R]eally has to do with one major issue, and that is there's some Tweisha and quarry yards spares, mostly Tweisha; there's spares there where Mr. Osbaldeston has zeroed that estimate out for those spares, and the estimate carried by Al Hani at the time of 50 percent of the estimated value was that difference of about – it's about EUR 826,000 of the total difference.

So, the Tribunal, of course, needs to assess whether the estimate done by the Al Hani folks is more appropriate than Blackrock's assessment of zero.<sup>330</sup>

308. Putting to the side the experts' disagreement regarding the value of missing spares, the Tribunal notes a more fundamental difficulty. The evidence previously reviewed in connection with Claimant's Claim 1.b for lost equipment shows that Al Hani lost equipment to a variety of causes, not only Respondent's armed forces. The same is true of this claim. The evidence establishes that some of the claimed damage was caused by Libyan armed forces in non-combat circumstances not posing issues of military necessity, and so is entitled to compensation under the Treaty. The evidence also shows, however, that damage was caused by other actors as well.

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<sup>328</sup> CH-3, FTI Quantum Hearing Presentation, p. 16.

<sup>329</sup> CH-3, FTI Quantum Hearing Presentation, p. 17.

<sup>330</sup> TR 9:1971:15 – 1972:3 (Mr. Osborne).



309. There clearly was relevant loss and damage caused by members of Libya's armed forces occupying Al Hani's sites in non-combat situations. The Sadaoui Report describes such loss and damage at the Tweisha site by members of Libya's armed forces, particularly the 32<sup>nd</sup> Reinforced Brigade. The Sadaoui Report observes that the Brigade's troops occupied the site "to protect themselves from the bombardment of NATO. The offices, living containers, equipment and tools including the petrol tanks were used by the army, as well as the whole site and the equipment were treated like a military base and as own properties of the military armies."<sup>331</sup> In addition to the requisitions and takings of vehicles and equipment addressed *supra*, the Report refers to "[t]he fierce exploitation of the site including equipment, offices and camps by the military troop during the war period (about 5 months) which resulted in the damage of the equipment and site furniture." The Report cites "[d]amages of equipment caused by the fierce and unskilled exploitation of military troop; such damages were ascertained on the heavy equipment (bulldozers, trucks, forklifts ...) and light equipment and furniture like cars, spare parts, generators, tires, computers and air-conditioners ..."<sup>332</sup>
310. However, the same report also attributes other property losses to other actors. It attributes losses at the Ras Al Lafah quarry to a lack of security leading to "attacks of the armed robbers," not to actions by Respondent's armed forces.<sup>333</sup> As to the Tweisha yard, the Sadaoui Report observes that "[t]he absence of total security and the chaotic situation of the area which reined after the defeat of the military troop (Reinforced Brigade 32) and the arrival of the rebels groups led to the exposure of the site and its remaining equipment to waves of vandalism by armed people, who stole all valuable equipment, tools, materials ... etc."<sup>334</sup>

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<sup>331</sup> C-290, Sadaoui Report, p. 13.

<sup>332</sup> C-290, Sadaoui Report, pp. 14-15.

<sup>333</sup> C-290, Sadaoui Report, p. 25.

<sup>334</sup> C-290, Sadaoui Report, p. 14.

311. The Report also indicates that some of the damage inflicted on Al Hani's facilities occurred late in the hostilities, as the 32<sup>nd</sup> Reinforced Brigade abandoned the Tweisha site. It cites in this regard:

- Intentional deterioration of the site and its equipment by the military troop during their withdrawal; such deterioration had been noticed on:
- Living camps, canteens and offices (damaging roofs, doors, windows, sanitary tools and cold stores...)
- Tearing tires by using bayonets, and breaking doors and windows of trucks.<sup>335</sup>

312. Respondent contends that this last type of damage, and perhaps other types as well, were justified as measures taken for reasons of military necessity, in order to deny use of Al Hani's facilities to rebel forces:

It is clear that during 2011, it was militarily necessary for the Libyan army to destroy certain property to prevent it from falling into the hands of its opponents. By the summer of 2011 ... rebel forces had advanced on Tripoli through Tajura. In such circumstances, it was a military necessity for the Libyan army to destroy equipment that could fall into the hands of the rebels.<sup>336</sup>

313. Respondent advances no evidence in support of this claim of military necessity, instead maintaining that it is Claimant's burden under the Treaty to prove the negative, i.e., that Respondent's forces' actions damaging Al Hani's property were *not* compelled by military necessity. In Respondent's view, this is required by the ordinary meaning of the text of Article 5(2)(b) of the Treaty, which it understands to require Claimant to prove that

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<sup>335</sup> C-290, Sadaoui Report, p. 15.

<sup>336</sup> Resp. C-Mem. ¶627 (footnotes omitted).

destruction was not caused by “the necessity of the situation.”<sup>337</sup> Respondent cites in support of this interpretation of the treaty the award in *AAPL v. Sri Lanka*.<sup>338</sup>

314. Claimant responds that military necessity is an affirmative defense that must be proved by the party asserting it, which it maintains Respondent fails to do.<sup>339</sup>

**(2) The Tribunal’s Analysis**

315. In the circumstances of this case, the Tribunal need not decide whether Article 5(2)(b) of the Treaty has the burden-allocating role that Respondent assigns to it, requiring Claimant to show that damage to Al Hani’s premises was not due to military necessity. Claimant’s evidence sufficiently establishes that Libyan armed forces caused some damage to Al Hani’s property that was not the result of military necessity. Claimant alleges in this regard that the damage to its premises and other property at the hands of the departing 32<sup>nd</sup> Brigade was in the nature of unwarranted spoliation of civilian property – vandalism, - and refers in this regard to UN bodies’ finding of attacks against, and abuses of, civilians by Respondent’s armed forces.<sup>340</sup> As discussed below, photographic evidence in the Sadaoui Report submitted by Claimant lends support to Claimant’s contention in this regard. Respondent advances no evidence in rebuttal. Given Claimant’s allegations and the available evidence, the Tribunal believes it is not sufficient for Respondent to rest its defense to this claim on Claimant’s claimed burden of proof.
316. The evidence regarding the extent of the damage inflicted by 32<sup>nd</sup> Brigade troops as they occupied and then abandoned Al Hani’s facilities is limited. Neither Party is in a position to provide additional evidence concerning these events. Claimant was not present at the time. Military forces for which the Respondent is responsible under the BIT were present. However, as Respondent also points out, those forces were loyal to the previous regime and no longer exist.

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<sup>337</sup> Resp. Rej. ¶422.

<sup>338</sup> CL-21, *AAPL v. Sri Lanka*.

<sup>339</sup> Cl. Reply ¶525.

<sup>340</sup> Cl. Mem. ¶¶293, 313.

317. Given this situation, the Tribunal has weighed the evidence available, in particular the Sadaoui Report and its accompanying photographs. These include some photographs of intentional damage to vehicles that might have been intended to deny them to approaching rebels and thus might reflect military necessity.<sup>341</sup> Other photographs, however, show damage to Al Hani facilities more indicative of vandalism or destruction driven by spite or purely for the sake of destruction. Thus, a sequence of photographs of a living unit at Tweisha shows punched-out panels and screens, wrecked beds and tables, and personal belongings strewn on the floor of a living unit.<sup>342</sup> A similar sequence shows burned and vandalized workers' quarters at Tajura.<sup>343</sup> Graffiti on walls records the presence of 32<sup>nd</sup> Brigade troops. Other photographs provide evidence of extensive looting, but this could have happened either at the time the troops left or subsequently.<sup>344</sup>
318. Thus, some of these photographs indicate the possibility of damage inflicted to deny incoming rebels the use of vehicles. Others show damage to premises and property apparently inflicted for the purpose of inflicting damage and not to gain any military advantage. The extent or monetary value of damage for either reason is not clear from the photographs.
319. Respondent advances an alternative argument to the effect that if damage was inflicted by Libya's military forces, it resulted from unauthorized conduct by forces acting outside of their orders, for which it was not responsible.<sup>345</sup> This argument fails. *Inter alia*, Respondent, which contended that Al Hani's facilities were deliberately damaged to deny them to advancing rebels, offered no evidence for its alternative theory attributing damage to actions of rogue soldiers. As a matter of international law, the International Law Commission affirms that the responsibility of a State under Article 91 of Geneva Protocol I – that the State “shall be responsible for all acts by persons forming part of its armed

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<sup>341</sup> C-290, Sadaoui Report, pp. 21-22.

<sup>342</sup> C-290, Sadaoui Report, p. 16.

<sup>343</sup> C-290, Sadaoui Report, p. 31.

<sup>344</sup> C-290, Sadaoui Report, pp. 18-20.

<sup>345</sup> Resp. C-Mem. ¶601.

forces” “clearly covers acts committed contrary to orders or instructions.”<sup>346</sup> Moreover, the evidence shows that the 32<sup>nd</sup> Reinforced Brigade was an elite regular force that acted under the chain of command.<sup>347</sup>

### **(3) The Tribunal’s Decision**

320. As with Claimant’s other claims for loss of property during the Revolution, the evidence shows that there was some damage to Al Hani’s property and facilities for which there is a right to compensation under Article 5(2)(b) of the Treaty. The evidence also shows, however, that during this period, Al Hani’s property and facilities were also damaged or looted by others including rebels, NATO, looters, and Al Hani’s own employees. Respondent is not responsible under Article 5 of the Treaty for damage from these other causes.

321. The Tribunal is therefore again left to make its best assessment of how much damage is attributable to actions by Libya’s armed forces, in particular, soldiers of the 32<sup>nd</sup> Reinforced Brigade, in conditions not potentially implicating military necessity. In doing so, it is again guided by the principles applied in the previous claim for equipment lost/destroyed in 2011, recognizing that some compensation is due, but that the evidence does not allow of precise determination. Based on the Sadaoui Report, especially the detailed chronology of events from page 11 onwards, the Tribunal determines that approximately one-third of the damage is attributable to Libyan State forces for purposes of liability under Article 5(2)(b) with a reasonable degree of certainty. Consequently, the damages for which Libya is liable amount to €858,000, approximately one-third of the €2,573,186 claimed.

### **E. CLAIM 2. EQUIPMENT REMOVED FROM TWEISHA IN 2014**

322. Pursuant to Article 3(1) of the Treaty, Claimant seeks compensation for a large amount of Al Hani’s vehicles and heavy equipment removed from the Tweisha yard by unidentified persons at some time after October 2013 but before July 2014.

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<sup>346</sup> RL-16, ILC Articles, Art. 7, Commentary, Section (4).

<sup>347</sup> Cl. Reply ¶554.

323. A large amount of Al Hani's vehicles and other heavy equipment was assembled at Al Hani's Tweisha yard following the outbreak of the Revolution in 2011, and varying amounts of equipment were kept there subsequently.<sup>348</sup> Satellite photographs show numerous vehicles and other items of equipment in the yard as of October 2013, and that they were no longer there in July 2014.
324. Claimant places the value of the missing vehicles and equipment at €10,238,821. Respondent's expert finds the documented value to be about €561,000 less.<sup>349</sup> Thus, the core dispute between the Parties does not go to the value of the missing equipment. It instead concerns the circumstances of its removal, and whether Respondent bears responsibility under the Treaty.

**(1) Claimant's Position**

325. Claimant contends that removal of the vehicles and equipment, and Respondent's subsequent failure to investigate its loss and seek its return, was in breach of the Treaty, and in particular involved a failure to assure constant protection and security in breach of Article 3(1) of the Treaty. In Claimant's view, Article 3(1) imposes an obligation of due diligence to provide physical protection and security.<sup>350</sup> As to the content of this duty, Claimant refers to *AMT v. Zaire*, which found it to require a State to take "all measures necessary to ensure the full enjoyment of protection and security of [the] investment."<sup>351</sup> Claimant adds that the duty of due diligence includes the obligation to "take adequate steps to apprehend and punish a wrongdoer."<sup>352</sup> Claimant rejects Respondent's suggestion that a State's resources and ability to provide protection and security are relevant in assessing due diligence, contending that the view that the constant protection and security standard

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<sup>348</sup> Cl. Mem. ¶¶349 et seq.

<sup>349</sup> Cl. PHB ¶381.

<sup>350</sup> Cl. Mem. ¶¶318-319.

<sup>351</sup> Cl. Mem. ¶319, quoting CL-20, *American Manufacturing & Trading, Inc. v Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997 ("*AMT v. Zaire*"), ¶6.05.

<sup>352</sup> Cl. Mem. ¶323.

can be affected by a State's resources "has little relevance in this case, and in any event does not represent the state of International law on this issue."<sup>353</sup>

326. Claimant indicates that it learned of the disappearance of the vehicles and equipment from review of commercial satellite images taken well after its departure from Libya;<sup>354</sup> Claimant asserts no independent knowledge of what happened to the vehicles and equipment. However, it advances two lines of argument to establish Respondent's liability under the Treaty. First, Claimant refers to a letter sent by Strabag in December 2014 to Libya's Minister of Foreign Affairs and International Cooperation, with copies to the Prime Minister and the Ministers of Foreign Affairs, of Economy and Industry, and of Finance and Planning, seeking assistance regarding the missing equipment. The letters to these officials were addressed to them at a hotel in Tobruk, presumably reflecting the unsettled conditions in Libya at that time. (Copies were also sent to the Prime Minister's Office and to Ministry buildings in Tripoli.) The copy from Claimant's files in the record indicates that various methods of delivery were to be utilized. There is no evidence confirming that the letters were received, but Respondent does not deny that they were.
327. Citing the Treaty's constant protection and security obligation under Article 3(1) of the Treaty, Strabag's December 2014 letter requested

that you confirm whether any Government officials or persons otherwise acting on behalf of the Libyan State were responsible for the removal of our property. In any event, we request the competent Libyan authorities to take steps as a matter of urgency and arrange for the return of our machinery and equipment to our main yard at Tripoli – Gasr Bengashir – Tweisha.<sup>355</sup>

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<sup>353</sup> Cl. Reply ¶585.

<sup>354</sup> Cl. PHB ¶15.

<sup>355</sup> C-370, Letter from Strabag SE to H.E. Mohammed al-Dairi, Minister of Foreign Affairs and International Cooperation dated 22 December 2014.

328. There was no reply, and there is no indication that Respondent's officials took any action in response to the letter. Claimant contends that these circumstances establish Respondent's liability for a failure to provide constant protection and security as required by the Treaty.
329. In its Post-Hearing Brief, Claimant develops an additional argument. At the close of the Hearing, the Tribunal asked the Parties to provide any additional information available regarding the missing Tweisha vehicles and equipment. Neither Party provided anything further. However, pointing to Mr. Turki's testimony at the Hearing that Al Hani's materiel had been removed to LIDCO's yard (examined *infra*), and to Mr. Al-Naas's testimony that "LIDCO is part of the Libyan Government," Claimant argues that the Tribunal should draw adverse inferences in light of Respondent's failure to provide anything on the fate of the vehicles and equipment.<sup>356</sup>

## **(2) Respondent's Position**

330. Respondent's Counter-Memorial agrees that the obligation to provide full protection and security imposes a duty of due diligence but maintains that this duty does not entail strict liability. For Respondent, "[t]he essential question is whether the State exercised due diligence to the extent 'reasonable under the circumstances'."<sup>357</sup> In this regard, Respondent contends that "international law affords a State a particularly wide measure of deference" in assessing whether the State has shown due diligence.<sup>358</sup> Moreover, in Respondent's view, application of the Treaty standard "must take into account a State's resources and ability under the circumstances of [a] war."<sup>359</sup>

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<sup>356</sup> Cl. PHB ¶¶15-16.

<sup>357</sup> Resp. C-Mem. ¶630.

<sup>358</sup> Resp. C-Mem. ¶631.

<sup>359</sup> Resp. C-Mem. ¶634.



331. Respondent also contends that “[b]reaches of this standard are not easily proven,”<sup>360</sup> pointing to perceived shortcomings in the logic or evidence of Claimant’s claim. Thus, in a footnote, Respondent’s Counter-Memorial contends that the fate of the equipment was an internal Al Hani matter for Strabag to sort out with its joint venture partner:

Claimant claims that satellite photography show that its equipment was removed from the Tweisha worksite in July 2014 ... However, Mr. Turki testifies that he was told by an Al-Hani representative that Al-Hani itself had in fact moved its equipment from the Tweisha yard ... The Joint Venture Agreement between LIDCO and Strabag provides that LIDCO is responsible for sourcing equipment and for “sourc[ing], nominat[ing], and secur[ing]” locations for Al-Hani ... The decisions of the Al-Hani joint venture partners regarding management of their property is an internal matter for Al-Hani.<sup>361</sup>

332. In her opening argument at the Hearing, Respondent’s Counsel elaborated on this argument. She noted that Mr. Azouz the individual identified in a witness’s statement (discussed *infra*) as having removed the property was Al Hani’s Deputy General Manager, and a member of its Board of Directors, signed many letters for Al Hani,<sup>362</sup> and indeed was the victim of an earlier kidnapping cited by Claimant.<sup>363</sup> As Deputy General Manager, Mr. Azouz presumptively had authority to take possession of the equipment.
333. Counsel also suggested at the Hearing that the equipment might have been sold to satisfy Al Hani’s obligations, particularly to Gumhouria Bank.<sup>364</sup> She speculated that, as the bank had a security interest in Al Hani’s moveable property, the equipment could legitimately have been sold to satisfy the bank’s claims.<sup>365</sup> However, Counsel’s argument was framed as a hypothetical, describing what might have happened. While she cited documents indicating that the bank had a security interest in Al Hani’s moveable equipment, no

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<sup>360</sup> Resp. C-Mem. ¶631.

<sup>361</sup> Resp. C-Mem. fn 584.

<sup>362</sup> Mr. Penkhues also identifies Mr. Azouz as one of two persons to whom requests to procure plant, machinery and equipment were sent for approval. 1<sup>st</sup> Penkhues WS ¶6.

<sup>363</sup> TR 1:294-296 (Ms Harwood). Mr. Azouz was kidnapped by disgruntled workers from the Tweisha yard in May 2013. 1<sup>st</sup> Napowanez WS ¶57.

<sup>364</sup> TR 1:209-210, TR 1:259-261 (Ms. Harwood).

<sup>365</sup> TR 1:292-294 (Ms. Harwood).

evidence was offered to support the hypothesis that the bank seized and liquidated the equipment.

334. As to Claimant's letter requesting Respondent to investigate the disappearance of the equipment, Respondent contends that at the time the equipment disappeared from the yard, Libyan authorities were not in control of the affected area and could not investigate or recover the lost property. Respondent maintains in this regard that "[t]he circumstances in Libya following the 2011 Revolution made it impossible for the Libyan authorities to recover the property in question or identify the individuals allegedly responsible."<sup>366</sup> More specifically, Respondent cites a conflict among multiple factions that broke out in 2014:

In such a situation it is impossible for the Libyan authorities to guarantee full protection and security. The internationally recognized government has not been in continuous direct control of much of the territory where the property in question was located, such as the areas of Tweisha and Tajura.<sup>367</sup>

### **(3) The Tribunal's Analysis and Decision**

335. The Parties agree that Article 3(1) of the Treaty does not impose strict liability and that the applicable legal standard is instead one of due diligence.<sup>368</sup> They do not agree on the implications of this standard here. However the standard is defined, Claimant has the evidentiary burden of showing Respondent's failure to exercise due diligence in the circumstances. The Tribunal therefore turns to the relevant evidence.
336. The evidence shows that Mr. Napowanez, Mr. Penkhues,<sup>369</sup> Mr. Akasha<sup>370</sup> and other Al Hani personnel sought to collect as much of Al Hani's property as possible at Tweisha yard after the Revolution began in early 2011.<sup>371</sup> The amount of property in the yard rose and

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<sup>366</sup> Resp. C-Mem. ¶643 et seq.

<sup>367</sup> Resp. C-Mem. ¶646.

<sup>368</sup> Cl. Reply ¶578.

<sup>369</sup> 1<sup>st</sup> Penkhues WS ¶14.

<sup>370</sup> Akasha WS ¶4.

<sup>371</sup> 1<sup>st</sup> Napowanez WS ¶26.

fell over the following months. However, the date stamped satellite images clearly show the presence of numerous heavy vehicles and other equipment in the yard in the months leading up to and including October 2013.<sup>372</sup> The equipment was no longer there in an image dated 25 July 2014.<sup>373</sup>

337. There is very little evidence in the record regarding the circumstances of the removal of Al Hani's property from the yard and its subsequent fate. Two bits of testimony suggest that it may have been removed by LIDCO, Strabag's joint venture partner, a wholly owned subsidiary of the "Libyan Social Development Fund."<sup>374</sup>

338. Respondent's witness Mr. Turki states in his First Witness Statement that "[s]ometime in 2015 I was told by a representative of Al-Hani that Al-Hani had moved some of its equipment from the Tweisha camp in 2014, but I have no actual knowledge of when or how equipment was removed from the Tweisha camp."<sup>375</sup>

339. Mr. Turki was cross-examined regarding this paragraph in his witness statement:

Q. And then you go on to state that you had been told by a representative of Al Hani that Al Hani moved some of its equipment from Tweisha in 2014. Is that your understanding?

A. Yes.

Q. And is it correct that this equipment was moved to LIDCO's facilities?

A. This is what happened, yes.<sup>376</sup>

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<sup>372</sup> C-369 (multiple images).

<sup>373</sup> C-369. The October 2013 and earlier images show numerous heavy trucks, busses, and other heavy equipment in the work area.

<sup>374</sup> Cl. Mem. fn 45; *see* C-21.

<sup>375</sup> 1<sup>st</sup> Turki WS ¶32. Respondent mischaracterizes this statement at Resp. C-Mem. ¶306, dropping the "some" and characterizing Mr. Turki as saying that Al Hani had removed all of the equipment.

<sup>376</sup> TR 7:1677:6-13 (Mr. Turki).

340. Mr. Akasha, a former Al Hani employee who did not appear at the Hearing, stated in his Witness Statement:

Two days after Mr. Napowanez left Libya,<sup>377</sup> Mr. Azouz, Mr. Ali Salabi, together with three armed men from a private militia came to the Tweisha site. I was at the Tweisha yard when they came. They said they had instructions to take everything from the yard and move it to LIDCO's compound. I tried to stop them, but was beaten up by the militiamen and was told not to return to the Tweisha site again. I reported this incident to the police, but no investigation was carried out and no one was charged. I have not returned to the Tweisha site since that time, although I heard that LIDCO has taken all of Al Hani's equipment and has sold much of it to third parties.<sup>378</sup>

341. The Tribunal cannot give great weight to the evidence of either of these witnesses. Mr. Turki candidly states that he "ha[d] no actual knowledge of when or how equipment was removed from the Tweisha camp." Mr. Akasha did not attend the Hearing and was not cross-examined. Further, he acknowledges in his written statement that his reference to LIDCO taking Al-Hani's equipment and selling it is based on hearsay and not personal knowledge.
342. Thus, the witness evidence concerning the circumstances of loss consists of two small and uncertain comments from witnesses with no personal knowledge who suggest that Strabag's joint venture partner LIDCO may have had something to do with it. There is no other evidence regarding the circumstances of the equipment's disappearance. There is no evidence that Claimant made any inquiries aside from its December 2014 letter, or that it sought to contact its erstwhile joint venture partner.

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<sup>377</sup> Mr. Napowanez states that he left "in early 2014." 1<sup>st</sup> Napowanez WS ¶62.

<sup>378</sup> Akasha WS ¶20.

343. Thus, the core of the Claimant's claim boils down to an argument that when high Government officials were asked about the disappearing equipment some months later, at a time when they were displaced from the capital to Benghazi, there was no response at the time or subsequently. The Tribunal should therefore infer that Respondent failed to act in response to the disappearance, showing a failure to provide constant protection and security in breach of Article 3(1) the Treaty.

344. The inference Claimant asks the Tribunal to draw must be assessed in light of the situation in Libya. As Respondent contends, and as the Tribunal earlier observed, the security situation in and around Tripoli in and after the summer of 2014 was unsettled and dangerous. As the UN Secretary-General observed in his 5 September 2014 Report to the UN Security Council:

The reporting period witnessed the most serious outbreak of armed conflict, in Tripoli, Benghazi and elsewhere in the country, since 2011. The use of heavy weaponry in densely populated areas by all sides, in particular in the capital, resulted in an unprecedented movement of population as civilians tried to escape the fighting. An estimated 100,000 people were displaced in Tripoli, with an additional 20,000 in the east. At least 100,000 are known to have crossed the borders into neighbouring countries. The conflict also caused the vast majority of the international community present in Libya, including the United Nations, to withdraw from Libya.<sup>379</sup>

345. The Tribunal finds that Claimant's evidence is not sufficient to establish a failure of due diligence by Respondent. The bits of witness testimony described above both pointing in the direction of Al Hani's joint venture partner as the relevant actor are of little assistance. And in light of the prevailing conditions of violence and disruption in Libya in 2014 and subsequently, the suggested inference is too uncertain to sustain claim for €10 million. The Tribunal finds that Claimant has not proved that Respondent failed to meet its obligations under Article 3(1) of the Treaty with respect to the unexplained disappearance of Al Hani's property or otherwise acted contrary to its obligations under the Treaty. Claimant's claim for €10,238,821 for equipment missing from Tweisha yard in 2014 is dismissed.

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<sup>379</sup> RL-102, UN Secretary-General Report on UN Support Mission in Libya, UN Doc S/2014/653, 5 September 2014 ¶12.

**F. CLAIM 3. AMOUNTS OWED TO AL HANI UNDER PAYMENT CERTIFICATES**

346. Pursuant to Article 8(1) of the Treaty, Claimant seeks substantial amounts for payment certificates that were submitted under the Benghazi, Misurata, TIAR, TIAR-NE, and Tajura Contracts, but were not paid. Claimant’s quantification experts from FTI place the total value of these at €36,615,174.<sup>380</sup> Respondent’s quantification expert from Blackrock assesses the unpaid payment certificates on a figures-as-figures basis to be €33,618,213.<sup>381</sup> The difference between the experts – slightly less than €3 million primarily involving differences regarding the road contracts<sup>382</sup> – is hardly inconsequential, and is examined *infra*. Nevertheless, the Parties’ quantification experts agree to a substantial degree regarding the amounts of unpaid certificates, differing as to about 8.2% of the claimed total.

**(1) Issues under the Road Contracts**

347. Respondent’s principal witness on the payment certificates for the road contracts, Mr. Al Kelani, acknowledges that substantial amounts were not paid on approved payment certificates for these contracts. Mr. Al Kelani joined the TPB in June 2011,<sup>383</sup> and so had no personal knowledge of earlier events. At the Hearing, he introduced a number of changes to his witness statements,<sup>384</sup> and on cross-examination he did not in some cases provide responsive or consistent answers.<sup>385</sup> Claimant’s Post-Hearing Brief cites this to

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<sup>380</sup> This amount claimed was refined slightly over the course of the proceedings. The €36.6M figure reflects the final claim as presented by FTI at the hearing. CH-3, FTI Quantum Hearing Presentation, p. 8.

<sup>381</sup> RH-15, Respondent’s Expert’s Presentation on Quantum (“Blackrock Quantum Hearing Presentation”), p. 4. In his presentation to the Tribunal, Mr. Osbaldeston said that he had given his assessments “on a figures-as-figures basis ... I’ve simply given you a figure that I believe is correct insofar as you determine any liabilities due.” TR 10:2246:1-4 (Mr. Osbaldeston).

<sup>382</sup> TR 9:1971:22 – 1972:4 (Mr. Berkowitz).

<sup>383</sup> 1<sup>st</sup> Al Kelani WS ¶10.

<sup>384</sup> TR 6:1387:20 et seq. (Mr. Al Kelani).

<sup>385</sup> *See, e.g.*, TR 6:1395:10 – 1397:6, and TR 6:1401:2 – 1402:19 (witness insists he prepared his statement and annexes without support, but an annex states it was prepared by a Mr. Soula.) Subsequent questions in the examination are similar: the witness maintains that he prepared his statement and annexes, which is inconsistent with documents in the record.

argue that Mr. Al Kelani did not prepare his witness statement himself, that he had no first-hand knowledge, and that his testimony should be given no weight.<sup>386</sup>

348. It does appear that significant parts of Mr. Al Kelani's witness statement and its supporting documentation were prepared by, or with substantial assistance from, others. His testimony denying that he received significant assistance from others in preparing his witness statement was unconvincing.<sup>387</sup> However, his statements provide an overview of the road contract payment certificate claims, and the Tribunal has referred to his evidence in framing its consideration of these claims.

349. Mr. Al-Kelani acknowledges that substantial sums were due with respect to unpaid payment certificates for the Benghazi, Misurata, TIAR-NE and TIAR Contracts. His appraisals of amounts due differ from the Parties' quantification experts' analyses, and the Tribunal has primarily referred to the Parties' experts' assessments in analyzing this claim. Nevertheless, the Tribunal views Mr. Al Kelani's First Witness Statement as a useful "reality check," confirming that many payment certificates were indeed not paid.

350. Thus, in Mr. Al Kelani's calculation, for *inter alia*:

- *The Benghazi Contract*. Claimant sought approximately LYD3.67 million and €2.58 million for unpaid certificates. Of these, Mr. Al Kelani acknowledged that approximately LYD2.85 million and €1.74 million are owed to Al Hani.<sup>388</sup>
- *The Misurata Contract*. Claimant sought about LYD2.59 million and €2.58 million for unpaid certificates. Mr. Al Kelani accepts that of this, Al Hani is owed LYD2.41 million and €1.38 million.<sup>389</sup>

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<sup>386</sup> Cl. PHB ¶¶31-34.

<sup>387</sup> Compare TR 6:1399:18 with TR 6:1402:15 (Mr. Adel Mukhtar Soula both "a supervisor" and "an assistant" who photocopied documents for Mr. Al Kelani.).

<sup>388</sup> 1<sup>st</sup> Al Kelani WS ¶28; ¶¶30-35 of Mr. Al Kelani's First WS describe how he arrived at these figures.

<sup>389</sup> 1<sup>st</sup> Al Kelani WS ¶36.

- *The TIAR Contract.* Claimant sought approximately LYD3.37 million and €1.90 million for unpaid payment certificates, of which Mr. Al Kelani assesses that roughly LYD3.17 million and €1.81 million is due to Al Hani. However, he also maintains that the amount due should be reduced by the amount of the unrecovered advance payment (LYD767,000 and €439,000), leaving a balance in Al Hani's favor of LYD2.41 million and €1.38 million.<sup>390</sup>

351. At the Hearing, both Parties' experts attributed the roughly €3 million difference between their valuations of unpaid certificates under all of the contracts to essentially the same causes. In FTI's calculation, almost half of the difference reflects disagreement as to the applicable exchange rate under the road contracts, a matter that FTI viewed as "contractual or legal in nature." An amount of about €584,000 is attributed to deductions to Al Hani's claims for additional costs of bitumen under the Benghazi, Misurata and TIAR Contracts.<sup>391</sup> FTI attributes a further amount of about €935,000 to Respondent's contention that Al Hani was not entitled to certain payments under the TIAR-NE Contract, principally for Payment Certificate No. 3.

352. Respondent's expert Mr. Osbaldeston of Blackrock had a similar analysis:

[T]he issues really boil down to about two or three issues. For the Benghazi and the Misurata Contracts, I understand the differences primarily relate to an Exchange Rate issue and/or deductions that were made on certain Certificates in respect to document bitumen. The largest difference which I think now has been addressed by FTI in its presentation of yesterday relates to the TIAR-NE Contract and the valuation of the Works, the gross value of the Works against the various milestone payments.<sup>392</sup>

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<sup>390</sup> 1<sup>st</sup> Al Kelani WS ¶48. Respondent's claim of set-off for unrecovered advance payments is addressed *infra*.

<sup>391</sup> CH-3, FTI Quantum Hearing Presentation, p. 20.

<sup>392</sup> TR 10:2247:5-15 (Mr. Osbaldeston).



353. The Tribunal observes that both Parties' quantification experts presented extremely detailed and extensive reports, addressing numerous valuation and accounting issues involving amounts great and small. The Tribunal does not see its task to be to address every issue raised in several hundred pages of reports by the two sets of experts. It will instead focus on a small group of issues that may bear significantly on any amounts due under the contracts.

**(2) The Quantification Experts' Principal Disagreements**

354. The Parties' experts identify three areas as primarily responsible for their different assessments of the amount due for unpaid payment certificates: the exchange rates for the Misurata Contract; Respondent's deductions from Al Hani's bitumen certificates; and the alleged payment shortfalls under the TIAR-NE Contract.

***A. The Misurata Exchange Rate***

355. The largest single difference, which FTI assesses to be over €1 million, involves the exchange rate used for payments under the Misurata Contract.

356. Mr. Al Kelani contends in his First Witness Statement that:

Because the Benghazi, Misrata and Garaboulli contracts did not mention the exchange rate to be used, the exchange rate applied was the exchange rate in effect on the day TPB's payment letter of credit (the "Payment Letter of Credit") was opened (or the exchange rate in effect when the Payment Letter of Credit was increased to fund the Variation Order amount, or refunded to fund work already under the scope of the contract, in the event the Payment Letter of Credit was not fully funded at the outset of the project).<sup>393</sup>

357. Claimant disagrees:

In respect of the Misurata and Garaboulli Contracts, Mr. Al Kelani and the Respondent wrongly assert that the contracts are silent as to the applicable exchange rate. As Mr. Knaack explained in his letter to the TPB on 10 October 2010, Article 3 of Annex 2 to the Misurata Contract stipulated that the exchange rate applicable in the contract was the "selling rate of exchange of the Central Bank of Libya 28

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<sup>393</sup> 1<sup>st</sup> Al Kelani WS ¶26.

days prior to signing the Contract.” Mr. Knaack sent a further letter to the TPB on this issue on 7 December 2010. The TPB responded to neither letter.<sup>394</sup>

358. Annex 2 is contained in a 21 March 2007 Addendum to the Misurata Contract submitted by Al Hani in English that, *inter alia*, states Al Hani’s price in response to RBA’s tender offer. Each page of this Addendum and its Annexes was signed by RBA and bears its seal, evidencing RBA’s agreement to Al Hani’s response to its offer. Article 3 of Annex 2 states: “The rates and prices are based on the selling rate of exchange of the Central Bank of Libya 28 days prior to signing of the contract.”<sup>395</sup>

359. Mr. Al Kelani’s response in his Second Witness Statement is essentially that the Addendum was contractually irrelevant and created no obligation for TPB because it was in English:

TPB is required by law to apply the terms in the Arabic versions of the Contracts and, as I noted in my First Statement, the Arabic versions of these two Contracts are silent as to the exchange rate. The applicable exchange rate for payments under the Benghazi and Misrata Contracts is, therefore, the one on the date of opening of the relevant letter of credit, which is consistent with the practice of TPB.<sup>396</sup>

360. When he was shown the Addendum in cross-examination at the Hearing, Mr. Al Kelani testified that he did not know of its existence:

Q. But you see that in English there is a signed agreement which does mention an exchange rate.

A. I don’t know. I don’t know this document. As a person working on the financial side, I was not aware of this document.

Q. You have not seen this document before today; is that what you are saying?

A. No, I have never seen it before.<sup>397</sup>

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<sup>394</sup> Cl. Reply ¶¶633 (footnotes omitted).

<sup>395</sup> C-869, Misurata Contract, Arabic version Annex 2, ¶3.

<sup>396</sup> 2<sup>nd</sup> Al Kelani WS ¶24.

<sup>397</sup> TR 6:1420:19-22, TR 6:1421:1-5 (Mr. Al Kelani).

361. The import of the argument in Mr. Al Kelani's Second Witness Statement is that the Addendum (which he had never seen) was contractually irrelevant. However, the Addendum includes numerous elements that are central elements of the Misurata Contract. These include Al Hani's specification of the projected contract priced, the term of execution, the amount of the advance payment, minimum liability insurance requirements, unit prices for materials, Al Hani's obligations to accommodate TPB on-site engineer, as well as lesser commitments such as Al Hani's obligation to provide TPB with 4 Volkswagen Passats and a four-wheel drive Toyota Landcruiser. The document was signed and sealed by TPB, indicating agreement with the contents.
362. The Parties implemented the Contract in accordance with the terms of the Addendum, and there is no evidence that TPB regarded other provisions of the Addendum, which it signed and sealed, as evidence of agreement as contractually irrelevant. As a matter of good faith in the performance of its contractual obligations, TPB cannot pick and choose which provisions in the Addendum are to be observed and which can be ignored.
363. The Tribunal decides that the applicable exchange rate for determining payments in Euros under the Misurata Contract is "the selling rate of exchange of the Central Bank of Libya 28 days prior to signing of the contract." On this basis, FTI assesses and the Tribunal accepts that Al Hani is entitled to receive an additional €1,092,078 on its payment certificates claim pursuant to Article 8(1) of the Treaty.

***B. Deductions for Bitumen Payment Certificates***

364. Mr. Al Kelani explains in his First Witness Statement that there was a shortage of bitumen in 2009, resulting in market prices for bitumen above the contractually authorized prices. Accordingly, a special process was created for contractors to recover the increased cost:

[T]he General People's Committee issued instructions to pay the difference between the market price and the contractually agreed price of bitumen. Based on those instructions, contractors in projects that TPB was supervising would submit payment certificates with a separate, specific accounting for the price of bitumen. These certificates (the "Bitumen Certificates") would go through the same review process as the normal Payment Certificates for works performed under the Road Contracts.<sup>398</sup>

365. According to Mr. Al Kelani's First Witness Statement, Claimant sought LYD7.488 million for bitumen certificates, of which he calculated only LYD5.333 million was due, a difference on the order of LYD2.155 million.<sup>399</sup> FTI contends that the figures Mr. Al Kelani gives in this paragraph cannot be reconciled with figures elsewhere in his witness statement, and that "[t]he amount excluded by Blackrock/Al Kelani for increased bitumen costs in excess of the BOQ is not entirely clear from the Al Kelani witness statement, but it appears that this amount is approximately EUR 1.0M."<sup>400</sup>
366. Mr. Al Kelani contends in his First Witness Statement that Al Hani claimed for amounts of bitumen in excess of the agreed Bills of Quantities under the contracts.<sup>401</sup> He therefore reduced the claim for the Benghazi Contract because of "the excess amount of bitumen Al-Hani claimed in these certificates, which were [sic] in excess of the amounts set forth in the agreed Bill of Quantities for the Benghazi Contract."<sup>402</sup> He made a corresponding reduction to the bitumen claim for Misurata for the same reason: "[t]his difference is attributable to the excess amounts of bitumen that Al-Hani claimed to use which were in excess of the amounts set forth in the approved Bill of Quantities."<sup>403</sup>

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<sup>398</sup> 1<sup>st</sup> Al Kelani WS ¶66.

<sup>399</sup> 1<sup>st</sup> Al Kelani WS ¶¶67-68.

<sup>400</sup> 2<sup>nd</sup> FTI Quantum Report ¶22 C.

<sup>401</sup> 1<sup>st</sup> Al Kelani WS ¶¶70-86.

<sup>402</sup> 1<sup>st</sup> Al Kelani WS ¶72.

<sup>403</sup> 1<sup>st</sup> Al Kelani WS ¶77.

367. At the Hearing, Mr. Al Kelani confirmed that bitumen certificates had to be reviewed and approved by the employer's representative (the supervising engineer at the site) prior to submission.<sup>404</sup> Prior to approving the certificate, the supervising engineer therefore was obliged to confirm that the certificates correctly indicated the quantity of bitumen used.

368. Claimant's experts from FTI disagree with Mr. Al Kelani's analysis:

30) ... Mr. Al Kelani suggests that the Bills of Quantities for the increased cost of Bitumen were "agreed", inferring that they represented fixed price adjustments up to the limit of those quantities.

31) In the first instance, we have seen no evidence to confirm Mr. Al Kelani's assertion. Secondly, the amounts being claimed for the increased cost of Bitumen are all based on payment certificates that were approved under the terms of the contract and the quantities of asphalt work included in approved contract work certificates. The values of the contracts were estimated, to be finally decided by multiplication of the contract rates by the actual executed quantities of work. The same principle applied to the evaluation of the increased cost of Bitumen, in that the Bills of Quantities for the evaluation were necessarily provisional, subject to final quantities of asphalt work, which serve as the basis for the evaluation of the increased cost of bitumen. ...

32) ... Neither Blackrock nor Mr. Al Kelani have explained or provided any evidence to support the statement that the amounts that were certified in the Bitumen Payment Certificates "were in excess of the amounts set forth in the agreed Bill of Quantities". In this respect, as the contracts always provided for the value of the contract work and the increased cost of bitumen to vary by re-measurement of the asphalt work, any cap on the quantities of bitumen work applied by RBA, for internal budgeting purposes, would always be subject to change according to the quantities of work actually performed.<sup>405</sup>

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<sup>404</sup> TR 6:1414:21-22; TR 6:1415:1-4 (Mr. Al Kelani).

<sup>405</sup> 2<sup>nd</sup> FTI Quantum Report ¶¶30-32.

369. Mr. Osbaldeston's Second Quantum Report notes Mr. Al Kelani's argument in this regard, but does not comment on it.<sup>406</sup>
370. The Tribunal agrees with FTI's characterization of the situation with respect to bitumen under the contracts. The Bills of Quantities under the contracts were indicative and provisional. They were not contractual limits on the amounts of materials to be used, as demonstrated by the provisions of the contracts and of Libya's Contracts Regulations discussed elsewhere in this Award that authorized the employer to vary quantities within a 15% range without any change in unit costs.
371. In his Second Witness Statement and in cross-examination, Mr. Al Kelani advances a further contention. He maintains that bitumen certificates previously certified by TPB's supervising engineer and approved by others in TPB and REKABA, including TPB's Technical Department,<sup>407</sup> were reduced because the Technical Department later changed its position and decided that Al Hani charged for more material than was required.<sup>408</sup> These changes were made by a person currently in TPB's Technical Department who did not provide a Witness Statement or appear as a witness to explain them.<sup>409</sup>
372. The Tribunal finds that Respondent's cited bases for the reductions in Al Hani's bitumen certificates lack sufficient legal or factual basis. The Tribunal does not accept that the contract's estimated Bills of Quantities set a limit on the amounts of bitumen that could be used and for which Al Hani could be paid, or the additional or alternative contention that TPB's Technical Department long after the fact reversed its earlier approval and reduced the compensable amount previously approved for payment.
373. The Tribunal finds, under Article 8(1) of the Treaty, that Al Hani was entitled to recover the full claimed amount of its unpaid payment certificates for bitumen pursuant to its contractual rights to be paid.

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<sup>406</sup> 2<sup>nd</sup> Blackrock Quantum Report ¶62.2.

<sup>407</sup> TR 6:1408:17-20 (Mr. Al Kelani).

<sup>408</sup> TR 10:2297-2299 (Mr. Osbaldeston).

<sup>409</sup> CI. PHB ¶33.

*C. The TIAR-NE Contract*

374. The TIAR-NE Contract involved a comparatively small (LYD4,950,000) project to design a three-kilometer extension of the Tripoli International Airport Road. The Contract provided for the work to be performed in three phases.<sup>410</sup> Claimant's witness Mr. McDevitt summarized Claimant's understanding of the three phases as follows:

[T]he first phase corresponded to the preparation and provision to the employer of the preliminary studies and design for the road extension; the second phase corresponded to the preparation and submission of the primary design; and the third phase corresponded to the preparation and submission of the final design and the tender documents for the construction work.<sup>411</sup>

375. As summarized by Claimant, this claim involves its contention that "whereas TIAR-NE Payment Certificate No. 1 was paid in full, Payment Certificate No. 2 which was also certified, was only 80% paid, and the TPB paid none of Payment Certificate No. 3 or for the additional work going beyond the original contract scope."<sup>412</sup>

376. As presented at the Hearing, FTI assesses the difference between the Parties' experts regarding the amount for unpaid invoices under the TIAR-NE Contract to be €935,680.<sup>413</sup> Mr. Osbaldeston of Blackrock assesses a substantially larger difference, of €2,033,659.<sup>414</sup> While not clear to the Tribunal, the difference apparently reflects Mr. Osbaldeston's belief that significantly lower amounts are due to Al Hani, either reflecting the unrecovered balance of the advance payment or Respondent's contention that Al Hani was paid for work that was not performed.

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<sup>410</sup> 1<sup>st</sup> Bisher WS ¶¶13-15.

<sup>411</sup> McDevitt WS ¶8.

<sup>412</sup> Cl. PHB ¶137.

<sup>413</sup> CH-3, FTI Quantum Hearing Presentation, p. 20.

<sup>414</sup> RH-15, Blackrock Quantum Hearing Presentation, p. 5.

***(i) The 20% Reduction of Payment Certificate No. 2***

377. Respondent's defenses to the claims regarding the TIAR-NE Contract relied heavily upon the evidence of Eng. Mohammed Bisher, the head of TPB's Studies and Planning Department. For procedural reasons, Mr. Bisher was unable to obtain a visa to attend the Hearing, and therefore had to be cross-examined remotely from Tunis. Whether due to technological difficulties or his lack of familiarity with the process, his answers were sometimes not responsive or in harmony with his written testimony.
378. As to the 20% payment reduction for the Payment Certificate No. 2, Mr. Bisher's First Witness Statement alleges a variety of shortcomings and unwarranted delays by Al Hani. He thus states that Al Hani's work on the second phase failed to produce required elements, including soil surveys, a geotechnical study, a plan to protect existing utilities and "a complete set of preliminary design drawings and specifications."<sup>415</sup> In his Second Witness Statement, he alleges that TPB nevertheless paid for allegedly incomplete work "in order to ensure the continuity of work on the project."<sup>416</sup> Mr. Al Kelani's Second Witness Statement advances a similar argument of deficient performance as a "correction" to his First Witness statement. He urges that Al Hani was not entitled to recover the 20% balance on Payment Certificate No 2 "[i]n light of Al-Hani's failure to complete Phase Two."<sup>417</sup>
379. For Claimant, Mr. McDevitt describes the design work performed under the contract, which involved a substantial process of coordination with stakeholders in the project, as well as changes resulting from that process.<sup>418</sup> He stated that he did "not understand why the TPB did not pay the full amount since the design work was properly executed,"<sup>419</sup> and disputes Respondent's allegations of delays and poor performance:

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<sup>415</sup> 1<sup>st</sup> Bisher WS ¶26.

<sup>416</sup> 2<sup>nd</sup> Bisher WS ¶13.

<sup>417</sup> 2<sup>nd</sup> Al Kelani WS ¶22.

<sup>418</sup> McDevitt WS ¶¶18-27.

<sup>419</sup> McDevitt WS ¶23.



I also object to Mr. Bisher's criticisms of our performance and his allegations that we were severely delayed. It is true that we requested extensions of time, first in our letter dated 22 June 2010 and then in our letter dated 12 December 2010. However, these were caused by delays caused by the different government authorities who had a stake in the project and the time it took us to redesign and incorporate the changes required by the Committee and the other government authorities, many of whom we could only communicate with through the TPB, and were agreed to by the TPB.<sup>420</sup>

380. The Tribunal finds that the evidence does not support Respondent's contention of inadequate performance of Phase 2 of the TIAR-NE Contract. In this regard, in Mr. Bisher's testimony on cross-examination, he acknowledged that he had signed Payment Certificate No. 2, and that in doing so he affirmed that the work required under the second phase of the contract had been properly carried out:

Q. When you signed Payment Certificate Number 2, that was to confirm that the Payment Certificate was correct; is that right?

A. I did not sign the Payment Certificates for the money side. I look at the technical parts. I'm not a specialist in financial questions.

Q. So, your signature on the Payment Statement was confirmation that the technical work had been completed in full; is that correct?

[technical interruption]

A. The answer is yes.<sup>421</sup>

381. Other statements by Mr. Bisher on cross-examination lead the Tribunal to doubt that the Phase 2 payment was reduced for reasons somehow reflecting the quality of Al Hani's performance. Mr. Bisher first stated on cross-examination that he did not recall why only

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<sup>420</sup> McDevitt WS ¶27.

<sup>421</sup> TR 5:1216:11-22 (Mr. Bisher).

80% of Payment Certificate No. 2 was paid,<sup>422</sup> but he was then shown a TPB letter referring to a General People's Committee resolution "which indicates to payment [sic] of (80%) for approved interim invoices, pending the completion of the administrative procedures related to the payment and reimbursement." This document referred to Payment Certificate No. 2 as "approved by the supervision and technical management department."<sup>423</sup> Mr. Bisher did not dispute this letter, and indeed later referred to it in responding to questions from the Tribunal.<sup>424</sup>

382. The Tribunal finds that the evidence on record does not establish that there was any deficiency in Al Hani's performance in the second phase of the contract. In signing the Payment Certificate, Mr. Bisher affirmed that the work was properly done and Al Hani was entitled to payment. TPB's letter directing 80% payment likewise affirmed that payment was approved. That letter shows that the 80% partial payment was made to carry out a broader Government policy, not because of any supposed deficiency in Al Hani's Phase 2 performance. There was therefore no legal basis for the 20% reduction to Payment Certificate No. 2. Al Hani is entitled to recover the amount of the reduction.

***(ii) Payment Certificate No. 3***

383. Payment Certificate No. 3, which reflected 40% of the value of the TIAR-NE Contract (LYD1.98 million), was submitted on 27 December 2010,<sup>425</sup> shortly before the Revolution began in February 2011. In his assessment of amount due under the TIAR-NE Contract, Mr. Al Kelani initially did not take Payment Certificate No. 3 into account as he "learned of Payment Certificate No. 3 under this Contract only in this Arbitration. To my knowledge, this payment request was never submitted by Al-Hani to TPB."<sup>426</sup>

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<sup>422</sup> TR 5:1217:16-18 (Mr. Bisher).

<sup>423</sup> See R-171, Letter from TPB to Administrative Committee Secretary dated 20 February 2011.

<sup>424</sup> See TR 5:1240-1242 (Mr. Bisher).

<sup>425</sup> C-567, Letter from Al Hani to TPB dated 27 December 2010.

<sup>426</sup> 1<sup>st</sup> Al Kelani WS ¶65.

384. Mr. Al Kelani revised his testimony in his Second Witness Statement, contending that Al Hani had failed to perform Phase Three of the contract and was therefore not entitled to payment.<sup>427</sup> Mr. Bisher's First Witness Statement was more categorical: "[t]he Third Phase of the contract was not paid, as no works were performed for that phase."<sup>428</sup>
385. Under Appendix B of the TIAR-NE Contract,<sup>429</sup> the third installment of 40% of the contract's value was to be made "[u]pon receipt and approval of the second phase documents and papers (the final studies and designs, as well as the bid documents)." Claimant contends that the "documents and papers" required by the Contract were submitted, and that it was entitled to payment. In this regard, the record includes a 2 January 2011 letter from Al Hani to RBA transmitting the Phase 2 and Phase 3 studies in CD form.<sup>430</sup> The TIAR-NE Detailed Design Report is also in the record.<sup>431</sup> It is a substantial and detailed 839-page document including, *inter alia*, annexes with road design drawings, horizontal and vertical alignments, a drainage system design, a ventilation design for the tunnel, technical specifications, and a cost estimate report.
386. The Tribunal has difficulty reconciling this evidence with Mr. Bisher's and Mr. Al Kelani's initial assertions that no work was done under Phase 3 of the TIAR-NE Contract. In his Second Witness Statement, Mr. Bisher acknowledges that Al Hani had indeed submitted 800-plus pages of materials, but contends that they were insufficient as they did not include "detailed design drawings and specifications" and other documents that in his view were required under the Contract.<sup>432</sup>

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<sup>427</sup> 2<sup>nd</sup> Al Kelani WS ¶22.

<sup>428</sup> 1<sup>st</sup> Bisher WS ¶33.

<sup>429</sup> C-569, TIAR-NE Contract.

<sup>430</sup> C-589, Letter from Al Hani to TPB dated 2 January 2011.

<sup>431</sup> C-566, TIAR-NE Detailed Design Report.

<sup>432</sup> 2<sup>nd</sup> Bisher WS ¶27.

387. Claimant sought without much success to cross-examine Mr. Bisher regarding the procedure that TPB would have followed in reviewing Payment Certificate No. 3. This process should have entailed consideration whether the extensive materials submitted by Al Hani satisfied the contractual requirements. However, Mr. Bisher did not provide clear answers to questions regarding that process.<sup>433</sup> Indeed, he testified that he had no personal recollection of Payment Certificate No. 3.<sup>434</sup>
388. Counsel for Claimant referred to Payment Certificate No. 3 having been lost in TPB and having been resubmitted after the Revolution, but Mr. Bisher was unaware of this, testifying that “I don’t remember. I don’t remember when this Payment Certificate was submitted or whether it was lost.”<sup>435</sup> In any case, it is clear that Payment Certificate No. 3 was not paid.
389. The evidence shows that Al Hani submitted over eight hundred pages of design work to RBA at the end of 2010 and beginning of 2011. Under the terms of the contract, Al Hani was to be paid “[u]pon receipt and approval of the second phase documents and papers (the final studies and designs, as well as the bid documents).” The documents clearly were not approved, but it is not evident from the record whether RBA actually considered them in good faith. (The Tribunal recalls in this regard that the design documents were submitted shortly before the outbreak of the Revolution in February 2011.)
390. Mr. Bisher’s written evidence contends that the materials were not complete and did not satisfy the contract. His responses on cross-examination – his testimony that he did not recall submission of Payment Certificate No. 3, and his unclear testimony regarding TPB’s procedure for review of payment certificates – suggest that the submitted materials were not given detailed consideration, if indeed they were considered at all.

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<sup>433</sup> TR 5:1226:9 – 232:12 (Mr. Bisher).

<sup>434</sup> TR 5:1235:21 – 1236:20 (Mr. Bisher).

<sup>435</sup> TR 5:1237:3-5 (Mr. Bisher).

391. It is clear that Al Hani did a large amount of design work, and submitted an extensive volume of documentation pursuant to its Phase 3 obligations under the TIAR-NE Contract. However, it also appears that this material was not reviewed or approved through the approval process envisioned under the Contract, so the Contract's requirements for payment were not fully satisfied. In the circumstances, the Tribunal believes that a modest reduction on the order of 10% in the amount to be allowed is warranted, to take account of any corrections or shortcomings that might have emerged in the review process. Accordingly, on the basis of Article 8(1) of the Treaty, the Tribunal awards 90% of the amount claimed with respect Payment Certificate No. 3, €1.04 million.

#### *D. Tajura Payment Certificates*

392. Most of the Parties' arguments and evidence involving the Tajura project go to Claimant's claims for delay and are discussed *infra*. Claimant also seeks the amount of several unpaid payment certificates approved by HIB's engineer for work done and materials used in the Tajura project.<sup>436</sup> Al Hani submitted five certificates for work done on the project. The first was paid in full, and the second was largely paid. The last three certificates, all submitted on the eve of the Revolution, were not paid. Al Hani also submitted several smaller unpaid bitumen certificates that the Parties' quantification experts assessed at either approximately €560,000 or €605,000.<sup>437</sup>

393. The Parties' experts do not differ significantly in their assessments of the amount of the unpaid Tajura payment certificates. FTI's First Quantum Report assesses that €15,190,589 was not paid; Mr. Osbaldeston's First Quantum Report concludes that nothing was due, as in his opinion, the amounts owing should be credited against the unrecovered balance of the Tajura advance payment, leaving a net to Al Hani of zero.<sup>438</sup> In his Second Expert Report, Mr. Osbaldeston maintains his opinion in this regard. However, he assesses on a figures-for-figures basis that the amount of unpaid Tajura payment certificates was LYD9,802,008 and €8,185,038. He converts the LYD component to be €5,691,356 (versus

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<sup>436</sup> 1<sup>st</sup> FTI Quantum Report ¶3.7.3.

<sup>437</sup> RH-15, Blackrock Quantum Hearing Presentation, p. 5.

<sup>438</sup> 1<sup>st</sup> Blackrock Quantum Report ¶188.

FTI's assessment of €5,456,692), for a total of €13,876,394. Mr. Osbaldeston adds to this the amount €605,076 for unpaid bitumen certificates, for a total of €14,481,470.

394. Over the course of the proceedings, FTI refined its calculation of the amount due for the Tajura payment certificates, but it did not state the amount separately in its presentation at the Hearing. Mr. Osbaldeston's Hearing presentation presents FTI's final claim to be €14,200,825.<sup>439</sup>
395. The Tribunal notes Mr. Osbaldeston's opinion that nothing is due with respect to these certificates, as the unpaid amounts should be netted against the unrecovered amount of the Tajura advance payment. The Tribunal addresses issues related to Respondent's set-off claim *infra* and does not consider any possible set-off here.
396. Thus, the Parties' quantification experts are substantially agreed regarding the total of the unpaid payment certificates. FTI assesses the total to be of the order of €14.20 million. Blackrock identifies a higher amount, approximately €14.48 million, roughly €280,000 larger than FTI's assessment,<sup>440</sup> the difference apparently due to different exchange rates used by the experts. The Tribunal has not been directed to evidence in the record that details the different exchange rates used or that would otherwise assist it in assessing this relatively small difference between their assessments. In any case, the Parties and their experts have not identified significant issues requiring decision by the Tribunal.
397. The Tribunal accepts FTI's lower figure of €14.20 million as appropriately reflecting the amount of payment certificates for the Tajura project that were certified by HIB's representative on the project but were not paid.

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<sup>439</sup> RH-15, Blackrock Quantum Hearing Presentation, p. 5.

<sup>440</sup> RH-15, Blackrock Quantum Hearing Presentation, p. 5.

**(3) The Tribunal's Decision on Payment Certificates**

398. As noted *supra*, Claimant's quantification experts from FTI place the total value of unpaid payment certificates to be €36,615,174.<sup>441</sup> Respondent's quantification expert from Blackrock assesses the unpaid payment certificates on a figures-as-figures basis to be €33,618,213.<sup>442</sup> As to the three issues identified by the experts as primarily responsible for the approximately €3 million difference, the Tribunal has decided that the exchange rate specified in Addendum 2 to the Misurata Contract should be applied; that Al Hani's bitumen certificates should be paid in full; and that the claims for Payment Certificates 2 and 3 under the TIAR-NE Contract should be paid in full, subject to a limited reduction to the amount due under Payment Certificate No. 3 to reflect that the final documentation produced was not reviewed and accepted as required by the TIAR-NE Contract.
399. Accordingly, pursuant to Article 8(1) of the Treaty, the Tribunal awards the sum of €36,500,000 in respect of Claimant's claim for all unpaid payment certificates.

**G. CLAIMS 4 AND 5, PART I. RESPONDENT'S CRITICAL PATH CONTENTIONS;  
BENGHAZI CONTRACT**

400. As noted *supra* in paragraphs 245 and 246, the Tribunal has primarily adopted the system for numbering Claimants' claims used by the Parties' quantification experts. The Tribunal deals with Claims 4 and 5 jointly in this section.

**(1) Amounts Owed to Al Hani for Additional Work Done**

***A. Respondent's Critical Path Evidence***

401. Before turning to Claimant's several claims for work allegedly done in excess of that provided for in Al Hani's contracts, the Tribunal must consider a body of evidence presented by Respondent which it contends should significantly reduce the amount of any such recoveries.

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<sup>441</sup> This amount claimed was refined slightly over the course of the proceedings. The €36.6M figure reflects the final claim as presented by FTI at the hearing. CH-3, FTI Quantum Hearing Presentation, p. 8.

<sup>442</sup> RH-15, Blackrock Quantum Hearing Presentation, p. 4. In his presentation to the Tribunal, Mr. Osbaldeston said that he had given his assessments "on a figures-as-figures basis ... I've simply given you a figure that I believe is correct insofar as you determine any liabilities due." TR 10: 2246:1-4 (Mr. Osbaldeston).

402. Respondent submitted two substantial expert reports by Mr. Richard Lee Edwin of Blackrock Programme Management, who contended that the extensions of time extended to Strabag/Al Hani under several of its contracts were not sufficiently or properly justified.

403. As Mr. Edwin described his mandate to the Tribunal at the Hearing:

My instructions are to ... give my opinion regarding whether Al Hani submitted sufficient or adequate evidence demonstrating its entitlement to extensions of time and prolongation compensation on each of the various contracts, also to provide proper and timely notice in support of each of its claims and whether or not it based its asserted Delay Claims on the Terms and Conditions of the various contracts.<sup>443</sup>

404. In Mr. Edwin's opinion, extensions for delays are appropriate only where a delaying factor can be shown to affect the "critical path" of the project; that is, that the cited delaying factor actually impacted the program and resulted in delay overall. In his view, this

leads to the presumption that some form of critical-path analysis is necessary. Simply demonstrating a change of scope or increasing quantities or delay to a specific activity ... may not, of itself, be sufficient to justify the award of an extension of time. It must also be demonstrated to have impacted the critical path at the relevant time.<sup>444</sup>

405. Mr. Edwin concluded that the several extensions of time for contract performance authorized under Al Hani's several contracts were not properly justified, in particular by appropriate critical path analysis, and were therefore unwarranted.

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<sup>443</sup> TR 9:2141:13-21 (Mr. Edwin).

<sup>444</sup> TR 9:2145:16-22 (Mr. Edwin).



406. Drawing on Mr. Edwin's evidence, Respondent maintains that various events giving rise to delays in Al Hani's construction projects have not been shown to have "caused a critical delay to the Contract"<sup>445</sup> and "In the absence of any reasonable contemporaneous critical path program, it is impossible to determine whether any event actually impacted a project."<sup>446</sup> The thrust of Respondent's argument is that, in the absence of the critical path analysis advocated by Mr. Edwin, Claimant has not established that the substantial extensions of time for contract performance were awarded because of events attributable to Al Hani's contract partners.<sup>447</sup>
407. In his presentation to the Tribunal on the penultimate day of the Hearing, Mr. Edwin sought to illustrate his views by presenting a detailed analysis of work on the Benghazi Contract, an analysis not previously introduced by the Respondent. Members of the Tribunal questioned whether this material could properly be considered, given its nature and the very late stage at which it was first offered.<sup>448</sup>
408. The Tribunal then paused to consider the matter. The presiding arbitrator then recalled discussions between the Parties and the Tribunal prior to the Hearing:

[W]e had a carefully discussed and ordered procedure under which the direct examinations it was not envisaged that they would be going to the kind of supplemental analysis that you have presented here.

Now, we understand your view that this sort of follows inexorably from what you may have said, but still it does seem to the Tribunal to, in effect, be new evidence at a difficult point in the proceedings. And, from that point of view, the Tribunal is reluctant to accept your Report for purposes of the record because it does seem to supplement in material ways what we already had before us.<sup>449</sup>

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<sup>445</sup> Resp. Rej. ¶329.

<sup>446</sup> Resp. Rej. ¶330.

<sup>447</sup> Resp. Rej. ¶340.

<sup>448</sup> TR 9:2157:10-13 (Arbitrator Crivellaro).

<sup>449</sup> TR 9:2158:4-16 (Arbitrator Crook).

409. Mr. Edwin's expert testimony accordingly continued without reference to his new analysis. He contended that in the case of Benghazi Variation Order No. 2, there was no critical path analysis and no proper substantiation of the additional time sought by Al Hani and granted by the employer.<sup>450</sup> He offered similar views with respect to the extensions granted for the Misurata<sup>451</sup> and other contracts.
410. On cross-examination, however, Mr. Edwin acknowledged that the type of analysis he advocated was typically used prior to granting an extension of time. He acknowledged further that Claimant did not now seek additional extensions, that the extensions involved in the contracts at issue were all agreed by the respective employers based on the circumstances and information known to them at the time, and that Respondent did not ask the Tribunal to disregard those extensions or make any counter-claims related to them.
411. Mr. Edwin answered questions put to him on cross-examination clearly and fully, and the Tribunal appreciates his clarity and candor. However, the Tribunal finds his answers to call into question the relevance of his evidence in this case:

Q. In an ideal world, notifications of delay or the assessments of delay, any extensions of time are made during the currency of a project, aren't they?

A. That's correct.

Q. And the Claimant relies on extensions of time that were made on that basis, doesn't it?

A. Yes.

Q. And the Employer granted those extensions of time contemporaneously.

A. Yes.

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<sup>450</sup> TR 9:2166:12-20 (Mr. Edwin).

<sup>451</sup> TR 9:2166:21-22 – 2168:1-22 (Mr. Edwin).

Q. Where the Parties agree extensions of time contemporaneously, there is no need to perform a further analysis after the event to second guess that extension of time. It was granted, wasn't it?

A. In terms of the time element, potentially, yes. In terms of the entitlement to compensation whether the time element associated with the payment of compensation, then it is relevant to undertake further analysis, in my opinion.

Q. So, for example, in relation to Tajura, you said that to the extent the Parties agreed an extension of time of 318 days during the currency of the Project, further analysis at this stage appears unnecessary?

A. That's correct.

Q. And the same principle would apply to other projects than Tajura.

A. That's correct.

Q. Your clients have not suggested that the contemporaneous extensions of time can or should be reopened, have they?

A. No, they have not.

Q. And no legal basis for reopening extensions of times has been asserted in these proceedings?

A. No.

Q. As a practical matter, many years after the event, you couldn't put yourself fully back into the position of the Employer at the time, could you?

A. No.<sup>452</sup>

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<sup>452</sup> TR 9:2181:6-22 – 2182:1-22 (Mr. Edwin).

412. As Mr. Edwin confirmed, the several extensions of time for contract performance by Al Hani involved in the following claims were agreed by the employers. The decisions to grant those extensions are not now disputed. Had Mr. Edwin been advising the Parties when these decisions were made years ago, events might or might not have developed differently. He was not, and he freely acknowledged that he could not as a practical matter put himself back in the position of the employers at the time these decisions were made.

***B. The Tribunal's Decision on the Critical Path Evidence***

413. Accordingly, the Tribunal concludes that Mr. Edwin's evidence does not materially assist it in its task. Respondent in effect contends that, absent critical path analysis at the time, the Tribunal cannot attribute any significance to the several extensions of time that have given rise to claims in this case.<sup>453</sup> The Tribunal does not agree. The extensions were granted, and the Tribunal must therefore assess their significance in light of the evidence in the case.

**(2) The Benghazi Contract**

414. Claimant seeks €7,302,790 for additional costs claimed for delay and disruption of the Benghazi Road project said to be the responsibility of Respondent.<sup>454</sup>

415. **The Benghazi Project.** The Benghazi Contract was Strabag and Al Hani's first significant project in Libya. The Contract was signed on 18 October 2006,<sup>455</sup> following discussions that began in May 2006.<sup>456</sup> It called for Strabag to maintain 228 kilometers of the dual-carriageway coastal highway between Ajdabiya and Al Marj in the east of the country.<sup>457</sup> The initial parties to the Benghazi Contract were Strabag SE (which under the law in Libya at that time, could enter into contract for public works) and the Road and Bridges Authority.

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<sup>453</sup> Resp. Rej. ¶334.

<sup>454</sup> Cl. PHB ¶150.

<sup>455</sup> C-9, Benghazi Contract.

<sup>456</sup> Cl. PHB ¶152.

<sup>457</sup> De Maria WS ¶5.

The Contract was subsequently assigned to Al Hani.<sup>458</sup> The employer's representative on the project was Middle East Consulting Engineer ("MEC").<sup>459</sup>

416. **The Contract.** The Contract price was based on measured quantities quantified in a Bill of Quantities ("BOQ") included in the Contract documents.<sup>460</sup> The tender documents for the Contract included a document provided to Strabag prior to contracting indicating the maintenance method to be used in the rehabilitation project ("MNM document").<sup>461</sup> As discussed *infra*, the Parties dispute whether this document was a part of the Contract establishing the repair method Strabag was to employ, or instead lacked contractual significance, so that the employer could require a significantly different method of repair without financial consequences.

417. There is no dispute regarding the contents of the MNM document. It specifies seven different methods of maintenance and identified twelve stretches of road of varying lengths where a particular maintenance method was to be applied.<sup>462</sup>

418. Article 1 of the Contract states that Strabag was to carry out the maintenance work:

[I]n accordance with the provisions of this contract and its appendices, the technical specifications, drawings, maps, quantity lists, price schedules and CDs attached thereto ... In addition, the Second Party acknowledges that it has reviewed all contract documents and its appendices, has properly understood them, and has accepted to contract based thereupon as well as to proceed with execution pursuant thereto.

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<sup>458</sup> Request for Arbitration Exhibit 11.

<sup>459</sup> De Maria WS ¶15.

<sup>460</sup> De Maria WS ¶6.

<sup>461</sup> C-395, "Method of Maintenance (MNM) for the Benghazi Contract." Strabag was also given a set of drawings and tables that included multiple pages of color schematics indicating in linear form the level or type of work to be done on each measured section of road. C-119, Letter from Al Hani to Secretary of the Implementing Board of the Communication Projects dated 16 October 2010, p. 2 and Annex I. Strabag referred to these documents in explaining the details of its August 2016 bid (C-7). Additional copies of these materials were included in the additional documents submitted by Claimant pursuant to the Tribunal's request to the Parties at the Hearing.

<sup>462</sup> De Maria WS ¶¶8-10.

All aforementioned documents and appendices shall be considered an integral part of this contract.<sup>463</sup>

419. Article 5 states:

The Second Party hereby attests that, prior to signing this contract, it inspected the job site and the surrounding areas, and acquainted itself with all circumstances that are related to execution of the work or that may affect it, such as the nature of the land, the condition of the soil, the water resources, the weather conditions in the region, the roads, the traffic, and the availability of a workforce, etc. The Second Party shall be deemed solely responsible for the effects and results arising from these factors.<sup>464</sup>

420. Article 7 states:

Any error or omission, in any description, design or drawing submitted by the First Party, may be corrected at any time. In addition, the Second Party shall personally verify the soundness of the specifications, designs and drawings submitted thereto, and shall notify the First Party, at the appropriate time, of its remarks in regards thereto. If it accepts them, it shall be responsible for them as though it had submitted them.<sup>465</sup>

421. Article 9 states:

The First Party shall be entitled to amend the scope of the contract, in accordance with the nature of work, by increasing it or decreasing it by up to (15%) of the value of the contract, and this shall not entitle the Second Party to seek any compensation. The value of the aforementioned amendments shall be computed in accordance with the agreed upon [price] categories.<sup>466</sup>

(Articles 5, 7 and 9 appear to have been standard in the several contracts at issue.)

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<sup>463</sup> C-9, Benghazi Contract, Art. 1.

<sup>464</sup> C-9, Benghazi Contract, Art. 5.

<sup>465</sup> C-9, Benghazi Contract, Art. 7.

<sup>466</sup> C-9, Benghazi Contract, Art. 9.

422. **The Course of Performance.** Strabag and RBA carried out a joint preliminary inspection of the road on 28 and 29 November 2006. This showed that the estimated BOQ provided with the Contract “grossly under-stated” the quantities necessary to carry out the works indicated in the Contract.<sup>467</sup> Strabag began physical work on the basis indicated in the maintenance method document in April 2007.<sup>468</sup>
423. In May 2007, Strabag was notified that RBA had appointed MEC as the Engineer on the project. On 17 May 2007, Strabag submitted to MEC a “Method Statement” setting out how it intended to carry out the work, describing it as involving continuous repair and repaving as envisioned in the MNM document.<sup>469</sup>
424. MEC was requested to conduct its own inspection to determine the quantities required.<sup>470</sup> MEC’s survey “revealed that damage to the road was more severe” than assumed in the initial BOQ, so quantities had to be adjusted, including for preliminary activities required before laying the binder course.<sup>471</sup>
425. Multiple drafts of a revised BOQ were prepared, and a final version agreed with MEC was submitted to RBA for approval on 28 July 2007. The description of the Works in this document specified that three small areas, totaling 1.8 km, would be patched, but the remaining 415 km would be carried out over the full width of the road.<sup>472</sup>
426. In the meantime, however, beginning in May 2007, MEC began to instruct use of different methods of maintenance, and in particular to carry out repairs on small discontinuous patches of road, not a continuous repair and resurfacing.<sup>473</sup> Acting on MEC’s instructions,

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<sup>467</sup> De Maria WS ¶14.

<sup>468</sup> De Maria WS ¶¶33-34.

<sup>469</sup> C-119, Letter from Al Hani to Secretary of the Implementing Board of the Communication Projects dated 16 October 2010, unnumbered Annex.

<sup>470</sup> De Maria WS ¶15.

<sup>471</sup> De Maria WS ¶17.

<sup>472</sup> De Maria WS ¶18.

<sup>473</sup> De Maria WS ¶34.

Strabag/Al Hani ultimately carried out the repair work in approximately 3,700 patches, rather than in twelve continuous stretches of road.<sup>474</sup>

427. The evidence shows that the revised maintenance method led to significant delays. Because of this, because the Contract's initial BOQ badly underestimated the quantities required even for the initial maintenance method, and because it did not reflect significant increases in milling and other work required by the changed method of interrupted patches, Al Hani ultimately requested two Variation Orders.
428. Mr. El-Abesh described the process for developing variation orders as an iterative negotiating process, in which RBA/TPB and the contractor engaged to come to a result reviewed by the auditors and acceptable to all.<sup>475</sup> He also noted that the process for approving requests for variation orders was "lengthy and required several layers of approval."<sup>476</sup> After a lengthy review process,<sup>477</sup> both Benghazi Variation Orders were approved.
429. Variation Order No. 1, approved on 7 August 2008, extended the value of the Contract by about LYD9.8 million and its duration to 15 December 2009,<sup>478</sup> a total of 350 days.<sup>479</sup> Variation Order No. 2 further increased the Contract price by more than LYD30.6 million and extended the period for performance to 50.5 months, until 15 May 2011.<sup>480</sup> In total, the two Variation Orders increased the value of the Benghazi Contract by 61.91%.<sup>481</sup>

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<sup>474</sup> De Maria WS ¶11. The impact of the changed maintenance method is graphically displayed in linear charts showing the work performed on each section of the road included as an Annex to C-119.

<sup>475</sup> 1<sup>st</sup> El-Abesh WS ¶¶8-9.

<sup>476</sup> 1<sup>st</sup> El-Abesh WS ¶14.

<sup>477</sup> 1<sup>st</sup> El-Abesh WS ¶8 describes a complex bureaucratic process for development and approval of Variation Orders.

<sup>478</sup> De Maria WS ¶23.

<sup>479</sup> 2<sup>nd</sup> FTI Report ¶58.

<sup>480</sup> 2<sup>nd</sup> FTI Report ¶64; 2<sup>nd</sup> Blackrock Quantum Report ¶172.5.

<sup>481</sup> Cl. Mem. ¶87.



***A. Claimant's Position***

430. Claimant seeks €7,302,790 for additional costs due to delay and inefficiency resulting from RBA's change in the maintenance method. Claimant contends that it concluded the Contract and mobilized personnel and equipment on the basis that it was to carry out the repairs specified in the MNM document to the substructure of the road in the specified reaches, and then lay a continuous binder course over the road. Because of the relatively short 19-month period initially specified for repairing 425 kilometers of road, Claimant states "we had to select and import high producing plant and heavy equipment to meet this demanding schedule."<sup>482</sup>
431. The two Variation Orders significantly increased both the Contract value and the time for performance. However, Claimant contends that neither compensated it for additional costs due to delay and inefficient utilization of resources due to the change to a system of 3700 patchwork repairs. Claimant contends this change rendered the work significantly slower and less efficient, and resulted in substantial uncompensated costs.<sup>483</sup> In Claimant's submission:

[C]arrying out the repairs in this manner resulted in the under-utilisation of Strabag International's equipment and manpower, and introduced significant inefficiencies into the progress of the works. In consequence, additional time was needed to carry out the contract works, and Strabag International (and later Al Hani) suffered a significant reduction in its productivity rates.<sup>484</sup>

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<sup>482</sup> C-119, Letter from Al Hani to Secretary of the Implementing Board of the Communication Projects dated 16 October 2010, p. 15.

<sup>483</sup> De Maria WS ¶¶39-40.

<sup>484</sup> Cl. Reply ¶123 (citations omitted).

432. Claimant contends that it developed its bid on the basis of the tender documents provided by the employer, including the “Maintenance Categories” detailed in the MNM.<sup>485</sup> In this regard Strabag’s letter of 16 August 2006 submitting its bid states that Strabag’s quote is based on “[d]ocuments of a number of Maintenance Categories specifying and quantifying the rehabilitation works.” The letter also refers to the colored schematics indicating the maintenance methods to be applied to each section of the road.<sup>486</sup>
433. Claimant maintains that it planned the work and mobilized resources on the understanding that, under the Banghazi Contract, “following the removal of defective pavement surfaces in certain stretches of the roadway and certain other isolated repairs, an overlay of asphalt pavement (Wearing and Binder course) would then be placed to the full width of the road.”<sup>487</sup> Instead, MEC’s instructions required it to work in a slow and piecemeal fashion, ultimately making 3,700 separate patches.
434. Mr. de Maria estimated that the changed maintenance method reduced Strabag’s productivity by 60%.<sup>488</sup> In his submission, “Strabag had to incur additional costs arising from the under-utilisation of its equipment, and a disjointed and discontinuous method of working, for a longer period of time.”<sup>489</sup>
435. Claimant disputes Respondent’s interpretation of Article 5 of the Contract, to the effect that Article 5 required Claimant to carry out an extensive in-depth survey of the road at its own expense prior to bidding. Claimant observes that pre-contracting inspection of 430 km of road during a bidding process extending from May to Mid-August 2006<sup>490</sup> was necessarily limited, and that a detailed pre-bidding survey of the kind urged by Respondent would have taken many months and involved substantial uncompensated expense.

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<sup>485</sup> Cl. PHB ¶152.

<sup>486</sup> C-7, Letter from Strabag to RBD dated 16 August 2006.

<sup>487</sup> De Maria WS ¶10.

<sup>488</sup> De Maria WS ¶37.

<sup>489</sup> De Maria WS ¶39.

<sup>490</sup> Cl. PHB ¶152.

436. Claimant likewise rejects Respondent's interpretation of Article 7 of the Contract, to the effect that Article 7 made the contractor responsible for the correctness of the plans and factual representations made in RBA's bidding and contracting documents. To the contrary, Claimant showed that it was prepared to do the work utilizing the maintenance method indicated in the tender documents and indeed mobilized on this basis.
437. Claimant also disputes Mr. Osbaldeston's interpretation of Article 9, to the effect that it gave RBA discretion to change the scope of the work significantly without additional compensation. In Claimant's understanding, this provision established only that, should experience show that the BOQ had to be increased or decreased within the 15% limit, the prices specified in the Contract for the inputs specified in the BOQ aggregate, cement, and the like would be applied without change. In Claimant's view, Article 9 did not authorize the employer to significantly change the nature of what the contractor was to accomplish.<sup>491</sup>
438. Claimant denies that Variation Orders Nos. 1 and 2 barred its claims. Claimant insists that the revised BOQs in the Variation Orders "reflected the increased quantities needed to carry out the repairs on a patchwork basis, but did not compensate Strabag for the costs incurred as a result of the unproductive method of working, such as increased labour costs, additional equipment costs and other overheads."<sup>492</sup> Claimant notes in this regard that it presented these separate claims to RBA contemporaneously.<sup>493</sup>
439. Claimant's quantification experts from FTI conclude that the amount claimed for delay and lost productivity for the 350-day period "is reasonably stated."<sup>494</sup> As described by FTI, Claimant established its loss of productivity utilizing "measured mile" methodology. Productivity (for example tons of asphalt laid per day) was established for activities specified in the MNM document for periods when the contractor utilized those methods.

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<sup>491</sup> De Maria WS ¶39.

<sup>492</sup> De Maria WS ¶23.

<sup>493</sup> De Maria WS ¶¶40, 49.

<sup>494</sup> Cl. PHB ¶158, citing 2<sup>nd</sup> FTI Report ¶80.

This was then compared with reduced productivity determined for periods where work was carried out using piecemeal patching.<sup>495</sup> Al Hani describe this methodology in a 16 October 2010 letter to the Implementing Board of the Communications Projects setting out its claim for additional costs resulting from the changed maintenance method. (This letter and its supporting documentation and photographs run over 290 pages.)<sup>496</sup>

440. Claimant's experts from FTI then calculated a daily rate of LYD46,301 for the costs stemming from delay and inefficiency, based on an internal cost schedule. This amount was multiplied by the 350 additional days authorized by the variation orders, resulting in estimated losses of over LYD16.2 million. As its estimate was significantly higher than Claimant's claim, FTI judged that the claim was reasonable.<sup>497</sup>

### ***B. Respondent's Position***

441. As summarized in its Post-Hearing Brief, Respondent first maintains that the MNM document was not a part of the Contract so that that the employer could instruct Al Hani to utilize a substantially different and more time-consuming method of work without contractual consequences. Respondent cites in this regard the Libyan Administrative Contract Regulations, which specify that "only those documents that are signed by both parties can be considered part of the contract."<sup>498</sup> In Respondent's contention, the MNM document on record bears only Strabag's seal and is not signed or sealed by RBA.<sup>499</sup> This confirms, in Respondent's view, that the MNM document was not part of the Contract.<sup>500</sup>

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<sup>495</sup> 2<sup>nd</sup> FTI Report ¶74.

<sup>496</sup> C-119, Letter from Al Hani to Secretary of the Implementing Board of the Communication Projects dated 16 October 2010.

<sup>497</sup> 2<sup>nd</sup> Blackrock Quantum Report ¶174.2.

<sup>498</sup> Resp. PHB ¶¶171-2.

<sup>499</sup> C-395, Benghazi Contract, Method of Maintenance.

<sup>500</sup> Respondent acknowledges that a similar document in the record in the Misurata claim was stamped by both parties. However, it was not signed by the RBA representative. In Respondent's contention, the absent signature means that "this document and the maintenance method reflected therein were not incorporated into the Misrata Contract." Resp. PHB ¶176.

442. In Respondent's view, the maintenance method in the MNM document was not part of the Contract, "because the manner in which work was to be performed was to be determined by Al Hani and not specified by any contractual terms."<sup>501</sup> While the MNM document was provided to Strabag prior to bidding, it was, like the BOQ, a provisional document subject to change. "Tender documents provided only preliminary data and a preliminary estimate of quantities, which was subject to change during the execution of the contract."<sup>502</sup>
443. Thus, in Respondent's view, neither the Benghazi nor the subsequent Misurata Contract "fixed a maintenance method or provided a manner in which the work was to be performed." Instead, "Al-Hani was responsible for determining the final maintenance method under these contracts through a survey to assess the necessary scope and design of the works."<sup>503</sup> However, in Respondent's view, Strabag/Al Hani failed to conduct a proper pre-contractual survey, which would have revealed the badly deteriorated condition of the road and the shortcomings of the maintenance method contained in RBA's tender documents.
444. Respondent maintains in this regard that Articles 5 and 7 of the Benghazi Contract required Strabag/Al Hani prior to contracting to verify the road's condition and the correctness of RBA's contract documents. In Respondent's view, these articles "allocated the risk of the condition of the road and the adequacy of the general maintenance parameters for the works" to the contractor. Strabag/Al Hani failed to make appropriate investigations of the road and of the bidding documents it was given, and must bear the consequences, as "the risk of 'any additional costs' was contractually assumed by Al-Hani."<sup>504</sup>

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<sup>501</sup> Resp. PHB ¶173.

<sup>502</sup> 2<sup>nd</sup> El-Abesh WS ¶10.

<sup>503</sup> Resp. PHB ¶169.

<sup>504</sup> Resp. PHB ¶187.

445. In his reports, Respondent's quantification expert Mr. Osbaldeston briefly advances the further argument that Article 9 of the Contract authorizes significant uncompensated increases in the scope of work to be performed.<sup>505</sup> This argument is not developed in Respondent's Post-Hearing Brief.
446. Respondent further contends that "the increase in contract price through the approved variation orders provided full compensation for all of the contractor's costs,"<sup>506</sup> and that nothing more can be claimed for the work. In Respondent's view, by accepting the variation orders, Claimant waived any claims for additional payments.
447. Thus, for example, Variation Order No. 2 significantly increased the total value of the Contract to reflect Al Hani's additional work. Article 3 then provided, *inter alia*, "the second party [i.e., the contractor] shall not claim any increase in the contract prices or any compensation resulting of the increase in the contract value."<sup>507</sup> In Respondent's view, by accepting the variation orders, the contractor waived the claims for additional amounts sought here.
448. Respondent adds in this regard that, had Al Hani believed itself entitled to additional payment on account of alleged delay and inefficiency, it should have included these claims in the proposed variation orders that it prepared and that RBA ultimately approved. It did not do so, indicating that no such additional compensation was due.<sup>508</sup>
449. As to the amount claimed, Respondent's quantification expert Mr. Osbaldeston from Blackrock contends in his First Report that Al Hani failed to document its claim or explain its basis or the method used to calculate it. He accordingly values the claim at "nil."<sup>509</sup> In his Second Report, Mr. Osbaldeston again wholly discounts the claim, relying on Mr.

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<sup>505</sup> 1<sup>st</sup> Blackrock Quantum Report ¶190.

<sup>506</sup> 1<sup>st</sup> El-Abesh WS ¶9.

<sup>507</sup> C-80, Benghazi Variation Order No. 2 dated 24 January 2010 (emphasis added).

<sup>508</sup> 2<sup>nd</sup> El-Abesh WS ¶15.

<sup>509</sup> 1<sup>st</sup> Blackrock Quantum Report ¶211.

Edwin's opinion to the effect that the extensions of time granted in the variation orders were not properly substantiated and that the delay was the contractor's responsibility.<sup>510</sup>

450. In his Second Report, Mr. Osbaldeston further contends that, should the Tribunal nevertheless find liability for delay and inefficiency due to the changed maintenance method, the daily rate should be significantly less than that claimed by Claimant. In his view, Claimant failed to substantiate its claimed rate, failed to show how costs were mitigated, and failed to consider its own inefficiencies.<sup>511</sup> He further contends that the Bau-Rechen- und Verwaltungszentrum ("BRVZ") cost reports used by FTI (see paragraph 864 *infra*) do not provide a sufficient basis for the claimed rate, that they incorrectly include certain overheads, and otherwise overstate the proper rate.<sup>512</sup>
451. Mr. Osbaldeston estimates in his Second Report that, should any costs be allowed, the daily rates should be a range of approximately LYD11,000 to 19,000 for delay and prolongation costs and between approximately LYD11,521 and 18,890 per day for disruption and loss of productivity costs.<sup>513</sup>

### ***C. The Tribunal's Decision***

452. *Status of the MNM Document.* The Tribunal does not agree that the MNM document lacked contractual significance and could be disregarded without consequence after work began.
453. The MNM document clearly set out, measured section by measured section, the work that the contractor was to perform on specific sections of the road. Respondent acknowledges that RBA provided it to Strabag and other prospective bidders with the understanding and expectation that the recipients would rely upon it in preparing their bids. Mr. El-Abesh confirmed at the Hearing that the MNM document was provided to Strabag and other potential bidders by RBA prior to bidding<sup>514</sup>

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<sup>510</sup> 2<sup>nd</sup> Blackrock Quantum Report ¶¶171-172.

<sup>511</sup> 2<sup>nd</sup> Blackrock Quantum Report ¶165.

<sup>512</sup> 2<sup>nd</sup> Blackrock Quantum Report ¶175.

<sup>513</sup> 2<sup>nd</sup> Blackrock Quantum Report ¶177.

<sup>514</sup> TR 5:1266:1-4 (Mr. El-Abesh: "So, if your question is related to the way the method of maintenance is done, well, we have a document which is presented to all the companies that apply.")

454. Respondent's Post-Hearing Brief contends that the MNM document was provided to bidders "exclusively to aid the companies participating in the bidding process to price their offers by relaying limited maintenance points."<sup>515</sup> However, the Tribunal does not accept that the MNM document concerned only "limited maintenance points." The document clearly identifies the work that a prospective bidder was to perform, identifying the repairs to be performed on specific measured sections of the road. Without such guidance, a prudent contractor could not know what it was being asked to do, or how much to bid.

455. In cross-examination, Mr. El-Abesh appeared to accept that the document was intended to be taken seriously:

Q. ... [I]n terms of the tender, it was provided to tell the Contractor, what to do; correct?

A. Yes, correct.<sup>516</sup>

456. Strabag's letter submitting its bid clearly shows that it relied on this information in preparing the bid.<sup>517</sup> After the bid was accepted, Strabag mobilized on the basis of the work it expected to perform. Mr. de Maria states, for example that "our paver and asphalt plant were selected on the basis of carrying out bulk work."<sup>518</sup>

457. If, as Respondent contends, there was no maintenance method established by the Contract,<sup>519</sup> leaving it to be determined after a contractor surveyed the road before or after it took possession, it is difficult to understand why RBA provided this document and the related colored schematics indicating the work to be done section-by-section. It would seem inconsistent with good faith for an employer to provide these materials to prospective bidders, expecting bidders to rely upon them, but then to disregard them after contracting.

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<sup>515</sup> Resp. PHB ¶177.

<sup>516</sup> TR 5:1278:13-16 (Mr. El-Abesh).

<sup>517</sup> C-7, Letter from Strabag to RBD dated 16 August 2006.

<sup>518</sup> De Maria WS ¶10.

<sup>519</sup> 2<sup>nd</sup> El-Abesh WS ¶9.



458. Thus, the Tribunal is not persuaded by Respondent's argument that RBA's MNM document and presumably the colored schematics also provided to Strabag and other prospective bidders – have no contractual consequences and can be disregarded by the employer. Respondent urges that the MNM was not stamped and signed by both parties, which it maintains was necessary for it to be part of a contract under Libya's Contracting Regulations. The same argument would presumably apply as well to the colored schematics in the record.<sup>520</sup>
459. However, this argument seems not to have been carried out in the contracting parties' actual practice. Article 1 of the Benghazi Contract requires the contractor to carry out the work in accordance with the Contract and "the appendices, the *technical specifications*, drawings, maps, quantity lists, price schedules and CDs attached thereto ... *All aforementioned documents and appendices shall be considered an integral part of this contract*" (emphasis added).<sup>521</sup> While the record does not include the full array of the documents Article 1 lists as elements of the Contract, it does include, for example, the multi-page document establishing the technical specifications.<sup>522</sup> This is a significant document listed in Article 1, but it bears only the contractor's stamp and signature. It shows that the contracting parties did not view parallel stamps and signatures as essential for all of the contractually important documents that Article 1 expressly identifies as parts of the Contract.
460. Given this practice – and the significant issue of good faith that would otherwise be presented if the MNM document were deemed to be contractually irrelevant – the Tribunal does not accept that the MNM document and other tender documents provided to Strabag to specify the required scope of work are contractually irrelevant.

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<sup>520</sup> Respondent advances a similar argument regarding the Misurata Contract, where the record includes a similar document setting out a maintenance method. In that case, the document was stamped and signed by Al Hani, and also stamped – but not signed – by the employer. Respondent urges that the absence of a signature to accompany the employer's seal renders that document irrelevant, notwithstanding the presence of the employer's seal. Resp. PHB ¶177.

<sup>521</sup> C-9, Benghazi Contract.

<sup>522</sup> C-863, Benghazi Contract (Arabic version).

461. *Articles 5, 7 and 9.* The Tribunal does not share Respondent's interpretations of Articles 5, 7 and 9 of the Benghazi Contract, which Respondent contends shift the risks of hidden defects, imperfect specifications, and the like to a contractor. In the Tribunal's view, a correct understanding of these articles must take into account Article 1 of the Contract, which defines the work the contractor is to perform. Article 1 makes clear that it is the employer, and not the contractor, that determines what is to be done:

The Second Party pledges to execute the activities for the project to: maintain the coastal highway between Ajdabiya and Al Marj, with complete accuracy and meticulousness in accordance with the provisions of this contract and its appendices, the technical specifications, drawings, maps, quantity lists, price schedules and CDs attached thereto, as well as any written agreement to be concluded in connection with this contract ...<sup>523</sup>

462. Article 1 reflects a familiar pattern in contracting. The client specifies what the contractor is to do; the contractor agrees to do that work. Respondent contends, however, that Article 5 obliged prospective bidders to carry out a detailed survey of the road, and that failure to do so made the successful bidder responsible for undisclosed defects and deterioration of the road, apparently including concealed conditions.

463. *Article 5 of the Contract.* The Tribunal does not agree with this expansive reading of the contractor's obligations under Article 5 of the Benghazi Contract. As its language shows, Article 5 addresses actions prior to bidding, as a prospective contractor evaluates a possible bid on a project. In cross-examination, Mr. El-Abesh acknowledged the limited character of a contractor's pre-bidding inspection in this situation.

Q. So, I think you've answered the point that, before the Contract is signed, there is nothing to be done, but I was – you were saying that actually they were to perform some survey?

A. Before signing the Contract, the company doesn't do any work which is paid for. This is normal.

Q. Yes.

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<sup>523</sup> C-9, Benghazi Contract.

So, you would expect the Contractor only to do very limited investigations prior to getting a contract, wouldn't you?

A. Yes.

It's an assessment of the general situation. They study the documents. They verify that they are correct when there are documents which specify the details of the Contracts. In this given situation with the Strabag contracts, there's also the BOQ, and they study the BOQ, they visit the site, they look at the road, they get to know the road. This is what they do before the Contract.

Q. Yes.

And then after the Contract has been awarded to the successful Contractor, that Contractor would have a greater opportunity to see the areas and plan further; is that correct?

A. It is not a possibility; it is a duty.<sup>524</sup>

464. This testimony by the head of the TPB reinforces the Tribunal's view that Article 5 does not impose the heavy burdens, or has the broad risk-shifting effect, now claimed by Respondent. Article 5 is a universal standard clause, typical of all contracts made for "construction only", where the design is provided by the employer or its own consultants. It is generally meant to prevent future claims for price increases based on alleged lack of knowledge of the site conditions at the time of the tender. The present Claimant's claim, however, is for damages and costs caused by the revised working methods and associated costs and delays, not a claim for price revision. In any case, the clause applies to the works to be executed as defined in the contract and cannot enlarge the contractor's scope of works beyond the works precisely agreed in the contract. Nor can it transform a "sole construction" contract into a "design and build" contract, as Respondent seems to contend.

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<sup>524</sup> TR 5:1260:9-22, TR 5:1261:1-12 (Mr. El-Abesh).

465. Respondent's interpretation of Article 5 would disregard the normal mode of contracting. It would instead obligate the contractor to investigate in depth prior to bidding in order to identify significant errors in the client's description of the project and shortcomings in its specification of the necessary work. Having failed to do so, says Respondent, the contractor assumed the risks of the employer's errors and shortcomings. This is not, in the Tribunal's view, a correct or fair reading of Article 5.
466. The Tribunal believes that a prospective contractor should be entitled to rely on what it is told in tender documents provided by the client, including the client's description of the work it seeks to have performed. It would be unreasonable, and inconsistent with the employer's duties of good faith under Article 148 of the Libyan Civil Code<sup>525</sup> to interpret Article 5 to make Al Hani responsible prior to contracting for identifying the shortcomings of the pre-contractual documents it received from the employer.
467. The Tribunal notes in this regard that in a subsequent contract, in a situation where the TPB wished Al Hani to carry out a detailed survey of a road repair project and to suggest a maintenance method, this was clearly stated in that contract. The BOQ of the Garaboulli Contract thus required Al Hani to perform a "technical field study of the status of the road and the method of maintenance."<sup>526</sup> There is no such provision in the Benghazi (or Misurata) Contracts.
468. The Tribunal accordingly dismisses Respondent's defenses based on Article 5 of the contract.
469. *Article 7 of the Contract.* With respect to Article 7, Strabag and its successor Al Hani clearly was prepared to do the work utilizing the maintenance method contained in the MNM document, subject to increases in the BOQ to provide adequate materials. Indeed, Strabag began work utilizing the specified method, while informing the employer that additional quantities of material would be required. It was the employer's representative

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<sup>525</sup> CH-2, *Relevant Provisions of the Libyan Civil Code* (submitted by Dr. Ahnish at the Hearing).

<sup>526</sup> R-147, Letter from Al Hani to TPB dated 6 December 2010 (transmitting the Garaboulli field study documents for approval).

who then changed the method to be used, not the contractor. This gives the lie to any claim that Strabag/Al Hani failed to comply with Article 7.

470. *Article 9 of the Contract.* The extent to which Respondent maintains arguments based on Article 9 is not clear. This article allows certain adjustments in quantities of materials to reflect evolving conditions as a project progresses. However, the Tribunal does not accept that it authorizes an employer to change the basic nature of the work to be done without financial consequences. Article 9 has a different and narrower purpose. Correctly interpreted, it means that if the BOQ quantities actually required go up or down by no more than 15%, there can be no change in the unit rates for the materials involved.

471. Mr. El-Abesh explains this clearly in his Second Witness Statement:

When the value of the required works exceeded the estimated contractual value by less than 15%, Al-Hani was required to perform the works under a variation order using the existing contractual unit rates and did not have the right to change the unit rates for the additional quantities needed for performance.<sup>527</sup>

472. The Tribunal next considers Respondent's contention that, by accepting the two Variation Orders, Strabag waived any claims for additional compensation related to delays and inefficiencies. The relevant sentence appears in Paragraph 3 of the Variation Orders to quote Variation Order No. 2: "The second party shall not claim any increase in the contract prices or any compensation resulting of the increase in the contract value."<sup>528</sup>

473. The Tribunal does not understand this sentence in the manner urged by Respondent. The first clause in the sentence does not by its terms apply. This claim does not seek increases in the contract prices, that is, the contractually specified unit prices for materials and items listed in the BOQ. The second sentence also appears inapposite. The claim involves delays and inefficiencies resulting from changes in the project, not compensation "resulting of the increase in the contract value." The quoted phrase might have relevance were this a "cost-

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<sup>527</sup> 2<sup>nd</sup> El-Abesh WS ¶8.

<sup>528</sup> C-80, Benghazi Variation Order No. 2 dated 24 January 2010.

plus” contract, where the contractor’s compensation is determined by the value of the contract and not by the measured volumes. This is not such a contract.

474. It is clear that Al Hani did not regard itself as having waived its Delay Claims by operation of this sentence in the variation orders. There was no agreement of the kind that Mr. El-Abesh said characterized the formulation of such orders.<sup>529</sup> Al Hani made clear at all relevant times that it sought additional compensation for the delay and inefficiency resulting from the changed method of repair. Indeed, Mr. El-Abesh confirmed that Al Hani persisted with these claims following the variation orders, noting that Al Hani “continued to insist that the approved variation orders did not compensate it for the delay caused by its loss of productivity.” In this regard, a meeting planned in early 2011 to address the issue did not occur because of the Revolution.<sup>530</sup>
475. Thus, there clearly was no agreement by Al Hani to forego these claims, and the language of the orders said to reflect or result in a waiver of the claims falls short of doing so.
476. *Quantification.* It is not disputed that the changed maintenance method resulted in delays and inefficient use of equipment. Mr. El-Abesh acknowledged as much in cross-examination:

Q. So, it’s much less efficient to work on a patchwork basis than it is to work on a full-width basis, isn’t it?

A. Yes.

Patchwork also needs more skills, and if you don’t have those skills, it means that the Contractor will be delayed. This is what happens, usually.<sup>531</sup>

...

Q. ... So, it’s more difficult to do the patchwork, and it takes longer to lay the same quantity of asphalt, doesn’t it?

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<sup>529</sup> 1<sup>st</sup> El-Abesh WS ¶¶8-9.

<sup>530</sup> 1<sup>st</sup> El-Abesh WS ¶20.

<sup>531</sup> TR 5:1288:14-22 (Mr. El-Abesh).

- A. If we work on patches, we take more time, but, as I have always said, if the company does not have the skills necessary within the ranks of the workers because a lot – logic says that if there is – the quantities are less, then we should work in a weaker fashion. But it is clear that when we work on the basis of patches, we cannot use heavy equipment. We have to use smaller-sized equipment.<sup>532</sup>

477. The record shows that the changed maintenance method introduced significant elements of delay and inefficiency in Strabag's/Al Hani's operations. RBA acknowledged the delay by agreeing to a 350-day extension of time for performance. Moreover, Al Hani incurred a variety of costs – for inefficiently deployed labor, for depreciation or rental of idle equipment, and for running and administrative costs – that would not have been incurred had the project proceeded as initially planned.
478. The Tribunal finds that Claimant has shown that it is entitled to additional compensation on account of uncompensated additional costs incurred on account of the changed maintenance method and the resultant delays. The Tribunal therefore turns to the issue of quantification of the compensation due under the Benghazi Contract.
479. Claimant assessed its additional costs to equal a daily rate of LYD34,455 for 350 additional days, a claim that FTI assessed to be “reasonably stated.”<sup>533</sup> In this regard, FTI made its own independent assessment of the appropriate daily rate for the period of delay. FTI concluded, based on its assessment of data in Al Hani's Monthly Reports, that a daily rate of LYD46,301, was justified by the evidence. This rate is significantly higher than that claimed by Al Hani.<sup>534</sup>
480. As noted *supra*, Respondent's expert Mr. Osbaldeston contended, based on Mr. Edwin's opinion, that the extensions granted to Al Hani were not justified, so that this claim should be valued at “nil.” However, as also explained *supra*, the Tribunal does not accept the relevance of Mr. Edwin's evidence. The extensions were in fact approved by RBA at the time and Respondent makes no request to set them aside. The Tribunal is convinced from

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<sup>532</sup> TR 5:1288:13-22, TR 5:1289:1-9 (Mr. El-Abesh).

<sup>533</sup> FTI 2<sup>nd</sup> Quantum Report ¶80.

<sup>534</sup> FTI 2<sup>nd</sup> Quantum Report ¶78.

the evidence that the significant increase in the time required for performance was the result of the changed maintenance method and the resulting delays and inefficiencies.

481. Mr. Osbaldeston contends in the alternative that, should the Tribunal find liability, the daily rate applied in calculating the claim was too high. In his opinion, Claimant did not consider the possible effects of Strabag/Al Hani's own actions as causes of delay, and included unjustified overheads and other unwarranted elements. (On this first point, the record indicates that Strabag did in fact consider at least some of its own shortcomings and other extraneous factors in calculating its claim. Mr. de Maria states, for example, that in seeking additional time, Strabag excluded delays caused by its own delay in beginning asphalt production and by shortages in bitumen.<sup>535</sup>)
482. Mr. Osbaldeston calculates a range of daily rates both for delay and inefficient working that in his view should apply should the Tribunal find liability. His low estimates for delay and inefficiency combined totaled on the order of LYD22,500 per day; his combined high estimates totaled about LYD37,890.<sup>536</sup> This higher combined daily rate in fact exceeds the amount used by Claimant in calculating the claim (LYD34,455), a point implicitly reflected in FTI's final presentation to the Tribunal at the Hearing.<sup>537</sup>
483. Given that the daily rate used by Claimant is less than both the rate calculated by FTI, and the high end of the range of estimates offered by Mr. Osbaldeston, the Tribunal judges it to provide a reasonable reference point for assessing additional uncompensated costs from the changed maintenance method. As to the relevant evidence, the Tribunal has taken account of Exhibit C-119, which is a voluminous and detailed demonstration of the prolongation costs and disruptive losses of productivity; Section 4.2 of FTI's First Report, and Appendix 16 to their Second Report, which analyze Exhibit C-119, finding it a valuable piece of evidence that leads FTI to assess a daily rate substantially higher than the

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<sup>535</sup> De Maria WS ¶45.

<sup>536</sup> 2<sup>nd</sup> Blackrock Quantum Report ¶177.

<sup>537</sup> CH-3, FTI Quantum Hearing Presentation, p. 22, column "C".



rate claimed by Claimant; and has, especially, taken account of Blackrock's 'Assessments Summary' forming part of Appendix 4.1 to their Second Quantum Report.

484. In this last table, Blackrock assesses this claim at a maximum of LYD13,265,000, which would be reduced to a minimum of LYD8,007,746 "if items colored in red above are removed." The Tribunal notes that the minimum value arrived at by Blackrock reflects the total removal of the four items colored in red in the above table, whereas Blackrock had only suggested to adjust them down rather than deleting them all. The Tribunal further notes that, by readjusting the difference between Blackrock's maximum and minimum through reasonable reduction rather than complete removal of the four criticized items, the resulting amount would almost coincide with the amount claimed by Al Hani at the time of the events, and in addition would leave intact an important part of the amount assessed by FTI.

485. Based on these considerations, pursuant to Article 8(1) of the Treaty, the Tribunal awards €6.90 million in respect of Claimant's claim for uncompensated work on the Benghazi Road project.

## **H. CLAIMS 4 AND 5, PART II. MISURATA CONTRACT**

### **(1) Losses from Delay and Uneconomic Working – The Misurata Contract**

486. The Misurata Contract provided for maintenance of 210 km of the coast road between Misurata and Sirte.<sup>538</sup> Pursuant to Article 8(1) of the Treaty, Claimant seeks €11.114 million for uncompensated costs said to result from delays and inefficient working conditions in the course of performing the Contract.<sup>539</sup> The claim involves 519 days of delay<sup>540</sup> for which Respondent granted extensions of time,<sup>541</sup> resulting in delay and

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<sup>538</sup> Resp. C-Mem. ¶125.

<sup>539</sup> Cl. PHB ¶¶14, 159; RH-15, Blackrock Quantum Hearing Presentation, p. 4. This amount appears to reflect a claim initially presented to the employer in LYD converted at an exchange rate of approximately LYD1.717 = €1.

<sup>540</sup> Cl. PHB ¶160.

<sup>541</sup> Cl. PHB ¶160.

inefficiencies that Claimant attributes to RBA's changed instructions regarding the scope of the work to be done and its failure to provide timely decisions and instructions.

487. Respondent presents multiple arguments in response to the claim, at different levels. Respondent first contends that there is no contractual or legal basis for the claim. Respondent also advances a second tier of arguments regarding Al Hani's allegedly deficient performance of work under the Misurata Contract.

***A. Basis of the Claim: Claimant's Position***

488. Claimant contends that:

During the course of the works on the Misurata project, the RBA issued a number of instructions to Al Hani changing the method of repairing the Misurata road, the pavement design and the culvert design. The instructed changes resulted in delay and increased cost to Al Hani, which Al Hani is entitled to recoup under the contract. Al Hani thus claimed from the TPB the monthly costs for wages, equipment, running costs, salaries, financing and overhead costs incurred during the period of delay.<sup>542</sup>

489. Specifically, Claimant seeks compensation for uncompensated monthly costs said to result from three separate periods of delay:

- (1) Claimant seeks compensation for 215 days of delay during the first delay period, from 28 September 2007 through 30 April 2008.<sup>543</sup> This period covers the time after Al Hani took possession of the work site in July 2007 and received the advance payment in September 2007, and then ascertained that the road was seriously deteriorated and needed to be rebuilt rather than merely "maintained" as anticipated under the Contract. Claimant contends that there followed a substantial period before RBA provided instructions for how the additional work was to be performed.

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<sup>542</sup> Cl. Mem. ¶539.

<sup>543</sup> 2<sup>nd</sup> FTI Quantum Report ¶99.

- (2) The second claimed delay period of 288 days<sup>544</sup> began in August 2008, when the asphalt mix specified in RBA's revised instructions could not withstand the heavy loads on the road, leading to rutting. Work was then stopped for an extended period while a German laboratory assessed the problem and recommended adding a polymer to the asphalt mix. RBA then took additional time to approve this recommendation and to authorize import of the polymer material.
- (3) The third period, for 16 days, involves delays in determining the design for repairing or replacing 45 culverts in the road.

490. Claimant contends that the Misurata Contract was a construction contract, and that Al Hani's contractual role was not to design the project. For Claimant, the Misurata Contract and other road contracts

were all construction contracts whereby Strabag International/Al Hani was obliged to construct the roads according to the instructions and specifications provided by the RBA/TPB. The design was thus provided by the RBA/TPB: these were not design and build contracts.

Accordingly, when invited to bid for these contracts, Strabag International/Al Hani did so on the basis of the scope of work detailed in the tender documents prepared by the employer, notably the [Bills of Quantities], Technical Specifications, and Method of Maintenance ... Once selected, the contractor was obliged to execute the works that work [sic] in accordance with the scope and specifications contained in the tender documents unless and until the employer instructed it otherwise ...<sup>545</sup>

491. Thus, in the view of Claimant's witness Mr. McDevitt:

Our view has always been and I believe it's supported in our execution of this Contract and also in the document itself that we are not responsible for design. We were not. We were only responsible for construction. And we pointed this out.<sup>546</sup>

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<sup>544</sup> 2<sup>nd</sup> FTI Quantum Report ¶107.

<sup>545</sup> Cl. PHB ¶¶101-102 (footnotes omitted).

<sup>546</sup> TR 2:417:11-15 (Mr. McDevitt).

492. In support of its position, Claimant points to, *inter alia*, a document given to it prior to bidding indicating section-by-section the specific work that was to be done on each portion of the road. Claimant views the maintenance method contained in this document as defining the work it was to perform under the Contract. In direct examination, Mr. McDevitt testified that it formed the basis for Al Hani's pricing of its bid for the job:

My clear understanding of the situation at that time was that the maintenance method formed the basis for the pricing of the offer and the pricing of this work and subsequently became part of the part of this Contract for this Project and was part of the documents thereof.<sup>547</sup>

493. In support of its contention, Claimant draws attention to a March 2007 Addendum to the Misurata Contract, signed by RBA and bearing its seal and official tax stamps, stating *inter alia*, that Al Hani's quote is based on specified documents provided by RBA including "[d]ocuments of a number of Maintenance Categories specifying and quantifying the rehabilitation works."<sup>548</sup>

494. Claimant further maintains that under Article 1 of the Contract, the contractor was contractually bound to carry out the work in accordance with the technical specifications it was given, including the maintenance method.<sup>549</sup>

495. *The First Delay Period.* As described in FTI's First Report, "[t]he scope of the contract work required repairs to be carried out to areas of the carriageway in accordance with the Employer's maintenance and repair scheme, which specified planning, or milling of the road surface, repairing cracks and laying asphaltic concrete to damaged areas."<sup>550</sup> However, according to FTI, on commencement of work:

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<sup>547</sup> TR 2:416:3-8 (Mr. McDevitt).

<sup>548</sup> C-454, Addendum to the Misurata Contract, pp. 2-3.

<sup>549</sup> Cl. PHB ¶105.

<sup>550</sup> 1<sup>st</sup> FTI Quantum Report ¶4.3.6.

[T]he severity of damage to the road exceeded that anticipated by the Employer, rendering the specified repair work inappropriate. Al Hani had no alternative other than to await the Employer's instructions during which time it sourced quarries with sufficient capacity to provide the aggregate for the anticipated additional work. It was not until 25 March 2008 that the Employer carried out an inspection of the road and issued instructions on 1 and 19 April 2008 to amend the contract work by removing and replacing the entire asphaltic wearing course, binder layers and also the base course.<sup>551</sup>

496. Due to additional amendments by the employer to the specifications and scope of the project, Al Hani could not commence work until 30 April 2008, 215 days later than planned.<sup>552</sup> This is the First Delay Period for which Claimant seeks compensation.
497. *The Second Delay Period.* Claimant seeks compensation for a further 288 days of delay, from 18 August 2008 to 1 June 2009, stemming from the need to change the paving mix because the reconstructed road was subject to rutting caused by heavily overloaded trucks.<sup>553</sup> “Al Hani’s view ... was that the period from 18 August 2008 to 1 June 2009 was essentially non-productive, and resulted in the requirement to increase the amount of time required for the works on the road.”<sup>554</sup> Respondent’s Counter-Memorial acknowledges that “[t]hroughout these months, little other work was performed.”<sup>555</sup>
498. The Second Delay Period arose as follows. After receiving RBA’s revised instructions to proceed in late April 2008, Al Hani began reconstruction of the road. However, in August 2008, rutting appeared in two of the reconstructed sections.<sup>556</sup> A 17 August 2008 message from Al-Mamar, the supervising engineer, received the next day, stated that “[a]ll works are stopped” and requested Al Hani “to start searching and studying the reasons of this

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<sup>551</sup> 1<sup>st</sup> FTI Quantum Report ¶4.3.7.

<sup>552</sup> 1<sup>st</sup> FTI Quantum Report ¶4.3.8.

<sup>553</sup> 2<sup>nd</sup> FTI Quantum Report ¶87.

<sup>554</sup> 2<sup>nd</sup> FTI Quantum Report ¶89.

<sup>555</sup> Resp. C-Mem. ¶150.

<sup>556</sup> McDevitt WS ¶52.

matter [the rutting] before the removal operation.”<sup>557</sup> Then, “[o]n August 26, 2008, Al-Mamar further instructed Strabag International to prepare a full study on the maximum loads and other characteristics of the road, as well as a study on the properties of the bitumen being used.”<sup>558</sup>

499. Samples of the bitumen were sent to a lab in Germany, which in November 2008 advised that the asphalt mix specified by RBA was not suitable for the traffic, which involved overloaded commercial vehicles carrying excessive loads. The lab recommended adding a polymer to the paving mix to compensate for poor bitumen quality.<sup>559</sup>
500. A substantial period was then required to obtain a variation order authorizing a change in the paving mix to address the rutting issue,<sup>560</sup> including debates regarding which paving courses should use polymer-modified asphalt and RBA’s demand that Al Hani discount the increased price by 10%.<sup>561</sup> RBA instructed Al Hani to follow the lab’s instructions in part in February 2009, but did not approve import of the material to be used until 1 June 2009.<sup>562</sup>
501. *The Third Delay Period.* The Third Delay Claim involves delays in determining a course of action for 45 badly deteriorated culverts, an issue that had to be resolved prior to paving.<sup>563</sup> Claimant contends that Al Hani identified this issue early in the project, but there was no joint inspection of the culverts until 7 April 2008, after which RBA agreed they should be replaced.<sup>564</sup> This entailed a significant change in the scope of work.<sup>565</sup> Further delays ensued pending RBA’s decision on the design for the new culverts; Al Hani and

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<sup>557</sup> C-468, Letter from Mr. Al-Mamar to Al Hani dated 17 August 2008.

<sup>558</sup> Resp. C-Mem. ¶146.

<sup>559</sup> McDevitt WS ¶¶57-59.

<sup>560</sup> McDevitt WS ¶52.

<sup>561</sup> 1<sup>st</sup> El-Abesh WS ¶¶31-35.

<sup>562</sup> McDevitt WS ¶¶60-62.

<sup>563</sup> McDevitt WS ¶63 et seq.

<sup>564</sup> Cl. Reply ¶¶166-167.

<sup>565</sup> McDevitt WS ¶¶70-71.

RBA each blamed the other for the delays in resolving the design.<sup>566</sup> On 4 January 2009, Al Hani was instructed to proceed on the basis of an earlier design proposed by the consulting engineer. Al Hani did so on 26 January 2009, with the caveat that it would not assume responsibility for the design.<sup>567</sup>

502. Mr. McDevitt's Witness Statement refers to multiple unanswered requests to RBA for guidance regarding the culverts, beginning in December 2007 and culminating in a 17 May 2008 instruction from the engineer to rebuild the culverts using a design provided by RBA.<sup>568</sup> Al Hani responded, *inter alia*, that the RBA design was for culverts of one meter diameter, but ten of the existing culverts were two meters.<sup>569</sup> Difficulties and a substantial correspondence then ensued over several months regarding quality of concrete provided by a local supplier, a request that Al Hani provide designs for the two meter culverts (which was done), and other issues.<sup>570</sup> This sequence concluded with RBA on 4 January 2009 instructing Al Hani to proceed with construction of the culverts based on instruction contained in the engineer's letter of May 2008. Mr. McDevitt understood this to show that "RBA had changed its position regarding our proposals for the 2m culverts."<sup>571</sup>
503. Claimant contends that the period required to settle on the design for the culverts extended for a period of 519 days. However, most of this overlapped with the 503 days claimed for the first and second periods of delay<sup>572</sup> discussed above. Accordingly, this claim is for only 16 days, reflecting the "difference between the total amount claimed for the culverts, 519 days, and the total of the first two claims (503 days)."<sup>573</sup>

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<sup>566</sup> McDevitt WS ¶¶73-79.

<sup>567</sup> McDevitt WS ¶84.

<sup>568</sup> McDevitt ¶¶66-71.

<sup>569</sup> McDevitt ¶71.

<sup>570</sup> McDevitt ¶77.

<sup>571</sup> McDevitt ¶84.

<sup>572</sup> 1<sup>st</sup> FTI Quantum Report ¶4.3.14.

<sup>573</sup> 2<sup>nd</sup> FTI Quantum Report ¶90.

504. RBA agreed to variation orders authorizing additional time for contract performance exceeding the periods claimed in this claim<sup>574</sup> and raising the Contract value for the direct costs of the additional work involved in the changes in scope involved in these three claims. Claimant contends, however, that these did not compensate it for its associated indirect costs of idle facilities, personnel, equipment and the like.
505. Claimant disputes Respondent's contention that Article 5 of the Contract required it to conduct a detailed pre-contracting inspection of the road sufficient to identify the extent of its deterioration and define the remedial work required. In Claimant's view, the nature of any contractor's pre-contracting inspection for a 210 km road project was necessarily limited. Prior to contracting, the contractor did not have free access to the site, nor the time or funding necessary to conduct extensive assessments.<sup>575</sup> In the view of Claimant's witness Mr. McDevitt, Article 5 of the Misurata Contract therefore:

covers your inspection to establish resources and to establish whether there are facilities available. It actually explains what it covers here, availability of workforce, existing plant and equipment, existing sources of materials--all of the things that you need in order to put together a bid for the actual work itself. It does not, in my opinion, extend to including design or evaluation of the design because the time allowed for that is just simply too great.<sup>576</sup>

506. Mr. McDevitt observes that even after signing the Contract and being given access to the site in July 1997:

Strabag International would have carried out the initial visual drive through to see the general condition and so on, yes, but at that stage, we had no--we had no down payment at this point. We didn't get that until September [1997] to mobilize the resources necessary to start all of this. And the Contract, I think, says that it doesn't start until we receive our Advance Payment.

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<sup>574</sup> The precise amount of additional time approved by the Variation Orders is not clear from the evidence. McDevitt WS ¶90. However, it is undisputed that the additional time allowed by the two variation orders exceeds the period of delay involved in this claim.

<sup>575</sup> Cl. PHB ¶110.

<sup>576</sup> TR 2:473:1-10 (Mr. McDevitt).



So, yes, we would have done some general reconnaissance ... as I said earlier, this survey you referred to is purely for construction purposes, not for redesigning the Project.<sup>577</sup>

507. Claimant also denies that Article 7 of the Misurata Contract made Al Hani the guarantor that RBA's designs and specifications were correct. In Claimant's view, Article 7 did not go to the accuracy of the documents provided, but instead "whether the drawings and specifications provided were sufficient for the contractor to carry out the work specified."<sup>578</sup> Mr. McDevitt thus understood this provision to have a limited role: based on its review of the documents, could the contractor determine "is it buildable, basically."<sup>579</sup>

***B. Basis of the Claim: Respondent's Position***

508. Respondent denies liability, maintaining that under the Contract Al Hani, and not the employer, was responsible for determining the nature and extent of required remedial work and the manner to accomplish it. In Respondent's submission, "the contract was signed based on only a rough estimate of the works required for the road,"<sup>580</sup> with responsibility for determining the scope and character of necessary work falling on Al Hani.

509. Respondent explains in this regard that the Misurata Contract was

tendered without a full study of the conditions of the coastal road, the precise maintenance method that would be required, or the quantities that would be necessary for the works. Mr. El-Abesh explained during his cross-examination that "the Coastal road Contracts were not based on technical surveys, and they do not include engineering and technical studies." Rather, the Benghazi and Misrata Contracts were tendered on the basis of a visual inspection only, and the final maintenance method was left subject to Al-Hani's completion of an actual survey of the road in order to quantify the works to be performed under the Contracts.<sup>581</sup>

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<sup>577</sup> TR 2:463:5-18 (Mr. McDevitt).

<sup>578</sup> Cl. PHB ¶113.

<sup>579</sup> TR 2:460:2-4 (Mr. McDevitt).

<sup>580</sup> Resp. C-Mem. ¶131.

<sup>581</sup> Resp. PHB ¶178 (footnotes omitted).

510. Thus, in Respondent's view, the Contract was not a typical construction contract. It was instead in substance a "design and build" contract that gave Al Hani the primary role in surveying the state of the road and determining and proposing the remedial or reconstruction work required. According to Mr. El-Abesh's Second Witness Statement:

[T]he Misrata Contract and all the other Road Contracts was awarded on the basis of an estimated BoQ and general maintenance parameters. The contractor was responsible for proposing the final maintenance method for the road after completing a survey of the works.<sup>582</sup>

511. Mr. El-Abesh affirmed this interpretation of the Contract at the Hearing:

Q. ... after the Contract has been awarded to the successful Contractor, that Contractor would have a greater opportunity to see the areas and plan further; is that correct?

A. It is not a possibility; it is a duty. The Contractor, once he received the site, he has to review all the documents and verify the state of the road, suggest a mode of action, define the true BOQ, the Specifications, the Technical and Engineering Specifications. This is the duty that falls upon the Contractor.<sup>583</sup>

512. Accordingly, in Respondent's submission, all delays in determining the nature and extent of necessary work to repair the Misurata road were the fault of Al Hani and should be at its cost. Respondent advances, in support of this view, interpretations of Articles 5,<sup>584</sup> 7 and 9 of the Contract mirroring those considered *supra* in connection with the Benghazi Contract.

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<sup>582</sup> 2<sup>nd</sup> El-Abesh WS ¶17.

<sup>583</sup> TR 5:1262:8-18 (Mr. El-Abesh).

<sup>584</sup> Article 5 of the Misurata Contract is similar if not identical to Article 5 of the Benghazi Contract. The version in the record reads: "The Second Party [the contractor] hereby attests that, prior to signing this contract, it inspected the job site and the surrounding areas, and acquainted itself with all circumstances that are related to execution of the work or that may affect it, such as the nature of the land, the condition of the soil, the water resources, the weather conditions in the region, the roads, the traffic, and the availability of a workforce, etc. The Second Party shall be deemed solely responsible for the effects and results arising from these factors."

513. Respondent thus maintains that Article 5 of the Misurata Contract made Al Hani responsible for identifying the seriously deteriorated condition of the road and other relevant factors, such as heavy truck loading, prior to signing the Contract. Failure to identify such factors placed the risk of their occurrence on Al Hani. Respondent contends further that under Article 7, Al Hani accepted the correctness of the plans and specifications it received from RBA. If these turned out to be incorrect as both Parties agree they were the ensuing delays were again entirely at Al Hani's risk. Thus, according to Respondent, "[t]he changes in the maintenance method and pavement design fall clearly within Al-Hani's assumption of liability under Articles 5 and 7 of the Contract."<sup>585</sup>
514. Respondent stressed that Article 5 of the Misurata Contract made Al Hani responsible for investigating and accepting "all circumstances" that might affect the work. It thus shifted all risks that such conditions might affect performance of the contract away from RBA and onto Al Hani.

Al-Hani assumed responsibility for any adverse effects that the actual condition of the road could have on the performance of the works. That included severe damage to the road, the traffic load and the effects of inclement weather. Al-Hani, therefore, undertook the risk of any adverse actual conditions by signing the Mirata [sic] contract ..."<sup>586</sup>

515. Given the circumstances of the claim where contractor and employer agreed that the scope of the work to be performed that was provided to the contractor did not reflect realities on the ground Respondent also stresses Article 7 of the Contract.<sup>587</sup> Respondent maintains that, under this provision, "Al-Hani also assumed responsibility for any defects in the drawings and other technical specification 'as though [Al-Hani] had submitted

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<sup>585</sup> Resp. C-Mem. ¶534.

<sup>586</sup> Resp. C-Mem. ¶532.

<sup>587</sup> The text of Article 7 in the record is again similar, if not identical, to the version considered in connection with the Benghazi Contract: "Any error or omission in any description, design or drawing submitted by the First Party, may be corrected at any time. In addition, the Second Party shall personally verify the soundness of the specifications, designs and drawings submitted thereto, and shall notify the First Party, at the appropriate time, of its remarks in regards thereto. If it [i.e. the Second Party] accepts them [i.e. the specifications, designs and drawings], it shall be responsible for them as though it had submitted them."

them.”<sup>588</sup> And, as with the Benghazi Contract, Respondent contends that Article 9 of the Misurata Contract authorizes the employer to change the scope of work by up to 15% without any additional compensation.<sup>589</sup>

516. Respondent also contends, as it did in connection with the Benghazi Contract, *supra*, that a maintenance method specified in RBA’s tender offer was not part of the Contract under Libyan law, and Al Hani had no contractual right to rely on it.<sup>590</sup> The arguments advanced are essentially those advanced in connection with the Benghazi Contract, and will not be repeated here.
517. Respondent further contends that these claims are foreclosed by the terms of RBA’s Variation Order No. 2, which contains language that Respondent contends bars Al Hani’s claims for additional costs due to delay.<sup>591</sup> The arguments are again similar to those advanced under the Benghazi claim.
518. Blackrock, Respondent’s quantification experts, maintain in their First Report that nothing is due in respect of this claim, “primarily because the details provided did not allow proper independent verification of the periods involved, the resources affected and their costs.”<sup>592</sup> Blackrock’s Second Report again maintains that there is no liability, relying on the opinion of Respondent’s expert Mr. Edwin<sup>593</sup> that Al Hani bore responsibility for the claimed delays and losses. Mr. Edwin’s opinion is in turn based on the opinion of Mr. El-Abesh, the head of the TPB. As discussed *infra*, Blackrock’s expert Mr. Osbaldeston maintains that, should the Tribunal find liability, any recovery should be calculated for shorter delay periods and lower daily rates.

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<sup>588</sup> Resp. C-Mem. ¶533.

<sup>589</sup> Resp. C-Mem. ¶58.

<sup>590</sup> Resp. PHB ¶¶170, 174.

<sup>591</sup> Resp. PHB ¶¶ 19, 125; C-79, Misurata Contract, Variation Order No. 2 dated 24 January 2010, Art. 3.

<sup>592</sup> 1<sup>st</sup> Blackrock Quantum Report ¶¶250-252; 2<sup>nd</sup> Blackrock Quantum Report ¶183.

<sup>593</sup> Edwin Critical Path Report ¶110 et seq.

**(2) The Tribunal's Analysis and Decision Regarding the Basis of the Claim**

519. *The Nature of the Contract.* In the Tribunal's view, assessing the significant differences between the Parties regarding Al Hani's responsibility under the Misurata Contract again requires consideration of the Contract's specific terms. Article 1, defining the "Subject of Contract," defines Al Hani's basic obligation:

The 2nd. Party [i.e., Al Hani] committed to execute the works of the project: Maintenance of the Coastal Road, Misurata/ Sirte Sector with all perfection and precision according to the provisions hereunder: technical specifications, drawings, layouts, bills of quantities, price schedules attached herewith and all what is to be agreed for in writing regarding this contract at the specified locations of the aforementioned sector. The 2nd. Party declares that he reviewed all contract documents, the annexes thereof, well understood and based on [these] he accepted contracting and to execute in conformity with [them].

All documents and annexes mentioned above are deemed as indivisible part of this contract.<sup>594</sup>

520. Thus, Article 1 of the Misurata Contract commits Al Hani to perform specified work according to the construction documents provided to it, an obligation echoed in Article 13. There is no mention of an obligation for Al Hani to conduct a detailed survey of the road's condition and on that basis to design and secure the employer's approval of a program to reconstruct it. This is simply not what the Contract says.

521. Article 8, captioned "Project Management & Execution Time Schedule," reinforces this understanding of the Misurata Contract:

The 2nd. Party, within fifteen days as from the date of taking over the site, must present for the 1st. Party a program clarifying the methodology to be followed in the progress of works hereunder, the time schedule to fulfill the work stages, arrangements to be taken during the progress of work, equipment to be supplied for execution, the temporary construction to be established and any others.

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<sup>594</sup> C-869, Misurata Contract (resubmitted).

Moreover, it shall amend this schedule based upon what the First Party deems appropriate and the progress of the work.<sup>595</sup>

522. The Contract thus gives Al Hani just fifteen days to develop its program to carry out the specific work it agreed to perform, clearly too little time to carry out the type of detailed survey and design work described by Mr. El-Abesh as required by the Contract. Article 25, dealing with the calculation of the amounts of monthly claims for payment, again does not conform to Respondent's conception of the Misurata Contract. It provides for monthly computation of work performed based on actual measurement. There is no process or metric for measuring design or engineering work.
523. The Tribunal thus does not believe that the Misurata Contract supports Respondent's characterization of Al Hani's contractual responsibilities. Had RBA intended a contract providing for the contractor to prepare detailed studies and the accurate pre-identification of the maintenance method, it could have done so, as it did in the subsequent Garaboulli Contract.<sup>596</sup> Instead, internal TPB correspondence from 2009 acknowledges that "the maintenance project of the costal road *has been contracted in full and in general* without the preparation of detailed studies and the accurate pre-identification of maintenance method."<sup>597</sup>
524. Respondent contends that Al Hani "knew full well" that it was standard practice of Libya to enter into contracts based on rough estimates and not detailed studies.<sup>598</sup> This, however, is not how this Contract is worded. Moreover, the evidence for this description of Libya's general practice is unconvincing and inconsistent with Mr. El-Abesh's testimony. While he testified that the road maintenance contracts involving Al Hani were not based on technical studies, he stated that this was not true of other road contracts: "As for the other

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<sup>595</sup> C-598, Letter from Al Hani to General Manager of General Technical Affairs Department of TPB dated 2 January 2011.

<sup>596</sup> R-147, Letter from Al Hani to TPB dated 6 December 2010 (transmitting the Garaboulli field study documents for approval).

<sup>597</sup> R-38, Letter from TPB Manager of Technical Affairs to Manager of Financial and Administrative Affairs dated 15 December 2009 (emphasis added).

<sup>598</sup> Resp. C-Mem. ¶531.

contracts, they are numerous, they were concluded with other companies, and they included in the files technical and engineering studies very detailed and sophisticated.”<sup>599</sup> For their part, Claimant’s witnesses clearly did not agree that Al Hani entered into a contract with an undefined scope of work.<sup>600</sup>

525. *Article 5 of the Contract.* The Tribunal explained its understanding of Article 5 in connection with the Benghazi Claim, *supra*, and refers to that discussion in connection with Respondent’s similar contentions here. It notes, however, that testimony at the Hearing reinforces its view of the limited scope of a contractor’s obligations under Article 5 of the Misurata Contract. Mr. El-Abesh acknowledged at the Hearing that a contractor’s pre-contracting inspection was necessarily limited and that the time available “was a few months. You are speaking of a few months, less than a year. About four months, if I recall.”<sup>601</sup> He acknowledged further that any inspection during this period was necessarily limited:

Q. The surveys that were carried out before the award of the Contracts would not be paid for by the Employer, would they?

A. Do you mean the original BOQ that was used for the Contract? Is that what you’re speaking about?

Q. No, I’m talking about any work that was done by a bidder before they were given the Contract. That wasn’t to be paid for, was it?

A. I’m not quite sure I’ve understood the question.

There is no work before the Contract. When there is no contract, there is nothing to be done. Either I haven’t understood you--can you please clarify your question? It’s not clear.

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<sup>599</sup> TR 5:1258:3-7 (Mr. El-Abesh).

<sup>600</sup> *See, e.g.*, McDevitt WS ¶39.

<sup>601</sup> TR 5:1260:4-6 (Mr. El-Abesh).

Q. So, I think you've answered the point that, before the Contract is signed, there is nothing to be done, but I was--you were saying that actually they were to perform some survey?

A. Before signing the Contract, the company doesn't do any work which is paid for. This is normal.

Q. Yes. So, you would expect the Contractor only to do very limited investigations prior to getting a contract, wouldn't you?

A. Yes.<sup>602</sup>

526. *Article 7 of the Contract.* Article 7 of the Misurata Contract figures more significantly in Respondent's arguments here than in the Benghazi claim, where the Claimant expected and intended to proceed on the basis of the maintenance method it received from the employer. The Tribunal is not persuaded, however, that Article 7 shifts to Al Hani all of the risks and costs associated with the shortcomings of the employer's description of the work to be done.

527. The first sentence of Article 7 of the Misurata Contract recognizes that there may be errors or omissions in "any description, design or drawing" provided by the employer, and that these may be corrected. Article 7 thus recognizes that the employer's documents may not be the last word, and that experience may reveal errors or shortcomings. In light of this, the second sentence directs the contractor to verify the soundness of the construction documents it was given, checking them against the physical realities of the project. The evidence shows that this is what Al Hani did at the time of the relevant events, thus, *inter alia*, complying with the "timeliness" requirement in Article 7. It found that the construction documents received from RBA did not match the realities of a badly deteriorated road. It then did as the second sentence requires, notifying the employer of the actual conditions of the road, launching a protracted process of assessment and redesign.

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<sup>602</sup> TR 5:1260:16 – 1261:20 (Mr. El-Abesh).



528. The Tribunal notes in this regard the undisputed testimony of Mr. McDevitt, who indicated that when Al Hani gained access to the job site in July 2007, it began to verify whether the drawings and specifications matched the realities of the road. It then promptly notified the employer of the discrepancies between the “description, design or drawing” and the road’s actual condition. Mr. McDevitt thus told the Tribunal at the Hearing that

if you look at the correspondence, we were notifying them from the 3rd of July forward of things that we were finding in the field.<sup>603</sup>  
[O]n the 3rd of July of that year, we did draw attention to the fact that there were problems with how applicable this maintenance, method of maintenance would be because of the deteriorated condition of the highway or the road. And from that point forward, of course, it eventually ended up that the whole thing had to be changed, and we moved from a maintenance and repair-type project to a complete reconstruction.<sup>604</sup>

529. Thus, the Tribunal does not find Respondent’s interpretation of Article 7 of the Misurata Contract to be persuasive or consistent with the article’s wording, the evidence of the witnesses, or with international practice in the construction industry.

530. The Tribunal therefore rejects Respondent’s defense based on Article 7 of the Contract.

### **(3) Responsibility for the Maintenance Method Provided to the Contractor**

531. Respondent contends that “the parties did not agree on a maintenance method in the Misurata Contract.”<sup>605</sup> As noted *supra*, the documents provided to potential bidders on the Misurata project included a document setting out, section by section, the nature and extent of maintenance work to be carried out on each portion of the road. The specified method generally provided that limited resurfacing and other maintenance work was involved, not a major rebuilding of the road. This document was included among the sealed documents included in the record as part of the Misurata Contract.<sup>606</sup>

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<sup>603</sup> TR 2:459:17-19 (Mr. McDevitt).

<sup>604</sup> TR 2:416:13-21 (Mr. McDevitt).

<sup>605</sup> Resp. C-Mem. ¶529.

<sup>606</sup> C-507, Original Method of Maintenance and Technical Specifications for the Misurata Contract.

532. In the event, however, Al Hani and the employer agreed that the road was substantially more deteriorated than anticipated, and that significant reconstruction was required in lieu of the maintenance method originally communicated to the contractor. The process of assessing the state of the road, deciding on the methods and specifications for rebuilding it, and providing implementing instructions to Al Hani, took many months. During this period, resources mobilized for the project were largely idle, leading to Claimant's First Delay Claim.

533. Respondent contends, however, that the maintenance methods provided to prospective bidders were not part of the Contract and did not define Al Hani's responsibilities thereunder. In the case of the similar document involved in the Benghazi Contract, Mr. El-Abesh testified that these were merely a "description" of the work to be performed:

Q. [T]he tender documents also included information regarding the method of working that you just referred to; didn't they? It's the thin document, I think you said.

A. Yes. This document is an explanation of the different maintenance points. There are designs, drawings when you have to withdraw a layer of asphalt from the road, when you have to grade the surface, how you have to go about repairing, but this is not an official document. That is why we do not consider it is a contractual document. It is not a specification. It's just a description.<sup>607</sup>

534. As evidence that the maintenance method given to bidders had no legal consequences, Respondent again cites provisions of Libya's contracting regulations listing documents deemed to be part of a contract. The import of Respondent's argument is that the employer had no responsibility for delays resulting when the maintenance method it provided to prospective bidders to guide preparation of their bids did not in fact reflect the much more extensive work required.

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<sup>607</sup> TR 5:1267:5-16 (Mr. El-Abesh).

**(4) The Tribunal's Conclusion Regarding Status of the Maintenance Method**

535. The Tribunal does not accept Respondent's contention that the maintenance method given to Al Hani to guide preparation of its bid is contractually irrelevant. This argument is inconsistent with normal business practice and with principles of fairness and good faith governing interpretation and performance of contracts in Libya. An employer cannot in good faith provide prospective contractors with a detailed schema showing the work they are to perform under a contract, and then contend – after a contractor has committed to a project and a price – that its description of the work to be performed is irrelevant, as Respondent seems to contend.
536. In any case, in addition to the evidence previously cited,<sup>608</sup> in response to the Tribunal's request at the Hearing, Claimant provided a fuller copy of the Misurata Contract that includes a copy of the management method document bearing the seal of RBA.<sup>609</sup> Respondent acknowledges that the document was sealed by both parties to the Contract, but contends that it was not signed by the RBA representative and that the absent signature means that “this document and the maintenance method reflected therein were not incorporated into the Misrata Contract.”<sup>610</sup> The Tribunal does not accept this argument, which rests on an unpersuasive technicality.
537. The maintenance method was part of the Misurata Contract and could not be disregarded without consequences. Further, as Claimant points out, even if this were not so, under Article 1 of the Contract, it was obliged to follow the instructions given by the employer, until the employer changed those instructions. Al Hani did not have the right under the Misurata Contract to disregard RBA's guidance defining the work it was to perform.

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<sup>608</sup> C-454, Addendum to the Misurata Contract.

<sup>609</sup> C-868, Misurata Contract (Arabic version).

<sup>610</sup> Resp. PHB ¶176.

**(5) Did the Variation Orders Extinguish Al Hani's Delay Claims?**

538. Respondent next contends that Al Hani waived its Delay Claims when it agreed to the terms of Variation Order Nos. 1 and 2.<sup>611</sup> Respondent's Counter-Memorial cites in this regard item 3 of Variation Order No. 2: "The second party is not entitled to claim any increase in the prices stated in the contract or claim any compensation resulting from the increase in the value of the contract."<sup>612</sup> Respondent also cites Article 99(c) of the Administrative Contract Regulations, which it contends requires this result.<sup>613</sup>

539. Claimant denies that it waived its Delay Claims and disputes Respondent's construction of the quoted language. In Claimant's view, the cited clause does not bar its Delay Claims, but instead "mirrors the provision contained in Article 99 of the Administrative Contracts Regulations that provides that additional works of up to an additional 15% of the contract value will be performed under the contract's original unit rates ..."<sup>614</sup> The Tribunal believes the analogy to the Administrative Contracts Regulations is informative, because it clarifies the significance of the word "prices" plural.

540. Article 99 of the Administrative Contract Regulations provides:

The Contracting Body shall have the right to make amendment modification to the contract object by increase or decrease within the limits of the percentage to be agreed upon in the contract, provided that total amendments shall not exceed (15%) (Fifteen percent) of the original contract value, without any right to the Contractor to claim for any amendment to the prices. The Contracting Body may apply the provisions of paragraph (c) of Article (60) to the value of amendments.<sup>615</sup>

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<sup>611</sup> 1<sup>st</sup> El-Abesh WS ¶22.

<sup>612</sup> Resp. C-Mem. ¶537.

<sup>613</sup> Resp. C-Mem. ¶540.

<sup>614</sup> Cl. PHB ¶166.

<sup>615</sup> Cl. Reply ¶182.

541. Accordingly, the Tribunal does not understand the cited language of the variation orders in the sense contended by Respondent. The first sentence says that the employer has the right to increase or decrease the volume of work to be performed without “any amendment to the prices.” The reference to “prices” – plural – is most reasonably understood, as Claimant contends, to refer to the unit rates set by the Contract, such as the agreed unit prices for materials such as aggregate, bitumen, or cement. This makes practical and commercial sense. A project may increase or decrease in scale to reflect realities on the ground; within the limited range of 15%, the agreed unit rates for the contractor’s inputs remain stable.
542. Indeed, in his Second Witness Statement, Mr. El-Abesh expresses the same understanding of the very similar language of Article 9 of the Misurata Contract, confirming that the reference to “prices” refers to unit rates:

When the value of the required works exceeded the estimated contractual value by less than 15%, Al-Hani was required to perform the works under a variation order using the existing contractual unit rates and did not have the right to change the unit rates for the additional quantities needed for performance.<sup>616</sup>

543. The meaning and relevance of the concluding clause of the cited provision in the Variation Order No. 2: “or claim any compensation from the increase in the value of the contract” is not clear. It is not literally correct, as the Variation Order did in fact authorize additional compensation for Al Hani’s direct costs. It also is not relevant: the present claims are not predicted upon “the increase in the value of the project,” but are for indirect costs allegedly incurred on account of delay.
544. The Tribunal concludes that RBA/TBA’s Variation Orders did not bar or extinguish Al Hani’s claims for damages allegedly resulting from delay.

#### **(6) Analysis of the Three Delay Periods**

545. As summarized in Claimant’s Memorial,

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<sup>616</sup> 2<sup>nd</sup> El-Abesh WS ¶8.

[o]n 12 January 2010, Al Hani submitted to the Secretary of the General People's Committee for Transportation a report detailing the delays caused by the RBA's instructions and the associated costs that Al Hani incurred as a result. Al Hani claimed, in particular, additional costs incurred arising from (a) the revision of the scope of works maintenance contract to a "full scale re-construction"; (b) the RBA's changes to the pavement design; and (c) the need to replace the culverts.<sup>617</sup>

546. Through two variation orders, RBA agreed to compensate Al Hani for the direct costs incurred from the changed maintenance method, the revised technical specification, and the increased culvert work, but the variation orders did not reflect indirect costs resulting from delay.<sup>618</sup> These included costs such as depreciation of equipment that sat idle during periods of delay and costs of maintaining staff during periods of inactivity. In total, Al Hani claims for delay of 519 days related to RBA's alleged failures to respond in a timely way to requests for decisions and instructions, at a daily rate of LYD 36,772/day.<sup>619</sup>

#### **(7) The First Delay Period**

547. Claimant seeks compensation for 215 days during this period, from 28 September 2007 through 30 April 2008.<sup>620</sup>

548. The site was handed over on 1 July 2007, and RBA provided the advance payment in two installments on 5 September 2007 and 10 September 2007.<sup>621</sup> Soon after gaining access to the site, Al Hani wrote to the RBA that "[t]he actual existing pavement condition is far worse than suggested by the Maintenance Methods given in the contract documents."<sup>622</sup> Instead, "a complete pavement renewal would be necessary."<sup>623</sup> Al Hani began some work,

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<sup>617</sup> Cl. Mem. ¶407 (footnotes omitted)

<sup>618</sup> McDevitt WS ¶85 et seq.

<sup>619</sup> McDevitt WS ¶105.

<sup>620</sup> 2<sup>nd</sup> FTI Quantum Report ¶99.

<sup>621</sup> McDevitt WS ¶37.

<sup>622</sup> McDevitt WS ¶39.

<sup>623</sup> McDevitt WS ¶42.

but was instructed by the Engineer (Al-Mamar, RBA's representative at the site) to halt as cracks were discovered affecting the total cross section of the road.<sup>624</sup>

549. Mr. El-Abesh confirms that "in mid-November we instructed Al-Hani to perform the required studies and to determine the actual state of the road. Based on this, Al-Hani was to propose a strategy for the maintenance of the road."<sup>625</sup> Mr. El-Abesh complains that Al Hani's subcontractor was slow in initiating this work.<sup>626</sup> The Tribunal observes in this regard that a detailed survey was not part of Al Hani's original duties under the Misurata Contract, so a certain amount of time would have been required to identify and mobilize resources to carry out the additional work.
550. The method for reconstruction was not finally defined and confirmed for many months. In a 31 January 2008 meeting, RBA confirmed the need for long-term durability and asked Al Hani to propose a new maintenance method. Al Hani did so, but its proposal was not accepted.<sup>627</sup> On 6 March 2008, Al Hani wrote to the RBA stating that they had not received instructions on how to proceed. A joint site inspection did not occur until 25 March 2008.<sup>628</sup> Subsequent letters to RBA in April 2008 again cited the lack of instructions on how to proceed.<sup>629</sup>
551. According to Mr. El-Abesh, "on April 1, 2008 Al-Mamar [the supervising engineer] approved the method of maintenance for the first 35 km section of the road,"<sup>630</sup> but later that month Al-Mamar, ordered additional changes. Al-Mamar then confirmed the approved method in a letter dated 7 May 2008.<sup>631</sup> The changed method required significantly increased quantities of materials, including large quantities of additional aggregates

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<sup>624</sup> McDevitt WS ¶43.

<sup>625</sup> 1<sup>st</sup> El-Abesh WS ¶27.

<sup>626</sup> 1<sup>st</sup> El-Abesh WS ¶28.

<sup>627</sup> McDevitt WS ¶44.

<sup>628</sup> Cl. Reply ¶157.

<sup>629</sup> McDevitt WS ¶46.

<sup>630</sup> 1<sup>st</sup> El-Abesh WS ¶29.

<sup>631</sup> McDevitt WS ¶48.

different from those previously specified. In Claimant's view, this "resulted in substantial prolongation and loss of productivity along with substantial delay to the completion of all activities."<sup>632</sup> Claimant further contends that "this initial period was largely abortive."<sup>633</sup>

552. At the Hearing, Mr. McDevitt testified to the great impact of the change in the work to be performed by Al Hani:

It changed from being a selective repair and maintenance to being a total reconstruction. That is the radical change that we're talking about. That means — has ramifications in many ways — vastly increased quantities of materials and so on.<sup>634</sup>

553. Mr. El-Abesh agreed at the Hearing that the revised maintenance method was approved in April 2008 and Variation Order No. 1 formally recording the employer's changed instructions was issued later in 2008.<sup>635</sup> The RBA subsequently agreed in Variation Order No. 2 to authorize the additional materials required,<sup>636</sup> but did not compensate Al Hani for time-related depreciation and other delay costs.<sup>637</sup>

#### **(8) The Tribunal's Assessment of the First Delay Period**

554. In addition to its arguments involving interpretation of the Contract, Respondent contends that delays related to the Misurata Contract reflected lack of competence and effort on the part of Strabag/Al Hani:

The lack of technical expertise from Strabag International's staff, including its engineers, coupled with the insufficiency of its equipment strategy, posed major obstacles to its performance. As explained below, Strabag International had trouble meeting its scheduled obligations and had issues with quality, something unexpected from a company representing itself as having "more than 170 years of experience" in "80 countries."<sup>638</sup>

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<sup>632</sup> McDevitt WS ¶49.

<sup>633</sup> McDevitt WS ¶50.

<sup>634</sup> TR 2:471:4-9 (Mr. McDevitt).

<sup>635</sup> TR 5:1297:5-19 (Mr. El-Abesh).

<sup>636</sup> TR 5:1298:3-7 (Mr. El-Abesh).

<sup>637</sup> McDevitt WS ¶51.

<sup>638</sup> Resp. C-Mem. ¶130.



555. The Tribunal does not believe that the evidence supports Respondent’s characterization, which is difficult to reconcile with HIB’s subsequent decision to enter into the extremely large Tajura Contract with Al Hani. In the Tribunal’s view, the evidence shows that Al Hani mobilized with appropriate dispatch, but then encountered a situation fundamentally different from that reflected in the terms of the Contract. This resulted in several months of severely limited activity as Al Hani carried out the detailed assessment of the road as instructed by RBA in November 2007 and then awaited RBA’s revised instructions regarding the work to be done. FTI concludes that “very little work could be accomplished during this period, and what work was performed was largely abortive.”<sup>639</sup>
556. The Tribunal finds that Claimant has established that Al Hani is entitled to recover its indirect costs stemming from the delay incurred during this period.
557. *Quantification of the First Delay Claim.* In a submission to RBA dated 31 October 2010, Al Hani submitted its claim for delay and an additional LYD50,000 for culvert design work. The total claimed was LYD19,134,893, an amount that FTI concluded “in principle is reasonable.”<sup>640</sup> This submission included a detailed schedule of monthly costs for wages, equipment, running costs, and other time-related expenses. The total monthly costs were divided by 30 to give a daily rate of LYD36,772,<sup>641</sup> the rate used to calculate the amount of all three components of this claim.
558. The evidence of Respondent’s quantification experts does not assist the Tribunal in assessing the amount of the First Delay Period Claim. Mr. Edwin, Respondent’s “critical path” expert, accepted Mr. El-Abesh’s legal interpretations of Al Hani’s duties under the Misurata Contract and Respondent’s interpretation of Article 7, concluding that no compensation was due.<sup>642</sup> As noted, the Tribunal rejects both of these premises.

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<sup>639</sup> 2<sup>nd</sup> FTI Quantum Report ¶100.

<sup>640</sup> 1<sup>st</sup> FTI Quantum Report ¶4.3.28.

<sup>641</sup> 1<sup>st</sup> FTI Quantum Report ¶¶4.3.26-4.3.28.

<sup>642</sup> 2<sup>nd</sup> Blackrock Critical Path Report ¶¶66-68.

559. Blackrock's First Quantum Report by Mr. Osbaldeston is similar. Mr. Osbaldeston also accepts Respondent's interpretation of Al Hani's obligations under the Contract,<sup>643</sup> further suggesting that some progress was made during the delay period.<sup>644</sup> FTI finds this analysis "flawed" and "wrong," contending that the evidence cited by Mr. Osbaldeston relates to a sector of the road that is not subject to the Delay Claim.<sup>645</sup> Mr. Osbaldeston objects as well to the lack of detailed designs and specifications for the changed work, plant records, and the similar detailed substantiation of the amounts claimed, leading him to conclude that "I am unable to value this claim."<sup>646</sup>
560. Mr. Osbaldeston's Second Report is similar. He again values the claim at "nil," based on the opinion of Mr. Edwin, who in turn relied upon Mr. El-Abesh's evidence interpreting the Contract. Thus, Mr. Osbaldeston concludes: "I value this at NIL. My assessment is based on the findings of Mr. Edwin that the delay resulted from Al Hani's failure to undertake its survey and to propose the method of maintenance in a timely manner."<sup>647</sup>
561. While Mr. Osbaldeston regarded this portion of the claim as having a value of "nil," he did accept that some limited Delay Claims might be justified, and posited a daily rate of LYD9,127 for these, referring to Annex 4.2 of his Second Report as substantiating this figure. Annex 4.2 is a detailed Excel spreadsheet that lacks explanatory narrative. It does not clarify to the Tribunal the basis for Mr. Osbaldeston's estimated daily rate.
562. The Tribunal addresses the applicable daily rate below. As to the length of the delay, Claimant seeks compensation for 215 days of delay from 28 September 2007 through 30 April 2008.<sup>648</sup> Mr. El-Abesh appears to agree that there was delay from September 2007 to April 2008, although he places the blame for the delay on Al Hani.<sup>649</sup> Given Mr. El-

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<sup>643</sup> See, e.g., 1<sup>st</sup> Blackrock Quantum Report ¶236.

<sup>644</sup> 1<sup>st</sup> Blackrock Quantum Report ¶¶235, 239.

<sup>645</sup> 2<sup>nd</sup> FTI Quantum Report ¶100.

<sup>646</sup> 1<sup>st</sup> Blackrock Quantum Report ¶252.

<sup>647</sup> 2<sup>nd</sup> Blackrock Quantum Report ¶184.1.

<sup>648</sup> 2<sup>nd</sup> FTI Quantum Report ¶99.

<sup>649</sup> 2<sup>nd</sup> El-Abesh WS ¶26.

Abesh's evidence, the Tribunal accepts 28 September 2007 through 30 April 2008 a period of 215 days, as claimed by Claimant as the length of the First Delay Period.

**(9) The Second Delay Period**

563. The difference between the Parties with respect to the Second Delay Period essentially concerns responsibility for rutting identified in the road in August 2008, after work got underway following the First Delay Period. The rutting led the supervising engineer to instruct a halt in the work pending clarification of its cause. Analysis showed that the rutting was due to use of a prescribed asphalt mix that could not withstand the weight of heavily overloaded trucks in summer heat.
564. Respondent contends that Al Hani was contractually obliged to conduct a survey that would have identified that trucks on the Misurata road were often overloaded, and the rutting proved that Al Hani had failed to conduct a proper survey. Respondent refers in this respect to its contentions regarding Article 5 of the Contract:

Al-Hani reported that the changes in the maintenance method were due to the severity of the damage to the road, and that the change in the pavement design was due to heavier traffic than anticipated and that the material used to repair the road was especially vulnerable to rutting in the presence of high ambient temperature. Both of these factors, i.e., traffic and weather conditions, are expressly within Al-Hani's assumed liability under Article 5 of the Contract.<sup>650</sup>

565. Thus, according to Mr. El-Abesh:

[I]t was Al-Hani's responsibility to perform a proper survey of the road, including traffic load. If, as claimed by Al-Hani in October 2010, the rutting was being caused by higher than anticipated traffic load, any delays caused by the required change in the asphalt mix to address that problem can only mean that Al-Hani did not perform an adequate survey in the first place. Had Al-Hani calculated the traffic load properly, no rutting would have appeared and no necessary corrective action would have been required.<sup>651</sup>

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<sup>650</sup> Resp. C-Mem. ¶534.

<sup>651</sup> 1<sup>st</sup> El-Abesh WS ¶36.

566. Mr. El-Abesh added that once the rutting occurred, it was Al Hani's responsibility to identify the proper mix formula to correct it, and that Al Hani was slow in doing so:

It took Al-Hani several months to present the necessary studies and to prepare and propose the mix formula for the project. Neither RBA nor Al-Mamar could give any new instructions without these. Therefore, it is very surprising that Claimant now brings a claim for delay when it was Al-Hani that caused these delays.<sup>652</sup>

567. For its part, Claimant contends that “the rutting was due to the out of date and inadequate pavement design specification for the traffic loadings and the poor quality of the available bitumen.”<sup>653</sup> Mr. McDevitt stated that on 13 December 2007, RBA provided the Technical Specifications that Al Hani was to follow in its work;<sup>654</sup> RBA's cover letter referred to the Misurata Contract and stated that the specification were provided “for compliance and successful implementation.”<sup>655</sup> The Technical Specifications document stated that a paving mixture created pursuant to the specifications it contained “may be considered satisfactory for heavier [traffic loads] if [that] occurs.”<sup>656</sup> The rutting showed that RBA's Technical Specifications were not correct in this crucial regard, leading Mr. McDevitt to conclude:

The fact that the Project faced delays because the outdated prescribed Maintenance Method and Technical Specifications needed to be revised to cope with the actual state of the roadway was the responsibility of the RBA and not Al Hani as Mr. El Abesh suggests.<sup>657</sup>

568. Respondent does not dispute that RBA provided Al Hani with detailed specifications for the work it was to perform. Exhibit C-454 is an Addendum to the Misurata Contract signed and sealed by RBA specifying that Al Hani's offer was predicated in part on Libya's “General Technical Specifications Book for Road Construction.” The December 2007 version of the specifications given to Al Hani appears to be a limited revision of these.

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<sup>652</sup> 1<sup>st</sup> El-Abesh WS ¶37.

<sup>653</sup> McDevitt WS ¶52.

<sup>654</sup> McDevitt WS ¶53.

<sup>655</sup> C-509, Letter from RBA dated 13 December 2007, p. 1.

<sup>656</sup> C-509, Letter from RBA dated 13 December 2007, p. 53.

<sup>657</sup> McDevitt WS ¶62.

Respondent does not contend that Al Hani failed to comply with RBA's specifications. Instead, Respondent's argument seems at its core to be that the Contract required Al Hani's duty to identify the inadequacy of RBA's specifications in light of existing conditions and to propose an alternative.

569. The Tribunal addressed *supra* and in connection with the Benghazi claim Respondent's contentions regarding Articles 5 and 7 of the Contract. In the Tribunal's view, Respondent's reliance on those articles here does not accurately reflect Al Hani's duties under the Contract. Under Article 1, Al Hani agreed to work in accordance with the specifications it was given. There is no claim that it failed to do so. The Tribunal does not accept Respondent's contention that the Contract also required Al Hani to identify shortcomings in those specifications and to conduct the engineering work required to identify how RBA should change them.
570. It is also clear from the record that, after a recommended solution was identified following laboratory tests in Germany, many months elapsed as RBA assessed the solution, negotiated with Al Hani over price and details of application of the recommended polymer, and finally approved procurement of the required material so that work could resume.
571. Al Hani claims that it encountered 288 days of delay as the solution for the rutting was identified and as RBA considered and eventually authorized the solution. Claimant contends that this period "from 18 August 2008 to 1 June 2009 was essentially non-productive, and resulted in the requirement to increase the amount of time required for the works on the road."<sup>658</sup>
572. The Tribunal concludes on the basis of the evidence that Al Hani is entitled to recover its indirect costs resulting from this period of 288 days of delay. The Tribunal considers *infra* the appropriate daily rate to be used in assessing compensation for this delay.

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<sup>658</sup> 2<sup>nd</sup> FTI Quantum Report ¶189.

**(10) The Third Delay Period**

573. As summarized *supra*, Claimant contends that early in the project, Al Hani identified the need to repair or replace 45 culverts. However, there was no joint inspection of the culverts until 7 April 2008, after which RBA agreed they should be replaced,<sup>659</sup> leading to additional changes to the scope of work<sup>660</sup> and further delays pending RBA's decision on the new culverts' design. Mr. McDevitt's Second Witness Statement refers to multiple unanswered requests to RBA for guidance regarding the culverts, beginning in December 2007 and culminating in a 17 May 2008 instruction from the engineer to rebuild the culverts using a design provided by RBA.<sup>661</sup> Al Hani responded, *inter alia*, that the RBA design was for culverts of one meter diameter, but ten of the existing culverts were two meters.<sup>662</sup> Difficulties and a substantial correspondence then ensued over several months regarding quality of concrete provided by a local supplier, a request that Al Hani provide designs for the two meter culverts (which was done), and other issues.<sup>663</sup> This sequence concluded with RBA on 4 January 2009 instructing Al Hani to proceed with construction of the culverts based on instruction contained in the engineer's letter of May 2008.<sup>664</sup>

574. Mr. El-Abesh's understanding of this complicated course of events is different. In his view:

The supposed design problems to which Mr. McDevitt refers pertained to 8 culverts only, and these were required to be designed by Al-Hani. Al-Hani took roughly four months to submit its full designs for those 8 culverts, and only provided its commercial proposal for these culverts on November 13, 2008. Thus, it is clear that it was Al-Hani itself that delayed the completion of these culverts.

Even if it were true that RBA was responsible for the design and that the J&P design was provided to Al-Hani for the 8 culverts, under Article 7 of the Misrata Contract Al-Hani is deemed to be responsible for the designs as if it had submitted them.<sup>665</sup>

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<sup>659</sup> Cl. Reply ¶¶166-167.

<sup>660</sup> McDevitt WS ¶¶70-71.

<sup>661</sup> McDevitt WS ¶¶66-71.

<sup>662</sup> McDevitt WS ¶71.

<sup>663</sup> McDevitt WS ¶77.

<sup>664</sup> McDevitt WS ¶84.

<sup>665</sup> 2<sup>nd</sup> El-Abesh WS ¶¶34-35.

575. The Tribunal has previously rejected Respondent's interpretation of Article 7 of the Misurata Contract. It also finds Mr. El-Abesh's response to Mr. McDevitt's chronology of complaints insufficient to rebut a chronicle of slow responses and slow decision-making in RBA regarding the culverts.
576. Claimant contends that the period required to settle on the design for the culverts extended for 519 days. However, most of this overlapped with periods involved in its First and Second Delay Claims. Accordingly, this claim is for only 16 days, reflecting the "difference between the total amount claimed for the culverts, 519 days, and the total of the first two claims (503 days)."<sup>666</sup>
577. The Tribunal finds Respondent responsible for an additional 16 days of delay related to the culverts. The Tribunal considers below the daily rate to be applied in determining damages for the three delay periods.

#### **(11) The Daily Rate**

578. The Tribunal thus finds in favor of Claimant's claim for compensation for 519 days of delays in the Misurata project on account of various instances in which the scope of work under the Contract had to be revised and the employer did not provide timely and appropriate directions. Claimant seeks compensation for this delay at the rate of LYD36,772/day.<sup>667</sup> This figure is therefore significant in assessing the amount of compensation that may be due.

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<sup>666</sup> 2<sup>nd</sup> FTI Quantum Report ¶90.

<sup>667</sup> McDevitt WS ¶105; RH-15, Blackrock Quantum Hearing Presentation, p. 17.

579. Al Hani's calculations for determining the daily rate are in Annex 2 of a submission sent to the Secretary of the General People's Committee for the Implementation of Communications Projects dated 31 October 2010.<sup>668</sup> This lists, *inter alia*, a monthly charge of LYD400,000 for depreciation of equipment; LYD259,100 for salaries, taxes and insurance; LYD233,200 for wages and food for 320 local and third-country employees; and LYD46,900 for running costs, rentals and maintenance at site. The subtotal of expenses is then increased for 5.25% for "Finance Cost," 3.5% for "Local Overhead," and 6.5% for "Overseas overhead."

580. The amounts claimed in Annex 2 were not analyzed by Claimant's quantification experts at FTI. They instead built up alternative daily rates based on the available evidence that in aggregate exceeded the rate claimed by Claimant,<sup>669</sup> leading FTI to conclude that the claimed rate was reasonable. FTI's First Quantum Report further observed:

[I]n respect of each claim, we have reviewed the basis of claim and discussed with Strabag employees the methodology adopted by Al Hani to calculate the costs incurred by it. In our view as construction experts, the claims made by Al Hani are reasonable in principle, as is the methodology adopted by Al Hani to determine the amounts that it has claimed.<sup>670</sup>

581. Blackrock's quantification expert Mr. Osbaldeston did not engage with this figure in his First Quantum Report, finding insufficient supporting records to assess any portion of the amounts claimed.<sup>671</sup> His Second Report concludes that there was no liability because Al Hani did not meet its contractual obligations.<sup>672</sup> However, this report appears to accept the possibility that compensation for a limited number of days of delay might be justified. In that case, Mr. Osbaldeston posits daily rates of variously LYD9,018 for the initial period of change in scope and LYD9,127 for the period of delay on the culverts.<sup>673</sup>

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<sup>668</sup> C-127, Letter from Al Hani to Secretary of IBCP, p. 18.

<sup>669</sup> CH-3, FTI Quantum Hearing Presentation, p. 23.

<sup>670</sup> 1<sup>st</sup> FTI Quantum Report ¶2.2.3.

<sup>671</sup> 1<sup>st</sup> Blackrock Quantum Report ¶252.

<sup>672</sup> 2<sup>nd</sup> Blackrock Quantum Report ¶184.1.

<sup>673</sup> 2<sup>nd</sup> Blackrock Quantum Report ¶¶197, 203.



582. Mr. Osbaldeston's analysis in his Second Report of the daily rate claimed by Claimant is not clear to the Tribunal. His Annex 4.2 is a dense spreadsheet with no accompanying clarifying narrative. Mr. Osbaldeston expresses a clearer view where he suggests that the claimed costs for delay might have been, at least in part, already recovered through Payment Certificates. However, the Tribunal disagrees. Payment Certificates only remunerate physical works progressively executed, measured and priced by multiplying unit rates for relevant quantities. They cannot cover for idle time costs.
583. Mr. Osbaldeston was also unclear when invited by Tribunal Members to clarify his view on the matter.<sup>674</sup> In criticizing Claimant's BRVZ accounting system used in this and other claims, he expressed "concerns" as to whether the daily rates applied to recover prolongation costs reflected "actual costs incurred," an issue "that raises an alarm bell for me." He also seemed to have misunderstood elements of the claim, referring to the possibility that Claimant included risks allowances, rather than costs incurred. This is contradicted by Claimant's list of cost items provided to the IBCP on 31 October 2010.<sup>675</sup> Each item unquestionably refers to actual costs already incurred; there is no risk allowance for future events.

**(12) The Tribunal's Analysis and Decision Concerning the Daily Rate and Compensation Due**

584. The Tribunal is faced with the following situation: Respondent's primary defense to this claim is that time-related costs resulting from delays were, under the Contract, risks undertaken by Claimant, a position the Tribunal does not accept. Respondent's expert disputes the daily rate claimed, primarily with questions and expressions of skepticism that do not materially assist the Tribunal. For their part, Claimant's experts endorse "as construction experts" the validity of Al Hani's methodology in calculating the costs incurred, but do not assess the specific amounts claimed, instead developing their own hypothetical aggregate daily rate higher than the rate claimed by Al Hani.<sup>676</sup>

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<sup>674</sup> TR 10:2357:17 – 2364:22 (Mr. Osbaldeston).

<sup>675</sup> C-127, Letter from Al Hani to Secretary of IBCP, Annex 2.

<sup>676</sup> CH-3, FTI Quantum Hearing Presentation, p. 23.

585. The Tribunal is thus left with the task of evaluating the quantum of the present claim using its own discretion and understanding of the factual and documentary evidence on the record. Al Hani's detailed (114-page) explanation of the amount claimed at Exhibit C-127 provides much useful information; References 6 through 21 of that document show that Respondent and Al Hani attended several meetings and shared continuing written exchanges during 2008 and 2009 in order to define the specific design parameters needed to remedy the insufficient tender data or inadequate specifications to allow the work to proceed. The evidence shows that the Respondent's essential approvals of the engineering solutions finally adopted were constantly late, a recurring cause of delays.
586. The file also reflects several joint site inspections made by Respondent and Al Hani. The Tribunal infers that Respondent therefore could not be unaware of the continuing presence at site of Al Hani's resources, principally construction materials, equipment and personnel, during the long non-working periods. Respondent was thus in a position to assess from the observations of RBA's personnel whether the daily rate claimed by Claimant was appropriate or not, but there is no indication that it made any effort to do so. The Tribunal further notes that Claimant's witness Mr. McDevitt attended all meetings and inspections of 2008 and 2009 and thus has detailed direct personal knowledge of the relevant circumstances. The Tribunal must give appropriate weight to his testimony, in particular to his statement whereby "we calculated the total site costs incurred during these delays for general site overheads, staff salaries, labour wages, plant and equipment, financing charges and head office overheads at a rate of LYD36,772.433 per day, resulting in an overall cost of LYD19,134,892."<sup>677</sup>
587. The Tribunal finds that the list of Al Hani's claimed delay costs in Annex 2 of Exhibit C-127 depicts logically and correctly a construction site and the principal cost items. The Tribunal sees no inconsistency or apparent disproportion in the amounts attributed to each item, and any discount or modification of specific items by the Tribunal would prove arbitrary in the absence of any better evidence. The costs in the breakdown in Annex 2 do not appear excessive, given the dimension of the site in question, the significant number of

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<sup>677</sup> McDevitt WS ¶105.

workers and employees, the magnitude of materials, plants and equipment imported to Libya, and the corresponding financing disbursements. Notwithstanding Mr. Edwin's evidence questioning the extensions, the amount of time actually approved by the employer is not disputed. The costs listed at that time total LYD1,103,173.<sup>678</sup>

588. The Tribunal therefore accepts the daily rate calculated by Al Hani reflected in Annex No. 2, except for the two overhead items, namely "local" and "overseas" overhead. First, overheads generally include a profit component, and are indeed used to build up a new price, not to determine the amount of a pure cost. Second, parts of the local overheads are already accounted for in the site running costs. Third, the Tribunal does not accept that the so-called overseas overheads, apparently incurred by Claimant, should be considered in the present context. The Tribunal presumes that its Austrian headquarters expenses, usually compensated through overheads, were not overburdened due to the suspensions and resulting delays in Libya.
589. Accordingly, the Tribunal deducts from the claimed monthly costs in Annex No. 2 the amounts of LYD33,502.00 for local overheads and LYD62,218.00 for overseas overheads, in total LYD95,720, leaving a monthly cost of LYD1,007,453. The daily rate awarded by the Tribunal is therefore LYD33,582. (LYD1,007,453: 30 = LYD33,582).
590. Applying this daily rate to the 519 days claimed by Claimant results in a total of approximately LYD17,429,000. According to FTI's Second Report, Annex 2, paragraph 3 of the Misurata Contract establishes LYD1.72/€1 as the applicable exchange rate under the Contract.<sup>679</sup> Applying this rate, the amount due for this claim equals €10.133 million. The Tribunal awards this amount in respect of the Misurata claim pursuant to Article 8(1) of the Treaty.

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<sup>678</sup> C-127, Letter from Al Hani to Secretary of IBCP, p. 18.

<sup>679</sup> 2<sup>nd</sup> FTI Quantum Report ¶33(C).

**I. CLAIMS 4 AND 5, PART III. TAJURA CONTRACT: INTRODUCTION AND FIRST DELAY CLAIM**

**(1) Introduction: The Claims**

591. Pursuant to Article 8(1) of the Treaty, Claimant also seeks substantial amounts for additional uncompensated costs incurred and work performed under the Tajura Contract. The Tajura project was by far the largest project undertaken by Al Hani in Libya. It involved extensive design and construction work in connection with a major urban development in Tajura, a city roughly 20 km from Tripoli.<sup>680</sup> As described by Respondent's witness Mr. Baryon at the Hearing, "[i]ndeed, the Tajura Work was very complex. It covered roads, main water network, sewage network, and traffic design, so it was a huge Project ..."<sup>681</sup>

592. Claimant seeks payment in respect of several payment certificates that were approved by HIB's representative but were not paid. These claims are addressed *supra*, in connection with Strabag's claims for unpaid payment certificates and need not be considered here. In addition, Claimant makes two claims for delay-related losses and a third for additional unpaid work in connection with the Tajura project and certain emergency road repairs. As quantified in the presentation of Claimant's valuation expert at the Hearing,<sup>682</sup> Claimant seeks:

- €8,716,301 for indirect costs related to the delayed commencement of work following conclusion of the contract;
- €16,220,240 for additional indirect costs caused by delays after notice to proceed was given in June 2009; and

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<sup>680</sup> 1<sup>st</sup> Baryon WS ¶9.

<sup>681</sup> TR 6:1502:15-17 (Mr. Baryon).

<sup>682</sup> CH-3, FTI Quantum Hearing Presentation, p. 23. RH-15, Blackrock Quantum Hearing Presentation, gives the corresponding amounts in Libyan dinars (LYD). The two experts' figures appear consistent at an exchange rate of LYD1.796 = 1€.

- €6,341,831 for work performed, but not compensated pursuant to HIB's Requests for Proposals ("RFPs") Nos. 4 and 8, and for emergency repair work on the 11<sup>th</sup> of June Road leading to Tripoli's International Airport late in 2009. (Although the road repair work was not in the Tajura area, payment for emergency repairs on the 11<sup>th</sup> of June Road was "rolled into" HIB's Tajura project for administrative purposes.)

## (2) The Tajura Contract

593. Al Hani and HIB initially signed the Tajura Contract at an inaugural ceremony on 26 November 2007. Following delays that apparently included slow demobilization by an incumbent contractor<sup>683</sup> and review and revision of the initial Contract by REKABA,<sup>684</sup> the revised Tajura Contract was then signed on 18 May 2008.<sup>685</sup> It established a global price of approximately LYD780 million.<sup>686</sup>
594. Article 1 of the Tajura Contract commits Al Hani to "execute the integrated utilities project for the city of Tajura, including execution of the water, sewage and rainwater drainage networks, the pumping stations, the sanitation water collection tanks, the upper water tank, the filtration tanks, as well as the road, pavement and street light networks." Clause "d" of Annex 1A specifies "[t]he execution and detailed design will be based on the VEGAWERK [sic] design." Clause "f" of that Annex specifies that "[t]he stormwater network will be based on seepage tanks execution confirmation will be after soil investigation and study."<sup>687</sup>

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<sup>683</sup> 1<sup>st</sup> FTI Quantum Report ¶4.6.4.

<sup>684</sup> Cl. PHB ¶172 (a); C-149, NJS Report (December 2010), p. 2.

<sup>685</sup> Cl. Reply ¶223.

<sup>686</sup> C-27, Tajura Contract.

<sup>687</sup> C-27, Tajura Contract, p. 28.

595. The “Particular Conditions” in Annex IB of the Tajura Contract include, *inter alia*, Condition 4 addressing payment for “the completion of the FEGA WERK design and modified version of the Storm Water Network with Seepage Reservoirs ...”<sup>688</sup> Condition 6 defines the scope of work to include “Completion of the FEGA WERK design and detailed design” and “Modified version of the Storm Water Network with Seepage Reservoirs.”<sup>689</sup>
596. Clause 16 of Annex IB provided: “In the unlikely event of a delay to the Works by the First Party, the Second Party shall be entitled to extension of time for the Contract Period and the Second Party entitle to claim compensation according to law regulations.”<sup>690</sup>
597. Pursuant to Article 7 of the Contract, Al Hani was to verify the soundness or omissions in Fegawerk’s design, propose to HIB variations or alterations to make the preliminary design workable, and wait for HIB’s approval before performing the authorized variations.
598. HIB appointed two supervising engineers to oversee Al Hani’s performance of the Contract. One was AECOM Libya Housing and Infrastructure, Inc., the Libyan subsidiary of the American firm AECOM. AECOM was appointed by HIB to provide technical and managerial oversight for all of HIB’s projects in Libya. The second was the Japanese consulting firm NJS Consultants Limited (“NJS”), which was responsible for engineering supervision in the Tajura project.
599. The work initially specified in the Contract was to be increased over time pursuant to several RFPs for additional design and construction work.<sup>691</sup> RFP I related to a project that was cancelled. As discussed *infra*, additional work pursuant to RFPs 2, 3, 5, and 6 was eventually incorporated into Modification Order No. 2 (“MO 2”).<sup>692</sup>

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<sup>688</sup> C-27, Tajura Contract, p. 30.

<sup>689</sup> C-27, Tajura Contract, p. 31.

<sup>690</sup> C-27, Tajura Contract, p. 34.

<sup>691</sup> 1<sup>st</sup> Baryon WS ¶10.

<sup>692</sup> C-617, Tajura Modification Order No. 2 (“MO 2”).

### (3) The First Delay Claim

#### *A. Introduction: Factual Background*

600. As presented by Claimant's quantification experts from FTI at the Hearing, Al Hani seeks €8,716,301 for costs related to the delayed commencement of work on the Tajura project.<sup>693</sup>
601. The basic design for the project was developed by a Swiss firm, Fegawerk. As noted above, the Tajura Contract provided that Al Hani was to complete the Fegawerk design, and prepare a more detailed design based on that design. Al Hani was also to design a "Storm Water Network with Seepage Reservoirs" and 48 km of roads and street lighting.<sup>694</sup>
602. Initial site handover occurred on 7 October 2008. The initial 75% of the advance payment was paid on 25 October 2008, with the balance paid on 5 March 2009.<sup>695</sup>
603. The evidence indicates that Al Hani began work on the project even before the second signing of the Contract in May 2008, including site preparation, identifying vendors and quarries, mobilizing personnel and equipment, and beginning review of the design documents.<sup>696</sup> It also reviewed the Fegawerk basic design documents, which were revised in response to Strabag's comments.<sup>697</sup> According to a December 2010 Report by NJS, Respondent's supervising engineer, "the Contractor commenced work on his site installation area on 3<sup>rd</sup> June 2008 and held a design issues presentation on 1<sup>st</sup> July 2008 despite the fact that Notice to Proceed was not issued until 1 year later on 24<sup>th</sup> June 2009."<sup>698</sup>

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<sup>693</sup> CH-3, FTI Quantum Hearing Presentation, p. 22.

<sup>694</sup> Cl. Reply ¶224.

<sup>695</sup> 1<sup>st</sup> FTI Quantum Report ¶4.6.6.

<sup>696</sup> Cl. Reply ¶223; Döhring WS ¶¶7-8.

<sup>697</sup> Cl. Reply ¶227

<sup>698</sup> C-149, NJS Report (December 2010), p. 3.

604. According to the First Consolidated Monthly Report prepared by NJS for the period August 2008 to March 2009, “[c]ontractor has fully mobilized in anticipation of fast start of construction.”<sup>699</sup> According to Claimant’s witness Mr. Döhring, Al Hani’s Tajura Project Manager at Tajura during this period:

[A]t the outset of the project, we took the basic design drawings prepared by Fegawerk, including for the water supply and the sewerage network, then worked to modify and complete them, and prepare the detailed design on the basis of the Fegawerk design. We provided to the HIB a detailed presentation in which we reported on the design for the project (including both the Fegawerk design and the design that we and [a sub-contractor] had prepared). We also started activities on the project, including on the road works and water supply, both of which were based on the original Fegawerk basic design.<sup>700</sup>

605. During this period, again according to NJS’s First Consolidated Monthly Report, “[i]t is apparent that the Contractor anticipated very little design modification and has indicated that he expected to confirm and construct the Fegawerk designs without modification.”<sup>701</sup>

606. As noted *supra*, the Tajura Contract specified that Al Hani was to work on the basis of the basic Fegawerk design. However, at some point in 2008, HIB and AECOM decided to utilize a different set of national design criteria developed by AECOM to harmonize all of HIB’s infrastructure projects in Libya.<sup>702</sup>

607. In November 2008, NJS gave Al Hani a CD containing the new AECOM design criteria, but the CD was not accompanied by any clear direction regarding the new criteria.<sup>703</sup> In a 24 November 2008 letter to HIB, Mr. Döhring responded that the Contract “is based on the General Specification of Implementation Board of Housing and Infrastructure and the

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<sup>699</sup> R-375, NJS Progress Report No. 1 dated 24 August 2008.

<sup>700</sup> 1<sup>st</sup> Döhring WS ¶19.

<sup>701</sup> R-375, NJS Progress Report No. 1 dated 24 August 2008.

<sup>702</sup> 1<sup>st</sup> Baryon WS ¶18; 1<sup>st</sup> FTI Quantum Report ¶4.6.7.

<sup>703</sup> C-669, Letter from Housing and Infrastructure Board to NJS dated 19 November 2008.



Fegawerk Technical Report, Specifications and Drawings.”<sup>704</sup> He stated that the new AECOM design was in many respects different from the Fegawerk design, and that its application would result in “a considerable delay in time and an increase in the total project costs.” The letter stated further that if this new design was to be adopted, Al Hani would require formal instructions.<sup>705</sup>

608. Following Mr. Döhring’s request for written instructions regarding the change in Al Hani’s work under the Contract, a 22 January 2009 letter from Mr. Sterry, NJS’s senior representative on the project, directed Al Hani to abandon the “*abortive*” Fegawerk criteria and to adopt the new AECOM design criteria. *Inter alia*, the NJS letter stated:

You are hereby instructed that any design work hence forth carried out by you for this project which is based solely upon the Fegawerk design criteria, concepts and details will be considered abortive work. It has been made clear to NJS that no approvals for construction may be issued for designs prepared in this manner which do not comply with Aecom design criteria and modified concepts. It should be clear that the intention is that the review and modification process be a rigorous and complete review and redesign prior to construction.

For your guidance, the following is an outline of the approach which will be followed

- 1) This letter is issued to immediately halt abortive design work being undertaken based on Fegawerk criteria.<sup>706</sup>

609. The NJS letter specified that a modification order would be issued addressing extensive changes in the substance and timing of Al Hani’s work. These included requiring Al Hani “to adopt the HIB/AECOM design criteria as issued (including those under development) as the basis for all project designs,” and to modify the project designs and construction schedule.

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<sup>704</sup> C-680, Letter from Al Hani to Implementation Board of Housing and Infrastructure dated 24 November 2008.

<sup>705</sup> C-680, Letter from Al Hani to Implementation Board of Housing and Infrastructure dated 24 November 2008; 1<sup>st</sup> Döhring WS ¶21.

<sup>706</sup> C-37, Letter from NJS to Al Hani dated 22 January 2009, p. 1.

610. The letter also called for Al Hani to carry out several large additional tasks not covered by the existing Contract, pursuant to RFPs to be issued to include power, gas, and telecommunications design and construction work. It also informed Al Hani that the seepage pond system for storm water specified in the Contract was rejected in favor of an alternative using a few large ponds, with overflow to the sea “with criteria to be prepared by Aecom.” The letter concluded that NJS “look[s] forward to your cooperation in reformulating and redesigning this project.”<sup>707</sup>
611. There followed a period of several months during which Al Hani discarded or revised design work previously done based on the Fegawerk designs and developed alternative designs utilizing the new design criteria. At the Hearing, Claimant’s witness Mr. Döhring explained the extent of changes required by the instruction to adopt the new design criteria and to undertake significant new design work.<sup>708</sup> Al Hani was unable to carry out significant construction work for the period required for the replacement designs for that work to be developed, reviewed, and approved.
612. Ultimately, HIB issued a preliminary Notice to Proceed on the TC 5 Roadway on 24 June 2009. HIB did not at the time complain of delays attributable to Al Hani.<sup>709</sup>

### ***B. Claimant’s Position***

613. Claimant claims €8,716,301 for Al Hani’s indirect and delay costs for the 13-month period between the date of signature of the final version of the Tajura Contract (18 May 2008) and the date it was given Notice to Proceed on the TC5 Roadway on 24 June 2009.<sup>710</sup> Claimant maintains that HIB’s change in design criteria and the 22 January 2009 instruction to cease work based on the Fegawerk criteria significantly delayed Al Hani’s performance of the Contract and led to substantial inefficiencies and delay costs. According

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<sup>707</sup> C-37, Letter from NJS to Al Hani dated 22 January 2009, p. 2.

<sup>708</sup> TR 2:611:16 – 612:3 (Mr. Döhring).

<sup>709</sup> 1<sup>st</sup> FTI Quantum Report ¶4.6.7; R-87, Letter from NJS to Al-Hani dated 1 September 2009.

<sup>710</sup> Cl. PHB ¶170.

to Mr. Döhring, the claimed costs “comprised plant and equipment costs (including depreciation and repair costs), labour costs and salaries, rent and running costs of buildings, bond, guarantee and insurance costs.”<sup>711</sup>

614. Claimant refers, *inter alia*, to contemporary correspondence and to the testimony of Mr. Döhring to show the extent of effort prior to the 22 January 2009 NJS letter that was wasted and the impact of the changes set out in that letter on subsequent work. According to Mr. Döhring “[e]ffectively, we were being asked to go back to square one and start our work on the project from scratch.”<sup>712</sup>

615. Claimant maintains that the impact of the 22 January 2009 changes was understood and accepted by AECOM and NJS. *Inter alia*, Claimant points to the agreed minutes of a 30 January – 2 February 2009 workshop convened to address the changes’ impact and to determine the way forward:

It was agreed between AECOM, NJS and Al Hani that changes in design and phasing of the works will modify parts of the already executed design works as of 22<sup>nd</sup> January 2009 and Al Hani will include the cost for any such works in their response to RFPs. It is agreed that Al Hani has mobilized according to the agreed program and is not able to start the works as planned. Accordingly the cost of idle time and/or inefficient mobilized resources will be included into the RFP.<sup>713</sup>

616. Claimant contends that during the initial thirteen-month period, NJS, HIB and AECOM several other times acknowledged Al Hani’s entitlement to additional compensation and gave assurances that additional costs would be compensated. For example, on 27 March 2009, NJS stated:

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<sup>711</sup> Döhring WS ¶36.

<sup>712</sup> Döhring WS ¶25.

<sup>713</sup> C-613, Summary of the Design Workshop held from 30 January to 2 February 2009, Item 10.

[Y]ou should rest assured that any unforeseen costs which you can reasonably demonstrate to have resulted from directions given by NJS and AECOM, accepted by you in good faith, will be fairly and professionally evaluated, and recommended for payment if not covered by existing or modified contract provisions.<sup>714</sup>

617. With respect to the amount of its claim, Claimant refers to the positive assessment of its quantification experts from FTI and rejects the opinion of Respondent's quantification expert Mr. Osbaldeston, who values both of Claimant's Delay Claims at nil.<sup>715</sup> FTI contends in this regard that Mr. Osbaldeston's opinion is "flawed and appears to be based, in part, on legal/contractual opinions."<sup>716</sup> Claimant further contends that his opinion is inconsistent with much contemporaneous documentation and Mr. Döhring's evidence.<sup>717</sup>
618. Claimant disputes the objections of local accountants retained by NJS who rejected significant amounts of this claim,<sup>718</sup> deeming their objections unreasonable and formalistic. According to Mr. Döhring, in response to the accountants' concerns, Al Hani on 10 November 2009 submitted additional explanations and supporting documents.<sup>719</sup> These are said to have explained "the basis for our calculation of the depreciation costs related to the plant and equipment for the project (in respect of which we provided three alternatives), provided evidence of the location of the idle equipment, provided substantiation of our costs (with reference to invoices), eliminated any double-counting in the calculations, checked and re-submitted staff lists and provided details of salary costs."<sup>720</sup> However, the accountants "continued to make very formal objections, for example, stating that we had provided copies and not originals, or that the suppliers' invoices were not consistent with Tax Department requirements ..."<sup>721</sup>

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<sup>714</sup> C-694, Letter from NJS to Al Hani dated 27 March 2009.

<sup>715</sup> 1<sup>st</sup> Blackrock Quantum Report ¶295.

<sup>716</sup> 2<sup>nd</sup> FTI Quantum Report ¶162.

<sup>717</sup> 2<sup>nd</sup> FTI Quantum Report ¶¶162-167.

<sup>718</sup> R-79, Letter from NJS to Al Hani (critical of Al Hani claims for First Delay Period, disallowing large amounts).

<sup>719</sup> Döhring WS ¶45, citing Letter to NJS dated 10 November 2009 and attachments.

<sup>720</sup> Döhring WS ¶45.

<sup>721</sup> Döhring WS ¶45.

619. Claimant denies that it failed to mitigate.<sup>722</sup> In this regard, NJS's Second Monthly Report for the period April 2009 – June 2009 records:

The contractor has partially demobilized due to the interruption to design process brought about post 22<sup>nd</sup> January 2009 and the anticipated delays to approval of RFPs prior to recommencement of design activities. Some plant has been removed from site to other projects in order to minimize the claim for idle equipment.<sup>723</sup>

***C. Respondent's Position***

620. Respondent disputes Claimant's compensation claims for the First Delay Period. Respondent advances in this regard arguments based on Article 5, 7 and 9 of the Tajura Contract similar to those advanced in the Misurata and Benghazi Contracts. (These three provisions appear to have been standard in the contracts concluded by Strabag/Al Hani with its Libyan counterparts.)
621. Respondent first contends that under Article 5 of the Tajura Contract, Al Hani was obliged to inspect the job site and familiarize itself with conditions potentially affecting the project.<sup>724</sup> In Respondent's contention, a proper inspection would have revealed the shortcomings of the Fegawerk designs.<sup>725</sup>
622. Respondent further contends that Article 7 of the Tajura Contract obliged Al Hani to review the plans and specifications for the project and to identify promptly any deficiencies, and that this obligation made it "responsible for addressing any problems with the Fegawerk design."<sup>726</sup> Citing the evidence of Mr. Baryon, Respondent maintains that there were multiple flaws in the Fegawerk designs, so that "Al-Hani was responsible for fixing the Fegawerk designs even if there had never been new AECOM design criteria," flaws that Al Hani did not correct.<sup>727</sup>

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<sup>722</sup> Döhring WS ¶39.

<sup>723</sup> R-376, NJS Progress Report No. 2 dated 24 August 2008.

<sup>724</sup> Resp. C-Mem. ¶177.

<sup>725</sup> Resp. C-Mem. ¶176.

<sup>726</sup> Resp. C-Mem. ¶164.

<sup>727</sup> Resp. C-Mem. ¶178.

623. Respondent maintains that Al Hani did not make necessary revisions to the Fegawerk designs, citing “Al-Hani’s refusal to assess and modify the Fegawerk designs as required.”<sup>728</sup> In this regard, emphasizing the evidence of Mr. Baryon, Respondent contends that the Fegawerk designs clearly were deficient, and that this should have been apparent to Al Hani. Indeed, Respondent maintains that the defects in the Fegawerk design were brought to Al Hani’s attention prior to contracting, citing a letter to Al Hani on 15 March 2010.<sup>729</sup> Having agreed to work on the basis of these designs, Al Hani bore responsibility for their shortcomings, so the time required to develop appropriate replacement designs was at Al Hani’s risk and expense, not Respondent’s.
624. Respondent further contends that Article 9 of the Tajura Contract authorized HIB to revise the scope of the project by 15% without any additional compensation to Al Hani.<sup>730</sup> This apparent import of this contention is that the decision to abandon the Fegawerk criteria was a limited revision of the project’s scope not warranting additional compensation. Respondent maintains in this regard that the changes required by the 22 January 2009 letter were of limited consequence. Mr. Baryon thus stated at the Hearing that these changes required by the new design criteria were minor, and involved only “slight changes to the designs.”<sup>731</sup>
625. Again emphasizing Mr. Baryon’s evidence,<sup>732</sup> Respondent contends that Al Hani’s work was in any event poorly done. “Al-Hani’s poor management and design coordination was the most significant factor in the delayed commencement of construction on the Tajura Project. Most problematic and surprising was its poor design work.”<sup>733</sup> Respondent also criticizes Al Hani for delays associated with Al Hani’s insistence on a Modification Order revising and expanding the scope of work under the Contract. Respondent dismisses Al

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<sup>728</sup> Resp. C-Mem. ¶177.

<sup>729</sup> Resp. C-Mem. ¶163.

<sup>730</sup> Resp. C-Mem. ¶165.

<sup>731</sup> TR 6:1510: 21-22 (Mr. Baryon).

<sup>732</sup> 1<sup>st</sup> Baryon WS ¶¶15-19.

<sup>733</sup> Resp. C-Mem. ¶180.

Hani's insistence on securing a Modification Order as "excuses" and an attempt "to shift the blame for its delays to HIB, NJS and AECOM."<sup>734</sup>

626. With respect to Claimant's claim for damages, Respondent's quantification expert Mr. Osbaldeston values the claim at nil, "based on the assumption that the Commencement Date was 18 June 2009 therefore up to this point Strabag was proceeding at risk."<sup>735</sup>
627. Should the Tribunal not agree with this legal conclusion, Mr. Osbaldeston also refers to a review of Al Hani's claims for this period carried out by accountants retained by NJS and summarized in a December 2010 NJS Report. This report reflects NJS's judgment recognizing claims of LYD8,631,195 during this initial period.<sup>736</sup> Mr. Osbaldeston calculates that should the Tribunal find that Al Hani was not proceeding "at risk," the Delay Claims during the First Delay Period should be calculated at a daily rate of between LYD24,019 and LYD26,585 per day.<sup>737</sup>

***D. The Tribunal's Analysis and Decision***

628. The Tribunal finds that Claimant is entitled to recover for Al Hani's indirect costs incurred on account of delays during the thirteen-month period between May 2008 and June 2009. The Tribunal agrees in this regard with the assessment of HIB's supervising engineer, NJS, that "the original contract is not a design and build type contract," a position NJS finds "fully supported by examination of the original contract documents."<sup>738</sup>

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<sup>734</sup> Resp. C-Mem. ¶186.

<sup>735</sup> 2<sup>nd</sup> Blackrock Quantum Report ¶215.

<sup>736</sup> 2<sup>nd</sup> Blackrock Quantum Report ¶243. The total cited by Mr. Osbaldeston is derived from C-149, NJS Report (December 2010), p. 16.

<sup>737</sup> 2<sup>nd</sup> Blackrock Quantum Report ¶249.

<sup>738</sup> C-149, NJS Report (December 2010), p. 11.

629. The evidence shows that even before the final signing of the Tajura Contract in June 2008, Al Hani began both substantial mobilization and work to revise and supplement the Fegawerk designs. As examined *infra*, the evidence further shows that after being instructed by NJS to cease work based on Fegawerk designs, previously completed design work had to be redone or discarded. Further, Al Hani was placed in a position of significantly reduced activity during which it incurred substantial indirect and delay costs.
630. The Tribunal finds Respondent's contentions that the Fegawerk design was not "revised wholesale"<sup>739</sup> and involved only "minor" changes unconvincing and inconsistent with the record. In response to the Tribunal's question at the Hearing, Mr. Döhring described the significance of the changed standards:

Q. [C]an you give us some practical illustrations of how that changed the nature of the design task? We've heard in very abstract ways it was a fundamental change, but in concrete terms, what did that mean for you and your design people?

A. What does it mean?

If you're starting a design in a certain country or certain area, you're not doing it out of your mind. You have some basic standards which you have to apply. In Paris you have some standards, and in Germany different standards, and in America different standards.

And these standards you have to work with. You have to calculate, for example, the requirement of the people, you can use maybe 100-liter per day or 10-liter or 200-liter per day, and this is fixed in the standards. With the quantity of water, you have to decide the size of the pipes, for example. With size of the pipes, you have to decide the size of the pump to pump the water out, and this is the whole role.

Therefore, the specification is the basis for everything, wherever your calculation starts.<sup>740</sup>

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<sup>739</sup> Resp. Rej. ¶368.

<sup>740</sup> TR 2:684:1-2 (Mr. Döhring).



631. NJS's 22 January 2019 letter deeming further work predicated on the Fegawerk criteria "abortive" recognized the impact of the new design criteria. The evidence shows that, even if elements of the Fegawerk design could be retained, as Respondent claims, they had to be revised to assure compliance and compatibility with the new AECOM design. In cross-examination, Mr. Döhring disputed the contention that portions of Al Hani's design work were not affected by the changed criteria.

Q. And, obviously, there are some areas where there is no difference; right?

A. I don't think so because FEGAWERK design is based on a European standard and AECOM design is based on American standards, and they're completely different. You cannot pick one of them and pick one of them, you work a little bit as part American, and work a little bit as part European, that will not work. You need a complete specification standard and drawings which are similar to the whole Project.<sup>741</sup>

632. Multiple documents emanating from or endorsed by HIB or its representatives acknowledged Al Hani's right to compensation for loss and delay resulting from the changed design criteria. Thus, the signed minutes of the "design workshop" convened among Al Hani, HJS, and AECOM in late January and early February 2009, quoted *supra*, show that Respondent's representatives understood and accepted the significant consequences of the 22 January 2009 changes for Al Hani. The minutes record that Al Hani mobilized "according to the agreed program and is not able to start the works as planned," and that "the cost of idle and/or inefficient mobilized resources will be included into the RFP."<sup>742</sup>

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<sup>741</sup> TR 2:611:20-22, TR 2:612:1-7 (Mr. Döhring).

<sup>742</sup> C-613, Summary of the Design Workshop held from 30 January to 2 February 2009.

633. Similarly, on 19 February 2009, NJS sent a “Road Map” to AECOM that was copied to Al Hani. This listed the RFPs that HIB needed to issue to cover the additional work specified in the 22 January 2009 letter, and identified the need for Al Hani to identify its Delay Claims stemming from redesigning the project.<sup>743</sup> The Road Map noted the extensive changes required by the HIB’s change in direction, citing:

- A change from a fairly well defined (albeit imperfect) client designed and Bill of Quantities based project (with a requirement to review and complete the designs), to a radically different design and build type of contract with significantly increased design coordination, liaison and detailed base design responsibilities for the contractor (RFP 6) as well as significant additional scope items (design of electrical, telecoms and gas networks and tertiary roadways and infrastructure RFP 2,3,5)).
- A modified phasing of the works substantially different from that anticipated by the Contractor...<sup>744</sup>

634. An NJS document entitled “Report on Al Hani Claims” covering the period until June 2009 states in part:

It must be included [sic] then that Al Hani do indeed have the technical basis for claim for delay, and that this conclusion is well supported by the contract documents, and also by the very issue of signed MO 2. This conclusion was initially reported to AECOM/HIB by NJS by way of letter dated 20<sup>th</sup> April 2009, some 17 months before approval of MO2.<sup>745</sup>

635. Contemporary documents sent or endorsed by HIB’s representatives thus clearly accepted Al Hani’s right to claim for additional costs.

636. The Tribunal does not accept Mr. Osbaldeston’s contention that the Tajura Contract was not effective prior to the June 2009 Notice to Proceed, so that Al Hani acted at its peril (and expense) prior to that date. The Tribunal finds that the interpretation of the Contract

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<sup>743</sup> C-615, Roadmap, Letter from NJS to Al Hani dated 19 February 2009, p. 2.

<sup>744</sup> C-616, NJS Tajura Time Impact Analysis.

<sup>745</sup> 1<sup>st</sup> FTI Quantum Report, FTI-80.

explained in a December 2010 NJS Report to HIB correctly reflects the situation under the Contract:

Annex 1B states that “the Second Party shall be paid for the design review within 60 days after the signing of the Contract”. It further states that the First Party shall provide the Second Party an area of approximately 8 hectares within 60 days after signing of the Contract, as a job site.

This is important since it establishes that the Contract becomes effective on signing and confirms that the obligations of both Parties exist prior to payment of Advance Payments, Notice to Proceed, or Hand Over of the site. It confirms the Clients desire that design works be completed urgently and further establishes that site establishment for construction should proceed quickly.<sup>746</sup>

637. Claimant seeks €8,716,301 for indirect costs stemming from the delayed commencement of the work.<sup>747</sup> FTI’s First Report indicates that more than half of the claimed amount reflected salaries for expatriate and local staff at the Tajura project site.<sup>748</sup> The amounts claimed by Al Hani evolved as documentation was refined and discussed with the NJS accountants. (As noted *supra*, NJS referred Al Hani’s claims for delay to outside accountants, who disputed significant amounts of the claims.) An NJS report sent to Al Hani on 30 March 2010, summarized the claims for February, March and April of 2009. The outside accountants supported approximately LYD2.60M of the LYD3.773M claimed for this three-month period, about 69% of the total.<sup>749</sup>

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<sup>746</sup> C-149, NJS Report (December 2010), p. 6.

<sup>747</sup> CH-3, FTI Quantum Hearing Presentation, p. 22.

<sup>748</sup> 1<sup>st</sup> FTI Quantum Report ¶4.6.8.

<sup>749</sup> R-97, Letter from NJS to Al-Hani dated 30 March 2010.

638. Of Al Hani's claim of LYD13.370 million for the period through June 2009, NJS and its accountants ultimately accepted LYD8.631 million,<sup>750</sup> approximately 64.6%. Applying his own assessments of the evidence and of the elements properly he believed chargeable in Al Hani's daily rate, Mr. Osbaldeston assessed at the Hearing that should the Tribunal find liability, Claimant had documented claims amounting to LYD10,873,277, approximately 69.4% of the final amount claimed.<sup>751</sup>
639. The reasons for NJS's accountants' reductions to the First Delay Claims, and Al Hani's responses, are not fully developed in the record. Mr. Osbaldeston observes that the results of an audit by the accountants "are presented in summary format and I cannot verify what specifically NJS accepted and/or rejected."<sup>752</sup> In cross-examination, Mr. Baryon, Respondent's primary witness on many aspects of the Tajura claim, stated that he had no role in assessing Al Hani's claims.<sup>753</sup> Mr. Turki also stated that he "was not involved in the evaluation of the claims."<sup>754</sup> A 19 August 2009 NJS letter paraphrasing the accountants' objections suggests that claims for equipment rental were disallowed because the accountants thought the equipment should have been purchased by Al Hani with funds drawn from the advance payment, and not rented.<sup>755</sup> A more detailed December 2010 NJS Report identifies controversies concerning expatriate remuneration and the costs of idle equipment. As to equipment, NJS's position appears to have been that depreciation was not an allowable actual cost.<sup>756</sup>

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<sup>750</sup> Cl. Reply ¶247; 2<sup>nd</sup> Blackrock Quantum Report ¶243; C-149, NJS Report (December 2010), p. 16.

<sup>751</sup> RH-15, Blackrock Quantum Hearing Presentation, p. 11.

<sup>752</sup> 2<sup>nd</sup> Blackrock Quantum Report ¶242.

<sup>753</sup> TR 6:1501:8-10 (Mr. Baryon).

<sup>754</sup> 2<sup>nd</sup> Turki WS ¶8.

<sup>755</sup> R-79, Letter from NJS to Al Hani dated 19 August 2009, pp. 3-4; same letter also at R-107.

<sup>756</sup> C-149, NJS Report (December 2010), p. 16.

640. As discussed *supra*, Mr. Döhring contended that NJS’s accountants’ review process was overtechnical and unreasonable, for instance, by requiring original documents rather than copies. He also describes a process of multiple meetings and discussions with the accountants during 2010, in the course of which “we considered that we had provided more than enough support to evidence these costs.”<sup>757</sup> Al Hani also met with HIB on 2 December 2010, after which it again submitted “full documentation supporting our claim.”<sup>758</sup> The Revolution then intervened.
641. For their part, Claimant’s quantification experts from FTI concluded that “the claim amounts as originally presented are reasonable and do not require adjustment.”<sup>759</sup>
642. Thus, contemporaneous assessments by NJS’s accountants assessments disputed by Al Hani at the time and by Claimant in the current proceedings as well as the calculations of Respondent’s quantification expert Mr. Osbaldeston accept from 65% to 69% of Al Hani’s claims to be appropriate and sufficiently documented. A significant proportion of the amount now claimed is thus not disputed.
643. With respect to the remaining thirty-odd percent of the claimed amount, the Tribunal finds force in Mr. Döhring’s contention that the NJS accountants reviewed Al Hani’s claims in an excessive and unreasonable fashion, and did not take into account explanations and supporting documentation provided by Al Hani. In particular, the Tribunal fails to understand why depreciation, an actual cost item recoverable in this industry, was disallowed by NJS’ accountants.
644. Because of the Revolution, there was no final agreed resolution of this final disputed portion of the Delay Claim. The Tribunal accepts that in a complex multi-part claim such as that involved here, there may have been some computation errors, improperly included items, and the like, such that recovery of the full amount claimed is not warranted. In these

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<sup>757</sup> Döhring WS ¶46.

<sup>758</sup> Döhring WS ¶47, citing Letter from Al Hani to HIB dated 19 January 2011.

<sup>759</sup> 2<sup>nd</sup> FTI Quantum Report ¶182.

circumstances, the Tribunal concludes that a reduction of approximately 10% of the claimed amount is warranted.

645. On the basis of Article 8(1) of the Treaty, the Tribunal accordingly awards 90% of the amount claimed for the First Delay Claim, i.e., €7.845 million.

**J. CLAIMS 4 AND 5, PART IV. TAJURA CONTRACT: SECOND DELAY CLAIM AND CLAIM FOR ADDITIONAL WORK**

**(1) The Second Delay Claim**

***A. Introduction: Factual Background***

646. As presented by FTI at the Hearing, Claimant seeks €16,220,240 for additional costs related to delays in the Tajura project from the date of AECOM's Notice to proceed (24 June 2009) to the scheduled date of approval of the revised preliminary design under RFP 6 (7 May 2010.)<sup>760</sup>
647. The Notice to Proceed instructed Al Hani to proceed with a number of projects and tasks,<sup>761</sup> most importantly preparation of a new preliminary design for the entire project. The current claim involves the substantial period involved in preparing and securing approval of the overall preliminary project design and related materials utilizing the substitute AECOM criteria.<sup>762</sup>
648. As noted *supra*, the 22 January 2009 NJS letter called for Al Hani to revise the basic Fegawerk design documents and to undertake much additional work. This additional work was sketched out in February 2009, when NJS issued the "Road Map for Preparation for Requests for Proposals and Modification Orders." The Road Map envisioned issuance of 6 RFPS by HIB for additional work on the Tajura project. These were RFP 2 (Gas Utilities Design), RFP 3 (Power Utilities Design), RFP 4 (Coordination and Liaison for Designs, Utilities and Clearance), RFP 5 (Tertiary Roadway and Utilities Design) and RFP 6

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<sup>760</sup> CH-3, FTI Quantum Hearing Presentation, p. 23. Blackrock presents the claim in Libyan dinars, as LYD29,136,872. This indicates an exchange rate of LYD1.79 €1, which appears to be broadly consistent with exchange rates during the period.

<sup>761</sup> Resp. C-Mem. ¶181.

<sup>762</sup> Döhring WS ¶¶49, 52-57.

(Design Modification to New Criteria and Phasing, including redesign of main and secondary roads and associated utilities).

649. RFP 6 covered the new preliminary design for the entire project utilizing the new design criteria.<sup>763</sup> The Road Map anticipated that after these RFPs were approved, HIB would issue a Modification Order to provide a contractual basis authorizing and assuring funding for the additional work.<sup>764</sup>
650. The process for issuing the RFPs, for developing Al Hani's responses, and for securing HIB's assessment and approval of those responses took many months, involving extensive and sometimes vigorous exchanges between Al Hani and NJS. The core redesign work for the entire project covered by RFP No 6 was not approved until 7 May 2010, the terminal date for this portion of the claim.
651. MO 2, required to provide a contractual basis for Al Hani's redesign of the work covered by the original Contract under RFP No 6 and the additional work covered by RFPs 2, 3 and 5, was not initially signed until 15 December 2009. The document was then revised, apparently at the instance of REKABA,<sup>765</sup> and a final version was dated 30 September 2010.<sup>766</sup>
652. The Parties cast blame on each other for delays during the long process to secure HIB's approval of the revised project design and the designs for additional work under the several RFPs. However, as finally agreed by HIB, MO 2 extended the period for contract performance by an agreed total of 318 days, covering the period between the date of the Notice to Proceed (24 June 2009) to the date of approval of the preliminary design under

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<sup>763</sup> Döhring WS ¶49.

<sup>764</sup> Döhring WS ¶¶49-50.

<sup>765</sup> Cl. PHB ¶172(a).

<sup>766</sup> Döhring WS ¶58.

RFP 6 (7 May 2010).<sup>767</sup> MO 2 also increased the value of the Contract by LYD24,850,000, reflecting all the additional work envisioned by RFPs 2, 3, 5 and 6.

653. The evidence, including periodic progress reports prepared by NJS, indicates that during this multi-month process, Al Hani also carried out some construction work on roads and other infrastructure.<sup>768</sup>

### ***B. Claimant's Position***

654. Claimant urges that MO 2 shows HIB's agreement that the change in design criteria, and the process for designing and approving additional work called for by RFPs 2, 3, 5 and 6, resulted in significant delays, as shown by the 318-day agreed extension of time.
655. Claimant contends that the increase in time and direct costs reflected in MO 2 did not compensate it for €16,220,240 of additional or indirect costs stemming from the 318-day delay. As with its First Delay Claim under this Contract, Claimant maintains that NJS understood and accepted this. Claimant points to, *inter alia*, a 31 January 2010 NJS letter stating that "[you] should rest assured that any unforeseen costs which you can reasonably demonstrate to have resulted from directions given by NJS and AECOM, accepted by you in good faith, will be fairly and professionally evaluated, and recommended for payment ..."<sup>769</sup> NJS's 29 December 2010 Report on Al Hani's claims is to the same effect, concluding: "Al Hani do indeed have the technical basis for claim for delay, and this conclusion is well supported by the contract documents, and also by the very issue of signed MO 2."<sup>770</sup>

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<sup>767</sup> Döhring WS ¶59.

<sup>768</sup> See R-375 – R-381. Most of these reports, which were relevant and responsive to Claimant's document production requests, were not produced until specifically requested by the Tribunal at the Hearing.

<sup>769</sup> Döhring WS ¶37, citing Letter from NJS to Al Hani dated 27 March 2009.

<sup>770</sup> C-149, NJS Report (December 2010), p. 12.



656. Claimant denies that delays stemmed from poor design, planning or management on Al Hani's part. Claimant maintains that Respondent's arguments regarding alleged shortcomings in its performance rest on selective and misleading references to NJS correspondence in the course of a complex iterative design process and omit Al Hani's responses. Claimant notes in this regard that iterative revision of designs is characteristic of the design process.<sup>771</sup> Claimant adds that some of its responses were delayed because the underlying criteria for RFPs were not fully known to Al Hani, or were otherwise due to conditions beyond its control, including deteriorated utilities and non-performance by other entities, such as the State-owned electricity company.
657. Claimant urges that Respondent's extensive arguments concerning disagreements and shifting positions regarding design of the storm water system are misleading and incorrect, but are in any event irrelevant to the present claim. Claimant reviews the history of this matter in considerable detail, noting that, while Mr. Baryon was opposed to seepage ponds, they were provided for in the Tajura Contract, NJS and HIB approved the concept in June 2009,<sup>772</sup> and that NJS then approved designs for seepage reservoirs in October 2010, but the next month instructed Al Hani to cease work on the current design<sup>773</sup> because of an abrupt change in design philosophy by HIB.
658. Claimant denies that MO 2 established the total compensation due for the period and barred the present claims. Claimant points in this regard to extensive correspondence and interchanges with NJS and HIB following MO 2 as showing that both Parties did not regard these claims as having been waived. Rather, Mr. Döhring insists, MO 2 confirmed that "[t]he prices offered do not include any provision to direct and indirect delay costs which are dealt with separately."<sup>774</sup>

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<sup>771</sup> Döhring WS ¶¶73-74.

<sup>772</sup> R-336, Minutes of 9 June 2009 Meeting.

<sup>773</sup> C-644, Letter from NJS to Al Hani dated 10 November 2010.

<sup>774</sup> Döhring WS ¶61.

659. Claimant maintains that its claims were extensively and properly documented, and that the accountants acting for NJS acted unreasonably in assessing Al Hani's claims.<sup>775</sup>

***C. Respondent's Position***

660. Respondent's Counter-Memorial contends, emphasizing the testimony of Mr. Baryon, that "[i]n reality, it was Al-Hani's shoddy design work that was the primary cause of the delayed commencement. Al Hani was consistently late in submitting designs and its designs were of exceedingly poor quality."<sup>776</sup>

661. Respondent highlights Mr. Baryon's criticisms of Al Hani's approach to the design of the storm water drainage system, providing for the use of seepage ponds, which Mr. Baryon judged to be incorrect in the circumstances.<sup>777</sup> Respondent also emphasizes perceived shortcomings in "fast-track" work on certain priority road projects.<sup>778</sup> While acknowledging that "it is true that the removal of certain obstacles was not proceeding as expected," Respondent contends that "there was still work that could have been done."<sup>779</sup> Respondent further maintains that Al Hani utilized its campsite, tools and personnel on other projects, in violation of the Contract.<sup>780</sup>

662. Respondent emphasizes that, in its view, Al Hani's claims were wholly unwarranted or inadequately documented. Respondent urges in this regard that Al Hani's claims were examined by NJS "and found to be woefully insufficient,"<sup>781</sup> recalling the arguments and evidence with respect to the alleged deficiencies of Al Hani's claims during the First Delay Period.<sup>782</sup> The Counter-Memorial notes in particular NJS's accountants' objections to Al

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<sup>775</sup> Cl. Reply ¶255.

<sup>776</sup> Resp. C-Mem. ¶561.

<sup>777</sup> Resp. C-Mem. ¶¶207-213.

<sup>778</sup> Resp. C-Mem. ¶¶223-227.

<sup>779</sup> Resp. C-Mem. ¶¶227-228.

<sup>780</sup> Resp. C-Mem. ¶¶219-221.

<sup>781</sup> Resp. C-Mem. ¶562.

<sup>782</sup> Resp. C-Mem. ¶562.

Hani's treatment of the costs of rented equipment, which the NJS accountants suggested should have been purchased with funds from the advance payment.<sup>783</sup>

663. Respondent's quantification expert Mr. Osbaldeston of Blackrock was of similar mind, contending in his reports that Al Hani had not "properly made out its claim with calculations, records and other details to demonstrate its losses."<sup>784</sup>
664. Respondent adds that Al Hani's requests for clarifications and for approval of MO 2 did not justify delays on Al Hani's part. Respondent argues in this regard that "verbal and written direction" to proceed with additional work were sufficient, and Al Hani's insistence on a modification order to provide a contractual basis for its work reflected "excuses" and attempts "to shift the blame for its delays to HIB, NJS and AECOM."<sup>785</sup>
665. Respondent also contends that "a major cause" of delays in the design process was the location of Strabag International's engineering team in Germany.<sup>786</sup>
666. A further argument raised by Mr. Osbaldeston concerns the possible waiver by Al Hani of the Second Delay Claim pursuant to the 30 September 2010 Addendum to the Contract,<sup>787</sup> a document captioned in the Claimant's exhibits as "Variation Order No. 2 to the Tajura Contract." Article (2) of this document states that "[t]he prices of this annex are fixed and include all expenses, costs, obligations, taxes and fees of any kind, incurred by the Second Party for implementing the scope of works of this annex according to the attached BoQ."

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<sup>783</sup> Resp. C-Mem. ¶198.

<sup>784</sup> 1<sup>st</sup> Blackrock Quantum Report ¶295.

<sup>785</sup> Resp. C-Mem. ¶186.

<sup>786</sup> Resp. C-Mem. ¶191.

<sup>787</sup> C-114, Tajura Variation Order No. 2 dated 30 September 2010.

667. Mr. Osbaldeston observed in his First Report that “according to [the] contract addendum of 30 September 2010, it appears to me that Al Hani may have compromised all of its claims in relation to the design issues.”<sup>788</sup> FTI responded in its Second Report, pointing out that an antecedent document, Modification No. 2,<sup>789</sup> includes a note stating “The prices offered do not include any provision to direct and indirect delay costs which are dealt with separately.”<sup>790</sup> Mr. Osbaldeston acknowledged this in his Second Report but indicated that the document dated 30 September 2010<sup>791</sup> does not contain this language. He observes that “I do not know why this is, but the Variation Order would normally be the document that confirms the modification of the Contract and not MO 2 which I understand precedes it.”<sup>792</sup>
668. As to the December 2010 NJS report stating that Al Hani had a “technical basis” for its claims, Respondent urges, again citing Mr. Baryon, that the document was prepared by a person “who had a reputation of being overly lax with Al Hani,” and that it in any event pointed to significant shortcomings in the preparation and documentation of Al Hani’s claims.<sup>793</sup>
669. Notwithstanding Respondent’s objections to this claim, the Counter-Memorial concludes that:

Despite the “appalling” nature of Al-Hani’s claims, HIB was prepared to compensate Al-Hani for costs associated with delays. However, characteristically Al-Hani has refused to send documentation. HIB remains waiting to this day for Al-Hani to provide an accounting of its delay costs that meets the basic minimum standards of accounting.<sup>794</sup>

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<sup>788</sup> 1<sup>st</sup> Blackrock Quantum Report ¶286.

<sup>789</sup> C-82, Letter from Al Hani dated 27 January 2010 (attaching C-617, MO 2).

<sup>790</sup> 2<sup>nd</sup> FTI Quantum Report ¶169.

<sup>791</sup> C-114, Tajura Variation Order No. 2 dated 30 September 2010.

<sup>792</sup> 2<sup>nd</sup> Blackrock Quantum Report ¶232.

<sup>793</sup> Resp. C-Mem. ¶562.

<sup>794</sup> Resp. C-Mem. ¶565.

670. Respondent's Rejoinder takes a less forthcoming view: Claimant's Delay Claims "have still not been substantiated nor did HIB agree to compensate Al-Hani for this extension."<sup>795</sup>

***D. The Tribunal's Analysis and Decision***

671. As explained *infra*, the Tribunal finds that the evidence, including extensive contemporary documentation, establishes that Al Hani was entitled to some recovery for its delay and indirect costs during the Second Delay Period. However, the record regarding the amount of compensation due is less clearly developed than with respect to Claimant's First Delay Claim under the Tajura Contract.

672. *Were the Claims Compromised?* The Tribunal first considers Mr. Osbaldeston's suggestion that by reason of the 30 September 2010 Addendum to the Contract, Al Hani "compromised all of its claims in relation to the design issues."<sup>796</sup>

673. MO 2, signed by Al Hani in September 2010 and by NJS in December 2009, is at variance with this claim.<sup>797</sup> The additional design work instructed after abandonment of the Fegawerk design was priced in MO 2. However, as pointed out by FTI, the document excludes the direct and indirect delay costs incurred during the 318-day period of delay. It includes a note clearly stating "[t]he prices offered do not include any provision to direct and indirect delay costs which are dealt with separately."<sup>798</sup>

674. In contemporary correspondence, Al Hani made clear its intention to seek compensation for these additional costs. Al Hani's 27 January 2010 letter to NJS states:

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<sup>795</sup> Resp. Rej. ¶369.

<sup>796</sup> 1<sup>st</sup> Blackrock Quantum Report ¶286.

<sup>797</sup> C-617, MO 2; Cl. Reply, fn 343. The pages signed by NJS are also attached to C-82, Letter from Al Hani to NJS dated 27 January 2010.

<sup>798</sup> 2<sup>nd</sup> FTI Quantum Report ¶169.

At this stage we would like to clearly point out again that the Amount of 24,850,000.000 LYD for this MO represents the amount for the re-design only. No allowance has been made for consequential direct and indirect cost related to the MO and to the contract, due to the extended contract period of 318 days.

This has been made clear by the “Note: The prices offered do not include any provision to direct and indirect delay costs which are dealt with separately”, as mentioned in the MO.<sup>799</sup>

675. NJS promptly replied on 31 January 2010, affirming that any request for payment of additional costs “will be evaluated by NJS fairly and professionally in accordance with the contract and an appropriate recommendation made to AECOM/HIB.”<sup>800</sup>
676. On 28 June 2010, Al Hani submitted its claim for additional costs and expenses during the Second Delay Period.<sup>801</sup> The Parties remained in discussion of these claims and their supporting documentation throughout the remainder of their relationship. HIB declined to pay the claims, apparently because of disagreements regarding the adequacy of the supporting documentation, reflecting objections by the accountants retained by NJS that Claimant views as excessive and unreasonable.<sup>802</sup>
677. Al Hani’s claims thus remained under discussion with HIB, including at a 2 December 2010 meeting, several months after signature of Variation Order No. 2. A report by NJS on Al Hani’s claims dated 29 December 2010 concluded that “Al Hani do indeed have the technical basis for claim for delay, and that this conclusion is well supported by the contract documents, and also by the very issue of signed MO2.”<sup>803</sup> Concerning abandonment of the Fegawerk design, the NJS Report observes that “Technically the Contractor was quite contractually correct, and within his rights, to ignore anything other than written instructions from HIB until late November. Even after issue of the Letters of Authority, the

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<sup>799</sup> C 82, Letter from Al Hani to NJS dated 27 January 2010.

<sup>800</sup> C 83, Letter from NJS to Al Hani dated 31 January 2010.

<sup>801</sup> Cl. Reply ¶253.

<sup>802</sup> Cl. Reply ¶240.

<sup>803</sup> C-149, NJS Report (December 2010), p. 12.

powers given to AECOM and NJS by these letters of authority were so limited as to be of little value in resolving a major contractual conflict.”<sup>804</sup>

678. On 19 January 2011 at HIB’s request, and virtually as the Revolution began Al Hani provided updated calculations of its additional costs until that date.<sup>805</sup> Al Hani’s claims for delay and indirect expenses were never paid.

679. The Parties’ contemporary conduct thus shows that Al Hani continued to assert its claims for delay and additional costs throughout 2010 and into 2011, that NJS affirmed the contractual basis for those claims, and that HIB continued to consider them. Thus, the contracting parties at the time did not understand Al Hani’s Delay Claims to have been waived.

680. Respondent’s Counter-Memorial confirms that this was precisely the procedure the parties envisioned:

While Variation Order No. 2 extended the contract period by 318 days and increased the contract value to reflect additional design and construction work, the parties agreed to a separate process to compensate Al-Hani for any costs associated with the delayed commencement. Al-Hani was required to submit its Delay Claims to NJS for evaluation.<sup>806</sup>

681. The Tribunal accordingly concludes that present claim was not waived by operation of the 30 September 2010 Addendum to the Contract.

682. *Was Al Hani’s Work Defective?* The Tribunal next considers Respondent’s contention that the design and construction work performed during the Second Delay Period was of poor quality. Respondent’s contention in this regard is heavily reliant on Mr. Baryon’s evidence, particularly his strongly expressed views regarding allegedly incorrect choices by Al Hani in designing the storm water drainage system.

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<sup>804</sup> C-149, NJS Report (December 2010), p. 13.

<sup>805</sup> C-155, Letter from Al Hani to HIB dated 19 January 2011; Cl. Reply ¶255.

<sup>806</sup> Resp. C-Mem. ¶195.

683. The Tribunal notes that Mr. Baryon was hired by NJS as a field inspector engineer in July 2009, after significant events now at issue occurred;<sup>807</sup> he confirmed at the Hearing that his evidence regarding those matters does not reflect personal knowledge but instead what he was told by colleagues.<sup>808</sup> He confirmed on cross-examination that he was one of thirty engineers employed by NJS,<sup>809</sup> most of whom worked on roads, drainage water and drinking water, and that he “was specialized in roads and water, sewer, rainwater, and drinking water.”<sup>810</sup> Thus, his expertise and personal knowledge did not extend to some of the design and contracting issues on which he offered opinions.
684. Respondent criticizes Al Hani’s “refusal to assess and modify the Fegawerk designs as required,”<sup>811</sup> alleging that Al Hani failed to correct significant design defects as required by the Tajura Contract, including “significant problems with the water system, sewage system, storm water system” and other elements.<sup>812</sup> Respondent and Mr. Baryon further allege “poor management and design coordination” and “consistently late and of low quality work” by Al Hani.<sup>813</sup>
685. Claimant’s witness Mr. Döhring, Al Hani’s project manager, vigorously disputes these contentions,<sup>814</sup> urging that Respondent’s use of contracting correspondence is selective and misleading, citing examples supporting this view.<sup>815</sup>

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<sup>807</sup> TR 6:1490:2-3 (Mr. Baryon).

<sup>808</sup> TR 6:1480:17-22, TR 6:1481:1-4 (Mr. Baryon).

<sup>809</sup> TR 6:1533:21-22 – 1534:1-2 (Mr. Baryon).

<sup>810</sup> TR 6: 1534:15-16 (Mr. Baryon).

<sup>811</sup> Resp. C-Mem. ¶177.

<sup>812</sup> Resp. C-Mem. ¶178.

<sup>813</sup> Resp. C-Mem. ¶180.

<sup>814</sup> Döhring WS ¶73.

<sup>815</sup> Cl. Reply ¶¶271-273.



686. The Tribunal notes that these criticisms also seem at variance with the generally more positive assessments given in NJS's Monthly Reports on the project and in correspondence and reports,<sup>816</sup> including by NJS's senior person on the project, Mr. Sterry. Mr. Baryon criticized Mr. Sterry as unduly permissive and favorable to Al Hani.<sup>817</sup> However, Mr. Sterry, and not Mr. Baryon, was NJS's senior representative, responsible for overseeing and assessing Al Hani's work at Tajura. Mr. Döhring, Mr. Sterry's counterpart on the project, found Mr. Baryon's "suggestion that Mr. Sterry's views were not representative of NJS [to be] misplaced."<sup>818</sup> In cross-examination, Mr. Döhring described Mr. Sterry as "very hard-pushing against-towards us to start and to execute the Project."<sup>819</sup>
687. Mr. Baryon's evidence reflected strong personal views regarding a protracted design debate among various interested parties regarding management of storm water run-off. While the Tajura Contract provided for seepage ponds, Mr. Baryon viewed this an unsuitable approach. However, the evidence shows that Al Hani was given evolving instructions by its employer in this regard. The 22 January 2009 letter instructed Al Hani to design an alternative detention basin solution with overflow to the sea. Some questioned this revised approach, and an option "without overflow to the sea" was then adopted.<sup>820</sup> To cut a long story short, the debate over the best method to deal with storm water and associated soil tests continued for many months.<sup>821</sup> NJS eventually approved the designs for two seepage ponds, but on 27 September 2010 noted public concern over the use of such ponds. Then, on 10 November 2010, NJS instructed Al Hani to cease all work on the currently approved design philosophy until a new concept had been approved.<sup>822</sup> Mr.

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<sup>816</sup> See, e.g., C-616, NJS, Tajura Time Impact Analysis (undated).

<sup>817</sup> TR 6:1531:5-7 (Mr. Baryon).

<sup>818</sup> Döhring WS ¶78.

<sup>819</sup> TR 2:534:20-21 (Mr. Döhring).

<sup>820</sup> Cl. Reply ¶276.

<sup>821</sup> Cl. Reply ¶¶275-286.

<sup>822</sup> C-644, Letter from NJS to Al Hani dated 10 November 2010.

Baryon indicated on cross-examination that the decision to abandon seepage ponds was made by HIB,<sup>823</sup> which had originally called for them in the Contract.

688. Claimant views this sequence of evolving design choices and evolving directions to Al Hani as “symptomatic of the approach that the HIB took to the management of the Tajura Contract.”<sup>824</sup> The Tribunal finds force in this contention.

689. *Responsibility for Delays.* The Tribunal is also not persuaded by Respondent’s contention that Claimant was largely responsible for delays during this period. An undated Time Impact Analysis prepared by NJS paints a substantially different picture.<sup>825</sup> This Analysis reviews the delays from February 2009 to May 2010, attributing them to the large volume of additional work and design revisions introduced by HIB. NJS notes in this regard:

- the introduction of base designs of electrical, telecoms and gas distribution systems, which were not part of the originally agreed scope of work;
- the introduction of design of tertiary roads and infrastructure not previously included in the project scope;
- the abandonment of Fegawerk’s design and the introduction of a radically different design and build type of contract with significantly increased design coordination, liaison and detail-based design responsibility for the contractor;
- significant additional scope items connected to the inclusion of electrical, telecoms and gas distribution systems; and
- a modified phasing of the works substantially different from those originally anticipated based on Fegawerk design, especially for the purpose to bring benefit to the largest number of people in the shortest possible time starting with the most highly urbanized areas.

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<sup>823</sup> TR 6:1535:19-21 (Mr. Baryon).

<sup>824</sup> Cl. Reply ¶287.

<sup>825</sup> C-616, NJS, Tajura Time Impact Analysis (undated).

690. The NJS analysis accordingly concluded that

[t]he nature of the changes and increased responsibilities incorporated in MO 2 are such that in effect the Contractor has found himself under virtual suspension of work since 22<sup>nd</sup> January 2009 until such time as the issue of a letter by HIB dated 31<sup>st</sup> January 2010 confirming acceptance of the offer and scope of works for MO2.<sup>826</sup>

691. Given the scope of the changes to Al Hani's work under the Tajura Contract, Mr. Baryon acknowledged in cross-examination that the 318-day extension of time for performance authorized by MO 2 was "reasonable":

A. So, when we talk about 318 days, that was not a period of time that was required just to finish this new design but also to finish the design work on other parts of the project.

So, it is true that we agreed that 318 days was reasonable, but it was reasonable to conduct all this required design work, and it was not specific or restricted to RFP 6.<sup>827</sup>

692. The evidence also shows that the construction work Al Hani was able to carry out during this period encountered obstacles for which Al Hani was not responsible, notably failure to identify or clear utilities and other obstacles standing in the way of design and construction work. NJS's First Consolidated Monthly Report for August 2008 – March 2009 thus observes "Responsibility for Utilities clearance rests with HIB and not contractor and is delaying construction."<sup>828</sup>

693. NJS Report No. 7 at the end of August 2010 is similar:

The main factors that have affected construction progress have been delays caused by third party utilities. Works on TF 66 has been suspended until GECOL confirm their requirements regarding the existing underground cable which is in the proposed sewer alignment. GECOL substations and OH cables still require relocating along TC 22. This is causing partial obstructions along the new road alignment...<sup>829</sup>

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<sup>826</sup> C-616, NJS, Tajura Time Impact Analysis (undated), pp. 1-3.

<sup>827</sup> TR 6:1514:13-20 (Mr. Baryon).

<sup>828</sup> R-375, NJS Progress Report No. 1 dated 24 August 2008.

<sup>829</sup> R-381, NJS Progress Report No. 7 dated 12 September 2010.

694. A third NJS document describes another difficulty:

To meet the Contractor's schedule, approximately 1.2 km of road needs to be cleared and handed over each week. Thus since the signing of the Contract some 3 years ago, approximately 150 km should have been cleared and handed over to date, whereas in fact only 13 km have been handed over to date, with many of these roads, even now, not completely free of obstructions.<sup>830</sup>

695. NJS concluded in a December 2010 Report that “[h]and over of sites remains on the single most critical issues affecting the current program of the project and undermining the Client’s [i.e., HIB’s] position under the Contract.”<sup>831</sup>

696. The Tribunal also finds unpersuasive Respondent’s contention that Al Hani’s calls for clear authorization from HIB to deviate from the initial Contract, and in particular for completion of MO 2 to sanction payment for additional work, caused unnecessary delay. The evidence shows that Al Hani’s caution in this regard was reasonable. NJS itself acknowledged the limited scope of its authority to direct deviations from the Contract in the December 2010 Report to HIB, noting “the very limited powers given to NJS through the Letter of Authority, which restricts the authority of NJS to some extent, and therefore requires HIB confirmation of significant instructions.”<sup>832</sup> NJS accordingly concluded:

Technically, the Contractor was quite contractually correct, and within his rights, to ignore anything other than written instructions from HIB until late November [2008]. Even after the issue of the Letters of Authority, the powers given to AECOM and NJS by these Letters of Authority were so limited as to be of little value in resolving a major contractual conflict.<sup>833</sup>

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<sup>830</sup> C-149, NJS Report (December 2010), p. 7.

<sup>831</sup> C-149, NJS Report (December 2010), p. 8.

<sup>832</sup> C-149, NJS Report (December 2010), p. 4.

<sup>833</sup> C-149, NJS Report (December 2010), p. 13.

697. Respondent's position regarding other claims in this case also indicates that Al Hani's caution was warranted. For example, as discussed *infra*, Respondent's defense to the claim for emergency repairs to the 11<sup>th</sup> of June Road contends, *inter alia*, that payment could not be made because there was no modification order authorizing it.
698. The Tribunal, accordingly, does not accept the contention that Al Hani was itself a major cause of the delays encountered. The Tribunal instead concludes that the evidence shows that actions (and inaction) by HIB and its representatives led to significant delays and inefficiencies that caused significant additional expense to Al Hani.
699. However, the evidence also shows that Al Hani was able to carry on a good deal of work on roads and other construction during this period. Mr. Döhring thus observed that by February 2011, Al Hani had
- undertaken significant work in preparing the sites, obtaining material and equipment, mobilizing personnel, and obtaining approval for the designs. By that time we were also working on the roads on the sites that had been made available to us, had started building the pumping stations, digging trenches for the pipelines, we had built the pre-cast yard, and were constructing seepage ponds as well as other works – we were accordingly fully engaged in construction activities.<sup>834</sup>
700. During this period, Al Hani submitted Payment Certificate Nos. 3, 4, and 5 as well as four bitumen certificates, for a total of LYD9,802,008 and €8,185,038, plus LYD1,004,316 for unpaid bitumen certificates.<sup>835</sup> Al Hani's claims for these unpaid certificates are addressed in connection with Claimant's separate claims for unpaid payment certificates, *supra* and will not be addressed here.
701. The difficulty facing the Tribunal, then, is how to assess the amount of additional costs Al Hani incurred due to delays caused by the revised and expanded design process, while during the same period it was able to utilize its personnel and equipment to carry out some work for which it seeks payment through its payment certificate claims.

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<sup>834</sup> Döhring WS ¶76.

<sup>835</sup> Cl. Reply ¶¶258-259.

702. The evidence for this period is less clearly developed than that for the First Delay Claim Period. Al Hani's First Delay Claim was scrutinized, albeit unfairly in Al Hani's view, by NJS's accountants who approved substantial amounts. The Tribunal has not been referred to any corresponding evidence of NJS's assessment of the claims here which might provide a reference point. Accordingly, the Tribunal must look to the evidence provided by the Parties' experts from Blackrock and FTI.
703. The experts advance different analyses and conclusions. FTI's evidence emphasizes the chronology of events leading to the 318-day time extension agreed by HIB.<sup>836</sup> FTI judges this extension to be fully warranted, arguing that it indeed "understates the true delay experienced by Al Hani up to the point that all work stopped in February 2011."<sup>837</sup> FTI made its own calculation of an appropriate daily rate during the period, which it assessed to be LYD82,375 per day.<sup>838</sup> Multiplying this by the 318 days of the agreed extension gives approximately LYD26.195 million (approximately €14.63 million at the exchange rate that FTI apparently used). FTI concludes that the similarity of their estimate with the amounts originally claimed shows that the claim is "reasonable and do[es] not require adjustment."<sup>839</sup>
704. Blackrock's First Report does not assist the Tribunal, as it concludes that Al Hani is not entitled to any compensation for delay during either the First or Second Delay Claim Period.<sup>840</sup> Mr. Osbaldeston's Second Report affirms this conclusion, continuing to value the Second Delay Claim at "nil".<sup>841</sup> However, should the Tribunal award indirect costs for this period, Mr. Osbaldeston's Second Report calculates a "provisional" daily rate of between LYD39,694 and LYD47,731 for the Second Delay Period.<sup>842</sup> Multiplied by 318

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<sup>836</sup> 2<sup>nd</sup> FTI Quantum Report ¶¶141-150.

<sup>837</sup> 2<sup>nd</sup> FTI Quantum Report ¶150.

<sup>838</sup> 2<sup>nd</sup> FTI Quantum Report ¶181.

<sup>839</sup> 2<sup>nd</sup> FTI Quantum Report ¶182.

<sup>840</sup> 1<sup>st</sup> Blackrock Quantum Report ¶295.

<sup>841</sup> 2<sup>nd</sup> Blackrock Quantum Report ¶216.

<sup>842</sup> 2<sup>nd</sup> Blackrock Quantum Report ¶216.

days, these rates point to additional costs ranging from approximately LYD12.62 million to LYD15.18 million (roughly €7.05 million to €8.48 million).

705. In his presentation at the Hearing, Mr. Osbaldeston presented a “figures-as-figures” assessment of the value of the claim as LYD15,063,977,<sup>843</sup> very close to the figure arrived at above using the higher of his two daily rates. In its corresponding Hearing presentation, FTI assessed this amount to equal €8,385,984, slightly more than half of Claimant’s claim of €16,220,240.<sup>844</sup>
706. The evidence and arguments do not allow a precise assessment of the almost €8 million difference between the experts’ respective assessments. Unlike the First Delay Claim Period, the claims here were not scrutinized by NJS’s accountants, a process that although disputed offered a reference point for the Tribunal’s assessment. The evidence shows that the Second Delay Period was not wholly lost for Al Hani, which was able to utilize its personnel and equipment to perform some substantial design and construction work for which it could and did submit Payment Certificates. In the circumstances, and in the exercise of its discretion in a situation involving less than perfect evidence, the Tribunal determines to award the amount put forward by Mr. Osbaldeston at the Hearing (approximately €8,386,000), plus half of the difference between his estimate and the amount claimed, an additional amount equal to €3,917,000.
707. Pursuant to Article 8(1) of the Treaty, the Tribunal accordingly awards €12,303,000 for Claimant’s period covering the Second Delay Period Claim.

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<sup>843</sup> RH-15, Blackrock Quantum Hearing Presentation, p. 11.

<sup>844</sup> CH-3, FTI Quantum Hearing Presentation, p. 23.

**(2) Claims for Additional Work**

***A. The 11<sup>th</sup> of June Road***

708. As set out in FTI's Hearing presentation, Claimant seeks €2,716,395 for uncompensated emergency repair work it carried out on the 11<sup>th</sup> of June Road in late October and early November 2010.<sup>845</sup> Although the amount involved in this claim is less than that involved in many other claims, both Parties devoted substantial effort and attention to it.
709. It is undisputed that in early October 2010, HIB requested Al Hani to carry out emergency repairs to the road leading to Tripoli's International Airport in preparation for an African-European summit the next month.<sup>846</sup> It also is undisputed that Al Hani diverted resources from the TIAR road project, rapidly completed the required emergency repairs, and that Al Hani was not paid for the work.<sup>847</sup> The road to the airport was reopened on 7 November 2010, in time for the summit.<sup>848</sup>
710. The Parties dispute whether Al Hani is entitled to an agreed price of LYD4,879,536.947, or should be paid some lesser amount. Respondent contends that Al Hani did not properly perform the work, so its compensation should be reduced. Further, although the 11<sup>th</sup> of June Road was not in the Tajura area, emergency repairs were linked to the Tajura Contract for Respondent's administrative purposes. Respondent contends that payment was properly refused because Al Hani did not submit a proposed Modification Order to the Tajura Contract for HIB's review and approval under the Tajura Contract's Modification Order process.

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<sup>845</sup> CH-3, FTI Quantum Hearing Presentation, p. 22.

<sup>846</sup> Cl. Mem. ¶420; 1<sup>st</sup> Napowanez WS ¶10.

<sup>847</sup> Cl. Reply ¶290.

<sup>848</sup> Cl. Reply ¶¶288-289.



***B. Claimant's Position***

711. Claimant contends Al Hani and HIB agreed, in particular at a meeting on 20 October 2010, that Al Hani would perform the emergency repair work for a fixed total cost of LYD4,879,536.947.<sup>849</sup> Claimant cites in this regard the signed and sealed minutes of that meeting, minutes that were signed by Respondent's witness who testified at the Hearing, Mr. Turki. These confirm LYD4,879,536.947 as the cost of the work, and state that "the full value of the work will be billed to HIB" and that "HIB agrees to pay, the invoice for the work on or before December 15, 2010."<sup>850</sup>
712. Claimant maintains that the emergency repairs were accomplished in the manner, and in the limited time, required by HIB; that it submitted a payment certificate on 27 November 2010;<sup>851</sup> and that it is entitled to payment of the full agreed price. It further contends that the modalities for arranging payment are a matter for HIB to resolve, and that payment cannot properly be denied because of HIB's internal administrative requirements.
713. With respect to HIB's claim to reduce the amount due by approximately LYD1 million on account of various specified and unspecified shortcomings, Claimant contends, *inter alia*, that the supposed shortcomings were never notified to it during performance. Claimant submits that the reductions instead reflect an intervention by REKABA, which criticized Al Hani's work in a letter to HIB that also castigated HIB for entering into the repair arrangement without a formal contract, said to be contrary to applicable legislation.<sup>852</sup> At the Hearing, Mr. Turki testified that he had never seen REKABA's letter.<sup>853</sup>
714. With respect to Respondent's several grounds for reducing the amount to be paid, and for then denying payment, Claimant contends, *inter alia*, that:

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<sup>849</sup> Cl. PHB ¶208.

<sup>850</sup> C-124, Minutes of 20 October 2010 Meeting.

<sup>851</sup> C-139, Letter from Al Hani to HIB dated 4 December 2010.

<sup>852</sup> C-805, Letter from Director of the General Department to Secretary of the Management Committee of Housing and Utilities dated 6 December 2010.

<sup>853</sup> Cl. PHB ¶212.

- Road signage was properly placed, citing measurement sheets approved by the supervising engineer,<sup>854</sup> and pointing out that neither the project engineer nor HIB's on-scene representative is recalled to have voiced complaints about this issue while work was underway;
- A reduction due to the failure to lay two courses of asphalt is improper, noting that the agreed minutes provided that Al Hani would only lay a "[r]egulating course where needed,"<sup>855</sup> given the limited time to carry out the emergency repairs;
- The claim that Al Hani failed to smooth around manhole covers is unsupported, and that Al Hani was not instructed to carry out this work;<sup>856</sup>
- There is no basis for an arbitrary reduction of 30% based on unexplained "comments,"<sup>857</sup> apparently on account of REKABA's criticisms;<sup>858</sup> and
- Notwithstanding Respondent's contrary claim, Al Hani did submit requested documents, but in any case, HIB cannot invoke its internal administrative processes as a reason for non-payment.<sup>859</sup>

### ***C. Respondent's Position***

715. In his Witness Statements and at the Hearing, Mr. Turki explained the reduction on multiple grounds, contending, *inter alia*, that performance was defective; the emergency repair contract was not for a lump sum, but was based on a BOQ, with payment for works actually performed; and that Al Hani failed to take the steps required to obtain payment.<sup>860</sup> At the Hearing, Mr. Turki went further, testifying that there was no contract, only a modification of the Tajura Contract.<sup>861</sup>

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<sup>854</sup> Cl. PHB ¶213.

<sup>855</sup> C-124, Minutes of 20 October 2010 Meeting.

<sup>856</sup> Cl. Reply ¶292.

<sup>857</sup> Cl. Reply ¶¶293-295.

<sup>858</sup> Cl. PHB ¶214.

<sup>859</sup> Cl. Reply ¶¶296-300.

<sup>860</sup> 2<sup>nd</sup> Turki WS ¶10.

<sup>861</sup> TR 7:1641:14-16 (Mr. Turki).

716. Respondent first contends that the amount due to Al Hani should be reduced due to the “shoddy and incomplete nature of Al-Hani’s work.”<sup>862</sup> It contends, *inter alia*, that Al Hani failed to (1) provide all of the required road signage, (2) properly lay the asphalt, in that it laid a single course of asphalt rather than laying separate wearing and regulating courses, and (3) failed to request a Modification Order to the Tajura Contract in accordance with the modification mechanism under that contract. At the Hearing, Mr. Turki stated that it was the contractor’s responsibility to know that such an order was required,<sup>863</sup> and Al Hani was not paid because they did not follow the provisions of the Tajura Contract dealing with modification orders.<sup>864</sup>
717. Mr. Turki values the works performed at LYD3,878,594.94,<sup>865</sup> approximately LYD1 million less than the amount claimed. In his Second Quantum Report, Respondent’s valuation expert Mr. Osbaldeston assesses the amount due to Al Hani for the repair work to be LYD3,379,604, LYD500,000 less than the amount indicated by Mr. Turki.<sup>866</sup>

***D. The Tribunal’s Analysis and Decision***

718. The Tribunal understands the evidence to show that Al Hani performed the emergency repairs on the 11<sup>th</sup> of June Road in the expedited manner requested by HIB and in accordance with the terms of the Minutes of the 20 October 2010 meeting. Respondent’s present complaints regarding the quality of those repairs were not expressed by HIB’s representatives at the time, and are often countered by measurement sheets signed by HIB’s on-scene representative. Respondent has not provided a convincing explanation for the substantial deductions from the agreed price reflected in the October Minutes that appear to have been prompted by REKABA’s intervention.

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<sup>862</sup> Resp. C-Mem. ¶553.

<sup>863</sup> TR 7:1651:15-20 (Mr. Turki).

<sup>864</sup> TR 7:1673:18-22, TR 7:1674:1-12 (Mr. Turki).

<sup>865</sup> 2<sup>nd</sup> Turki WS ¶11.

<sup>866</sup> 2<sup>nd</sup> Blackrock Quantum Report ¶217.

719. Further, the Tribunal does not accept the contention that Al Hani could not be paid because it did not secure a Modification Order to the Tajura Contract. The agreed Minutes of the 20 October 2010 meeting, at which Al Hani agreed to perform the emergency work and which were signed by Mr. Turki, state the agreed price, that Al Hani was to submit its invoice, and that it would then be promptly paid.<sup>867</sup> Respondent has not shown why its own internal administrative and budgeting processes which Al Hani in any event sought to satisfy justify payment of less than the full agreed amount. The Tribunal is not persuaded that it was incumbent upon Al Hani to know that payment provisions reflected in the 20 October Minutes were of no consequence and that payment would require a Modification Order to the Tajura Contract.
720. Pursuant to Article 8(1) of the Treaty, the Tribunal accordingly awards €2,716,395 for the uncompensated emergency repair work Al Hani performed on the 11<sup>th</sup> of June Road in the autumn of 2010.

**(3) Claim for Additional Work under RFP 4**

721. RFP 4, which Mr. Döhring described as “particularly important,”<sup>868</sup> involved identification and removal of existing utilities, work that was required in order for new construction work to proceed. The work covered by RFP 4 may not have been incorporated into a Modification Order prior to the Revolution, although the evidence is inconsistent regarding this.<sup>869</sup> Nevertheless, it is undisputed that Claimant carried out work within the scope of RFP 4 for which it was not paid.

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<sup>867</sup> C-124, Minutes of 20 October 2010 Meeting.

<sup>868</sup> Döhring WS ¶84.

<sup>869</sup> There is conflicting evidence whether RFP 4 was incorporated into a Modification Order. Mr. Baryon stated in his first Witness Statement that it was not. However, an NJS Report disclosed by Respondent after the hearing pursuant to the Tribunal’s request states that Modification Order No. 3 – which would have included the work covered by RFP 4 – was approved by the HIB in December 2010. Cl. PHB ¶196.

***A. Claimant's Position***

722. Pursuant to Article 8(1) of the Treaty, Claimant seeks €2,664,276 for this work, which included work to identify water supply, sewerage, and storm water networks.<sup>870</sup> Mr. Döhring states that this work included both above-ground surveys, and also below-ground work that required sending “investigating teams down the sewers to identify the location of utilities ... this was a huge exercise.”<sup>871</sup>
723. Claimant alleges that Al Hani performed this work, which was recorded on a Day Works basis, on a good faith basis and expecting to be paid.<sup>872</sup> According to Mr. Döhring, Al Hani acted proactively in good faith with the expectation that it would be paid, notwithstanding that the HIB had not yet issued a Modification Order.<sup>873</sup> Claimant refers in this connection to a 13 December 2010 letter from NJS stating that “it is our intent to convert all works currently being executed on a Day Works basis to BOQ items once MO3 (RFP4) has been approved.”<sup>874</sup>
724. On the basis of their review of Al Hani’s field measurement sheets and other materials supporting this claim, FTI concludes that Al Hani is entitled to LYD4,937,222, which they equated to €2,748,508.<sup>875</sup> At the Hearing, the FTI experts reduced the claim by approximately €84,000 to €2,664,276.<sup>876</sup>

***B. Respondent's Position***

725. Respondent contends that payment was not made because of differences regarding the rates to be applied to the work. According to Respondent’s Counter-Memorial:

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<sup>870</sup> CH-3, FTI Quantum Hearing Presentation, p. 22.

<sup>871</sup> Döhring WS ¶85.

<sup>872</sup> Cl. Reply ¶262, Döhring WS ¶88.

<sup>873</sup> Cl. Reply ¶263.

<sup>874</sup> Cl. Reply ¶262, citing C-145, Letter from NJS to A Hani dated 14 December 2010.

<sup>875</sup> 2<sup>nd</sup> FTI Quantum Report ¶193.

<sup>876</sup> CH-3, FTI Quantum Hearing Presentation, p. 22.

With regard to RFP 4, the parties could not agree on the terms of payment. NJS and HIB insisted that the contract rates be used. However, as FTI notes, the contract rates were only used by Al-Hani “in some instances.” The parties were to resolve their differences regarding payment terms in a new variation order, and HIB requested that Al-Hani submit such a variation order. However, Al-Hani never did so.<sup>877</sup>

726. At the Hearing, Respondent’s quantification expert Mr. Osbaldeston assessed the value of the work performed at LYD4,634,606,<sup>878</sup> equal to €2,580,044.<sup>879</sup>

*C. The Tribunal’s Analysis and Decision*

727. The Parties do not appear to dispute, and the Tribunal accepts, that Al Hani performed a significant amount of work related to RFP 4 for which it was not paid. As finally presented at the Hearing, the Parties’ experts’ assessments of the value of this work do not differ greatly; the difference between them is €84,232, approximately 3% of the total claimed.
728. The evidence for both this claim and the following one is less complete than for some other claims. Claimant states in this regard that in both cases, the value of the claim was “estimated on the basis of available documents.”<sup>880</sup>
729. Given the nature of the evidence and lacking a clear explanation of the reason for the difference between the FTI and Blackrock assessments of the value of the work performed, the Tribunal awards the lower of the two, €2,580,044, pursuant to Article 8(1) of the Treaty.

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<sup>877</sup> Resp. C-Mem. ¶555.

<sup>878</sup> RH-15, Blackrock Quantum Hearing Presentation, p. 11.

<sup>879</sup> CH-3, FTI Quantum Hearing Presentation, p. 26.

<sup>880</sup> Cl. PHB ¶170(d).

**(4) Claim for Additional Work under RFP 8**

***A. Claimant's Position***

730. Claimant also seeks €961,160<sup>881</sup> for construction work on a large box storm water culvert and two other smaller construction tasks falling within the scope of RFP 8, which also seems not to have been included in a Modification Order.<sup>882</sup>
731. As with the work related to RFP 4, Claimant contends that it performed this work in good faith and in expectation that it would be paid, and that it submitted appropriate documentation of this work. The record includes photographs of the large storm water culvert.

***B. Respondent's Position***

732. Respondent contends that the Modification Order required in order for Al Hani to be paid was never signed “due to a breakdown in the negotiations regarding the payment method to be made for the work, and due to Al-Hani’s failure to submit the variation order for review as requested.”<sup>883</sup> However, “HIB was still prepared to pay Al-Hani for the work that it had adequately performed and for which it could provide documentation.”<sup>884</sup>
733. Respondent’s quantification expert Mr. Osbaldeston assesses the claim at LYD831,787 (approximately €463,000) stating that “[w]hilst I accept that some reinforced concrete work was done based solely on the photographs provided I cannot value it accurately.”<sup>885</sup>

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<sup>881</sup> CH-3, FTI Quantum Hearing Presentation, p. 22.

<sup>882</sup> Cl. Reply ¶263.

<sup>883</sup> Resp. C-Mem. ¶167.

<sup>884</sup> Resp. C-Mem. ¶556.

<sup>885</sup> 2<sup>nd</sup> Blackrock Quantum Report ¶217.

***C. The Tribunal's Analysis and Decision***

734. Here again, it is undisputed that Al Hani performed substantial work in the reasonable expectation that it would be paid, but was not paid. The difficulty goes to assessing the value of the work that was done. Mr. Osbaldeston of Blackrock estimates the value of the work to be roughly half of FTI's estimate. Given the circumstances, and the absence of clear evidence to sustain a higher value, the Tribunal adopts Mr. Osbaldeston's estimate.
735. Pursuant to Article 8(1) of the Treaty, the Tribunal awards €463,000 for Al Hani's uncompensated work covered by RFP 8.

**K. CLAIMS 4 AND 5, PART V. RETENTION AMOUNTS**

**(1) Retention Amounts**

736. All of Al Hani's contracts with Libyan public entities authorized the employer to retain 5% of the amounts claimed on payment certificates as an incentive to assure satisfactory completion of the works. For example, under Article 10(e) of the General Conditions of the Benghazi Contract,

[t]he first party shall keep 5% of each monthly payments [sic] for the guarantee of the good performance of the works. They shall be paid after the provisional acceptance of the works in accordance with the provisions of article (54) of the Contract.<sup>886</sup>

737. Like Al Hani's other contracts, Article 54 of the Benghazi Contract then sets out a detailed procedure for inspection and provisional acceptance of the works following completion. It provides, *inter alia*, that

[t]he final payment and the release of the final guarantee shall not be made before the execution [of the agreed procedure for inspection and acceptance] otherwise the first party shall execute t[h]em on the expenses and responsibility of the second party.<sup>887</sup>

738. Claimant's Memorial summarizes the claim:

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<sup>886</sup> C-864, Benghazi Contract.

<sup>887</sup> C-864, Benghazi Contract.



Each payment certificate issued by Al Hani recorded the amount retained by the Authorities by way of performance guarantee, but which the Authorities failed to release to Al Hani despite the fact that they took possession of the corresponding sections of the roads.<sup>888</sup>

739. According to Claimant's witness Mr. Knaack:

On the Benghazi, Misurata and TIAR contracts, we had completed significant sections of the roads which were being used by traffic and we considered that we were entitled to the release of retention sums for these sections, but the clients never did so.<sup>889</sup>

740. At the Hearing, Claimant's quantification experts from FTI computed the total of the improperly retained retentions to be €7,924,256.<sup>890</sup> The corresponding calculation by Respondent's witness and its experts from Blackrock offered two figures: one indicated by Respondent's witness Mr. Al Kelani of €7,917,828 and a second calculated by Mr. Osbaldeston of €7,872,602.<sup>891</sup> All three of these calculations point to similar amounts.

741. As discussed below, Respondent denies Al Hani's right to recover any of the retentions. For all of the contracts, Respondent maintains that the contractual requirements for final acceptance and release of the retentions were not met, so that it need not release the retained amounts.

742. The facts relating to the contracts differ, so they must be considered individually. In its assessments, the Tribunal is mindful that the contractual acceptance process was not necessarily conducive to prompt acceptance and release of retentions. Indeed, the road contracts can be seen as giving the employer incentives not to rush to accept completed work. Prior to acceptance, even if a road had been in service for several years, the contractor remained fully responsible for maintaining it, removing sand, and, in

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<sup>888</sup> Cl. Mem. ¶546.

<sup>889</sup> 1<sup>st</sup> Knaack WS ¶8.

<sup>890</sup> CH-3, FTI Quantum Hearing Presentation, p. 4; Cl. PHB ¶381. There is an unexplained difference of about €14,000 between Claimant's experts' assessment of the amount of the withholdings and Mr. Osbaldeston's assessment.

<sup>891</sup> RH-15, Blackrock Quantum Hearing Presentation, p.6

Respondent's view, for repairing any damage from road accidents or unexpectedly heavy vehicle loadings after the road was put in service.

743 This view of the contractor's continuing responsibilities was confirmed by Respondent's witness Mr. El-Abesh at the Hearing:

Q. Is it correct that the Employer considered any damage to the road had to be repaired by the Contractor, no matter how that was caused?

A. This is the nature of the Contract. The Contract stipulates that the Project or the road is under the responsibility of the other party until it is delivered, taken possession of, and the company knows now, that because they have looked at the model Contract used-or-used for other parts of this road before it signed the Contract.

Q. But once the road is being taken back by the Employer and put to traffic, then it isn't in the possession of the Contractor, is it?

A. Contractually speaking, that is not correct.<sup>892</sup>

744. Claimant's supervisor of the Benghazi project, Mr. de Maria, characterized the matter this way: "[i]t was ... not in the RBA's interests to issue a provisional acceptance certificate for completed sections of the road, and in fact, in Libya, the RBA delayed provisional acceptance."<sup>893</sup>

***A. The Benghazi Contract***

745. In their First Report, Claimant's quantification experts from FTI stated the total retention amount for the Benghazi Contract, the most advanced of the several contracts, to be LYD4,654,798.<sup>894</sup>

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<sup>892</sup> TR 5:1320:8-21 (Mr. El-Abesh).

<sup>893</sup> De Maria WS ¶51.

<sup>894</sup> 1<sup>st</sup> FTI Quantum Report ¶3.2.10.

746. The evidence shows that sections of road covered by the Contract began to be placed in service in 2007 and much more of the road was placed in service by October 2009.<sup>895</sup> At the Hearing, Mr. El-Abesh confirmed that at the time of the Revolution, the Benghazi project was completed, except for RBA's acceptance of the road:

Q. ... [B]y the time the Revolution happened, this Project was complete, wasn't it?

A. The Benghazi Project, you mean?

Q. Yes.

A. Yes, yes. It was the only thing that was not completed was the delivery and taken the Owner had not taken possession of the road.<sup>896</sup>

747. Mr. de Maria's Witness Statement described a recurring sequence of attempts, beginning in 2008, to gain provisional acceptance as the length of completed road increased. RBA in each instance identified what it deemed to be shortcomings in Al Hani's work, as well as damage to the road after it was put into service, all requiring additional work by Al Hani.<sup>897</sup>

748. In Respondent's view, these further requirements for contractual acceptance were never satisfied. Hence, "RBA insists on the fact that Strabag International continues to bear responsibility until the Benghazi project is handed over to RBA,"<sup>898</sup> albeit twelve years after long sections of the refurbished road entered into service.

749. In his First Witness Statement, Mr. El-Abesh, described Al Hani's initial effort to secure acceptance in October 2009. At that time RBA requested "the removal and replacement of certain damaged sections of the road, the restoration of damaged shoulders, the removal of sand from shoulder edges and the reposition of certain road signs."<sup>899</sup> Mr. de Maria insisted

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<sup>895</sup> De Maria WS ¶59.

<sup>896</sup> TR 5:1322:20 – 1324:4 (Mr. El-Abesh).

<sup>897</sup> De Maria WS ¶¶54-61.

<sup>898</sup> Resp. C-Mem. ¶116 fn 197.

<sup>899</sup> 1<sup>st</sup> El-Abesh WS ¶54.

that this work was done, but Mr. El-Abesh insisted that it was not, and described additional inspections and meetings in 2010 when Al Hani's work was again found inadequate for provisional acceptance.<sup>900</sup> The RBA this time called for Al Hani to "prepare a proposal for the treatment of waves" on the road surface, repairing guard rails, removing sand from shoulders, and providing the asphalt mixtures that had been used.<sup>901</sup> This process continued through the years; a 2011 attempt was frustrated by the Revolution, and another RBA committee identified additional required changes in 2012.<sup>902</sup>

750. Among the requirements identified in 2012 was for lab tests to be done on samples taken from multiple locations on the road. In his First Witness Statement, Mr. El-Abesh insisted that they were not paid for,<sup>903</sup> so that RBA did not receive the results, and that "the provisional acceptance process remains incomplete and we have not been able to release the retention money."<sup>904</sup> In his testimony at the Hearing, Mr. El-Abesh told the Tribunal "there was a modest amount of money that wasn't paid, which is the fees for the testing done by the laboratory. The company did not pay for the tests, and that is why we have never received the results of these tests undertaken."<sup>905</sup> In response to the Tribunal's question referring Mr. El-Abesh to a check by which Claimant said it had paid for the tests, Mr. El-Abesh expanded upon his written statement, speculating, without reference to any evidence, that either the check was not deposited or the samples failed the tests.<sup>906</sup>

751. In his Second Witness Statement, Mr. Napowanez disputed Mr. El-Abesh's version of events, stating that the tests had been paid for and passed. "We paid Fatah University its fees, who confirmed that the samples taken had met with the required technical specifications."<sup>907</sup> Mr. Napowanez's testimony is supported by photocopies of a certified

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<sup>900</sup> 1<sup>st</sup> El-Abesh WS ¶55.

<sup>901</sup> 1<sup>st</sup> El-Abesh WS ¶55.

<sup>902</sup> 1<sup>st</sup> El-Abesh WS ¶58.

<sup>903</sup> 1<sup>st</sup> El-Abesh WS ¶59.

<sup>904</sup> 1<sup>st</sup> El-Abesh WS ¶59.

<sup>905</sup> TR 5:1365:14-18 (Mr. El-Abesh).

<sup>906</sup> TR 5:1373:4-18 (Mr. El-Abesh).

<sup>907</sup> 2<sup>nd</sup> Napowanez WS ¶40.

check to the University Office for Engineering Consultancy for LYD16,545, stamped as having been received, and of the university's signed and stamped receipt.<sup>908</sup> Respondent did not dispute the authenticity of these documents.

752. Respondent's Rejoinder seeks to counter this evidence with a January 2018 letter to the TPB from the University's Engineering Consulting Office. This letter states that Al Hani did not pay the remaining test fees of LYD16,545, so that the results "will not be handed to the company until it was paid the amount owed to the office."<sup>909</sup> The Tribunal has two observations regarding this letter, which was obtained by TPB a few months before the Hearing in this arbitration. First, it conflicts with Respondent's occasional speculative arguments that Al Hani had the results and knew that they were unsatisfactory, and so concealed them. The January 2018 letter says that Al Hani cannot see the results until it pays. Second, it is flatly inconsistent with the Consulting Office's official signed and sealed receipt given to Al Hani in March 2013, acknowledging receipt of Al Hani's certified check for LYD16,545.<sup>910</sup>

***(i) The Tribunal's Analysis and Decision***

753. The events summarized here show a recurring pattern in which RBA and TPB rebuffed multiple attempts by Al Hani over the course of multiple years to secure acceptance of completed road work, much of it placed into service years before. The evidence indicates that Al Hani sought to remedy defects cited by RBA in this process. These efforts were never good enough. Instead, throughout this period, RBA was content to leave the responsibility and expense of repairing damage from accidents, removing sand, and remedying design defects on Al Hani.
754. In the circumstances, the Tribunal finds that Al Hani is entitled to the amount of the retentions held by Respondent under the Benghazi Contract.

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<sup>908</sup> C-829, Check from Al Hani dated 31 March 2013 in the amount of LYD16,454, with receipt.

<sup>909</sup> R-300, Letter from RBA to REKABA dated 18 November 2009.

<sup>910</sup> C-829, Check from Al Hani dated 31 March 2013 in the amount of LYD16,454, with receipt.

755. FTI's final presentation to the Tribunal did not give contract-by-contract figures for the claimed amount of retentions. Blackrock's final presentation to the Tribunal at the Hearing identified FTI's final figure for the Benghazi retentions to be €2,790,715; Blackrock's corresponding final figure was €2,753,085, utilizing the exchange rate indicated by FTI.<sup>911</sup> The reason for the approximately €47,000 difference was not explained and is not readily apparent to the Tribunal.
756. In light of this ambiguity in the evidence, the Tribunal elects to split minor difference between the two experts' valuations. Pursuant to Article 8(1) of the Treaty, the Tribunal awards €2,780,000 in respect of this portion of the claim.

***B. The Misurata Contract***

757. The Parties' experts appear to agree that Respondent holds retentions for work on the Misurata road repair contract in the amount of €1,909,862.<sup>912</sup>
758. As mentioned above, the Misurata Contract was concluded by Strabag International and the RBA in April 2007,<sup>913</sup> and later transferred to Al Hani with the consent of the Libyan authorities. As discussed *supra*, the project then was affected by substantial delays. The Parties dispute responsibility for these delays and whether Al Hani is entitled to additional compensation for them. Both Parties' primary emphasis regarding this contract in these proceedings involves these delay issues.
759. Work on the project was still underway at the time of the 2011 Revolution, and the project was then one of three (along with the TIAR and Garaboulli road projects) for which Al Hani signed recommencement agreements after the Revolution.<sup>914</sup>

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<sup>911</sup> RH-15, Blackrock Quantum Hearing Presentation, p. 6.

<sup>912</sup> RH-15, Blackrock Quantum Hearing Presentation, p. 6.

<sup>913</sup> McDevitt WS ¶28.

<sup>914</sup> Cl. Reply ¶20.

760. According to Respondent's Counter-Memorial, "[b]y February 2011, when the 2011 Revolution commenced, Al-Hani had performed roughly two thirds of the works under the Misurata Contract."<sup>915</sup> In his First Witness Statement, Mr. Knaack said that Al Hani had completed "significant sections" of Misurata and other roads, and that they were being used for traffic.<sup>916</sup> This is consistent with Respondent's statement that about two-thirds of the work was completed.

761. The record regarding Al Hani's efforts to secure release of the retentions is less detailed than for the Benghazi Contract. Respondent's Counter-Memorial mentions one effort by Al Hani to gain provisional acceptance of a portion of the road:

In or around August 2010, Al-Hani requested provisional acceptance of the first section of the road. Pursuant to the Contract, a technical committee, with the participation of Al-Hani, was formed. The technical committee found rutting problems with the road, paint jobs failing to meet specifications, and areas where no shoulder works were performed. In view of these considerable issues, the committee refused to grant provisional acceptance.<sup>917</sup>

762. Respondent bases this statement regarding the claimed inspection and defects in performance on an undated letter from the "Committee for Provisional Acceptance to the Main and Branch Roads Department of TPB."<sup>918</sup> This letter is signed by only two of the three committee members and bears no stamps or seals, as frequently appear on TPB's official correspondence.

763. In his Witness Statement, Mr. El-Abesh adds that "[t]o date, the works in that section are still out of specification. For this reason, provisional acceptance has not occurred."<sup>919</sup>

764. Claimant indicates a different understanding of these events:

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<sup>915</sup> Resp. C-Mem. ¶157.

<sup>916</sup> Knaack WS ¶8.

<sup>917</sup> Resp. C-Mem. ¶156.

<sup>918</sup> R-52, Letter from Committee for Provisional Acceptance to TPB Main and Branch Roads Department (undated).

<sup>919</sup> 1<sup>st</sup> El-Abesh WS ¶61.

698. ... [T]he first part of the Misurata road, between Misurata and Al-Hesha, was complete and ready for hand-over to the TPB. Accordingly, on 11 August 2010, Al Hani wrote to the TPB requesting provisional acceptance of this 78 km stretch of the road.

699. The TPB only responded five months later, on 24 January 2011, indicating that it intended to form an inspection committee that would meet on 30 January 2011. However, to the Claimant's knowledge, no meeting of the inspection committee ever took place, with the result that the Respondent has failed to reimburse to Al Hani any of the retention monies for this completed stretch of the road.<sup>920</sup>

765. Claimant cites in this regard a 24 January 2011 letter from the TPB, notifying Al Hani that a committee had been formed and would visit the works on 30 January 2011.<sup>921</sup> This was at the time that revolutionary unrest was beginning in eastern Libya.

766. In any case, at the Hearing, Mr. El-Abesh confirmed that, while the road had not been accepted, it has been open to traffic for many years:

Q. And in relation to Misurata, the Employer has not confirmed provisional receipt of any of the Misurata road, has it?

A. The company asked delivery, but to my knowledge, reception hasn't happened yet.

Q. And yet the road has been opened to traffic for many years now, hasn't it?

A. Yes, yes.<sup>922</sup>

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<sup>920</sup> Cl. Reply ¶¶698-699.

<sup>921</sup> C-542, Letter from TPB to Al Hani dated 24 January 2011.

<sup>922</sup> TR 5:1326:1-8 (Mr. El-Abesh).



***(i) The Tribunal's Analysis and Decision***

767. The record is less extensive with respect to the Misurata Contract, and there is conflicting evidence regarding the status of Al Hani's efforts to gain provisional acceptance. However, Respondent and its witness confirm that at least two-thirds of the work was completed and that the road, improved by work performed by Al Hani, has now been open to traffic "for many years."
768. Thus, Respondent has had the benefit of Al Hani's work on the road over a substantial period, while keeping the retentions. Al Hani did tender the work for approval, although the evidence is conflicting and inconclusive regarding the result. However, in the circumstances, the Tribunal again concludes, in keeping with the role of good faith in the performance of contracts, that Al Hani is entitled to recover the amount of the retentions held by Respondent. As noted, Claimant's and Respondent's valuation experts both place this amount to be €1,909,862,<sup>923</sup> which is the amount awarded by the Tribunal pursuant to Article 8(1) of the Contract.

***C. The TIAR Contract***

769. To recall, the TIAR Contract involved the re-construction and upgrading of the access road to Tripoli's International Airport. The Parties' valuation experts agree that Respondent retained €1,883,705 in respect of work performed by Al Hani on the Contract.<sup>924</sup> It also appears agreed that as of the time of the Revolution, the project was 75% complete.<sup>925</sup> Mr. Napowanez states in this regard that "[b]y February 2011 we had completed much of the construction work on the Airport Road, with only works on the westernmost lane in the urban section of the road outstanding."<sup>926</sup>
770. According to Claimant:

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<sup>923</sup> RH-15, Blackrock Quantum Hearing Presentation, p. 6.

<sup>924</sup> RH-15, Blackrock Quantum Hearing Presentation, p. 6.

<sup>925</sup> Cl. Reply ¶197.

<sup>926</sup> 2<sup>nd</sup> Napowanez WS ¶13.

During the currency of the TIAR Contract, Al Hani requested the RBA or TPB on multiple occasions from as early as 11 October 2009 to take provisional acceptance of completed sections of the road. On 20 February 2011, the TPB approved the establishment of a committee to arrange for the provisional acceptance of the road, but to the best of the Claimant's knowledge no further steps were taken.<sup>927</sup>

771. Mr. Napowanez cites multiple letters from Al Hani to RBA<sup>928</sup> requesting RBA or TPB to take possession of the road. He states:

As we completed work on sections of road, they were immediately opened to traffic. I requested the RBA several times to take primary receipt of sections of the road, but there was no response from the RBA and the provisional acceptance process was never initiated.<sup>929</sup>

772. Respondent offered limited comments with respect to this claim. In his First Witness Statement, Mr. El-Abesh says only the following:

By the time of the 2011 Revolution, Al-Hani had completed approximately 75% of the works under the TIAR Contract. However, it had not completed provisional acceptance of any portion of the road.

I note that Claimant has now requested the release of LYD 3.2 million of retention money for the TIAR project. That money cannot be released until the provisional acceptance process is completed.<sup>930</sup>

***(i) The Tribunal's Analysis and Decision***

773. Thus, Respondent again has had the benefit of Claimant's work on a substantially completed and important project, but has held the retentions. In the circumstances, the Tribunal again concludes, in keeping with the role of good faith in the performance of contracts, that Claimant is entitled to recover the amount of the retentions held by

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<sup>927</sup> Cl. Reply ¶197.

<sup>928</sup> See C-552 – C-556.

<sup>929</sup> 2<sup>nd</sup> Napowanez WS ¶5.

<sup>930</sup> 1<sup>st</sup> El-Abesh WS ¶¶62-63.

Respondent. Claimant's and Respondent's valuation experts both place this amount to be €1,883,705.<sup>931</sup> The Tribunal awards the identical amount pursuant to Article 8(1) of the Treaty.

***D. The Tajura Contract***

774. Claimant seeks €989,766 for amounts withheld under the Tajura Contract. However, this project was far from complete when work was interrupted by the Revolution, and Claimant does not contend that Respondent has any current benefits or advantages from the work Al Hani did complete. Respondent further points out in its Rejoinder that Claimant did not seek to have any completed work provisionally accepted.<sup>932</sup> The considerations warranting recovery of the retained amounts present under some other contracts are not present here.

775. This portion of the claim is denied.

***E. The Garaboulli Contract***

776. Claimant also seeks €336,184 with respect to amounts withheld from payments under the Garaboulli Contract.<sup>933</sup> This was the final contract concluded by Al Hani in Libya, and at the time of the Revolution, approximately 5% of the work had been completed.<sup>934</sup> Here, as with the Tajura Contract, Respondent gained no significant benefit from a substantially completed project, nor did Al Hani seek provisional acceptance of any of its work. The considerations warranting recovery of the retained amounts under some other contracts are not present here.

777. This portion of the claim is denied.

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<sup>931</sup> RH-15, Blackrock Quantum Hearing Presentation, p. 6.

<sup>932</sup> Resp. Rej. ¶411.

<sup>933</sup> RH-15, Blackrock Quantum Hearing Presentation, p. 6.

<sup>934</sup> 1<sup>st</sup> El-Abesh WS ¶64.

**(2) Conclusion Regarding the Retention Amounts**

778. For the reasons given here, pursuant to Article 8(1) of the Treaty, the Tribunal awards €6,573,567 in respect of the claims for the amounts of retentions for the Benghazi, Misurata, and TIAR Contracts. Claimant's claims for retentions for the Tajura and Garaboulli Contracts are denied.

**L. CLAIMS 6.1 – 6.4. CLAIMS RELATED TO EXCEPTIONAL / *FORCE MAJEURE* EVENTS**

779. Pursuant to Article 8(1) of the Treaty, Claimant seeks substantial amounts for injuries said to result from the events of 2011, based on "Article 36 and related provisions of the Contracts."<sup>935</sup>

**(1) Claimant's Position**

780. As initially presented in Claimant's Memorial, this claim was for about €56.5 million.<sup>936</sup> Approximately €22.23 million was for immobilization of equipment, notably for depreciation while equipment was idle; Respondent's quantification expert did not dispute that such claims for immobilization of equipment were a proper element of damages should the Tribunal find liability. An additional €21.67 million reflected lost or damaged equipment, and €9.97 million was for bond and insurance costs.

781. As the case progressed, Claimant's experts from FTI deleted claims for lost/damaged equipment that were duplicated in other claims. As presented by FTI at the Hearing, the modified claim totals €37,148,520,<sup>937</sup> of which about €24.3 million is for "immobilized equipment" and €10.3 million for "financial charges" (bonds and insurance).<sup>938</sup> The remainder of the claim, approximately €2.36 million, is for stand-by and evacuation costs. This last element is a relatively small part of the claim. Nevertheless, certain portions of it, such as Claimant's assumed per-person cost for evacuating third-country staff, received considerable attention by the experts and at the Hearing.

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<sup>935</sup> Cl. PHB, caption at ¶328.

<sup>936</sup> Cl. Mem. ¶575.

<sup>937</sup> CH-3, FTI Quantum Hearing Presentation, p. 4 (total of items 6.1-6.5 in FTI table).

<sup>938</sup> CH-3, FTI Quantum Hearing Presentation, p. 9.

782. Claimant's arguments and FTI's analyses did not allocate the claimed damages contract-by-contract, but amounts claimed for each contract are contained in letters sent by Al Hani to its contract partners in September 2011 setting out Al Hani's claimed entitlement under various contracts for the period 20 February 2011 until the end of June 2011.<sup>939</sup> These letters were subsequently updated several times.<sup>940</sup>

783. Claimant summarized its position in its Post-Hearing Brief:

The so-called "Article 36 Claims" were triggered by the Respondent's failure to observe the obligations under Article 36 of the Contracts (for the Garaboulli, TIAR and Tajura Contracts, as modified) and Article 105 of the Administrative Contracts Regulations.

The Claimant's case is straightforward: Al Hani was entitled to compensation for exceptional circumstances and duly notified its claims to the Authorities in September 2011. There appears to be no dispute that exceptional circumstances existed at the time, giving rise to the claims for compensation, and that the Authorities failed to [sic] any compensation. The Respondent has accordingly failed to observe its obligations in breach of Article 8(1) of the Treaty.<sup>941</sup>

## (2) Respondent's Position

784. Respondent denies that any compensation is due. As explained in its Post-Hearing Brief,

Respondent maintains that (i) the Libyan Revolution and ongoing hostilities have amounted to *force majeure*, not just "exceptional circumstances," and (ii) Al-Hani is not entitled to compensation for damages as a result of the *force majeure* situation either under the terms of the Contracts or Libyan law. Although the applicable *force majeure* provisions vary by Contract, none of the Contracts provide for compensation in the event of *force majeure*.<sup>942</sup>

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<sup>939</sup> C-218, Letter from Al Hani the HIB dated 7 September 2011; C-221 – C224, Letters from Al Hani to the RBA dated 26 September 2011 in respect of each of the Benghazi, Misurata, Garaboulli and TIAR Contracts.

<sup>940</sup> Cl. Mem. ¶438.

<sup>941</sup> Cl. PHB ¶¶328-329 (footnote omitted).

<sup>942</sup> Resp. PHB ¶23 (footnotes omitted).

785. In the Counter-Memorial, Respondent advances an additional argument affecting the three contracts for which the Parties concluded Recommencement Agreements (the Misurata, TIAR and Garaboulli Contracts). Respondent contends that their *force majeure* provisions “were later superseded by their respective Recommencement Agreements, which in Article 2 provided for a separate and exclusive process to determine losses due to the 2011 Revolution.”<sup>943</sup> Thus, for these three contracts, “compensation is only available through the mechanism and for the amounts established by the Recommencement Agreements.”<sup>944</sup>
786. The Parties agree that the relevant contract provisions vary, so that the contracts must be analyzed in light of their specific terms.

### (3) The Parties’ Legal Experts

787. As these claims involved significant questions of Libyan law, the Parties’ legal experts played an important role. Dr. Abuda and Dr. Ahnish, the Parties’ respective experts, offered substantial opinions on the parties’ respective rights under the several contracts, agreeing on some matters, and not on others. The expert offered by Respondent, Dr. Abuda, expressed opinions that, if accepted by the Tribunal, would significantly limit compensation for these claims. Accordingly, the Tribunal must consider a matter bearing on his evidence.
788. At the Hearing, counsel for Claimant referred to documents showing that Dr. Abuda served as head of the Twenty Committee, and thus played a significant role in devising Libya’s policies related to treatment of foreign investors and investments after the Revolution. This fact was relevant to the Tribunal’s assessment of the independence and objectivity of Dr. Abuda’s evidence. However, his role as head of the Twenty Committee was not disclosed in his Expert Opinions or otherwise by Respondent. Respondent’s counsel acknowledged in response to the Tribunal’s question at the Hearing that it should have been disclosed.<sup>945</sup>

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<sup>943</sup> Resp. C-Mem. ¶569.

<sup>944</sup> Resp. C-Mem. ¶578.

<sup>945</sup> TR 8:1938:21-22, TR 8:1939:1 (Ms. Harwood).

789. Nevertheless, Dr. Abuda’s significant connection with the Respondent was not disclosed to the Tribunal until Claimant raised the issue. Claimant’s Post-Hearing Brief contends that this failure to disclose shows that he was not an independent expert<sup>946</sup> and that his testimony should be given no weight.<sup>947</sup>
790. Following Dr. Abuda’s testimony at the Hearing, the presiding arbitrator stated that “the Tribunal will certainly take the failure to disclose [his role as head of the Twenty Committee] into account in its consideration of his testimony,”<sup>948</sup> further observing “[c]ertainly, he might have had some value had he been tendered as a witness of fact, but he was not.”<sup>949</sup> The Tribunal has taken this situation into account in assessing the credibility and weight of Dr. Abuda’s evidence.

#### **(4) The Tribunal’s Analysis and Decision**

##### ***A. Article 36 and Articles 105 and 106 of the Administrative Contracts Regulations***

791. The Tribunal begins with an observation regarding the nature of *force majeure* provisions under contracts or general law. These exist to allocate risks resulting from exceptional, often large-scale, events that cannot be anticipated or prudently planned for. These events typically impose costs on both contractors and their employers. Through contract provisions such as Article 36, the contracting parties agree on the allocation of those costs. The Tribunal’s task is thus to identify and give effect to the risk allocation agreed by the parties in each contract.
792. Each of the contracts at issue, except the TIAR-NE Design Contract, includes an identically worded Article 36. The Parties’ experts both utilized the following translation of this provision:

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<sup>946</sup> Cl. PHB ¶¶45 et seq.

<sup>947</sup> Cl. PHB ¶¶45-46.

<sup>948</sup> TR 8:1939:22 – 1940:1-2 (Arbitrator Crook).

<sup>949</sup> TR 8:1940:12-14 (Arbitrator Crook).

If general, exceptional, irreversible and unanticipated circumstances occur, render execution of the obligation exhausting, and expose the Second Party to grave loss, but do not render execution impossible, the Second Party may request compensation that restores the financial equilibrium of the contract to a reasonable level. If these circumstances persist, and there is no hope that they will cease, the contract may be terminated. In addition, the Second Party may be exempted from executing its obligations, if *force majeure* occurs rendering execution of the contract impossible.<sup>950</sup>

793. The Parties and their experts agree that this provision gives effect to principles of Libyan law that recognize two different situations: exceptional circumstances and *force majeure*.<sup>951</sup> They also agree that in Libyan law, the two situations have different legal consequences.<sup>952</sup> The fundamental difference between the Parties concerned which situation existed in Libya at relevant times.
794. The experts agree that the first leg of Article 36, which mirrors Libya's Administrative Contracts Regulations,<sup>953</sup> deals with situations involving "exceptional circumstances," where contract performance can be resumed but potentially at a significant cost to the contractor. Where there are such "exceptional circumstances," a contractor may request compensation to "restore the financial equilibrium of the contract." Claimant maintains that the circumstances of 2011 reflected exceptional circumstances, entitling it to such compensation.
795. The second leg of Article 36, again mirroring the Administrative Contract Regulations, gives a contractor the right to terminate the contract if *force majeure* continues and relieves the contractor of its obligation to perform if *force majeure* renders performance impossible.<sup>954</sup> This second leg does not authorize any compensation. Respondent contends

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<sup>950</sup> 1<sup>st</sup> Ahnish Opinion, p. 8.

<sup>951</sup> TR 1:365:6-19 (Ms. Harwood).

<sup>952</sup> 1<sup>st</sup> Ahnish Opinion, p. 9.

<sup>953</sup> 1<sup>st</sup> Ahnish Opinion, p. 8.

<sup>954</sup> The term "*force majeure*" as used in Article 36 and the Regulations thus has a specialized meaning narrower than the general understanding of the term.



that the events of 2011 and subsequently involved continuing conditions of *force majeure* precluding performance, so there was no right to compensation.

796. The Parties' experts agree that parties to a contract can agree to modify application of the provisions of the Administrative Contracts Regulations dealing with situations that disrupt contract performance, and that they have done so with the Garaboulli, TIAR and Tajura Contracts.<sup>955</sup> The Tribunal considers the effect of these three amendments *infra*. However, three of the contracts (Benghazi, Misurata and TIAR-NE) were not amended, so the possibility of compensation is governed by Article 36 (Benghazi, Misurata), or the Administrative Contract Regulations (TIAR-NE). The Tribunal considers these three contracts first.

***B. Claimant's Position Regarding Article 36***

797. Claimant maintains that circumstances in Libya following the Revolution should be characterized as exceptional circumstances warranting compensation under the first sentence of Article 36, not as *force majeure*. In his First Opinion, Dr. Ahnish opined that the events of 2011 were exceptional circumstances whose continuation later ripened into a situation of *force majeure* that continues to the present day:

I am of the view that continuation of the events of 2011 for some time and the sporadic uncertainty that still exists until now amounts to *Force Majeure* as it is not yet evident that the current Government has effective control over the territory of Libya. A reasonable interpretation of Libyan law would lead to the conclusion that the continuation of the unrest in Libya since 2011, coupled with the sporadic violence that is still continuing, confirms that the unforeseeable and unanticipated circumstances that took place in Libya in 2011 have continued and culminated into an event of *force majeure*.<sup>956</sup>

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<sup>955</sup> 1<sup>st</sup> Ahnish Opinion, p. 11; 1<sup>st</sup> Abuda Opinion ¶¶36, 40.

<sup>956</sup> 1<sup>st</sup> Ahnish Opinion, p. 13.

798. At the Hearing, Dr. Ahnish confirmed that, in his view, there was a period of exceptional circumstances in the aftermath of the Revolution marked by negotiation of the Recommencement Agreements, but that the evolving security situation subsequently led to a situation of *force majeure* that has continued:<sup>957</sup>

[It] seems from what I have known from the documents that I have reviewed, there are two events, one that started with exceptional circumstances, and the Parties tried to deal with that in what they call the Resumption Agreement, and after that the Parties--the event of exceptional circumstances continued to the extent that it becomes *force majeure* under Libyan law.<sup>958</sup>

### ***C. Respondent's Position Regarding Article 36***

799. Respondent counters that there has existed a continuous period of *force majeure* in Libya rendering performance of the contracts impossible, beginning with the Revolution in 2011 and continuing to the present day. As expressed by Respondent's counsel on the first day of the Hearing, "[w]hat we have here in this case is impossibility. We have had persistent, protracted extraordinary circumstances that prevent performance."<sup>959</sup> In Respondent's view, "the continuous impossibility of performance since the 2011 Revolution cannot be doubted, as the facts demonstrate a persistent, protracted period of circumstances preventing performance."<sup>960</sup>

800. Dr. Abuda endorsed Respondent's position. In his opinion, the events of 2011 constituted *force majeure*; in response to the Tribunal's question at the Hearing, he confirmed that "the *force majeure* situation still prevails."<sup>961</sup> In his opinion, this *force majeure* situation

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<sup>957</sup> TR 8:1834:3-10 (Dr. Ahnish).

<sup>958</sup> TR 8:1833:20 – 1834:1-5 (Dr. Ahnish).

<sup>959</sup> TR 1:373:16-18 (Ms. Harwood).

<sup>960</sup> Resp. PHB ¶35.

<sup>961</sup> TR 8:1944:8-19 (Dr. Abuda).

rendered performance of the contracts impossible, and the contractor was therefore not entitled to compensation under Libyan law:<sup>962</sup>

In terms of compensation due as a result of *force majeure*, the default rule under Article 168 of the Civil Code is that no compensation is due by a person if the injury results from a cause outside his control such as unforeseen circumstances or an event of *force majeure*. Neither the Civil Code, nor the Administrative Contracts Regulation entitle the parties to compensation due to *force majeure*.<sup>963</sup>

...

Neither the Administrative Contracts Regulation nor the contracts at issue here refer to an intention to deviate from the default rules of the Civil Code. Therefore, in the event of impossibility due to *force majeure*, RBA, TPB and HIB are also (i) legally exempt from performing their obligations, (ii) not liable to make reparation for damages arising from *force majeure* if the injury resulted from a cause beyond their control and (iii) the corresponding contract may be terminated.<sup>964</sup>

#### ***D. Were the Contracts Terminated by Force Majeure?***

801. There is another apparent difference of view between the legal experts as to the effect of *force majeure* under Article 36 on the continued existence of the contracts. In cross-examination, Dr. Ahnish expressed the view that such *force majeure* automatically terminated an affected contract by operation of law, even without notice of termination or similar action by the contractor:<sup>965</sup>

Q. ... So, you are saying that regardless of whether the Parties – either Party declared a termination, you’re saying, as a matter of Libyan law, they were terminated.

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<sup>962</sup> 2<sup>nd</sup> Abuda Opinion ¶23.

<sup>963</sup> 2<sup>nd</sup> Abuda Opinion ¶30.

<sup>964</sup> 2<sup>nd</sup> Abuda Opinion ¶32.

<sup>965</sup> TR 8:1815:8-14 (Dr. Ahnish).

A. I think the Declaration, in my view, as a matter of Libyan law, the Declaration, the termination would be of a declaratory nature rather than an obligation with a party to ... explicitly announce the termination. What caused the termination is a *force majeure* ...<sup>966</sup>

802. Dr. Abuda did not share this view, indicating that under Libyan law, a contract “may” be terminated in circumstances of *force majeure*, as indeed is clear from the text of Article 36, which gives an affected contractor a right to terminate, but termination is not automatic.<sup>967</sup>

803. The Parties’ conduct is not consistent with Dr. Ahnish’s suggestion that the contracts were automatically terminated by *force majeure*. Based on the evidence, in the months after the end of the Revolution in October 2011, both Parties displayed interest in resuming work and clearly did not view the contracts as having been terminated. As noted *supra*, in the spring of 2012, Respondent’s authorities created the “Twenty Committee” which developed policy guidance for government bodies in restoring contract relations with foreign contractors.<sup>968</sup> Much additional evidence shows the Parties’ shared understanding that the contracts were not terminated and could be brought back into operation. Respondent’s Counter-Memorial points out, for example:

307. Two days after the liberation of Libya on October 23, 2011, Al-Hani wrote to TPB, stating that it was assessing its losses in order to resume works under the contracts ...

308. In December 2011, TPB wrote to Al-Hani to see whether it was interested in recommencing works under the TIAR Contract. On February 7, 2012, TPB met with Al-Hani to explore the possibility of recommencing works.<sup>969</sup>

804. The Minutes of a 7 February 2012 meeting between Mr. El-Abesh and Al Hani representatives are to the same effect. They state that “Eng. Sami Al-Abish informed that

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<sup>966</sup> TR 8:1818:2-12 (Dr. Ahnish).

<sup>967</sup> 2<sup>nd</sup> Abuda Opinion ¶29.

<sup>968</sup> See *supra*, paragraph 87.

<sup>969</sup> Resp. C-Mem. ¶¶307-308 (footnotes omitted).

the Libyan Government instructed the TPB to contact the National Companies to discuss the subject of recommencement and completion of their projects as soon as possible.”<sup>970</sup> (At the Hearing, Mr. El-Abesh denied the statement attributed to him regarding instructions from the Libyan Government,<sup>971</sup> although he previously cited the Minutes of the 7 February meeting as an exhibit to his First Witness Statement without any reservation.) In any case, the uncontested portions of the document clearly show TPB’s wish to get on with projects that had been interrupted, not to terminate the contracts.

805. Beginning in 2012, the Parties entered into negotiations for the Recommencement Agreements on terms that assumed the continued existence of the contracts. As Respondent points out, “[i]n the Recommencement Agreements, the parties expressly stated their intention to resume works that had been suspended because of the 2011 Revolution.”<sup>972</sup> In 2014, TPB, concerned that Al Hani had not recommenced work under four road contracts (including the Benghazi Contract, for which there was no Recommencement Agreement) wrote to Al Hani that if work was not recommenced TPB would “start the procedures to withdraw these contracts.”<sup>973</sup>
806. Claimant continued to perform under the contracts, maintaining in force substantial financial guarantees; indeed, Claimant claims for amounts it has paid and continues to pay for these as part of the relief sought in this case.
807. Thus, the Parties clearly regarded these contracts as remaining in force, and Respondent’s representatives and its counsel at the Hearing confirmed to the Tribunal that they have not been terminated.<sup>974</sup> Based on the record and uncontested statements regarding the contracts’ status at the Hearing, the Tribunal does not accept that they have been terminated.

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<sup>970</sup> C-255, Minutes of 7 February 2012 Meeting.

<sup>971</sup> TR 5:1348:21 – 1353:9

<sup>972</sup> Resp. C-Mem. ¶314.

<sup>973</sup> R-181, TPB letter to Al Hani dated 29 April 2014.

<sup>974</sup> TR 1:389:13 et seq. (Ms. Harwood), TR 1:399:9 et seq. (Ms. Harwood), TR 7:1727:3 et seq. (Arbitrator Crook, Mr. Turki), TR 7:1730:10 (Ms. Harwood).

*E. Article 36: Exceptional Circumstances or Force Majeure?*

808. The Tribunal is confronted with two competing visions of the situation under Article 36 of the contracts and relevant provisions of Libyan law. Is there a continuing situation of *force majeure* that began in 2011 and has since rendered performance of the contracts permanently impossible, as Respondent contends? Or, was there a period of exceptional circumstances, during which it was possible to resume performance, although subsequent events transformed the situation into an enduring situation of *force majeure*, as Claimant contends?
809. It does appear that for a time following the Revolution, the parties to these contracts believed there was a possibility to resume work under some of them, and took actions to that end. However, the Tribunal assesses that the actual course of events shows this belief was not correct. As matters developed, Al Hani was not able to resume work. Indeed, Mr. Napowanez, Claimant's senior representative in Libya, writes that "I left Libya in early 2014 as the security situation had worsened, and Strabag's management did not consider it safe for me to remain in Libya."<sup>975</sup>
810. The Tribunal has considered *supra* evidence regarding post-Revolutionary conditions in Libya in connection with Libya's courts' ability to fairly and safely adjudicate claims under these contracts and other matters.<sup>976</sup> Additional evidence submitted by both Parties indicates that conditions in Libya following the Revolution would not have allowed the resumption of substantial work under Al Hani's contracts.
811. Respondent, for example, points out that:

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<sup>975</sup> 2<sup>nd</sup> Napowanez WS ¶47.

<sup>976</sup> See *supra* Section V.E. "Recourse to Libyan Courts". See also Section VIII.E. "Claim 2. Equipment Removed from Tweisha in 2014".

- In January 2012, clashes erupted between former rebel forces in Benghazi, reflecting discontent with the pace and nature of change under the governing National Transitional Council (“NTC”).<sup>977</sup>
- The NTC struggled to control local armed militias, especially in the western part of the country. In June 2012, one of the militias, the Al-Awfeia Brigade, briefly took over Tripoli International Airport, and the election commission building in Benghazi was ransacked by mobs.<sup>978</sup>
- Protests erupted again following the GNC’s refusal to disband after the expiration of its mandate in February 2014, and fighting subsequently broke out between forces loyal to the outgoing GNC and the new Parliament. In July 2014, UN staff left the country, embassies shut down and foreigners were again evacuated. The Tripoli International Airport was destroyed for the most part in the fighting that took place in July and August 2014.<sup>979</sup>

812. Claimant offers a similar litany of serious security concerns after the Revolution:

- Claimant’s Memorial observes that “[d]uring the course of 2013, Al Hani experienced increasingly serious issues related to the security situation in Libya.”<sup>980</sup>
- Mr. Napowanez emphasized this deteriorating security situation in 2013, as Al Hani was preparing to resume some work. “[D]uring this period, the security situation got worse. The security situation in Libya after we returned to Libya was manageable, but we still had to be very careful about our movements. However, in 2013 the situation deteriorated ... One particularly serious incident occurred on 15 May 2013 at the Tweisha office when a large group of former employees stormed the office” and took

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<sup>977</sup> Resp. C-Mem. ¶291.

<sup>978</sup> Resp. C-Mem. ¶292.

<sup>979</sup> Resp. C-Mem. ¶297.

<sup>980</sup> Cl. Mem. ¶238.

hostages,<sup>981</sup> an event Claimant viewed as “a serious threat to the safety of Al Hani’s employees and the security of its operations.”<sup>982</sup>

- According to Mr. Napowanez, “[w]ith increased physical danger, and the lack of protection that we were getting from the Libyan police and security forces, we could not guarantee the safety of the sites of our employees.”<sup>983</sup>
- Mr. Knaack states that “[i]n 2013, the security situation in the country deteriorated. With our ongoing cash-flow problems and faced with the deteriorating security situation, it became increasingly apparent that we would not be able to proceed with the contracts.”<sup>984</sup>

#### *F. The Tribunal’s Decision on Exceptional / Force Majeure Events*

813. Given this and other similar evidence in the record, the Tribunal finds that conditions in Libya since the end of the Revolution in 2011 have constituted *force majeure* for purposes of Article 36 of the Benghazi, Misurata, and TIAR-NE Contracts, as contended by Respondent.

#### **(5) The Effect of the Recommencement Agreements**

814. Respondent advances a further argument regarding the three contracts that were the subject of Recommencement Agreements (the Misurata, TIAR, and Garaboulli Contracts). Respondent contends that these contracts’ *force majeure* provisions “were later superseded by their respective Recommencement Agreements, which in Article 2 provided for a separate and exclusive process to determine losses due to the 2011 Revolution.”<sup>985</sup> Thus, for these contracts, “compensation is only available through the mechanism and for the amounts established by the Recommencement Agreements.”<sup>986</sup>

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<sup>981</sup> 1<sup>st</sup> Napowanez WS ¶¶56-57.

<sup>982</sup> Cl. Mem. ¶239.

<sup>983</sup> 1<sup>st</sup> Napowanez WS ¶60.

<sup>984</sup> 1<sup>st</sup> Knaack WS ¶49.

<sup>985</sup> Resp. C-Mem. ¶569.

<sup>986</sup> Resp. C-Mem. ¶578.



815. Thus, for example, Article 2 of the Misurata Recommencement Agreement provides:

The second party will not claim, as main condition for resuming work in the project, value of compensations of any direct or indirect damages as a result of the events that occurred in the country. The damages will be specified by forming a committee from the owner in the presence of the contractor as proof for the case and settlement of the compensation will be according [to] the state's decision in the compensation.<sup>987</sup>

816. The Tribunal notes that the primary thrust of this provision is to oblige Al Hani not to claim compensation for its damages from the Revolution as a condition for resuming work. It does not alter any entitlement to damages under the relevant contract and legal provisions. It is procedural in character, indicating a procedure through which these claims could in the future be asserted and assessed through a committee to be created, and that, so far as the Tribunal is aware, never has been created.

817. In any case, the Parties' experts agree that the Recommencement Agreements could not have affected Claimant's claimed rights in respect of these damages. As stated in Respondent's Rejoinder, the Agreements are in a "state of suspension." They

would have had an effect on Article 36 if Al-Hani had resumed works. Because Al-Hani never did so these Contracts remain in a state of suspension (similar to the TIAR-NE, Benghazi and Tajura Contracts). Claimant agrees that because "Al-Hani could not recommence its works under the Contracts, then the Parties are to revert to the provisions of the original Contracts."<sup>988</sup>

818. In cross-examination, when directed to this passage in the Rejoinder, Dr. Abuda, Respondent's legal expert, endorsed it:

Q. So, there [i.e., in the Rejoinder] the Respondent seems to say that the Recommencement Agreements are suspended, and the Original Contracts apply. Is that also your opinion?

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<sup>987</sup> C-328, Misurata Recommencement Agreement dated 19 February 2013.

<sup>988</sup> Resp. Rej. ¶143 (footnotes omitted).

A. When an agreement is suspended with specific conditions and terms such as the recommencement of the work and the contractor does not recommence the work, it means that this Agreement is not enforced because one of the parties did not implement it, and the original text remains prevailing over the other.

Q. So, the Recommencement Agreements would only have prevailed over the original agreements if the Recommencement Agreements had been in force. Is that what you're saying?

A. Yes, yes.<sup>989</sup>

819. Dr. Ahnish, Claimant's legal expert, expressed a similar conclusion. In his view, the Recommencement Agreements established two conditions recommencement of the works, and the ability to complete them within 900 days "without interruption attributable to the disturbances following" the Revolution:

If either of the two conditions failed to materialise, it is my opinion that the Recommencement Agreements were to cease to apply, in their entirety, because the whole purpose of entering into the Recommencement Agreements would be frustrated. If disturbances continued and, as a consequence thereof, Al Hani could not recommence its works under the Contracts, then the Parties are to revert to the provisions of the original Contracts in every aspect/matter relating thereto.<sup>990</sup>

820. The conditions described by Dr. Ahnish were, of course, not met. The Parties' experts thus point to the same conclusion: that the Recommencement Agreements are not relevant for the Tribunal's present task of assessing whether any compensation is due in respect of the claimed injuries. The Tribunal accordingly does not consider them further here.

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<sup>989</sup> TR 8:1925:7-20 – 1927:2 (Dr. Abuda).

<sup>990</sup> 2<sup>nd</sup> Ahnish Opinion, p. 13.

**(6) Implications of *Force Majeure* for the Benghazi, Misurata, and TIAR-NE Contracts**

821. The Tribunal first considers the implications of its finding of *force majeure* for the Benghazi, Misurata, and TIAR-NE Contracts. In the first two, Article 36 is the governing text.<sup>991</sup> Article 36 does not appear in the TIAR-NE Contract, but the substantively identical provisions of the Government Contracting Regulations instead apply.
822. Given the Tribunal’s conclusion that events in Libya since 2011 constitute *force majeure* for purposes of Article 36 and the Government Contracting Regulations, Al Hani has no right to compensation for its force majeure related losses under the Benghazi and Misurata contracts. It has the right to terminate the contracts, a right it has not exercised. Further, Al Hani “may be exempted from executing its obligations if *force majeure* occurs rendering execution of the contract impossible.” But the contractually-agreed allocation of loss under Article 36 places the burden of Al Hani’s losses from the Revolution and subsequent events on Al Hani, not on Respondent.
823. The same applies to the TIAR-NE Contract, which is governed by the corresponding principles of the Government Contracting Regulations. No compensation is due with respect to any *force majeure*-related losses related to this contract, although it appears that none is claimed.
824. The Tribunal notes that, even if the prevailing conditions were assessed to be “exceptional circumstances” and not *force majeure*, it is not apparent that compensation would have been available under these contracts.
825. Events in Libya in the months after the Revolution did not correspond to the logic of the first clause of Article 36 and the corresponding provisions of Libyan law and regulations. Claimant’s expert evidence explains that the purpose of allowing compensation for “exceptional circumstances” is to allow work on public contracts to be continued or

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<sup>991</sup> 1<sup>st</sup> Ahnish Opinion, p. 11.

resumed. In his Second Expert Opinion, Dr. Ahnish described the underlying policy rationale to be that “the administrative authority must bear a portion of this financial burden *in order to ensure that the contractor can continue to perform the contract and, in turn, ensure that public works are not disrupted.*”<sup>992</sup>

826. Against this background, both experts express the view that the first clause of Article 36 authorizes compensation only if work is resumed during or after the *force majeure* period.<sup>993</sup> According to Dr. Abuda, under this provision and Article 105 of the Regulations, “if the contractor notifies the other party of the end of *force majeure*, then it has to resume performance, unless performance becomes permanently impossible.”<sup>994</sup> Dr. Ahnish expresses a similar understanding of Article 36, writing:

Unlike in respect of the TIAR, Garaboulli and Tajura Contracts, this “compensation” becomes due only if the Second Party continues to perform its obligations under the Benghazi and/or the Misurata Contracts. Termination for *force majeure* itself as defined in Article 36 (without amendment) does not trigger compensation.<sup>995</sup>

827. Claimant disputes this interpretation in the Reply,<sup>996</sup> but the Tribunal finds that it is most consistent with the wording and structure of the first clause of Article 36. This provision deals with situations where continuing or resuming work is not “impossible” but is “exhausting” and exposes the contractor to “grave loss.” If so, the contractor “may request” compensation to “restore the financial equilibrium ... to a reasonable level.” The contract thus envisages a process of adjustment so that work can continue or resume. The contractor may seek not full compensation but amounts sufficient to restore the balance of rights under the contract to a “reasonable” level so that the contractor can resume or continue work.

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<sup>992</sup> 2<sup>nd</sup> Ahnish Opinion, p. 6 (emphasis added).

<sup>993</sup> The first sentence of the translation of Article 36 can perhaps be read to mean that there can be compensation only if the contractor continues to work during the period of upheaval, but this would be inconsistent with the common understanding of *force majeure*. Neither Party’s expert takes this view.

<sup>994</sup> 1<sup>st</sup> Abuda Opinion ¶38.

<sup>995</sup> 1<sup>st</sup> Ahnish Opinion, p. 11.

<sup>996</sup> Cl. Reply. ¶¶667-669.

828. This understanding of Article 36 indicates that no compensation would be available with respect to the Benghazi Contract even if there had been “exceptional circumstances.” The evidence shows that by 2011 work on this project was virtually complete. The road was open to traffic; portions had been open for several years. As discussed above, there were limited remaining issues involving final acceptance and recovery of retention monies, but for all practical purposes, the project was finished. Al Hani had no realistic expectation or desire to return to work on it after the Revolution, save to the limited extent of its unsuccessful efforts to recover the retentions. No compensation was needed to enable Al Hani to resume work.
829. The situation related to the Misurata Contract is somewhat different. Work was well advanced on the project, but it was not as near to final completion as the Benghazi project. Respondent’s desire to conclude a Recommencement Agreement indicates that it wished further work on the road. However, Al Hani did not resume work, either under the original contract nor the Recommencement Agreement. Given this, it is not clear that compensation would be due under this contract, even if the prevailing conditions were deemed to be exceptional circumstances.
830. The Tribunal concludes that no compensation was due under the Benghazi, Misurata and TIAR-NE Contracts.

**(7) The Garaboulli, TIAR and Tajura Contracts**

***A. Garaboulli and TIAR Contracts***

831. The Garaboulli, TIAR, and Tajura Contracts all include additional clauses, each captioned and worded differently, that both Parties’ legal experts agree supersede or modify the application of Article 36.<sup>997</sup> All three amendments use language that does not by its terms reflect the distinction between exceptional circumstances and *force majeure*. Instead, the three contracts all utilize the term “*force majeure*” in its broader and more generally understood meaning, not the limited sense it is used in Article 36.

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<sup>997</sup> 1<sup>st</sup> Ahnish Opinion, p. 8.

832. Dr. Abuda and Dr. Ahnish offer slightly different translations of the amendments to the Garaboulli and TIAR Contracts, but their translations do not differ in substance. In Dr. Abuda's translation of the Garaboulli Contract:

If Second Party is unable to fulfil its obligations under the contract due to *force majeure*, it shall be entitled to obtain an extension and monetary compensation due to the delay.

If the obstacle to execution of the work persists, due to the *force majeure*, for 60 days or for multiple periods totaling more than 90 days, the Second Party shall be entitled to terminate the contract, and recoup all losses and costs resulting therefrom.<sup>998</sup>

833. Dr. Ahnish's translation is similar in substance.<sup>999</sup>

834. In Dr. Abuda's translation, the TIAR amendment provides:

In the event of exceptional circumstances that prevent the Second Party from executing the work, such as *force majeure*, the Second Party shall be entitled to extension of time and costs as a result thereof.

If these circumstances continue for a period of 60 days, or there is an increase exceeding 90 days, the Second Party shall be entitled to terminate the contract, and shall be compensated by the First Party for the losses and expenses.<sup>1000</sup>

835. Dr. Ahnish's translation of this amendment is again similar in substance.<sup>1001</sup>

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<sup>998</sup> 1<sup>st</sup> Abuda Opinion ¶42.

<sup>999</sup> "In the event that the Second Party is not able to perform its obligations provided in the Contract as a result of *force majeure*, the Second Party shall be entitled to an extension of time and financial compensation for such delay. In the event of continuation of prevention of execution of the Works as a result of the circumstances [*force majeure*] for a period of 60 days or for multiple periods which total more than 90 days then the Second Party shall have the right to terminate the Contract and recover all losses and costs incurred." 1<sup>st</sup> Ahnish Opinion ¶3.2.

<sup>1000</sup> 1<sup>st</sup> Abuda Opinion ¶43.

<sup>1001</sup> "If exceptional circumstances prevent the Second Party from performing the Works, being *force majeure*, the Second Party shall have the right to extension of time and costs incurred as a result thereof [the delay]. In the event of continuation of these circumstances for 60 days [continuously] or for [multiple] periods which exceed 90 days the Second Party shall have the right to terminate the Contract and it shall [then] be compensated by the First Party for the loss and expenses." 1<sup>st</sup> Ahnish Opinion, p. 10.

***(i) The Tribunal's Assessment of the TIAR and Garaboulli Contracts Amendments***

836. These clauses entitle the contractor to receive compensation in circumstances where it is not available under Article 36. They give the contractor different rights depending on the gravity of the situation. Thus, according to Dr. Ahnish:

Under this amendment, compensation payable to the Second Party in the event of continuation to perform is twofold: (i) “extension of time and (ii) costs incurred as a result thereof [the delay]” (emphasis is mine). Payment of compensation awarded to the Second Party in the event of continuation to perform its duties under these Contracts is no longer left to the absolute discretion of the judge upon applying the principle of “restoring the financial equilibrium” of the contract to a reasonable level as provided under Article 36. Under the amendment of Article 14, the level of compensation is now defined with some clarity: “costs incurred as a result of the delay” meaning, all costs incurred by the Second Party resulting from the delay.

If the unforeseen event developed into force majeure that triggers termination, again the Second. Party under Article 14 shall be entitled to “compensation for losses and expenses incurred.”

...

Therefore, under the above Garaboulli and TIAR Contracts, the level of compensation payable in the event of continuation is “costs incurred” or “financial compensation” as a result of the delay. In the event of termination, the level of compensation is the same: to “recover all losses and costs incurred” or “compensation for the losses or expenses”.<sup>1002</sup>

837. Dr. Abuda agrees that under these amendments, the contractor is entitled to full compensation, and not some reduced amount under the “equilibrium” concept, including compensation in case of termination. For him, the amendments “modify the effect of *force majeure* by allowing the contractor to recover all occurred losses and expenses due to *force majeure* when performance becomes impossible.”<sup>1003</sup>

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<sup>1002</sup> 2<sup>nd</sup> Ahnish Opinion, p. 10.

<sup>1003</sup> 1<sup>st</sup> Abuda Opinion ¶44.

838. Thus, the experts agree that if there are *force majeure* conditions *force majeure* as generally understood, and not in the limited sense the term is used in Article 36 a contractor can obtain both an extension and “compensation due to the delay.” If these conditions persist “for 60 days or for multiple periods totaling more than 90 days,” the contractor has additional rights: the option to terminate the contract and the right to recover its “losses and costs.”
839. The contracts thus make compensation available in both situations delay, and ultimate impossibility although the use of different language suggests that the extent of compensation might be different in each case.
840. Dr. Ahnish addresses the meaning of “compensation for delay” under the two amendments. In his view:

The meaning of the expressions “compensation for delay” and “losses and costs/expenses incurred” is not defined under these Contracts; but it would certainly include the following heads of loss which I understand that Al Hani subsequently claimed in September 2011:

Cost related to immobilization of plant and equipment;

Costs of repatriating personnel from Libya for safety reasons;

Costs of cancellation of subcontracts and purchase orders;

Standby costs of keeping personnel on site for reasonable period until evacuation or resumptions of Works after force majeure event ceases;

Financial charges incurred in having to keep in place bonds and insurance pending resumption of Works under the Contracts;

Surveillance, utilities, maintenance and other costs incurred in maintaining the sites relating to the Works pending resumption of Works;

Damage to equipment, machinery and site facilities in 2011 not compensated by insurance.<sup>1004</sup>

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<sup>1004</sup> 1<sup>st</sup> Ahnish Opinion, pp. 12-13.



841. Dr. Abuda appeared to question this list, noting that Dr. Ahnish did not provide a basis for his conclusions, but he offers no alternative reasoning or conclusions.<sup>1005</sup>
842. Thus, Claimant is contractually entitled under the TIAR and Garaboulli Contracts to recover “compensation due to the delay” associated with the *force majeure* events of 2011. The Tribunal assesses that Dr. Ahnish’s list provides a reasonable measure of compensable costs under these contracts. However, it notes that in the claim as ultimately presented, Claimant’s valuation experts from FTI removed claims for cancellation of subcontracts and purchase orders and made no claim for surveillance, maintenance and administrative costs.<sup>1006</sup> The amount of compensation due under the Garaboulli and TIAR Contracts is addressed *infra*.

### ***B. The Tajura Contract***

843. The Tajura amendment uses a different formula that includes a reference to Article 36. In Dr. Ahnish’s translation, the provision reads:

In the event of *force majeure* [that] faces the Second Party, the Second Party shall then be entitled to extension of time for the Contract Period and shall be paid the additional expenses incurred by it and associated therewith [with the delay] pursuant to Article 36.<sup>1007</sup>

844. In Dr. Abuda’s similar translation:

In the event of Force Majeure facing the Second Party, the Second Party shall be entitled to extension of time for the Contract Period and reimbursement of his associated additional costs incurred, pursuant to Article 36.<sup>1008</sup>

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<sup>1005</sup> 1<sup>st</sup> Abuda Opinion ¶51.

<sup>1006</sup> RH-15, Blackrock Quantum Hearing Presentation, p. 4.

<sup>1007</sup> 1<sup>st</sup> Ahnish Opinion ¶3.

<sup>1008</sup> 1<sup>st</sup> Abuda Opinion ¶46.

845. In correspondence in 2012, Al Hani confirmed that its claim with respect to losses related to Tajura is based on this clause.<sup>1009</sup>
846. This amendment, like the amendments to the TIAR and Garaboulli Contracts, diverges from Article 36. First, it utilizes the term “*force majeure*” in its more commonly understood and broader meaning, not in the limited sense used in Article 36. Under the Tajura amendment, *force majeure* is not limited to situations where performance cannot be resumed. Second, the clause gives the contractor two rights: an extension of time to perform, and a right to compensation for delay-related expenses “pursuant to Article 36.”
847. In their opinions, both experts conclude that the cross-reference imports from Article 36 the concept that compensation is to “restore the balance of the contract.” Thus, while Dr. Ahnish views the intention of the cross reference to be “unclear,” he assesses that “the parties here agreed that the ‘compensation’ payable to the Contract [sic] under Article 14 shall be calculated under the criterion provided under Article 36: ‘... compensation that restores the financial equilibrium of the Contract to a reasonable level’.”<sup>1010</sup> Dr. Abuda agrees that the Article 36 principle of “restoring the balance” applies under the Tajura amendment.<sup>1011</sup>
848. However, the Parties and their respective experts differ in another fundamental respect. Respondent interprets the provision also to import Article 36’s limitation that compensation is only available if the contractor resumes work. Respondent points out there was no Recommencement Agreement for Tajura, and that Al Hani never resumed work. Accordingly, in Respondent’s view, there can be no compensation for *force majeure* losses under the Tajura Contract.<sup>1012</sup>

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<sup>1009</sup> C-257, Letter from Al Hani to Secretary of the Administrative Committee of the Housing and Utilities Authority dated 23 February 2012 ¶¶2-2-3.

<sup>1010</sup> 1<sup>st</sup> Ahnish Opinion, p. 11.

<sup>1011</sup> 1<sup>st</sup> Abuda Opinion ¶47.

<sup>1012</sup> Resp. C-Mem. ¶¶571-572.

849. Dr. Abuda supports Respondent's view:

This provision seems to modify Article 36 by requiring that the contractor, as part of restoring the balance of the contract under Article 36, must receive an extension of time. It does not seem to require payment of compensation when performance has become impossible due to force majeure; otherwise, granting an extension of time to the contractor would be meaningless. In the latter situation, under Article 106 of the Administrative Contracts Regulations, both parties are excused from liability.<sup>1013</sup>

850. Dr. Ahnish sees no such limitation on compensation under the amendment.

***(i) The Tribunal's Assessment of the Tajura Amendment***

851. The disputed reference to Article 36 is located at the end of the clause relating to the payment of compensation. The Tribunal finds the logical interpretation of this to be as do both Drs. Ahnish and Abuda that it imports into the Tajura Contract the concept that compensation for losses may be less than full. Under Article 36, compensation is limited to that required "to restore the equilibrium of the contract." It thus may involve something other than full reimbursement of the costs stemming from a force-majeure-related delay.

852. The Tribunal does not accept Respondent's further argument that the cross-reference to Article 36 also imports the limitation that compensation is only available if work is resumed. The consequence of this argument would be that the brief reference to Article 36 reintroduces the distinction between exceptional circumstances and *force majeure*, with compensation only available for the former. This would effectively render the Tajura amendment without substantial effect, as a contractor's right to compensation would be the same under both the amendment and under Article 36. This goes too far. The Tribunal does not believe that in amending Article 36 the contracting parties intended a nullity.

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<sup>1013</sup> 2<sup>nd</sup> Abuda Opinion, p. 47.

853. Accordingly, the Tribunal decides that Claimant is entitled to compensation for its damages resulting from disruption of the Tajura Contract to the extent required to “restore the financial equilibrium” of the contract. This requires the Tribunal to assess the meaning of the obligation to “restore the financial equilibrium” in the facts presented here.
854. Dr. Ahnish indicates that this involves something short of full compensation for all losses and excludes, for example, lost profits.<sup>1014</sup> His Second Expert Opinion summarizes the jurisprudence of the French Conseil d’État, which he portrays as very influential in the development of administrative law in Egypt and Libya. According to Dr. Ahnish, “the decisions of the Conseil d’État as a matter of practice in the majority of cases has been to hold the state liable for 90% of the loss. In a few rare occasions, the French Conseil d’État had held states liable for 80% and 95% of the loss.”<sup>1015</sup>
855. Dr. Abuda agrees with the concept of sharing the financial burden of *force majeure* conditions between the two parties, although he maintains that this allocation of burden must be done by a judge. In his view, this idea
- is reflected in Article 105 of the Administrative Contracts Regulation: “the contractor shall have the right to compensation for recovering the contract financial balance to a reasonable limit,” which can be done by distributing the financial burden resulting from these circumstances, within reason, between the contracting parties. This rebalancing needs to be done by a judge. Justice would not be served if only one of the parties is held responsible for such exceptional circumstances causing hardship.<sup>1016</sup>
856. The opinions of both legal experts thus indicate that the contractor would be entitled to compensation, but adjusted in some manner to allocate the losses between contractor and client. However, if the Conseil d’État decisions are a guide to this balancing as Dr. Ahnish contends, the reduction of the contractor’s claim would be relatively modest. The Tribunal addresses this issue further *infra*.

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<sup>1014</sup> 1<sup>st</sup> Ahnish Opinion, p. 9.

<sup>1015</sup> 2<sup>nd</sup> Ahnish Opinion, p. 7.

<sup>1016</sup> 1<sup>st</sup> Abuda Opinion ¶¶36-37.

### *C. The Compensation Due*

857. As explained *supra*, only three of the Contracts – Garaboulli, TIAR and Tajura – allow for recovery of all or a portion of what the Tribunal refers to here for convenience as “*force majeure*” losses. The Benghazi, Misurata and TIAR-NE Contracts do not authorize such compensation. The Tribunal addresses *infra* the question of how to allocate Claimant’s claimed losses among the several contracts, given that Claimant presented these claims globally and not contract-by-contract. First, however, the Tribunal must consider the total amount of losses claimed.
858. As presented at the Hearing, Claimant seeks €37,148,520 for its “*force majeure*” claims. The two Parties’ quantification experts differ regarding the claimed amount. FTI assesses the claim for “immobilized plant and equipment,” the largest component of the claim, at €24,770,928. Blackrock accepts that €23,111,695 of this has been documented.<sup>1017</sup> The difference, almost €1.66 million, reflects Mr. Osbaldeston’s use of a lower net book value for the equipment, reflecting his opinion that the cost of transporting equipment from port to job site should not be included in net book value.<sup>1018</sup>
859. FTI disputes Mr. Osbaldeston’s position, pointing out, *inter alia*, that “[u]nder International Accounting Standards ..., costs to transport fixed assets to the place where they are placed in service are to be capitalized and spread out (i.e. depreciated) over the depreciable life of the asset.”<sup>1019</sup> The Tribunal finds FTI’s argument and evidence in this regard to be persuasive, and accepts FTI’s assessment of the value of immobilized plant and equipment, €24,770,928.

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<sup>1017</sup> RH-15, Blackrock Quantum Hearing Presentation, p. 25.

<sup>1018</sup> RH-15, Blackrock Quantum Hearing Presentation, p. 25.

<sup>1019</sup> 2<sup>nd</sup> FTI Quantum Report ¶341.

860. The next element of the claim involved comparatively smaller claims of €1,058,315 for the costs of evacuating staff, and €1,300,912 for staff stand-by costs. Of these, Blackrock accepts €603,056 of evacuation costs and €791,291 of staff stand-by costs to have been sufficiently documented.<sup>1020</sup> The difference between the experts thus amounts to approximately €965,000.
861. Mr. Osbaldeston raises an array of objections to the claimed evacuation costs, assessing €264,000 of local expenditures to be unsubstantiated, based, *inter alia*, on his view that Mr. Knaack's estimate of a cost of LYD150 per evacuee, while it "does not seem unreasonable" should have been "recorded in Cologne," which was not subject to the chaotic conditions prevailing in Libya.<sup>1021</sup> As these costs were incurred in multiple locations in the face of a chaotic situation, and the amount is, as Mr. Osbaldeston indicates, "not unreasonable," the Tribunal is not persuaded by this objection. Mr. Osbaldeston further regards approximately €172,000 of flight costs as potentially duplicative. FTI disputes this, claiming that the disputed items reflect different cost codes in Strabag's accounting data and were properly reflected there as separate expenditures.<sup>1022</sup> The Tribunal accepts Claimant's position in this regard, and accepts the claimed evacuation costs as an element of the overall "*force majeure*" claim.
862. Mr. Osbaldeston also raises multiple questions regarding the €1.3 million claim for standby staff costs. These often reflect his view that the claim lacked the "further and better particulars" he would normally expect to find in a construction claim, or involve evidence that he finds unclear or that is stated in foreign currencies or languages (German).<sup>1023</sup> FTI and Blackrock both identify the remaining difference between the experts in this area to be approximately €510,000.<sup>1024</sup> About €190,000 of this reflects use of Al Hani's January 2011 staff costs, rather than those from March 2011, in extrapolating staff costs for February

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<sup>1020</sup> CH-3, FTI Quantum Hearing Presentation, p. 4.

<sup>1021</sup> RH-15, Blackrock Quantum Hearing Presentation, p. 20; 2<sup>nd</sup> Blackrock Quantum Report ¶¶323-327.

<sup>1022</sup> CH-3, FTI Quantum Hearing Presentation, p. 24.

<sup>1023</sup> 2<sup>nd</sup> Blackrock Quantum Report ¶337 et seq.

<sup>1024</sup> CH-3, FTI Quantum Hearing Presentation, p. 24; RH-15, Blackrock Quantum Hearing Presentation, p. 20.

2011.<sup>1025</sup> Another €320,000 reflects Blackrock's questioning the correctness or sufficiency of Al Hani's payroll data. The Tribunal does not accept Blackrock's arguments in either respect.

863. The final element involves claims for financial charges claimed on account of the disruption of Al Hani's/Strabag's activities, for which Claimant seeks €10,281,063. Mr. Osbaldeston of Blackrock regards €9,236,544 of this as having been sufficiently documented.<sup>1026</sup> The difference between the experts is thus approximately €1 million. A portion of this assessed either as €176,500 (FTI) or €191,000 (Blackrock) relates to insurance costs, and primarily involves a difference regarding the recoverable amount of the construction coverage: is it recoverable to the end of the maintenance period (as FTI contends) or to the end of the construction period (Blackrock).<sup>1027</sup> Mr. Osbaldeston contends for the shorter period because "a contractor would recover the full cost during the Time for Completion and nothing during the maintenance period."<sup>1028</sup> The Tribunal does not accept the logic of this argument; the full cost recovered by a contractor at the time of completion would presumably reflect the cost of maintaining insurance cover during any subsequent maintenance period.
864. A second and larger difference given as approximately €862,000 (FTI) or €592,000 (Blackrock) involves Strabag's costs for maintaining guarantees. With respect to these, Mr. Osbaldeston of Blackrock excludes Strabag's administrative fees for maintaining the guarantees incurred by BRVZ, "the treasury department of the Strabag Group."<sup>1029</sup> Mr. Osbaldeston finds that he is "unable to assess these fees," but finds them "exceptionally high."<sup>1030</sup> However, according to Mr. Knaack, these fees reflect both the direct costs for the fees and charges of the bank issuing the guarantees as well as the

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<sup>1025</sup> CH-3, FTI Quantum Hearing Presentation, p. 24.

<sup>1026</sup> CH-3, FTI Quantum Hearing Presentation, p. 25.

<sup>1027</sup> CH-3, FTI Quantum Hearing Presentation, p. 25; RH-3, Blackrock Quantum Hearing Presentation, p. 20.

<sup>1028</sup> 2<sup>nd</sup> Blackrock Quantum Report ¶356.2.

<sup>1029</sup> 2<sup>nd</sup> Knaack WS ¶30.

<sup>1030</sup> 2<sup>nd</sup> Blackrock Quantum Report ¶377.1.

associated administrative costs incurred by BRVZ to administer the guarantees.<sup>1031</sup> Viewed in this broader light, the Tribunal does not find the BRVZ charges to be excessive.

865. The previous discussion does not address the full range of Blackrock’s numerous questions and criticisms. A number of these involve relatively small amounts that may indeed be questionable in the circumstances. Making allowance for these in the context of a good deal of detailed and sometimes conflicting evidence, the Tribunal concludes that Claimant has sufficiently established “*force majeure*” losses in the amount of €37,000,000.
866. However, the Tribunal has also determined that Claimant is not entitled to recover *force majeure* losses under the Benghazi, Misurata and TIAR-NE Contracts (although it appears that none are claimed under the TIAR-NE Contract). Al Hani is contractually entitled to recover such costs for the TIAR and Garaboulli Contracts. It also has a right to recovery under the Tajura Contract, but any recovery must be adjusted to restore the “financial equilibrium” of the Contract.
867. Claimant’s “*force majeure*” claim was not specified contract-by-contract; claims under all of the contracts were instead aggregated. There is no right to recovery under some contracts, and only a qualified right to recover under the Tajura Contract. Accordingly, the Tribunal must assess, within the limits of the available evidence, the recoveries under the three contracts that authorize them. The result is an approximation, but this is the necessary consequence of the manner in which Claimant presented its claim.
868. Claimant’s Memorial refers to the “Reclamation Letters” sent by Al Hani in December 2011 and subsequently updated that set out Al Hani’s claimed *force majeure* costs for each individual contract.<sup>1032</sup> The amounts claimed in these letters are not presented in a manner that precisely parallels the current claims. Nevertheless, these letters contain sufficient information to allow the Tribunal to make a reasoned appraisal of the proportion that the costs Claimant attributes to each contract bears to Claimant’s total claim.

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<sup>1031</sup> 2<sup>nd</sup> Knaack WS ¶30.

<sup>1032</sup> Cl. Mem. ¶439.



869. The Tribunal has carried out a substantial analysis of amounts claimed in the Reclamation Letters. On the basis of the information contained there, the Tribunal assesses that Al Hani's several contracts for which it claims *force majeure* claims contributed to the amount of the total claim in the following proportions:

Benghazi	-	4.5%
Misurata	-	10.4%
TIAR	-	8.7%
Garaboulli	-	11.0%
Tajura	-	65.4%
		100%

870. While these proportions are approximate, they are the Tribunal's best assessment, made necessary by the manner in which Claimant elected to present its claims.

871. As discussed *supra*, the Tribunal has determined the total of Claimant's "*force majeure*" losses to be €37,000,000. As the Benghazi and Misurata Contracts do not authorize compensation for "*force majeure*" losses, 14.9% of this amount, approximately €5.51 million, must remain on Claimant's shoulders.

872. Claimant is entitled to recover with respect to 19.7% of the total, €7.29 million, for losses related to the TIAR and Garaboulli Contracts.

873. The Tribunal assesses that 65.4% of *force majeure* losses, or €24.20 million, can be attributed to the Tajura Contract. However, as decided *supra*, this amount must be adjusted in order to restore the "balance of the contract." Dr. Ahnish testified that the influential practice of the French Conseil d'État "as a matter of practice in the majority of cases has been to hold the state liable for 90% of the loss. In a few rare occasions, the French Conseil d'État had held states liable for 80% and 95% of the loss."<sup>1033</sup> The Tribunal was not directed to other relevant evidence on this issue. Taking account of terms of the Contract,

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<sup>1033</sup> 2<sup>nd</sup> Ahnish Opinion, p. 7.

the practice of the Conseil d'Etat, and the circumstances of the claim, the Tribunal awards €21.25 million in respect of the claim involving Tajura.

874. Accordingly, pursuant to Article 8(1) of the Treaty, the Tribunal awards €28.54 million in respect of Claimant's claim under Article 36 and related provisions of the several contracts.

#### **IX. ADVANCE PAYMENTS UNDER THE CONTRACTS<sup>1034</sup>**

875. Respondent contends that any amounts found due under the several contracts should be set off against large sums said to reflect the unrecovered balances of advance payments made to Al Hani under those contracts. As described *supra*, Al Hani's employers made substantial advance payments in connection with all of the contracts at issue. These funds were to be recouped by the employers over time by reducing the amounts paid to Al Hani as work progressed. This was accomplished by having Al Hani deduct an agreed percentage from the total amount claimed under each payment certificate prior to submitting it for payment.

876. It is undisputed that through this mechanism, Respondent completely recovered the advance payments on the Benghazi and Misurata road contracts. (Although the Benghazi advance payment was recovered, Respondent continued to recover some funds in excess of the total required.<sup>1035</sup>) However, large amounts were not recovered in this manner. The largest advance payment was for the large Tajura infrastructure contract, where the work was not far advanced, in part due to the delays discussed *supra*. Respondent's counsel stated at the Hearing that the initial advance payment for Tajura was for €45 million and LYD74 million;<sup>1036</sup> in post-Hearing correspondence, Claimant states its exposure under the Tajura advance payment guarantee to be €51,905,971.53.<sup>1037</sup> In its Post-Hearing Brief,

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<sup>1034</sup> This Section IX should be read in conjunction with the Partial Dissenting Opinion of Arbitrator Nassib G. Ziadé.

<sup>1035</sup> Cl. Reply ¶84.

<sup>1036</sup> TR 1:344:3-5 (Ms. Harwood).

<sup>1037</sup> Claimant's letter to Tribunal dated 15 November 2019, p. 1.

Respondent puts the total of the “unearned” advance payments under the Tajura, TIAR, TIAR-NE, and Garaboulli Contracts as €98,128,159.<sup>1038</sup>

877. Also, as described *supra*, the contracts required that guarantees be established and maintained to provide security for the employers’ ability to recover the advance payments. As described by Respondent:

The Contracts (except for TIAR-NE<sup>1039</sup>) all included a provision requiring the Advance Payment to be guaranteed with an “unconditional” and “irrevocable” letter of credit, which HIB or TPB had a right to call “without the need for a warning, a judicial claim, or the undertaking of any other actions, and without consideration of any objection from the Second Party or a third party.”<sup>1040</sup>

878. Significant issues related to the guarantees were not clarified at the Hearing. On 29 October 2019, the Tribunal Secretary sent a message to the Parties on behalf of the Tribunal seeking clarification regarding the guarantees. The letter stated that the Tribunal

noted that the guarantees established and maintained by the Claimant as security for the advance payments received by Al Hani would seem to be a factor of some significance in the relationship between the Parties, but also noted a lack of clarity in the pleadings and at the hearing regarding the situation of the guarantees.

...

The Tribunal would welcome any clarifications the Parties can provide in relation to the matter of the guarantees in order to assist the Tribunal in completing its mandate. The Tribunal would in particular appreciate knowing whether there have been any relevant developments related to the guarantees since the hearing.<sup>1041</sup>

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<sup>1038</sup> Resp. PHB ¶208.

<sup>1039</sup> This statement that no guarantee was required for the TIAR-NE Contract is not consistent with Respondent’s Counter-Memorial, according to which a letter of guarantee was required. Resp. C-Mem. ¶83.

<sup>1040</sup> Resp. PHB ¶228.

<sup>1041</sup> Tribunal letter to the Parties dated 29 October 2019.

879. The Parties' responses to this inquiry were received simultaneously on 15 November 2019. On 25 November 2019, the Tribunal invited each Party to comment on the other Party's submission. The Parties' simultaneously-filed responses were transmitted to the Tribunal on 11 December 2019.

**A. RESPONDENT'S POSITION**

880. Respondent contends that the unrecovered balances of the advance payments exceed any amounts due to Al Hani under the contracts, and that these balances should be set-off against any amounts found due to Strabag under the contracts.<sup>1042</sup> Respondent's Post-Hearing Brief confirms that it seeks to have its unrecovered advance payments treated as a set-off.<sup>1043</sup> Respondent does not make a counter-claim.<sup>1044</sup>

881. *Unjust Enrichment.* Respondent contends that the amount Al Hani received as advance payments substantially exceeds the percentage of work accomplished in Tajura and other cases.<sup>1045</sup> Thus, large portions of the advance payments were "unearned," and should be set off against any recovery by Strabag.<sup>1046</sup> Failing to do so unjustly enriches Claimant, while allowing set-off would entitle Respondent to recover the "unearned" portion pursuant to the contracts and applicable provisions of Libyan law and the Administrative Contracts Regulations.<sup>1047</sup> Respondent further contends that, as Claimant alleges that the advance payments were utilized to purchase equipment, compensating Al Hani for lost equipment would constitute impermissible double recovery.<sup>1048</sup>

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<sup>1042</sup> Resp. PHB ¶137.

<sup>1043</sup> Resp. PHB ¶¶233-234.

<sup>1044</sup> TR7:1601:5-19 (Ms. Harwood).

<sup>1045</sup> Resp. PHB ¶136.

<sup>1046</sup> Resp. PHB ¶137.

<sup>1047</sup> Resp. PHB ¶209.

<sup>1048</sup> Resp. Rej. ¶634.

882. *Unauthorized Use.* Respondent further maintains that a set-off is required because Claimant failed to prove that it utilized the advance payments for the purposes for which they were provided, and instead used them for other purposes.<sup>1049</sup> In this connection, Respondent suggests that Strabag improperly transferred the Euro portion of the advance payments to accounts in Europe for its own corporate purposes, rather than utilizing the funds for the purposes for which they were provided.<sup>1050</sup>
883. Respondent also contends that a set-off was required both by several provisions of the contracts and by provisions of Libyan law dealing with restitution.
884. *Status of the Guarantees.* In response to the Tribunal's 29 October 2019 request for clarification regarding the guarantees, Respondent replied by counsel's letter of 15 November 2019 that "the guarantees relating to the Tajura Contract expired in 2012 and 2013." Respondent's letter adds that a three-year limit under Libyan law for HIB to claim against the issuing bank for refusing to extend or pay the amounts under the guarantee has expired, leaving HIB with only the option of a suit in Libyan courts against Al Hani for restitution and breach of contract. The letter further states that any such action in Libyan courts "would be limited to the extent the Tribunal has set off against the amount claimed by Strabag (based on the contractual claims belonging to Al Hani) the unearned payment currently still held by Strabag but belonging to Al Hani."<sup>1051</sup>
885. As to the TIAR, TIAR-NE and Garaboulli projects, Respondent's letter states:

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<sup>1049</sup> Resp. PHB ¶136.

<sup>1050</sup> See, e.g., Resp. Rej. ¶631.

<sup>1051</sup> Resp. 15 November 2019 letter to Tribunal, pp. 1-2.

[T]he advance payment guarantees were valid at the time of the hearing and we understand them to be valid still today. As with the Tajura advance payment guarantee, to the extent any advance payment setoffs asserted by Respondent are accepted against the claimed amounts sought by Strabag in this arbitration ... regarding the TIAR, TIAR-NE and Garaboulli contracts, TPB would be prevented by the terms of the advance payment guarantees from calling on or cashing them. In other words, the advance payments under the TIAR, TIAR-NE and Garaboulli contracts would be deemed by the bank to have been repaid to the same extent of the setoffs allowed by the Tribunal.<sup>1052</sup>

886. In a second letter responding to the Tribunal's invitation to comment on Claimant's letter of 15 November 2019, Respondent reiterates its view that the Tajura guarantee has expired and cannot now be called by HIB.<sup>1053</sup> The letter further disputes the evidence that Claimant has paid bank charges to maintain this and other guarantees, contending that the evidence of record consists only of accounting data and is "only secondary proof (at best)" that Strabag has paid bank charges to maintain the guarantees between February 2011 and June 2017.<sup>1054</sup> Respondent concludes that, because Al Hani did not agree to renew the Tajura guarantee at the time the parties were discussing possible resumption of the Tajura project, "[t]here is no basis to claim amounts for maintaining guarantees that Claimant itself made sure expired long ago."<sup>1055</sup>

## **B. CLAIMANT'S POSITION**

887. Claimant dismisses Respondent's argument as "a confused mixture of set-off and unjust enrichment arguments."<sup>1056</sup> In Claimant's view, there is no contractual basis for Respondent's argument,<sup>1057</sup> or any jurisdictional basis under the Austria-Libya BIT for the

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<sup>1052</sup> Resp. 15 November 2019 letter to Tribunal, p. 2.

<sup>1053</sup> Resp. 10 December 2019 letter to Tribunal, p. 3.

<sup>1054</sup> Resp. 10 December 2019 letter to Tribunal, p. 1.

<sup>1055</sup> Resp. 10 December 2019 letter to Tribunal, p. 4.

<sup>1056</sup> Cl. PHB ¶83.

<sup>1057</sup> Cl. Reply ¶70.

Tribunal to apply a set-off.<sup>1058</sup> Claimant further observes that Respondent has never claimed set-off in Libyan courts.<sup>1059</sup>

888. Claimant contends that there are no remaining “unearned” balances from the advance payments, maintaining that all of these funds were utilized for work on Al Hani’s projects and have been exhausted.<sup>1060</sup> In this regard, Claimant refers to evidence said to show that, because of Respondent’s slow or non-payment of substantial amounts due for payment and bitumen certificates, its claims for additional work, and the failure of its State-owned joint venture partner LIDCO to inject cash into the joint venture, Al Hani had to finance the work itself, first by securing loans from Strabag, and then with a loan from Gumhouria Bank.<sup>1061</sup> Claimant submits that it lost money on its Libyan contracts and was not unjustly enriched.<sup>1062</sup>

889. Claimant denies that it improperly diverted the Euro portion of the Tajura advance payment to its own benefit. Claimant contends that Respondent’s argument in this regard reflects misunderstanding of the accounting procedures and documents upon which the argument is based, and that the advance payments made in Euros were transferred to Strabag accounts in Europe with the employers’ knowledge to cover costs for equipment and other expenses payable in Euros.<sup>1063</sup>

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<sup>1058</sup> Cl. PHB ¶91.

<sup>1059</sup> Cl. PHB ¶88.

<sup>1060</sup> 2<sup>nd</sup> Knaack WS ¶8: “By late 2010, all lines of credit with Strabag and Gumhouria Bank were fully exhausted and Al Hani had fully utilized all of the advance payments received from the client to finance Al Hani’s operations in Libya.”

<sup>1061</sup> Cl. Reply ¶10; 3<sup>rd</sup> Knaack WS; 1<sup>st</sup> Knaack WS ¶14 et seq.

<sup>1062</sup> Cl. PHB ¶85.

<sup>1063</sup> 3<sup>rd</sup> Knaack WS ¶3.

890. Claimant expresses concern that the advance payment guarantees remain a potential liability, pointing out that Mr. Al-Naas indicated at the Hearing that HIB apparently envisioned calling the Tajura guarantee.<sup>1064</sup> In counsel's 15 November 2019 letter responding to the Tribunal's 29 October 2019 request for clarification, Claimant contends that while the status of the Tajura fronting guarantee is "uncertain" due to an administrative error by Gumhouria Bank, a related counter guarantee by Strabag remains in force between Gumhouria Bank and ABC International Bank to secure the Libyan Bank from loss in case of a call,<sup>1065</sup> while a third backing guarantee runs between Claimant and ABC International Bank.<sup>1066</sup> With respect to the Tajura advance payment guarantee the Claimant states:

[T]he Respondent has previously relied on the fact that, as Mr. Knaack originally explained, in 2012 HIB issued instructions to Gumhouria Bank to extend the fronting guarantee, but (according to the Claimant's understanding based on correspondence from Gumhouria Bank) HIB delivered those instructions to the wrong branch. Because of this mistake, there is some uncertainty regarding the status of the fronting guarantee (i.e., whether it has expired as a matter of Libyan law). However, there is no such uncertainty regarding the status of the backing guarantee, under which the Claimant remains fully liable, with the result that ABC International Bank retains the right to call on that backing guarantee (which it will likely do if it faces a claim by Gumhouria Bank), and if ABC International Bank does so, the Claimant will have the obligation to pay the full amount of the guarantee.<sup>1067</sup>

891. Claimant observes in this regard that it continues to pay bank charges to maintain the guarantees, including the Tajura advance payment guarantee, and has claimed these as an element of its claim for damages related to interruption of the contracts. The Tribunal addresses these claims for bank charges *supra*.

892. Claimant contends that it would suffer "significant prejudice"

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<sup>1064</sup> Cl. PHB ¶87.

<sup>1065</sup> 2<sup>nd</sup> Knaack WS ¶14.

<sup>1066</sup> Cl. 15 November 2019 letter to Tribunal, p. 2.

<sup>1067</sup> Cl. 15 November 2019 letter to Tribunal, p. 3 (footnotes omitted).



if the Tribunal accepted the Respondent's set-off argument and then faced a call from ABC International Bank on the Tajura backing guarantee that remains in place, along with calls on the Tajura and TIAR performance guarantees from ABC International Bank and Deutsche Bank (which it will be unable to contest). If that occurs (which Mr. Al Naas indicated is highly likely), the Claimant would effectively face a 'double jeopardy': it would be prejudiced in its claim for damages in this arbitration, and it would be obliged to pay over EUR 55 million, in circumstances where the Respondent has deliberately avoiding calling on the guarantees until the close of these arbitration proceedings.<sup>1068</sup>

893. In counsel's second letter of 10 December 2019, Claimant contends that Respondent's claim in its 15 November 2019 letter that the Tajura guarantee has lapsed is not correct and does not accurately reflect the evidence. Claimant points in this regard to Mr. Al-Naas's statement at the Hearing (discussed *infra*) that HIB "intends to call the guarantees, depending on the outcome of this arbitration." Claimant further disputes Respondent's contention that a limitations period has extinguished HIB's rights to claim restitution against the bank,<sup>1069</sup> contending that Respondent's position in this regard is inconsistent. In Claimant's view, if HIB's claim against the bank is time-barred under Libyan law, so is Respondent's claim for restitution of the advance payments.<sup>1070</sup> Claimant further denies that any set-off would reduce the amount that could be claimed under the guarantees, pointing out that these are irrevocable on-demand instruments, so that any call would result in payment of the full guarantee amount.<sup>1071</sup>

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<sup>1068</sup> Cl. 15 November 2019 letter to Tribunal, p. 5.

<sup>1069</sup> Cl. 15 November 2019 letter to Tribunal, p. 2.

<sup>1070</sup> Cl. 10 December 2019 letter to Tribunal, p. 3.

<sup>1071</sup> Cl. 10 December 2019 letter to Tribunal, p. 3.

**C. THE TRIBUNAL'S ANALYSIS AND DECISION**

894. The Tribunal notes that the Parties' recent exchange of correspondence leaves some matters of fact unclear. *Inter alia*, there is a lack of clarity regarding the advance payment guarantees for the TIAR, TIAR-NE and Garaboulli Contracts. Respondent appears to regard the unrecovered advance payments under these three contracts as relevant in determining the amount of its claimed set-off. For its part, however, Claimant does not identify them as posing potential liabilities, apparently because these guarantees were provided by Al Hani, not by Strabag. In its 10 December 2019 letter, Claimant states in this regard:

With regard to the Respondent's reference to the TIAR, TIAR-NE and Garaboulli guarantees, which the Respondent acknowledges are still valid, these include guarantees provided by Al Hani along with the TIAR performance guarantee provided by Strabag (which the Claimant discussed in its 15 November 2019 letter).<sup>1072</sup>

895. *Jurisdiction and Admissibility.* Respondent does not specifically address the Tribunal's jurisdiction to consider its set-off claim, instead contending that a set-off is required to avoid unjust enrichment and that cited provisions of the contracts and of the Libyan Civil Code authorized recovery of the unrecovered advance payments.<sup>1073</sup> For its part, Claimant disputes the Tribunal's jurisdiction to consider the claim and finds no legal basis for it on the merits.

896. In assessing its jurisdiction to consider the set-off claim, the Tribunal notes that Article 13 of the Treaty, which deals with indemnification, indicates that a Contracting Party can seek to set-off claims against it:

A Contracting Party shall not assert as a defence, counter-claim, right of set-off or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received ....

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<sup>1072</sup> Cl. 10 December 2019 letter to Tribunal, p. 4.

<sup>1073</sup> Resp. C-Mem. ¶¶767-768.

897. While this provision does not expressly authorize a set-off in the present context, it indicates that the treaty-makers saw set-offs as within a tribunal's jurisdiction. The Tribunal also recalls that ICSID's Arbitration (Additional Facility) Rules apply in this case. Article 47 of those Rules authorizes either party to present "an incidental or additional claim or counter-claim." Respondent's claimed set-off can reasonably be viewed as an "incidental or additional claim" for purposes of Article 47. Accordingly, the Tribunal finds that it has jurisdiction to address Respondent's set-off claim to the extent of its authority to extend relief under Article 15 of the Treaty.
898. There is a related matter regarding the admissibility of Respondent's set-off claim under the Arbitration (Additional Facility) Rules. Under Article 47 of those rules, an incidental claim must be presented no later than in the Reply. In this case, Respondent's claim of set-off was sufficiently articulated in the Counter-Memorial to satisfy the requirement of Article 47.<sup>1074</sup>
899. *Unjust Enrichment.* Respondent contends that not allowing its requested set-off would result in unjust enrichment of Claimant,<sup>1075</sup> but it did not clearly address the status or nature of unjust enrichment under some potentially relevant system of law under the Treaty. Forms of the doctrine do exist in different systems of national law, but with varying elements and requirements.<sup>1076</sup> All appear to require, however, that the party against whom a claim for unjust enrichment is brought receive some incontrovertible benefit as a result.

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<sup>1074</sup> See, e.g., Resp. C-Mem. ¶¶765-766 (Amounts due for unpaid payment certificates "have to be offset against the unearned portion of the Advance Payment ...")

<sup>1075</sup> Resp. PHB ¶210.

<sup>1076</sup> See, e.g., P. Gallo, Unjust enrichment: A Comparative Analysis, 40 AM J COMP L 431, 463 (1992).

900. The Tribunal is not persuaded that this is the case here. The testimony of Mr. Knaack and other witnesses establishes to the Tribunal's satisfaction that the advance payments, as well as substantial additional funds derived from loans from Strabag and from Al Hani's Libyan bankers, were utilized by Al Hani to carry forward the several construction projects in the face of delayed or non-payment of Al Hani's payment certificates and claims for additional work. And, at the end of the day, Claimant maintains that it lost money on its activities in Libya.<sup>1077</sup> "Unjust Enrichment" does not properly describe the situation here.
901. *Claimed Misuse of the Advance Payments.* Claimant denies that Al Hani and Strabag improperly diverted advance payments received, either to fund work on other contracts or for Strabag's purposes unrelated to Libya. In this regard, the Tribunal notes that the contracts do not specify or limit the purposes for which the advance payments are provided. They thus do not support Respondent's contention that Claimant utilized the advance payments improperly by using advance payments received in connection with one project to support work on others. This is particularly the case as Al Hani was working on several contracts at the same time, while experiencing difficulties in obtaining timely payment on many, if not all, of them.
902. The Tribunal is also not persuaded by Respondent's contention that Strabag improperly transferred funds from Al Hani to accounts in Europe for Strabag's own purposes unrelated to construction activities in Libya. The Tribunal finds the evidence sufficient to show that payments received in Euros were properly transferred to Strabag's accounts with the knowledge of Al Hani's employers and for appropriate purposes, such as purchase of equipment and payment of expatriate salaries.
903. *Status of the Guarantees.* The several contracts at issue do not by their terms provide for set-offs and instead create a mechanism of guarantees to secure the advance payments. As Respondent points out, *supra*, these take the form of unconditional and irrevocable letters of credit in favor of the employer established in a Libyan bank. The contracts allow for the amount of the letter of credit to be reduced over time as the employer progressively

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<sup>1077</sup> Cl. PHB ¶83.

recovers the advance payment through reductions in the amounts paid on Al Hani's payment certificates,<sup>1078</sup> although it is not clear to the Tribunal whether this in fact occurred.

904. The Parties disagree whether this mechanism has continuing relevance for the large advance payment for the Tajura Contract. In both of its recent letters, Respondent denies the continued existence of any guarantee of the Tajura advance payment, contending that the Tajura advance payment guarantee ceased to exist in 2011.

905. The Tribunal is not persuaded of Respondent's recent position. The testimony at the Hearing and the evidence on record show that significant elements in the chain of guarantees securing the Tajura advance payment remain in effect, as does the entire TIAR guarantee and the separate performance guarantees for both of these Contracts.

906. Respondent's present position seems inconsistent with the position of Respondent's officials at the Hearing, when Mr. Al-Naas, HIB's senior official responsible for letters of credit, told the Tribunal that HIB was contemplating a possible call on the Tajura guarantee:

Q. Do you know whether HIB, depending on the outcome of this arbitration, intends to call the Guarantees?

A. Yes.

[Interpreter asks that question be repeated for technical reasons.]

Q. Are you saying that HIB intends to call the Guarantees depending on the outcome of this arbitration?

A. HIB seeks to get its rights. It has obligations, but it also has rights, and it is entitled to asking for the enjoyment of its rights.<sup>1079</sup>

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<sup>1078</sup> See, e.g., C-27, Tajura Contract, Art. 10(a).

<sup>1079</sup> TR 7:1588:17 – 1589:12 (Mr. Al-Naas).

907. Respondent’s present position also conflicts with a substantial body of evidence, accepted by Blackrock’s quantification expert Mr. Osbaldeston, showing that Strabag has for many years paid bank charges to maintain the Tajura and TIAR advance payment and performance guarantees. In the context of Claimant’s “Article 36” claim for losses from disruption due to the Revolution, Respondent and Blackrock did not dispute that Strabag made payments to maintain these guarantees, although, as discussed *supra*, the Parties’ respective experts differed regarding the total amount paid. Blackrock’s presentation to the Tribunal at the Hearing ultimately assessed Claimant’s cost of maintaining guarantees at €2,951,026.<sup>1080</sup> Claimant presumably did not pay these significant amounts in respect of allegedly “non-existent” guarantees.
908. Respondent’s recent correspondence questioned this evidence, and indeed suggested that Claimant acted improperly by submitting evidence of recent transactions to maintain the Tajura performance guarantee.<sup>1081</sup> This guarantee is different from the advance payment guarantee, and Respondent has not previously contested its continued existence. The Tribunal does not accept Respondent’s recent contentions regarding it.
909. The Tribunal accordingly concludes that the guarantees, including at least the Tajura backing guarantee and Strabag’s related obligations to ABC Bank, remain in effect and must be taken into account in assessing the claimed set-off.
910. *Contract Provisions Dealing with Termination.* Respondent contends that Al Hani’s contracts must now all be deemed to be terminated, so these provisions addressing contract termination must be applied and require a “wrapping up” giving effect to the claimed set-off. Respondent observes in this regard that the several contracts and Libya’s Contracting Regulations all contain provisions requiring a final settlement of accounts between the contracting parties at the time of a contract’s conclusion or premature termination. Respondent’s Post-Hearing Brief identifies several such standard contract provisions

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<sup>1080</sup> RH-15, Blackrock Quantum Hearing Presentation, p. 20

<sup>1081</sup> Resp. 10 December 2019 letter to Tribunal, referring to Attachments to Cl. 15 November 2019 letter to Tribunal.

including Article 54 (the procedure for provisional receipt), Article 56 (final receipt), and the corresponding provision of the Administrative Contract Regulations (Article 125).<sup>1082</sup>

911. Apparently to show that these provisions now should be applied, Respondent's Post-Hearing Brief contends that "the contracts should be deemed terminated *ipso facto* as of February 2011."<sup>1083</sup> However, as discussed *supra* in connection with Claimant's "Article 36" claims, the Tribunal does not agree that the contracts have been terminated. This contention is inconsistent with the views of both Libyan officials and of Respondent's counsel at the Hearing.
912. Thus, in response to the presiding arbitrator's question at the Hearing, Mr. Turki was clear that the Tajura Contract has not been terminated:

Q. ... Why has the Contract not been terminated?

A. As I have told you, there is still goodwill on our part for the Contract to be reinstated, and all rights. As of 2011, we have been asking the Contractor, and we collaborate with him in order to pursue the implementation of the Project, the purpose of which is to serve the people of this area who have suffered a lot. Until this day, they still carry water to have water. There is still areas that are covered--flooded with water. We had hoped that this company would help us in completing the Project, but the contrary is what happened. That is why we did not take any measure to terminate the Contract.<sup>1084</sup>

913. Referring to this testimony, Respondent's counsel at the Hearing confirmed that the Tajura Contract has not been terminated: "the [Tajura] Contract has not been terminated, and [Mr. Turki] testified to that in answer to I think that's general knowledge, and I think his testimony confirmed that as well ... It has not been terminated. Not been terminated."<sup>1085</sup>

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<sup>1082</sup> Resp. PHB ¶¶226-227.

<sup>1083</sup> Resp. PHB, caption at ¶211.

<sup>1084</sup> TR 7:1727:8-22 (Mr. Turki).

<sup>1085</sup> TR 7:1730:4-11 (Ms. Harwood).

914. Thus, testimony at the Hearing, confirmed by Respondent's counsel, is that the Tajura Contract has not been terminated. The Tribunal has received no evidence that any of the other contracts have been terminated, so that the cited provisions of the contracts and the Administrative Contracts Regulations dealing with situations of contract termination do not literally apply here. These contracts remain in existence.
915. However, even if the contract provisions cited in Respondent's Post-Hearing Brief are taken as a reference or guide, they do not greatly assist the Tribunal. The contracts and the Administrative Contracts Regulations do indeed establish procedures for an orderly settlement of accounts between contracting parties at contract termination or completion of performance. The difficulty here, however, is that the circumstances of this arbitration do not allow this sort of orderly and comprehensive resolution of the contracting parties' respective positions. Performance of the contracts has been interrupted by the Revolution and the ensuing disorder in Libya, so that the Parties are addressing Claimant's claims in this vigorously contested arbitration, not through a negotiated wrapping-up. Under the Treaty, the Tribunal does not have jurisdiction to compel any such comprehensive wrapping-up of accounts that would include authoritative release of the guarantees.
916. This Tribunal's jurisdiction under Article 15 of the Treaty is limited to declaring that a Party has acted contrary to the BIT, to making a recommendation, or awarding pecuniary compensation. Absent the agreement of the Parties under Article 15(1)(d) of the BIT which has not been given here – it cannot effect any sort of global settlement of accounts that would address the panoply of Claimant's claims, Respondent's claimed set-off, and release of the guarantees to the extent of any set-off allowed.
917. *Restitution under Libya's Civil Code.* The same difficulty arises with respect to Respondent's contention that its claimed set-off is justified by the provisions of Libyan law dealing with restitution.<sup>1086</sup> This invocation of Libyan law seems at variance with Respondent's recent suggestion that Libyan law also imposes a three-year limitation period

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<sup>1086</sup> E.g., Resp. C-Mem. ¶227.



on restitution claims,<sup>1087</sup> which would seem to preclude its present claim invoking that same law. Putting this difficulty aside, if Respondent's restitution claim could be addressed in Libya's courts,<sup>1088</sup> it would be before a judge with broader powers to address the overall situation, including compelling Respondent to release the guarantees to the extent of any set-off the court might allow. This Tribunal has no such authority.

918. *The Unbalanced Situation Created by the Guarantees.* As the foregoing suggests, the Tribunal is concerned by the continued existence of the unconditional and irrevocable guarantees created to secure the advance payments and other aspects of Al Hani's performance. If Respondent's claimed set-off were to be applied, those guarantees would remain. Claimant would be left exposed to the risk of what would in essence be double recovery by the Respondent.
919. The Tribunal does not wish to impugn the good faith of any Party. Nevertheless, as a matter of good order and fundamental fairness, it could not apply the requested set-off without firm arrangements in place to assure that Claimant's exposure under the guarantees would at the same time be reduced or ended to the extent of any set-off. The Tribunal does not take comfort in this regard from Respondent's recent statement that Gumhouria Bank, or any other bank involved in the chain of guarantees, would reduce the amount paid in the event of a demand on a guarantee purely on the basis that this Tribunal allowed some or all of Respondent's claimed set-off. A bank that extends an "unconditional" and "irrevocable" letter of guarantee has no duty, and perhaps no right, to pay some lesser amount on the basis of an arbitration ruling to which it is not party.
920. The Tribunal has no authority to address this difficulty without the agreement of the Parties. Article 15 of the Treaty limits the forms of relief the Tribunal may include in an award. Under Article 15(1)(d), any attempt by the Tribunal to devise some remedy relevant to the set-off and the continued existence of the guarantees would require the Parties' consent. They have not given such consent. Even if they were to do so, there might be no assurance

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<sup>1087</sup> Resp. 15 November 2019 letter to Tribunal p. 1, fn 3.

<sup>1088</sup> The Tribunal addresses elsewhere the unhappy difficulties now confronting Libya's judicial system.

that any bank issuing a letter of guarantee would or could give effect to a Tribunal award.

921. For the forgoing reasons, the Tribunal decides, by majority, that Respondent's requested set-off is denied. In the view of the majority, this is a matter that must be addressed by the Parties, if it is to be addressed, outside the context of this arbitration.

## **X. COSTS**

922. Each Party seeks an award of costs in its favor.

923. In this regard, Article 15(b) of the Treaty provides that arbitration awards may provide for "pecuniary compensation, which shall include interest from the time the loss or damage was incurred until time of payment."

924. The Tribunal is further guided in this regard by the first sentence of Article 58(1) of the Arbitration (Additional Facility) Rules:

Unless the Parties otherwise agree, the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne.

### **A. CLAIMANT'S COSTS SUBMISSION**

925. Claimant contends that in considering the allocation of costs, the Tribunal has broad discretion under Article 58 of the Rules. In this regard, it cites what it sees as growing application in investment arbitration of "the principle that the losing party pays, but not necessarily all of the costs of the arbitration or of the prevailing party."<sup>1089</sup> However, in Claimant's view, other factors may also be considered. Tribunals may take into account

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<sup>1089</sup> Cl. Costs Submission ¶9, quoting RL-33, *EDF v. Romania* ¶327.

misconduct by a party during the proceedings and whether a party responsible for a particular part of the proceeding should bear the resulting costs.<sup>1090</sup>

926. Claimant identifies four aspects of this arbitration that it contends the Tribunal should weigh in assessing costs. First, Claimant maintains that Respondent refused to engage in consultations as required by Article 11(1) of the Treaty, did not respond to written requests for consultations prior to initiation of the arbitration, and otherwise engaged in conduct said to be inimical to settlement of the case.<sup>1091</sup>
927. Second, Claimant contends that Respondent sought unsuccessfully to bifurcate the proceeding and insisted on making groundless jurisdictional objections, resulting in unnecessary costs. Claimant further asserts that Respondent “adopted a tactic of delaying the arbitration and unnecessarily complicating and confusing the issues before the Tribunal,” citing events in the course of the proceedings said to support this view.<sup>1092</sup>
928. Third, Claimant contends that Respondent engaged in procedural tactics and delays that disrupted the proceedings and resulted in unnecessary costs, citing multiple events during the course of the proceedings said to support this contention.<sup>1093</sup>
929. Finally, Claimant alleges that Respondent adopted a defensive strategy of misleadingly obfuscating factual issues and introducing unnecessary complexity, thereby significantly complicating the arbitration and resulting in unnecessary costs. *Inter alia*, Claimant contends that Respondent made allegations that were unsubstantiated, based on selective and misleading use of documents, or contradicted by the evidence, including new evidence disclosed after the Hearing at the Tribunal’s request. Claimant further contends that Respondent refused a meeting between the Parties’ financial experts that would have simplified the quantum evidence.<sup>1094</sup>

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<sup>1090</sup> Cl. Costs Submission ¶10.

<sup>1091</sup> Cl. Costs Submission ¶¶15-18.

<sup>1092</sup> Cl. Costs Submission ¶¶19-23.

<sup>1093</sup> Cl. Costs Submission ¶¶24-41.

<sup>1094</sup> Cl. Costs Submission ¶¶42-50.

930. Given these factors, Claimant submits that, should the Tribunal find in Claimant's favor, it should be awarded all of its costs. However, if the Tribunal "does not accept the Claimant's submissions in whole or substantial part ... the Tribunal should nevertheless order the Respondent to reimburse a significant part of the costs that the Claimant only incurred as a result of Respondent's defence strategy."<sup>1095</sup> Finally, Claimant requests that the Tribunal award compound interest on costs awarded to it, calculated in accordance with Section VI of its Memorial.<sup>1096</sup>
931. Claimant's Reply to Respondent's Submission on Costs responds to what it deems "a series of misleading and inaccurate statements" in that document. The Reply criticizes harsh language contained in Respondent's Submission. It denies that Claimant acted inappropriately in relation to three matters cited by Respondent, i.e., Claimant's successful opposition to Respondent's request for bifurcation, its actions in relation to possible interference with a witness, and its complaints regarding Respondent's document production.<sup>1097</sup>
932. Claimant states its costs to be:
- a. Contribution to ICSID and the Tribunal's costs and expenses: US\$800,000;<sup>1098</sup>
  - b. Legal costs, comprising:
    - i. Claimant's law firm's costs and expenses: €7,884,465.27
    - ii. Libyan law advice (costs of Libyan lawyers providing advice on miscellaneous issues of Libyan law): €143,701.53
    - iii. FTI's costs and expenses: £1,491,628.36

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<sup>1095</sup> Cl. Costs Submission ¶12.

<sup>1096</sup> Cl. Costs Submission ¶53.

<sup>1097</sup> Cl. Reply Costs Submission ¶25.

<sup>1098</sup> The Tribunal notes that this amount includes the advance payments made by Claimant as well as the lodging fee. The Tribunal also notes that this amount as stated in Claimant's cost submission does not reflect the final advance payment made by Claimant following its cost submission. The advances paid by each party are reflected in ICSID's financial statement which will be sent to the parties separately.

- iv. Libyan law expert's costs and expenses: €190,972.99
- v. Other costs and expenses incurred in relation to the arbitration, including:
  - 1. Bond Solon costs (witness familiarization course): €10,502.22
  - 2. Witness costs (e.g., travel and hotel costs): €54,424.20
  - 3. Costs of Strabag in-house legal department (CLS /CML): €697,890.00
  - 4. Costs of Strabag party representatives: €487,061.14

933. The legal costs and expenses incurred in this arbitration by Claimant amount to €9,469,017.35 and £1,491,628.36. This amount excludes the amounts Claimant paid for its lodging fee and subsequent advances paid by Claimant to ICSID to cover the costs of the arbitration, which will be addressed *infra*.

#### **B. RESPONDENT'S COSTS SUBMISSION**

934. Respondent contends that it should be awarded costs in accordance with the “costs follow the event” principle, in accordance with the practice of a growing number of investment tribunals. Respondent alleges that its costs were substantially increased by what it deems “Claimant’s procedural misconduct in this Arbitration,”<sup>1099</sup> and that “there is a long and constant practice of tribunals using their discretion to sanction procedural misconduct.”<sup>1100</sup>

935. Respondent alleges that Claimant’s misconduct lay in making misleading statements opposing bifurcation; an improper attempt to obtain provisional measures; and “scurrilous accusations of improper conduct,” the latter apparently referring to correspondence involving possible interference with a witness.<sup>1101</sup>

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<sup>1099</sup> Resp. Costs Submission ¶18.

<sup>1100</sup> Resp. Costs Submission ¶12.

<sup>1101</sup> Resp. Costs Submission ¶14.

936. Respondent further requests an award of costs “as a result of Claimant’s false accusations in regard to Respondent’s document production,” emphasizing the difficulties of collecting documents in Libya “given the state of affairs affecting Libya.”<sup>1102</sup>
937. Respondent contends further that Claimant’s refusal to accept bifurcation of the case was inappropriate and caused unnecessary expense.<sup>1103</sup> Finally, Respondent requested the Tribunal to use its discretionary power to order Claimant to pay interest on any amount awarded in respect of legal and arbitration costs “at a reasonable commercial rate running from the date of the Award until payment.”<sup>1104</sup>
938. In response to Claimant’s Submission on Costs, Respondent maintains that Claimant’s allegations of its procedural misconduct are “frivolous” and should be disregarded.<sup>1105</sup> In Respondent’s submission, these allegations are made to “explain away [Claimant’s] exorbitant and unreasonable costs.”<sup>1106</sup> Respondent’s submission discusses details of an unsuccessful settlement meeting, and renews allegations of improper conduct by Claimant in relation to an incident of possible interference with one of its witnesses. Respondent characterizes Claimant’s costs as exorbitant, and its allegations as “false in all material respects” and as involving “outrageous and baseless accusations.”<sup>1107</sup>
939. Respondent states its costs and expenses incurred in the arbitration to total US\$5,950,334.75, comprised as follows:

- Fees of Respondent’s law firm: US\$4,183,298.50
- Travel and other disbursements: US\$450,747.42

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<sup>1102</sup> Resp. Costs Submission ¶15.

<sup>1103</sup> Resp. Costs Submission ¶¶9-10.

<sup>1104</sup> Resp. Costs Submission ¶17.

<sup>1105</sup> Resp. Comments on Cl. Costs Submission ¶2.

<sup>1106</sup> Resp. Comments on Cl. Costs Submission ¶2.

<sup>1107</sup> Resp. Comments on Cl. Costs Submission ¶18.

- Experts:	US\$962,103.09
- Libyan Disputes Department disbursements:	US\$29,185.74
- ICSID and arbitrators' fees and expenses:	US\$325,000.00 <sup>1108</sup>
<b>TOTAL:</b>	<b>US\$5,950,334.75</b>

Hence Respondent incurred US\$5,625,334.75 in legal fees and expenses. The amount paid by Respondent to cover the costs of the arbitration is addressed below.

**C. COSTS OF THE ARBITRATION**

940. The costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in US\$):

Arbitrators' fees and expenses

Prof. Crook (President)	399,247.86
Prof. Crivellaro	311,043.58
Prof. Ziadé	324,776.46

ICSID's administrative fees	190,000.00
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Direct costs	140,360.14
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<b>Total</b>	<b>1,365,428.04</b>
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941. The above costs have been paid out of the advances made by the Parties. As reflected in ICSID's financial statement, Claimant has made advance payments in the amount of US\$974,632.00 to cover the cost of the arbitration. (The payment of the US\$25,000 lodging fee is excluded in this amount as it is not part of the advance payments made to cover the costs of the arbitration.) The amount advanced by Respondent to cover the cost of the

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<sup>1108</sup> The Tribunal notes that this amount as stated in Respondent's cost submission does not reflect the final advance payment made by Respondent following its costs submission. The advances paid by each party are reflected in ICSID's financial statement which will be sent to the Parties separately.

arbitration is US\$524,477.91. The difference between the Parties regarding the amounts of advance payments made is largely due to the fact that while each Party was invited to pay half of the requested advances, Claimant on two occasions paid Respondent's share.

**D. THE TRIBUNAL'S DECISION ON COSTS**

942. The Parties agree that under Article 58 of the ICSID (Additional Facility) Arbitration Rules, the Tribunal has discretion in allocating costs and expenses to take into account the outcome of the arbitration. Each Party urges the Tribunal to do so in its favor on this basis. This approach is indeed being applied with increasing frequency in international investment arbitration. The Tribunal has followed it in this case, as urged by both Parties.
943. This arbitration has been vigorously conducted. Both Parties have been represented by able and energetic counsel. As is natural in a complex and vigorously contested arbitration involving multiple issues, particularly one conducted under unusual and difficult circumstances, there have been some strongly held differences of view and some misunderstandings. However, notwithstanding contrary suggestions in both Parties' costs submissions, the Tribunal does not accept that there has been conduct of a nature that should significantly affect the allocation of costs.
944. At the end of the day, Claimant has been largely successful. The Tribunal has not accepted Respondent's multiple objections to jurisdiction, or its claimed set-off for the contract claims. However, Claimant has not prevailed in all respects. The Tribunal has accepted only a portion of its claims for losses relating to actions by Respondent's military forces under Article 5 of the Treaty. Its claim for the disappearance of a large quantity of property from the Tweisha yard in 2014 failed for lack of proof. While Claimant's claims under the road and Tajura Contracts have largely been upheld, portions of its "Article 36" claims and claims for delay and additional work on the Tajura project have not been accepted. Thus, Claimant's success is less than total.



945. Given the overall outcome of the case, the Tribunal decides that Respondent shall bear its costs for legal costs and expenses. In addition, Respondent shall pay to Claimant 75% of Claimant's legal costs and expenses in this case. As noted above, Claimant's legal costs and expenses amount to €9,469,017.35 and £1,491,628.36. (This amount excludes the advances paid to ICSID to cover the cost of the arbitration, an issue that is addressed in the following paragraph). Applying the Tribunal's decision, Respondent is to pay Claimant €7,101,763.01 and £1,118,721.20 for Claimant's legal costs and expenses.
946. With regard to the costs of the arbitration, the Tribunal recalls its decision on Day 2 of the Hearing (10 July 2018) that Respondent is to pay the costs associated with Mr. Bisher's testimony by video-conference, including costs associated with ICSID staff traveling to Tunis. As indicated on ICSID's financial statement, this amounts to US\$6,435.75.
947. Regarding the cost of the arbitration, the Tribunal notes that the total arbitration costs, excluding the costs associated with Mr. Bisher's video-conference testimony (i.e. US\$ 6,435.75), amount to US\$1,358,992.29. The Tribunal decides that Respondent is to bear 75% of these arbitration costs, i.e. US\$1,019,244.22. Claimant shall bear 25% of these arbitration costs, i.e. US\$339,748.07.
948. Based on ICSID's financial statement, of the total disbursements excluding costs related to Mr. Bisher's testimony, US\$837,281.87 was paid from Claimant's advance payments. Applying the Tribunal's cost ruling, i.e. that Claimant pay US\$339,748.07 of the arbitration costs, Respondent is to pay to Claimant US\$497,533.80. Any funds remaining in the trust fund account will be refunded by ICSID.<sup>1109</sup>

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<sup>1109</sup> The amount Respondent is to pay to Claimant can also be calculated as follows: using US\$1,019,244.22 (i.e., Respondent's 75% share of the arbitration costs excluding the costs associated with Mr. Bisher's testimony), then adding US\$6,435.75 (i.e., the costs associated with Mr. Bisher's testimony) and then subtracting US\$528,146.17 (i.e., the advances paid by Respondent plus its share of the investment income as indicated in ICSID's Financial Statement).

## **XI. INTEREST**

### **A. CLAIMANT’S POSITION**

949. On the question of interest, Claimant requests:

interest on the amounts that the Tribunal orders the Respondent to pay to the Claimant calculated from the date on which the respective amounts became due and at the rates specified in Section VI of the Memorial, until the Claimant receives full payment of the amount ordered by the Tribunal.<sup>1110</sup>

950. Claimant’s Post-Hearing Brief adds that interest should be calculated in accordance with Article 15(b) of the Treaty and at a commercial rate as set out in Claimant’s Memorial.<sup>1111</sup>

In the Memorial, Claimant asks the Tribunal to award compound interest at a commercial rate, citing in this regard Article 4(2)(d) of the Treaty (providing for interest “at a commercial rate established on a market basis” in determining compensation for expropriation),<sup>1112</sup> as well as the writings of commentators<sup>1113</sup> and recent arbitration decisions.<sup>1114</sup> In Claimant’s view, these cases and commentators establish compound interest as reflecting contemporary commercial practice.

951. In response to Respondent’s contentions, Claimant’s legal expert Dr. Ahnish denied that Libyan law barred payment of interest under Al Hani’s contracts as usury (riba) and that Libya’s Law No 1 of 2013 annulled Article 92 of Libya’s Administrative Contracts Regulations authorizing compensation for late payment.<sup>1115</sup> In his view, “the payment of interest on payments overdue under the contracts concluded between a Libyan authority and another judicial person before 01/01.2015 would not be affected” by the 2013 law.<sup>1116</sup>

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<sup>1110</sup> Cl. Reply ¶904.

<sup>1111</sup> Cl. PHB ¶392.

<sup>1112</sup> Cl. Mem. ¶589.

<sup>1113</sup> Cl. Mem. ¶590.

<sup>1114</sup> Cl. Mem. ¶591 and fn 623.

<sup>1115</sup> 2<sup>nd</sup> Ahnish Opinion, pp. 16-17.

<sup>1116</sup> 2<sup>nd</sup> Ahnish Opinion, p. 17.

952. Claimant cites a calculation of its interest claim made by its experts FTI on the basis of the five-year average on 3-month EURIBOR rates compounded on a 6-monthly basis.<sup>1117</sup>

**B. RESPONDENT’S POSITION**

953. Respondent contends that Claimant is not entitled to recover interest under the contracts<sup>1118</sup> because they are subject to Libya’s law prohibiting assessment of interest.<sup>1119</sup> Respondent cites in this regard Libya’s 2013 Law on Banning Usury in Civil and Commercial Transactions,<sup>1120</sup> which Respondent contends has retroactive effect. Thus, “Al-Hani is not entitled to recover interest as it is prohibited as Riba under Libyan law.”<sup>1121</sup>

954. Respondent’s legal expert, Dr. Abuda, supported these contentions, maintaining that Articles 1 and 2 of the 2013 law prohibit the recovery of interest and have retroactive effect.<sup>1122</sup>

955. In its Counter-Memorial, Respondent acknowledged that Libya’s Administrative Contract Regulations allow compensation for late payments, although the interest rate cannot exceed a rate approved by the Central Bank of Libya.<sup>1123</sup> However, in its Post-Hearing Brief, Respondent maintains that this Regulation “was derogated by the law on Riba.”<sup>1124</sup>

956. As to Claimant’s request for compound interest, Respondent refers to Article 235 of the Libyan Civil Code which is said to prohibit compound interest and recoveries of interest exceeding the amount of a debt.<sup>1125</sup> Respondent also points to the ILC’s Commentary on its Articles on State Responsibility, which concludes that “the general view of courts and

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<sup>1117</sup> FTI 1<sup>st</sup> Quantum Report, Sec. 9.

<sup>1118</sup> Resp. PHB, caption at ¶302.

<sup>1119</sup> Resp. C-Mem. ¶580.

<sup>1120</sup> Resp. C-Mem. ¶581.

<sup>1121</sup> Resp. PHB. ¶303.

<sup>1122</sup> 1<sup>st</sup> Abuda Opinion ¶¶52-58.

<sup>1123</sup> Resp. C-Mem. ¶801.

<sup>1124</sup> Resp. PHB ¶303.

<sup>1125</sup> Resp. C-Mem. ¶¶802, 804.

tribunals has been against the award of compound interest, ... even of those tribunals which hold claimants to be normally entitled to compensatory interest.”<sup>1126</sup> Respondent cites additional commentators and arbitral authority to the same effect.<sup>1127</sup>

957. Respondent concludes that if the Tribunal awards interest with respect to amounts due under the contracts, it should likewise award interest with respect to the unrecovered balances of the advance payments “calculated as simple interest at an annual rate of 3% or 5%, whichever rate the Tribunal determines is appropriate ... if any interest is to be awarded to Claimant.”<sup>1128</sup>

### C. THE TRIBUNAL’S DECISION ON INTEREST

958. The Tribunal begins by recalling the central position of the Treaty as the foundation of its jurisdiction. Article 15 of the Treaty expressly sanctions payment of interest as part of an Award. Under Article 15(1) of the Treaty, arbitration awards “may include an award of interest.” Further, under Article 15(1)(b), in cases where pecuniary compensation is awarded, it “*shall* include interest from the time the loss or damage was incurred until time of payment” (emphasis added). The Tribunal finds further instruction in Article 4(2)(d), which requires that compensation in cases of expropriation shall “include interest at a commercial rate established on a market basis ...”
959. The Treaty thus defines the Tribunal’s role in relation to interest. It is to apply the international law of the Treaty, and not Libya’s domestic law. The Parties and their legal experts debated the position of interest under Libya’s domestic law at some length. However, that domestic law whatever its content, which was vigorously disputed does not alter the international legal obligation that Libya and Austria established in their Treaty.

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<sup>1126</sup> Resp. C-Mem. ¶831, quoting RL-178, Commentary on ILC State Responsibility Articles, Art. 38, Sec. 8.

<sup>1127</sup> Resp. C-Mem. ¶¶832-835.

<sup>1128</sup> Resp. PHB ¶304.

960. The Treaty reflects well-established international practice in this regard.<sup>1129</sup>
961. Thus, it is the Treaty, and not Al Hani's contractual arrangements, that determines the amount of any interest to be reflected in the Tribunal's award. The Tribunal notes in this regard that Claimant has in these proceedings referred to amounts said to be due as default interest on late payments of payment certificates and other amounts claimed by Al Hani, on the basis of contract provisions authorizing interest on late payments by the employers.<sup>1130</sup> While those contract provisions may provide relevant indicators, they do not prescribe or limit the interest to be awarded by the Tribunal. As set out *infra*, the Tribunal includes interest as a component of the relief awarded pursuant to the Treaty.
962. A further question is whether interest should be simple or compound. It is true that compound interest is a feature of contemporary commercial and economic life, and that many tribunals have seen it to be warranted in order to provide full compensation for losses. Other tribunals, however, have not followed this approach. Hence, there cannot be said to be a uniform international practice in this regard. The Tribunal is also mindful of the ILC's Commentary to Article 38 of the State Responsibility Articles (reflecting the critical perspective of the distinguished rapporteur, Judge Crawford). The Commentary takes the view that compound interest should be awarded only where there are "special circumstances which justify some element of compounding as an aspect of full reparation."<sup>1131</sup>

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<sup>1129</sup> See, e.g., *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, ¶¶128-129; *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment, 28 January 2002, ¶¶51-53 (tribunal correct in applying international law and ICSID practice, and not Egyptian law, in determining amount of interest.).

<sup>1130</sup> Cl. Mem. ¶¶ 443-452.

<sup>1131</sup> RL-178, Commentary on ILC State Responsibility Articles, Art. 38, Sec. 10.

963. The Tribunal finds that in the unusual circumstances of this case, where it has found that Respondent has been subject to a protracted period of *force majeure* from early 2011 to the present day, simple and not compound interest provides a more appropriate measure of compensation. Accordingly, the Tribunal decides to award simple interest at the EURIBOR annual rate plus 4% on the sums awarded with respect to Claimant's claims under the Treaty and on the sums awarded to Claimant in respect of its legal costs and expenses and the costs of arbitration. Should EURIBOR cease to be available at some date prior to payment of the Award, any interest accruing subsequent to that date shall be determined at the rate of the Euro Short Term Rate for the relevant period plus 4%.
964. A further complication involves the date at which interest should begin to run. This case involves multiple claims that gave rise to liability at different times over a span of years. Given this situation, the Tribunal determines that interest shall commence to accrue on 1 January 2012 with respect to amounts awarded pursuant to Claimant's claims 1a., 1.b., 1.d. and claims 6.1-6.4. Interest shall begin to accrue on 1 March 2011 on amounts awarded in respect of all of Claimant's other claims under the Treaty, namely on claims 3, 4 and 5. Interest on the sums awarded to Claimant in respect of its legal costs and expenses and the costs of arbitration pursuant to paragraph 948 shall begin to accrue 60 days after the date of dispatch of this Award.

**XII. CLAIMANT'S REQUESTS FOR COMPENSATION: ADDITIONAL CLAIMS**

965. As this Award shows, Claimant's case involves a web of separate claims for multiple items of damage, each valued individually. In its Memorial, Claimant seeks 60% of the amount of specified damage for six listed heads of claim, based on its 60% ownership of Al Hani. As noted *supra*, these were (1) equipment requisitioned by Respondent's forces; (2) equipment destroyed by those forces; (3) equipment damaged by those forces; (4) damage they caused to site facilities; (5) property removed from the Tweisha yard; (6) amounts under payment certificates and for additional work related to the contracts; (7) retention amounts; and (8) amounts claimed "under Article 36 and associated provisions of the Contracts,"<sup>1132</sup> a claim with multiple components.

966. The Tribunal has been guided by this outline of Claimant's claims in preparing this Award. However, Claimant's Memorial also adds two alternative and additional claims. The Tribunal must now consider these.

967. First, Claimant contends that compensation for its losses should be "no less than the losses that the Claimant incurred in making its investment in Libya."<sup>1133</sup> Claimant defines these to be: (1) the amount of Strabag's paid-up capital in Al Hani (LYD12 million) with interest from the date of the investment, plus (2) Al Hani's total debt to Strabag International for funds it loaned to Al Hani, said to amount to €35 million as of 28 February 2014, with interest from that date.<sup>1134</sup>

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<sup>1132</sup> Cl. Mem. ¶¶595-596.

<sup>1133</sup> Cl. Mem. ¶582.

<sup>1134</sup> Cl. Mem. ¶583.

968. This claim was presented as a contingent or alternative request for a minimum amount of compensation. As set out in this Award, the Tribunal awards sums larger than this minimum amount in relation to Claimant's six principal heads of claim. Accordingly, the Tribunal need not further address this alternative claim. (The Tribunal notes that there was a lack of clarity in the proceedings regarding the status or relevance of the €35 million loan from Strabag International to Al Hani. The loan reflected a transaction between two closely linked companies in the Strabag group of companies. Had Al Hani been paid for its unpaid payment certificates and for its additional work, it should have been able to repay that loan. Al Hani's claims for these amounts are largely upheld in this Award. Adding €35 million for the loan to the amount of compensation awarded here would therefore threaten a significant double recovery.)
969. To the extent that Claimant maintains any claim with respect to recovery of the €35 million loan from Strabag International to Al Hani, that claim is denied.
970. In addition to the heads of damage specifically listed above, Claimant's Memorial makes another large claim under Article 3(1) of the Treaty, involving an alleged denial of fair treatment. Claimant bases this claim on a 5 May 2013 notification from Libya's Prime Minister to Libya's Central Bank, which Claimant understood to relieve it of the obligation to continue extending letters of guarantee and to pay various charges to maintain bonds and guarantees.<sup>1135</sup> Claimant accordingly seeks approximately €7.165 million for Respondent's alleged failure

to exempt Al Hani and Strabag from the expenses of extending letters of guarantee, and by the Authorities' failure to take steps to release the Claimant from its on-going obligations to pay financial charges for the performance bonds for the Tajura and TIAR Contracts and the advance payment guarantee for the Tajura Contract.<sup>1136</sup>

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<sup>1135</sup> Cl. Mem. ¶476; C-344, Notice from the Office of the Prime Minister to the Governor of the Central Bank of Libya.

<sup>1136</sup> Cl. Mem. ¶584.



971. Respondent disputes this claim, referring, *inter alia*, to the testimony of Mr. Al-Naas, who attended meetings on the subject at the Central Bank and believes that no decision was taken to implement the notification. Respondent contends further that the communication from the Prime Minister's office had a more limited scope than asserted by Claimant.<sup>1137</sup> In recent correspondence regarding the advance payments, Respondent insists that the Prime Minister's announcement was "never enacted into law or regulation" and would have in any event been applicable only to Libyan entities issuing guarantees.<sup>1138</sup>
972. This issue, involving a claim for many millions of Euros, received only peripheral treatment by the Parties. Given the limited and disputed evidence, the Tribunal cannot find that there was a breach of Article 3 or any other provision of the Treaty with respect to it.
973. This claim is subject to yet another infirmity. The amounts claimed appear to have also been claimed, in whole or significant part, as part of Claimant's "Article 36" claims. As considered *supra*, Claimant's claims for maintaining guarantees and related financial expenses have been allowed by the Tribunal insofar as they are authorized by the terms of the governing contracts.
974. This claim for additional compensation involving the 5 May 2013 communication from the Prime Minister's office, is denied.

### **XIII. THE PARTIES' REQUESTS FOR RELIEF**

975. In its Reply, Claimant requests the following relief:

For the reasons set out in the Claimant's Memorial and this Reply, the Claimant requests that the Tribunal render an award:

- a. Declaring that the Respondent has violated Articles 3(1), 3(2), 4, 5 and 8(1) of the Treaty;

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<sup>1137</sup> Resp. C-Mem. ¶688 fn 1302, citing 1<sup>st</sup> Al-Naas WS ¶34.

<sup>1138</sup> Resp. 10 December 2019 letter to Tribunal, p. 2.

- b. Ordering that the Respondent pay damages and compensation to the Claimant in respect of the Respondent's violations of the Treaty in the amount of EUR112,087,995, as set out above in Section V, above, or such other amount as the Tribunal may determine to be payable;
- c. Ordering that the Respondent pay interest on the amounts that the Tribunal orders the Respondent to pay to the Claimant calculated from the date on which the respective amounts became due and at the rates specified in Section VI of the Memorial, until the Claimant receives full payment of the amount ordered by the Tribunal ...<sup>1139</sup>

976. For its part, Respondent asks in its Rejoinder that:

For the reasons set forth in the Counter-Memorial, this Rejoinder, and all of the accompanying witness statements, legal expert opinions and expert reports submitted therewith, Claimant's claims should be dismissed in their entirety for lack of jurisdiction, or, in the alternative, the claims should be dismissed in their entirety on the merits.<sup>1140</sup>

#### **XIV. CONCLUSION ON CLAIMANT'S CLAIMS**

977. As specified above, the Tribunal finds that breaches of Respondent's obligations under the Treaty have caused loss or damage to Al Hani in the amount of €124,895,006.00.

978. As specified above, Claimant's 60% ownership interest in Al Hani,<sup>1141</sup> entitles Claimant to be compensated for 60% of the amount of loss or damage incurred by Al Hani.<sup>1142</sup>

979. Accordingly, on account of Respondent's breaches of the Treaty, Claimant is awarded, and Respondent shall pay, €74,937,003.60, constituted as follows:

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<sup>1139</sup> Cl. Reply ¶904.

<sup>1140</sup> Resp. Rej. ¶746.

<sup>1141</sup> *Supra* paragraphs 7, 105, 108.

<sup>1142</sup> *Supra* paragraph 126; Cl. PHB ¶¶389-390.

	<b>Loss or damage to Al Hani</b>	<b>Amount of compensation due to Claimant (60%)</b>
<b>Claimant's Claim 1.a. – Equipment Requisitioned in 2011</b>	€5,963,000.00 <sup>1143</sup>	€3,577,800.00
<b>Claimant's Claim 1.b. – Equipment Destroyed/Lost in 2011</b>	€3,520,000.00 <sup>1144</sup>	€2,112,000.00
<b>Claimant's Claim 1.c. – Equipment Damage Repair</b>	-nil- <sup>1145</sup>	-nil-
<b>Claimant's Claim 1.d. – Site Facilities and Materials Damaged</b>	€858,000.00 <sup>1146</sup>	€514,800.00
<b>Claimant's Claim 2 Equipment Removed from Tweisha in 2014</b>	-nil- <sup>1147</sup>	-nil-
<b>Claimant's Claim 3 – Amounts Owed to Al Hani Under Payment Certificates</b>	€36,500,000.00 <sup>1148</sup>	€21,900,000.00
<b>Claimant's Claims 4 and 5 –</b>		
<b>Benghazi Contract</b>	€6,900,000.00 <sup>1149</sup>	€4,140,000.00
<b>Misurata Contract</b>	€10,133,000.00 <sup>1150</sup>	€6,079,800.00
<b>Tajura Contract: First and Second Delay Claims</b>	€20,148,000.00 <sup>1151</sup>	€12,088,800.00
<b>Tajura Contract: Additional Work Claims</b>	€5,759,439.00 <sup>1152</sup>	€3,455,663.40

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<sup>1143</sup> *Supra* paragraph 263.

<sup>1144</sup> *Supra* paragraph 298.

<sup>1145</sup> *Supra* paragraph 304.

<sup>1146</sup> *Supra* paragraph 321.

<sup>1147</sup> *Supra* paragraph 345.

<sup>1148</sup> *Supra* paragraph 399.

<sup>1149</sup> *Supra* paragraph 485.

<sup>1150</sup> *Supra* paragraph 590.

<sup>1151</sup> *Supra* paragraphs 645, 707.

<sup>1152</sup> *Supra* paragraphs 720, 729, 735.

<b>Retention Amounts</b>		
<b>Benghazi, Misurata and TIAR Contracts</b>	€6,573,567.00 <sup>1153</sup>	€3,944,140.20
<b>Tajura and Garaboulli Contracts</b>	-nil- <sup>1154</sup>	-nil-
<b>Claimant's Claims 6.1. - 6.4. Claims Related to Exceptional / Force Majeure Events</b>	€28,540,000.00 <sup>1155</sup>	€17,124,000.00
<b>TOTAL</b>	<b>€124,895,006.00</b>	<b>€74,937,003.60</b>

## **XV. THE TRIBUNAL'S DECISIONS AND AWARD**

980. For the reasons stated in the body of this Award, the Tribunal makes the following decisions and Award:

- (1) As specified in the body of this Award, the Tribunal has jurisdiction over the Claimant and its claims under the Treaty and the ICSID Additional Facility Rules. Respondent's objections to jurisdiction are dismissed.
- (2) As specified in the body of this Award, Respondent has breached its obligations under Article 5 of the Treaty.
- (3) As specified in the body of this Award, Respondent has breached its obligations under Article 8 of the Treaty.
- (4) As specified in the body of this Award, on account of Respondent's breaches of the Treaty, Claimant is awarded, and Respondent shall pay to Claimant, €74,937,003.60.

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<sup>1153</sup> *Supra* paragraph 778.

<sup>1154</sup> *Supra* paragraph 778.

<sup>1155</sup> *Supra* paragraph 874.

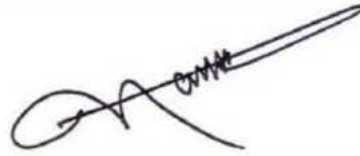
- (5) In light of the sum awarded in (4) with respect to loss or damage to Claimant incurred under Articles 5 and 8 of the Treaty, the Tribunal considers that Claimant is fully compensated. Therefore, the Tribunal does not make further awards of compensation under other provisions of the Treaty cited by Claimant. Claimant's claims with respect to an inter-company loan and an alleged denial of fair treatment in connection with expenses to maintain bonds and guarantees are denied.
- (6) Respondent shall pay simple interest at the EURIBOR annual rate (or the Euro Short Term Rate if applicable in the future) plus 4% on the sum awarded to the Claimant, i.e. €74,937,003.60, until the date of payment, divided as follows and commencing on the following dates:
  - Commencing 1 January 2012: interest on the amounts awarded to Claimant in respect of Claimant's claims 1.a., 1.b., 1.d. and 6.1-6.4., i.e., on €23,328,600.00.
  - Commencing 1 March 2011: interest on the amounts awarded to Claimant in respect of all of Claimant's claims 3, 4 and 5, i.e., on €51,608,403.60.
- (7) Respondent shall bear its own legal costs and expenses incurred in these proceedings. Respondent shall pay to Claimant the amount of €7,101,763.01 and £1,118,721.20 in respect of 75% of Claimant's legal costs and expenses and shall pay simple interest on this amount at the EURIBOR annual rate (or the Euro Short Term Rate if applicable in the future) plus 4%, such interest to begin to accrue 60 days after the date of this Award.
- (8) Respondent shall also pay to Claimant the amount of US\$497,533.80 in respect of the costs of the arbitration. Respondent shall pay simple interest on this amount at the EURIBOR annual rate (or the Euro Short Term Rate if applicable in the future) plus 4%, such interest to begin to accrue 60 days after the date of this Award.
- (9) All other claims are dismissed.



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Professor Antonio Crivellaro  
*Arbitrator*

Date: 16 June 2020

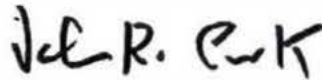


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Professor Nassib G. Ziadé  
*Arbitrator*

Date: June 22, 2020

*Subject to the attached  
Partial Dissenting Opinion*



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Professor John R. Crook  
*President of the Tribunal*

Date: June 27, 2020

ICSID Case No. ARB(AF)/15/1

STRABAG SE  
Claimant

-v-

LIBYA  
Respondent

Partial Dissenting Opinion

1. I firmly believe that dissenting opinions should be resorted to only in the event of serious disagreements over matters of principle. While I fully respect the views of my two distinguished colleagues and value the thoroughness with which our deliberations have been conducted, I am unable to support their decision on the important issues of advance payments and set-off described below. I thus respectfully dissent with respect to these issues only.
2. For the sake of clarity, I set out below the main facts relevant to the present opinion. These facts are extensively developed in the Award.
3. Claimant, Strabag SE, is a large international construction firm incorporated in Austria. Following the relaxation of international sanctions against Libya, Claimant saw opportunities for large construction projects in Libya and, through its wholly owned German subsidiary Strabag International Ltd., secured contracts with the Libyan Roads and Bridges Authority (“RBA”) in 2006 and 2007 for two major road projects in Benghazi<sup>1</sup> and Misurata.<sup>2</sup>
4. Following Libya’s decision to require foreign construction firms to carry on their business jointly with a Libyan partner,<sup>3</sup> Strabag International Ltd. joined with the Libyan Investment and Development Company (“LIDCO”) in 2007 to create a joint

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<sup>1</sup> Exhibit C-9, Benghazi contract, October 18, 2006.

<sup>2</sup> Exhibit C-16, Misurata contract, April 19, 2007.

<sup>3</sup> Exhibit C-11, General People’s Committee Decision No. 443 of 2006 for specifying certain provisions for performance of foreign companies for their activities in the Great Jamahiriya, November 14, 2006.

venture company under the name of Al Hani General Construction Co. (“Al Hani”).<sup>4</sup> Claimant indirectly owns 60% of Al Hani and LIDCO owns the remaining 40%.

5. In 2009, with the approval of RBA, Strabag International Ltd. assigned the Benghazi and Misurata contracts to Al Hani.<sup>5</sup> Al Hani also entered into several other contracts for construction works in Libya. They included the TIAR contract with RBA for the reconstruction and upgrading of the Tripoli International Airport Road,<sup>6</sup> the TIAR-NE contract with RBA for technical studies and designs for the northern extension of the Tripoli International Airport Road,<sup>7</sup> the Garaboulli contract with the Transportation Projects Board (“TPB”) for the maintenance of the coastal road between Ras Ejdir and Garaboulli and the development and upgrading of the Tripoli Western Access Road,<sup>8</sup> and the Tajura contract with the Housing and Infrastructure Board (“HIB”) for design and construction work in connection with a major new urban development in the city of Tajura, a suburb of Tripoli.<sup>9</sup> The latter was the largest contract, with an estimated value of over 778 million Libyan Dinars (“LYD”).
6. Article 10(a) of the Tajura, TIAR, and Garaboulli contracts and Article 2(1) of Appendix B of the TIAR-NE contract provided for an advance payment to be made to Al Hani by the relevant contractual counterparty on Respondent’s side. (Article 10(a) of the Benghazi and Misurata contracts provided for the advance payment to be made to Strabag International Ltd.) The advance payment constituted part of the total value of the contract and its purpose was to help Al Hani/Strabag International Ltd. cover the initial costs incurred in starting the project.
7. In the Benghazi, Misurata, TIAR, TIAR-NE, and Garaboulli contracts, the advance payment amounted to 15% of the total contract price. In the Tajura contract, it represented 20% of the contract price.

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<sup>4</sup> Exhibit C-19, Memorandum of Association of Al Hani, July 12, 2007.

<sup>5</sup> Exhibit C-65, assignment agreement relating to the Benghazi contract, October 27, 2009; see also Exhibit C-45, assignment agreement relating to the Misurata contract, June 18, 2009.

<sup>6</sup> Exhibit C-32, TIAR contract, November 2, 2008.

<sup>7</sup> Exhibit C-53, TIAR-NE contract, August 23, 2009.

<sup>8</sup> Exhibit C-108, Garaboulli contract, August 24, 2010.

<sup>9</sup> Exhibit C-27, Tajura contract, May 18, 2008.



8. Because the advance payments were made under each contract prior to the performance of any works by Strabag International Ltd. (for the Benaghazi and Misurata contracts) and Al Hani (for the remaining contracts), they were intended to be recouped through pro rata deductions from Strabag International Ltd.'s/Al Hani's invoices during the life of the relevant contract. Strabag International Ltd. or Al Hani, as the case may be, would repay the advance payments through the deduction of the amount of 15% (or 20% in the case of the Tajura contract) from each Payment Certificate until the advance payments were repaid in full. Each Payment Certificate required Strabag International Ltd./Al Hani to submit proof of works on the specific project.
  
9. Each contract required that the advance payments be guaranteed by unconditional and irrevocable letters of credit obtained by Al Hani (or Strabag International Ltd. for the Benghazi and Misurata contracts prior to their assignment to Al Hani in 2009) in favor of the relevant contractual counterparty on Respondent's side, except for the TIAR-NE contract, in which Article 2(1) of Appendix B merely provided that the advance payment should be paid by RBA to Al Hani "in exchange for a letter of guarantee in the same amount," without specifying that the letter of guarantee should be unconditional and irrevocable.<sup>10</sup>
  
10. It is undisputed between the Parties that Strabag International Ltd. (for the Benghazi and Misurata contracts) and Al Hani (for the remaining contracts) received all the contractually mandated advance payments. The amounts of the advance payments were, for the Benghazi contract, LYD 4,870,803 and EUR 2,949,640;<sup>11</sup> for the Misurata contract, LYD 7,419,344;<sup>12</sup> for the Tajura contract, LYD 155,717,915;<sup>13</sup> for the TIAR contract, LYD 11,124,958;<sup>14</sup> for the TIAR-NE contract, LYD 742,500;<sup>15</sup> and for the Garaboulli contract, LYD 25,903,040.<sup>16</sup>

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<sup>10</sup> Exhibit C-53, TIAR-NE contract, August 23, 2009, Appendix B, Article 2(1).

<sup>11</sup> Exhibit R-5, Benghazi payment authorization (advance payment), February 11, 2007.

<sup>12</sup> Exhibit R-37, Misurata payment authorization (advance payment), September 5, 2007.

<sup>13</sup> Respondent's Counter-Memorial, ¶ 170; see also FTI Exhibit 18, p. 6, Tajura invoice no. 2.

<sup>14</sup> Exhibit R-215, TIAR payment authorization (advance payment), December 30, 2008; see also FTI Exhibit 9(2), p. 4, TIAR contract particulars.

<sup>15</sup> Exhibit R-216, TIAR-NE payment authorization (advance payment), December 28, 2009.

<sup>16</sup> Respondent's Counter-Memorial, ¶ 252; see also FTI Exhibit 14(1), p. 6, Garaboulli contract particulars.

11. It is also undisputed that Strabag International Ltd. and Al Hani, directly or through Claimant, provided the contractually required unconditional and irrevocable advance payment guarantees, in the form of letters of credit, in favor of the various counterparties on Respondent's side.
12. It is likewise undisputed that through the deduction mechanism of Article 10(a), Respondent completely recovered the advance payments on the Benghazi and Misurata road contracts.
13. Respondent contends, however, that Al Hani still holds EUR 98,128,159 in unearned advance payments under the Tajura, TIAR, TIAR-NE, and Garaboulli contracts,<sup>17</sup> and that Al Hani has an obligation to repay those unearned amounts since they pertain to work that was never performed by Al Hani under the contracts.<sup>18</sup>
14. Accordingly, Respondent contends that if the Tribunal determines that any amounts are owed to Al Hani under the contracts, such amounts should be set off against the unearned amounts of the advance payments.
15. Claimant, on the other hand, argues that there are no remaining unearned amounts from the advance payments, since all the advance payments were applied to work on Al Hani's projects and have been used up. It also expresses concern that some letters of credit in relation to some of the projects remain a potential liability. Claimant contends that it would suffer significant prejudice and face "double jeopardy" if the Tribunal were to accept Respondent's set-off argument and if it then had to honor a call from the banks, which it would be unable to contest as the bank guarantees are unconditional.<sup>19</sup>

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<sup>17</sup> Respondent's Post-Hearing Brief, ¶ 208; see also Exhibit RH-15, presentation on quantum by Ian Michael Osbaldeston, slide 7, column J. According to column H, the amounts of unearned advance payments are as follows: for the TIAR contract, LYD 1,491,601; for the TIAR-NE contract, LYD 556,875; for the Garaboulli contract, LYD 24,230,566; and for the Tajura contract, LYD 148,570,399. They total EUR 98,128,159. Claimant's quantum expert, Patrick A. McGeehin, also states that the balance of the advance payments is around EUR 90 million: "it's safe to say that the current balance of the Advance Payment is somewhere in the 90-some million range." See Hearing Transcript, July 19, 2018, 2126:6-8.

<sup>18</sup> Respondent's Post-Hearing Brief, ¶ 224; see also, for instance, Respondent's Post-Hearing Brief, ¶ 246 ("TPB paid Al-Hani an Advance Payment of LYD 25.9 million, representing 15% of the Garaboulli Contract price. However, as of the time Al-Hani ceased activities in 2011, it had only performed about 6% of the works on the Garaboulli Project.").

<sup>19</sup> Claimant's letter of November 15, 2019 to Tribunal, p. 5.

16. Claimant alleges that three bank guarantees continue to represent liabilities<sup>20</sup> for it: (1) the advance payment guarantee for the Tajura project, Letter of Credit 12293,<sup>21</sup> in an amount of EUR 51,905,971.53; (2) the performance guarantee for the Tajura project, Letter of Credit 12295,<sup>22</sup> in an amount of EUR 5,190,597.15; and (3) the performance guarantee for the TIAR project, Letter of Credit 12402,<sup>23</sup> in an amount of LYD 1,002,747.58.
17. The advance payment guarantee for the Tajura project and the performance guarantees for the Tajura and TIAR projects each consisted of (1) an unconditional and irrevocable “fronting guarantee” in the form of a standby letter of credit from Gumhouria Bank in Libya in favor of HIB (for the Tajura guarantees) and RBA (for the TIAR performance guarantee) and (2) a “backing guarantee” in the form of a counter-guarantee letter of credit issued by Claimant’s bank, namely ABC International Bank (for the Tajura guarantees) and Deutsche Bank (for the TIAR performance guarantee), in favor of Gumhouria Bank. Claimant had to pay fees to ABC International Bank and Deutsche Bank to maintain the letters of credits.
18. As for the TIAR advance payment guarantee and the TIAR-NE and Garaboulli guarantees, Claimant does not seem to consider them a potential liability as these were provided by Al Hani, not by Claimant itself.<sup>24</sup>
19. It was Respondent’s understanding in late 2019 that the TIAR, TIAR-NE, and Garaboulli advance payment guarantees were still valid,<sup>25</sup> and likewise the TIAR-NE performance guarantee.<sup>26</sup> With respect to the Tajura guarantees (for advance payment

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<sup>20</sup> Ibid., pp. 2-3.

<sup>21</sup> Exhibit C-821, Swift communication from ABC International Bank to Gumhouria Bank regarding the Tajura advance payment guarantee, June 27, 2008; see also Exhibit C-30, Letter of Credit No. 12293, August 3, 2008.

<sup>22</sup> Exhibit R-68, Letter of Guarantee No. 12295, August 7, 2008.

<sup>23</sup> Exhibit C-35, Letter of Guarantee No. 12402, December 30, 2008.

<sup>24</sup> Claimant’s letter of December 10, 2019 to Tribunal, p. 4; see also Award, ¶ 894.

<sup>25</sup> Respondent’s letter of November 15, 2019 to Tribunal, p. 2; see also Respondent’s letter of December 10, 2019 to Tribunal, p. 3.

<sup>26</sup> Respondent’s letter of November 15, 2019 to Tribunal, p. 2.

as well as for performance), Respondent asserts that they had expired by 2012 and 2013.<sup>27</sup>

20. The majority of the Tribunal finds that “[t]he testimony at the Hearing and the evidence on record show that significant elements in the chain of guarantees securing the Tajura advance payment remain in effect, as does the entire TIAR guarantee and the separate performance guarantees for both of these Contracts.”<sup>28</sup> It concludes, therefore, that “the guarantees, including at least the Tajura backing guarantee and Strabag’s related obligations to ABC Bank, remain in effect and must be taken into account in assessing the claimed set-off.”<sup>29</sup>
21. The majority’s finding that the Tajura guarantees remain valid is premised on (1) the hearing testimony of Mr. Al Naas, HIB’s senior official responsible for letters of credit, who stated that HIB was contemplating a possible call on the Tajura guarantees,<sup>30</sup> and (2) “a substantial body of evidence ... showing that Strabag has for many years paid bank charges to maintain the Tajura and TIAR advance payment and performance guarantees.”<sup>31</sup> According to the majority, “Claimant presumably did not pay these significant amounts in respect of allegedly ‘non-existent’ guarantees.”<sup>32</sup>
22. However, the evidence on the record regarding the Tajura advance payment guarantee in the amount of EUR 51,905,971.53 (by far the most substantial guarantee) casts serious doubt on its continuing validity. The record shows that both Gumhouria Bank and ABC International Bank regarded at least the fronting guarantee component of the Tajura advance payment guarantee as having expired.
23. According to the very wording of Letter of Credit 12293, the fronting guarantee was supposed to remain valid until May 31, 2012, after which date, “and in absence of [HIB] instructions within its validity, it will be automatically considered as null and void.”<sup>33</sup>

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<sup>27</sup> Ibid., p. 1; see also Respondent’s letter of December 10, 2019 to Tribunal, p. 3.

<sup>28</sup> Award, ¶ 905.

<sup>29</sup> Ibid., ¶ 909.

<sup>30</sup> Ibid., ¶ 906.

<sup>31</sup> Ibid., ¶ 907.

<sup>32</sup> Ibid.

<sup>33</sup> Exhibit C-821, Swift communication from ABC International Bank to Gumhouria Bank regarding the Tajura advance payment guarantee, June 27, 2008, p. 2.

The backing guarantee was supposed to be “valid 30 (thirty) days beyond the expiry date of [the fronting guarantee].”<sup>34</sup>

24. A Swift communication from Gumhouria Bank to ABC International Bank dated July 17, 2012, shows that (1) on March 15, 2012, HIB delivered instructions to Gumhouria Bank to renew the fronting guarantee, but that those instructions were sent to the wrong branch of Gumhouria Bank; (2) on July 5, 2012, ABC International Bank sent a Swift message to Gumhouria Bank asking to be “release[d]” from the backing guarantee; and (3) on July 17, 2012, Gumhouria Bank requested ABC International Bank to “reinstate” the guarantee until the end of June 2013.<sup>35</sup>
25. From the foregoing, one may reasonably infer that ABC International Bank considered the fronting guarantee to have expired given that no request for extension was made within its validity period. ABC International Bank accordingly asked to be “release[d]” from the backing guarantee.
26. The record shows that ABC International Bank considered the backing guarantee to have expired as well. On December 23, 2015, in response to a Swift communication from Gumhouria Bank dated November 16, 2015, ABC International Bank stated that “[a]s advised to you previously, *your standby LC* reference ST-BY L/C 12293 [i.e., the fronting guarantee] *and our counter guarantee in your favour* with Ref No. 10/08/0526 *have both expired.*”<sup>36</sup>
27. ABC International Bank informed Claimant of its understanding on this matter in a letter of December 29, 2015.<sup>37</sup> Thus, Claimant was aware of ABC International Bank’s position that both the fronting guarantee and the backing guarantee had expired.
28. Moreover, this position was shared by Al Hani. In a letter it sent to HIB as far back as March 11, 2013, it referred to the Tajura advance payment guarantee as having

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<sup>34</sup> Ibid.

<sup>35</sup> Exhibit C-822, Swift communication from Gumhouria Bank to ABC International Bank regarding the Tajura advance payment guarantee, July 17, 2012; see also Exhibit R-193, letter from HIB to Gumhouria Bank, March 15, 2012.

<sup>36</sup> Exhibit C-375, letter from ABC International Bank to Claimant plus copies of Swift communications with Gumhouria Bank, December 29, 2015, p. 5 (emphasis added).

<sup>37</sup> Ibid., p. 1.

expired.<sup>38</sup> This understanding was also made clear in Claimant's submissions in the course of the proceedings and in statements made by one of Claimant's witnesses.

29. In its Reply, Claimant states the following:

The Respondent in its Counter-Memorial contends that Al Hani's failure to renew the advance payment guarantee, which had lapsed, explains why the recommencement agreement for the Tajura Contract was never agreed. The Respondent's position is misleading: the disagreement with the advance payment guarantee was in the context of the negotiations with Gumhouria Bank, which refused to renegotiate the interest that Al Hani was paying on its credit facility unless it re-established the guarantee which, as Mr. Knaack explained in his first witness statement, Al Hani was unwilling to agree to renew while it was still uncertain whether Al Hani could proceed with the project.<sup>39</sup>

30. Claimant's assertion in its Reply is borne out by the testimony of Mr. Knaack, the commercial manager of Al Hani. Mr. Knaack made it clear that Al Hani understood the Tajura advance payment guarantee, including the backing guarantee between Gumhouria Bank and ABC International Bank, to have expired:

At this time, I also had a number of meetings with Gumhouria Bank. As I mentioned above, Al Hani had taken out a credit facility with Gumhouria Bank in 2010 which we had exhausted, and I tried to negotiate with the bank a moratorium on interest. However, our negotiations with Gumhouria Bank were difficult since the bank would always insist that we agreed to renew the advance payment guarantee for the Tajura contract. *The counter-guarantee between Gumhouria Bank and ABC Bank had expired* due to an administrative oversight and Gumhouria Bank tried to get us to agree to rectify this, which we refused to do since it was still uncertain that we would be able to continue with the project.<sup>40</sup>

31. Notwithstanding all of the above, Claimant was charged by ABC International Bank and agreed to pay it fees for the backing guarantee,<sup>41</sup> despite ABC International Bank's clear belief, which Claimant shared, that both the fronting guarantee and the backing guarantee relating to the advance payment under the Tajura contract had expired.

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<sup>38</sup> Exhibit C-824, letter from Al Hani to IIB, March 11, 2013, p. 1.

<sup>39</sup> Claimant's reply, ¶ 369 (footnotes omitted).

<sup>40</sup> Mr. Knaack's First Witness Statement, ¶ 37 (emphasis added).

<sup>41</sup> FTI Exhibit 157, Strabag's accounting data relating to payments for the Tajura bank guarantees up to June 2017.

32. The conclusions reached by the majority with respect to the issues of the advance payments and the guarantees are untenable for the reasons given below.
33. *First*, the Tribunal unanimously observes that “the state of the Libyan courts remains very critical,”<sup>42</sup> that “Libyan courts are not a practicable and safe option,”<sup>43</sup> and that Claimant had “no viable mechanisms for settling disputes with the Libyan State entities involved ... other than resorting to Treaty arbitration.”<sup>44</sup> Yet, when it comes to Respondent’s request for set-off, the majority states that this is a “matter that must be addressed by the Parties, if it is to be addressed, outside the context of this arbitration,”<sup>45</sup> without indicating in which forum. The practical implications of this distinction is that contractual claims, insofar as they address Claimant’s rights, are selectively elevated into treaty claims, while Respondent’s set-off requests arising from the same contractual relationship are denied similar treatment and are to be addressed “outside the context of this arbitration” in a forum yet to be identified by Respondent.
34. Having determined that it had jurisdiction over Claimant’s contractual claims, and having supplanted Libyan courts for the purpose of deciding those claims, the Tribunal was under the obligation to comprehensively resolve the dispute, as Libyan courts would have done. Consequently, it was incumbent on the Tribunal to rule on the issue of the advance payments with a view to settling all amounts against all contracts.
35. Respondent’s proposition that the amounts resulting from Claimant’s claims for damage had to be set off against the unearned portions of the advance payments finds support in Libyan law, which is the law applicable to the underlying contracts. Article 184(1) of the Libyan Civil Code states: “Whoever receives, by way of payment, what is not owed to him must return it.” Similarly, Article 185 of the Libyan Civil Code provides: “A payment which was not due may be recovered if it was made in the performance of an obligation whose cause had not materialized or had ceased to exist.” In the same vein, Article 349 of the Libyan Civil Code (entitled “debts capable of set-off”) allows the amount owed by a debtor to a creditor to be set off against the amount

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<sup>42</sup> Award, ¶ 203.

<sup>43</sup> Ibid., ¶ 208.

<sup>44</sup> Ibid., ¶ 204.

<sup>45</sup> Ibid., ¶ 921.

owed by the creditor to the debtor. This is possible even when the claims do not arise from the same source, i.e., if the claimant is seeking a claim under one contract and the respondent is seeking set-off for overpaid funds under another contract.

36. *Second*, the majority expresses concern regarding the “continued existence of the unconditional and irrevocable guarantees created to secure the advance payments and other aspects of Al Hani’s performance.”<sup>46</sup>
37. However, the evidence on record from both Parties with respect to the advance payment guarantees is confusing and contradictory, and any assertion that the Tajura guarantees (by far the most substantial ones) are still valid is speculative. It is noteworthy that the majority gives undue weight to the testimony of one of Respondent’s witnesses, Mr. Naas, in relation to the Tajura bank guarantees, even though Respondent distanced itself from the testimony of Mr. Naas in its letter to the Tribunal of November 15, 2019.<sup>47</sup> It is striking that while the Award frequently casts doubts on Respondent’s witnesses and their testimonies, qualifying them as contradictory, inconsistent, or unconvincing,<sup>48</sup> the majority makes a positive assessment of the testimony of one of Respondent’s witnesses on this particular issue.
38. The majority posits that it “could not apply the requested set-off without firm arrangements in place to assure that Claimant’s exposure under the guarantees would at the same time be reduced or ended to the extent of any set-off.”<sup>49</sup> It adds that the Tribunal “has no authority to address this difficulty without the agreement of the Parties.”<sup>50</sup> Both assertions are arguable.
39. As indicated in the Award, the drafters of the Austria-Libya BIT saw set-offs as lying within a tribunal’s jurisdiction per Article 13 of the treaty, and Respondent’s claimed set-off can reasonably be viewed as an “incidental or additional claim” for purposes of Article 47 of the ICSID’s Arbitration (Additional Facility) Rules.<sup>51</sup> The Tribunal

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<sup>46</sup> Ibid., ¶ 918.

<sup>47</sup> Respondent’s letter of November 15, 2019 to Tribunal, p. 1.

<sup>48</sup> Award, ¶¶ 347-348, 377, 387, 390, 750, 788-790, 804.

<sup>49</sup> Ibid., ¶ 919.

<sup>50</sup> Ibid., ¶ 920.

<sup>51</sup> Ibid., ¶¶ 896-897.



therefore has jurisdiction over the advance payment issue, irrespective of any jurisdiction it has to rule on the bank guarantees. Even if all the bank guarantees were deemed still to be valid and any decision on the advance payment were to be made conditional on the prior resolution of the issue of the bank guarantees (which is the approach taken by the majority), it would have been possible to determine the amount of the unearned portions of the advance payments and allow Respondent to proceed with set-off *only after* releasing all the bank guarantees still in its possession. Alternatively, Respondent could have been requested to provide evidence that the guarantees had been cleared prior to any ruling on set-off.

40. *Third*, while the majority stresses the necessary link between the advance payments and the bank guarantees, it overlooks the obvious overlap between the advance payments and some of Claimant's claims for damages.
41. While Respondent and its expert provide detailed figures for advance payments that they consider not yet to have been earned,<sup>52</sup> Claimant states vaguely, with little supporting documentation, that the full advance payments had been fully used up to finance "significant costs that Strabag incurred upfront at the outset of the projects (for example, in recruiting and mobilising personnel, constructing site facilities, purchasing equipment and machinery, and engaging sub-contractors)."<sup>53</sup> By its own admission, Claimant used unearned portions of the advance payments to buy equipment and supply the joint venture with cash.
42. The Tribunal nonetheless awards Claimant compensation for some of the aforementioned up-front costs, including for lost or damaged equipment and damages caused by delay. Without proper consideration of the issue of advance payments, it may well turn out that the Award compensates Claimant for equipment and other costs that, by Claimant's own admission, have already been covered using unearned portions of the advance payments, i.e., monies from Respondent.
43. As Respondent states in its written submissions:

If the Tribunal awards damages for loss of equipment as requested by Claimant without offsetting the unearned portions of the

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<sup>52</sup> See *supra* footnotes 17 and 18 and their accompanying texts.

<sup>53</sup> Claimant's Reply, ¶ 837; see also *ibid.*, ¶¶ 9, 64, 88 and 838.

Advance Payments, then Al-Hani would have received twice the value of the equipment: first by way of damages and second by means of the unearned retained Advance Payments. This double recovery is impermissible.<sup>54</sup>

44. A task partially completed may prove in practice to be more problematic than a task not initiated at all. The majority's decision to summarily deny Respondent's requested set-off<sup>55</sup> fails to recognize that the issues of the advance payments, the bank guarantees, and Claimant's claims for damages are intertwined and cannot be resolved separately. This fragmentation is not conducive to "good order and fundamental fairness,"<sup>56</sup> to which the majority and indeed the entire Tribunal aspired.

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<sup>54</sup> Respondent's Rejoinder, ¶ 634 (footnote omitted).

<sup>55</sup> Award, ¶ 921.

<sup>56</sup> Ibid., ¶ 919.

A handwritten signature in black ink, appearing to be 'N. Ziadé', written over a horizontal line.

Professor Nassib G. Ziadé  
*Arbitrator*

Date: June 22, 2020