EXHIBIT A1

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AWARD

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ICC INTERNATIONAL COURT OF ARBITRATION

CASE No. 22236/ZF/AYZ

ETRAK İNŞAAT TAAHHÜT VE TİCARET ANONİM ŞİRKETİ

(Turkey)

vs/

THE STATE OF LIBYA

(The State of Libya)

This document is a certified true copy of the original of the Final Award rendered in conformity with the Rules of Arbitration of the ICC International Court of Arbitration.

FINAL AWARD

ICC Arbitration 22236/ZF/AYZ

ETRAK İNŞAAT TAAHHÜT VE TİCARET ANONİM ŞİRKETİ ("Claimant")

v.

THE STATE OF LIBYA ("Respondent")

TRIBUNAL
Mr. John M. Townsend, Arbitrator
Ms. Jean Kalicki, Arbitrator
Prof. Dr. Kaj Hobér, President

Administrative Secretary to the Tribunal
Dr. Joel Dahlquist Cullborg

22 July 2019

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TABLE OF CONTENT

I. DEFINED TERMS

1. The following defined terms are used in this Award:

- **"Appeal"** – Respondent's appeal of the Court Decision.
- **"Arbitral Tribunal"** – Arbitral Tribunal, includes one or more arbitrators.
- "**Arbitration**" – The present arbitral proceedings, initiated by Claimant's Request for Arbitration.
- **"Award"** – This arbitral award.
- **"Austria-Libya BIT"** – Agreement between the Republic of Austria and the Great Socialist People's Libyan Arab Jamahiriya for the Promotion and Protection of Investments, signed on June 18, 2002, entry into force January 1, 2004.
- **"BIT"** - Agreement between the Republic of Turkey and the Great Socialist People's Libyan Arab Jamahiriya on the Reciprocal Promotion and Protection of Investments, signed on November 25, 2009.
- **"Court"** – International Court of Arbitration of the International Chamber of Commerce.
- **"Court Decision"** – The court decision of the Beyda Civil Court of First Instance dated 29 October 2012.
- **"First Mukhtar Opinion"** – Expert Opinion of Mr. Mahmud R. Mukhtar, dated 4 June 2017.
- **"First El-Murtadi Report"** – Expert Report of Dr. El-Murtadi, dated 13 October 2017.
- **"First Shahat Statement"** – Witness Statement of Mr. Anis Shahat Attiyah Ibrahim dated 23 October 2017.
- **"Hasasu Statement"** – Witness Statement of Mr. Yilmaz Hasasu, dated 3 June 2017.
- **"ICC"** – International Chamber of Commerce.
- **"ICJ"** – International Court of Justice
- **"First Günay Statement"** – Witness Statement of Mr. Ziya Günay, dated 3 June 2017.
- **"LD"** – Libyan dinars.
- "**NTC**" – National Transitional Council.
- **"Parties"** – Claimant and Respondent jointly.
- **"Rejoinder"** – Respondent's Rejoinder, dated 20 September 2018.
- **"Reply"** – Claimant's Reply to Respondent's Statement of Defense dated 21 May 2018.
- **"Request for Arbitration"** – The Claimant's Request for Arbitration, dated 29 August 2016 and received by the Secretariat on 31 August 2016.
- **"Request for Interim Measures"** – The Claimant's Request for Interim Measures, submitted on 9 October 2017 and amended on 10 October 2017
- "**Rules**" - ICC Arbitration Rules in force as of 1 January 2012.
- **"Second El-Murtadi Report"** – Second Expert Report of Dr. El-Murtadi, dated 19 September 2018.
- "**Second Günay Statement**" – Witness Statement of Mr. Ziya Günay, dated 17 May 2018.
- **"Second Mukhtar Opinion**" – Second Expert Opinion of Mr. Mahmud R. Mukhtar, dated 17 May 2018.

- **"Secretariat"** – Secretariat of the International Court of Arbitration.
- **"Settlement Agreement"** – The document of December 9, 2013 referred to as the Settlement Agreement by Claimant in its Request for Arbitration. Also referred to as the "**Agreement**".
- **"Statement of Claim"** – The Claimant's Statement of Claim dated 5 June 2017.
- **"Statement of Defense"** – The Respondent's Statement of Defense dated 13 November 2017.
- **"Tripoli Proceedings"** – Proceedings in Northern Tripoli Court of First Instance, 11th Civil Division, Libya, in which Respondent argues that the Settlement Agreement is invalid.

II. THE PARTIES

2. Claimant is Etrak İnşaat Taahhüt ve Ticaret Anonim Şirketi, a joint stock company organized under the laws of the Republic of Turkey. Its address is Kadiköy Fikirtepe Kasriali Cad, Kombe Apt. No. 13/1, Istanbul, Turkey.

3. Respondent is the State of Libya, represented by the Litigation Department, Foreign Disputes Committee. Its address is Essidi Street Courts Complex, 3rd Floor, Tripoli, The State of Libya.

III. PROCEDURAL HISTORY

4. On 31 August 2016 the ICC Secretariat ("the Secretariat") received a Request for Arbitration dated 29 August 2016 filed by Claimant.

5. In its Request, the Claimant proposed that the arbitration be submitted to a three-member Tribunal and nominated Mr. John M. Townsend as co-arbitrator. Mr. Townsend's address is Hughes Hubbard & Reed LLP, 1775 I Street, N.W, Washington D.C., 20006, United States.

6. The Secretariat notified the Request for Arbitration to the following entities on the following dates:

THE STATE OF LIBYA
Litigation Department, Foreign Disputes Committee
To the attention of: Abdel Rahman Mohamed Shamileh
Director of the Litigation Department
Essidi Street
Courts Complex 3rd Floor
Tripoli
The State of Libya
Delivered on September 21, 2016.

THE STATE OF LIBYA
Ambassador Ibrahim O. A. Dabbashi
Permanent Representative of Libya to the UN
Permanent Mission of Libya of the UN
309-315 East 48th Street
New York, NY 10017
U.S.A.
Delivered on September 16, 2016.

THE STATE OF LIBYA
Ambassador Alshiabani Mansour Abuhamoud
Embassy of Libya to the Republic of France
6-8 rue Chasseloup-Laubat
75015 Paris
France
Delivered on September 19, 2016.

On September 16, 2016 the Secretariat was informed by the courier service retained by it that the Request for Arbitration could not be delivered to the following address due to "incomplete address":

THE STATE OF LIBYA
The Honorable Fayez Al Sarraj
Prime Minister of the State of Libya
Tripoli
The State of Libya

7. On 20 October 2016 the Secretariat received a confirmation from Respondent, in which it confirmed receipt of the Request for Arbitration on September 21, 2016. In this message, the Respondent also requested an extension of 12 weeks to submit its answer.

8. On 15 November 2016 Respondent nominated Ms. Jean E. Kalicki as co-arbitrator. Ms. Kalicki's address is Kalicki Arbitration, 201 West 72nd St., 6A, New York, NY, 10023, United States.

9. On 13 December 2016 the Parties agreed to Geneva as the place of arbitration.

10. Following several extensions of time agreed between the Parties, the Respondent was granted until 12 January 2017 to submit its Answer to the Request for Arbitration. On 19 January 2017 the Secretariat received an Answer to the Request for Arbitration filed by Respondent.

11. In the Answer to the Request for Arbitration, Respondent raised jurisdictional objections pursuant to Article 6(3) of the Rules (summarized below at para. 48).

12. On 19 January 2017 Prof. Dr. Kaj Hobér was confirmed as president of the Arbitral Tribunal by the ICC Secretary General, upon joint nomination by the co-arbitrators. Prof. Dr. Hobér's address is Säves väg 36, 75263 Uppsala, Sweden.

13. Pursuant to Article 16 of the Rules the file was transmitted to the Arbitral Tribunal on January 20, 2017.

14. In emails from the Claimant on 9 February 2017, and from the Respondent on 20 February 2017, the Parties agreed to the appointment of Mr. Joel Dahlquist Cullborg as administrative secretary to the Arbitral Tribunal, in conformity with the section on Administrative Secretaries of the Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration.

15. As required by Article 24 of the Rules, the Arbitral Tribunal convened a case management conference, which took place via telephone conference on February 27, 2017 for the purpose of consulting with the Parties on procedural measures to be adopted pursuant to Article 22(2) of the Rules and Appendix IV to the Rules.

16. On 21 March 2017, the Parties and the Arbitral Tribunal established the Terms of Reference.

17. On 15 May 2017, the Arbitral Tribunal issued Procedural Order No. 1, which further to the Terms of Reference contained instructions on the conduct of the proceedings, including the procedural timetable.

18. On 5 June 2017, Claimant submitted its Statement of Claim.

19. On 9 October 2017 Claimant submitted a Request for Interim Measures. The Request for Interim Measures was amended on 10 October 2017.

20. On 13 October 2017, Respondent requested an extension for filing its Statement of Defence. According to the original timetable incorporated in Procedural Order No. 1, the Statement of Defence was due to be filed on 16 October 2017. Respondent asked that this deadline be extended to 11 December 2017. In its Procedural Order No. 2, on 16 October 2017 the Arbitral Tribunal extended the deadline for the Statement of Defence to 13 November 2017. As a consequence of this extension, all other submission deadlines in the original procedural timetable were pushed back four weeks.

21. After receiving the Parties' submissions on the issue of interim measures, on 9 November 2017 the Arbitral Tribunal issued Procedural Order No. 3, in which it denied the Claimant's Request for Interim Measures, while reserving its decisions on costs in connection with the Request to a later stage of the arbitration.

22. On 13 November 2017, the Respondent submitted its Statement of Defence ("the Statement of Defence").

23. As per the updated procedural timetable in Procedural Order No, 2, on 3 January 2018 the Parties exchanged comments on the other side's request for document production.

24. On 1 February 2018, the Arbitral Tribunal decided on the contested aspects of both Parties' requests for production of documents.

25. On 8 March 2018, Claimant wrote an email to the Arbitral Tribunal, in which it claimed that Respondent had not produced a letter, together with attached minutes from a meeting ("the Document(s)"), dated 18 June 2013 and sent from the National Head of the State Litigation Department to the Derna Branch Head of the State Litigation Department. Respondent's stated reason for not producing the Document(s) was that they "include[] advice and concerns the conduct of litigation and accordingly Respondent claims privilege over both documents". On the Arbitral Tribunal's invitation, Respondent developed its reasons for the invoked privilege on 19 March 2018. Also on the Arbitral Tribunal's invitation, Claimant commented on Respondent's developed reasons on 23 March 2018. On 27 March 2018, the Tribunal rejected Claimant's request for the production of the Document(s).

26. On 21 May 2018, Claimant submitted its Reply to Respondent's Statement of Defence ("the Reply".)

27. On 16 August 2018, Claimant wrote to the Arbitral Tribunal with a further Request for Document Production. According to Claimant, it had been informed by Respondent on 13 August 2018 of new circumstances in the pending court proceedings in which Respondent requests a declaration on the validity and effect of the Settlement Agreement under Libyan law ("the Tripoli Proceedings"). Claimant asked the Arbitral Tribunal to order Respondent to produce:

    - Any document in connection with or relating to the alleged notification to Claimant of the Tripoli Proceedings and a 18 October 2018 hearing in those proceedings; and

    - A full and complete copy of the case file in respect of the Tripoli Proceedings, including any document in connection with the alleged notification of the statement of claim, a full set of all pleadings, any documents issued by the court, as well as any document with respect to the taking of any procedural steps in the proceedings.

28. On 20 August 2018, the Arbitral Tribunal noted that Claimant had received the relevant documents from Respondent, pre-empting any need for an Arbitral Tribunal order, and that Claimant reserved its right to request leave to make brief written submissions concerning the Tripoli Proceedings, after receiving Respondent's Statement of Rejoinder on 17 September 2018, and before the Hearing.

29. On 20 September 2018, the Respondent submitted its Statement of Rejoinder ("the Rejoinder").

30. The Hearing was held from 15 October through 18 October 2018 in London.

31. On 26 November 2018, the Parties submitted their statements on costs. On 13 December 2018, the Parties submitted their comments on the other Party's statement on costs.

32. On 15 January 2019, the Arbitral Tribunal declared the proceedings closed. On that same date, the Arbitral Tribunal requested the ICC Court to extend the time limit for the submission of the draft Final Award until 31 May 2019. On 31 January 2019, the ICC Court extended the time limit until 31 May 2019. On 23 May 2019 the time limit was further extended until 28 June 2019. On 26 June 2019, the ICC Court extended the time limit for rendering the final award until 31 July 2019.

IV. PRAYERS FOR RELIEF

33. Claimant has requested that the Arbitral Tribunal:[1]

A. Find and declare that the Arbitral Tribunal has jurisdiction over all claims brought by Claimant;

B. Find and declare that Respondent has violated its obligations under the BIT and customary international law as a result of non-compliance with the Settlement Agreement;

C. Alternatively, find and declare that Respondent has violated its specific obligations contained in the Settlement Agreement, and thus the umbrella clause obligation under the BIT by virtue of the MFN clause thereof;

D. Alternatively, find and declare, as a matter of contract, that Respondent has violated its obligations contained in the Settlement Agreement itself;

E. Award compensation of no less than USD 20,080,549.71 as a result of Respondent's non-performance of the Settlement Agreement *per se* in line with the finding and declaration of violations as per "A" or "B" or "C" above;

F. Award moral damages to Claimant in an amount no less than USD 3,000,000;

[1] Terms of Reference, para. 47.

G. Award Claimant interest calculated from 29 August 2016 at a rate to be compounded and fixed by the Arbitral Tribunal. Claimant requests interest at an annual interest rate of 4% calculated on a simple basis in case the Arbitral Tribunal finds that Respondent has breached the Settlement Agreement as a matter of contract, or alternatively an interest rate of LIBOR plus 5%, compounded semi-annually, in case the Arbitral Tribunal finds that Respondent has breached the BIT;

H. Award Claimant all costs and fees incurred in connection with this Arbitration;

I. Award Claimant any other relief to which it may be entitled in law or equity.

34. Respondent has requested that the Arbitral Tribunal:

A. Dismiss Claimant's claims for lack of jurisdiction, on the following grounds:

I. The Turkey-Libya BIT has never entered into force, because Turkey never notified Libya of the completion of the requisite constitutional formalities in Turkey for its entry into force.

II. Claimant has not shown that it holds any qualifying "investment" within Libya for the purposes of Article 1(2) of the Turkey-Libya BIT.

III. Even if Claimant had made a qualifying investment within Libya, the dispute in issue between Claimant and Libya would be outside the jurisdiction of this Tribunal because it arose before the Turkey-Libya BIT entered into force.

IV. Claimant chose to submit the dispute to the Libyan courts and cannot now bring claims arising from the same dispute in this arbitration, pursuant to Articles 8(2) and 8(3) of the Turkey-Libya BIT. The Libyan court proceedings are still ongoing and have not yet resulted in a final decision.

V. By entering into the Turkey-Libya BIT, Respondent has not consented to the referral to arbitration of Claimant's claims which are entirely contractual in nature.

B. In the event that the Arbitral Tribunal finds it has jurisdiction to consider Claimant's claims, dismiss those claims on the merits; and

C. Award Respondent all of its costs incurred in connection with this arbitration, including its attorney's fees and expenses, and the fees and expenses of the Arbitral Tribunal and the ICC.

V. BACKGROUND

35. Below follows a summary of the facts of the dispute, based on the submissions made by the Parties in this Arbitration. Further details of the Parties' submissions are set out in Sections VI, VII and VIII below, which deal with the Parties' positions on matters of jurisdiction, liability and quantum respectively.

36. Claimant is a Turkish construction company, which has been active in Libya since 1980. According to Claimant, it has concluded more than 35 public works projects under approximately 20 contracts with various Libyan authorities.[2] In the early 1990s, Claimant ceased work in Libya. According to Claimant, the reason for this cessation of activities was that its invoices were not paid by its counterparts.[3] Respondent asserts, however, that the contracts were terminated by mutual consent. Respondent makes no admissions as to the performance of the contracts prior to their termination.[4] In any event, Claimant states that it was never paid fully for its works, and that it tried to recover payment of the alleged debts during the next two decades.

37. In July 1994, Claimant's unpaid invoices were tabulated.[5] From 1994, Claimant began a process of collating various documents showing the alleged outstanding debts. These documents were submitted to the Libyan Treasury under the framework of a protocol between the governments of Turkey and Libya in December 1994, which concerned numerous unpaid debts owed by Libya to different Turkish companies.[6]

38. Claimant describes this work as long, continuous and arduous, and it was only completed in 2005.[7] In 2007 and 2008, Claimant participated in an audit performed by a committee for the Audit and Review of Outstanding Liabilities of Libya's Treasury ("the Audit Committee"). On 21 December 2008, the audit was completed, determining that Libya owed Claimant LD 1,721,389.823. According to Respondent, the Audit Committee's findings were not final, which Respondent asserts that Claimant recognized at the time.[8]

39. From 2009 to 2011 Claimant attempted unsuccessfully to collect the amount identified by the Audit Committee. Ultimately, Claimant initiated court proceedings in order to recover its alleged debt. On 27 September 2012, Claimant filed a claim before the Beida Court of First Instance against the Prime

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[2] Statement of Claim, para. 10.
[3] Statement of Claim, para. 12.
[4] Rejoinder, para. 50.
[5] Exh. C-22, Letter from Great Socialist People's Libyan Arab Jamahiriya Secretariat of the People's General Committee for Infrastructure, Tourism and Transportation Public Projects Authority to Heads of Projects Offices at Zawiya – Sabha – Murzuq – Obari, 27 July 1994.
[6] Statement of Claim, para. 14.
[7] Statement of Claim, paras 15-19. See also First Günay Statement paras 9-11; Hasasu Statement paras. 11-13; Rejoinder, para. 43.
[8] Rejoinder, paras. 59-62.

Minister of the Transitional Interim Government, the President of the General National Congress, the Minister of Finance, and the Governor of the Libyan Central Bank. On 29 October 2012, the Beida Court of First Instance found that Respondent was to pay Claimant for receivables dating back to 1991, amounting to LD 1.906.360.23 plus interest at the rate of 7.5% running from 18 January 1991, as well as LD 1.000.000 to cover losses incurred in trying to collect the outstanding payment "("the Court Decision").

40. No representatives of Libyan authorities appeared to contest the claims before the Beida Court of First Instance.[9] According to Respondent, the Libyan entities named as respondents in the Beida Court of First Instance case were not notified of the proceedings by Claimant, who under Libyan law had the legal obligation to notify the other party.[10] The State Litigation Department only became aware of the Court Decision in January 2013.[11]

41. On 9 December 2013 a Settlement Agreement ("the Settlement Agreement) was signed by representatives of Claimant and Mr. Ghaith Suleiman, Deputy Minister in the Libyan Ministry of Finance.[12] Under the Settlement Agreement, Claimant was to receive payments totaling LD 5,420,308.707 in installments to be paid at two separate dates in 2014.[13] The Settlement Agreement also included an agreement that both parties abandon any domestic or international proceedings regarding the Court Decision.[14]

42. Respondent disputes that the Settlement Agreement is valid,[15] and does not accept Claimant's evidence as to the negotiation and signing of the Settlement Agreement.[16] As developed below at para. 47, Respondent has initiated court proceedings in Tripoli to nullify the Settlement Agreement. To date, Claimant has not received any payments under the Settlement Agreement.[17]

43. The Court Decision was orally appealed on 23 January 2013 ("the Appeal"), and on 31 January 2018, the Beida Court of Appeal issued the Appeal Decision, which overturned the Court Decision.[18] The Parties are not in agreement as to what transpired between January 2013, when the Appeal was lodged, and January 2018, when the Appeal Decision was issued.

44. According to Respondent, the Appeal was transferred to the Green Mountain Court of Appeal in Derna on 17 April 2013. However, the worsening security situation in the region forced the Green Mountain Court of Appeal to close in June 2013 amidst violence and due to the assassination of a judge.[19] The Appeal was

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[9] Statement of Claim, para. 27; Statement of Defense, paras. 35-39; First Shahat Statement, para. 35.
[10] Statement of Claim, para. 38.
[11] Statement of Claim, para. 41.
[12] Exh. C-2, Settlement Agreement. See also Rejoinder, para. 150
[13] Statement of Claim, para. 33.
[14] Reply, para. 40; Exh. C-2, Settlement Agreement, Art. 7.
[15] Statement of Defense,, para. 5.
[16] Rejoinder, para. 153.
[17] Statement of Claim, para. 36.
[18] Exh R-43.
[19] Statement of Defense, paras 44-45.

thereafter transferred to the newly established Beida Court of Appeal, which began hearing cases in late 2015.[20] Given the backlog of pending cases, the Appeal was recorded by Beida Court Appeal on 1 March 2017. In Respondent's 19 January 2017 Answer in the present Arbitration, Respondent explained that the Appeal was still ongoing at that time, but subject to delays.[21] Respondent asserts that Claimant has been given every chance to participate in the Appeal proceedings, but has elected not to do so.[22]

45. In Claimant's view, Respondent's version of the facts concerning the Appeal are beset by "controversies and inconsistencies".[23] Following the Settlement Agreement, Claimant had assumed that the Appeal had been withdrawn. It claims to have learned about the Appeal's existence only via a 13 September 2017 letter submitted by Respondent's counsel in the present Arbitration.[24] Claimant views the Appeal as inactive for more than four years, and then "reactivated" by Respondent. The Appeal Decision provides that the Court of Appeal regarded the Appeal as filed on 28 September 2017, i.e. *after* Respondent's 13 September 2017 letter informing Claimant about the Appeal.[25] Even assuming that the Appeal was recorded on 1 March 2017, Claimant points out, this date is around 40 days after the Respondent submitted its Statement of Defence, in which it referred to the Appeal ambiguously.[26]

46. There was a procedural hearing in the Appeal on 3 October 2017, followed by a substantive hearing on 15 November, 2017. Claimant was not present at either of these hearings.[27] The Parties dispute whether Claimant was properly notified of the hearings.[28]

47. Claimant views Respondent's pursuit of the Appeal as a violation of the Settlement Agreement.[29] In between the two hearings in the Appeal, Claimant filed its Request for Interim Measures, asking the Tribunal to order Respondent to suspend or request a stay of the Appeal, which the Tribunal rejected in Procedural Order No. 3 on 9 November 2017.

48. By contrast, Respondent asserts that the Appeal Decision is the result of well-founded objections against the Court Decision.[30] The Appeal was based on criticisms against the Court Decision, concerning (i) the lack of proper service on the respondents; (ii) the lack of jurisdiction of the Beida Court of First Instance; and (iii) the effect of the Audit Committee process.[31] Claimant asserts that the

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[20] Statement of Defense, paras. 48-50; Rejoinder, para. 94.
[21] Answer, paras. 19-21.
[22] Rejoinder, para. 165.
[23] Reply, para. 39.
[24] Exh. C-39, Letter from Respondent's Counsel to Claimant.
[25] Reply, para. 54.
[26] Reply, para. 48.
[27] Rejoinder, para. 122.
[28] Claimant's Amended Request for Interim Measures, para. 8; Rejoinder, paras. 122-123.
[29] Claimant's Request for Interim Measures, paras. 12-15.
[30] Rejoinder, para. 147.
[31] Rejoinder, paras. 132-147.

basis for the Appeal Decision is "fundamentally wrong",[32] and amounts to a denial of justice in violation of the BIT.[33]

49. On 25 March 2018, the State Litigation Department, on behalf of the Prime Minister and Governor of the Central Bank of Libya initiated the Tripoli Proceedings at the Northern Tripoli Court of First Instance, with the aim of declaring the Settlement Agreement null and void.[34] Respondents in the Tripoli Proceedings are, in addition to Claimant, the Undersecretary of Finance and the Minister of Finance.[35] The declaration is sought on three grounds: (i) the Settlement Agreement was concluded by an individual without the requisite legal authority; (ii) mandatory procedures for entering into a binding settlement agreement by a government authority were not satisfied; and (iii) the Appeal Decision, which overturned the Court Decision, has made performance of the Settlement Agreement legally impossible.

VI. JURISDICTION

50. Claimant has raised claims under the arbitration clause set forth in Article 8 of the Turkey-Libya BIT, dated November 25, 2009 ("the BIT"). Article 8 reads:

> ***ARTICLE 8***
>
> ***Settlement of Disputes Between One Contracting Party and Investors of the Other Contracting Party***
>
> *1. Disputes between one of the Contracting Parties and an investor of the other Contracting Party, in connection with his investment, shall be notified in writing, including detailed information, by the investor to the recipient Contracting Party of the investment. As far as possible, the investor and the concerned Contracting Party shall endeavor to settle these disputes by consultations and negotiations in good faith.*
>
> *2. If these disputes, cannot be settled in this way within ninety (90) days following the date of the written notification mentioned in paragraph 1, the dispute can be submitted, as the investor may choose, to the competent court of the Contracting Party in whose territory the investment has been made or to international arbitration under:*
>
> *(a) the International Center for Settlement of Investment Disputes (ICSID) set up by the "Convention on Settlement of Investment Disputes Between States and Nationals of other States", in case both Contracting Parties become signatories of this Convention,*

[32] Reply, paras. 37 and section IV(C)(ii)(b).
[33] Reply, paras. 328-335.
[34] Exh. R-59
[35] Rejoinder, para. 157.

(b) an ad hoc court of arbitration laid down under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law (UNCITRAL).

(c) the Court of Arbitration of the Paris International Chamber of Commerce.

3. Once the investor has submitted the dispute to the one of the dispute settlement procedures mentioned in paragraph 2 of this Article, the choice of one of these procedures is final.

4. Notwithstanding the provisions of paragraph 2 of this Article;

(a) only the disputes arising directly out of investment activities which have obtained necessary permission, if any, in conformity with the relevant legislation of both Contracting Parties on foreign capital, and that effectively started shall be subject to the jurisdiction of the International Center for Settlement of Investment Disputes (ICSID), in case both Contracting Parties become signatories of this Convention, or any other international dispute settlement mechanism as agreed upon by the Contracting Parties;

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

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

The Republic of Turkey shall not accept the referral of any disputes arising between the Republic of Turkey and any other Contracting State concerning the interpretation or application of "Convention on the Settlement of Investment Disputes between States and Nationals of other States", which is not settled by negotiation, to the International Court of Justice.

5. The arbitration awards shall be final and binding for all parties in dispute. Each Contracting Party commits itself to execute the award according to its national law.

51. Respondent has raised several jurisdictional objections:

a) The Turkey-Libya BIT has never entered into force, because Turkey never notified Libya of the completion of the requisite constitutional formalities in Turkey for its entry into force.

b) Claimant has not shown that it holds any qualifying "investment" within Libya for the purposes of Article 1(2) of the Turkey-Libya BIT (the *ratione materiae* objection).

c) Even if Claimant had made a qualifying investment within Libya, the dispute in issue between Claimant and Libya would be outside the jurisdiction of this Tribunal because it arose before the Turkey-Libya BIT entered into force (the *ratione temporis* objection).

d) Claimant chose to submit the dispute to the Libyan courts and cannot now bring claims arising from the same dispute in this arbitration, pursuant to Articles 8(2) and 8(3) of the Turkey-Libya BIT. The Libyan court proceedings are still ongoing and have not yet resulted in a final decision.

e) By entering into the Turkey-Libya BIT, Respondent has not consented to the referral to arbitration of Claimant's claims which are entirely contractual in nature.

52. During the Hearing, Respondent abandoned its earlier objection that Claimant is not a qualifying "investor" for the purposes of Article 1.1(b) of the Turkey-Libya BIT.[36]

53. Below, the Arbitral Tribunal summarizes the Parties' positions on the question of the Arbitral Tribunal's jurisdiction.

A. RESPONDENT'S POSITION

I. The Validity of the BIT

54. The BIT has never entered into force, because Turkey never notified Libya of the completion of the requisite constitutional formalities in Turkey for its entry into force. Absent such notification, the BIT does not enter into force.[37]

55. In this regard, Article 12(1) of the BIT provides as follows:

"Each Contracting Party shall notify the other in writing of the completion of the constitutional formalities required in its territory for the entry into force of this Agreement. This Agreement shall enter into force on the date of the latter of the two notifications […] (emphasis added)"

56. The Republic of Turkey did not, on 22 April 2011, validly notify the State of Libya of the completion of its internal ratification procedure (i.e. of the "completion of the constitutional formalities required in its territory"), as required by Article 12(1). The notification was not sent to the proper representative of the State of Libya. Accordingly, the requirements for entry into force under Article 12(1) of the BIT have not been met.

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[36] Hearing Transcript. Day 1, p. 9.
[37] Rejoinder, para. 226.

57. Claimant has sought to place weight on the United Nations' publication of the BIT, in the UN Treaty Collection, following Turkey's registration of the BIT with the United Nations on 12 September 2011. Neither registration nor subsequent publication by the United Nations however satisfies the requirement of Article 12(1). The act of publication does not imply that the United Nations consider the BIT to be in force or that it has made any assessment of the treaty; the United Nations expressly states that publication does not have the effect of conferring any legal status that is otherwise absent.[38]

58. Furthermore, Respondent has not acknowledged that the BIT has entered into force. Concerning the 2014 Political Declaration relied upon by Claimant, a mere reference to a BIT does not suggest that either Libya or Turkey considered the BIT to be in force. A political agreement referring to 'equal treatment to Turkish and Libyan investors' is not remarkable and does not suggest a legally binding commitment to that principle, or to any of the protections included in the BIT.[39]

59. In any event, the Political Declaration does not suggest that Turkey satisfied the requirements of Article 12(1) of the BIT on 22 April 2011 or at any other relevant time; and is not an Article 12(1) notification itself.[40]

II. *Ratione Materiae* Jurisdiction

60. Article 1(2) of the BIT reads:

The term "investment", in conformity with the hosting Contracting Party's laws and regulations, shall include every kind of asset in particular, but not exclusively:
(a) shares, stocks or any other form of participation in companies.
(b) returns reinvested, claims to money or any other rights having financial value related to an investment,
(c) movable and immovable property, as well as any other rights as mortgages, liens, pledges and any other similar rights related to investments as defined in conformity with the laws and regulations of the Contracting Party in whose territory the property is situated,
(d) industrial and intellectual property rights related to investments such as patents, industrial designs, technical processes, as well as trademarks, goodwill, know-how and other similar rights,
(e) business concessions conferred by law or by an investment contract, including concessions to search for, cultivate, extract or exploit natural resources in the territory of each Contracting Party; [...]

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[38] Statement of Defense, para. 144.
[39] Rejoinder, para. 243.
[40] Rejoinder, para. 244.

61. According to Respondent, the Settlement Agreement cannot be considered as an "investment" under the BIT. Article 1(2) of the BIT uses the term "investment" as a term of art and with its ordinary meaning within investment treaties, that is, by reference to the ordinary meaning of the term, and by reference to the objective characteristics of an investment.[41] Article 1(2) also expressly requires that qualifying "investments" must be "*in conformity with the hosting Contracting Party's laws and regulations [...]*"

62. Further, Article 8 of the BIT ("Settlement of Disputes Between One Contracting Party and Investors of the Other Contracting Party") states that this Tribunal only has jurisdiction with respect to disputes that are:

"in connection with [Claimant's] investment [...]"; and

"[...] arising directly out of investment activities which have obtained necessary permission, if any, in conformity with the relevant legislation of both Contracting Parties on foreign capital, and that effectively started [...]".

63. Accordingly, and to establish jurisdiction, Claimant must establish not only that it has made a qualifying investment in Libya (pursuant to Article 1(2) of the BIT), but also that the dispute in question arises in connection with the specific qualifying investment relied upon, and arises directly out of investment activities, and that it has obtained necessary permissions for its investment and has "effectively started" that investment.

64. Article 1(2)(b) does not provide that "claims to money" in isolation are investments. Rather, it provides that only "*claims to money or any other rights having financial value related to an investment*" can qualify for protection. Claims to money, without more, are not protected investments. If the contrary were true, a winning lottery ticket would also constitute a protected investment under the BIT as a 'claim to money'. This cannot be right.

65. Investment treaty arbitration tribunals have developed a general consensus, with minor variations in expression, as to the inherent objective characteristics of an "investment", namely (i) duration, (ii) contribution, and (iii) an assumption of investment risk.[42]

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[41] Statement of Defense, para. 150.

[42] Statement of Defense paras. 167-171. See **Exh. RLA-65**, *KT Asia Investment Group B.V. v. Kazakhstan*, ICSID Case No. ARB/09/8, Award, 17 October 2013, para. 173 ("The Tribunal thus concludes that the objective definition of investment under the ICSID Convention and the BIT comprises the elements of contribution or allocation of resources, duration, and risk, which includes the expectation (albeit not necessarily fulfilled) of a commercial return"); **Exh. RLA-10,** *Ulysseas v. Ecuador*, Final Award, 12 June 2012, para. 251 ("As held by many ICSID tribunals, the ordinary conception of an investment includes several basic characteristics, essentially: (a) it must consist of a contribution having an economic value; (b) it must be made for a certain duration; (c) there must be the expectation of a return on the investment, subject to an element of risk; (d) it should contribute to the development of the economy of the host State. While the last condition has been criticised, the others have been generally accepted by other tribunals and commentators in the field of investment treaty arbitration.", emphasis added). See also **Exh. CLA-21,** *Bosca v. Lithuania*, Award, 17 May 2013, para. 168: "The Service Agreement had the necessary elements of contribution, risk and duration typically considered basic characteristics of an investment".

66. The only assets listed in the BIT as potentially qualifying as investments on a standalone basis in Article 1(2) are shareholdings of over 10% and "*business concessions conferred by law or by an investment contract*". Neither type of asset is at issue in this Arbitration. Claimant held no shareholding rights in a Libyan company and there is no "*business concession conferred by law or by an investment contract*". Neither applies to the Settlement Agreement.

67. Administrative contracts of the kind relied on by Claimant could not have qualified as "investments" under Libya's investment laws, Respondent argues. Under the applicable Libyan law investment contracts, unlike administrative contracts, require the provision of upfront capital by the foreign entity. While the BIT is governed by international law, domestic law is relevant in assessing whether or not an "investment" has been made.[43]

68. The Settlement Agreement is not a self-standing "investment." The Settlement Agreement is not a valid or binding settlement agreement under Libyan law, and is subject to the jurisdiction of the Libyan courts. Furthermore, the Settlement Agreement does not meet any of the characteristics of an investment for the purpose of Article 1(2) of the BIT, nor does it fall within any of the possible categories of investments identified in that Article.

69. The Settlement Agreement is also not "tied to" another investment. The BIT only envisages certain very specific contracts as representing qualifying investments – "*business concessions conferred by law or by an investment contract*" – neither of which are shown to have been at issue here. In addition, administrative contracts of the kind relied on by Claimant would not generally qualify as investments under Libyan law, not least because they do not involve a contribution of capital.[44]

70. As for Claimant's "single unified investment" theory, i.e. that *"Etrak's investment activity beginning with the initial construction projects, running through the Court Decision and culminating in the Settlement Agreement, taken together should be considered a single unified investment",*[45] Respondent contends that this argument would still require the showing of relevant qualifying investments, a showing that has not been made. The Settlement Agreement cannot be considered as a further step in one unified investment.[46]

71. The Settlement Agreement is not valid and binding under the governing Libyan law, and thus cannot constitute a protected investment. In any event, the validity of the Settlement Agreement is being challenged in the Tripoli Proceedings. Thus, the validity of the Settlement Agreement is in abeyance, pending a declaration of the Libyan courts.[47]

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[43] Statement of Defense, para. 175.
[44] Statement of Defense, para. 212.
[45] Statement of Claim, paras. 63-64.
[46] Statement of Defense, paras 217-221.
[47] Rejoinder, para. 256.

III. *Ratione Temporis* Jurisdiction

72. This case is an attempt to submit to a BIT tribunal a dispute that arose long before the BIT allegedly entered into force, in violation of Article 10 of the BIT, and in violation of the principle of non-retroactivity under international law. Claimant's efforts to distinguish the current dispute from anything that arose before the BIT entered into force are designed to bypass the delimitations, in Article 10, of the scope of the BIT *ratione temporis*.

73. Article 10 reads:

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

74. Claimant's arguments ignore the distinction between a "claim" and a "dispute". At its core, Claimant's argument is that the Settlement Agreement has given rise to new claims, and therefore, to a new dispute. The logic of the argument is wrong because a claim and a dispute are different concepts; within a single dispute, several claims can arise.[48]

75. Respondent contends that the dispute before this Arbitral Tribunal is the same dispute that resulted in the decision of the Beida Court of First Instance on 29 October 2012. The issue for the Arbitral Tribunal to determine is whether this dispute arose before or after 22 April 2011, in order to decide whether it has *ratione temporis* jurisdiction.[49]

76. There can be no serious doubt as to the crystallisation of a dispute before the BIT is alleged to have entered into force. There was a dispute by as early as 1991, when Claimant claims that Libya stopped making payments, and certainly by the date just before the Libyan Revolution when Claimant's representative consulted a lawyer to file a dispute with the Libyan courts.[50]

77. Other investment arbitration tribunals have consistently looked at the subject matter and the real cause of action to define what a dispute is. If the central demand from the claimant remains the same, the exact forum and process for that demand are irrelevant – the dispute still remains the same.[51]

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[48] Statement of Defense, para. 255.
[49] Statement of Defense, para. 269.
[50] Statement of Defense, para. 276.
[51] Hearing Transcript, Day 4, pp. 50-60.

This approach has been adopted by the tribunals in *Luccheti v. Peru*[52], *ATA v. Jordan*,[53] *EuroGas v. Slovakia*[54], and *Vieira v. Chile*.[55]

78. The *EuroGas* tribunal stated the following:

The Tribunal does not accept that an investor may invoke the last event in a series of related or similar actions by the State to claim the benefit of the treaty. In the present case, the situation is clear-cut since there has not been a series of (alleged) transgressions by the Respondent, but one (alleged) transgression whose effects have been maintained throughout domestic court proceedings and repeated decisions by the mining authorities.[56]

79. In Respondent's view, the above explains why this Arbitral Tribunal has no jurisdiction. The question of whether or not Libya failed for many years to pay debts due to Claimant is not properly a matter for this Arbitral Tribunal. It is a matter for the Libyan courts. It is a matter which Claimant had the opportunity to address by opposing the Appeal, and still can seek to demonstrate through the Tripoli Proceedings in defense of its claims under the Settlement Agreement.[57]

IV. Fork-in-the-road

80. The "fork-in-the-road" provision in the BIT – Article 8(3) – prevents an investor from submitting a dispute first to the local courts and then to international arbitration. Since the dispute submitted to the local courts in 2012 and the dispute submitted to this Arbitral Tribunal is one overall dispute, this Arbitral Tribunal lacks jurisdiction over it.[58]

81. Respondent does not accept the so-called triple identity test, which requires a showing that the same dispute involving the same object and cause of action between the same parties has been submitted to the domestic courts of the host state, and Respondent disagrees with its strict application advanced by Claimant. Respondent submits that a strict application of the triple identity test would empty the fork-in-the-road clause of any practical meaning. The correct approach is to consider whether the fundamental basis of the two proceedings is the same.[59]

82. Claimant claims that "where facts subsequent to the domestic litigation change the fundamental nature of the dispute, Treaty claims are not

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[52] **Exh. CLA-122**, Empresas Lucchetti, S.A. and Lucchetti Peru, S.A.v. The Republic of Peru, ICSID Case No. ARB/03/4, Decision on Annulment dated 5 September 2007.
[53] **Exh. RLA-14,** ATA Construction v. Jordan, ICSID Case No. ARB/08/02, Award, 18 May 2010.
[54] **Exh. RLA-15,** Eurogas v. Slovakia, ICSID Case No, ARB/14/17, Award, 18 August 2017.
[55] **Exh. CLA-34,** Sociedad Anónima Eduardo Vieira v. Republic of Chile, ICSID Case No. ARB/04/7, Award dated 21 August 2007.
[56] **Exh. RLA-15,** Eurogas v. Slovakia, ICSID Case No, ARB/14/17, Award, 18 August 2017, para. 460.
[57] Statement of Defense, para. 279.
[58] Rejoinder, paras. 476-478.
[59] Rejoinder, para. 481.

precluded by a fork-in-the- road provision."[60] Respondent agrees with this statement as a matter of principle. However, Claimant does not explain what facts subsequent to domestic litigation would "change the fundamental nature of the dispute". Respondent does not consider that there are any such facts: Claimant is still claiming for alleged unpaid debts.

83. Claimant's choice to submit its dispute to local courts in 2012 must be given full effect. As its claims in this Arbitration have the same fundamental basis as those advanced before the Beida Court of First Instance, and pursuant to Article 8(3) of the BIT, this Arbitral Tribunal lacks jurisdiction to determine them by virtue of the fork-in-the-road clause in the BIT, alternatively on the basis that Claimant's choice to submit its dispute to local courts gave rise to an estoppel, such that Claimant's is now prevented from submitting the same dispute to international arbitration under the BIT.[61]

V. The Contractual Nature of the Claims

84. Claimant asks the Arbitral Tribunal to exercise jurisdiction over purely contractual breaches, in particular for breach of obligations arising out of the Settlement Agreement. It asserts that such claims can be brought under Article 8 of the BIT, which extends jurisdiction to disputes "in connection with [the investor's] investment …."

85. The Arbitral Tribunal's jurisdiction to consider any contractual claim would still depend on Claimant having shown that the contractual obligations in question arise from or at least are part of an investment over which the Arbitral Tribunal has jurisdiction *ratione materiae* and *ratione temporis*. No such showing has been made.[62]

86. Moreover, Respondent contends that Claimant's interpretation of Article 8 is implausible. Investment treaties do not exist to provide investors with an alternative tribunal of first instance, in relation to any breach of contract, however banal, and regardless of the presence of any internationally wrongful act. They exist to provide protection, in accordance with their terms, from illegitimate State interference with an investment, in particular as an exercise of *puissance publique* (sovereign authority). There is no such State interference here.[63]

87. The ordinary meaning of a standing offer in a BIT to arbitrate "*Disputes…in connection with [the investor's] investment* […]" is an offer to arbitrate disputes relating to the BIT's protections. It cannot, in good faith, be interpreted as an agreement to arbitrate other disputes – whether disputes under contract or other non-Treaty disputes under domestic administrative, criminal or constitutional law. Article 8 includes express language that only

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[60] Reply, para. 186.

[61] Rejoinder, para. 493.
[62] Statement of Defense, para. 288.
[63] Statement of Defense, para. 289.

"*disputes arising directly out of investment activities* [...] (emphasis added)" fall within the Tribunal's jurisdiction, further qualifying the standing offer of arbitration.[64]

88. Had Turkey and Libya intended to make an extraordinary standing offer of arbitration in respect of all contractual disputes within the BIT, they could have done so in express language. But they did not. Turkey and Libya did not even include the more limited mechanism for (arguably) bringing certain types of contractual disputes before a BIT tribunal – an umbrella clause – within the BIT.[65]

B. CLAIMANT'S POSITION

I. The Validity of the BIT

89. According to Claimant, the BIT entered into force on 22 April 2011.

90. Turkey and Libya signed the BIT on 25 November 2009, and Libya notified Turkey of its ratification on 23 August 2010. Turkey then completed its constitutional formalities on 14 April 2011 and notified the People's General Committee for Foreign Communication and International Cooperation of the State of Libya on 22 April 2011.[66] Subsequently, Turkey registered the BIT with the United Nations Secretariat. Respondent does not dispute these facts.[67]

91. Given these facts, Respondent's assertion that the BIT never entered into force is untenable for two reasons. *First*, the Libyan government itself recognizes that the BIT is in force, in the 2014 Political Declaration signed by the Prime Ministers of both countries which explicitly refers to the BIT. Secondly, Turkey, along with many countries, had not recognized the National Transitional Council ("NTC") as the government of Libya on the date of the notification until September, or at the very earliest, July 2011, either of which is after the time when it notified Libya of its ratification. Instead Turkey recognized the pre-NTC government.[68]

II. Jurisdiction *Ratione Materiae*

92. Claimant argues that it has qualified investments under the BIT. The BIT adopts a broad, asset-based definition of "investment". By noting that *"[t]he*

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[64] Statement of Defense, para. 290.
[65] Statement of Defense, para. 291.
[66] **Exh. C-34,** Letter from Embassy of Turkish Republic in Tripoli to Libya's People's General Committee for Foreign Communication and International Cooperation Administration of Immunities and Privileges, 22 April 2011.
[67] Reply, para. 60.
[68] Reply, para. 78.

term 'investment,' in conformity with the hosting Contracting party's laws and regulations, shall include every kind of asset in particular, but not exclusively," (Art. 1(2)), the parties have clearly demonstrated their intention to define the term "investment" as broadly as possible so that it covers any asset owned by the foreign investor.

93. This definition includes "returns reinvested, claims to money or any other rights having financial value related to an investment". The Settlement Agreement is an "asset". It represents "claims to money" and may also be characterized as rights having financial value, and therefore clearly fall within the BIT's expansive definition of "investments." This follows from the plain language of the treaty.[69]

94. In the Settlement Agreement, Claimant gives up a significant sum that it was otherwise due in consideration for an agreement by Respondent for timely payment of the agreed amounts and the withdrawal of its appeal of the Court Decision. In doing so, it has not only given up its right to enforce the Court Decision, it has also invested (or more precisely, re-invested) the discounted amount with the expectation of Respondent's performance of the Settlement Agreement. This is an investment within the meaning of the BIT.[70]

95. Should the Arbitral Tribunal accept that the Settlement Agreement must be tied to another investment, that requirement is met in this case.

96. Claimant's performance of the underlying construction contracts in the 1980s and 90s entailed the contribution of substantial amounts of capital, equipment, and other resources for the realization of dozens of infrastructure construction projects spanning more than a decade. As part of those projects, Claimant purchased and utilized equipment, material, and other resources worth millions of dollars; provided letters of guarantee and employed hundreds of workers. Finally, Claimant invested significant know-how into Libya. As such this activity amounted to an investment within the meaning of the BIT.[71]

97. It is undisputed that the basis of the Court Decision is the unpaid receivables owed by Respondent to Claimant and that the basis of the Settlement Agreement is the Court Decision. Thus, while the Settlement Agreement is an investment in its own right, it is also connected with the underlying investments.[72]

98. Finally, and alternatively, should the Arbitral Tribunal conclude that the Settlement Agreement is not an investment, Claimant's investment activity – beginning with the initial construction projects, continuing with the Court Decision and culminating in the Settlement Agreement – should be considered together as a single unified investment.[73]

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[69] Statement of Claim, para. 56.
[70] Statement of Claim, para. 58.
[71] Statement of Claim, para. 61.
[72] Statement of Claim, para. 62.
[73] Statement of Claim, para. 63.

99. The BIT does not require assets to satisfy Respondent's purported definition of "investment" under Libyan law. The text of the chapeu of Article 1(2) only requires that an investor's operations must conform to local laws and regulation. This does not mean that a different and specialized definition of the term "investment" must be imported from Libyan law to govern what does or does not constitute an "investment" under the BIT.[74]

100. Furthermore, Respondent's attempt to introduce an "objective" standard of investment used by some ICSID tribunals should be rejected, for two reasons. *First*, the BIT itself offers a clear scope of the term "investment". *Secondly*, tribunals have rejected Respondent's proposed approach time and time again.[75]

III. *Ratione Temporis* Jurisdiction

101. The BIT does not exclude consideration of facts that occurred before the date of its entry into force ("the Effective Date"). The operative part of Article 10 provides that "this Agreement shall not apply to disputes that have arisen before its entry into force" (emphasis added). This language does not prevent the Arbitral Tribunal from considering facts that occurred prior to the BIT's entry into force.[76]

102. Contrary to what Respondent contends, Claimant argues that every claim currently before this Arbitral Tribunal arises from a dispute that itself arose after the Effective Date of the BIT. Despite Respondent's mischaracterization, the disputes in this case concern Libya's failure to abide by the Settlement Agreement, which occurred after the Effective Date of the BIT.[77]

103. The dispute in this Arbitration arises from Respondent's actions following the Court Decision that its courts issued and the Settlement Agreement that its Ministry of Finance executed. The dispute in this Arbitration has further come to involve Respondent's acts following the initiation of this proceeding, which acts constitute further breaches of the BIT, the Settlement Agreement and Libyan law — *viz.*, the revival of a long-dormant Appeal by its Ministry of Justice and subsequent decision thereon by its Appellate Courts. All of these actions undeniably took place after the Effective Date of the BIT.[78]

104. The key date for determining when the dispute began is the date of first legal confrontation. Claimant never filed a claim before any court or arbitral tribunal prior to filing its complaint before the Beida Court in 2012 — after the Effective Date of the BIT. There was no legal confrontation, and hence no dispute, between the Parties prior to that date. The Audit Committee had confirmed that Respondent owed Claimant a certain amount and Claimant

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[74] Reply, paras. 84-86.
[75] Reply, paras.125-137, with cases cited therein.
[76] Reply, paras. 156-157.
[77] Reply, para. 158.
[78] Reply, para. 159.

was willing to accept such payment as a final resolution of its unpaid receivables. There was no conflict as to law or fact between Claimant and Respondent until after Claimant had run the administrative gauntlet in Libya without effect, prompting Claimant then to file its complaint over a year after the BIT entered into force. That is the very earliest time it may be said that the dispute had crystallized. Thus, Claimant's claims are within this Tribunal's jurisdiction *ratione temporis.*

105. Even if this Arbitral Tribunal were to find that a dispute arose between the parties at some point prior to the filing of Claimant's complaint in the Beida Court of First Instance and prior to the Effective Date of the BIT, it nonetheless will not be deprived of jurisdiction *ratione temporis*. It is well-established that an intervening state act can give rise to a new dispute.[79]

106. Finally, even if the Arbitral Tribunal were to find that the dispute before the Libyan Courts is indistinct from this Arbitration and that there was no intervening state act, it must then find that such dispute was extinguished by the Settlement Agreement, which expressly provides that all existing disputes between the parties should be "abandoned."[80]

IV. Fork-in-the-road

107. In Claimant's view, the "fork in the road" clause at Articles 8(2) and 8(3) of the BIT cannot apply to the dispute regarding Respondent's failure to comply with the Court Decision and the Settlement Agreement, because no claim regarding those failures has been previously brought in any other forum. The disputes at issue in this Arbitration do not concern the question of whether Respondent failed to pay the underlying contract amounts (i.e., what was litigated in the Court Decision), but rather whether Respondent failed to abide by a decision of its own court and its own settlement agreement, each a separate breach of the BIT and of international law.[81]

108. Tribunals consistently hold that the loss of access to international arbitration via a fork-in-the-road provision applies only where the so-called triple identity test is met.[82] This requires a showing that the same dispute involving the same object and cause of action between the same parties has been submitted to the domestic courts of the host state.[83]

109. If the triple identity test is applied in this Arbitration, Respondent's argument fails. *First*, whereas the cause of action in the Beida Court of First Instance proceedings lay entirely in Libyan law, Claimant's claims in this Arbitration

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[79] Reply, paras. 167-174 with authorities cited therein.
[80] Reply, para 175; **Exh. C-2**, Settlement Agreement, Art. 7.
[81] Statement of Claim, para. 105.
[82] **Exh. CLA-126**, Christoph Schreuer, Interaction of International Tribunals and Domestic Courts in Investment Law, CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS (2010), at 79; **Exh. CLA-127**, *Veteran Petroleum Limited (Cyprus) v. Russian Federation*, PCA Case No. 228, Interim Award on Jurisdiction and Admissibility, 30 November 2009, ¶¶ 609-611.
[83] Reply, para. 183.

are made under both Libyan and international law. *Secondly*, the dispute before this Arbitral Tribunal is not identical to that submitted to the Beida Court of First Instance.[84]

110. Respondent's claim that the fork-in-the-road clause precludes a treaty claim if the claim shares the same "fundamental basis" as claims brought in another forum is not supported by authority. However, regardless of whether the test proposed by Respondent is applied, the fork-in-the-road clause does not preclude Claimant's claims in the Arbitration, because facts subsequent to the domestic litigation have changed the fundamental nature of the dispute.

V. The Contractual Nature of the Claims

111. The Arbitral Tribunal has jurisdiction over disputes arising from Respondent's violations of other obligations. In Claimant's view, Respondent ignores the clear meaning of Article 8 of the BIT by advancing a narrow interpretation of the article. Article 8 does not limit the jurisdiction of a treaty tribunal only to claims that arise under the BIT.[85]

112. Case law supports the proposition that jurisdiction under Article 8 is not confined to just the parties' BIT obligations.[86] Furthermore, as the parties have chosen not to limit the Arbitral Tribunal's jurisdiction to disputes arising out of the substantive provisions of the BIT, the tribunal has jurisdiction over claims arising directly out the contract, i.e. the Settlement Agreement.

113. The dispute regarding Respondent's breach of the Settlement Agreement is related to Claimant's investments in the construction projects and thus falls within the jurisdiction of the Tribunal. There is no ground for refusing jurisdiction over contractual claims in this case. The Settlement Agreement was concluded directly with a ministry of the Libyan State, not with a separate legal entity and there is no exclusive choice of forum clause in the Settlement Agreement. While the disputes in this Arbitration relate to the investments in the contracts, they are distinct from the payment disputes arising from those contracts.[87]

C. THE TRIBUNAL'S REASONS

114. While all arguments advanced by the Parties have been taken into account by the Arbitral Tribunal in reaching its decisions, not all points are expressly referenced in the reasons below, which focus on the matters which the Arbitral Tribunal has found determinative.

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[84] Reply, para. 184.
[85] Reply, para. 147.
[86] Statement of Claim, paras. 71-77 and authorities cited therein.
[87] Reply, para. 153.

115. Furthermore, Respondent initially classified its objection against Claimant's reliance on the BIT's most favoured nation clause to import the so-called umbrella clause from the Austria-Libya BIT as a jurisdictional objection.[88] To the Arbitral Tribunal, this objection is properly characterized as one pertaining to liability, rather than jurisdiction (as supported by the manner in which the objection was subsequently argued by the Parties). Accordingly, this objection will be discussed in the liability section of the Award, below at para. 350.

I. The Validity of the BIT

116. For the following reasons, the Arbitral Tribunal finds that the BIT validly entered into force on 22 April 2011.

117. Article 12(1) of the BIT provides:

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

118. It is not disputed that both Libya and Turkey completed the "constitutional formalities" referenced in the first sentence of Article 12(1). Rather, Respondent's objection to the BIT's validity concerns the Article's notification element. Specifically, Respondent argues that Turkey did not validly notify Libya of Turkey's completion of constitutional formalities, because Turkey did not notify the proper entity.

119. In the Arbitral Tribunal's view, it has been sufficiently established that when Turkey notified the Libyan People's General Committee for Foreign Communication and International Cooperation,[89] it properly notified what both Turkey and the vast majority of other states regarded as the Libyan government as per the date of notification, i.e. 22 April 2011.

120. At this time, neither Turkey nor most other states had recognized the National Transitional Council as the legitimate government of Libya. On the contrary, Turkey does not appear to have recognized the NTC until September 2011. In the intervening months Turkey maintained diplomatic relations with the previous government, which was the entity to which Turkey sent its notification.[90] This fact alone is sufficient to establish that Turkey's notification was in compliance with Article 12(1) and thus triggered the BIT's entry into force on 22 April 2011.

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[88] Answer to RfA, para. 27.6. See also para. 63(f) of the Terms of Reference.
[89] **Exh. C-34**, Letter from Embassy of Turkish Republic in Tripoli to Libya's People's General Committee for Foreign Communication and International Cooperation Administration of Immunities and Privileges dated 22 April 2011.
[90] Reply, paras. 75-78.

121. Further support for this conclusion is found in the Turkish deposit of the BIT to the United Nations Secretariat,[91] a fact to which the new Libyan government seemingly did not object or react.

122. Moreover, in the 3 January 2014 Declaration[92] the Prime Ministers of both states make reference to the BIT in a manner evidencing that Libya was aware of the BIT's applicability in 2014. Under the headline "Cooperation in the Fields of Economy, Trade, Development, Planning, Investments, Banking and Finance, Industry, Transportation, Maritime Affairs, Tourism, and Health", paragraph 8 expressly refers to the BIT:

> *Providing equal treatment to Turkish and Libyan investors without discrimination in accordance with the Agreement concerning the Reciprocal Promotion and Protection of Investments.*[93]

123. Neither of these two supporting facts on its own establishes that the BIT entered into force. Together, however, they indicate that both states treated the BIT as having entered into force.

124. For these reasons, the Arbitral Tribunal finds that the Turkey-Libya BIT entered into force on 22 April 2011.

II. Jurisdiction *Ratione Materiae*

125. Claimant initially argued that both the Court Decision and the Settlement Agreement constituted investments within the meaning of the BIT. At the Hearing, however, Claimant abandoned its reliance on the Court Decision as an investment, and thereafter relied only on the Settlement Agreement.[94]

126. The question whether the Settlement Agreement constitutes an investment has two separate elements to it: *first*, whether the Settlement Agreement is valid under Libyan law, and *second*, whether the Settlement Agreement is an investment within the meaning of Article 1(2) of the BIT. The Arbitral Tribunal addresses these two issues separately, beginning with the validity of the Settlement Agreement.

Whether the Settlement Agreement is valid under Libyan law

127. As a preliminary question, the Parties disagree on whether or not the Settlement Agreement is valid under Libyan law. The Arbitral Tribunal finds that it is, for the following reasons.

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[91] **Exh. R-32.** Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations, Volume 2782, 2011.
[92] **Exh. C-53.**
[93] Ibid., para. B8.
[94] Hearing Transcript, Day 4, p. 2.

128. The Arbitral Tribunal is tasked with applying international law. However, the validity of the Settlement Agreement as a matter of Libyan law is an important element of the Arbitral Tribunal's analysis of whether Claimant has an investment under Article 1(2) of the BIT. It is common ground between the Parties that the Settlement Agreement is governed by Libyan law.[95] Both Parties have presented their arguments on this assumption. Both Parties have also submitted expert reports based on Libyan law. In both expert opinions by Mr. Mukhtar, which were submitted by Claimant to support its contention that the Settlement Agreement is binding, Mr. Mukthar discusses this issue as a matter of Libyan law.[96] Similarly, Respondent's expert Dr. El-Murtadi in both his expert reports responds to the questions put to him by Respondent "based on Libyan law and practice".[97]

129. Respondent has objected that under Libyan law, the Settlement Agreement is not valid because the Deputy Minister of Finance did not have actual authority to sign the Settlement Agreement on behalf of Libya.[98] Instead, only the Minister of Finance possesses this authority. Nor, in Respondent's view, did the Deputy Minister have apparent authority.[99]

130. Claimant has argued that the Deputy Minister of Finance did have actual authority to sign the Agreement.[100] In any event, Claimant contends that the Deputy Minister had apparent authority to sign the Agreement.[101]

131. As explained below, the Arbitral Tribunal finds that the Deputy Minister of Finance did have apparent authority to sign the Settlement Agreement. In these circumstances, there is no need to engage with the question whether the Deputy Minister had actual authority.

132. The issue of apparent authority breaks down into two elements. *First*, the person relying on apparent authority must have assumed in good faith that the agent had authority. *Secondly*, the good faith must be based on an external appearance of authority, as created by the principal.[102]

133. In the textbook which both Parties' experts discussed at the Hearing, a third element is also mentioned: the agent acts in the name of the principal but without actual authority.[103] This condition was not separately argued by the Parties in their pleadings. For the Arbitral Tribunal, this condition is intimately linked with the good faith element, and will not be discussed separately.

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[95] Statement of Defense, para. 63; Rejoinder, para. 185.
[96] First Mukhtar Opinion, paras. 4, 19-26; Second Mukhtar Opinion, paras. 2, 32-64.
[97] First El-Murtadi Report, 13 October 2017, paras. 6, 9-10.5; Second El-Murtadi Report, paras. 4, 8-11.2.
[98] Rejoinder, paras. 187-195.
[99] Rejoinder, paras. 196-203. See also Second El-Murtadi Report, paras. 8.6-8.7.
[100] Reply, para. 201; Second Mukhtar Report, para. 33.
[101] Reply, para. 202; Second Mukhtar Report, paras. 38-41.
[102] See **Exh. EO-19,** Dr. Alsanhuri, AL WASSIT IN EXPLAINING CIVIL LAW, Part 7, Vol. 1 (Arabic Original and English Translation).
[103] Ibid., p. 602.

134. As for the first element, Respondent has argued that under Libyan law, a contracting party purporting to rely in good faith on the apparent authority of his counterpart must perform a certain degree of due diligence as to the authority of his counterpart.[104] This view was expressed by both Parties' experts on Libyan law.

135. Claimant's expert on Libyan law Mr. Mukhtar testified on cross-examination that although there is no direct provision on apparent authority in Libyan law, it is discussed at length in textbooks and applied by courts.[105] Mr. Mukhtar relied on a leading textbook written by the person who also wrote the Libyan Civil Code.[106] This textbook describes the test for apparent authority under Libyan law, including the due diligence required from a party which purports to rely on apparent authority.[107]

136. Similarly, Respondent's expert Dr. El-Murtadi referred to the same textbook in his second report.[108] Dr. El-Murtadi also "broadly agreed" with Mr. Mukhtar's description of the requirements for applying the doctrine of apparent authority, including the need for Claimant to prove "that it did its due diligence in respect of the Deputy Minister's mandate and powers, could not have discovered that the Deputy Minister lacked the required authority to sign the settlement agreement, and that it relied on the apparent authority of the Deputy Minister to sign the settlement agreement on behalf of the Finance Ministry".[109]

137. On the Arbitral Tribunal's analysis, Claimant's representative Mr. Günay discharged his due diligence duty in connection with the signing of the Settlement Agreement.

138. In his efforts to have the Settlement Agreement executed, Mr. Günay communicated with multiple state officials, primarily at the legal department of the Ministry of Finance. In his witness statement, Mr. Günay recalled how officials at the Ministry of Finance assured him that the Deputy Minister was the official authorized to sign the Agreement.[110] The two officials at the Ministry with whom Mr. Günay interacted also occasionally mentioned the Deputy Minister as the official in charge of the settlement.[111]

139. Furthermore, the Deputy Minister was copied in correspondence during the negotiations, as confirmed by numerous intra-government letters.[112] Most of

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[104] **Exh. EO-21,** Settlement Agreement (re-translated Exh. C-2).
[105] Hearing Transcript, Day 3, p. 11.
[106] **Exh. EO-19,** Dr. Alsanhuri, AL WASSIT IN EXPLAINING CIVIL LAW, Part 7, Vol. 1 (Arabic Original and English Translation).
[107] Ibid., pp. 605-609.
[108] Second El-Murtadi Report, para. 8.6.
[109] Ibid., paras. 8.6-8.7
[110] Second Günay Statement, para. 41.
[111] Ibid.
[112] **Exh. C-10,** Letter from the Deputy Minister of Finance to the Director of Legal Proceedings, Ministry of Justice, 9 October 2013; **Exh. C-5**, Letter from Bashir Ali Elaktari, Deputy Minister, State Litigation Department, Ministry, to Deputy Minister, Ministry of Finance, 29 July 2013 (resubmitted); **Exh. C-4,** Letter from Fattalah Avad Bin Hayal, Director for Legal Proceedings, Derna Directorate, to

these letters were shared with Mr. Günay and Mr. Hasasu, a long-time employee of Claimant's, who also acted as Mr Günay's Arabic translator.[113]

140. In particular, in his witness statement Mr. Günay recalls seeing a letter from Bashir Ali Elaktari, the Deputy Minister of the State Litigation Department, sent to the Deputy Minister.[114] This letter, of which Mr. Günay took a photograph,[115] updates the Deputy Minister on the settlement discussions. It also recognizes that "this Department [the State Litigation Department] is not authorized to propose any settlement or to meet with the party concerned in your absence".[116]

141. In his discussions with officials of the Legal Department of the Ministry of Finance, Mr. Günay ultimately offered a 10% discount on the receivables owed to Claimant, in order to reach a settlement. That offer was incorporated into a letter sent from the Litigation Department Manager Mr. Tarik Ahmed El Velid to the Deputy Minister in October 2013.[117] In this letter, the draft version of the Agreement contained a block on the last page where there was space reserved for the Deputy Minister's signature.[118] The letter was shown to Mr. Günay.[119]

142. Mr. Günay has also stated that he and Mr. Hasasu saw letters on a table while visiting the Legal Department of the Ministry of Finance as part of the negotiations. These letters were from other Turkish companies in similar situations, and were addressed to the Deputy Minister.[120] During cross-examination, Mr. Günay stated that these letters "were kept open on the table and we were sitting around that table. Most of them had a signature part open with the name of the deputy".[121] Although Mr. Günay himself does not read Arabic, he was in the company of Mr. Hasasu, who does. Mr. Günay testified that Mr. Hasasu explained the content of the letters on the table.[122]

143. In addition, Mr. Günay has testified that when he delivered the draft Settlement Agreement to the Ministry of Finance's budget department, they remarked that the document lacked a specified date, and returned it to be dated.[123] The budget department did not raise any concern about the Deputy Minister's authority to sign.[124]

Deputy Minister, Directorate of Legal Proceeding, 7 May 2013; **Exh. C-38**, Letter from Litigation Department to the Ministry of Finance, 9 December 2013.

[113] Second Günay Statement, para. 39.

[114] Ibid., para. 25.

[115] **Exh. C-5**, Internal Letter dated 29 July 2013 (resubmitted).

[116] Ibid.

[117] **Exh. ZG-5**, Letter dated 28 October 2013 from Ministry of Finance, Head of Legal Department, Tarik Ahmed.
El Velid.

[118] **Exh. C-67**, Letter from Head of the Ministry of Finance legal department to Deputy Minister of Finance 28 October 2013, attaching a draft Settlement Agreement (Arabic Original and English Translation) (re-submitted version of Exh. ZG-5).

[119] First Günay Statement, para. 22; Second Günay Statement, para. 29.

[120] Hearing Transcript, Day 2, pp. 65-67.

[121] Ibid., p. 66.

[122] Ibid., pp. 66-67.

[123] Hearing Transcript, Day 2, p. 117.

[124] Ibid.

144. Taken together, these efforts demonstrate sufficient due diligence from Mr. Günay, in his attempts to ascertain that the Deputy Minister had the authority to sign the Settlement Agreement on behalf of Respondent.

145. At the very least, Mr Günay's efforts provided various state officials with the opportunity to rectify the situation, if their view at the time was indeed that the Deputy Minister was not authorized. At no point during the negotiations did any Libyan official indicate to Mr. Günay that the Deputy Minister did not have the required authority to sign the Settlement Agreement.

146. After the Settlement Agreement was signed, the Deputy Minister in March 2014 provided a proof of his signature to the Ministry of Foreign Affairs, in order to establish that it was the Deputy Minister who had signed the Agreement.[125] This proof was provided following Claimant's request to have the Settlement Agreement internationally recognized by the Ministry of Foreign Affairs.[126] The Deputy Minister sent proof of his signature, and the Minister of Finance himself was copied on the transmittal letter. In the Arbitral Tribunal's view, this confirms, albeit ex post facto, that the Minister of Finance did not question that the Deputy Minister was authorized to sign the Settlement Agreement on behalf of the Ministry.

147. A notification explaining Libya's current view that the Deputy Minister was not authorized to sign the Agreement came only in November 2017, when the present Arbitration was well underway.[127]

148. For the above reasons, the Arbitral Tribunal finds that Claimant's representative Mr. Günay in good faith relied on the apparent authority of the Deputy Minister of Finance to sign the Settlement Agreement on behalf of the Ministry, and thus of the Respondent.

149. As per the second element referred to above, Mr. Günay's good faith must be based on an external appearance that the Deputy Minister was in fact authorized. The appearance must have been created by the principal, i.e. the Ministry of Finance, including with the knowledge or acquiescence of the Minister himself.[128]

150. The facts discussed above in paragraphs 135-145 show that there was an external appearance created by the Ministry. There were direct representations by officers of the Ministry that the Deputy Minister was authorized. There were also several other indications, such as the letters addressed to the Deputy Minister which were visible at the Ministry, and the Ministry's budget department's failure to react to the Deputy Minister's signature. It is difficult to accept that the practice of the Deputy Minister's involvement in such matters, apparently

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[125] **Exh. C-28**, Letter from Ministry of Finance to Ministry of Foreign Affairs, 2 March 2014 (Arabic Original and English Translation).
[126] **Exh. C-27**, Letter from Etrak to Ministry of Finance, 26 January 2014 (Arabic Original and English Translation).
[127] **Exh. R-65**, Letter from the Ministry of Finance to the State Litigation Department, 8 November 2017.
[128] **Exh. EO-19**, Dr. Alsanhuri, AL WASSIT IN EXPLAINING CIVIL LAW, Part 7, Vol. 1 (Arabic Original and English Translation). p. 610.

accepted by all these officers and departments, was unknown to the Minister of Finance himself. Indeed, as noted above, the Minister was personally copied later on the Deputy Minister's proof of signature, provided at the request of the Ministry of Foreign Affairs for the express purpose of certifying the official status of the Settlement Agreement, and made no objection to the Deputy Minister's authorization to act. At the very least, this constituted acquiescence at the highest level to the Deputy Minister's action, cementing the external appearance of authorization created by the acts of other Ministry officials.

151. Having found that Mr. Günay in good faith relied on representations of authority created by an external appearance that the Deputy Minister could act on behalf of the Ministry of Finance, the Arbitral Tribunal finds that the Deputy Minister had apparent authority to sign the Settlement Agreement with binding effect.

152. Respondent has also argued that in any event, the validity of the Settlement Agreement is currently subject to the Tripoli Proceedings. Based on the evidence presented to it, the Arbitral Tribunal is persuaded that as a matter of fact, the Settlement Agreement is valid under Libyan law. For the present purposes, this conclusion is not affected by the fact that Respondent argues otherwise before a Libyan court.

153. Having found that the Settlement Agreement is valid under Libyan law, the Arbitral Tribunal now turns to the question whether it is a protected investment for the purposes of the BIT.

Whether the Settlement Agreement constitutes an "investment" within the meaning of Article 1(2) of the BIT

154. Article 1(2) of the BIT defines an "investment" in the following way:

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

(a) shares, stocks or any other form of participation in companies.
(b) returns reinvested, claims to money or any other rights having financial value related to an investment,
(c) movable and immovable property, as well as any other rights as mortgages, liens,
pledges and any other similar rights related to investments as defined in conformity with the laws and regulations of the Contracting Party in whose territory the property is situated,
(d) industrial and intellectual property rights related to investments such as patents, industrial designs, technical processes, as well as trademarks, goodwill, know-how and other similar rights,
(e) business concessions conferred by law or by an investment contract, including concessions to search for, cultivate, extract or exploit natural resources in the territory of each Contracting Party; [...]

155. Claimant has argued that the Settlement Agreement is a protected investment either on its own, or alternatively because it constitutes "*claims to money or any other rights having financial value related to an investment*" within the meaning of Article 1(2)(b).

156. For the reasons set out below, the Arbitral Tribunal finds that the Settlement Agreement is a qualifying investment because it constitutes "claims to money [...] related to an investment". The Arbitral Tribunal therefore does not need to, nor will it, rule on the issue whether the Settlement Agreement is a protected investment on its own.

157. The Settlement Agreement constitutes "claims to money". It follows expressly from the terms of the Settlement Agreement that it entitles Claimant to LD 5,420,308.707. Article 3 of the Agreement reads:

> *The First Party* [Ministry of Finance] *shall pay the agreed sum after the waiver, a total of LD 5,420,308.707 (Five Million Four Hundred Twenty Thousand Three Hundred Eight Libyan Dinars and 707 Dirhams) in favor of the Second Party* [Claimant] *in two installments, to the account specified by the Second Party [...]* (brackets inserted)[129]

158. Furthermore, the Settlement Agreement is "related to an investment", in that it flows from, and crystallizes, a range of earlier investments.

159. It is undisputed that Claimant was engaged in construction works in Libya in the 1980s and 1990s. Photographs submitted by Claimant show construction sites, including activities involving heavy equipment such as a cement mixer and a shovel.[130] Claimant has also submitted various photographs showing Claimant's employees together with Libyan officials on construction sites in Libya.[131]

160. In addition, Claimant has submitted a list of projects from 1981-1990, which describes numerous projects together with payment orders related to such projects,[132] as well as several contracts for specific projects.[133] The file also contains a list of Claimant's employees in Libya dated October 1989.[134]

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[129] **Exh. C-2,** Settlement Agreement, Article 3.
[130] **Exh. C-15.**
[131] Ibid.
[132] **Exh. C-16.**
[133] **Exh. C-17**, Public Works Contract for the Addition of Housing Units at Al-Hawadith Hospital Site at Sabha (date illegible); **Exh. C-18**, Contract for Construction of Sabha Encampment dated 17 May 1986 between Military Works Department, Etrak and Sabha General Company for Construction and Roads; **Exh. C-19**, Contract for Construction of a Model Village at Maknousa, Murzuq dated 26 February 1981 between Secretariat of Housing and Etrak; **Exh. C-20**, Public Works Contract between Sabha Municipality and Etrak (date illegible); **Exh. C-21,** Contract for Construction of 100 Housing Units in the City of Sabha dated 10 October 1982 between Etrak and Housing Secreteriat.
[134] **Exh. Z-G7.**

161. There are numerous unpaid receivables listed by the 2008 Audit Committee Report[135] – the authenticity of which is not disputed by Respondent – which appear to relate to previous construction activities.[136]

162. Finally, the detailed statements and testimony by both Mr. Günay and Mr. Hasasu show the extent of Claimant's activities. Mr Günay has referred to Claimant's "more than 35 projects" in Libya during the 1980s and 1990s.[137] Mr. Hasasu, who joined Claimant in 1991,[138] has confirmed this assessment.[139] Mr. Hasasu has testified that in the early 1990s, the value of all projects exceeded USD 100 million, and the number of employees in Libya were about 1000.[140] He has also described specific projects, including an airport, several housing projects (the largest of which included more than 100 separate houses), a sports hall and military camps.[141]

163. Taken together, Claimant's activities during the 1980s and 1990s constitute investments in the meaning of Article 1(2) of the BIT. Respondent has not presented any evidence pointing in the opposite direction.

164. These investments ultimately led to both the Court Decision and, eventually, the Settlement Agreement. The Settlement Agreement is thus a "claim to money related to an investment", as required by Article 1(2)(b) of the BIT.

165. The earlier investments, unlike the Settlement Agreement, pre-date the entry into force of the BIT in April 2011. However, this is not an obstacle for the purposes of the Arbitral Tribunal's jurisdiction. The controlling provision in this respect is Article X. It reads:

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

166. Thus, the BIT protects investments, but not disputes, that pre-date the entry into force of the treaty. The fact that the construction activities pre-date 22 April 2011 therefore does not present an obstacle to the Arbitral Tribunal's jurisdiction *ratione materiae*. Whether or not the "dispute" pre-dates this date is discussed below at paras. 168-188.

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[135] **Exh C-3,** Minutes of the 45th Meeting on the results of the Committee formed for Audit and Review of Outstanding Liabilities of the State's Treasury, pp. 4-7.
[136] Statement of Claim, paras. 11, 23.
[137] Statement of Claim, para. 10; First Witness Statement by Mr. Günay, para. 10.
[138] Hearing Transcript, Day 2, p. 114.
[139] Hearing Transcript Day 2, p. 126
[140] Hasasu Statement, para. 8.
[141] Hasasu Statement, para. 6. See also Hearing Transcript, Day 2, p. 114.

167. In sum, the Arbitral Tribunal has jurisdiction *ratione materiae* because the Settlement Agreement is a claim to money related to an investment as stipulated in Article 1(2)(b) of the BIT.

168. Given the detailed discussion in paras. 154-167, there is no need to discuss the so-called *Salini* criteria.

III. Jurisdiction *Ratione Temporis*

169. Article 10 of the BIT, which regulates the treaty's scope of application, states that: "[…] this Agreement shall not apply to disputes that have arisen before its entry into force" (emphasis added). Article 8(1) provides for arbitration over "Disputes between one of the Contracting Parties and an investor of the other Contracting Party, in connection with his investment […]" (emphasis added).

170. The Parties disagree about when the present dispute arose. Respondent has based its objection on the contention that its alleged non-compliance with the Settlement Agreement is but one element of a long-running dispute which pre-dates the entry into force of the BIT. Claimant is of the view that Respondent's alleged non-compliance with the Settlement Agreement creates a new dispute, separate from the disagreements pre-dating the Agreement.

171. Both Parties have advanced arguments based on arbitral jurisprudence concerning what should be regarded as a "new dispute" and a "continuous dispute", respectively.

172. While the Arbitral Tribunal has weighed carefully the arguments based on the findings by other tribunals, it ultimately finds Respondent's objection to be unconvincing. Unlike the cases advanced by Respondent as authority for its broad reading of what constitutes one and the same "dispute", the case before this Arbitral Tribunal involves a valid Settlement Agreement, which under the applicable Libyan law extinguishes all prior disputes between the Parties.

173. In *Lucchetti v. Peru*,[142] which Respondent describes as the "landmark" case on what is a "new" dispute,[143] the tribunal declined jurisdiction after having found that the BIT dispute concerned the same subject-matter as an earlier dispute which pre-dated the BIT.[144] The tribunal ultimately held that the earlier dispute and the later dispute had the same subject-matter and the "same origin or source: the municipality's desire to ensure that its environmental policies are complied with and Claimants' efforts to block their application".[145]

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[142] **Exh. RLA-13**, Lucchetti v. Peru, ICSID Case No. ARB/04/7, Award, 21 August 2007.
[143] SoD, para. 237.
[144] **Exh. RLA-13**, Lucchetti v. Peru, paras. 50-53.
[145] Ibid., para. 53.

174. Respondent has also argued that a number of subsequent tribunals followed the general approach adopted by the *Lucchetti* tribunal.

175. In *ATA v. Jordan*,[146] an arbitral tribunal had issued an award against a Jordanian entity, which was then set aside by Jordanian courts. When the investor initiated BIT arbitration, the tribunal declined jurisdiction *ratione temporis*. It held that "the dispute giving rise to the Claimant's claims in this proceeding [...] [was] legally equivalent to the contractual dispute which [gave rise to the first award]".[147]

176. The tribunal in *Eurogas v. Slovakia* stated that "[w]hat matters is the real cause of the dispute".[148] The BIT dispute concerned a mining license which had been re-assigned by the state. The investor successfully challenged this re-assignment twice before local courts prior to the BIT's entry into force. When the investor ultimately initiated BIT arbitration, it relied on post-BIT facts, but the tribunal declined jurisdiction on *ratione temporis* grounds. The tribunal held that the post-BIT facts could not be considered as "the source of a new dispute; rather they were a refusal to resolve the ongoing dispute, which arose from the alleged breach [before the entry into force of the BIT]".[149]

177. Finally, during its closing statements at the Hearing, Respondent also relied on *Vieira v. Chile*.[150] In that case, the dispute concerned whether the investor could fish in offshore waters outside of Chile. The *Vieira* tribunal ultimately found that the dispute had already arisen when the BIT entered into force.[151] Respondent has argued that the essence of this dispute remained the same, despite the fact that the investor argued its case under different legal grounds and in different *fora* before bringing it to BIT arbitration.[152]

178. In Claimant's view, none of these cases relied upon by Respondent involved a mutual agreement between the parties to settle the dispute, such as the Settlement Agreement.[153]

179. For the Arbitral Tribunal, the present case is different from the situations described in these prior awards relied upon by Respondent. The distinguishing factor is the Settlement Agreement, which under Libyan law extinguishes prior disputes between the Parties.

180. As explained above, in paras. 127-153, the Settlement Agreement is valid and binding under Libyan law. It follows expressly from the Agreement that "any domestic or international court litigation, application for enforcement abroad, or

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[146] **Exh. RLA-14**, ATA Construction v. Jordan, ICSID Case No. ARB/08/02, Award, 18 May 2010
[147] Ibid., para. 95. See also SoD, paras. 240-241.
[148] **Exh. RLA-15**, EuroGas v. Slovakia, ICSID Case No. ARB/14/14, Award, 18 August 2017, para. 453.
[149] Ibid., para. 456. See also SoD, paras. 242-243.
[150] **Exh. CLA-34,** Sociedad Anónima Eduardo Vieira v. Republic of Chile, ICSID Case No. ARB/04/7, Award, 21 August 2007.
[151] Ibid., paras. 266-303.
[152] Hearing Transcript, Day 4, pp. 53-55.
[153] Hearing Transcript, Day 4, pp. 25-26.

any court or administrative liens, whether international or domestic, in relation to the ruling subject hereof, shall be abandoned".[154]

181. In addition to the express wording of Article 7 of the Settlement Agreement, Libyan law provides for the extinguishing effect of the Agreement. Under Libyan law, the Settlement Agreement is characterized as a "compromise". Article 548 of the Libyan Civil Code provides:

Compromise is a contract by which two parties put an end to a dispute that has arisen, or prevent a dispute that is expected to arise, by the mutual surrender of part of their respective claim.[155]

182. Both Parties' experts on Libyan law agree that a compromise, such as the Settlement Agreement, extinguishes any prior disputes between the Parties. Claimant's expert Mr. Mukhtar says this expressly in his Second Opinion, in which he states that:

The Settlement Agreement in this case is exactly what is defined by the Libyan Civil Code as compromise. Thus, it ended any potential dispute between the parties with respect to the Court Decision. This is further confirmed by the express provision in Article 7 of the Settlement Agreement whereby the parties agreed to withdraw any proceedings with respect to the Court Decision.[156]

183. When questioned by Claimant's counsel at the hearing, Respondent's expert Dr. El-Murtadi also stated that as a matter of Libyan law, a compromise puts an end to the prior disputes between the parties:

***Q**. You would agree, Dr El-Murtadi, that under Libyan law a compromise has the effect of putting an end to a dispute that has arisen?*
***A.** Yes, that's right.*
***Q**. And that under Article 552 that a compromise terminates the disputes in respect of which the compromise is made?*
***A.** That's right.*
***Q.** If you have a compromise under Libyan law,that means that it puts an end to the prior disputes. Am I right about that?*
***A**. Yes, you are correct.*
***Q.** In the event that the compromise agreement is breached the parties are limited to their right to enforce the settlement. They cannot go back to recreate the prior disputes; am I correct?*
***A**. You are correct.*[157]

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[154] **Exh. C-2**, Settlement Agreement, Article 7.
[155] **Exh. E0-9**, The Libyan Civil Code, Article 548.
[156] Second Mukhtar Opinion, para. 62.
[157] Hearing Transcript, Day 3, pp. 138-139.

184. With the signing of the Settlement Agreement in December 2013, both Parties agreed to settle all prior disputes as part of a bargain by which Claimant agreed to accept a discounted version of the receivables owed to it. Respondent's subsequent alleged non-compliance with this Agreement gave rise to a new dispute, separate from earlier disagreements over what was owed to Claimant.

185. Since the Settlement Agreement put an end to the prior disputes between the Parties, Respondent's objection that Claimant's earlier disagreements with various Libyan public entities share the same "real cause" or the same "underlying substance" as the disagreements post-dating the Settlement Agreement is not relevant here. The Settlement Agreement creates a break in the timeline of the Parties' disagreement.

186. Thus, the "disputes", for the purposes of both Article 8 and Article 10 of the BIT, have arisen in relation to Respondent's alleged non-compliance with the Settlement Agreement. The Settlement Agreement was concluded in December 2013, and the BIT entered into force on 22 April 2011. Thus, any dispute concerning the Settlement Agreement post-dates the entry into force of the BIT. The Arbitral Tribunal therefore has jurisdiction *ratione temporis* over the present dispute.

IV. Fork-in-the-road

187. As with the dispute about jurisdiction *ratione temporis* (paras. 168-185), the Parties' disagreement concerning the consequences of Articles 8(2)-8(3) of the BIT centers on the nature of the "dispute(s)".

188. Respondent claims that the fork-in-the-road clause prevents Claimant from resorting to arbitration under the BIT, because the claims brought in this Arbitration share the same fundamental basis as claims already brought by Claimant in the Libyan courts. The fork-in-the-road clause would therefore operate to prevent Claimant from bringing essentially the same dispute to international arbitration, because according to Article 8(3) the choice first to bring its case to domestic court is "final". In the alternative, Respondent has objected that Claimant's choice to submit the same dispute to Libyan courts has given rise to an estoppel, which would prevent it from bringing the same dispute to international arbitration.

189. Claimant has argued that the fork-in-the-road clause does not prevent Claimant from bringing the present Arbitration. It claims that the so-called "triple identity test" must be applied and that the result of this test is that the earlier disputes are different from the present arbitration.

190. There is no need for the Arbitral Tribunal to engage with the Parties' broader arguments regarding the scope and interpretation of fork-in-the-road clauses generally or under this specific BIT. As explained in paras. 125-150, the Settlement Agreement extinguishes previous disputes, including the domestic litigation which was initiated by Claimant and which led to the Court Decision and the Appeal.

191. The Settlement Agreement thus constitutes a new agreement between the Parties. The Arbitral Tribunal has been asked to determine whether Respondent's alleged non-compliance with that agreement violates the BIT. As explained in paras. 164-181, that is a different dispute from the dispute(s) that preceded the Settlement Agreement.

192. For these reasons, neither Respondent's primary contention that the fork-in-the-road clause bars Claimant's BIT claims, nor its secondary position that Claimant's choice to initiate the Libyan court proceedings would "estop" it from then bringing this Arbitration, is accepted by the Arbitral Tribunal.

V. The Contractual Nature of the Claims

193. In paras. 125-168, the Arbitral Tribunal has found that the Settlement Agreement is a protected investment under the BIT. Under these circumstances, there is no need for the Arbitral Tribunal to rule on Claimant's alternative claim that the Arbitral Tribunal has jurisdiction in any event based on the Settlement Agreement as a contract.

VII. LIABILITY

A. INTRODUCTION AND BACKGROUND

194. The Claimant brings its claims under several different provisions of the BIT.

195. Article 2(2) of the BIT reads:

> *"Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use enjoyment, extension, or disposal of such investments"*

196. Article 4 of the BIT obligates Libya not to expropriate an investor's investment except under certain conditions. It reads:

> *"Investments shall not be expropriated, nationalized or subject, directly or indirectly, to measures of similar effects except for a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article 3 of this Agreement"*

197. Claimant also argues that Articles 3(2)-3(3) of the BIT work to "import" the Umbrella Clause in Article 8(1) of the Austria-Libya BIT. Article 3(2)-3(3) of the BIT read:

"(2). Neither Contracting Party shall in its territory subject investments or returns of investors of other Contracting Party to treatment less favorable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State, whichever is the most favorable.

(3). Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards management, use, enjoyment or disposal of their investments to treatment less favorable than that which it accords to its own investors or to investors of any third State, whichever is the most favorable.

198. The Umbrella Clause in Article 8(1) in the Austria-Libya BIT reads:

"Each Contracting party shall observe any obligation it may have entered into with regard to specific investments by investors of the other Contracting Party."

199. In addition to the BIT provisions cited above, Claimant also argues on contractual grounds (as opposed to treaty-based) that Respondent has breached the Settlement Agreement.

200. Respondent disputes liability under any of these grounds.

201. The Parties' respective positions on the merits of the dispute are summarized below.

B. CLAIMANT'S POSITION

I. Fair and Equitable Treatment - Legitimate Expectations

202. Despite the difficulties faced by tribunals in clearly defining the fair and equitable treatment obligation, it is settled law that "*legitimate expectations is now part of the FET standard.*"[158]

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[158] **Exh. CLA-53**, *Crystallex v. Venezuela*, fn. 766; **Exh. CLA-51**, *Saluka v. Czech Republic*, para. 302; **Exh. CLA-56**, *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, Award dated 8 October 2009, para. 216 (qualifying legitimate and reasonable expectations as "one of the major components" of FET); **Exh. CLA-57**, *Electrabel S.A. v. Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability dated 30 November 2012, para. 7.75 (affirming that protection of legitimate and reasonable expectations is FET's "most important function").

203. Respondent's characterization of Claimant's expectations and rights under the Settlement Agreement as "hopes" that a "debt" will be paid downplays and mischaracterizes an official agreement. In this vein, Respondent cites *Parkerings v. Lithuania*, where the tribunal held that "not every hope amount[s] to an expectation under international law."[159] In this case, Claimant's expectation was that Respondent would comply with a specific representation to settle a state debt that had been affirmed.

204. Moreover, and on a general level, Claimant had a legitimate expectation at the time it initiated legal proceedings before a Libyan Court that Respondent would abide by its own laws and would comply with any decision issued by Libyan courts in keeping with basic principles of due process and the rule of law. Not only has Respondent failed to meet this basic and legitimate expectation, it has also aggravated its breach by engaging in the Appeal process. Moreover, redress before national courts is not a meaningful option for Claimant.[160]

205. Legitimate expectations are created at, but not limited to, the time the investment decision is made. They may change and vary over the course of an investment.[161]

206. Post-investment expectations can be included within the scope of the FET. However, even if the expectations to be assessed are limited to those at the time of making the investment, Claimant's expectations in connection with the Settlement Agreement must be taken into account. The Settlement Agreement constitutes an investment in and of itself and thus marks a point in time when Claimant relied on such expectations to make an investment.[162]

207. However, Respondent's attempt to narrow the FET obligation to legitimate expectations must be rejected.

Fair and Equitable Treatment - Denial of Justice

208. Claimant sued Respondent in Libyan court. The court issued a decision in Claimant's favour and ordered Respondent to pay Claimant damages. Respondent never did so, but rather induced Claimant to sign a settlement agreement which Respondent never performed. Respondent's claim that the Court Decision is the basis of an on-going Appeal does nothing but support the conclusion that Respondent has treated Claimant unfairly. Representatives from

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[159] **Exh. RLA-34**, *Parkerings v. Lithuania*, ICSID Case No. ARB/05/8, Award dated 11 September 2007, para. 344.
[160] Reply, para. 323.
[161] Statement of Claim, para. 147.
[162] Reply, para. 300.

Respondent assured Claimant that the Appeal would be withdrawn and signed the Settlement Agreement which required that it in fact be withdrawn.[163]

209. Not only has Libya failed to meet basic requirements of the rule of law, it has done so without regard to basic principles of good faith and by engaging in an abusive Appeal process. In contravention of the Settlement Agreement and prevailing Libyan law, Libya obtained an Appeal Decision wrongfully overturning the Court Decision. The pursuit of this Appeal was undertaken by the State Litigation Department ("SLD"), an entity which is a state actor.

210. The wrongfulness of Libya's pursuit of the Appeal is confirmed by the appeal decision in the similar *Denfarm* case, which established that the two objections that Respondent lodges against the enforceability of the Settlement Agreement are in fact meritless as a matter of Libyan law.[164]

211. Claimant argues that Respondent, under the terms of the Settlement Agreement, had no right to pursue the Appeal absent an intervening nullification of the Settlement Agreement. The Appeal is further evidence that Respondent has violated its obligations towards Claimant by not being transparent, making false representations regarding the withdrawal of the Appeal and by failing to adhere to standards of due process and notice.[165]

212. It is not disputed between the Parties that the Beida Court of Appeal proceeded without the original case file before it. Thus, it ruled without the original version of the decision of the Court of First Instance, the alleged original Appeal submission, and the document that related to the alleged irregularity in the service upon Libya of Claimant's initial submission to the Beida Court of First Instance.[166] Under Libyan law, it is impermissible for the Court of Appeal to render a decision in the absence of the original court decision against which the appeal was brought. The absence of the original case file and the relevant original documents becomes even more important when considering that the sole basis for the decision of the Court of Appeal is the alleged irregularity in the service of Claimant's statement of claim in the court of first instance case. The only document that concerns the service issue is Claimant's initial statement of claim, which bears the official statement of the bailiff, who states that he actually served the document. The Court of Appeal discards this official statement – which may only be done by preliminarily establishing that the bailiff had actually committed forgery or the crime of lying – and concludes that the bailiff must be lying. This is improper in

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[163] Statement of Claim, para. 155.
[164] Reply, para. 329; **Exh. C-48**, Denfarm Decision.
[165] Statement of Claim, para. 156.
[166] Reply, para. 330.

the absence of any document in the alleged case file that casts doubt on, or contradicts, the bailiff's statement.[167]

Fair and Equitable Treatment - Arbitrary/unreasonable acts

213. Numerous tribunals have found that where a State's conduct is arbitrary or unreasonable and thus lacking in any legitimate motive, that conduct could give rise to breach of the State's FET obligations.[168]

214. Moreover, it is well-settled that included in a State's FET obligation is a duty to act consistently and transparently. Linked to the notion of transparency is the concept of consistency, which requires that "[o]ne arm of the State cannot [...] affirm what another arm denies to the detriment of a foreign investor."[169] Where a State engages in inconsistent behaviour to the detriment of the investor, such behaviour is lacking in transparency and constitutes a breach of the State's fair and equitable treatment obligation. This is particularly true where one arm of the state contradicts another arm, as has occurred in this case. Specifically, the Ministry of Finance, the State Budget Office and the Ministry of Foreign Affairs have at all times considered the Settlement Agreement as binding and treated it as such. In contrast, while initially treating the Agreement as binding, the Ministry of Justice, via the State Litigation Department, in this Arbitration now treats it as non-binding. This treatment is both inconsistent with its prior position as well as with the positions of the Ministry of Finance, the State Budget Office and the Ministry of Foreign Affairs.[170]

215. Claimant performed numerous construction contracts from which Libya received great benefit. Respondent, while it has repeatedly acknowledged the existence of its debt, has also created legal and administrative barriers to Claimant's attempts to collect what it was due. In doing so, Respondent has failed to act with transparency, consistency and good faith and has violated Claimant's legitimate expectations that Libya would both fulfil the terms of its agreements and would follow the requirements of its own laws.[171]

216. Furthermore, a state can breach its FET obligations when it induces an investor into agreement with promises of compensation and fails to pay compensation. In this regard, the *von Pezold v. Zimbabwe* case is illustrative. In that case, the

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[167] Reply, para. 333.
[168] See, e.g., **Exh. CLA-61,** *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Final Award dated 11 December 2013, para. 522; **Exh. CLA-112**, *Flemingo v. Poland*, para. 535; Statement of Claim, paras.134-149.
[169] **Exh. CLA-53,** *Crystallex v. Venezuela*, para. 579 citing *EnCana Corporation v. Republic of Ecuador*, Award dated 3 February 2006, para. 158.
[170] Reply, para. 319.
[171] Reply, para. 326.

tribunal found a violation of FET where the state induced the investors to sign certain agreements regarding their water rights with promises of compensation and failed to pay that compensation.[172]

"Contractual violations" as FET breach

217. Respondent argues that a simple breach of contract does not amount to a breach of legitimate expectations or its FET obligation. Respondent further argues that its FET obligation may be breached only if the host State acted in the exercise of sovereign authority.

218. According to Claimant, Respondent's contentions fail for two reasons. *First*, a State's violation of its contractual obligations may constitute a violation of the FET standard. *Secondly*, Respondent's breaches in this case cannot be reduced to a simple breach of contract.

219. The mere fact that a State engages with an investor via the conclusion of a contract does not automatically render that relationship a commercial one.[173] The factual background against which that contract was concluded must be taken into account. For instance, in a very recent award, the *Teinver v. Argentina* tribunal found that Argentina's breach of an agreement to purchase shares amounted to a breach of Argentina's fair and equitable treatment obligations. In reaching this conclusion, the tribunal observed that the agreement was "not simply a commercial agreement" but rather one that was entered into by the State with the intent to put an end to a long-fraught relationship between claimant and Argentina.[174]

220. As in the *Teinver* case, the Settlement Agreement is actually an agreement intended not for a commercial purpose but rather to settle a then-existing dispute between Respondent and Claimant.

II. Expropriation

221. Expropriation is not limited to tangible property rights. Tribunals have interpreted expropriation provisions broadly to encompass expropriation of intangible property.

222. When the facts of this case are considered in light of the accepted law on expropriation, it is clear that Claimant has been the victim of expropriation.

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[172] Reply, para. 310.
[173] Reply, para. 307.
[174] **Exh. RLA-47**, *Teinver v. Argentina*, para. 854.

223. It is a well-established principle of investment law that contractual rights are capable of being expropriated, provided that they qualify as investments under the relevant BIT. The Settlement Agreement and its rights thereunder qualify as investments. It follows that it may be the subject of an expropriation analysis.[175]

224. Furthermore, contrary to Respondent's assertion, both State action and inaction can give rise to an expropriation. Respondent characterizes its non-payment as an omission and then concludes that an omission cannot give rise to an expropriation. Setting aside for a moment that this case involves more than simple omission on behalf of the state actors, a weight of authority holds that omissions as well as positive acts can give rise to expropriation. There is no distinction between acts and omissions under international law for the purpose of determining the responsibility of a State, as affirmed by the Commentary on the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts ("the ILC Articles"), Article 2.[176]

225. Moreover, in Claimant's view, when determining whether expropriation has occurred, the Arbitral Tribunal should examine the cumulative acts and omissions of the State and not, as Respondent contends, the mere fact of non-payment in isolation. Although the key features of Respondent's expropriatory conduct are its breaches of the Settlement Agreement by non-payment and reactivation of the Appeal process, its acts and omissions since Claimant first sued in Libyan Court in 2012 should be considered together.[177]

226. The central tenet of Respondent's defense rests on its assumption that a breach of contract cannot give rise to an expropriation. This is incorrect. A breach of contract can give rise to an expropriation where it (i) amounts to a direct repudiation of the contract or is carried out by means of state action, or, as in this case, (ii) has the effect of depriving the investor of his investment. Respondent also argues that Claimant's investment was not expropriated since it can still seek to enforce its rights in Libyan courts. This contention is similarly flawed.[178]

227. *First*, Respondent's repudiation of the Settlement Agreement constitutes expropriation. Investment tribunals have repeatedly found that breaches of contract that result in substantial deprivation of the economic value of the agreement or that constitute repudiation of the relevant contract amount to expropriation.[179] In an effort to support its arguments, Respondent relies on a

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[175] Reply, para. 239.
[176] Reply, para. 240.
[177] Reply, para. 248.
[178] Reply, para. 249.
[179] Reply, para. 251 with authorities cited therein.

series of cases in which the tribunals rejected claims of expropriation for non-payment, as opposed to repudiation, of a contract. However, the present case involves far more than the non-payment of a commercial contract. Indeed, the *dicta* of the cases relied on by Respondent indicate that egregious and concerted actions on behalf of the State could amount to expropriation.[180]

228. *Secondly*, Respondent's contention that there can be no expropriation because Claimant could have enforced its rights in Libyan courts must be rejected for the following reasons. There is no requirement to exhaust local remedies. The cases cited by Respondent stand merely for the proposition that in the context of a commercial breach (which is not the type of breach at issue here), a State must make its courts available and failure to do so would give rise to expropriation. Each of these decisions recognizes that when an ordinary commercial contractual breach – i.e., a breach that does not involve an element of sovereign conduct – is at issue, an investor must first attempt to remedy that breach in local courts, if available. If such courts are not available, then this transforms a simple commercial breach into an expropriation. However, the Settlement Agreement is not a commercial agreement and its breach by Respondent is not a simple commercial breach. This alone calls into question the basis for Respondent's insistence that local remedies must be exhausted.[181]

229. In Claimant's view, the Settlement Agreement put an end to a judicial process. It is an unconditional, unreserved and straightforward assumption of an obligation by Libya (i.e., state action). The Parties concluded the Settlement Agreement to settle the amount ordered to be paid by a Libyan court (again, state action). Different entities within the Libyan administration, namely the State Litigation Department and the Ministry of Finance, examined and evaluated the Court Decision and concluded that settlement was in Libya's best interests (once more, state action). Respondent also agreed to discontinue any judicial proceedings regarding the amount settled by the Settlement Agreement (yet again, state action). The very existence of the Settlement Agreement is the result of state action, the presence of which puts to rest Respondent's argument that Claimant was required to resort to Libyan courts.[182]

230. Even if this Arbitral Tribunal were to find that Claimant would have been required to return to Libyan domestic court to adjudicate its claims arising from the Settlement Agreement, it should nevertheless find that the continuous non-performance of the Settlement Agreement has amounted to a "definitive denial of the right," due to the nature of the Settlement Agreement, without any need for further recourse to local courts.[183]

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[180] Reply, para. 255.
[181] Reply, paras. 257-262 with authorities cited therein.
[182] Reply, para. 263.
[183] Reply, para. 264.

231. Finally, Claimant notes that Respondent's arguments make no practical sense. This Arbitral Tribunal has jurisdiction over claims arising directly out of the Settlement Agreement. If the fork-in-the-road clause in the BIT is read as requiring Claimant first to bring claims arising from the Settlement Agreement before the Libyan Courts, that would deprive the Claimant of its right to have recourse to this Arbitral Tribunal. Thus, Respondent's view, if adopted, would render useless the rights that the BIT guarantees. The Arbitral Tribunal should not countenance such a result.[184]

III. Umbrella Clause

232. Claimant contends that the MFN clause in the BIT allows Claimant to rely on more favourable standards of protection contained in other investment treaties. This extends to umbrella clauses and, in particular, to the umbrella clause contained in the Austria-Libya BIT.[185]

233. The express purpose of Articles 3(2)-3(3) is to ensure the most favourable possible treatment to investments and to investors. Claimant is thus entitled to more favourable treatment (constituting a better substantive protection) included in treaties with third parties, as compared to the treatment contained in the Turkey-Libya BIT.[186]

234. There is no restriction in the MFN clause which explicitly confines its application to the clauses of the BIT. The MFN clause itself, despite implementing specific restrictions with respect to certain issues, does not restrict its application to other substantive standards including umbrella clauses. Consequently, the MFN clause allows Claimant to import any standard of substantive protection that is more favourable than the protection afforded under the BIT.[187]

235. The umbrella clause in the Austria-Libya BIT is such a standard, as it provides investors greater investment protection than that provided under the Turkey-Libya BIT. It does so by imposing a specific obligation on Libya to respect its contractual and other commitments it enters into with investors and by rendering a breach of such commitment a violation of the BIT. Claimant is therefore entitled to rely on this clause of the Austria-Libya BIT as part of Libya's responsibility to Etrak under the Turkey-Libya BIT.[188]

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[184] Reply, para. 268.
[185] Reply, para. 336.
[186] Reply, para. 338.
[187] Reply, para. 355.
[188] Reply, para. 356.

236. Article 8(1) of the Austria-Libya BIT uses mandatory language and is broadly written. By using the phrase "shall observe" it imposes a mandatory duty on Respondent that cannot be escaped. Further, '"[a]ny" obligation is capacious; it means not only obligations of a certain type, but "any" - that is to say, all…'".[189] The Umbrella Clause in the Austria-Libya BIT, by its own terms, obligates Libya to observe *all* obligations it has entered into *vis a vis* specific investments it has entered into with investors such as Claimant. This wording explicitly extends to all obligations, international or domestic, contractual or non-contractual. As a consequence, contrary to Respondent's objection that the clause does not permit the Arbitral Tribunal to entertain contractual claims, breaches by Respondent of specific obligations owed to Claimant become equally breaches of both the BIT and the obligation, i.e. the contract, itself.[190]

237. As for the Settlement Agreement, the obligations therein are clearly defined as (i) an obligation to pay Claimant the agreed sums by the agreed dates, and (ii) an obligation to withdraw the pending Appeal.

238. The Settlement Agreement was entered into by authorities of the State, namely senior officials of the Ministry of Finance acting in their official capacity. The Agreement has been disregarded by Respondent, which has neither paid the sums due, nor withdrawn the Appeal.[191]

239. In addition to Respondent's objection that the clause does not permit the Arbitral Tribunal to entertain contractual claims, Respondent also argues that the Settlement Agreement and its breach do not involve *puissance publique* (sovereign authority), and that umbrella clauses cannot override an exclusive jurisdiction provision for contractual disputes. In Claimant's view, none of these grounds is tenable.

240. Under the umbrella clause, Respondent is obligated to observe the obligations that the umbrella clause may entail, and any breach of any such obligations entails a breach of the BIT. There is no requirement of exercise of *puissance publique* (sovereign authority) for the application of the umbrella clause.[192]

241. The wording of the clause is clear in that it concerns "any obligation." The language in the BIT neither specifies coverage only for obligations that the host State assumes in its exercise of state authority nor bases coverage on whether the observance or breach of such obligations concerns state action. There is no need to identify any exercise of sovereign authority. In any event, the obligations

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[189] Statement of Claim, para. 191.
[190] Reply, paras. 363.
[191] Statement of Claim, para. 204.
[192] Reply, para. 364.

that Respondent breached are not ordinary commercial obligations; rather, they are obligations that Libya, as a sovereign party, assumed as part of Libyan governmental policy.[193]

242. Finally, Respondent's argument that the umbrella clause is not applicable in the presence of an exclusive jurisdiction provision is also meritless. It is true that certain investment tribunals have refrained from extending the applicability of an umbrella clause when a contract contains a choice of forum clause providing exclusive jurisdiction for another *forum*. In the Settlement Agreement, however, there is no choice of forum clause, let alone an exclusive one.[194] In all cases where a tribunal has found the application of an umbrella clause inadmissible based on this ground, it did so because of an explicit exclusive forum selection clause. The sole example cited by Respondent, *SGS v. Philippines*, is one such case. In *SGS*, the tribunal emphasized the effect of the exclusive choice of the forum clause and based its decision on the existence thereof.[195] Respondent's reliance on *SGS v. Philippines* and its related objection to the application of the umbrella clause is baseless, as there is no similar clause in the Settlement Agreement that would dictate a similar outcome.

IV. "Pure" contract breach

243. The Settlement Agreement is valid under international law, under international law principles of *intra vires* or apparent authority. The ILC Articles set out a general principle of international law in Article 4:

> 1. *The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.*
> 2. *An organ includes any person or entity which has that status in accordance with the internal law of the State.*

244. The language adopted by the ILC in this provision clearly indicates that this is a general rule on attribution of conduct. This approach is confirmed by jurisprudence and the practice of international investment tribunals.[196]

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[193] Reply, para. 368.
[194] Reply, para. 369.
[195] **Exh. CLA-26**, *SGS v. Philippines*, paras. 136-143.
[196] **Exh. CLA-129**, Andrew Paul Newcombe and Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment (Kluwer Law International 2009), fn. [133] and paras. 9.17; **Exh. CLA-11**, *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award dated 1 June 2009, paras. 194-197.

245. The same rule applies when State organs act in excess of authority or in contradiction of instructions. Under international law, the conduct of those State organs would still be attributable to the State. This rule is embodied in Article 7 of the ILC Articles.

246. The question to ask when examining a specific *ultra vires* act by a State organ/entity or official is whether the conduct has been carried out by a person "in an apparently official capacity" [197], or "under colour of authority"[198] or "with apparent authority".[199] "Apparent authority" is defined as a situation when a State in question gives the "impression or allow(s) the impression reasonably to arise, that the particular acts or omissions were within the authority of the body or person".[200]

247. Investment tribunals consistently accept that States may not escape from their obligations under the pretext of the absence of authority for its organs and agents.

248. As discussed at length in the expert legal opinions,[201] and in the witness statements of Mssrs. Günay and Hasasu, Ministry of Finance officials at all times represented to Claimant representatives that they had the authority to enter into the Settlement Agreement and that the Settlement Agreement was binding on Libya. The State Litigation Department made this very representation in a letter dated 7 May 2013, which referred the matter to the Deputy Minister of the Ministry of Finance to approve settlement with Claimant and pay Libya's contractual obligations.[202] It repeated that representation in a letter dated 29 July 2013.[203]

249. In conclusion, the Settlement Agreement is binding on Respondent under principles of international law for much the same reason it is binding under Libyan law.

C. RESPONDENT'S POSITION

I. Fair and Equitable Treatment

Legitimate Expectations

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[197] **Exh. CLA-12**, Draft Articles, Art. 4, para. 13.
[198] Ibid.
[199] **Exh. CLA-130**, Draft Articles, Art. 7, para. 8.
[200] **Exh. CLA-131**, F.V. García Amador, Louis B. Sohn, Richard Baxter et al., Recent Codifications of the Law of State Responsibility for Injuries to Aliens (Springer 1974), at 248.
[201] Second El-Murtadi Opinion, Section C(i).
[202] **Exh. C-46**, SLD Copy of Internal Letter dated 7 May 2013.
[203] **Exh. C-4**, Letter from Fattalah Avad Bin Hayal, Director for Legal Proceedings, Derna Directorate, to Deputy Minister, Directorate of Legal Proceeding, dated 7 May 2013,

250. The fair and equitable treatment standard is informed by the concept of legitimate expectations. These expectations provide a degree of stability around the key parameters of an investment when an investor is deciding whether or how to invest. This is the principled basis for there being any protection of expectations within the FET standard at all. It explains both why only certain expectations can be protected as 'legitimate expectations', and why those expectations must be legitimate to attract protection.[204]

251. Unless an expectation affects an investor's decision to invest – i.e., whether to make a contribution, of a certain duration, that is subject to operational/investment risk – the expectation cannot be relied upon by the investor, and is not internationally protected. Only a specific, precise and unambiguous expectation, which is derived from a representation by State officials, can be said to contribute to an investor's decision to invest, or be relied upon by an investor in making its investment.[205]

252. Only expectations which arose before an investment is made can be legally protected 'legitimate expectations'. This has been widely recognised by international tribunals. This is because only expectations which arose before an investment can be relied upon by an investor in making its investment.[206]

253. Moreover, only legitimate expectations are internationally protected. Whether legitimate expectations exist, and if so their content, is an objective question. An investor's subjective expectations are irrelevant. The general economic and political conditions of a State and its overall circumstances can be expected to inform a prudent investor's assessment and acceptance of business risk. While the post-Uprising Libyan economy offered opportunities, these opportunities existed in what remained an emerging economy with a newly (re)created government infrastructure. In this environment, an investor could not have had a legitimate expectation that its dealings with the new authorities would run as smoothly as they would in a more stable State.[207]

254. Further, if Claimant's evidence as to its 20 years of prior dealings with Gaddafi-era authorities (prior to the entry into force of the BIT) was true, the objective expectation of an investor in Claimant's position could only have been that things would not run smoothly. Claimant, like any investor or potential investor, needed to make a realistic assessment of the situation. To the extent that Claimant failed to carry out a realistic assessment or to undertake due diligence, it cannot use international law as an insurance policy against its own shortcomings.[208]

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[204] Rejoinder, para. 571.
[205] Rejoinder, para. 577.
[206] Rejoinder, para. 578.
[207] Rejoinder, paras. 586-590.
[208] Rejoinder, paras. 591-592.

255. Finally, Claimant's cited legitimate expectations are not protected. Claimant does not assert that any specific, precise and unambiguous expectation, derived from a representation by State officials, contributed to its 'investment'. Nor does it allege any change, much less an internationally wrongful change, to the regulatory framework in Libya. It relies exclusively on three purported 'expectations': (i) alleged contractual obligations in the Settlement Agreement; (ii) an "*expectation that [Libya] would comply with a specific representation to settle a state debt*"; and (iii) "*on a general level…that Libya would abide by its own laws and would comply with any decision issued by Libyan Courts*".[209]

256. As to the first 'expectation' (at (i) above), contractual obligations are not internationally protected 'legitimate expectations', and a simple breach of contract by the State cannot amount to a violation of legitimate expectations protected by the BIT. The existence of legitimate expectations and contractual rights are two separate issues.

257. As to the second 'expectation' (at (ii) above), Claimant has not suggested any specific, extra-contractual basis for such an expectation. Indeed, Claimant's reference to the agreement being "affirmed by a significant part of its administration" appears to rely on how the Settlement Agreement was allegedly treated after it was signed by Claimant, which cannot have created any expectation before it was signed

258. Even if such an expectation had been alleged and was proved, the function of 'legitimate expectations' is not to elevate contractual obligations under domestic law to international obligations under the BIT and international law.

259. As to the third 'expectation' (at (iii) above), Claimant has not alleged, much less shown, any basis for a specific expectation that "Libya would abide by its own laws and would comply with any decision issued by Libyan Courts". Moreover, such 'expectation' is not protected as a legitimate expectation under international law.

Fair and Equitable Treatment - Denial of Justice

260. Even if it is found that the Settlement Agreement is valid and binding, the Ministry of Finance's non-compliance with the Settlement Agreement is, at most, a failure to abide by a contract. That is not a denial of justice. A denial of justice claim arises, in case of failure to obtain redress through the domestic legal system. This supposes that the investor has sought to obtain redress through that judicial

[209] Rejoinder, para. 593.

system, and that its attempt has failed because of the internationally wrongful failings of that judicial system.[210]

261. Instead of seeking to enforce that Settlement Agreement in Libya, and obtain redress through the judicial system, Claimant initiated international arbitration claiming a denial of justice. But Claimant has not tested the judicial system in order to seek enforcement of the agreement - a prerequisite for such an action.[211]

262. Conversely, if the Settlement Agreement is not a valid and binding agreement, then there is no agreement between the parties regarding the Court Decision. The Court Decision is not enforceable, pending the decision of the Beida Court of Appeal on the ongoing appeal.

263. Furthermore, in its Reply, Claimant included a new denial of justice claim, based on the Appeal process. These allegations are ill-founded. The Beida Court of Appeal proceedings contain no irregularities and the Beida Court of Appeal Decision was in fact correct under Libyan law. In any event and crucially, this Tribunal does not sit as an appellate court, and even the sum of Claimant's expert's criticisms (even if they were well-founded) would not reach the threshold for a denial of justice. Finally, Claimant has made no attempt to exhaust the remedies available within the Libyan court system, noticeably an appeal of the Beida Court of Appeal Decision.[212]

264. The Appeal proceedings have been conducted in accordance with Libyan law, with a clear record of its procedural history. That history does not disclose any procedural inadequacy, much less issues rising to the level of a denial of justice.[213]

265. Claimant's claims are, in effect, simply that the Beida Court of Appeal got Libyan law wrong. Claimant asserts (i) that the Beida Court of Appeal Decision is contrary to another decision of that Court, (ii) that the Decision should have contained more procedural detail, (iii) that an appeal decision cannot be rendered without the original case file, and (iv) that a Court cannot query a statement of a private process server without staying proceedings, reporting an alleged crime to prosecutors, and awaiting the process server's trial.[214] Even if it were a relevant question for this Tribunal to determine (which it is not), Claimant has not shown that the Beida Court of Appeal got Libyan law wrong.

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[210] Statement of Defense, para. 345.
[211] Statement of Defense, para. 346.
[212] Rejoinder, para. 631.
[213] Rejoinder, para. 632.
[214] Rejoinder, para. 633.

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[210] Statement of Defense, para. 345.
[211] Statement of Defense, para. 346.
[212] Rejoinder, para. 631.
[213] Rejoinder, para. 632.
[214] Rejoinder, para. 633.

reasonable degree of regulatory flexibility, and a tribunal will not substitute its own judgment on whether a measure or policy was appropriate; only whether it was arbitrary.[220] This imposes a high standard on a claimant seeking to establish such arbitrariness.

271. A contractual breach will not, of itself, amount to arbitrary conduct.[221] In any event and however these elements of the FET standard are defined, Libya has not breached the FET standard.

272. Claimant's claims under this head relate to (i) an alleged change or inconsistency in position between other State bodies and the State Litigation Department, (ii) asserting legal arguments said to be contrary to Libyan law, and (iii) "maltreatment" which "extends back decades".

273. As to (i) (an alleged change or inconsistency in position), State organs adopting an inconsistent position of itself is not a breach of the FET standard. This is especially the case where the 'inconsistent' acts are sequential. What has been criticised by some tribunals, and what in appropriate cases might amount to a breach of the FET standard, is where a State simultaneously imposes different and inconsistent requirements on an investor, and does not provide a mechanism to resolve the apparent inconsistency. That is not the case here. Claimant's case is that, based solely on dealings with a small number of individuals with the Ministry of Finance legal department and undisclosed representatives of "the budget office", in 2013-2014, 'Libya' adopted a position that the Settlement Agreement was binding, and then reversed that position in this arbitration.[222]

274. This arbitration was Claimant's first attempt to enforce obligations in the Settlement Agreement. Accordingly, Libya's consistent position, from Claimant's first attempt to enforce its alleged legal rights, has been to deny that the Settlement Agreement is binding. Even assuming the testimony of Messrs Günay and Hasasu were true and complete, it is unsurprising – and certainly not a breach of the FET standard – that a State's legal department may take a different view of the legal effect of conduct of individual government officials than those officials themselves. In any event, Claimant has not proffered any evidence that it relied on the alleged representations of the individuals Claimant referred to.

275. Furthermore, Claimant has had (and continues to have) every opportunity to participate in the Tripoli Proceedings, in which the State Litigation Department requests a declaration on the validity and effect of the Settlement Agreement under Libyan law. Claimant was served with those proceedings in accordance with Libyan civil procedure rules,[223] and then received extra and extraordinary

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[220] **Exh. RLA-123,** Electrabel v. Hungary, ICSID Case No. ARB/07/19, Award, 25 November 2015, para. 179, and the authorities cited within.
[221] Rejoinder, para. 612.
[222] Rejoinder, para. 616.
[223] Rejoinder, para. 618.

notice of those proceedings through its counsel in this arbitration. Whether it chooses to take the opportunity to participate is outside Respondent's control.

276. As to (ii) (asserting legal arguments said to be contrary to Libyan law), the *Denfarm* case, the only authority referenced by Claimant, does not have the legal effect asserted by Claimant, and, in any event, is presently under appeal. In any event, Claimant cannot be suggesting that it is a breach of the FET standard for government lawyers to advance legal arguments, on behalf of State entities, which are inconsistent with a single finding of an intermediate domestic court (the Beida Court of Appeal in the *Denfarm* case), in circumstances where such finding is challenged as being wrong in law.[224]

277. As to (iii), Claimant asks the Tribunal to consider that Libya has "created great legal and administrative barriers to Claimant's attempts to collect what was due", by reference to witness evidence concerning Claimant's attempts to collect receivables from 1991-2007. The Libya-Turkey BIT (allegedly) came into force only in 2011, and as explained above, the principle of non-retroactivity means that the BIT's provisions do not apply to acts which took place before its entry into force. Respondent could not breach an obligation under the BIT that did not exist.[225]

"Contractual violations" as FET breach

278. A State can only be deemed to have breached the FET provision of the applicable BIT if, in breaching a contract, it acted as a *puissance publique* (sovereign authority) in a way not contemplated by the contract. The requirement of *puissance publique* has been recognised by numerous tribunals.[226]

279. Claimant advances two positions – *first*, that a simple violation of contractual obligations may constitute a breach of the FET standard; and *secondly*, that Libya's contract breaches "cannot be reduced to a simple breach of contract".

280. In support of its first argument, Claimant cites a single authority, *Noble Ventures v. Romania*, from which it quotes part of a paragraph:

> *"**Considering the place of the fair and equitable treatment standard at the very beginning of Art. II(2),** one can consider this to be a more general standard which finds its specific application in inter alia the duty to provide full protection and security, the prohibition of arbitrary and discriminatory measures and the*

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[224] Rejoinder, para. 619.
[225] Rejoinder, para. 620.
[226] **Exh. RLA-37** Toto v. Lebanon, ICSID Case No. ARB/07/12, Award, 7 June 2012, para. 162, [RLA-36]; Gustav F W Hamester GmbH & Co KG v. Ghana, ICSID Case No. ARB/07/24, Award, 18 June 2010, para. 330; **Exh. RLA-38,** Bureau Veritas v. Paraguay, ICSID Case No. ARB/07/9, Further Decision on Objections to Jurisdiction, 9 October 2012, para. 211.

obligation to observe contractual obligations towards the investor. ***As demonstrated above, none of those obligations or standards has been breached***. *While this in itself cannot lead to the conclusion that the more general fair and equitable treatment standard has not been breached, it remains difficult to see how the judicial proceedings can be regarded as a violation of Art. II(2)(a) of the BIT […]"*[227] (Claimant's partial quote underlined, Respondent's emphasis in bold).

281. Reading beyond Claimant's partial quote indicates that (i) the tribunal was not in fact interpreting the FET standard in isolation but Article II(2) of the US-Romania BIT, an article which also includes, with the FET standard, the 'FPS', 'non-impairment' and 'umbrella clause' obligations referenced by the tribunal;[228] and (ii) the tribunal found that none of those obligations (including the obligation to observe contractual obligations) was breached. This case – the only one cited by Claimant for this proposition – is not authority that a contractual breach can, much less will, amount to a breach of the FET standard.

282. The remainder of the cases cited by Claimant relate to its subsidiary argument – that a breach of contract may amount to a breach of the FET standard if it involves something more – for example, a repudiation of the contract, or an abuse of right by the State.[229]

283. Where a breach of contract is caused by a State acting as a *puissance publique* (sovereign authority) in a way not contemplated by the contract, that can give rise to a breach of the FET standard. However, what is sanctioned as a breach of the FET standard is not the breach of contract, but the State's wrongful exercise of sovereign power. This explains the remarks by other tribunals which Claimant cites.

284. The facts of this case are nothing like those in the cases involving FET breaches cited by Claimant. Respondent has not exercised sovereign power – such as the passage of expropriatory legislation – to pursue its purported legal rights.[230] Nor has it abusively exercised its purported contractual rights, working in conjunction with other State agencies and in defiance of court orders, to attack Claimant's operations.[231] In all those cases, while there was a contractual context, it was the State's extra-contractual conduct, and exercise of sovereign power, that was held to be the breach of the FET standard.[232]

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[227] **Exh. CLA-71,** Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award dated 12 October 2005, para. 182, cited in Reply, para 303.
[228] Excerpted at para. 33 of the Award.
[229] Rejoinder, paras. 606-607 with cases cited therein.
[230] See the facts of **Exh. RLA-47,** Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic, ICSID Case No. ARB/09/01, Award, 21 July 2017, and **Ehx. RLA-121,** Quilborax v. Bolivia, ICSID Case No. ARB/06/2, Award, 16 September 2015.
[231] See the facts of **Exh. CLA-112,** Flemingo DutyFree Shop Private Limited v. Republic of Poland, UNCITRAL, Award dated 12 August 2016.
[232] Rejoinder, para. 608.

285. Claimant's 'contractual breach' claim does not involve any such sovereign power.

II. Expropriation

286. Respondent has not expropriated Claimant's investment. Claimant argues that Respondent has expropriated its investment by failing to comply with the Settlement Agreement. Respondent submits that its non-compliance with this instrument could not amount to an expropriation.

287. *First*, the Settlement Agreement, in itself, is not an investment under the BIT, and therefore it cannot be expropriated. Furthermore, Claimant has not shown that the Settlement Agreement is connected with any underlying investment. Even if contrary to Respondent's arguments the Arbitral Tribunal were to find that this instrument was connected with an underlying investment, Claimant would have to show that this underlying investment was expropriated – which Claimant has not attempted to do, as it has not tried to substantiate any link between this instrument and an alleged underlying investment.[233]

288. *Secondly*, even if the Agreement were an investment capable of being expropriated, Libya acted only as any private party could have in the circumstances, and has not had recourse to *puissance publique* (sovereign authority) in its dealings with Claimant.

289. *Thirdly*, in itself, Libya's non-compliance with the Settlement Agreement cannot in any event amount to an expropriation, since non-compliance with contractual obligations is an omission that does not subject investments to a measure.

290. *Finally*, any alleged debt resulting from the Settlement Agreement has not been expropriated or 'taken' in any way; Claimant can still seek to enforce any rights it says it has in the Libyan courts.

291. As for Claimant's argument that Respondent has expropriated Claimant's investment through 'repudiation', Respondent argues that a contractual breach by the State does not take or destroy the investment.[234]

292. Claimant also argues that expropriation can occur when it is committed through "state action". Based on Claimant's pleaded examples of what it labels 'state action', which seems to refer to any conduct of State entities whatever its nature, it is hard to conceive of any breach of contract by a State that would not involve 'state action' according to Claimant's interpretation. Accordingly, based on Claimant's own analysis, this cannot serve as a distinguishing factor either.[235]

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[233] Statement of Defense, para. 294.
[234] Rejoinder, para. 541.
[235] Rejoinder, para. 546.

293. Regardless of which descriptive label Claimant seeks to apply, the point is that Respondent has not taken or destroyed Claimant's alleged investment. Rather, there is disagreement that any amount is payable to Claimant under the Settlement Agreement as a matter of Libyan law. If that is incorrect, the Ministry's non-payment would have been in breach of a Libyan law contract. This would not however be an extraordinary breach or a 'repudiation' of an investment, but an ordinary incident of a contractual dispute, in which the justice system of the State is open to the investor. However analysed, that is not an expropriation. If it were, then any difference in legal opinion on the validity or effect of a contract by any State could be an 'expropriation'.

294. Also, concerning Respondent's alleged use of 'sovereign means' or 'sovereign authority' to expropriate the investment, Claimant has confused the mere involvement of the State, with a State acting in its sovereign capacity through acts of *puissance publique* (sovereign authority). Similarly, the pursuit by a State organ or other entity of 'State interests' and 'State objectives' does not mean that the acts in question necessarily involve the exercise of sovereign means or sovereign authority. A breach of contract, *per se*, even if one had occurred (which is denied), would not involve the exercise of either.[236]

295. To illustrate, while Claimant refers to Libya acting through its State lawyers, Ministry of Finance, Ministry of Foreign Affairs and State Budget Office; all the actions complained of, from the negotiating of agreements to the content of the legal argument presented, could have been performed by a hypothetical ordinary company and its various departments.[237]

296. Thus, while a State could in principle destroy the value of a right which had its origins in a contract through acts of *puissance publique* (sovereign authority), no such acts are alleged here.

III Umbrella Clause

297. Article 3 of the BIT does not entitle Claimant to import into the BIT the 'umbrella clause' in the Austria-Libya BIT.

298. The interpretation of MFN clauses is a contested and controversial issue of treaty interpretation. There is no *jurisprudence constante* (established case law). This is in part because there is no single standard MFN clause, but rather a range of provisions that provide for a kind of 'MFN treatment' which must be interpreted on a BIT-by-BIT basis.

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[236] Rejoinder, paras. 548-550.
[237] Rejoinder, para. 552.

299. This Arbitral Tribunal's task is to interpret Articles 3(2) and 3(3) in the Turkey-Libya BIT. The Arbitral Tribunal must approach its task in accordance with the established rules on treaty interpretation under international law. While some past awards may provide useful guidance in this task, such awards do not replace the interpretative process itself.[238]

300. The interpretation of treaty provisions is a single and unified process of interpretation. However, Claimant's claims can usefully be considered through three points of reference:[239]

I. MFN clauses, absent special wording, do not operate to 'import' provisions contained in treaties with third States. MFN clauses contain a promise of substantive treatment. However, MFN clauses in investment treaties have also been regarded by some tribunals and scholars as having another role: to 'import' more favourable provisions from third treaties into the basic treaty. How this 'importation' into the basic treaty is said to occur has not been explained satisfactorily in any of the authorities cited by Claimant.

II. Articles 3(2) and 3(3) of the BIT do not provide for the import of provisions from other treaties. There is no single MFN clause or form of MFN treatment, and each clause must be interpreted on its own terms. Articles 3(2) and 3(3) of the BIT contain three separate indications that the articles do not operate to import provisions from treaties with third States. *First*, Articles 3(2) and 3(3) apply to each State only "in its territory". *Secondly*, Articles 3(2) and 3(3) provide that "Neither Contracting Party shall subject investors" or "[…] subject investments" to treatment less favourable than it accords to investors or investments from any third State. This is prohibitory language, rather than a promise of treatment. *Thirdly*, each of Article 3(2) and Article 3(3) provides a single, unified protection regarding both most-favoured-nation and national treatment. There can be no question of a national treatment protection operating to 'import' other treaty provisions.

III. In any event, Articles 3(2) and 3(3) of the BIT do not provide for the import of protections not contained within the basic treaty. To the extent the Arbitral Tribunal considers that Articles 3(2) and 3(3) have an 'import' function, there are further reasons why any such importing should be limited to importing (i) more favourable versions of protections included within the basic treaty, if and when (ii) such protections are incorporated into new/future treaties.

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[238] Rejoinder, para. 647.
[239] Rejoinder, paras. 653-690.

301. A breach of contract does not automatically result in breach of an umbrella clause. *First*, an umbrella clause does not override the jurisdiction of domestic courts over contractual disputes, and Claimant's claims should therefore be rejected on admissibility grounds because the Settlement Agreement is subject to the exclusive jurisdiction of the Libyan Courts. *Secondly*, an umbrella clause extends only to contracts entered into in the exercise of sovereign authority, and Claimant has failed to show that the Settlement Agreement was entered into by Libya as a sovereign. Finally, an umbrella clause only protects contractual obligations that only a State can undertake.[240]

IV. "Pure" contract breach

302. As referred to above, Claimant does not dispute that the Settlement Agreement is governed by Libyan law and that this must extend to any issues raised as to its validity. Claimant however invites the Arbitral Tribunal effectively to ignore Libyan law and to instead find the Settlement Agreement "enforceable under international law principles of ultra vires or apparent authority". It relies for this purpose on the rules governing the attribution of conduct for the purposes of State responsibility, under the ILC Articles.

303. In Respondent's view, Claimant's argument is misconceived for at least two reasons.

304. *First*, the issue as to whether the Settlement Agreement is valid must be governed exclusively by Libyan law. It is absurd to suggest that a contract which is found not to be valid or binding under its undisputed governing law can somehow become 'valid' under a different law.[241]

305. *Secondly*, in any event, even if international law had any bearing on this issue (which is denied), the rules governing attribution for the purpose of State responsibility have nothing to do with the formation or interpretation of a contract.[242]

306. As explained in Article 2 of the ILC Articles, for State responsibility to arise, an act or omission at issue must (a) be attributable to the State under international law, and (b) constitute a breach of an international obligation of the State. The question of whether conduct that might breach an international obligation is attributable to the State is completely distinct from questions concerning the existence or interpretation of the international obligation at issue. Chapter II of the

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[240] Rejoinder, paras. 693-702.
[241] Rejoinder, para. 716.
[242] Rejoinder, para. 717.

ILC Articles applies to the attribution of conduct; not to the creation of new international obligations.[243]

307. The distinction is made clear by Professor Crawford, the Special Rapporteur on the ILC Articles, in an article exhibited by Claimant:

"It is sometimes argued that the question is one of attribution under Chapter 2 of Part I of the ILC's Articles on State Responsibility, but attribution has nothing to do with it. The issue of attribution arises when it is sought to hold the state responsible for some breach of an international obligation, including one arising under a substantive provision of a BIT"[244]

308. Accordingly, the rules of attribution under international law do not concern the creation of international obligations, and certainly not the creation of contractual obligations between a State ministry and a foreign company, and in any event cannot and do not alter the undisputed governing law of a contract.

D. THE TRIBUNAL'S REASONS

309. Claimant has advanced claims based on several different provisions of the BIT. The Parties have not requested that the different claims be dealt with in any particular order. Under these circumstances, the Arbitral Tribunal may assess the claims in the order it sees fit, and need only assess such claims as it deems sufficient to resolve the core question of liability (and if so, damages) or absence of liability. In the interest of judicial economy, the Arbitral Tribunal begins with its analysis of the claims based on the fair and equitable treatment standard in Article 2(2) of the BIT.

310. As will be developed below, the Arbitral Tribunal finds that Respondent has failed to accord Claimant's investment fair and equitable treatment. This being the case, the Arbitral Tribunal need not and will not examine any other alleged violations of the BIT, in particular since Claimant has not argued that the calculation of the damages claimed would change in the event that other treaty breaches were also found.

311. Nor will the Arbitral Tribunal assess any claims presented solely on contractual grounds, as discussed at para. 188. The damages claimed on contractual grounds are in any event lower than those claimed on treaty-based grounds.

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[243] Rejoinder, para. 718.

[244] **Exh. CLA-119,** James Crawford, Treaty and Contract in Investment Arbitration, Arbitration International (1 September 2008), p. 363. Professor Crawford's remarks are in the context of attempts to use rules of attribution to interpret investment contracts signed with legal entities other than the State itself as a contract by the State; he states that rules of attribution cannot create or alter a State's international obligations.

312. At the outset, the Arbitral Tribunal notes that it has taken cognizance of the difficult circumstances in Libya. In particular during 2011 and the following years, the State was afflicted by violence, upheaval and generally dire circumstances for the administration of public justice. The Arbitral Tribunal recognizes and has made allowances for the challenges involved in properly managing a State under these circumstances.

I. Legitimate Expectations

313. For the reasons set out below, the Arbitral Tribunal nevertheless finds that Respondent has violated Claimant's legitimate expectation with respect to the specific representations made prior to the conclusion of, and enshrined in, the Settlement Agreement.

314. The Arbitral Tribunal has found above, at paras. 154-167, that the Settlement Agreement constitutes a claim to money related to an underlying historical "investment," which claim itself constitutes an "investment" within the meaning of Article 1(2)(b) of the BIT. The investment with which Claimant's legitimate expectations are associated is thus the Settlement Agreement. In order to determine the scope of these expectations, the Arbitral Tribunal must examine which expectations Claimant had at the time when the Settlement Agreement was concluded.[245]

315. Respondent's conduct during the negotiations leading up to the conclusion of the Settlement Agreement in December 2013, as well as the Settlement Agreement itself, constitute specific representations with which Claimant legitimately could expect Respondent to comply.

316. The initial suggestion to try to settle the claims owed under the Court Decision emanates from discussions between the Derna branch of the State Litigation Department (which is part of the Ministry of Justice) and Claimant's lawyer, Mr. Elshelwy. The record shows that the first letter mentioning the potential of a settlement was sent from Mr. Elshelwy to the State Litigation Department, but Mr. Günay recalls that this letter was sent after the State Litigation Department had informally proposed that Claimant send such a letter.[246]

317. The State Litigation Department then initiated the settlement discussions by sending an internal letter to the Deputy Minister of Finance.[247] Following this letter, it was the Ministry of Finance that conducted the negotiations with Claimant's representatives Mr. Günay and Mr. Hasasu.

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[245] Respondent has itself argued that the expectations must arise when the investor made its investment. In making this point, Respondent relied on the *Teinver v. Argentina* award as authority. See **Exh. RLA-47**, Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic, ICSID Case No. ARB/09/01, Award, 21 July 2017, para. 667 and Rejoinder, paras. 580-581

[246] Second Günay Statement, paras. 22-23.

[247] **Exh. C-5,** Letter from Bashir Ali Elaktari, Deputy Minister, State Legal Proceedings, Ministry of Justice, to Deputy Minister, Ministry of Finance, 29 July 2013 (resubmitted).

318. In order to negotiate the Settlement Agreement, Claimant's representatives participated in several meetings with officials at the Ministry of Finance in 2013. During these meetings, representations were made by different officials concerning what was expected in order for the State to agree to a settlement.

319. Mr. El Velid at the Ministry of Finance's legal department suggested to Claimant's representatives Mr. Günay and Mr. Hasasu that Claimant propose terms for a settlement, in order to initiate the negotiations.[248] Mr. Günay has recounted that Mr. El Velid expressly said that a discount from the amounts awarded by the Court Decision was expected.[249]

320. Following this suggestion from Mr. El Velid, Claimant's representatives submitted a first settlement offer to the Ministry of Finance, which proposed a 5% discount on the receivables owed under the Court Decision. Based on this offer from Claimant's representatives, Mr. El Velid prepared a first draft of an agreement.[250]

321. At a later meeting during the negotiations, Claimant's representatives met with Mr. Tarik, the head of the Ministry of Finance's legal department. He told Claimant's representatives that the 5% discount from the first draft would not be accepted, and insisted that Claimant offer a higher discount.[251] Upon this suggestion, Claimant's representatives offered the 10% discount, which was ultimately included in an updated draft agreement.[252]

322. The updated draft version of the Settlement Agreement also provided for payment in two instalments at different dates in 2014, rather than immediately upon execution of the Agreement.[253] Mr. Tarik explained to Mr. Günay that the instalments were necessary in order for Claimant to receive its money, because the budget for 2013 had already been exhausted.[254]

323. In the final version of the Settlement Agreement, Respondent's representations were very specific: Respondent undertook to pay Claimant LD 5,420,308.707, spread out over two instalments at two different dates in 2014.[255] Both Parties also undertook to abandon "any domestic or international court litigation, application for enforcement abroad, or any court or administrative liens, whether international or domestic, in relation to the ruling subject hereof".[256]

324. Thus, the final version of the Settlement Agreement is the result of negotiations, in which two different officials at the Ministry of Finance suggested specific provisions concerning the sums owed, and the structure of their payment. The Arbitral Tribunal concludes that Claimant justifiably relied on these suggestions,

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[248] Second Günay Statement, para. 26.
[249] Second Günay Statement, para. 26.
[250] **Exh. ZG-9,** First draft of the Settlement Agreement.
[251] Second Günay Statement, para. 28.
[252] **Exh. ZG-10**, Second draft of the Settlement Agreement.
[253] **Exh. ZG-10**, Second draft of the Settlement Agreement, Article 3.
[254] Second Günay Statement, para. 30.
[255] **Exh. C-2,** Settlement Agreement, Article 3.
[256] **Exh. C-2,** Settlement Agreement, Article 7.

on the assumption that their inclusion in the Agreement would lead to Claimant being paid in 2014.

325. Subsequent to the signing of the Settlement Agreement, the Ministry of Foreign Affairs assisted Claimant in obtaining the signature samples needed to verify the authenticity of the Settlement Agreement for international recognition.[257]

326. Respondent was under no obligation to enter into the Settlement Agreement in the first place. On the contrary, it could have chosen to challenge the Court Decision rather than settle the claims enshrined therein.

327. In this respect, the Arbitral Tribunal recognizes that the Court Decision was rendered *in absentia*, which Respondent has pointed out as one of the reasons for its Appeal. The reason for Respondent's absence, as well as its consequences, are disputed by the Parties. Respondent has argued that it was never notified of the proceedings leading up to the Court Decision, and has relied on this fact as one of the grounds for its Appeal.[258]

328. However, Claimant has furnished contemporaneous evidence that Libyan officials did not consider the *in absentia* decision as necessarily being problematic. On 7 May 2013, i.e some six months after the Court Decision was rendered on 29 October 2012, the Director of Legal Proceedings in Derna informed the Deputy Minister of Finance that the Court Decision could not be successfully appealed, and should instead be settled:

> *According to our belief, the decision, **although finalized in absentia** against the State of Libya, has been decided justly and based on correct evidence. The administration delayed the payment of the Plaintiff company's proven receivables more than 10 years against the conditions of contract. This resulted the basis of the decision [SIC] of payment to the benefit of the company, the main receivables and the compensation.*
>
> *The Court Decision has been forwarded to our branch, and although we have taken decision to appeal the decision at the Cebel Ahtar Appeals Court (Derna), there are no serious reasons for Appeals Court to change or alter the decision of the Beida Primary Court, and the decision of the Appeals Court will most likely finalize to the benefit of the Plaintiff company.*
>
> *Therefore, I would like to notify and request approval from the Deputy Minister of Finance, to settle and consolidate the receivables with the company.*[259]

329. As already noted, Respondent subsequently decided to settle with Claimant rather than challenge the claims in the Court Decision. Despite this decision, and

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[257] First Günay Statement, para. 27
[258] Statement of Defense, para 69.
[259] **Exh. C-4**, Letter from Fattalah Avad Bin Hayal, Director for Legal Proceedings, Derna Directorate, to Deputy Minister, Directorate of Legal Proceeding, 7 May 2013 (emphasis added).

the associated representations to that effect reflected in the Settlement Agreement, Respondent thereafter proceeded with its Appeal.

330. The exact circumstances and timing of Respondent's appeal of the Court Decision have not been established during this Arbitration. However, during the settlement negotiations in 2013, officials at the Ministry of Finance assured Claimant's representatives that the Appeal would be abandoned.[260] As already mentioned, the Settlement Agreement also ultimately included a provision by which both Parties undertook to refrain from any litigation concerning the subject of the dispute. Article 7 of the Settlement Agreement provides that "*[a]ny domestic or international court litigation, application for enforcement abroad, or any court or administrative liens, whether international or domestic, in relation to the ruling subject hereof, shall be abandoned*".

331. Mr. Günay was assured that a copy of the Settlement Agreement would be sent from the Ministry of Finance to the State Litigation Department, which would then abandon the appeal in accordance with the Agreement.[261]

332. There is nothing in the record of this Arbitration that casts any light on what transpired in the Appeal during the time between the conclusion of the Settlement Agreement in December 2013 and the initiation of this Arbitration in August 2016. Mr. Günay has stated that he assumed that the Appeal was abandoned, in line with what was represented by Ministry of Finance officials and in line with what was included in the Settlement Agreement.

333. However, during this Arbitration, it became clear in September 2017 that the Appeal was still pending in the Beida Court of Appeal. In a letter to Claimant's counsel on 13 September 2017, Respondent's counsel indicated that a hearing was scheduled to take place in the Appeal on 3 October 2017. According to Mr. Günay, this was the first time Claimant received any information suggesting that the Appeal had not been abandoned as required by the Settlement Agreement. The September 2017 letter prompted Claimant's Request for Interim Measures, in which it asked the Arbitral Tribunal to order Respondent to suspend the Appeal, or alternatively to ask the Libyan Court to stay the Appeal pending the outcome of this Arbitration.[262]

334. It seems to be undisputed that Respondent has not complied with its obligations under the Settlement Agreement.[263] Under Article 3 of the Agreement, Respondent undertook to pay two different specified sums in two different instalments, and under Article 7, both Parties undertook to abandon any litigation relating to the subject matter of the Agreement. No money has been paid to Claimant, and Respondent has pursued court litigation in the Appeal, despite agreeing to abstain from doing so. Respondent has therefore frustrated Claimant's legitimate expectations that the representations and undertakings included in the Settlement Agreement would be respected.

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[260] **Exh. C-2,** Settlement Agreement, Article 7.
[261] Second Günay Statement, para. 46.
[262] Claimant's Request for Interim Measures, 9 October 2017, para. 63.
[263] Hearing Transcript, Day 1, pp. 15, 24; SoC, para. 168. This has not been disputed by Respondent.

II. Non-Performance of the Settlement Agreement

335. In addition to the frustration of Claimant's legitimate expectations, in the Arbitral Tribunal's view, Respondent has also breached the fair and equitable treatment standard through its non-performance of the Settlement Agreement.

336. The Arbitral Tribunal shares Respondent's view that not every breach of contract by a State violates the fair and equitable treatment standard.[264] However, the Settlement Agreement is different from a commercial agreement. It put an end to a relationship fraught with conflict between a foreign investor and the host State. In this respect, the facts in this Arbitration are similar to those in *Teinver v. Argentina* discussed by both Parties.[265]

337. In *Teinver*, the contract in question was a share purchase agreement, by which the State acquired the shares in two domestic airlines from the investor. In distinguishing the agreement from a commercial contract, the *Teinver* tribunal pointed out that the agreement was signed and ratified by the Argentine government.[266] Furthermore, the tribunal found that the purpose of the agreement was to fulfil a public obligation, *viz.* to ensure the provision and continuity of fair transportation services in the country.[267] The tribunal also emphasized that the share purchase agreement "was intended to put an end to the long and difficult relationship" between Respondent and the foreign investors, which had preceded the agreement. The Arbitral Tribunal finds the *Teinver* tribunal's analysis to be instructive, in particular as it concerns the State's intention to put an end to a long dispute by way of a formalized agreement.

338. In the present case, Claimant had spent considerable time and effort trying to collect on money owed to it by Libyan public authorities as compensation for Claimant's investment in public works projects in Libya. Eventually, these efforts led to the Court Decision, in which a Libyan court recognized the debts owed to Claimant.

339. When it became clear to Claimant's representatives that Respondent would not pay the sums awarded by the Court Decision, Claimant entered into negotiations to conclude the Settlement Agreement. As described above at paras. 315-330, both during the negotiations and thereafter, various Libyan officials represented to Claimant that the Settlement Agreement would be respected, which would ultimately lead to Claimant receiving the receivables owed to it under the Settlement Agreement.

340. Against this background, the Settlement Agreement is different from a "commercial" agreement. The Settlement Agreement was negotiated and drafted by Libyan public officials at both the Ministry of Justice and the Ministry of Finance. It was then approved for the purposes of international recognition by the Ministry of Foreign Affairs, assisted by the Ministry of Finance. The purpose of the Agreement was not commercial, but rather to end a long-running dispute with

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[264] As expressed in its Rejoinder, paras. 601-609.
[265] Rejoinder paras. 607-608; Reply, paras. 307, 324.
[266] **Exh. RLA-47**, *Teinver v. Argentina*, para. 854.
[267] Ibid.

Claimant, by settling a state debt. For these reasons, the Arbitral Tribunal finds that a breach of the Settlement Agreement is sufficient to generate responsibility under the fair and equitable treatment standard of the BIT.

341. Respondent has objected that it is pursuing an invalidation of the Settlement Agreement in the pending Tripoli Proceedings,[268] arguing that Respondent cannot be held liable for non-compliance with an agreement it views as invalid. In Respondent's view, the Settlement Agreement, as well as a number of similar agreements also entered into by Deputy Minister Ghaith Suleiman in 2012-2013, are null and void under Libyan law.

342. This objection is not convincing. The Tripoli Proceedings were initiated on 25 March 2018, more than a year and half after the initiation of this Arbitration.[269] Respondent cannot excuse its continuing non-performance of a contract entered into in 2013 with a reference to its effort to invalidate that contract in 2018. Furthermore, as discussed in paras 124-150, the Arbitral Tribunal has found that the Settlement Agreement is valid as a matter of Libyan law.

III. Arbitrary and inconsistent conduct

343. Furthermore, under the fair and equitable treatment standard in Article 2(2) of the BIT, Claimant had the right to expect that Respondent would act consistently and logically. Respondent has not lived up to these expectations.

344. The sequence of events demonstrates an inconsistent conduct on behalf of Respondent. During 2013, Respondent engaged in the settlement negotiations, which ultimately led to the signing of the Settlement Agreement in December 2013. Officials from the Ministry of Finance took an active part in the negotiations and suggested the inclusion of specific language in order for the Agreement to be acceptable to the State. This ultimately led Claimant to make certain concessions, including a 10% discount of the amounts owed, as well as dividing the payment into separate later instalments. These concessions were made by Claimant in response to representations by agents of the Respondent that they were needed to make possible an agreement.[270]

345. In the Agreement, both Parties agreed to abandon "any domestic or international court litigation, application for enforcement abroad, or any court or administrative liens, whether international or domestic, in relation to the ruling subject hereof".[271] Respondent has nevertheless chosen to pursue the Appeal subsequent to the conclusion of the Settlement Agreement. In addition, after Claimant's initiation of this Arbitration, in March 2018, Respondent also initiated the Tripoli Proceedings, in an effort to nullify the Settlement Agreement.

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[268] **Rejoinder**, para. 600 and Section III(E).
[269] **Exh. R-59,** State Litigation Department Initiating Court Pleading filed before the Northern Tripoli Court of First Instance, 25 March 2018.
[270] Second Günay Statement, paras. 29-30
[271] **Exh. C-2,** The Settlement Agreement, Article 7.

346. After the Settlement Agreement was signed, the Ministry of Foreign Affairs assisted Claimant in authorizing the Agreement.[272] In this process, the Ministry of Foreign Affairs was assisted by the Ministry of Finance, which provided signature samples.[273] Such authorization was believed to be necessary in order for Claimant to have the Settlement Agreement internationally recognized. In carrying out the authorization Claimant received assistance from two separate ministries, neither of which gave the impression that the Settlement Agreement would not be complied with.

347. Furthermore, despite Respondent insisting that the payment of the sums owed be divided into separate instalments to be paid during 2014 – as opposed to an immediate single payment – no money has been paid. Respondent induced Claimant to agree to the instalment scheme under the pretext that payment would be forthcoming if Claimant consented to it,[274] only thereafter to tell Mr. Günay to "wait" when he twice visited Libya in 2014.[275] Later, in 2015, Claimant sent three letters asking about the status of the missing payments, but did not receive any answer from Respondent.[276]

348. Compared to Respondent's consistent direct and indirect confirmation of the Settlement Agreement – as manifested both during the negotiations, in the Agreement itself and in the months after the signing of Agreement – the position advanced by Respondent in this Arbitration, i.e. that the Settlement Agreement is invalid, seems to be an afterthought conceived in order to present a defence in the Arbitration.

349. In sum, the Arbitral Tribunal finds that Respondent has acted arbitrarily and inconsistently, in a manner that violates the fair and equitable treatment standard.

IV. Summary

350. For the above reasons, the Arbitral Tribunal finds that Respondent has breached the fair and equitable treatment standard in Article 2(2) of the BIT. Given this outcome, based on the widely accepted principle of judicial economy, the Arbitral Tribunal will not examine whether Respondent also violated the provisions on expropriation, the umbrella clause in the Austria-Libya BIT, or any contractual obligations. Instead, the Arbitral Tribunal will now turn its attention to an analysis of the damages claimed for the breach of the fair and equitable treatment standard.

VIII. QUANTUM

351. Claimant has requested that the Arbitral Tribunal award compensation to Claimant for its damages, amounting to no less than USD 20,080,549.707 or,

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[272] First Günay Statement, para. 27.
[273] **Exh. C-28**, Letter from Ministry of Finance to Ministry of Foreign Affairs 2 March 2014.
[274] Second Günay Statement, para. 30.
[275] First Günay Statement, para. 28.
[276] Ibid.

alternatively, USD 19,768,000.384. Included in both alternative amounts is pre-award interest, as developed below at paras. 361-363.

352. In addition, Claimant has asked the Arbitral Tribunal to award moral damages to Claimant in an amount of no less than USD 3,000,000.

353. Claimant has also requested that the Arbitral Tribunal award Claimant interest calculated from 29 August 2016 at a rate to be compounded and fixed by the Arbitral Tribunal. Claimant suggests an annual interest rate of 4% calculated on a simple basis if the Arbitral Tribunal finds that Respondent has breached the Settlement Agreement as a matter of contract, or alternatively an interest rate of LIBOR plus 5%, compounded semi-annually if the Arbitral Tribunal finds that Respondent has breached the BIT.

354. Respondent has disputed these valuations, but accepted that any awarded interest should be set at the 4% simple rate specified in the Settlement Agreement.

355. Below, the Parties' respective positions concerning the valuation of Claimant's alleged losses are summarized.

A. CLAIMANT'S POSITION

I. Standard of Compensation

356. Respondent does not dispute that the standard of compensation in this case is, as established in the *Chorzów Factory* judgement, the standard of full reparation.[277] Claimant thus understands that Respondent accepts the *Chorzów* standard.

II. Valuation of the Investment

357. While the Settlement Agreement creates new rights going forward — the rights under the Settlement Agreement — it does so after explicitly recognizing the findings of the Court Decision. Furthermore, Respondent's subsequent repudiation of the Settlement Agreement constitutes the taking of all such rights that Respondent had recognized. The Settlement Agreement reflects a lower value than the Court Decision, a reduction which Claimant accepted only on the condition that Respondent would make the payments required under the Settlement Agreement in a timely fashion and that Respondent would abandon any legal proceedings with respect to the Court Decision. Respondent neither paid Claimant, nor abandoned the Appeal. Thus, none of the conditions have been fulfilled.[278]

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[277] Statement of Defense, Section V.
[278] Reply, para. 380.

358. Article 3 of the Settlement Agreement provides as follows:

> *The First Party shall pay the agreed sum after the waiver, a total of LD 5,420,308.707 (Five Million Four Hundred Twenty Thousand Three Hundred Eight Libyan Dinars and 707 Dirhams) in favor of the Second Party in two installments, to the account specified by the Second Party, as follows:*
>
> *- First payment – a sum of LD 2,710,154.354 (Two Million Seven Hundred Ten Thousand One Hundred Fifty Four Libyan Dinars and 354 Dirhams), payable by no later than the end of the first quarter of 2014G.*
>
> *- Second payment – a sum of LD 2,710,154.354 (Two Million Seven Hundred Ten Thousand One Hundred Fifty Four Libyan Dinars and 354 Dirhams), payable by no later than the end of the first half of the coming year, 2014G.*[279]

359. Under Article 4 of the Settlement Agreement, "[i]nterest due on the agreed amount as specified in Article (3) of this Agreement shall be calculated on each payment up to the time of actual payment."

360. Article 5 of the Settlement Agreement provides for the same exchange rate as in the Court Decision: "The amounts due to the Company as stipulated in Article (3) of this Agreement shall be transferred to the account of the Company abroad at an exchange rate against the United States Dollar as prevailing on 29.10.1994, of LD 0.299332 for 1 United States Dollar, as provided in the said ruling."[280]

361. Respondent disputes Claimant's calculation of damages under the Settlement Agreement. Respondent argues that, in calculating the value of the Settlement Agreement, interest shall accrue on the sums specified in Article 3 after they became due and not before, as Claimant argues. The text of the Settlement Agreement does not support this interpretation.

362. Article 4 of the Settlement Agreement specifically states that the interest shall be calculated on the "agreed amount as specified in Article (3) of this agreement."[281] It does not link the calculation of interest to any specific dates. Thus, interest should be calculated from the date of the execution of the Settlement Agreement, i.e., 9 December 2013.

363. In its Statement of Claim, Claimant, based on the information received from its legal expert at the time, utilized a 5% interest rate in its calculations. In his Second

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[279] **Exh. C-2**, Settlement Agreement, Art. 3.
[280] **Exh. C-2**, Settlement Agreement, Art. 5.
[281] **Exh. C-2**, Settlement Agreement, Art. 4.

Libyan Law Opinion, Mr. Mukhtar updated his opinion to indicate that the applicable rate should be 4%. In light of this correction, interest due on the principal amount would be LYD 228 590,442.395.[282] Accordingly, the principal amount plus interest would be LYD 6,010,751.105.[283]

364. Should the Arbitral Tribunal find that interest must be calculated from the payment dates, the amount of interest on the first payment would be LYD 261,956.837[284] and the amount of interest on the second payment would be LYD 234,929.545.[285] Consequently, the total amount due as of 29 August 2016, the date of the Request of Arbitration, comprising the principal amount and interest would be LYD 5,917,195.091.

365. Respondent also contends that the conversion rate specified in Article 5 of the Settlement Agreement does not apply to any interest accruing on the settlement amounts. In Claimant's view, this contention is incorrect. The provision on the conversion rate in Article 5 refers to a similar provision in the Court Decision.[286] The conversion rate under the Court Decision applies to all parts of the awarded amounts, including interest.[287] Since the Settlement Agreement is based on the Court Decision, there is no reason to believe that a different approach should be followed for the amounts due under the Settlement Agreement. Thus, the conversion rate specified in Article 5 of the Settlement Agreement must apply to all amounts due to Claimant.

366. The application of the conversion rate of LYD 0.299332 per USD 1 on the amount of LYD 6,010,751.105 results in the amount of USD 20,080,549.707. This amount represents Claimant's valuation of damages under the Settlement Agreement. Alternatively, the application of the conversion rate on the amount of LYD 5,917,195.091 results in the amount of USD 19,768,000.384. This amount represents Claimant's alternative valuation of damages under the Settlement Agreement.

367. Finally, Respondent seems to argue that the value of lost rights under the Settlement Agreement needs to be calculated by taking into consideration "factors mitigating the liability of the Ministry of Finance under Libyan law or Libya's liability under international law" and "Claimant's contribution to any injury

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[282] The number of days between 9 December 2013 and 29 August 2016 is 994. Thus, the calculation of the due amount would be as follows: 5,420,308.71 x 0,04 x (994 / 365) = 590,442.395.
[283] 5,420,308.71 + 590,442.395 = 6,010,751.105.
[284] The first instalment of 2,710,154.354 was due on 31 March 2014. The number of days between 31 March 2014 and 29 August 2016 is 882. Thus, the calculation of the due amount would be as follows: 2,710,154.354 x 0,04 x (882 / 365) = 261,956.837.
[285] The second instalment of 2,710,154.354 was due on 30 June 2014. The number of days between 30 June 2014 and 29 August 2016 is 791. Thus, the calculation of the due amount would be as follows: 2,710,154.354 x 0,04 x (791 / 365) = 234,929.545.
[286] **Exh. C-2**, Settlement Agreement, Art. 5 and Preamble.
[287] **Exh. C-1**, Court Decision, at 7.

suffered including by failing to engage with the competent Libyan courts since the date of the Court Decision." This is a statement which Respondent does not substantiate. In particular, Respondent does not explain what these factors are, how they should be quantified and how they would affect the valuation.

III. Moral Damages

368. Respondent argues that the awarding of moral damages in international arbitration "is far from universally accepted," especially as regards moral damages "suffered by corporate claimants."[288] Claimant argues that this statement is without support.

369. The prevailing jurisprudence allows that moral damages to officers and employees can be recovered by a corporation. This has been endorsed by legal scholarship, as well as arbitral tribunals.[289]

370. Following the approach reflected in the authorities referred to above, this Arbitral Tribunal must award Claimant moral damages suffered by Claimant's officers and employees, such as Messrs. Hikmet Günay, Ziya Günay and Yılmaz Hasasu, as a result of deterioration of their health, stress, anxiety and other mental suffering including humiliation, shame and loss of reputation, credit and social position. Indeed, such moral damages are an inherent component of the principle of full reparation.

371. Further, Respondent contends that a claim for moral damages is outside the jurisdiction of the Tribunal because such claim is not "in connection with" Claimant's investment.[290] This is incorrect. The current practice of investment tribunals confirms that such tribunals have, as a general matter, jurisdiction to award compensation for moral damages.[291]

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[288] Statement of Defense, para. 381.

[289] **Exh. CLA-12**, ARSIWA, Art. 31, para. 5; **Exh. CLA-77**, Opinion in the Lusitania Cases, Reports of International Arbitral Awards, 1 November 1923, Volume IIV 32-44, p. 40; **Exh. CLA-78**, *Desert Line v. Yemen*, paras. 289-291; **Exh. CLA-32**, *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability dated 21 January 2010, para. 476; **Exh. CLA-79**, *Pezold v. Zimbabwe*, paras. 908-921; **Exh. CLA-80**, *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. The Government of the State of Libya, The Ministry of Economy in the State of Libya, The General Authority for Investment Promotion and Protection Affairs, Ministry of Finance in Libya and The Libyan Investment Authority*, Ad Hoc Arbitration, Final Arbitral Award dated 22 March 2013, at 368-369; **Exh. RLA-24**, *Biwater v. Tanzania*, para. 773; **Exh. CLA-153**, Patrick Dumberry, Compensation for Moral Damages in Investor-State Arbitration Disputes, 27 J.INT.ARB 3 (2010) at 252-254.

[290] Statement of Defense, para. 381.

[291] See **Exh. CLA-153**, Dumberry, *Moral Damages in Investment Arbitration*, at 274; **Exh. CLA-78**, *Desert Line v. Yemen*, ¶ 289.

372. Besides, a claim for moral damages in this case arises directly from Claimant's investment. It is thus a claim that is "in connection with" the investment, and as such it is within the jurisdiction of this Tribunal.

373. Respondent next states that an award of moral damages can be warranted only "in exceptional cases," which, in Respondent's view, are absent in this case.[292] Claimant disagrees. Although arbitral tribunals generally look for certain criteria in awarding moral damages, they still exercise a great deal of discretion in doing so. Besides, a mere reference by tribunals to the "exceptional circumstances" does not necessarily mean that a high standard for finding a breach of international law in the context of moral damages claims must be applied

374. In Claimant's view, the conditions for awarding moral damages are present in this case. Claimant's claim for moral damages comprises both loss of reputation and mental suffering of Claimant's executives and employees. It is established in international law, and undisputed by Respondent, that a loss of reputation may lead to an award of moral damages. Claimant's deprivation of its investments in the forms of the Court Decision and the Settlement Agreement resulted in Claimant's losing the only assets it had and thus paralyzed Claimant's operation altogether, thereby depriving Claimant of any possibility to conduct any further business. This resulted in the destruction of Claimant's professional reputation, both in Libya and in Turkey.

375. The emotional and physical injuries suffered by executives and persons affiliated with Claimant is another important component of Claimant's claim for moral damages. The Court Decision and Settlement Agreement, as investments, embodied the efforts of such people as Messrs. Hikmet Günay, Ziya Günay and Yılmaz Hasasu over a period of more than 20 years. At great personal expense and with patience and hard work, they have contributed to establishing Claimant's investments that have been so blatantly destroyed by Respondent. The level of frustration, stress and injury to the feelings of these persons as a result of Respondent's unlawful actions cannot be overstated.

376. Mr. Ziya Günay explains in his Second Statement:

> *Over the last few years, my attempts to get receivables paid by Libyan officials has become one of the main focuses in my life. Libya's failure to comply with its obligations has cost so much to our family and its business that I regard it to be my mission to take this matter to its conclusion and to receive relief that would compensate for all the harms done to the Günay family's reputation, its social and business status, and in particular to the reputation and health of my father, Hikmet Günay.*[293]

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[292] Statement of Defense, paras. 382, 385.
[293] Second Günay Statement, para. 50.

377. Mr. Ziya Günay, together with Mr. Yilmaz Hasasu, travelled to Libya many times at great personal risk. They went to Libya, a place where no one else would go at the time, for the sole purpose to pursue high-ranking Libyan officials in charge of Claimant's case to make them honour Libya's obligations so that Claimant could finally get back what Respondent unlawfully took from it.

378. As guarantors of all of Claimant's bank loans and bank guarantees, the Günay company and Mr. Hikmet Günay in his personal capacity had to pay huge amounts due under these loans and guarantees, which was "at great cost to the Günay's own business and the Günay family estate."[294] To cover for the destruction of Claimant's investments, Mr. Hikmet Günay and Mr. Ziya Günay sold a number of property items that belonged to the Günay family with the total value of approximately USD 18.5 million.[295] When that did not cover all of Claimant's debts, which arose as a result of Respondent's failure to honour its obligations under the Court Decision and Settlement Agreement, the Günay family members had to sell their shares in the Günay company. Mr. Ziya Günay testifies that had Claimant received the payments under the Settlement Agreement in a timely fashion, the Günay family members would have never sold shares in the Günay company .[296]

379. Mr. Hikmet Günay himself had numerous health problems, and eventually had to cease working altogether as his life ran into danger as a result of continuous anxiety, stress and moral suffering.[297]

380. These circumstances amount to an exceptional case that warrants an award of moral damages. The losses and damages are difficult to quantify but they are as real as it gets. Claimant submits that the modest — relative to the suffering and agony of people involved — amount of USD 3,000,000 would compensate for all moral harms inflicted upon Claimant and persons associated with Claimant as a result of Respondent's breaches.

IV. Interest Rate

381. In addition to the pre-arbitration interest rate already included in the sums claimed, Claimant requests that the Arbitral Tribunal order Respondent to pay additional interest on any sums awarded in this arbitration.

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[294] Second Günay Statement, para. 51.
[295] Ibid.
[296] First Günay Statement, para. 31; Second Günay Statement, para. 51; **Exh. ZG-6**, Share Transfer Agreements.
[297] Second Günay Statement, para. 52.

382. If the Arbitral Tribunal finds that Respondent has breached the Settlement Agreement as a matter of contract, as opposed to as a matter of treaty, the interest rate should be calculated according to Libyan law. In Claimant's view, this means an annual interest rate of 4%, calculated on a simple basis.[298]

383. In the event that the Arbitral Tribunal finds that Respondent has breached the BIT, an international interest rate should apply. Claimant proposes an interest rate of LIBOR plus 5%, compounded semi-annually, as a reflection of the sovereign credit risk relating to Respondent. Compound interest reflects the prevalent view in the recent jurisprudence of investment treaty tribunals.[299]

384. Regardless of which rate the Arbitral Tribunal finds applicable, in Claimant's view that rate should be applied from the date of the request for arbitration.[300]

B. RESPONDENT'S POSITION

I. Standard of Compensation

385. The purpose of compensation is to "undo the material harm inflicted by a breach of an international obligation"[301] Such harm is the actual loss suffered by an investor, that has been caused by the State's breach of an international obligation.[302]

386. In relation to Claimant's expropriation claims, Article 4 of the BIT prescribes the relevant standard of compensation, being the "market value of the expropriated investment before the expropriatory action was taken or became known".

387. In relation to Claimant's non-expropriation treaty claims, the BIT does not contain an express standard of compensation.

388. Claimant simply claims that all of the alleged breaches of the BIT by Respondent "[...] resulted in a single outcome, i.e. the total destruction of [Claimant's] investments. [Respondent] must provide reparation for [Claimant's] full deprivation of its investments".

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[298] Second Mukhtar Opinion, para. 85.
[299] Transcript, Hearing Day 4, pp. 11-12.
[300] Transcript, Hearing Day 4, p. 14.
[301] **Exh. CLA-75,** S.*D.Myers Inc. v. Government of Canada*, UNCITRAL, Partial Award dated 13 November 2000, para. 315, cited in Statement of Claim, para. 215.
[302] **Exh. CLA-52,** *LG&E v. Argentina*, ICSID Case No. A.RB/02/1, Decision on Liability, 3 October 2006, Award, para. 45.

389. Thus, if Claimant cannot substantiate this allegation, its compensation claims fail in their entirety. Respondent notes in this regard that tribunals have only been ready to award compensation for the full loss of investments in respect of violations of non-expropriatory international legal obligations if the breach has produced effects equivalent to that of an expropriation.[303]

II. Valuation of the Investment

390. Claimant's argument is that the Arbitral Tribunal must award compensation based on the value of the Settlement Agreement.

391. Claimant has calculated damages for loss of the Settlement Agreement based upon its alleged entitlements under the Settlement Agreement; that is, to put Claimant in a position as if the Settlement Agreement had been performed. Such argument can therefore only succeed if the Settlement Agreement were to be found valid and binding.[304]

392. In the event that, despite Respondent's arguments, the Arbitral Tribunal finds that Claimant should be awarded compensation based on the value of the Settlement Agreement, Respondent comments below on how such loss should be calculated.

393. It is common ground between Claimant and Respondent that the Settlement Agreement is a Libyan law-governed document. Article 152(2) of the Libyan Civil Code provides:

> *"When a contract has to be construed it is necessary to ascertain the common intention of the parties and to go beyond the literal meaning of the words, taking into account the nature of the transaction as well as that loyalty and confidence which should exist between the parties in accordance with commercial usage."*[305]

394. Furthermore, Article 153(1) of the Libyan Civil Code provides that:

> *"In cases of doubt the construction shall be in favour of the debtor".*[306]

395. As to the calculation of interest, Article 4 of the Settlement Agreement provides that:

> *"Interest due on the agreed amount as specified in Article (3) of this Agreement shall be calculated on each payment up to the time of actual payment."*[307]

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[303] Rejoinder, paras. 725-726.
[304] Rejoinder, para. 736.
[305] **Exh. R-23,** Libyan Civil Code, Article 152.
[306] **Ibid.**, Article 153.
[307] **Exh. C-2,** Settlement Agreement, Article 4.

396. Interest on each of the two payments specified in Article 3 of the Settlement Agreement accrued only from the date that payment fell due. Article 3 provides for two payments, each of LYD 2,710,154.354, converted at a fixed USD/LYD rate specified in Article 5, and paid "by no later than" a specified date. It is unrealistic to suggest that the parties agreed that the Ministry of Finance would pay two specific USD sums by no later than a given date, and that it would also pay additional daily interest to accrue at an unspecified rate but which Claimant now says is 4% p.a.[308]

397. Claimant's interpretation would mean that the Ministry of Finance's contractual liability would be unknown, and would vary depending on the date when "actual payment" was made. This is unlikely to have been the parties' intention in any contract, and is especially unlikely in circumstances where the Ministry of Finance was (*arguendo*) tasked with arranging payment of USD 9 million to a foreign account, not a straightforward matter for a Libyan government entity in December 2013. Such a payment would need to be arranged well in advance and for a specific amount, and the date of "actual payment" would be difficult for the Ministry of Finance to predict.[309]

398. In contrast, Respondent's interpretation is that the parties agreed that if payment was not made on the due date, interest would, in principle, accrue on the specified sums. This is a realistic reading of the contractual terms and the parties' common intention.[310]

399. Respondent agrees to the modified arithmetic in para. 389 of Claimant's Reply as to the calculation of LD interest from the specified dates to 29 August 2016.[311]

400. Accordingly, the amount due up to 29 August 2016 in accordance with the terms of the Settlement Agreement is USD 18,108,1016.20[312] and LYD 496,886.382.

III. Moral Damages

401. Claimant is not entitled to moral damages. Moral damages may be awarded only in exceptional circumstances, which on any view are not present in this case.

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[308] Rejoinder, para. 740.
[309] Ibid.
[310] Ibid.
[311] Ibid.
[312] There appears to be a clerical error in para. 742 of Respondent's rejoinder, as the USD amount contains 11 numbers, rather than 10.

402. Claimant states that moral damages (i) are available including to corporate claimants; (ii) do not require exceptional circumstances; and (iii) should be awarded based on the witness evidence of Mr Günay.

403. As to the availability of moral damages, Respondent notes that such damages have only ever been awarded in exceptional circumstances and are not generally available, especially for corporate claimants.[313] Non-pecuniary loss requires a non-pecuniary remedy.

404. As to the availability of damages to corporate claimants specifically, as even Claimant's cited academic Dr Sabahi notes ""[a] strict application of the rules on standing should prevent awarding compensation for damage to the executives' personality rights in the latter scenario. Yet, such an approach could cause practical problems [if claims for 'moral damages' cannot be pursued before local courts] [...] (emphasis added)".[314]

405. Putting aside whether claims for 'moral damages' can ever be used to circumvent the rules on standing, it is not appropriate for companies to receive extra, non-compensatory damages, simply because one or more of its directors or employees is dissatisfied with a failed investment involving breaches of a treaty. Nor do moral damages exist to provide additional damages in circumstances where pecuniary loss has been suffered by non-parties to the arbitration and cannot be proved by the claimant, and/or where such pecuniary loss has a vague connection with, but is not caused by, the breaches of a treaty.[315]

406. As to the need for exceptional circumstances, Respondent respectfully disagrees with the view of Dr Dumberry, relied upon by Claimant,[316] whose personal view that moral damages should be available as a matter of course is not supported by the survey of awards in his 2010 article, and does not appear to have been supported in any award in the following eight years. Moral damages are not designed to compensate for economic/pecuniary loss, and their general availability for breach of investment treaty protections would be incompatible with the nature of investment treaties and investment treaty arbitration.

407. The two proceedings in which moral damages have been awarded by experienced tribunals were characterised by grave and exceptional

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[313] **Exh. RLA-4**, Z. Douglas, The International Law of Investment Claims (2009), para 276.
[314] **Exh. CLA-154,** Borzu Sabahi, Compensation and Restitution in Investor-State Arbitration: Principles and Practice (Oxford University Press 2011), para. 6.2.6. Dr Sabahi goes on to suggest that what he describes as a "legal shortcoming" can be circumvented.
[315] Rejoinder, para. 747.
[316] Reply, para. 400

circumstances.[317] In the many other cases in which moral damages have been claimed, they have been rejected.

408. Finally, Mr Günay's witness evidence does not assert, much less prove, any facts that would give rise to an award of moral damages. Respondent notes that there is no hint of physical duress to Claimant or its representatives by or on behalf or Respondent. The pleaded "suffering and agony" bears no relation to the serious conduct and harm identified in *Desert Line* and *von Pezold.* Nor does Mr Günay's statement provide concrete evidence of the harm asserted.[318]

409. Moreover, Claimant's submissions suggest that it is seeking 'moral damages' in respect of conduct which pre-dates the BIT, and accordingly for conduct not in breach of any obligation under the BIT. In Respondent's view, this ignores the principle of non-retroactivity, by asserting that the effects of conduct and events as much as 20 years prior to the BIT's entry into force somehow entitle Claimant to damages under the BIT. Such efforts must fail.[319]

IV. Interest Rate

410. As to interest after 29 August 2016, the 4% simple interest rate suggested by Claimant's expert represents an appropriate rate of interest, and represents more than fair compensation for Claimant's actual loss in circumstances where the US one-year LIBOR rate during 2014 averaged 0.56%.

411. Accordingly, Respondent submits that interest would continue to accrue at a rate of LYD 594.01 per day.[320]

412. As to the application of the exchange rate, Article 5 of the Settlement Agreement provides that the "amounts due to [Claimant] as stipulated in Article (3) of the Agreement shall [be transferred at the specified exchange rate]". This highly favourable exchange rate is expressed to apply only to the principal sum in Article 3, not to any interest that may accrue under Article 4. To adopt Claimant's reasoning, if the parties had wished to apply this exchange rate to any interest, at an unspecified rate, that might accrue due to late payment, they would have done so, rather than expressly applying the exchange rate only to amounts in Article 3, which refers to the principal sum only. In any event, insofar as there is

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[317] **Exh. CLA-78,** Desert Line v. Yemen, ICSID Case No. ARB/05/17, Award, 6 February 2008; **Exh. CLA-79,** Bernhard von Pezold and others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award dated 28 July 2015.
[318] Rejoinder, para. 750.
[319] Rejoinder, para. 751.
[320] Ibid.

doubt regarding the interpretation of Article 5, the clause must be construed in favour of the debtor, the Ministry of Finance.[321]

413. Any interest rate should be simple, and not compounded. Compound interest is rarely awarded, but when it is, it is reliant on pleading and proving loss from specific alternative sources of funding, which Claimant has failed to do.[322]

414. The rate of interest for any sums awarded should be the 4% rate specified in the Settlement Agreement.[323]

415. Should the Arbitral Tribunal instead propose an internationally pegged rate, Respondent suggests 12 months Euro LIBOR plus 1%. Claimant's circumstances do not justify any other rate, as Claimant has had no cost of lending for investment or for doing business in Libya, which Claimant ceased in 1998.[324]

C. THE TRIBUNAL'S REASONS

416. The BIT provides for standards of compensation for expropriation.[325] There is no provision, however, dealing with the standard of compensation for a breach of the fair and equitable treatment standard. In determining the compensation owed for the breach of the fair and equitable treatment standard, the Arbitral Tribunal has proceeded from the customary international law standard of full reparation for the injury caused, as reflected in Article 31 of the ILC Articles on State Responsibility. The object is to put the injured party in the same position it would have been in, had the illegal act not been committed.

417. Claimant has advanced alternative claims for compensation, depending on whether the Arbitral Tribunal finds Respondent liable on contractual or treaty-based grounds. In the event that the Arbitral Tribunal finds Respondent liable under a treaty-based standard, Claimant has argued for the damages to be calculated the same way regardless of which treaty standard is found to have been violated.

418. The Arbitral Tribunal has found that Respondent violated the fair and equitable treatment standard in Article 2(2) of the BIT. The Arbitral Tribunal will therefore proceed with its determination of the damages based on Claimant's claims for compensation for this violation.

I. Valuation

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[321] Rejoinder, para. 741.
[322] Transcript, Hearing Day 4, p. 93.
[323] Ibid.
[324] Transcript, Hearing Day 4, pp. 93-94.
[325] **Exh. CLA-1**, Turkey-Libya BIT, Articles 4(2)-4(3).

419. The Parties seem to agree that the principal damages owed under the Settlement Agreement is the principal sum specified in the Agreement itself, i.e. LD 5,420,308.707.[326]

420. However, the Parties disagree over the calculation of interest due under the Agreement, as well as the application of the exchange rate from LD to USD.

421. Although the Parties agree that under Libyan law, the applicable interest rate for the sums due under the Settlement Agreement is 4%, they disagree over the date when interest starts to accrue. Claimant has argued that the appropriate starting point is the date of the execution of the Settlement Agreement, i.e. 9 December 2013, whereas Respondent has argued that the appropriate starting point is the two separate dates when the two respective instalment payments were due.

422. The Settlement Agreement does not specify the date from which interest accrues. Article 4 provides that "Interest due on the agreed amount as specified in Article (3) of this Agreement shall be calculated on each payment up to the time of actual payment." The amounts referred to in Article 3 are two equal sums of LD 2,710,154.354 to be paid by 31 March 2014 and 30 June 2014 respectively.

423. The Parties also disagree over whether or not the currency exchange rate in the Settlement Agreement applies also to the interest accrued under the Settlement Agreement. In Claimant's view, the exchange rate applies to all parts of the awarded amounts, including interest. In Respondent's view, the exchange rate only applies to the principal amount owed.

424. In the Arbitral Tribunal's view, the appropriate dates when interest under the Settlement Agreement starts to accrue are as of the respective due dates of the two sums. In this respect, the Arbitral Tribunal agrees with Respondent that it is not realistic to assume – in the absence of any indication to this effect in the text of the Settlement Agreement – that the parties intended for Respondent to pay a daily interest rate from the date of the conclusion of the agreement, as opposed to from the date when the respective payments fell due.

425. As for the exchange rate in Article 5 of the Settlement Agreement, the Arbitral Tribunal agrees with Claimant that this rate should apply also to the interest accrued on the awarded principal amounts. As pointed out by Claimant, Article 5 refers back to a similar provision in the Court Decision.[327] The Court Decision expressly states that the exchange rate applies to all amounts, including interest owed on the principal amount.[328] As the Settlement Agreement is based on the amounts in the Court Decision, it is reasonable that the same principle applies to the exchange rate under the Settlement Agreement in the absence of any indication to the contrary.

426. For the above reasons, the Arbitral Tribunal finds that interest on the principal amounts owed under the Settlement Agreement starts to accrue at the contractually specified rate of 4% as of the dates when the sums should have

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[326] Reply, para. 389; Rejoinder, para. 736
[327] Reply, para. 391.
[328] **Exh. C-1,** p. 7.

been paid, and that the currency exchange rate specified in the Settlement Agreement applies also to this interest.

427. In these circumstances, the total damages owed under the Settlement Agreement up to 29 August 2016, the date of the request for arbitration, is USD 19,768,000.38.[329]

428. The total damages as of the date of the Award, including interest as per such date, amount to USD 21,865,554. This sum is arrived at through the following calculation. Interest calculated from the payment dates on the principal amount of LD 5,420,308.707 means that interest at 4% on the first payment amounts to LD 575,889.2375239454112.[330] Interest at the same rate on the second payment amounts to LD 548,861.944788183898158.[331] Adding these two interest sums to the principal amount of LD 5,420,308.707 leads to a total amount of LD 6,545,059.889312129309358 due as of the date of the Award. Applying an exchange rate of LD 0.299332 per USD 1 to this amount results in a total sum of USD 21,865,554.

II. Moral Damages

429. Claimant has requested USD 3,000,000 as compensation for moral damages, suffered by Claimant's officers and employees.

430. The Arbitral Tribunal shares Respondent's view, as expressed by numerous other tribunals, that moral damages are only available in exceptional circumstances.

431. In the rare cases where tribunals have awarded moral damages, the factual circumstances have been different from those in the present case. In the two awards referred to by Claimant – *Desert Line v. Yemen*[332] and *Bernhard von Pezold and others v. Republic of Zimbabwe*[333] – the circumstances were exceptional. In *Desert Line*, the tribunal found that Respondent had exerted physical duress on the claimant's executives, in a manner that was "malicious and [...] therefore constitutive of fault-based liability".[334] In *von Pezold and others v. Republic of Zimbabwe,* the tribunal was presented with testimony from Mr. von

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[329] The first instalment of 2,710,154.354 was due on 31 March 2014. The number of days between 31 March 2014 and 29 August 2016 is 882. Thus, the calculation of the due amount would be as follows: 2,710,154.354 x 0,04 x (882 / 365) = 261,956.837. The second instalment of 2,710,154.354 was due on 30 June 2014. The number of days between 30 June 2014 and 29 August 2016 is 791. Thus, the calculation of the due amount would be as follows: 2,710,154.354 x 0,04 x (791 / 365) = 234,929.545.

[330] The first instalment of 2,710,154.354 was due on 31 March 2014. The number of days between 31 March 2014 and 22 July 2019 is 1939. Thus, the calculation of the due amount would be as follows: 2,710,154.354 x 0,04 x (1939 / 365) = 575,889.2375239454112.

[331] The second instalment of 2,710,154.354 was due on 30 June 2014. The number of days between 30 June 2014 and 22 July 2019 is 1848. Thus, the calculation of the due amount would be as follows: 2,710,154.354 x 0,04 x (1848 / 365) = 548,861.944788183898158.

[332] **Exh. CLA-78,** Desert Line v. Yemen, ICSID Case No. ARB/05/17, Award, 6 February 2008.

[333] **Exh. CLA-79**, Bernhard von Pezold and others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, 28 July 2015.

[334] **Exh. CLA-78,** Desert Line v. Yemen, ICSID Case No. ARB/05/17, Award, 6 February 2008, para. 290.

Pezold, which was "never seriously challenged" by the state,[335] of humiliation, death threats, assault, kidnapping and firearms put to the heads of Mr. von Pezold and his staff.[336]

432. The facts of the present case do not constitute such exceptional circumstances. Although Claimant's representatives – in particular Mr. Günay – have encountered financial and emotional difficulties in attempting to collect on the money owed to Claimant, these difficulties do not rise to the level of harm required to justify moral damages. Ultimately, this case concerns Respondent's frustrations of contractual undertakings, as reflected in the Settlement Agreement. Although the difficulties associated with the long period of time during which Claimant's representatives have worked to collect the money owed were exacting, Claimant has not been able to demonstrate convincingly any physical duress or harm to its reputation resulting from Respondent's conduct. Under these circumstances, non-compensatory damages of the kind requested by Claimant cannot be available. In this respect, the Arbitral Tribunal's conclusion finds support in the findings of several other tribunals.[337]

433. For these reasons, the Arbitral Tribunal rejects Claimant's claim for moral damages.

III. Post-Award Interest Rate

434. The Parties have advanced different claims for the appropriate interest rate applicable to the damages awarded in this Arbitration.

435. The Court Decision, which forms the basis for the Settlement Agreement, provides for a relatively high rate of interest of 7,5%.[338] As a result, the sums owed to Claimant have increased from some LD 1,9 million in the Court Decision,[339] to the LD 5.4 million agreed to in the Settlement Agreement.

436. The parties agreed in the Settlement Agreement to a simple interest rate of 4% per annum. On the same theory on which the Arbitral Tribunal determines that the principal amount of damages suffered by the Claimant is the sum agreed to in that agreement, the Arbitral Tribunal has calculated the interest due as of the date of the commencement of this arbitration, and continuing through until the date of the Award, at the agreed rate of 4% simple interest.

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[335] **Exh. CLA-79**, Bernhard von Pezold and others v. Republic of Zimbabwe, ICSID Case No. ARB/10/15, Award, 28 July 2015, para. 919.
[336] Ibid., para. 918.
[337] **Exh. RLA-150,** Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Award, 8 May 2008; **Exh. CLA-68,** Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award dated 8 April 2013; **Exh. RLA-52**, Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award, 28 March 2011; **Exh. RLA-150,** Victor Pey Casado and President Allende Foundation v. Republic of Chile, ICSID Case No. ARB/98/2, Award, 8 May 2008.
[338] **Exh. C-1,** Court Decision, p. 7.
[339] Transcript, Hearing Day 4, p. 8.

437. Against this background, the Arbitral Tribunal is reluctant to award post-Award interest at the rate requested by Claimant. Furthermore, as pointed out by Respondent, Claimant does not seem to have incurred any costs associated with the sovereign risk of Respondent.

438. For these reasons, the Arbitral Tribunal finds that a reasonable post-Award interest rate is LIBOR + 3% per annum, compounded annually from the date of the notification of the Award until the date of payment.

IV. Summary of Quantum

439. The Arbitral Tribunal finds that the damages owed to Claimant under the Settlement Agreement as per the date of the Award is USD 21,865,554. In addition, Respondent shall pay post-Award interest on this amount at a rate of LIBOR + 3% per annum, compounded annually from the date of the notification of the Award. The claims for moral damages are rejected.

IX. COSTS

440. Pursuant to Articles 37(4) of the ICC Rules, the Arbitral Tribunal has a wide discretion to "*fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties*".

441. Each Party has requested that the Arbitral Tribunal order the other Party to pay its costs and expenses.

442. In this respect, Claimant has submitted that its costs and fees amount to USD 3,945,151.33. This amount includes legal fees; expert fees and costs; costs associated with travel, personnel, arbitration hearing and other related costs; and fees and expenses to the ICC.

443. Respondent has submitted that its costs and expenses amount to GBP 1,393,321.59 and USD 63,750.00. These amounts cover legal fees; expert fees; disbursements; and the advance on costs paid to the ICC.

444. Both Parties have included in their cost submissions sums that have already been paid to the ICC: Claimant in the amount of USD 516 250 and Respondent in the amount of USD 63,750. On 2 July 2019, the ICC Court fixed the ICC costs of arbitration at USD 542,600, out of which USD 478,850 was paid by Claimant and USD 63,750 was paid by Respondent.

445. As for each Party's costs and expenses, in the Arbitral Tribunal's view, both Parties' respective claims are reasonable.

446. According to Article 37(5) of the ICC Rules, in exercising its discretion in apportioning the costs the Arbitral Tribunal may take into account "such

circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner". In the ICC Secretariat's Guide to ICC Arbitration, a number of other factors to take into account are listed. Of particular importance is the outcome of the case, about which the Secretariat states that "the arbitral tribunal is likely to allow [an entirely successful party] to recover some or all of its reasonable costs from the losing party".[340]

447. Claimant is the prevailing party, having succeeded on both jurisdiction, liability and most of its claimed damages. However, Claimant did not succeed on its request for moral damages, nor on its November 2017 request for interim measures.

448. The Arbitral Tribunal further considers that both Parties have generally acted in an expeditious and cost-effective manner, especially given the occasionally challenging circumstances involved in obtaining documentation and witness testimony from within Libya.

449. Taking these circumstances into account, the Arbitral Tribunal, in exercise of its discretion under Articles 37(4)-(5) of the ICC Rules, finds it appropriate that each side bears its own costs and expenses, and that Respondent pays the costs of arbitration fixed by the ICC Court at USD 542,600. Therefore, Respondent shall pay USD 478,850 to Claimant as compensation for the costs already paid by Claimant.

X. DECISIONS

450. For the reasons set out above, the Arbitral Tribunal declares and decides as follows:

I. Respondent's objections against the Arbitral Tribunal's jurisdiction are rejected;

II. The Arbitral Tribunal has jurisdiction over all of Claimant's claims based on the BIT and raised in this arbitration;

III. Respondent has breached Article 2(2) of the BIT by failing to accord fair and equitable treatment to Claimant's investment;

IV. Respondent shall pay damages to Claimant in the amount of USD 21,865,554, including pre-award simple interest accrued at 4% per annum;

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[340] **Exh. RLA/IM-2**, J Fry, S Greenberg and F Mazza, *The Secretariat's Guide to ICC Arbitration*, para. 3-1488.

V. Claimant's claims for moral damages are rejected;

VI. All other requests and claims are rejected;

VII. Respondent shall pay interest on the sum USD 21,865,554 awarded from the date of the notification of the Award at the rate of LIBOR + 3% per annum, compounded annually;

VIII. Each side shall bear its own costs and expenses associated with the proceedings;

IX. Respondent shall pay the costs of this Arbitration fixed by ICC Court at USD 542,600. Therefore, Respondent shall pay USD 478,850 to Claimant as compensation for the costs already paid by Claimant.

Place of arbitration: Geneva, Switzerland
Date: 22 July 2019

Signatures:

John M. Townsend
Co-arbitrator

Kaj Hobér
President

Jean Kalicki
Co-arbitrator

CERTIFIED TRUE COPY OF THE ORIGINAL
PARIS, 29 NOVEMBER 2019

Alexander G. FESSAS
Secretary General
ICC International Court of Arbitration

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22236/ZF/AYZ
ETRAK INSAAT TAAHUT VE TICARET ANONIM SIRKETI (Turkey) **vs/** THE STATE OF LIBYA (State of Libya)

CERTIFICATE

I, the undersigned, Alexander G. Fessas, Secretary General of the International Court of Arbitration of the International Chamber of Commerce ("the Court"):

HEREBY CERTIFY THAT:

On 29 July 2019, the final award in the above-referenced matter, signed and dated 22 July 2019, was notified to the parties pursuant to Article 34(1) of the ICC Arbitration Rules of 2012 (the "Rules").

Article 34(6) of the Rules provides that: "*Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made*".

Paris, 22 October 2019.

Alexander G. Fessas
Secretary General
ICC International Court of Arbitration