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RULING OF MARCH 14, 2023

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Decision referred to the Court: Ruling of January 21, 2020 - President of the judicial court of Paris RG n° 20/00102

APPELLANT
STATE OF LIBYA
represented by the Director of its Department of Business Litigation of the Supreme Judicial Council domiciled in this capacity at said headquarters,
Essidi Street Courts Complex, Libya

Having as its counsel: Patricia Hardouin of the private firm 2H LLP, barristers and lawyers with the Paris bar, toque letterbox: L0056
Having as its litigators: Rémi Kleiman and Sarah Monnerville, of PARTNERSHIPS EVERSHEDS SUTHERLAND LLP (France), barristers with the Paris bar, toque letterbox: J014

RESPONDENT
ETRAK INSAAT TAAHHÜT VE TICARET ANONIM SIRKETI
Company incorporated under Turkish law
Represented by its legal or statutory representative domiciled in this capacity at the headquarters listed
Headquartered at: Kadikoy Fikirtepe Kasriali CAD Kombe Apt. n° 13/1, Istanbul, Turkey

Having as its counsel: Luca De Maria, of the private firm PELLERIN – DE MARIA – GUERRE LLP, lawyers with the Paris bar, toque letterbox: L0018
Having as its litigators: Thomas Clay and Taha Zahedi Vafa of the private firm THOMAS CLAY LLP, lawyers at the Paris bar

COMPOSITION OF THE COURT:

The case was heard on January 09, 2023, in public audience, before the court, composed of:
Daniel Barlow, Chamber president
Fabienne Schaller, Chamber president
Laure Aldebert, Counselor
who deliberated on it.

A report was presented to the audience by Daniel Barlow, per the conditions provided for by article 804 of the French Code of Civil Procedure.

Clerk during the hearing: Najma El Farissi

RULING:

- in the presence of both parties
- pronounced publicly by submission to the clerk of the Court, the parties having been previously advised per the conditions outlined in the second paragraph of article 450 of the French Code of Civil Procedure.
- signed by Daniel Barlow, chamber president, and by Najma El Farissi, clerk to whom the minutes of the ruling were issued by the signatory magistrate.

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I/ FACTS AND PROCEEDINGS

1. The court is seized of the appeal lodged by the State of Libya against an exequatur order pronounced on January 21, 2021, by the appointee of the president of the judicial court of Paris, who declared enforceable in France an arbitral award handed down in Geneva on July 22, 2019, under the aegis of the International Court of Arbitration of the International Chamber of Commerce, in a dispute between this State and the Turkish company Etrak Insaat Taahhüt Ve Ticaret Anonim Sirke (hereinafter: “Etrak”).

2. The dispute originated in Etrak's claim for payment of various invoices issued in execution of public works contracts concluded with Libyan entities in the 1980s. It gave rise to multiple proceedings.

3. In a ruling of October 29, 2012, the court of first instance of El Beida ordered the State of Libya to pay Etrak the sum of 1,906,360 Libyan Dinars (LYD), together with interest at the rate of 7.5% per year from January 18, 1991, as well as the sum of 1,000,000 LYD as damages.

4. On December 9, 2013, a transactional memorandum of understanding relating to the execution of this decision was signed by the company Etrak and the undersecretary of the Ministry of Finance of the State of Libya, by virtue of which Libya agreed to make two payments to Etrak, each in the amount of 2,710,154 LYD (hereinafter: “the settlement protocol”).

5. Failing to obtain the execution of this agreement, the validity of which will be contested by the State of Libya, the company Etrak, on August 29, 2016, sent a request for arbitration to the secretariat of the International Court of Arbitration of the International Chamber of Commerce, on the basis of article 8 of the Agreement signed on November 25, 2009, between the Turkish Republic and the Great Socialist People's Libyan Arab Jamahiriya Concerning the Encouragement and Reciprocal Protection of Investments, a bilateral treaty agreement which entered into force on April 22, 2011 (hereinafter: “the treaty”).

6. The arbitral tribunal was constituted on January 19, 2017.

7. By ruling of February 1, 2018, the ruling handed down by the court of first instance of El Beida was annulled, on appeal lodged by the State of Libya on October 29, 2012, on the grounds of lack of proper service on Libya.

8. By a ruling delivered orally on May 2, 2019, following proceedings in which Etrak was not represented, the Tripoli court annulled the settlement protocol of December 9, 2013, considering that the under-secretary of the Ministry of Finance was not competent to bind the State of Libya.

9. By award of July 22, 2019, the arbitral tribunal ruled in these terms:

> I. Respondent's objections against the Arbitral Tribunal's jurisdiction are rejected;
>
> II. The Arbitral Tribunal has jurisdiction over all of Claimant's claims based on the BIT and raised in this arbitration;
>
> III. Respondent has breached Article 2(2) of the BIT by failing to accord fair and equitable treatment to Claimant's Investment;
>
> IV. Respondent shall pay damages to Claimant in the amount of USD 21,865,554, including pre-award simple interest accrued at 4% per annum;
>
> V. Claimant's claims for moral damages are rejected;
>
> VI. All other requests and claims are rejected;
>
> VII. Respondent shall pay interest on the sum USD 21,865,554 awarded from the date of the notification of the Award at the rate of LIBOR +3% per annum, compounded annually;
>
> VIII. Each side shall bear its own costs and expenses associated with the proceedings;
>
> IX. Respondent shall pay the costs of this Arbitration fixed by ICC Court at USD 542,600. Therefore, Respondent shall pay USD 478,850 to Claimant as compensation for the costs already paid by Claimant.

10. On September 16, 2019, the State of Libya brought an action for annulment against this arbitration award before the Swiss courts, which will be dismissed by the Swiss Federal Court on November 2, 2020.

11. By order of January 21, 2020, the Court of Paris granted the arbitral award an exequatur, making it enforceable in France.

12. The State of Libya appealed against this order by declarations of March 30 and April 8, 2021.

13. By writ of August 30, 2021, it applied to the Paris judicial court for recognition and exequatur of the judgment rendered in Tripoli on May 2, 2019. On October 26, 2022, the pre-trial judge stayed this matter pending the outcome of this appeal.

14. By ruling of October 4, 2021, the Munich Court of Appeal rejected the request for enforcement of the arbitration award, of which the German courts had been seized by the company Etrak.

15. The pre-trial judge declared the investigation closed on December 13, 2022, with the case being called for a hearing on January 9, 2023.

II/ CLAIMS OF THE PARTIES

16. In its final summary submissions notified electronically on November 18, 2022, the State of Libya requests the court, in light of articles 1520, 1525, 122 and 910-4 of the French Code of Civil Procedure, to:

Principally:

- REJECT as inadmissible the request from Etrak Insaat Taahhüt Ve Ticaret Anonim Sirke to have the deed entitled "Agreement on the execution of the judgment" dated December 9, 2013, declared valid;

- REJECT as inadmissible the plea raised by the company Etrak Insaat Taahhüt Ve Ticaret Anonim Sirke alleging the lack of indirect jurisdiction of the Tripoli-North court to hear the request for annulment of the act entitled "Agreement on the execution of the judgment" dated December 9, 2013;

- DECLARE enforceable in France the judgment of the Tripoli-North court of first instance dated May 2, 2019; and

- REVERSE the ruling issued on January 21, 2020, (RG n°20/0010) by the President of the judicial court of Paris declaring enforceable the ICC Arbitration Award n° 22236/ZF/AYZ issued in Geneva on July 22, 2019, by the Arbitral Tribunal composed of Dr. Kaj Hobér (Chairman), Mr. John M. Townsend and Mrs. Jean Kalicki;

In the alternative,

- ORDER the stay of proceedings pending an irrevocable decision on the request for recognition and exequatur for all useful purposes, which the State of Libya has brought before the Judicial Court of Paris by summons of August 30, 2021;

In all circumstances,

- REJECT as inadmissible and unfounded the request of the company Etrak Insaat Taahhüt Ve Ticaret Anonim Sirke seeking to have the State of Libya condemned to the sum of 100,000 euros under Articles 32-1 and 559 of the French Code of Civil Procedure and 1240 of the French Civil Code;

- DISMISS the company Etrak Insaat Taahhüt Ve Ticaret Anonim Sirke's action to have the State of Libya condemned to the sum of 350,000 euros under Article 700 of the French Code of Civil Procedure;

- DISMISS all of Etrak Insaat Taahhüt Ve Ticaret Anonim Sirke's actions, claims and arguments;

- ORDER the company Etrak Insaat Taahhüt Ve Ticaret Anonim Sirke to pay the State of Libya the sum of 300,000 euros in application of the provisions of Article 700 of the French Code of Civil Procedure;

- ORDER Etrak Insaat Taahhüt Ve Ticaret Anonim Sirke to pay all costs of these proceedings, to be paid to Patricia Hardouin of the firm 2H LLP, and this, in accordance with the provisions of Article 699 of the French Code of Civil Procedure.

17. In its latest summary submissions communicated electronically on December 5, 2022, Etrak requests the court to:

– UPHOLD the exequatur order of January 21, 2020;

– REJECT the incidental request for exequatur of the Tripoli ruling of May 2, 2019

– DISMISS, more generally, all of the State of Libya's actions, claims and arguments;

– ORDER the State of Libya to pay the company Etrak Insaat Taahhüt Ve Ticaret Anonim Sirke the sum of 100,000 euros under Articles 32-1, 559 of the French Code of Civil Procedure and 1240 of the French Civil Code;

– ORDER the State of Libya to pay Etrak Insaat Taahhüt Ve Ticaret Anonim Sirke the sum of 350,000 euros under Article 700 of the French Code of Civil Procedure;

– ORDER the State of Libya to pay all the costs.

III/ GROUNDS OF THE RULING

A. On the procedure

18. The appeal lodged by the State of Libya on March 30, 2021 was reiterated on April 8 of the same year.

19. Two competing files were therefore opened and investigated together, which gave rise to the exchange of the same sets of writings and the same documents, the first under number RG 21/06118, the second under reference 21/06828.

20. The proper administration of justice requires ordering these two proceedings to be merged under the single roll number 21/06118, and adjudicated in a single ruling.

B. On the claims of the State of Libya

21. The court is principally seized of the appeal lodged by the State of Libya against the ruling by which the delegate of the president of the judicial court of Paris conferred the exequatur to the arbitral award rendered in Geneva, under the aegis of the International Court of Arbitration of the International Chamber of Commerce, on July 22, 2019.

22. For the purposes of this appeal, the appellant brought an incidental claim before the court to have the ruling rendered on May 2, 2019 by the Tripoli-North court of first instance declared enforceable in France.

23. This request, which constitutes an independent claim in the submissions of the State of Libya, is nonetheless closely linked to the appeal of Etrak's exequatur. It will therefore be examined jointly with the latter, the court following in this the approach adopted by the parties in their pleadings.

24. The court also notes that Etrak has not asked this court for a ruling holding the "Agreement on the execution of the ruling", dated December 9, 2013, declared valid. The request for dismissal or declaration of inadmissibility formulated to this end by the State of Libya is therefore devoid of purpose.

25. By virtue of article 1525 of the French Code of Civil Procedure, the decision ruling on a request for recognition or exequatur of an arbitration award rendered abroad is subject to appeal. The court may only refuse recognition or enforcement of the arbitral award in the cases provided for in article 1520 of the same code, which provides for action for annulment in the event that:

1° The arbitral tribunal has wrongly declared itself competent or incompetent; or

2° The arbitral tribunal was improperly constituted; or

3° The arbitral tribunal ruled without complying with the mission entrusted to it; or

4° The principle of contradiction has not been respected; or

5° The recognition or enforcement of the award is contrary to international public policy.

26. In the present case, two grounds of reversal are invoked by the appellant, one based on the contravention of international public order of the recognition or execution of the disputed arbitral award, the other, the incompetence of the arbitral tribunal which pronounced it.

(i) On the jurisdiction of the arbitral tribunal

27. The State of Libya concludes that the arbitral tribunal lacks jurisdiction *ratione materiae* due to the cancellation of the settlement protocol and the absence of investment within the meaning of the treaty.

28. It maintains, on the first point, that the settlement protocol was declared void under the terms of the Tripoli ruling of May 2, 2019, so that the investment no longer existed on the day the arbitral tribunal ruled. It adds, that independently of its international legality, this ruling establishes proof of the content of Libyan law and its conditions of application with respect to the invalidity of the Protocol, the arbitral tribunal having in this respect made an erroneous application of the civil doctrine of apparent authority.

29. It maintains, on the second point, that this settlement protocol does not constitute a protected investment within the meaning of the treaty invoked, in that it is purely a declaration of rights, and confines itself to expressing an alleged claim to a sum of money which, taken in isolation and independently of the execution of construction contracts, is not linked to an investment.

30. It explains that the arbitral tribunal was also incompetent *ratione temporis*, because:

- the settlement protocol and the amount owed which it stipulates are linked to construction contracts, the non-performance of which predates the entry into force of the treaty, thus running counter to the requirements of article 8(4) of this text;

- the conclusion of the settlement protocol did not put an end to the dispute which arose before the entry into force of the treaty;

- the dispute referred to the arbitral tribunal, sole and undivided, arose before the entry into force of this text;

- the settlement protocol was, from the point of view of the Libyan legal ruling, devoid of resolutory effect.

31. Finally, it invokes non-compliance with the bifurcation clause provided for in the treaty, holding that the dispute submitted to the Court of First Instance of El Beida and that submitted to the arbitral tribunal constitute a single and unique dispute, the formulated claims having the same causes, such that pursuant to the so-called "fork-in-the-road" clause provided for in article 8(3) of the treaty, the arbitral tribunal was no longer competent to rule once the proceedings were initiated by Etrak before the Libyan court.

32. Etrak claims, in response, that the arbitral tribunal has jurisdiction.

33. It maintains, on *ratione materiae* jurisdiction, that the appellant cannot challenge the formal validity of the settlement protocol since this agreement was regarded as valid by the Libyan authorities until 2017, and that the arbitral tribunal held that the signatory deputy minister had acted under apparent authority. It adds that, contrary to what the State of Libya maintains, the approval of the agreement by its Litigation Department was not required, as the Tripoli ruling cannot be invoked for the aforementioned reasons.

34. It considers that the settlement protocol constitutes an investment within the meaning of article 1(2)(b) of the Treaty, in that it refers to financial claims or any other rights having a financial value linked to an investment as a result of previous investments.

35. It explains, with regard to *ratione temporis* jurisdiction, that, as the arbitral tribunal found, the settlement protocol had put an end to the dispute between the parties so that the non-compliance with this agreement by the State of Libya is at the origin of a new dispute, born on April 1, 2014, namely after the entry into force of the treaty, the provisional connecting criterion to be taken into account in the context of article 10 not being the transactional protocol but the behavior of the State of Libya with regards to the aforementioned protocol, the fact that the settlement protocol is linked to previous investments being irrelevant.

36. Finally, it argues, on non-compliance with the bifurcation clause, that article 8(3) of the treaty is inapplicable in the present case since neither the test of triple identity nor that of the existence of a fundamental normative basis allow for the application of this clause, the two disputes being distinct, one based on non-performance of construction contracts and the other on non-performance of the transaction protocol.

ON THIS:

37. Pursuant to article 1520, 1°, of the French Code of Civil Procedure, to which the aforementioned article 1525 refers, it is up to the annulment judge to review the decision of the arbitral tribunal on its jurisdiction, whether it has declared itself competent or incompetent, by seeking all the elements of law or fact allowing the scope of the arbitration agreement to be assessed.

38. When the latter results from a bilateral investment treaty, the jurisdiction of the arbitral tribunal and the extent of its jurisdictional power depend on this treaty, the consent of the State to arbitration arising from a standing offer to arbitrate disputes with a defined category of investors relating to certain defined investments.

39. It is therefore necessary to assess the common will of the parties to have recourse to arbitration in the light of all provisions of the said treaty, the arbitral tribunal only being competent to hear the dispute if it falls within the scope of the treaty and all its conditions have been satisfied.

40. The review of the arbitral tribunal's decision on its jurisdiction is exclusive of any review of the merits of the award, the annulment judge not having to rule on the admissibility of the claims or on their merits.

41. The award that is the subject of this appeal was rendered within the framework established by the Agreement signed on November 25, 2009, between the Turkish Republic and the Great Socialist People's Libyan Arab Jamahiriya Concerning the Encouragement and Reciprocal Protection of Investments, entered into force on April 22, 2011.

42. Article 8 of this treaty provides for recourse to arbitration for settlement of disputes between one contracting party and investors of the other contracting party. It stipulates to this end that:

> 1. Disputes between one of the Contracting Parties and an investor of the other Contracting Party, in connection with his investment, shall be notified in writing, including detailed information, by the investor to the recipient Contracting Party of the investment. As far as possible, the investor and the concerned Contracting Party shall 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 [...], the dispute can be submitted, as the investor may choose, to the competent court of the Contracting Party in whose territory the investment has been made, or to international arbitration under: [...]
>
> (c) the Court of Arbitration of the Paris International Chamber of Commerce.
>
> 3. Once the investor has submitted the dispute to one of the dispute settlement procedures mentioned in paragraph 2 of this Article, the choice of one of these procedures is final.
>
> 4. Notwithstanding the provisions of paragraph 2 of this Article;
>
> (a) only the disputes arising directly out of investment activities which have obtained the 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;

43. Article 10, relating to the scope of the treaty, specifies that:

> "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."

44. Article 1 provides the following definitions:

> 1. The term "investor" means:
>
> a) Natural persons deriving their status as nationals of either Contracting 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.

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 relating to investments as defined in conformity with the laws and regulations of the Contracting Party in whose territory the property is situated,

d) Industrial and intellectual property rights related to investments such as patents, industrial designs, technical processes as well as trademarks, goodwill, know-how and other similar rights,

e) Business concessions conferred by law or by an investment contract, including concessions to search for, cultivate, extract, or exploit natural resources in the territory of each Contracting Party, provided that such investments are not in the nature of acquisition of shares less than 10 percent of a company through stock exchanges which shall not be covered by this Agreement.

45. Within the framework thus defined, the State of Libya criticizes the arbitral tribunal for having disregarded its material jurisdiction to rule on an investment which did not exist on the day it ruled, the settlement protocol invoked by the company Etrak having been declared invalid by the Libyan courts. It adds that the arbitral tribunal made an erroneous application of the doctrine of apparent authority, in disregard of Libyan law established by the Tripoli-North ruling.

46. However, it is not for the annulment judge, nor by extension the exequatur judge, to rule on the validity of the settlement protocol founding the claim invoked by Etrak to establish the existence of an investment within the meaning of the treaty. This point is indeed a matter of substance, independent of that relating to the scope of the consent of the State of Libya to arbitration. It is not, as such, subject to the review of jurisdiction, the appellant inviting the court in this way to review the merits of the award, which it cannot do.

47. This part of the plea, which is lacking in law, will therefore be dismissed, the assessment of the subject matter jurisdiction of the arbitral tribunal having to be based on the sole question of whether the investment claimed by the company Etrak to justify the arbitral jurisdiction falls within the categories of rights and property falling within the scope of the treaty.

48. The claimed investment results, according to the claims submitted to the arbitral tribunal, from the settlement protocol signed on December 9, 2013, the purpose of which is to adjust the conditions for the execution of a court decision that ordered the Libyan State to pay sums of money corresponding to unpaid invoices relating to construction works carried out in Libya before 1991 as well as to damages. This settlement protocol requires Libya to pay Etrak a sum of money calculated on the basis of a 10% discount granted by Etrak on the principal amount of the judgment, in addition to a reduction of interest for a period of one year, and a waiver of the costs of the proceedings and enforcement. To this end, it stipulates a payment in two instalments, each bearing interest.

49. The court finds that this agreement, which creates a payment obligation on the part of the State of Libya towards the company Etrak, is a “claim to money” within the meaning of article 1, 2, b) of the aforementioned treaty.

50. The debts thus consecrated relate to previous investments made on Libyan territory, their primary origin being in the non-payment of services related to construction works, carried out in Libya between 1980 and 1991, the execution of which is not disputed.

51. The argument of the State of Libya that it has not been demonstrated that the public works contracts invoked in this respect by Etrak constitute "commercial or industrial concessions or any other category of investments" covered by the treaty, is in this respect ineffective, as the performance of construction work in execution of contracts entered into by a private company with Libyan public authorities, as produced by the respondent, fall well within this category, the list set out in article 1(2) of the treaty, which includes "every kind of asset", not being exhaustive.

52. Nor can it be considered that the dispute submitted to the arbitral tribunal is beyond its jurisdiction for being a purely contractual dispute, as the State of Libya maintains, since, although it finds its source in the non-performance of a settlement protocol, the dispute nevertheless concerns the non-payment of a debt related to an investment, in accordance with article 1(2) of the treaty, as it is clear from the foregoing observations.

53. The second branch of the plea alleging lack of *ratione materiae* jurisdiction of the arbitral tribunal must therefore be rejected.

54. With regard to *ratione temporis* jurisdiction, article 10 of the treaty limits the offer of arbitration to disputes after April 22, 2011, by stating that the text "shall not apply to disputes that have arisen before its entry into force."

55. The date of completion of the investments invoked, however, is irrelevant, as the same article specifies that these investments may be carried out "before or after [its] entry into force".

56. It is therefore important to assess the date on which the dispute submitted to the arbitral tribunal arose, which alone determines the possibility of resorting to arbitration.

57. The State of Libya sets this date before the entry into force of the treaty, arguing that the dispute originates in contractual breaches prior to 2011, which only the payment of the debt could resolve. It specifies that the 2013 settlement protocol has not put an end to this dispute, of which it underlines the unique and undivided nature, the court decision as well as the agreement which arranges its execution being in this respect without effect, for lack of modifying the situation of the debtor, in the absence of execution, both in terms of international law and the Libyan legal order.

58. The court notes, however, that the dispute submitted to the arbitral tribunal relates to the non-compliance by the State of Libya with the commitments made in the settlement agreement concluded on December 9, 2013, which does not limit itself to providing for the pure and simple execution of a previous legal decision, the purpose of which goes beyond the mere payment of previous claims, to include damages and interest, but records reciprocal concessions by the parties and expresses their desire to put an end to their previous dispute by the abandonment, in article 7, of all legal proceedings related to this dispute, which must therefore be regarded as resolved by this agreement. The non-execution of this agreement, like the contestation of its validity by the State of Libya, thus gives rise to a new dispute which, arising after the entry into force of the treaty, is independent thereof.

59. The principles set out in Article 31 of the Vienna Convention of May 23, 1969, according to which an international treaty must be interpreted in good faith, according to the ordinary meaning to be attributed to the terms it uses, in their context and in the light of its object and purpose, are not such as to call this analysis into question.

60. The treaty in question does not in fact provide any definition of the dispute, the emergence of which gives rise to the offer of arbitration. This notion must therefore be understood in its ordinary, commonly-accepted sense of disagreement or dispute on a point of law and fact.

61. In this respect, the argument advanced by the State of Libya, according to which only the payment of the debt would be capable of resolving the first dispute, stems from an interpretation that goes beyond the terms of the treaty, by adding a condition it does not provide for. It also ignores the fact that the sums recorded in the settlement protocol are not identical to the "debt" resulting from unpaid amounts alone.

62. Nor can it be concluded that there has been a breach of the principle postulated in Article 28 of the Vienna Convention, which provides that the provisions of a treaty shall not bind a party with regard to a deed or fact which predates its entry into force, or a situation which had ceased to exist on that date, since the dispute in question relates to the compliance with and the calling into question of a settlement protocol made subsequent to the entry into force of this text.

63. Finally, above and beyond this, the court notes that if the origin of the dispute must be assessed in the international legal order, the provisions of Libyan law, to which the parties devote substantial developments, tend towards the same meaning, given that article 548 of the Libyan Civil Code, which the experts heard by the arbitral tribunal concluded applied to the settlement protocol, provides that a compromise such as this agreement resolves all prior disputes.

64. It is therefore right that the arbitral tribunal declared itself competent *ratione temporis*.

65. Finally, the State of Libya denounces the non-respect of the bifurcation clause provided for in article 8(3) of the treaty, which excludes submitting to arbitration a dispute which has already been referred to the local courts.

66. This argument is, here again, inoperative, as Etrak rightly points out that the dispute submitted to the arbitration tribunal, which stems from non-compliance with the settlement protocol, presents a different object and cause from the dispute settled by the court of El Beida in 2012 as is clear from previous findings.

67. It follows that the grounds put forward to conclude that the arbitral tribunal lacks jurisdiction must be rejected in their entirety.

(ii) On the contravention of international public policy

68. The State of Libya argues, in essence, that the disputed arbitral award cannot be enforced in France due to being irreconcilable with the ruling rendered by the Tripoli-North court of first instance, which predates it, and is invested in France with substantial effectiveness and the authority of res judicata.

69. It notes that the question of the validity of the settlement protocol was, according to the arbitral tribunal, a prerequisite to the examination of Etrak's claims, both on jurisdiction and on the merits, such that this tribunal could not rule on the validity of this agreement after the Libyan court, which was competent to hear it, had declared it null and void.

70. It argues that the exequatur which is provisionally attached to the award does not preclude the examination based on this plea, notwithstanding the latest case-law on the matter, according to which the contravention of international public order based on the irreconcilability of rulings is retained when the foreign judgment has been granted exequatur, when the court is also seized of a request for incidental exequatur of the foreign ruling in question, which is the case here. It adds that the exequatur with which the disputed award is covered, is under debate before the court, which derives the power to refuse it from article 1525, 4° of the French Code of Civil Procedure, and considers, in response to the plea developed by Etrak, that article 1526 is unrelated to this question, as the suspensive nature of the appeal is not linked to the extent of the referral to the court for the examination of the heads of control.

71. It explains that the declaratory judgment on assets issued by the Tripoli court automatically has the authority of res judicata and produces its effects in France as soon as it is pronounced, independently of any declaration of exequatur, when enforcement measures are not sought.

72. Emphasizing the compliance of this ruling with the French criteria of international regularity, it argues that:

- the Tripoli court was competent to rule on the validity of the settlement protocol which, governed by Libyan law, did not contain any arbitration clause, the arbitral tribunal constituted under the BIT having no exclusive jurisdiction to rule on this point and the company Etrak having not contested the indirect jurisdiction of the Libyan judge during the arbitration so that it is now inadmissible to do so;

- the Tripoli ruling is consistent with substantive international public order, and Etrak may not avail itself here of the exequatur provisionally granted to the award, except to deny any possibility of review by the Court of Appeal;

- this ruling is in accordance with substantive international public order, Etrak having been advised of the proceedings initiated in Tripoli in which it chose not to participate, whereas it had all the time necessary to prepare and assert its defense;

- no fraud against the law can be established, the Libyan courts being competent to rule on the validity of the settlement protocol.

73. Noting that the irreconcilability between the arbitral award and the Tripoli judgment, not disputed by the Respondent, is clear, it argues that the conflict between one and the other must be resolved in favor of the first judgment rendered, in application of the prior tempore principle, recommended in matters of private international law, which makes it possible to avoid a race for exequatur.

74. In response, Etrak argues that the recognition or enforcement of an arbitral award in violation of the res judicata effect of a foreign ruling not bearing exequatur is not likely to violate French international public policy to any significant extent within the meaning of article 1520, 5°, of the French Code of Civil Procedure, the control exercised in this respect by the appeal judge of the exequatur order only attaching to examine if the execution of the arbitral award manifestly, effectively and concretely conflicts with French international public policy.

75. It maintains, on the grievance based on the irreconcilability between the enforced arbitration award and the Tripoli ruling, that the case-law makes the taking into consideration of such a conflict conditional on the fact that the decisions in question must be equally enforceable on the French territory, and regards as erroneous the plea alleging that the court is seized of a request for exequatur of the foreign ruling, noting that this request is of a dilatory and artificial nature, that it does not have the effect of rendering “equally enforceable” conflicting decisions, only the arbitration award being to date covered by the exequatur, and

that the appellant's reasoning would suppose that this exequatur was no longer established or that its effectiveness was relativized, which is not the case.

76. It specifies that as the appeal lodged against the exequatur order is not suspensive, pursuant to Article 1526 of the French Code of Civil Procedure, and its execution not having been the subject of any request for adjustment during the proceedings, the disputed award is subject to exequatur and, as such, is enforceable in France, which is not the case with the Tripoli ruling.

77. It maintains that foreign rulings declaring assets do not automatically have the authority of res judicata in France, the Court of Cassation having never extended the benefit of this recognition to these rulings, and maintains that the conflict between the Tripoli ruling and the arbitral award must be resolved in favor of the latter, no rule obliging the arbitral tribunal to stay the proceedings pending the decision of the court of Tripoli, the arbitral tribunal having the jurisdiction to rule on its own jurisdiction. Moreover, since the Tripoli court was seized after the constitution of the arbitral tribunal, the application of the prior tempore principle is neither justified, nor legitimate, nor appropriate in this case.

78. Finally, it argues that the Tripoli ruling does not meet any of the conditions of international regularity of rulings rendered abroad, stating in this regard that:

- the Tripoli court of first instance violated the jurisdiction of the arbitral tribunal, for having been seized on March 25, 2018, in order to have the settlement protocol canceled, whereas this question had been expressly submitted to the arbitration court constituted since January 19, 2017, thus characterizing a fraud in the jurisdiction;

- the recognition of this judgment is likely to violate in a manifest, effective and concrete manner, the substantive French international public policy, as being irreconcilable with an arbitral award bearing exequatur in France;

- this ruling was taken in violation of the international public policy of proceedings, as the State of Libya did not provide proof of delivery of the affidavit of service to the company Etrak, who was thus prevented from exercising its rights of defense during proceedings before the Tripoli court of first instance;

- it was obtained by fraud, the referral to the Libyan court constituting a maneuver whose sole purpose was to exempt the State of Libya from its obligations before the arbitral tribunal.

ON THIS BASIS:

79. Article 1520, 5°, of the French Code of Civil Procedure, to which article 1525 refers, allows for recourse to annulment when the recognition or execution of the award is contrary to international public order.

80. The international public policy in the light of which the court’s review is carried out, means the conception that the French legal order has of it, that is to say the values and principles which it cannot ignore, not even in an international context.

81. The inspection carried out by the judge for the defense of international public policy is only concerned with examining whether the execution of the provisions taken by the arbitral tribunal conflicts in a manifest, effective, and concrete manner with the principles and values included in the international public policy.

82. Particularly likely to constitute such a violation, is the irreconcilability of the award complained of, with another decision, decisions being irreconcilable when they entail mutually exclusive consequences.

83. Disregard of the res judicata effect of an arbitral award does not, however, in itself constitute a violation of international public policy, only the recognition or execution of an award that is irreconcilable with a domestic or foreign court decision that has previously been granted exequatur in France, is likely to constitute a manifest, effective, and concrete violation of international public policy.

84. In the present case, the State of Libya invokes the irreconcilability of the arbitral award, the exequatur of which is contested with the ruling rendered by the Tripoli-North court of first instance on May 2, 2019.

85. This irreconcilability is regarded as a given by the parties, the conflicting rulings being mutually exclusive, the arbitration award indeed giving effect to a settlement protocol declared null by the court of Tripoli-North.

86. As the ruling in question is not, as it stands, subject to exequatur in France, the authority of res judicata attached to this decision, put forward by the appellant, and its alleged recognition *de plano* because of its declaratory nature of assets, cannot, however, by virtue of the principles recalled above, characterize the alleged breach of international public policy.

87. The court is nonetheless seized of an interlocutory application seeking to have this ruling declared enforceable in France.

88. In this regard, it is accepted that exequatur, for the purposes of recognition or enforcement of a foreign ruling, may be the subject of an interlocutory application in a proceeding which does not have this ruling as its main object, including for the first time on appeal when the party concerned was not constituted in first instance.

89. The company Etrak, which confines itself to noting the "artificial" nature of this application, does not contest its admissibility, the court noting here that the State of Libya was not represented during the proceedings on request having led to granting the exequatur of the arbitration award that is the subject of this appeal.

90. In law, it follows from the provisions of Article 509 of the French Code of Civil Procedure, that rulings handed down by foreign courts are enforceable on the territory of the French Republic in the manner and in the cases provided for by law.

91. To grant exequatur outside of any international convention, it is up to the French judge to ensure that three conditions are satisfied, namely the indirect jurisdiction of the foreign judge, the compliance of the decision rendered with substantive and procedural international public policy, and the absence of fraud.

92. The international jurisdiction of the foreign judge who ruled on the decision whose exequatur is requested, is defined in contrast to the direct jurisdiction of the French judge seized on the merits: any time the French rule for resolving conflicts of jurisdiction does not attribute exclusive jurisdiction to the French courts, the foreign court must be recognized as competent if the dispute is linked in a specific way to the country in which the judge was seized, and if the choice of jurisdiction was not fraudulent.

93. Seized of a request for recognition or exequatur of a foreign decision, the court addressed must verify the indirect jurisdiction of the foreign judge, without regard to the arbitration clause opposed to it.

94. In the present case, the Tripoli-North court of first instance, in its ruling of May 2, 2019, annulled the settlement protocol signed on December 9, 2013, by the company Etrak and the under-secretary of the Libyan Ministry of Finance.

95. The claim settled by this decision clearly does not fall within the exclusive jurisdiction of the French courts, as it concerns the validity of an agreement relating to the consequences of a conviction pronounced against the State of Libya for the benefit of a Turkish company.

96. The very purpose of the action giving rise to this ruling characterizes the existence of a connecting link between the dispute and the country of the judge who ruled, wherein the criterion based on the indirect jurisdiction of the Libyan judge must be regarded as fulfilled.

97. The breach of international public policy of procedure invoked by Etrak does not appear to be demonstrated.

98. If, contrary to what the State of Libya maintains, it cannot be taken for granted that this company was duly summoned in this proceeding, in which it did not participate, or that it was notified of its existence from its origin, in April of 2018, the exhibits produced to this effect by the Appellant not demonstrating that the Respondent had been effectively informed on this point, it remains nonetheless established that Etrak was informed, during the arbitration, of the existence of this proceeding, and that it was provided with all necessary documentation in August of 2018, as appears from the very terms of the award, with enough time for it to prepare its defense, the constraints it invoked on this last point being unsubstantial, as they were not substantiated by any probative evidence.

99. In these circumstances, it cannot claim a breach of international procedural public policy, which does not require that the defendant have actually been affected by the document initiating the proceedings, but merely that they were placed in a position to become aware of the existence of the proceedings and to prepare their defense, which is indeed the case here.

100. It is also established that this company was notified of the contested ruling, and did not exercise any recourse against it, such that the decision became final.

101. Nevertheless, Etrak rightly points out that recognition of the ruling for which enforcement is sought would be likely to create a situation of irreconcilability with the award that is the subject of this appeal, which, notwithstanding the exercise of this appeal, is already recognized by the French legal system, the order issued by the president of the Paris court being provisionally enforceable.

102. While true that this decision, as the subject of this appeal, is not final, and the State of Libya invokes the breach of international public policy which would result from the exequatur of the Tripoli-North ruling, the interlocutory application that it makes in this sense invites the court to create, by the decision that it is called upon to render, the irreconcilability that this State intends to denounce. In doing so, this request places the court in a situation of legal aporia which would lead it to itself cause the breach of international public policy which it is being requested to prosecute.

103. The anteriority of the Tripoli-North court ruling cannot, in this respect, justify the priority invoked by the appellant since this ruling was rendered in proceedings initiated after the referral to the arbitral tribunal, even though the question of the settlement protocol's validity was submitted to it and that it did indeed fall within its jurisdiction on the merits, in that it determined the fate of the claims it was called upon to adjudicate, the action taken by the State of Libya before the state judge having here no other purpose than to impede the execution of the arbitration award.

104. The interlocutory application for exequatur must, under these conditions, be dismissed, thus depriving the grievance arising from the conflict between the contested award and relevant international public policy.

105. In view of all of these considerations, the appeal lodged by the State of Libya should be dismissed and the exequatur order issued by the appointee of the president of the Paris judicial court on January 20, 2021, confirmed.

C. On the counterclaim brought by the company Etrak

106. The company Etrak maintains that the appeal lodged by the State of Libya is part of a series of appeals brought for dilatory purposes, which consists of an instrumentalization of justice and whose lack of substantiation Etrak denounces. It states that it reserved the right, from the very set of pleadings, to submit a request for a condemnation on this ground, and notes that the State of Libya has demonstrated unfair behavior by providing itself with means of annulment of the award during the arbitral proceedings.

107. The State of Libya concludes that this request is inadmissible pursuant to article 910-4 of the French Code of Civil Procedure, in the absence of a claim raised by Etrak in its submissions as a respondent, the request subsequently submitted not aiming to reply to the appellant's summary conclusions, and Etrak being unable to justify the occurrence of a new fact. It adds that the proceeding cannot be described as abusive, as its requests are manifestly well-founded and legitimate.

ON THIS BASIS:

108. Pursuant to article 559 of the French Code of Civil Procedure, the appellant may, in the event of a dilatory or abusive principal appeal, be sentenced to a civil fine of a maximum of 10,000 euros, without prejudice to damages and interest claimed from them.

109. Such a conviction presupposes the demonstration of a fault committed in the exercise of the right to act, that could cause the action to degenerate into abuse, the award of damages being subject to the existence of prejudice with a causal link to this fault.

110. Article 910-4 of the same code provides that on pain of inadmissibility, raised automatically, the parties must present, from the conclusions mentioned in articles 905-2 and 908 to 910, all of their substantive claims. Inadmissibility may also be invoked by the party against whom subsequent claims are made. However, without prejudice to paragraph 2 of article 802, the claims intended to reply to the opposing conclusions and documents, or to rule on questions arising from the intervention of a third party or the occurrence or revelation of a fact subsequent to the first conclusions, shall remain admissible, within the limits of the heads of the contested ruling.

111. If, pursuant to article 566 of the same code, the parties may explain the claims which were virtually included in the claims and defenses submitted to the first judge, and add to these all the claims which are ancillary, consequential, or complementary thereto, these substantive claims must still be concentrated in the first submissions of the parties.

112. In the present case, the respondent's submissions filed by the company Etrak on January 31, 2022, did not include, in their operative part, any request for the State of Libya to be convicted for abuse of procedure, as this claim was subsequently formulated.

113. Although these pleadings specify, in the preamble to the part devoted to discussion, that “the Defendant specifies that it reserves, within the framework of its future pleadings, the right to request from this Court that it convict the Appellant of abuse of procedure if it persists in maintaining its appeal, which has all the characteristics of a dilatory remedy”, it must be noted that this statement does not constitute a claim within

the meaning of article 4 of the French Code of Civil Procedure, as it is not included as such within the operative part of these pleadings.

114. Etrak's request for a conviction for abuse of procedure must, under these conditions, be declared inadmissible.

D. Costs and expenses

115. The unsuccessful State of Libya will be ordered to pay the costs, its claim based on article 700 of the French Code of Civil Procedure being dismissed.

116. This State will also be ordered to pay the respondent company the sum of 150,000 euros, to cover the irrecoverable costs incurred by the latter for the purposes of the proceedings.

IV/ OPERATIVE PART

On these grounds, the court:

1) Orders the joinder of the proceedings entered on the roll under numbers RG 21/06118 and 21/06828, to be merged under the single roll number RG 21/06118;

2) Rejects the request for exequatur of the ruling of the Tripoli-North court of first instance of May 2, 2019;

3) Upholds the exequatur order issued on January 21, 2020, under the number RG n°20/0010, by the president of the Paris court, declaring enforceable the ICC Arbitration Award n° 22236/ZF/AYZ rendered in Geneva on July 22, 2019;

4) Declares inadmissible the counterclaim for conviction for abuse of process brought by the company Etrak Insaat Taahhüt Ve Ticaret Anonim Sirke;

5) Rejects the request made by the State of Libya on the basis of article 700 of the French Code of Civil Procedure;

6) Orders the State of Libya to pay Etrak Insaat Taahhüt Ve Ticaret Anonim Sirke the sum of one-hundred-and-fifty thousand euros (€150,000) under article 700 of the French Code of Civil Procedure;

7) Orders the State of Libya to pay the costs.

THE CLERK, THE PRESIDENT,