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INVESTMENT TREATY ARBITRATION BETWEEN LIBYA AND TURKISH CONTRACTORS: TEMPORAL VALIDITY OF TURKEY-LIBYA BILATERAL INVESTMENT TREATY

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I. Introduction

Investment arbitration is an exciting topic for arbitration practitioners who are also interested in practicing public international law. It can be considered a hybrid practice bringing public and private international law together: where investors can benefit from the investment treaty provisions in which states commit to provide a certain standard of protection to the investors of the other contracting party investing in their country.

While we intend not to elaborate on fundamental investment arbitration terminology or what the fundamental principles of promotion and protection of investments applicable to the merits of the dispute are, we will inform the reader on applicability of relevant investment treaties between Turkey and Libya to investor-state disputes relating to the events took place in Libya since early 2011; and respective jurisdictional issues which are continuing to be hot topics to this date.

In this article, we will firstly summarize the said events where we also mention the presence of Turkish contractors in Libya. We will then explain the investment treaty regime between Turkey and Libya, and finally focus on the temporal application of the Turkey-Libya Bilateral Investment Treaty ("**Turkey-Libya BIT**") and its alternatives with case examples and frequently encountered legal issues.

II. Construction Market in Libya and Involvement of Turkish Investors

Factual Background

Libya's construction market has been one of the most significant markets for Turkish contractors since their first ventures to invest in foreign countries in the 1970's. According to the Turkish Contractors Association's ("**TCA**") Turkish Contracting in the International Market Report published in March 2018 ("**TCA Report**")[1], Libya was the first country which the Turkish contractors collectively invested in and it was the leading foreign market for them until the 1990's, before dropping to second

place. Between 2000 and 2009, Libyan market maintained the second place and had a 12.4% share in the total value of Turkish contractors' projects in foreign countries, *i.e.* USD 42 billion.

According to the TCA Report, between the years 1972 and 2017, Turkish contractors undertook 602 projects in Libya with the total value of approximately USD 29 billion. Even though such number hardly increased since 2011, it corresponds to 8% of the total value of all projects Turkish contractors undertook outside Turkey, between the same 45 years period.

By 2011, there were over 200 Turkish contractors operating in Libya who were awarded 124 projects valued at USD 8 billion. Turkish companies were estimated to hold USD 2.5 billion in assets, funds and pending reimbursements in Libya and another $1.4 billion in overdue payments.[2]

Disruption of the investment environment

From 17 February 2011 onwards, protests broke out and Libya experienced a full-scale revolt, triggering a civil war in the country. As the -then- Libyan government, opposing rebel groups, local tribal militias fought against each other for the country's political, territorial and economic control, working conditions in the country increasingly became non-secure. Turkish contractors reported occupations of construction project sites by the parties to the conflict, theft in the worksites and damages on equipment, machinery and buildings by looting or bombing. Most of the companies controlled or owned by Turkish contractors ended up evacuating their personnel and abandoning their investments. On 23 October 2011, the National Transitional Council ("**NTC**") declared that Libya had been liberated[3].

Following the parliamentary elections held on 7 July 2012, the General National Congress ("**GNC**")[4] replaced NTC and in November 2012, Libya's first elected government was sworn in[5]. As a result, at the end of 2012, series of resumption agreements were negotiated and signed between Turkish contractors and the Libyan state entities for resumption of certain projects that were still ongoing prior to the 2011 revolution.

However, in May 2014, a second civil war emerged in Libya and many, if not all, construction and infrastructure projects were once more disrupted and companies had to abandon their investments again.

As the security concerns persist, some foreign investors try to conclude new deals or resume their existing projects in Libya, while a considerable number of foreign investors, among which several Turkish contractors opt for investment treaty arbitration. Some of the cases have already been concluded while many remain to be concluded, presumably to take their place within the landmark decisions.

III. Investment treaty regime between Turkey and Libya

To determine whether an investor enjoys investment treaty protection in a particular state, the state where the foreign national investor is investing in ("**Host State**") and the state which the said investor is a real person national of/or a legal entity registered in ("**Home State**") must have acceded to an applicable investment treaty which affords the investor sufficient protection such as investor-state arbitration allowing direct recourse to the state.[6] Naturally, for the national of the Home State to take advantage of the protection afforded by such investment treaty, such national needs to qualify as an 'investor' which is often defined by the treaty itself, otherwise determined pursuant to the principles established by the investment arbitration precedent set by arbitral tribunals such as those constituted by the International Centre for Settlement of Investment Disputes ("**ICSID**") pursuant to vast amount of international investment treaties. Lastly, the cause of action to be asserted by the investor also needs to be within the material and temporal scope of such investment treaty.

In this case, there are two investment treaties under which investors of each state may initiate their investment claims through international investment arbitration. The first one is the investment agreement of the Organization of Islamic Cooperation ("**OIC**") to which Turkey and Libya are both parties, namely, the Agreement for Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference[7] ("**OIC Investment Agreement**") entered into force in 1988 and in force between Turkey and Libya since 13 May 1996. The second investment treaty is the Agreement between the Republic of Turkey and the Great Socialist People's Libyan Arab Jamahiriya concerning the Reciprocal Promotion and Protection of Investments ("**Turkey-Libya BIT**") which, despite being signed on 25 November 2009, entered into force on 22 April 2011[8] only after the outburst of the civil unrest in Libya.

In order to assert claims under these two investment treaties, investors must demonstrate that they qualify as investors who have been afforded protection by the Host State and that their construction contracts and relevant assets in relation to these contracts meet the definition provided in the relevant provisions of these treaties therefore qualify as investment.

As to investor-state dispute resolution, we should mention that Libya is not a contracting state to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States[9] ("**Washington Convention**" or "**ICSID Convention**"). Therefore, arbitration under the ICSID Convention is not available to Turkish investors. On the other hand, we note that Libya has a history of respecting arbitral awards given pursuant to the Arbitration Rules of the International Chamber of Commerce ("**ICC**").[10]

Application of the Turkey-Libya BIT and the OIC Investment Agreement to Turkish contractors' claims

Recognizing that each case has unique circumstances and should be evaluated by arbitral tribunals on their own terms, we will briefly consider whether Turkish construction companies in Libya would qualify as investors and their business would qualify as investment below, then move to the dispute resolution provisions of these treaties and assess their applicability.

The Turkey-Libya BIT defines the term "investor" under

Article 1 as natural persons deriving their status as nationals of either Contracting Party and corporations, firms or business associations incorporated or constituted under the Turkish or Libyan law and having their headquarters in the territory of Turkey or Libya who have made an investment in the territory of the other Contracting Party. Turkish construction companies incorporated under Turkish law, entering Libyan market to undertake major infrastructure projects, mass housing projects, hospitals, shopping malls together with several businesses in the retail sector would therefore, in principle, qualify as investors under the Turkey-Libya BIT. The definition of investor under Article 1(6) of the OIC Investment Treaty is the same.

The term "investment" is broadly defined under Article 1 of the Turkey-Libya BIT which includes "*every kind of asset in particular, but not exclusively: (a) shares, stocks or any other form of participation in companies, (b) returns reinvested, claims to money or any other rights having financial value related to an investment, (c) movable and immovable property, as well as any other rights as mortgages, liens, pledges and any other similar rights related to investments as defined in conformity with the laws and regulations of the Contracting Party in whose territory the property is situated, (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 (…)*". The OIC Investment Treaty has a broader definition of investment as it states in its Article 1(5) that the contribution of capital in one of the permissible fields in the territories of a contracting party with a view to achieving a profitable return, or the transfer of capital to a contracting party for the same purpose, in accordance with [the OIC Investment Agreement] means investment. In other words, if an investor satisfies, among other requirements, these three criteria (capital contribution, investing in a permissible field and intending to achieve a profitable return) then its investment would, in principle, qualify as an investment made under the OIC Investment Agreement.

As mentioned above, our focus is on the Turkish contractors operating in the Libyan market. Provided that these contractors qualify as investors pursuant to the relevant provisions of Turkey-Libya BIT and OIC Investment Agreement, then, their capital contributions such as assets, know-how, equipment, labour and services related to the projects they undertook would, in principle, qualify as investment.

Both Turkey-Libya BIT and the OIC Investment Agreement contain provisions regarding the standards of treatment and protection of the investors of both states and their investments in each other's territories. These treatment and protections include some of the classic investment treaty protection provisions such as most-favoured-nation[11], full protection and security[12], prohibition on expropriation without prompt, adequate and effective compensation[13].

As per Article 8(2) Turkey-Libya BIT, investors are required to submit their disputes to the Host State in writing for settlement and can only resort to domestic courts or arbitration 90 days after such submission (known as the cooling-off period). The investor is not required to exhaust domestic remedies to be able to resort to arbitration. Pursuant to this article, after the cooling-off period, the investor can then choose to submit its dispute to:

a) the competent courts of the Host State;

b) ICSID on condition that both parties became signatories of the ICSID Convention;

c) an *ad-hoc* arbitral tribunal established under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law ("**UNCITRAL**"); or

d) an arbitral tribunal established under the ICC Arbitration Rules.

Once this choice of procedure has been made by the investor, it is final. Bearing in mind that Libya is not a contracting state to ICSID Convention, resorting to the latter is not an option for Turkish investors in Libya.

Article 16 of the OIC Investment Agreement also does not set forth an exhaustive list of domestic remedies as a condition precedent for resorting to the arbitration. In fact, it stipulates the investor's right to either resort to domestic courts within the Host State's national judicial system or to an *ad-hoc* arbitration, exclusive of each other. Article 17 of the OIC Investment Agreement sets forth that any dispute that may arise would be settled by conciliation or arbitration. There are conflicted interpretation of the dispute resolution articles regarding whether conciliation is designated as a step prior to the arbitration.[14]

Pursuant to these treaties, Turkish investors may, in principle, bring investment treaty claims by resorting to arbitration against Libya. Nevertheless, practitioners swiftly noticed that the Turkey-Libya BIT entered into force on 22 April 2011, shortly after the civil unrest had started in February 2011 which made the temporal application of the Turkey-Libya BIT a problematic issue. On the other hand, there is no issue with the OIC Investment Agreement's temporal application to disputes concerning events which took place in Libya after February 2011 since the document has been in force between Turkey and Libya since 13 May 1996. However, we should underline that there may be other temporal application issues such as the protection of investments prior to the effective date of the OIC Agreement.

IV. Temporal Application of the Turkey-Libya BIT

Article 10 of the Turkey-Libya BIT titled "Scope of Application" provides two temporal application rules. Firstly, Article 10 sets forth that the BIT shall be applicable to investments in the territory of a Contracting Party made by the investors of other party before or after its entry into force. Secondly, it states that the BIT shall not be applicable to disputes that have arisen before its entry into force. In this section, we will firstly examine these two rules and then explain the temporal limitations under investment law to which acts of a state that treaties may be applicable to.

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Investments made before the entry into force of a BIT

Many investment treaties include provisions which clearly state that their scope of application covers investments made prior to their effective date[15]. This means that existing investments are covered by a treaty, in addition to those made after its entry into force. On the other hand, it is widely accepted that these provisions do not mean that acts committed before the relevant treaty's entry into force are covered by it[16]. We should also note that inexistence of such provisions does not necessarily mean that existing investments are excluded from the protection of the treaty[17]. In light of these findings, one may reach the conclusion that the Turkey-Libya BIT is applicable to investments of Turkish contractors that were made prior to and still existing at the time of, the entry into force of the BIT.

Timing of existence of a legal dispute

There are many other BITs which limit consent to arbitration to disputes arising after their entry into force, such as the Argentina-Spain BIT[18]. In *Maffezini v. Spain*[19], the respondent raised a jurisdictional objection arguing that the dispute originated before the entry into force of the Argentina-Spain BIT. The Tribunal found that although the events on which the parties disagreed began before the entry into force of the BIT, a legal dispute did not exist at the time. The Tribunal explained as follows:

"*…there tends to be a natural sequence of events that leads to a dispute. It begins with the expression of a disagreement and the statement of a difference of views. In time these events acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party. The conflict of legal views and interests will only be present in the latter stage, even though the underlying facts predate them.*"

We underline that the Tribunal made a distinction between the "legal dispute" and "events leading to the legal dispute" stating that the legal dispute will be existent only after the events leading to the dispute "acquire a precise legal meaning through the formulation of legal claims, their discussion and eventual rejection or lack of response by the other party". Based on this distinction, the Tribunal found that it had jurisdiction over the dispute.

As to the investments of Turkish contractors, we should underline that there was a period only a little over two months between the beginning of the civil war in Libya and the entry into force of the BIT. Without prejudice to specific conditions and facts of each case that might have an opposite effect, it could be argued that this period could not have been sufficient for the occurrence of legal disputes, since even the facts of such potential disputes were ongoing. In addition, many Turkish contractors returned to Libya after the first civil war and negotiated and/or entered into resumption agreements for their contracts starting from the end of 2012.

Temporal application to acts or events concerning the dispute

It should be emphasized that the above-explained temporal rules do not concern the question of ascertaining which events are covered by the treaty, *i.e.* whether investment treaties have

retrospective effect on states' act prior to entry into force of the respective treaty. In principle, treaties apply to acts or events that occurred after their entry into force. Such principle is expressed in Article 28 of the Vienna Convention on the Law of Treaties ("**VCLT**")[20] and accepted by the international practice as well[21]. That being said, principle of non-retroactivity may not apply to continues or composite acts of states.[22]

In *Tecmed v. Mexico*, the Tribunal made a distinction between application of a BIT to investments made prior to the entry into force of the BIT and to alleged breaches occurring prior to the date of entry into force of such BIT. Respectively, while noting that the concerned investment was eligible for protection under the BIT, the tribunal found that the BIT could not have retrospective effect to actions of the host state prior to the effective date of the BIT.[23] However, the Tribunal expressed that the pre-BIT acts of the host state would be relevant to consider a continuing or aggravating breach of the respective BIT[24].

In this regard, a continuous act may be defined as such which started before the treaty's entry into force but extends over time by persisting thereafter.[25] Indeed, the above-mentioned Article 28 of the VCLT provides that the principle of non-retroactivity of the treaties is "*in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty*". For instance, in SGS v. Philippines[26], the Tribunal found that failure to pay sums due under a contract constitutes a continuous breach.

A composite act is an act that is composed of "series of actions or omissions defined in aggregate as wrongful"[27]. Such acts are exceptions to the non-retroactivity principle since they do not occur until the completion of the series. Accordingly, Tribunals found that if the completion of such acts is after the entry into force, the treaty is temporally applicable[28]. A consistent pattern of discrimination that is contrary to a treaty provision may be given as an example to a composite act[29].

With respect to current and potential disputes between Turkish contractors and Libya, we note that temporal application to acts and events of such disputes most certainly requires specific examinations for each case. Although, as a general approach, the suspension of construction projects and non-payment of the related progress payments may be considered as continuous acts.

V. Turkish Contractors' Investment Treaty Claims under Turkey-Libya BIT

After the events of May 2014, there would be no question of temporal applicability of the Turkey-Libya BIT as at this time the disputes had arisen after its entry into force. Consequently, Turkish contractors began to resort to investment arbitration. The claims were related to outstanding progress payments by the relevant Libyan state entity, lack of proper compensation for losses, the contractors' need of extension of time for completion due to delay and disruption to the works, protracted bank guarantees and related expenses for retaining such guarantees and finally termination of their contracts.

According to public sources, over a dozen Turkish construction companies triggered investment treaty arbitration claims arising from construction projects against Libya including several claims brought under the ICC rules.[30]

Libya was expected to argue that certain disputes arose on or around February 2011, before the entry into force of Turkey-Libya BIT.[31] Indeed, Libya's strategic steps against the investment treaty claims of Turkish contractors include requests of bifurcation from the Tribunals to obtain a decision on temporal jurisdiction in the preliminary phase so that the Tribunals could dismiss the relevant cases entirely.

- The first company to file an investment treaty claim (along with a parallel contractual claim) was Tekfen Holding (Tekfen/TML or "**TTJV**") against Libya in 2015[32]. TTJV's claims relate to the suspension of the construction of the 400-km section of the Great Man-Made River network on 21 February 2011 and the subsequent evacuation of its sites in Libya in 2011.[33] There appears to be no bifurcation request in the proceedings in Tekfen/TML v. Libya case.[34] The case regarding TTJV's contractual claim resulted in favour of TTJV where Libya's Man-Made River Authority ("**MMRA**") was ordered to pay approximately US$40 million plus interest.[35] However, the ICC Tribunal also ruled that the MMRA was a separate entity from the Libyan state, therefore Libyan government had no liability to the TTJV.[36] In November 2018, Tekfen disclosed to the public that the award of the parallel investment treaty arbitration would be rendered before May 2019 under the Turkey-Libya BIT and the OIC Investment Agreement.[37]

- Öztaş İnşaat ve Ticaret A.Ş.'s case against Libya for €60 million over the termination of its contract to develop a water system resulted in favour of Libya in which the ICC tribunal rejected the claim and ordered Öztaş İnşaat to pay US$237,000 in costs.[38]

- Another Turkish contractor, notably TAV Airports Holding's [and a Libyan subsidiary of Lebanon's Consolidated Contractors Company (CCC)] claim against Libya over the Sabha International Airport expansion project interrupted by the civil war also resulted in favour of Libya.[39]

- Güriş İnşaat ve Mühendislik A.Ş.'s €190 million investment treaty arbitration claim based on Turkey-Libya BIT is related to certain public infrastructure projects in Tripoli and the case is currently pending before the respective ICC Arbitral Tribunal.[40] The ICC Arbitral Tribunal in Güriş v. Libya declined to hear Libya's jurisdictional objections on a preliminary basis.[41] As Güriş was complaining of Libya's conduct from mid-2011 onwards, after the entry into force of Turkey-Libya BIT, said Tribunal found the temporal jurisdiction to be satisfied.[42]

- Cengiz İnşaat Sanayi ve Ticaret A.Ş. ("**Cengiz**")

also initiated an arbitration under the ICC rules in 2016.[43] This case resulted from the suspension of the construction of a range of infrastructure under the contract with a Libyan state entity and the following destruction of Cengiz' work camps in early 2011 due to the civil war.[44] This arbitration resulted in favour of Cengiz as the Tribunal awarded an approximately US$50 million in compensation and further relief related to the release of certain performance bonds and financial guarantees.[45] Apparently, similar to Güriş, Cengiz also based the core of its claims regarding the acts and omissions of the Libyan state entity from post-April period, therefore the Tribunal concluded that the late entry into force of Turkey-Libya BIT did not hinder Cengiz' claim.[46]

- Üstay Yapı Taahhüt ve Ticaret A.Ş. also submitted a request for arbitration under the ICC rules under the Turkey-Libya BIT in early 2017.[47]

- Nurol İnşaat ve Ticaret A.Ş. has requested the Tribunal to bifurcate the proceedings to address the jurisdictional objections regarding the Turkey-Libya BIT in its investment treaty claim against Libya.[48] Contrary to what has been ruled in *Güriş v. Libya* case, the Tribunal granted Libya's bifurcation request to examine certain jurisdictional issues on a preliminary basis.[49]

- Last but not the least, an unnamed Turkish investor also brought an investment treaty claim under the Turkey-Libya BIT filed under the ICC rules whose claims are similar to those referred to above.[50]

VI. Conclusion

In light of the above, we would like to emphasise that each principle mentioned in this article is applied differently to relevant cases taking into due consideration their factual background. The authors aim at drawing the readers' attention to an interesting legal issue which is currently ongoing in the "investment arbitration arena" at a large scale. It appears from the latest awards that the Tribunals carefully consider the temporal validity of the Turkey-Libya BIT. One should certainly expect to learn a great deal from each of the cases referred to between Turkish contractors and Libya and not solely in relation to the *ratione temporis* issue examined herein.

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12 Article 2 of the Turkey-Libya BIT and Article 2 of the OIC Investment Agreement.
13 Article 4 of Turkey-Libya BIT and Article 10 of the OIC Investment Agreement.
14 The OIC Investment Agreement is so seldomly used that publicly available resources only suggest 5 cases have been initiated thereunder, 2 of which have been decided, one discontinued and one pending. (*see*: http://investmentpolicyhub.unctad.org/ISDS/FilterByApplicableIia); In *Hesham Talaat M. Al-Warrak v. Republic of Indonesia*, UNCITRAL, Award on Respondent's Preliminary Objections to Jurisdiction and Admissibility of the Claims, 21 June 2012, para 79 (*see*: https://www.italaw.com/sites/default/files/case-documents/italaw3174_0.pdf), the Tribunal interprets Article 17 of the OIC Investment Treaty and comes to the conclusion that Article 17 does not mandate or require conciliation to precede arbitration even though the possibility of conciliation followed by arbitration is deemed to have been contemplated by Article 17(2)(a) and explicitly states that: "(…) *Accordingly, on a correct interpretation of Article 17, conciliation and arbitration are separate forms of dispute resolution which may be used either sequentially or alternatively, and the fact that there is no prior conciliation agreement is not an obstacle to an investor-state arbitration*."
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25 Dolzer / Schreuer, p. 40.
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