4A_461/2019[1]

Judgment of November 2, 2020

First Civil Law Court

Federal Judge Kiss, Presiding
Federal Judge Niquille,
Federal Judge May Canellas,
Clerk of the Court: Mr. Bittel

State of Libya – Litigation Department, Foreign Disputes Committee,
represented by Monika McQuillen and Dr. Claudius Triebold,
Appellant,

v.

A._____ Anonim Sirketi,
represented by Daniel Hochstrasser and Julia Jung,
Respondent

Facts:

A.
A._____ Anonim Sirketi, (Claimant, Respondent) is a Turkish company with its registered office in U._____. Since 1980, it has been involved in more than 35 public construction works on the territory of the State of Libya (Defendant, Appellant). At the beginning of the 1990s, it suspended its works due to unpaid invoices.

Between 1994 and 2005, the Claimant attempted to recover payment of the outstanding invoices from the Defendant. Between 2007 and 2008, it participated in an "Audit and Review of Outstanding Liabilities of Libya's Treasury" which was conducted by the Libyan Ministry of Finance. Beginning in 2009, it attempted to obtain payment of the total amount which was ascertained in the course of that audit, to no avail. On September 27, 2012, it filed an action in the court of first instance in Beida, Libya. By Decision of October 29, 2012, that court adjudged the Defendant liable to pay 1,906,360.23 Libyan Dinar (LD) plus interest for open receivables from the above-referenced construction projects as well as damages in the amount of LD 1,000,000.00 for the Claimant's unsuccessful efforts at collection (hereinafter: Beida Judgement). The Defendant was absent from these proceedings. On January 23, 2013[*sic*], the

[1] Translator's Note: Quote as State of Libya *v.* A._____ Anonim Sirketi, 4A_461/2019.
The decision was issued in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

Defendant, represented by the State Litigation Department, filed an appeal from that Judgement. On January 31, 2018, the appellate court with jurisdiction in the case set aside the Beida Judgement.

On December 9, 2013, the Parties concluded a "Settlement Agreement". In connection with this, the Defendant was represented by the Deputy Minister in the Libyan Ministry of Finance. In the Settlement Agreement, the Defendant undertook to pay the amount of LD 5,420,308.707 to the Claimant. The Settlement Agreement further provided that all of the domestic and international court proceedings and other litigation in connection with the Beida judgment were discontinued. The Settlement Agreement itself did not contain an arbitration clause.

On March 25, 2018, the Defendant, represented by the State Litigation Department, filed an action against the Claimant, demanding a declaration that the Settlement Agreement was null and void (the so-called "Tripoli Litigation").

B.
Previous to this, on August 31, 2016, the Claimant had filed a request for arbitration with the International Chamber of Commerce in Paris on the basis of the Bilateral Investment Treaty between Turkey and Libya of November 25, 2009 (hereinafter: the BIT). The Parties agreed to Geneva as the seat of the arbitration.

On July 22, 2019, the Arbitral Tribunal issued the following award:

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;
X.	Respondent has breached Article 2(2) of the BIT by failing to accord fair and equitable treatment to Claimant's investment;
XXV.	Respondent shall pay damages to Claimant in the amount of USD 21,865,554, including pre-award simple interest accrued at 4% per annum;
XXV.	Claimant's claims for moral damages are rejected;
XXV.	All other requests and claims are rejected;
XXV.	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; [2]
XXV.-IX.	[*costs and party compensation*].

The Arbitral Tribunal found that the Claimant was basing its claims, *first*, on substantive obligations of the Defendant under the BIT, specifically Art. 2(2) and Art. 4 BIT, as well as an umbrella clause which is (implicitly) contained in the BIT, which, based indirectly on the BIT, obliges the Defendant to comply with contracts it has entered into. In addition to this treaty-based legal foundation, the Claimant also made

[2] Translator's Note: In English in the original text.

contractual arguments asserting a breach of the Settlement Agreement. In terms of its jurisdiction, the Arbitral Tribunal found that the Settlement Agreement dated December 9, 2013, was valid under Libyan law, and that it contained a monetary claim in connection with an investment under Art. 1(2) BIT, and for this reason that settlement was itself a protected investment within the meaning of the Treaty. It also found that the dispute that initiated the proceedings resulted from the asserted non-compliance with the Settlement Agreement had only arisen after the BIT entered into force on April 22, 2011. Thus, based on Art. 8 and Art. 10 BIT, the Arbitral Tribunal found that it had jurisdiction, notwithstanding the fact that the Settlement Agreement itself had no arbitration clause.

C.
By civil law appeal of September 16, 2019, the Defendant requested the Federal Tribunal find that the Arbitral Tribunal lacked jurisdiction, set aside the Award, charge the Claimant costs.

The Respondent requests the Federal Tribunal dismiss the appeal to the extent the matter is capable of appeal. The Arbitral Tribunal waived its right to submit comments. The Parties submitted replies and rejoinders without being requested to do so by the Federal Tribunal.

By Order of the Chairman of the Federal Tribunal of December 19, 2019, the Respondent's request for security for costs was granted. Following this, security for costs in the amount of CHF 79'975.00 was paid into the cashier of the Federal Tribunal.

By Order of the Chairman of the Federal Tribunal of March 25, 2020, suspensory effect was granted to the appeal. By written submission of September 21, 2020, the Appellant submitted a request for clarifications with respect to suspensory effect and applied to the Federal Tribunal for an explanation of whether the suspensory effect ordered on March 25, 2020 constituted a suspension of the enforceability of the Award of the Arbitral Tribunal with its seat in Geneva dated July 22, 2019, and whether, in addition to this, the effects of the Award were suspended in their totality, including their *res judicata* effects and binding effects (para. 1 and 2). In addition, the Appellant submitted two requests for the grant of injunctive measures (para. 3 and 4). By written submission of October 8, 2020, the Respondent submitted an application to the Federal Tribunal to decline to allow the request for clarification pursuant to the Appellant's request nos. 1 and 2, and in the alternative, to dismiss the requests. It argued that the request for the issuance of injunctive measures pursuant to the Appellant's request nos. 3 and 4 should be dismissed to the extent they are capable of consideration by the Federal Tribunal. The present decision on the merits renders these requests moot.

Reasons:

1.
Pursuant to Art. 54(1) BGG[3], decisions of the Federal Tribunal are issued in an official language, as a rule, in the language of the decision under appeal. Where the decision is in another language, the Federal

[3] Translator's note: BGG is the most commonly used German abbreviation for the Federal law of June 6, 2005 organizing the Federal Tribunal (RS 173.110).

Tribunal resorts to another official language used by the Parties. The challenged award was rendered in the English language. Because English is not one of the official languages of this Court and the Parties submitted their written submissions to the Federal Tribunal in German, in accordance with Art. 42(1) BGG in conjunction with Art. 70(1) BV[4], the decision of the Federal Tribunal will be issued in the language of the Appeal Brief (BGE 142 III 521[5] at 1, p.524).

2.
In the field of international arbitration, a civil law appeal is allowed pursuant to the requirements of Art. 190-192 PILA[6] (SR 291) (Art. 77(1)(a) BGG).

2.1. The seat of the Arbitral Tribunal in the present case is located in Geneva. Both Parties had their seat outside Switzerland at the time (Art. 176(1) PILA). As the Parties did not expressly opt out of the provisions of Chapter 12 PILA, its provisions are applicable (Art. 176(2) PILA).

The challenged arbitral Award in this case is a final award. Such an award may be challenged by appeal under Art. 190(2) PILA.

2.2. A civil law appeal within the meaning of Art. 77(1) BGG is, in principle, of a purely cassatory nature, *i.e*. it may only seek the setting aside of a decision which is being challenged (see Art. 77 (2) BGG, ruling out the applicability of Art. 107(2) BGG to the extent that this empowers the Federal Tribunal to adjudicate the matter itself). To the extent that the dispute relates to the jurisdiction of the arbitral tribunal or its composition, however, there is an exception to this rule providing that the Federal Tribunal may itself rule on the arbitral tribunal's jurisdiction or lack thereof and/or on the challenge of the arbitrator involved (BGE 136 III 605 at 3.3.4. p. 616, with references). Similarly, the Federal Tribunal may remand the matter to the arbitral tribunal (Judgements 4A_418/2019 of May 18, 2020 at 2.3; 4A_294/2019[7] of November 13, 2019 at 2.2; 4A_462/2018 of July 4, 2019 at 2.2; 4A_628/2018[8] of June 19, 2019 at 2.2).

The applications of the Appellant are accordingly admissible.

2.3. Only the grievances listed in Art. 190(2) PILA are admissible (BGE 134 III 186[9] at 5 p. 187; 128 III 50 at 1a p. 53; 127 III 279 at 1a p. 282). Pursuant to Art. 77(3) BGG, the Federal Tribunal reviews only grievances raised and reasoned in the Appeal Brief; this corresponds to the duty to provide reasons in Art. 106(2) BGG for the violation of constitutional rights and of cantonal and inter-cantonal law (BGE 134

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[4] Translator's note: BV is the German abbreviation for the Swiss Constitution.
[5] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network
[6] Translator's note: PILA is the most frequently used English abbreviation for the Federal Statute on International Private Law of December 18, 1987.
[7] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-294-2019-4a-296-2019
[8] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-628-2018
[9] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

III 186 at 5 p. 187; cited Judgement 4A_418/2019 at 2.4; Judgement 4A_80/2018[10] of February 7, 2020; each with references). Criticisms of an appellate nature are inadmissible (BGE 134 III 565 at 3.1 p. 567; 119 II 380 at 3b p. 382; cited Judgement 4A_80/2018 at 2.2).

2.4. The Federal Tribunal bases its judgement on the factual findings of the arbitral tribunal (Art. 105(1) BGG). These include the findings as to the facts upon which the dispute is based and those concerning the first instance proceedings, *i.e*. the findings as to the contents of the case, which include, in particular, the submissions of the Parties, their factual allegations, legal arguments, statements in the case, evidence and offers of evidence, the contents of a witness statement or an expert report, or the findings of visual inspections (BGE 140 III 16 at 1.3.1 with references).

The Federal Tribunal may not rectify or supplement the factual findings of the arbitral tribunal, even when they are blatantly inaccurate or based on a violation of the law within the meaning of Art. 95 BGG (*see* Art. 77(2) BGG, ruling out the applicability of Art. 97 BGG and Art. 105(2) BGG). However, the Federal Tribunal may review the factual findings of the arbitral award under appeal but only when some admissible grievances within the meaning of Art. 190(2) PILA are raised against them or, exceptionally, when new evidence is taken into consideration (BGE 142 III 220 at 3.1 p. 224, 239 at 3.1 p. 244; 140 III 477[11] at 3.1, p. 477; 138 III 29 at 2.2.1; cited Judgement 4A_418/2019 at 2.5; each with references).

2.5. Pursuant to Art. 190(2) PILA, the Federal Tribunal freely reviews jurisdictional objections as to legal issues, including preliminary substantive issues upon which the determination of jurisdiction depends (BGE 144 III 559[12] at 4.1, p.563; 142 III 239[13] at 3.1, p.244; 134 III 565 at 3.1, p.567; 133 III 139 at 5, p. 141; examples in the realm of BIT cases: BGE 146 III 142 at 3.4.1, p.148-149; cited Judgement 4A_80/2018 at 2.5; Judgements 4A_65/2018[14] of December 11, 2018 at 2.4.1 and 3.2.1-3.2.3; 4A_157/2017[15] of December 14, 2017 at 3.3.4).

Where such preliminary substantive issues are to be determined under foreign law, the Federal Tribunal will likewise freely review the question of their application in the course of the jurisdiction appeal and has full discretion in ruling on these. In doing so, the Federal Tribunal will follow the clearly prevailing view in the applicable foreign legal system, and, where there are disagreements between the jurisprudence and the legal scholars, it will follow the jurisprudence of the highest courts of that legal system (BGE 138 III 714 at 3.2; cited Judgement 4A_80/2018 at 2.5; each with references).

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[10] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-80-2018

[11] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/arbitration-clause-not-rescinded-subsequent-"showpiece"-contract

[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-396-2017-2

[13] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/unsigned-arbitration-clause-upheld

[14] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-65-2018

[15] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-157-2017

3.

3.1. The relevant sections of Art. 8 BIT read as follows:

> 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. [...].
> 2. If these disputes cannot be settled in this way within ninety (90) days [...], 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) [...]
> (b) [...]
> (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) [...]
> (c) [...]
> 5. [...][16]

3.2. In addition, Art. 10 BIT provides:

> The present Agreement shall apply to investments in the territory of a Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party before or after the entry into force of this Agreement. However, this Agreement shall not apply to disputes that have arisen before its entry into force.[17]

4.

Where an international arbitral tribunal with its seat in Switzerland constitutes the court of first instance, in other words, where the case was made *lis pendens* through the filing of an arbitration, then the arbitral tribunal is not required to take account of the existence of parallel litigation before the state courts or another arbitral tribunal (whether within Switzerland or abroad) from the vantage point of the *lis pendens* rules. As the court of first instance, the Arbitral Tribunal has priority (Judgement 4P.124/2001 of August 7, 2001 at 3c/dd; Christian Oetiker, in: *Zürcher Kommentar zum IPRG*, 2018, N. 39 to Art. 186 PILA; Stephanie Pfisterer, in: *Basler Kommentar Internationales Privatrecht*, 4th Ed. 2020, N. 19 to Art. 181 PILA; Kaufmann-Kohler/Rigozzi, *International Arbitration, Law and Practice in Switzerland*, 2015, margin no. 5.61). The Tripoli Litigation was filed on March 25, 2018; by contrast, pursuant to the findings of the Arbitral Tribunal, the present arbitration became *lis pendens* (if, indeed, it relates to the same parties and

[16] Translator's Note: In English in the original text.
[17] Translator's Note: In English in the original text.

the same subject matter, which the Respondent disputes) at the time of the filing of the request for arbitration on August 29, 2016 (received by ICC Secretariat on August 31, 2016). As a basic principle the Arbitral Tribunal is thus not required to give any consideration to the Tripoli Litigation.

4.1. The Appellant raises the grievance that the Arbitral Tribunal has wrongfully exercised its *Kompetenz-Kompetenz*.

4.1.1. Although, as it acknowledges, based on Art. 186(1) PILA, the Arbitral Tribunal was entitled to independently rule on the validity of the Settlement Agreement as a preliminary issue to the question of jurisdiction, the Appellant argues that in light of the lack of an arbitration clause in the Settlement Agreement itself, the Appellant does nevertheless have the right to subject the validity of that agreement to review before the competent state courts in Libya. The Appellant argues that it does not have to content itself with a review by an arbitral tribunal by way of a preliminary ruling on jurisdiction. Thus, the Appellant argues that if the court in Tripoli had jurisdiction, then its judgement could also be recognized in Switzerland. For this reason, the Arbitral Tribunal should have coordinated its decision with the court case in Tripoli, of which it was aware, and in which identical relief was requested. This is, the Appellant argues, a rule of international comity. This would, it argues, have avoided the prospect of conflicting decisions in the Tripoli Litigation and in the present litigation.

4.1.2. The Appellant is cannot succeed with its arguments here: because of the priority in time of the arbitration, which the Respondent correctly points out, the Arbitral Tribunal was not even required to have recourse to Art. 186(1)bis PILA to establish its *Kompetenz-Kompetenz.* The Appellant fails to make any sufficient legal showing that the Arbitral Tribunal was subject to an obligation under an alleged rule of international comity to coordinate its decision with the Tripoli Litigation. It remains for this Court to add that it is likewise unable to follow the Appellant's argument to the extent it claims that, due to the lack of an arbitration clause in the Settlement Agreement, it was not required to content itself with a review of the validity of the Settlement Agreement by an Arbitral Tribunal by way of a preliminary issue, but was entitled to have such a review undertaken by a state court. In support of this assertion, it refers to one literature citation (Schott/Courvoisier, in: *Basler Kommentar Internationales Privatrecht*, 3rd Ed. 2013, N. 7 to Art. 186 PILA), but that citation merely expresses the view in a case in which not even the *appearance* of a valid arbitration clause exists, whereas, in this case, one cannot expect the potential respondent to an arbitration to litigate the question of arbitral jurisdiction before the arbitral tribunal. However, there can be no suggestion that we are dealing with an *a priori* situation of this kind.

4.2. In the view of the Appellant, the Arbitral Tribunal would have had to find it lacked jurisdiction, due to the principle of *res judicata*. The Tripoli Judgement, it says, is capable of being recognised and enforced in Switzerland and is thus, it argues, binding on every arbitral tribunal in Switzerland.

This objection fails, as well. *First*, the Federal Tribunal is unable to see how the Arbitral Tribunal would have been able to take account of the Tripoli Judgement, as the Appellant did not in fact introduce that judgment during the arbitration at all. The Appellant claims that the Tripoli Judgement was issued on January 15, 2019, after the close of proceedings, and that it was validly served on the Respondent in certified form, in addition to diplomatic service, on September 20, 2019. Although this may be true, it does

nothing the change the fact that the Arbitral Tribunal was unable to give any consideration to the judgment because it was unaware of it.

Second, the objection also misses the point, irrespective of whether the Arbitral Tribunal was aware of the Tripoli Judgement. This is because, apart from the fact that the Appellant has not furnished any evidence of the *res judicata* status of the Tripoli Judgement (which the Respondent correctly raises in its defence), under Art. 27(2)(c) PILA a decision issued abroad will not be recognised in Switzerland if one party furnishes evidence that litigation between the same parties on the same subject matter was first initiated in Switzerland, even if the Swiss proceedings take longer than the foreign proceedings initiated subsequently (Däppen/Mabillard, in: *Basler Kommentar Internationales Privatrecht*, 4th Ed. 2020, N. 66 to Art. 27 PILA; *see also* Markus Müller-Chen, in: *Zürcher Kommentar zum IPRG*, Band I, 3rd Ed. 2018, N. 104 to Art. 27 PILA).

5.
The Arbitral Tribunal examined the question of whether the dispute substantively fell within the scope of the BIT.

5.1. To this end, it referred by way of introduction to Art. 1(2) BIT, which defines the term "investment" by way of a non-exhaustive list (a)-(e). In the present case, the investment in question is an investment pursuant to Art. 1(2)(b) BIT ("*returns reinvested, claims to money or any other rights having financial value related to an investment*"[18]). The Settlement Agreement itself, the Respondent argues, is an investment of this kind, specifically constituting "claims to money related to an investment", because, the Respondent argues, it vests a claim for LD 5,420,308.707 in the Respondent. It argues that the Settlement Agreement is "related to an investment" in the sense that it "flows from, and crystalizes, a range of earlier investments" of the Appellant in the 1980s and 1990s. The Respondent argues that the fact that this investment was made before the BIT entered into fore in April 2011 does not harm its argument, as shown by Art. 10 BIT (*see* at 3.2 *supra*). Pursuant to Art. 10, the BIT also protects investments made prior to April 22, 2011, but not disputes arising out of them. Thus, the Respondent argues, the jurisdiction of the Arbitral Tribunal *ratione materiae* is made out.

5.2. The Appellant argues that the Arbitral Tribunal's reasoning is based solely on the Settlement Agreement. If that Settlement Agreement is invalid, then jurisdiction will fail. Consequently, it disputes the Settlement Agreement's validity, citing two aspects.

5.2.1. First, it argues the Settlement Agreement is not valid because the Deputy Minister of Finance was not authorised to legally sign it on behalf of the Libyan State.

5.2.1.1. The Arbitral Tribunal found that the question could remain open whether under Libyan law, which is indisputably applicable to this question, the Deputy Minister of Finance was actually authorised to sign the Settlement Agreement. The reason is that he did have "apparent authority", upon which the Respondent was entitled to rely in good faith. Under Libyan law, "apparent authority" is premised on two

[18] Translator's Note: In English in the original text.

prerequisites: *first*, the contracting party relying on it must be entitled to assume in good faith that the agent has authority and, *second*, there must be the "external appearance of authority" as created by the principal. The first prerequisite, good faith, requires that a party relying on "apparent authority" has discharged its duty of due diligence; with respect to the second prerequisite, the Arbitral Tribunal found that the appearance of authority in this concrete case was created by the Libyan Ministry of Finance, which the Minister of Finance himself must have been aware of, or must have (at least) tolerated. Based on numerous factual elements, relating to the period both before and after the conclusion of the Settlement Agreement, the Arbitral Tribunal found that both prerequisites of "apparent authority" had been made out.

5.2.1.2. The Appellant relies on Ordinance No. 1 of 2012 and Judgement 15/64 of the Supreme Court of Libya of January 6, 1970, which the Appellant says, proves that the Deputy Minister has no authority to enter into the agreement. It argues that these legal bases are not only determinative of the question left open by the Arbitral Tribunal of whether the Deputy Minister actually had agency authority, but also govern the degree of diligence under the "apparent authority". It argues that, in light of the clear rule on authority under Libyan law, the Arbitral Tribunal was not entitled to simply rely on questionable external circumstances described by a witness that allegedly created the appearance of authority on the part of the Deputy Minister of Finance. It argues that, in order to cast aside the rules on authority prescribed by the relevant Libyan ordinance, a heightened level of diligence was required prior to signing the agreement. The Appellant argues that the Respondent has failed to furnish evidence that it carried out the requisite investigation, for which reason it was not entitled to rely on apparent authority (this being the Appellant's understanding of 'apparent authority'), which the Arbitral Tribunal failed to recognise. It argues that, based on these relevant legal sources, one would expect the Respondent, who was advised by counsel at the relevant time, to take account of the rule contained in Ordinance No. 1.

As correctly raised by the Respondent, no finding was made that it was represented by counsel at all times. However, in particular, it is impossible to see why counsel for the Respondent was supposed to have been more familiar with Ordinance No. 1 of 2012 than the Deputy Minister of Finance (apparently), the staff of the Department of Finance, and the Minister of Finance himself. The Arbitral Tribunal found specifically that officials of the Libyan State had repeatedly confirmed the authority of the Deputy Minister of Finance, without any indications to the contrary. If the Appellant continues to advance the argument that the Arbitral Tribunal, in making findings regarding these facts, had relied on many "questionable external circumstances", it is impermissibly criticising the Arbitral Tribunal's assessment of the evidence (*see* section 2.4, *supra*).

5.2.2. The Appellant then raises the grievance that the Arbitral Tribunal failed to deal with its second objection to the validity of the Settlement Agreement, arguing that mandatory formal procedural rules were not adhered to when the agreement was signed. It argues that, for a settlement agreement to be valid, Art. 4 and Art. 5 of Libyan Law No. 87 require the previous approval of the Litigation Department of the Libyan Government. The Appellant argues that the Appellant's expert had rejected the contrary view expressed by the Respondent's expert. The Appellant argues that because the Arbitral Tribunal declined to deal with the question of the approval requirement, the Arbitral Tribunal committed a violation of the Appellant's right to be heard and reached an incorrect conclusion. It argues that the court in Libya seized

of the matter found by judgement in that same case dated May 2, 2019 that the Settlement Agreement was indeed invalid.

The Federal Tribunal likewise finds it unnecessary to delve further into this objection: if the Arbitral Tribunal was entitled to assume "apparent authority" then further discussions of the formal prerequisites to an agreement (which, incidentally, here are only allegations) are moot. Consequently, the Arbitral Tribunal likewise did not violate the Appellant's right to be heard.

The Appellant thus has failed to prevail with its grievances in respect of the Settlement Agreement, including also its objection asserted under the heading of "Lack of jurisdiction *ratione materiae*" based on lack of jurisdiction of the Arbitral Tribunal, arguing that there is allegedly no "claim to money" within the meaning of Art. 1(2)(b) BIT, because the Settlement Agreement is allegedly invalid. In further and other respects, the Appellant does not dispute the jurisdiction of the Arbitral Tribunal in substantive respects.

6.
6.1. In respect of the temporal applicability of the BIT, the Arbitral Tribunal found that pursuant to Art. 10 BIT (*see* Sec. 3.2 *supra*), what is required is a "dispute" which has arisen after the BIT entered into force, *i.e*. after April 22, 2011. It found that the Settlement Agreement represented a "compromise" under Libyan law, the effect of which was to settle all previous disputes. Based on the Appellant's failure to adhere to the Settlement Agreement, it found that a new dispute had arisen within the meaning of Art. 8 and Art. 10 BIT. The Settlement Agreement constituted a "break in the timeline" in the disputes between the Parties. Because the Agreement was concluded in the December 2013 and the BIT had entered into force on April 22, 2011, any and all disputes relating to that agreement fell into the scope of the BIT.

6.2. The Appellant argues that this ("too narrow", "legalistic") interpretation by the Arbitral Tribunal, which it classifies as being solely geared to the legal effects of a settlement agreement under Libyan law, is incorrect. It argues that the interpretation of the Settlement Agreement should be undertaken in line with the Vienna Convention on the Law of Treaties of May 23, 1969 (Vienna Convention; SR 0.111). It argues that a good-faith interpretation of the BIT would make clear that the parties to it did not have the intention of extending the agreed investment protection to disputes that had already arisen. It argues that the fact that a settlement had been concluded in the present case does nothing to change the fact that the disputes between the Appellant and the Respondent had already arisen before the BIT was concluded. It argues that the Arbitral Tribunal's remarks as to its interpretation of "compromise" under Libyan law were only correct to the extent that they related to new claims in the more narrow sense of that term ("claims") from the Settlement Agreement. However, to the extent that the Arbitral Tribunal was applying an independent interpretation, as required under BIT agreements, the Arbitral Tribunal's remarks on Libyan law missed the mark, because they did not take account of the comprehensive concept of "dispute" within the meaning of Art. 10 BIT, which goes beyond the definition of "claim". The Appellant argues that the meaning and purpose of the BIT, according to its Preamble, is the "encouragement and reciprocal protection of investments" and/or incentives for new investments, "which will stimulate the flow of capital and technology and the economic development of the Contracting Parties". Thus, old disputes that existed prior to the entering into force of the BIT should remain excluded from its purview, because the contracting parties of the BIT had not wanted claims which were controversial between the parties

prior to its entry into force to enjoy the legal protections of the BIT, even if they had been the subject of a new agreement after it entered into force. In addition, it argues that the old dispute could only be regarded as having been settled when the Settlement Agreement was fully performed.

6.3. Pursuant to Art. 31(1) VCLT, a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context in the light of their object and purpose. Together with interpretation in good faith, a teleological interpretation guarantees a treaty's "*effet utile*". If there are multiple possible interpretations, the term to be interpreted is to be assigned the meaning that guarantees its effective application and does not lead to a result that conflicts with the treaty's object and purpose (BGE 144 III 599 at 4.4.2 p. 568; 144 II 130 at 8.2.1 p.139; 143 II 136 at 5.2.2 p. 148-149; 142 II 161 at 2.1.3 p.167; 141 III 495[19] at 3.5.1 p. 503).

6.4. The Federal Tribunal cannot concur with the Appellant. First of all, it is questionable whether a sufficient grievance (*see* section 2.3) has been made out at all where the Appellant simply asserts that the Arbitral Tribunal had failed to take account of the "comprehensive understanding of 'dispute' within the meaning of Art. 10 BIT" and that the investment protection could not in good faith be extended to disputes which had already arisen previously. In further respects, the Arbitral Tribunal's reasoning is persuasive: the dispute in this case arose because the Settlement Agreement was not complied with and its validity was disputed. This dispute regarding the validity of the Settlement Agreement falls easily within the scope of Art. 10 BIT. The Settlement Agreement itself makes unmistakably clear that as of the date of its conclusion, all the domestic and international court proceedings and other proceedings in connection with the Beida Judgement were settled (*see* Facts, A). There were thus no longer any "disputes" between the Parties remaining from the time prior to the BIT's entry into force. As the Respondent correctly points out, the Arbitral Tribunal did not solely base its ruling on jurisdiction by referring to the effects of "compromise" under Libyan law, but rather primarily relied on the wording of the Settlement Agreement. The Appellant, however, fails to deal with this fact, for which reason there is likewise no sufficient grievance made out. It is therefore not necessary for this Court to further delve into the question of what the legal effects of a settlement under Libyan law are.

The reference to the meaning and purpose of the BIT pursuant to its Preamble likewise does not help the Appellant. With this argument, it appears to be trying to assert that only investments which were solicited and then made after the entry into force of the BIT would fall under the scope of its protection. However, this argumentation conflicts with the wording of Art. 10 BIT, which expressly speaks of "investments […] before or after the entry into force of this Agreement". Furthermore, the BIT, as well as the "non-exclusive" list of assets which are protected as "investments" in Art. 1(1) BIT, is based on a broad property-oriented perspective, which does not rely on any particular act (transaction) occurring. Thus, the Treaty envisages both the promotion and the mutual protection of investments (as to this distinction between a transaction-based and property-based approach, *see* BGE 144 III 559[20] at 4.4.2

[19] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/swiss-supreme-court-addresses-difference-between-treaty-claims-and-contract-claims

[20] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-396-2017-2

and 4.4.3, pp. 570-571). Thus, the Arbitral Tribunal correctly assumed that the BIT was also applicable in terms of its temporal scope.

The Appellant's argument referring to the ICSID decisions it submitted in evidence is likewise incapable of changing this result in any way. It is already the case that such decisions in the realm of international BIT law do not constitute actual sources of law which the Arbitral Tribunal is bound to follow (BGE 144 III 559 at 4.4.2, p. 569).

It will thus not be necessary for the Federal Tribunal to delve into the alternative justification that was put forward by the Respondent before the Arbitral Tribunal and then again in these appellate proceedings, arguing that jurisdiction is present irrespective of the validity of the Settlement Agreement because its activities in Libya in the 1980s and 1990s were investments within the meaning of Art. 8 BIT and the actions of the Appellant in connection with the conclusion of the Settlement Agreement and its dispute of the validity of the Settlement Agreement constituted a violation of the principle of "fair and equitable treatment" guaranteed by the BIT ("fair and equitable treatment", FET; *see also* BGE 141 III 495 at 3, pp. 496 ff.).

7.
The Appeal is therefore dismissed, to the extent the matter is capable of appeal. In accordance with the outcome of these proceedings, the Appellant is liable for costs and party compensation (Art. 66(1) and Art. 68(2) BGG).

Therefore, the Federal Tribunal pronounces:

1.
The Appeal is rejected, to the extent the matter is capable of appeal.

2.
The judicial costs of CHF 60'000 shall be paid by the Appellant.

3.
The Appellant shall pay the Respondent a total of CHF 80'000 for the proceedings before the Federal Tribunal. This payment of compensation will be taken from the security for costs which were paid into the cashier of the Federal Tribunal.

4.
This Judgement shall be communicated in writing to the Parties and to the arbitral tribunal seated in Geneva.

Lausanne, November 2, 2020

In the name of the First Civil Law Court of the Swiss Federal Tribunal

Presiding judge:	Clerk of the Court:
Kiss	Mr. Bittel