UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF LIBYA, Petitioner, v. STRABAG SE, Respondent.	Case No. _____

PETITION TO VACATE ARBITRAL AWARD

Petitioner State of Libya ("Libya")[1] hereby petitions this Court for an order and judgment vacating or, alternatively modifying the arbitral award rendered on June 29, 2020 in *Strabag SE v. State of Libya*, ICSID Case No. ARB(AF)/15/1 (the "Award") pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 10, 11. A duly certified copy of the Award and the dissenting opinion of Professor Nassib G. Ziadé is appended as Exhibit 1 to the Declaration of Hermann Ferré dated September 15, 2020 ("Ferré Decl."). In support of its Petition, Libya respectfully states as follows:

THE PARTIES

1. Petitioner State of Libya is a foreign state as defined in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(a).

2. Respondent Strabag SE ("Strabag") is a corporation organized under the laws of the Republic of Austria. Strabag wholly owns ILBAU, a German company, which in turn wholly owns Strabag International Limited ("Strabag International"), a German company, which in turn holds a 60% interest in Al Hani General Construction Company ("Al Hani") – the Libyan

[1] This submission is without prejudice to Libya's position that sums due on any arbitral award are to be paid by the Libyan Agencies as defined infra, and not by Libya itself.

joint venture company at the center of the parties' dispute. Award ¶ 7. The Libyan Investment and Development Company ("LIDCO") holds the remaining 40% interest in Al Hani. *Id*.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter of this proceeding under 28 U.S.C. § 1332(a)(4) because Libya is a foreign state as defined in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1603(a) and the amount in dispute exceeds $75,000.

4. This Court also has jurisdiction over the subject matter of this proceeding under 9 U.S.C. § 203, which provides that "[t]he district courts of the United States . . . have original jurisdiction over" any "action or proceeding falling under" the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). This proceeding falls under the New York Convention because it arises out of a commercial arbitration between Libya and Strabag, neither of which are citizens of the United States. *See* 9 U.S.C. § 202. In addition, the Award was rendered in Washington, D.C. and therefore this Court has primary supervisory jurisdiction over the Arbitration (as defined below) and the Award under the New York Convention and thus is the only jurisdiction with the authority to vacate the award. *See Alghanim v. Toys "R" Us*, 126 F.3d 15, 22-23 (2d Cir. 1997); *Termorio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935 (D.C. Cir. 2007).

5. This Court has personal jurisdiction over Strabag because Strabag is party to the Award, which was issued in Washington, D.C. *See Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 352 (2d Cir. 1999) (recognizing personal jurisdiction over parties to an

arbitration at the place they arbitrate). Strabag submitted to this Court's supervisory jurisdiction under the New York Convention.[2]

6. Venue is proper in this Court pursuant to 9 U.S.C. §§ 10, 204 and 28 U.S.C. § 1391 because the arbitration was seated in Washington D.C. and the award was rendered in Washington, D.C.

FACTUAL BACKGROUND

7. Petitioner the State of Libya is a foreign state as defined in the FSIA. Respondent Strabag is a corporation organized under the laws of the Republic of Austria. At the center of the parties' dispute is Al Hani, a Libyan joint venture company in which Strabag holds an indirect 60% interest through its 100% ownership of the German company ILBAU, which in turn wholly owns another German company, Strabag International. Award ¶ 7. Strabag International holds a 60% interest in Al Hani. *Id*. LIDCO holds the remaining 40% interest in Al Hani. *Id*. Al Hani was "controlled, and its operations directed, in all practical respects by Strabag." *Id.* ¶ 128.

8. The dispute between Strabag and Libya concerns six construction contracts (the "Contracts") between Al Hani and certain Libyan government agencies, namely the Roads and Bridges Authority ("RBA"), the Housing and Infrastructure Board ("HIB"), and the Transportation Projects Board ("TPB") (together, the "Libyan Agencies"). *Id.* ¶¶ 59–60. The parties signed the Contracts between 2006 and 2010. *Id.* ¶ 60. Performance was interrupted by the outbreak of hostilities in Libya in February 2011, which have since become known as the Libyan Revolution. *Id.* ¶¶ 75–78. The Contracts and the parties' dispute are further described *infra*.

[2] Libya will be filing a motion for alternative service and will endeavor to timely serve Strabag under 9 U.S.C. § 12.

9. Strabag commenced the arbitration against Libya (the "Arbitration") in 2015 after it sought outstanding payments under the Contracts as well as compensation for damage to Al Hani's equipment caused by the Libyan Revolution. *Id.* ¶ 93. Although Strabag's claims pertained almost entirely to sums that the Libyan Agencies allegedly owed to Al Hani under the Contracts, the Contracts themselves do not provide for arbitration. *Id.* ¶¶ 189–90; *see also, e.g.*, Ferré Decl., Ex. 7, Article 53. Instead, they require that disputes be resolved through litigation in the Libyan courts. Award, ¶¶ 189–90.

10. Eschewing these contractual requirements, Strabag instead brought its claim under a bilateral investment treaty, the Agreement between the Republic of Austria and the Great Socialist People's Libyan Arab Jamahiriya, entered into force on January 1, 2004 (the "Austria-Libya BIT" or the "Treaty"), which is appended as Exhibit 4 to the Declaration of Hermann Ferré. The Austria-Libya BIT sets out various protections that Austria and Libya each undertake to provide to "investments" made by qualifying "investors" of the other State.

11. Strabag commenced its arbitration under Article 11 of the Treaty, which permits a qualifying investor to submit a dispute to arbitration under the rules governing the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (the "ICSID Additional Facility Rules").[3] The Tribunal determined that the Arbitration would be seated in Washington, D.C. Award ¶ 19.

12. Over the course of the Arbitration, the parties exchanged written submissions, witness statements and expert reports. *Id.* ¶¶ 20–45. The ICSID Additional Facility Rules do not require arbitral hearings to take place at the seat of arbitration, and so the Tribunal held a two-week hearing in Paris in July 2018. *Id.* ¶ 46. It issued an Award on June 29, 2020. *Id.*¶ 46.

[3] As set forth *infra*, awards rendered under the ICSID Additional Facility Rules are subject to the New York Convention and not the ICSID Convention.

13. In its Award, the Arbitral Tribunal (the "Tribunal") awarded Strabag €82,038,766.61, £1,118,721.20, and $497,533.80 (including €74,937,003.60 in damages plus €7,101,763.01 and £1,118,721.20 in attorney fees and $497,533.80 in arbitration costs).[4] *Id.* ¶¶ 979–80. Of the amount awarded to Strabag, the vast majority, approximately €68.7 million, was awarded in respect of Strabag's claims for payments that Al Hani was owed under the terms of the Contracts. *Id.* ¶ 979. In particular, the Tribunal determined that pursuant to the Treaty's "Umbrella Clause," it had jurisdiction over disputes under the Contracts. *Id.* ¶ 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."). This Umbrella Clause, Article 8(1), states that "[e]ach Contracting Party shall observe any obligation it may have entered into with regard to specific investments by investors of the other Contracting Party." *Id.* ¶ 137; Treaty, Article 8(1).

14. The remaining €6.3 million was awarded based on Libya's breach of another provision of the Treaty through the conduct of its military during the Libyan Revolution, the "War Clause." Award ¶ 979. The "War Clause," Article 5, stipulates that States shall compensate investors for losses that their investments suffer due to wartime requisitioning or the use of military force in the absence of military necessity. Treaty, Article 5.

15. The Award does not, however, account for the approximately €98 million in advance payments that Strabag was paid at the outset of the projects for work that was never performed. Although the Tribunal unanimously determined that it had jurisdiction to adjudicate Libya's assertion of a set-off of these unearned advance payments, two of the three members of the Tribunal (the "Majority") nevertheless refused to actually adjudicate the set-off. Instead of

[4] The Tribunal also awarded simple interest at the EURIBOR Annual Rate plus 4% on €51,608,403.60 of this amount running from March 1, 2011, and on the remainder running from January 1, 2012. *Id.*

resolving this issue, the Majority directed the parties to resolve the set-off of the prepayments "outside the context of this arbitration." Award ¶¶ 915–17, 921.

16. Petitioner moves to set aside the award under 9 U.S.C. § 10(a)(4), and, alternatively, moves to modify the award under 9 U.S.C. § 11. By failing to adjudicate Libya's assertion to an offset, the Tribunal did not issue a final award as required by 9 U.S.C. § 10(a)(4) and therefore the Award should be vacated. Alternatively, because the Award provides Strabag a double recovery, the Court should modify the Award pursuant to 9 U.S.C. § 11.

17. Petitioner sets out below (A) the terms of the Contracts, including those governing the prepayments at issue in the present action; (B) the unsettled contractual issues resulting from the Libyan Resolution and the suspension of works; (C) the substance of the dispute in the Arbitration; and finally (D) the disagreement between the Majority and the Dissent over whether to account for the prepayments that Libya had already made to Strabag for works that have never been performed.

I. The Parties' Contracts

18. The six Contracts pursuant to which the Tribunal awarded the majority of the damages in the Arbitration are:

- The "Benghazi Contract". In 2006, Strabag International and RBA entered into the Benghazi Contract, which provided for the maintenance of a road near Benghazi, Libya. This Contract is appended as Exhibit 7 to the Declaration of Hermann Ferré.
- The "Misurata Contract". In 2007, Strabag International and RBA entered into the Misurata Contract, which provided for the maintenance of a road near Misurata, Libya. This Contract is appended as Exhibit 8 to the Declaration of Hermann Ferré.
- The "Tajura Contract". In 2008, Al Hani and HIB entered into the Taiura Contract, which provided for the design and construction of infrastructure for a suburban development in Tajura, Libya. This Contract is appended as Exhibit 9 to the Declaration of Hermann Ferré.

- The "TIAR Contract". In 2008, Al Hani and RBA entered into the TIAR Contract, which provided for the construction of a road in Libya. This Contract is appended as Exhibit 10 to the Declaration of Hermann Ferré.

- The "TIAR-NE Contract". In 2009, Al Hani and RBA entered into the TIAR-NE Contract, which provided for the design of a road in Libya. This Contract is appended as Exhibit 11 to the Declaration of Hermann Ferré.

- The "Garaboulli Contract". In 2010, Al Hani and TPB entered into the Garaboulli Contract, which provided for the maintenance of a road in Libya. This Contract is appended as Exhibit 12 to the Declaration of Hermann Ferré.

See Award ¶ 60; *see generally id.* ¶¶ 56–74; *see also* Exs. 7–12. In 2009, Strabag International assigned the Benghazi and Misurata Contracts to Al Hani. Award ¶ 7. In July 2010, TPB assumed all of RBA's rights and obligations under the Benghazi, Misurata, TIAR and TIAR-NE Contracts. *Id.* ¶ 8.

19. As is standard in the construction industry, all work under the Contracts was priced, and all payments were to be made for the performance of a specified quantity of work. Each of the Contracts specifies a total price that the employer (*i.e.* the Libyan Agencies) would pay to the contractor (*i.e.* Al Hani) for its performance, the amount of work that the contractor was required to perform, and the period over which the contractor would perform the work. *See, e.g.*, *id.* ¶ 361 (describing "the projected contract price[]" and "the term of execution" as "central elements" of the Misurata Contract); Ferré Decl., Ex. 8, Article 2. The central contractual payment mechanism reflected this bargain: the contractor was paid through monthly "payment certificates" that stated the amount of work the contractor had performed during the covered period against quantities of materials and work indicated in the Contracts. Award ¶ 61.

20. In addition to this "payment certificate" mechanism, the beginning and end of performance were marked by additional payment mechanisms. Upon signing and site handover, each of the Contracts required the employer to make a substantial advance payment to the contractor, ranging from 15 to 20% of the total Contract price. *Id.* ¶¶ 65–66. In addition,

throughout performance, a retention amount was withheld from the contractor's payment certificates, which the contractor would be awarded upon completion of performance. Award ¶ 63.

21. Through the advance payment mechanism, Strabag received substantial amounts under each of the Contracts. RBA paid Strabag International €5.9 million under the Benghazi Contract and €4.2 million under the Misurata Contract. Ferré Decl., Ex. 7 Articles 2, 10; Ferré Decl., Ex. 8, Articles 2, 10. The Libyan Agencies also paid Al Hani advance payments of €6.2 million under the TIAR Contract, €417,640 under the TIAR-NE Contract, €15.3 million under the Garaboulli Contract, and €89.9 million under the Tajura Contract. Ferré Decl., Ex. 9, Articles 2, 10; Ferré Decl., Ex. 10, Articles 2, 10; Ferré Decl., Ex. 11, Appx. B; Ferré Decl., Ex. 12, Articles 2, 10; Award ¶ 65. Although Strabag only owns sixty percent of Al Hani, one hundred percent of the advance payments made to Al Hani were passed on to Strabag. *See* Award ¶ 132 (noting that Strabag's corporate accounts included "[a]ny income received from the Libyan project"). Thus, Strabag received advance payments under each of the Contracts before commencing work, for a total of over €121.9 million.[5]

22. The contractor was required to pay back these advance payments over the term of the Contracts. *Id.* ¶¶ 65–66. Al Hani's payment certificates thus included *pro rata* deductions to account for the advance payments. *Id.* ¶ 65. For example, the Tajura Contract provided for a 20% advance payment and therefore the monthly payment certificates issued by Al Hani would include a corresponding 20% deduction of the invoiced amount to pay back a portion of the advance payment received at the outset of the project. *Id.* ¶ 66. This mechanism allowed the

[5] Under the Contracts, sums were paid partially in Euros and partially in Libyan Dinar according to fixed exchange rates. *See, e.g.*, Ferré Decl., Ex. 10, Appx. No. 1, Article 6.

Libyan Agencies to gradually recoup the value of the advance payments from Al Hani as it performed and completed the works under the Contracts.

23. The Contracts also required Al Hani to maintain irrevocable bank guarantees to secure any remaining "unearned" advance payment.[6] *Id.* ¶ 65. Notably, because LIDCO is a Libyan entity and was exempt from the guarantee obligation, Al Hani was only required to guarantee sixty percent of any outstanding advance payments, notwithstanding that in practice Strabag itself collected the entire advance payment. *Id.* ¶ 68.

24. The guarantees consisted of standby letters of credit issued by Gumhouria Bank in Libya in favor of the Libyan Agencies. *Id.* ¶ 903. For certain guarantees, such as those under the TIAR and Tajura Contracts, Gumhouria Bank also required Al Hani or its parent companies to secure the bank's exposure to the Libyan Agencies. For these guarantees, in addition to letters of credit in favor of the Libyan Agencies, or "fronting guarantees," Strabag International's bank[7] provided a "backing guarantee" in the form of a counter-guarantee letter of credit in favor of Gumhouria Bank. *Id.* ¶ 890; *see also* Dissent ¶ 17. Because the backing guarantees were issued in favor of Gumhouria Bank, they could only be exercised by Gumhouria Bank and not the Libyan Agencies. *See, e.g.*, Award ¶ 890. The guarantees were to be released upon completion of all of the work under the Contracts. *Id.* ¶ 65.

II. The Libyan Revolution & Strabag's Invocation of *Force Majeure*

25. In February 2011, the Libyan Revolution began, leading to the overthrow of the regime of Muammar al Gaddafi. *Id.* ¶¶ 75–77. On March 3, 2011, Al Hani sent letters to the

[6] The amount of the bank guarantees was subject to reduction commensurate with the amounts Al Hani paid back through its performance and submission of payment certificates. Award ¶ 66.

[7] Strabag International used different banks for different backing guarantees, including ABC International Bank and Deutsche Bank. *See, e.g.*, Dissent ¶ 17.

Libyan Agencies invoking *force majeure* as of February 20, 2011. *Id.* ¶ 78. Thereafter, Al Hani ceased work under the Contracts and evacuated expatriate personnel. *Id.* ¶ 78.

26. When Al Hani ceased performance, the Contracts were in varying stages of completion. The Benghazi Contract was nearly complete. *Id.* ¶ 60. However, Al Hani had only performed roughly 5% of the Tajura Contract, the largest of the Contracts. *Id.* ¶ 72. A similar, minimal portion of the Garaboulli Contract had been performed. *Id.* ¶ 776.

27. The parties' respective payment obligations were left unsettled. The Libyan Agencies recognized outstanding obligations of roughly €33 million pursuant to approved payment certificates for work that Al Hani had performed, and Al Hani asserted additional claims for additional works that it had performed, delays, and *force majeure* losses.[8] *Id.* ¶ 346.

28. For its part, Al Hani still retained approximately €98 million in advance payments for which it had not completed any corresponding work. *Id.* ¶ 876. These unearned advance payments amounted to €853,807 under the TIAR Contract, €14,273,425 under the Garaboulli Contract, and €82,707,835 under the Tajura Contract.[9] *Id.* ¶¶ 71–72, 876. Meanwhile, the "fronting" guarantee of the advance payment under the Tajura Contract (*i.e.* the largest of the guarantees) lapsed. *Id.* ¶ 67 ("[T]he 'fronting' guarantee for the Tajura guarantee apparently was allowed to lapse through a Libyan bank's administrative error."); *see also* Dissent ¶¶ 22–31.

[8] As the Tribunal noted, Al Hani's outstanding entitlements under payment certificates were largely agreed between the parties. *Id.* ¶ 346.

[9] In the Arbitration, Libya asserted a set-off for a portion of the advance payment under the TIAR-NE Contract based on its assertion that Al Hani had not performed work entitling it to full payment under the second or third payment certificate for that Contract (thus, Al Hani had not fully repaid the advance payment through performance). *Id.* ¶ 876. Because the principal mechanism through which Al Hani was to repay advance payments was through withholdings on duly earned payment certificates, the Tribunal's finding against Libya with respect to these payment certificates disposes of the advance payment issue under that Contract. *See id.* ¶ 65 (describing this repayment mechanism); *id.* ¶¶ 380–82, 391 (finding that Al Hani had performed its obligations under the TIAR-NE Contract). Libya's entitlement to set-off for the remaining unearned advance payments are unaffected by the Award.

29. Notwithstanding efforts by the Libyan Agencies from 2011 to 2013 to induce Strabag to resume work, including by making contractual payments and proposing processes for Strabag to recover the remainder of sums owing, Strabag has indicated that it will not re-mobilize in Libya due to deteriorating security conditions. *See generally* Award ¶¶ 85–96.

III. Strabag Commences the Arbitration

30. In 2015, Strabag initiated the Arbitration under the Treaty. Strabag asserted that it was an "investor" under the Treaty, and that Al Hani, Al Hani's contractual rights, and Al Hani's construction equipment in Libya constituted its protected "investments." *Id.* ¶ 100. It asserted claims under the War Clause of the Treaty for loss and damage to Al Hani's equipment during the Libyan Revolution. *Id.* ¶ 211. Relying on the Treaty's Umbrella Clause, which as described *supra* provides protection for "any obligation" entered into by Libya, Strabag also asserted claims to recover payments owed by the Libyan Agencies under the terms of the Contracts, including their *force majeure* provisions.[10] *Id.* ¶ 137.

31. Libya raised several jurisdictional objections. *Id.* ¶ 101. Libya argued that the Contracts were not "investments" as defined in the Treaty. *Id.* Libya also argued that Strabag was not an "investor" under the Austria-Libya BIT because Strabag itself had not made any investments in Libya and Strabag was not entitled to claim "investor" status under the Austria-Libya BIT based on the activities of its second-tier German subsidiary, Strabag International. *Id.* Libya similarly argued that Strabag had no rights in the assets of its third-tier Libyan subsidiary,

[10] Strabag also asserted claims under various other provisions of the Treaty. With the exception of one claim that was dismissed on the merits, the Tribunal declined to resolve these claims as they were based on the same underlying facts and did not affect the quantum of damages. Award ¶¶ 238–241; *see also id.* ¶¶ 234-236 (rejecting Strabag's argument that Libya failed to provide it "constant protection and security" by failing to prevent or investigate the seizure of certain Al Hani equipment in 2014 because Libya acted diligently in accordance with prevailing conditions in the country).

Al Hani. *Id.* In addition, Libya argued that the Umbrella Clause did not transform ordinary breaches of commercial contracts into treaty violations and therefore the Tribunal lacked jurisdiction over Strabag's contract claims. *Id.* ¶ 141. Libya further argued that neither Libya nor Strabag were themselves parties to the Contracts, and that, in any event, the Contracts expressly provided for disputes to be resolved in the Libyan courts. *Id.* ¶¶ 142, 189.

32. On the merits, Libya argued, *inter alia*, that Strabag sought recovery for losses caused by military forces for which Libya was not responsible, such as NATO, and that Al Hani's performance under the Contracts had been deficient. *See, e.g.*, *id.* ¶¶ 269, 406.

33. Significantly, Libya argued that Strabag could not recover damages on its claims without accounting for the advance payments that Strabag had been paid under the Contracts for work that it had not performed. *Id.* ¶ 875. Libya pointed out that Strabag received and retained approximately €98 million in advance payments under the Tajura, TIAR and Garaboulli Contracts, and that Strabag had an obligation to repay those prepaid amounts since they pertained to work that neither had been nor would be performed. *Id.* ¶ 876. Because the Contracts were governed by Libyan law, Libya relied on provisions of the Libyan Civil Code governing unjust enrichment and restitution. *Id.* ¶¶ 881, 883. It also relied on the terms of the Contracts themselves, which provided for repayment by the contractor of advance payments, generally tied payment obligations to performance obligations, required the contractor to secure the unearned advance payments, and contemplated a settlement of accounts upon termination or the completion of performance. *Id.* ¶ 883.

34. Following the hearing, the Tribunal invited the parties to file supplemental briefs to provide "clarifications … in relation to the matter of the guarantees in order to assist the Tribunal in completing its mandate." *Id.* ¶¶ 54, 878. This communication is appended as

Exhibit 4 to the Declaration of Hermann Ferré. The parties filed supplemental briefs setting out the status of the guarantees in November and December 2019. Award ¶¶ 54, 879. At no point during the Arbitration did the Tribunal ask the parties to address whether, as a matter of law, it had the ability to take action with respect to the guarantees.

IV. The Majority Award and the Dissenting Opinion

35. On June 29, 2020, the Tribunal issued its Award. The Tribunal agreed on issues pertaining to jurisdiction and liability with respect to Strabag's claims. However, the arbitrators did not agree on whether to resolve the set-off of the advance payments. While the Tribunal found unanimously that it had jurisdiction over the set-off for the advance payments, two of the arbitrators refused to actually adjudicate the matter and, instead, found that the parties should resolve the matter "outside the context of" the Arbitration. Award ¶ 921. Professor Nassib G. Ziadé, a former Acting Secretary General of ICSID, issued a strong dissenting opinion (the "Dissent"). He concluded that the Tribunal, having assumed jurisdiction over the case, had an obligation to resolve the set-off in order to meaningfully resolve the contractual dispute and to avoid double recovery by Strabag.

A. The Tribunal's Rulings

36. The Tribunal determined that it could exercise jurisdiction over Strabag's claims. It held that Strabag's indirect interest in Al Hani and Al Hani's Contract rights constituted an "investment" under the Treaty. Award ¶¶ 109, 110, 118. It found that Strabag could claim directly for sums owed to Al Hani under the Contracts because "in reality, Al Hani was not in fact an autonomous entity." *Id.* ¶ 128. The Tribunal also held that it had jurisdiction over Strabag's contract claims under the Umbrella Clause. *Id.* ¶ 188. It determined that the Treaty's Umbrella Clause did not require the investor to be a party to the contracts constituting the

"investment," and that the text of the Umbrella Clause did not restrict the type of conduct which could give rise to a breach. *Id.* ¶¶ 164, 167, 173, 188.

37. The Tribunal recognized that the Contracts contained forum selection clauses requiring the parties to litigate any disputes arising out of the Contracts in the Libyan courts. *Id.* ¶ 195. Nevertheless, the Tribunal held that enforcement of the forum selection clauses was excused as impossible in light of the ongoing security concerns in Libya. It found that, "due to poor security conditions, the courts are not regularly operating in Libya since the Revolution of 2011" and that "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." *Id.* ¶¶ 196, 202. It therefore concluded that the forum selection clauses in the Contracts did not prohibit the exercise of arbitral jurisdiction over Strabag's contract claims under the Umbrella Clause of the Treaty. *Id.* ¶ 208.

38. On the merits, the Tribunal awarded Strabag compensation for the requisition and destruction of equipment during the Libyan Revolution. *Id.* ¶¶ 263, 298. It reduced Strabag's claims to account for the damage caused by forces other than the Libyan military. *See, e.g.*, *id.* ¶¶ 292, 298. It also awarded sums owed to Al Hani under approved payment certificates (which, as noted above, Libya had recognized as due and owing), and granted an additional €25.76 million for uncompensated delays and additional works under certain of the Contracts. *Id.* ¶ 979.

39. The Tribunal also found that conditions in Libya made further performance of the Contracts impossible, triggering *force majeure* under Article 36 of the Contracts and applicable Libyan law. *Id.* ¶¶ 813, 842. Although the Tribunal found that the parties had not considered the Contracts terminated as of February 2011, it acknowledged that hostilities had triggered a right to terminate under Article 36 of the Contracts. *Id.* ¶¶ 795, 807. The Tribunal awarded Strabag

approximately €17.1 million in *force majeure* compensation under Article 36 and related provisions of the Tajura, TIAR and Garaboulli Contracts on the understanding that performance could not resume. *Id.* ¶¶ 795, 810 ("[C]onditions in Libya following the Revolution would not have allowed the resumption of substantial works under Al Hani's Contracts.").

40. The Tribunal also deemed certain Contracts to be effectively completed and undertook to resolve Strabag's entitlements on that basis. It thus held that Strabag was entitled to recover the "retention payments" withheld by the Libyan Agencies under the Benghazi, Misurata and TIAR Contracts as though the work had been completed, awarding approximately €3.9 million on that basis notwithstanding the fact that a quarter of the works under the TIAR Contract remained to be performed. *Id.* ¶¶ 768, 769, 773, 979. However, the Tribunal denied Strabag's claims to recover the retention amounts under the Tajura and Garaboulli Contracts on the grounds that Al Hani had completed very little of the works under those Contracts. *Id.* ¶¶ 774–77.

B. The Majority's Rulings on Libya's Advance Payment Claims, Resulting in a Double Recovery by Strabag

41. The Tribunal unanimously held that it had jurisdiction to adjudicate Libya's assertion that any compensation awarded to Strabag should be reduced by the amount of advance payments – approximately €98 million – that had been paid to Strabag by the Libyan Agencies and neither earned back through performance nor repaid. *Id.* ¶ 897. This finding was consistent with its application of other Contract-based reductions to Strabag's damages claims under the Contracts in recognition of the Libyan Agencies' rights thereunder. *See, e.g.*, *id.* ¶¶ 391, 699, 706. Nevertheless, the Majority refused to resolve the set-off, instead expressly leaving the issue to the parties to resolve between themselves. *Id.* ¶¶ 916, 921.

42. The Majority recognized that the Libyan Agencies "made substantial advance payments in connection with all of the contracts at issue," and that "large amounts were not recovered" through Al Hani's performance as anticipated under the Contracts. *Id.* ¶¶ 875–76. However, the Majority was "concerned" by the "continued existence" of guarantees securing a portion of the advance payments. *Id.* ¶ 918. The Tribunal observed that the guarantees securing 60% of the advance payments received by Strabag under the TIAR and Garaboulli Contracts remained in effect. *Id.* ¶ 909. While the Tribunal recognized that the fronting guarantee issued in favor of HIB to secure 60% of the advance payment received by Strabag under the Tajura Contract (by far the largest of the advance payments) had lapsed, it nevertheless found that "significant elements in the chain of guarantees securing the Tajura advance payment remain in effect" – meaning the backing guarantee in favor of Gumhouria Bank and not HIB. *See id.* ¶¶ 67, 905. The Majority was concerned that if it applied a set-off for the amount of the unearned advance payments "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," Libya might wrongfully call on these guarantees notwithstanding that it would fully recover its advance payments through set-off. *Id.* ¶ 919. It considered that the Tribunal lacked the authority to implement such "firm arrangements." *Id.* ¶¶ 919–20.

43. The Tribunal requested post-hearing submissions on the status of the guarantees, but it never told the parties about its concern that it lacked the power to condition a set-off on a release of the guarantees. The Tribunal relied on Article 15 of the Treaty to assert that it did not have adequate remedial authority to fashion its preferred remedy. *Id.* ¶ 920. However, the list of remedies that an arbitral tribunal may provide, as set out in Article 15, includes, "with the agreement of the parties to the dispute, any other form of relief." Treaty, Article 15(1)(d). The

Tribunal did not seek the parties' consent to any particular form of relief that would have, in the Majority's view, been adequate. *See* Ferré Decl., Ex. 6.

44. Instead, the Majority's analysis focused exclusively on the perceived hypothetical risk of an unlawful call on the guarantees by Libya. Award ¶¶ 918–19. It did not assess Libya's rights under the Contracts and applicable principles of Libyan law on restitution, but instead identified the remedy that the Majority would want to grant as a matter of "good order and fundamental fairness" if it were to decide in Libya's favor on set-off. *Id.* ¶ 919. That remedy would condition application of any set-off on Libya's release of the guarantees.[11] *Id.*

45. Despite the Majority's anxiety about the possibility of a wrongful call on the guarantees by Libya, the Majority did not address the double recovery that results from its award of compensation to Strabag, which does not account for the sums that Strabag has already been paid. The Award grants Strabag approximately €68.7 million for work that Al Hani performed under the Contracts, notwithstanding that Strabag has received approximately €98 million in advance payments under those same Contracts for work that will never be done.

46. The Majority also ignored the fact that a set-off of the unearned advance payments was necessary to avoid double recovery on Strabag's remaining claims for compensation under the War Clause of the Treaty for lost and damaged equipment. As the Majority itself found, Strabag had used some of the advance payments that it had received from

[11] Although Libyan courts would have been able to comprehensively resolve Strabag's contract claims, Libya's set-off and the issue of the outstanding guarantees, the Majority concluded that, unlike Libyan courts, it lacked the authority to condition its application of a set-off for the advance payments on Libya's release of the guarantees. Award ¶¶ 915–17. Thus, because it felt that it could not fashion its preferred remedy, it simply told the parties to address the issue of the advance payments "outside the context of this arbitration." *Id.* ¶ 921.

the Libyan Agencies to purchase that equipment. *See, e.g.*, *id.* ¶ 902. In other words, absent a set-off of the advance payments, Libya will be forced to pay for that equipment twice.[12]

47. The Majority reached its determination that it could not fashion its preferred remedy *sua sponte*. While Strabag argued unsuccessfully that the Tribunal lacked jurisdiction to determine the set-off (*id.* ¶ 887), it never argued that the Tribunal would be powerless to fashion a remedy for the set-off that addressed the guarantees if, as the Tribunal held, it had jurisdiction over the set-off. Moreover, while the Majority stated that "there is a lack of clarity regarding the advance payment guarantees," it never asked the parties for their positions on whether the Tribunal could condition a set-off of the advance payments on a release of the guarantees. *Id.* ¶ 894. Nor did it seek the parties' agreement to an appropriate comprehensive remedy, as expressly contemplated by the Treaty, or simply set off the unearned advance payments that were not secured by guarantees. *Id.* ¶ 894; Treaty, Article 15(1)(d). Instead, the Majority refused to address the approximately €98 million in advance payments which the Award effectively allows Strabag to retain in addition to the over €83 million awarded to Strabag as compensation, attorney's fees and costs.

C. The Dissent's Ruling on Libya's Advance Payment Claims

48. Professor Ziadé issued a strong dissenting opinion on the issue of the set-off. The Dissent asserted that the Tribunal not only had the power to adjudicate the set-off, but in fact had an obligation to do so, explaining that the Majority's refusal to adjudicate the set-off was "untenable" for several reasons. Dissent ¶ 32.

[12] The Majority also failed to consider that the guarantees only secured 60% of the outstanding unearned advance payments, as discussed *supra*. Thus, even if the Libyan Agencies had called on the guarantees (and as noted they could not with respect to the Tajura Contract), they would at most have only been able to recover only 60% of the unearned advance payments.

49. The key problem, as the Dissent highlighted, was that the Majority abdicated its obligation to fully resolve the parties' dispute under the Contracts. It stated that "the issues of the advance payments, the bank guarantees, and Claimant's claims for damages are intertwined and cannot be resolved separately." *Id.* ¶ 44. Accordingly, the Dissent found that:

> 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**.

Id. ¶ 34 (emphasis added). In other words, the Dissent concluded that once the Tribunal decided to adjudicate Libya's liabilities under the Contracts, it was obliged to adjudicate Strabag's corresponding liabilities under those same Contracts.

50. The Dissent further explained that it was particularly untenable for the Majority to "selectively" adjudicate Strabag's contract claims while refusing to resolve Libya's assertion of a set-off "arising from the same contractual relationship" in light of the Tribunal's decision to override the forum selection clauses in the Contracts, which provided for litigation in Libyan courts. *Id.* ¶ 33. The Dissent thus recognized the fundamental unfairness of providing Strabag a forum to litigate its claims under the Contracts while declining to provide Libya the same rights under those same Contracts. *Id.* ¶ 44 ("This fragmentation is not conducive to 'good order and fundamental fairness.'").

51. The Dissent also dismissed the Majority's concerns regarding the guarantees. It found that, even if all of the advance payment guarantees were still valid, the existence of those guarantees would not present an insurmountable obstacle to resolving the set-off. The Dissent disagreed with the Majority's conclusion that it was powerless to condition a set-off of the advance payments on the release of the guarantees. *Id.* ¶ 39. The Dissent explained that,

because the Tribunal unanimously held that it had jurisdiction over the set-off, the Tribunal could simply "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," or, alternatively, request that Libya "provide evidence that the guarantees had been cleared prior to any ruling on set-off." *Id.* (emphasis in original).

52. The Dissent further points out that the Majority "overlooks the obvious overlap between the advance payments and some of Claimant's claims for damages." *Id.* ¶ 40. For instance, the Dissent explains 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." *Id.* ¶ 42. Absent a set-off, Strabag would receive "twice the value of the equipment: first by way of damages and second by means of the unearned retained Advance Payments." *Id.* ¶ 43. Accordingly, the Dissent agreed with Libya that a set-off of the advance payments was necessary to avoid an impermissible double recovery by Strabag. *Id.*

53. The Dissent concluded that the Majority's decision to rule on Strabag's contract claims while abstaining from ruling on Libya's assertion of a set off for the advance payments made under the same Contracts only served to exacerbate – not resolve – the parties' dispute. *Id.* ¶ 44 ("A task partially completed may prove in practice to be more problematic than a task not initiated at all."). And it determined that the Majority's decision ultimately undermined the fundamental fairness of the arbitration. *Id.*

COUNT ONE
(Vacatur of the Award under 9 U.S.C. § 10)

54. Libya incorporates each and every allegation in the preceding paragraphs as if set forth fully herein.

55. Article 3 of the ICSID Additional Facility Rules states that the ICSID Convention does not apply to awards rendered pursuant to the Additional Facility Rules. Ferré Decl., Ex. 3, Article 3. Thus, this Award is not governed by 22 U.S.C. § 1650a, the statute implementing the ICSID Convention. Rather, as an international award rendered in the United States, which is a party to the Convention, to resolve a commercial dispute between foreign parties, it is governed by the New York Convention and the FAA. *See, e.g.*, *Crystallex Int'l Corp. v. Bolivarian Republic of Venez.*, 760 F. App'x 1, 2 (D.C. Cir. 2019).

56. Article V(1)(e) of the New York Convention states that an award may be set aside by a "competent authority of the country in which, or under the law of which, that award was made." Because Washington, D.C. was the agreed seat of the arbitration, the award was made in Washington, D.C. and therefore this Court is a competent authority to set aside the Award under the New York Convention.

57. The New York Convention is codified under Chapter 2 of the FAA. Pursuant to the New York Convention and 9 U.S.C. § 208, this Court may vacate the Award based on any of the grounds enumerated in 9 U.S.C. § 10.

58. Section 10 of the FAA authorizes this Court to vacate an arbitral award when the arbitral tribunal has so imperfectly executed its powers that it has failed to render a mutual, definite and final award. 9 U.S.C. § 10(a)(4). An award is not final unless it has resolved the issues submitted to it by the parties, such that no further litigation will be needed to determine their mutual rights and obligations. That standard is not met here. Despite determining Strabag's claims and holding that it had jurisdiction to resolve Libya's corresponding assertions of a set-off, the Majority declined to determine the credit to which Libya is entitled for its advance payments, stating: "This is a matter that must be addressed by the Parties, if it is to be

addressed, outside the context of this arbitration." Award ¶ 921. The Award thus made a decision regarding Strabag's claims while leaving Libya's assertion of a set-off for approximately €98 million unresolved, effectively allowing Strabag to recover twice. This failure to render a mutual, definite and final award requires that the Award be vacated by this Court.[13]

59. Section 10 also allows this Court to vacate an arbitral award when the arbitral tribunal has exceeded its powers by straying from the authority granted to it by the parties' agreement to arbitrate. 9 U.S.C. § 10(a)(4). In this case, the Majority abstained from evaluating Libya's entitlement to a set-off under applicable law because of an avowed concern that Libya might initiate an unauthorized call on the guarantees thereafter. In doing so, the Tribunal was improperly substituting its own notions of justice for the real limit of its authority, which remains the agreement between the parties – in this case, the bilateral investment treaty purportedly authorizing the tribunal's jurisdiction over the dispute.[14] Instead of deciding an issue over which it had jurisdiction on the basis of the applicable law, the Majority expressly reached its outcome on the basis of its concern about the practical risk that Strabag would face of wrongful action by Libya if the tribunal were exercise the jurisdiction that it possessed. This decision, based on the Majority's arbitrary and unlitigated conception of "good order and fundamental fairness," rather than the legal rights and obligations of the parties, constitutes an "excess of powers" which requires vacatur of the Award.

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[13] As set forth more fully in the accompanying Memorandum of Law, the Tribunal had ample means at its disposal to resolve all claims between the parties.

[14] The Tribunal also exceeded its powers by improperly asserting jurisdiction over the dispute in contravention of the terms of the Treaty. As discussed further in the Memorandum of Points and Authorities in Support of this Petition to vacate or modify the Award, Strabag did not "make" an investment as required by Article 1(1)(b) of the Austria-Libya BIT and thus could not properly avail itself of the opportunity to arbitrate its dispute under the Treaty.

60. For the reasons stated above and discussed further in the accompanying Memorandum of Points and Authorities, this Court should vacate the award because the tribunal has both failed to render a mutual, definite and final award and exceeded its powers.

COUNT TWO
(Modification of the Award under 9 U.S.C. § 11)

61. Libya incorporates each and every allegation in the preceding paragraphs as if set forth fully herein.

62. As set out above, the Award is subject to the FAA and the New York Convention. The Award was rendered in Washington, D.C. and therefore this Court may modify the Award pursuant to 9 U.S.C. § 11.

63. Section 11 of the Federal Arbitration Act permits this Court to modify or correct an award which evidences a material miscalculation or a material mistake so as to effect the intent thereof and promote justice between the parties. In this case, the Award grants Strabag damages for the claims it brought to the Tribunal, but ignores the payments that Strabag had already received. The Tribunal found that it had jurisdiction over both Strabag's claims and Libya's corresponding entitlement to a set-off, but the Majority declined to adjudicate the set-off issue, deciding that its own perception of the resulting risk to Strabag of an unauthorized call on its guarantees by Libya precluded it from granting relief in the form it deemed most preferable. The result of the Majority's decision is to allow Strabag to retain the advance payments even though it did not earn those payments through performance and also to compensate Strabag for those same amounts through the award of damages. This constitutes an impermissible double recovery to Strabag.

64. Caselaw in the D.C. and other Circuits demonstrates that when presented with an arbitral award which provides double recovery, a court is obligated to modify the award to

prevent the manifest injustice that would result from confirming it. Here, in attempting to address the possibility of double recovery by one party, the tribunal effectively granted such double recovery to the other. Under the terms of the Award, Strabag is permitted to both receive amounts owed to it under the Contracts and retain the approximately €98 million in unearned advance payments already paid to it for work that it will not perform. This Court can and should modify the Award to prevent such impermissible double recovery.

PRAYER FOR RELIEF

WHEREFORE, Petitioner State of Libya respectfully requests this Court to enter an order vacating the Award pursuant to 9 U.S.C. § 10 or, alternatively, modifying the Award pursuant to 9 U.S.C. § 11 to set off the unearned advance payments received and retained by Respondent Strabag. Petitioner further requests that this Court award any other relief that this Court, in the interests of justice, deems necessary and proper.

Dated: Washington, D.C.
September 15, 2020

Respectfully submitted,

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