International Court of Arbitration of the
International Chamber of Commerce
Case No. 21537/ZF/AYZ

Arbitration between

CENGIZ IN$AAT SANAYI VE TICARET A.§.

Claimant

and

THE STATE OF LIBYA

Respondent

FINAL AWARD

The Arbitral Tribunal

Juan Fernandez-Armesto (President)
Pierre Mayer (Co-arbitrator)
Georges Khairallah (Co-arbitrator)

The Arbitral Secretary
Krystle M. Baptista Serna

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ABBREVIATIONS AND ACRONYMS

Aecom	American project management firm who served as program manager for the Projects
ACC	Arab Contractors Company, an Egyptian construction company
Arbitration Agreement	Article 8 of the Turkey- Libya BIT
Administrative Costs	Fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court
Arbitration Costs	Administrative Costs and Legal Expenses
BIT, Treaty	Agreement between the Republic of Turkey and the Great Socialist People's Libyan Arab Jamahiriya – the State of Libya's legal predecessor – concerning the Reciprocal Promotion and Protection of Investments dated November 25, 2009, which entered into force on April 22, 2011
BP£	British Pound
Brook I	Claimant's financial audit report prepared by Mr. Ed Brook dated December 2, 2016
Brook II	Additional note to Claimant's financial audit report prepared by Mr. Ed Brook dated October 14, 2017
CI	Claimant's Statement of Claim dated December 2, 2016
CII	Claimant's Statement of Reply dated October 16, 2017
CM	Claimant's First Post-Hearing Brief dated March 29, 2018
CIV	Claimant's Second Post-Hearing Brief dated April 20, 2018
CV	Claimant's Statement on Costs dated May 4, 2018
Cengiz, Claimant	Cengiz Inşaat Sanayi Ve Ticaret A.Ş., in English, Cengiz Construction, Industry & Trade Company, a company duly organized and existing under the laws of the Republic of Turkey
Cengiz Holding	Cengiz Holding A.Ş., Claimant's mother company, established in 1987, one of the leading construction companies in Turkey
Cengiz Libya	Cengiz Libya Construction and Investment Joint-Stock Company, Claimant's Libyan subsidiary incorporated to invest in Libya
Contracts	The WAH and the Sebha Contracts
Court	International Court of Arbitration of the ICC
20th Committee	Committee established by the Libyan Government to encourage the return of foreign investors to Libya, to handle negotiations with companies with ongoing governmental contracts, and to assess the damages caused by the Libyan Revolution
Doc. BL-XX	Exhibits attached to Mr. Legrand's report
Doc. C-XX	Documentary evidence presented by the Claimant
Doc. CL-XX	Legal evidence presented by the Claimant
Doc. FTI-XX	Exhibits attached to Mr. Osborne's reports
Doc. H-XX	Documentary evidence presented by the Parties during the Hearing
Doc. JWC-XX	Exhibits attached to Mr. Walker-Cousins Report

Doc. MA-XX	Exhibits to Mr. Ajaj's witness statements
Doc. PG-XX	Exhibits attached to Mr. Garbutt's report
Doc. RE-XX	Documentary evidence submitted with Respondent's post-hearing briefs
Doc. SDF-XX	Documentary evidence presented by Respondent
Doc. SD-XX	Legal evidence presented by Respondent
Draft ILC Articles	Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10)
EUR	Euro
FET	Standard of fair and equitable treatment
FPS	Standard of full protection and security
Garbutt I	Claimant's technical audit report prepared by Mr. Philip Garbutt, MIStructE, BEng, CEng, ENPC, MSOA dated December 2, 2016
Garbutt II	Claimant's second technical audit report prepared by Mr. Philip Garbutt, MIStructE, BEng, CEng, ENPC, MSOA dated October 16, 2017
HIB	Libyan Housing and Infrastructure Board, state entity, under the Ministry of Housing and Utilities, in charge of large infrastructure and housing projects in Libya. Signatory of the Contracts and Protocols with Cengiz Libya
Hearing	Hearing held in Paris from January 15 to 19, 2018
HT	Hearing transcript for the Hearing (days 1 to 5)
ICC	International Chamber of Commerce
ICC Rules	Arbitration Rules of the Court of the ICC, in force as of 1 January 2012
ICDI	International Company for Development and Investment, Government entity with whom Claimant partnered to incorporate Cengiz Libya
Legal Expenses	Reasonable legal and other costs incurred by the Parties for the arbitration
Legrand	Claimant's security report prepared by Mr. Franck Legrand dated October 16, 2017
Libyan Revolution	The period between February and October 2011 and the events that took place therein
Libya Shield Force	Militia established by the NTC, which reported to the Libyan army and was composed of revolutionaries who had participated in the Libyan Revolution
LYD	Libyan Dinar
M	Millions
MFN	Most-favoured nation treatment standard
Mr. Ajaj's WSI	Witness Statement of Mr. Mahmoud Bashir Ajaj dated June 14, 2017
Mr. Ajaj's WSHI	Witness Statement of Mr. Mahmoud Bashir Ajaj dated February

	28, 2017
Mr. Cetin's WS	Witness Statement of Mr. Nahit Qetin dated December 1, 2016
Mr. Cevik's WS	Witness Statement of Mr. Mert Qevik dated December 1, 2016
Mr. Ermurat's WS	Witness Statement of Mr. Ertan Ermurat dated October 12, 2017
Mr. Mafa's WS	Witness Statement of Mr. Ömer Mafa dated December 1, 2016
NATO	North Atlantic Treaty Organization
Note	Note on the appointment, duties and remuneration of administrative secretaries issued by the ICC on August 1,2012
NTC	Libyan National Transitional Council
Osborne I	Claimant's report quantifying Cengiz' losses prepared by Mr. Chris Osborne from FTI Consulting dated December 2, 2016
Osborne *H*	Claimant's second report quantifying Cengiz' losses prepared by Mr. Chris Osborne from FTI Consulting dated October 16, 2017
Para.	Paragraph
Parties	Claimant and Respondent
PO	Procedural Order
Projects	WAH and Sebha Projects
Protocols, 2013 Protocols	Contracts signed between Cengiz Libya and HIB on June 13, 2013 in order to resume the Projects (Doc. C-16 and C-17, Doc. C-84, Doc. C-85)
RI	Respondent's Statement of Defense dated August 22, 2017
RII	Respondent's Statement of Reply dated December 6, 2017
Rin	Respondent's First Post-Hearing Brief dated March 29, 2018
RIV	Respondent's Second Post-Hearing dated Brief April 20, 2018
RV	Respondent's Statement on Costs dated May 4, 2018
Respondent, Libya	The State of Libya
SSC	Supreme Security Committee, a security institution established by decree of the Libyan Ministry of Interior
Sebha	Oasis capital city of the Sebha District in southwestern Libya
Sebha AP Bond	Advance payment bond for the Sebha Project valued at EUR 26.3 M
Sebha Contract	Contract to design and construct infrastructure, entered into by Cengiz Libya and HIB on November 8, 2009
Sebha Performance Bond	Letter of performance bond for the Sebha Project valued at EUR 4 M
Sebha Project	Project derived from the Sebha Contract for the construction of infrastructure within an area of approximately 1,200 hectares in Sebha
Shopp I	Respondent's financial expert report prepared by Mr. Matthew D. Shopp dated August 21, 2017
Shopp II	Respondent's second financial expert report prepared by Mr. Matthew D. Shopp dated December 6, 2017
Studi	Tunisian design firm, who acted as HIB's representative on-site and as technical consultant engineer for the WAH Project

UPA	Libyan Urban Planning Authority
USD	United States dollar
WACC	Weighted average cost of capital
WAH	District of Wadi-al-Hayat in Libya
WAH AP Bond	Advance payment bond for the WAH Project valued at EUR 42 M
WAH Contract	Contract to design and construct integrated facilities entered into by Cengiz Libya and HIB on December 30, 2008
WAH Performance Bond	Letter of performance bond for the WAH Project valued at EUR 5,65 M
WAH Project	Project derived from the WAH Contract for the construction of infrastructure on an area of approximately 1,850 hectares in WAH
Walker- Cousins	Respondent's security expert report prepared by Mr. Joseph Walker-Cousins dated December 6, 2017
War Clause	Clause 5 of the BIT regarding compensation for losses in case of war, insurrection, civil disturbance or other similar events

I. INTRODUCTION

1. GENERAL SUMMARY OF THE CASE

1. This is an investment arbitration dispute subject to the Rules of Arbitration of the International Chamber of Commerce, in force as from January 1, 2012 **["ICC Rules"]**. The proceeding involves various alleged breaches by the State of Libya under the Agreement between the Republic of Turkey and the Great Socialist People's Libyan Arab Jamahiriya – the State of Libya's legal predecessor – concerning the Reciprocal Promotion and Protection of Investments dated November 25, 2009, which entered into force on April 22, 2011 [the **"Treaty"** or the **"BIT"]**.

2. Claimant, a Turkish construction company, through its Libyan subsidiary, entered into two contracts with the Libyan Housing and Infrastructure Board **["HIB"]**, which required Claimant to master plan, design and build integrated infrastructure in an area of more than 3,000 hectares in the Southern region of Libya.

3. Claimant alleges that it held an investment in Libya, protected under the Treaty, and that due to Libya's breach of its obligations to provide full protection and security ["FPS"] and fair and equitable treatment ["FET"], and due to the State of Libya's discriminatory measures regarding compensation of losses in times of war ["War Clause"], Claimant's investment was completely destroyed and rendered worthless. Claimant is unable to enjoy its investment and reap profits therefrom, and requests USD 302.6 million ["M"] in compensation for the losses and damages arising from such breaches.

4. The State of Libya submits that the Tribunal lacks jurisdiction to adjudicate the present dispute and that Claimant's claims should be dismissed in their entirety.

2. THE PARTIES TO THE ARBITRATION

2.1 CLAIMANT: CENGIZ İN$AAT SANAYI VE TİCARET A.§.

5. Claimant is CENGIZ İN§AAT SANAYI VE TİCARET A.§., in English, CENGIZ CONSTRUCTION, INDUSTRY & TRADE COMPANY **["Cengiz"** or the **"Claimant"]**, a company duly organized and existing under the laws of the Republic of Turkey and with the following contact:

CENGIZ İN§AAT SANAYI VE TICARET A.$.
Altunizade Kisikli Cad. No: 37 34662
Üskiidar, İstanbul – Turkey

6. Claimant is represented in this arbitration by:

Peter R. Griffin
SLANEY ADVISORS LIMITED
33 St James's Square
London SW1Y 4JS – United Kingdom
Tel: (+44) 7793 651 255
Email: peter.griffm@slaneyadvisors.com

Mr. Pierre Pic
Mr. Eric Teynier
Ms. Arianna Rafiq
Ms. Asha Rajan
2 rue Lord-Byron
75008 Paris – France
Tel: (+33) 1 53 45 97 00
Email: pierre.pic@teynier.com
eric.teynier@teynier.com
arianna.rafiq@teynier.com
asha.rajan@teynier.com

2.2 RESPONDENT: THE STATE OF LIBYA

7. Respondent is the State of Libya **["Respondent"** or **"Libya"]**.

8. Respondent is represented in this arbitration by:

Mr. Otman A. A. Elkaf
LITIGATIONS DEPARTMENT (IDART AL KADYA)
Saidi Street
Courts complex, Third floor
Tripoli
State of Libya
Email: State-litigation-department@dfd.com.ly
departmentofforeigndesputes@gmail.com

Mr. Mohamed. B. Shaban (Principal Partner)
Mr. Tom Stewart-Coats
Mr. Oliver Assersohn
MS-LEGAL SOLICITORS
88 Kingsway
London WC2B 6AA
United Kingdom
Email: mohamed.shaban@ms-legal.co.uk
Tom.stewartcoats@xxiv.co.uk
01iver.assersohn@xxiv.co.uk

9. Claimant and Respondent will be jointly referred to as the **"Parties"**.

2.3 THE ARBITRAL TRIBUNAL

10. On March 31, 2016, the International Court of Arbitration [the "Court"] of the International Chamber of Commerce [the **"ICC"]** decided to submit the arbitration to three arbitrators as provided in Article 12(2) of the Rules of Arbitration of the ICC Rules.

11. On June 2, 2016, the Court confirmed Prof. Mayer as co-arbitrator upon nomination by Claimant, pursuant to Article 13(2) of the ICC Rules. On June 2, 2016, the Court directly appointed Mr. Khairallah as co-arbitrator on behalf of Respondent, who failed to nominate a co-arbitrator, pursuant to Article 13(4) a) of the ICC Rules. On July 15, 2016, the Court directly appointed Mr. Fernandez-Armesto as President of the Arbitral Tribunal, pursuant to Article 13(4) a) of the ICC Rules. The proceedings were instituted on July 15, 2016, when the Tribunal was officially constituted. The arbitrators stated

that notifications and communications to the arbitral tribunal arising in the course of the arbitration should be made at:

Mr. Juan Fernandez-Armesto
Chairman – Spanish national
Armesto & Asociados
General Pardinas, 102
28006 Madrid
Kingdom of Spain
Tel: +34 91 562 16 25
E-mail: jfa@jfarmesto.com

Pierre Mayer
Co-Arbitrator – French national
20 rue des Pyramides
75001 Paris
France
Tel: (+33) 1 85 09 01 58
Email: mayer@pierremayer.com

Georges Khairallah
Co-arbitrator – French and Lebanese national
23, avenue de Versailles
75016 Paris
France
Tel: (+33) 1 45 25 16 92
Email: georges.khairallah@club-internet.fr

2.4 ADMINISTRATIVE SECRETARY

12. On August 17, 2016, the Tribunal issued its communication A2, by which it proposed Mrs. Krystle M. Baptista as Administrative Secretary to the Arbitral Tribunal and invited the Parties to confirm their agreement with her appointment. On September 15, 2016, the Claimant confirmed its agreement. Throughout these proceedings Respondent has never expressed any objection to this appointment.

13. The appointment of the Administrative Secretary was made in accordance with the "Note on the appointment, duties and remuneration of administrative secretaries" issued by the ICC on August 1, 2012 [the **"Note"]**. The Parties received the Administrative Secretary's curriculum vitae, as well as her declaration of independence and impartiality and her undertaking to act in accordance with the instructions included in the Note. The Secretary's contact details are the following:

14. The Administrative Secretary is:

Krystle M. Baptista
ARMESTO & ASOCIADOS
General Pardinas 102
28006 Madrid
Spain
Tel: +34-91.562.16.25
Fax: +34-91.515.91.45
E-mail kbs@jfarmesto.com

2.5 SECRETARIAT OF THE INTERNATIONAL COURT OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE:

15. The administration of this arbitration was granted to the Secretariat of the Court, initially in the person of Ms. Ziva Filipic, and then in the person of Ms. Asli Yilmaz, who both acted as Counsel for the case management. All notifications and communications should be addressed to:

Asli Yilmaz
Counsel
INTERNATIONAL COURT OF ARBITRATION
INTERNATIONAL CHAMBER OF COMMERCE
33-43 avenue du President Wilson
75116 Paris
France
Tel: + 33 (0)1 49 53 28 61
E-mail: ica5@iccwbo.org

II. PROCEDURAL HISTORY

1. THE ARBITRATION AGREEMENT

16. Article 8 of the BIT reads as follows:

> "1. Disputes between one of the Contracting Parties and an investor of the other Contracting Party, in connection with his investment, shall be notified in writing, including detailed information, by the investor to the recipient Contracting Party of the investment. As far as possible, the investor and the concerned Contracting Party shall endeavor to settle these disputes by consultations and negotiations in good faith.
>
> 2. If these disputes, cannot be settled in this way within ninety (90) days following the date of the written notification mentioned in paragraph 1, the dispute can be submitted, as the investor may choose, to the competent court of the Contracting Party in whose territory the investment has been made or to international arbitration under:
>
> (a) the International Center for Settlement of Investment Disputes (ICSID) set up by the 'Convention on Settlement of Investment Disputes Between States and Nationals of other States', in case both Contracting Parties become signatories of this Convention,
>
> (b) an ad hoc court of arbitration laid down under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law (UNCITRAL).
>
> (c) the Court of Arbitration of the Paris International Chamber of Commerce.
>
> 3. Once the investor has submitted the dispute to the [sic] one of the dispute settlement procedures mentioned in paragraph 2 of this Article, the choice of one of these procedures is final.
>
> 4. Notwithstanding the provisions of paragraph 2 of this Article;
>
> (a) only the disputes arising directly out of investment activities which have obtained necessary permission, if any, in conformity with the relevant legislation of both Contracting Parties on foreign capital, and that effectively started shall be subject to the jurisdiction of the International Center for Settlement of Investment Disputes (ICSID), in case both Contracting Parties become signatories of this Convention, or any other international dispute settlement mechanism as agreed upon by the Contracting Parties;
>
> (b) the disputes, related to the property and real rights upon the real estates are totally under the jurisdiction of the Contracting Party in whose territory the investment is made, therefore shall not be submitted to jurisdiction of the Center for Settlement of Investment Disputes (ICSID) or any other international dispute settlement mechanism; and
>
> (c) with regard to the Article 64 of the 'Convention on the Settlement of Investment Disputes between States and Nationals of other States':

> The Republic of Turkey shall not accept the referral of any disputes arising between the Republic of Turkey and any other Contracting State concerning the interpretation or application of 'Convention on the Settlement of Investment Disputes between States and Nationals of other States', which is not settled by negotiation, to the International Court of Justice.
>
> 5. The arbitration awards shall be final and binding for all parties in dispute. Each Contracting Party commits itself to execute the award according to its national law".

17. Article 8 of the Treaty formalizes Respondent's offer to arbitrate "[disputes between one of the Contracting Parties and an investor of the other Contracting Party, in connection with his investment" *(inter alia)* under the ICC Rules. Claimant accepted such offer by filing its request for arbitration in accordance with article 8.2(c) of the Treaty. These two acts jointly constitute the Parties' written consent and agreement to arbitrate the dispute under the ICC Rules.

18. The BIT entered into force on March 22, 2011. This fact is not disputed by the Parties. Although Respondent did originally contest the entry into force of the BIT, it later dropped that argument[1].

2. SEAT OF ARBITRATION, LANGUAGE AND APPLICABLE LAW

19. On March 31, 2016, the Court fixed the place of the arbitration as Paris, France.

20. Considering that the Parties had not agreed on the language of the arbitration, the Arbitral Tribunal issued Procedural Order No.1 dated September 30, 2016, deciding that the language of the proceedings be English.

21. The proceedings are governed by the ICC Rules. The dispute arises under the Turkey-Libya BIT, an international treaty signed between two sovereign countries, which is silent on the issue of applicable law. Both parties have analyzed the issue and have agreed that the dispute should be adjudicated in accordance with the provisions of the BIT, as supplemented by international law[2]. The Tribunal has confirmed such agreement in section VII.1 *infra*.

3. COMMENCEMENT OF THE ARBITRATION

22. Claimant filed the Request for Arbitration [the **"RfA"]** pursuant to the BIT[3] with the ICC Secretariat on December 18, 2015. The arbitration began on that date, pursuant to Article 4(2) of the ICC Rules.

23. Respondent received Claimant's Request at its address in London on January 28, 2016, and at its address in Tripoli on February 4, 20164. The 30-day time limit for Respondent

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[1] In its Draft Statement of Defence dated June 1, 2017, Respondent disputed the date of the entry into force of the Treaty, alleging that the exchange of notifications required for the entry into force of the Treaty never occurred (Witness Statement of Mr. Nifat, paragraph 14). Subsequently, in para, 165 of its Statement of Defence of 21 August 2017, Respondent dropped this argument as it was based on erroneous research.

[2] Cl, para. 254; Rl, para. 230.

[3] Agreement between the Republic of Turkey and the Great Socialist People's Libyan Arab Jamahiriya Concerning the Reciprocal Promotion and Protection of Investments. Tripoli, November 25, 2009, Doc. C- 1.

to submit an Answer to the Request [the **"Answer"]**, pursuant to Art. **5(1)** of the ICC Rules, expired on March 7, 2016.

24. On February 16 and 23, 2016, the Ambassador's office of the Libyan Embassy in London informed the ICC Secretariat by email that any correspondence should be sent directly to the relevant office in Libya and provided the email address.

25. However, Respondent did not file an Answer on or before March 7, 2016, nor did it apply for an extension. Hence Claimant requested that the Court proceed in accordance with Article 5(2) of the ICC Rules.

26. In accordance with Article 6(3) of the ICC Rules, if any party against which a claim has been made does not submit an Answer, the arbitration will proceed and the arbitral tribunal will decide any question of jurisdiction or of whether the claims can be determined together, unless the Secretary General refers the matter to the Court for its decision.

27. Furthermore, as per Article 6(8) of the ICC Rules, if any party refuses or fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure.

28. By correspondence of March 14, 2016, the ICC Secretariat informed the parties that this arbitration had not been referred to the Court and that the Arbitral Tribunal would decide any question of jurisdiction or of whether the claims may be determined together, after providing the Parties with an opportunity to comment.

29. On May 16, 2016, Mr. Mohamed B. Shaban informed the ICC Secretariat that he had received written authority from Respondent to represent it in this dispute. Given the situation in Libya, Mr. Shaban requested that no further action be taken in these proceedings until September 2016.

30. By letter dated May 27, 2016, Claimant objected to Respondent's request that the arbitration be held in abeyance until September 2016.

31. The ICC Secretariat informed the Parties on May 30, 2016 that, because the Parties had reached no agreement with regard to the suspension of the proceedings, the case should proceed.

32. On June 2, 2016, the Court confirmed Prof. Mayer as co-arbitrator upon nomination by Claimant, pursuant to Art. 13(2) of the ICC Rules.

33. On June 2, 2016, the Court directly appointed Mr. Khairallah as co-arbitrator on behalf of Respondent, who failed to nominate a co-arbitrator, pursuant to Art. 13(4) a) of the ICC Rules.

34. The Tribunal was constituted on July 15, 2016, when the Court directly appointed Mr. Fernandez-Armesto as President of the Arbitral Tribunal, pursuant to Article 13(4) a) of the ICC Rules.

[4] ICC letter dated February 23, 2016 and March 4, 2016.

Preparation of the Terms of Reference

35. On July 26, 2016, the Tribunal issued its first communication[5] to the Parties, requesting a short summary of their respective claims and relief sought (as per Article 23(1) c) of the ICC Rules) and suggesting that the Case Management Conference be held *in persona* in Paris on October 11, 2016. The Tribunal requested that the Parties answer to the Tribunal's requests by August 1, 2016.

36. On August 1, 2016, Claimant confirmed its availability to hold an *in persona* meeting in Paris on October 11, 2016.

37. On August 2, 2016, Respondent's counsel sent the following communication by email:

> "Dear Honourable Tribunal,
>
> It was with regret that this office has been unable so far to assist substantively in these proceedings. The main reason for our inactivity is the difficulty in securing adequate funding and instructions from our client, which we are actively seeking. As the Honourable Tribunal is aware, our clients are experiencing extreme difficulties in both the security and logistics sphere and this has hampered their ability to be more proactive in these proceedings.
>
> We shall revert to you as soon as we can in the circumstances.
>
> Kind regards.
>
> M. B. Shaban (Principal Partner)"

38. On August 17, 2016, the Tribunal issued its second communication[6] by which it:

- granted Respondent an additional period of time, until September 15, 2016, to file a short summary of its claims and relief sought;
- convened an *in persona* Case Management Conference to be held in Paris on October 11, 2016, starting at 14.00 hours, with an agenda and at a location to be established in due course;
- circulated a first draft of the Terms of Reference and requested that the Parties comment on it by September 15, 2016; and
- proposed Mrs. Krystle M. Baptista as Administrative Secretary to the Arbitral Tribunal and invited the Parties to confirm their agreement with her appointment by September 15, 2016.

39. On September 15, 2016, Claimant sent its comments to the draft Terms of Reference, confirmed its availability for the Case Management Conference and confirmed its agreement with the appointment of Mrs. Baptista as Secretary to the Arbitral Tribunal.

40. On September 16, 2016, the Arbitral Tribunal granted Respondent a further period of one week in order to comply with the unattended requests of the Arbitral Tribunal.

41. The Tribunal received no answer from Respondent.

[5] Communication A1.
[6] Communication A2.

42. On September 27, 2016, the Tribunal sent its communications A1, A2 and A3 with their attachments by Fedex to the five physical addresses of Respondent. According to Fedex records[7], the communications were received in London on September 28, 2016, and in Tripoli on October 5 and 6, 2016[8].

43. On September 30, 2016, the Tribunal sent a new draft of the Terms of Reference to the Parties, to be signed at the *in persona* Case Management Meeting to be held in Paris on October 11, 2016.

Procedural Order No. 1

44. On that same date, the Tribunal issued Procedural Order **["PO"]** No.1, by which it established that the language of the arbitration shall be English, after having invited the parties' comments.

Case Management Meeting and Execution of the Terms of Reference

45. On October 11, 2016, Claimant and the members of the Tribunal held the Case Management Meeting – as per Art. 24 of the ICC Rules – to discuss and sign the present Terms of Reference. Despite having knowledge of the Case Management Meeting, Respondent did not appear.

46. The following persons were present at the Case Management Meeting:

On behalf of Claimant:

- Nahit Cetin
- Esra Ozkan
- Ahmet Mutlu
- Ecehan Tuzluoglu
- Peter Griffin
- Eric Teynier
- Pierre Pic
- Marie-Helene Ludwig
- Asha Rajan
- Amandine Gasnier

The Arbitral Tribunal:

- Juan Fernandez-Armesto

[7] Annex III to the Terms of Reference.
[8] The documents were received at the Ministry of Foreign Affairs on October 5, 2016; at the Litigations Department (Idart Al Kadya) on October 6, 2016 and were received at the Ministry of Justice on October 13, 2016.

- Pierre Mayer
- Georges Khairallah

The Administrative Secretary:

- Krystle M. Baptista

47. The Terms of Reference were signed by the Arbitral Tribunal and by Claimant at the meeting, and subsequently approved by the ICC Court on November 3, 2016, following which the Secretariat invited Respondent to sign the Terms of Reference as approved by the Court.

4. PROCEDURAL ORDER NO. 2

48. On November 3, 2016, the Tribunal submitted a draft PO No. 2 to the Parties, requesting their comments. On November 8, 2016, Claimant submitted its comments to the draft and Respondent did not submit any comments.

49. On November 11, 2016, the Tribunal issued PO No. 2 regarding the procedural timetable, the conduct of the proceedings and the appointment of Mrs. Krystle M. Baptista as Administrative Secretary.

5. MAIN SUBMISSIONS

Claimant's Statement of Claim

50. On December 2, 2016, Claimant submitted its Statement of Claim **["Cl"]**[9], together with:

- exhibits Doc. C-20 to C-119,
- legal exhibits legal exhibits Doc CL-1 to CL-99,
- three witness statements given by Mr. Omer Mafa **["Mr. Mafa's WS"]**, Mr. Nahit Cetin **["Mr. Cetin's WS"]** and Mr. Mert Cevik **["Mr. Cevik's WS"]**,
- one Technical Audit Report prepared by Mr. Philip Garbutt, MIStructE, BEng, CEng, ENPC, MSOA **["Garbutt I"]**,
- one Financial Audit Report prepared by Mr. Ed Brook **["Brook I"]**, and
- one report quantifying Cengiz' losses prepared by FTI Consulting **["Osborne I"]**.

Respondent's appearance in the proceedings

51. On March 3, 2017, Respondent – who had not communicated with the Arbitral Tribunal since August 2016 – wrote an email to the Arbitral Tribunal informing it that they had reached an agreement with Claimant in order to modify the procedural calendar (i.e. Annex I to PO No. 2) and postpone the dates of their following submissions.

[9] Communication C-8.

52. On March 7, 2017, the Arbitral Tribunal confirmed the Parties' agreement and reissued Annex I to PO No. 210. A further postponement agreement was confirmed by the Arbitral Tribunal on April 28, 201711 and Annex I to PO No. 2 was reissued accordingly.

Respondent's draft Statement of Defense

53. On June 1, 2017, Respondent presented its Draft Statement of Defense, together with documents SD-1 to SD-14 and the witness statement of Mr. Mohamed Shaban **["Mr. Shaban's WS I"]**, which was accompanied by documents MS-1 to MS- 6.

54. In its Draft Statement of Defense Respondent made two requests:

- First, a 14 day extension to provide further evidence alleging that there had been an outbreak of serious fighting in Tripoli which disrupted the final approval of additional witness statements.

- Second, a bifurcation of the proceedings and, alternatively, a further 3-month extension to file an amended statement of defense.

55. Having heard Claimant, the Tribunal issued communication A10 on June 7, 2017:

- First, granting the extension requested by Respondent and ordering Respondent to present the draft witness statements announced in the Draft Statement of Defense, and

- Second, convening the Parties to a conference call to discuss Respondent's bifurcation petition and procedural calendar.

56. On June 14, 2017, Respondent complied with the Tribunal's order and presented:

- A witness statement of Eng. Ajaj [" **Mr. Ajaj's WSI"],**

- Witness statement of Mr. Nifat[12] and letter by Mr. Al-Zoui,

- exhibits MA-1 to MA-19.

57. The Parties and the Arbitral Tribunal held a conference call on June 21, 2017, and agreed on a new procedural timetable, which did not include a bifurcation of the proceedings[13], but allowed Respondent to submit its Statement of Defense on August 21, 2017.

Respondent's Statement of Defense

58. On August 21, 2017, Respondent presented its Statement of Defense **["RI"]**[14], together with:

- the second witness statement of Mr. Mohamed Shaban **["Mr. Shaban's WSII"]** and accompanying exhibits MS-7 to MS-13;

[10] Communication A7.
[11] Communication A8.
[12] Not relied by Respondent according to RI.
[13] PO No. 3.
[14] Communication R-8.

- witness statement of Mr. Khaled Albuaeshi;
- legal exhibits SD-8 to SD-29, and
- expert report of Mr. Matthew Shopp **["Shopp I"]**.

Claimant's Reply

59. On October 16, 2017, Claimant presented its Statement of Reply **["CD"]** together with:

- exhibits Doc. C-120 to C-165,
- legal exhibits CL-100 to CL-180,
- witness statement of Mr. Ertan Ermurat **["Mr. Ermurat's WS"]**,
- expert report of Mr. Legrand **["Legrand"]** and accompanying exhibits BL-1 to BL-77,
- an additional note to Mr. Brook's report **["Brook II"]**,
- an additional note to Mr. Garbutt's expert report **["Garbutt II"]**, and
- Chris Osborne's second expert report **["Osborne II"]**.

Respondent's Rejoinder

60. On December 6, 2017, Respondent filed its Statement of Rejoinder **["RII"]** attaching:

- factual exhibits SDF-1 to SDF-3,
- legal exhibits SD-30 to SD-50,
- a second witness statement of Mr. Ajaj,
- Mr. Walker-Cousins' expert report **["Walker-Cousins"]**,
- a second expert report by Mr. Matthew Shopp **["Shopp II"]**, and
- Mr. Alyaseer's report on Libyan Law.

6. HEARING PREPARATION AND HEARING

61. On December 15, 2017, Claimant notified the Tribunal and the counterparty of the witnesses and experts to be called to the hearing.

62. On December 18, 2017, the Tribunal acknowledged receipt of Claimant's witness notification and inquired on Respondent's witness notification. The Tribunal also sent the Parties a PO No. 4 regarding the organization of the hearing.

63. On December 21, 2017, the Parties commented on the draft procedural order sent by the Arbitral Tribunal and Respondent confirmed its intention to examine all of Claimant's witnesses and experts. The organisation of the hearing was reflected in PO No. 4 issued on December 28, 2017.

64. The **"Hearing"** was held in Paris, at the Centre de Conference Etoile Saint Honore, located in 21-25 rue de Balzac from Monday, January 15 to Friday, January 19, 2018.

65. The following witnesses and experts attended the Hearing and were duly examined by counsel to the Parties:

Witnesses:

- Omer Mafa
- Ertan Ermurat
- Nahit Cetin
- Mert Cevik
- Hashem Mohammed Al-Zoui (examined by videoconference)
- Mahmoud Bashir Ajaj

Experts:

- Frank Legrand
- Joseph Walker-Cousins
- Phillip Garbutt
- Edward Brook
- Chris Osborne
- Mathew D. Shopp

66. The Parties produced exhibits H 1 to H 6 in the Hearing.

67. During the Hearing, Claimant waived the deposition of Khaled Albuaeshi[15] and Chancellor Husain Saleh Alyaseer was not made available by Respondent[16].

68. Given that certain witnesses testified in Arabic, Turkish and French three interpreters were present during the Hearing. The Hearing was transcribed, and the Parties and the Tribunal were provided with the Hearing transcript **["HT"]**.

69. At the end of the Hearing the Tribunal asked the Parties if there were any due process issues that the Parties would like to raise[17]. The Parties declared that their due process rights had been respected[18].

[15] HT day 4, 552:24-553:5.
[16] HT day 2, 453:6-22.
[17] HT day 5, 1061:5-13.
[18] HT day 5, 1061:14-16.

7. PROCEDURAL ORDER NO. 5

70. As agreed in PO No. 4 the Tribunal, in consultation with the Parties, determined at the end of the Hearing how the proceedings should continue. The agreements reached were reflected in PO No. 5. In particular, the Parties reached the following agreements:

Document Production

71. The Parties agreed to liaise and exchange the following documents at the latest by February 16, 2018:

- The guarantees provided by Cengiz Libya in accordance with the Contracts.
- The internal reports on damages issued by the 20th Committee [the **"20th Committee"]**.
- The reply to the email sent by Mr. Erden to Mr. Ünliier on June 6, 2013 (document C-126), if available.

Comments by Libya

72. The Parties agreed that at the latest by February 16, 2018, Respondent would comment and provide further information on any damages compensation the State of Libya has provided or will provide to an Egyptian company (ACC), as reported in the news article produced at the Hearing (Doc. BL-70), or any other.

Post-Hearing submissions

73. The Parties agreed to have two rounds of simultaneous page-limited post-Hearing submissions. The first post-Hearing submissions would be submitted on March 15, 2018, and will have a maximum length of 80 pages. The second post-Hearing submissions would be submitted on April 6, 2018, and will have a maximum length of 15 pages.

Cost Submissions

74. The Parties agreed that each Party would submit a statement of costs in the form of an affidavit of each Party's Chief Legal Counsel by April 27, 2018.

Postponement requests

75. Upon Respondent's request and having heard Claimant, the Tribunal granted a 9-day extension to Respondent to produce the documents agreed in PO No. 5 and provide the agreed comments.

76. On March 13, 2018, the Tribunal confirmed the Parties' agreement for a two week extension to file the first post-hearing briefs, until March 29, 2018. All other submissions (including the Tribunal's endeavour to render the award) were accordingly postponed by two weeks[19].

[19] Communication A21.

8. POST-HEARING SUBMISSIONS

77. On March 29, 2018, the Parties submitted their first post-hearing briefs [Claimant's will be referred to as "CIII" and Respondent's as "RET"]. On April 20, 2018, Claimant and Respondent submitted their second post-hearing briefs ["CIV" and "RIV", respectively].

9. SUBMISSIONS ON COSTS

78. On April 26, 2018, the Tribunal confirmed the Parties' request to postpone the filing of the Parties' submission on costs for one week. All other deadlines, including the Tribunal's endeavour to render the award were accordingly postponed[20].

79. On May 4, 2018, the Parties presented their simultaneous submissions on costs [Claimant's Cost submission will be referred to as "CV" and Respondent's Cost submission will be referred to as "RV"].

10. ADVANCE ON COSTS

80. On March 31, 2016, the Court fixed the advance on costs at USD 650,000, subject to later readjustments[21]. The advance on costs was fully paid by Claimant[22], due to Respondent's failure to pay its share.

81. On December 7, 2017, the Court readjusted the advance on costs and increased it from USD 650,000 to USD 985,00023. Again Claimant paid the full amount[24], due to Respondent's failure to pay its share.

11. CLOSING OF THE PROCEEDINGS

82. The Tribunal declared the proceedings closed with respect to the matters to be decided in this arbitration on September 25, 201825.

12. TIME PERIOD FOR THE ISSUANCE OF THE AWARD

83. The Court initially fixed April 30, 2018, as the time limit to render the award[26].

84. However, at the end of the Hearing the Parties and the Tribunal agreed that the Parties needed reasonable time to present two rounds of post-hearing briefs on March 15 and April 6, respectively, and their statement on costs on April 27, 2018. Thus, the Tribunal agreed with the Parties to endeavor to send the award for scrutiny to the ICC by September 13, 201827.

85. The Court then fixed September 30, 2018, as the time limit for rendering the final award[28].

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[20] Communication A22.
[21] Secretariat's letter of January 10, 2017.
[22] Secretariat's letter of January 10, 2017.
[23] Secretariat's letter of December 7, 2017.
[24] Secretariat's letter of March 22, 2018.
[25] Communication A23.
[26] Secretariat's letter of February 7, 2017.
[27] HT day 5, 1052:8-1053:15.
[28] Secretariat's letter of dated April 30, 2018.

86. Upon the Parties agreement[29], the deadlines initially agreed to submit the first post-hearing briefs and costs submissions were extended for a total of three-additional weeks. The Parties' agreement was confirmed by the Tribunal in communications A21 and A22, with the express understanding that the Tribunal's endeavor to send the award to the ICC by September 13, 2018, would also be postponed three weeks, i.e. until October 4, 2018.

87. On September 26, 2018, the Court extended the time for rendering the final award until October 31, 201830.

88. On October 31, 2018, the Court again extended the time for rending the final award until November 30, 2018. Therefore, this Award is rendered within the time limit granted.

[29] Communications C30 and C35.
[30] Secretariat's letter of September 27, 2018.

ITLRELIEF SOUGHT

89. Claimant requests the following relief[31]:

> "(i) A declaration that the State of Libya breached Articles 2.2, 3.3, 4 and 5 of the Treaty in its relationship vis-à-vis Cengiz;
>
> (ii) An order that the Respondent pay the amount of USD 302.6 million in compensation of Cengiz' losses and damages arising from the State of Libya breaches of Articles 2.2, 3.3, 4 and 5 of the Treaty;
>
> (iii) An order that these amounts bear interest at a LIBOR USD 6 month + 2% from 1 September 2011 until full payment;
>
> (iv) An order that the Respondent release or orders HIB to release the existing bank guarantees in relation to the Wadi A1 Hayat and Sebha Projects;
>
> (v) An order that the Respondent reimburse all costs and expenses incurred by Claimant in connection with the preparation and conduct of these arbitration proceedings including, without limitation, the fees and expenses of legal counsel, experts, consultants and witnesses and the fees and expenses of arbitrators and the International Chamber of Commerce on a full indemnity basis;
>
> (vi) Interest on all sums awarded to Cengiz".

90. Respondent requests, in summary, that Cengiz' claim be dismissed[32] and that Claimant pay Libya's defense costs[33]. In its Statement of Reply, Respondent requested that the Tribunal[34]:

> "a. Declare that Cengiz' claims are not within the jurisdiction of the Arbitral Tribunal (or are otherwise inadmissible);
>
> b. Declare, alternatively, that Libya has not breached any of its obligations under the Treaty and dismiss all of Cengiz' claims in their entirety;
>
> c. Declare, alternatively, that even if Libya has breached any of its obligations under the Treaty that Cengiz' damages should be assessed at zero;
>
> d. Order Cengiz to pay in full the fees and expenses of the Arbitral Tribunal and all costs in connection with this arbitration by Libya (including, without limitation, the fees and expenses of Mr. Shopp, Mr. Walker-Cousins, Mr. Alyaseer and all legal fees and expenses) as well as the costs charged by the Arbitral Tribunal on a full indemnity basis plus interest per annum accruing from the date on which Libya incurred the costs in question until paid; and
>
> e. Award Libya such further relief as the Arbitral Tribunal may consider appropriate in the circumstances of this case".

[31] Cl, para. 483; CII, para. 470; CIII, para. 300.
[32] RI, para. 283; RIII, para. 84.
[33] RI, para. 285; RIII, para. 84.
[34] RII, para. 217.

IV. OVERVIEW

91. In 2003, the UN sanctions against Libya, which had kept the country insulated from the rest of the world, were lifted[35]. Shortly thereafter, Libya initiated a large infrastructure and housing development program throughout the country to address past underinvestment[36]. The overall budget for this countrywide program was reported to be between USD 40 billion and USD 100 billion[37].

92. Such development program was placed under the authority of the Libyan Housing and Infrastructure Board (HIB), which appointed Aecom, a global and prominent construction management company, as the lead program manager for urban developments throughout the country[38].

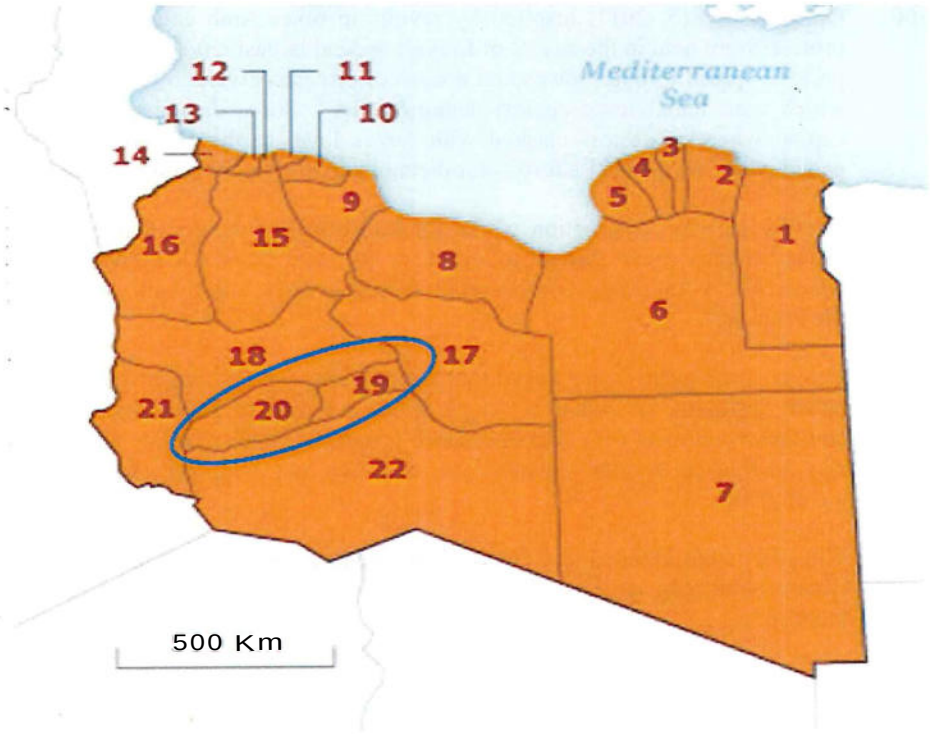
93. In 2008, seeking new commercial opportunities in Libya, Claimant incorporated Cengiz Libya Construction and Investment Joint-Stock Company ["Cengiz Libya"], a Libyan corporation, to participate in these infrastructure and housing developments[39].

94. At the end of 2008, Cengiz Libya entered into a first contract with HIB [the "WAH Contract"], for the construction of infrastructure on an area of approximately 1,850 hectares in the district of Wadi-al-Hayat ["WAH"] in Southwestern Libya [the "WAH Project"][40]. The project covered the installation and construction of wastewater and rainwater networks, fresh water supply network, pump stations, water tanks, urban roads, street lighting, electric distribution networks and telecommunication networks[41].

95. Approximately a year thereafter, in November 2009, Cengiz Libya entered into a similar contract with HIB [the "Sebha Contract"] for the development of infrastructure within an area of approximately 1,200 hectares in Sebha City [the "Sebha Project"][42].

96. Wadi-Al-Hayat and Sebha are two southern neighboring districts of Libya with populations of approximately 100,000 inhabitants each[43]. Both districts, circled in the map below, are situated in the Libyan desert, near the Algerian border.

[35] Doc. FTI-12, p. 2.
[36] Doc. C-39.
[37] Doc. FTI-14.
[38] Doc. FTI-14.
[39] Cl, para. 62.
[40] Doc. C-8a).
[41] Mr. Cetin's WS, para. ix.
[42] Doc. C-9.
[43] Doc. FTI-17.



Source: Exhibit FTI-16: Governance of Libya, fanack.

97. Following the signature of the WAH and Sebha Contracts, Cengiz mobilised resources, importing construction machines and erecting facilities and camp installations on the construction sites[44].

98. For budgeting purposes, HIB produced indicative estimates of the value of the projects on a per hectare basis. HIB estimated price per hectare was constant across Libya (save for allowances[45]) at LYD 225,000 per hectare[46]. On the basis of this preliminary estimate, the construction value of the WAH Project was estimated at LYD 488.7 M (approximately USD 384.8 M) and the value of the Sebha Project at LYD 310.5 M (approximately USD 244.5 M)[47].

99. In March 2009, the design of the WAH Project started, with construction following by the end of the year. The design of the Sebha Project started in November 2009 and construction started six months later.

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[44] Mr. Cetin's WS, paras. xi to xiv.

[45] All contracts awarded by HIB at the time, including the WAH and Sebha Contracts, provided for the unit prices. These prices were constant across Libya, save for certain geographical allowances of between 2.2% and 22.5% above the base prices, depending on where in Libya the project was situated. The allowances for the WAH and Sebha Projects were respectively 17.4% and 15.0% (meaning that the WAH and Sebha project attracted a price premium of 17.4% and 15.0% respectively over and above HIB's base prices) (see Doc. C-8a), p. 3 and Doc. C-9, p. 3). Allowances were essentially aimed at incentivising contractors to apply for projects outside of Libya's main cities (Osborne I, para. 2.18).

[46] Garbutt I, p. 33.

[47] Doc. C-8a), p. 3 and Doc. C-9, p. 3.

100. On February 15, 2011, inspired by revolts in other Arab countries, anti-government protests were held in the streets of Libya's second largest city. In the following days, the protests spread to other towns and dozens of protesters were killed by the Government, which used lethal force against demonstrators[48]. Soon, demonstrations spread to the capital where protestors clashed with forces loyal to the Government. The uprising ended with Col. Gadaffi's forty-year dictatorship after months of violence and civil war.

101. The design and construction works for both Projects were still ongoing in February 2011, when Cengiz started to evacuate its staff from Libya because of security concerns[49]. A full evacuation occurred in August 2011, shortly after an armed attack on the Projects[50].

102. Cengiz subsequently established that the property and equipment left on site had been either destroyed or stolen[51]. Cengiz tried to return to Libya and, in 2013, signed additional contracts with HIB in order to restart the works. Despite all efforts, Claimant was unable to resume construction and was not paid outstanding sums by the government.

103. Thus, Claimant initiated this Treaty claim alleging a violation of the FPS, FET and War Clause standards, and requesting compensation for the losses and damages arising therefrom.

[48] RI, para. 41(a) (b); Walker-Cousins, p. 21.
[49] Mr. Cetin's WS, para. xi; Mr. Cevik's WS, para. xxxi.
[50] See section V.6 *infra*.
[51] Doc. C-120; Doc. C-157.

V. FACTS

1. DRAMATIS PERSONAE

104. The following entities were involved in the present dispute:

105. **CENGIZ**: Claimant is a 100% subsidiary of the Turkish group Cengiz Holding A.Ş. **["Cengiz Holding"]**[52]. Cengiz, initially named Cengiz Construction Co., was established in 1987 and has become one of the leading construction companies in Turkey[53]. Its core business includes infrastructure and superstructure projects to build highways, airports, tunnels, bridges and viaducts, high-speed railways, ports, dams, etc. It has successfully undertaken major infrastructure operations in Turkey and internationally[54]. In 2015, it had a turnover of more than USD 1 Billion and it employed approximately 20,000 workers[55].

106. **CENGIZ HOLDING**: is the Cengiz Group's holding company, which owns the shares of more than 35 companies and affiliates, with an annual revenue exceeding USD 5 B[56]. Its principal business areas are[57] construction, energy[58] and mining and metallurgy[59].

107. **CENGIZ LIBYA**: Cengiz Libya Construction and Investment, Joint Stock Company (Cengiz Libya) is a Libyan company incorporated by Cengiz for the purpose of complying with Libyan law and being eligible to tender for construction contracts in Libya[60].

108. When Cengiz Libya was incorporated, Cengiz held 49% of the company's shares, while International Company for Development and Investment **["ICDI"]**[61], a Government entity, was the majority shareholder, with 51% of the share capital. However, soon thereafter, Cengiz increased its participation to 65% of Cengiz Libya, while ICDI remained nominal owner of 35% of the capital[62].

109. Although ICDI continued to formally hold 35% of Cengiz Libya's capital, such shareholding was purely nominal. Pursuant to a shareholders' agreement signed in 2008, ICDI accepted to become a passive partner, without any participation or liability in the construction projects, and also waived the right to any "financial benefit" deriving

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[52] Doc. C-5, Doc. C-6 and Doc. C-7.
[53] Doc. C-26.
[54] Mr. Mafa's WS, para. vi.
[55] Doc. C-28.
[56] Mr. Mafa's WS, para. v.
[57] Mr. Mafa's WS, para. v; See Doc. C-27 and Doc. C-28.
[58] Cengiz Holding is a significant investor in electricity generation and distribution, natural gas distribution and trade, sales and marketing of both commodities.
[59] Cengiz Holding is the sole producer of copper and aluminum in Turkey.
[60] CII, para. 13.
[61] Memorandum of Association, June 3, 2008, Art. 7. Doc. C-6.
[62] Minutes of session of the extraordinary general meeting of Cengiz Libya Construction and Investment JSC, December 25, 2008; Cengiz Libya Amended Articles of Association, April 1, 2009; Memorandum of Association, January 4, 2009, Art. 1. Doc. C-7.

from its 35% shareholding. In exchange, ICDI is entitled to receive a 2% fee calculated on the net contract price for the Wadi A1 Hayat Project[63]:

110. Consequently, in economic terms Cengiz is entitled to 100% of the revenue stream and of the net worth arising from Cengiz Libya – subject only to the payment of a 2% fee on the net contract price of the Wadi A1 Hayat Project payable to its Libyan partner, ICDI.

111. **HIB**: the Libyan Housing and Infrastructure Board is a state entity, under the Ministry of Housing and Utilities, in charge of large infrastructure and housing projects in Libya[64]. HIB was the signatory of the contracts with Cengiz Libya, as well as subsequent arrangements with Claimant.

112. **Aecom**: is an American project management firm, and the world's biggest construction consultant[65]. It served as HIB's lead program manager for all urban areas throughout Libya[66], and has also served as program manager in this case[67].

113. **TJPA**: is the Libyan Urban Planning Authority **["UPA"]**[68].

114. **Studi**: is a Tunisian design firm[69] **["Studi"]**. It acted as HIB's representative on-site[70] and as technical consultant engineer for the Wadi A1 Hayat Project[71]. Studi approved work inspection records, produced monthly reports to HIB and participated in design and follow up meetings[72].

115. **CMCS SIS-JY**: is a joint venture between a German engineering firm Dorsch[73] and their local joint venture partner ECOU[74], which acted as technical consultant engineer for the Sebha Project[75].

2. CONTEXT PRIOR TO CLAIMANT'S ALLEGED INVESTMENT IN LIBYA

116. In 2003, the UN lifted the embargo against Libya (after Libya fulfilled all remaining UN Security Council Resolution requirements pertaining to the Lockerbie bombing, including renunciation of terrorism, acceptance of responsibility for the actions of its officials, and payment of appropriate compensation to the victims' families). This

[63] Shareholders' Agreement Between Cengiz and ICDI in Cengiz Libya, December 25, 2008, Article 4(5): "International shall not contribute to the execution of projects and shall not issue any payment guarantee or performance bond. It shall have no technical or financial liability during the execution of projects. International irrevocably agrees that no share in the company will yield a financial benefit in return for its 35% partnership share in the company. Nonetheless, International shall be entitled, in return for the services and assistance offered by it, to 2% of the net value of the contract and other possible additional amounts; this rate shall only be applicable to the Wadi A1 Hayat project for HIB Libya, which is valued at LYD 488,677.500. As for other projects, the Parties shall agree to the rate at the time". Doc. C-56.
[64] CII, para. 20; Mr. Ajaj First WS, paras. 5-6; Resolution of the General People's Committee No. 60 (2006), M A I.
[65] Garbutt I, p. 25.
[66] Mr. Cetin's WS, para. xviii.
[67] Garbutt I, p. 21; Doc. PG-37.
[68] Mr. Cetin's WS, para. xii.
[69] Garbutt I, p. 25.
[70] Mr. Cetin's WS, para. xviii.
[71] Garbutt I, p. 24; Doc. PG-53.
[72] Garbutt I, p. 24.
[73] Garbutt I, p. 24; Doc. PG-57.
[74] Garbutt I, p. 25; Doc. PG-58.
[75] Garbutt I, p. 24; Doc. PG-53.

rekindled interest in Libya: Claimant started to monitor and visit the country looking for business opportunities[76].

117. In 2008, after an attempted contract with the Libyan Investment Authority, Cengiz was introduced to HIB, who had an urgent problem with one of their projects: Wadi Al Hayat. HIB had awarded the WAH project to a Korean contractor, who was unable to provide the guarantees required by the contract. Thus, HIB offered Cengiz the possibility to substitute the Koreans, if they were ready to bid on short notice[77].

118. By this time, Colonel Gadaffi had been in power for 40 years and the situation in Libya was relatively stable[78]. Libya was attracting international companies from around the world, in an effort to improve its housing, roads, utilities, hotels, universities, ports, railways and desalination plants[79].

119. The Libyan economy was supported by windfall profits from the sale of oil, leading to strong economic performance[80]. To ensure growth and consolidate social gains, Libya launched a Public Investment Plan with an initial estimated allocation of about USD 225B for the period 2008-2012, (which was then reduced at the end of 2008)[81], designed to:

> "address the most pressing needs in terms of improvement of the provision of public services, and to deal with a backlog of infrastructure rehabilitation, plus major modernization and expansion needs"[82].

120. According to the World Bank Main Report, by 2009 the size and performance of public investment in Libya had been steadily improving, and Libya's efforts to fill the infrastructure gap had been remarkable[83]. In particular, the big winners of the increased budget allocations were housing, urban development and infrastructure, which together represented about half of total investment for 2007[84].

121. In this context, Cengiz found that the WAH project was financially attractive[85] and in order to comply with the Libyan law requirement that the tenderer ought to be a Libyan company with a Libyan minority shareholder, it partnered with ICDI[86] and incorporated Cengiz Libya[87].

3. THE CONTRACTS

122. Cengiz Libya and HIB entered into two separate contracts:

- On December 30, 2008, Cengiz Libya signed the WAH Contract to design and build the infrastructure of an area of 1,850 hectares at 12 sites in the Wadi Al Hayat Shabia south region. The contract area included the following localities, located in

[76] Mr. Mafa's WS, para. x.
[77] Mr. Mafa's WS, para. xii.
[78] CII, para. 45.
[79] Doc. C-39.
[80] Doc. C-20, p. 1.
[81] Doc. C-20, p. 4.
[82] Doc. C-20, p. 4.
[83] Doc. C-20, p. 9.
[84] Doc. C-20, p. 10.
[85] Mr. Mafa's WS, para. xiii.
[86] Mr. Mafa's WS, para. xv.
[87] Mr. Mafa's WS, para. xiv.

the Wadi Hayat District: Awbari, al-Hutiya, al-Gharifa, Jarma, Abrik, Qaraqara, alFajij, al-Qaraya, al-Raqiba, Bint Beh, Akhlif and al-Abyad.

- Almost a year later, on November 8, 2009, Cengiz Libya entered into the Sebha Contract to master plan, design and build infrastructure in an area of 1,200 hectares in the Sebha south region.

123. The WAH and Sebha Contracts and Projects will be jointly referred to as the **"Contracts"** and the **"Projects"**.

3.1 MAIN CONTRACTUAL PROVISIONS

A. WAH Contract

Scope of Contract

124. According to the WAH Contract, Cengiz Libya would review and complete the design and then construct the "integrated facilities" (i.e. roads, water supply, street lighting, electric distribution networks and telecommunication networks) of 12 localities in the WAH District, covering an area of 1,850 hectares[88].

125. When Cengiz Libya and HIB signed the WAH Contract, master planning was not included in the scope of Cengiz Libya's work[89]. However, on May 11, 2009 an Addendum to the WAH Contract was signed and Cengiz Libya was entrusted with master planning[90] and was awarded additional fees[91].

Price

126. The initial value of the WAH Contract was calculated at LYD 488,677,50092. Such initial value was based on an estimate calculated by HIB, on the basis of the areas to be constructed, multiplied by a unit price per hectare[93]. The final cost of the Contract would result from multiplying the price categories by the amount of work actually performed (for measurable work)[94].

127. The WAH Contract specified that the studies and designs would constitute 1% of the total contract cost, which HIB would pay upon approval.

Duration

128. The duration of the WAH Project was fixed at 44 months[95].

[88] WAH Contract, Article 1, Doc. C-8a.
[89] Mr. Cetin's WS, para. xii.
[90] WAH Contract, Article 1(b), Doc. C-8b.
[91] Garbutt I, p. 27; WAH Contract, Article 1(d), Doc. C-8b.
[92] WAH Contract, Article 2, Doc. C-8a.
[93] WAH Contract, Article 2, Doc. C-8a. Garbutt I, p. 16: During the WAH Contract tendering HIB provided Cengiz Libya the overall surface area of works to be carried out based on the outline master planning done by UPA.
[94] WAH Contract, Article 2, Doc. C-8a. Garbutt I, pp. 32-33.
[95] WAH Contract, Article 3, Doc. C-8a.

Guarantees

129. For the WAH Contract to become binding, Cengiz Libya had to deposit a performance bond with HIB for 2% of total cost of the contract. The bond was to guarantee full execution of Cengiz Libya's duties[96]. In addition, to receive an advance payment of 15% of the contract cost, Cengiz Libya had to submit a second letter of guarantee equal to amounts advanced, to remain in place until completion of the Contract[97].

130. Cengiz in fact obtained and delivered two guarantees in favor of HIB[98]:

- A performance bond of EUR 5,65 M[99]; and
- An advance payment bond of EUR 42 M[100].

Payment terms

131. The WAH Contract established the possibility of advance payments. In particular, an initial advance payment amounting to 15% of the contract cost could be requested by Cengiz Libya after delivery of the work site, submission of the letter of guarantee and registration of the contract with the tax authority[101].

132. HIB made an advance payment to Cengiz Libya of LYD 72,559,200 for the WAH Contract[102].

Discretionary powers of HIB

133. HIB had a wide discretion under the Contract, including a unilateral right to increase or decrease the contract value by 20%[103] and to cancel the contract in the public interest[104].

Insurance

134. Cengiz Libya acquired the duty to obtain insurance to cover "the completed work, materials, instruments and equipment located at the work site against theft, fire and destruction". The insurance ought to also protect against "all contractor risks" until initial acceptance[105].

Jurisdiction

135. The WAH Contract attributes Libyan courts the jurisdiction to hear any dispute arising from the contract[106].

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[96] WAH Contract, Article 6, Doc. C-8a.
[97] WAH Contract, Article 1fra), Doc. C-8a.
[98] CII, para. 67; Doc. C-178.
[99] WAH Contract, Article 6, Doc. C-8a; Doc. C-178.
[100] WAH Contract, Article 11, Doc. C-8a; Doc. C-178.
[101] WAH Contract, Article 11, Doc. C-8a.
[102] RI, para. 73(a); Mr. Aja First WS, para. 23.
[103] WAH Contract, Article 10, Doc. C-8a.
[104] WAH Contract, Article 34, Doc. C-8a.
[105] WAH Contract, Article 16, Doc. C-8a; check MA 8 and Mr. Aja First WS, para. 21.
[106] WAH Contract, Article 5, Doc. C-8a.

B. Sebha Contract

Scope of the Project

136. The Sebha Project included master planning, design and build of "fully integrated infrastructure" for the city of Sebha, including design and build of drinking water systems, sewage systems and networks, roads, sidewalks, lighting network, traffic signs and signals, civil works for telephone system and electrical networks[107].

Price

137. The estimated value of the Sebha Contract was calculated at LYD 310,500,000[108]. As in the WAH Contract, such initial value was based on an estimate calculated by HIB, on the basis of the areas to be designed, multiplied by a unit price per hectare[109]. The final cost of the Contract would be the amount that resulted from multiplying the price categories by the amount of work actually performed (for measurable work)[110].

138. The Sebha Contract specified that the master planning would constitute 0.5% of the estimated value of the Contract and that the studies and designs would constitute 1% of the total contract cost, which HIB would pay upon approval[111].

Duration

139. The duration of the Sebha Project was fixed at 30 months[112].

Guarantees

140. Similarly to the WAH Contract, for the Sebha Contract to become binding, Cengiz Libya had to deposit a performance bond with HIB for 2% of total cost of the contract. The bond was to remain under HIB's control as a guarantee of full execution and to ensure any duties due from Cengiz Libya[113]. In addition, in order to receive an advance payment of 15% of the contract cost, Cengiz Libya had to submit a letter of guarantee for the value of the advance that ought to remain in place until completion of the Contract[114].

141. Thus, for the Sebha Project, Cengiz obtained and delivered two guarantees in favor of HIB[115]:

- A letter of performance bond valued at EUR 4 M[116] and
- An advance payment bond valued at EUR 26.3 M[117].

[107] Sebha Contract, Article 1, Doc. C-9.
[108] Sebha Contract, Article 2, Doc. C-9.
[109] Sebha Contract, Article 2, Doc. C-9.
[110] Sebha Contract, Article 2, Doc. C-9; Garbutt I, pp. 34-35.
[111] Sebha Contract, Article 2, Doc. C-9.
[112] Sebha Contract, Article 3, Doc. C-9.
[113] Sebha Contract, Article 6, Doc. C-9.
[114] Sebha Contract, Article 11(a), Doc. C-9.
[115] CII, para. 69; Doc. C-179.
[116] Sebha Contract, Article 6, Doc. C-9.
[117] Sebha Contract, Article 11, Doc. C-9; Doc. C-179.

142. The provisions regarding payment terms, powers of HIB, insurance and jurisdiction are similar to those established in the WAH Contract. HIB made an advance payment of LYD 43,631,700, representing 15% of the estimated value of the Contract[118].

3.2 EXPANSION OF THE PROJECTS[119]

143. After the signature of the Contracts the scope of both Projects was expanded[120]. On May 11, 2009, master planning was added to the WAH Contract[121] and in July 2010 the initial scope of works for both sites was extended in two ways[122]:

- The urban networks to be developed were densifled; and
- The area encompassing the Projects was increased.

144. This led to two consequences: HIB and Cengiz Libya agreed to increase:

- the duration[123]; and
- the price of the Contracts.

The revised value of the WAH project was estimated at LYD 1.5 B and the revised value of the Sebha project was estimated at LYD 1.4 B[124].

145. After this initial expansion of the projects, in March 2010 HIB was confronted with budget constraints[125] and, while it attempted to arrange additional funds, it decided to retain the detail design for projects and to remove certain works from the scope of the Contracts[126].

146. As a result, the situation of the Project at the date of stoppage, was as follows[127]:

- The revised contract prices amounted to LYD 496,007,662 for the WAH Project and LYD 318,274,313 for the Sebha project[128].
- The Parties reached a provisional arrangement: the electrical and telecommunications works of the WAH Project would be executed later and, at the Sebha Project, the most densely populated areas would be accorded priority[129].

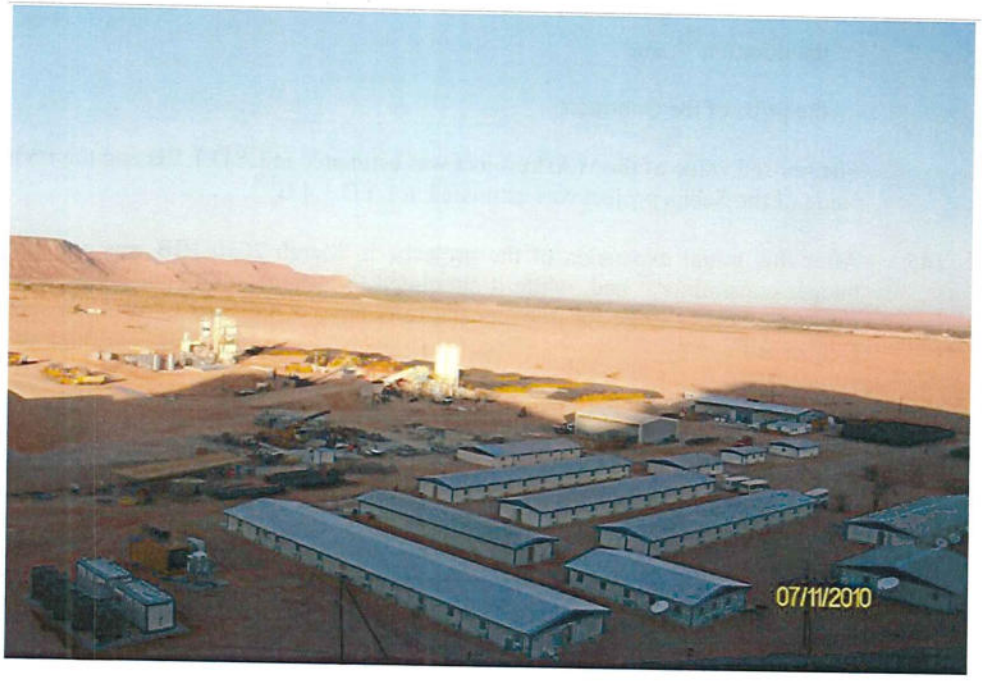
[118] RI, para. 73(b); Sebha Contract, Article 11, Doc. C-9.
[119] See Garbutt I, pp. 48-63.
[120] CII, para. 70; Garbutt I, section 1.2.7.
[121] WAH Contract, Addendum, Doc. C-8b.
[122] CII, para. 70; Garbutt I, section 1.2.7; Doc. PG-76.
[123] CII, para. 71; Garbutt I, section 1.2.7.
[124] Garbutt I, table in section 1.2.7.1 and 1.2.7.2.
[125] Mr. Cetin's WS, fii. 4; Doc. NC-3.
[126] CII, para. 72; Garbutt I, section 1.2.7.
[127] CII, para. 73.
[128] CII, para. 71; Garbutt I, pp. 51, 60
[129] Garbutt I, section 1.1.7; Mr. Cetin's WS, fn. 4, paras. xxxi; Doc. PG-78.

4. DESIGN AND CONSTRUCTION (2009-2011)

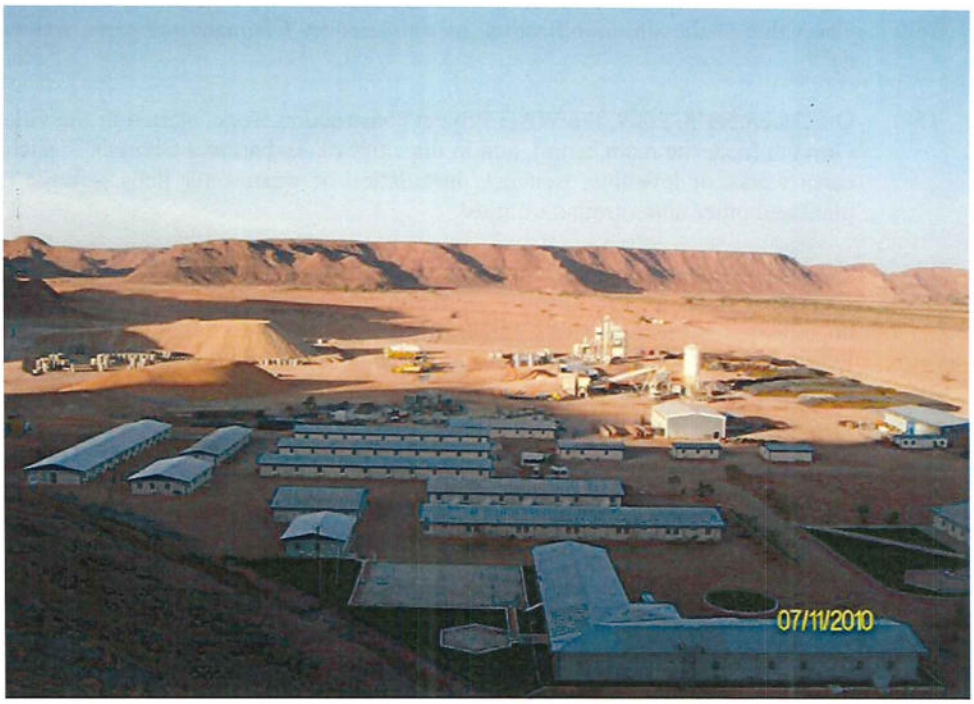
A. WAH Project

147. Cengiz Libya started the design process for the WAH Project in March 2009, once the notice to proceed had been signed[130].

148. Given the remoteness of the location, as a first step Cengiz Libya decided to construct and set up a main camp [the **"WAH Main Camp"]** outside of Germah and close to the A1 Grayfah village. This was accomplished by December 2009[131]. The camp was extensive (6,245 sqm.) and included a number of facilities: main office, dining hall, dormitories for engineers, staff, foreman and workers, recreation area, mosque, laboratories, infirmary, VIP guest house, warehouse, workshop, baths and WCs, laundry, engineer office[132].



[130] WAH Notice to Proceed, March 18, 2009, Doc. PG-99.
[131] Garbutt I, p. 66.
[132] Garbutt I, section 2.I.I.c.



Overview pictures of the Main Camp and plant, just outside the town of Germah (Source: Garbutt I, p. 77).

149. Cengiz Libya also erected a number of substantial industrial plants, which would provide the materials required in the construction works. The facilities included:

- a concrete batching plant,
- an asphalt plant,
- a mixing plant,
- a precast plant for manholes, and a
- crushing and screening plant[133].

150. Cengiz Libya commenced installation of these plants in October 2010[134], and they were fully operational by December 2010[135].

151. Cengiz Libya also deployed an important fleet of self-owned machinery and equipment (including asphalt pavers, graders, soil compactors, drilling machines, concrete transmixers, loaders, bitumen sprayer, excavators, bulldozers, forklifts, tankers, cranes, trucks and generators)[136].

[133] Garbutt I, section 2.1.1.
[134] Doc. PG-21.
[135] Garbutt I, section 2.1.1.a.
[136] Garbutt I, section 2.1.1.b. gives a precise list of all the machinery.

152. The value of the site mobilization, as estimated by Claimant's experts, was USD 35.3 M[137].

153. On December 8, 2009, the WAH Project construction works started in the village of Al Grayfah (near the main camp), and in the cities of Awbari and Germah[138]: site cleaning, earth works of levelling, trenches, installation of wastewater lines, sewage treatment plant and other underground utilities[139].

154. Cengiz Libya was able to perform 9% of the construction work, before the project was suspended due to the security situation in March 2011[140]. Work progress was documented in Payment Certificates, which were approved by HIB up to PC No.5 dated February 2011[141]. The last PC, PC No.6 dated April 2011, was never signed by HIB, because its consultants had left the site in February 2011[142].

155. In 2009, HIB made an advance payment to Cengiz Libya of LYD 72.5 M, representing 15% of the estimated value of the WAH Contract[143]. HIB then made two additional payments, in June and October 2010, which partially covered PC 1 and PC 2. No additional payments were performed[144].

B. Sebha Project

156. Similar infrastructure and equipment were purchased and mobilized for the Sebha Project[145]. A main camp was set up close to Sebha [the **"Sebha Main Camp"]**, which covered 7,897 sqm. and which contained similar facilities to those of the WAH Main Camp.

Overview pictures of the plant and camp in Sebha

[137] Garbutt I, section 1.1.3.1, p. 11; Brook I, section 2.1.5.1.
[138] Garbutt I, section 2.2.2, p. 88.
[139] Garbutt I, section 2.2.2, p. 88.
[140] Garbutt I, section 2.2.2, p. 88.
[141] PC No. 5, February 28, 2011, Doc. PG-105.
[142] Garbutt I, section 2.2.3, po. 88,89; Doc. PG-107 and Doc. PG-108.
[143] RI, para. 73(a); WAH Contract, Article 11(a), Doc. C-8a; Ajaj I, para. 23(a); Doc. MA-9, p.4.
[144] Brook I, p. 20.
[145] Garbutt I, section 2.1.2.a; Doc. PG-42.

Source: Garbutt I, p. 86

157. Close to the Sebha Main Camp Cengiz Libya erected and put into operation five industrial plants which would produce the material required in the construction process:

- a concrete batching plant,
- an asphalt plant,
- a mixing plant,
- a precast plant (manholes) plant and a
- crushing and screening plant[146].

158. Cengiz Libya also commissioned a fleet of construction machinery for the Sebha Project, similar to that commissioned in the WAH Project[147].

159. The value of the site mobilization, as calculated by Claimant's experts, was USD 43 M[148].

160. The construction works for the Sebha Project started in May 2010 with the site cleaning and removal of existing surface waste in Zone 1[149].

161. Cengiz Libya was able to perform 12% of the construction work, before the project was suspended due to the security situation in March 2011[150]. Work progress was documented in six Payment Certificates, all of them approved by HIB. Again, HIB only

[146] Garbutt I, section 2.1.2.a.
[147] Garbutt I, section 2.1.2 b. gives a complete list of equipment.
[148] Garbutt I, section 1.1.3.1, p. 11; Brook I, section 2.1.5.1.
[149] Garbutt I, section 2.4.1, p. 108.
[150] Brook I, p. 21.

made three payments: the advance payment and a partial payment of the first two Payment Certificates[151].

5. THE 2011 UPRISING IN LIBYA (FEBRUARY-OCTOBER 2011)

162. On February 15, 2011, inspired by revolts in other Arab countries, thousands of people took to the streets of Benghazi, Libya's second largest city, to hold anti-government protests. In the following days, the protests spread to other towns and the Government, using lethal force against demonstrators, killed dozens of protesters[152].

163. On February 18-19, 2011, demonstrations spread to the capital, Tripoli, where protestors clashed with forces loyal to the Government. Gaddafi's son, Saif, appeared on television stating that his father would fight until the "last bullet"[153]. However, several leaders resigned and refused to represent the Libyan government[154].

164. On February 21, 2011, while rebels claimed control of eastern Libya, the UN Secretary General Ban Ki-moon held talks with Gaddafi and demanded that the conflict end immediately[155].

165. The following day, February 22, 2011, Gaddafi appeared on television to refute rumors that he had fled the country and vowed to stay in Libya, and "die as a martyr at the end"[156]. On the same day, the UN Security Council issued a statement condemning the violence and use of force against civilians and expressing deep concern about the safety of foreign nationals in Libya[157].

166. A couple of days later, on February 25, 2011, the United States completed the evacuation of US citizens in Libya and closed its embassy. US President Obama signed an executive order freezing Gaddafi's assets and the entire Libyan delegation to the Arab League resigned[158].

Foreign intervention

167. Approximately ten days into the protests, on February 26, 2011, the UN Security Council passed a resolution imposing sanctions against Libya, including an arms embargo and asset freeze[159]. It also referred Libya to the International Criminal Court

[151] Brook I, p. 23.
[152] RI, para. 41(a) (b); Walker-Cousins, p. 21.
[153] RI, para. 41(a) (b); CNN Library: "2011 Libya Civil War Fast Facts", updated March 29, 2017: http://edition.cnn.com/2013/09/20/world/libya-civil-war-fast-facts/index.html (consulted on December 20, 2017): Doc. MS-1.
[154] RI, para. 41(a) (b); CNN Library: "2011 Libya Civil War Fast Facts", updated March 29, 2017: http://edition.cnn.com/2013/09/20/world/libya-civil-war-fast-facts/index.html (consulted on December 20, 2017): Doc. MS-1.
[155] RI, para. 41(c); CNN Library: "2011 Libya Civil War Fast Facts", updated March 29, 2017: http://edition.cnn.com/2013/09/20/world/libya-civil-war-fast-facts/index.html (consulted on December 20, 2017): Doc. MS-1.
[156] RI, para. 41(d); CNN Library: "2011 Libya Civil War Fast Facts", updated March 29, 2017: http://edition.cnn.com/2013/09/20/world/libya-civil-war-fast-facts/index.html (consulted on December 20, 2017): Doc. MS-1.
[157] Cl, para. 52; Doc. C-50.
[158] RI, para. 41(e); CNN Library: "2011 Libya Civil War Fast Facts", updated March 29, 2017: http://edition.cnn.com/2013/09/20/world/libya-civil-war-fast-facts/index.html (consulted on December 20, 2017): Doc. MS-1.
[159] UN Security Council Resolution 1970 (2011), paras. 9, 17; MSG.

for investigation of crimes against humanity[160]. On that same day, former Justice Minister, Mustafa Mohamed Abud al Jeleil, announced the formation of an interim government to lead the eastern regions under opposition control[161].

168. On February 28, 2011, the European Union voted sanctions against Libya, including freezing Gaddafi's assets and imposing an arms embargo[162].

169. Throughout the first half of March 2011 fighting continued and large numbers of foreigners fled the country, while the members of North Atlantic Treaty Organization **["NATO"]** discussed establishing a no-fly zone over Libya[163].

170. On March 17, 2011, the UN Security Council voted to impose a no-fly zone over Libya and take "all necessary measures" to protect civilians[164]. NATO enforced this resolution[165].

171. On March 19, 2011, French and US military forces intervened in the conflict: French fighter jets enforced the no-fly zone over Libya, and the US launched "Operation Odyssey Dawn" firing more than 100 missiles at targets in Libya[166]. At the same time government and opposition troops battled in Benghazi[167].

172. A few days later, on March 23, 2011, the Libyan National Transitional Council **["NTC"]** formally established a transitional government and appointed Mahmoud Jibril as interim Prime Minister[168].

173. In the following weeks and months several countries – first, France, then Qatar, then Italy[169], Spain, Australia, Germany, Canada, Turkey, USA[170], United Kingdom[171] – recognized the NTC as the official government in Libya[172].

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[160] UN Security Council Resolution 1970 (2011), paras. 4-8.
[161] RI, para. 41(f); CNN Library: "2011 Libya Civil War Fast Facts", updated March 29, 2017: http://edition.cnn.com/2013/09/20/world/libya-civil-war-fast-facts/index.html (consulted on December 20, 2017): Doc. MS-1; Walker-Cousins, p. 11; Doc. JWC-14.
[162] RI, para. 41(g);
[163] RI, para. 41(h)(i); CNN Library: "2011 Libya Civil War Fast Facts", updated March 29, 2017: http://edition.cnn.com/2013/09/20/world/libya-civil-war-fast-facts/index.html (consulted on December 20, 2017): Doc. MS-1.
[164] RI, para. 41(j); CNN Library: "2011 Libya Civil War Fast Facts", updated March 29, 2017: http://edition.cnn.com/2013/09/20/world/libya-civil-war-fast-facts/index.html (consulted on December 20, 2017): Doc. MS-1; UN Security Council Resolution 1973 (2011), paras. 4, 6-8; Walker-Cousins, p. 11; Doc. JWC-16; Doc. CL-127.
[165] Legrand, para. 47.
[166] RI, para. 41(k); CNN Library: "2011 Libya Civil War Fast Facts", updated March 29, 2017: http://edition.cnn.com/2013/09/20/world/libya-civil-war-fast-facts/index.html (consulted on December 20, 2017): Doc. MS-1; Walker-Cousins, p. 11; Doc. JWC-18.
[167] RI, para. 41(k).
[168] Legrand, para. 48; Walker-Cousins, para. 46.
[169] April 4, 2011 (CNN Library: "2011 Libya Civil War Fast Facts", updated March 29, 2017: http://edition.cnn.com/2013/09/20/world/libya-civil-war-fast-facts/index.html (consulted on December 20, 2017)): Doc. MS-1.
[170] July 15, 2011.
[171] July 27, 2011.
[172] RI, para. 41(n); CNN Library: "2011 Libya Civil War Fast Facts", updated March 29, 2017: http://edition.cnn.com/2013/09/20/world/libya-civil-war-fast-facts/index.html (consulted on December 20, 2017): Doc. MS-1; Legrand, para. 53; Cl, para. 43, Doc. C-44.

174. On August 23, 2011, the rebels invaded Tripoli[173] and thus, Libya fell under control of the opposition[174], while Gaddafi's whereabouts were unknown[175].

175. While the fighting continued across Libya, in mid-September 2011 British Prime Minister David Cameron and French President Nicolas Sarkozy traveled to Libya to pledge support for the NTC.

176. On September 20, 2011, the NTC Prime Minister Mahmoud Jibril represented Libya for the first time during the annual UN General Assembly[176] and said that he expected Libya to have a new government within ten days[177].

177. A month later, on October 20, 2011, rebel forces captured Moammar Gaddafi and eventually killed him in his hometown Sirte[178]. A few days later, Libya's interim leaders declared the nation's freedom in Benghazi, where the uprisings had begun in February[179].

178. On October 27, 2011, the UN Security Council voted unanimously to end military operations in Libya and canceled NATO's mission in Libya as of October 31, 2011[180].

179. On October 31, 2011, the NTC elected Abdurrahim El-Keib as acting Prime Minister[181].

180. The Tribunal will refer to the period between February and October 2011 and the events that took place therein as the **"Libyan Revolution"**.

6. SITUATION AT THE PROJECT SITES (FEBRUARY-DECEMBER 2011)

181. The uprising did not immediately affect the Project sites. On February 21, 2011, approximately one week after the protests had begun, rebels claimed control of eastern Libya – but the Cengiz Project sites, located in the South, were still safe[182].

A. WAH Project

182. However, only a few days later, on February 23, 2011, Cengiz Libya sent a letter to HIB informing that the situation had deteriorated[183]: Cengiz Libya was unable to continue construction of the WAH Project. The Contractor complained that:

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[173] Cl, para. 57.
[174] CNN Library: "2011 Libya Civil War Fast Facts", updated March 29, 2017: http://edition.cnn.com/2013/09/20/world/libya-civil-war-fast-facts/index.html (consulted on December 20, 2017): Doc. MS-1.
[175] Walker-Cousins, p. 12; Doc. JWC-21; Doc. JWC-22.
[176] CNN Library: "2011 Libya Civil War Fast Facts", updated March 29, 2017: http://edition.cnn.com/2013/09/20/world/libya-civil-war-fast-facts/index.html (consulted on December 20, 2017): Doc. MS-1.
[177] CNN Library: "2011 Libya Civil War Fast Facts", updated March 29, 2017: http://edition.cnn.com/2013/09/20/world/libya-civil-war-fast-facts/index.html (consulted on December 20, 2017): Doc. MS-1.
[178] RI, para. 58, Doc. C-5; Walker-Cousins, p. 12; Doc. JWC-23.
[179] RIII, para. 27; Walker-Cousins, p. 12; Doc. JWC-24; Mr. Shaban's WSI, para. 6.
[180] CNN Library: "2011 Libya Civil War Fast Facts", updated March 29, 2017: http://edition.cnn.com/2013/09/20/world/libya-civil-war-fast-facts/index.html (consulted on December 20, 2017): Doc. MS-1.
[181] CNN Library: "2011 Libya Civil War Fast Facts", updated March 29, 2017: http://edition.cnn.com/2013/09/20/world/libya-civil-war-fast-facts/index.html (consulted on December 20, 2017): Doc. MS-1.
[182] Doc. C-66.

- STUDI, HIB's representative on-site and technical consultant engineer for the WAH Project, had left the country on February 20;
- Government authorities and banks remained closed;
- There was fuel shortage and risk of food shortage; and
- A general lack of safety.

183. Cengiz Libya added that it was delayed in the construction work, but willing to continue works if suitable conditions were reinstated[184].

184. On the following day, Mr. Cetin, Cengiz' Project Manager, wrote an email to Cengiz' headquarters, informing that the situation at the work sites was calm and under control, and that operations at the WAH construction site had been resumed and would continue while the necessary resources were available and the situation allowed[185].

185. On March 17, 2011, while the UN Security Council voted to impose a no-fly zone over Libya and take "all necessary measures" to protect civilians[186], HIB sent two letters to Cengiz Libya, asking the contractor to resume works at the WAH[187] and Sebha[188] Projects, alleging that the circumstances that had caused stoppage of the works had been solved. HIB guaranteed that they would provide all possible support for the works to be resumed[189].

Evacuation of WAH Main Camp

186. Notwithstanding these undertakings, the actual situation deteriorated, and on that very day (March 17, 2011) Cengiz Libya evacuated the WAH Main Camp, with a small team left behind to secure the site[190].

187. At the time of stoppage of the works, the development was as follows[191]:

- The WAH Main Camp had been constructed and was operational;
- The industrial plants had been erected and machinery and equipment had been purchased and imported[192];
- The design had progressed 65% in the WAH Project[193], while construction had progressed 9%[194].

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[183] Doc. C-68; Cl, para. 98.
[184] Doc. C-68; Cl, para. 98.
[185] Doc. C-67.
[186] RI, para. 41(j); CNN Library: "2011 Libya Civil War Fast Facts", updated March 29, 2017: http://edition.cnn.com/2013/09/20/world/libya-civil-war-fast-facts/index.html (consulted on December 20, 2017): Doc. MS-1; UN Security Council Resolution 1973 (2011), paras. 4, 6-8; Walker-Cousins, p. 11; Doc. JWC-16.
[187] Doc. C-131.
[188] Doc. C-132.
[189] Doc. C-131; Doc. C-132.
[190] Mr. Cetin's WS, para. xl.
[191] Cff. RI, paras. 109-120.
[192] Garbutt I, section 2.1.1.
[193] Garbutt I, section 2.2.1.
[194] Garbutt I, section 2.2.1.

B. Sebha Project

188. By the end of April, Cengiz Libya sent two letters to HIB[195] noting that it remained committed to executing the Sebha Contract, but that several difficulties prevented a normal work progress, including:

- Lack of bank transactions;
- Blockage of materials at Musrata harbor;
- Delays in project approvals;
- Money rationing and lack of oil;
- Armed robbery attacks on company staff.

189. Cengiz Libya requested HIB to provide safety for the staff at the camps and at worksites to be able to continue the works.

Evacuation of Sebha Main Camp

190. Such safety was not forthcoming, and on April 30, 2011, Cengiz Libya decided to also evacuate the Sebha Main Camp, leaving only a small team behind[196].

191. At the time of stoppage of the works, the development was similar to that of the WAH Project, with the Main Camp, the industrial plants and the equipment operational. The percentage of progress of the works was however higher: design works had been completed by 70.5% and construction works by 12%[197].

C. Attacks on the Main Camps

192. On August 23, 2011, a group of armed individuals of the Tarik Bin Ziyad Battalion, under the command of Battalion Commander Brigadier General Adbiilselam Ismail, violently restrained the site personnel at the WAH Main Camp and forcibly took equipment, motors and vehicles belonging to Cengiz Libya[198].

193. A few days later, on August 25, 2011, the Deputy Chief of the Tank Battalion of the army, Suleyman Alwah, seized further equipment from the WAH Main Camp: three electric motors, three water pumping motors, television, and receiver apparatus[199].

194. On August 26, 2011, a group of citizens, supported by police vehicles and the Tank Battalion, again entered the WAH Main Camp and stole everything at hand: small vehicles, trucks, construction machinery, equipment and bedroom, dining hall and administrative office equipment[200].

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[195] Doc. C-134; Doc.C-135; Doc. C-136.
[196] Mr. Cetin's WS, para. xliii; Garbutt I, section 2.4, 2.5; Doc. PG-20.
[197] Garbutt I, section 2.4, 2.5; Doc. PG-20.
[198] Doc. C-69; Mr. Cetin's WS, para. xliv *et seq.*
[199] Doc. C-101; Mr. Cetin's WS, para. xliv *et seq.*
[200] Doc. C-100; Mr. Cetin's WS, para. xliv *et seq.*

195. On the same day, the Sebha Main Camp was taken over by armed men and the personnel on site were physically restrained and threatened[201].

196. In the next few days, the remaining Cengiz employees had to flee: 16 Turkish employees from the Sebha Main Camp and five from the WAH Main Camp escaped over the Algerian border[202]. There is evidence that Cengiz recruited some local personnel to secure the WAH Main Camp during the absence of the Turkish employees – but without success, since the Camp was looted and totally destroyed[203].

7. CENGIZ S ATTEMPTS TO RESUME CONSTRUCTION (OCTOBER 2011- DECEMBER 2013)

197. A few months after the attacks, on October 26, 2011, members of Cengiz staff were able to return to Libya to assess the extent of the damages and evaluate the possibility of resuming works[204]. Such possibility was centered on the Sebha Project; in which the Main Camp had suffered less loss, and represented less security risks that then WAH Project.

198. A month after arrival, on November 20, 2011, Cengiz Libya sent HIB a letter identifying the loss and theft suffered at the Sebha Main Camp, and expressing the hope that the authorities could ensure protection of the Sebha sites and return the missing machinery and equipment[205].

199. A few days thereafter, on December 4, 2011, HIB reacted, requesting that Cengiz Libya prepare a report of the damages suffered and a new working schedule and that work at the Sebha Project be resumed. Simultaneously, HIB affirmed that the events which had happened qualified as *force majeure*[206].

200. In February 2012, Cengiz Libya submitted to HIB an inventory of losses suffered in relation to both Projects[207] as a consequence of the August 2011 events[208]. In March, the inventory of losses submitted to HIB was completed with information on the monetary value of the losses suffered in each Project[209]. For the WAH Project the value of the loss suffered was calculated as LYD 44,882,068 (on assets worth LYD 61,059,447) [210] and for the Sebha Project at LYD 36,368,234 (on assets worth LYD 69,214,742)[211]

201. The losses suffered in the WAH Project were confirmed by Studi, HIB's on-site representative, who in a report issued in May 2012 confirmed that all mobile and stationary construction machines had been stolen and the Main Camp had been destroyed and looted. Studi concluded "we can confirm the contents of the damage report issued by the company"[212]. Studi also averred that works could only be resumed if the following requirements were met:

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[201] Doc. C-12; Doc. C-70; Mr. Cetin's WS, para. xxxii.
[202] Doc. C-184, p. 7; RI, paras. 136, 138; Ajaj I, para. 35-38.
[203] See Doc-MA 11.
[204] Mr. Cetin's WS, para. xliv *et seq*.
[205] Doc. C-73 (attachments not available- inventories made in 2012 Docs. 120-121).
[206] Doc. C-139.
[207] Doc. C-74; Doc. C-75; Doc. C-120; Doc. C-121.
[208] Doc. C-120; Doc. C-157.
[209] Doc. C-155; Doc. C-156.
[210] Doc. C-155.
[211] Doc. C-156.
[212] Doc. C-77.

- Safety in Libya and, particularly in WAH and Sebha.
- Payment of all receivables to the contractor and the consultancy office.
- Providing a solution regarding compensation for losses suffered.
- Return of banks to normal activity.

8. THE PROTOCOLS (JUNE 2013-MARCH 2014)

202. After months of meetings[213], exchanges[214] and communications with government officials[215], on June 13, 2013, Cengiz and HIB finally were able to sign a reactivation protocol for each Contract[216] [the **"Protocols[217]"** or **"2013 Protocols"**].

203. After signing the Protocols Cengiz completed its mobilization study, repaired the Sebha Main Camp and made it suitable to accommodate 250 workers[218]. Work on the WAH Main Camp, which had been completely destroyed, does not seem to have been resumed.

204. Cengiz Libya also extended all bank guarantees and bonds required by the Contracts within one month of the signature of the Protocols[219].

205. However, and despite Cengiz' repeated requests[220], HIB did not pay the amounts agreed upon in the Protocols. On March 12, 2014, HIB answered with regard to the WAH Project, and provided the following explanation[221]:

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[213] Doc. C-123 (Cengiz emphasized that its rights should be reserved).
[214] Doc. MA-13; Doc. C-127; Doc. C-128.
[215] Doc. C-83: on February 5, 2013 Cengiz sent a letter to Libyan Prime Minister Ali Zeydan :
- Informing him that Cengiz' construction sites were burnt and plundered as a result of the uprising;
- Informing him of Cengiz' willingness and ability to resume works once damaged machines and facilities were repaired and plundered equipment replaced;
- Proposing the following solutions to resume works:
  - The signature of a protocol to refund Cengiz' loss and damages;
  - That guarantees submitted to HIB be refunded as a remedy for recovering loss and damages;
  - No advance deduction is applied to the progress payments;
  - Payment to Cengiz of approved Progress Payments amounting to LYD 36 M;
  - Necessary security measures are taken to resume works quickly.

[216] HT day 3, 488: 2-5 (Ajaj).
[217] Doc. C-16 and C-17, Doc. C-84, Doc. C-85.
[218] Mr. Ermurat's WS, para. 14; Doc. C-88.
[219] WAH Contract: Claimant has provided evidence that HIB periodically sent "extend or pay" requests (Doc. C-178; WP-4; WP-5; WP-6; WP-7; WP-8; WP-10; Doc. C-178; WA-3; WA-4; WA-5; WA-6; WA-7; WA-8; WA-9; WA-10; WA-11) for the bonds, although the bonds expired in 2017 (Doc. C-178; WP-10;WP-10; WA-11: In Claimant's email dated February 16, 2018, it is argued that all WAH guarantees are still in force, since the Libyan Banks are still asking for the bonds to be extended and commission be paid. Claimant submits WP-9 as proof, but such document only seems to refer to WAH advance payment Bond).
Sebha Contract: Claimant has provided evidence that HIB periodically sent "extend or pay" requests (Except for the performance bond for the period between June 30, 2014 and December 31, 2015Doc. C-179; Doc. SP-3; Doc. SP-5; Doc. SP-6; Doc. SP-7; Doc. SA-4; Doc. SA-5; Doc. SA-6; Doc. SA-7; Doc. SA-8; Doc. SA-9); both bonds are currently valid with a maturity until December 31, 2018 (Doc. C-179; Doc. SP-7; Doc. SA-10).
[220] Doc. C-87; Doc. C-150; Doc. C-151.
[221] Doc. MA-17.

- after the signature of the Protocols HIB had followed the financial procedures to pay Cengiz the outstanding amounts, but payment was delayed due to Cengiz's failure to extend the contractual guarantees; and

- requested that Cengiz assign a manager to the WAH Project, instead of having a shared management for both Projects.

9. SECURITY SITUATION IN SEBHA (MARCH **2012-** DECEMBER **2014)**

206. While these negotiations were developing, the security situation throughout Libya was deteriorating. In the South – near the Projects – the situation was also fraught. On March 27, 2012, militia clashes – which had been ongoing for some days – reached the centre of Sebha[222], with an aftermath of at least 50 people killed.

207. In the following months two militias associated to the Government were deployed in Sebha [223], in order to improve security in the area:

- The Supreme Security Committee **["SSC"],** a security institution established by decree of the Ministry of Interior[224]; and

- The **"Libya Shield Force"**, established by resolution of the NTC, a militia which reported to the Libyan army and was composed of revolutionaries who had participated in the uprising[225].

208. In autumn 2012, there were clashes between the SSC deployed in Sebha and pro-Gaddafi remnants operating out of Birak (70 km north of Sebha)[226] and by the end of the year 2012, the Libyan Government had to place the administration of the South in the hands of the Army[227].

209. Clashes continued in Sebha in 2013. In particular, in October 2013, an attack against the air base or Birak (north of Sebha) by a group of pro-Gaddafi fighters was confronted and defeated by the southern division of the Libya Shield Force[228].

210. In May 2012, Cengiz Libya had signed an agreement with a certain Muhammet Ömer Zeydan Ali, representing a so-called "Security Group", which (against payment) undertook to establish three teams with four individuals each, to guard the Sebha Main Camp[229]. The agreement, which was endorsed by HIB, was extended till the end of 2013.

Main Camp raided

211. The incorporation of this private security detachment proved insufficient: On November 5, 2013, the Sebha campsite was raided by an armed mob[230]. As a result two camp guards were injured, an attacker was killed and five excavators were taken from the

[222] Doc. JWC-43.
[223] Doc. BL-11; Doc. BL-11.1.
[224] Doc. BL-4.1
[225] Doc. BL-10; Doc. BL-12; Doc. BL. 12.1.
[226] Legrand, fh. 17; Doc. BL-6; Doc. BL-6.1; Doc. BL-7; Doc. BL-7.1; Doc. BL-7.2.
[227] Legrand, para. 93; Walker-Cousins, para. 102.
[228] Doc. BL-6.1.
[229] Doc. C-141.
[230] Cl, para. 131; 304-310; Doc. C-88; Doc. C-89.

camp[231]. A few days later, Cengiz informed HIB of the incident and requested to put the campsite under HIB's protection and responsibility until works could be resumed[232].

212. And then, on December 20, 2013, four road rollers were stolen from the camp site[233].

213. The result was that on January 1, 2014, Cengiz Libya reiterated its request that HIB take control of the security of the Sebha Main Camp[234].

214. In January the situation became even worse: at the end of January Cengiz Libya wrote to HIB, stating that

> "as you are informed, severe conflicts have been going on since January 8, 2014, and security risks have become highly critical in the district"[235].

Libya Shield takes control of Sebha Main Camp

215. To improve the situation, in February 2014 the Government sent the 3rd Force of the Libya Shield (a group of militias officially affiliated with the state security apparatus as provided for in Resolution Num. 47/2012[236], under the command of the Ministry of Defence), and composed of Misrati soldiers, to Sebha, with the task of ensuring protection and safety[237]. At the end of 2013, the Government had reversed its earlier decision to disband the Libyan Shield, and had provided additional funding to this unit[238].

216. Three heavily armed groups belonging to these militia took over the Sebha Main Camp in March[239]. Cengiz employees secretly took photos of these armed groups, and Claimant's expert Mr. Legrand, has been able to confirm that these troops belonged to the 3rd Force of the Libyan Shield[240].

[231] Cl, para. 131; 304-310; Doc. C-88; Doc. C-89.
[232] Doc. C-89.
[233] Cl, para. 131; Doc. C-88; Doc. C-145.
[234] Doc. C-154.
[235] Doc. C-88.
[236] Doc. BL-10.
[237] Legrand, para. 98; confirmed by Doc. C-146.
[238] Walker-Cousins, para. 93.
[239] Doc. C-146.
[240] Legrand, para. 99-100.

Source: Doc. C-146

The Libyan Civil War erupts

217. By mid-2014, the situation escalated, and was labelled as the **"Libyan Civil War"**; violence became wide-spread, with rival militias fighting each other[241]. Eventually three separate Governments coexisted: in Tobruk under Gen. Haftar, the General National Congress of Mr. Abusahmain and the National Salvation Government. In December 2015, a Government of National Accord was finally set up under UN guidance, with Fayaz Al-Sarraj as Prime Minister[242].

218. There is little information in the file regarding the fate of the Sebha Main Camp once the Civil War started[243]. What seems to have happened is that Cengiz repatriated the totality of its personnel at Sebha, and that the Sebha Main Camp remained in the hands of Libyan security forces and was eventually dismantled.

219. There is also no information in the file regarding the WAH Main Camp. This installation had been completely destroyed and plundered, and Cengiz Libya made no effort to restart the WAH Project, which had to be constructed in a remote area and over 12 separated construction sites.

220. What is undisputed is that Libya did not make any payments under the Protocols, that Cengiz Libya did not resume work on any of the Projects, and that the WAH and Sebha Main Camps are either totally destroyed and looted or outside the control of Cengiz Libya[244].

[241] HT day 3, 368:8-10; Doc. JWC-46.
[242] RV, p. 50.
[243] The chronologies supplied by the parties do not shed any light; see Doc. C-184 and RIII Appendix B.
[244] Cl, para. 146.

VI. .niRISfiTCTTONAL AND ADIYTTSSIRTTJTY OR.rECTTONS

221. In its Statement of claim, Claimant sought to establish the Tribunal's jurisdiction *ratione materiae*, *ratione personae* and *ratione temporis*[245]. Respondent contested the Tribunal's jurisdiction *ratione materiae* and *ratione personae* and submitted that, in any case, the claims are inadmissible.

222. According to Respondent, the Arbitral Tribunal has no jurisdiction because:

- Claimant has not proven that it made an investment under Article 1(2) of the BIT (VI.1.1);
- Libya did not have sole jurisdiction over its territory when the BIT entered into force (VI.1.2);
- Claimant is not an investor under the Treaty (VI.1.3);
- The alleged investment was not made in accordance with Libyan law (VI.1.4).

223. Respondent further submits that the claims are inadmissible because:

- Claimant's claim is estopped (VI.2.1); and
- Claimant did not respect the 90-day cool of period provided in Article 8(2) of the Treaty (VI.2.2).

224. In the following section the Tribunal will summarize the Parties' positions before adjudicating each of the objections raised by Respondent.

VI.1. JURISDICTIONAL OBJECTIONS

1. FIRST OBJECTION: CLAIMANT S INVESTMENT IS NOT WITHIN THE SCOPE OF THE TURKEY-LIBYA BIT

1.1 RESPONDENT S POSITION

225. Respondent submits that Claimant has failed to prove that it held an investment under the scope of Article 1(2) of the Treaty, which reads as follows:

> "2. The term "investment", **in conformity with the hosting Contracting Party's laws and regulations**, shall include every kind of asset in particular, but not exclusively:
>
> (a) shares, stocks or any other form of participation in companies,
>
> (b) returns reinvested, claims to money or any other rights having financial value related to an investment,
>
> (c) movable and immovable property. as well as any other rights as mortgages, liens, pledges and any other similar rights related to investments as defined in conformity with the laws and regulations of the Contracting Party in whose territory the property is situated [...]"

[245] Cl, chapter 3.

226. Respondent makes two main arguments to support this jurisdictional objection:

227. First, Respondent argues that Claimant has failed to establish that it made an investment under Article 1(2) of the BIT because:

- Claimant has not proven the value paid for the shares in Cengiz Libya[246];
- Claimant admits that there was no resolution to distribute dividends and that Cengiz Libya did not operate long enough to distribute dividends[247]; and
- Claimant has not proven that it owned the equipment in the Projects, because it purportedly sold the equipment to Cengiz Libya[248].

228. Alternatively[249], Respondent denies that Claimant has established the criteria developed by ICSID case law[250]:

- Any contribution made by Claimant by subscribing the shares of Cengiz Libya was minimal and it is not accepted that Claimant had title to the material used for the Projects[251];
- The duration of the projects was also minimal, since the works started at the WAH Project only a little over a year before the uprising, and even later at the Sebha Project[252];
- Respondent denies that Cengiz or Cengiz Libya took any risk since the later was required to take out insurance policies and it received large advance payments designed to minimize or eliminate such risk[253];

229. However, Respondent does not contest that the Projects contributed to the economic development of Libya[254].

1.2 CLAIMANT S POSITION

230. Claimant submits that the Tribunal's *ratione materiae* jurisdiction is derived from Article 1(2) of the BIT. Claimant makes two main arguments:

231. First, that its investment in Libya is composed of:

- "shares, stocks or any other form of participation in companies"[255], because Claimant held 65% of Cengiz Libya's shares[256] when the proceeding was instituted[257];

[246] RI, paras. 213-214.
[247] RII, para. 64.
[248] RI, para. 187, 221; RII, paras. 54-62.
[249] RII, para. 65.
[250] RI, paras. 220-225.
[251] RI, para. 221; RII, para. 65.
[252] RI, para. 222.
[253] RI, para. 223; RII, para. 65.
[254] RI, para. 224-225; RII, para. 65.
[255] Article 1(2)(a) BIT, Doc. C-1.
[256] Doc. C-6; Doc. C-7; CII, paras. 48-50, 58.
[257] CII, para. 51-53, 58.

- "claims to money or any other rights having financial value"[258], because Claimant was entitled to 100% of Cengiz Libya's dividends[259]; and

- "movable [...] property"[260], since Claimant held all the equipment in the Projects directly or through Cengiz LibyaZD[261].

232. Alternatively, Claimant submits that its investment fulfils the criteria developed under ICSID case law, although such criteria ought not be established in the present arbitration[262]:

- There is no threshold value for a contribution to qualify as an investment under the ICSID Convention[263];

- Cengiz has had an investment in Libya for several years, because Cengiz' investment materialized with the incorporation of Cengiz Libya in 2008[264]; the Contracts were signed in December 2008 (WAH) and November 2009 (Sebha) with a duration of 44 and 30 months, respectively[265]; finally, Cengiz's advances to Cengiz Libya were made soon after the Contracts were signed and Cengiz has remained a shareholder to this day[266]; thus, the ICSID duration criteria is met.

- Not all risks were covered by insurance or advance payments[967]; in fact, Claimant faced several risks, some linked to the nature of the Project – a long-term construction contract subject to the whims of the market – and others linked to the structure of the Contracts[268].

1.3 TRIBUNAL S DECISION

233. Article 1(2) of the Treaty contains the following definition of "investment":

> "2. The term "investment", in conformity with the hosting Contracting Party's laws and regulations, shall include every kind of asset in particular, but not exclusively:
>
> (a) shares, stocks or any other form of participation in companies,
>
> (b) returns reinvested, claims to money or any other rights having financial value related to an investment,
>
> (c) movable and immovable property. as well as any other rights as mortgages, liens, pledges and any other similar rights related to investments as defined in conformity with the laws and regulations of the Contracting Party in whose territory the property is situated [...]"

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[258] Article 1(2)(b) BIT, Doc. C-1.
[259] CII, paras. 70-75; Osborne I, para. 3.3; Doc. C-56.
[260] Article 1(2)(c) BIT, Doc. C-1.
[261] CII, paras. 61-69; Doc. C-129; Osborne I, paras. 3.5-3.7 and table 3-1.
[262] RII, para. 46, paras. 77-94.
[263] CII; paras. 78-81.
[264] RII, para. 84.
[265] RII, para. 84.
[266] RII, para. 85.
[267] RII, para. 92.
[268] RI, paras. 211-219; RII, para. 92.

234. In accordance with Article 1(2) of the BIT "shares" or "any other form of participation in companies", "claims to money" and "movable and immovable property" all qualify as protected investments.

235. Claimant alleges that when this proceeding commenced – the critical date to assess an investment, in its view[269] – it was the owner of 65% of Cengiz Libya's shares[270]. Claimant further avers that it holds claims to money because it is entitled to Cengiz Libya's dividends[271], and that it holds movable property in Libya since it owned all the equipment in the Projects directly or through Cengiz Libya[272].

236. Respondent submits that Claimant has failed to provide evidence supporting these averments.

237. As shown below, upon review of the available evidence, the Tribunal comes to the conclusion that Cengiz has proven that it owned an investment under the BIT.

Cengiz' investment in Libya

238. Claimant alleges that when it initiated this proceeding[273] it directly owned a 65% stake in Cengiz Libya[274], as well as a right to 100% of its dividends[275].

239. Cengiz has explained that on June 3, 2008, Cengiz, together with ICDI, incorporated Cengiz Libya in accordance with Libyan laws as a Libyan joint-stock company owned by Cengiz with a 49% capital share, and by ICDI with a 51% share[276]. The company was registered in the Libyan General Commercial Registry on June 10, 2008, and, a day later, in the Chamber of Commerce and Industry of Tripoli[277].

240. Cengiz' account is supported by the following documents[278]:

- Cengiz Libya's original memorandum of association,
- Cengiz Libya's minutes of the first shareholder's meeting,
- Cengiz Libya's articles of association,
- The registration certificate of the General Commercial Registry and the Chamber of Commerce and Industry of Tripoli, as well as the payment receipts for the registration fees.

241. On December 25, 2008, Cengiz and ICDI agreed as follows: Cengiz would hold 65% of the shares and ICDI would hold 35%[279]. Thus, Cengiz became a majority shareholder. This is proven by the following documents[280]:

[269] CII; paras. 51-52. This is not challenged by Respondent.
[270] Doc. C-6; Doc. C-7; CII, paras. 48-50, 58.
[271] CII, paras. 70-75; Osborne I, para. 3.3; Doc. C-56.
[272] CII, paras. 61-69; Doc. C-129; Osborne I, paras. 3.5-3.7 and table 3-1.
[273] CII, paras. 51-53, 58.
[274] Doc. C-6; Doc. C-7; CII, paras. 48-50, 58.
[275] Cl, para. 191; CII, paras. 70-75; Osborne I, para. 3.3; Doc. C-56.
[276] Article 1 and 7 of the Memorandum of Association, Doc. C-6.
[277] Doc. C-5 and Doc. C-6.
[278] Doc. C-6.
[279] Doc. C-7.

- Minutes of the extraordinary general meeting of Cengiz Libya of December 25, 2008;
- Amendment to the Memorandum of Association dated January 4, 2009;
- Transfer of shares certificate of January 5, 2009;
- Amended Articles of Association of April 1, 2009.

242. Furthermore, on that same date, December 25, 2008, Cengiz and ICDI entered into a shareholders agreement whereby ICDI was awarded 2% of the net contract price of the WAH Project, together with the right to additional payments for assistance and services provided, in exchange for waiving its rights to any dividends[281].

243. Thus, as of December 25, 2008, ICDFs 35% shareholding in Cengiz Libya is purely nominal and it is a passive partner, without any participation or liability in the construction projects. Consequently, in economic terms Cengiz is entitled to 100% of the revenue stream and of the net worth arising from Cengiz Libya – subject only to the payment of a 2% fee on the net contract price of the WAH Project payable to its Libyan partner, ICDI.

244. Turkey and Libya have defined investments in Article 1(2) of the BIT in an extremely broad manner as "every kind of asset", and then have agreed upon a non-exhaustive list, which includes five categories of examples, one of which are shares or participations in companies.

245. The asset held by Cengiz consists in a 100% "effective" shareholding in a Libyan company, which at the relevant time carried out an entrepreneurial activity in Libya: the design and construction of infrastructure of an area exceeding 3,000 hectares in the WAH and Sebha South regions.

246. Cengiz made a direct investment in Libya, created a local enterprise under its direct control, and produced services for the Libyan market. Incorporation of a local enterprise by the foreign investor is the most efficient tool for furthering economic development in the host State. The foreign investor brings in funds, assets and know-how, creates an enterprise which employs a workforce, pays taxes, offers goods and services – all activities which create wealth. Whatever definition of investment is applied, there can be no doubt that foreign direct investment, where the foreign investor directly owns and manages an enterprise situated in the host country, qualifies as such[282].

Salini Criteria

247. Alternatively, the Parties have referred to a frequently used list of characteristic features of investment, the so-called *Salini* Criteria (contribution/ duration/ risk/ economic development of the host state)[283].

248. In the present case, where the investor holds a tangible investment in an enterprise, which carried out business activity in the host country, an investment exists under Article 1 of the BIT. The *Salini* Criteria are inapposite and the question of whether such Criteria are met does not need to be addressed.

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[280] Doc. C-7.
[281] Article 4(5), Doc. C-56.
[282] *Edenred S.A.* v. *Hungary*, ICSID Case No. ARB/13/21, Award, December 13, 2016, para. 177.
[283] RI, paras. 220-225; RII, para. 46, paras. 77-94.

* * *

249. The Tribunal concludes that Claimant has convincingly proven that it was a 65% majority shareholder (entitled to 100% of the revenue stream and of the net worth) of a Libyan company called Cengiz Libya. This qualifies as an investment for the purposes of Article 1(2) of the BIT.

2. SECOND OBJECTION: INVESTMENTS NOT MADE IN LIBYAN TERRITORY

2.1 RESPONDENT S POSITION

250. Libya contends that the BIT applies only in respect of investments made in the territory of Libya and that Claimant's investments do not satisfy this condition[284]. Libya makes two main arguments:

251. First Libya explains that according to Article 1(5)(b) of the Treaty the "territory" of Libya is defined as:

> "[…] all the lands which the Great Socialist People's Libyan Arab Jamahiriya has sole jurisdiction thereon, that includes the mere economic area, which includes seabed submarine and the overlying airspace which are all subject to practice of sovereignty rights according to international law".

252. Based on such provision, Respondent avers that Claimant's investment was not made on "Libyan territory" because UNSC Resolution No. 1973 (2011) imposed a no-fly zone over Libya[285], depriving the State "of sole jurisdiction and the practice of sovereignty rights"[286].

253. Second, Libya sustains that the no-fly zone in its case was particularly robust and amounted to a *de facto* occupation led by NATO that "derogates" from territorial sovereignty[287].

2.2 CLAIMANT S POSITION

254. Claimant argues that Libya's objection must fail for two main reasons[288]:

255. First Claimant submits that under international law, a no-fly zone does not deprive the State of its sovereignty over its territory. Conversely, it does not give the States enforcing the no-fly zone, jurisdiction or temporary sovereignty over the territory they fly over[289].

256. Second, and as for the argument on *de facto* occupation, Claimant reiterates that the no-fly zone imposed on Libya did not constitute an occupation under international law[290]. As such, jurisdiction over its territory remained at all times with the Libyan State. The uprising resulted in a change in regime, but the State of Libya did not at any time lose jurisdiction over its territory.

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[284] RI, para. 215.
[285] Doc. CL-127.
[286] HT day 1, 117:13-14.
[287] RII, paras. 67-70; HT day 1, 116:23-120:3 and 215:24-216:20.
[288] CIII, paras. 32-34.
[289] CII, paras. 104-108.
[290] CII, para. 104.

2.3 TRIBUNAL S DECISION

257. Article 1(5)(b) of the Treaty defines the "territory" of Libya as all the lands, mere economic area, seabed submarine and overlying airspace subject to the sole jurisdiction of Libya:

> "[…] all the lands which the Great Socialist People's Libyan Arab Jamahiriya has sole jurisdiction thereon, that includes the mere economic area, which includes seabed submarine and the overlying airspace which are all subject to practice of sovereignty rights according to international law".

258. Respondent contends that Claimant did not hold an investment in Libya because the no-fly zone imposed by the UN deprived Respondent of its sole jurisdiction over its airspace[291].

259. The Tribunal disagrees.

260. The enactment and enforcement of a no-fly zone does not, under international law, deprive the State of title to its territory[292]. Neither does it give the States enforcing the measure, jurisdiction over the territory over which the no-fly zone is imposed.

261. In the words of Judge Crawford[293]:

> **"Restrictions on use of territory**, accepted by treaty, **do not affect territorial sovereignty** as a title, even when the restriction concerns matters of national security and preparation for defence. The **same applies where demilitarized zones have been imposed by the Security Council** or even (in the context of provisional measures) by the International Court." [Emphasis added]

262. Prof. Crawford expressly cites Security Council Resolution 1973, which approved the no fly zone in Libya:

- while "reaffirming its strong commitment to the sovereignty, independence, territorial integrity and national unity of the Libyan Arab Jamahiriya"[294] and
- expressly "excluding a foreign occupation force of any form on any part of Libyan territory"[295].

263. Thus, the Tribunal rejects Respondent's second jurisdictional objection because the jurisdiction over the Libyan territory remained with the Libyan State at all times, even during the enforcement of Resolution 1973.

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[291] RI, para. 167.
[292] See for example *Bankovic and Others* v. *Belgium and 16 Other States*, ECtHR, Application no. 52207/99, Decision on Admissibility, 12 December 2001, paras. 71-82, (Doc. CL-125), a case where the ECtHR ruled that NATO's control over the airspace of former Yugoslavia did not amount to effective control of the State's territory for the purpose of establishing jurisdiction pursuant to the European Human Rights Convention.
[293] J. Crawford, Brownlie's Principles of Public International Law, Oxford University Press, 2012, p. 209, Doc. CL-126.
[294] UNSC Resolution 1973, preamble.
[295] UNSC Resolution 1973, para. 4.

264. There is a final argument: Claimant's investment consists in the ownership of shares in Cengiz Libya, a Libyan company. The imposition of the no-fly zone – a physical measure - did not affect in any way the consideration of Cengiz Libya as a Libyan corporation, nor Claimant's ownership of a majority shareholding in such company.

3. THIRD OBJECTION: CLAIMANT IS NOT AN INVESTOR UNDER THE TREATY

3.1 RESPONDENT S POSITION

265. Libya alleges that Claimant does not qualify as an investor, because Claimant has not demonstrated that it was an investor under the BIT[296]. In particular, Respondent submits that Article 1 of the BIT narrowly defines investors as:

> "Corporations or firms 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".

266. Respondent argues that Claimant has failed to prove that it was Cengiz who actually made the investment rather than HIB or Cengiz Libya[297].

3.2 CLAIMANT S POSITION

267. Claimant submits that Respondent's objection must be dismissed for the following reasons:

268. First Claimant avers that Respondent misapplies the law when it ties the Treaty notion of "investor" to the terms of the Libyan law[298]. Cengiz argues that the notion of "investor" is solely defined according to the Treaty. Thus, the definition of investor under domestic law is irrelevant to the present claim[299].

269. Second, it is not disputed that Cengiz is a company incorporated in the Republic of Turkey[300].

270. Finally, Claimant has demonstrated that it made an investment, because Cengiz [301]:

- held shares in Cengiz Libya[302];
- held the right to the dividends generated by Cengiz Libya[303];
- infused cash in Cengiz Libya[304]; and
- purchased, installed and provided the material and equipment necessary for the completion of the Projects[305].

[296] RI, para. 187.
[297] RI, para. 187.
[298] CII, paras. 172-173.
[299] CII, paras. 129-135, 172-173.
[300] CII, para. 175
[301] CII, para. 176.
[302] CII, paras. 48-57.
[303] CII, para. 58.
[304] CII, paras. 70-75.

271. In sum, Cengiz was a Turkish investor, protected under the BIT.

3.3 TRIBUNAL S DECISION

272. The notion of investor is defined according to the terms of Article 1(1) (b) of the Treaty as:

> "Corporations, firms or business associations 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". [Emphasis added]

273. In accordance with Article 1(1)(b) of the BIT an investor in Libya would be:

- a Turkish corporation – incorporated or constituted under the law in force in Turkey-
- who has made an investment in Libya.

274. Respondent submits that Claimant has failed to provide evidence supporting these facts[306].

275. The Tribunal cannot agree.

276. Claimant has provided sufficient evidence that it is company incorporated in Turkey, with its principal place of business in Istanbul[307]. Respondent itself has admitted this much[308]:

> "Libya accepts the points made at §§232-237" which state:
>
> "232. Article 8 of the Turkey-Libya BIT provides that, *ratione personae*, the dispute must arise between a Contracting Party and an investor of another Contracting Party for an arbitral tribunal to be able to adjudicate this dispute.
>
> 233. According to the Preamble of the BIT, "the Contracting Parties" refers to the Republic of Turkey and the Great Socialist People's Libyan Arab Jamahiriya.
>
> 234. The Respondent is therefore a "Contracting Party" under Article 8 and the Tribunal undoubtedly has jurisdiction against it.
>
> 235. The same is true concerning Cengiz, a national of the other Contracting Party under the meaning of Article 8 above.
>
> 236. According to Article 1.1 of the BIT,
>
> The term 'investor' means:
>
> (a) natural persons deriving their status as nationals of either Contracting Party according to its applicable law,

[305] CII; paras. 61-69.
[306] RI, para. 187.
[307] Doc. C-4.
[308] RI, para. 226.

> (b) corporations, firms or business associations 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.
>
> 237. Cengiz is and has always been a company incorporated in the Republic of Turkey, having its principal place of business in İstanbul, Turkey".

277. Furthermore, in section 1.3 *supra*, the Tribunal reviewed the available evidence and came to the conclusion that Cengiz had an investment in Libya.

278. In summary, Claimant is a Turkish corporation, with an investment in Libya and, thus, the Tribunal must reject Respondent's third Jurisdictional Objection (*rationepersonae).*

4. FOURTH OBJECTION: INVESTMENTS NOT MADE IN ACCORDANCE WITH LIBYAN LAW

4.1 RESPONDENT S POSITION

279. Libya submits that Claimant's activities in Libya do not fall under the scope of protected investments under the BIT and therefore the Tribunal has no jurisdiction to determine the dispute[309].

280. Libya's objection is based on a joint reading of Articles 1, 10 and 8(4)(a) of the Treaty, which impose an additional requirement[510] for investments to be "in conformity with the relevant legislation of both Contracting Parties on foreign capital"[311].

281. Libya argues that in order to seek protection under the BIT, Claimant's investment had to be registered in accordance with Libyan Law No. 9 of 2010 regardless of whether Claimant wanted to enjoy the tax and other benefits provided by the Law[312]. Law No. 9 of 2010 is aimed at the promotion of national and foreign capital investment, with the purpose of setting up investment projects, within the scope of the State's general policy and the objectives of economic and social development[313].

282. Respondent submits that neither Claimant nor the Projects were registered under such Law[314]. And although Respondent does not contend that Claimant acted illegally[315], it submits that Claimant made no investment in conformity with the Libyan laws and regulations, and therefore the Tribunal has no jurisdiction to determine the dispute[316].

4.2 CLAIMANT S POSITION

283. Claimant argues that Respondent's objection is untenable for the following reasons:

284. First a host State cannot welcome investments and recognize their legality, while at the same time it conditions protection under an investment treaty on an added layer of

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[309] RI, paras. 172-183; RII, paras. 74-84.
[310] HT day 1, 120:25-121:3.
[311] Article 8(4) of the BIT.
[312] RI, para. 174.
[313] Article 3 of the Law No. 9 of 2010, consulted online at: http://www.wipo.int/wipolex/en/text.isp?file_id=424451 on July 14, 2018.
[314] RI, paras. 181-183.
[315] HT day 1, 122:15-2.
[316] RI, para. 183.

authorization, which does not derive from the Treaty itself, but from other unrelated domestic legislation[317]. Claimant alleges that arbitral case law shows that the requirement of compliance with host State laws affects the *validity* of the investment, not its *existence* or *qualification* as investment under the BIT[318].

285. Second, the only reference in the BIT to a *permission* can be found in Article 8(4) of the BIT[319]:

> "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 Centre for Settlement of Investment Disputes (ICSID), in case both Contracting Parties become signatories of this Convention, or any other interactional dispute settlement mechanism as agreed upon by the Contracting Parties…" [Emphasis added]

286. However, Respondent does not argue that any such permission was necessary under Turkish or Libyan law to export or import the kind of capital that Claimant used on its Projects[320]. Claimant submits that there is no doubt that Cengiz's investment was made legally and no permission was required[321].

287. Finally, Claimant alleges that Law No. 9 of 2010 applies irrespective of the nationality of the investor because it applies to both Libyan and foreign companies and, in any case, construction contracts are not subject to such Law[322].

4.3 TRIBUNAL S DECISION

288. Article 1(1)(b) defines investors as corporations constituted under the law in force in either Contracting Party:

> "(b) Corporations, firms or business associations 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". [Emphasis added]

289. Then, Article 1(2) defines investment as every kind of asset in conformity with the law of the host State:

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[317] CIII, para. 39.
[318] CIII, para. 40; CIII, hi. 92.
[319] Article 8(4) of the BIT: "[…] (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 Centre for Settlement of Investment Disputes (ICSID), in case both Contracting Parties become signatories of this Convention, or any other interactional dispute settlement mechanism as agreed upon by the Contracting Parties…"
[320] CIII, para. 41-42.
[321] CIII, para. 42.
[322] CIII; para. 43, HT day 2, 439:13-23.

> "2. The term "investment", **in conformity with the hosting Contracting Party's laws and regulations**, shall include every kind of asset …" [Emphasis added]

290. Article 10 provides the scope of application of the BIT, saying that it shall apply to investments in the territory of a Contracting Party made in accordance with its laws and regulations:

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

291. Finally, Article 8(4) of the BIT provides that disputes arising directly out of investment activities shall be subject to the jurisdiction of international tribunals, provided that the investment has received the "necessary permission", if such permission is required:

> "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…(ICSID), … or any other international dispute settlement mechanism as agreed upon by the Contracting Parties…" [Emphasis added]

292. Respondent contends that a joint reading of the above-mentioned Articles of the Treaty imposes an additional requirement[323] for investments to be "in conformity with the relevant legislation of both Contracting Parties on foreign capital"[324]. In particular, Article 8(4) imposes – according to Respondent – that investments obtain an *ex ante* administrative authorization[325].

293. The issue before the Tribunal is not one of legality of the investment (Respondent does not contend that the investment was illegal), but rather, whether pursuant to Article 8(4) of the BIT, Claimant's investment required a

> "necessary permission, **if any**, in conformity with the relevant legislation of both Contracting Parties on foreign capital"[326]. [Emphasis added]

294. Upon review of the parties' positions, the Tribunal first establishes that under Libyan law Claimant's investment did not require any administrative authorization (A). Having come to this conclusion, the Tribunal will decide that Article 8(4) of the BIT is inapposite (B).

A. The requirement of a permission under Libyan Law on Foreign Capital

295. Libya insists that in order to seek protection under the BIT, Claimant's investment had to be registered in accordance with Libyan Law No. 9 of 2010[327].

[323] HT day 1, 120:25-121:3.
[324] Article 8(4) of the BIT.
[325] HT day 1, p. 223-224.
[326] HT day 1, p. 223-224.

296. The Tribunal disagrees. Claimant's investment does not fall within the scope of Law No. 9 of 2010.

297. Law No. 9 of 2010 was designed to promote national and foreign capital investments[328] in high-priority sectors[329]:

> "Article 8 - Areas of Investment
>
> Investment shall be in all production and service areas. [...]".

298. One of the purposes of Law No. 9 of 2010 was to provide tax incentives for companies which register in accordance with its provisions[330]:

> "Article 10 - Privileges and Exemptions
>
> The investment project, subject to the provisions of this Law, shall enjoy the following privileges:
>
> (1) Exemption of the machinery, equipment and apparatuses necessary for the execution of the project, from all taxes, customs duties, import fees, service charges and other fees and taxes of a similar nature. However, exemptions stated, as per this clause, shall not include fees levied for services as port, demurrage or handling fees.
>
> (2) Exemption of facilities, spare parts, transport means, furniture, requirements, raw materials, publicity and advertising items, related to the operation and management of the project, for a period of 5 years, from all fees and taxes, whatsoever their type or source.
>
> (3) Exemption of commodities, produced for export, from production tax, customs duties and such charges imposed on exports.
>
> (4) Exemption of the investment project from income tax for any activity, for a duration of 5 years, the calculation of which shall commence from the date of the permission for licensing the engagement in the activity.
>
> (5) Exemption of the returns of shares and equities, arising from the distribution of the investment project's interests, during the period of exemption, as well as interests arising from the merger, sale, division or change of the legal form of the project, from all types of taxes and levies, provided these occur during the period of exemption.
>
> (6) Exemption of interest arising from the project's activity if re-invested.
>
> (7) Exemption of all documentary records, registers, transactions, agreements that are made, ratified, signed or used by the investment project, from the stamp duty payable in accordance with the effective legislation.
>
> The investor may carry forward the losses that the project may incur during the exemption years to the following years. The Executive Regulation of this

[327] RI, para. 174.
[328] Article 1 of Law No. 9 of 2010.
[329] Article 8 of Law No. 9 of 2010.
[330] CIII; para. 43.

> Law shall decide the conditions and rules necessary for the execution of this Article".
>
> ***
>
> "Article 15 - Additional Privileges and Exemptions
>
> It may be possible, in accordance with a decision from the General People's Committee, under a proposal from the Secretary, to offer for the investment projects, tax privileges and exemptions for a period, not exceeding 3 years, or other additional privileges, if those projects prove that:
>
> (1) They contribute to the achievement of food security.
>
> (2) Utilise measures that are capable of achieving abundance in energy or water or contribute to environment protection.
>
> (3) Contribute to the development of the area.
>
> The Executive Regulation shall specify the classification of the rules and provisions taking into account that the project is one that fulfils these aforementioned considerations".

Scope of Law No. 9

299. The Law applies to national, foreign and joint venture capital invested in the areas which fall within the scope of the Law[331], which is defined as "all production and service areas"[332]. In these areas administrative permission under Article 9 is required for any investor (whether foreign or national) to carry out an investment.

300. Law No. 9 of 2010 is not applicable to investments in the construction sector – only to investments in the "production and service areas".

301. This interpretation was confirmed by Respondent's witness, Mr. Alzoui, who admitted at the Hearing that construction contracts are not subject to Law No. 9 of 2010[333]

> "because they are ruled by other administrative regulations and other terms of reference that are not within the scope of the investment law"[334].

302. Thus, the set-up, development or operation of Claimant's projects did not require any permission under Law No. 9 of 2010, the Libyan Law on Investment Promotion.

Other arguments

303. There is an additional argument which disproves the argument that Claimant's investment failed to receive all authorizations required by Libyan law. Cengiz' partner in the joint venture was ICDI, a State-owned entity, and the counter-party in the

[331] Article 2 of Law No. 9 of 2010: "This law applies to national, foreign, or joint venture capital jointly invested in the areas targeted by this Law".
[332] Article 8 of Law No. 9 of 2010: "Areas of Investment shall be in all production and service areas. The Executive Regulation shall determine the areas of production and services, which are not covered by this Law..."
[333] CIII; para. 43, HT day 2, 439:13-23.
[334] HT day 2, 439:20-23.

construction Contracts was HIB, a Government agency. There is no evidence that at any stage of this legal process a breach of Libyan (administrative or other) law occurred or that any requisite administrative authorization was not obtained.

304. Finally, there is also a temporal argument. Law No. 9 of 2010 was approved on January 28, 2010. Claimant's was materialized in 2008335, well before the Law was enacted – and Respondent is not claiming that the Law had retroactive effects with regard to existing investments.

305. Thus, Respondent has failed to prove that Libyan Law requires that Claimant obtain any administrative permission or authorization in order to make its investment in 2008.

B. The wording of Article 8(4) of the Treaty

306. Article 8 of the BIT regulates dispute settlement between an investor and a contracting party in relation to an investment. And Article 8(4) defines the disputes which a protected investor can submit to international arbitration:

> "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…(ICSID), … or any other international dispute settlement mechanism as agreed upon by the Contracting Parties…" [Emphasis added]

307. Article 8(4) of the BIT requires that investment obtain necessary permissions if (and only if) such permission is required "in conformity with the relevant legislation" of either of the Contracting States. Contrary to Respondent's contention, a plain reading of Article 8(4) of the Treaty makes it clear that the Treaty does not establish a registration or approval requirement for investments to access the jurisdiction of international tribunals. The use of the words "if any" leaves no doubt that Article 8(4) only becomes applicable, if municipal law either of Turkey or of Libya creates a requirement that foreign investments obtain a specific permission or authorization.

308. The Tribunal has already found that, contrary to Respondent's submission, Claimant's investment in Libya does not fall within the scope of Law No. 9 of 2010. Respondent has not argued that Claimant's investment required any authorization under any other Libyan law. Consequently, Article 8(4) is inapposite.

* * *

309. In summary, the Tribunal rejects Respondent's fourth Jurisdictional Objection, because Respondent has failed to prove that Claimant's investments were not made in conformity with Libyan Law.

[335] *See* section VI.1.1.3 *supra.*

VL2. ADMISSIBILITY OBJECTIONS

1. FIRST OBJECTION: ESTOPPEL

1.1 RESPONDENT S POSITION

310. Respondent submits that Claimant is estopped from arguing that Libya is liable for the matters under the terms of the Protocols. Respondent makes two supporting arguments[336]:

- First that the preamble of the Protocols, by which Cengiz Libya represented that it considered that the "circumstances in the country were of a general nature, unexpected and outside the intention of the Parties", prevents Cengiz from alleging that Libya is at fault;

- Second, and alternatively, that the Protocols settled any previous dispute.

1.2 CLAIMANT S POSITION

311. Claimant submits that the evidence does not support Respondent's objection[337] and remarks the following[338]:

- First events underlying Claimant's claims do pertain, in part, to the events of 2011 but also, in significant part, to Libya's acts and omissions after 2011. There is no basis in law, therefore, for Libya to argue that by virtue of the 2013 Protocols, Cengiz somehow renounced its rights to bring claims that had not even arisen at the time.

- Second, the reason the 2013 Protocols were not implemented was that HIB did not fulfil its obligations towards Cengiz Libya[339].

- Third, the fact that the 2013 Protocols acknowledged that the "circumstances in the country were of a general nature, unexpected and outside the intention of the parties" may well have had an effect on the parties' rights and obligations under the Contracts. However, this does not in any manner, exonerate the Libyan State of its obligations towards a Turkish investor, Cengiz, under the BIT.

312. Claimant further alleges that the Parties' conduct does not fall within the parameters of estoppel[540].

313. Finally, Claimant avers that the 2013 Protocols did not – and were not intended to – conclude or preclude negotiations, which were delayed in the interest of restarting works as soon as possible[341].

1.3 TRIBUNAL S DECISION

314. On June 13, 2013, Cengiz and HIB signed the Protocols[342], pursuant to which Cengiz agreed to:

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[336] RI, para. 16; RII, paras. 40-47.
[337] CII; para. 29.
[338] CII, para. 40; CIII, para. 47.
[339] HT day 3, 526:18 – 529:3.
[340] CII, paras. 39-42
[341] CIII, para. 50; HT day 3, 488:20-23; 489:8-12.

- resume the Contracts and carry on the performance of the works[343]; and

- extend all bank guarantees and bonds required by the Contracts within one month from the signature of the Protocol[344].

At the same time, HIB agreed to:

- enable Cengiz to work on the sites[345]; and

- pay Cengiz 50% of the approved and payable notices for contract works, to allow it to prepare and pay outstanding obligations[346].

315. Respondent alleges that when Claimant signed the Protocols it recognized that the events of 2011 were "of a general nature, unexpected and outside the intentions of the parties", and thus is prevented from arguing that Libya is liable for breaches under the BIT. Alternatively, Libya submits that the Protocols settled any previous dispute.

Discussion

316. The Tribunal does not agree.

317. In the Preamble to the Protocols Cengiz Libya declares that construction was halted "because of events that coincided with the Glorious Revolution of 17 February 2011" and adds "that the circumstances in the country were of a general nature, unexpected and outside the intention of the parties"

318. Respondent says that this statement made by Cengiz Libya in the preamble of the Protocols

- settles any previous dispute and

- prevents Claimant from alleging that Libya is at fault.

319. Respondent's position is a clear *non sequitur*.

320. Cengiz Libya simply stated that the Libyan Revolution was an event

- of a general nature,

- unexpected, and

- outside the intention of HIB and Cengiz Libya.

321. Respondent says that this statement amounts to a settlement of a previous dispute.

322. It is difficult to follow Respondent's line of argument. The literal wording of the statement does not leave room for doubt: Cengiz Libya is not settling any previous dispute, either between itself and HIB, nor between its parent Cengiz and the Libyan State.

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[342] Doc. C-16 and C-17, Doc. C-84, Doc. C-85.
[343] Article 1, Doc. C-16; Doc. C-17.
[344] Article 3; Doc. C-16; Doc. C-17.
[345] Article 1 and 2, Doc. C-16; Doc. C-17.
[346] Article 4; Doc. C-16; Doc. C-17.

323. Respondent submits a second argument: this statement prevents Claimant from alleging that Libya is at fault.

324. The argument is without any merit.

325. The first requirement for estoppel is a clear and unambiguous statement by the person estopped[347].

326. Claimant has not made any statement at all – the Protocol was signed by Cengiz Libya. But even if it is accepted that the statement by Cengiz Libya binds Claimant, the text of the preamble does not include any promise to refrain from claiming against Libya in an investment arbitration procedure, for breaches under the BIT.

327. In sum, the Tribunal finds that Respondent's argument is totally without merit, and that Claimant is not estopped from bringing the present claims against Respondent. Respondent's first admissibility objection is dismissed.

2. SECOND OBJECTION: COOLING –OFF PERIOD

2.1 RESPONDENT S POSITION

328. Respondent submits that Claimant did not engage in amicable negotiations for 90 days as prescribed by Article 8(2) Treaty and thereby failed to respect the cooling-off period. Respondent makes two supporting arguments:

329. First Respondent argues that while it endeavoured to engage in negotiations by answering Claimant's dispute notification letter within the 90-day period, Claimant disregarded Respondent's offer to meet until after the RfA had been filed[348].

330. Second, Respondent explains that in its letter dated December 18, 2015, Claimant insisted on various preconditions in order to meet Respondent's representatives[349], which Libya submits is hardly in accordance with Article 8(1) of the BIT[350].

2.2 CLAIMANT S POSITION

331. Claimant submits that Respondent has failed to put forth any evidence to support its allegation and ignores that Claimant attempted to secure an amicable settlement[351]. Claimant's main arguments are as follows:

332. First, Claimant filed its RfA more than 100 days after notifying the dispute to Respondent. HIB's letter of October 26, 2015, did not interrupt the interim cooling-off period[352].

333. Second, any good faith attempt by Libya to negotiate is dubious in light of its letter of December 2, 2015, by which the State required Cengiz to complete the works "within the shortest time"[353].

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[347] D.W. Bowett, "Estoppel before International Tribunals and its Relation to Acquiescence", 33 BYIL 1957 (1958), pp. 176-202, Doc. CL-101.
[348] RI, para. 12(d);155-156; RII, para. 29(c)(d).
[349] RII, para. 29(e).
[350] RI, para. 157-158.
[351] CII, para. 18, 23-25; CIII, para. 59.
[352] CII, para. 19; CIII, para. 54.

334. Third, Claimant continued to make efforts to negotiate after the cooling off period. Claimant alleges that the offers to negotiate sent to Respondent in December 2015 and March 2016 were fruitless[354].

2.3 TRIBUNAL'S DECISION

335. Respondent alleges that the Tribunal lacks jurisdiction because Claimant failed to fulfil the 90-day cooling-off requirement of Article 8 of the BIT. In particular, Libya alleges that Cengiz failed to negotiate in good faith by disregarding for almost two months an offer to meet before filing its RfA[355].

336. The notice provision can be found in Article 8(1) and (2) of the BIT, which provides in the pertinent part[356]:

> "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[…]"[Emphasis added]

337. On its face, Article 8(1) of the BIT establishes a formal notice requirement: in writing and including detailed information of the investment. It further requires that, as far as possible, the investor and the host country try to settle the dispute by consultations and negotiations in good faith. Hence, Cengiz had to expressly notify Libya of an investment dispute under Article 8 of the BIT and try to engage in consultations and negotiations in good faith.

338. However, if the dispute cannot be settled by consultations and negotiations in good faith within ninety (90) days following the date of the written notification made by the investor, it may initiate arbitration proceedings.

339. Claimant has strictly followed the requirements of Article 8(1) and (2) of the BIT:

- On August 20, 2015, Claimant sent Respondent a notification letter referring to Article 8(1) of the Treaty, detailing its investment and the dispute, and offering to conduct negotiations[357];

- Respondent answered Claimant's notice on October 26, 2015, that is, 67 days following the date of Claimant's written notification. In its letter, Respondent

[353] CII, para. 26; CIII, para. 56.
[354] CII, para. 27; CIII, para. 58.
[355] RI, paras. 12(d), 154-162, 188-189; RII, paras. 28-39; RIII, para. 21.
[356] Article 8, BIT, Doc. C-1.
[357] CI, para. 140; RIII, para. 27; Doc. C-18; Doc. C-19.

informed Cengiz that they were ready to hold a meeting in Tripoli to find a satisfactory solution for both Parties[358];

- Claimant filed its RfA on December 18, 2015, more than 100 days following the notification letter;

- On the same day, December 18, 2015, Claimant answered Respondent's October letter, expressing its willingness to meet with representatives of the State of Libya to discuss a settlement under certain terms.

340. The fact that Claimant did not immediately respond to Libya's invitation to hold a meeting in Tripoli[359] cannot be interpreted as a refusal to engage in good faith negotiations, especially when it took Respondent more than 65 days (out of the 90 established in the BIT) to answer Claimant's notice. Claimant filed its RfA 100 days after giving notice to Libya.

341. Furthermore, Claimant's interest in engaging in good faith negotiations was maintained after it filed its RfA. Indeed, the same day it filed its RfA, Claimant responded to the Public Projects Agency's letters expressing its willingness to meet with representatives of the State of Libya to discuss a settlement[360].

342. In summary, given that no agreement was reached between the Parties during the 90-day period, Cengiz was entitled to exercise its right to commence arbitration proceedings under Article 8 of the BIT.

[358] Doc. C-94.
[359] Doc. C-94.
[360] Doc. C-96, p. 2.

VII. MERITS

343. Claimant argues that Libya is in breach of three substantive obligations assumed under the Treaty[361]:

- The full protection (and security) standard (FPS);
- Compensation for losses in case of war, insurrection, civil disturbance or other similar events (War Clause); and
- The fair and equitable treatment standard (FET).

344. Respondent submits that such claims have no merit, because Claimant has failed to establish any breach of the Treaty or the causation of any damage[362].

345. In the following section the Tribunal will address each claim. In each of them it will briefly summarize the Parties' positions and then it will render its decision. But before doing so, it is necessary that the Tribunal devote some thought to the issue of applicable law (VII.1) and to the interplay between Article 2 and Article 5 of the BIT (VII.2).

346. In its relief sought Claimant alleged that Libya breached Articles 2.2, 3.3, 4 and 5 of the BIT. The Claimant, however, never elaborated on the alleged breach of Art. 4 (expropriation), nor did Libya address it in its defense. The Tribunal concludes that a claim regarding a potential breach of Art. 4 has been abandoned and need not be addressed.

[361] CIII, para. 60.
[362] RI, para. 6.

VII.1. APPLICABLE LAW

347. These proceedings are governed by the ICC Rules. And Article 21 of such Rules provides the following guidance as regards applicable law:

> "Article 21 - Applicable Rules of Law
>
> 1. The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.
>
> 2. The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.
>
> 3. The arbitral tribunal shall assume the powers of an *amiable compositeur* or decide *ex aequo et bono* only if the parties have agreed to give it such powers".

348. The dispute arises under the Turkey-Libya BIT, an international treaty signed between two sovereign countries, which is silent on the issue of applicable law. Both parties have analyzed the issue and have agreed that the dispute should be adjudicated in accordance with the provisions of the BIT, as supplemented by international law[363]. This agreement, with which the Tribunal concurs, reinforces the purpose of investment treaty protection: to grant foreign investors protection grounded on international law and enforced through international arbitration".

349. The application of the BIT supplemented by international law does not imply that the domestic law of Libya is irrelevant for the Tribunal's adjudication. As Respondent correctly states, Libyan law is relevant for gauging whether the investment was made in conformity with domestic law; furthermore, the Contracts entered into between Cengiz Libya and HIB are subject to Libyan law[364], and Cengiz Libya, a corporation incorporated in Libya, is also subject to Libyan corporate law[365].

[363] Cl, para. 254; RI, para. 230.
[364] See clause 54 of the Contracts (Docs. C-8 and C-9).
[365] RI, para. 232.

VII.2. THE INTERPLAY BETWEEN ARTICLES 2 AND 5 OF THE BIT

350. Article 2(2), Article 3(1),(2) and (3) and Article 5 of the BIT read as follows:

> Article 2 Promotion and Protection of Investments
>
> **[…]**
>
> 2. 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.
>
> Article 3 Treatment of Investments
>
> 1. Each Contracting Party shall admit in its territory investments, and activities associated therewith, on a basis no less favourable than that accorded in similar situations to investments of investors of any third country, within the framework of its laws and regulations.
>
> 2. Neither Contracting Party shall in its territory subject investments or returns of investors of other Contracting Party to treatment less favorable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State, whichever is the most favorable.
>
> 3. Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards management, use, enjoyment or disposal of their investments to treatment less favorable than that which it accords to its own investors or to investors of any third State, whichever is the most favorable.
>
> […]
>
> Article 5 Compensation for Losses
>
> Investors of either Contracting Party whose investments suffer losses in the territory of the other Contracting State owing to war, insurrection, civil disturbance or other similar events shall be accorded by such Contracting Party treatment no less favourable than that accorded to investors of any third country, whichever is the most favourable treatment, as regards any measures it adopts in relation to such losses.

The Parties' positions

351. Respondent says that Claimant is precluded from invoking Article 2 in respect of losses allegedly caused by war, insurrection or other similar events. If it were otherwise, Article 5 would be unnecessary. Article 5 contains specific rules governing the particular case of investment losses sustained in war or similar events and prevails over the general condition in Article 2. This conclusion is reinforced by the general rule that

a state is not liable for losses sustained by a foreigner due to war, armed conflict, insurrection or other civil disturbances[366].

352. Claimant disagrees. In its opinion, the obligation under Article 5 is self-standing and does not displace Libya's obligations towards Cengiz under Article 2 of the BIT. Claimant says that the *lex specialis* principle cannot apply to provisions that differ in scope and cannot result in an exemption of liability. Article 5 establishes the floor treatment that must be afforded to an investor for losses suffered during a period of war or civil strife[367].

Tribunal's decision

353. The Tribunal agrees with Claimant.

354. Article 2(2), Article 3(2) and (3) an Article 5 must be read cumulatively, for they are different in scope and consequently the application of the *lex specialis* principle *(generalia specialibus non derogant)* is not warranted.

355. The principle goes back to a well-known opinion developed by Grotius in his "De iure belli et pacis"[368]:

> "Among agreements which are equal in respect to the qualities mentioned, that should be given preference which is most specific and approaches most nearly to the subject in hand; for special provisions are ordinarily more effective than those that are general."

356. The principle starts from the logical assumption that if the parties to a treaty inserted a specific provision to govern a certain subject matter, then they intended to settle the question definitively in this way, without taking into consideration provisions of a wider or more general character. The central element of the principle is that the two conflicting rules – the special and the general one – must relate to the same subject matter. This is confirmed in the definition of the principle provided by a Study Group of the International Law Commission:

> "It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific"[369]

357. In the Tribunal's opinion, in the present case, the conflicting provisions deal with different subject matters:

- Article 2(2) sets out the standard of FPS, the host State's obligation to provide protected investments with full protection in its territory;

- Articles 3(2) and (3) require that the home State accords to protected investments, returns and investors national treatment and most-favoured-nation **["MFN"]** treatment as regards management, use, enjoyment or disposal;

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[366] RIII, para. 37.
[367] CIII, para. 189-192.
[368] Lib. II Cap. XXIX; quoted in *AAPL* v. *Sri Lanka (ICSID/ARB/87/3) Dissenting Opinion of Samuel K.B. Asante,* Doc. SD-12, p. 581.
[369] Report of the International Law Commission, Fifty-eighth session (1 May-9 June and 3 July-11 August 2006), UN General Assembly Official Records Supplement No. 10 (A/61/10), p. 408, Doc. CL-145.

- Article 5 extends the national and MEN treatment to losses suffered due to war, insurrection or civil disturbances, as regards any measures adopted by the host State in relation to such losses.

358. Consequently, the *lex specialis* principle should find no application. Articles 3(2) and 3(3) do not derogate Article 2(2), because their subject matter is distinct – the provisions must be read cumulatively. The same principle applies in the relationship between Article 5 and Article 2(2). Article 5 does not cover the same subject matter as Article 2(2), and both provisions create independent obligations for the host State.

Respondent's counter-argument

359. Respondent submits a second argument: it says that if Claimant's construction was correct, namely that Libya guaranteed FPS in the event of war, then Article 5 would be unnecessary[370].

360. The Tribunal remains unconvinced.

361. The FPS standard only provides limited protection to a foreign investor; the protection is only triggered if the host State directly causes harm to the investment or fails to meet a standard of due diligence. The State may provide an increased level of protection to its own investors, or to investors of a third country; in such case Article 5 comes into operation, and such heightened standard must also be applied to Turkish (or Libyan) investors.

Scholarly opinion and case law

362. The Tribunal's opinion is supported by scholarly opinion and by the predominant arbitration case law.

363. Schrijer/Prislan have interpreted the war clause in the Dutch Model Treaty, which is in all material aspects analogous to Article 5 of the BIT, and have concluded that it is

> "obvious that the provision is not intended to derogate from other treaty rights and shall not be interpreted as a general exception clause"[371].

364. The same opinion is defended by Newcombe/Paradell[372]:

> "This type of provision, therefore, does not create a ground for exemption from liability; rather, it ensures that when liability does not arise for another reason (for example, due to a successful plea of military necessity) the measures still give rise to a duty to compensate losses if compensation is provided to nationals or other foreign investors".

365. In previous decisions, arbitral tribunals have predominantly defended the same interpretation.

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[370] RI, para. 246.
[371] N. Schrijver, V. Prislan, "The Netherlands", *Commentaries on Selected Model Investment Treaties*, Oxford University Press, 1st edition, 2013, p. 578, Doc. CL-147.
[372] A. Newcombe, L. Paradell, "Chapter 10 - Defences, VI. Fundamental Change of Circumstances (Rebus Sic Stantibus / Imprevision), *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer Law International, 2009, p. 500, Doc. CL-148.

366. In *CMS* the Tribunal considered a war clause with a drafting very similar to Art. 5 of the BIT, and came to the following conclusion[373]:

> "The plain meaning of the Article is to provide a floor treatment for the investor in the context of the measures adopted in respect of the losses suffered in the emergency, not different from that applied to nationals or other foreign investors. The Article does not derogate from the Treaty rights but rather ensures that any measures directed at offsetting or minimizing losses will be applied in a non-discriminatory manner".

367. The tribunal in *Suez*, confronted with the same line of defense adopted in this procedure by Respondent, decided[374]:

> "270. The Tribunal cannot agree with Argentina's interpretation of the above-quoted BIT provisions. The clear meaning of those provisions is to impose on Contracting Parties an obligation of equality of treatment of investments for losses resulting from war, civil disturbance, and national emergencies. The provision contains no reference whatsoever to other obligations imposed by the BITs on Contracting Parties, let alone to provide for an exemption from such obligations. Had the Contracting Parties, after carefully negotiating a complex set of legal obligations to protect and promote investments, intended that such obligations would not apply in times of war, civil disturbance, or national emergency, they certainly would have so stated specifically. Indeed, in many other BITs, contracting parties have included exception provisions to provide for limited exemptions from BIT obligations in particular situations. The Contracting Parties of the BITs in question in these cases could also have done so if they had wished, but they did not.
>
> 271. The Tribunal considers that the above-quoted BIT provisions mean what they say: they impose on Argentina an obligation of equality of treatment with respect to investment losses sustained as a result of war, civil disturbance, and national emergency. They do not exempt Argentina from its other treaty obligations under the BITs. The Tribunal therefore rejects Argentina's interpretation of the applicable BIT provisions and its claimed defense to its liability for violating such other provisions".

368. The same conclusion was reached by the tribunals in *AAPL*[315] and *Funnekotter*[316].

369. (The opposite decision was reached, however, in *Lesi*[377], albeit applying a treaty with a differing structure and wording).

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[373] CMS Gas Transmission Company v. The Republic of Argentina, ICSID Case No. ARB/01/8, Award, 12 May 2005, para. 375, Doc. CL-61.

[374] *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010, paras. 270-271, Doc. CL-149.

[375] *Asian Agricultural Products Ltd.* v. *Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990 *("AAPL* v *Sri Lanka")*, para. 65, Doc. CL-1, with a dissenting opinion of Samuel Assante, Doc. SD-12.

[376] *Bernardus Henricus Funnekotter and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, para. 104 (Emphasis added), Doc. CL-150.

[377] *L.E.S.I. S.p.A. and ASTALDI S.p.A. v. People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Award, 12 November 2008, Doc. SD-25: the relevant treaty, the BIT between Italy and Algeria, had a drafting which differs from that of the Turkey-Libya BIT: the war clause (Article 4.5) was

* * *

370. Summing up, the Tribunal concludes that Article 5 of the BIT does not cover the same subject matter as Article 2(2), and that both provisions are independent, and create separate obligations for the host State: under Article 2(2) the State is obliged to provide FPS to protected investments, while Article 5 creates a separate duty: if the State accords measures to protect its own investors or investors of a third party to compensate losses from war or civil disturbances, such treatment must be extended to the investor protected by the BIT.

included in the same Article as the FPS standard (Article 4.1) and it lacks any reference to compensation for losses. The tribunal in *Lesi* invoked the dissenting opinion of Samuel Asante in *AAPL* (Doc. SD 12)

VII.3. FULL PROTECTION AND SECURITY

1. CLAIMANT S POSITION

371. Claimant alleges that under Article 2(2) of the BIT, Respondent undertook to provide full protection to the investments of Turkish investors in its territory[378]. This obligation is two-fold entailing[379]:

- a negative obligation to refrain from harming the investments and
- a positive obligation to exercise due diligence or take necessary measures of vigilance to prevent damage.

372. Claimant submits that Respondent violated both[380]:

- First as regards the positive obligation, entities whose acts were attributable to the State (such as the Libyan army) directly interfered with the investment, looting the campsite, threatening Claimant's personnel and attacking the premises since 2011[381]; and,
- Second, as regards the negative obligation, the State failed to protect the campsites during the 2011-2014 period, despite the fact that it could reasonably have done so and that it did, in fact, offer reasonable protection to other foreign investors[382].

2. RESPONDENT S POSITION

373. Respondent's main submission is that Article 2 of the BIT is not applicable to the dispute, because Article 5 holds a specific provision for war and civil unrest and solely imposes a duty not to discriminate in terms of measures adopted regarding losses[383]. However, subsidiarily, if Article 2 is applicable, Respondent submits the following[384]:

374. First as regards Claimant's contention that Libya directly attacked the camps, Respondent avers that the allegation is not supported by evidence and thus is meritless. Respondent makes two supporting arguments[385]:

- Acts attributable to the State cannot be examined from the angle of FPS[386].
- If FPS is applicable to acts for which the State is responsible, *quod non*, then Claimant has failed to establish the following[387]:
- The specific armed groups that carried out the relevant attacks;

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[378] Cl, paras. 276-288; CII, para. 226.
[379] CIII, para. 61.
[380] Cl, paras. 289-310; CIII, para. 62.
[381] CII, paras. 229-241; CIII, paras. 68-79; 81-88.
[382] CII, paras. 242-261; CIII, paras. 65-67; 89-109.
[383] RI, para. 15(a).
[384] RIII, para. 40.
[385] RIII, para. 45.
[386] SD-28; CL-53.
[387] RII, para. 118; RIII, para. 45(b) and (c); 121-134.

- That those armed groups in fact were related to the new government;

- That the relevant acts were not in contravention to specific orders given by the militia or armed group; and

- That the relevant acts are "the individual acts of members of the movement, acting in their own capacity".

375. Second, as regards the alleged failure to protect, Respondent makes three arguments:

- that Libya was under no duty to protect Cengiz' investment in time of war[388]; alternatively, if there was a duty, it is common ground that Libya was not under an absolute duty to protect the investment but only to take reasonable action[389];

- Claimant's contention that Libya could have protected the Projects is unreal given the incapacity of the State at the relevant times and the widespread security issues[390], because[391]:

- the projects were in a difficult area;

- the distances involved were considerable;

- the works were to be carried out across large open areas;

- a substantial number of workers was involved;

- works were not undertaken in isolation; and

- the Projects would have taken considerable time to complete.

- It is likely that after the evacuation in 2011, Claimant had no intention to return to Libya to complete the projects (and would not have been able to do so successfully in any event)[392].

3. TRIBUNAL'S DECISION

376. Article 2.2 of the Treaty provides the following:

> "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".

377. Claimant's case is that Libya failed to provide FPS to the WAH Main Camp and to the Sebha Main Camp, while Respondent avers that acts performed by unidentified armed groups cannot be attributed to the State and that Libya could not have adopted any reasonable measures to protect the Projects. The Tribunal will first establish the proven facts (3.1), will then devote a section to the definition and scope of the FPS standard

[388] CII, para. 263.
[389] RI, para. 262; RII, paras. 244-245.
[390] RIII, para, 41 and Appendices B and C.
[391] RIII, paras. 108-115.
[392] RIII, para. 41.

(3.2), and will finally apply the standard to the facts (3.3-3.5), reaching its conclusion (3.6).

3.1 PROVEN FACTS

378. Pro memoria:

- The Libyan Revolution started in February 2011;
- the NTC established a new government towards the end of March 2011 and the new regime was promptly recognized by a number of significant foreign countries;
- on 23 August 2011 the new government took control of Tripoli;
- in September 2011 British Prime Minister David Cameron and French President Nicolas Sarkozy traveled to Libya to pledge support to the NTC; and
- in October 2011 former President Gaddafi was killed and the revolution finalized.

The NATO mission, which had started in March and had imposed a no-fly zone, was cancelled in October 2011.

A. WAH Main Camp

379. In the aftermath of the Libyan Revolution, which erupted in February 2011, the general security situation in Libya started to deteriorate. The Southern region, a thinly populated territory larger than Spain with the capital in Sebha, was especially affected.

380. Claimant was developing two construction Projects in the Southern Region, for the urbanization of 12 villages in the WAH area (WAH Project) and certain quarters of Sebha (Sebha Project). These Projects involved two extensive Main Camps (with industrial facilities) and several scattered construction sites. Progress of the work was very dependent on an appropriate security situation. Notwithstanding the fact that after the February 2011 events law and order started to suffer, HIB insisted that Cengiz Libya should not suspend its activities: on March 17, 2011, HIB instructed Cengiz Libya in writing, to continue working both on the WAH and the Sebha Projects[393].

381. Notwithstanding these instructions, the situation in the remote and tribal WAH region, more than three hours by car from the capital, Sebha, had deteriorated to such an extent, that on that same day Cengiz Libya took the decision to evacuate the WAH Main Camp, leaving only a small team to secure the site[394].

382. The decision proved reasonable, because a few months thereafter, on August 23, 2011, a group of armed soldiers from the Tarik Bin Ziyad Battalion, under the command of Battalion Commander Brigadier General AdbUlselam Ismail, entered the WAH Main Camp and forcibly took equipment, motors and vehicles belonging to Cengiz Libya[395].

383. Two days later, on August 25, 2011, the Deputy Chief of the Tank Battalion of the army, Suleyman Alwah, seized further equipment from the WAH Main Camp: three

[393] See Doc. C-131 and C-132.
[394] Mr. Cetin's WS, para. xl.
[395] Doc. C-69 – letter from Cengiz Libya to HIB; Mr. Cetin's WS, para. xliv *et seq.*

electric motors, three water pumping motors, television, and receiver apparatus and two cars[396].

384. Ayhan Sozer, one of the Turkish employees at the WAH Main Camp wrote in an email to headquarters sent on 25 August, that he had been in meetings with authorities all day, trying to obtain protection, but

> "military and police state they cannot protect the site and even they loot and plunder the site themselves"[397].

385. On August 26, 2011, a group of citizens, supported by police vehicles and the Tank Battalion, again entered the WAH Main Camp and stole everything at hand: small vehicles, trucks, construction machinery, equipment and bedroom, dining hall and administrative office equipment[398]. The WAH Main Camp suffered significant damage, which Cengiz Libya calculated as LYD 44,882,068 (on assets worth LYD 61,059,447, i.e. 74%)[399].

386. The last Turkish employees working at the WAH Project had to flee over the Algerian border, and Cengiz Libya hired some local personnel to secure the remains of the WAH Main Camp[400].

387. There is no evidence that Cengiz Libya was ever able to return to it. At some unspecified moment what remained of the WAH Main Camp was either destroyed or looted.

B. Sebha Main Camp

388. The Sebha Main Camp was not evacuated in March, at the same time as the WAH Main Camp, because at that time the security situation in Sebha was still under control. When the situation started to deteriorate, Cengiz Libya requested HIB to provide safety for the Sebha Main Camp and at the worksites[401], and when such safety was not forthcoming, decided to evacuate the Sebha Main Camp, leaving only an emergency team. This happened at the end of April 2011.

389. On August 26, 2011, the Sebha Main Camp was taken over by armed men and the remaining personnel on site were physically restrained and threatened, and machinery and equipment were taken away[402]. On that same day the last Turkish employees fled to Algeria, together with their colleagues from the WAH Project.

390. There is evidence that Cengiz' machinery and equipment came into the hands of the Free Martyrs Brigade of Sebha[403] and of some "Military Brigades" "in the service of Free Libya". This is proven by two letters sent by HIB to these Brigades, politely asking that the machinery and equipment be returned to Cengiz Libya[404]. The Brigades seem to have been troops loyal to the NTC government (which possibly plundered the

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[396] Doc. C-101; Mr. Cetin's WS, para. xliv *et seq.*
[397] Doc. C-11.
[398] Doc. C-100; Mr. Cetin's WS, para. xliv *et seq.*
[399] Doc. C-155.
[400] Doc. C-100 ("armed volunteers who were appointed by the President of the Germa Main People's Conference for supporting the protection of the company's construction site").
[401] Doc. C-134; Doc.C-135; Doc. C-136.
[402] Doc. C-12; Doc. C-70; Mr. Cetin's WS, para. xxxii.
[403] Doc. C-142.
[404] Doc. C-143.

machinery and equipment in preparation for the Battle of Sebha, in which the NTC forces fought and defeated pro-Gaddafi militias in September 2011).

391. After these incidents the Sebha Main Camp was not totally destroyed, although a significant amount of machinery and equipment was stolen. The damage suffered by the Sebha Project was estimated as LYD 36,368,234 (on assets worth LYD 69,214,742, i.e. around 50 %)[405].

Return in autumn 2011

392. By the end of October 2011 the safety situation had improved sufficiently for Cengiz staff to return to Sebha and start reparation of the Main Camp.

393. But the security situation was still worrying, and in May 2012 Cengiz Libya signed an agreement with a certain Muhammet Ömer Zeydan Ali, representing a so-called "Security Group", which (against payment) undertook to establish three teams with four individuals each, to guard the Sebha Main Camp[406]. The agreement, which was endorsed by HIB, was successively extended till the end of 2013.

394. Despite the incorporation of this private security force, on November 5, 2013 the Sebha campsite was raided by an armed mob[407]. As a result, two camp guards were injured, an attacker was killed, and five excavators were taken[408]. A few days later, Cengiz informed HIB of the incident and requested that the campsite be put under HIB's protection and responsibility until works could be resumed[409].

395. And then, on December 20, 2013, four road rollers were stolen from the Main Camp[410].

396. The result was that on January 1, 2014, Cengiz Libya reiterated its request that HIB take control of the security situation in the Sebha Main Camp[411].

397. Later in January the situation became even worse, and Cengiz Libya reported "severe conflicts" which apparently started on January 8, 2014[412].

398. In February 2014 the NTC Government sent the 3rd Force of the Libya Shield to Sebha, with the task of improving law and order[413]. But the situation at the Sebha Main Camp deteriorated: in March three heavily armed groups belonging to this government-controlled militia entered the Sebha Main Camp, taking control from Cengiz Libya[414].

399. By mid-2014 the Libyan Civil War erupted.

400. There is little information in the file regarding the fate of the Sebha Main Camp once the Civil War started[415]. What seems to have happened is that Cengiz repatriated the totality of its personnel at Sebha, and that the Sebha Main Camp remained under the

[405] Doc. C-156.
[406] Doc. C-141.
[407] Cl, para. 131; 304-310; Doc. C-88; Doc. C-89.
[408] Cl, para. 131; 304-310; Doc. C-88; Doc. C-89.
[409] Doc. C-89.
[410] Cl, para. 131; Doc. C-88; Doc. C-145.
[411] Doc. C-154.
[412] Doc. C-88.
[413] Legrand, para. 98; confirmed by Doc. C-146.
[414] Doc. C-146.
[415] The chronologies supplied by the parties do not shed any light; see Doc. C-184 and RIV, Appendix B.

control of security forces reporting to the NTC government. It is undisputed that Cengiz Libya has never regained possession or control of the remaining assets (if any) pertaining to the Sebha Main Camp.

3.2 DEFINITION AND SCOPE OF THE FPS STANDARD

401. Article 2(2) of the BIT provides as follows:

> Promotion and Protection of Investments
>
> [...]
>
> 2. 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.

402. Article 2(2) of the BIT guarantees that qualifying investments "shall enjoy full protection in the territory of the other Contracting Party". The BIT uses the expression "full security" - while the more frequent phrasing in investment treaties refers to full protection *and security* (hence "FPS"). There is however no material difference between the standard of "full protection" established by the BIT, and the FPS standard as commonly defined in other investment treaties and in international law. As a commentator has explained, it is frequent that treaties use analogous expressions to refer to the same FPS standard[416]:

> "Thus while the most common formulation is 'full protection and security[5], it is possible to see 'the most constant protection[5], or simply 'protection and security[5] and 'full legal protection and Till legal security[5]".

403. In the most basic formulation, the purpose of the FPS standard is to protect the physical integrity of an investment against interference by use of force[417]. The perpetrator of such interference is irrelevant: it could be the State itself, (including agencies, groups, entities or other organs whose actions can be attributed to the State), or any other third party[418]. FPS thus entails a two-fold obligation for the host State:

- A negative obligation to refrain from directly harming the investment by acts of violence attributable to the State, plus
- A positive obligation to prevent that third parties cause physical damage to such investment.

404. The FPS standard thus combines an obligation of result and an obligation of means:

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[416] G. Cordero Moss, "Full protection and security" in *Standards of Investment Protection*, A. Reinisch, Oxford University Press, 2008, p. 132, Doc. CL-54.
[417] *Saluka Investments BV* v. *The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras. 483-484, Doc. CL-52.
[418] G. Cordero Moss, "Full protection and security" in *Standards of Investment Protection*, A. Reinisch, Oxford University Press, 2008, p. 138, Doc. CL-54.

405. (i) The obligation of result requires that the State and its organs abstain from directly causing physical harm. As Dolzer/Schreuer explain[419]:

> "Whenever state organs themselves act in violation of the standard, or significantly contribute to such action, no such issues of attribution or due diligence will arise because the state will then be held directly responsible".

406. (ii) The second leg of the standard requires the State to exercise reasonable care to prevent damage caused by third parties. Reasonableness must be measured taking into consideration the State's means and resources and the general situation of the country[420]. This obligation of vigilance does not grant an insurance against damage or a warranty that the property shall never be occupied or disturbed – it simply requires that the State apply reasonable means to protect foreign property[421].

3.3 LIBYA S BREACH OF THE **FPS** STANDARD

407. The Tribunal must establish whether Libya has breached either the negative obligation (3.4.) or the positive obligation (3.5.) of the FPS standard.

3.4 BREACH OF THE NEGATIVE OBLIGATION UNDER THE FPS STANDARD

408. Cengiz Libya, Claimant's subsidiary incorporated in Libya, constructed and equipped two Main Camps (including industrial facilities), one for the WAH Project and another for the Sebha Project, at a cost of USD 35.3 M and USD 43 M, respectively. These Main Camps were necessary for Cengiz Libya to perform the work under two construction contracts awarded by HIB.

409. There is overwhelming evidence[422] that the Libyan armed forces, or militia controlled by the Libyan government, pillaged both Main Camps, and that the Sebha Main Camp eventually was taken over by a militia controlled by the Libyan government:

- The WAH Main Camp was pillaged in August 2011, first by armed soldiers belonging to the Tarik Bin Ziyad Battalion and a few days thereafter by armed soldiers belonging to a Tank Battalion of the Army[423];
- Simultaneously, the Sebha Main Camp was pillaged by armed men belonging to the Free Martyrs Brigade of Sebha[424] and to a Military Brigade "in the service of Free Libya";
- In 2014 the 3rd Force of the Libya Shield took over the Sebha Main Camp and dispossessed Cengiz Libya[425].

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[419] R. Dolzer & C. Schreuer, *Principles of International Investment Law*, Oxford University Press, 2nd edition, 2008, p. 150, Doc. CL-152.
[420] *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, para. 82, Doc. CL-154.
[421] R. Dolzer & C. Schreuer, *Principles of International Investment Law*, Oxford University Press, 2nd edition, 2008, p. 150, Doc. CL-152.
[422] See sections V.6 and V.9 *supra*.
[423] Doc. C-69; Doc. C-100; Doc. C-101; Mr. Cetin's WS, para. xliv et seq.
[424] Doc. C-142.
[425] Doc. C-146; Legrand, para. 99-100.

A. Attribution

410. The Parties have discussed extensively whether under international law these actions can be attributed to Libya.

The Parties' positions

411. Claimant's starting point is that all acts committed by a State's police or armed forces are attributable to the State. Claimant adds that the conduct of an insurrectional movement which becomes the new Government of a State must be considered an act of that State. Consequently, a State may incur concurrent liability for acts carried out by its regular armed forces and by a successful insurrectional movement[426].

412. Respondent stresses that by August 2011 it was the NTC, and not the former Gaddafi regime, that was the rightful government of Libya, and the Gaddafi-aligned forces were at most unsuccessful insurrectional forces that were seeking to displace the new government of Libya. In such circumstances, the acts of Gaddafi-aligned forces cannot be attributable to Libya[427]. Libya submits that Claimant has not established that the specific militia or armed group which it says committed the damage to the Main Camps was directed or controlled by the State[428].

The Tribunal's decision

413. To settle this issue, it is necessary first to establish the legitimate Government of Libya at a certain time (i), to identify the attackers in each specific incident (ii), and then to decide on the alleged responsibility of the Libyan State (iii).

a. Libya's legitimate Government

414. Libya says that by the time when the first incidents occurred – end of August 2011 – the legitimate Government of Libya was that of the NTC[429].

415. The Tribunal tends to agree.

416. Italy and France recognized the NTC government in April and June 2011, respectively, and on 15 July US Secretary of State Hillary Clinton stated that the US had decided to formally recognise the NTC as the country's "legitimate authority"[430]. The UK made a similar declaration on 27 July 2011[431]. The evidence shows that by the end of August, international legitimacy had passed from the Gaddafi Government to the NTC Government, which had arisen out of the Libyan Revolution.

417. And by that date, the NTC was also in control of the major part of Libyan territory. The exception may have been certain parts of the Southern Region, a traditional stronghold of Gaddafi supporters, which were still held by pro-Gaddafi forces. The battle of Sebha, which led to a defeat of such loyalist forces, was fought in September 2011 – leading to Coronel Gaddafi's demise in October 2011.

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[426] CIII, paras. 140-143.
[427] RIII, para. 126
[428] RIII, para. 133
[429] RIII, para. 127.
[430] Doc. RE-9.
[431] Doc. RE-10.

b. Identification of the attackers

418. The identification of the attackers is a task which requires the Tribunal to carefully weigh the scarce available evidence. Notwithstanding these difficulties, the Tribunal is confident that the following facts can be deemed to be proven:

419. The WAH Main Camp was pillaged at the end of August 2011 by armed soldiers belonging to the Libyan army – first by soldiers from a unit belonging to the Tarik Bin Ziyad Battalion of the Army and a few days thereafter from a Tank Battalion of the Army. The evidence shows that the attackers were regular units of the Libyan army.

420. Were these units pro-Gaddafi, or where they in favour of the NTC Government?

421. Although the available evidence is scarce, it seems likely that by August 2011 the army units in questions were still defending the old Gaddafi regime. The Tribunal submitted this question to Claimant's counsel, and he confirmed that this was the most likely scenario[432].

422. The situation in Sebha was different: here there is indirect evidence that attackers belonged to militias controlled by the NTC Government: Free Martyrs Brigade of Sebha, a Military Brigade "in the service of Free Libya" and in 2014 the 3rd Force of the Libya Shield. The indirect evidence are two letters drafted by HIB *ex post facto*, in which the Government agency asks these Brigades to return to Cengiz the equipment looted from the Camp Site[433].

c. Responsibility of the Libyan State

423. There are two principles of international law which are relevant for deciding this issue: the principle that a State is responsible for the actions performed by its armed forces, and the principle that a State also assumes responsibility for the acts of a successful insurrectional movement.

(i) Responsibility for acts of armed forces

424. Article 4 of the Draft ILC Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts **["Draft ILC Articles"]**[434] provides as follows:

> "Article 4. Conduct of organs of a State
>
> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
>
> 2. An organ includes any person or entity which has that status in accordance with the internal law of the State".

[432] HT day 1, 77, 9-14.
[433] Doc. C-142 and C-143.
[434] Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts with commentaries, 2001, *Yearbook of the International Law Commission*, 2001, vol. II (2), Article 4, Doc. CL-43.

425. Under this rule a State is responsible for the acts carried out by its regular armed forces. The rule is relevant in order to establish the responsibility for the attacks on the WAH Main Camp: the Tribunal has concluded that the attackers of the WAH Main Camp were members of the Libyan army, and consequently their acts are attributable to Libya.

Respondent's counterargument

426. Respondent raises a counter-argument: it says that the Libyan military units which attacked the WAH Main Camp were in fact loyal to the previous Government of Colonel Gaddafi and must be considered as unsuccessful insurrectional forces seeking to displace the new government of Libya[435].

427. The Tribunal agrees with the statement but disagrees with the conclusion.

428. It is likely that the Libyan military units which attacked the WAH Main Camp were at that time defending the Gaddafi regime. But that is irrelevant for the purposes of attribution: these units belonged to the regular Libyan army, as such they were an organ of the Libyan State, and their actions, under international law, were attributable to the State. Whether these units were loyal to the Gaddafi or the NTC Government does not affect the principle of attribution. The Libyan State, including its regular armed forces, never ceased to exist, even if one Government was toppled by the Libyan Revolution and a new Government was instated. The Libyan State must assume responsibility for the looting performed by its regular armed forces – independently of purpose or political affiliation.

(ii) Responsibility for insurrectional movements

429. Article 10 of the Draft ILC Articles read as follows

> 1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.
>
> 2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.
>
> 3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

430. The rule implies that acts committed by members of an insurrectional movement are attributable to the State, if such movement eventually is successful and takes over the Government of such State. The Commentaries to the Draft ILC Articles provide the following explanation[436]:

> "Where the insurrectional movement, as a new Government, replaces the previous Government of the State, the ruling organization of the insurrectional movement becomes the ruling organization of that State. The continuity which thus exists between the new organization of the State and that of the

[435] RIII, para. 126.
[436] Draft ILC Articles, Commentary under Article 10, para. 5, Doc. CL-43.

> insurrectional movement leads naturally to the attribution to the State of conduct which the insurrectional movement may have committed during the struggle. In such a case, the State does not cease to exist as a subject of international law. It remains the same State, despite the changes, reorganizations and adaptations which occur in its institutions. Moreover, it is the only subject of international law to which responsibility can be attributed. The situation requires that acts committed during the struggle for power by the apparatus of the insurrectional movement should be attributable to the State, alongside acts of the then established Government."

431. The result of this rule is that the Libyan State must be deemed responsible for acts and omissions committed by both its regular army (without taking into consideration which Government the army was defending) and by all insurrectional groups and militias, which defended the NTC Government and fought the Gaddafi regime, and which ultimately were successful.

Libya Shield

432. The Libya Shield, the unit which eventually took over the Sebha Main Camp, merits a specific comment.

433. In its commencement the Libyan Shield was a group of militias, created to support the insurrection. Since the Libyan Revolution eventually triumphed, its actions are attributable to Libya under the principle set forth in Article 10 of the Draft ILC Articles.

434. When the Libyan Revolution eventually assumed the Government of Libya, the Libyan Shield became officially affiliated with the state security apparatus, as provided for in Resolution Num. 47/2012[437], and was placed under the command of the Ministry of Defence. The Libyan Shield thus was transformed into an organ of the Libyan State, whose actions are directly attributable to Libya under Article 4 of the Draft ILC Articles. In this new capacity, the NTC Government sent the Libyan Shield to Sebha to enforce law and order – and eventually to take over Claimant's Sebha Main Camp.

B. Breach of Article 2(2) of the BIT

435. Summing up, the Tribunal concludes that the regular Libyan army and militias which formed part of the insurrectional movement and were then controlled by the NTC Government, looted and caused physical harm to Cengiz Libya's Main Camps. Under the rules of attribution of international law, the Libyan State must assume responsibility for such conduct, which breached the FPS standard guaranteed in Article 2(2) of the BIT to protected Turkish investments.

3.5 BREACH OF THE POSITIVE OBLIGATION OF THE **FPS** STANDARD

436. There is evidence that, further to the pillage and violence perpetrated directly by armed forces and militias controlled by and attributable to Libya, the Main Camps were also raided by civilian mobs, supported by groups of armed persons. Both Main Camps were attacked at the end of August 2011 and at the Sebha Main Camp was raided again in November 2013.

[437] Doc. BL-10.

A. Breach of Article *2(2)* of the BIT

437. The positive obligation which the FPS standard places on the State is an obligation of means – not of the result. The question which the Tribunal must address is whether the Libyan government exercised reasonable care to protect Cengiz' investment in the Southern Region, taking into consideration the State's means and resources and the general political and security situation in Libya?

438. The short answer is that Libya totally failed to provide any security to the two Main Camps an investment worth almost USD 90 M, full of valuable machinery and equipment, located in the Southern region and subject to a heightened risk of attack. Libya never deployed any unit of the regular Army, any police force nor Government controlled militia to protect such assets.

439. The responsibility is aggravated by the fact that HIB, an agency of the Government, repeatedly requested Cengiz Libya not to discontinue and (after the first evacuation) to promptly resume its construction activities – even signing the 2013 Protocols in order to induce Claimant to restart work[438].

440. Faced with these requests, Cengiz Libya asked at various moments that HIB provide security, so that construction activity could be safely performed[439]. But there is no evidence of HIB, or any other agency of the Libyan government, or the Libyan government itself, took any measure to support Cengiz Libya's situation. The record only shows two (mildly phrased) letters, send after the attacks, in which HIB politely requested that the military units which had raided the Camp return the machinery to its rightful owner[440].

441. Cengiz Libya was left on its own in the task of protecting the Main Camps. To do so it had to resort to private armed individuals. There is indirect evidence that this happened at the WAH Project. And there is ample evidence that in Sebha Cengiz Libya had to resort to an ominous "Security Group", captained by a certain Muhammet Ömer Zeydan Ali, which (against payment and without much success) provided armed protection to the Sebha Main Camp.

442. The Tribunal concludes that Libya also breached the second leg of the FPS standard: it totally failed to provide any government-sponsored protection to the two Main Camps, at a time when there was a heightened security deficit in the South of the country. This failure facilitated that private mobs were repeatedly able to raid the Main Camps, looting equipment and destroying facilities.

B. Respondent's counter-argument

443. Libya submits a counter-argument: in a situation of civil war and general unrest, it would be unreasonable to expect a government to use scarce resources to protect ancillary projects like the WAH and Sebha Projects[441].

444. The Tribunal remains unconvinced.

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[438] *See* for details section V.8 *supra*.
[439] E.g. Doc. C-73.
[440] Doc. C-142 and Doc. C-143.
[441] RIV, para. 8

445. First the Tribunal has concluded that due diligence required Libya to deploy means to protect Cengiz Libya's two Main Camps – not the ability to perform its construction activities and complete the WAH and Sebha Projects.

446. The construction sites were scattered over 12 villages in the WAH Project, and over different quarters of the city in the Sebha Project and required that a large number of foreign workers (approximately 1,400) and different types of construction materials and machinery and equipment move daily from the Main Camps to the construction sites and back.

447. The Tribunal agrees with Libya[442] that to organize this type of dynamic protection, and to achieve a level of security which would have permitted Cengiz Libya to continue with its work, would have over-stretched the resources of most countries, and certainly those of Libya in 2011-2013.

448. But this level of security is not what the second leg of the FPS standard requires. What Libya could reasonably have done is to provide basic static protection to the two Main Camps, as a deterrent against theft and plunder by violent mobs. Libya failed to provide such protection at all, and the result is that mobs repeatedly were able to enter the Main Camps and to loot and destroy the property.

449. Second, there is evidence that Libya, if it had wanted, would have been able to marshal the limited resources required to provide static protection to the two Main Camps. Mr. Legrand, Claimant's security expert, declared that the government controlled a number of fighting units in the South: Libya Shield, Mourzouk Katiba, El Soumoud Katiba, Batallion num. 30. Any of these could have been used to perform this simple task[443].

450. Third, there actually is a comparable example of a foreign investment which received this type of protection. Enka Teknik was a Turkish company working on the construction of the Awbari gas power station, located in the South of the country in the WAH region. The State allocated to Enka Teknik a group of 30 soldiers to protect their camp, and this simple measure (together with basic self-protection measures) achieved the result that the power station was neither looted nor destroyed, and that Enka eventually was able to resume the project[444].

3.6 CONCLUSION

451. The Tribunal concludes

- that the Libyan army and militias controlled by the Libyan army caused physical harm to Cengiz Libya's Main Camps, looting machinery and equipment and eventually taking control of the Sebha Main Camp, and

- that Libyan failed to provide any type of military, militia or police protection to the Main Camps, further facilitating that civilian mobs raided the installation.

452. This conduct, which is attributable to the Libyan state, implies a breach of the positive and of the negative obligations of the FPS standard provided for in Article 2(2) of the BIT.

[442] RIII, para. 115.
[443] Legrand, paras. 102-106.
[444] See Doc. C-102 and Doc. BL-39.

VII.4. THE WAR CLAUSE

453. The Tribunal has already concluded that the FPS standard in Article 2(2) of the BIT, and the compensation for war losses provided for in Article 5, give rise to two distinct obligations. In this section the Tribunal will analyse whether there is evidence which proves that Libya provided to any Libyan or foreign investor a treatment more favourable than that awarded to Cengiz. The Tribunal will summarize the Parties' positions (1 and 2.) and then discuss its own decision (3.).

1. CLAIMANT'S POSITION

454. Claimant submits that pursuant to Article 5 of the BIT, Libya owes Cengiz "treatment no less favorable" than it accorded its own investors or other foreign investors, "whichever is the most favorable treatment, as regards any measures it adopts in regard to such losses"[AA5].

455. Claimant submits that Article 5 of the BIT applies "as regards any measures [the State] adopts in relation to such losses". This drafting also includes measures different from monetary compensation. Claimant alleges that Libya offered other investors:

- Monetary compensation[446];
- Awarding additional contracts[447];
- Increases in the contractual value[448],

to compensate the losses suffered owing to the Libyan revolution.

2. RESPONDENT'S POSITION

456. Respondent represents that no compensation was paid by HIB or the Libyan State to any foreign investor[449], submits that Claimant was not treated less favorably than other investors[450] and that consequently Libya has not incurred in any breach of Art. 5 of the BIT.

3. TRIBUNAL'S DECISION

457. Article 5 of the Treaty, which deals with compensation for losses, reads as follows:

> "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".

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[445] CIII, para. 187.
[446] CIII, para. 195-197.
[447] CIII, paras. 198-202.
[448] CIII, para. 203.
[449] RIII, para. 51; Doc. RE-4.
[450] RIII, para. 50.

458. The Tribunal's task in the present section is to establish whether Libya has accorded to

- its own investors, or
- to investors of any third country,

treatment regarding losses suffered owing to "war, insurrection, civil disturbances or other similar events", which is more favourable than the treatment offered to Cengiz. And the treatment to which Cengiz is entitled derives from the Tribunal's findings in the previous section: Libya has breached both the positive and the negative obligation to provide FPS to Claimant's WAH and Sebha Main Camps, and Cengiz is entitled to compensation for the damage suffered. If Libya has accorded any other investor a treatment which goes above and beyond this standard, Article 5 of the BIT requires that the improved treatment be also extended to Claimant.

459. Application of the War Clause in Article 5 requires a three-step approach[451]:

- First an appropriate comparator must be identified, i.e. an investor which is in a situation similar to that of Cengiz, and which has suffered losses owing to war or similar events;
- Second, Claimant must prove that Libya has applied to this comparator "measures […] in relation to such losses", which are more favourable than those accorded to Cengiz;
- Third, lack of a reasonable or objective justification for the difference of treatment.

A. The comparator

460. Cengiz is a Turkish construction company, performing two civil construction contracts with an agency of the Libyan government, which has suffered losses due to war, insurrection, civil disturbances or other similar events. The Comparator must meet the same requirements:

- A construction company,
- Active in Libya,
- Contracting civil works with the Libyan public sector,
- Which has suffered similar damage.

461. Claimant has identified two groups of companies which, in Claimant's submission, meet these criteria: the first group includes construction companies which allegedly have received monetary compensation, and the second group construction companies which have received compensation in form of new contracts[452]. The Tribunal finds that this second category does not represent an appropriate comparator: in this arbitration Cengiz is requesting a monetary compensation for the loss suffered – not the awarding of new contracts.

[451] CII, para. 114.
[452] CIII, para. 198.

462. Claimant refers to three companies which allegedly have received monetary compensation for the losses suffered during the Libyan Revolution[453]:

- Arab Contractors Company **["ACC"],** an Egyptian construction company;
- Won, a Korean company,
- An unnamed contractor working for the Libyan State-owned Al-Gazalla Company[454].

B. More favourable measures

463. The second step in the procedure requires that Claimant prove that the comparator entities received measures more favourable than those accorded to Cengiz.

464. The evidence marshalled by Claimant is the following:

- ACC: the Libya Monitor, an open source of economic news on Libya, informed on March 28, 2013 that ACC's chairman had said in a statement that the Libyan Government had agreed to pay USD 8 M compensation "for equipment that was damaged or lost during the 2011 conflict"; the statement added a caveat: payment would be made "as soon as procedures were completed"[455];
- Won: on October 3, 2013 the Libyan Monitor published a piece of news saying that Won construction had "reportedly agreed to restart work on a 2,500-unit housing project in Dema, with the Government paying a significant sum in compensation for stolen or damaged equipment"; the news was based on a report from the Libyan State news agency LANA, stating "that the government had agreed to pay LYD 10 M ($8M) to Won Construction cover [sic] the costs of stolen or damaged equipment, machinery and building materials"[456];
- Al-Gazalla: this is a Libyan State owned company, which had entered into a construction contract with an unnamed foreign contractor; the Libyan Audit Bureau (the Government watch-dog) criticized the project in its 2015 report, and among various items mentioned that "Al-Gazalla Company has compensated the contractor for losses arising during the period of work suspension during the incidents of 17th February revolution"[457].

465. Libya emphatically denies having compensated any foreign construction company for the losses suffered during the Libyan Revolution:

- Eng. Ajaj, the Chairman of HIB, has declared in his third WS: "I can categorically state that HIB has not paid any compensation to contractors as a result of the 2011 conflict"[458];
- Eng. Hmouda, Chief of the Public Projects Board, submitted an official statement to the Tribunal, confirming "that the Public Board and the implementing boards affiliated to the Board which implement the public projects which are financed by

[453] CIII, para. 195 and 197.
[454] CIII, paras. 195-197.
[455] Doc. BL-70.
[456] Doc. BL-71.
[457] Doc. BL-74, p. 266.
[458] Mr. Ajaj's WSIII, p. 1.

the Public Budget have never paid monies (compensation) to whatever company including Arab Contractors Company"[459].

C. Extension to Claimant of such measures

466. Article 5 requires that the measures accorded to other comparable investors be also extended to Cengiz, provided that such measures are "more favourable" than those enjoyed by Claimant, and that there is no reasonable or objective justification.

467. The situation of ACC is unclear. The open source information avers that ACC will receive compensation for losses "as soon as procedures are completed" – and the Libyan government avers that payment was never made.

468. Won's situation is different and not directly comparable with that of Cengiz: the Libyan State requested that construction of the housing project restart, and in order to convince the constructor to reinitiate work the open-source news say that the State compensated "the costs of stolen or damaged equipment, machinery and building materials".

469. Finally, what seems to have happened in the Al-Gazalla project is that the constructor was indemnified for the suspension of work during the Libyan Revolution – not for the cancellation of the contract and the destruction of machinery and equipment.

D. Conclusion

470. All in all, and after carefully weighing the evidence marshalled, the Tribunal concludes that Claimant has not been able to prove that any other contractor in a comparable situation was accorded a treatment which was more favourable than that metered to Cengiz – including Cengiz' right to be compensated for the losses suffered at its two Main Camps, deriving from Libya's breach of the FPS standard in violation of Article 2(2) of the BIT.

[459] Doc. RE-4.

VII.5. FAIR AND EQUITABLE TREATMENT

471. Claimant submits that Libya breached another of its obligations assumed under the BIT: a failure to provide FET treatment to Claimant's investment. The Tribunal will again summarize the Parties' positions (**1.** and 2**.**), and then discuss its own decision (3**.**)

1. CLAIMANT S POSITION

472. Claimant submits that Libya did not uphold its obligation to provide FET to Cengiz' investments under Article 2(2) of the BIT. Libya breached this obligation[460]:

- when it applied unreasonable and discriminatory measures;
- frustrated Cengiz' legitimate expectations;
- and treated Cengiz' investments unreasonably and in an arbitrary manner;

thereby impairing the "management, maintenance, use, enjoyment, extension, or disposal of such investments".

Discriminatory measures

473. Claimant alleges that it suffered discriminatory treatment because, unlike other investors, it was[461]:

- not protected;
- nor paid for the works carried out prior to 2011: it did not receive any compensation, in cash or in kind, and was not put in a position to return and resume the works.

474. According to Claimant, evidence supports the conclusion that many investors[462]:

- were able to return safely to Libya after the events of 2011, when the situation stabilized;
- were paid the amounts owed and allowed to resume their projects, or
- were given compensation for losses, whether monetary or by way of additional contracts.

475. However, Claimant was afforded none of these, in spite of the fact that it performed its obligations under the Protocols[463].

Frustration of legitimate expectations

476. Claimant avers that the obligation to accord FET to foreign investments comprises the protection of an investor's legitimate expectations[464]. Thus, it submits that the State's conduct[465]:

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[460] CIII, para. 110.
[461] CIII, para. 111.
[462] CIII, para. 121.
[463] CIII. Para. 115-122.

- signing the Protocols;
- engaging in negotiations to sign the protocols and in exchanges with Claimant after the uprising;
- publicizing its eagerness for foreign investors to return to Libya; and
- signing contracts with foreign investors to resume works,

created the expectation that Cengiz would be able to reactivate the Projects and recoup its losses. Thus, Libya's unjustified frustration of these expectations must be held as a violation of its obligation under Article 2(2)[466].

Unreasonable and arbitrary treatment

477. Claimant alleges that the prohibition on arbitrary and discriminatory measures is part of the State's obligation to provide FET[467]. As such, arbitral tribunals have found that a measure will be regarded as unreasonable or arbitrary if[468]:

- it does not serve any apparent legitimate purpose;
- it is based on discretion, prejudice or personal preference;
- it is taken for reasons different than the ones put forward by the decision-maker or
- it is taken in willful disregard of due process and proper procedure.

478. Claimant submits that it has been the subject of unreasonable and arbitrary treatment by the Libyan State[469]:

- Despite committing, through the Protocols, to resume works it was never put in a position to do so.
- To the contrary, it has maintained at a significant cost the guarantees for the Projects put in place in 2009[470].
- Mr. Ajaj's statements during the hearing suggest that Claimant was punished by Libya for what it perceived to be the inimical stance of the Turkish government[471].
- Claimant did not agree to waive its rights to compensation[472].

2. RESPONDENT'S POSITION

479. Respondent denies a breach of its obligations under the FET standard and responds to Claimant's allegations with the following main arguments:

[464] CII; paras. 287-289; CIII, para. 123.
[465] CIII, paras. 124-128.
[466] CHI.para. 130.
[467] CIII, para. 131.
[468] CIII, para. 131; Cl, para. 234.
[469] CIII. Paras. 132-139.
[470] CIII: para. 133.
[471] CIII, paras. 134-317.
[472] CIII, paras. 138-139; Doc. C-174, pp. 44-47.

Discriminatory measures

480. Libya says that Claimant has not established discriminatory treatment[473] and points to the following facts that would show that Claimant was not discriminated against by Libya[474]:

- The fact that some projects were able to continue and others not, makes no allowance for the differing situation in different regions[475];
- The Protocols were not executed due to Claimant's inability to extend the guarantees and insure the Projects as required by the Contracts[476];
- As shown in the 20th Committee's reports[477] concerns as to guarantees and insurance were applied to other contractors[478];
- Libya had every reason to desire that the Projects succeed; HIB had a proactive approach and was a cooperative partner[479];
- There was no discriminatory treatment of foreign investors *per se*, and many of the examples cited by Claimant refer to Turkish companies[480];
- Even if the Protocols had been enacted, Claimant might not have been able to finish the Projects, because the security situation worsened[481].

Frustration of legitimate expectations

481. First, Respondent alleges that since this claim was not pursued in Claimant's Statement of Claim the Arbitral Tribunal should not allow it to proceed[482].

482. Second, Respondent avers that Libya made no specific representations to Claimant that would justify reliance[483]. But even if Claimant could establish that the Protocols were not enacted due to Libya's fault, that would not give rise to a FET breach: Claimant signed the Protocols fully aware of the ongoing conflict and the risks involved (new suspension, termination)[484]. Further, to the extent that the Protocols were breached, *quod non*, that would only amount to a breach of contract and not a Treaty breach[485].

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[473] RII, paras. 155-156.
[474] RIII; para. 153-170.
[475] Walker-Cousins, paras. 124-126.
[476] Ajaj I, paras. 42-43; Doc. MA-15; Doc. MA-16; Respondent's letter of March 1, 2018; CIII, para. 50(b).
[477] Docs. C-173 and C-174
[478] RIII, para. 145.
[479] RIII, para. 50(d).
[480] RIII, para. 50(e).
[481] RIII, para. 50(f); Shopp II, para. 70; table 8.
[482] RII, para. 171.
[483] RII, paras. 174, 177.
[484] RII, para. 176.
[485] RII, para. 176.

Unreasonable and arbitrary treatment

483. Finally, Respondent denies that the high threshold required to prove unreasonable and arbitrary treatment has been met by Claimant[486].

3. TRIBUNAL S DECISION

484. To adjudicate this issue, the Tribunal will first establish the proven facts (3.1.) and then it will analyse the three separate FET sub-claims submitted by Claimant: that Libya discriminated against Cengiz (3.2), that Libya frustrated Cengiz legitimate expectations (3.3) and that Libya took unreasonable or arbitrary actions against Cengiz (3.4).

3.1 PROVEN FACTS

485. Pro memoria:

- The Libyan Revolution started in February 2011;
- The WAH Main Camp was evacuated in March 2011; the Sebha Main Camp in April 2011;
- On 23 and 25 August 2011 the WAH Main Camp was raided by units belonging to the regular Libyan army; a few days thereafter the Camp was looted and destroyed by a citizen mob supported by police and army;
- On 26 August 2011 the Sebha Main Camp was raided by militia brigades.

A. The Protocols

486. Towards the end of 2011, the Libyan Revolution had triumphed, the last Gaddafi forces had been defeated and the security situation started to improve. At that time Claimant initiated negotiations with the HIB, requesting that Cengiz Libya be indemnified for the damage caused during the Libyan Revolution, and that the construction of the two Projects be resumed.

487. After various meetings and exchanges with government officials, on June 13, 2013, Cengiz and HIB finally were able to sign a reactivation Protocol for each Contract[487].

488. The Protocols are two very short and simple agreements, whose main provisions can be summarized as follows[488]:

- In the Preamble Cengiz Libya recognizes that the events of 2011 were "of a general nature, unexpected and outside the intentions of the parties";
- Cengiz Libya agrees to resume the Contracts and carry on the performance of the works within 30 days of the work continuation order[489];
- HIB agrees to enable Cengiz to work on the sites[490];

[486] RII; para. 178; Doc. SD-44; Doc. SDF-1.
[487] HT day 3, 488: 2-5 (Ajaj).
[488] Doc. C-16; Doc. C-17; Doc. C-84; Doc. C-85.
[489] Article 4; Doc. C-16; Doc. C-17.
[490] Article 1 and *2*, Doc. C-16; Doc. C-17.

- Cengiz undertakes to extend all bank guarantees and bonds required by the Contracts within one month from the signature of the Protocol[491];

- HIB agrees to pay Cengiz 50% of "the approved and payable notices for contract works", i.e. amounts accrued and outstanding in accordance with the Contracts; the remaining 50% would be paid "after the company embarks on the project"[492];

- The original contractual deadlines are extended to cover the suspension period[493].

489. The Protocols "form an integral part of the original contract" and as such are subject to Libyan law and the jurisdiction of Libyan courts.

490. The Protocols do not include any obligation that the HIB indemnify Cengiz Libya for the damage caused to the contractor's machinery or equipment during the Libyan Revolution. The only provision refers to damage caused to completed and delivered construction work: if damaged the Contractor is bound to rebuild the work at current prices[494].

Re-mobilization

491. After signing the Protocols Cengiz completed its mobilization study, repaired the Sebha Main Camp and made it suitable to accommodate 250 workers[495]. Work on the WAH Main Camp, which had been completely destroyed, was not resumed – because the road from Sebha to WAH was closed due to security concerns[496].

492. Cengiz Libya also extended all bank guarantees and bonds required by the Contracts within one month of the signature of Protocols (for details see section B. *infra).*

Security deteriorates

493. But shortly thereafter the security situation in Libya started to deteriorate, and in the autumn of 2013 the Sebha Main Camp was repeatedly raided by mobs and militias. On 22 January 2014 Cengiz Libya wrote to the HIB, informing of the deteriorating security situation and complaining about the cost of maintaining the bank guarantees and bonds, while resumption of work was impossible[497].

494. And then in March 2014 three heavily armed groups belonging to the 3rd Force of the Libya Shield took over the Sebha Main Camp and expelled Cengiz Libya[498].

495. In the meantime, the Protocols were not implemented. Despite Cengiz' repeated requests[499], HIB never paid the amounts agreed upon in the Protocols for the WAH Project, nor for the Sebha Project.

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[491] Article 3; Doc. C-16; Doc. C-17.
[492] Article 4; Doc. C-16; Doc. C-17.
[493] Article 5, Doc. C-16; Doc. C-17.
[494] Article 6, Doc. C-16; Doc. C-17.
[495] Mr. Ermurat's WS, para. 14; Doc. C-88.
[496] Mr. Ermurat's WS, para. 14.
[497] Doc. C-88.
[498] Doc. C-146.
[499] Doc. C-87; Doc. C-150; Doc. C-151.

496. There is very little contemporary evidence explaining the reasons for this failure. The only letter which has been marshalled is dated March 12, 2014, and in it HIB provides an answer with regard to the WAH Project[500]:

- after the signature of the 2013 Protocols HIB had followed the financial procedures to pay Cengiz the outstanding amounts, but payment was delayed due to Cengiz's failure to extend the contractual guarantees; and

- requesting that Cengiz assign a manager to the WAH Project, instead of having a shared management for both Projects.

497. In his witness statement and in his interrogatory during the Hearing, Eng. Ajaj, HIB's chairman, declared that the reason for HIB's failure to pay and to give the work resumption order was that Cengiz Libya's had breached its obligation to provide guarantees and bonds.

498. In its submission, Libya advances a second reason: that the security situation in the Southern Region was very unstable, and that in such circumstances HIB was reluctant to resume two Projects which required the development of urban facilities, which required construction activities scattered over many sites in Sebha and throughout the WAH region[501].

B. <u>Extension of bonds</u>

499. *Pro memoria,* the Contracts required that Cengiz Libya deposit two types of bank guarantees with HIB, which were to remain in effect for the duration of the Contracts:

- A performance bond for 2% of total cost of each Contract[502].

- An advance payment bond for 15% of the Contract cost of each Contract[503].

500. For the WAH Project, Cengiz issued two guarantees in favor of HIB[504]:

- A letter of performance bond valued at EUR 5,65 M[505] **["WAH Performance Bond"]** and

- An advance payment bond valued at EUR 42 M[506] **["WAH AP Bond"]**.

501. Similarly, for the Sebha Project, Cengiz issued two guarantees in favor of HIB[507]:

- A letter of performance bond valued at EUR 4 M[508] **["Sebha Performance Bond"]** and

- An advance payment bond valued at EUR 26.3 M[509] **["Sebha AP Bond"]**.

[500] Doc. MA-17.
[501] RII, para. 167.
[502] WAH Contract, Article 6, Doc. C-8a; Sebha Contract, Article 6, Doc. C-9.
[503] WAH Contract, Article 11, Doc. C-8a; Sebha Contract, Article 11, Doc. C-9.
[504] CII, para. 67; Doc. C-178.
[505] WAH Contract, Article 6, Doc. C-8a; Doc. C-178.
[506] WAH Contract, Article 11, Doc. C-8a; Doc. C-178.
[507] CII, para. 69; Doc. C-179.
[508] Sebha Contract, Article 6, Doc. C-9.

502. One of Claimant's obligations under the Protocols was to extend (not to renew)[510] all bank guarantees and bonds required by the Contracts, within one month from the signature of the Protocol[511].

WAH Performance Bond

503. The WAH Performance Bond was established on January 13, 2010 to be valid until October 1, 2013[512]. Thus, at the time of signature of the Protocols and a month thereafter, the WAH Performance Bond was still valid.

504. Claimant has provided evidence that HIB periodically sent "extend or pay" requests[513]; the WAH Performance Bond expired, however, in 2017, allegedly because the request by HIB was either late or inconsistent with the conditions set forth in the text of the Bond[514].

WAH AP Bond

505. The WAH AP Bond was established on January 13, 2010, to be valid until September 30, 2012[515].

506. On June 18, 2012, HIB wrote to the manager of the Jumhouria Bank requesting that the Bond be decreased from EUR 42 M to EUR 40.3 M[516]. Juiphouria Bank confirmed the reduction of the guarantee and its extension until June 30, 2013[517]. Furthermore, by letter dated September 2, 2013, the bank confirmed that the WAH AP Bond had been extended until June 30, 2014. Thus, at the time of signature of the Protocols and a month later, the WAH AP Bond was valid.

507. Claimant has provided evidence that HIB periodically sent the bank "extend or pay" requests[518]: the WAH AP Bond expired, however, in 2017, allegedly because the request by HIB was either late or inconsistent with the conditions set forth in the text of the Bond[519].

Sebha Performance Bond

508. The Sebha Performance Bond was established on December 8, 2009, to be valid until July 1, 2013[520]. It was extended before its expiry date until June 30, 2014, following HIB's "extend or pay" letter of May 23, 2013[521]. Thus, at the time of signature of the 2013 Protocols and a month later, the Sebha Performance Bond was still valid.

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[509] Sebha Contract, Article 11, Doc. C-9; Doc. C-179.
[510] Claimant emphasizes the distinction in Doc. C-178, fn. 1, 12.
[511] Article 3; Doc. C-16; Doc. C-17; Doc. C-159.
[512] Doc. C-178; WP-1; WP-2.
[513] Doc. C-178; WP-4; WP-5; WP-6; WP-7; WP-8; WP-10.
[514] Doc. C-178; WP-10: WP-10.
[515] Doc. C-178; WA-1; WA-2.
[516] Doc. C-148.
[517] Doc. C-178; WA-4 (undated).
[518] Doc. C-178; WA-3; WA-4; WA-5; WA-6; WA-7; WA-8; WA-9; WA-10; WA-11.
[519] Doc. C-178; WA-11; WP-9; WP-10.
[520] Doc. C-179; Doc. SP-1; Doc. SP-2.
[521] Doc. C-179; Doc. SP-3 (note that letter confirming the extension of the guarantee until June 30, 2014 is dated November 13, 2013).

509. Claimant has provided evidence that HIB periodically sent the bank "extend or pay" requests[522]. The Sebha Performance Bond is currently valid until December 31, 2018[523].

Sebha AP Bond

510. The Sebha AP Bond was established on December 8, 2009, to be valid until July 1, 2013[524]. On June 14, 2012, HIB sent to the Wahda Bank in Tripoli an "extend or pay" in order to have the bond extended until December 31, 2013[525]. Thus, at the time of signature of the 2013 Protocols and a month later, the Sebha Performance Bond was valid.

511. Claimant has provided evidence that HIB periodically sent the appropriate bank "extend or pay" requests[526] and that the Sebha AP Bond is valid until December 31, 2018[527].

512. Summing up, the evidence shows that - contrary to HIB's case - all bank guarantees and bonds required by the Contracts were in place one month after the signature of 2013 Protocols. The WAH Performance Bond and the WAH AP Bond expired in 2017, while the Sebha Performance Bond and the Sebha AP Bond are valid until the end of 2018.

C. Present situation of the Contracts

513. The situation of the two Contracts can be summarized as follows:

514. (i) Construction activities under both Contracts were suspended in March and April 2011.

515. (ii) At the time of suspension, only a small percentage of the work had been carried out (WAH: design had progressed 65%[528], while construction had progressed 9%[529]. Sebha: design works had been completed by 70.5% and construction works by 12%[530]).

516. (iii) At the time of suspension, the HIB had only paid a part of the price due (WAH: LYD 72.5 M[531]; Sebha: LYD 43.6 M[532]).

517. (iv) The WAH and Sebha Main Camps have been raided, looted and destroyed and Cengiz Libya has been dispossessed of both Camps.

518. (v) The Protocols, which amended the original Contracts, were signed in 2013:

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[522] Doc. C-179; Doc. SP-3; Doc. SP-5; Doc. SP-6; Doc. SP-7.
[523] Doc. C-179; Doc. SP-7.
[524] Doc. C-179; Doc. SA-1; Doc. SA-2.
[525] Doc. C-149 (please note that this document seems to make reference to bond 6/39/57 for LYD 43,6M). Even if this bond is not the Sebha AP Bond, the following documents suggest that the guarantee was extended before its expiry:
- Swift message from Europe Arab Bank to Wahda Bank of December 10, 2013 refers to a "new date of expiry" of 31 December 2014 and indicates that "the beneficiary has withdrawn his claim for payment" (Doc. SA-5).
- On October 2, 2013, HIB made an "extend or pay" request to the bank (Doc. SA-4), which was approved and notified by letter dated January 29, 2014 (Doc. SA-7).
[526] Doc. C-179; Doc. SA-4; Doc. SA-5; Doc. SA-6; Doc. SA-7; Doc. SA-8; Doc. SA-9.
[527] Doc. C-179; Doc. SA-10.
[528] Garbutt I, section 2.2.1.
[529] Garbutt I, section 2.2.1.
[530] Garbutt I, section 2.4, 2.5; Doc. PG-20.
[531] RI, para. 73(a); WAH Contract, Article 11(a), Doc. C-8a; Ajaj I, para. 23(a); Doc. MA-9, p.4.
[532] RI, para. 73(b).

- Cengiz Libya agreed to resume work, while
- HIB agreed to pay Cengiz 50% of amounts accrued and outstanding; the remaining 50% would be paid once construction is restarted;
- The original contractual deadlines were extended to cover the suspension period.

519. (vi) Cengiz Libya duly extended all bank guarantees and bonds required by the Contracts within one month of the signature of 2013 Protocols; the WAH bonds expired in 2017, the Sebha bonds are valid till the end of 2018.

520. (vii) HIB never made any payment under any of the Protocols and it never issued the work continuation order; work has not been resumed.

521. (viii) Neither HIB nor Cengiz Libya have terminated the Contracts, which are still in force.

3.2 DISCRIMINATION

522. Claimant says that it suffered discriminatory treatment, because, unlike several other investors, the Protocols were not implemented, it was not paid for the works carried out prior to 2011 and was not put in a position to return and resume work. Claimant adds that in 2013 HIB paid more than LYD 700 M to different companies that had executed protocols and then refers specifically to six companies which – in its submission – received a better treatment[533].

523. Respondent denies any discrimination: the Projects were not executed because of the dangerousness of the Southern Region and the Protocols were not implemented because Cengiz Libya failed to provide the requisite bonds[534].

The BIT

524. Articles 2(2) and Article 3(2) and 3(3) prohibit discriminatory treatment of protected investors and investments:

> "Article 2 Promotion and Protection of Investments
>
> 1 […]
>
> 2 […] Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use , enjoyment, extension, or disposal of such investments".
>
> "Article 3 Treatment of Investments
>
> […]
>
> 2. Neither Contracting Party shall in its territory subject investments or returns of investors of other Contracting Party to treatment less favorable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State, whichever is the most favorable.

[533] CIII, para. 111.
[534] RII, paras. 155-170.

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

A. Requirements

525. Claimant says that it suffered discrimination vis-à-vis other investors. To prove the existence of discrimination, it is necessary that a three-step approach be followed[535]:

- First an appropriate comparator must be identified, *i.e.* an investor which is in a situation similar to that of Cengiz (or an investment which is in a situation similar to Cengiz' investment in Libya);
- Second, Claimant must prove that Libya has applied to this comparator a treatment more favourable than that accorded to Cengiz or to its investment in Libya;
- Third, there must be a lack of a reasonable or objective justification for the difference of treatment.

B. Failure to meet the requirements

526. The burden of proving these three elements lies with Claimant. To discharge this burden, Claimant refers to six different investors or investments, which allegedly were in a situation similar to that of Cengiz Libya and received a more favourable treatment, without there being a reasonable or objective justification.

527. First, Cengiz refers to the fact that HIB in 2013 paid more than LYD 700 M to different companies that had executed protocols signed with HIB, including local Libyan and foreign companies[536].

528. The Tribunal agrees with Claimant that Eng. Ajaj acknowledged that HIB made payments in these amounts[537]. But the Tribunal does not agree with Claimant's conclusion that the existence of these payments provides conclusive evidence of discrimination: HIB was managing many construction projects all over Libya, and the fact that it paid some contractors but not others is by itself not a sign of discrimination. For discrimination to exist what is required is that projects similar to those of Cengiz received (without justification) a better treatment - and the level of overall payments made by HIB in 2013 does not prove that.

529. Second, Cengiz refers to Hill, an American consultancy and project management company which was owed almost USD 60 M by ODAC, a Libyan Government agency, and which collected USD 10 M, as recorded in Hill's 2017 financial statements.

530. The Tribunal finds that the comparator is not in a situation similar to that of Claimant:

- Hill is a consultancy, which was owed moneys by an agency of the Libyan Government, and which eventually managed to collect roughly 10% of the balance, while

[535] CII, para. 114.
[536] CIII, para. 121.
[537] HT day 3, 530: 5-9.

- Cengiz is a construction company (not a consultancy), and its case is that HIB is delaying or obstructing resumption of two construction Projects (while Hill's situation relates to its inability to collect a debt owed by the Libyan Government).

531. Third, Claimant also refers to TML, a Turkish company that was able to complete its project with the port authorities in Libya worth LYD 100 M.

532. The Tribunal is unconvinced, for two reasons:

- First, the evidence marshalled by Claimant is shaky[538];

- But even if *arguendo* Claimant's case is accepted, the situation of a company constructing a port is materially different from that in charge of urban development in certain villages and towns of the Southern Region – TML is not a valid comparator.

533. Fourth, Claimant invokes the situation of CSCEC, a Chinese construction company which allegedly reached an agreement to resume work on a housing project in Benghazi and received compensation by means of additional contracts.

534. Again, the Tribunal finds that the comparator is inappropriate. Claimant's situation is materially different from that of CSCEC. The Chinese construction company resumed work and received additional contracts for the construction of housing in Benghazi. While Cengiz' case relates to the resumption of two widely-scattered urban development projects in the wild and unsecure Southern Region of the country. There are objective reasons which justify Libya's decision to advance Benghazi housing projects, while postponing urbanization projects in the Southern Region.

535. Fifth, Claimant refers to ACC and Won, two construction companies which allegedly were compensated by Libya for damages suffered during the Libyan Revolution.

536. The evidence marshalled by Claimant (to which the Tribunal has already referred in section VII.4.3.A *supra)* is the following:

- ACC: the Libya Monitor informed on March 28, 2013 that the Libyan Government had agreed to pay USD 8 M compensation "for equipment that was damaged or lost during the 2011 conflict"; the statement added a caveat: payment would be made "as soon as procedures were completed"539;

- Won: on October 3, 2013 the Libyan Monitor published a piece of news saying that Won construction had reportedly agreed to restart work on a 2,500-unit housing project in Dema, with the Government paying LYD 10 M (USD 8 M) in compensation for stolen or damaged equipment540;

537. The Tribunal has already found that[541]:

- The situation of ACC is unclear, because the press statement says that ACC will receive compensation for losses "as soon as procedures are completed", the Libyan government avers that payment was never made and Claimant has not marshalled evidence proving actual payment; and

[538] A statement from Claimant's witness Mr. Cetin – HT day 2, 385: 13-19.
[539] Doc. BL-70.
[540] Doc. BL-71.
[541] *See* para. 464 *supra.*

- Won's situation is not directly comparable to that of Cengiz, because the Libyan State requested that construction of the housing project restart, and in these circumstances apparently was prepared to compensate "the costs of stolen or damaged equipment, machinery and building materials".

538. Sixth, Claimant finally refers to Enka, a Turkish company constructing a power plant in the Southern Region, which allegedly was able to resume and finish its project.

539. The Tribunal again is unconvinced.

540. Enka is indeed an appropriate comparator, but for a totally different purpose. The Tribunal has already used ENKA to prove that Libya had the means to provide static security to relevant foreign investment in the Southern Region (see Section VII.3.3.5B *supra*).

541. But Enka does not serve as an appropriate comparator to prove that Cengiz' is being discriminated. Enka entailed the construction of a power plant, which was close to completion when the Libyan Revolution erupted. The Sebha and WAH Projects were urbanisation projects which at that time were at their beginning.

Conclusion

542. The Tribunal concludes that the evidence marshalled by Claimant is insufficient to prove its case: Cengiz is unable to identify a comparator in a similar situation, which received a more favourable treatment. And in the few cases were Claimant has been able to identify an appropriate comparator which has received more favourable treatment, there are convincing reasons which justify the difference in treatment: the Sebha and WAH Projects

- had advanced very little when the Libyan Revolution erupted;
- related to urban developments in Sebha and certain villages in the WAH Region;
- were located in the Southern Region, a tribal area of high insecurity; and
- required that construction activity be scattered across more than a dozen sites.

* * *

543. The Tribunal consequently rejects Claimant's submission that Libya engaged in discriminatory conduct with regard either to Cengiz or to its investment in Libya.

3.3 LEGITIMATE EXPECTATIONS

544. Claimant says that it had a legitimate expectation that Libya would comply with the commitments assumed in the Protocols – something which Libya failed to do. But Libya not only breached the contract, it also acted in bad faith, wilfully refusing to abide by its obligations and abused its authority to evade the terms of the agreement – thus violating Claimant's legitimate expectations[542].

545. Respondent denies that HIB breached the Protocols. Libya adds, *arguendo*, that even if HIB had breached such contracts, this would not give rise to a violation of legitimate

[542] CIII, paras. 123-124

expectations: a violation of the BIT requires that an act of *puissance publique* is committed – something which did not happen here[543].

The BIT

546. Article 2(2) of the Treaty defines the FET standard:

> "Article 2: Promotion and Protection of Investments
>
> **!** […]
>
> 2 Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment **[…]**"

Discussion

547. It is uncontentious that the obligation to "at all times" accord FET to investments encompasses the protection of an investor's legitimate expectations. If a host State, through its laws or administrative actions, makes specific representations or commitments, and thus creates certain legitimate expectations, and those expectations lead the investor to invest, it is contrary to good faith (and in breach of the FET standard) for the State to approve laws or take actions that deny or frustrate those expectations.

548. Claimant says that Libya's failure to implement the Protocols was performed in bad faith, wilfully, with abuse of power and thus the conduct transcended a simple breach of contract, violated Cengiz' legitimate expectations, constituted an international wrong and resulted in breach of Article 2(2) of the BIT

549. The facts do not support Claimant's case.

550. In a nutshell: Cengiz Libya signed two construction Contracts with HIB, an agency of the Libyan Government in 2008 and 2009. Construction activity has been suspended since the Libyan Revolution erupted in 2011. The Contracts, subject to Libyan law and jurisdiction, were amended through the 2013 Protocols. HIB has not made the up-front payment foreseen in the Protocols, nor has it given the order for work to restart.

551. Claimant avers that HIB's conduct is in breach of contract, while Libya argues that Cengiz Libya failed to provide the proper guarantees – an argument which is rejected by Cengiz Libya. Libya also advances the argument that the location and the nature of the Projects made them too dangerous for work to restart – especially given the wider security situation in Libya. Another element is important: neither Cengiz Libya nor HIB have terminated the Contracts, which are still in force.

552. The facts do not yield any indication that HIB acted in bad faith, willfully refused to abide by its obligations or abused its authority to evade the terms of the agreement. There is also no element of *puissance publique,* of Libya abusing its sovereign powers to enhance its contractual position. What the evidence shows is a dispute between the contractual parties – HIB and Cengiz Libya – where the guarantees were properly provided, and where there is an impossibility to resume work due to the security situation in the Southern Region.

[543] RII, para. 173.

553. Given these factual findings, Claimant's case that Libya's failure to implement the Protocols also constitutes an international wrong, a violation of the FET standard enshrined in Article 2(2) of the BIT, fails.

3.4 ARBITRARY ACTIONS

554. As a last argument, Claimant submits that it was the victim of unreasonable or arbitrary measures imposed by the Libyan State, which entitle it to compensation. Claimant says that HIB has kept sending to Cengiz Libya and its banks "extend or pay" demands for the bonds, and Cengiz Libya has been forced to keep these bonds in existence, at a considerable cost. Claimant says that this is an obvious violation of Article 2(2) of the BIT, which prohibits Libya from taking arbitrary or unreasonable measures – measures that inflict damage to the investor without serving any apparent legitimate purpose[544].

555. Respondent disagrees. It says that the standard to be met is high: The State's actions must shock or at least surprise juridical propriety. And in this case the standard is not met[545].

The BIT

556. Article 2(2) provides as follows:

> Article 2 Promotion and Protection of Investments
>
> 1 […]
>
> 2 […] Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, or disposal of such investments.

Discussion

557. The Tribunal agrees with Respondent.

558. Notwithstanding the long period of suspension, it is a fact that the Contracts, novated by the 2013 Protocols, are still in force. Neither Cengiz Libya nor HIB have adopted the decision to terminate the agreements. There is consequently an expectation that at some future time construction will resume, and that the Contracts will be fully performed.

559. Cengiz Libya provided the bonds required by the original Contracts. After the signing of the 2013 Protocols, the bonds were duly extended (within one month, as required in the Protocols). As the original bonds expired, HIB submitted "pay or extend" notices, and Cengiz Libya extended the guarantees. In 2017, however, the WAH Performance Bond and the WAH AP Bond expired – apparently because Libya failed to provide the appropriate "pay or extend" notice. The Sebha Performance Bond and Sebha AP Bond are still in force and will expire by the end of 2018.

560. Claimant says that HIB's conduct, when it submitted "pay or extend" notices, was arbitrary.

561. The Tribunal disagrees.

[544] CII paras. 308-309.
[545] RII, para. 178.

562. The Contracts were at all times and still are valid and in force. HIB requested Cengiz Libya to comply with one of its contractual obligations, that of establishing and on maturity extending the requisite bonds. There is nothing arbitrary in HIB's requests: *qui hire suo utitur, neminem laedit*. Confronted with these requests, Cengiz Libya complied with its commitments and duly extended the bonds – except that in 2017 it rejected HIB's requests regarding the WAH Performance and AP Bonds, apparently because there was a mistake in the "pay or extend" notice (a question which eventually may lead to a contractual dispute between HIB and Cengiz Libya, and which is outside the scope of this procedure).

563. This Tribunal is tasked with adjudicating international law disputes for the breach of commitments assumed by the State of Libya in an international treaty – including the commitment, formalized in Article 2(2) of the BIT, not to accord arbitrary treatment to protected investments.

564. Having carefully reviewed the facts, the Tribunal finds that there is no evidence that Libya's conduct regarding the extension of the bonds in any way breached its commitments under Article 2(2) of the BIT.

VIII. COMPENSATION

565. The Tribunal has reached the conclusion

- that the Libyan army and militias controlled by the Libyan army caused physical harm to Cengiz Libya's Main Camps, looting machinery and equipment and eventually taking control of the Sebha Main Camp, and

- that Libya failed to provide any type of military, militia or police protection to the Main Camps, facilitating that civilian mobs raided the installation.

566. This conduct, which is attributable to the Libyan state, led to the destruction of the Main Camps and implies a breach of the positive and of the negative obligations of the FPS standard provided for in Article 2(2) of the BIT.

567. In this section, the Tribunal must establish the compensation to which Claimant is entitled for the damage which Libya's international wrong caused to its investment.

568. The legal standard which the Tribunal must apply is not disputed by the Parties: it is the principle of full reparation of the injury caused, firmly established in jurisprudence since the PCIJ's seminal *Chorzow Factory* decision[546]. The PCIJ held that full reparation was an essential and consistent principle of customary international law and should be applied even in the absence of any specific provision setting forth an indemnification obligation in the treaty underlying the dispute[547]:

> "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself'

569. The principle of full reparation, as adopted by the *Chorzow Factory* decision, was subsequently codified in the Draft ILC Articles.

570. Article 31 states the principle that the injury caused by internationally wrongful acts must give rise to full reparation[548]:

> "1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
>
> 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."

571. As for monetary compensation, Article 36 provides further guidance[549]:

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[546] Case concerning the Factory at Chorzow (Germany v. Poland), PCIJ, Claim for Indemnity (Jurisdiction), July 26, 1927, Series A, No. 9 (1927), Doc. CL-80.
[547] Case concerning the Factory at Chorzdw (Germany v. Poland), PCIJ, Claim for Indemnity (Jurisdiction), July 26, 1927, Series A, No. 9 (1927), p. 21, Doc. CL-80.
[548] Draft ILC Articles, Article 31, Doc. CL-43.
[549] Draft ILC Articles, Article 36, Doc. CL-43.

> 441. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
>
> 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established."

572. This understanding of the full reparation principle is constantly being reiterated by investment tribunals – including cases where the investment was destroyed due to civil war or military action.

573. In *AAPL* a shrimp farm belonging to a Sri Lankan enterprise partially owned by a foreign investor was destroyed during a conflict between security forces and armed rebels. Having found that Sri Lanka was in breach of the treaty, the tribunal concluded that the amount of compensation should reflect the full value of the investment lost[550]:

> "[I]n case of property destruction, the amount of the compensation due has to be calculated in a manner that adequately reflects the full value of the investment lost as a result of said destruction and the damages incurred as a result thereof."

574. In *AMT,* a case where the Zairian armed forces destroyed property belonging to a Zairian company owned by a foreign investor, the Tribunal came to a similar conclusion[551]:

> "[T]hat in principle, it is necessary to assess the true value or the actual market value of the properties destroyed or the losses suffered by AMT."

575. Based on these principles, Claimant is claiming for three items of compensation[552]:

- First an order that Respondent pay monetary losses and damages suffered by Cengiz in an amount of up to USD 302.6 M (1.);
- Second, an order that these amounts bear interest (2.);
- Third, an order that Respondent release the existing bank guarantees in relation to the WAH and Sebha Projects (3.).

1. LOSSES AND DAMAGES

576. Claimant requested Mr. Chris Osborne, an economist working for FTI Consulting, to prepare and submit an expert report assessing the losses and damages suffered by Claimant. Mr. Osborne presented two extensive expert reports[553] and a presentation[554], used as the basis for his expert testimony during the Hearing.

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[550] *Asian Agricultural Products* v. *Republic of Sri Lanka,* ICSID Case No. ARB/87/3, Final Award, June 27, 1990, para. 88, Doc. CL-1.
[551] *American Manufacturing & Trading, Inc.* v. *Republic of Zaire*, ICSID Case No. ARB/93/1, Award, February 21, 1997, para. 7.13, Doc. CL-2.
[552] CIII, para. 300.
[553] Osborne I and II.
[554] Doc. H-5.

577. Respondent also availed itself of an economic expert, Mr. Matthew Shopp, who submitted two expert reports[555], and also used a presentation[556] for his expert testimony during the Hearing.

578. The Tribunal thanks the experts for the quality and independence of their advice.

579. Mr. Osborne used two alternative approaches to assess Cengiz' losses:

- the first approach estimates the loss by reference to the Contracts (**1.1**), and
- the second, which is alternative to the first, by reference to the loss of value of the shares of Claimant's subsidiary in Libya, i.e. the company Cengiz Libya (**1.2**).

1.1 FIRST APPROACH: LOSS BY REFERENCE TO THE CONTRACTS

580. Under this methodology, Mr. Osborne calculates the loss by adding two different items[557]:

- The actual damage suffered by Cengiz, which is equal to its net investment in the Projects **(A.)**, plus
- The lost profit, the hypothetical profit which Cengiz would have realized if the construction Projects had been finalized in accordance with the Contracts (B.).

A. Actual damage suffered by Claimant

581. The actual damage suffered by Cengiz is equal to its "net investment" (using Mr. Osborne's terminology) or to its "sunk cost" (the expression preferred by Mr. Shopp). Both terms refer to the same concept, the actual damage suffered by Cengiz as shown in Cengiz' accounts. The net investment is calculated by establishing

- the overall amount spent on the Projects (spent directly by Cengiz or by providing funding to Cengiz Libya), and then deducting
- the amounts (i) paid by HIB to Cengiz Libya in the form of advance payments and progress payments and (ii) then remitted to Cengiz (after payment of local costs in Libya)[558].

582. Mr. Shopp acknowledges that Mr. Osborne has conducted a comprehensive analysis of Cengiz' cost accounting[559] and both experts are in agreement regarding the basic quantification of the net investment (or sunk cost), with only two points of disagreement.

583. The agreement refers to the basic quantification of net investment: Mr. Osborne and Mr. Shopp coincide that such figure equals USD 48 M[560].

584. The disagreements refer to costs of bank guarantees **(a.)** and internal mark-up of equipment **(b.)**.

[555] Shopp I and II.
[556] Doc. H-6.
[557] Doc. H-5, p. 3.
[558] Osborne II, para. 2.9.
[559] Doc. H-6, p. 2.
[560] Doc. H-5, p. 5; Doc. H-6, p. 2.

a. Cost of bank guarantees

585. One of the items which forms part of the net investment is the cost of maintaining the bonds required under the Contracts. In Mr. Osborne's opinion, the cost of the bank guarantees through June 2018 should be included[561], while Mr. Shopp was instructed[562] to exclude the costs accrued between 2017 and June 2018. The difference is USD 3.2 M.

586. The Tribunal without hesitation sides with Mr. Osborne.

587. This is so, as both experts agree that the costs of the bonds should be included in the calculation. Mr. Osborne failed to include the 2017-2018 costs, simply because his initial reports were issued in 2016. Costs have continued to accrue, and fairness requires that these additional costs be added in.

b. Internal mark-up

588. Cengiz invested USD 50.2 M in its Libyan Projects, if the amount is calculated taking the initial purchase price of machinery and equipment, and USD 73 M based on Cengiz' resale price to Cengiz Libya, on terms reflecting their market value. Mr. Osborne explains that Cengiz sold machines and equipment to Cengiz Libya at higher prices than it initially paid for the purchases. This was because Cengiz had access to preferential rates, and the addition of a mark-up was intended to result in a transfer value that reflects normal market rates. Mr. Osborne estimates the mark-up on Cengiz' costs for the purchase of these machines and equipment at USD 22.7 M (the rounded-up difference between USD 73.0 M minus USD 50.2 M)[563].

589. Mr. Shopp disagrees. He says that the mark-up is not a sunk cost from Claimant's perspective, as Cengiz did not actually spend that money out-of-pocket. He adds that he considers the actual price paid in a real transaction between two parties is more representative of market value than an internal accounting transfer that shows a 54%[564] mark-up[565].

590. The Tribunal, after a careful evaluation of the situation, sides with Mr. Shopp and finds that the internal-mark up should not be included.

591. The facts are as follows: Cengiz, one of the largest buyers of plant and equipment in the world, was regularly able to buy at a discount to the official prices. Thus, it was able to buy the plant and equipment used in the two Libyan Projects for USD 50.2 M. When the plant equipment was sent to Cengiz Libya, its price was increased, applying an internal mark-up of USD 22.7 M (a mark-up of 45%) – and the total figure (USD 73.0 M) was recorded in Cengiz' accounts. Cengiz says that USD 73.0 M is the actual market value of the plant and equipment.

592. The problem with Claimant's argument is that there is no evidence whatsoever that the mark-up is correct. No proof has been marshalled showing that Cengiz is routinely able to buy from its suppliers at reduced prices; there is no indication of the range of discounts Cengiz is able to extract. In the absence of any evidence, the 45% mark-up

[561] Doc. H-5, p. 5.
[562] HT day 5, 987: 13-18.
[563] Osborne II, para. 2.4.
[564] It is unclear how Mr. Shopp calculates this percentage.
[565] Shopp II, para. 17, HT day 5, pp. 987-988.

seems to be a rough over-the-thumb calculation made by Cengiz' accounting department.

593. Confronted with a figure which is the actual amount paid by Cengiz to its suppliers (USD 50.2 M), and a figure which is totally unsupported, the Tribunal feels more comfortable with the first.

* * *

594. Summing up, the Tribunal concludes that the actual damage suffered by Claimant and caused by Respondent's breach of the commitments assumed under the BIT amounts to USD 51.2 M (the sum of USD 48 M plus USD 3.2 M).

B. Lost profits

595. Claimant says that, to properly evaluate Cengiz' loss, it is necessary to add to the actual damage suffered (USD 51.2 M in the Tribunal's calculation) the lost profits, i.e. the profits that Cengiz would have realized if Cengiz had been able to carry out its work under the two Contracts[566].

596. Mr. Osborne has made an assessment of this profit and comes to a figure of USD 198 M. His calculation assumes that both projects together would yield a revenue of USD 650 M, and that Cengiz would be able to make a profit margin of 30.5% (and 30.5% applied to USD 650 M results in USD 198 M)[567].

597. Respondent disagrees. Mr. Shopp says that the profits calculated by Mr. Osborne are not accurately or reliably forecasted and are highly speculative. In his opinion the most likely outcome is that the Projects would have failed, when confronted with the economic challenges and business risks in Libya after the Libyan Revolution[568].

598. In his opinion lost profits are zero[569].

Discussion

599. The Tribunal agrees with Respondent.

600. The starting point of the Tribunal's analysis is Article 36 (2) of the Draft ILC Articles:

> "Article 36 Compensation
>
> 1 [...]
>
> 2 The compensation shall cover any financially assessable damage including loss of profit insofar as it is established." [Emphasis added]

601. The provision recognizes that in certain cases compensation for loss of profit may be appropriate – provided that the expected profit "is established". As the Commentary to the Draft ILC Articles explains,

[566] Doc. H-5, p. 3.
[567] Osborne II, para. 3.3 and 3.4.
[568] Shopp II, para. 31.
[569] Shopp II, para. 29.

> "[I]n other cases, lost profits have been excluded on the basis that they were not sufficiently established as a legally protected interest"[570].

602. In *AAPL* a claim for lost profits by a newly established business was rejected for lack of evidence of established earnings. The tribunal stated that "according to a well-established rule of international law", the assessment of prospective profits requires the proof that

> "they were *reasonably* anticipated; and that the profits were probable and not merely possible"[571].

603. The Tribunal, after carefully reviewing the available evidence, concludes that Claimant has failed to prove, that the profits could reasonably be anticipated, and that they were probable and not merely possible.

604. The Tribunal's opinion is based on the following arguments:

605. First, Claimant, although a highly successful Turkish construction company, had no prior experience nor track-record in Libya – a difficult and risky environment even under the Gaddafi regime. In the International Country Risk Guide Libya was ranked from 93rd to 97th out of 140 countries during the period of 2008-2010 (i.e. before the Libyan Revolution)[572].

606. Cengiz had ventured into Iraq in 2008 and had had a negative experience – it suffered an average loss in its Iraqi projects of -9.3% [573].

607. The assumption that in its Libyan projects Cengiz would reach a positive profit margin of 30.5% on turnover is unsupported by the Iraqi experience and highly speculative given the Libyan political environment.

608. Second, the Projects were at an early stage. Construction work was only 9% complete in the WAH Project and 12% at Sebha[574].

609. There is no evidence that this initial construction had been completed at a profit. The assumption that the remaining 91% and 88% of the work could be successfully completed and could earn a 30.5% margin is again unsupported by the construction activity already performed and highly speculative.

610. Third, in February 2011 the scope of work was still under discussion between HIB and Cengiz Libya. The estimated prices per hectare in the WAH and in the Sebha Projects were found to have been significantly understated in the initial calculations, and HIB was therefore confronted with the choice of either continuing work on the basis of the original budget, reducing the scope of work, or to increase the project's overall budget[575].

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[570] Draft ILC Articles, commentary to Article 36, para. 32, p. 105, Doc. CL-43.
[571] Asian Agricultural Products v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award, June 27, 1990, para 104 (making reference to M. Whiteman, "Damages in International Law", II (1937) p. 1837, emphasis in the original), Doc. CL-43.
[572] Shopp I, para. 47.
[573] Shopp I, p. 13 (years 2008-2014).
[574] Garbutt I, p. 9; Shopp I, p. 11.
[575] Osborne I, paras. 5.3 – 5.5.

611. The discussions regarding scope reinforce the uncertainties surrounding both Projects[576].

612. Fourth, the two Projects were in remote locations in the Southern Region and faced higher than average risks – even in the context of Libya. The WAH Project and the Sebha Project came with revenue premiums of 17.4% and 15% respectively. These premiums were meant to incentive contractors to pursue projects in remote areas, and prove that the Libyan authorities also considered the Projects as high risk ventures[577].

613. Fifth, after the Libyan Revolution the economic and business conditions in Libya worsened. Security decreased. Inflation set in. Economic output declined[578].

614. The over-all situation of the country would also impact on the two Projects. There would be difficulties in receiving supplies, increased costs due to worsened security, increased labour costs and delays in performance. It is unrealistic to assume that during a period of high economic and political uncertainty, Cengiz would have been able to extract a 30.5% profit margin from its Libyan construction Projects.

615. Using publicly available information Mr. Shopp has reviewed 12 construction projects in Libya, where construction companies resumed work after the Libyan Revolution (or planned to do so). His conclusion is that 11 out of the 12 projects have been suspended, cancelled or remain unfinished by the end of 2017[579]. There is a high chance that Cengiz' Projects would have suffered a similar fate.

616. Summing up, the Tribunal concludes that Cengiz' loss of profit claim is highly speculative. The evidence proves that it is unlikely that Cengiz would have been able to successfully conclude the Projects as foreseen in the Contracts, and extremely unlikely that Cengiz would be able to clinch a 30.5% rate of profit from the Contracts.

1.2 SECOND APPROACH: LOSS OF VALUE

617. Claimant submits a second, subsidiary methodology to assess the damage. The failure to protect Cengiz' investment has meant that Cengiz Libya is essentially valueless. The alternative measure of Cengiz' loss is the market value of the shares in Cengiz Libya when its investment was impaired – in August 2011. The market value of Cengiz Libya's shares corresponds to the present value of its expected future cash flows at the time of the breach. Using a standard DCF analysis, albeit in simplified form, Mr. Osborne estimates the value of Cengiz Libya at approximately USD 302 M – and this is the amount alternatively claimed by Cengiz[580].

618. Mr. Shopp disagrees. He says that a DCF valuation based on the forecast of future cash flows must be disregarded for the same reasons which support that loss of profit be excluded from the calculation of damages. In his opinion the value of Cengiz Libya as

[576] The conclusion is independent of the fact that Mr. Osborne (correctly) calculates his loss of profit on the value of the original Contracts – Osborne I, para. 4.3.
[577] Shopp II, para. 67.
[578] The Tribunal notes that in the determination of loss of profit, the actual factual situation as it developed after the breach must be taken in consideration. In DCF valuations the situation may be different.
[579] Shopp II, para. 70.
[580] Osborne II, paras. 1.23 – 1.25.

of August 30, 2011 was USD 49.2 M, based on the net book value of machinery and equipment[581].

Discussion

619. The Tribunal again agrees with Mr. Shopp.

620. Valuations based on the DCF method have become usual in investment arbitrations, whenever the fair market value of an enterprise must be established. The Tribunal agrees that, where the circumstances for its use are appropriate, forward looking DCF has advantages over other, more backwards looking valuation methods.

621. DCF, however, cannot be applied to all types of circumstances, and while in certain enterprises it returns meaningful valuations, in other cases it is inappropriate. The tribunal in *Rusoro* has provided a list of criteria which a company must meet for its DCF valuation to be relevant:

> "DCF works properly if all, or at least a significant part, of the following criteria are met:
>
> - The enterprise has an established historical record of financial performance;
>
> - There are reliable projections of its future cash flow, ideally in the form of a detailed business plan adopted *in tempore insuspecto*, prepared by the company's officers and verified by an impartial expert;
>
> - The price at which the enterprise will be able to sell its products or services can be determined with reasonable certainty;
>
> - The business plan can be financed with self-generated cash, or, if additional cash is required, there must be no uncertainty regarding the availability of financing;
>
> - It is possible to calculate a meaningful WACC, including a reasonable country risk premium, which fairly represents the political risk in the host country;
>
> - The enterprise is active in a sector with low regulatory pressure, or, if the regulatory pressure is high, its scope and effects must be predictable: it should be possible to establish the impact of regulation on future cash flows with a minimum of certainty."[582]

622. Cengiz Libya does not meet most of these requirements:

- Cengiz Libya has no established record of financial performance – the Projects are the first business activity which the company carries out;

- There are no reliable projections of future cash flows: the same reasons which make the estimation of loss of profits highly speculative, also undermine the reliability of

[581] Shopp II, paras. 72-73.
[582] *Rusoro Mining Ltd.* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, August 22, 2016, para. 759 (internal footnotes ommitted).

the cash flow projections; Mr. Osborne uses a cash flow margin of 34,5%, which in fact is the profit margin of 30.5% adjusted to account for cash elements[583];

- It is impossible to calculate a meaningful WACC; Mr. Osborne proposes a WACC of 15%, including a risk premium of 11%; but the 11% is based on Prof. Damodaran's estimate for Libya, and does not take into consideration the political and war risk after the Libyan Revolution – a risk which is difficult to properly reflect in a country risk premium.

623. Finally, there is, like in all valuations, an element of common sense. It seems highly unlikely that in August 2011 any informed buyer would have been willing to pay more than USD 300 M for the shareholding of Cengiz Libya, a company with a net book value of USD 49.2 M and whose book of contracts was limited to two construction projects in a remote region of Libya, which were still in their initial stages.

* * *

624. In summary, the Tribunal finds that Mr. Shopp's valuation of Cengiz Libya, based on net book value, is to be preferred to a DCF approach. The net book value of Cengiz Libya at the relevant time was USD 49.2 M, and the Tribunal concludes that the loss suffered by Cengiz, under this alternative methodology, equals this amount.

625. The Tribunal has already established in Section 1.1A that the actual damage suffered by Cengiz amounted to USD 51.2 M (under Claimant's preferred methodology of calculating loss by reference to the Contracts).

626. Under the alternative methodology analyzed in this section, the result is very close: USD 49.2 M. The similarity of results reinforces the Tribunal's confidence in the accurateness of its calculation.

627. Since Claimant's principal case is that loss should be calculated by reference to the Contracts, while the calculation based on loss of value of Cengiz Libya is submitted as an alternative, the Tribunal will give preference to the first calculation and award a compensation of USD 51.2 M.

2. INTEREST

628. Parties have devoted little attention to the question of interest. In its first post-hearing brief Claimant simply reiterates its request that amounts awarded should bear interest of "USD 6 month LIBOR + 2% from 1 September 2011 until full payment"[584].

629. Respondent's position was briefly described in its Rejoinder[585]: Libya said that Claimant had not provided any basis for the application of LIBOR, and that alternatively "a lower rate applied to more accurately reflect the low rates of borrowing (e.g. the Bank of England Base Rate)" should accrue.

The BIT

630. The BIT provides a rule for the application of interest in cases of expropriation:

Article 4 Expropriation

[583] Doc. H-5, p. 8.
[584] CIII, para. 296.
[585] RII, para. 214.

! […]

2 **[…]**

3 In the event that payment of compensation is delayed, it shall carry an interest at a rate to be agreed upon by both parties, unless such rate is prescribed by law from the date of expropriation until the date of payment.

631. In absence for any provision in the BIT regulating interest for other types of compensation, the Tribunal finds that Article 4(3) does not prevent the Tribunal from deciding this issue and can be applied by analogy.

632. Article 4(3) of the BIT provides three rules:

- That interest shall accrue on compensation due to the investor,
- That such interest shall accrue from the date of the international wrong,
- And that the rate of interest shall be agreed by the parties (unless prescribed by law – something which has not been argued).

Discussion

633. In accordance with this rule, and the Parties' claims and arguments, the Tribunal decides:

634. (i) Compensation awarded in this Award shall accrue simple interest in favour of Claimant.

635. (ii) The *dies a quo* shall be September 1, 2011, the date proposed by Claimant and not disputed by Respondent, which coincides with the breach committed by Libya.

636. (iii) The *dies ad quem* shall be the date of effective payment.

637. (iv) The BIT does not impose any interest rate – it simply refers to the rate of interest agreed by the Parties.

638. The Parties have not reached an agreement, Claimant proposing USD LIBOR, Respondent the Bank of England Base Rate. In the absence of agreement, it is for the Tribunal to establish the rate.

639. The Tribunal sides with Claimant.

640. The Bank of England Base Rate is a domestic UK rate, inappropriate for an international debt expressed in USD.

641. LIBOR, on the other side, is an international benchmark: the interest rate at which banks can borrow funds from other banks in the London market. LIBOR is published daily for different maturities and currencies and is universally accepted as a valid reference for the calculation of variable rates[586]. Since the compensation is expressed in USD, the appropriate rate should be the LIBOR rate for six months deposits

[586] *Joseph Charles Lemire v. Ukraine, ICSID,* Case No. ARB/06/18, Award, March 28, 2011, para. 352.

denominated in USD. The initial rate shall be established as of the *dies a quo*, and shall be adjusted every six-months thereafter, to reflect changing conditions[587].

642. LIBOR reflects the interest rate at which banks lend to each other money. Loans to customers invariably include a surcharge, and this surcharge must be inserted in the calculation of interest to reflect the financial loss caused to Claimant by the temporary withholding of money. Claimant is requesting a 2% surcharge, and the Tribunal finds the request appropriate.

643. (v) The principal amount on which interest accrues shall be the compensation awarded in this Decision: USD 51,200,000 plus Arbitration Costs[588].

3. **RELEASE OF BANK GUARANTEES**

644. In its PHB, Claimant repeats its request that Respondent release (or orders HIB to release) the existing bank guarantees in relation to the WAH and Sebha Projects[589]. Respondent does not seem to have objected to this claim.

645. The Tribunal has already established that it must apply the principle of full reparation of the injury caused, as defined in the *Charzow Factory* decision. The PCIJ held, in a well-known and often cited passage

> "that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if the act had not been committed»[590].

646. In the present case, the compensation awarded to Claimant includes the cost of maintaining the bonds until 2018, and implicitly assumes that no additional costs and commissions will accrue thereafter.

647. But it is a fact that at least two bonds, the Sebha Performance and the Sebha AP Bond are still in force, and that Respondent could insist on the renewal of these bonds by issuing "pay or extend" orders.

648. The purpose of compensation is to wipe out all consequences of the international wrong committed by the delinquent State. To achieve this aim, it is necessary that the Tribunal orders, as Claimant requests, that all existing bank guarantees relating to WAH and Sebha Projects be released – otherwise Claimant could be forced to incur additional costs and expenses and the consequences of the breach would not be fully "wiped out".

649. This conclusion is not contradicted by the Tribunal's finding that the Contracts have not been terminated and are still in force. If at any time the Protocols are reactivated, before resuming construction Cengiz Libya will have to re-establish the bonds as required by the Contracts.

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[587] *Rusoro Mining Ltd.* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, August 22, 2016, para. 837.
[588] *See* section IX.3 *infra*.
[589] CIII, para. 299-300.
[590] Case concerning the Factory at Chorzow (Germany v. Poland), PCIJ, Judgment No. 13, September 13, 1928, Series A, No. 17, p. 47.

650. In summary, the Tribunal finds that the State of Libya must release (directly or by giving instructions to HIB) the existing bank guarantees and bonds in relation to the WAH Project and the Sebha Project.

IX. COSTS

651. Each Party has requested a decision on the costs of the arbitration **["Arbitration Costs"]**.

652. Arbitration Costs are composed of:

- Fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court [the **"Administrative Costs"];** and
- Reasonable legal and other costs incurred by the Parties for the arbitration [the **"Legal Expenses"]**

653. Art. 37 of the ICC Rules provides as follows[591]:

> "1. The costs of the arbitration shall include 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. **[…]**
>
> 4. The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.
>
> 5. 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".

654. Art. 37 of the ICC Rules provides that the final award shall fix the costs of the arbitration, which include the Legal Fees and the Administrative Costs, authorizes the Tribunal to establish the "reasonable" amount of the Legal Fees, and gives the Tribunal ample discretion to decide how to allocate these items.

655. The Tribunal will start by establishing how to allocate the Legal Expenses (**1.**) and will then turn to the Administrative Costs (2**.**).

1. LEGAL EXPENSES

656. Claimant has requested that its Legal Expenses be reimbursed. Said Legal Expenses amount to USD 1,143,177.78 and EUR 1,113,631.47, comprised of:

- USD 1,885,000 plus EUR 211,629.37 for legal fees and expenses[592];
- EUR 808,600.41 for expert's fees and expenses[593];

[591] Art. 37, paragraphs 1, 4 and 5 of the ICC Rules.
[592] CV, p. 2.
[593] EUR 489.905,96 (financial expert's fees and expenses) + EUR 178.860,00 (technical experts' fees and expenses) + EUR 139.834,45 (security expert's fees and expenses) = EUR 808.600,41); CV, p. 2.

- EUR 66,410.39 for hearing organization expenses[594], the Tribunal notices that Claimant has borne the costs of the hearing entirely on its own;

- USD 158,177.78595 plus EUR 26,991.30596 for other costs and expenses;

657. Respondent also claims to be entitled to the recovery of its Legal Expenses, which amount to BP£ 455,375.75[597]:

- BP£ 348,075 for legal fees and expenses[598];

- BP£ 78,387.63 for experts fees[599];

- BP£ 28,913.12 for other costs and expenses[600].

658. The Arbitral Tribunal must decide in what proportion Legal Expenses shall be borne by the Parties. In making this decision, it must take into account all circumstances considered relevant.

659. One of such circumstances is whether there is a successful party, who has prevailed in its position[601]. In this arbitration, Claimant has convinced the Tribunal that it has jurisdiction and that it has suffered a FPS breach under the BIT, but not a FET or War Clause violation; the principle that costs follow the event mandates, in principle, that Respondent bear the costs of the arbitration, at least in its majority.

660. This notwithstanding, the Arbitral Tribunal decides to deviate from this rule for two reasons:

661. First the Arbitral Tribunal finds that a genuine dispute existed between the Parties.

662. Claimant submitted that the Tribunal had jurisdiction to adjudicate the dispute under the Treaty and that it had suffered both a FET and an FPS violation attributable to the State of Libya. Furthermore, Claimant argued that Libya offered other investors more favourable conditions to compensate the losses suffered in the Libyan revolution.

663. On the other hand, Respondent convincingly argued that it had not breached the FET standard nor the War Clause.

664. Second, the Contracts are still in force, and there is still a chance that works may be resumed and that basic infrastructure services are provided in the Southern region of

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[594] EUR 21,369.36 (Hearing facility) + EUR 19,078.50 (Court reporter) + EUR 25,962.53 (Interpreters) = EUR 66.410,39; CV, p. 2.
[595] USD 2,794.13 (Documentation expenses) +USD 6,342.80 (travel expenses) + USD 9,259.88 (Accommodation expenses) +USD 3,852.41 (miscellaneous expenses) + USD 135,928.56 (total man-hours) = USD 158,177.78; CV, p. 2.
[596] EUR 16,641.64 (documentation expenses) + EUR 10,349.66 (accommodation expenses) = EUR 26,991.30; CV, p. 2.
[597] BP£ 348,075 (legal fees and expenses) + BP£ 78,387.63 (experts fees) + BP£ 28,913.12 (other expenses) = BP£ 455,375.75; RV, p. 2.
[598] RV, p. 2.
[599] BP£ 53,154.64 (financial expert's fees and expenses) + BP£ 25,232.99 (security expert's fees and expenses) = BP£ 78,387.63; RV, p.2.
[600] BP£ 5,735.59 (travel and accommodation) + BP£ 23,177.53 (other disbursements: translations, documentation expenses, transcript, video link, etc.) = BP£ 28,913.12; RV, p. 2.
[601] J. Fry, S. Greenberg, F. Mazza, *The Secretariat Guide to ICC Arbitration*, para. 3-1488.

Libya, improving the lot of the population. The Tribunal does not wish to disrupt any possible resumption of commercial relations by imposing costs on the losing party.

665. In conclusion, the Arbitral Tribunal decides that each Party shall assume its own Legal Expenses.

666. The Tribunal notes that there is an item of EUR 66,410.39 for hearing organization expenses[602] which must be borne equally by both Parties, since both benefited from such procedural step and should have paid for such expenses in equal parts as provided in para. 23 of PO No. 2. However, Claimant solely bore the hearing expenses. Thus, the Tribunal decides that Respondent must reimburse Claimant in the amount of EUR 33,205.20, equivalent to its share of the hearing organizational expenses.

2. ADMINISTRATIVE COSTS

667. The Administrative Costs were fixed by the Court at its session of October 25, 2018 at USD 939,400.

668. The Court initially fixed the advance on costs at USD 650,000[603] and later readjusted it to USD 985,000[604].

669. Article 36(2) of the ICC Rules provides that:

> "[…] The advance on costs fixed by the Court pursuant to this Article 36(2) shall be payable in equal shares by the claimant and the respondent".

670. The advance on costs were paid entirely by Claimant, thus it requests a reimbursement of the entire amount.

671. The Tribunal has already explained the reasons why it is not persuaded to follow the costs follow the event approach; however, since Respondent did not pay its 50% share of the Administrative Costs, it is only fair for it to do so now, as mandated by Article 36(2) of the ICC Rules. Thus, the Tribunal decides that Respondent must reimburse Claimant in the amount of USD 469,700, equivalent to its share of the Administrative Costs.

3. INTEREST

672. Claimant has requested that interest be applied "on all sums awarded to Claimant" [605]. And the Tribunal agrees.

673. The Tribunal has already decided that the compensation awarded to Cengiz shall accrue simple interest at a LIBOR rate for six months deposits denominated in USD plus a 2% surcharge.

674. The same shall be applied to the amounts that Respondent is ordered to reimburse as costs, but applying LIBOR denominated in EUR to the amount in Euros.

675. The *dies a quo* shall be the date of issuance of this award.

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[602] EUR 21,369.36 (Hearing facility) + EUR 19,078.50 (Court reporter) + EUR 25,962.53 (Interpreters) = EUR 66,410.39; CV, p. 2.
[603] Secretariat's letter of January 10, 2017.
[604] Secretariat's letter of December 7, 2017.
[605] Cl, para. 483; CII, para. 470; CIII, para. 300.

676. The *dies ad quern* shall be the date of effective payment.

* * *

677. In summary, the Tribunal does not impose Arbitration Costs on the Parties. However, Respondent must reimburse Claimant for its share of the Administrative Costs and hearing expenses, which amount to USD 469,700 and EUR 33,205.20, respectively. Additionally, Respondent must pay interest over such amounts in favour of Claimant as follows:

- USD 469,700: simple interest at a LIBOR rate for six months deposits denominated in USD with a 2% surcharge, accrued from the date of issuance of the award until the date of effective payment; and

- EUR 33,205.20: simple interest at a LIBOR rate for six months deposits denominated in EUR with a 2% surcharge, accrued from the date of issuance of the award until the date of effective payment.

X. SUMMARY

678. The dispute brought before the Tribunal required that the Tribunal decide on Respondent's Jurisdiction and Admissibility Objections (1.), on the breach of Respondent's obligations under the BIT (2.) and on the compensation owed to Claimant plus interest and costs (3.).

1. JURISDICTION AND ADMISSIBILITY

679. Respondent submitted the following four Jurisdictional Objections:

- That Claimant had not proven that it made an investment under Article 1(2) of the BIT;
- That Libya did not have sole jurisdiction over its territory when the BIT entered into force;
- That Claimant was not an investor under the Treaty;
- That the alleged investment was not made in accordance with Libyan law.

680. Respondent further submitted that the claims were inadmissible because:

- Claimant's claim was estopped; and
- Claimant did not respect the 90-day cooling-off period provided in Article 8(2) of the Treaty.

681. The Tribunal sided with Claimant in all Jurisdictional and Admissibility Objections and found that:

- Claimant proved that it was a 65% majority shareholder (entitled to 100% of the revenue stream and of the net worth) of a Libyan company called Cengiz Libya, which qualifies as an investment for the purposes of Article 1(2) of the BIT;
- the jurisdiction over the Libyan territory remained with the Libyan State at all times, even during the enforcement of Resolution 1973;
- Claimant is an investor under the Treaty since it is a Turkish corporation, with an investment in Libya;
- Respondent did not prove that Claimant's investment was not made in accordance with Libyan Law;
- Claimant was not estopped from bringing the present claims against Respondent; and
- Cengiz was entitled to exercise its right to commence arbitration proceedings under Article 8 of the BIT.

2. MERITS

682. Claimant's main claim was that the State of Libya breached Articles 2(2), 3(3), 4 and 5 of the Treaty in its relationship with Cengiz, that is to say, that the State of Libya breached the standards of FPS, FET and the War Clause under the BIT.

683. The Tribunal first clarified that Article 5 of the BIT does not cover the same subject matter as Article 2(2), and that both provisions are independent, and create separate obligations for the host State. The Arbitral Tribunal concluded that under Article 2(2) the State is obliged to provide FPS to protected investments. On the other hand, Article 5 creates a separate duty: if the State accords measures to protect its own investors or investors of a third party to compensate losses from war or civil disturbances, such treatment must be extended to the investor protected by the BIT.

684. The Tribunal then found that Libya did breach the positive and negative obligations of the FPS standard provided for in Article 2(2) of the BIT, because:

- the Libyan army and militias controlled by the Libyan army caused physical harm to Cengiz Libya's Main Camps, looting machinery and equipment and eventually taking control of the Sebha Main Camp, and

- Libya failed to provide any type of military, militia or police protection to the Main Camps, facilitating that civilian mobs raided the installation.

685. However, the Arbitral Tribunal dismissed Cengiz' claims for violation of FET and the War Clause.

686. The Arbitral Tribunal decided that:

- Claimant was unable to prove that it had suffered discriminatory conduct;

- the facts did not support a violation of Claimants legitimate expectations under the 2013 Protocols; and

- there is no evidence that Libya's conduct regarding the extension of the bonds was arbitrary or in any way breached its commitments under Article 2(2) of the BIT.

687. As regards the War Clause, the Tribunal found that Claimant had not proven that any contractor in a comparable situation was accorded a treatment which was more favourable than that granted to Cengiz.

3. QUANTUM

688. Cengiz claimed the following:

- USD 302.6 M in compensation for its losses and damages arising from Libya's breaches of the Treaty;

- interest at a LIBOR USD 6 month + 2% from 1 September 2011 until full payment;

- an order that Respondent release or order HIB to release the existing bank guarantees in relation to the WAH and Sebha Projects;

- an order that Respondent reimburse all costs and expenses incurred by Claimant in connection with the preparation and conduct of these arbitration proceedings; and

- interest on all sums awarded to Cengiz.

689. The Tribunal concluded that the proper compensation due to Cengiz under the BIT amounts to USD 51,200,000. Additionally, the Tribunal decided to award Cengiz simple interest on the amount of compensation at LIBOR rate for six months deposits

denominated in USD plus a 2% surcharge, to accrue from September 1, 2011 until the date of full and actual payment.

690. The Arbitral Tribunal further ordered Respondent to release all existing bank guarantees relating to WAH and Sebha Projects be released.

691. Finally, the Tribunal decided that the Arbitration Costs shall be borne equally by both Parties, and that each Party shall bear its own Legal Expenses. However, since Claimant paid in full the Administrative Costs and the hearing costs, Respondent must reimburse Claimant for its share of the Administrative Costs and hearing expenses, which amount to USD 469,700 and EUR 33,205.20, respectively.

692. Additionally, the Tribunal has found that Respondent must pay interest over such amounts in favour of Claimant as follows:

- USD 469,700: simple interest at a LIBOR rate for six months deposits denominated in USD with a 2% surcharge, accrued from the date of issuance of the award until the date of effective payment; and

- EUR 33,205.20: simple interest at a LIBOR rate for six months deposits denominated in EUR with a 2% surcharge, accrued from the date of issuance of the award until the date of effective payment.

XI. DECISION

693. For the foregoing reasons, the Tribunal, unanimously:

1. Declares that the Tribunal has jurisdiction to adjudicate Claimant's claims.

2. Declares that the State of Libya breached Article 2(2) of the BIT by failing to provide full protection in its territory to Cengiz' investment.

3. Orders the State of Libya to pay to Cengiz USD 51,200,000 as compensation for the breach declared in point 2 *supra.*

4. Orders the State of Libya to pay to Cengiz simple interest on the compensation awarded in point 3 *supra,* accrued between September 1, 2011 and the date of actual payment, calculated at an interest rate equal to USD LIBOR for six-month deposits, plus a margin of 2%.

5. Orders the State of Libya to release (directly or by giving instructions to HIB) the existing bank guarantees and bonds in relation to the WAH Project and the Sebha Project.

6. Orders that the Administrative Costs shall be borne equally by both Parties, and that each Party shall bear its own Legal Expenses, and that the State of Libya must reimburse Cengiz for its share of the Administrative Costs and hearing expenses, which amount to USD 469,700 and EUR 33,205.20, respectively.

7. Orders the State of Libya to pay Cengiz interest on the amounts awarded in point 6 supra as follows:

- USD 469,700: simple interest at a LIBOR rate for six months deposits denominated in USD with a 2% surcharge, accrued from the date of issuance of the award until the date of effective payment; and

- EUR 33,205.20: simple interest at a LIBOR rate for six months deposits denominated in EUR with a 2% surcharge, accrued from the date of issuance of the award until the date of effective payment.

8. Dismisses all other claims.

Place of arbitration: Paris, France

Date: November 7, 2018

ARBITRAL TRIBUNAL

Pierre Mayer

Georges Khairallah

Juan Fernandez-Armesto