1. MUSTAFA ORHAN ÖZER (Turkey)

2. NURETTIN MENDOST DIRLIK (Turkey)

(the "Claimants")

v.

THE STATE OF LIBYA

(the "Respondent" and, together with the Claimants, the "Parties")

DECISION ON THE CONSTITUTION OF THE TRIBUNAL

Tribunal

Prof. Gabrielle Kaufmann-Kohler (Presiding Arbitrator)

Jean-Pierre Harb

J. Christopher Thomas QC

Tribunal Secretary

Ankita Godbole

6 April 2022

I. PROCEDURAL BACKGROUND

1. By a single Notice of Arbitration dated 2 November 2020 (the "Notice"), the Claimants commenced arbitration proceedings against The State of Libya (the "Respondent" or "Libya") pursuant to the 2009 Agreement between the Republic of Turkey and Great Socialist People's Libyan Arab Jamahiriya on the Reciprocal Promotion and Protection of Investments (the "BIT"), and the 1981 Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organization of the Islamic Conference (the "OIC Treaty"). The Claimants appointed Dr. Karim Hafez as co-arbitrator in the Notice.

2. By its letter of 9 February 2021, Libya appointed J. Christopher Thomas QC as "arbitrator in respect of the arbitration purportedly commenced by [the Claimants] under Article 8 of [the] Turkey-Libya BIT". However, on the basis that the OIC Treaty was improperly invoked and was therefore not applicable, Libya "made no appointment in respect of the matters that [the Claimants] ha[d] purported to refer to arbitration under Article 17 of the OIC Agreement by their notice of arbitration dated 2 November 2020".[1] On the same day, Libya informed the Claimants that it had Mr. Thomas QC in respect of the arbitration commenced under the BIT but "ha[d] made no appointment in respect of the matters that [the Claimants] have purported to refer to arbitration under Article 17 of the OIC Agreement".[2]

3. By its letter of 26 April 2021, Libya accepted the Claimants' proposal that the co-arbitrators should proceed to appoint the Presiding Arbitrator but added that such appointment would be without prejudice to (i) "[the Claimants'] position regarding the validity and scope of Mr. Thomas QC's appointment" as well as (ii) "[Libya's] clear position that Mr. Thomas QC has been appointed only in respect of the arbitration that [the Claimants] ha[d] purportedly commenced under the BIT, that he has not been appointed under the OIC [Treaty] and that the appointment to be made by the two co-arbitrators will only be in respect of the BIT arbitration". Finally, Libya "consent[ed] to the Claimants' position [on the scope of Mr. Thomas QC's appointment] being put to the Tribunal upon constitution".[3]

4. In the circumstances, by their communication of 4 May 2021, the Claimants requested "the two appointed co-arbitrators [to] immediately start engaging towards the appointment of a President in coordination with the Parties".[4]

5. On 16 November 2021, the Claimants appointed Mr. Jean-Pierre Harb as their co-arbitrator to replace Dr. Hafez following the latter's resignation.

6. In December 2021, after consulting the Parties, the co-arbitrators proposed the appointment of Prof. Gabrielle Kaufmann-Kohler as the President of the Tribunal. Following Prof. Kaufmann-Kohler's acceptance of her appointment, the Tribunal was constituted on 12 January 2022.

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1 See, Respondent's letter to Mr. Thomas QC dated 9 February 2021, submitted to the Tribunal during the course of the proceeding.

2 Respondent's letter to Claimants dated 9 February 2021, Exh. C-78.

3 See, Respondent's letter to Claimants dated 26 April 2021, Exh. C-79.

4 See, Claimants' letter dated 4 May 2021, Exh. C-80.

7. On 17 January 2022, the Tribunal circulated drafts of the Terms of Appointment ("draft ToA") and Procedural Order No. 1 ("draft PO1") to the Parties for their comments. The Tribunal and the Parties also agreed to hold a first procedural hearing by videoconference on 31 January 2022 to discuss and finalize the procedural calendar and the draft procedural documents just mentioned.

8. The Parties' disagreement regarding the OIC Treaty (mentioned at paragraph 2 above) directly impacted the content and consequently the finalization of the Terms of Appointment. Accordingly, during the first procedural hearing, the Tribunal proposed that it would decide on the applicability of the OIC Treaty before finalizing the ToA. The Parties agreed with this proposal.[5] At the same time, the Parties agreed to the finalization of PO1 and the Procedural Calendar, as neither document depended on the Tribunal's decision regarding the OIC Treaty.

9. Consequently, the Tribunal issued PO1 in final form ("PO1") on 2 February 2022 and the Procedural Calendar in final form on 4 February 2022.

10. On 17 February 2022, Libya filed a submission regarding the applicability of the OIC Treaty ("R-Submission") together with legal authorities RLA-1 to RLA-10.

11. On 9 March 2022, the Claimants submitted an answer to Libya's Submission on the applicability of the OIC Treaty ("C-Answer") together with Exhibits C-78 to C-81 and legal authorities CLA-18 to CLA-29.

12. On 16 March 2022 (i.e., 7 calendar days following the Answer), the Respondent submitted a reply to the Claimants' Answer ("R-Reply") together with legal authorities RLA-11 to RLA-13.

13. On 17 March 2022, the Tribunal noted that while the Respondent had sought to retain the possibility to reply to the Claimants' submissions on the OIC Treaty during the first procedural hearing, the Parties had agreed with the Tribunal's counter proposal that the Respondent should seek leave to file a reply and the Tribunal would then take a decision on the need for such reply. This being said, to ensure that it had all the necessary elements to rule on the applicability of the OIC Treaty, the Tribunal accepted the Respondent's Reply and, with a view to ensuring equality, granted the Claimants 7 calendar days from the date of the Reply to submit a rejoinder.

14. On 23 March 2022, the Claimant submitted its Rejoinder on the applicability of the OIC Treaty ("C-Rejoinder") together with Exhibit C-82 and legal authority CLA-30.

II. PARTIES' POSITIONS

A. THE RESPONDENT'S POSITION

15. Libya submits that the Parties' disagreement raises two issues regarding the applicability of the OIC Treaty:

[5] Audio recording of the first procedural hearing circulated by the PCA, 00:00 – 05:45 minutes.

> "(i) first, the scope of the appointments made in this case – as to which Libya submits there can be no doubt – and whether / how, in light of the appointments that have been made, an arbitration can proceed; (ii) second, whether in international law in general a claimant can bring arbitration pursuant to multiple instruments in one arbitration and, if so, in what circumstances, and whether this is a case in which that is possible."[6]

16. According to Libya, the Tribunal must presently determine only the first of these two issues. Libya contends that it "included discussion of the second question to explain why it was only appointing [a co-arbitrator] under the BIT, to set out the extent to which the Claimants' approach would prejudice Libya's rights under the OIC Treaty and to support its position that the arbitration can proceed under the BIT". In other words, its submissions provided the context in which the first question arises for determination.[7] These submissions were not intended to raise an issue for the Tribunal's determination at this stage.

(1) Scope of Libya's appointment

17. Libya contends that it appointed Mr. Thomas QC only in respect of the arbitration commenced under the BIT, as is clear from its correspondence with the Claimants:[8]

a. First, contrary to the Claimants' reading of the 9 February 2021 letter, Libya asserts that it did not appoint Mr. Thomas QC as co-arbitrator "in respect of *this arbitration*", thereby referring to the arbitration as a whole. On the contrary, Libya clearly stated that it had "appointed an arbitrator in respect of the arbitration purportedly commenced by [the Claimants] under Article 8 of [the] Turkey-Libya BIT" and further that it had made no appointment in respect of the matter referred to arbitration under the OIC Treaty.[9] According to Libya, there is no proper basis to interpret this letter as making a broader appointment.

b. Second, Libya's subsequent correspondence does not indicate that it consented to Mr. Thomas QC being given a broader mandate. Libya argues that its letter of 26 April 2021 expressly stated that it was agreeing to the co-arbitrators appointing a presiding arbitrator "without prejudice to its clear position that Mr. Thomas QC has been appointed only in respect of the arbitration […] purportedly commenced under the BIT."[10]

18. As a result, it is Libya's submission that there is no basis to characterize its correspondence as appointing Mr. Thomas QC for the "arbitration as a whole".

19. Following from this conclusion, Libya stresses that Prof. Kaufmann-Kohler's appointment as the President of the Tribunal can only be in respect of the BIT arbitration. This is because first, Libya's participation in the appointment of the presiding arbitrator was expressly limited to the BIT arbitration[11] and, second, Prof. Kaufmann-Kohler's

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6 R-Reply, ¶ 3.

7 R-Reply, ¶ 5.

8 R-Submission, ¶¶ 2-3; R-Reply, ¶ 4.

9 R-Reply, ¶¶ 7.1-7.3, citing Respondent's letter dated 9 February 2021, Exh. C-78.

10 R-Reply, ¶¶ 9-10, citing Respondent's letter dated 26 April 2021, Exh. C-79.

11 See, R-Reply, ¶¶ 9-10, citing Respondent's letter dated 26 April 2021, Exh. C-79.

appointment was made by Mr. Thomas QC, who was himself only appointed in respect of the BIT arbitration.[12]

20. In the circumstances, Libya submits that there is no tribunal in place in respect of the arbitration purportedly commenced by the Claimants under the OIC Treaty, this observation being "the start and end of the analysis".[13]

(2) Claimants' commencement of a single arbitration is improper

21. In any event, so Libya asserts, a claimant cannot commence one arbitration under two distinct treaties by submitting a single notice of arbitration when the arbitration provisions in the two treaties are incompatible.

22. Applying this proposition to the present case, Libya contends that the arbitration provisions in the BIT and OIC Treaty contain fundamental differences that make them incompatible, with the result that disputes arising under these treaties cannot be submitted to one single arbitration.

23. For example, first, the BIT provides for the application of either the ICSID, UNCITRAL or ICC Rules at the Claimants' choice. The OIC Treaty contains no such provision and permits the Tribunal to decide all aspects of the procedure. The fact that the Tribunal may choose to adopt the UNCITRAL Rules does not overcome this inconsistency. Second and importantly, the provisions for the constitution of the Tribunal are different. In light of the Claimants' choice of the UNCITRAL Rules, the BIT provides the host State a period of 30 days to appoint a co-arbitrator, whereas the OIC Treaty provides a period of 60 days. Moreover, if the host State fails to appoint a co-arbitrator, the default appointment process under the BIT and the OIC Treaty are different. Third, the temporal scope of the OIC Treaty, which entered into force in 1988, is larger than that of the BIT, which only applies to disputes arising after 22 April 2011. Finally, the OIC Treaty contains a bespoke enforcement provision whereby a contracting party is obliged to implement arbitral awards in its territory "as if it were a final and enforceable decision of its national courts". By contrast, the BIT provides that each Contracting Party "commits itself to execute the award according to its national law". Thus, "[o]ne is a provision to execute the award under national law […]; the other is a provision requiring the decision to be executed as if [it were] a final and enforceable court decision".[14]

24. According to Libya, in accordance with the generally accepted approach in international arbitration, the Claimants should have commenced separate arbitrations and then sought the Respondent's consent to consolidate the proceedings. Absent Libya's consent, the Claimants' initiation of a single arbitration under two different treaties is impermissible and significantly undermines Libya's rights.[15]

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12 R-Submission, ¶ 2.

13 R-Submission, ¶ 3.

14 See, R-Submission, ¶¶ 8, 11-15.

15 R-Submission, ¶¶ 5.2, 17 *ff*, citing B Hanotiau, *Complex Arbitrations: Multi-party, Multi-contract, Multi-issue – A Comparative Study* (2nd Edition, Jun 2020), p. 302 *et seq*. and provisions for multi-party, multi-contract or multi-issue arbitration under the ICC, LCIA, SIAC, HKIAC Rules, among others.

25. Libya further submits that the Claimants' reliance on various investment arbitration awards to support their position is unavailing. First, the cases cited by the Claimants (and referenced at footnote 20 below) in support of the proposition that it is common practice for investors to initiate multi-party or multi-treaty arbitrations, do not advance the Claimants' position. The mere fact that multi-treaty cases exist "does not establish that a claimant can bring such a claim as of right and force that approach on a State which *does* object" to such an approach being taken.[16] Second, Libya asserts that multi-treaty arbitrations are not "common practice". In support, it points to an unpublished decision of the PCA, upholding the Czech Republic's decision not to appoint a single arbitrator in respect of claims brought by multiple investors under the ECT and a number of different BITs.[17] Finally, for Libya, the decision in the *Guaracachi* case, on which the Claimants rely, is distinguishable because the *Guaracachi* tribunal held that there was no fundamental incompatibility between Bolivia's consents to arbitration in the two BITs at issue in that case, which would result in either consent being violated if the two claims were heard together. Here, says Libya, there are multiple fundamental incompatibilities between the arbitration provisions in the two treaties at issue.[18]

26. In any event, even if the Claimants' position were correct and they could commence a single arbitration under the BIT and the OIC Treaty, it would not mean that Libya's appointment can be deemed to be made under the OIC Treaty as well. Libya's consent to arbitrate disputes under the OIC Treaty is circumscribed by the procedure provided in Article 17. That provision establishes default rules in the event a party fails to appoint an arbitrator. These default rules require the other party to request the appointing authority under the OIC Treaty – the Secretary General of the OIC – to make the appointment. The Claimants have not resorted to the default procedure, choosing instead to issue a single notice of arbitration and then maintaining that the Respondent must appoint an arbitrator under both treaties.[19] According to Libya, such circumvention of the default rules is impermissible.

27. As the Respondent has appointed Mr. Thomas QC only in respect of the arbitration under the BIT, Prof. Kaufmann-Kohler's appointment is also so limited. There can thus be no "declaration" that "the Tribunal" has been properly constituted under both the BIT and the OIC Treaty. Nor is there any basis for an interim award on costs as requested by the Claimants.

B. THE CLAIMANTS' POSITION

28. In response to Libya's contentions, the Claimants advance that (1) they validly initiated a single arbitration in respect of claims under two different treaties; (2) as a consequence, Libya's appointments were and could only have been for the arbitration as a whole; and

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16 R-Reply, ¶ 7.

17 R-Reply, ¶ 18.1, citing Investment Arbitration Reporter report dated 1 January 2014 'Following PCA decision, Czech Republic thwarts move by solar investors to sue in single arbitral proceeding …', Exh. RLA-11.

18 R-Reply, ¶ 19.

19 R-Submission, ¶ 18; R-Reply, ¶¶ 21-26.

(3) in any event, Libya consented to claims under both the BIT and the OIC Treaty being referred to a single arbitration.

(1) The Claimants validly initiated a single arbitration in respect of claims under two different treaties

29. The Claimants note that Libya's limited appointment of Mr. Thomas QC is premised on its reasoning that the Claimants purportedly initiated two distinct arbitrations, one under the BIT and another under the OIC Treaty, albeit under a single reference. However, this very premise is incorrect. The Claimants started a single arbitration by way of a single Notice of Arbitration in relation to a single set of facts under the BIT and the OIC Treaty.

30. Further, contrary to Libya's arguments, the Claimants contend that "there is overwhelming prior case law supporting [their] position that the initiation of a single investment arbitration, in relation to a single set of facts, on the basis of several instruments, is common practice".[20] By contrast, there is only one case - *Guaracachi America and Rurelec v. Bolivia* – in which the respondent State argued that an arbitration initiated based on several investment treaties should be treated as multiple separate proceedings, and this argument was unanimously rejected by that tribunal.[21]

31. In particular, the *Guaracachi* tribunal held that the Claimants "did not commence two separate arbitrations in respect of two independent arbitral claims that have subsequently been consolidated". Rather, they initiated "*ab initio* and in the same arbitration, two claims by two claimants against one respondent, regarding the same dispute and involving the same set of facts, albeit allegedly in violation of two different BITs concluded by the Respondent with the UK and the US, respectively".[22] Moreover, the consent to arbitration provided by the respondent State under the two treaties invoked in this case "contain[ed] no limitation that would preclude the joint submission by two or more Claimants of identical claims under different BITs".[23] On this basis, the *Guaracachi* tribunal determined that Bolivia had consented to its hearing the claims submitted under the two BITs.

32. The Claimants submit that the *Guaracachi* tribunal's findings apply equally in the present case, because (i) this arbitration was commenced as one proceedings involving a single set of facts under two treaties; (ii) both the BIT and OIC Treaty are silent on the possibility of "multi-party", "multi-agreement" arbitrations; and (iii) neither the BIT nor the OIC Treaty

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20 C-Answer, ¶ 18, C-Rejoinder, ¶ 11, citing *Ioannis Kardassopoulos and Ron Fuchs v. Georgia,* ICSID Case No. ARB/05/18, Award dated 3 March 2010, Exh. CLA-21; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. The Republic of Hungary,* ICSID Case No. ARB/12/2, Decision on Respondent's Objection under ICSID Arbitration Rule 41(5) dated 11 March 2013, Exh. CLA-22; *Ampal-American Israel Corporation and others v. Arab Republic of Egypt,* ICSID Case No. ARB/12/11, Decision on Jurisdiction dated 1 February 2016, Exh. CLA-23*; Duke Energy Electroquil Partners & Electroquil S.A. v. Republic of Ecuador,* ICSID Case No. ARB/04/19, Award dated 18 August 2008, Exh. CLA-24; *Pac Rim Cayman LLC v. Republic of El Salvador,* ICSID Case No. ARB/09/12, Decision on the Respondent's Preliminary Objections under CAFTA Articles 10.20.4 and 10.20.5 dated 2 August 2010, Exh. CLA-25*.*

21 C-Answer, ¶ 16, citing *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award dated 31 January 2014, Exh. CLA-26.

22 *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award dated 31 January 2014, Exh. CLA-26, ¶ 338.

23 *Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award dated 31 January 2014, Exh. CLA-26, ¶ 346.

expressly exclude the possibility of "multi-party arbitrations," which implies consent of the contracting States to a tribunal resolving claims brought under both treaties.[24] According to the Claimants, Libya's attempt to distinguish *Guaracachi* from the present case is without merit.[25]

33. Similarly, the Claimants assert that the two legal authorities cited by Libya in support of its position bear no relevance to the case at hand. The first decision is not public and thus, any reporting in specialized journals lacks necessary particulars.[26] The second case relied upon by the Respondent is equally irrelevant because the claimant in that case deliberately chose to bring two separate proceedings under the ICSID Convention and the OIC Treaty and subsequently proposed that they be consolidated.[27]

34. Therefore, so the Claimants argue, Libya's attempt to limit unilaterally the scope of the Tribunal's mandate and of the claims referred to arbitration cannot withstand scrutiny.

(2) Libya's arbitrator appointments were made for the arbitration as a whole

35. Following from the above conclusion, the Claimants say, the "Respondent's February 9, 2021 appointment of Mr. Christopher Thomas QC as its co-arbitrator, as well as its subsequent agreement on the procedure to appoint the President, must be deemed to have been made for the arbitration as a whole, and any reservations made at the time […] should be considered only as reservations in terms of potential jurisdictional objections to be further argued and substantiated at the appropriate time set in the procedural calendar".[28] More specifically, the reservation that Libya "did not 'accept that claims can be brought against it by way of investor-State arbitration under the OIC Agreement or that [Claimants] can commence arbitration under the OIC Agreement' […] could not have had […] any impact on the scope of the legal instruments and the validity of this appointment for the purposes of the arbitration as a whole".[29]

36. According to the Claimants, their characterization of the Respondent's appointment is reinforced by subsequent correspondence. They note that, in its 26 April 2021 letter, Libya expressly consented that the Claimants' position regarding the scope of Mr. Thomas QC's appointment would be put to this Tribunal upon its constitution. In so doing, Libya confirmed that the Tribunal would have to rule upon its reservation.[30]

37. Similarly, by the 4 May and 16 November 2021 letters, the Claimants requested the co-arbitrators to appoint a presiding arbitrator. This request, the Claimants note, was expressly without prejudice to Libya's position that Mr. Thomas QC had not been

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24 C-Answer, ¶¶ 17.1-17.3.

25 C-Rejoinder, ¶¶ 14-17.

26 C-Rejoinder, ¶ 12.1, referring to Investment Arbitration Reporter report dated 1 January 2014 "Following PCA decision, Czech Republic thwarts move by solar investors to sue in single arbitral proceeding…", Exh. RLA-11, p. 1.

27 C-Rejoinder, ¶ 12.2, referring to Investment Arbitration Reporter report dated 7 March 2022 "Power plant dispute triggers two arbitration claims against Iraq …", Exh. RLA-12.

28 C-Rejoinder, ¶¶ 18-23.

29 C-Answer, ¶ 5.

30 C-Answer, ¶ 7, referring to Respondents' letter to Claimants dated 26 April 2021, Exh. C-79.

appointed under the OIC Treaty and to the Claimants' position regarding the validity and scope of Mr. Thomas QC's appointment. According to the Claimants, this language meant "such issues would have to be put to the Tribunal for determination in accordance with the internationally recognized principle of Kompetenz-Kompetenz".[31]

(3) Libya consented to claims under both Treaties being referred to a single arbitration

38. The Claimants further argue Libya should be deemed to have consented to claims under the BIT and the OIC Treaty being brought by way of a single arbitration in light of (i) the compatibility between the arbitration clauses in both treaties; (ii) the object and purpose of the treaties; and (iii) the absence of contrary indications under the applicable law.

39. First, the dispute resolution clauses in the BIT and the OIC Treaty are not incompatible. In order to demonstrate incompatibility, clauses must be irreconcilable, which in turn depends on the extent to which the terms of each clause make the conduct of one proceeding impossible.[32] The Claimants submit that the Respondent has not shown that the arbitration clauses in the BIT and the OIC Treaty meet this standard. Libya's argument that the two clauses provide for different default appointment mechanisms is unavailing because it is not established that these mechanisms would obstruct the practical possibility of a single proceeding. The fact that the two clauses provide for different arbitration rules is equally unavailing since a tribunal constituted under the OIC Treaty could adopt the UNCITRAL Rules.[33]

40. As a second argument in favor of Libya's consent to one arbitration, the Claimants point to the purpose of the treaties and the similar protections afforded.[34]

41. Third, the Claimants underline that the Respondent has failed to substantiate any obstacles arising from the applicable law to the initiation of a single arbitration in respect of claims under the two Treaties.[35]

42. On this basis, the Claimants request the Tribunal to grant the following relief:

> "a. Declare that it was properly constituted under both the BIT and the OIC Treaty;
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> b. Order Libya to pay the costs incurred by Claimants in connection with this phase of the proceedings; and
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> c. Order any other relief that the Tribunal deems appropriate."[36]

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31 C-Answer, ¶ 6, referring to Claimants' letter dated 4 May 2021, Exh. C-80; Claimants' letter dated 16 November 2021, Exh. C-81.

32 C-Answer, ¶ 25, C-Rejoinder, ¶ 28, citing Karim Youssef, Consent in Context, 2009, Exh. CLA-27, p. 146, § 6:30.

33 C-Rejoinder, ¶¶ 28-29.

34 C-Rejoinder, ¶ 30; C-Answer, ¶¶ 28-33.

35 C-Answer, ¶ 34.

36 C-Rejoinder, ¶ 32; C-Answer, ¶¶ 26.1-26.5,

III. ANALYSIS

A. PROCEDURAL OBJECTION

43. As a preliminary matter, the Claimants object to the Tribunal's decision to permit a second round of submissions regarding the OIC Treaty. In particular, the Claimants submit that "by email dated March 17, 2022, and without first affording Claimants an opportunity to comment, the Tribunal ruled that Respondent's unsolicited and unscheduled submission was admissible, and afforded Claimants a mere 7 calendar days to respond thereto".[37] The Claimants' concern is that Libya's unsolicited submission will delay the Tribunal's decision on the OIC Treaty issue and thus have an adverse impact on the preparation of the Memorial.

44. The Tribunal takes due notice of the Claimants' objection. It is true that no second round of submissions was scheduled. A second round had been discussed at the first hearing, but it had then been agreed that if a Party wished to have a second opportunity, it should seek leave to make such submission. It is further correct that the Respondent did not comply with this procedure. This said, the Tribunal was of the view that a second round might usefully contribute to its understanding of the issues and that it was important not to delay the proceedings. Hence, it accepted the Reply and granted equal time for the Rejoinder. Be this as it may, the Tribunal is satisfied that both Parties were duly heard and that it is now in a position to issue an informed decision.

B. SCOPE OF THIS DECISION

45. This Decision addresses what the Parties have called the applicability of the OIC Treaty. More precisely, it deals with whether the appointment of Mr. Thomas QC and consequently that of Prof. Kaufmann-Kohler were made under the BIT only or under the BIT and the OIC Treaty. In resolving these issues, the Tribunal at the same time, by logical implications, determines under which treaty(ies) it is constituted.

C. DISCUSSION

46. The crux of the Parties' disagreement is whether this Tribunal is validly constituted under the OIC Treaty in addition to under the BIT.

47. According to Libya, its correspondence clearly demonstrates that the appointment of Mr. Thomas QC and by extension of Prof. Kaufmann-Kohler was made only in respect of the BIT claims. By contrast, the Claimants argue that they initiated a single arbitration under two treaties by way of one notice of arbitration, and that Libya's appointment of a co-arbitrator and the co-arbitrators' appointment of the presiding arbitrator can only be construed as appointments made for purposes of the arbitration as a whole.

48. It follows from the Parties' positions that, in the first place, they disagree whether Libya's litigious appointments at issue were limited to the BIT as a matter of fact. The Tribunal will thus begin by establishing the relevant facts (1). It will then determine the legal

[37] C-Rejoinder, ¶ 5.

consequences that follow from its factual findings (2). Because the President's appointment is contingent upon that of Mr. Thomas QC, the Tribunal will focus on the latter.

1. Scope of appointment as a matter of fact

49. The starting point for determining the scope of Libya's appointment is the Claimants' Notice of 2 November 2020. Through that Notice, the Claimants initiated a single arbitration against Libya under the BIT and the OIC Treaty. Pursuant to their selection of the UNCITRAL Rules under the BIT, they proposed the constitution of a three-member tribunal and appointed an arbitrator in respect of the claims under the BIT as well as the OIC Treaty. The Claimants further noted that "[p]ursuant to Article 17 of the OIC Treaty, Libya ha[d] sixty days to inform Claimants of the name and contact details of the arbitrator it wishes to appoint, failing which Claimants [would] move for a default appointment".[38]

50. In response to the Notice, on 9 February 2021, Libya wrote to Mr. Thomas QC "to appoint [him] as arbitrator in respect of an arbitration purportedly commenced by [the Claimants] pursuant to Article 8 of the [BIT] by Notice of Arbitration dated 2 November 2020". Further, observing that the Notice also referred to Article 17 of the OIC Treaty and purported to commence arbitration pursuant to that provision, Libya expressly informed Mr. Thomas QC that it "makes no appointment in respect of that arbitration" and his appointment "is only in respect of the arbitration purportedly commenced under Article 8 of the [BIT]".[39] On the same day, Libya wrote to the Claimants informing them that it had "appointed [Mr. Thomas QC] in respect of the arbitration purportedly commenced […] under Article 8 of [the BIT]" but "ha[d] made no appointment in respect of the matters that [the Claimants] have purported to refer to arbitration under Article 17 of the OIC Agreement".[40] Libya also briefly articulated its reasons for making an appointment only in respect of the BIT claims.

51. In the Tribunal's view, the language of these two letters is unambiguous: Libya's appointment of Mr. Thomas QC was only in respect of the BIT claims. Contrary to the Claimant's argument, Libya was not purporting to appoint Mr. Thomas QC in respect of the arbitration as a whole, subject to any jurisdictional or other reservations. Whether Libya's approach has legal merit is a separate issue and does not alter the fact that Libya appointed Mr. Thomas QC under the BIT.

52. It is true that Libya's wording referred to the arbitration commenced under the BIT as if there had been two separate arbitrations (one under the BIT and one under the OIC Treaty), when the Claimants had commenced one arbitration only. However, this does not change the Respondent's intention to make an appointment concerning the BIT and not the OIC Treaty. In other words, the record is clear that Libya has not appointed an arbitrator for purposes of the OIC Treaty claims.

53. Nothing in the Parties' subsequent correspondence shows a change in Libya's position. In its letter of 26 April 2021, while confirming that the co-arbitrators should begin the process

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38 Notice, ¶¶ 129-131.

39 Respondent's letter to Mr. Thomas QC dated 9 February 2021, submitted to the Tribunal during the course of the proceedings.

40 Respondent's letter to Claimants dated 9 February 2021, Exh. C-78.

of appointing a presiding arbitrator, Libya specified that any appointment so made would be without prejudice to its position that "Mr. Thomas QC has been appointed only in respect of the [BIT] arbitration […] and that the appointment to be made by the two co-arbitrators will only be in respect of the BIT arbitration".[41] In other words, as far as Libya was concerned, the appointment of a presiding arbitrator would result in the constitution of a Tribunal under the BIT only.

54. In the same letter, Libya "consent[ed] to the Claimants' position [regarding the scope of Mr. Thomas' QC's appointment] being put to the Tribunal upon constitution". In the Tribunal's view, this statement cannot be construed as consent to the Tribunal also being constituted under the OIC Treaty. Given Libya's position in respect of the co-arbitrator's appointment, it can only mean that Libya agreed that the dispute over the scope of the appointment(s) be resolved by the Tribunal at the outset of the proceedings.

55. Finally, the Tribunal is not persuaded that the letter of 4 May 2021, addressed by the Claimants to the co-arbitrators on behalf of both Parties, can be interpreted as Libya's agreement that the forthcoming tribunal would be constituted for the claims under the OIC Treaty as well. This letter narrates the positions adopted by the Parties in their prior correspondence. Nothing express or implied in the text indicates that the Respondent was changing its position and appointing Mr. Thomas QC or the presiding arbitrator in respect of both treaties.

56. In the circumstances, the Tribunal finds that, as a matter of fact, Libya limited the appointment of Mr. Thomas QC and by extension, Prof. Kaufmann-Kohler to the claims under the BIT only.

2. The consequences of Libya's appointment

57. The consequence arising from the facts just established is that the Tribunal has not been constituted under the OIC Treaty.

58. Yet, the Claimants submit that Libya's limited appointment should not be given effect. Instead, Libya "must be deemed to have made a valid co-arbitrator appointment, and to have validly consented to the appointment of Prof. Dr. Gabrielle Kaufmann-Kohler as President, for purposes of ruling on the entire dispute put to the Tribunal, including in respect of the OIC Treaty".[42] In support, the Claimants contend that (i) "the present arbitration was […] initiated as a single arbitration by way of a single Notice of Arbitration, in relation to one single set of facts, under both the Turkey-Libya BIT and the OIC Treaty";[43] (ii) it is legally valid and indeed common practice for investors to initiate a single investment arbitration under one or more investment treaties;[44] (iii) Libya consented to claims under the BIT and the OIC Treaty being referred by way of a single arbitration; and (iv)

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41 Respondent's letter to Claimants dated 26 April 2021, Exh. C-79.

42 C-Answer, ¶ 9.

43 C-Rejoinder, ¶ 9, C-Answer, ¶ 8.

44 C-Rejoinder, ¶¶ 11 *ff;* C-Answer, ¶¶ 13 *ff.*

consequently, the Respondent's appointment of Mr. Thomas QC and Prof. Kaufmann-Kohler "must be deemed to have been made for the arbitration as a whole".[45]

59. In response, Libya argues that the Tribunal need not determine whether the Claimants can initiate a single arbitration pursuant to multiple instruments. In the event the Tribunal nevertheless addresses this issue, Libya contends that Article 17 of the OIC Treaty does not provide for investor-State arbitration; that the Claimants cannot commence a single arbitration under two distinct treaties when the arbitration provisions in the two treaties are incompatible, as in the present case;[46] and that the Claimants have offered no legal basis for "deeming" Libya's appointment to be made for the arbitration as a whole.[47]

60. The Tribunal does not consider it necessary or useful to determine whether the Claimants are entitled to submit disputes arising under distinct treaties to one proceeding or, differently worded, whether the Contracting States to the BIT and OIC Treaty have consented to being sued in one arbitration involving claims brought under both treaties. Indeed, even assuming an affirmative answer to these questions, Libya's appointment of an arbitrator – and the power of that arbitrator to participate in the selection of the president – would remain limited to the BIT, with the result that the Tribunal's constitution is subject to the same limitation.

61. On this basis, the Tribunal cannot but hold that the appointment of Mr. Thomas QC and subsequently of Prof. Kaufmann-Kohler were made under the BIT only. Therefore, the Tribunal is duly constituted under the BIT.

IV. OPERATIVE PART

62. In light of the foregoing reasons, the Tribunal makes the following decision:

(i) Mr. Thomas QC was appointed under the BIT only;

(ii) Prof. Kaufmann-Kohler was appointed under the BIT only;

(iii) The Tribunal is constituted under the BIT only;

(iv) The draft Terms of Appointment will be finalized on this basis; and

(v) The costs related to the present decision will be addressed at a later stage.

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45 C-Rejoinder, ¶¶ 18 *ff.*

46 R-Submission, ¶¶ 8, 11 *ff.*

47 R-Reply, ¶¶ 4, 8.

Date:

Jean-Pierre Harb
(Arbitrator)

J. Christopher Thomas QC
(Arbitrator)

Prof. Gabrielle Kaufmann-Kohler
(Presiding Arbitrator)

Date:

Jean-Pierre Harb
(Arbitrator)

J. Christopher Thomas QC
(Arbitrator)

Prof. Gabrielle Kaufmann-Kohler
(Presiding Arbitrator)

Date: 6 April 2022

Jean-Pierre Harb
(Arbitrator)

J. Christopher Thomas QC
(Arbitrator)

Prof. Gabrielle Kaufmann-Kohler
(Presiding Arbitrator)