

ICC Arbitration No. 21603/ZF/AYZ

FINAL AWARD

June 14, 2018

OZTAS CONSTRUCTION, CONSTRUCTION MATERIALS TRADING INC.

Mebusevleri Iller Sokak No. 10

Tandogan

06580 Ankara

Turkey

Claimant

represented by

Ms. Azade Candemir

Mr. Bogac Cekinmez

Mr. Mert Cekinmez

CEKINMEZ LAW FIRM

2052. Sokak No. 40

Beysukent

06800 Beysukent-Ankara

Turkey

versus

LIBYAN INVESTMENT DEVELOPMENT COMPANY

Al Fallah Street

Tripoli

Libya

AND

THE STATE OF LIBYA

Respondents

represented by

Dr. Abdurazek Ballow

Avocat au Barreau de Paris

72, boulevard de Courcelles

75017 Paris

France

Me Kamal Sefrioui

Me Delphine Provence

CABINET SEFRIOUI

72, boulevard de Courcelles

75017 Paris - France



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I. INTRODUCTION

1. This is the Final Award on both jurisdiction and the merits of an arbitration commenced on the basis of the Agreement between the Republic of Turkey and the Great Socialist People's Libyan Arab Jamahiriya Concerning the Reciprocal Promotion and Protection of Investments (the "BIT") dated November 25, 2009, signed by the Republic of Turkey and Respondent No. 2, which entered into force on April 22, 2011.

2. As will be explained in greater detail below, Claimant (a Turkish company) and Respondent No. 1 (a Libyan company) entered into a contract prior to the 2011 Civil War. Following the Civil War, the contract was terminated and Respondent No. 1 promised to pay compensation to Claimant. The compensation has never been paid, and Claimant now seeks to recover it by way of this arbitration. It does so despite the fact that neither the initial contract nor the termination agreement contains an arbitration agreement (whether ICC or otherwise).

3. In order to invoke the ICC's jurisdiction, the Turkish company has relied upon the BIT. As will be explained in Section VI below, the Arbitral Tribunal considers that the criteria for jurisdiction under the BIT are satisfied insofar as the claim against Respondent No. 2 (the State of Libya) is concerned. However, as will be explained at Section VII below, a majority of the Arbitral Tribunal considers that Claimant has established no breach of the BIT, that the BIT contains no umbrella clause and that therefore Claimant's claims must fail.

4. In the rest of this introduction, we will identify the Parties (A), the Arbitral Tribunal (B), the Arbitration Agreement (C), the place of arbitration (D), the applicable substantive law (E) and the Parties' most recent claims for relief (F). We will then explain the structure of the rest of this Award (G).

A. The Parties

1. Claimant

5. **OZTAS CONSTRUCTION, CONSTRUCTION MATERIALS TRADING INC.** is a corporation organized and existing under the laws of Turkey, with its principal registered offices at:

Mebusevleri Iller Sokak No. 10
Tandogan
06580 Ankara
Turkey

6. Claimant is in the present arbitration represented by its duly authorized attorneys:

Ms. Azade Candemir
Mr. Bogac Cekinmez
Mr. Mert Cekinmez
CEKINMEZ LAW FIRM
2052. Sokak No. 40
Beysukent
06800 Beysukent-Ankara
Turkey

E-mail: azadecandemir@cekinmez.com
bogaccekinmez@cekinmez.com
mertcekinmez@cekinmez.com

2. Respondents

7. Respondent No. 1, **LIBYAN INVESTMENT DEVELOPMENT COMPANY**, is a corporation organized and existing under the laws of Libya, with its principal registered offices at:

Al Fallah Street
Tripoli
Libya

8. Respondent No. 2 is the **STATE OF LIBYA**.

9. Respondents are represented by the Litigation Department of the State of Libya, with offices at Courts Complex, Saïdi Street, Tripoli, Libya, pursuant to the provisions of Article 5 of the Libyan Law No. 87, dated 30 October 1971.

10. Respondents are in the present arbitration represented by their duly authorized attorneys:

Dr. Abdurazek Ballow
Avocat au Barreau de Paris
72, boulevard de Courcelles
75017 Paris
France

Phone: +33 1 47 66 11 00
Fax: +33 1 47 66 08 88
E-mail: draballow@gmail.com

Me Kamal Sefrioui
Me Delphine Provence
CABINET SEFRIOUI
72, boulevard de Courcelles
75017 Paris
France

Phone: +33 1 47 66 11 00
Fax: +33 1 47 66 08 88
E-mail: paris@sefrioui.com
kamal@sefrioui.com
provence@sefrioui.com

11. Claimant and Respondents shall collectively be referred to as the “**Parties**” and each of them as a “**Party**”.

B. The Arbitral Tribunal

12. The Arbitration Agreement (as defined at Section 10 below) does not specify the number of arbitrators. On May 26, 2016, the ICC International Court of Arbitration (“**ICC Court**”) decided to submit the arbitration to three arbitrators, pursuant to Article 12(2) of the 2012 version of the ICC Rules (the “**ICC Rules**”) which apply because the arbitration was filed on January 20, 2016.¹

1. Co-Arbitrator Nominated by Claimant

13. Pursuant to Articles 12(2) and 13(2) of the ICC Rules, Claimant nominated on July 15, 2016, and on October 19, 2016 the Secretary-General of the ICC Court confirmed as co-arbitrator:

Dr. Tolga Ayoglu
YASAMAN HUKUK BUROSU
Kurucesme Caddesi No: 57/4
Besiktas
Istanbul
Turkey

Phone: + 90 542 451 40 91
E-mail: tayoglu@gsu.edu.tr
tolgaayoglu@yahoo.com

2. Co-Arbitrator Nominated by Respondents

14. Pursuant to Articles 12(2), 12(6) and 13(2) of the ICC Rules, Respondents on September 27, 2016 nominated, and on October 19, 2016 the Secretary-General of the ICC Court confirmed as co-arbitrator:

Prof. Dr. Mohamed S. Abdel Wahab
ZULFICAR & PARTNERS LAW FIRM
Nile City Building

¹ See ICC Rules, Art. 6(1): “Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted ipso facto to the Rules in effect on the date of commencement of the arbitration, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.” The Arbitration Agreement contains no such agreement.

South Tower, Eighth floor
2005 A, Corniche El Nil
Ramlet Beaulac
11221 Cairo
Egypt

Phone : +20 2 24612 147
Email : msw@zulficarpartners.com

3. President

15. Pursuant to Article 13(4)(a) of the ICC Rules, the ICC Court appointed as President on November 10, 2016:

Jacob Grierson
MCDERMOTT WILL & EMERY
23, rue de l'Université
75007 Paris
France

Phone: +33 (0)1 81 69 15 00
Fax: +33 (0)1 81 69 15 15
E-mail: jgrierson@mwe.com

C. The Arbitration Agreement

16. Claimant alleges that the jurisdiction of the Arbitral Tribunal derives from the arbitration agreement contained in Article 8 of the BIT, which provides:

"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 endeavour 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,

(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 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 the 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 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."

17. The BIT in which the Arbitration Agreement is contained is signed by the Republic of Turkey and by Respondent No. 2, the State of Libya. Neither Claimant nor Respondent No. 1 is a signatory to that agreement. However, Claimant is an "investor of [a] Contracting Party", as will be explained at Section VI(D)(2) below, and therefore has (by the terms of the Arbitration Agreement) the right to rely upon it. The question whether Respondent No. 1 is bound by the Arbitration Agreement will be addressed at Section VI(B) below.

18. Respondents contest the jurisdiction of the Arbitral Tribunal to hear Claimant's claims under the BIT, and deny that Claimant is entitled to benefit from the provisions of the BIT. This jurisdictional objection will be addressed at Section VI below.

D. Place of Arbitration

19. The Arbitration Agreement does not specify the place of arbitration. Accordingly, the ICC Court on May 26, 2016 fixed Paris, France as the place of arbitration, pursuant to Article 18(1) of the ICC Rules.

E. Applicable Substantive Law

20. The Arbitration Agreement does not specify the applicable law.

21. Claimant contends that the applicable law should be the law of the Republic of Turkey, (a) because Claimant's claim is not contractual and therefore the choice of law provision in the Contract (as defined in paragraph 62 below) does not apply, (b) because "*the main aim of the investment arbitrations is to provide a dispute resolution method for foreign investors, ultimately and solely independent from the laws and regulations of the host state*" and (c) "*taking Libya's uncertain and unstable political and governmental situation and OZTAS's aggrieved and claimant position.*"²

22. Respondents, on the other hand, contend that contract breaches (if addressed by the Arbitral Tribunal) should be governed by Libyan law, pursuant to Article 51 of the Contract. As for breaches of the BIT, these "*should primarily be governed by the BIT, as lex specialis, with a possible selection by the arbitrators of rules of Lybian law (as law of the host State) and of international law depending on the issues at hand.*"³

23. The Arbitral Tribunal unanimously agrees with Respondents that breaches of the BIT should primarily be governed by the BIT itself and then (if necessary and to a limited extent only) in accordance with Libyan law and other sources of international law. In reaching its unanimous decision on the applicable law, the Arbitral Tribunal notes that: (i) the BIT forms the *lex specialis* for the claims brought forward by the Claimant in this arbitration, which Claimant advocates to have been pleaded and advanced under the auspices of the BIT; (ii) the contended investment took place on the territory of Libya as the host state and so Turkish law forms no part of the applicable legal regime under the BIT for the purposes of the present dispute, especially given that investments are alleged to have been made on the Libyan territory; (iii) the Turkish nationality of the Claimant offers no proper basis for the application of Turkish law; and (iv) Article 10 of the BIT states in unambiguous terms that "*[t]he present Agreement shall apply to investments in the territory of a*

² SOR, ¶¶ 33-35.

³ Rejoinder, ¶ 88.

*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 [...]*⁴

F. The Parties' Most Recent Claims for Relief

1. Relief Sought by Claimant

24. Claimant's most recent request for relief is stated on page 29 of the slides presented to the Arbitral Tribunal at the Oral Hearing on 6 November 2017:

"In this arbitration, at this stage with reserving it's (sic) all rights and to claim for addition damages in course of the proceedings, OZTAS seeks the relief:

- 1. LIDCo and LIBYA be ordered to pay 2.883.975,06 USD (= 3.665.192,00 Libyan Dinar / 1,270882) termination fee (as the OZTAS's damage),*
- 2. LIDCo and LIBYA be ordered to pay highest commercial interest rate in accordance with the payment schedule determined in Termination Agreement,*
- 3. LIDCo and LIBYA be ordered to pay all costs of the mediation and the arbitration (attorney fees, legal and all other costs incurred by OZTAS)."*

25. This is materially the same as the request for relief included in the Terms of Reference, at section 6.1.

2. Relief Sought by Respondents

26. Respondents' most recent request for relief is stated on page 27 of its Statement of Rejoinder:

"The Respondents respectfully request that that the Arbitral Tribunal:

- a. Declines jurisdiction over the Claimant's claims;*
- b. On a subsidiary basis, dismisses the Claimant's claims;*
- c. And, in any case, orders the Claimant to pay all costs and expenses incurred by the Respondents in relation to the arbitration."*

27. This is materially the same as the request for relief included in the Terms of Reference, at section 6.2.

G. Structure of this Award

28. In the rest of this Award, the Arbitral Tribunal will summarize the proceedings to date (II) and the background facts relevant to this arbitration (III), before addressing the following issues: the admissibility of Respondents' Answer to the Request for Arbitration (IV); the requirement of a 90-

⁴ BIT, CX-3, Art. 10 (emphasis added).

day cooling-off period (V); Respondents' jurisdictional objections (VI); and the merits of Claimant's claims against the State of Libya (VII). The Arbitral Tribunal will then set out its decision on the costs of this arbitration (VIII) and conclude with a statement of the relief granted herein (IX).



II. THE PROCEEDINGS TO DATE

29. In this section, we will summarize the proceedings to date: prior to the transfer by the ICC of the file to the Arbitral Tribunal (A); between the transfer of the file and the Oral Hearing (B); and following the Oral Hearing (C). We will also describe the financial status of the arbitration (D) and the time-limit for the Final Award and the extensions thereto (E).

A. Procedural Steps Prior to the Transfer of the File to the Arbitral Tribunal

30. On January 20, 2016, Claimant filed a request for arbitration herein (the “**Request for Arbitration**”).

31. On May 26, 2016, the ICC Court fixed Paris, France as the place of arbitration, pursuant to Article 18(1) of the ICC Rules.

32. On July 31, 2016, Respondents filed “Comments on the Request for Arbitration”.

33. On October 19, 2016, the Co-Arbitrators nominated respectively by Claimant and Respondents were confirmed by the Secretary-General of the ICC Court, as explained at paragraphs 13 and 14 above.

34. On November 10, 2016, the ICC Court appointed the President of the Arbitral Tribunal, as explained at paragraph 15 above. On the same day, the file was transferred to the Arbitral Tribunal by the ICC.

B. Procedural Steps Between the Transfer of the File and the Oral Hearing

35. On December 6, 2016, starting at 13:00 Paris time, the Arbitral Tribunal and representatives of the Parties (Ms. Azade Candemir and Ms. Sinem Özer for Claimant and Me. Kamal Sefrioui, Me. Delphine Provence and Dr. Abdurazek Ballow for Respondents) held a Case Management Conference by telephone. In-house representatives of Claimant, Ms. Oya Ipek Hokkaci and Mr. Kadir Burak Baran, attended the latter part of the Case Management Conference. The following items were discussed:

- a) The Terms of Reference were discussed, based on the draft that had been circulated by the Arbitral Tribunal on December 1, 2016, and it was agreed that certain further minor changes would be made. The Arbitral Tribunal indicated that it would circulate a final draft, containing those (and only those) changes, and requested that the Parties sign and circulate the signature pages as quickly as possible.

- b) The Procedural Rules were discussed, based on the draft that had been circulated by the Arbitral Tribunal on November 25, 2016 and on Respondents' written comments of December 4, 2016, and it was agreed that certain further changes would be made.
- c) The Arbitral Tribunal heard argument from the Parties on the application made by Respondents for a bifurcation of the arbitral proceedings between jurisdiction and merits. The Arbitral Tribunal decided not to accept Respondents' application, and therefore not to bifurcate the proceedings. The reasons for this decision were briefly explained to the Parties' representatives during the Case Management Conference: the Arbitral Tribunal considered that the issues of jurisdiction and merits were likely to be closely intertwined (as in fact they turned out to be). The Arbitral Tribunal also explained that the non-bifurcation was without prejudice to the Respondents' jurisdictional objections, since both issues of jurisdiction and issues of the merit would be addressed together in non-bifurcated proceedings.
- d) The Procedural Timetable was discussed, based on the draft which had been circulated on November 25, 2016, the markup thereof that had been received from Claimant on December 2, 2016 and the comments in Respondents' email of December 5, 2016. The Arbitral Tribunal and the Parties' representatives agreed to dates for the steps in the arbitration. The Arbitral Tribunal indicated that it would issue a Procedural Timetable recording these dates.

36. On December 9, 2016, the Arbitral Tribunal issued **Procedural Order No. 1** (the Procedural Rules) and a **Procedural Timetable** based on the agreement reached between the Parties and the Arbitral Tribunal during the Case Management Conference and on the Arbitral Tribunal's decision not to bifurcate the proceedings.

37. On January 2, 2017, the Arbitral Tribunal transmitted to the Court the **Terms of Reference** signed by it and by the Parties, pursuant to Article 23(2) of the ICC Rules.

38. Claimant filed a Statement of Claim ("**SOC**") on January 6, 2017 and Respondents filed a Statement of Defence ("**SOD**") on April 6, 2017, pursuant to the agreed Procedural Timetable.

39. On April 20, 2017, Claimant made requests for document production to Respondents. Respondents responded to those requests and Claimant replied to Respondents'

requests and placed its requests before the Arbitral Tribunal on May 11, 2017, in the form of a Redfern Schedule. All of this was pursuant to the agreed Procedural Timetable.

40. On May 24, 2017, the Arbitral Tribunal issued its decision on the document requests, in **Procedural Order No. 2**. Its decisions were stated in a Redfern Schedule attached to the Procedural Order.

41. On June 9, 2017, Claimant requested a four-week extension of the deadline for filing its Statement of Reply (due on July 6, 2017), on the ground that Respondents had provided it five documents in Arabic the day before. On June 11, 2017, Respondents responded that a two-week extension would be appropriate. On June 12, 2017, the Arbitral Tribunal decided to grant Claimant a two-week extension of the deadline for filing its Statement of Reply and Respondents a two-week extension of the deadline for its Statement of Rejoinder, and announced that decision to the Parties.

42. On July 4, 2017, Claimant requested (a) the production of allegedly missing documents and a clarification of the list of members of the Board of Directors of First Respondent and (b) a further (indefinite) extension of the July 20, 2017 deadline for filing its Statement of Reply. On July 5, 2017, the Arbitral Tribunal decided (a) that Respondents should provide a brief witness statement by the person responsible for responding to Claimants' document requests confirming that there were no responsive documents that had not been disclosed by Respondents and (b) that there should be no further extension of the deadline for filing Claimant's Statement of Reply, and it announced that decision to the Parties.

43. On July 20, 2017, Claimant filed its Statement of Reply ("**Reply**"), pursuant to the Procedural Timetable as modified by the Arbitral Tribunal on June 12, 2017.

44. On September 12, 2017, the President of the Arbitral Tribunal wrote to the Parties (a) inviting them to comment on various amendments to the Procedural Timetable required in light of the extensions granted by the Arbitral Tribunal on June 12, 2017, (b) requiring Respondents to file the witness statement referred to at paragraph 42 above at the same time as their Statement of Rejoinder, (c) inviting the Parties to comment on whether a one- or two-day Oral Hearing was necessary, (d) offering to hold the Oral Hearing in his offices in Paris and (e) asking the Parties whether they had any suggestions for a stenographer for the Oral Hearing.

45. Claimant and Respondents responded, on September 14 and 13 respectively, agreeing with the dates proposed in the President's e-mail of September 12, 2017, agreeing that a one-day Oral

Hearing would be sufficient, accepting the President's offer to hold the Oral Hearing in his offices in Paris and making various suggestions for stenographers.

46. On September 18, 2017, the Arbitral Tribunal therefore issued **Procedural Order No. 3**, (a) amending the Procedural Timetable as per an attached Amended Procedural Timetable (also dated September 18, 2017), (b) ordering that the Oral Hearing should take place at President's offices in Paris and (c) requiring that Claimant should engage a stenographer whom the President had ascertained was available.

47. On October 20, 2017, Respondents filed their Statement of Rejoinder ("**Rejoinder**"), pursuant to the Procedural Timetable as modified by the Arbitral Tribunal on June 12, 2017.

48. Pursuant to Procedural Order No. 1 (the Procedural Rules) and the Amended Procedural Timetable, a Pre-Hearing Conference Call took place on October 30, 2017 at 2pm Paris time, with representatives of each of the Parties attending:

- A number of issues relating to the conduct of the Oral Hearing were discussed, and the Parties and the Arbitral Tribunal reached agreement on all of them;
- The Parties were also given an opportunity to make submissions concerning Respondents' request, made on October 23, 2017, for a reasonable extension of the deadline for submitting the witness statement that the Arbitral Tribunal had required Respondents to provide by October 20, 2017 to confirm that there were no responsive documents that had not been disclosed by Respondents. Claimant continued to object to this request, for reasons that it had set forth in its e-mail of October 24, 2017. Respondents explained that the delay in obtaining the witness statement was due to difficulties currently faced by the Libyan authorities, but that they hoped to be able to submit the statement in a few days' time;
- The Arbitral Tribunal considered that, in light of the current situation in Libya, there were exceptional circumstances justifying a short extension of the deadline for submitting the witness statement that it had required Respondents to provide by October 20, 2017.

49. The Arbitral Tribunal therefore issued a **Procedural Order No. 4**, ordering that:

- The deadline for submitting the witness statement confirming that there were no responsive documents that had not been disclosed by Respondents would be extended until November 5, 2017;

- The Oral Hearing would start at 10 am (sharp) on November 6, 2017;
- In the morning, Claimant would present its submissions for a maximum of one and a half hours. Following a short break, Respondents would present their submissions for a maximum of one and a half hours;
- After lunch, the Parties would each have a brief right of reply. The Arbitral Tribunal would then ask questions of the Parties.

50. Pursuant to the Amended Procedural Timetable, the Oral Hearing on jurisdiction and merits took place on 6 November 2017 at the President's offices in Paris. The following points may be noted among others:

- At the beginning of the Oral Hearing, the Arbitral Tribunal asked Respondents for an explanation of why the witness statement that it had required (to confirm that there were no responsive documents that had not been disclosed by Respondents) had still not been submitted. Respondents' counsel explained that they had still not received the witness statement from Respondents:

*"The reasons are related to some disorganization within the litigation department in Libya. Actually we were told about the non-availability of the chairman of the litigation department who is currently moving. He is in the east of Libya right now. The number two of the department is not available either, so we were not able to get – after the extension of time granted by the Tribunal – any person having a practical knowledge of the case who was able to provide us with a witness statement."*⁵

- Pursuant to Procedural Order No. 4, the representatives of the Parties presented their submissions, were given a right of reply and were then asked questions by the Arbitral Tribunal;
- The representatives of the Parties confirmed, at the end of the Oral Hearing, that: (i) they had no objections to the manner in which the Oral Hearing had been conducted; and (ii) they had no further submissions, claims or defences to make by way of post-hearing briefs;
- A stenographer attended the Oral Hearing and subsequently provided a transcript of what was said during the Oral Hearing to the Arbitral Tribunal and the Parties. That transcript will

⁵ Mr. Sefrioui in answer to a question from the President of the Arbitral Tribunal, Tr. 7:10-20.

be referred to in this Final Award in the following way: “Tr. 34:6” refers to line 6 of page 34 of the transcript.

C. Procedural Steps Following the Oral Hearing

51. Following an initial deliberation, the Arbitral Tribunal issued a **Procedural Order No. 5**, ordering that, by 24 November 2017, the Parties submit to the Arbitral Tribunal a copy of the notice of dispute sent by the Claimant to the Respondents pursuant to Article 8(1) of the BIT, together with any brief comments they may specifically have on the same.⁶

52. On 17 November 2017, Claimant filed an “Answer to Procedural Order No. 5,” in which it (i) referred to the Request for Mediation dated 19 February 2017, (ii) provided details of the way in which that Request for Mediation had been notified to Respondents and (iii) explained (by reference to case-law and commentary) that the cooling-off period was in any case “*not mandatory nor jurisdictional*”.⁷

53. On 24 November 2017, Respondents wrote to the Arbitral Tribunal (i) requesting that Claimant’s Answer to Procedural Order No. 5 be rejected as inadmissible and inappropriate, because of the number and length of its exhibits, and (ii) arguing that Claimant had failed to provide evidence of the service of any notice of dispute on the State of Libya.

54. None of the Parties had asked for the right to put in a further submission on any substantive issue, and the Arbitral Tribunal (after further deliberation) decided that it did not require any further submission from the Parties on any substantive issue. Accordingly, the Arbitral Tribunal issued **Procedural Order No. 6** requiring the Parties to file their costs submissions with the Arbitral Tribunal by December 8, 2017 (and providing an indication of the minimum level of detail that such costs submissions should contain).

55. The Parties filed their costs submissions on December 8, 2017.

56. On December 11, 2017, the Arbitral Tribunal informed the Parties that it intended to close the proceedings pursuant to Article 27 of the ICC Rules, and invited them to state whether they had any objection to its doing so.

⁶ Claimant had stated during the Oral Hearing that it had “*fulfilled the cooling-off period*” (Tr. 13:1.2) but it did not state which document had triggered the start of that period.

⁷ Claimant’s Answer to Procedural Order No. 5, ¶ 9.

57. On December 11 and 12, 2017, Respondents and Claimant respectively confirmed that they had no such objection.

58. Accordingly, on December 14, 2017, the Arbitral Tribunal issued a **Procedural Order No. 6**, declaring the proceedings closed with respect to the matters to be decided in the Final Award.

D. The Financial Status of the Arbitration

59. Pursuant to Article 36(2) of the ICC Rules, the ICC Court decided, on September 1, 2016, to fix the advance on costs at US\$ 262,000 subject to later readjustments.

60. Claimant has paid the entirety of this advance.⁸

E. Time-Limit for the Final Award

61. Pursuant to Article 30(1) of the ICC Rules, the ICC Court fixed February 7, 2018 as the time-limit for the Final Award, as explained in the Secretariat's e-mail dated February 7, 2017. On January 26, 2018, the ICC Court extended this time-limit until 28 February 2018. On February 22, 2018, the ICC Court extended this time-limit until March 30, 2018. On March 22, 2018, the ICC Court extended this time-limit until April 30, 2018. On April 26, 2018, the ICC Court extended this time-limit until May 31, 2018. On May 31, 2018, the ICC Court extended this time-limit until June 29, 2018.

⁸ See the ICC's Financial Table dated August 3, 2017, sent to the Arbitral Tribunal and the Parties by letter of the same date.

III. THE BACKGROUND FACTS

62. On May 13, 2008, Claimant and Respondent No. 1 entered into Contract Number 43 for the Year 2008, dated May 13, 2008 (the “**Contract**”) relating to a project for the supply and execution of a water supply and transport system for the inhabitants living along the great man-made river pipeline Abuzyiyan – Al Ruhaybat Section (the “**Project**”). This Contract contains, among other things, a choice of courts provision:

“This contract, in regards to its explanation and execution, obeys the regulations’ decrees and the applied tariffs which are used in Libya, and the Libyan Judge is responsible for dealing with the conflicts that may result from this contract.”⁹

63. Presumably as a result of the Libyan Civil War in 2011, the Parties agreed to terminate the Contract, which they did by way of a “Mutual Agreement to Terminate the Contract Between Libyan Investment and Development Company (LIDCo) and Oztas” dated March 18, 2013 (the “**Termination Agreement**”). The Termination Agreement provided:

“The parties have mutually agreed that LIDCo will terminate its contract with OZTAS for LYD 3,939,191.759, from which will be deducted LYD 274,000.000 for payment to OZTAS’ Libyan Sub-Contractor Almasar Engineering Services Co., with net proceeds of LYD 3,665,192.000 to be paid to OZTAS. Attached is the agreement between OZTAS and Almasar Engineering Services Co. regarding the settlement between these two parties.

LIDCo. will pay OZTAS the amount of LYD 3,665,192.000 in four equal payments by checks with the first due to OZTAS within 60 days from the signing of this agreement. The remaining three payments will be paid by LIDCo to OZTAS every 60 days thereafter on the following dates:

- *First check in the amount of LYD 916,298.00 on or before May 17, 2013*
- *Second check in the amount of LYD 916,928.00 on or before July 17, 2013*
- *Third check in the amount of LYD 916,928.00 on or before September 17, 2013*
- *Fourth check in the amount of LYD 916,928.00 on or before November 17, 2013*

The fulfillment of this agreement eliminates any further liabilities by OZTAS to LIDCo regarding any of the work that OZTAS has performed, and LIDCo is not responsible for any further financial liabilities to OZTAS beyond the payments detailed above.”¹⁰

⁹ Contract, CX-1, Art. 51.

¹⁰ Termination Agreement, CX-2.

64. This Termination Agreement contains no choice of courts provision and no arbitration agreement.

65. Respondent No. 1 has failed to make the payments provided for by the Termination Agreement.¹¹ This is not contested by Respondents.

66. Claimant has pursued its claim for non-fulfilment of the Termination Agreement by diplomatic channels but has not made any claim before the Libyan courts. This was explained by Claimant's counsel during the question and answer session at the Oral Hearing:

"DR AYOGLU: ... Has Oztas ever considered filing a lawsuit against LIDCo in the Libyan courts?"

MR MERT CEKINMEZ: Oztas has never considered going to Libya's courts because during the works and after the termination, as all other contractors, we considered LIDCo as the Libyan Government, so we have never looked for that. Besides, during the termination period and afterwards, we have always been in contact with the Embassy of Libya where we could find someone, anyone, also during the process after the termination and during the civil war and the post-civil war. The Turkish Government and the Libyan Government have always contacted each other about the resolution of our case and many others so no, we have never considered going to the Libyan court."¹²

67. On February 19, 2015, Claimant sent a Request for Mediation to the ICC ADR Centre and each of the Respondents: in the case of Respondent No. 1, at its address in Libya; in the case of Respondent No. 2, at the Libyan Embassy in Paris. The Request for Mediation summarized the facts referred to above and then stated:

"However, LIDCo has breached the Termination Agreement by not making any payment until now, even though OZTAS has persistently demanded.

It should be mentioned that LIBYA has undertaken to protect the rights of OZTAS under the "Agreement between the Republic of Turkey and the Great Socialist People's Libyan Arab Jamahiriya Concerning the Reciprocal Promotion and Protection of Investments". In this scope, LIBYA is also responsible from the governmental company LIDCo's payment.

OZTAS, with all its good faith, is willing to resolve the dispute amicably; in this context, by reserving all of our rights, we kindly request mediation in line with the ICC Mediation Rules.

¹¹ SOC, ¶ 6.

¹² Question and answer session at Oral Hearing, Tr. 92:5-22.

In case LIBYA and/or LIDCo do not fulfill their obligations determined under Termination Agreement, unfortunately, OZTAS will have no other option but to seek its legal rights by arbitration.

Since there is no agreement about the mediation procedure, we would like the Centre to appoint a mediator, determine English as the language and Paris as the place of the mediation; finalize the mediation in 90 days following the informing of LIBYA and LIDCo about this mediation.”¹³

¹³ Request for Mediation dated February 19, 2015, CX-26.

IV. THE ADMISSIBILITY OF RESPONDENTS' ANSWER

A. The Parties' positions

68. Claimant has pointed out that neither Respondent submitted an answer to the Request for Arbitration within the 30-day limit imposed by Article 5.1 of the ICC Rules.¹⁴ As a result, Claimant argues that “*the claims alleged by the Respondents cannot be taken into account in this arbitration case.*”¹⁵

69. Respondents have responded that no rule of admissibility can be found in the ICC Rules.¹⁶ Rather, the ICC Rules require an arbitration to “*proceed*” in the event that no answer is submitted.¹⁷ Respondents further argue that the Arbitral Tribunal is bound to ensure that the Parties have “*a reasonable opportunity to present [their] case*”¹⁸ and that the Tribunal’s decision must base itself on “*the Parties’ submissions, statements and pleadings [...]*.”¹⁹ In addition, Respondents argue that a failure to consider Respondents’ arguments would be a “*patent violation of Respondents’ rights of defense,*” which they argue constitute a mandatory rule of French law (the *lex loci arbitri*).²⁰

B. The Arbitral Tribunal’s decision

70. The Arbitral Tribunal unanimously agrees with Respondents on this issue.

71. The Arbitral Tribunal does not believe that Respondents’ failure to submit an Answer precludes Respondents from being given an opportunity to respond to, and defend themselves against, Claimant’s allegations. There is nothing in the ICC Rules that excludes a respondent that fails to provide an answer within the deadline (or at all) from raising defences against a claimant’s claims. Indeed, The Secretariat’s Guide to ICC Arbitration explains that “[t]here is no explicit sanction under the rules for a respondent’s failure to submit the Answer within the time limit it has been set.”²¹

72. Rather, the Arbitral Tribunal considers that if it were to preclude Respondents from being able to defend themselves, this arbitration would not respect the requirement that the proceedings be adversarial, *i.e.* “*le principe de la contradiction.*”

¹⁴ Reply, ¶¶ 1-3.

¹⁵ Reply, ¶ 4.

¹⁶ Rejoinder, ¶ 91.

¹⁷ Rejoinder, ¶ 91; ICC Rules, art. 6(3).

¹⁸ Rejoinder, ¶ 91; ICC Rules, art. 22(4).

¹⁹ Rejoinder, ¶ 92, referring to TOR, ¶ 9.

²⁰ Rejoinder, ¶ 93.

²¹ J. Fry, S. Greenberg, F. Mazza, The Secretariat’s Guide to ICC Arbitration ¶ 3-148 (ICC, 2012).

73. Accordingly, the Arbitral Tribunal finds that Respondents' answers to Claimant's claims are admissible. Indeed, all written submissions (whether by Respondents or by Claimant) will therefore be taken into account by the Arbitral Tribunal for the purpose of this Final Award.²²

²² In respect of Claimant's "Answer to Procedural Order No. 5", which Respondents asked the Arbitral Tribunal to disregard, the reasons for the Arbitral Tribunal's decision to admit that memorial will be set forth at ¶ 80 below.



V. SATISFACTION OF THE 90-DAY COOLING-OFF PERIOD**A. Introduction**

74. Article 8 of the BIT, set out in full at paragraph 16 above, provides that:

“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 endeavour 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 ...”²³

75. Accordingly, an investor who wishes to commence an international arbitration against a host State must first notify the host State of the dispute in writing, “including detailed information”. Then it must endeavour in good faith to settle the disputes by consultations and negotiations. If such endeavours are still unsuccessful 90 days after the date of the written notification of the dispute, the investor may then commence an international arbitration (or, at its choice, domestic court proceedings).

76. The first question for the Arbitral Tribunal’s consideration is therefore whether this 90-day cooling-off period requirement has been satisfied and, if not, what consequences flow from that.

B. The Parties’ positions

77. The Parties made few (if any) arguments about the cooling-off period in their written submissions. Claimant stated during the Oral Hearing:

“Also according to Article 8 of the BIT, if these disputes cannot be settled in the way of negotiations with good faith, the parties have a right to submit their dispute to international arbitration under ICC. Here I just want to remind you that we have already applied to mediation in the ICC before this arbitration case – I have already submitted the related documents to you – but we did not have any answer from either LIDCo or Libya, and that is why we have already fulfilled our settlement negotiation procedure and then we applied to arbitration. We have already fulfilled the cooling off period according to the arbitration.”²⁴

²³ BIT, CX-3, Art. 8.

²⁴ Claimant’s submissions at the Oral Hearing, Tr. 12:15-13:3.

78. As it was not entirely clear to the Arbitral Tribunal from this statement which document Claimant considered to be the written notification of the dispute for the purposes of Article 8(1) of the BIT, the Tribunal requested the Parties by Procedural Order No. 5 to submit “*a copy of the notice of dispute sent by the Claimant to the Respondents pursuant to Article 8(1)*” of the BIT and invited the Parties to comment thereon.

79. As explained at paragraphs 52-53 above, both Parties submitted their comments, and Respondents requested that the Arbitral Tribunal reject Claimant’s comments “*as inadmissible and inappropriate,*” on the basis that Claimant’s submission “*exceeds by far the scope of the Tribunal’s order.*”²⁵

80. The Arbitral Tribunal does not agree with Respondents that Claimant’s Answer to Procedural Order No. 5 “*exceeds by far the scope of the Tribunal’s order.*”²⁶ Claimant’s comments are, in reality, quite short; it is the factual and legal exhibits to which Claimant refers that are numerous. In addition, the Arbitral Tribunal notes that Claimant sent its Answer to Procedural Order No. 5, together with its supporting documents, on 17 November 2017, *i.e.* one week before the Tribunal’s deadline of 24 November 2017. Respondents therefore had an opportunity to respond to and comment on Claimant’s Answer to Procedural Order No. 5. Accordingly, the Arbitral Tribunal does not consider that Respondent’s rights of the defence have in any way been prejudiced, and it has unanimously decided to admit Claimant’s Answer to Procedural Order No. 5.

81. In that submission, Claimant appears to contend that the Request for Mediation that it filed with the ICC on February 19, 2015 was a notice of dispute in accordance with the BIT. Claimant argues that it properly notified the Request for Mediation when it sent the Request for Mediation via email to the ICC, Respondent No. 1 (LIDCo) and the Libyan Consulate in Paris, on February 19, 2015.²⁷ The Request for Mediation was also sent by the ICC to the Libyan Embassy in Paris on 27 February 2015.²⁸ Claimant argues, in any event, that the “*cooling off period or the settlement clauses in BIT[s] are not mandatory or jurisdictional*”²⁹ and has submitted further investment arbitration case law and doctrine in support of this argument.³⁰

²⁵ Respondents’ Response to PO No. 5, p. 1.

²⁶ Respondents’ Response to PO No. 5, p. 1.

²⁷ Claimant’s Answer to PO No. 5, ¶ 2; *see also* Claimant’s email to the ICC, Respondent No. 1, and the Libyan Consulate in Paris, dated February 19, 2015, CX-25.

²⁸ ICC’s letter to Claimant, Respondent No. 1 and Respondent No. 2, dated February 27, 2015, CX-38.

²⁹ Claimant’s Answer to PO No. 5, ¶ 9.

³⁰ Claimant’s Answer to PO No. 5, ¶ 10.

82. Respondents, on the other hand, argue that Claimant's Request for Mediation (i) does not equate to a "notice of dispute" under Articles 8(1) and 8(2) of the BIT, (ii) "was submitted in absence of any agreement of the parties for ICC Mediation" and (iii) was not properly served on the State of Libya, because the Libyan Embassy and the Libyan House of Representatives do not have the authority to receive notifications on behalf of the State of Libya.³¹

83. It seems, therefore, that the following issues are live as between the Parties in relation to the cooling-off period: (a) whether Claimant served a notice of dispute for the purposes of Article 8 of the BIT; (b) whether service was properly effected on Respondents; and (c) if the answer to either of these questions is no, then what consequences should follow. There are no other live issues in relation to the cooling-off period: the Parties appear to agree that, if the Request for Mediation constitutes a notice of dispute and if it was properly served on Respondents, then the cooling-off period has been satisfied.

C. The Arbitral Tribunal's decision

84. The Arbitral Tribunal unanimously considers that the 90-day cooling-off period has been satisfied by Claimant in this case in respect of Respondent No. 2 (the State of Libya), for the following reasons.

85. As explained at paragraph 75 above, Article 8 of the BIT requires that an investor who wishes to commence an international arbitration against a host State must first notify the host State of the dispute in writing, "including detailed information".

86. The Request for Mediation does exactly that: it notifies the host State, Libya, of the dispute; it does so in writing; and it includes detailed information, including a reference not only to the Contract and the Termination Agreement but also to the BIT.³²

87. The fact that the Parties had not agreed to mediate their dispute is beside the point: Article 8 of the BIT requires that the investor notify the host State in writing (and in detail) about the dispute; and the Request for Mediation did just that, whether or not the Parties had agreed to mediation.

88. As to whether the Request for Mediation was properly served on Respondents, the Arbitral Tribunal considers that the notification of the Request for Mediation to the Libyan Embassy in

³¹ Respondents' Response to PO No. 5, p. 2; *see also* Me Gibault's letter to the ICC International Center for ADR dated April 2, 2015, CX-46.

³² See Request for Mediation, CX-26.

Paris³³ was adequate service on Respondent No. 2: it clearly brought the dispute to the attention of the State of Libya, which is what is required under Article 8 of the BIT. The response by Me. Gibault on behalf of the Libyan Embassy in Paris confirms that the Request for Mediation was received;³⁴ and whether or not that Embassy had authority under Libyan law to receive notifications on behalf of the State, it was in a position to, and ought to have, informed the relevant persons within the government of the State of Libya about the Request for Mediation.

89. Accordingly, the Arbitral Tribunal considers that the cooling-off period requirement was satisfied in respect of Respondent No. 2, the State of Libya. It is therefore unnecessary for the Arbitral Tribunal to consider what consequences would have followed if the cooling-off period requirement had not been satisfied.

90. As to whether the cooling-off period requirement was satisfied in respect of Respondent No. 1, LIDCo, the Arbitral Tribunal does not need to take a decision on this, given that (as will be explained in Section VI below) the Arbitral Tribunal has decided that it does not in any case have jurisdiction over Respondent No. 1.

³³ ICC's letter to Claimant, Respondent No. 1, and Respondent No. 2 dated February 27, 2015, CX-38.

³⁴ Me. Gibault's letter to the ICC International Center for ADR dated 2 April 2015, CX-46.

VI. THE JURISDICTIONAL OBJECTIONS

A. Introduction

91. The question of whether the Arbitral Tribunal has jurisdiction over Respondents needs to be treated separately in respect of Respondent No. 1 and Respondent No. 2. Quite different considerations arise in respect of each of those entities. The Arbitral Tribunal will therefore consider first its jurisdiction over Respondent No. 1 (B) before turning to the Parties' arguments relating to its jurisdiction over Respondent No. 2 (C) and to take its decision in that respect (D).

B. Jurisdiction over Respondent No. 1, LIDCo

92. *The Parties' positions.* The Parties made few submissions concerning the Arbitral Tribunal's jurisdiction over Respondent No. 1. Indeed, most of the discussion in the Parties' written submissions and during the Oral Hearing concerned not the liability of Respondent No. 1 but rather of Respondent No. 2, the State of Libya. As will be explained at Section VII(B) below, there was much discussion about whether the State of Libya could be liable for actions of LIDCo; but there was little (if any) discussion about the liability of LIDCo itself.

93. *The Arbitral Tribunal's decision.* The Arbitral Tribunal has unanimously decided that it can have no jurisdiction over Respondent No. 1, LIDCo. Article 8 of the BIT, from which the Arbitral Tribunal derives its jurisdiction, provides:

"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 endeavour 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 ..."*³⁵

94. Respondent No. 1, LIDCo, is not (on any view) "one of the Contracting Parties" to the BIT. Accordingly, the dispute between Claimant and Respondent No. 1 necessarily falls outside the scope of Article 8 of the BIT, and the Arbitral Tribunal can therefore have no jurisdiction over such a dispute in the absence of an arbitration agreement that binds Respondent No. 1.

³⁵ BIT, CX-3, Art. 8 (emphasis added).

95. Accordingly, the Arbitral Tribunal unanimously decides to decline jurisdiction in respect of Respondent No. 1.

C. Jurisdiction over Respondent No. 2, the State of Libya: the Parties' positions

96. *Respondents' position.* Respondents have argued that the Arbitral Tribunal does not have jurisdiction over Respondent No. 2 principally on the basis that this is a contract claim, not an investment claim. At paragraphs 12 and 13 of their Statement of Rejoinder, Respondents argue:

"12. ... it is necessary to allege a conduct which is contrary to the investment treaty (i.e., a treaty claim), in order to establish jurisdiction under that treaty. The sole allegation of a violation of the contract (i.e. a pure contract claim) is insufficient to establish jurisdiction under the treaty.

*13. In this case, the Claimant's claim is merely the allegation of a breach of contractual provisions."*³⁶

97. In addition, Respondents argue that Claimant has failed to formulate any explicit treaty claims:

"19. ... the Claimant's reasoning fails to identify any proper breach of the BIT.

20. Indeed, in order to establish jurisdiction, the Claimant cannot simply quote the existence of the BIT, but has at least to invoke facts which are capable of constituting a breach of that treaty.

*21. Put differently, in order to decide that it has jurisdiction, the Tribunal must ascertain that the facts of the dispute would constitute a breach of the BIT if they were established. If the facts alleged are not, even in theory, capable of constituting a breach of that treaty, then the Tribunal cannot but dismiss the claim by lack of jurisdiction *ratione materiae*.*

*22. In that respect, in order to characterize a possible violation of the BIT, the Claimant has at least to allege that it suffered from actions taken by the host State in the exercise of its sovereign authority ... or, generally, that such acts of *puissance publique* have negatively interfered with contractual performance.*

...

24. In the present case, the Claimant does not refer to any fact or action reflecting the exercise of sovereign prerogatives by either LIDCo or the State of Libya. As aforesaid, the Claimant's claim is limited to the allegation of a mere breach of contract (i.e. the non-payment of a termination indemnity).

25. Even assuming that it was established, such breach could not constitute a breach of the treaty (i.e. a treaty claim), by lack of involvement of any sovereign authority.

³⁶ Rejoinder, ¶¶ 12-13.

26. *Therefore, the Claimant's claim under the treaty is inadmissible ratione materiae, and remains, as a pure contract claim, governed by the dispute resolution clause of the contract.*³⁷

98. **Claimant's position.** Claimant's arguments concerning jurisdiction are hard to distinguish from their arguments concerning the merits of its claim against Respondents. Essentially, Claimant submits that, contrary to what Respondents allege, its claims are treaty-based. Thus, at paragraph 11 of its Statement of Reply, Claimant states:

"11. In this arbitration case, the applicability of the BIT derives from:

- LIBYA's responsibility for LIDCo's acts;*
- LIBYA's responsibility for its own acts."*

99. Claimant then goes on to explain why Respondent No. 2, the State of Libya, is responsible in each of these ways. These arguments will be examined in detail in Section VII below, in relation to the merits of Claimant's claims against Respondent No. 2.

D. Jurisdiction over Respondent No. 2: the Arbitral Tribunal's decision

100. The conditions for jurisdiction under the BIT are specified in Article 8 of the BIT:

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 ... (c) the Court of Arbitration of the Paris International Chamber of Commerce*³⁸

101. The Arbitral Tribunal must therefore be satisfied that the following conditions are met in order to uphold jurisdiction over this dispute: (1) the claim must be against a "Contracting Party", (2) must be made by an "investor" of the other Contracting Party and (3) must be in connection with an "investment."

³⁷ Rejoinder, ¶¶ 19-26.

³⁸ BIT, CX-3, Art. 8.

102. Each of these conditions will now be examined in turn to see whether it is satisfied in respect of Respondent No. 2, the State of Libya (1, 2 and 3). The Arbitral Tribunal will then see whether there is an additional jurisdictional requirement that Claimant make out a *prima facie* showing of breach of the BIT (4), before providing some concluding remarks (5).

1. Claim against a “Contracting Party”

103. Respondent No. 2 is the State of Libya. The State of Libya is a “Contracting Party” to the BIT.³⁹

104. Accordingly, the first condition for jurisdiction is satisfied in respect of Respondent No. 2.

2. Claim by an “investor” of the other Contracting Party

105. The BIT defines the term “investor” as “corporations [...] incorporated or constituted under the law in force of either of the Contracting parties and having their headquarters in the territory of that Contracting Party; who have made an investment in the territory of the other Contracting Party.”⁴⁰ Accordingly, Claimant must (a) be a corporation “constituted under the law in force of [a] Contracting party [with its] headquarters in the territory of that Contracting Party” and (b) “have made an investment in the territory of the other Contracting Party.”

a. Claimant is a corporation constituted under the laws of Turkey, with its headquarters in Turkey

106. Claimant is Oztas, a company incorporated under the laws of Turkey and whose headquarters are at Mebusevleri Iller Sokak No. 10, Tandogan, 06580 Ankara, Turkey.⁴¹ Therefore, Claimant is “constituted under the law in force of [a] Contracting party” and has its “headquarters in the territory of that Contracting Party.”

b. Claimant has made an investment in Libya

107. As will be explained at paragraphs 107-120 below, the Arbitral Tribunal considers, in light of the evidence on record and the Parties’ submissions, that Claimant has made an “investment” in Libya, within the meaning of the BIT.

3. Claim in connection with an investment

108. Claimant claims that its “investment” in Libya is the amount that is owed to it under the Termination Agreement. This was made clear (following some previous confusion on the issue) in

³⁹ BIT, CX-3, p. 1.

⁴⁰ BIT, CX-3, Art. 1(b).

⁴¹ See CX-7; and see Claimant’s opening statement at the Oral Hearing, Tr. 11:10-14.

the answer given by Ms. Candemir (counsel for Claimant) to a question posed by the Arbitral Tribunal:

"MS CANDEMIR: ... Oztas' investment is terminated and the amount we are claiming is Oztas's damage suffered because of the termination of the investment. It is the total amount.

PROF DR ABDEL WAHAB: That is understood.

MS CANDEMIR: This amount has now become, according to the BIT, the investment. The claimed amount has become the investment of Oztas because the investment is terminated. The real asset part is terminated and what we have in the final amount to claim.

PROF DR ABDEL WAHAB: Is it your investment, this amount you are claiming?

MS CANDEMIR: After the end of the termination my investment as an asset. What is my investment remaining? The amount that I have to claim."⁴²

109. The question, therefore, is whether this claim under the Termination Agreement amounts to an "investment" within the meaning of the BIT.

110. The Arbitral Tribunal unanimously decides that it does, for the following reasons.

111. The term "investment" is very broadly defined in the BIT:

"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:

...

(b) returns reinvested, claims to money or any other rights having financial value related to an investment."⁴³

112. There is no doubt that Claimant's claim under the Termination Agreement falls within the term "every kind of asset" and more specifically within the term "claim to money" in Article 1(2)(b).

113. The question remains whether Claimant's claim under the Termination Agreement is "in conformity with [Libya's] laws and regulations."

⁴² Oral Hearing, Tr. 135:22-136:14.

⁴³ BIT, CX-3, Art. 1(2).



114. Respondents appeared to make the argument (for the first time) in their rebuttal arguments at the Oral Hearing that Claimant's claim under the Termination Agreement might not be "*in conformity with [Libya's] laws and regulations.*" Thus, Dr. Ballow (Respondents' counsel) stated:

"This contract could not be considered simply and easily as a contract of investment. Investment in Libya is well organized and is under the strict control of a specific board and here are specific laws which apply to investments. To come to Libya as an investor and consequently to benefit from the BIT you have to come to Libya upon a demand to come as an investor. You have to be registered by the authority. You also have to get a licence to exercise activities. It is not just coming to Libya and say I am an investor and now I am covered by the BIT. That is just to clarify this point.

*We do not see on the documents of Claimants that she has to get the authorization. She is authorized to invest in Libya and you came as a general contractor who concludes a contract with LIDCo. Also this contract we know determines the amount, so you did not make any financial operation? Nothing else. Neither the Contract which has been signed in 2008, nor the settlement agreement or the Termination Agreement concluded in 2013 could not be considered as an investment operation."*⁴⁴

115. The Arbitral Tribunal unanimously disagrees with this, because it considers that the phrase "*in conformity with the hosting Contracting party's laws and regulations*" is intended to exclude from the BIT's protection illegal investments rather than to create a requirement that investments be pre-approved by the host State in order to qualify for protection.

116. In this respect, the majority fully agrees with the finding of the arbitral tribunal in *Salini Construttori SpA and Italstrade SpA v. Kingdom of Morocco* that:

*[T]his provision refers to the validity of the investment and not to its definition. More specifically, it seeks to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal.*⁴⁵

117. In the present case, there has never been any suggestion (let alone any evidence presented by Respondents) that Claimant's investment was in any way illegal.

118. In addition, the Arbitral Tribunal notes that Respondents' counsel appeared to retreat from Mr. Ballow's statement. Thus, Mr. Sefrioui stated (shortly after Mr. Ballow had made his comments):

⁴⁴ Respondents' rebuttal submissions at Oral Hearing, Tr. 86:2-87:8.

⁴⁵ RL-7, *Salini Construttori SpA and Italstrade SpA v. Kingdom of Morocco*, Decision on jurisdiction, ICSID case n°ARB/00/04, 16 July 2001, ¶ 46.

*"This point has not been made and we clearly assume that it has not been made in the written submissions."*⁴⁶

119. Finally, the Arbitral Tribunal notes that the argument made by Dr. Ballow would have been more apposite in relation to an arbitration under the Rules of the International Center for Settlement of Investment Disputes ("ICSID"). Pursuant to Article 8(4)(a) of the BIT, an ICSID arbitral tribunal could only have had jurisdiction over "*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.*"⁴⁷ The BIT provides for no such condition in relation to the jurisdiction of an ICC arbitral tribunal.

120. Accordingly, the Arbitral Tribunal unanimously finds that Claimant's claim under the Termination Agreement is an "*investment,*" and that the dispute in this arbitration is therefore "*in connection with [the investor's] investment*", within the meaning of the BIT.

4. Is there an additional jurisdictional requirement that Claimant make out a *prima facie* case for breach of the BIT?

121. As explained at paragraphs 96-97 above, Respondents have argued that "*it is necessary to allege a conduct which is contrary to the investment treaty (i.e., a treaty claim), in order to establish jurisdiction under that treaty*" and that "*in order to establish jurisdiction, the Claimant cannot simply quote the existence of the BIT, but has at least to invoke facts which are capable of constituting a breach of that treaty.*"⁴⁸

122. In other words, Respondents argue (without citing any authority for the proposition) that, in order to establish the Arbitral Tribunal's jurisdiction, it is not enough for Claimant to satisfy the conditions specified in Article 8 of the BIT; it must also establish a *prima facie* case of a breach of the BIT.

123. The Arbitral Tribunal unanimously disagrees with this. The jurisdiction of an arbitral tribunal does not depend on the strength of the claims made before it. Thus, to take a quite unrelated (and extreme) example, even if a claimant were to allege breach of a provision that does not exist in a commercial contract that does exist, that would be no bar to the jurisdiction of an arbitral tribunal that is otherwise competent to hear the dispute by virtue of an arbitration clause that gives the arbitral tribunal jurisdiction to hear all disputes arising out of or related to the contract in question.

⁴⁶ Respondents' rebuttal submissions at Oral Hearing, Tr. 88:5-7.

⁴⁷ BIT, CX-3, Art. 8(4)(a).

⁴⁸ Rejoinder ¶¶ 12 and 20.

124. The Arbitral Tribunal can see no reason why it should be any different in the context of the BIT. Nor have Respondents provided any explanation as to why that should be the case. Moreover, Respondents have not even advanced a substantiated application for an expedited dismissal of the Claimant's claims for the Arbitral Tribunal to consider the merits of such application. Accordingly, the Arbitral Tribunal sees no legal basis to add an inexistent condition to Article 8 of the BIT.

125. Claimant has claimed that Respondent No. 2 has breached its duty to provide "*full protection and security*" and "*fair and equitable treatment*" under the BIT, by (among other things) failing to protect Claimant from the consequences of the Libyan civil war:

*"Because of this civil war Libya did not provide a legally, commercially and physically secure and predict[able] environment for investors and also because of this breached the obligations of fair and equitable treatment and full protection and security in BIT ..."*⁴⁹

126. As will be explained in Section VII below, a majority of the Arbitral Tribunal does not agree with this claim, but that does not mean that Claimant was required to establish a *prima facie* case for breach.

127. Accordingly, the Arbitral Tribunal unanimously finds that there is no additional jurisdictional requirement that Claimant make out a *prima facie* case of breach of the BIT.

5. Conclusions

128. The Arbitral Tribunal therefore finds that it has jurisdiction over the State of Libya. The three conditions specified in Article 8 of the BIT are all satisfied: the claim is against a "*Contracting Party*"; it is made by an "*investor*" of the other Contracting Party; and is in connection with an "*investment*" within the meaning of the BIT as per the evidence on record and the Parties' pleadings. There is no additional requirement that the Claimant establish a *prima facie* showing of breach of the BIT.

129. Accordingly, the Arbitral Tribunal will turn now to consider the merits of Claimant's claims against Respondent No. 2.

⁴⁹ Claimant's opening submissions at Oral Hearing, Tr. 20:19-24.

VII. THE MERITS OF CLAIMANT'S CLAIM AGAINST RESPONDENT NO. 2, THE STATE OF LIBYA**A. Introduction**

130. Claimant's case for breach of the BIT by Respondent No. 2 is made in the following two ways:

- That Respondent No. 2 has breached the BIT *qua* Respondent No. 1 (i.e., "Libya's responsibility for LIDCO's acts");⁵⁰ and
- That Respondent No. 2 has breached the BIT *qua* Respondent No. 2 (i.e., "Libya's responsibility for its own acts").⁵¹

131. In addition, during the Oral Hearing, Claimant (for the first time) suggested (in answer to a question from the Arbitral Tribunal) that it could benefit from the importation, through the most favoured nation ("MFN") clause contained in Article 3 of the BIT, of an arbitration clause into the Termination Agreement.⁵²

132. In this section of the Award, we will consider whether Respondent No. 2 has breached the BIT *qua* Respondent No. 1 (B), whether Respondent No. 2 has breached the BIT *qua* Respondent No. 2 (C) and whether Claimant can benefit from the importation into the Termination Agreement of an arbitration clause because of the MFN clause in the BIT (D), before providing some concluding remarks (E).

133. The arguments examined below are the only arguments made by the Parties. Although other arguments (e.g., concerning "indirect expropriation of the construction materials"⁵³ or "non performance of the disclosure requirements in line with the stock market regulations by LIDCO"⁵⁴) are discussed in the dissenting opinion of Arbitrator Ayoglu, these were not raised by any of the Parties and were not put to them for their comment. We will therefore not discuss them in this Final Award, as they do not form part of the record.

B. Alleged breaches by Respondent No. 2 (State of Libya) *qua* Respondent No. 1 (LIDCo)**1. The Parties' positions**

134. *Claimant's position.* Claimant's case is that LIDCO's failure to indemnify Oztas pursuant to the Termination Agreement is attributable to the State of Libya because LIDCO is under governmental authority. Thus, Claimant argues that LIDCO is owned by the Economic and Social

⁵⁰ Reply, ¶ 11.

⁵¹ Reply, ¶ 11.

⁵² See Claimants' answers to the Arbitral Tribunal's questions at the Oral Hearing, Tr. 123:12-124:25.

⁵³ Dissenting opinion, ¶ 33.

⁵⁴ Dissenting opinion ¶ 35.

Development Fund (“ESDF”),⁵⁵ which itself is a subsidiary of the Libyan Investment Authority (“LIA”), which was established by the General People’s Committee in order to control assets of the State of Libya and whose Board of Trustees includes the Prime Minister and other government ministers.⁵⁶ Claimant in particular draws attention to “Law No. 36 on Asset and Property Management of Certain Persons” by which it says the State of Libya “*has expropriated the assets and companies of ESDF, including LIDCo and the investments of LIDCo.*”⁵⁷ In addition, Claimant alleges that the Integrity Commission of the State of Libya “*halted the powers*” of Respondent No. 1’s General Manager, Abdelhamid Dabebiba.⁵⁸

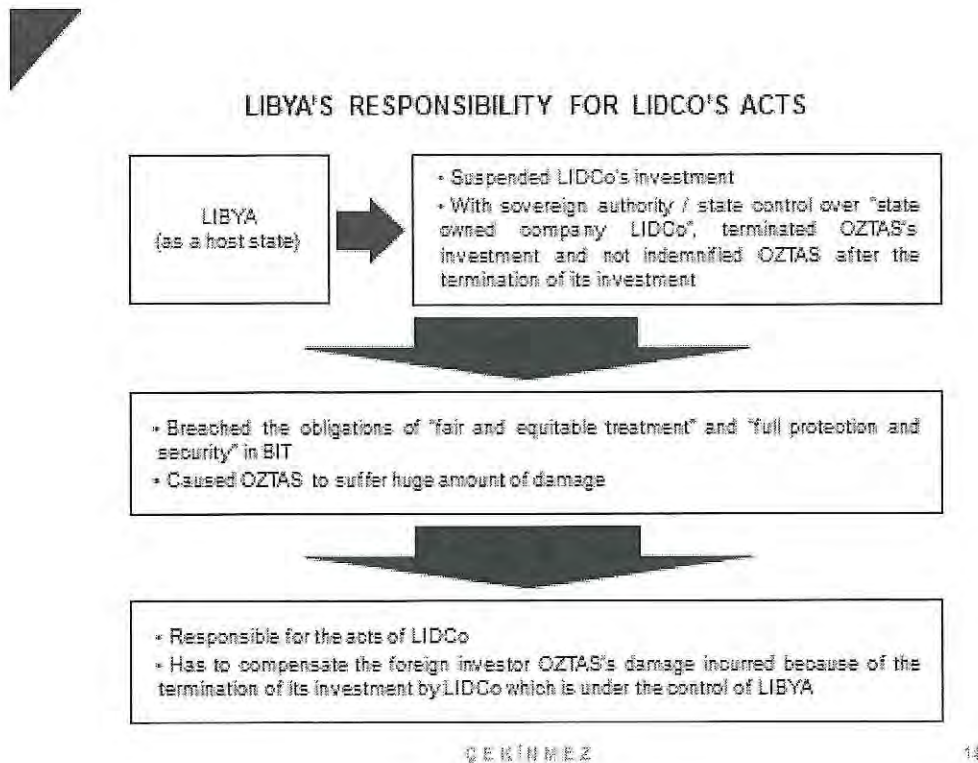
135. Claimant alleges that the State of Libya has (a) “*suspended LIDCo’s investments after the expropriation of LIDCo and LIDCo’s investments with the Law No. 36*” (“**Law No. 36**”) and (b) “*with sovereign authority/state control over ‘state owned company LIDCo’, terminated OZTAS’s investment and not indemnified OZTAS after the termination of its investment.*”⁵⁹

136. Claimant concludes from this that the State of Libya “*as a host state, breached the obligation to provide ‘full protection and security’ to foreign investor OZTAS and its investment under BIT.*”⁶⁰

137. Claimant cites a number of authorities to support the arguments summarized above.⁶¹

⁵⁵ Reply, ¶ 12.
⁵⁶ Reply, ¶¶ 13-15.
⁵⁷ Reply, ¶ 17.
⁵⁸ Reply, ¶ 18.
⁵⁹ Reply, ¶ 19.
⁶⁰ Reply, ¶ 20.
⁶¹ Reply, ¶ 21.

138. Claimant's position is also expressed in the following slide presented during the Oral Hearing:



139. *Respondents' position.* In response to Claimant's claim that the State of Libya has breached the BIT *qua* LIDCo, Respondents make the following points:

- a) “[T]he indirect ownership of LIDCo by the State of Libya is of no avail to support the Claimant’s claim inasmuch as treaty violations are predicated upon the exercise of sovereign prerogatives .../... such sovereign prerogatives do not automatically flow from a public ownership.”⁶² “Quite obviously, the Claimant is unable to establish the exercise of any sovereign prerogative by LIDCo. The Claimant indeed only relies on the allegation of a mere non-performance of the Termination agreement, which is insufficient to constitute a treaty claim.”⁶³
- b) “Claimant’s assertion that ‘Libya (the Integrity Commission) halted the powers of LIDCo’s General Manager (Abdelhamid Dabeiba) in 2012 is again incorrect.”⁶⁴

⁶² Rejoinder, ¶¶ 70-71.

⁶³ Rejoinder, ¶ 75.

⁶⁴ Rejoinder, ¶ 79.

- c) Law No. 36 was in fact amended by another law (Law No. 47/2012), “pursuant to which the list of persons subject to receivership was repealed and replaced with an amended list, which did not include either LIA, ESDF or any of their subsidiaries ... / As a consequence, LIDCo was never put under any receivership of any kind and was subject to the sole statute of Libyan private commercial law when it entered into the” Termination Agreement.⁶⁵

2. The Arbitral Tribunal’s decision

140. A majority of the Arbitral Tribunal is of the opinion that the State of Libya has not breached the BIT *qua* LIDCo because there has been no breach of the BIT by LIDCo. If there has been no breach of the BIT by LIDCo, then it follows logically there can have been no breach by the State of Libya *qua* LIDCo, whether or not the State of Libya is liable for LIDCo’s actions.

141. As explained at paragraph 135 above, Claimant based its allegation that LIDCo has breached the BIT on the allegation that the State of Libya (a) “suspended LIDCo’s investments after the expropriation of LIDCo and LIDCo’s investments with the Law No. 36”⁶⁶ (“**Law No. 36**”) and (b) “with sovereign authority/state control over ‘state owned company LIDCo’, terminated OZTAS’s investment and not indemnified OZTAS after the termination of its investment.”⁶⁷

142. Even if these allegations, for which the Arbitral Tribunal finds insufficient evidence, are correct, they do not show any breach by LIDCo (or by the State of Libya *qua* LIDCo). At most, they show a breach by the State of Libya qua the State of Libya (which we will examine in Section VII(D) below).

143. The Arbitral Tribunal sought to give Claimant a full opportunity to explain how LIDCo had breached the BIT during the question and answer session during the Oral Hearing:

“THE PRESIDENT: ... Which article of the BIT do you say that LIDCo has breached and how?

MS CANDEMIR: In our submissions we say that Libya is responsible for the acts of LIDCo and LIDCO, as a host state, breached the BIT. Just here Libya has breached the BIT. Why? Because it is responsible for the acts of LIDCo.

Because Oztas’ damage has not been paid by LIDCo or by Libya, Oztas still has an investment in Libya. Oztas has not been compensated until today because of the termination of its investment, therefore this way of making the Termination

⁶⁵ Rejoinder, ¶¶ 82-84.

⁶⁶ Reply, ¶ 19.

⁶⁷ *Idem*.

Agreement with LIDCo and not compensating Oztas is a breach of the BIT of the full protection and fair and equitable treatment by the Libyan Government because the government is responsible for the acts of LIDCo.

THE PRESIDENT: *You say that Article 2.2 of the BIT is effectively a guarantee that LIDCo will do what it is contracted to do. Is that basically what you are saying?*

MS CANDEMIR: *Because Oztas' damage has not been incurred it means that Article 2.2 is breached by the Libyan Government and that it should be applicable to this case."*

144. In other words, Claimant's position is that LIDCo breached the BIT (and in particular its Article 2.2) by failing to pay compensation to Claimant.

145. Yet, a failure to make payment under a contract cannot in itself (and without more) amount to a breach of Article 2.2 of the BIT, which provides:

*"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."*⁶⁸

146. No arbitral tribunal constituted pursuant to an investment treaty has (to our knowledge) ever interpreted the obligations of "*fair and equitable treatment*" and "*full protection*" to require respect of contractual terms, let alone by a party that is not the Contracting Party under the relevant BIT.

147. To the contrary, the arbitral tribunal in *Toto Costruzioni Generali SpA v. the Republic of Lebanon* found that, to show that a breach of contract simultaneously constitutes a treaty violation, a claimant must provide evidence that the breach involved acts of sovereign authority, *i.e.* acts going beyond that of a normal contracting party.⁶⁹ The arbitral tribunal in that case held:

*"A basic general distinction can be made between commercial aspects of a dispute and other aspects involving the existence of some form of State interference with the operation of the contract involved."*⁷⁰

148. A majority of the Arbitral Tribunal agrees with that. The Claimant must show "*some form of State interference with the operation of the contract involved*" in order to invoke the protection of the BIT.

⁶⁸ BIT, CX-3, Art. 2.2.

⁶⁹ *Toto Costruzioni Generali SpA v. the Republic of Lebanon*, Decision on Jurisdiction, ICSID case n° ARB/07/12, 11 September 2009, RL-8, ¶ 104.

⁷⁰ *Idem*.

149. Yet, in relation to Claimant's allegation that the State of Libya breached the BIT *qua* LIDCo, there cannot, *ex hypothesi*, be any question of outside interference with the operation of the contract, since LIDCo is itself a party to both the Contract and the Termination Agreement.

150. Put differently, the Claimant's claim that the State of Libya breached the BIT *qua* LIDCo is a mere claim for breach of contract, for which Claimant cannot invoke protection under the BIT.

151. Accordingly, a majority of the Arbitral Tribunal rejects Claimant's claim that the State of Libya breached the BIT *qua* LIDCo.

152. Arbitrator Ayoglu has explained why he disagrees with this in his dissenting opinion.

C. Alleged breaches by Respondent No. 2 (the State of Libya) *qua* Respondent No. 2

1. The Parties' positions

153. *Claimant's position.* In respect of the alleged breaches by the State of Libya *qua* the State of Libya, Claimant again relies on Article 2.2 of the BIT, which provides that:

*"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."*⁷¹

154. Accordingly, Claimant argues that Libya has undertaken to provide fair and equitable treatment, along with full protection and security, to Turkish investors.⁷² Claimant maintains that the State of Libya breached this by failing to "*take necessary measures to avoid / block the Libyan Revolution / Libyan Civil War,*"⁷³ whereas other countries that were experiencing similar issues "*resigned and concluded the protests peacefully without causing civil war.*"⁷⁴ Claimant argues that Libya actually escalated the crisis, in particular by violating human rights, which generated an insecure legal and commercial environment.⁷⁵

155. Furthermore, Claimant argues that the principle of full protection and security requires States not only to "*provide physical protection and security,*" but also "*commercial and legal protection*

⁷¹ BIT, CX-3, Art. 2.2.

⁷² SOC, ¶ 10.

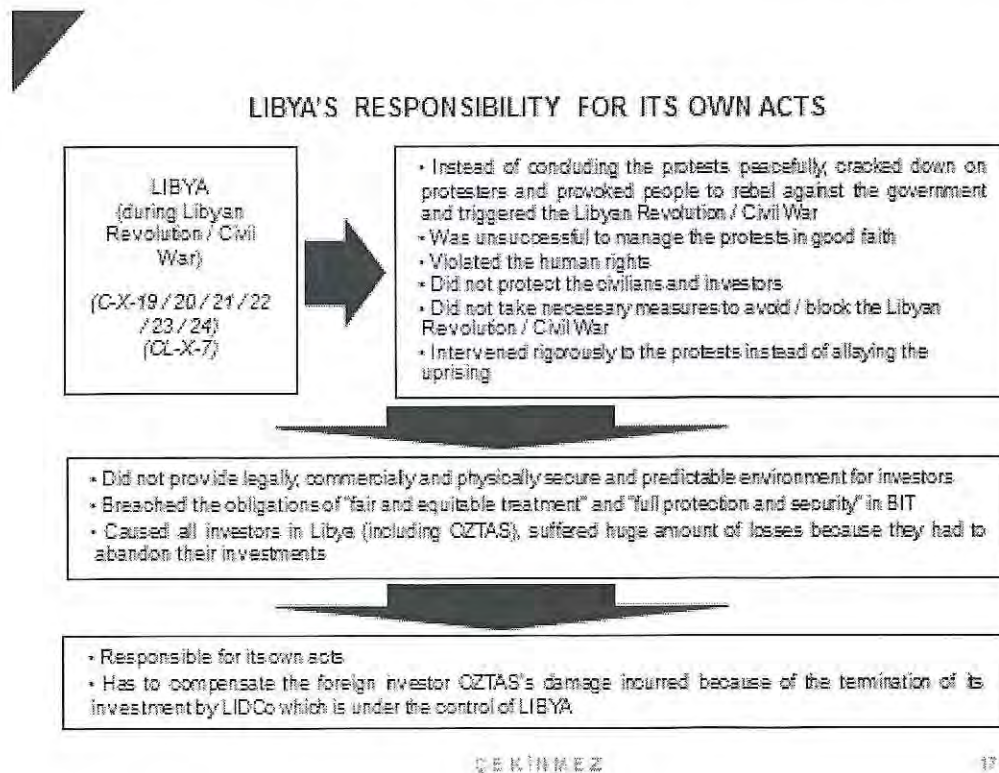
⁷³ Reply, ¶ 24.

⁷⁴ Reply, ¶ 22.

⁷⁵ Reply, ¶¶ 24-25.

and security to foreign investors as well.”⁷⁶ As for fair and equitable treatment, Claimant argues that this principle requires States “to provide a stable and predictable legal and business framework for investors.”⁷⁷ Accordingly, Claimant concludes that the State of Libya failed “to provide commercial and legal protection and a stable and predictable legal and business framework for Oztas,” in violation of the BIT.⁷⁸

156. Claimant’s position is also expressed in the following slide presented during the Oral Hearing:



157. **Respondents’ position.** Respondents contend that the BIT does not contain an obligation for the State to provide full protection and security, but rather a lesser requirement that the investment be shielded against “unreasonable or discriminatory measures [impairing] the management, maintenance, use, enjoyment, extension or disposal” of the investment.⁷⁹ Additionally, Respondents observe that the BIT contains no stabilisation clause.⁸⁰ Against this background, Respondents further assert that Claimant has not provided evidence that the non-payment of the termination fee

⁷⁶ Reply, ¶ 29.

⁷⁷ Reply, ¶ 30.

⁷⁸ Reply, ¶ 31.

⁷⁹ BIT, CX-3, Art. 2.2; Rejoinder, ¶ 60.

⁸⁰ Rejoinder, ¶ 61.

contained in the Termination Agreement resulted from Libya's failure "*to provide commercial and legal protection and a stable and predictable legal and business framework for Oztas.*"⁸¹

158. Additionally, Respondents point out that the uprising during the Libyan revolution took place between 15 February 2011 and 23 October 2011, which was two years before the Termination Agreement was signed on 18 March 2013, and can therefore not possibly have impaired the performance of that agreement.⁸² In addition, Respondents contend that Claimant has failed to "*evoke any conduct [...] (whether an adverse measure, [...] interference of public authorities, a lack of protection, a change to the legislation etc.) which could have hampered the performance [of] the Termination agreement [...].*"⁸³ Therefore, Respondents maintain that the claim is "*purely contractual [and] fall[s] outside the jurisdiction ratione materiae of the Tribunal.*"⁸⁴ In this respect, Respondents argue that Claimant failed to draw any causal link between the Libyan revolution and the investment.⁸⁵

2. The Arbitral Tribunal's decision

159. A majority of the Arbitral Tribunal finds that the State of Libya did not breach the BIT *qua* the State of Libya.

160. As can be seen from paragraphs 154-155 above, Claimant essentially makes two arguments as to why the State of Libya breached the BIT *qua* the State of Libya:

- a) It argues that the State of Libya failed to "*take necessary measures to avoid / block the Libyan Revolution / Libyan Civil War,*"⁸⁶ whereas other countries that were experiencing similar issues "*resigned and concluded the protests peacefully without causing civil war.*"⁸⁷ and
- b) It argues that the State of Libya failed "*to provide commercial and legal protection and a stable and predictable legal and business framework for Oztas.*"⁸⁸

⁸¹ Rejoinder, ¶ 62 (citing from Reply, ¶ 31).

⁸² Rejoinder, ¶¶ 63-64.

⁸³ Rejoinder, ¶ 65.

⁸⁴ Rejoinder, ¶ 66.

⁸⁵ Rejoinder, ¶¶ 67-68

⁸⁶ Reply, ¶ 24.

⁸⁷ Reply, ¶ 22.

⁸⁸ Reply, ¶ 31.

161. As to the first of these arguments, it seems to a majority of the Arbitral Tribunal that the contention that the State of Libya breached the BIT by failing to take necessary measures to avoid/block the Libyan Revolution is unwarranted and unsubstantiated.

162. There is, so far as we are aware, no case in which an arbitral tribunal constituted pursuant to an investment treaty has found that an investment treaty was breached by a failure to avoid a revolution or civil war. As a matter of international law, the condition of civil war or uprising, if existent, constitutes an extraordinary situation that negates any negligence or lack of due diligence against the State of Libya, and Claimant has not shown, let alone compellingly demonstrated, that the State of Libya has taken measures that directly aggravated or triggered the civil war and resulted in Claimant's alleged losses. Moreover, Respondents pointed out that the uprising during the Libyan revolution took place between 15 February 2011 and 23 October 2011, which was two years before the Termination Agreement was signed on 18 March 2013, and the majority of the Arbitral Tribunal agrees that therefore it could not have possibly impaired its ability to recover the amount that is owed to it under the Termination Agreement, which (as explained at paragraph 108 above) Claimant claims is the relevant "*investment*".

163. Furthermore, the second sentence of Article 2.2 of the BIT states that "[n]either Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, or disposal of such investments." It is very difficult to see how failing to avoid/block the Libyan Revolution could fall within the scope of "*unreasonable or discriminatory measures*" when that term is read in the context of Article 2.2 of the BIT.

164. There is in fact a provision in the BIT which specifically envisages war and insurrection. It is Article 5, which provides:

*"Investors of either Contracting Party whose investments suffer losses in the territory of the other Contracting Party owing to war, insurrection, civil disturbance or other similar events shall be accorded by such other Contracting Party treatment no less favourable than that accorded to its own investors or to investors of any third country, whichever is the most favourable treatment, as regards any measures it adopts in relation to such losses."*⁸⁹

165. Somewhat surprisingly, this provision was not invoked by any of the Parties during the arbitration. It was rather the Arbitral Tribunal which raised the provision during the question and answer session at the Oral Hearing. See the following exchange with Claimant's counsel:

⁸⁹ BIT, CX-3, Art. 5.

“THE PRESIDENT: ... Does that [Article 5 of the BIT] not provide the protection in relation to what you are alleging against the State of Libya?”

MR BOGAC CEKINMEZ: She said, ‘all other principles’ also. When you are referring to the most favoured clause principle, it means that any third party BIT is under this principle.

THE PRESIDENT: You have not provided any evidence, have you, of that, or of any more favourable treatment that any national or any third country investor has received?

....

MS CANDEMIR (after a short break): As you know, according to the article of the BIT it is talking about ‘treatment no less favourable than that accorded to its own investors or to investors of any third country’ in the situation of war or civil disturbance or other similar events. But now, as we know, Libya did not treat less favourable to Oztas from another party. We never heard about any different treatment to any other countries or its investors.

We know that all the investors are suffering because of the civil war. What we know and also on the United Nations official website we can see that there are lots of investment arbitrations against Libya. I think it is not directly related to our position.”⁹⁰

166. When questioned (in turn) about Article 5, Respondents’ counsel stated:

“Article 5 is the one regarding indemnification after events of war. There is that article which provides for a standard of indemnification. It has not been raised as a ground by the Claimant so I do not have much to say about that. In any case what I can say is that the Claimant is coming with a Termination Agreement which provides for an indemnification of the Contract and which is supposed to settle all prior and further liabilities arising from the initial Contract. I think that is the question to be raised.”

167. While neither of the Parties seeks to rely on Article 5, it does seem to a majority of the Arbitral Tribunal to be the proper and only remedy for Claimant in respect of such losses as it may have suffered as a result of the Libyan Revolution if the conditions of Article 5 are met. Article 2.2 is not the proper remedy for such losses. Accordingly, Claimant is entitled to receive compensation on terms as favourable as those enjoyed by Libyan investors or (if more favourable) those enjoyed by investors from a third country. This is in fact what Claimant received. As Ms Candemir conceded, “Libya did not treat less favourable to Oztas from another party.”⁹¹ In other words, there is no evidence that the State of Libya treated other investors (whether Libyan or from third countries) any differently than Claimant.

⁹⁰ Question and answer session at Oral Hearing, Tr. 150:2-151:21.

⁹¹ Ms Candemir during question and answer session at Oral Hearing, Tr. 151:12-15.

168. As to the second argument summarized at paragraph 160 above (*i.e.*, that the State of Libya failed “to provide commercial and legal protection and a stable and predictable legal and business framework for Oztas.”)⁹² a majority of the Arbitral Tribunal finds it difficult to see how Claimant can succeed with this argument when it has never attempted to litigate its claim under the Termination Agreement before the Libyan courts, which a majority of the Arbitral Tribunal considers to be the proper forum for the disputes pertaining to said Agreement.⁹³

169. The following exchange during the question and answer session at the Oral Hearing confirms that Claimant never even considered suing LIDCo for breach of the Termination Agreement before the Libyan courts:

“DR AYOGLU: ... Has Oztas ever considered filing a lawsuit against LIDCo in the Libyan courts?”

*MR MERT CEKINMEZ: Oztas has never considered going to Libya's courts because during the works and after the termination, as all other contractors, we considered LIDCo as the Libyan Government, so we have never looked for that. Besides, during the termination period and afterwards, we have always been in contact with the Embassy of Libya where we could find someone, anyone, also during the process after the termination and during the civil war and the post-civil war. The Turkish Government and the Libyan Government have always contacted each other about the resolution of our case and many others so no, we have never considered going to the Libyan court.”*⁹⁴

⁹² Rejoinder, ¶ 62 (citing from Reply, ¶ 31).

⁹³ As explained at ¶ 64 above, the Termination Agreement contains neither a choice of courts clause nor an arbitration clause. However, a majority of the Arbitral Tribunal considers that private international law principles would almost certainly lead to Libyan courts having jurisdiction in a case where (a) the defendant is a Libyan company, (b) the dispute relates to a construction project in Libya and (c) the original Contract does contain a choice of courts provision in favour of the Libyan courts.

⁹⁴ Question and answer session at Oral Hearing, Tr. 92:5-22.

170. Moreover, Claimant has not submitted sufficient evidence that the Libyan courts do not function effectively.⁹⁵ Indeed, it has hardly even made an argument to that effect.⁹⁶ By contrast, Respondents have provided at least an argument that the Libyan courts do function effectively. See the following exchange during the question and answer session at the Oral Hearing:

***“DR AYOGLU:** ... What is the situation of the judicial system in Libya? Do the courts work properly at the moment?*

***MR SEFRIOUI:** Yes, the courts do work. The courts are open. The judicial system is quite vast. The courts complex has been open over the last years. The Tripoli courts complex – I can tell you because we studied that point on another case – was only closed for one day because it was blocked by a demonstration of policemen protesting against the assassination of some policemen ...*

***DR AYOGLU:** Are court awards executed properly by the judicial system at the moment? You can enforce an award?*

...

***MR SEFRIOUI:** In theory, yes. You have that situation which can be complex in respect of localized zones in Libya which this is well known, depending on the times. If you take the Libyan situation over the last 12 months, there have been obviously some zones where temporarily the public force could not have direct access.*

When you have two militias fighting, for example, within the power struggle this makes obviously a slight complication. To be very honest with you, Libya is actually undergoing difficulties, but generally the courts are recognized and not challenged as the judicial system of Libya by all parties at hand. Judgments continue to be issued and they have the force of res judicata, so yes, they are enforceable.

***MR BOGAC CEKINMEZ:** May I make a small remark. According to exhibit C-X-6, the CIA's Factbook about Libya, it says that according to the CIA's report the highest courts are not available. There is no such court.*

***MS CANDEMIR:** Also for the legal system it says 'Libya's post-revolution legal system is in flux and driven by state and non-state entities' and there is no highest court, not available.*

...

⁹⁵ The dissenting opinion of Arbitrator Ayoglu contains references to various pieces of information as to the disfunctioning of Libyan courts. See dissenting opinion, ¶¶ 27 and 39. However: but this was not put on the record; the Parties did not have an opportunity to comment on it; and Claimant never substantiated any claim as to the disfunctioning of Libyan courts. The only evidence referred to by Claimant in this respect is a printout from the “CIA World Factbook” website (CX-6) which states (under the heading “Judicial branch”): “highest court(s): NA.” This is self-evidently insufficient to support Claimant’s allegations.

⁹⁶ No such argument is contained in the slide set out at ¶ 156 above, nor was it made in any other part of Claimant’s submissions, except very briefly in response to Respondents’ submissions, as set forth in the passage from the Transcript cited in this ¶ 171.

DR AYOGLU: *Is there a Supreme Court functioning properly in Libya?*

MR SEFRIQUI: *Yes, there is a Supreme Court functioning in Libya which has issued very well known decisions.”⁹⁷*

171. Accordingly, a majority of the Arbitral Tribunal considers that Claimant cannot complain that the State of Libya has breached its obligation under the BIT to provide a “*stable and predictable legal and business framework*” when it has neither (a) sought to avail itself of the “*legal framework*” nor (b) submitted serious compelling evidence that the Libyan courts do not function effectively. There is, in the majority’s view and contrary to Arbitrator Ayoglu’s view, no legitimate reason to reverse the burden of proof on this issue. To the contrary, the majority considers that it would be unreasonable to require the State of Libya to prove a negative by showing that there is no failure of its judicial system. It is for Claimant to compellingly evidence such failure if it existed; a matter which Claimant clearly failed to do.

172. Accordingly, a majority of the Arbitral Tribunal rejects Claimant’s claim that the State of Libya breached the BIT *qua* the State of Libya.

173. Arbitrator Ayoglu has explained why he disagrees with this in his dissenting opinion.

D. Can Claimant benefit from the importation into the Termination Agreement of an arbitration clause because of the MFN clause in the BIT?

174. *The Parties’ submissions.* As explained at paragraph 131 above, during the Oral Hearing, Claimant (for the first time) suggested (in answer to a question from the Arbitral Tribunal) that it could benefit from the importation, through the MFN clause contained in Article 3 of the BIT, of an arbitration clause into the Termination Agreement. This suggestion was made in the following exchange during the question and answer session:

“PROF DR ABDEL WAHAB: ... *Do you agree that the BIT does not have an umbrella clause?*

Mr BOGAC CEKINMEZ: *The BIT has everything we need because it has the most favoured nation clause. If you have the most favoured nation clause –*

...

MR BOGAC CEKINMEZ: *The BIT has the most favoured nation clause, so at the end of the day we have the umbrella clause.*

⁹⁷ Question and answer session at Oral Hearing, Tr. 106:8-108:15.

PROF DR ABDEL WAHAB: *Are you using the umbrella clause to say that any contract breach qualifies as a treaty breach from your perspective? That is the purpose of an umbrella clause.*

MR BOGAC CEKINMEZ: *Yes, we have also exhibits supporting this idea.*

PROF DR ABDEL WAHAB: *As we just clarified, we are going to the BIT in two ways: one is Libya's responsibility for LIDCo and one is the responsibility of Libya for its own acts. One is LIDCo's acts. The breach of LIDCo also becomes the breach of treaty because of this umbrella clause."*⁹⁸

175. Respondent was offered the opportunity to respond to this orally and (if it wished) in writing, but chose to respond only orally:

“THE PRESIDENT [to Mr. Sefrioui]: *... We understand that Claimant's claim is based in part on the umbrella clause which they say is brought in by the MFN provision which you find in Article 3.1 of the BIT. Do you wish to respond to that and, if so, how?*

We are not requiring you to respond now. We know that this has come up for the first time ...

MR SEFRIOUI: *... I will leave that to maybe until the end of the hearing whether there is a need for additional submissions or not.*

Right now the answer I give is that although I do not have a total knowledge of investment law, the issue of whether an umbrella clause can be brought in by the MFN clause is something that I will need to verify ...

As regards that issue, yes, we have to object that this is a new argument which is brought very late and should have been the basis of a claim. It is a very important element and it would have required at least not only for the Claimant in their submission to bring to the attention of the Tribunal and the Respondents that they wanted to proceed in this way in their reasoning, but also to provide a document, an example of another BIT which would be brought in through the MFN clause, assuming that this would be possible.

As a matter of fact, I have some doubts because there is something that I know a little bit better about the Libyan BITs which are generally very restrictive BITs. They are not the latest generation BITs with the most extensive clauses. This is just an observation that I would make perhaps, but it still has to be demonstrated on the basis of a BIT.

THE PRESIDENT: *In terms of procedure how would you submit that we should proceed in relation to this issue?*

⁹⁸ Question and answer session at Oral Hearing, Tr. 123:12-124:25.

MR SEFRIQUI: My immediate answer would be that the debate should be closed, that the parties have debated enough on this topic and that the arguments raised should be irreversible at this stage ..."⁹⁹

176. Claimant's and Respondents' counsel subsequently both confirmed that they did not wish to file post-hearing submissions on this issue (or indeed on any other issue).¹⁰⁰

177. *The Arbitral Tribunal's decision.* The Arbitral Tribunal unanimously rejects Claimant's argument that it benefits from the importation into the Termination Agreement of an arbitration clause because of the MFN clause in the BIT. Claimant has not submitted any evidence of (or indeed even referred to) a bilateral investment treaty entered into by the State of Libya which contains an umbrella clause. Accordingly, there is no basis whatsoever for Claimant's argument, which in any case raises a number of other issues, including whether an MFN clause can have the effect of importing an umbrella clause from one bilateral investment treaty into another – a matter which the Arbitral Tribunal need not address further given the absence of any evidence or basis to support Claimant's argument.

E. Conclusions

178. Accordingly, a majority of the Arbitral Tribunal rejects Claimant's claims against Respondent No. 2 (the State of Libya) on the merits. Claimant has not shown that Respondent No. 2 breached the BIT, whether *qua* Respondent No. 1 or by its own acts.

⁹⁹ Question and answer session at Oral Hearing, Tr. 153:9-155:14.

¹⁰⁰ See Tr. 157:7-16.

VIII. COSTS

179. After setting out the costs of the arbitration claimed by the Parties – both the costs fixed by the ICC Court (A) and the Parties' legal and other costs (B) – the Arbitral Tribunal will explain why the costs of the arbitration (as defined in Article 37(1) of the ICC Rules) should be borne by Claimant (C). The Arbitral Tribunal will then consider the reasonableness of Respondents' legal and other costs (D) before concluding as to the amounts that it has decided should be awarded to Respondents in respect of costs (E).

A. The Costs of Arbitration fixed by the ICC Court

180. The ICC costs of arbitration amount to US\$ 236,900. This is covered by the advance of US\$ 262,000 that has been paid by Claimant, as explained at paragraph 59 above.

B. The Parties' Legal and Other Costs

181. *Claimant.* Claimant claims the following legal and other costs (in addition to the monies that it has advanced to the ICC):

- The fee paid to the ICC for the Mediation Request, of US\$ 2,000;
- Counsel's fees of US\$ 95,257;
- A success fee of 7%;
- Translation costs of US\$ 8,571;
- Travel costs of US\$ 6,404;
- Court reporting costs of US\$ 2,207;
- Cargo costs of US\$ 676; and
- Stationary costs of US\$ 175.¹⁰¹

182. *Respondents.* Respondents claim the following legal and other costs fees of Cabinet Sefrioui for the period July 2016 to November 2017 of € 97,891.40.¹⁰²

¹⁰¹ See Claimants' Submission on Costs.

¹⁰² See Respondents' Submission on Costs; and see Cabinet Sefrioui's invoice dated December 6, 2017, at attachment 1 thereto; and see Cabinet Sefrioui's confirmation that that invoice is "due for payment by the Litigation Department", at attachment 2 to Respondent's Submission on Costs.

C. Apportionment Between the Parties

183. Article 37(4) of the ICC Rules provides that:

"The final award shall fix the costs of the arbitration¹⁰³ and decide which of the parties shall bear them or in what proportion they shall be borne by the parties."

184. Article 37(5) provides that:

"In making decisions as to 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."

185. This rule gives the Arbitral Tribunal a broad discretion in deciding on the costs of the arbitration, which are defined by Article 37(1) of the ICC Rules as including:

"the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration."

186. A majority of the Arbitral Tribunal finds that the costs of the arbitration (as thus defined in Article 37(1) of the ICC Rules) should be borne in their entirety by Claimant, for the following reasons:

- A majority of the Arbitral Tribunal considers that it should apply the prevailing principle in international arbitration that costs should follow the event, subject to variation in light of the conduct of the Parties.
- Respondents have prevailed in this arbitration in respect of Claimant's claims, to a complete extent.
- While it is true that Claimant prevailed in respect of Respondents' objection to jurisdiction in respect of Respondent No. 2, that objection to jurisdiction did not necessitate significant additional work by either party, as the objection to jurisdiction was in reality closely intertwined with the merits of the dispute. In any case, Claimant did not prevail in respect of Respondent No. 1's objection.

¹⁰³ The term "costs of arbitration" is defined by Article 37(1) of the ICC Rules, which will be cited at ¶ 185 below.

- A majority of the Arbitral Tribunal considers that all Parties have conducted this arbitration in an expeditious and cost-efficient manner, so that there is no reason to vary the principle that costs should follow the event.

D. The Reasonableness of Respondents' Legal and Other Costs

187. As explained at paragraph 185 above, Article 37(1) of the ICC Rules defines the costs of the arbitration as including both the ICC costs and the “*reasonable legal and other costs incurred by the parties for the arbitration.*” This raises the question whether the legal and other costs claimed by Respondents (as set out at Section VIII(B) above) are “*reasonable*”.

188. The Arbitral Tribunal considers that the costs incurred by Respondents in this arbitration are reasonable. It finds that fees totalling roughly € 97,891.40 are not unreasonable in an arbitration of this type, which involved two rounds of memorials, an in-person hearing and a post-hearing submission.

E. Conclusions on Costs

189. Accordingly, a majority of the Arbitral Tribunal finds that:

- The costs of arbitration fixed by the ICC Court shall be borne by Claimant; and
- The following amount should be paid by Claimant to Respondents: € 97,891.40, being Respondents' reasonable legal costs.

IX. DISPOSITIVE

190. Having fully considered the Parties' submissions, claims and defences and duly deliberated on all issues in dispute, the Arbitral Tribunal hereby determines, orders and awards as follows:

- The Arbitral Tribunal unanimously declines jurisdiction over Claimant's claims in respect of Respondent No. 1;
- The Arbitral Tribunal unanimously accepts jurisdiction over Claimant's claims in respect of Respondent No. 2;
- The majority of the Arbitral Tribunal dismisses all of Claimant's claims *vis-à-vis* Respondent No.2;
- The majority of the Arbitral Tribunal orders that Claimant shall bear the ICC costs of arbitration fixed by the Court in the amount of US\$ 236,900 (two hundred and thirty-six thousand, nine hundred US Dollars);
- The majority of the Arbitral Tribunal orders Claimant to pay Respondents' legal costs amounting to € 97,891.40 (*ninety-seven thousand, eight hundred and ninety-one Euros and forty cents*); and
- The majority of the Arbitral Tribunal dismisses any other claims herein.

Place of arbitration: Paris (France)

Date: June 14, 2018



Dr. Tolga Ayoglu
Co-arbitrator



Prof. Dr. Mohamed S. Abdel Wahab
Co-arbitrator



Jacob Grierson
President