Dissenting Opinion

ICC Case No. 21603/ZF/AYZ

Oztas Construction, Construction Materials Trading Inc.

("Claimant")

v.

Libyan Investment and Development Company

(Respondent No. 1)

And

The State of Libya

(Respondent No. 2)

1. It is an ethical duty for an arbitrator to provide a dissenting opinion in order to disclose his legal opinions and reasoning concerning the case, when he disagrees with the Arbitral Award. This dissenting opinion is written solely with this purpose, with the aim to disclose my personal legal assessment regarding the responsibility of the State of Libya (Respondent No. 2) against the Claimant, under the Bilateral Investment Treaty signed between the Republic of Turkey and the State of Libya on November 25, 2009, (the "BIT") concerning Reciprocal Promotion and Protection of Investments, which made me dissent from the majority view accepted in the Arbitral Award that finds no breach of BIT provisions on the part of the State of Libya. Besides this point, it should be stated that I agree with the findings of the Arbitral Award concerning the lack of jurisdiction over Libyan Investment and Development Company ("LIDCO"- Respondent No. 1) under the BIT. Therefore, the scope of this dissenting opinion is limited with the responsibility of the State of Libya (Respondent No. 2) vis-à-vis the Claimant under the BIT.

2. In the case at hand, on May 13, 2008, Claimant has entered into a contract ("*Contract Number 43 for the year 2008*" regarding "*Project for the Supply and Execution of a Water Supply and Transport System for the Inhabitants Living Along the Great Man- Made River Pipeline Abuziyyan- Al-Ruhaybat Section*") with LIDCO (Respondent No. 1), which is

100% owned and controlled indirectly by the Sate of Libya (Respondent No. 2), through the Economic and Social Development Fund ("ESDF") and the Libyan Investment Authority ("LIA"). LIDCO and Oztas have mutually agreed to terminate this contract and signed "*Mutual Agreement to Terminate The Contract*" ("Termination Agreement") on March 18, 2013. Pursuant to the Termination Agreement, parties have mutually agreed that Contract Number 43 for the year 2008 will be terminated and LIDCO will pay Oztas a "Termination Fee" (the exact amount is equal to 3,665,192 LYD) in four equal installments by checks. However, LIDCO did not pay the Termination Fee to Oztas, did not deliver the checks either and Oztas initiated the arbitral proceedings at hand, claiming that by not paying the Termination Fee LIDCO and the State of Libya have breached the BIT. Claimant alleges that by not providing commercial and legal protection to its investment and by not providing a stable framework for investments of the foreign investors in general, the State of Libya has breached its obligations to provide "full protection" and "fair and equitable treatment" under the BIT. In its Statement of Claim, Claimant requested the Arbitral Tribunal to order the Respondents to pay the Termination Fee with the interest accrued. Respondents have denied the jurisdiction of the Arbitral Tribunal under the BIT and argued that no breach of BIT has occured, since the claim for the payment of the Termination Fee is purely of contractual nature, rather than being a breach of treaty.

3. In this dissenting opinion, Respondents' objections related with jurisdiction of the Arbitral Tribunal will be evaluated primarily. As mentioned above under paragraph 1, I agree with the findings of the Arbitral Award concerning the lack of jurisdiction of the Arbitral Tribunal over LIDCO under the BIT, since LIDCO is not a party to the BIT, but a company which is 100% owned and controlled by the State of Libya indirectly, namely through a sovereign wealth fund, Economic and Social Development Fund ("ESDF") and the Libyan Investment Authority ("LIA"). Since solely the State of Libya is a party to the BIT, and the obligations foreseen in the BIT is assumed solely by the State of Libya, a breach of BIT may only occur on behalf of the State of Libya. Therefore, the Arbitral Tribunal has no jurisdiction over LIDCO under the BIT. On the contrary, the Arbitral Tribunal has jurisdicton over the State of Libya under the BIT, for the reasons mentioned below.

4. Pursuant to art. 1/1 of the BIT, the term "investor" means: "*a) natural persons deriving their status as nationals of either contrating Party according to its applicable law, 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*". Being a corporation incorporated under the laws of Republic of Turkey and having its headquarters in Turkey registered at the Trade Registry of Ankara (Exhibit C-X-7), Claimant qualifies as an "investor" under article 1/1 (b) of the BIT. Considering that the State of Libya is a party to the BIT and is the hosting "Contracting Party" in the dispute at hand, the Arbitral Tribunal has jurisdiction over the dispute in terms of ratione personae.

5. Under the BIT, the term "investment" includes every kind of asset, including returns reinvested, claims to money and any other rights having financal value related to an investment [art. 1/2 (b)]. Pursuant to article 1/3, the term "returns" includes, in particular, but not exclusively, profit, interest, capital gains, royalties, fees and dividends. Since the Termination Fee set forth in the "*Mutual Agreement to Terminate The Contract*" dated March 18, 2013, by its legal nature, constitutes a monetary claim attached to Claimant's initial investment in relation with "*Contract Number 43 for the year 2008*" regarding "*Project for the Supply and Execution of a Water Supply and Transport System for the Inhabitants Living Along the Great Man- Made River Pipeline Abuziyyan- Al-Ruhaybat Section*", the Termination Fee falls within the scope art. 1/2 (b) of the BIT and qualifies as an "investment" itself. Following determination of existence of an "investment" under the BIT, it shall be noted that, as Claimant alleges by not providing commercial and legal protection to its investment and by not providing a stable framework for investments of the foreign investors in general the State of Libya has breached its obligations for providing "full protection" and "fair and equitable treatment" under the BIT, the claims of the Claimant, in terms of their legal nature, are related with the alleged breaches of the BIT. Therefore, the Arbitral Tribunal has jurisdiction over the dispute at hand in terms of ratione materiae.

6. As another point regarding jurisdiction of the Arbitral Tribunal over the dispute between the Claimant and the State of Libya, it shall be discussed whether the Arbitral

Tribunal has jurisdiction in terms of ratione temporis. Pursuant to article 10 of the BIT, the BIT applies 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 the BIT. However, pursuant to the same article, the BIT shall not apply to disputes that have arisen before its entry into force. It shall be noted that the BIT has been executed by and between the Republic of Turkey and the State of Libya on November 25, 2009 and entered into force as of April 22, 2011. In the case at hand, Claimant has made its initial investment with "*Contract Number 43 for the year 2008*" regarding "*Project for the Supply and Execution of a Water Supply and Transport System for the Inhabitants Living Along the Great Man- Made River Pipeline Abuziyyan- Al-Ruhaybat Section*", on May 13, 2008, before the entry into force of the BIT. LIDCO and Oztas have mutually agreed to terminate the contract and signed "*Mutual Agreement to Terminate The Contract*" on March 18, 2013, and with this Termination Agreement, Claimant's initial investment has been transformed into a pure claim of money, which is equal to the Termination Fee and is also protected under the BIT pursuant to article 1/2 (b) of the said Treaty as an "investment". Since the Termination Fee is determined with the Termination Agreement dated March 18, 2013, the dispute related with the non payment of the Termination Fee has arisen following the entry into force of the BIT. Therefore, the exception set forth in art. 10 of the BIT, which foresees that the BIT shall not apply to disputes that have arisen before its entry into force, is not applicable in the case at hand. Accordingly, considering that the temporal scope of application defined in art. 10 of the BIT covers investments made both before and after the entry into force of the BIT, in the case at hand, the Arbitral tribunal has jurisdiction over Claimant's claims based on the BIT against the State of Libya in terms of ratione temporis.

7. As a last point regarding the jurisdiction of the Arbitral Tribunal, it shall be discussed whether the conditions set forth in articles 8/1 and 2 of the BIT are fulfilled. Pursuant to article 8/1 of the BIT, disputes between one of the Contracting Parties and an investor of the other Contracting Party related with an investment, shall be notified in writing, including detailed information, by the investor to the recipient Contracting Party of the investment. In such case, the investor and the concerned Contracting Party shall endeavor to settle the dispute by consultations and negotiations in good faith. In case the dispute cannot be settled in an amicable way within a cooling-off period composed

of ninety days, the investor will be entitled to submit the dispute to the competent court of the Contracting Party or to international arbitration, as the investor may choose (article 8/2 of the BIT). Since it is undisputed between the Parties that Claimant has sent a mediation request in accordance with the Mediation Rules of the International Chamber of Commerce on February 19, 2015 to both LIDCO and the State of Libya, the mediation process proved abortive and Claimant has filed its request for arbitration on January 20, 2016, it shall be accepted that the conditions set forth in articles 8/1 and 2 of the BIT are fulfilled. Therefore, in the light of the foregoing explanations, I believe that the Arbitral Tribunal has jurisdiction over the dispute that has arisen between the Claimant and the State of Libya, in relation with Claimant's investment, under the BIT.

8. Following establishment of Arbitral Tribunal's jurisdiction over the dispute between the Claimant and the State of Libya under the BIT, the case shall be evaluated as to its merits. It is undisputed between the parties that the BIT in the case at hand does not contain an "umbrella clause", a type of clause found in many bilateral investment treaties, which creates a reciprocal obligation for the contracting states, as the host state, to observe and perform their contractual obligations vis-à-vis the investors of the other contracting states, with regard to their investments.

9. Nonetheless, even in the absence of an umbrella clause, a contractual breach of a State can be qualified as a breach of a BIT concurrently, where the standard of protection granted by the BIT is breached with the contractual breach simultaneously:

> "*The fact that a breach may give rise to a contract claim does not mean that it cannot also – and separately- give rise to a treaty claim. Even if the two perfectly coincide, they remain analytically distinct, and necessarily require different enquiries.*" (ICSID Case No. ARB/03/3, Impregilo S.p.A. v. Islamic Republic of Pakistan, para. 258),
>
> "*A Treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standards.*" (ICSID Case No. ARB/97/3, Compañia de Aguas del

Aconquija SA and Vivendi Universal v. Argentine Republic, Decision on Annulment, para. 113),

"*... the investment protection treaty only provides a remedy to the investor where the investor proves that the alleged damages were a consequence of the behaviour of the Host State acting in breach of the obligations it had assumed under the treaty.*" (ICSID Case No. ARB/03/3 Impregilo S.p.A. v. Islamic Republic of Pakistan, para. 260).

10. Whether there has been a breach of BIT and whether there has been a breach of contract are different questions and each of these questions shall be examined by reference to its own proper or applicable law, in the case of the BIT, by international law; in the case of the contract, by the proper law of the contract (ICSID Case No. ARB/97/3, Compañia de Aguas del Aconquija SA and Vivendi Universal v. Argentine Republic, Decision on Annulment, para. 96). Based on the discretion granted to arbitral tribunals by art. 42/1 of the ICSID Convention ("Convention on the Settlement of Investment Disputes Between States and Nationals of Other States"), it is generally accepted that international law shall be applied to the breach of treaty claims. Accordingly, in the case at hand, I am of the opinion that Claimant's alleged breach of treaty claims against the State of Libya shall be evaluated in accordance with the BIT itself, in the first place, and then in accordance with international law.

11. Nevertheless, prior to assessing the breach of treaty claims raised by the Claimant, the attributability of the acts LIDCO to the State of Libya constitutes a major issue to be resolved under the circumstances of the case. As is known, pursuant to article 8 of the International Law Commission articles on the Responsibility of States for Internationally Wrongful Acts (2001, "ILC Articles");

"*The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct*".

12. Since the said provision of ILC Articles is referring to "person" or "group of persons", besides physical persons, legal persons (legal entities) are also included within the scope of the article. It is undisputed between the parties that LIDCO is a distinct legal entity, a corporation incorporated under Libyan Law, wholly (100 %) owned and controlled indirectly by the State of Libya, through a sovereign wealth fund, Economic and Social Development Fund ("ESDF") and the Libyan Investment Authority ("LIA"). While ESDF, who owns the whole shares of LIDCO is a sovereign wealth fund, LIA, who controls ESDF is an administrative unit of the State of Libya, as it can be inferred from their names. It is open to discussion, whether this 100 % control over LIDCO shall trigger responsibility of the State of Libya for the acts of LIDCO, under article 8 of the ILC Articles.

13. In ICSID Case No. ARB/00/4, Salini Construttori S.p.A. and Italstrade S.p.A v. Kingdom of Morocco, it is accepted that the assessment of the degree of State control and participation in a company is based on two criteria: first, structural, related with the shareholder structure of the company, and second, functional, related with the objectives of the company in question (Decision on Jurisdiction, para. 31). In line with the Salini case, existence of these two criteria shall be tested in the case at hand.

14. As mentioned above, LIDCO is wholly (100 %) owned and controlled indirectly by the State of Libya, through the mediation of Economic and Social Development Fund ("ESDF") and the Libyan Investment Authority ("LIA"), and this fact is undisputed between the parties. From the shareholder structure perspective, this 100 % indirect ownership suggests an absolute control on behalf of the State of Libya over LIDCO. As an undeniable consequence of this absolute control, the will of LIDCO is indeed the will of the State of Libya. This demonstrates that the first criterion related with the structure of the company is met in the case at hand.

15. Regarding the second criterion, which is based on the function of the company, in my opinion, in lieu of the objectives set forth in the articles of association of the company, which are generally standard and therefore not distinctive, the actual purposes and objectives of the company shall be taken into consideration. Although its articles of association does not contain a clear provision on this matter, as its name suggest, LIDCO ("Libyan Investment and Development Company"), aims to support development of the

State of Libya, as a wholly owned state company. In compliance with this purpose, LIDCO assumes responsibility in important infrastructure projects, such as "*Project for the Supply and Execution of a Water Supply and Transport System for the Inhabitants Living Along the Great Man- Made River Pipeline Abuziyyan- Al-Ruhaybat Section*", under which the contract with the Claimant ("*Contract Number 43 for the year 2008*") has been executed.

16. The name and the preamble of the Contract dated May 13, 2008 reveals LIDCO's role on behalf of the State of Libya in the said infrastructre project as the contact begins with the official name of the Libyan State before the Libyan Civil War "*Great Socialist People's Libyan Arab Jamahiriya*" and continues with the first recital "*This is a Contract of a Project for the supply and execution of a system of water transport for the supply of congregations of habitation that exist on the sideway of great industrial river (Abuzian, Al-Ruhaybat)*". There is no evidence that proves involvement of LIDCO in the said project is based on a commercial purpose, instead of public interest. Assuming that the purpose of LIDCO was of commercial nature while getting involved in this infrastracture project, there should have been a construction contract between the State of Libya and LIDCO, as the owner and the contractor of the project respectively, which at least in theory would have enabled LIDCO to gain a certain profit margin for the works to be done, in comparison to the costs of the Contract dated May 13, 2008, executed between LIDCO and the Claimant. However, as accepted by the Respondents in the hearing (Transcript of Proceedings, November 6, 2017, page 94 lines 2 and 3, p. 100 lines 10 et seq.), there is no such construction contract or contactorship agreement between LIDCO and the State of Libya. Inexistence of a contractual relationship between the State of Libya and LIDCO suggests that involvement of LIDCO in the said infrastructure project was based on a governmental assingment, instead of a commercial purpose. It is not logical to suppose that LIDCO funded the infrastructure project from its own assets, where no contractual consideration (a contractorship fee) was available for the said Company from the government. Based on the inexistence of a contractual relationship between the State of Libya and LIDCO, it can be inferred that it was the State of Libya, who funded both LIDCO and the infrasturucture project since the beginning. In addition, it can be inferred that it was a governmental decision, a decision of puissance publique (jure imperii), that

terminated the infrastructure project itself and directed LIDCO to offer termination agreements to its contractors in the project, including the Claimant.

17. Consequently, the inexistence of a contractual relationship between the State of Libya and LIDCO, in my opinion, suggests that purpose of LIDCO, while getting involved in the infrastructure project was not of commercial nature, but was based on a governmental assignment. In line with this determination, the second criteria set forth in the Salini decision, the one based on the function of the company, is also met in the case at hand, since the actual purpose of LIDCO is accomplishment of infrastucture projects on behalf of the public interest and the State of Libya, as a wholly owned state company. Ultimately, considering that both structural and functional criteria set forth in the Salini case are met in the case at hand, I reach to the conclusion that art. 8 of the ILC Articles is applicable and The State of Libya can be held liable for the acts of LIDCO, including non- payment of the Termination Fee, since LIDCO is under absolute control and direction of State of Libya, in terms of the said article. However, as the BIT does not contain an umbrella clause, non payment of the Termination Fee, by itself, even if it is attributable to the State of Libya under art. 8 of ILC Articles, cannot be qualified as a breach of BIT.

18. After determining that the acts of LIDCO are attributable to the State of Libya pursuant to art. 8 of ILC Articles under the circumstances of the case, whether a breach of treaty has occured on the part of the State of Libya remains as the sole question to be discussed. As mentioned above, Claimant alleges breach of BIT obligations to provide "full protection" and "fair and equitable treatment" due to lack of a stable framework and commercial and legal protection for its investment, while the State of Libya denies such allegations.

19. While in some bilateral investment treaties "fair and equitable treatment" and "full protection" form a single standard, in some others, they form separate obligations. Art. 2/2 of the BIT between the Republic of Turkey and the State of Libya falls within the second category:

"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."

As can be understood from the first phrase of article 2/2 of the BIT, providing *"fair and equitable treatment"* and *"full protection"* are separate obligations for the Contracting Parties. Second phrase of the article 2/2 prohibits unreasonable or discriminatory measures in order to protect investments, in addition to *"fair and equitable treatment"* and *"full protection"* obligations set forth in the first phrase of the article.

20. In recent case law, it is accepted that providing a stable framework for investments constitute an essential element of *"fair and equitable treatment"* obligation. In LG&E Energy Corp., LG&E Capital Corp, LG&E International Inc. v. The Argentine Republic, the Tribunal held stability of the legal and business framework as an essential element for fair and equitable treatment:

"In considering the context within which Argentina and the Unites States included the fair and equitable treatment standard, and its object and purpose, the Tribunal observes in the Preamble of the Treaty that the two countries agreed that "fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective use of economic resources". In entering the Bilateral Treaty as a whole, the parties desired to "promote greater economic cooperation" and "stimulate the flow of private capital and the economic development of the parties". In the light of these stated objectives, this Tribunal must conclude that stability of the legal and business framework is an essential element of fair an equitable treatment in this case, provided that they do not pose any danger for the existence of the host State itself". (ICSID Case No. ARB/02/1, LG&E Energy Corp., LG&E Capital Corp, LG&E International Inc. v. The Argentine Republic, Decision on Liability, para. 124).

Based on this determination, in the said case, the Arbitral Tribunal concluded that:

"... the stability of legal and business framework in the State party is an essential element in the standard of what is fair and equitable treatment. As such, the Tribunal considers this interpretation to be an emerging standard of fair and equitable treatment in international law." (para. 125).

21. In the same decision (LG&E Energy Corp., LG&E Capital Corp, LG&E International Inc. v. The Argentine Republic), the Arbitral Tribunal underlined that bad faith of the host State is not necessary in order to find a violation of fair and equitable treatment standard (para. 129). In another ICSID case between CMS Gas Transmission Company v. The Argentine Republic (ICSID Case No. ARB/01/8), the Arbitral Tribunal underlined that fair and equitable treatment is inseperable from stability and predictability;

"... In addition to the specific terms of the Treaty, the significant number of treaties, both bilateral and multilateral, that have dealt with this standard also unequivocally shows that fair and equitable treatment is inseperable from stability and predictability." (para. 276).

In this decision, it is confirmed that bad faith of the host State is not a condition for violation of fair and equitable treatment standard due to lack of stability and predictability (para. 280).

22. In compliance with the above mentioned decisions, it can be concluded that providing a stable framework for investments and maintining the stability is an essential element for fair and equitable treatment standard. The Preamble of the BIT between the Republic of Turkey and the State of Libya confirms this interpretation bu quoting;

"... Agreeing that fair and equitable treatment of investments is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources."

23. With a quite similar wording to the BIT between Argentina and the United States in LG&E Energy Corp., LG&E Capital Corp, LG&E International Inc. v. The Argentine

Republic (ICSID Case No. ARB/02/1, Decision on Liability, referred to above in para. 20), the BIT between the Republic of Turkey and the State of Libya also emphasises that fair and equitable treatment of investments is desirable in order to maintain a stable framework for investment. Considering the wording of the above referred recital, it is inevitable to accept that maintaining a stable framework for investments is an essential element of fair and equitable treatment under the BIT between the Republic of Turkey and the State of Libya.

24. Whether, in addition to physical security protection, granting commercial and legal protection to an investment is included within the scope of the obligation for providing "*full protection*" constitutes another important question to be analyzed. In Azurix Corp. v. The Argentine Republic (ICSID Case No. ARB/01/12), the Arbitral Tribunal held that:

> "*... when the terms "protection and security" are qualified by "full" and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security.*" (para. 408).

In another case, in Biwater Gauff Ltd. v. United Republic of Tanzania (ICSID Case No. ARB/05/22), the Arbitral Tribunal adhered to Azurix decision, by quoting:

> "*The Arbitral Tribunal adheres to the Azurix holding that when the terms "protection" and "security" are qualified by "full", the content of the standard may extend to matters other than physical security. It implies a State's guarantee of stability in a secure environment, both physical, commercial and legal. It would be in the Arbitral Tribunal's view be unduly artificial to confine the notion of "full security" only to one aspect of security, particularly in the light of the use of this term in a BIT, directed at the protection of commercial financial investments.*" (para. 729).

25. Based on the above mentioned decisions, I reach to the conclusion that when a BIT contains an obligation to provide "full protection" for the host state, like the one in the case at hand, the scope of the protection obligation of the host state extends to providing

commercial and legal protection to investments, in addition to physical security protection.

26. However, whether the State of Libya has breached its obligations to provide "fair and equitable treatment" and "full protection" under the BIT, by not providing a stable framework for investments in general and by not granting commercial and legal protection to Claimant's investment, shall be discussed under the circumstances of the case.

27. More than six years after the break-out of the Libyan Civil War, the political situation in Libya is still not stabilized and the governing authority in Libya is still contested. The Tripoli- based Presidency Council is currently challenged by the Tobruk-based House of Representatives and Tripoli-based militias. Although the international community supports and recognizes the Presidency Council as the sole national executive authority, the political and economical turmoil continues. As Martin Kobler, the Special Representative of the Secretary-General and the Head of United Nations Support Mission in Libya has stressed on April 19, 2017, in 7927th meeting of United Nations Security Council (S/PV/7927), the political instability threatens financial institutions of the country, including LIA, which owns and controls LIDCO through ESDF, on behalf of the State of Libya:

> *"Political divisions also threaten the cohesiveness of sovereign financial institutions, such as the Central Bank, the National Oil Corportion and the Libyan Investment Authority. It is difficult to produce a realistic common budget for the whole of Libya. The political vacuum complicates efforts to create a united security force and has encouraged some to advocate for a military solution to the Libyan crisis. History does not tolerate a power vacuum. Armed groups are gaining power, and Libya is witnessing new and heightened violence."* [1]

Unfortunately, the turmoil in the country continues in year 2018. Ghassan Salamé, Special Representative of the Secretary-General and the Head of the United Nations

[1] https://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7927&referer=/english/&Lang=E.

Support Mission in Libya, clarified that the specter of violence remains present in Libya[2]; clashes occurred recently between forces affiliated with two rival communities in the area at the eastern vicinity of Tripoli. Mr. Salamé, with his own words, describes the situation in Libya in 2018 as follows: "*Libya needs a competent and efficient government*", "*One which can deliver the public services the people desperately need. One that is able to unify the institutions of the country. One which can provide order and justice. One that will preside over the elections that will end the transition.*"[3]. In the 8159th Meeting of the United Nations Security Council (January 17, 2018), Mr. Salamé has clarified that the fragile and shaky status quo in the country is not sustainable, and stated that "*unless a national polity is rebuilt, no meaningful progress can be made in unifying national institutions, preventing outbreaks of violence or achieving widespread acceptance of the election results*"[4]. The Report of the Secretary-General Antonio Guterres on the United Nations Support Mission in Libya (S 2018/140, February 12, 2018), prove the collapse in the Libyan judicial system. Pursuant to this report, "*Armed groups engaged in ongoing fighting committed violations of international human rights and humanitarian law. The weakness of judicial institutions and the general climate of lawlessness and insecurity hampered victims' ability to seek protection, justice and redress.*"[5]. Human Rights Watch confirms the collapse in the Libyan judicial system, by stating that "*The criminal justice system has all but collapsed since 2014. Civilian and military courts in the east and south remained mostly shut, while elsewhere they operated at reduced capacity.*"[6].

28. Despite the fact that more than six years has passed following the Libyan Revolution and the break-out of the Libyan Civil War, unfortunately the political and economic turmoil is still pending in the country. In my understanding, the passive attitude of the

---

[2] Remarks of SRSG Ghassan Salamé to the United Nations Security Council, 21 March 2018; "*...Armed groups, including those formally integrated into the state structures, continue to operate outside of the law, perpetrating human rights abuses. Bodies bearing signs of torture have turned up in many locations. Libyan men, women and children are increasingly kidnapped for profit, even in the heart of the Capital. Citizens are arbitrarily arrested by shadowy security forces. People are held and abused in unofficial, official or quasi-official detention prisons.*", "*...we must be realistic. In a country awash with arms, disarmament will require time and much, much stronger national institutions.*", "*In my first briefing from Tripoli, I reported the consistent staccato of bullets overhead. The bullets are still there. The other day I was told that this was just "normal". For the sake of the Libyan people for whom we in the United Nations work, we must refuse to accept this normality.*"
(https://unsmil.unmissions.org/sites/default/files/srsg_salame_unsc_briefing_21march2018_english.pdf)

[3] https://news.un.org/en/story/2018/01/1000622.

[4] https://www.un.org/press/en/2018/sc13165.doc.htm.

[5] Para. 38, https://unsmil.unmissions.org/sites/default/files/n1803952.pdf.

[6] https://www.hrw.org/world-report/2018/country-chapters/libya.

State of Libya, against this unstable political and economic situation is not acceptable under the BIT. Considering that the Preamble of the BIT between the Republic of Turkey and the State of Libya foresees that fair and equitable treatment of investments is desirable in order to maintain a stable framework for investment, with reference to the LG&E Energy Corp., LG&E Capital Corp, LG&E International Inc. v. The Argentine Republic decision (ICSID Case. No. ARB/02/1, Decision on Liability, para. 124-125), under the standard of "fair and equitable treatment" set forth in article 2/2 of the BIT, I believe that the State of Libya is under an obligation to maintain a stable framework for investments, and to rebuild it as soon as possible when it is abolished. Nevertheless, in the case at hand, the State of Libya neither maintained this stable framework for investments nor showed sufficient efforts to rebuild it, despite the fact that more than six years has passed following the Libyan Revolution and the break-out of the Libyan Civil War. Under these circumstances, I reach to the conclusion that, fair and equitable treatment standard of the BIT is breached by the State of Libya due to inexistence of a stable framework for investments.

29. Moreover, I believe that art. 5 of the BIT, which has the heading "*Compensation for Losses*", is directly related with the dispute and therefore has particular importance for the case at hand. Pursuant to the said article;

> "*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.*"

30. This article, entitling investors to a compensation for the loss suffered due to war, insurrection, civil disturbance, or other similar events, is a clear reflection of fair and equitable treatment standard. Based on the assumption that granting a right to request payment of a compensation by the host State for the loss suffered due to such kind of events is a natural consequence of fair and equitable treatment standard, the article foresees that this compensation or other measures taken in favour of the investors of

the Contracting Party shall not be less favourable than the compensation or measures taken in favour of the host State's own investors and the investors of any third country. It is beyond doubt that the Civil War pending in Libya is included within the scope of this article.

31. Assuming that the Termination Agreement has never been concluded between LIDCO and the Claimant, the Claimant would be in a position to claim a compensation for termination of its investment due to the Libyan Civil War, under art 5 of the BIT. In other words, by directing LIDCO to conclude a Termination Agreement with the Claimant, the State of Libya avoided application of article 5 of the BIT in favour of the Claimant. The Claimant indeed was obliged to accept the offer of LIDCO for concluding a Termination Agreement, since art. 31 of the Contract dated May 13, 2008, entitle LIDCO to terminate the contract unilaterally at any time (even if there is no breach by the Claimant) on the condition of compensating the Claimant for the already accomplished works:

> Art 31- *Contract Termination*:
>
> "*If the overall benefit requires, then the first party has the right to terminate the contract at any time even if there is no mistake made by the second party on a condition of compensating the second party for the already accomplished work, if the compensation is valid*". (Use of the words "*overall benefit*" in this article, in my understanding, is additional evidence that proves LIDCO is acting on behalf of the State of Libya in line with the public interest, instead of pursuing a commercial one).

32. Considering existence of art. 31 in the Contract dated May 13, 2008 Claimant had no choice, but to accept concluding the Termination Agreement with LIDCO. Thus, I am of the opinion that the Termination Fee set forth in the Termination Agreement *de facto* replaces the compensation to be paid by the State of Libya to the Claimant, under art. 5 of the BIT, related with the termination of its investment due to the Libyan Civil War. As explained above (supra, para. 11- 17), since the State of Libya can be held liable for the acts of LIDCO under art. 8 of the ILC Articles due to its absolute control over LIDCO, the Termination Fee set forth in the Termination Agreement shall be qualified as a

compensation within the meaning of article 5 of the BIT, contractually undertaken by the State of Libya, itself. In compliance with this determination, I believe that non payment of the Termination Fee is tantamount to denial of compensation for the losses suffered by the Claimant in relation with its investment due to Libyan Civil War. This shall be considered as a breach of article 5 of the BIT and violation of the fair and equitable treatment standard under article 2/2 of BIT, in the wider sense of the word, since the right to be compensated for the loss suffered due to such kind of events is a natural reflection and consequence of the fair and equitable treatment standard.

33. On the other hand, since pursuant to the Contract dated May 13, 2008, construction materials used in the site belong to the Claimant and in line with art. 31 of the said Contract the Termination Fee covers compensation for the already accomplished part of the works until the date of termination, non payment of the Termination Fee simultaneously means indirect expropriation of the construction materials used by the Claimant for the already accomplished works, without prompt, adequate and effective compensation under article 4 of the BIT. Art. 4/2 of the BIT clearly foresees that compensation for expropriation shall be paid without delay. Considering that acts of LIDCO are attributable to the State of Libya under art. 8 of the ILC Articles, by not directing LIDCO to pay the Termination Fee, in my opinion, the State of Libya has also breached art. 4/1 and 2 of the BIT, and the "fair and equitable treatment" standard set forth in art. 2/2 of the BIT, as the obligation for paying compensation in case of direct or indirect expropriation is basically a reflection of "fair and equitable treatment" standard.

34. In line with the foregoing explanations, I am of the opinion that the State of Libya has breached its obligation to provide "fair and equitable treatment" under article 2/2 of the BIT vis-à-vis the Claimant. Following this determination, it shall be analyzed whether the State of Libya has breached its obligation to provide "full protection" under the said article of the BIT, simultaneously.

35. As mentioned above, the obligation to provide "full protection" includes providing commercial and legal protection to investments, in addition to physical security protection (supra, para. 24-25). In the case at hand, indeed, LIDCO is a listed company in the Libyan Stock Market. However, strong evidence suggests that the Libyan Stock

Market is currently not active, as the official website of the Market includes prices, news and announcements solely for the period between years 2010- 2013[7]. Assuming that the Libyan Stock Market is not currently functioning properly, such assumption leads us to the conclusion that LIDCO is not disclosing its financials regularly, as listed companies should have under the stock market regulations. As a matter of fact, solvency or insolvency of LIDCO is open to discussion and interrogation, since no properly disclosed financials of LIDCO, reachable for third parties are disclosed in the recent years (for the years following 2013). In my opinion, non performance of the disclosure requirements in line with the stock market regulations by LIDCO, by itself, shall be evaluated as lack of commercial and legal protection on the part of the Libyan State, vis-à-vis the investors who enter into a contractual relationship with LIDCO, including the Claimant, since these investors *de facto* lose their right of being informed for the material issues concerning LIDCO in terms of financial, commercial and legal sense. Without the information subject to disclosure in line with stock market regulations, investors dealing with LIDCO are left within an atmosphere of uncertainty, in terms of their commercial and legal decisions, related with their investments.

36. Moreover, it shall be underlined that LIDCO is not providing any reasons for non payment of the Termination Fee. LIDCO neither challenges the legality, existence and binding character of the Termination Agreement, nor puts forward insolvency as a reason for non payment, but simply prefers to ignore the payment requests of the Claimant (Transcript of Proceedings, November 6, 20017, page 93 lines 3-10 and 16-19). Assuming that LIDCO is insolvent and unable to pay its debts to third parties, the Libyan law should have leaded LIDCO to bankruptcy in order to protect its creditors, as much as possible. If this is the case, non application of bankruptcy procedure to LIDCO is lack of legal protection for its creditors, including the Claimant. Nevertheless, if this is not the case and LIDCO is currently solvent, as being a wholly owned and controlled State company LIDCO's acts are attributable to the State of Libya under art. 8 of ILC Articles, abstaining to provide a reason for non payment of the Termination Fee, regardless of the acceptability of the reason to be shown in legal sense, impair the legal situation of the Claimant. Because the Claimant is left within an atmosphere of uncertainty, by LIDCO and the State of Libya, in terms of legal steps to be taken against non performance, as the

[7] http://www.lsm.ly/English/Pages/default.aspx.

obligation to perform the payment of the Termination Fee is not clearly denied and the Claimant is put in a position to await the performance of the payment for several years before initiating the arbitral proceedings.

37. In the majority award issued by the honourable members of the Arbitral Tribunal, based on art. 51 of the Contract dated May 13, 2008 it is held that the Claimant should have gone to the Libyan courts against LIDCO in the first place, in order to claim payment of the Termination Fee. The first paragraph of art. 51 of the Contract dated May 13, 2008, is as follows:

> *"Art 51- The Role of the Libyan Judge-*
>
> *This contract, in regards to its explanation and execution, obeys the regulations, decrees and the applied tariffs which are used in Libya, and the Libyan Judge is responsible for dealing with the conflicts that may result from this contract."*

38. However, being terminated by the Termination Agreement dated March 18, 2013, the Contract dated May 13, 2008 is terminated with all its provisions, including art. 51. Therefore, the claim for payment of the Termination Fee is technically related with the Termination Agreement dated March 18, 2013, and not with the initial Contract dated May 13, 2008. In other words, in the case at hand, there is no dispute arising out of the Contract dated May 13, 2008, in technical sense. Since the Termination Agreement, that transforms Claimant's initial investment into a claim of money ("Termination Fee") which is also protected under the BIT as an investment does not contain a "choice of forum" clause, I believe that art. 51 of the Contract dated May 13, 2008 is irrelevant in the case at hand and the Claimant has a facultas alternativa in terms of article 8/2 of the BIT. Considering that the said article of the BIT enables the Claimant to make a choice between international arbitration and the courts of the host State, it is upto the Claimant to choose of one these alternatives as the forum for its claims. Therefore, in my understanding, article 51 of the Contract dated May 13, 2008 is irrelevant in terms of admissibility of the case and the Claimant is not under any contractual obligation to go to the Libyan courts in the first place.

39. In addition, even if it is accepted that art. 51 of the Contract dated May 13, 2008, is still binding and the Claimant is under a contractual obligation to go to Libyan courts against LIDCO in the first place before initiating the arbitral proceedings based on the BIT, the political situation and the unstable political envoirenment in Libya (as explained in supra, para. 27) constitutes a strong evidence that suggests failure of the judiciary system of the country. It will be contrary to the ordinary course of things to accept that the judiciary system of the country functions properly within a political envoirenment where the territory of the country is *de facto* divided into regions controlled by different power groups and where the governing authority is still contested. It will be extremely optimistic to assume that the judiciary system of the country functions properly, where Martin Kobler, the Special Representative of the Secretary-General and the Head of United Nations Support Mission in Libya has stressed on April 19, 2017, in 7927th meeting of United Nations Security Council (S/PV/7927) that the political instability evens threatens the existence of the financial institutions of the country and where the Report of the Secretary-General Antonio Guterres on the United Nations Support Mission in Libya (S 2018/140, February 12, 2018) reveals the collapse in the Libyan judicial system.

40. In my opinion, under these circumstances, regarding the proper functioning of the Libyan judiciary system, the rule of "*actori incumbit onus probandi*" ("the burden of proof rests on the plaintiff") is not applicable for two reasons. Firstly, instead of the Claimant, the State of Libya, as disfunction of one of its organs is at stake, is in a better position to prove that its judiciary system functions properly, if this is the case. Secondly, the ordinary course of things suggests a failure in the functioning of the judiciary system, parallel to the failure of all other organs and functions of the State of Libya. Therefore, I believe that the burden of proof regarding the proper functioning of Libyan judiciary system shall be shifted to the State of Libya, since being the host State under the BIT, the State of Libya is under an obligation to provide legal protection to Claimant's investment in compliance with its obligation to provide "full protection" to investors under the BIT, and proper functioning of the judiciary system is a *condictio sine qua non* for the existence of legal protection, at least in minimum standards.

41. Since there is no evidence in the file that proves proper functioning of Libyan courts, even if it is accepted that art. 51 of the Contract dated May 13, 2008 is still binding and the Claimant is under a contractual obligation to go to Libyan courts against LIDCO in the first place, it is highly presumable that a legal procedure which would have been initiated before Libyan courts would prove abortive and therefore would result in lack of legal protection for the investment of the Claimant. Based on this reasoning, even if it is accepted that art. 51 of the Contract dated May 13, 2008 is still binding and the Claimant is under a contractual obligation to go to Libyan courts against LIDCO in the first place, I believe that the burden of proof regarding the proper functioning of the Libyan judiciary system, which is not met in the proceedings, rests on the shoulders of the State of Libya.

42. In conclusion, considering the particular circumstances of the case, I am of the opinion that the State of Libya has breached its obligations to provide "full protection" and "fair and equitable treatment" under art. 2/2 of the BIT and is therefore responsible vis-à-vis the Claimant, in terms of the said treaty. As I dissent from the majority of the honourable members of the Arbitral Tribunal regarding the merits of the case against the State of Libya (Respondent No. 2), I also dissent with the majority award concerning the distribution of the costs of the proceedings, which in my opinion should have been imputed on the State of Libya (Respondent No. 2) in compliance with art. 38/5 of the ICC Arbitration Rules, excluding the costs to be imposed on the Claimant related with inclusion of LIDCO (Respondent No. 1) in the proceedings, over which the Arbitral Tribunal has no jurisdiction.

Based on the above mentioned reasons, I dissent from the majority of the honourable members of the Arbitral Tribunal as to the merits of the case against the State of Libya (Respondent No. 2).

Arbitrator

Prof. Dr. iur. Tolga Ayoğlu

Paris, June 14, 2018