INTERNATIONAL CHAMBER OF COMMERCE

ICC Case No. 21845/ZF/AYZ

(1) MR IDRIS YAMANTURK (2) MR TEVFIK YAMANTURK (3) MR MUSFIK HAMDI YAMANTURK (4) GURIŞ İNŞAAT VE MUHENDISLIK ANONIM ŞIRKETI (GURIS CONSTRUCTION AND ENGINEERING INC) V. SYRIAN ARAB REPUBLIC

FINAL AWARD

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31 August 2020

Tribunal:
Piero Bernardini (President (replaced))
Kemal Dayinlarli (Appointed by the investor (replaced))
Nassib G. Ziadé (Appointed by the Appointing Authority)
Charles N. Brower (Appointed by the investor)
Georgios Petrochilos (President)

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LIST OF MAIN DEFINED TERMS

Term	Abbreviation
International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts	*2001 ILC Articles*
International Law Commission, Draft Articles on the Effects of Armed Conflicts on Treaties	*2011 ILC Articles*
2012 Rules of Arbitration of the International Chamber of Commerce	*2012 ICC Rules*
Expert Report of Mr A Şeref Acar dated 8 February 2018 (submitted by the Claimants)	*Acar Expert Report*
Witness statement of Mr Mehmet Ercan Anil dated 3 March 2017 (submitted by the Claimants)	*Anil Witness Statement*
The Respondent's Answer to the Request dated 15 June 2017	*Answer*
Expert Report of Professor Dr M Talat Birgönül dated 5 February 2018 (submitted by the Claimants)	*Birgönül Expert Report*
Witness statement of Mr Ekrem Çalik dated 3 February 2017 (submitted by Claimants)	*Çalik Witness Statement*
Claimants' Post-hearing Submission dated 18 April 2019	*Claimants' PHB*
"Democratic Federation of Northern Syria"	*DFNS*
Dispute notices by the Claimants (April 2014 – November 2015)	*Dispute Notices*
Expert Report of Mr Serhat Erkmen dated 24 March 2017 (submitted by the Claimants)	*Erkmen Expert Report*
Mr İdris Yamantürk	*First Claimant*
"Free Syrian Army"	*FSA*
Güriş İnşaat ve Mühendislik Anonim Şirketi	*Güriş* or the *Fourth Claimant*
Al Hasakah Cement LLC	*Hasakah*
Term	**Abbreviation**
Expert Report of Mr Torky Hasan of March 2018 (submitted by the Respondent)	*Hasan Expert Report*
International Court of Arbitration of the International Chamber of Commerce	*ICC Court*
International Court of Justice	*ICJ*

"Islamic State of Iraq and Syria"	*ISIS*
Syrian Law No 10 of 1991 on Investment Incentives	*Law 10*
Most favoured nation	*MFN*
Democratic Union Party (*Partiya Yekîtiya Demokrat*)	*PYD*
Güriş Raqqa Cement Company	*Raqqa*
The Respondent's Rejoinder dated 29 March 2018	*Rejoinder*
The Claimants' Reply dated 9 February 2018	*Reply*
The Claimants' Request for Arbitration dated 5 April 2016	*Request*
Syrian Arab Republic	*Respondent* or *Syria*
Respondent's Post-hearing Submission of 16 April 2019	*Respondent's PHB*
Mr Tevfik Yamantürk	*Second Claimant*
First Expert Report of Mr Ahmad Rudwan Sharabi (submitted by the Respondent)	*Sharabi First Expert Report*
Second Expert Report of Mr Ahmad Rudwan Sharabi dated 26 March 2018 (submitted by the Respondent)	*Sharabi Second Expert Report*
The Claimants' Statement of Claim dated 3 April 2017	*SoC*
The Respondent's Statement of Defence dated 18 December 2017	*SoD*
Syrian Pounds	*SYP*
Mr Müşfik Yamantürk	*Third Claimant*
Term	Abbreviation
Agreement between the Republic of Turkey and the Syrian Arab Republic concerning the Reciprocal Promotion and Protection of Investments	*Treaty*
Witness statement of Mr Temel Tüylü dated 3 March 2017 (submitted by the Claimants)	*Tüylü Witness Statement*
Convention on the Law of Treaties (Vienna, 1969), 1155 UNTS 331	*VCLT*
Witness statement of Mr Ümit Yamantürk dated 1 March 2017 (submitted by the Claimants)	*Yamantürk Witness Statement*
Expert Report of Mr Ali Youssef (submitted by the Respondent)	*Youssef Expert Report*
"People's Protection Units" (*Yekîneyên Parastina Gel*)	*YPG*

I. INTRODUCTION

1. This Final Award is made pursuant to Article 31 of the 2012 Rules of Arbitration of the International Chamber of Commerce (the *2012 ICC Rules*), the version in effect at the commencement of this arbitration.

A. The Parties and Legal Representatives

1. The Claimants

2. The Claimants in this arbitration are as follows:
(i) Mr İdris Yamantürk, a national of Turkey (the ***First Claimant***);[1]

(ii) Mr Tevfik Yamantürk, a national of Turkey (the ***Second Claimant***);[2]

(iii) Mr Müşfik Yamantürk, a national of Turkey (the ***Third Claimant***);[3] and

(iv) Güriş İnşaat ve Mühendislik Anonim Şirketi, a joint-stock company established under the laws of Turkey[4] (***Güriş*** or the ***Fourth Claimant***).[5]

3. The First, Second and Third Claimants are the shareholders of Güriş, the Fourth Claimant.[6]

4. The Claimants' address is Ankara Caddesi, No 222, Karao�lan Mahallesi, 06830, Gölbaşi, Ankara, Turkey.[7]

5. Until 23 May 2016, the Claimants were represented in this arbitration by:
Mr Bo�aç Çekinmez
2052, Sokak No 40, 06800, Beysukent
Ankara, Turkey

6. Since 23 May 2016, the Claimants have been represented in this arbitration by:

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[1] Identity Card of Mr İdris Yamantürk, Exhibit C-31.

[2] Identity Card of Mr Tevfik Yamantürk, Exhibit C-32.

[3] Identity Card of Mr Müşfik Yamantürk, Exhibit C-33.

[4] Trade Registry Records of Güriş, 27 October 2016, Exhibit C-30.

[5] The Claimants' Request for Arbitration dated 5 April 2016 (the *Request*) had also listed Güriş Raqqa Cement Company and Al Hasakah Cement LLC, two companies incorporated in Syria, as claimants in this arbitration. However, the Claimants subsequently amended the Request on 13 December 2016 and requested removal of these two Syrian companies as claimants (*see* Claimants' Amendment to Request for Arbitration, 13 December 2016, ¶ 4). The Tribunal granted this request in its Procedural Order No 2 dated 30 December 2016.

[6] *See* Claimants' Statement of Claim dated 3 April 2017 (the *SoC*), ¶ 2.

[7] *See* Request, ¶ 4.

Dr Mehmet Karli (mkarli@kabinelaw.com)
Mr Tuvan Yalim (tyalim@kabinelaw.com)
Mr Selim Can Bilgin (scbilgin@kabinelaw.com)
Mr Alp Özzeybek (aozzeybek@kabinelaw.com)
Ms Gülce Keskin (gkeskin@kabinelaw.com)
Ms Özgecan Korkmaz (okorkmaz@kabinelaw.com)
Kabine Law Office
Levent Loft 1
Büyükdere Cad, No 201
D: 68 34394
Levent
Istanbul, Turkey

2. The Respondent

7. The respondent in this arbitration is the Syrian Arab Republic (the ***Respondent*** or *Syria*).

8. The Respondent is represented in this arbitration by:
Dr Moussa K Mitry (moussamitry@gmail.com)
Dr Amal Yazaji (amalyazji@gmail.com)
International Law Bureau
Althawara Street
Altayaran Building, 12th floor
PO Box 315, Damascus
Syrian Arab Republic

B. The Arbitral Tribunal

9. The Tribunal is composed as follows:
(i) The Honorable Charles N Brower of Twenty Essex Chambers, 20 Essex Street, London WC2R 3AL, United Kingdom (cbrower@20essexst.com), nominated by the Claimants on 5 July 2018, following the recusal of Dr Kemal Dayinlarli by the International Court of Arbitration of the International Chamber of Commerce (the ***ICC Court***), and confirmed by the ICC Court on 2 August 2018 pursuant to Article 13(2) of the 2012 ICC Rules.

(ii) Professor Nassib G Ziadé, Suite 701, Park Plaza, Building 247, Road 1704 Block 317, Diplomatic Area-Manama, Bahrain (nziade@ziadearbitration.com), appointed by the ICC Court on behalf of the Respondent on 24 November 2016 pursuant to Article 12(4) of the 2012 ICC Rules.

(iii) Dr Georgios Petrochilos of Three Crowns LLP, 104 avenue des Champs-Élysées, 75008 Paris, France (georgios.petrochilos@threecrownsllp.com), appointed as the President of the Tribunal by the ICC Court on 26 April 2018, following the resignation of Professor Piero Bernardini, pursuant to Article 12(5) of the 2012 ICC Rules.

10. Further details regarding the constitution of the Tribunal, and the appointment of a Tribunal Secretary, are set out in Section II (Procedural History) below.

C. The Arbitration Agreement

11. The Claimants have commenced these proceedings relying on Article VII of the "Agreement between the Republic of Turkey and the Syrian Arab Republic concerning the Reciprocal Promotion and Protection of Investments" (the ***Treaty***).[8] The Treaty was signed on 6 January 2004 and entered into force on 3 January 2006.[9] Article VII of the Treaty (in its English authentic version[10]) provides as follows:

1. Disputes between one of the Parties and an investor of the other Party, in connection with his investment, shall be notified in writing, including detailed information, by the investor to the recipient Party of the investment. As far as possible, the investor and the concerned Party shall endeavor to settle these disputes by consultations and negotiations in good faith.

2. If these disputes, [sic] cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the dispute can be submitted, as the investor may choose, to:

(a) the International Center [sic] for Settlement of Investment Disputes (ICSID) set up by the "Convention on [the] Settlement of Investment Disputes Between States and Nationals of other States", in case both Parties become signatories of this Convention,

(b) an ad hoc court of arbitration laid down under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law (UNCITRAL),

(c) the Court of Arbitration of the Paris International Chamber of Commerce,

provided that, if the investor concerned has brought the dispute before the court of justice of the party to dispute and a final award has not been rendered within one year.

3. The arbitration awards shall be final and binding for all parties in dispute. Each Party commits itself to execute the award according to its national law.

In this Award, the Tribunal refers to and relies upon the English text of the Treaty, save where necessary to examine the other authentic versions.

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[8] *See* Agreement between the Republic of Turkey and the Syrian Arab Republic Concerning the Reciprocal Promotion and Protection of Investments (Ankara, 6 January 2004), **Exhibit CL-2**.

[9] *See* Section V.B.1 below, which addresses further the question of the Treaty's entry into force.

[10] *See* Treaty, **Exhibit CL-2**, p 9 ("DONE at Ankara on the day of January 06, 2004 in the Turkish, Arabic and English languages all of which are equally authentic. In case of any conflict of interpretation the English text shall prevail.").

12. It is not disputed that the Claimants are "investor[s] of the [Republic of Turkey]" within the meaning of Article VII(1) of the Treaty. The Respondent has, however, formulated several other objections to the Tribunal's jurisdiction and the admissibility of the Claimants' claims, which are addressed in Section V.B below.

D. Place and Language of Arbitration

13. The place of the arbitration is Switzerland (Geneva), as determined by the ICC Court pursuant to Article 18(1) of the 2012 ICC Rules. [11]

14. The language of the arbitration is English, as determined by the Tribunal under Article 20 of the 2012 ICC Rules. [12]

II. PROCEDURAL HISTORY

A. The Pre-hearing Phase

15. On 5 April 2016, the Claimants submitted their Request for Arbitration (the ***Request***) to the Secretariat of the ICC Court (the ***Secretariat***), nominating Dr Kemal Dayinlarli as an arbitrator.

16. On 28 April 2016, the Secretariat acknowledged receipt of the Request and confirmed that, pursuant to Article 4(2) of the 2012 ICC Rules, the arbitration was deemed to have commenced on 5 April 2016.

17. By letter dated 23 May 2016, the Secretariat transmitted a copy of the Request to the Respondent and requested it to file within 30 days its Answer, including its comments on the Claimants' proposals in the Request regarding the appointment of three arbitrators and the place and language of arbitration.

18. On 25 July 2016, the Secretariat informed the parties that: (i) the Respondent had not submitted its Answer to the Request within the specified time-limit; and (ii) the ICC Court would determine the number of arbitrators under Article 12(2) of the 2012 ICC Rules and the place of arbitration pursuant to Article 18(1) of the 2012 ICC Rules.

19. By letter dated 8 August 2016, the Secretariat informed the parties that the ICC Court had: (i) decided to submit the arbitration to a tribunal comprising three arbitrators; and (ii) fixed Switzerland (Geneva) as the place of the arbitration. In the same letter, the Secretariat also requested the Respondent to nominate an arbitrator within 15 days from the receipt of that letter.

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[11] *See* 2012 ICC Rules, Article 18(1): "The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties."

[12] *See* 2012 ICC Rules, Article 20: "In the absence of an agreement by the parties, the arbitral tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract."

20. By its letter of 2 September 2016, the Secretariat informed the parties that the Respondent had not nominated an arbitrator within the time granted to it and that, consequently, the ICC Court would appoint an arbitrator on the Respondent's behalf under Article 12(4) of the 2012 ICC Rules. The Secretariat also indicated that the ICC Court would appoint the President of the Tribunal in accordance with Article 12(5) of the 2012 ICC Rules.

21. On 24 November 2016, the Secretariat informed the parties that the ICC Court had: (i) confirmed Dr Dayinlarli's appointment as arbitrator upon the Claimants' nomination, pursuant to Article 13(1) of the 2012 ICC Rules; (ii) appointed Professor Nassib G Ziadé as arbitrator on behalf of the Respondent, pursuant to Article 12(4) of the 2012 ICC Rules; and (c) appointed Professor Piero Bernardini as the President of the Tribunal, pursuant to Article 13(4)(a) of the 2012 ICC Rules.

22. On 13 December 2016, the Claimants submitted an Amendment to the Request: (i) seeking the removal of Güriş Raqqa Cement Company (*Raqqa*) and Al Hasakah Cement LLC (*Hasakah*),[13] two companies incorporated in Syria, from the list of claimants named in the Request; and (ii) proposing certain amendments to their position in the Request regarding the Tribunal's jurisdiction, the admissibility of the claims, the Respondent's liability, and requests for relief. On 19 December 2016, the Tribunal invited the Respondent to comment on this Amendment, but no such comments were provided.

23. On 22 December 2016, the Tribunal issued its Procedural Order No 1, determining English to be the language of this arbitration pursuant to Article 20 of the 2012 ICC Rules.

24. On 30 December 2016, the Tribunal issued its Procedural Order No 2: (i) determining the rules of law applicable to the merits of the dispute, pursuant to Article 21 of the 2012 ICC Rules;[14] and (ii) removing Raqqa and Hasakah from the list of Claimants, as requested in the Claimants' Amendment to the Request.

25. On 10 January 2017, the Tribunal held a case management conference by telephone. In addition to the members of the Tribunal at the time, the following individuals participated in that conference: (i) For the Claimants : Ms Burçin Seda Ürgen and Ms Berna Abadan (Güriş in-house lawyers); and Dr Mehmet Karli, Mr Tuvan Yalim, Mr Selim Can Bilgin, and Ms Özgecan Korkmaz (Kabine Law); and

(ii) For the Respondent: None.

26. Following the case management conference (minutes of which were circulated by the Tribunal to the parties on 11 January 2017), the Tribunal issued the Terms of Reference on 12 January 2017 and its Procedural Order No 3 on 16 January 2017. In its Procedural Order No 3, the Tribunal established the procedural rules for the written and oral phases of the arbitration and the Procedural Timetable.

27. On 26 January 2017, the Secretariat informed the parties that, pursuant to Article 23(3) of the 2012 ICC Rules, the ICC Court had approved the Terms of Reference signed by the Tribunal and the

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[13] Sometimes transliterated as "Hasakeh" or "Hasaka" in the English translations of primary materials in Arabic in the record.

[14] *See* 2012 ICC Rules, Article 21(1): "The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate."

Claimants. In the same communication, the Secretariat also invited the Respondent to sign those Terms of Reference.

28. Following various attempts to serve the Terms of Reference on the Respondent at the addresses specified by the Claimants, the Tribunal informed the parties on 2 March 2017 that the document had been successfully delivered to the Syrian Consulate in Istanbul.

29. By letter of 3 March 2017, the Claimants requested a two-week extension of the deadline for submission of their Statement of Claim (the ***SoC***).

30. On 8 March 2017, the Tribunal—having received no comments from the Respondent on the Claimants' request to extend the deadline for submission of the SoC—issued Procedural Order No 4, granting the Claimants' requested extension and fixing new time-limits for the parties' written submissions.

31. On 3 April 2017, the Claimants submitted their SoC, together with documentary evidence and the following witness statements and expert report:
(i) Witness statement of Mr Ümit Yamantürk dated 1 March 2017 (***Yamantürk Witness Statement***);

(ii) Witness statement of Mr Ekrem Çalik dated 3 February 2017 (***Çalik Witness Statement***);

(iii) Witness statement of Mr Mehmet Ercan Anil dated 3 March 2017 (***Anil Witness Statement***);

(iv) Witness statement of Mr Temel Tüylü dated 3 March 2017 (***Tüylü Witness Statement***); and

(v) Expert Report of Mr Serhat Erkmen dated 24 March 2017 (***Erkmen Expert Report***).

32. By a letter dated 4 April 2017, the Tribunal wrote to the Syrian Permanent Missions to the UN in New York and Geneva and to the Syrian Consulate in Istanbul, inviting the Respondent to participate in this arbitration proceeding.

33. By a letter to the Secretariat dated 7 April 2017 (which was received by the Secretariat on 7 May 2017), the Respondent, acting through its appointed counsel, stated "to have been just informed" of the Request, contested the validity of previous notifications to the Respondent, and requested a full set of documents regarding the proceeding.

34. On 17 and 18 May 2017, the Tribunal welcomed the participation of the Respondent in the proceeding, expressed its view that the Respondent should be granted reasonable time to examine the file, and invited the Claimants' comments.

35. By letter of 19 May 2017, the Claimants conveyed their agreement that the Respondent should be granted a reasonable extension of time to submit its Statement of Defence.

36. On 23 May 2017, the Secretariat transmitted the documentation relating to the arbitration proceeding to the Respondent's counsel.

37. On 25 May 2017, the Tribunal requested the Respondent to communicate views regarding any

revisions to the Procedural Timetable resulting from the Respondent's participation in the arbitration.

38. By its Procedural Order No 5 dated 30 May 2017, the Tribunal amended the Procedural Timetable to eliminate procedural steps that had become unnecessary following the Respondent's decision to participate in the arbitration.

39. On 31 May and 2 June 2017, the Respondent acknowledged receipt of the Request and the full set of documents exchanged during the arbitration, while contesting the validity of the procedural steps taken in the proceedings before its participation.

40. On 15 June 2017, the Respondent submitted its Answer to the Request (the ***Answer***), which was received by the Secretariat on 22 June 2017 and transmitted to the parties the following day.

41. On 30 June 2017, the Tribunal issued Procedural Order No 6, which: (i) granted the Respondent additional time to provide a summary of its position and requested reliefs, for inclusion in an updated version of the Terms of Reference; (ii) decided on a procedure for written submissions on certain jurisdictional issues raised in the Answer, and on the question of a possible bifurcation of these issues; and (iii) amended the Procedural Timetable.

42. On 22 July 2017, the Respondent submitted a summary of its position and requested reliefs for inclusion in the Terms of Reference.

43. On 11 August 2017, further to the timetable set out in Procedural Order No 6, the Claimants submitted their "Views on Bifurcation and Answer to Respondent's Pleas". On 19 August 2017, the Respondent submitted its Answer to Claimants' submission of 11 August 2017. On 11 September 2017, the Claimants submitted their Rejoinder to the Respondent's submission of 19 August 2017.

44. On 11 September 2017, the parties and the Tribunal executed an Addendum to the Terms of Reference, incorporating a summary of the Respondent's position and relief sought by it.

45. On 25 October 2017, following correspondence with the parties, the Tribunal issued Procedural Order No 7, which established a new Procedural Timetable (requiring as an immediate next step the filing of the Respondent's Statement of Defence (the ***SoD***) on 18 December 2017) and confirmed that the proceeding would not be bifurcated.

46. On 18 December 2017, the Respondent notified the Tribunal and the Claimants that it had transmitted by courier a hard copy of its SoD. This was accompanied by, among other documents, an expert report from Mr Ahmad Rudwan Sharabi (***Sharabi First Expert Report***).

47. On 25 December 2017, the Claimants acknowledged receipt of the Respondent's SoD and sought an extension of time for their Reply because of the Respondent's delivery of its SoD a week later than 18 December 2017.

48. By Procedural Order No 8 dated 28 December 2017, the Tribunal amended the Procedural Timetable to accommodate the Claimants' requested extension.

49. On 25 January 2018, following the parties' requests, the Tribunal issued Procedural Order No 9, by which it amended the Procedural Timetable to extend the deadlines for the filing of the parties' remaining pre-hearing written submissions.

50. On 9 February 2018, the Claimants submitted their Reply (the ***Reply***), together with documentary evidence and the following two expert reports:

(i) Expert report of Professor Dr M Talat Birgönül dated 5 February 2018 (***Birgönül Expert Report***); and

(ii) Expert report of Mr A Şeref Acar dated 8 February 2018 (***Acar Expert Report***).

51. On 27 February 2018, Professor Bernardini informed the parties of his decision to resign as an arbitrator due to health reasons.

52. On 1 March 2018, the Claimants suggested a mechanism to designate a replacement for Professor Bernardini.

53. On 5 March 2018, the Respondent submitted to the Secretariat a challenge against Dr Dayinlarli on the grounds that he was a citizen of Turkey, "an enemy government". The Secretariat acknowledged receipt of this challenge the following day, and requested comments from the Claimants and the two other arbitrators.

54. By a letter dated 7 March 2018, the Respondent indicated that it disagreed with the Claimants' proposed mechanism to replace Professor Bernardini, noting that the replacement of the presiding arbitrator should be attended to after the ICC Court's decision on the Respondent's challenge to Dr Dayinlarli.

55. By a letter dated 8 March 2018, the Secretariat informed the parties that the ICC Court had accepted Professor Bernardini's resignation pursuant to Article 15(1) of the 2012 ICC Rules; and that, in the absence of an agreement between the parties regarding a method for the nomination of the President of the Tribunal, the matter would be submitted to the ICC Court.

56. On 9 March 2018, Dr Dayinlarli submitted his comments on the Respondent's challenge. Between 9 and 18 March 2018, the parties exchanged comments regarding the challenge.

57. On 21 March 2018, the Respondent requested an extension of the deadline for its Rejoinder. The Claimants agreed to such an extension on the following day but argued that the proceeding should not be put on hold until the decision on the challenge was rendered.

58. On 29 March 2018, the Respondent indicated that it had transmitted by courier a hard copy of its Rejoinder (the ***Rejoinder***). The Rejoinder was accompanied by, among other documents, the following three expert reports:

(i) Second Expert Report of Mr Ahmad Rudwan Sharabi dated 26 March 2018 (***Sharabi Second Expert Report***);

(ii) Expert Report of Mr Torky Hasan of March 2018 (***Hasan Expert Report***); and

(iii) Expert Report of Mr Ali Youssef (undated) (***Youssef Expert Report***).

59. By a letter dated 29 March 2018, the Secretariat notified the parties that the ICC Court had considered admissible the Respondent's challenge to Dr Dayinlarli but rejected it on the merits.

60. By a letter dated 27 April 2018, the Secretariat informed the parties that, pursuant to Articles 13(4) and 15(1) of the 2012 ICC Rules, the ICC Court had appointed Dr Georgios Petrochilos as the President of the Tribunal.

61. On 15 May 2018, the reconstituted Tribunal and the parties held a case management conference to discuss the status of the arbitration and next procedural steps.

62. On 22 May 2018, in accordance with Article 11(3) of the 2012 ICC Rules, Dr Dayinlarli disclosed a new circumstance relating to his involvement in another unrelated proceeding involving the Claimants.

63. On 3 June 2018, the Respondent submitted to the Secretariat another challenge to Dr Dayinlarli, based on the recent disclosure. The Secretariat acknowledged receipt of this challenge on 5 June 2018 and invited comments. Dr Dayinlarli provided comments on 11 June 2018.

64. Following consultation with the parties and based on their agreement, by Procedural Order No 10 dated 18 June 2018, the Tribunal appointed Manish Aggarwal of Three Crowns LLP, New Fetter Place, 8-10 New Fetter Lane, London, EC4A 1AZ, as the Secretary to the Tribunal. Based on further correspondence with the parties, by Procedural Order No 11 dated 22 June 2018, the Tribunal supplemented Procedural Order No 10 so as to clarify that Mr Aggarwal could attend hearings and, upon the Tribunal's invitation, meetings and deliberations, provided always that his presence at meetings and deliberations would be for the sole purpose of supplying materials from the record and similar information as required by the Tribunal.

65. On 28 June 2018, the ICC Court accepted the Respondent's challenge to Dr Dayinlarli.

66. On 5 July 2018, the Claimants nominated the Honorable Charles N Brower as arbitrator. On 2 August 2018, pursuant to Article 13(2) of the ICC Rules, the ICC Court confirmed the appointment of Mr Brower.

67. By Procedural Order No 12 dated 16 August 2018, pursuant to Article 15(4) of the 2012 ICC Rules and based on the parties' agreement, the Tribunal determined that there would not be any repetition of any prior steps of the proceedings before the reconstituted Tribunal. In addition, the Tribunal directed that an oral hearing on jurisdiction and the merits would take place during 17 to 21 December 2018.

68. On 17 September 2018, following consultation with the parties, the Tribunal indicated that, further to its Procedural Order No 3, the hearing was to be held in Switzerland (Geneva), the place of the

arbitration. In the period thereafter, the Tribunal assisted the parties in securing visas for their hearing delegations.

69. On 13 November 2018, the Tribunal circulated for the parties' review and input a draft Procedural Order No 13 relating to the organisation of the hearing.

70. On 18 November 2018, the Tribunal sent to the parties a seven-page list of issues, going to jurisdiction, admissibility, and the merits of the case, which it requested the parties to address in advance of the hearing or in the course of it.

71. On 29 November 2018, the Tribunal held a pre-hearing conference call with the parties, telephonically. In addition to the members of the Tribunal and the Tribunal Secretary, the following individuals attended this conference:
(i) For the Claimants: Dr Mehmet Karli, Mr Tuvan Yalim, Mr Selim Can Bilgin, Ms Gülce Keskin, Mr Alp Özzeybek, and Mr Yusuf Kumtepe; and

(ii) For the Respondent: Dr Moussa Mitry.

72. On 10 December 2018, based on discussions with the parties at the pre-hearing conference, the Tribunal issued Procedural Order No 13.

73. On 12 December 2018, the Respondent requested leave to file a witness statement from an unspecified individual, who was claimed to have detailed information about the Claimants' facilities in Ain Issa. Following consultation with the parties, the Tribunal deferred its decision on the admissibility of this statement until the hearing.

B. Hearing

74. The hearing was held in Geneva, Switzerland between 17 and 21 December 2018. In addition to the members of the Tribunal and the Tribunal Secretary, the following persons attended the hearing:
(i) For the Claimants :
Counsel
Dr Mehmet Karli
Mr Tuvan Yalim
Mr Selim Can Bilgin
Ms Özgecan Korkmaz
Mr Alp Özzeybek
Ms Gülce Keskin

Güris representatives
Mr Musa Yamantürk
Mr Derviş Koyuncu

(ii) For the Respondent :

Counsel
Dr Moussa K. Mitry
Dr Amal Yazaji
Ms Alaa Chahin
Ms Amira Alhussami
Mr Khaled Qaddour Alainyia

Other representatives
Ms Huda Alsawaf Known Douaji (State Counsel)
Mr Waseem Sulaiman (General Establishment of Geology)

75. During the hearing, the Tribunal heard opening and closing submissions from both parties' counsel and evidence from the following witnesses and experts:
(i) For the Claimants :
Mr Ümit Yamantürk
Mr Ekrem Çalik
Mr Mehmet Ercan Anil
Mr Temel Tüylü
Mr Serhat Erkmen
Dr Talat Birgönül
Mr A Seref Acar

(ii) For the Respondent:
Mr Ahmad Rudwan Sharabi
Mr Ali Youssef
Mr Torky Hasan

76. At the conclusion of the hearing, both parties confirmed that they had no objections to the arbitration process followed as at that date. [15]

C. The Post-hearing Phase

77. On 21 December 2018, following discussions with the parties during the hearing, the Tribunal issued Procedural Order No 14. This set out further procedural steps to be taken by the parties, as well as the timeline for post-hearing submissions and costs submissions.

78. On 31 December 2018, further to the Tribunal's directions in Procedural Order No 14, the Respondents submitted a witness statement from Mr Jassem Ali Almousa.

79. On 21 January 2019, the Respondent submitted English and Arabic translations of the Turkish version of Article VII of the Treaty. The Respondent also confirmed that it no longer disputed that the "Agreement between the Government of the Italian Republic and the Government of the Syrian

[15] Hearing Transcript, 1137:23–1138:5.

Arab Republic on the Promotion and Protection of Investments" (the ***Syria–Italy BIT***) had been approved by the Syrian Parliament.

80. On 21 January 2019, the Claimants submitted their English translations of the Turkish and Arabic versions of Article VII of the Treaty. On the same day, the Claimants requested leave from the Tribunal: (i) to submit observations and further documentary evidence in response to the statement of Mr Almousa; and (ii) to comment on the Respondent's English translation of the Turkish version of Article VII of the Treaty.

81. On 28 January 2019, the Tribunal—after granting the Respondent an opportunity to comment on each of the Claimants' applications of 21 January 2019—directed the parties to comment on each other's English translations of the Turkish and Arabic versions of Article VII of the Treaty. In addition, the Tribunal granted the Claimants leave to submit observations or documentary evidence in response to Mr Almousa's statement.

82. On 30 January 2019, the Claimants submitted comments on the Respondent's English translation of the Turkish version of Article VII of the Treaty.

83. On 4 February 2019, the Tribunal noted that the Respondent had not commented on the Claimants' English translations of the Turkish and Arabic versions of Article VII of the Treaty and invited the Respondents to do so by no later than 6 February 2019. In addition, the Tribunal directed the Respondent to submit, by 6 February 2019, either an English translation of the Arabic version of Article VII of the Treaty or to confirm its agreement with the translation submitted by the Claimants. The Tribunal also extended the period for the parties to agree to corrections to the hearing transcript until 15 February 2019. In addition, based on the Respondent's 21 January 2019 communication regarding the Syria–Italy BIT, the Tribunal allowed into the record certain documents submitted by the Claimants at the hearing to establish that BIT's entry into force. Finally, the Tribunal transmitted to the parties for input a draft communication containing questions regarding the status of the Claimants' cement facilities, which the Tribunal proposed to send to the self-proclaimed "Democratic Federation of Northern Syria" (***DFNS***). This is an entity under the broad auspices of which operate the Democratic Union Party (or ***PYD***), a pro-Kurdish party, and an armed group said to be linked to PYD, the People's Protection Units (or ***YPG***).[16] The PYD and YPG are said practically to control the territories in which the Claimants' facilities are located.

84. On 6 February 2019, the Respondent provided its English translation of the Arabic version of Article VII of the Treaty. After receiving the parties' comments on the draft communication to the DFNS, on 13 February 2019 the Tribunal sent the communication to the individual charged with external affairs at the DFNS, who acknowledged the Tribunal's communication and agreed to assist with its queries.

85. On 12 March 2019, the Tribunal directed the Respondent to provide its comments, if any, on the Claimants' proposed corrections to the hearing transcripts or identify any further corrections to those transcripts by no later than 18 March 2019. On 13 March 2019, the Respondent confirmed that it would not be providing comments or corrections. The hearing transcripts were finalised on 19 March 2019.

[16] The Tribunal understands that YPG was the main founding element of a broader armed force, the Syrian Defence Forces or *Hêzên Suriya Demokratîk* (***SDF***), founded towards the end of 2015.

86. On 25 March 2019, the Claimants requested an extension of the deadline for the filing of post-hearing briefs until 5 April 2019, and also requested leave to introduce additional exhibits and legal authorities into the record.

87. On 26 March 2019, the Respondent objected to the Claimants' request.

88. On 28 March 2019, after considering the parties' positions, the Tribunal directed the Claimants to submit only a list of the new documents that it intended to submit, while identifying the relevant factual developments since the hearing or the specific Tribunal questions at the hearing to which those documents pertained.

89. On 29 March 2019, the Claimants submitted their list of new proposed exhibits and legal authorities.

90. On 1 April 2019, the Respondent communicated to the Tribunal its objections to the proposed new exhibits and authorities. In addition, the Respondent submitted a list of categories of new documents that it wished to introduce into the record.

91. On 2 April 2019, the Claimants responded to the Respondent's objections, also objecting in their turn to the new documents identified by the Respondent on 1 April 2019.

92. On 4 April 2019, the Respondent responded to the Claimants' communication of 2 April 2019.

93. On 5 April 2019, the Tribunal granted leave to both parties to place in the record the new documents identified by each of them. The Tribunal requested the parties to set out any comments on new documents in their post-hearing submissions. The Tribunal also extended the deadline for post-hearing submissions to 12 April 2019.

94. On 5 and 6 April 2019, the parties submitted the new documents identified by them.

95. On 8 April 2019, the Claimants objected to the admissibility of seven of the 14 new documents submitted by the Respondent. On the same day, the Respondent raised objections to the documents submitted by the Claimants, requesting that they be deemed inadmissible or that the Respondent be granted an additional two months to review them.

96. On 10 April 2019, the Tribunal rejected both parties' applications of 8 April 2019, and directed them to submit their post-hearing submissions by 18 April 2019.

97. Both parties filed their post-hearing submissions on 18 April 2019, and cost submissions on 6 May 2019.

98. On 16 May 2019, the Tribunal informed the parties that, despite the Tribunal's requests, the relevant individual at the DFNS had not provided the requested information and that, in the circumstances, the Tribunal had no choice but to proceed on the basis that the requested information would not be forthcoming— whether at all or in a meaningful timeframe—and to determine the relevant issues on the evidence in the record. The Tribunal invited the parties to provide any observations on this matter by 20 May 2019. Neither party submitted such observations.

99. On 26 June 2019, pursuant to Article 27 of the 2012 ICC Rules, the Tribunal declared the proceedings closed with respect to the matters to be decided in this Award.

D. Advances on Costs

100. On 23 May 2016, the Secretariat advised the Claimants that, pursuant to Article 36(1) of the 2012 ICC Rules,[17] the ICC Secretary-General had fixed the provisional advance on costs at EUR 132,000. This sum was duly paid by the Claimants.

101. On 8 August 2016, the Secretariat notified the parties that, pursuant to Article 36(2) of the 2012 ICC Rules,[18] the ICC Court had fixed the advance on costs at EUR 570,000, which—based on the amount in dispute then—was lower than normal and could be readjusted based on developments in the arbitration. The Claimants defrayed the entirety of the additional sum required.

102. On 3 August 2017, the Secretariat notified the parties that, pursuant to Article 36(5) of the 2012 ICC Rules,[19] the ICC Court had increased the advance on costs to EUR 655,000. The Claimants again defrayed the entirety of the additional sum.

103. On 19 April 2019, the Secretariat notified the parties that, on 18 April 2019, the ICC Court had increased the advance on costs to EUR 850,000. Following the Respondent's indication of 6 May 2019 that it had "no intention to settle the amount requested", on 7 May 2019 the Secretariat invited the Claimants to pay the Respondent's share. This was paid by the Claimants along with their own share.

E. Time-limit for Rendering of this Award

104. In accordance with Article 30(2) of the 2012 ICC Rules,[20] the ICC Court extended the time-limit for the rendering of the final award under Article 30(1) of the 2012 ICC Rules[21] at various stages of the proceedings.[22] On 20 June 2020, the Tribunal submitted this Award to the ICC for the Court's scrutiny

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[17] 2012 ICC Rules, Article 36(1): "After receipt of the Request, the Secretary General may request the claimant to pay a provisional advance in an amount intended to cover the costs of the arbitration until the Terms of Reference have been drawn up. Any provisional advance paid will be considered as a partial payment by the claimant of any advance on costs fixed by the Court pursuant to this Article 36."

[18] 2012 ICC Rules, Article 36(2): "As soon as practicable, the Court shall fix the advance on costs in an amount likely to cover the fees and expenses of the arbitrators and the ICC administrative expenses for the claims which have been referred to it by the parties, unless any claims are made under Article 7 or 8 in which case Article 36(4) shall apply. The advance on costs fixed by the Court pursuant to this Article 36(2) shall be payable in equal shares by the claimant and the respondent."

[19] 2012 ICC Rules, Article 36(5): "The amount of any advance on costs fixed by the Court pursuant to this Article 36 may be subject to readjustment at any time during the arbitration. In all cases, any party shall be free to pay any other party's share of any advance on costs should such other party fail to pay its share."

[20] 2012 ICC Rules, Article 30(2): "The Court may extend the time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative if it decides it is necessary to do so."

[21] 2012 ICC Rules, Article 30(1): "The time limit within which the arbitral tribunal must render its final award is six months. Such time limit shall start to run from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference or, in the case of application of Article 23(3), the date of the notification to the arbitral tribunal by the Secretariat of the approval of the Terms of Reference by the Court. The Court may fix a different time limit based upon the procedural timetable established pursuant to Article 24(2)."

[22] The ICC Court granted extensions as follows: (i) on 29 September 2017, an extension to 29 December 2017; (ii) on 20 December 2017, an extension to 31 August 2018; (iii) on 30 August 2018, an extension to 31 December 2018; (iv) on 20 December 2018, an extension to 29 March

under Article 33 of the 2012 ICC Rules. On 30 July 2020, the Court approved this Award.

III. FACTUAL BACKGROUND

105. The factual matrix of this dispute is unusually broad and heavily disputed, involving as it does an ongoing conflict of tragic proportions and staggering complexity. Some of the Claimants' claims required them to plead a broad-ranging case starting from the root causes of the conflict, said to go back to early-2011. The Claimants say that they have practically lost all control, use, and enjoyment of their investments. They blame circumstances of generalized armed conflict that are ultimately the responsibility of the Respondent, either because (i) the conflict is the outgrowth of internal revolt against what the Claimants characterize as the Respondent's harsh suppression of peaceful opposition, or (ii) the Respondent has ceded to Kurdish organizations control over areas in north-eastern Syria where the Claimants' investments are localized.

106. The Respondent has also addressed these issues in defence. It denies in the strongest terms that the conflict was the result of an internal uprising. Rather, the conflict was brought about by intervention, military and other, by foreign countries, including prominently Turkey. The Respondent also says that, while of course it remains sovereign within the internationally recognized boundaries of the Syrian Arab Republic, the exigencies of conflict have forced its armed forces to retreat temporarily from territories in the north-east of the country. The Respondent denies any endorsement of, collaboration with, or control over Kurdish organizations. On this basis the Respondent says that none of the conduct of such organizations, operating in parts of its territory where the Respondent has no control, can entrain its international responsibility.

107. The Tribunal is acutely aware that the conflict in Syria is one of the most complex in recent history and that the relevant facts are very closely contested—in these proceedings as in various world fora. As will be seen in Section V.C of this Award, however, the Treaty provisions that are engaged in this case require findings of fact that are discrete and either common ground between the parties or unchallenged by the Respondent. Thus, this Section III is intended to give a mere overview of the factual aspects of the case, reflecting the parties' pleaded positions. It will be clear from the narrative which aspects are common ground between the parties and which are not.

A. Summary of the Claimants' Position

108. The Claimants are Mr İdris Yamantürk; his two sons, Mr Tevfik Yamantürk and Mr Müşfik Yamantürk; and Güriş, a construction company that is active in, notably, the construction, cement production and renewable-energy sectors.[23] The Claimants are majority shareholders in Raqqa (at

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2019; (v) on 28 March 2019, an extension to 28 June 2019; (vi) on 26 June 2019, an extension to 30 August 2019; (vii) on 29 August 2019, an extension to 30 September 2019; and (viii) on 26 September 2019, an extension to 31 October 2019; (ix) on 24 October 2019, an extension to 29 November 2019; (x) on 28 November 2019, an extension to 31 December 2019; (xi) on 19 December 2019, an extension to 28 February 2020; (xii) on 27 February 2020, an extension to 31 March 2020; (xiii) on 27 March 2020, an extension to 30 April 2020; (xiv) on 30 April 2020, an extension to 29 May 2020; (xv) on 28 May 2020, an extension to 30 June 2020; (xvi) on 25 June 2020, an extension to 31 July 2020; and (xvii) on 30 July 2020, an extension to 31 August 2020.

[23] SoC, ¶ 2.

91%)[24] and Hasakah (at 87%),[25] two cement companies incorporated in Syria and located respectively in the eponymous Governorates of Syria.

109. The Claimants assert that they decided to invest in the Syrian cement sector in 2004, based on: (i) an invitation by the Syrian government to Turkish investors; (ii) growth in economic relations between Syria and Turkey, following a political change in Syria in 2000; and (iii) the increased stability of the investment environment in Syria.[26]

110. On 7 August 2005, the Claimants applied to the Syrian Supreme Council of Investments in order to benefit from Syrian Law No 10 of 1991 on Investment Incentives (***Law 10***) in relation to their future investments.[27] This application was granted on 29 November 2005.[28]

111. The Claimants incorporated Raqqa on 1 February 2006,[29] and deposited US$1 million with the Syrian Central Bank shortly thereafter to demonstrate their "seriousness as an investor".[30] On 5 June 2007, the Claimants incorporated Hasakah.[31]

112. Following preparatory work between 2006 and 2009,[32] Raqqa established in the Ain Issa region a cement grinding and packaging facility that began operations in April 2009 (the ***Raqqa Plant***);[33] while Hasakah established in the Al-Yarubiyah Free Zone a cement grinding and packaging facility that began operations in March 2010 (the ***Hasakah Plant***).[34] Raqqa also began construction of an integrated cement production factory (the ***Raqqa Factory***) at the site of the Raqqa Plant. The foundation stone was laid in January 2011, with start of operations planned for 2013.[35] It is clear from the evidence in the record, and indeed undisputed, that the Claimants were closely involved in the day-to-day management and operations of the two companies. Tevfik Yamantürk, the Second Claimant, and Müşfik Yamantürk, the Third Claimant, served on the Board of Directors of both companies. Mr Çalik, a Güriş manager, served as the project manager for all of the companies' facilities from 2009, and he was involved in "the direct management of these plants", working closely with their operations managers.[36] Similarly, Mr Anil, Güriş' planning manager, was initially "involved in the project procurement phase, as well as feasibility studies and cost finding" for the Raqqa and Hasakah Plants, and subsequently became the "Managing Director for Syria Projects" in

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[24] SoC, ¶ 163. *See also* Güriş Raqqa Cement Company Minutes of the General Assembly Meeting of Shareholders, 6 March 2011, **Exhibit C-206**, p 1 (showing the respective shareholding interests of Güriş (73%), İdris Yamantürk (6%), Tevfik Yamantürk (6%) and Müşfik Yamantürk (6%)). The remaining 9% is held by Mehmet Faik Hamidi, who is not a claimant in this arbitration.

[25] SoC, ¶162. *See also* Hasakah Cement LLC Minutes of the General Assembly Meeting, 6 March 2011, **Exhibit C-204**, p 1 (showing the respective shareholding interests of Tevfik Yamantürk (43.5%) and Müşfik Yamantürk (43.5%)). The remaining 13% is held by Mehmet Faik Hamidi (9%) and two Syrian nationals, Ahmet Al Hamo and Gazi Hairbek (2% each), none of whom is a claimant in this arbitration.

[26] SoC, ¶¶ 22–25; Claimants' Post-hearing Submission, 18 April 2019 (the ***Claimants' PHB***), ¶¶ 8–9.

[27] Güriş Application for Approval of the Inclusion of a Project under the Provisions of Law 10, 7 August 2005, **Exhibit C-10**.

[28] Syrian Supreme Council of Investments Resolution No 481 /MS, 29 November 2005, **Exhibit C-2**.

[29] SoC, ¶ 29; Raqqa's Company Registration Statement, 19 April 2011, **Exhibit C-3**. The original name of Raqqa was Güriş Hasakah Cement Company. At the time of its incorporation, the Claimants held 82% of the shares.

[30] SoC, ¶ 31; Letter No 489/T by the General Establishment of Geology and Mineral Resources and the Syrian Arab Republic Ministry of Petroleum and Mineral Resources, 13 February 2006, **Exhibit C-4**.

[31] SoC, ¶ 37; Hasakah Free Zone Registry Certificate, 5 June 2007, **Exhibit C-282**.

[32] SoC, ¶¶ 32–41.

[33] *See* Güris Board of Directors Decision, 1 May 2009, **Exhibit C-24**, p 2.

[34] *See* Hasakah Board of Directors Decision, September 2010, **Exhibit C-25**, p 2.

[35] SoC, ¶ 44.

[36] Çalik Witness Statement, **CWS-2**, ¶ 6.

2012 and "handled management of the plants and personnel from headquarters [in Turkey]".[37] Further, Mr Tüylü, Güriş's accounting and finance manager, dealt with the accounting and administration of both Raqqa and Hasakah.

113. The Claimants say that Syria's stability and security took a turn for the worse early in 2011.[38] Protests against the government, which started in March 2011, spread throughout the country.[39] By 2012, the protests had turned into violent, armed conflict between the government and numerous opposition groups.[40] The Claimants concede that the conflict spread to the areas of their cement facilities only in March 2012.[41] They say, however, that their concerns about security and safety compelled them (i) to cease commercial activities at the Raqqa Plant in March 2011 and at the Hasakah Plant in April 2011 and (ii) to cease construction of the Raqqa Factory in June 2011.[42] These decisions were taken by Güriş' "high management" in Turkey.[43]

114. The Claimants go on to say that in 2012, due to the escalating armed conflict, Syrian government armed forces started withdrawing from most of the northern Syrian territories, including the regions where the Claimants' cement facilities are located.[44] The Syrian government armed forces withdrew from the Ain Issa region by July 2012 and from the Al-Yarubiyah Free Zone by March 2013.[45] In the period that followed, the Kurdish organizations PYD and YPG began to exercise governmental authority in those areas with the implicit co-operation and assent of the Syrian government.[46] PYD/YPG has been in control of the Ain Issa region (though not totally uncontested) since July 2012[47] and of the Al-Yarubiyah region since November 2013.[48] (There was an interlude, when the Free Syrian Army (*FSA*), which is hostile to YPG, controlled Al-Yarubiyah between March and October 2013.[49])

115. It is a principal contention of the Claimants that Syria's government intentionally withdrew its armed forces from the areas where Kurdish organizations, now under the umbrella of the DFNS, proclaimed self-governance.[50] The Claimants say that the Syrian government has all but openly admitted this. They rely heavily on certain public statements by the President of Syria, Bashar al-

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[37] Anil Witness Statement, CWS-3, ¶¶ 5 and 8.

[38] *See* Claimants' PHB, ¶ 12.

[39] SoC, ¶¶ 50–51; Claimants' PHB, ¶ 12 and references therein.

[40] SoC, ¶¶ 50–72; Reply, Section VII.B.1.

[41] Yamantürk Witness Statement, CWS-1, ¶¶ 30 and 44; Çalik Witness Statement, CWS-2, ¶ 37.

[42] *See* Claimants' PHB, ¶¶ 16–18 and references therein.

[43] Hearing Transcript, 357:11–20.

[44] SoC, ¶ 79. *See also* Rejoinder, ¶ 30 ("The Syrian Arab Army was obliged to withdraw from the north of Syria, where Ain Issa is in about mid 2012") and ¶ 84 ("Syria, has no authority at all in the north where the alleged investment are since mid 2012").

[45] SoC, ¶ 79 ("Government forces mostly continued to control Al-Yarubiyah until March 2013, when FSA captured the city..."), ¶ 94 ("Timeline[s]"), and ¶ 126 ("Until March 2013, the [Al-Yarubiyah] town was mostly under the control of the government despite occasional occupancies by various opposition groups. In March of 2013, the FSA established control over the town."); Erkan Expert Report, CER-1, ¶¶ 64–65 and 68 ("Al-Yaarubiyah came under the control of armed groups attached to the Free Syrian Army for the first time and completely on 2 March 2013."); Hasan Expert Report, RER-6, p 19 ("The Syrian Arab Army has withdrawn from areas mostly populated by the Kurds in the north and north-east of the country since the summer of 2012.").

[46] *See* SoC, ¶¶ 80–87; Claimants' PHB, Annex 1, ¶¶ 8–29 and references therein.

[47] In July 2014, the Islamic State of Iraq and Syria (*ISIS*) captured Ain Issa, leading to an interruption in PYD/YPG control between the summer of 2014 and May 2015 (*see* SoC, ¶ 92).

[48] In the summer of 2014, ISIS captured Al-Yarubiyah, leading to an interruption in PYD/YPG control between the summer of 2014 and January 2015 (*see* SoC, ¶ 93).

[49] SoC, ¶ 89.

[50] Hearing Transcript, 10:16–20 and 31:6–9.

Assad, which are said to characterize the Kurds as allies in the struggle against other enemies, notably Islamic groups.[51] The Claimants note in that regard that certain civil-administration functions in DFNS-controlled areas are still performed by Syria's government, notably the payment of state pensions, schooling and teachers' salaries, and issuance of various official papers such as passports and civil-status certificates.[52] Also, it is undisputed that the Syrian government maintains an official presence in cities, within small "security squares" comprising government offices on which Syria's flag is flown.[53] On this basis, the Claimants say that actions and omissions by political or military organizations within DFNS- controlled areas (notably the PYD and the YPG)[54] are attributable to the Respondent under international law.[55]

116. The Claimants assert that from the time PYD/YPG assumed control in the Ain Issa and Al-Yarubiyah regions, the Raqqa and Hasakah Plants were ravaged by various incidents: thefts and armed attacks, demands for payments to be made or equipment to be handed over to PYD/YPG, forcible seizure of equipment and machinery by PYD/YPG, and even attempts by PYD/YPG to operate the plants.[56] The Claimants say that they have had no access at all to the site of the Raqqa Plant and the Raqqa Factory since July 2014 and to the Hasakah Plant since March 2014; and that their information is perforce limited to what may be obtained from publicly available sources and contacts they have in the region.[57] In essence, however, the Claimants say that they will not be able to return to Syria and to whatever may have been left of the cement facilities: the relevant investments are to be treated as lost.[58] To be clear, the Claimants affirm their desire to return to the Plants (and for a time they did indeed entertain the idea of returning but rejected it on security grounds).[59] They consider that the PYD/YPG would not pose an obstacle to the Claimants' resuming control over the Plants and operations there.[60] But the situation on the ground is too unsafe for the Claimants to return.[61]

117. The Claimants say that their requests for protection to the Syrian Ministries of Foreign Affairs and Economy in August 2013 were left without response.[62] Also, in November 2013, the Claimants informed the Al-Yarubiyah Directorate of Free Zones that their office tools and equipment had been stolen or damaged, but again received no response.[63] Between April 2014 and 30 November 2015, the Claimants sent various letters to the Respondent invoking their rights under the

Treaty and requesting amicable settlement,[64] but once more received no response.[65]

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[51] Hearing Transcript, 697:15–19 and 698:14–22.

[52] Hearing Transcript, 37:4–8, 288:14–20, 524:11–24 and 635:11–21.

[53] As the Respondent's witness confirmed at the hearing: Hearing Transcript, 711:11–13.

[54] The Tribunal notes that under Article 15 of the "Rojava" "Charter", the PYD is "the sole military force" in the relevant areas. The PYD is a political party, and the Claimants characterize it as the dominant political force in the relevant areas: Hearing Transcript, 38:18–22.

[55] Reply, ¶¶ 169–170.

[56] SoC, ¶ 315.

[57] *See* Claimants' PHB, ¶¶ 16–18 and references therein.

[58] Hearing Transcript, 30:8–15 and 41:21–25.

[59] Hearing Transcript, 358:3–6, 497:20–22 and 499:14–19.

[60] Hearing Transcript, 129:12–19.

[61] Hearing Transcript, 128:4–9 and 359:1–8.

[62] SoC, ¶ 107; Claimants' PHB, ¶ 19.

[63] SoC, ¶ 133.

[64] *See* Notifications submitted to various Syrian authorities, E**xhibit** C-16; Letter from Güriş to Consulate General of Syria in Istanbul, 26 September 2014, E**xhibit** C-19.

[65] SoC, ¶¶ 137–141.

B. Summary of the Respondent's position

118. The Respondent rejects the Claimants' allegation that the events of March 2011 triggered a "revolution"[66] and denies that the conflict in Syria may be characterised as a "civil war".[67] It asserts that Syria has been the victim of a "war" waged by armed groups and terrorists, assisted, financed, and trained by various countries.[68] Notably, it is said that "Turkey has been the main cause of the war in Syria" since March 2011,[69] and that Turkey "supported, funded and armed men to fight the Syrian Army".[70] The Respondent also notes that various efforts it made to resolve the crisis peacefully were rejected by opposition groups and the international community.[71]

119. The Respondent confirms—indeed relies for its defence upon the assertion—that it has had "no control of the region where the alleged investments are, since mid-2012",[72] but asserts that "the [C]laimants have no access to the alleged investment[s] since 2012 not because [of] the government of Syria and the use of excessive violence [by the Respondent's forces] but for only one reason[:] the imposed war on Syria by the governments of occidental states that pretend to form the [i]nternational community".[73] The Respondent claims that the government's armed forces did not freely concede control over the north-eastern territories of the country, but rather lost "many battles" against the "Kurd militias" (which the Respondent says were supported by United States military personnel on the ground), the FSA and ISIS, and were then compelled to withdraw in order to protect civilians in other parts of the country.[74] Since the middle of 2012, the Respondent "has had no [effective] sovereignty on the zone where the facilities of the Claimants are",[75] and it "is not able to establish any law, rules or order and enforce them in the north east of Syria".[76]

120. The Respondent denies that Syria's government co-operates with or controls PYD/YPG.[77] It asserts that these "Kurdish militias are considered as terrorist groups by Syria"[78] and their conduct is thus not attributable to the Respondent.[79] The 2014 "Charter" for the "Rojava" areas in north-eastern Syria in fact asserted broad autonomy and rejected the current constitution of the Syrian Arab Republic (while affirming the territorial integrity of Syria and the status of the Rojava areas as an integral part of it).[80]

121. The Respondent also asserts that the Claimants have failed to prove that: (i) "the Respondent

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66 SoD, ¶¶ 9 and 28; Rejoinder, ¶¶ 24–27.

67 SoD, ¶ 88; Rejoinder, ¶¶ 24–27; Hearing Transcript, 200:2–11.

68 SoD, ¶¶ 11–28; Rejoinder, ¶¶ 5–19.

69 SoD, ¶ 43.

70 SoD, ¶¶ 43–58; Rejoinder, ¶¶ 34–36.

71 SoD, ¶¶ 19–22.

72 Rejoinder, ¶ 33; Respondent's Post-hearing Submission, 16 April 2019 (the ***Respondent's PHB***), ¶ 23.

73 Rejoinder, ¶ 32.

74 SoD, ¶¶ 70–73; Rejoinder, ¶¶ 30–33; Respondent's PHB, ¶¶ 36–43.

75 Respondent's PHB, ¶ 24.

76 Respondent's PHB, ¶ 23.

77 Rejoinder, ¶¶ 37–49.

78 Rejoinder, ¶ 49; Respondent's PHB, ¶¶ 47–50.

79 Respondent's PHB, ¶ 25.

80 *See* notably the preamble and Article 12 of the "Charter" (also called the "Social Contract"). A revised version of this text, the "Social Contract of Rojava" of July 2016, reaffirms this fundamental principle in Article 7.

committed any act to deprive the Claimants [of] their facilities"; (ii) "the Respondent omitted to act in a way that would have deprived the Claimants [of] the facilities (the Respondent lost control on the northeast and that is not an omission of act[ion]);" and (iii) "the Kurdish militias acted by order of the Syrian army (to interfere in the facilities of the Claimants)". [81] According to the Respondent, the Claimants' facilities "are still there, nobody knows if anything is lost or not and how much it is worth", and "[i]f tomorrow Syria regains control and authority all over the north east, the Claimants will have full legal and actual titles to exploit their facilities". [82] In connection with this last point, the Respondent asserted that its armed forces would regain control of the relevant areas immediately after United States personnel withdrew, following a change of policy announced in December 2018. [83] The Respondent has not informed the Tribunal that this occurred.

IV. THE SCOPE OF THIS AWARD

122. The Claimants request the Tribunal to grant the following relief:

(a) Find that the Tribunal has jurisdiction over Claimants' claims;

(b) Find that Respondent is liable for the losses of Claimants' losses [sic];

(c) Award damages to Claimants due to the losses suffered from the violations of Respondent: (i) calculated in accordance with the discounted cash flow method, in an amount no less than USD 88,381,126.75; or alternatively (ii) equal to the "sunk costs" of Claimants, in an amount no less than USD 54,690,066.96;

(d) Award interest on all monetary sums awarded, including pre-award and post-award interest;

(e) Order Respondent to pay Claimants the full costs of arbitration, including, without limitation, all arbitrators' fees and costs, all ICC administration fees, reasonable attorneys' fees and other fees and expenses incurred by Claimants in connection with [the] present dispute, including the internal costs expended by Claimants in documenting and presenting these claims, in an amount to be calculated at the conclusion of these proceedings and payable in internationally convertible currency. [84]

123. For its part, the Respondent seeks relief to the following effect:

1- The Tribunal has no competence to resolve the dispute.

2- Subsidiar[ily], rejecting the Claim for form default.

3- More subsidiar[ily], rejecting the Claim at [the] substantive level as [it] fails to prove the facts and provided wrong calculation.

4- Ordering the Claimants to pay compensation (to be evaluated by the Arbitrator) to the

[81] Respondent's PHB, ¶¶ 48, 92–97.

[82] Respondent's PHB, ¶ 93.

[83] Hearing Transcript, 1095:5–15 and 1117:10–15.

[84] Claimants' PHB, ¶ 63.

Respondent for their malicious case by suing the Respondent without valid reason and by introducing wrong facts and arguments, in addition to compensation for the attorney's fees of the Respondent to the value of Seven hundred thousand Euros.

5- Ordering [t]he Claimant[s] to be in charge for [sic] the whole cost of the arbitration.[85]

124. The foregoing requests come within the Tribunal's Terms of Reference.[86] And as noted at paragraphs 323 *et seq*, this Final Award addresses all of the relief sought by the parties, though it is unnecessary to deal with all of the parties' arguments (*moyens*, in terms of Swiss law).

V. ANALYSIS

125. In developing its reasoning and decisions on the issues considered below, the Tribunal has been ably assisted by the pleadings of the parties, for which the Tribunal records its gratitude. While the Tribunal has carefully considered the many arguments and voluminous evidence presented by the parties, it will not be necessary to address all of them in its analysis.

126. The Tribunal's analysis is structured in four parts:
(i) The Tribunal starts by recalling the rules governing the arbitration proceedings, its jurisdiction, and the merits of the dispute (**Sub-section A**).

(ii) The Tribunal then turns to consider the existence, scope, and exercise of its jurisdiction (**Sub-section** B).

(iii) It then addresses the Respondent's liability for various alleged breaches of the Treaty (**Sub-section** C).

(iv) The Tribunal turns lastly to the Claimants' compensable harm and the quantum of compensation (**Sub-section** D).

A. Applicable Laws and Rules

1. The arbitration proceedings

127. Article 19 of the 2012 ICC Rules provides as follows:

The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are

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85 Respondent's PHB, ¶ 100.

86 Terms of Reference, ¶ 41(1)-(5).

silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.

128. As recorded in paragraph 43 of the Terms of Reference, these arbitration proceedings are governed by:

(i) the mandatory provisions of Chapter 12 of the Swiss Private International Law Statute ("PILS");

(ii) the [2012] ICC Rules;

(iii) [the] Terms of Reference; [and]

(iv) any additional procedural rules that the Parties may agree on or the Arbitral Tribunal may determine in accordance with Article 19 of the ICC Rules after consultation with the Parties.

129. In relation to point (iv), as already noted in Section II, the Tribunal has issued numerous Procedural Orders and directions, after consultation with the parties.

2. Jurisdiction

130. It is common ground between the parties that the Tribunal has the power to rule on its own jurisdiction.[87] It is also common ground that, the Claimants' claims being formulated under the Treaty, questions pertaining to the Tribunal's jurisdiction must be answered under the terms of the Treaty, in particular Article VII. As with every international treaty, its terms are to be interpreted in accordance with general international law. The relevant rules are codified in Articles 31–33 of the 1969 Vienna Convention on the Law of Treaties (*VCLT*).

3. The merits of the dispute

131. Article 21 of the 2012 ICC Rules provides as follows:

1 The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.

2 The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.

3 The arbitral tribunal shall assume the powers of an *amiable compositeur* or decide *ex aequo et*

[87] *See* Swiss PILA, Article 186(1); and 2012 ICC Rules, Article 6(3).

bono only if the parties have agreed to give it such powers.

132. In the Amendment to the Request for Arbitration, the Claimants proposed that "first and foremost, the Treaty between Turkey and Syria and relevant rules and principles of international law, and to the extent needed, the contracts between the parties and the relevant rules of Syrian law form the applicable law to the dispute". [88] In its Procedural Order No 2 of December 2016, issued at a time when the Respondent was not participating in the proceedings, the Tribunal indicated that it "shall apply to the merits of the dispute the provisions of the Treaty, Syrian law and such rules of international law as may be applicable". This enumeration indicates that the Treaty is of course the Tribunal's starting point and ultimate analytical framework. Operating within that framework, it is for the Tribunal to determine the issues to which Syrian law and general international law may be applicable.

133. The Respondent has suggested that the Tribunal should "apply the Syrian laws and regulations", as "the law of the host State should be applicable [in] all arbitration process[es]". [89] The Tribunal agrees that Syrian law is to be taken into account in respect of a number of issues, as will be seen below. Further, the Tribunal recalls that in matters of international responsibility by way of treaty breach, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty", [90] and "[t]he characterization of an act of a State as internationally wrongful is governed by international law" and "not affected by the characterization of the same act as lawful by internal law". [91] These are fundamental rules of international law. Rightly, the Respondent has not taken issue with them.

B. Jurisdiction and Admissibility

134. This section of the Award examines the following issues relating to the Tribunal's jurisdiction to decide the Claimants' claims and the admissibility of those claims:

(i) whether the Treaty has entered into force;

(ii) if it did, whether the Treaty has been suspended;

(iii) whether the Claimants' claims should be dismissed because of a "default in form", on the grounds that the Claimants are allegedly claiming damages for harm caused to the assets held by two Syrian companies, Raqqa and Hasakah, rather than harm specifically directed to the Claimants' shareholding interests in those two Syrian companies;

(iv) whether the fact that the Hasakah Plant is located in a Free Zone where certain special regulations (notably fiscal) apply means that the Claimants' shareholding in Hasakah, the Syrian company that owns the Hasakah Plant, cannot be said to be an "investment" in Syria within the

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[88] Amendment to the Request for Arbitration, 13 December 2016, ¶¶ 26–27.

[89] Answer, Section III.1.b.

[90] VCLT, Article 27.

[91] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc A/56/10 (2001) (***2001 ILC Articles***), Article 3.

meaning of Article I(2) of the Treaty;

(v) whether the Claimants properly notified the dispute to the Respondent, and whether the arbitration was commenced more than six months after any such notification, as required by Articles VII(1) and VII(2) of the Treaty, respectively—these being analytically separate issues but nevertheless closely inter-related in the present case and conveniently addressed together;

(vi) whether, in light of the proviso relating to seising the host-State courts in Article VII(2) of the Treaty, the Claimants should have referred the dispute to the Syrian courts and waited for a period of one year before commencing this arbitration; and

(vii) whether the "clean hands" doctrine bars the Claimants from invoking the Treaty's protections.

Each of these issues is addressed in turn below.

1. Whether the Treaty has entered into force

135. Article X(1) of the Treaty provides as follows:

Each Party shall notify the other in writing of the completion of the constitutional formalities required in its territory for the entry into force of this Agreement. This Agreement shall enter into force on the date of the latter of the two notifications. It shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with paragraph 2 of this Article.

136. In its Answer, the Respondent alleged that the Claimants had not provided sufficient proof that the States Parties to the Treaty, Syria and Turkey, had either completed the requisite constitutional formalities for the Treaty to enter into force or exchanged written notifications of the completion of such formalities. [92] The Respondent did not pursue this objection in its subsequent submissions. In response to a question from the Tribunal at the hearing, the Respondent confirmed that the Treaty did enter into force. [93]

137. Although the Respondent is no longer pursuing this jurisdictional objection, the Tribunal, having considered the materials in the record, [94] is satisfied in any event that Syria and Turkey notified each other in writing of the completion of the constitutional formalities required in their respective territories for the Treaty's entry into force, and that accordingly the Treaty entered into force on 3 January 2006 in accordance with its Article X(1).

138. The Tribunal notes further that, at the hearing, the Respondent confirmed that it has not taken any

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[92] Answer, ¶ 1.

[93] Hearing Transcript, 266:7–22.

[94] *See* Note Verbale from the Syrian Ministry of Foreign Affairs to the Embassy of the Turkish Republic in Damascus, 18 July 2004, **Exhibit C-214**; Note Verbale from Embassy of the Turkish Republic in Damascus to the Syrian Ministry of Foreign Affairs, 3 January 2006, **Exhibit C-215**; and Note Verbale from Syrian Ministry of Foreign Affairs to the Embassy of the Turkish Republic in Damascus, 5 February 2006, **Exhibit C-216**.

steps to date to denounce the Treaty, nor was it aware of any such steps by Turkey.[95] Neither side has informed the Tribunal subsequently of a denunciation of the Treaty by either Syria or Turkey.

2. Whether the Treaty has been suspended

139. The Respondent has not taken the position in formal diplomatic exchanges that the Treaty is to be regarded as terminated. Nor has the Treaty expired pursuant to the provisions in Article X(1) thereof. Further, although prompted specifically by the Tribunal, the Respondent did not indicate that it had given any notice to Turkey, in writing or otherwise, regarding the suspension of the Treaty, at any point.[96]

140. The Tribunal is aware of events in recent months, following the closure of the proceedings, that indicate further deterioration in the relations between Syria and Turkey. While the Tribunal has not been informed by the parties that either of the two States has served a notice of suspension of the Treaty on the other State, it does bear in mind those recent developments in addressing the Respondent's arguments.

141. The Respondent argues that the Treaty was suspended *ipso facto*, without notice, as a result of: (i) Turkey's hostility towards Syria, entailing a breach of the principles of economic cooperation and protection of investments on which the Treaty is premised; and (ii) the suspension of diplomatic relations between Turkey and Syria.[97] At the hearing, the Respondent explained that the alleged suspension of the Treaty occurred no later than April 2011, when Turkey hosted a meeting of the FSA, an armed opposition group to Syria's government,[98] and that since then there have been armed hostilities of varying intensity between Turkey and Syria. As for the legal consequences of the alleged suspension of the Treaty, the Respondent claims that "no claim [under the Treaty] whatever could be heard during the hostility period".[99] In simple terms, on the Respondent's case, no obligations under the Treaty, and thus no entitlements on the part of the Claimants, could have arisen after April 2011.

142. The Tribunal observes that there is no allegation by the Respondent that Turkish nationals or companies are treated as enemy nationals and their property as enemy property under Syrian law. Indeed, the Respondent has confirmed that the Claimants' rights of ownership over their shares remain fully valid and recognized within the Syrian legal order, as noted at paragraph 121 above.

(i) The requirement of written notice of suspension

143. While Article X(2) of the Treaty contains a provision regarding denunciation, there is no provision

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[95] Hearing Transcript, 274:22–275:4.

[96] *See* Hearing Transcript, 212:20–25.

[97] SoD, ¶¶ 138–157; Hearing Transcript, 212:13–217:24.

[98] Hearing Transcript, 217:9–11 and 290:25–292:7.

[99] SoD, ¶ 149.

in the Treaty concerning suspension. The matter therefore falls to be resolved by application of general international law. The question is whether any of the circumstances invoked by the Respondent—the occurrence of armed conflict/hostilities or the suspension of diplomatic relations between Turkey and Syria—is of itself capable of suspending the Treaty, without notice to that effect. In the Tribunal's view, the answer is in the negative.

144. The Tribunal notes at the outset that Syria is a party to the VCLT but Turkey is not. However, both sides accept that the relevant provisions of the VCLT reflect customary international law and are applicable in the relations between Turkey and Syria.[100] Under Articles 65(1) and 67(1) of the VCLT,[101] suspension of the Treaty would require Syria to give Turkey written notice of its intention to suspend the Treaty.[102] However, as noted above, no such notice was given by Syria at any point.[103]

(ii) No ipso facto *suspension in present circumstances*

145. Although the absence of notice is dispositive of the Respondent's argument, the Tribunal is not persuaded in any event that the Treaty may be said to have been suspended *ipso facto*.

146. The Tribunal considers that the contemporary customary international law rule on the impact of armed conflict on treaties is accurately codified in Article 3 of the 2011 Draft ILC Articles on the Effect of Armed Conflict on Treaties (the ***2011 ILC Articles***). This provides, in relevant part, that the "existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties as between State Parties to the conflict". As may be seen in the sources cited by the ILC in support of this provision, Article 3 reflects the predominant State practice and scholarly authority.[104] "Armed conflict" in the 2011 ILC Articles means "a situation in which there is resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups".[105] This characterization applies to the situation in Syria. It is of no moment in that regard if the situation is to be classified as an "international" armed conflict (as the Respondent contends) or a "non-international" armed conflict (as the Claimants contend).

147. The effect of the general rule in Article 3 of the 2011 ILC Articles is that a further inquiry is

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[100] *See* SoC, ¶ 180; SoD, ¶ 105.

[101] *See* VCLT, Article 65(1): "A party which, under the provisions of the present Convention, invokes... or a ground for... suspending [a treaty's] operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefor.". *See also* Article 67(1): "The notification provided for under article 65, paragraph 1 must be made in writing."

[102] *See also Draft Articles on the Effects of Armed Conflicts on Treaties,* [2011-II] YBILC (***2011 ILC Articles***), Article 9(1): "A State intending to terminate or withdraw from a treaty to which it is a Party, or to suspend the operation of that treaty, as a consequence of an armed conflict, shall notify the other State Party or State Parties to the treaty, or its depositary, of such intention."

[103] *See* ¶ 139 above.

[104] *See* 2011 ILC Articles, Commentary on Article 3 (referring notably to *Oppenheim's International Law* and McNair's *Law of Treaties*, resolutions adopted by the Institute of International Law in 1985, and domestic case law, and noting that "[w]hile the leading judgments on this matter are not always models of clarity, it has become evident that, under contemporary international law, the existence of an armed conflict does not *ipso facto* put an end to or suspend existing agreements, although a number of them may indeed lapse or be suspended on account of their nature, commercial treaties for instance"). *See also* Memorandum by the ILC Secretariat, *The Effect of Armed Conflict on Treaties: An Examination of Practice and Doctrine*, UN Doc A/CN.4/550 (2005) (noting that the "modern view" that "armed conflict does not *ipso facto* terminate or suspend the operation of treaties in force between the Parties to a conflict" is "perhaps one of the only common denominators that can be drawn from the vastly divergent practice and doctrine.").

[105] 2011 ILC Articles, Article 2(b). The latter definition follows the ICTY decision in *Prosecutor v Tadiç*, IT-94-1-A, 2 October 1995, ¶ 70.

necessary. As noted in the ILC's commentary, "in principle, the first step of the inquiry should be to establish whether the treaty so provides [ie, for its continued operation or otherwise], since it will, depending on the terms of the provision and its scope, settle the question of continuity".[106] Article 4 of the 2011 ILC Articles thus provides that "[w]here a treaty itself contains provisions on its operation in situations of armed conflict, those provisions shall apply". The relevant treaty provisions are of course subject to the normal rules of treaty interpretation. There is no requirement that they should expressly stipulate that they operate in situations of armed conflict.[107]

148. Turning to the Treaty, it does not contain a general provision authorizing derogation at times of armed conflict. To the contrary, several of its provisions indicate that the Treaty is intended to operate in situations of armed conflict. In particular, the "full protection at all times" standard in Article II(2)[108] and the "war losses" clause in Article IV(3)[109] recognize that the Treaty will continue to apply during times of armed conflict. Article IV(3) refers to "war", "insurrection", and "civil disturbance", thus capturing both inter-State and internal forms of conflict; and it makes no distinction or qualification for the event that the conflict may arise between the two States Parties, rather than between a State Party and a third State.[110] These are important provisions which cannot be ignored in the present analysis.

149. This conclusion is further supported by considering the factors relevant in ascertaining a treaty's susceptibility to apply at times of armed conflict. In that regard, Article 6 of the 2011 ILC Articles refers "to all relevant factors, including: (a) the nature of the treaty, in particular its subject matter, its object and purpose, its content and the number of Parties to the treaty...". An Annex to the Articles contains an "indicative list of treaties" whose subject-matter "involves an implication that they continue in operation, in whole or in part, during armed conflict".[111] The list includes "[t]reaties of friendship, commerce and navigation and agreements concerning private rights". Bilateral investment treaties are, of course, a modern-day evolution of friendship, commerce and navigation treaties. The ILC also specifically refers to "bilateral investment treaties" as falling within the scope of "agreements concerning private rights".[112] The Tribunal respectfully agrees with the ILC's approach, considering it to be consistent with other rules of general international law which protect private rights at times of uncertainty or dispute in international relations, such as the absence of international recognition or changes in boundaries (as the Tribunal indicates at paragraph 158 below).

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[106] 2011 ILC Articles, Commentary on Article 4.

[107] *Ibid* : "The Commission considered whether or not to include the qualifier "expressly", but decided against doing so as it regarded it as being redundant. Furthermore, it was found that such a qualifier could be unnecessarily limiting, since there were treaties which, although not expressly providing therefor, continued in operation by implication through the application of articles 6 and 7."

[108] Treaty, Exhibit CL-2, Article II(2): "Investments of investors of each Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection in the territory of the other Party.").

[109] Treaty, Exhibit CL-2, Article IV(3): "Investors of either Party whose investments suffer losses in the territory of the other Party owing to war, insurrection, civil disturbance or other similar events shall be accorded by such other 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."

[110] *See also* paras 229 *et seq* below for the Tribunal's findings regarding Article IV(3) of the Treaty.

[111] 2011 ILC Articles, Article 7 and Annex: "The effect of such an indicative list is to create a set of rebuttable presumptions based on the subject matter of those treaties: the subject matter of the treaty implies that the treaty survives an armed conflict. Although the emphasis is on categories of treaties, it may well be that only the subject matter of particular provisions of the treaty carries the implication of continuance."

[112] *Ibid.*, Annex, ¶ 48 and ¶ 69 (noting that "treaty mechanisms of peaceful settlement for the disputes arising in the context of private investments abroad... may... come within group (e) as "agreements concerning private rights").

150. There is therefore, at the very least, a presumption that the Treaty did continue being in effect after April 2011. This presumption could be rebutted if the Treaty's provisions made it clear that the Treaty was intended to be suspended in periods of armed conflict. However, as discussed in paragraph 148 above, several provisions in the Treaty indicate, to the contrary, the States Parties' intent that it continue to apply at times of armed conflict.

(iii) Suspension of diplomatic relations immaterial

151. The Tribunal is also unable to agree with the Respondent's suggestion that its suspension of diplomatic relations with Turkey entailed an *ipso facto* suspension of all treaties between the two States.[113]

152. As Article 63 of the VCLT provides, "[t]he severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty except insofar as the existence of diplomatic or consular relations is indispensable for the application of the treaty". Here, the Respondent did not assert that (and in any event it is difficult to see why) the existence of diplomatic or consular relations between Turkey and Syria is indispensable for the application of the Treaty.

153. A well-known illustration of the application of the principle reflected in Article 63 of the VCLT relates to the 1955 Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran. This treaty has been held by the International Court of Justice (the ***ICJ***) to have continued in force despite the breakdown in diplomatic relations between the two countries. As the ICJ explained in the first of a series of cases under this treaty,[114] *United States Diplomatic and Consular Staff in Tehran*:

The very purpose of a treaty of amity, and indeed of a treaty of establishment, is to promote friendly relations between the two countries concerned, and between their two peoples, more especially by mutual undertakings to ensure the protection and security of their nationals in each other's territory. It is precisely when difficulties arise that the treaty assumes its greatest importance, and the whole object of Article XXI, paragraph 2, of the 1955 Treaty was to establish the means for arriving at a friendly settlement of such difficulties by the Court or by other peaceful means. It would, therefore, be incompatible with the whole purpose of the 1955 Treaty if recourse to the Court under Article XXI, paragraph 2, were now to be found not to be open to the Parties precisely at the moment when such recourse was most needed. *Furthermore, although the machinery for the effective operation of the 1955 Treaty has, no doubt, now been impaired by reason of diplomatic relations between the two countries having been broken off by the United States, its provisions*

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[113] The parties confirmed in response to questions from the Tribunal that Turkey's consular and diplomatic missions in Syria suspended operations as of March and July 2012, and Syria's embassy in Ankara similarly suspended operations as of May 2012, but Syria's consulate in Istanbul continues to operate; *see* Letter from the Turkish Ministry of Foreign Affairs, **Exhibit** C-280; Letter from the Syrian Ministry of Foreign Affairs, **Exhibit** D.6. The parties also confirmed that neither Turkey nor Syria has taken any measures to place the interests of the nationals of the other country in a special "enemy" or "belligerent" status, or the like.

[114] These cases are: (i) *United States Diplomatic and Consular Staff in Tehran (USA v Iran)*, Judgment, 24 May 1980, [1980] ICJ Rep 3; (ii) *Oil Platforms (Iran v USA)*, Preliminary Objection, Judgment, [1996] ICJ Rep 803; and Judgment, [2003] ICJ Rep 161; (iii) *Certain Iranian Assets (Iran v USA)*, Preliminary Objections, Judgment, [2019] ICJ Rep 7; and (iv) *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v USA)*, Order on Interim Measures, [2018] ICJ Rep 623.

remain part of the corpus of law applicable between the United States and Iran.[115]

(iv) The Respondent's reliance on a decision of the Eritrea-Ethiopia Commission

154. The Tribunal has also carefully considered the decision of the Eritrea-Ethiopia Claims Commission relied upon by the Respondent in support of its argument for an *ipso facto* suspension of the Treaty.[116] In the Tribunal's view, that decision (which pre-dates the 2011 ILC Articles) does not advance the Respondent's case.

155. In that case, the treaty in question was a 1993 Protocol between Eritrea and Ethiopia under which Ethiopia had undertaken to pay pensions to former Ethiopian State employees who, following Eritrea's independence, had become Eritrean nationals and residents. The Claims Commission had to consider the impact that the 1998-2000 armed conflict between the two States had on Ethiopia's obligations under the Protocol. After noting that "modern doctrine does not provide settled guidance on significant points" related to this issue, the Commission observed that "[t]he parties' presumed intent is generally seen as a key factor in determining the treaty's wartime status".[117] It acknowledged that, by their terms, some treaties clearly apply during hostilities (citing as examples the Hague Regulations and the 1949 Geneva Conventions).[118] It also recognized that the "nature and purpose" of some treaties may "reveal an intention that the treaty continues to operate" (citing as an example "treaties confirming private rights to land").[119] As for the 1993 Protocol, the Commission held that when "the intention to maintain a treaty in operation during hostilities is not plainly apparent from the text or the surrounding circumstances", then the "parties should be presumed to intend that such treaties should be at least suspended during the hostilities".[120]

156. As already noted at paragraph 148 above, the present Treaty does in fact make it "plainly apparent" that it continues to operate at times of armed conflict.

157. In addition, the 1993 Protocol which the Commission considered had a fundamentally different nature from the present Treaty. In that regard, the Commission concluded that the two Contracting States would not have intended for one of them to continue to pay State official/employee pensions to nationals of the other during a period of armed conflict. This obligation was intimately linked to Ethiopia's statehood—the very thing that the armed conflict imperilled.

158. By contrast, the Treaty protects investors' economic rights, in essence property rights, which in principle—as the Eritrea-Ethiopia Claims Commission indeed recognized—transcend changes in

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115 [1980] ICJ Rep 3, ¶ 54 (emphasis added).

116 The Respondent cites to J E Viñuales and P-M Dupuy, *International Environmental Law* (2015), p 352, referring to *Pensions—Eritrea's Claims 15, 19 & 23*, Final Award, (2005) 26 RIAA 471.

117 *Pensions—Eritrea's Claims 15, 19 & 23*, Final Award, (2005) 26 RIAA 471, ¶¶ 28 and 29.

118 *Ibid.*, ¶ 29.

119 *Ibid.*

120 *Ibid.*, ¶ 30.

sovereignty or statehood.[121] The States Parties' obligations to promote and protect such rights as qualifying "investments" under the Treaty are not inexorably contingent upon the absence of armed conflict between the States Parties. The authority adduced and codified by the ILC bears this out clearly, as already noted above.

159. For the foregoing reasons, the Tribunal concludes that the Treaty was not suspended *ipso facto*.

160. For the sake of completeness, the Tribunal notes that, in its written pleadings, the Respondent had also argued that it had (tacitly or constructively) suspended the Treaty as a countermeasure against conduct by Turkey that the Respondent alleged was internationally wrongful.[122] However, at the hearing, the Respondent confirmed that it was no longer relying on the doctrine of countermeasures as a foundation for the suspension of the Treaty.[123] Accordingly, this issue does not arise for consideration.

3. Whether the Claimants' claims should be dismissed for "default in form"

161. The Respondent contends that the Claimants' claims should be rejected because they are predicated on harm caused to the assets held by the two Syrian companies, Raqqa and Hasakah, rather than harm specifically directed to the Claimants' shareholding interests in those Syrian companies.[124] The Respondent characterizes this as a "default in form", which the Tribunal understands to mean that the named Claimants do not have standing to pursue the claims presented.

162. In response, the Claimants contend that: (i) their protected investments include their shares in the two Syrian companies; (ii) the harm allegedly suffered by the Claimants includes "loss" of these shares; and (iii) they "quantify the damages by calculating the value of the only enterprises run by these companies, which is an accurate reflection of the value of the companies, and thus, Claimants' shares in these companies".[125] The Claimants assert that their claims are, therefore, not for "damages, compensation and returns for somebody else" as the Respondent contends, but for the Claimants themselves.[126]

163. The Tribunal notes that all of the claims presented by the Claimants are based on the Treaty provisions setting out obligations owed to qualifying "investors", "investments", or both.

164. Article I(1) of the Treaty defines an "investor" in the following terms:

The term "investor" means:

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[121] *See also* *Settlers of German Origin in Poland*, Advisory Opinion, PCIJ Series B No 6 (1923), pp 34 *et seq*.

[122] SoD, ¶¶ 150–157.

[123] Respondent's Opening Presentation, Slide 26.

[124] SoD, ¶¶ 123–128; Rejoinder, ¶¶ 59–69; Respondent's PHB, ¶ 90.

[125] Reply, ¶¶ 99–100.

[126] Reply, ¶ 100.

(a) natural persons deriving their status as nationals of either Party according to its applicable law,

(b) corporations, firms or business associations incorporated or constituted under the law in force of either of the Parties and having their headquarters in the territory of that Party.

165. Further, Article I(2) of the Treaty defines an "investment", in relevant part, as follows:

The term "investment", in conformity with the hosting 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,

...

The said term shall refer to all direct investments made in accordance with the laws and regulations in the territory of the Party where the investments are made...

166. There is no dispute that the First, Second and Third Claimants are natural persons of Turkish nationality, and that the Fourth Claimant is a company incorporated and headquartered in Turkey.[127] Accordingly, all Claimants satisfy the Treaty definition of "investor" in Article I(1). Nor does the Respondent contest that the shares (directly) held by the Claimants in the two Syrian companies, Raqqa and Hasakah, also qualify as "investments" for the purposes of Article I(2) of the Treaty. Moreover, by virtue of their being qualifying "investors" with protected "investments", the Claimants are entitled under Article VII of the Treaty to bring to arbitration "[d]isputes... in connection with [the Claimants'] investment" against the Respondent.[128]

167. The Respondent's objection is essentially that a shareholder's harm from measures/acts directed (primarily or exclusively) at the company is harm actionable only by the company, not the shareholder.[129] The Tribunal is, however, not persuaded that this objection—which has been rejected by a multitude of investment-treaty tribunals[130]—is legally sound. As one of the many decisions on the issue put it, "modern investment treaty arbitration does not require that a shareholder can only claim protection in respect of measures that directly affect shares in their own right, but that the investor can also claim protection for the effect on its shares by measures of the host state taken against the company".[131] In the Tribunal's view, if the Respondent's objection were accepted, the protections afforded by the Treaty to "shares, stocks or any other form of participation in companies" would be vanishingly limited.

168. As other tribunals also have acknowledged, the reality is that foreign investment is typically

[127] *See* footnotes 1–4 above.

[128] Treaty, Exhibit CL-2, Article VII(1).

[129] SoD, ¶¶ 124–132.

[130] *See, eg*, *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No ARB/01/8, Decision on Objections to Jurisdiction, 17 July 2003, ¶¶ 36–65; *Urbaser SA and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, ICSID Case No ARB/07/26, Decision on Jurisdiction, 19 December 2012, ¶ 248; *RosInvestco UK Ltd v Russian Federation*, SCC Case No 079/2005, Final Award, 12 September 2010, ¶ 608.

[131] *RosInvestco UK Ltd v Russian Federation*, SCC Case No 079/2005, Final Award, 12 September 2010, ¶ 608.

effected through locally-incorporated companies, which often are operating companies; and as a result, more often than not, measures ultimately affecting the shareholders' interests are immediately directed at the local companies. It is infrequently the case that shareholders' rights such as management rights and an entitlement to dividends will have been targeted per se. To limit investment-treaty protection to such rare cases appears to this Tribunal to reduce *effet utile* without sound justification. The argument that the object of measures directed at a company is something other than the investors' shares rests on the premise that the distinction between shareholder rights and companies' rights under customary international law must be transposed into investment treaties. And that assumption further assumes that investment treaties are, on this critical point, but a codification of customary international law. Neither of these assumptions appears justified to this Tribunal. As the ICJ has recognized, investment treaties may regulate matters differently.[132] Indeed, one would think that if States were happy to rest on customary international law, there would be little point in entering into investment treaties.

169. For the above reasons, the Respondent's complaints regarding "default in form" do not affect the Tribunal's jurisdiction to hear the Claimants' claims concerning harm they allege to have suffered in respect of their shareholding interests.

170. The Tribunal also notes that the harm which the Claimants have suffered is not simply a reduction in the economic value of their shares. As will be seen at paragraphs 295 *et seq* below, they have been deprived of effective control, use, and enjoyment of their shareholdings.

4. Whether an investment in a Syrian Free Zone company is covered by theTreaty

171. The Respondent contends that the Claimants' investments in the Al-Yarubiyah Free Zone may not be characterized as an "investment" under the Treaty,[133] because: (i) Article IX of the Treaty (quoted at paragraph 174 below) requires an "investment" to be "qualified so by the Syrian law and regulations";[134] (ii) the Hasakah Plant, which was established in the Al-Yarubiyah Free Zone, does not fulfil the criteria for an "investment" under Syrian law; and (iii) the Al-Yarubiyah Free Zone is "legally considered as not part of... Syria" and has "never been subject to [i]nternational [i]nvestment [l]aw".[135] In its Rejoinder, the Respondent indicated that it "is not challenging the Tribunal's *ratione materiae* [jurisdiction] over the Yaroubia project, but [seeking to] prov[e] that the activities in the free zone could not be [the] subject of the promotion and protection o[f] investment".[136]

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[132] *See, eg, Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, Preliminary Objections, Judgment, [2007] ICJ Rep 582, ¶ 88: "The Court is bound to note that, in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as the treaties for the promotion and protection of foreign investments, and the [ICSID] Convention..., and also by contracts between States and foreign investors. In that context, the role of diplomatic protection somewhat faded, as in practice recourse is only made to it in rare cases where treaty régimes do not exist or have proved inoperative."

[133] SoD, ¶¶ 133–135.

[134] Answer, Section II.1.b; SoD, ¶ 135; Rejoinder, ¶ 73.

[135] SoD, ¶ 136; Rejoinder, ¶ 76.

172. The Claimants retort that: (i) their assets qualify as "investments" under the definition in Article I(2) of the Treaty; (ii) Article IX of the Treaty relates to the legality of an investment activity under the laws of the host State, rather than allowing for the host State's legal framework to define what constitutes an "investment" within the meaning of the Treaty; and (iii) the Al-Yarubiyah Free Zone is legally a part of Syria within the meaning of Article I(4) of the Treaty.[137]

173. The Tribunal agrees with the Claimants.

174. As discussed at paragraph 166 above, the Claimants' shareholding interests in Hasakah qualify as "investments" within the meaning of Article I(2) of the Treaty. Article IX of the Treaty does not alter that conclusion. It provides in material part that the Treaty applies to "investments in the territory of one Party, made in accordance with its national laws and regulations, by investors of the other Party...". The key words are "made in accordance with", which are placed in a parenthetical sentence. They serve to exclude from the scope of the Treaty rights and interests which come within the terms of Article I(2) as covered "investments" but are in contravention of the host State's law. Article IX therefore serves as a requirement of lawfulness. It is not a general *renvoi* to domestic laws/regulations which may define "investments" for various purposes of internal law. In that regard Article IX merely reiterates Article I(2), which also provides that covered investments must be made "in conformity with the hosting [State] Party's laws and regulations" and "in accordance with the laws and regulations in the territory of the Party where the investments are made". By contrast, if Article IX served to define covered "investments" by mere cross-reference to internal law, as the Respondent argues, then the definitions set out in Article I(2) and its five sub-paragraphs would hardly have any *effet utile*.

175. It is unnecessary in this Award to catalogue the circumstances in which Article IX may be engaged. What matters is that Article IX is not engaged in the present case. There is no allegation by the Respondent that the Claimants' investments in the Al-Yarubiyah Free Zone violated Syrian law in any way.

176. Further, the notion of "territory" in Article I(2) of the Treaty is defined in Article I(4). This is couched in specific, comprehensive terms. These make it plain that, in respect of the Syrian Arab Republic, the Treaty applies to its "territory" without any qualification or exception, as well as maritime areas in which Syria exercises sovereign rights relating to natural resources.[138]

177. There can be no question that the Al-Yarubiyah Free Zone is within the international borders of Syria. In establishing and regulating the Free Zone, Syria did so *à titre de souverain*, to the exclusion of any other State. That is the only relevant point for present purposes. What regulations—special, limited, or otherwise—Syria chooses to put in place in different parts of its territory is a matter for Syria, as sovereign in respect of all these parts. And while such regulations may be relevant to *how* the Treaty's provisions apply in various specific contexts, there is no suggestion that shareholder rights in Free Zone companies are any different than in any other part of Syria.

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[136] Rejoinder, ¶ 77. *See also* Hearing Transcript, 209:19–212:12.

[137] Reply, ¶¶ 82–90.

[138] Article I(4) provides in relevant part: "The term 'Syria' means, in accordance with international law, the territory... of the Syrian Arab Republic including its internal waters, territorial sea, the subsoil thereof and the airspace above them on which Syria has sovereign rights and other maritime areas on which Syria has the right to exercise sovereign rights for the purpose of exploration, exploitation and conservation of natural resources."

5. Sufficiency of dispute notice as starting point for the six-month period under Article VII

178. The Respondent contests that the Claimants validly served on it notice of the present dispute. On this basis the Respondent goes on to say that the six-month waiting period between a notice of dispute and commencement of arbitration was not complied with.

179. To recall, Article VII(1)–(2) of the Treaty (in its English text) provides, in relevant part:

1. Disputes between one of the Parties and an investor of the other Party, in connection with his investment, *shall be notified in writing, including detailed information, by the investor to the recipient Party of the investment.* As far as possible, the investor and the concerned Party shall endeavor to settle these disputes by consultations and negotiations in good faith.

2. If these disputes, [sic] cannot be settled in this way *within six months following the date of the written notification mentioned in paragraph 1,* the dispute can be submitted, as the investor may choose, to [arbitration]... (emphasis added).

180. The Claimants assert as follows:

(i) In the period between April 2014 and 30 November 2015, they submitted to the Syrian Consulate in Istanbul six dispute notices addressed to various Syrian authorities, including the Syrian Ministry of Foreign Affairs and the Syrian Ministry of Economy (the ***Dispute Notices***). [139]

(ii) The Syrian Consulate served both as the consular and diplomatic mission of the Syrian Arab Republic, and was the Respondent's only representative in Turkey at the relevant times. [140] Thus, the Dispute Notices served as a written notification of the dispute to the Respondent under Article VII(1) of the Treaty.

(iii) The Claimants waited for a period of two years after the first Dispute Notice, and a period of approximately five months after the sixth Dispute Notice, before submitting their Request for Arbitration on 5 April 2016. [141]

181. For its part, the Respondent argues as follows:

(i) The letters by the Claimants to the Hasakah Free Zones Authority on 12 November 2013 [142] and to the Ministry of Economy and Trade on 11 March 2014, [143] which were sent before the Dispute Notices, were not "legally valid letters sent to the Respondent as per Article VII/1" of the Treaty. Each of these two bodies "has a legal personality independent from the legal personality of the

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[139] *See* Claimants' Views on Bifurcation and Answer to Respondent's Pleas, ¶ 8 (citing Exhibits C-16 and C-19, which contain notices sent on 25 April 2014, 26 September 2014, 3 December 2014, 4 February 2015, 18 August 2015 and on 30 November 2015).

[140] Claimants' Views on Bifurcation and Answer to Respondent's Pleas, ¶ 10.

[141] *Ibid.*, ¶ 12.

[142] Letter from Al-Hasakah Cement Company to Yarubiya Free Zones Directorate, 12 November 2013, Exhibit C-29.

[143] Letter to Syrian Ministry of Economy and Trade, 11 March 2014, Exhibit C-188.

Respondent" and "do[es] not represent the Syrian Arab Republic". [144]

(ii) The ICC Secretariat's service of the Request for Arbitration at the Respondent's addresses specified in that Request—namely, Syria's Permanent Missions to the UN (New York and Geneva), Syria's Embassy in Russia, the Syrian Consulate in Istanbul, and the Presidential Palace in Damascus—was not valid because: (a) the Permanent Missions represent the Respondent only at the UN; [145] (b) the Syrian Embassy in Russia and the Syrian Consulate in Istanbul were not required under the Vienna Conventions on Diplomatic and Consular Relations to accept service of the Request and transmit it to the Syrian Government: only the Syrian Consulate in Paris, where the "ICC is based", had the authority to do so; [146] and (c) the address given in the Request for the Presidential Palace was "incomplete and inaccurate". [147]

182. In response to the Respondent's arguments, the Claimants say as follows:
(i) "Diplomatic missions and consular posts are the representatives of th[e] [sending] state in the receiving state". [148]

(ii) There are no geographical restrictions on the authority of consulates; and as consulates are in constant contact with authorities in their sending state, they can be expected to make the central government authorities aware of notifications addressed to them. [149]

(iii) The address of the Presidential Palace specified in the Request was accurate, and there is no basis to argue that DHL—a reputable international courier service—had provided misleading information to the ICC in confirming delivery of the Request at that address. [150]

183. The Tribunal notes at the outset that the Respondent's objections do not call into question whether the Respondent is amenable to arbitration under Article VII(1) of the Treaty, which encompasses "[d]isputes between one of the Parties and an investor of the other Party". Rather, the Respondent's objections go to the question whether proceedings have been validly commenced by the Claimants and the Tribunal has been validly seised of the dispute.

184. Starting with the service of a dispute notice under Article VII(1), the Treaty does not stipulate how such service is to be effected. Nor are there any specific provisions in the 2012 ICC Rules or general international law. In practice, service on States in investment-treaty cases is effected through various State organs or even, on occasion, State agencies. [151] In the Tribunal's view, a notice will be validly served if service is effected in a manner that meets the purpose of informing the recipient State of the investor's complaint and the action expected of the State. It is thus sufficient for an investor/claimant under the Treaty to serve a dispute notice on a State organ or official, acting in a relevant official capacity, who can reasonably be expected to convey it to the government, enabling it to seek to resolve the complaint "by consultations and negotiations in good faith". This is a

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[144] Respondent's Response on Bifurcation, ¶ 9; SoD, ¶¶ 101–102; Respondent's Opening Presentation, Slide 6.
[145] Respondent's Response on Bifurcation, ¶ 3.
[146] *Ibid.*
[147] *Ibid.*, ¶ 4.
[148] Claimants' Rejoinder on Bifurcation, ¶ 14.
[149] *Ibid.*, ¶ 15.
[150] *Ibid.*, ¶¶ 16–17.
[151] *See* J Paulsson and G Petrochilos, *UNCITRAL Arbitration* (2017), p 18, ¶ 11, fn 20.

practical requirement, rather than a formal or rigid one. The question whether the requirement has been satisfied calls for an assessment of the circumstances of each case.

185. As for the service of the Request for Arbitration, the 2012 ICC Rules provide in Article 4(5) that "[t]he Secretariat shall transmit a copy of the Request and the documents annexed thereto to the respondent for its Answer to the Request once the Secretariat has sufficient copies of the Request and the required filing fee". Further, Article 3(2) of the 2012 ICC Rules stipulates that: (i) "[a]ll notifications or communications from the Secretariat... shall be made to the last address of the party or its representative for whom the same are intended, as notified either by the party in question or by the other party"; and (ii) "[s]uch notification or communication may be made by delivery against receipt, registered post, courier, email, or any other means of telecommunication that provides a record of the sending thereof".

186. Within this analytical framework, the Tribunal is unable to accept the Respondent's objections, for several reasons.

187. First, the Respondent's contestation of the validity of the Claimants' letters to the Hasakah Free Zones Authority of 12 November 2013 and to the Ministry of Economy and Trade of 11 March 2014 need not be resolved. The Claimants have not placed reliance on these two letters—which, again, predate the Dispute Notices—to establish that they satisfied the notification requirement in Article VII(1) of the Treaty. In any event, Syria's Ministry of Economy and Trade is, of course, a State organ in the central government, one that is closely linked to the subject-matter of the Treaty, and one that reasonably can be expected to convey such communications further within the government.

188. Secondly, the Tribunal notes that the Respondent does not expressly object to the validity of service of the Dispute Notices on the Syrian Consulate in Istanbul, on which the Claimants rely to establish compliance with Article VII(1) of the Treaty.

189. To the extent that the Respondent's objection to the service of the Request for Arbitration on the Syrian Consulate in Istanbul may be read as applying also to the service of the Dispute Notices, the Tribunal considers that such service did meet the requirements in Article VII(1) of the Treaty. The Respondent accepts that, as a matter of principle, service via its Consulates is valid.[152] Indeed, it is part of the consular functions to "protect[] in the receiving State the interests of the sending State" and to "further[] the development of commercial... relations between the sending State and the receiving State".[153] Moreover, consulates operate under the authority of the Ministry of Foreign Affairs of their sending State, and are in close, regular contact with that Ministry. The Tribunal therefore considers that one could reasonably expect that the Dispute Notices would ultimately be transmitted onwards to the Syrian Ministry of Foreign Affairs (to which, among others, they were addressed on their face). Even if the Respondent had argued or established that such onward transmission did not occur in fact— which the Respondent has not done in any event—that would be of no moment. An investor would be entitled to assume that onward transmission would occur in the regular course.

190. Accordingly, the Tribunal also holds that the six-month period specified in Article VII(2) of the

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[152] *See* Respondent's Response on Bifurcation, ¶ 3: "As the ICC is based in Paris, it could be possible to accept the notification via the Syrian consul[ate] in Paris."

[153] *See* Vienna Convention on Consular Relations 1963, Article 5(a)-(b).

Treaty started running from the date of the first Dispute Notice (ie, 25 April 2014). It follows that the Claimants' commencement of this arbitration on 5 April 2016 did not fall foul of the six-month period under Article VII(2).

191. Finally, the Respondent's objections to the validity of the ICC Secretariat's service of the Request for Arbitration on Syria's Permanent Missions to the UN in New York and Geneva, the Syrian Embassy in Russia, and the Syrian Consulate in Istanbul also are unavailing. The Respondent's argument is that, because the ICC is headquartered in Paris, internal Syrian regulations mean that only the Syrian Consulate in Paris could properly have accepted service of the Request. Accepting for argument's sake that the effect of the Syrian regulations is as contended by the Respondent, compliance with them was exclusively a matter for the Syrian authorities. Thus, it was incumbent on these authorities to refuse service or return the Request to the ICC, thereby putting the ICC on notice that service had not been effected. That they failed to do so reasonably created an appearance of regularity of the service from the perspective of the ICC. That apparent regularity is dispositive of the Respondent's argument.

192. As to the service effected at the Presidential Palace in Damascus, the Tribunal has been given no reason to believe that DHL provided misleading information to the ICC in confirming delivery at that address.

193. For the foregoing reasons, the Tribunal rejects the Respondent's objections regarding validity of service and compliance with the six-month period, respectively under paragraphs (1) and (2) of Article VII of the Treaty.

6. Whether the Claimants should have first referred the dispute to the Syriancourts

194. The English text of Article VII(2) of the Treaty gives access to arbitration "provided that, if the investor concerned has brought the dispute before the court of justice of the party to dispute and a final award has not been rendered within one year".

195. The Respondent's position is that: (i) the recourse to local courts envisaged in the "provided that" clause of Article VII(2) is mandatory; and (ii) the Claimants should therefore have brought the present dispute before Syrian courts first, and only in the event that the courts had not issued a final decision within one year could the Claimants have pursued arbitration. [154]

196. For their part, the Claimants make four arguments:

(i) The use of the double conditional in the Article VII proviso (ie, "provided that" and "if") confirms that recourse to local courts is merely optional. [155]

(ii) Even if the Tribunal were to interpret the proviso to Article VII(2) as mandatory, recourse to the

[154] Respondent's Response on Bifurcation, ¶ 11; SoD, ¶ 104.

[155] SoC, ¶¶ 177–207; Claimants' Submission on Bifurcation, ¶ 25.

courts in the present case would have been futile. [156]

(iii) Various other investment treaties concluded by the Respondent do not compel referral to domestic courts as a precondition to arbitration, thus affording more favourable treatment which may be availed of by the Claimants pursuant to Article III(2) of the Treaty. [157]

(iv) In any event, prior recourse to local courts concerns "the issue of the admissibility of claims and the Tribunal must find the present claims admissible since the Claimants cannot be rightfully expected to seek redress in the Syrian local courts at this stage". [158]

197. In response, the Respondent relies on certain Syrian court judgments as evidence for the contention that its courts are functional, do make decisions in favour of foreign parties, and therefore recourse to the courts cannot be dismissed as manifestly futile. [159] The Respondent also asserts that the most favoured nation (***MFN***) clause in Article III(2) of the Treaty cannot be invoked to avoid the requirement to resort to local courts. [160]

198. The primary issue for the Tribunal's determination is whether Article VII(2) of the Treaty compelled the Claimants to refer this dispute to the Syrian domestic courts before commencing this arbitration. This issue has been characterized as going to the admissibility of the Claimants' claims in this arbitration. [161] The other issues debated between the parties arise only if the Claimants were indeed required to have recourse to Syrian courts.

199. The answer to this question turns on the proper meaning of Article VII(2) and is therefore one of treaty interpretation. The parties agree that the relevant rules of general international law are codified in the VCLT, specifically Articles 31-32. [162]

(i) The English-language version of the Treaty prevails

200. The Tribunal starts its analysis by recalling that the Treaty was entered into in "the Turkish, Arabic and English languages", all of which versions are "equally authentic". [163] The Treaty also provides that "[i]n case of any conflict of interpretation the English text shall prevail". [164] In order to establish

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[156] SoC, ¶¶ 208–230; Rejoinder on Bifurcation, ¶¶ 30–32.

[157] *See* SoC, ¶¶ 231–252; and Treaty, Exhibit CL-2, Article III(2) (containing an MFN clause).

[158] SoC, ¶¶ 175 and 253–267.

[159] Respondent's Response on Bifurcation, ¶ 23.

[160] *See* SoD, ¶¶ 109–110 and 114.

[161] *See* ToR, ¶ 41.1.

[162] See paragraph 144 above; and SoC, ¶ 180; Respondent's PHB, ¶ 5.

[163] At the hearing, the Respondent also sought to rely on a French version of the Treaty (s *ee* Hearing Transcript, 190:16–191:2 and 280:9–282:17; and Respondent's PHB, ¶ 6). No French text has any status under the Treaty.

[164] *See* Article 33(1) of the VCLT, which provides that "[w]hen a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, *unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail*"; and Article 33(4) of the VCLT, which stipulates that, "*[e]xcept where a particular text prevails in accordance with paragraph 1*, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted." (emphasis added).

whether there is in fact such a conflict, the Tribunal first considers the text of Article VII(2) in each of the three authentic versions.

201. The full text of Article VII(2) in the English-language version of the Treaty is set out at paragraph 11 above. The part material for present purposes reads as follows:
2. If these disputes, [sic] cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the dispute can be submitted, as the investor may choose, to:

...

(c) the Court of Arbitration of the Paris International Chamber of Commerce,

provided that, if the investor concerned has brought the dispute before the court of justice of the party to dispute and a final award has not been rendered within one year.

202. As for the Turkish-language text of Article VII(2), the parties rely on conflicting English translations, as set out below (with the key portion of the text italicized):
(i) The Claimants' English translation : "If disputes cannot be settled in this way within six months following the date of the written notification mentioned in the first paragraph; *and in the event that the investor concerned has brought the dispute before the courts of justice of the party to dispute and a final award has not been rendered within one year*, the dispute can be submitted to the forums below as the investor may choose...". [165]

(ii) The Respondent's English translation : "If disputes are not resolved in this way for six months from the date of the written notification as outlined in paragraph (1), *the disputed case shall be referred to the authorized court in the country hosting the investment*, in case no decision is issued by this court for one year, the disputed case according to the investor's preference, shall be referred to [any one] [of the arbitration fora specified in Article VII(2)(a)-(c)]". [166]

203. The Claimants' English translation is more reliable than the Respondent's, as the latter is an indirect translation of the Turkish original text into Arabic and thence to English. [167] Accordingly, the Tribunal will rely on the Claimants' English translation.

204. As for the Arabic-language text of Article VII(2), there is no material difference between the parties' respective English translations, [168] which are set out below:

(i) The Claimants' English translation : "Provided that the concerned investor has raised the dispute before the courts of justice of the party who is a party in the dispute and that a final award has not

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[165] Claimants' Post-Hearing Communication, 21 January 2019.

[166] Respondent's Post-Hearing Communication, 21 January 2019. At the hearing, the Respondent disputed that the Turkish-language version of Article VII(2) contains the proviso that is contained in the English version, and alleged that Turkey had committed a "fraud" in including such a proviso in other authentic texts (Hearing Transcript, 188:24–193:4). In response, the Claimants explained that, because of the syntax of the Turkish language which places the verb at the end of a sentence, the proviso was located prior to subparagraphs (a)-(c) in Article VII(2) (Hearing Transcript, 969:13– 970:7). The Respondent subsequently abandoned its allegation; *see* Respondent's PHB, ¶¶ 6–7.

[167] *See* Respondent's PHB, ¶¶ 6–7; and Claimants' Comments on Respondent's Translation of Article VII of Syria-Turkey BIT, 30 January 2019.

[168] *See* Claimants' Post-Hearing Communication, 21 January 2019; and Respondent's Post-Hearing Communication, 21 January 2019.

been issued in respect of the dispute within a year".

(ii) The Respondent's English translation : "Provided the concerned investor has referred the dispute first to the courts of justice at the country that is a party to the dispute, and no final award has been issued within one year".

205. The Arabic and Turkish texts address the issue of referral to domestic courts in different and conflicting terms. The use of the "in the event" phrase in the Turkish text indicates that referral of the dispute to the host State's courts is optional. By contrast, the Arabic version is clear that such referral is mandatory, as indeed the Claimants concede.

206. Given this "conflict of interpretation" between the Turkish and Arabic authentic texts, and in light of the Treaty provision that in such an eventuality "the English text shall prevail", the Tribunal focuses on the interpretation of the authentic English text of Article VII(2).

(ii) The rules of the Vienna Convention on the Law of Treaties

207. As already noted, it is common ground that the interpretative process is to be conducted in accordance with the rules of the VCLT. Article 31 of the VCLT sets out the "general rule" of treaty interpretation in the following terms:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

208. Article 32 of the VCLT provides for "supplementary means of interpretation" in the following terms:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) Leaves the meaning ambiguous or obscure; or
>
> (b) Leads to a result which is manifestly absurd or unreasonable.

(iii) The meaning of the Article VII(2) proviso in the light of its object and purpose and the circumstances of its conclusion

209. Starting with the ordinary meaning of the proviso to Article VII(2), its formulation is peculiar. Both sides say that it contains surplus words which, on the face of the clause, can lend themselves to ambiguity and conflicting interpretations. The parties disagree, however, as to which these words are.
- The first possible interpretation is that the double conditional at the beginning of the proviso ("provided that, if") is intentional, and thus the word "and" later in the sentence is strictly speaking unnecessary. On this reading, the word "and" may be ignored, such that the clause would read: "provided that, if the investor concerned has brought the dispute before the court of justice of the party to dispute, and a final award has not been rendered within one year". The result would be that recourse to the local courts is optional.

- The second possible interpretation is that the word "and" is key and the double conditional is to be ignored as a drafting error. On this reading, the clause would read: "provided that, if the investor concerned has brought the dispute before the court of justice of the party to dispute and a final award has not been rendered within one year". The result would be that recourse to the local courts is mandatory.

210. The interpretations offered by both sides acknowledge the syntactic or linguistic infelicity on the face of the clause. As the Claimants put it at the hearing, the English text is "not the hallmark of clarity" and "there is an infelicitous side" to its language. [169] Similarly, the Respondent acknowledged that "the English language [text] is not clearly drafted" and contains a "double conditional" (ie, "provided that" and "if") which is "misleading language-wise". [170]

211. The Tribunal agrees with the parties that any ambiguity in the proviso results from a drafting infelicity rather than a more profound reason. The Tribunal has accordingly considered the wording of the proviso closely, in the light of its object and purpose within Article VII(2).

212. The first point to note is that Article VII(2) is *not* formulated to offer the host State's courts as an

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[169] Hearing Transcript, 976:2–13.

[170] Respondent's Opening Presentation, Slide 7.

option additional to arbitration. Had that been the case, such an option would have been set out in a separate sub-paragraph (d). Rather, the Treaty assumes that the domestic courts of the host State are available and open to the investor for disputes with the State, and that the investor may choose to resort to them. The proviso therefore deals with the coordination of jurisdictions— ie, whether resort to the domestic courts excludes resort to the arbitral fora set out in Article VII(2)(a)-(c).

213. On the Respondent's own case, it is Turkey that proposed the inclusion of this proviso.[171] The Respondent does not suggest that it opposed the proviso. As noted above, the Turkish-language version of Article VII(2) is unambiguous. It uses the phrase "in the event" to refer to recourse to the domestic courts, thus clearly formulating this as a possibility rather than a mandatory requirement. While this circumstance does not of course prejudge the meaning to be given to the English-language version, it does indicate the moving party's intention to spell out in what circumstances an investor could refer a dispute to arbitration notwithstanding the investor's earlier choice to submit the dispute to the domestic courts. If that were not spelled out, the host State could well object to arbitration, notably on grounds of *lis pendens*. Article VII(2) deals with this issue by providing that in such circumstances recourse to arbitration remains possible in one eventuality: that the domestic courts have not rendered a final decision within one year of their being seised. It follows that if the investor has not submitted the dispute to the local courts, the Article VII(2) proviso is not engaged at all. It also follows that if a final decision has been issued, the investor may not submit the same claim to arbitration.

214. In the light of the foregoing, the Tribunal considers that the meaning and effect of the Article VII(2) proviso are clear, and its admittedly clumsy syntax is only a superficial difficulty. In construing a proviso, one must focus above all else on the terms of the relevant condition. Article VII(2) contains a double conditional which forms a compound conjunction: "provided that, if". The proviso thus operates only "*if* the investor concerned has brought the dispute before the court of justice of the [State] party to dispute". This main element drives the interpretation. It cannot be brushed aside or neutralized by drafting infelicities farther down in the sentence. Differently put, the Tribunal cannot legitimately ignore "if", nor can it read it as "shall", especially as it is immediately attached to the all-important "provided that" phrase.

215. This, then, leaves the word "and", which features in the second part of the proviso: "and a final award has not been rendered within one year". A grammarian would say that "and" is unnecessary: the sentence can operate without it. But, recalling that the Treaty was negotiated between two States for which English is a foreign language, "and" serves to indicate that the condition it introduces is linked to "provided that". Thus, recourse to arbitration remains an option if the investor concerned has brought the dispute before the host State's courts, provided that the courts have not rendered a final decision within one year of being seised.

216. This reading is more satisfactory than the competing reading whereby "provided that" introduces a requirement to resort to local courts for at least a year. The Tribunal acknowledges that such requirements are to be found, on occasion, in investment treaties.[172] But the treaties in question use clear, mandatory terms to make prior recourse to domestic courts a precondition to resorting to arbitration, while Article VII(2) does not. As indicated above, the Tribunal considers that the Article

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[171] See ¶ 221 below.

[172] *See, eg, BG Group Plc v Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, ¶ 140; *Wintershall Aktiengesellschaft v Argentine Republic*, ICSID Case No ARB/04/14, Award, 8 December 2008, ¶¶ 114–125.

VII(2) proviso serves to expand an investor's ability to resort to arbitration, rather than to condition it upon first giving the host State's courts an opportunity to resolve the dispute within one year.

217. To conclude, the Tribunal considers that Article VII(2) does not require an investor to have recourse to the domestic courts of the host State before commencing arbitration. The Tribunal reaches this conclusion primarily as a matter of textual interpretation (Article 31(1) VCLT), taking into account the circumstances of the conclusion of the provision (Article 32 VCLT).

(iv) The relevance of other tribunals' decisions

218. The Tribunal is aware that the tribunals in the *Kılıç* and *İçkale* cases reached divergent conclusions regarding the interpretation of similar provisions in another treaty.[173] These decisions were addressed by the parties at some length. However, the Turkey-Turkmenistan treaty at issue in those cases did not specify which of its two authentic versions—English or Russian—would prevail in case of conflict. In the face of conflicting English and Russian versions, the tribunals focused on the Russian-language version, finding that version to be clear in requiring recourse to the local courts as a precondition to arbitration.[174] By contrast, in the present case, the Treaty provides that "[i]n case of any conflict of interpretation the English text shall prevail". The *Kılıç* and *İçkale* decisions are therefore not germane in the present case.

(v) The negotiating history of the Treaty and the States Parties' treaty practice

219. Bearing in mind the "supplementary means of interpretation" set out in Article 32 of the VCLT, the Tribunal specifically invited the parties to place on record, to the extent available, documents relating to the negotiating history of Article VII(2)—ie, *travaux préparatoires* in the broadest sense, such as joint negotiating records, minutes or protocols of negotiation, negotiating proposals put forward by either State Party, and even explanatory memoranda prepared by governments in the course of the conclusion or ratification of the Treaty. The parties did not produce such materials.

220. As for other circumstances relating to the conclusion of the Treaty, the Claimants referred to the Respondent's contemporaneous treaty practice.[175] This establishes that the Respondent did not require mandatory recourse to Syrian courts as a precondition to arbitration in any other investment treaty it has concluded, before or after the present Treaty.[176] For its part, the Respondent

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[173] *Kılıç İnşaat İthalat İhracat Sanayi Ve Ticaret Anonim Şirketi v Turkmenistan*, ICSID Case No ARB/10/1, Decision on Article VII.2 of the Turkey-Turkmenistan Bilateral Investment Treaty, 7 May 2012; *İçkale İnşaat Limited Şirketi v Turkmenistan*, ICSID Case No ARB/10/24, Award, 8 March 2016. Cf *Muhammet ◇ap & Sehil Inşaat Endustri ve Ticaret Ltd Sti v Turkmenistan*, ICSID Case No ARB/12/6, Decision on Respondent's Objection to Jurisdiction under Article VII(2) of the Turkey-Turkmenistan Bilateral Investment Treaty, 13 February 2015.

[174] *Kiliç*, ¶¶ 9.22 and 9.23; *İçkale*, ¶ 228.

[175] SoC, ¶¶ 202–207. On the general approach cf *KT Asia Investment Group BV v Republic of Kazakhstan*, ICSID Case No ARB/09/8, Award, 17 October 2013, ¶ 123; and *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005, ¶ 195.

[176] *See* SoC, ¶¶ 205–207.

did not provide evidence from its treaty practice or any other source indicating a policy of imposing resort to its courts as a precondition to arbitration.

221. As already noted, the Respondent acknowledges that Turkey sought the inclusion of the proviso to Article VII(2).[177] But this does not of itself establish that the proviso was intended to introduce a "mandatory" requirement, as the Respondent argues. As explained at paragraphs 212-214 above, the proviso does perform a useful function when read as optional.

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222. In light of its interpretation of Article VII(2) of the Treaty, the Tribunal concludes that there was no impediment to the Claimants' commencing these arbitration proceedings. The proviso in Article VII(2) is not engaged at all in this case. It is therefore unnecessary to decide the Claimants' two alternative arguments based on the MFN clause or the alleged futility of recourse to Syrian courts. The Tribunal does note, however, that the Respondent has not asserted that it would have been possible for its courts to resolve the present dispute by "final award" within a year.

7. Whether the "clean hands" doctrine precludes the Claimants from invoking the Treaty's protections

223. The Respondent argues that Turkey's alleged contribution to the conflict in Syria attracts the application of a "clean hands" exception, which is said to prevent the Claimants from invoking the Treaty's protections.[178]

224. The Tribunal cannot accept the Respondent's argument. No finding concerning the "clean hands" doctrine need or indeed can be made here. Assuming that a "clean hands" doctrine exists in general international law and applies in investor-State disputes, on any view the unclean hands must be those of the investor, not those of its home State.[179] In addition, this Tribunal does not have jurisdiction under Article VII(2) of the Treaty—this being the sole source of the Tribunal's jurisdiction—to determine whether Turkey's conduct is internationally wrongful. And as Turkey is not a party to this arbitration, it is impermissible for the Tribunal to pass judgment on the lawfulness or otherwise of Turkey's conduct.[180]

225. Accordingly, the Respondent's objection is to be dismissed.

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[177] SoD, ¶¶ 106–107, citing to the Turkish Draft of the Agreement between Republic of Turkey and Syrian Arab Republic, 24 December 2003, Exhibit R-3.

[178] Rejoinder, ¶¶ 34–36 and 65–71.

[179] *See, eg, Al-Warraq v Indonesia*, UNCITRAL, Final Award, 15 December 2014, ¶¶ 645–646; and *Niko Resources (Bangladesh) Ltd v Bangladesh Petroleum Exploration and ors*, ICSID Case No ARB/10/11 and No ARB/10/18, Decision on Jurisdiction, 19 August 2013, ¶¶ 476–485.

[180] Cf *Case of the Monetary Gold Removed from Rome in 1943*, Judgment, [1954] ICJ Rep 19, p 32: "To adjudicate upon the international responsibility of [a State] without [its] consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent".

C. Liability

226. In this Sub-section, the Tribunal first examines whether, on the facts of the present case, Article IV(3) of the Treaty excludes the application of other substantive protections in the Treaty, and whether the Respondent has breached Article IV(3) **(1)**. After answering both these questions in the negative, the Tribunal analyses the Claimants' allegation that the Respondent breached Article III(2) of the Treaty by failing to accord to them the more-favourable treatment that is due under Article 4 of the Syria-Italy BIT **(2)**. The majority of the Tribunal concludes that the Respondent failed to comply with this obligation. In the remainder of the Section, the Tribunal explains why, in the light of its holding regarding the Respondent's failure to comply with Article III(2) of the Treaty in conjunction with Article 4 of the Syria-Italy BIT, it need not address the claims under Articles IV(1) and II(2) of the Treaty or the question of attribution of PYD/YPG's conduct to the Respondent **(3-5)**.

1. Article IV(3) of the Treaty (War-Losses Clause)

227. Article IV(3) of the Treaty provides as follows:

> Investors of either Party whose investments suffer losses in the territory of the other Party owing to war, insurrection, civil disturbance or other similar events shall be accorded by such other 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.

228. It is common ground that the term "losses" is broad and covers physical destruction or loss of property as well as lesser forms of harm.

(i) Whether Article IV(3) excludes other Treaty protections

229. The Respondent contends that Article IV(3) is a "special" provision which excludes application of the Treaty's other, substantive protections in relation to losses "owing to war, insurrection, civil disturbance or other similar events".[181] The Claimants retort that Article IV(3) contains an additional protection against such losses and does not have the exclusionary effect contended for by the Respondent.[182]

230. In light of the ordinary meaning of the terms of Article IV(3), interpreted in their context and in light of the Treaty's object and purpose, the Tribunal does not consider the Respondent's argument to be valid. In short, a *lex specialis* with exclusionary effect bears the hallmark of derogating from other provisions that are general by comparison. Article IV(3) lacks this necessary characteristic.

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[181] SoD, ¶¶ 198-204.

[182] Reply, ¶¶ 237 and 242-247.

231. The plain meaning of Article IV(3) is that the host State must accord to foreign investors MFN treatment and national treatment, "whichever is the most favourable", with regard to any measures it may adopt in respect of losses in certain circumstances. Doubtless the provision caters to specific circumstances, namely losses due to "war, insurrection, civil disturbance or other similar events". But it does not necessarily follow from this specificity that the treatment due under Article IV(3) shall be the "sole" or "exclusive" treatment, and the text of Article IV(3) does not say so. Nor does Article IV(3) say that its application is "to the exclusion of" other provisions in the Treaty. Indeed, Article IV(3) does not even refer to other provisions in the Treaty. If the States Parties' intent were that Article IV(3) would operate as an exclusion, exemption, or derogation clause, one would certainly expect them to have spelt out such a far-reaching result expressly.[183]

232. The Tribunal acknowledges that Article IV(3) does not state that it is "without prejudice" to other Treaty provisions, including Article IV(1)-(2). But in the Tribunal's view, this was hardly necessary for the satisfactory operation of the Treaty. To the extent that other Treaty provisions may also be engaged in circumstances of "war, insurrection, civil disturbance or other similar events", these will apply in complementary manner.

233. Starting with Article IV, this is entitled "Expropriation and Compensation" and comprises three paragraphs. The first two deal with the circumstances of permissible expropriation (paragraph (1)) and the calculation and payment of compensation (paragraph (2)). Neither of these two paragraphs states that it is "subject to" paragraph (3) or that it is inapplicable at times of war, insurrection, and the like. The Tribunal can well see that an investor should not be entitled to double recovery for a single harm, for example an expropriatory war-requisition. But that is not to exclude that there may be two separate legal bases for compensation of an investor's harm, respectively under paragraphs (1)-(2) and (3). Avoiding double recovery is a matter of sensible coordination of overlapping provisions rather than the *a priori* exclusion of one provision in favour of the other.

234. Turning to consider other provisions in the Treaty, the Tribunal is unable to agree that they are to be regarded as excluded by the operation of Article IV(3). Notable among them is Article II(2), which sets out, among other duties, a duty of "full protection" of investments. Nothing in Article II(2) suggests that it ceases altogether to apply at times of war or armed conflict. Indeed, it is at such times that protection may be needed the most. That an investor may also be entitled to benefit from "measures [the host State] adopts in relation to [war, etc] losses" under Article IV(3) does not detract from the State's duty to afford protection under Article II(2) in the first place. The two duties are complementary. If their application overlaps on the facts of a certain case, the provisions must, again, be coordinated in a sensible way.[184]

235. In sum, the Tribunal sees no foundation in the Treaty for concluding that the only protection available in circumstances of "war, insurrection, civil disturbance or other similar events" is under Article IV(3). Again, it would have been straightforward for the States Parties to say so if that had been their intention, but no such intention is apparent in the Treaty. As the ILC put it, "[f]or the *lex specialis* principle to apply... there must be some actual inconsistency between [the relevant provisions], or else a discernible intention that one provision is to exclude the other".[185] Neither of

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[183] Cf *Suez and ors v Argentine Republic*, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010, ¶ 270.

[184] The Tribunal respectfully disagrees with the contrary holding in *LESI SpA & Astaldi SpA v Algeria*, ICSID Case No ARB/05/3, Award, 12 November 2008, ¶¶ 153–154.

[185] ILC Commentary to 2001 ILC Articles, comment (4) to Article 55 ("*Lex specialis*"), *reprinted in* J Crawford, *The International Law Commission's Draft Articles on State Responsibility* (2002), p 307.

these tests is met under the Treaty.

236. The conclusion that the Tribunal has reached under the Treaty accords with those reached by other investment-treaty tribunals which considered war-losses clauses as additive to those treaties' other protections.[186] For example, in *CMS v Argentina*, the tribunal rejected the contention that Article IV(3) of the US-Argentina BIT, which is similar to Article IV(3) of the Treaty,[187] excluded the application of other protections in that BIT. It held:

> The plain meaning of the Article is to provide a floor treatment for the investor in the context of the measures adopted in respect of the losses suffered in the emergency, not different from that applied to nationals or other foreign investors. *The Article does not derogate from the Treaty rights* but rather ensures that any measures directed at offsetting or minimizing losses will be applied in a non-discriminatory manner.[188]

237. In *Total v Argentina*, the tribunal considered a similar treaty provision,[189] and held that it had "an opposite purpose to that of an exculpatory clause". Rather, such provisions grant "an additional guarantee in respect of situations in which the host State, even if not internationally obliged to do so, has provided for compensation for the losses suffered due to certain events to its own nationals or investors of third States".[190] Numerous other tribunals have reached similar conclusions on the point of principle that war-losses clauses may complement other protections in investment treaties.[191]

238. The Tribunal turns to consider the relationship between Article IV(3) and the general most-favoured-nation clause in the Treaty, Article III(2), at paragraphs 256 *et seq* below, in connection with the Claimants' claim under the latter provision.

(ii) Whether the Respondent breached Article IV(3) of the Treaty

239. The Claimants argue that the Respondent breached Article IV(3) of the Treaty (already quoted at paragraph 227 above) by failing to extend to them the treatment due to Italian investors under Article 4 of the Syria-Italy BIT.[192] The argument is that Italian investors are "investors of any third

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[186] See *Cengiz Insaat Sanayi ve Ticaret AS v Libya*, ICC Case No 21537, Award, 7 November 2018, ¶ 370.

[187] Article IV(3) of the US-Argentina BIT provides as follows: "Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favorable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the more favorable treatment, as regards any measures it adopts in relation to such losses".

[188] *CMS Gas Transmission Company v Republic of Argentina*, ICSID Case No ARB/01/8, Award, 12 May 2005, ¶ 375 (emphasis added).

[189] Article 5(3) of the France-Argentina BIT provides as follows: "Investors of either Contracting Party whose investments have suffered losses as a result of war or any other armed conflict, revolution, state of national emergency or uprising in the territory or maritime zone of the other Contracting Party shall be accorded by the latter Party treatment which is no less favourable than that accorded to its own investors or to investors of the most-favoured nation".

[190] *Total SA v Argentine Republic*, ICSID Case No ARB/04/01, Decision on Liability, 27 December 2010, ¶¶ 229–230.

[191] *See, eg, Enron Corporation and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No ARB/01/3, Award, 22 May 2007, ¶ 321; *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Award, 28 September 2007, ¶¶ 362–363; *BG Group Plc v Republic of Argentina*, UNCITRAL Final Award, 24 December 2007, ¶ 382; *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic*, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010, ¶¶ 270–271.

country" in terms of Article IV(3), and that since under Article 4 of the Syria-Italy BIT Syria "shall offer adequate compensation in respect of [war, etc] losses", Syria was obliged to offer adequate compensation also to the Claimants but failed to do so.

240. The Respondent denies it had any such duty under Article IV(3). [193]

241. The Tribunal agrees with the Respondent.

242. Article IV(3) calls for a relative standard of treatment. [194] It is engaged in case of "measures [that the host State] adopts in relation to... losses" suffered by investors "owing to war, insurrection, civil disturbance or other similar events". Whatever such measures, if any, Syria has adopted for its own nationals or those of third States, are also to be made available to Turkish investors under the Treaty.

243. The term "measures" denotes laws, regulations, and administrative or material acts that the host State from time to time "adopts". It has the same significance as in Articles II(2) and IV(1), which refer to "measures" affecting investments, ie acts that the State has taken. [195] As the ICJ has held, "in its ordinary sense the word ['measure'] is wide enough to cover any act, step or proceeding". [196] As a matter of fact, there is no evidence that Syria has adopted specific laws, regulations, or other measures to redress the losses of Italian investors arising from the conflict. The Claimants themselves do not argue otherwise. [197]

244. The Claimants' claim therefore rests on reading the term "measures" in Article IV(3) as encompassing the international-law entitlement to receive an offer of "adequate compensation" under Article 4 of the Syria-Italy BIT (quoted at paragraph 276 below). That argument conflates the notion of "measures" with the distinct notion of "treatment". The latter notion is used in several provisions in the Treaty, [198] including Article IV(3) itself, and is a broader and more abstract notion: *treatment* materializes through *measures*. As another tribunal put it, "the term ['treatment'] typically carries with it the sense of how a State... regulates, protects, or otherwise interacts with specified actors, whether public or private". [199] Thus, for example, Article II(2) provides for "fair and equitable treatment", specifically enjoining impairment of investments "by unreasonable or discriminatory measures". While it is true that Italian investors have an entitlement to certain treatment under Article 4 of the Syria-Italy BIT, so long as Syria has not taken specific measures to give effect to such entitlements, Article IV(3) of the Treaty is of no avail to the Claimants.

245. In conclusion, the Tribunal rejects the Claimants' argument that Article IV(3) of the Treaty affords them a right to "adequate compensation" under Article 4 of the Syria-Italy BIT. In consequence, the

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192 Reply, ¶¶ 239, 248 and 261–263.

193 Rejoinder, ¶¶ 95–101.

194 Cf the decisions of other tribunals under analogous clauses: *AAPL v Republic of Sri Lanka*, ICSID Case No ARB/87/3, Award, 21 June 1990, ¶¶ 65–67; *LG&E Corp and ors v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006, ¶¶ 243–244; *Enron Corp and ors v Argentine Republic*, ICSID Case No ARB/01/3, Award, 22 May 2007, ¶ 320.

195 Cf *Enron Corp, ibid*, ¶ 320.

196 *Fisheries Jurisdiction (Spain v Canada)*, Jurisdiction, Judgment, [1998] ICJ Rep 432, ¶ 66.

197 Reply, ¶¶ 261–263

198 *See* Articles II(2), III(2), and IV(1) of the Treaty.

199 *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Award, 22 August 2012, ¶ 218.

Tribunal rejects the Claimants' claim that the Respondent has breached Article IV(3).

2. Article III(2) of the Treaty (MFN Treatment)

246. The Claimants rely on the MFN provision in Article III(2) of the Treaty as foundation for an entitlement to the more-favourable treatment that they say Italian investors are entitled to under Article 4 of the Syria-Italy BIT. [200]

247. Article III(2) of the Treaty provides as follows:

Each Party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable.

248. The effect of Article III(2) is limited by Article III(4) of the Treaty, which provides as follows:

The provisions of this Article shall have no effect in relation to following agreements entered into by either of the Parties:

(a) relating to any existing or future customs unions, regional economic organization or similar international agreements,

(b) relating wholly or mainly to taxation.

249. The Claimants' argument may be summarized as follows:
(i) Under Article III(2), the Claimants are "entitled to receive more favourable treatment provided for in Syria's investment treaties with other countries". [201]

(ii) The Claimants merely "seek to rely on protection under a war-clause provided in a comparator treaty [ie, Article 4 of the Syria-Italy BIT] in order to broaden the scope of the war clause already stipulated in the Treaty [ie, Article IV(3)]". [202]

(iii) The application of an MFN clause in the manner proposed by the Claimants "is far more established and virtually undisputed" in investment treaty jurisprudence. [203]

250. The Respondent argues as follows:

(i) The effect of allowing the Claimants to rely on Article III(2) of the Treaty in order to invoke Article

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[200] *See* Hearing Transcript, 82:19–86:11 for clarification by the Claimants' counsel that they rely primarily on Article III(2) of the Treaty in this regard, and that their reliance on Article IV(3) is only on an alternative and secondary basis.
[201] Reply, ¶ 254.
[202] Reply, ¶ 259.
[203] Reply, ¶ 259.

4 of the Syria-Italy BIT would be to "delete" Article IV(3) of the Treaty. Such misuse of MFN treatment is contrary to the "general principle of '*pacta sunt servanda*'".[204]

(ii) Under Article III(4) of the Treaty, the MFN provision in Article III(2) has no effect in relation to "any agreement concluded [by Syria] with a country that is party to [a] regional organisation", such as Italy, which is a member of the EU.[205]

(iii) The Syria-Italy BIT "expired on 12 November 2018" and is "not valid anymore", and therefore "none of its terms can be applied".[206]

(iv) Pursuant to Article 30(4)(b) of the VCLT, "the text of [Article IV(3) of the Treaty] should be applicable" exclusively, because the Syria-Italy BIT came into force before the Treaty and "[t]he will of Syria and Turkey [was] to adopt [a] different concept for similar situations" in the Treaty.[207]

251. The Tribunal is unable to accept the Respondent's arguments, which it addresses in turn below.

(i) "Treatment" includes protections under other investment treaties

252. The natural, ordinary meaning of the terms "treatment accorded" in Article III(2) encompasses not only treatment that has in fact been accorded but also treatment that is legally required to be accorded. Such a requirement may arise from investment treaties between the host State and third States (as it may also arise under domestic law, given that the terms of Article III(2) are unqualified). This is indeed an uncontroversial proposition in international investment law,[208] as well as general international law.[209] As the ILC put it:

> [T]he fact of favourable treatment may consist also in the conclusion or existence of an agreement between the granting State and the third State by which the latter is entitled to certain benefits. The beneficiary State, on the strength of the clause, may also demand the same benefits as were extended by the agreement in question to the third State. The mere fact that the third State has not availed itself of the benefits which are due to it under the agreement concluded with the granting State cannot absolve the granting State from its obligation under the clause.[210]

[204] Respondent's PHB, ¶¶ 13–16.

[205] Rejoinder, ¶ 99.

[206] Respondent's PHB, ¶ 12.

[207] Respondent's PHB, ¶ 15.

[208] *See, eg, Sergei Paushok and ors v Government of Mongolia* (UNCITRAL), Award on Jurisdiction and Liability, 28 April 2011, ¶¶ 570–572; *MTD Equity Sdn Bhd and ors v Republic of Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004, ¶¶ 103–104; and for a BIT involving Turkey, *Rumeli Telekom AS and ors v Republic of Kazakhstan*, ICSID Case No ARB/05/16, Award, 29 July 2008, ¶ 575.

[209] *See Rights of Nationals of the United States of America in Morocco* [1952] ICJ Rep 176, pp 190– 197; ILC *Draft Articles on Most-Favoured-Nation Clauses*, [1978-II] YBILC 16, Article 17; and *Final Report of the ILC Study Group on the Most-Favoured-Nation Clause*, UN Doc A/70/10, Annex (2015) ¶ 160.

[210] 1978 ILC Draft Articles, *ibid*, Commentary to Article 5, ¶ 6. And to the same effect, eg, A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), ¶ 5.20.

It is of course open to States to exclude from the "treatment" due under an MFN clause treatment that is due under other investment treaties.[211] But the States Parties to the Treaty have not done so.

253. Accordingly, Article III(2) of the Treaty permits the Claimants to avail themselves of provisions in investment treaties between Syria and third States which provide for more-favourable treatment than the Treaty, without needing to demonstrate that Syria has actually accorded the treatment required under those other treaties.

254. The Tribunal is aware of the decision in the *İçkale* case, which read the terms "treatment no less favourable than that accorded *in similar situations*... to investments of investors of any third country" in the Turkey-Turkmenistan BIT[212] to–

require[] a comparison of the factual situation of the investments of the investors of the home State and that of the investments of the investors of third States, for the purpose of determining whether the treatment accorded to investors of the home State can be said to be less favorable than that accorded to investments of the investors of any third State.[213]

The tribunal read the terms "in similar situations" as restricting the scope of the MFN clause to *de facto* discrimination only.

255. The *İçkale* tribunal's reading seems inapposite under the Treaty, for at least three reasons.

- First, the natural reading of the "similar situations" test in Article III(2) is that it requires a showing of likeness; that is to say, that an investment of an investor of a third State, positioned in like circumstances as an investment under the Treaty, would be entitled to or has received more-favourable treatment. This analysis is of course unremarkable and consistent with the *eiusdem generis* principle, addressed below.[214] It calls for an assessment of similarities and dissimilarities between investors or investments, in order to identify whether differential treatment would be warranted as a matter of international law. It is an altogether different matter to say that there is a further requirement of identifying an actual investment by an actual investor that has received more-favourable treatment in actual fact.

- Secondly, it is difficult to endorse a reading that would allow the States Parties altogether to defeat their Article III(2) MFN obligations by failing in fact to accord to third-State nationals the treatment to which they are legally entitled. That would be antithetical to the core idea of MFN treatment.

- Finally, it is difficult to see why, by virtue of Article III(4)(a), the States Parties would have agreed that Article III(2) is to have "no effect in relation to... customs unions, regional economic

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[211] Cf *UAB E energija v Republic of Latvia*, ICSID Case No ARB/12/33, Award, 22 December 2017, ¶ 1112; and Canada-European Union Comprehensive Economic and Trade Agreement (CETA; signed 2016, provisionally in force 2017), Article 8.7.4.

[212] The relevant provision, Article II(2), reads in full as follows:

Each Party shall accord to these investments [ie, investments permitted into its territory pursuant to Article II(1)], once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable.

[213] *İçkale*, note 173 above, ¶ 329.

[214] *See* paras 278 *et seq*.

organization or similar international agreements" if the latter Article only covered *de facto* discrimination.

(ii) Article IV(3) does not displace Article III(2)

256. The Respondent argues that if the Claimants were to be able to rely on Article III(2), this would amount to "deleting" Article IV(3), this provision being *lex specialis* to Article III(2).

257. In the view of the majority of the Tribunal, the argument cannot prosper, either at the level of principle or at the level of treaty interpretation. [215]

258. As a matter of principle, the very purpose of MFN clauses is to extend more-favourable treatment that is due under another instrument, whether a treaty or domestic law, in the stead of the treatment due under the basic treaty. Access to enhanced treatment by reference to another ("comparator") treaty cannot be said to "delete" any provision of the basic treaty, because "[b]y its very nature, an MFN clause promises something better than what is provided in the [basic] treaty". [216]

259. The Tribunal is also unable to accept that Article IV(3) is to be read as excluding by necessary implication Article III(2). Such a reading would lead to the result that investors under the Treaty would be entitled to the benefit of war-losses measures, if any had been adopted by the host State, but they would not be entitled to any broader treatment that the host State may have in fact accorded, or undertaken to accord, on whatever basis, to similarly situated investors of a third State or the host State. On such a reading, if investors of certain countries had been granted benefits over and above a generalized war-reparations programme— say, a choice between indemnification or restitution of property, or compensation in foreign currency that can be freely repatriated—these benefits would not be available to investors under the Treaty. One can see no compelling justification for such a reading.

260. Article III(2) and Article IV(3) both contain MFN obligations. Article III(2) is the broader provision, requiring that, "in similar situations", MFN "treatment" be accorded to "investments established". Article IV(3) provides for a highly specific form of MFN treatment, in extraordinary circumstances where "investments suffer losses... owing to war, insurrection, civil disturbance or other similar events". There, the duty to extend MFN treatment extends only to "measures [which the host State] adopts in relation to such losses". As may be seen from paragraph 244, extending the benefit of war-losses "measures" is a form of "treatment". Compliance with Article IV(3) will therefore be consistent with the obligation under Article III(2): the two articles are entirely concordant.

261. It would be inimical to this concordance to treat Article IV(3) as making Article III(2) redundant. As already noted at paragraph 235, *lex specialis* requires more than just pointing to a more-specific provision. Far from being a mechanical rule of invariable application, *lex specialis* is an aid to

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[215] Professor Ziadé issues a Partial Dissenting Opinion on this issue, setting forth the reasons for his disagreement with the majority of the Tribunal. The majority has had sight of this Opinion in final draft.

[216] Final Report of the ILC Study Group (note 209 above) ¶ 187.

interpretation whose "power is entirely dependent on the normative considerations for which it provides articulation: context, capacity to reflect State will, concreteness, clarity, definiteness".[217] Article IV(3) does not in terms indicate that it is exclusive of any other provision in the Treaty, nor does it need to be read in that way to be given *effet utile*. This Article is directed to an issue which may be debated as a matter of customary international law, namely whether war-losses programmes, which are sometimes discretionary, must be extended to foreign nationals on a footing of equality. Article IV(3) is therefore a non-discrimination provision with a highly specific purpose. It implements, rather than displacing, Article III(2).

262. This interpretation gives *effet utile* to both Article IV(3) and Article III(2) as concordant provisions placed within the same treaty text. There is no rigid rule of treaty interpretation requiring only one provision to apply to a given situation, to the exclusion of all other provisions in the treaty. Indeed, it is common to have general and specific provisions within the same treaty text, the specific provisions implementing the general ones. This is not, therefore, a situation where the only way to give *effet utile* to two provisions in a treaty requires one to be read as an exception or limitation to the other. The Tribunal is comforted in this interpretation by the fact that numerous tribunals that have considered arguments such as the Respondent's have been unable to regard specific MFN clauses as excluding more general ones,[218] with one tribunal noting that clauses such as Article IV(3) address a specific issue debated in customary international law.[219]

(iii) Article III(4) does not apply

263. The Respondent argues further that Article III(4) (quoted at paragraph 248 above) excludes the application of Article III(2) because Italy "is party to [a] regional organisation", the European Union. The Tribunal is unable to agree.

264. The Respondent's reading is inconsistent with the natural meaning of Article III(4). This provision is engaged only if either of the States Parties, Syria or Turkey, is a member of a customs union, regional economic organization, or similar arrangement. Then, the State Parties' obligations under the relevant agreements will be *lex specialis* and remain unaffected by their MFN obligations under the Treaty. The obvious rationale for this is that a customs union or economic organization will typically provide for freedoms and benefits going well beyond a bilateral relationship of mutual investment protection; and that such privileges should not automatically be extended outside the circle of States participating in the union or organization. Thus, the MFN-treatment obligation in Article III(2) may

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217 Report of the Study Group of the ILC: Fragmentation of International Law, UN Doc A/CN.4/L.682 (2006), ¶ 119.

218 *See Siemens AG v Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004, ¶ 90 ("The repeated [MFN] provision in a particular context stresses the concern of the parties in respect of that particular matter rather than limiting the scope of clauses of general character."); cf *Daimler Financial Services AG v Argentine Republic*, ICSID Case No ARB/05/1, Award, 22 August 2012, ¶¶ 206 *et seq*, especially 210, 232-233, and 253. *See also CMS Gas Transmission Company v Republic of Argentina*, ICSID Case No ARB/01/8, Award, 12 May 2005, ¶¶ 244, 375–377; *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic*, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010, ¶¶ 270–271; *El Paso Energy International Co v Argentine Republic*, ICSID Case No ARB/03/15, Award, 31 October 2011, ¶ 559; *Total SA v Argentine Republic*, ICSID Case No ARB/04/01, Decision on Liability, 27 December 2010, ¶¶ 226 and 229; *Enron Corporation and Ponderosa Assets, LP v Argentine Republic*, ICSID Case No ARB/01/3, Award, 22 May 2007, ¶¶ 319–320; *Sempra Energy International v Argentine Republic*, ICSID Case No ARB/02/16, Award, 28 September 2007, ¶¶ 362–363; *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/07/17, Award, 21 June 2011, ¶¶ 340–341.

219 *See EDF International SA and ors v Argentine Republic*, ICSID Case No ARB/03/23, Award, 11 June 2012, ¶¶ 1157–1162.

not be relied upon by a Turkish investor to claim the special benefits of a national of a State with which Syria may form a customs union or regional economic bloc. In that hypothesis, Article III(2) "shall have no effect", as Article III(4) states.

265. The Claimants rely on Article III(2) to avail themselves of a protection to which Italian investors would be entitled under Article 4 of the Syria-Italy BIT. Such an entitlement arises exclusively under that BIT, not under a customs union or regional economic organization agreement. Article III(4) does not apply.

(iv) The expiry of the Syria-Italy BIT is immaterial

266. The Respondent also argues that the expiry of the Syria-Italy BIT in November 2018 prevents the Claimants from relying on Article 4 of that BIT. The Tribunal is unable to see merit in this argument.

267. As already noted, the natural meaning of the terms "treatment accorded" in Article III(2) encompasses more-favourable treatment that the host State is legally required to accord to third-State nationals. It follows, consistent with general international law, that the duty of the host State under Article III(2) arises when it undertakes to extend the relevant treatment to nationals of a third State [220] and ceases when that obligation is terminated or suspended. [221] As observed by another tribunal, the "[b]enefits available due to an MFN clause last as long as the treaty that grants them is in effect". [222]

268. The Treaty entered into force on 3 January 2006, [223] a little more than two years after the entry into force of the Syria-Italy BIT. [224] Thus, from the entry into force of the Treaty, Article III(2) permitted a Turkish investor in Syria to rely on treatment due to Italian investors under the Syria-Italy BIT, including Article 4. [225] The Syria-Italy BIT ceased to be in force on 12 November 2018, pursuant to its Article 14(1). [226] Nevertheless, under Article 14(2), its provisions will "remain effective for a further

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[220] *See* 1978 ILC Draft Articles on most-favoured-nation clauses (note 209 above), Article 20(1): "The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause not made subject to a condition of compensation arises at the moment when the relevant treatment is extended by the granting State to a third State or to persons or things in the same relationship with that third State."

[221] *See* 1978 ILC Draft Articles (note 209 above), Article 21(1): "The right of the beneficiary State, for itself or for the benefit of persons or things in a determined relationship with it, to most-favoured-nation treatment under a most-favoured-nation clause is terminated or suspended at the moment when the extension of the relevant treatment by the granting State to a third State or to persons or things in the same relationship with that third State is terminated or suspended"; and *Rights of Nationals of the United States of America in Morocco* [1952] ICJ Rep 176, pp 190–197.

[222] *Siemens AG v Argentine Republic*, ICSID Case No ARB/02/8, Decision on Jurisdiction, 3 August 2004, ¶ 99.

[223] *See* ¶ 137 above.

[224] Although the Respondent had initially disputed the Syria-Italy BIT's entry into force (*see* Hearing Transcript, 232:12–20 and 275:5–278:21), it ultimately confirmed that this BIT "became effective [on] 13 November 2003" (Respondent's PHB, ¶ 12). The primary materials in the record confirm this in any event: *see* Exhibits C-287 – C-295.

[225] *See* 1978 ILC Draft Articles (note 209 above), Commentary on Article 20, ¶ 11: "It is to be understood that, if the third State enjoys that [more favourable] treatment already at the moment of the entry into force of the [MFN] clause, i.e. the treaty or international agreement containing it, then the beneficiary State becomes immediately entitled to the same treatment."

[226] Article 14(1) of the Syria-Italy BIT provides that it "shall remain effective for a period of 10 years from the date of [its entry into force] and shall remain in force for a further period of 5 years thereafter, unless either of the two Contracting Parties decides to denounce it not later than one year before its expiry date".

period of five years" (ie, until 12 November 2023) in respect of investments made while the BIT was in force.

269. It follows that Article 4 of the Syria-Italy BIT was in force at all possibly critical times for the present case, in 2011 (the Claimants' asserted date of breach by the Respondent) and in 2016 (the Claimants' Request for Arbitration); and in any event will "remain effective" until November 2023. The Claimants are plainly entitled to rely on Article 4, and the Respondent's contrary argument is to be rejected.

(v) The lex posterior *argument is unavailing*

270. The Respondent argues that the Treaty followed later in time than the Syria-Italy BIT, and Article IV(3) of the Treaty was intended to set out a separate, self-contained regime on war losses, such that Article 4 of the Syria-Italy BIT cannot be applied. This argument is founded on the *lex posterior* rule in Article 30(4)(b) of the VCLT. This article applies in case of "successive treaties relating to the same subject-matter" and provides that:

When the parties to the later treaty do not include all the parties to the earlier one:... [a]s between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

271. The Respondent's argument is predicated on the assumption that Article IV(3) of the Treaty sets out a self-contained regime which applies to the exclusion of any other investment protection. The Tribunal has already rejected this argument.

272. In any event, the Tribunal considers that Article 30(4)(b) is not engaged at all. Article 30 would apply only if Syria, Turkey, and Italy were party to an earlier (multilateral) treaty while only two of them party to a later (bilateral) treaty. [227] That is evidently not the case here. There are two sets of bilateral treaty relations, as between Syria and Italy and as between Syria and Turkey. By each of these bilateral treaties the contracting States may undertake to provide MFN treatment to the other State or its nationals.

273. The scope of an MFN clause is a matter for the contracting States to define in their basic treaty, this being "the juridical link" that allows the contracting States to avail themselves of rights that one of them has accorded or may come to accord to a third State or its nationals. [228] Here, it was for the States Parties, if they so wished, to restrict the MFN scope of Article III(2). The States Parties did indeed exclude certain benefits by virtue of Article III(4), as already discussed. But they did not restrict Article III(2) to treatment accorded by subsequent treaties only. No such restriction will be presumed in international law, [229] and the Tribunal sees every good reason to read the words

[227] *See* the ILC's commentary in respect of the 1966 Draft Articles on the Law of Treaties, Article 26(2)(b), [1966-II] YBILC 187, pp 216–217, ¶¶ 10–11.

[228] *See* *Anglo-Iranian Oil Co (UK v Iran)*, Preliminary Objection, Judgment, [1952] ICJ Rep 93, p 109.

[229] "[U]nless otherwise agreed, [an MFN clause] obviously attracts benefits extended to a third State both before and after the entry into force

"treatment accorded" as encompassing both pre-existing treaties (such as the Syria-Italy BIT) and subsequent treaties.

274. The only qualification in Article III(2) is that the more-favourable treatment must be "accorded in similar situations". As already discussed and is further discussed below, Article 4 of the Syria-Italy BIT does indeed concern treatment in similar situations as those which the Claimants faced.

275. Accordingly, the Respondent's argument is to be rejected.

(vi) Whether the Respondent failed to comply with Article III(2)

(a) Article 4 of the Syria-Italy BIT accords more favourable treatment in "similar situations" as those of the Claimants

276. Article 4 of the Syria-Italy BIT (in its English authentic version[230]) provides as follows in relevant part:

> Should investors of either Contracting Parties incur losses or damages on their investments in the territory of the other Contracting Party due to war, other forms of armed conflict, a state of emergency, civil strife or other similar events, the Contracting Party in which the investment has been effected shall offer adequate compensation in respect of such losses or damages. Irrespective of whether such losses or damages have been caused by governmental forces or other subjects, compensation payments shall be freely transferable as provided for in article 8 of this Agreement.

277. Read together, Article 4 of the Syria-Italy BIT and Article III(2) of the Treaty call for two inquiries.

278. The first concerns the "*eiusdem generis* principle", namely the subject-matter(s) that are within the scope of Article III(2) and thus attract MFN treatment.[231] The provision is cast in broad terms. It is not confined to certain categories of treatment, such as in respect of the acquisition, expansion, or management of investments. Rather, Article III(2) refers to "treatment no less favourable than that accorded in similar situations to... investments of investors of any third country". Thus, the subject-matter of Article III(2) comprises treatment that falls to be accorded under the Treaty in "situations" in which the Treaty finds application.

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of the treaty containing the [MFN] clause": 1978 ILC Draft Articles (note 209 above), Commentary to Article 20, ¶ 2. *See also* *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, ICSID Case No ARB/03/29, Award, 27 August 2009, ¶ 160: "[The] provision to which the Claimant more specifically referred, namely Article II(2) of the Pakistan-UK BIT, pre-dates the MFN clause in the Treaty. In and of itself that chronology does not appear to preclude the importation of an... obligation from another BIT concluded by the Respondent".

[230] The Syria-Italy BIT notes that it was done "in two originals, each in the Italian, Arab and English languages, all texts being equally authentic" and that, "[i]n case of any divergence, the English text shall prevail". In this Award, the Tribunal relies on the English text, save where helpful to examine the other authentic versions.

[231] In the well-known phrase of the *Ambatielos* tribunal, an MFN clause "can only attract matters belonging to the same category of subject as that to which the clause itself relates": *Ambatielos Claim* (Greece v UK), (1956) 12 RIAA 83, p 107.

279. Article 4 of the Syria-Italy BIT applies to a situation that is expressly covered by the Treaty. Article IV(3) of the Treaty concerns "losses... owing to war, insurrection, civil disturbance or other similar events". Article 4 of the Syria-Italy BIT concerns "losses or damages... due to war, other forms of armed conflict, a state of emergency, civil strife or other similar events". The two provisions evidently cover the same subject-matter, both being war-losses clauses. And while they are not word-for-word identical, both provisions include the generic "similar events" catch-all which expands their respective scope of application. The Tribunal has no difficulty concluding that these provisions are *in pari materiæ*, covering disturbances of various intensities and scale, whether inter-State ("war") or internal.

280. The second inquiry, as foreshadowed above, is whether Article 4 provides for more-favourable treatment than that which the Treaty provides for. Plainly it does. Article 4 sets forth a direct obligation to "offer adequate compensation in respect of such losses or damages". By contrast, as already discussed, Article IV(3) of the Treaty sets forth a relative standard of treatment, requiring the host State to extend to investors "any measures it adopts in relation to such losses", without requiring the State to adopt such measures in the first place.

281. The Tribunal concludes that Article 4 of the Syria-Italy BIT accords more-favourable treatment than that which is available in similar situations under Article IV(3) of the Treaty.

(b) The requirements of Article 4

282. Having established that Article 4 of the Syria-Italy BIT may be invoked by the Claimants, the Tribunal turns to the specific obligation that this provision entrained on the Respondent's part.

Article 4 is not limited to harm inflicted by the host State

283. The Tribunal is aware that a number of investment treaties provide for compensation for harm caused by the host State's "forces or authorities" (sometimes carving out action justified by military necessity or the exigencies of conflict). The Respondent has such treaties.[232]

284. This feature is absent from Article 4 of the Syria-Italy BIT.[233] Quite the opposite, Article 4 covers harm independently of the identity of those who caused it. The first sentence of the Article refers to "losses or damages... due to war, other forms of armed conflict, a state of emergency, civil strife or other similar events", without stipulating that such "losses or damages" must result from conduct attributable to the host State. Indeed, the clause is quite deliberately worded to be triggered solely by an objective occurrence, "losses or damages... due to" circumstances of war, etc. The second sentence puts this point beyond doubt, spelling out that the duty to compensate arises "[i]rrespective of whether such losses or damages have been caused by governmental forces or

[232] *See, eg,* Syria-Spain BIT (signed 2003; in force 2004), **Exhibit CL-5**, Article 6(2).

[233] Equivalent provisions are to be found in several other Italian BITs, such as the Italy-Morocco BIT (signed 1990; in force 2000), Article 4(1); and the Italy-Pakistan BIT (signed 1997; in force 2001), Article 4(1).

other subjects".

285. The Tribunal acknowledges that one might more naturally expect to see the "irrespective" clause placed in the first sentence, as indeed is the case in the Arabic version of the Treaty.[234] But the placement of the clause does not alter its meaning, which is plain on its face. The second sentence deals with "compensation payments" by virtue of the duty to "offer adequate compensation". The opening phrase of the second sentence makes clear that such payments arise "irrespective" of the person or entity who caused the harm. In that regard, the word "subjects" ("*soggetti*" in the Italian version; "أو غيرها", ie "other forces", in the Arabic version) refers to the actor responsible for the "losses or damages" and is simply a formal term to denote persons or entities. The sheer breadth of the terms "or other subjects", set in the clause by contradistinction to "governmental forces", means that there is no need to engage in any analysis of attribution: harmful acts by any person or entity will suffice. *234F*[235]

286. It necessarily follows that it is immaterial whether the actor acted lawfully (for example in accomplishing a military mission) or unlawfully (for example in opposing the governmental forces, or for private gain). It is required, by contrast, that the relevant conduct be part of war or similar events, as discussed immediately below. Accordingly, actions or omissions by the PYD/YPG, which as noted at paragraph 120 are not regarded by the Respondent as attributable to it, may be captured by Article 4, provided they are causative of "losses or damages" that are "due to" circumstances encompassed within the provision.

The relevant harm must be "due to" war and similar events

287. While Article 4 does not exclude conduct justified by military necessity, it does set forth a causal nexus that the investor's "losses or damages" must be shown to satisfy: such losses or damages must be "due to" war and similar circumstances.

288. The natural meaning of *due to* is *caused by*, *owing to*, or *by reason of*. It is consistent with the unusual breadth of Article 4 to read the words "losses or damages... due to war... or other similar events" as requiring a pronounced degree of causal proximity, certainty, and directness. An investor must of course show "an uninterrupted and proximate"[236] chain of causation between the "losses or damages" and the "war... or other similar events". But one must also be careful to exclude possible contributing or intervening events which interrupt the directness of causation (such as political hostility), as one must also exclude second-degree effects of war (such as a drop in demand, profiteering, inflation, or fluctuations in currency exchange rates). Article 4 may not be read as

[234] *See* English translation of the Arabic text of the Syria-Italy BIT, **Exhibit** C-**288**, Article 4: "In the event the investments of the investors of either Party to this Agreement suffer damage or loss in the territories of the other Party due to war, other forms of armed conflict, state of emergency, civil war, or other similar events, the Party on whose territories investments are affected shall award appropriate compensation for such loss or damage, *irrespective of whether such loss or damage is caused by government or other forces*. Such compensation shall be transferred freely as stipulated in Article (8) of this Agreement" (emphasis added).

[235] Cf *American Manufacturing & Trading, Inc v Republic of Zaire*, ICSID Case No ARB/93/1, Award, 21 February 1997, ¶ 6.13 (applicable clause referring to "damages due to revolution, state of national emergency, revolt, insurrection, riot or act of violence"; held that this entrained responsibility "without... enquiring as to the identity of the author of the acts").

[236] Cf *Lemire v Ukraine*, ICSID Case No ARB/06/18, Award, 28 March 2011, ¶ 163; and *Genocide Convention (Bosnia & Herzegovina v Serbia & Montenegro)*, Judgment, [2007] ICJ Rep 43, ¶ 262.

unlimited insurance against generalized adversity flowing from war and similar situations. Rather, and as the second sentence suggests by the words "*caused by* governmental forces or other subjects", the intent is to capture harmful events that occur in a theatre of war or conflict.

"Adequate compensation" for "losses or damages"

289. The host State's duty under Article 4 is to "offer adequate compensation". This is a second-order duty, in that the provision does not require the host State to have caused, let alone wrongfully, the investor's "losses or damages". This is not, therefore, responsibility to make reparation for an internationally wrongful act. It is a purely economic responsibility to indemnify for harm incurred in certain extraordinary circumstances. Nevertheless, the notion of "adequate compensation" for "losses or damages" ("*danni o perditi*" in the Italian version; "الخسائر أو الأضرار" in the Arabic version) corresponds to compensation for "any financially assessable damage including loss of profits" under the law of State responsibility.[237]

290. In short, Article 4 requires the host State to offer compensation for harm, including loss of profit so far as it can be established. Such redress must be adequate to the harm suffered, that is, wipe out its consequences as far as monetary relief may do so. It follows that the compensation must also make allowance for the time-value of money for the period between the occurrence of the investor's compensable harm and the actual payment by the host State.

(a) The Claimants' compensable harm under Article 4

291. As noted in paragraph 108 above, the Claimants' investments consist of:
(i) 91% of the shares in Raqqa, which (a) owned the Raqqa Plant and operated it in the period between April 2009 and March 2011, and (b) undertook various activities to construct the Raqqa Factory between April 2010 and June 2011;[238] and

(ii) 87% of the shares in Hasakah, which owned the Hasakah Plant and operated it in the period between March 2010 and April 2011.[239]

292. The Claimants assert that: (i) the conflict in Syria caused a suspension of commercial activities at the Raqqa Plant in March 2011 and the Hasakah Plant in April 2011, and a suspension of construction activities at the Raqqa Factory in June 2011; (ii) the conflict ultimately resulted in the Claimants' altogether losing access to the Raqqa Plant and Factory in July 2014 and the Hasakah Plant in March 2014; (iii) the pervasive lack of peace and security, due to the ongoing conflict, means that there is no certainty that the Claimants may in the foreseeable future be able to return and recommence operations or construction; and (iv) the harm suffered by the Claimants due to the conflict in Syria is, therefore, a complete deprivation of the substance of their shareholding interests

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[237] *See* 2001 ILC Articles, Article 36(2).

[238] Yamantürk Witness Statement, **CWS**-1, ¶¶ 25–29; Çalik Witness Statement, **CWS**-2, ¶ 20.

[239] *Ibid.*

in Raqqa and Hasakah.[240]

293. The Respondent retorts that "there was no security reason [in] 2011" that could have caused a suspension of the operations or construction of the Claimants' facilities.[241] The Respondent concedes that it has had "no control" and "no sovereignty" over the Ain Issa and Al-Yarubiyah regions "since mid 2012", but then goes on to assert that the Claimants' facilities "are still there, nobody knows if anything is lost or not and how much it is worth", and that "[i]f tomorrow Syria regains control and authority all over the north east, the Claimants will have full legal and actual titles to exploit their facilities".[242]

294. On the evidence, the Tribunal concludes that the Claimants have suffered a lasting deprivation of the use, control, and enjoyment of their shareholdings in Raqqa and Hasakah. The Tribunal's reasoning is as follows.

(vii) The nature of the Claimants' deprivation of their investments

295. As noted above, the Claimants are shareholders in businesses with underlying assets, both physical (such as sites, plant, and machinery) and economic (such as contracts, know-how, goodwill, and clientele). Although the Claimants argue that they "lost their shares" in Raqqa and Hasakah due to the conflict in Syria,[243] it is undisputed that the two Syrian companies, Raqqa and Hasakah, remain legally constituted and in existence; and the Claimants' legal status as shareholders in these companies is intact and undisputed within Syria's legal order. The Tribunal also notes that there has been no evidence to suggest that rights recognized within Syria's legal order are not recognized in the DFNS-controlled areas.

296. However, the Claimants' uncontested legal status as shareholders is not dispositive of an inquiry regarding the deprivation of their rights. The Claimants' shareholdings in Raqqa and Hasakah are nominal and hollow if these companies are effectively deprived of use and control of their assets. After all, these assets serve the businesses that these companies were established to conduct. Without these assets, there is no business for the companies to conduct or manage. In that situation, the shareholders of the companies are also practically deprived of the essential attributes of their shareholder rights, including their economic value.

297. In applying this test on the facts of the case, two periods must be distinguished. In the first period, starting in March-April 2011 and ending in March 2012, the Claimants' decision to repatriate to Turkey senior management and to suspend commercial operations at the two Plants and the construction of the Raqqa Factory was made for prudential reasons. The Claimants indeed accept that, while there were sporadic incidents of insecurity and intimidation in their facilities, it would have been possible to continue operating.[244] The Tribunal, while intending no criticism of the Claimants' decision, is bound to consider that the causal nexus required under Article 4 is not

[240] SoC, ¶¶ 6, 45, 125 and 409; Section III.E; fn 13; Reply, ¶ 39.
[241] Respondent's PHB, ¶ 62.
[242] Respondent's PHB, ¶ 93; and Respondent's Rejoinder, ¶ 33.

[243] SoC, ¶ 409; Reply, ¶ 100.
[244] Tüylü Witness Statement, **CWS-4**, ¶¶ 11 and 13.

satisfied by prudential action to avoid potential harm. Rather, in the circumstances of this case, this nexus requires that the investor's action was the only viable course in the circumstances of the conflict— an inexorable necessity.

298. The second period starts in April 2012, when on both sides' accounts intense conflict spread to the Ain Issa and Al-Yarubiyah areas and, a little later, the bulk of the Respondent's armed forces retreated from these areas. The Tribunal considers that from April 2012, continuing with commercial operations or construction activities was no longer viable, as a direct result of the evolution of the conflict. A reasonable operator has no real choice when harm is certain or near certain.

299. The evidence is as follows:

(i) Mr Yamantürk's testimony was that "conflicts had not escalated in the Ain-Issa region too much after the initial events that began in March 2011".[245]

(ii) Similarly, Mr Çalik testified that the Claimants suspended commercial operations "before the events spread to [their] region starting from 2011", and that "[t]he events started affecting Raqqa and Yarubiya in March 2012".[246]

(iii) This account is confirmed by Mr Tüylü, whose testimony on these issues was not challenged. He testified that the "slight unrest" in the Ain Issa region in 2011 was "not serious in scale and there was not much trouble in the region during that time".[247] Thus, "[i]n April [2011], when [the Claimants] pulled a large percentage of [their] laborers from the Yarubiyah plant, and in July [2011], when [the Claimants] pulled a large percentage of [their] laborers from the Ain-Issa plant [the Raqqa Factory], the conflicts had not yet jumped into the regions where the plants are located".[248] As he said, "the main conflicts began in March 2012",[249] as indeed he confirmed at the hearing: "incidents spread out to [the Plants'] region at a later stage".[250]

(iv) Mr Erkmen, the Claimants' expert on political matters and security, confirmed that the Ain Issa and Al-Yarubiyah regions did not become unsafe for commercial operations until the second half of 2011 at the earliest:

THE PRESIDENT:... I want to ask you now something about timing. If you have the two areas in mind that this case concerns, one is close to Ain Issa and the other one is close to Has[a]k[ah], can you tell us whether in 2011 the situation there was, in your view, unsafe for commercial operations?

MR ERKMEN: You mean in 2011?

THE PRESIDENT: I mean in 2011.

MR ERKMEN: No. When the incidents started we can't say that that region was unsafe, when the incidents started.

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245 Yamantürk Witness Statement, CWS-1, ¶ 30.

246 Çalik Witness Statement, CWS-2, ¶ 37.

247 Tüylü Witness Statement, CWS-4, ¶ 13.

248 Tüylü Witness Statement, CWS-4, ¶ 11.

249 Tüylü Witness Statement, CWS-4, ¶ 13.

250 Hearing Transcript, 300:5–16.

THE PRESIDENT: When would one start to say that these areas were unsafe? Is it in the middle of 2012? Is it earlier? Is it later?

MR ERKMEN: As of the second half of 2011, ie as clashes emerged sporadically – I'm sorry, in a distributed way in different places, we can say that, as of that period of time, it wouldn't be easy to conduct commercial activity in those regions. My answer a minute ago was about the period of time when the clashes initially started.[251]

(v) On the Respondent's account, by "mid 2012",[252] the government's armed forces started withdrawing from the north-eastern territories of the country, including Ain Issa and Al-Yarubiyah, after losing "many battles" against the FSA and "Kurd militias", to prioritize the protection of civilians in other parts of the country.[253] (UN reports confirm the Respondent's account of a retreat for strategic reasons.) After this retreat, the Respondent was unable to ensure the safety and security of persons and property in Ain Issa or Al-Yarubiyah.

(vi) The Tribunal also notes that Turkey suspended activities at its Embassy in Damascus in March 2012, which again suggests that the conflict in Syria attained a critical stage around that time.[254]

300. One now turns to the evidence regarding the deprivation of the Claimants' use, control, and enjoyment of their investments in the period after April 2012. After the departure of the Claimants' senior management and the suspension of activity at Raqqa and Hasakah, the Claimants gradually lost any form of access to the companies' sites. This occurred around July 2014 for the Raqqa site, and around March 2014 for the Hasakah site.

301. Starting with Raqqa, it is common ground that PYD/YPG has been in control of Ain Issa since the withdrawal of the Syrian government forces in 2012 (save for an interlude, when ISIS controlled Ain Issa between July 2014 and May 2015).[255] The evidence adduced by the Claimants—which the Respondent says it is unable either to confirm or challenge—shows that the Raqqa site was ravaged by various events after July 2012. These include: (i) thefts of electronic devices by third parties in July 2012;[256] (ii) demands by PYD/YPG for payments or equipment in the period September-December 2012;[257] (iii) theft of personnel's belongings and an automobile by armed third parties in March 2013;[258] (iv) theft of an earth digger, arson of a dormitory room, and a raid by various third parties in July 2013;[259] (v) demands by PYD/YPG to operate the Raqqa Plant in early 2014;[260] (vi) a seizure of equipment (two mixers and a concrete pump) by PYD/YPG in March 2014;[261] and (vii) damage to dormitory rooms as a result of an armed clash between PYD/YPG and ISIS in July 2014.[262]

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[251] Hearing Transcript, 593:2–595:6.
[252] Rejoinder, ¶ 33; Respondent's PHB, ¶ 23.
[253] SoD, ¶¶ 70–73; Rejoinder, ¶¶ 28–33; Respondent's PHB, ¶¶ 36–43.
[254] *See* Letter from Turkish Ministry of Foreign Affairs to Güris, 5 December 2018, **Exhibit C-280**.
[255] SoC, ¶ 92.
[256] Tüylü Witness Statement, **CWS-4**, ¶ 15.
[257] Tüylü Witness Statement, **CWS-4**, ¶¶ 17–18.
[258] Tüylü Witness Statement, **CWS-4**, ¶¶ 22–23.
[259] Anil Witness Statement, **CWS-3**, ¶ 29.
[260] Anil Witness Statement, **CWS-3**, ¶ 33.
[261] Anil Witness Statement, **CWS-3**, ¶ 35.
[262] Tüylü Witness Statement, **CWS-4**, ¶ 25; Anil Witness Statement, **CWS-3**, ¶ 34.

302. The Claimants say that these events culminated in their withdrawing all remaining personnel from the Raqqa Plant in July 2014, thus losing any form of access to the site. [263]

303. The Tribunal considers that the events in the period April 2012 – July 2014 show a pervasive absence of security and safety, compelling the Claimants' withdrawal of all remaining personnel due to the conflict in Syria.

304. The information available in respect of the period after July 2014 is limited, but it is consistent with the events up to that time. Mr Anil testified that, based on information provided by local personnel who obtained photographs and information "remotely", [264] the PYD or YPG started operating the Raqqa Plant jointly with third parties in April 2016. [265] Mr Yamantürk testified that the Claimants learnt from people they "know from the region" that the Raqqa Plant "is being operated right now, by third parties". [266] The Claimants also confirmed that they understand "from certain photos and occasional information received [from] the region that there have been attempts to operate the facilities". [267] Following the hearing, the Respondent submitted a witness statement by Jassem Ali Almousa, indicating that the Raqqa Plant was intact and being operated. Although this statement has limited probative value, containing as it does second-hand information [268] proffered by a person whom the Tribunal did not have an opportunity to examine, it is consistent with the Claimants' evidence.

305. Turning to Hasakah, the evidence is as follows:
(i) The Syrian government armed forces withdrew from the Al-Yarubiyah area by March 2013 at the latest. [269]

(ii) The FSA controlled Al-Yarubiyah between March and October 2013. [270]

(iii) PYD/YPG has largely been in control of the area since November 2013 (save for an interlude of ISIS control between July 2014 and May 2015). [271]

306. The Claimants say that they had no access to the Hasakah site during the period of FSA's control, between March and October 2013. [272] They were able to regain access to the Hasakah Plant in October 2013, and found that it "was seriously damaged" and that "all of [their] portable materials, such as generators, computers, and the detachable equipment on the electrical panel, had been

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[263] Anil Witness Statement, CWS-3, ¶ 36.

[264] Anil Witness Statement, CWS-3, ¶ 37.

[265] Anil Witness Statement, CWS-3, ¶ 42.

[266] Hearing Transcript, 349:23–350:8 and 500:1–502:15.

[267] Hearing Transcript, 40:7–10 and 125:16–17.

[268] The stated source for Mr Almousa's testimony is Adnan Mirza, a former employee of the Claimants.

[269] SoC, ¶ 79 ("Government forces mostly continued to control Al-Yarubiyah until March 2013, when FSA captured the city..."), ¶ 94 ("Timelines"), and ¶ 126 ("Until March 2013, the [Al-Yarubiyah] town was mostly under the control of the government despite occasional occupancies by various opposition groups. In March of 2013, the FSA established control over the town."); Erkan Expert Report, CER-1, ¶¶ 64–65 and 68 ("Al-Yarubiyah came under the control of armed groups attached to the Free Syrian Army for the first time and completely on 2 March 2013."); Hasan Expert Report, RER-6, p 19 ("The Syrian Arab Army has withdrawn from areas mostly populated by the Kurds in the north and north-east of the country since the summer of 2012.").

[270] SoC, ¶ 89.

[271] SoC, ¶ 94

[272] Anil Witness Statement, CWS-3, ¶¶ 48–51.

looted, and that the buildings and silos were damaged".[273] Ultimately, in March 2014, PYD/YPG started efforts to put the Plant to production,[274] following which the Claimants say they lost all access to it.[275]

307. The Tribunal has no reason to question the evidence of the Claimants, which is consistent with the overall situation on the ground as the Tribunal understands it. The Tribunal concludes that the Claimants' loss of any access to the Hasakah site in March 2014 was also due to the conflict in Syria.

(viii) The Claimants' deprivation is not transient or ephemeral

308. Summarizing the foregoing findings, from April 2012, the Claimants were forced by the circumstances of the conflict in Syria to abandon use, control, and enjoyment of their investments.[276] Gradually, they lost any form of access to the underlying assets, which are being operated, perhaps intermittently and only to a degree, by PYD/YPG or for their benefit.

309. While it is therefore the case that the Claimants' harm is ongoing, this is not a case of ephemeral or transient deprivation. It is a case of a lasting deprivation whose duration cannot be predicted with any certainty. This calls for judgement as to the compensation that is adequate to the nature and severity of the Claimants' harm. The Tribunal's assessment takes account of the factors set out below.

310. On the one hand, the possibility that the Claimants' deprivation will be reversed cannot be ruled out as a matter of principle.
(i) It is common ground that Raqqa and Hasakah, being validly constituted and existing Syrian companies, remain legally entitled to exercise full ownership over their assets and to recommence their business. It is also common ground that Syrian law does not recognize that any third party, such as PYD/YPG, has a valid right to possess or use the companies' assets. The Claimants acknowledge that "[t]here is no legislative or administrative act preventing [them] from accessing... their investments".[277] Nor do the Claimants suggest that PYD/YPG has prevented them, or would prevent them in future, from returning to the Plants and recommencing operations.[278]

(ii) All available evidence indicates that the Raqqa and Hasakah Plants are still operational and indeed have been operated by or for PYD/YPG, although it is not known to what degree and in what state of repair (or ill-repair). In this connection, the Tribunal records that, with the consent of the parties, it established contact with the individual charged with DFNS's foreign affairs and secured his promise to convey within the DFNS the Tribunal's inquiries regarding the Plants. The Tribunal, after consultation with the parties, addressed five specific questions to the DFNS concerning the legal and material status of the Plants.[279] No response was forthcoming, despite follow-up by the

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[273] Anil Witness Statement, CWS-3, ¶ 51.

[274] Anil Witness Statement, CWS-3, ¶ 53.

[275] Letter from Güriş to Consulate General of Syria in Istanbul, 26 September 2014, Exhibit C-19.

[276] The Claimants thus find themselves in a situation broadly analogous to that of the claimants in *AAPL v Republic of Sri Lanka*, ICSID Case No ARB/87/3; *see* the Award, 27 June 1990, ¶ 50.

[277] SoC, ¶ 383; Hearing Transcript, 127:20–25.

[278] Hearing Transcript, 127:18–131:5.

Tribunal. The Tribunal is therefore constrained to make its findings based on the evidence in the record.

(iii) The Syrian Arab Republic continues to assert full sovereignty over the territory comprised within its internationally recognized borders. This includes the areas at present under the control of DFNS, where the PYD/YPG organizations operate and where the Claimants' facilities are located. The DFNS operates under political cover of a "Charter" which proclaims Syria's "territorial integrity".[280] It follows that the arrangements set out in the Charter, seeking to establish a degree of autonomy for the regions of Afrin, Jazira, and Kobane, ultimately aspire to be endorsed by a new Constitution of the Syrian Arab Republic. In short, the present situation in the DFNS-controlled areas, which came about in a context of widespread conflict in Syria, is regarded as temporary both by the Syrian Arab Republic (which rejects it as an illegal state of affairs) and the DFNS itself. For its part, Turkey has also confirmed that it is "unequivocally committed to the territorial integrity and political unity of Syria".[281]

311. On the other hand, there can be no certainty as to the end of the conflict and the normalization of the situation in the areas where the companies' facilities are located. Also, the Plants have limited operating lives: on the Respondent's case, 2027 (for the Hasakah Plant) and 2031 (for the Raqqa Plant).[282] Even if one assumes that the Plants remain fully operational and in a good state of repair—which, on the evidence, is a highly optimistic assumption—most of the useful life of their plant and equipment has already been expended.

312. In the circumstances, a duty of ongoing, periodic compensation for the Claimants' ongoing harm would be ill-suited to the reality of the situation. Rather, for the purposes of compensation the Claimants' deprivation should be treated as being permanent as of 2012, and compensation should be fashioned in a manner that takes account of the fact that the underlying assets may still be operational when the conflict ceases and the situation is normalized. This issue is addressed further in Section V.D below.

(ix) The Respondent has not offered the Claimants compensation

313. It is common ground that the Respondent has not offered to provide compensation to the Claimants for the effective deprivation of their investments, in accordance with Article 4 of the Syria-Italy BIT in conjunction with Article III(2) of the Treaty. Indeed, in this arbitration the Respondent has

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[279] Specifically: (i) whether the Plants are intact or destroyed/damaged, and whether the equipment therein has been removed or remains in place; (ii) who currently holds the legal title to the Plants or a licence to operate them; (iii) whether the Plants are presently in use and, if so, since when, by whom, and for what purpose(s); (iv) whether any organ, agency, or office of the DFNS has taken any requisition measures in relation to any of the Plants to date and, if so, what compensation, if any, has been or will be paid in relation to such measures and to whom; and (v) if the Plants are intact and not currently being used, whether there are any legal or practical impediments to Raqqa and Hasakah resuming control and operations of the facilities.

[280] "An interim constitution" of DFNS, **Exhibit** RD-7, Preamble.

[281] Letter to the UN Security Council, 9 October 2019, UN Doc S/2019/804 (reiterating *verbatim* prior communications).

[282] The Claimants' DCF analyses assume that the Plants' useful operating lives are 25 years, from 2009 to 2034, but without any evidence in support (*see* SoC, ¶ 414). The Respondent asserts that the best indication is the terms of incorporation of the two Syrian companies that own them, as recorded in their company registration certificates: until 2031 for Raqqa and until 2027 for Hasakah (*see* Yousif Expert Report, RER-8, p 3).

rejected the notion that it has any such duty. The Respondent has therefore failed to comply with this Treaty obligation.

314. The Respondent's breach attracts a duty to compensate the Claimants for the injury caused to them. This injury is equal to the amount that the Claimants stood to be offered under Article 4 plus the time-value of this amount until full payment. This issue is also addressed further in Section V.D below.

(x) The Respondent's defences of force majeure and necessity

315. The Respondent has asserted force majeure and necessity arising from Syria's conflict as circumstances precluding the wrongfulness of any Treaty breaches on its part.[283] However, it has not specifically explained how such defences would exclude responsibility under a war-losses indemnity clause such as Article 4 of the Syria–Italy BIT.

316. For their part, the Claimants assert that such defences are "inapplicable" here.[284] They argue that "if a provision applies—exclusively—to cases of war and civil strife, arguing that it cannot be applied as war and/or civil strife constitutes a circumstance precluding wrongfulness would inevitably reduce the clause into redundancy".[285]

317. Both sides agree that force majeure and necessity are circumstances precluding wrongfulness, including a breach of treaty obligations, in the terms codified in the 2001 ILC Articles.[286]

318. The Tribunal considers that the Respondent has not made out a defence based on either of these grounds.

319. The obligation concerned here is to "offer adequate compensation" to investors. That is an obligation of monetary redress for harm already occurred. The obligation arises in case of "losses or damages on [investors'] investments in the territory of the other Contracting Party due to war, other forms of armed conflict, a state of emergency, civil strife or other similar events... [i]rrespective of whether such losses or damages have been caused by governmental forces or other subjects". As already noted, the obligation does not presuppose, let alone require, that the host State had a prior duty to avert or not to cause the "losses or damages".

320. It is therefore a purely economic obligation in the nature of an indemnity which must be shown to be "materially impossible in the circumstances to perform"[287] or to be precluded by conduct that is "the only way for the State to safeguard an essential interest against a grave and imminent peril".[288]

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[283] SoD, ¶¶ 173–196.
[284] Claimants' PHB, ¶ 42.
[285] Claimants' PHB, Annex 1, ¶ 60.
[286] *See* notably SoD, ¶¶ 176 and 191.
[287] 2001 ILC Articles, Article 23(1).
[288] 2001 ILC Articles, Article 25(1)(a). Paragraph (1) reads as follows:
1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

A demonstration of "material impossibility" or action necessary to "safeguard an essential interest against a grave and imminent peril" is fact-specific, requiring cogent evidence. Here, the Respondent has not explained, let alone demonstrated, how payment of money to the Claimants would satisfy either of these legal tests. The Tribunal observes in that regard that war or armed conflict, in themselves and without more, do not excuse non-compliance with monetary obligations.[289]

321. The Respondent's defences are accordingly to be rejected for want of substantiation.

322. For completeness, the Tribunal notes that a defence of force majeure is in any event unavailable where a State "has assumed the risk of that situation [of force majeure] occurring".[290] By virtue of Article 4 of the Syria–Italy BIT, the Contracting Parties assumed the risk that "war, other forms of armed conflict, a state of emergency, civil strife or other similar events" might occur and cause "losses or damages" to investors. To insure against the occurrence of such harm, the Contracting Parties undertook to "offer adequate compensation". It is not open to the Respondent to invoke as force majeure the very risk against which it has undertaken to offer an indemnity.

3. Article IV(1) of the Treaty (Expropriation)

323. Article IV(1) of the Treaty provides:
Investments shall not be expropriated, nationalized or subject, directly or indirectly, to measures of similar effects except for a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article III of this Agreement.

324. The Claimants assert as follows:
(i) "The prohibition on expropriation without compensation... protects the property of the investor even if the title is not taken or transferred to the expropriating party".[291]

(ii) "The expropriatory act can be a direct taking or can be an indirect deprivation of one or several of the essential characteristics of the relevant investment and properties".[292]

(iii) PYD/YPG forces, whose conduct is attributable to the Respondent under international law,[293]

(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
See also Gabčíkovo-Nagymaros Project, Judgment, [1997] ICJ Rep 7, ¶ 51 (confirming that "certain strictly defined conditions... must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met").

[289] *See* *Russian Claim for Interest on Indemnities*, (1912) 11 RIAA 421, p 443 (an "exaggeration" to suggest that continuing to pay amounts due as war indemnities while the respondent State was at war "would imperil [its] existence or seriously compromise its internal and external situation").

[290] 2001 ILC Articles, Article 23(2)(b).

[291] Reply, ¶ 170.

[292] Reply, ¶ 170. *See also* SoC, ¶¶ 378–380.

[293] *See* Reply, ¶¶ 169–170.

attacked the sites of Raqqa and Hasakah Plants on numerous occasions and seized machinery and equipment; sought to take over the Plants for their own purposes; and eventually deprived the Claimants of access to the sites completely. In the result, the Claimants lost access to and enjoyment of their investments in Syria, this amounting to an unlawful, indirect expropriation of their investments.[294]

325. The Respondent denies that the conduct of PYD/YPG is attributable to it.[295] It also contends that the Claimants' investments have not been expropriated in any event, since their shareholdings in Raqqa and Hasakah "are legally still valid in Syria" and the Claimants "still have the right to sell the parts/shares to somebody else who might continue investing in the projects of the companies".[296]

326. The Tribunal considers that the Claimants' claim under Article IV(1) does not arise for decision. The Tribunal has already held that the Claimants are entitled to "adequate compensation" for the deprivation of their shareholdings; and that, for the purposes of assessing this compensation, the Claimants' deprivation should be treated as being permanent as of 1 April 2012. As will also be clear from Section V.D below, a claim under Article IV(1), if successful, would lead to the same measure of compensation, since the compensable harm in such hypothesis would be the same, namely a permanent deprivation of the Claimants' investments. In these circumstances, where the Claimants' demand (*petitum*) is formulated as monetary relief predicated on one or more Treaty breaches,[297] their claim under Article IV(1) is merely a possible legal foundation (*moyen*) which need not be decided upon.

4. Article II(2) of the Treaty (Fair and Equitable Treatment, Full Protection)

327. Article II(2) of the Treaty provides:

Investments of investors of each Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection in the territory of the other Party. Neither Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, or disposal of such investments.

328. The Claimants allege that the Respondent breached Article II(2) of the Treaty by failing to accord to the Claimants' investments fair and equitable treatment and full protection.[298] The Respondent disagrees with the Claimants regarding the scope of these substantive obligations and denies that it has breached them, chiefly on grounds of non-attribution of the relevant conduct.[299]

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294 SoC, ¶ 385.

295 *See* ¶ 120 above.

296 Rejoinder, ¶ 62.

297 *See* ¶ 124 above.

298 SoC, ¶ 341; Hearing Transcript, 125:18–126:3.

299 SoD, ¶¶ 159–168; Hearing Transcript, 218:6–18.

329. The Tribunal considers that the Claimants' claim under Article II(2) does not arise for decision, on the same grounds of judicial economy as those which apply to the claim under Article IV(1) (see paragraph 326 above).

5. Attribution of PYD/YPG's conduct to the Respondent

330. The parties have devoted considerable energy in addressing the question of attribution of PYD/YPG's conduct to the Respondent. The Tribunal, recognizing the novel, delicate, and complex questions involved, records its appreciation for the parties' efforts. Nevertheless, in the light of the Tribunal's decision that the Claimants' claims under Articles IV(1) and II(2) need not be decided upon, this issue has become moot. Accordingly, this Award does not address it.

D. Quantum of compensation

331. In accordance with the Tribunal's conclusions as to the nature and scope of the Claimants' compensable harm, at paragraphs 312 and 314 above, the Tribunal now proceeds to matters of quantification. It addresses in turn (i) the Claimants' "adequate compensation" under Article 4 of the Syria-Italy BIT as at the time of their deprivation, 1 April 2012, and (ii) interest until final and full payment.

1. Adequate compensation

332. For an asset capable of generating revenue over its economic life, a revenue-based valuation methodology is in principle most apt to measure the value that the owner may fairly expect to receive from the asset. The Claimants' shareholdings can generate revenue in the form of dividends. There is no dispute between the parties as to these general principles.

333. The soundness of any valuation methodology turns on the specific circumstances of each case and the reliability of the necessary data inputs. Recognizing this, the Claimants have presented two alternative monetary claims:
(i) The primary claim is for an amount of USD 88,381,126.75, said to represent: (a) the net present values of the Raqqa and Hasakah Plants, on a "but-for" basis "as of 2009" (ie, had it not been for the conflict), using a discounted cash flow (*DCF*) methodology; plus (b) the Claimants' historical investment costs ("sunk costs") in the Raqqa Factory. [300]

(ii) The alternative claim is for an amount of USD 54,690,066.96, said to represent the Claimants' sunk costs in the Raqqa and Hasakah Plants and the Raqqa Factory. [301]

The Tribunal observes that the Claimants' claims are formulated as overall figures expressed in

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[300] Reply, ¶¶ 286 and 300(b).

[301] SoC, ¶¶ 418–420.

US Dollars. In great part, these figures reflect underlying Syrian Pound values, consistent with the fact that the investments were localized in Syria, converted into US Dollars at an exchange rate prevailing in 2010.

334. The Respondent contests the Claimants' DCF valuations and sunk-costs claim on several grounds [302] but has not proposed any alternative valuation methodology or adduced its own quantification.

335. Claims for compensation do not present binary choices between the parties' pleaded cases. As another tribunal put it: "Ultimately, the Tribunal must exercise its own arbitral discretion in assessing compensation by reference to the applicable legal principles and the particular facts, as determined by the Tribunal". [303] And as both sides in this case accept, economic value is a matter of judgement rather than objective fact. [304] As explained below, the Tribunal is not persuaded that the Claimants' DCF methodology is reliable in the circumstances. The Tribunal is convinced that the more appropriate approach is one based on the value of the capital the Claimants invested, as the appropriate metric of their sunk costs in the two companies. For the purposes of that approach, the Tribunal will rely on the evidence presented by the parties and debated between them, focusing on shareholders' equity.

(i) The Claimants' DCF valuations

336. The Respondent argues that the use of the DCF method is not "appropriate in this case", primarily in the light of the short period during which the Raqqa and Hasakah Plants were operational (two years and one year, respectively). [305]

337. The Claimants retort that "the DCF method does not necessarily require past performance data to be plugged in the model" and that "the DCF method [may be] based solely on projections (without past data), as long as the projections are reasonable, reliable and objective". [306] Consistent with this position, the Claimants presented two different DCF-based valuations. First, a valuation by Mr Yamantürk (a witness of fact), submitted with the Claimants' SoC, presented "but-for" net present values for the Raqqa Plant (USD 24.16 million) and the Hasakah Plant (USD 59.51 million) at the "beginning of 2011". [307] With their Reply, the Claimants submitted an expert report by Dr Birgönül, which presented different "but-for" net present values for the Raqqa Plant (USD 20.4 million) and the Hasakah Plant (USD 63.35 million) "in 2009". [308] In their subsequent requests for relief, the Claimants relied only on the DCF valuations presented by Dr Birgönül. The Tribunal accordingly focuses on those latter valuations.

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[302] SoD, ¶¶ 205–211; Rejoinder, ¶¶ 102–106.

[303] *Gemplus, SA, SLP, SA and Gemplus Industrial, SA de CV v United Mexican States*, ICSID Case No ARB(AF)/04/3 & ARB(AF)/04/4, Award, 16 June 2010, ¶ 12-57. *See also Joseph Charles Lemire v Ukraine II*, ICSID Case No ARB/06/18, Award, 28 March 2011, ¶ 248; *Copper Mesa Mining Corporation v Republic of Ecuador*, PCA Case No 2012-2, Award, 15 March 2016, ¶¶ 7.24–7.26.

[304] Cf *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/11/2, Award, 4 April 2016, ¶ 886.

[305] SoD, ¶ 208.

[306] Reply, ¶ 293.

[307] Yamantürk Witness Statement, **CWS**-1, ¶ 47; Cash Flow in "but for" scenario for Syrian Grinding Projects, **CWS1 – Annex 19**.

[308] Birgönül Expert Report, **CER-2**, ¶ 6.

338. The Tribunal agrees, as indeed does the Respondent's expert,[309] that the DCF method, being an income-based approach, is in principle appropriate to value shares in a commercial enterprise. Nevertheless, the method relies on forward-looking parameters that are inherently uncertain. The appropriateness of DCF therefore depends on a number of factors, notably a track-record of financial performance, reliable projections of revenues, and a future outlook that can be reliably reflected in risk premia that inform the overall discount factor.[310] And when a DCF method is adopted, it is typical to cross-check its results against other benchmarks, such as comparable arm's length transactions, stock-market valuations, or historical investment costs.[311]

339. In the Tribunal's view, the DCF valuations presented by the Claimants are not appropriate in the circumstances of this case. The Tribunal recognizes that the circumstances are highly unusual and uncertain, but its task is nevertheless to adopt a valuation methodology that is apt to such circumstances. The difficulties with the Claimants' DCF valuations may be outlined as follows.

340. First, the Claimants' valuation date is 2009. The intent is to capture a "but for" value, ie had it not been for the overall economic vagaries of conflict. That premise is inconsistent with the causal nexus required by Article 4 of the Syria-Italy BIT (as set out at paragraph 288 above),[312] and also inconsistent with the Tribunal's decision as to the date on which the Claimants' entitlement to compensation arose, ie 1 April 2012. As Dr Birgönül testified, his revenue projections do not take into account the prevailing situation in Syria or what he called "black swan effects, such as the Arab Spring".[313] Further, his discount rate of 8% purports to reflect "the cost of capital that any investor could earn... with an investment of comparable size and risk" in Syria in 2009,[314] but as he conceded, it does not account for "the political risk [which would have been] very high" in 2012, leading to a "very high" discount rate.[315]

341. Secondly, as Dr Birgönül also frankly admitted, "a track record of a couple of years for the two grinding plants" was "too narrow" a base to be able to use DCF as a reliable forward-looking method.[316]

342. Thirdly, there are difficulties with discrete inputs. Without intending to provide an exhaustive list, and using Raqqa as the main illustration, the principal difficulties are as follows:
(i) The Claimants' inputs are in US Dollars, while Raqqa's capital, assets, and liabilities are denominated in Syrian Pounds; as indeed were the companies' revenues from cement products, which were sold exclusively on the Syrian market.[317] There was no explanation for the conversion

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[309] *See also* Sharabi Second Expert Report, RER-7, p 5 (DCF "method of assessing corporates is one of the most widely used methods of evaluation.").

[310] For a helpful enumeration *see* *Rusoro Mining Ltd v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/12/5, Award, 22 August 2016, ¶ 759.

[311] *See, eg, ibid*, ¶ 760 (referring to "a 'sanity check' against other valuation methodologies.").

[312] Cf *American Manufacturing & Trading, Inc v Republic of Zaire*, ICSID Case No ARB/93/1, Award, 21 February 1997, ¶ 7.13 (referring to a valuation taking account of the "reality of the situation" of strife and uncertainty).

[313] *See* Hearing Transcript, 761:20–762:17 and 769:7–11 ("But I am making this analysis as of the year 2009 when there is a high degree of friendship and co-operation between Syria and Turkey, the prime ministers and the economic ministers are walking hand-in-hand").

[314] Birgönül Expert Report, CER-2, ¶ 14.

[315] Hearing Transcript, 769:14–770:6.

[316] Hearing Transcript, 773:16–775:16.

[317] Çalik Witness Statement, CWS-2, ¶ 14.

of the SYP underlying figures into 2010 USD figures.[318] Also, Dr Birgönül testified that his 8% discount rate was predicated on the US Dollar being the currency of valuation,[319] without an explanation for his approach. The Tribunal notes in this regard that the choice of currency and conversion date have a significant impact on assumptions related to inflation and country/business risk.

(ii) Dr Birgönül's projected annual sales (229,452 tons)[320] exceed the "annual cement production capacity" of the Raqqa Plant on the Claimants' own evidence (220,000 tons).[321] (Similarly, the projected annual sales for Hasakah are 734,247 tons,[322] while the Hasakah Plant was rated at 720,000 tons.)[323] The deltas are small per se, but the Tribunal has heard no explanation of how actual production may be sustained at levels above a plant's rated capacity year-on-year for 25 years.

(iii) Dr Birgönül's projected sales price of USD 80 per ton of cement is difficult to square with the contemporaneous evidence. The documents in the record show that the Raqqa Plant was selling both bagged cement (with two types of blended-cement products) and bulk cement, with different sales prices for each product.[324] No explanation has been offered for arriving at an average sales price across three different products, over 25 years. A similar issue arises in respect of costs projections, which also fail to account for the different costs involved in the production of various cement products.[325]

(iv) Dr Birgönül's analysis does not account for inflation, either on costs or sales prices.[326] The Respondent's expert, Mr Youssef, testified that inflation would increase costs more than sales prices, thereby decreasing profits.[327]

343. Fourthly, in respect of Hasakah, there is a question as to the company's inherent profitability, which the Claimants' DCF fails to account for. It is undisputed that Hasakah made losses in its 13 months of operation in 2010-2011.[328] The balance sheet for the year to 31 December 2010 indicates a net loss of SYP 176,661,043.[329] The Tribunal understands that Hasakah's production and marketing costs were higher than expected; and that these costs resulted from decisions by the Free Zone administration which limited working shifts and imposed export taxes and other requirements for sales both in Syria and Iraq.[330] A Board resolution of September 2010 records total production costs

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[318] The Tribunal notes that the Claimants put forward SYP figures, USD equivalent figures, and the relevant exchange rate (US$1=46.5 SYP as of 2010) only for their claim for total investment costs, but not for sales price and costs during the relevant period.

[319] Hearing Transcript, 767:13–14.

[320] Birgönül Expert Report, **CER-2**, ¶ 18 (taking "229,452 tons/year as the yearly output of the plant").

[321] Hearing Transcript, 408:14–410:19 and 761:3–763:10.

[322] Birgönül Expert Report, **CER-2**, ¶ 8 (taking "734,247 tons/year as the yearly output of the plant").

[323] Çalik Witness Statement, CWS-2, ¶¶ 14 and 29.

[324] For example, the evidence shows that the average sales price achieved by the Raqqa Plant in 2010 for bagged cement was US$90.94 and for bulk cement US$87.37. *See* Güris Board of Directors Decision, 27 December 2012, **CWS1** – Annex 1**0**, p 2.

[325] *See* Birgönül Expert Report, CER-2, ¶ 18.

[326] *See* Hearing Transcript, 395:22–396:6 and 763:11–764:13.

[327] *See* Hearing Transcript, 848:15–22.

[328] Yamantürk Witness Statement, **CWS**-1, ¶¶ 25–29; Çalik Witness Statement, **CWS-2**, ¶ 20.

[329] Financial tables and balance sheet of Al Hasekeh Cement LLC, 31 December 2010, **Exhibit** C-**283**.

[330] *See* Yamantürk Witness Statement, **CWS-1**, ¶¶ 39–40; Çalık Witness Statement, **CWS**-2, ¶ 30; Tüylü Witness Statement, **CWS-4**, ¶ 9; Güriş Syria Cement Operations Executive Board on 23 June 2010, **CWS2** – **Annex 7**; Al Hasakeh Cement LLC Board of Directors Decision, September 2010, E**xhibit** C-25 (noting that "[f]ailure to make a profit from the marketing of the cement is the main reason for the loss").

of USD 80.40/ton and a sales price of USD 80/ton.[331] Board minutes from June 2010 record that "[t]he Free Zone [was] not suitable for cement manufacturing and sales under these conditions" and, unless the conditions significantly changed (such as re-registering Hasakah as a "firm involved in manufacturing and selling in Syria outside the Free Zone legislation"), "it [was] hard to achieve the expected volume in terms of sales".[332]

344. Mr Çalık testified that the Claimants "made an application to the [Free Zone] administration to resolve the shift problems"; and that this "application was accepted", but only after operations had been suspended, hence Hasakah "never got the opportunity to work three shifts in this plant as planned".[333] The Tribunal observes that there is no documentary evidence of this application or its acceptance. It also observes that in respect of the tax and other impositions by the Free Zone administration, the Claimants put their case no higher than an expectation that these issues would eventually go away.[334]

345. Finally, the Claimants have been unable to present any cross-check or validation of the DCF results. This observation is not a criticism: there simply does not appear to be any substantially similar assets or transactions in Syria to serve as benchmarks. As Dr Birgönül testified, "lack of any similar cement grinding factories" in Syria makes the use of such comparators "impossible".[335]

(ii) The Claimants' claim for sunk costs

346. The Tribunal recognizes, as indeed do the Claimants,[336] that historical investment costs are an imperfect measure to value a revenue-generating asset. Nevertheless, recovery of capital invested is the minimum a rational investor expects to receive from a commercial venture that is expected to be successful. Thus, tribunals have relied on historical investment costs in appropriate cases, especially where the investment may be expected to generate profits but their assessment is too uncertain. The Tribunal considers the present case to fall in that broad category, for reasons given in connection with the Claimants' proposed DCF approach, above.

347. The Claimants rely primarily on the two companies' financial statements, with further explanations provided in Mr Yamantürk's Witness Statement and two reports by Şeref Acar that are annexed to that Statement.[337] The Claimants' claim is arrived at by tallying up the value of tangible and intangible fixed assets in the two companies' balance sheets (without depreciation) and converting them from SYP into USD.[338] For the Raqqa Factory in particular, the relevant figure is derived from the entry for the "[p]roject under process (2nd phase)" in Raqqa's 2012 financial statements.[339] In

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[331] *See* Al Hasakeh Cement LLC Board of Directors Decision, September 2010, **Exhibit C-25**.

[332] Güriş Syria Cement Operations Executive Board on 23 June 2010, **CWS2 – Annex 7**.

[333] Çalık Witness Statement, **CWS-2**, ¶ 40.

[334] Yamantürk Witness Statement, **CWS-1**, ¶¶ 39 *et seq.*

[335] Birgönül Expert Report, **CER-2**, ¶ 5.

[336] SoC, ¶ 420: "[A]warding damages equal to the amount of such sunk costs will not be sufficient to restore the situation which would have existed for Claimants had Respondent's breaches not occurred; therefore, it is not the appropriate method of determining Claimants' compensation."

[337] Raqqa-Certified Councillorship Special Purpose Report, 30 March 2017, **CWS1 – Annex 9**; and Hasekeh Cement LLC – Certified Councillorship Special Purpose Report, 30 March 2017, **CWS1 – Annex 18**.

[338] *See* SoC, ¶¶ 419 *et seq.*

addition, there is a claim for some USD 2.17 million, said to have been incurred by Güris on Raqqa's behalf for letters of credit and advances to contractors in connection with the Raqqa Factory. This amount was not invoiced to Raqqa and hence not recorded in Raqqa's financial statements. [340]

348. The financial statements of the two companies, Raqqa and Hasakah, are public documents, which the Respondent has had an opportunity to retrieve and comment upon. The Tribunal therefore turns to consider the probative value of the financial statements in the record, before turning to other issues.

(a) The financial statements

349. The financial statements for Raqqa are tabulated below.

Financial Year	Description	Submitted by
2006	Unsigned auditor's report	Respondent (RER5-Annex 1)
2007	Balance sheet and income statement (including notes), accompanied by an unsigned auditor's report	Respondent (RER5-Annex 2)
2008	Balance sheet and income statement (including notes), accompanied by an unsigned auditor's report	Respondent (RER5-Annex 3)
2009	Balance sheet, income statement, statement of changes in equity, and cash flow statement (including notes), accompanied by an unsigned auditor's report	Respondent (RER5-Annex 4)
2010	Balance sheet, income statement, statement of changes in equity, cash flow statement, and fixed assets and depreciation list (without notes), accompanied by an unsigned auditor's report	Respondent (RER5-Annex 5)
2011	Balance sheet, income statement, statement of changes in equity, and cash flow statement (without notes), accompanied by an unsigned auditor's report	Claimants (CWS1- Annex 8)
2012	Balance sheet, income statement, statement of changes in equity, cash flow statement, and fixed assets and depreciation list (including notes), accompanied by an unsigned auditor's report	Both parties (C-286 and RER5-Annex 8, the latter also including notes to financial statements)

[339] Hasekeh Cement LLC-Certified Councillorship Special Purpose Report, 30 March 2017, **CWS1 – Annex 18**, p 2.

[340] Yamantürk Witness Statement, **CWS-1**, ¶ 34.

350. As for Hasakah, which operated only for one full year under the Claimants' management, the only financial statement in the record is an unaudited balance sheet and a trial balance for the year ended 31 December 2010.[341] As Mr Acar explains, "it is not possible to have access to [other] account books and documents of the company due to the on-going civil war [in] the Syrian Arab Republic".[342] The Respondent has not adduced other financial statements for subsequent years.

351. The Respondent's experts, Mr Youssef and Mr Sharabi, criticised the reliability of the financial statements, which they say fail to comply with the International Accounting Standards, the International Financial Reporting Standards, and the International Auditing Standards.[343] In the case of Raqqa, the Respondents' experts also called into question the statements' overall integrity, as the auditor's reports accompanying them are not signed in the version placed in the record.[344]

352. The Tribunal is not persuaded that the financial statements lack all probative value as the Respondent contends. There are three reasons for this conclusion.

353. First, as is common ground between the parties, the Respondent's authorities did receive Raqqa's financial statements at the time they were issued, and they raised no concerns.[345] In fact, in the course of these proceedings Mr Sharabi received the 2006-2010 statements from the "General Committee for Investment in Syria" and from Raqqa's external auditor, Abdul Razzaq Al Korkli (whose name appears as the author on the face of each of the auditor reports).[346] Mr Sharabi confirmed that the Committee ordinarily does not accept non-signed statements;[347] as he also confirmed that it is a function of the Committee to review the statements as part of ensuring compliance with the requirements of a licence granted under Law 10 (the Law on Investment Incentives). There is no suggestion by the Respondent that the Committee (or any other Syrian authority for that matter) objected to Raqqa's financial statements contemporaneously. Nor is there any suggestion that Mr Korkli denied authorship of the auditor's reports or questioned their authenticity.[348] In fact, there is no suggestion that the lack of signature by the auditor would, by itself, invalidate the financial statements.

354. Secondly, as Dr Sharabi testified, violations of accounting or auditing standards are sanctionable under Syrian Law 33, by special courts designated by the Legal Accountants Association.[349] No sanctions have been imposed (or sought) on Mr Korkli in respect of Raqqa's accounts.

355. Finally, the Claimants' expert, Mr Acar, testified that "all the details which constitute the background

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341 Detailed financial tables and balance sheet of Al Hasekeh Cement LLC, 31 December 2010, Exhibit C-**283**. *See also* Hearing Transcript, 805:9–19 (Mr Acar's confirmation that "there was no independent audit" of this balance sheet).

342 Hasekeh Cement LLC-Certified Councillorship Special Purpose Report, 30 March 2017, **CWS1** – **Annex 18**, p 2.

343 Sharabi First Expert Report, **RER-5(A)**, p 14; Expert Report of Ali Yousif, **RER-8**, p 3.

344 *See also* Respondent's PHB, ¶ 76 ("The Claimants did not introduce any auditing report from the auditor nominated (Mr Kourki) by the two companies. However, they introduced some 'letters' on letter-headed papers with Mr. Kourki's name... they are not in conformity with the law that is applicable [to] the companies.").

345 See also third column of the table in paragraph 349 above and references therein.

346 Sharabi First Expert Report, **RER-5(B)**, p 5. Mr Korkli's name is sometimes transliterated as "Kourki" or "Kourkli" in the English translations of original Arabic documents in the record.

347 Hearing Transcript, 944:13–949:13.

348 The Claimants' expert, Mr Acar, also testified that the Claimants had tried but were "unable to reach" Mr Korkli to obtain his approval or signature on Raqqa's financial statements: Hearing Transcript, 808:14–18.

349 Hearing Transcript, 902:17–904:21.

to [the financial statements for Raqqa and Hasakah] do exist as documents accessible in the headquarters of [Güris in Ankara]". He reviewed these background documents to be "able to make confirmations" in his various reports.[350] The Respondent did not contest this evidence, nor did it seek to obtain any of the underlying documentation from Güris's records.

(b) The claim for undocumented expenditures on Raqqa's behalf

356. There is a dearth of evidence in respect of the expenditures of about USD 2.17 million that the Claimants allege to have incurred on Raqqa's behalf in connection with the Raqqa Factory. If those expenditures were intended to count as a contribution to Raqqa by its shareholders, one would expect them to have been documented as such, if not in the financial statements then elsewhere. In fact, the expenditures are not recorded in contemporaneous documents that the Tribunal has had sight of. This amount cannot therefore be considered as a sunk cost.

(c) The Claimants' equity in Raqqa and Hasakah

357. The Tribunal observes in the first place that the notion of *sunk cost* broadly refers to a permanent expenditure that cannot be freely withdrawn. In the present case, the Tribunal is concerned to quantify the value of shareholdings of which the Claimants have been deprived. This is a legal exercise, not an accounting task. The Tribunal will rely on accounting documents and notions to the extent that they fairly serve the Tribunal's legal task and are evidentially reliable.

358. The metric for their sunk costs that the Claimants have proposed, ie the non-depreciated value of the two companies' fixed assets, cannot be accepted on the evidence presented. The companies' financial statements do not spell out the source of the relevant capital expenditures, that is to say, whether they were funded by the companies, the Claimants or the minority shareholders, third-party financing, or a combination of these sources.

359. The companies' financial statements do, however, record the present-day value of the contributions that the shareholders made by way of capital. The relevant metric is shareholders' equity, which is equal to the companies' net book value—ie, the difference between the companies' assets (net of depreciation and amortization) and liabilities. That would be the minimum sum that the shareholders would stand to receive if they sold their shareholdings in the companies as going concerns. The Tribunal recognizes that this is a conservative approach and notes that other tribunals have relied upon it in appropriate cases.[351]

360. Starting with Raqqa, the Tribunal considers that it should rely on the 2011 financial statements, representing the last year in which the Claimants had managerial control over the company (even if only for part of the year). The shareholders' equity recorded in the balance sheet was SYP

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[350] Hearing Transcript, 824:1–826:13.

[351] *See, eg, Tidewater Investment SRL and Tidewater Caribe, CA v Bolivarian Republic of Venezuela*, ICSID Case No ARB/10/5, Award, 13 March 2015, ¶ 145 ("In some cases, the appropriate valuation may indeed be the book value of the assets."); *Siemens AG v Argentine Republic*, ICSID Case No ARB/02/8, Award, 6 February 2007, ¶ 355 ("[T]he book value method applied to a recent investment is considered an appropriate method of calculating its fair market value when there is no market for the assets expropriated").

2,031,212,637.40. (The Tribunal has confirmed that this amount represents the value of total assets, including a USD 1 million "investment guarantee" deposited with Syria's Central Bank, as noted at paragraph 111 above, minus the value of total liabilities.)[352] 91% of this amount is SYP 1,848,403,500.

361. For Hasakah, one may only rely on the balance sheet for the year ended 31 December 2010,[353] as the best available evidence for 2011, the last year of the Claimants' managerial control. The shareholders' equity recorded in the balance sheet for 2010 is SYP 226,502,879. (Again, this is equal to the value of total assets minus total liabilities.) Adjusting that figure to the end of 2011 requires one to take account of the depreciation of Hasakah's assets in the intervening period. Dr Birgönül has done this, without challenge by his colleagues on the Respondent's side, arriving at a figure of SYP 1,519,224.[354] For present purposes, one may also assume that the company, being inactive, made no profit or loss in the same period. The 2011 figure is therefore SYP 224,983,655. Prorating this to 87% results in an amount of SYP 195,735,779.

362. The Tribunal notes that the relatively low figure for shareholders' equity, compared to Raqqa, appears to result primarily from the fact that most of Hasakah's capital remained "unpaid".[355] It appears that the company did not require all of the capital to be paid upfront because its clinker-grinding facility had been leased rather than bought outright.[356] The Tribunal does not have information regarding this lease arrangement and is unable to take matters further.

363. Further, the Tribunal is mindful of the issues that impeded Hasakah's profitability in its first year of operations and which remained to be fully resolved (see paragraphs 343 *et seq* above). These issues ultimately turn on the application of various regulations by the Free Zone authorities, which are of course organs of the Respondent. Thus, once the Claimants' shares in Hasakah are transferred to the Respondent pursuant to this Award (see paragraph 375 and Section VII below), these issues may be resolved and profitability assured.

364. Based on the foregoing, the Tribunal concludes that the "adequate compensation" that the Claimants were entitled to be offered under Article 4 of the Syria-Italy BIT for the effective deprivation of their shareholdings in Raqqa and Hasakah was SYP 2,044,139,279 (before interest) as of 1 April 2012. For reasons set out at paragraphs 288 and 342(i) above, and given that the figures for the shareholders' equity in the financial statements of Raqqa and Hasakah are all stated in Syrian Pounds (see paragraphs 360 and 361 above), the Claimants' "losses or damages", and therefore the compensation to which they were entitled, were to be assessed in Syrian Pounds. The Tribunal recalls also that the Claimants' claim in US Dollars is predicated in great part on underlying Syrian Pound values (see paragraph 333 above). The Tribunal's holding is consistent with the Respondent's position and, as discussed in the next sub-section, the Tribunal has also adopted a Syrian Pound rate of interest consistent with this holding.

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[352] Raqqa's Financial Statements and Auditor Report for the year ended 31 December 2011, **CWS1 -Annex 8**.

[353] Financial tables and balance sheet of Al Hasekeh Cement LLC, 31 December 2010, **Exhibit C-283**.

[354] DCF Calculation Sheet for Yarubiye, **Exhibit CER2 – Annex ER-13**.

[355] *See* Financial tables and balance sheet of Al Hasekeh Cement LLC, 31 December 2010, **Exhibit C-283**, recording SYP 1.36 billion of "unpaid capital" out of total capital of SYP 1.76 billion.

[356] The trial balance, *ibid*, records at p 3, Item 266.001, a "Clinker Grinding Facility Leasing" as an intangible fixed asset with a value of approximately SYP 807.84 million.

2. Interest

365. The Claimants seek "interest on all monetary sums awarded, as from the date (and/or respective date(s) for each plant) that the Tribunal shall determine as the critical date(s) on which Claimants have been deprived of their investments, including pre-award and post-award interest".[357] The Claimants have not, however, specified the rate at which such interest should be awarded, and whether the interest should be compounded (and, if so, the periodicity of compounding), leaving these matters to the Tribunal's judgment.

366. The Respondent did not specifically address the issue of pre-award or post-award interest in its submissions.

367. As already explained (paragraphs 290 and 314 above), interest is an integral component of the notion of compensation, both in terms of Article 4 of the Syria-Italy BIT and under general international law.[358] Interest therefore arose from 1 April 2012, as part of the Respondent's duty to "offer adequate compensation"; it continued after the Respondent rejected this duty in the course of these proceedings, thereby breaching the Treaty; and will continue to apply until the date of final and full payment by the Respondent.[359]

368. The function of interest is to reflect the time-value of money from the perspective of the innocent party. "The interest rate and mode of calculation shall be set so as to achieve th[e] result" of fully compensating the innocent party.[360] These parameters must therefore be tailored to the specific circumstances of the case.

369. In the present case, the Tribunal considers the following considerations as salient:
(i) The principal amount of compensation is denominated in Syrian Pounds;

(ii) The compensation relates to investments localized in Syria, operating in the context of Syria's economy;

(iii) The payment to the Claimants is to be acquitted by the Syrian Arab Republic.

370. In the light of these considerations, the rate and other modalities of interest should at a minimum reflect the value that a large deposit in a Syrian bank would attract in the relevant period. Such interest reflects the prevailing inflation and other economic factors and risks in the Syrian economy. In that regard, the only evidence in the record is a notice issued by the Monetary and Credit Council of the Syrian Central Bank fixing the interest rate on term deposits in SYP, with the interest on a one-year deposit being 10% (and up to 20% for longer-term deposits).[361] Renewal of such a deposit would effectively result in compounded interest, ie interest on the principal plus the interest

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[357] *See* SoC, ¶ 422(iii); Reply, ¶ 300(c). *See also* Claimants' PHB, ¶ 63(d).

[358] *See* 2001 ILC Articles, Article 38(1): "Interest on any principal sum... will be payable when necessary in order to ensure full reparation....".

[359] Cf *SGS Société Générale de Surveillance SA v Republic of Paraguay*, ICSID Case No ARB/07/29, Award, ¶ 184; and 2001 ILC Articles, Article 38(2).

[360] 2001 ILC Articles, Article 38(1).

[361] Syrian Arab Republic, Monetary and Credit Council Decision No 1266.M.N/B.1, 31 May 2015, RER-7 – **Annex 7**.

accumulated in the year prior, as indeed is common in such commercial rates. The Tribunal therefore concludes that the interest payable to the Claimants should be calculated at an annual rate of 10% and be compounded annually.[362]

371. By application of this holding, the Tribunal has calculated the total amount of interest due to the Claimants in the period between 1 April 2012 and 31 August 2020 (inclusive) to be SYP 2,521,330,009.64.[363] Adding this interest to the principal amount of SYP 2,044,139,279 specified in paragraph 364 above, the Tribunal finds the total sum due to the Claimants as of 31 August 2020 to be SYP 4,565,469,288.64. This total sum shall also bear post-award interest, from the date of the award until final and full payment, at the same annual rate of 10%, compounded annually, as determined at paragraph 370 above.

3. Conversion to US Dollars at time of payment

372. Although the principal amount and interest thereon are calculated on the basis of Syrian Pounds as the applicable currency, the Tribunal records the Respondent's confirmation that "the Claimants could ask for an amount in [US] dollars equal to the total value of the Syrian Pounds on the day of payment".[364] The Tribunal understands the Respondent to refer to the official SYP:USD exchange rate published by Syria's Central Bank. This option is reflected in the operative part of this Award.

4. Transfer of the Claimants' shares to the Respondent

373. The Tribunal has already noted (paragraphs 310 *et seq*) that the Raqqa and Hasakah Plants *may* be operational once the situation in Syria returns to normalcy; at the very least, the Plants and the Raqqa Factory may have some residual value. The Tribunal has also noted that, having assessed the compensation due to the Claimants on the basis that their deprivation is to be regarded as permanent, it intends to fashion this monetary relief in a manner appropriate to the situation.

374. The logical corollary of (a) the Claimants' claim that they have "lost their shares", (b) the compensation awarded to them by this Award on the basis that their deprivation should be

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[362] *See also* *Gold Reserve Inc v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, Award, 22 September 2014, ¶ 854 ("Compound interest better reflects current business and economic realities and therefore the actual damage suffered by a party.").

[363] The Tribunal's calculation of interest is set out in the table below.

Period	Principal + Interest (SYP)	Interest (SYP)
Principal	2,044,139,279.00	
1 April 2012 – 31 March 2013	2,248,553,206.90	204,413,927.90
1 April 2013 – 31 March 2014	2,473,408,527.59	224,855,320.69
1 April 2014 – 31 March 2015	2,720,749,380.35	247,340,852.76
1 April 2015 – 31 March 2016	2,992,824,318.38	272,074,938.03
1 April 2016 – 31 March 2017	3,292,106,750.22	299,282,431.84
1 April 2017 – 31 March 2018	3,621,317,425.24	329,210,675.02
1 April 2018 – 31 March 2019	3,983,449,167.77	362,131,742.52
1 April 2019 – 31 March 2020	4,381,794,084.55	398,344,916.78
1 April 2020 – 31 August 2020	4,565,469,288.64	183,675,204.09
Total	4,565,469,288.**64**	2,521,330,**009.64**

[364] Respondent's PHB, ¶ 91.

regarded as permanent as of 1 April 2012, and (c) the principle that there should be no double recovery, is that upon the Respondent's payment of that compensation, the Claimants may also formally cease to have any of the benefits or responsibilities of shareholders in Raqqa and Hasakah. Conversely, the corollary of the Respondent's payment of that compensation is that all such benefits and responsibilities may be transferred to the Respondent. Other tribunals in analogous situations have recognized that a tribunal "has the capacity to render an award tailored so as to minimize the risk of double recovery between the parties". [365] It is indeed within the Tribunal's power to draw the implications attendant upon the relief sought and awarded, especially in order to comply with the principle of avoiding double recovery. A transfer of the Claimants' shares is the implication of the Claimants' pleaded case that they have irretrievably lost the attributes of ownership of their investments and they should be compensated by the Respondent for that loss.

375. Accordingly, the Tribunal intends to stipulate that following the Respondent's payment of compensation to the Claimants, the Respondent may have the Claimants transfer to the Respondent their shares in Raqqa and Hasakah without additional payment.

VI. COSTS

A. The Claimants' Position

376. As noted in Section II.D above, the Claimants have paid a sum of EUR 850,000 towards the advances on costs requested by the ICC in relation to the fees and expenses of the Tribunal and the ICC's administrative expenses.

377. The Claimants also state to have incurred the following other costs: [366]

Category	**Costs (in EUR)**
Fees of legal counsel and expert witnesses	717,708.67
Translation, court reporting and interpretation services	49,123.94
Accommodation costs for the hearing	70,281.40
Travel costs for the hearing	11,492.64
Costs for visas, insurance and per diem for the hearing	48,396.05
Total	**897,002.07**

[365] *Railroad Development Corporation v Republic of Guatemala*, ICSID Case No ARB/07/23, Award, 29 June 2012, ¶ 265. *See also* *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, ICSID Case No ARB/03/16, Award, 2 October 2006, ¶ 523; and *Metalclad Corporation v United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, ¶ 127.

[366] Claimants' Costs Submissions, 6 May 2019, ¶ 2.

378. The Claimants contend that the Respondent should bear the entirety of their costs.[367] They state that, in allocating costs, the Tribunal should specifically consider that the "Respondent's conduct unduly increased the costs of the arbitration".[368] In particular, the Claimants refer to the Respondent's: (i) delay in entering appearance;[369] (ii) allegedly "frivolous and vexatious objections and arguments", such as the initial contestation of the entry into force of the Treaty and the Syria-Italy BIT[370] and allegations of fraud in the drafting of the Treaty;[371] (iii) a "non-cooperative" approach, leaving the Claimants "to carry the entire workload of the preparation of the hearing bundles as well as the logistical arrangements for the [h]earing"; (iv) alleged breaches of Procedural Order No 3, through submissions of "many documents without translation, pagination and in a non-searchable format", non-submission of "the electronic versions of its main briefs, exhibits and expert reports", and late service of hard copy submissions; (v) belated submission of a witness statement after the hearing; and (vi) failure to pay its share of the advance on costs.[372]

B. The Respondent's Position

379. The Respondent makes no claim in respect of its share of the advances on costs, as the relevant sums were defrayed entirely by the Claimants.

380. As for its other costs, the Respondent claims a sum of EUR 700,000 for legal costs,[373] and EUR 70,000 for "other expenses", ie "[e]xchanging submissions via express mail, [e]xperts' reports, [t]ranslation to English of thousands of pages, [o]btaining visas, [t]ravel expenses to Geneva, [s]taying in a hotel and sojourn expenses, [t]ransportation etc".[374]

381. The Respondent claims that the Claimants should bear the entirety of its costs,[375] on the grounds that: (i) any delays in the arbitration were due to the Claimants' "accumulated mistakes", such as invalid service[376] and an arbitrator who was ultimately replaced;[377] (ii) the Claimants' "whole case was built on "wrong 'facts'";[378] and (iii) "the Claimants' insistence on having the hearing conducted in a European city".[379]

C. The Tribunal's decision

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[367] Claimants' PHB, ¶ 63(e).

[368] Claimants' Costs Submissions, 6 May 2019, ¶ 3.

[369] Claimants' Costs Submissions, 6 May 2019, ¶ 4.

[370] Claimants' Costs Submissions, 6 May 2019, ¶ 5.

[371] Claimants' Costs Submissions, 6 May 2019, ¶ 5(d).

[372] Claimants' Costs Submissions, 6 May 2019, ¶¶ 3–9.

[373] Respondent's Costs Submissions, 6 May 2019, ¶ 3.

[374] Respondent's Costs Submissions, 6 May 2019, ¶ 3.

[375] Respondent's PHB, ¶ 100(5).

[376] Respondent's Costs Submissions, 6 May 2019, ¶ 1.

[377] Respondent's Costs Submissions, 6 May 2019, ¶ 1.

[378] Respondent's Costs Submissions, 6 May 2019, ¶ 2.

[379] Respondent's Costs Submissions, 6 May 2019, ¶ 3.

382. The Tribunal starts with the principles governing the determination of costs that can be claimed and then proceeds to allocate those costs, having due regard to the parties' arguments above.

383. Under Swiss law, the determination and allocation of arbitration costs are procedural matters for the parties to agree upon, including by reference to arbitration rules.[380] The Tribunal therefore turns to the ICC Rules.

(i) Assessment of the costs of the arbitration

384. Article 37(4) of the 2012 ICC Rules provides that "[t]he final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties". Article 37(1) of the 2012 ICC Rules defines the costs of the arbitration as follows:

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

385. At its session of 30 July 2020, pursuant to Articles 37(1) and (2) of the 2012 ICC Rules, the ICC Court fixed the fees and expenses of the Tribunal and the ICC's administrative expenses at a total of EUR 744,700. As noted at paragraphs 100-103 above, the entirety of this sum was paid by the Claimants by way of advances on costs.

386. As for the parties' legal and other costs, the Tribunal is mindful that they can be claimed only insofar as they may be regarded as reasonable. As indicated above, the parties' claimed legal costs are almost identical in the amount. This is a strong indication that each of these amounts is reasonable, and the Tribunal so holds.

387. In respect of the other costs (translations, travel, etc), the Tribunal considers both sides' claimed costs to be reasonable, in their nature and amounts, in the light of the complexity, length, and importance of these proceedings.

(ii) Allocation of the costs of the arbitration

388. Article 37(5) of the 2012 ICC Rules provides that:

> In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.

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[380] *See* Private International Act, Article 182(1).

389. This provision confers broad discretion on the Tribunal in allocating the costs of arbitration. In the exercise of this discretion and consistent with both sides' positions, the Tribunal will primarily apply what it regards as the generally accepted principle, including in ICC proceedings seated in Switzerland, namely that costs should follow the event—that is to say, in principle the losing party is to pay the winning party's costs. [381]

390. The Claimants were overall the successful side in this case. They succeeded in defeating the Respondent's jurisdictional and admissibility objections, in establishing the Respondent's international responsibility for breach of the Treaty, and in securing an award of compensation (though in an amount considerably lower than that which was claimed). The Claimants also undertook logistical and administrative tasks for the benefit of both sides and the Tribunal, which the Tribunal records with appreciation. Nevertheless, the Claimants advanced a number of claims which required broad-ranging legal and factual developments but were ultimately unnecessary to resolve.

391. For its part, the Respondent successfully defended against one of the claims for breach of the Treaty.

392. In the light of these considerations, the Tribunal considers it appropriate that the Respondent bears 75% of the Claimants' legal and other costs, ie EUR 672,750; and that the Claimants bear 10% of the Respondent's legal and other costs, ie EUR 77,000. The net result is an amount of EUR 595,750 that the Respondent shall pay the Claimants.

393. The Claimants are also entitled to be reimbursed by the Respondent 65% of the fees and expenses of the Tribunal and the ICC's administrative expenses, subject only to the following adjustment. The Tribunal considers that the fees of Dr Kemal Dayinlarli, who was recused following a challenge based on information that Dr Dayinlarli had failed to disclose but were known to the Claimants, should be for the Claimants to bear. As notified in the Secretariat's communication of 12 July 2018, the fees of Dr Dayinlarli were fixed by the Court at EUR 40,000. The net amount due to the Claimants is therefore EUR 458,055 (ie, EUR 744,700 minus EUR 40,000 × 0.65).

394. The Respondent shall, therefore, pay the Claimants a total amount of EUR 1,053,805 for the costs of the arbitration (ie, EUR 595,750 and EUR 458,055). This amount shall bear post-award interest until final and full payment, at the same annual rate as the principal compensation due to the Claimants, as determined at paragraph 370 above.

VII. OPERATIVE PART

395. For the foregoing reasons, rejecting all contrary claims and contentions, the Tribunal DECLARES AND DECIDES as follows:
(i) The Claimants' claims are within the jurisdiction of the Tribunal and are admissible.

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[381] *See, eg,* ICC Commission Report, *Decisions on Costs in International Arbitration,* [2015:2] ICC Dispute Resolution Bulletin 2, ¶ 13; M W Bühler and M Stacher, "Chapter 18, Part IV: Costs in International Arbitration" in M Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide* (2018) p 2587 ("For arbitrations taking place in Switzerland, it is well accepted that unless the parties have agreed otherwise, the parties' success or failure of their claims or defences should, as a rule, be the primary criterion for the allocation of costs.").

(ii) The Respondent has not breached Article IV(3) of the Treaty.

(iii) The Respondent has breached Article III(2) of the Treaty in conjunction with Article 4 of the Syria-Italy BIT.

(iv) The Respondent shall pay the Claimants the amount of 4,565,469,288.64 Syrian Pounds, with post-award interest at the annual rate of 10%, compounded on an annual basis, from the date of this Award until final and full payment, with the Claimants having the option of seeking payment of this sum in US Dollars, based on the official exchange rate of the Syrian Central Bank on the date of payment; following which final and full payment the Respondent shall have the right to demand in writing that the Claimants transfer to the Respondent the entirety of their shares in Güriş Raqqa Cement Company and Al Hasakah Cement LLC without any additional payment.

(v) The Respondent shall pay the Claimants an amount of EUR 458,055 for the fees and expenses of the Tribunal and the ICC's administrative expenses, and an amount of EUR 595,750 for the Claimants' reasonable legal and other costs, with post-award interest on those two amounts at the annual rate of 10%, compounded on an annual basis, from the date of this Award until final and full payment.

(vi) All other claims and requests for relief are rejected.

INTERNATIONAL CHAMBER OF COMMERCE

ICC Case No. 21845/ZF/AYZ

(1) MR IDRIS YAMANTURK (2) MR TEVFIK YAMANTURK (3) MR MUSFIK HAMDI YAMANTURK (4) GURIŞ İNŞAAT VE MUHENDISLIK ANONIM ŞIRKETI (GURIS CONSTRUCTION AND ENGINEERING INC) V. SYRIAN ARAB REPUBLIC

PARTIAL DISSENTING OPINION OF NASSIB G. ZIADÉ

Tribunal:
Nassib G. Ziadé (Appointed by the Appointing Authority)

Partial Dissenting Opinion of Nassib G. Ziadé

1. I am unable to agree with my two distinguished colleagues on their finding with respect to the Respondent's liability towards the Claimants in the present case, the thoroughness of our deliberations notwithstanding. Despite our very affable relationship, I feel duty-bound to express my doubts.

2. For the sake of clarity, I set out below the main facts relevant to understanding the present opinion. These facts are set out exhaustively in the Award.

3. The Claimants initiated the present proceedings under the Syria-Turkey BIT as Turkish majority shareholders in two cement companies incorporated in Syria with plants located in Raqqa and Hasakah in northern Syria. [1]

4. The Claimants asserted that in 2012, due to the escalating conflict in Syria, armed forces of the Syrian government started withdrawing from most of the northern Syrian territories, including the regions where the Claimants' cement facilities were located, and that the Kurdish organizations PYD and YPG began to exercise governmental authority in those areas with the implicit cooperation and assent of the Syrian government. [2] The Claimants stated that their plants had since been ravaged by various incidents: thefts and armed attacks, demands for payments to be made or equipment to be handed over to PYD/YPG, forcible seizure of equipment and machinery by PYD/YPG, and even attempts by PYD/YPG to operate the plants. [3]

5. The Claimants invoked two most-favoured-nation (MFN) mechanisms contained in the Syria-Turkey BIT in the aim of importing into the present case Article 4 of the Syria-Italy BIT, [4] which, according to the Claimants, entitled them to compensation for their losses owing to war "regardless of who [was] responsible for the losses." [5]

6. The first mechanism can be found in the war clause of the Syria-Turkey BIT (Article IV(3)). It envisages MFN treatment in relation to "measures" the host state adopts vis-à-vis its own investors or investors of any third country that have suffered losses "owing to war, insurrection, civil disturbance or other similar events." The full text of Article IV(3) reads as follows:
Investors of either Party whose investments suffer losses in the territory of the other Party owing to war, insurrection, civil disturbance or other similar events shall be accorded by such other 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.

[1] Award. ¶¶ 108 and 112.
[2] Ibid., ¶ 114.
[3] Ibid., ¶ 116.
[4] Claimants' Reply, ¶ 252.
[5] Ibid., ¶ 250.

7. The second mechanism is the general MFN clause of the Syria-Turkey BIT (Article III(2)), which provides as follows (emphasis added):

Each Party shall accord to these investments, once established, treatment no less favourable than that accorded *in similar situations* to investments of its investors or to investments of investors of any third country, whichever is the most favourable.

8. The war clause of the Syria-Italy BIT (Article 4), which the Claimants wished to import into the present case either through the specific MFN treatment mechanism in the war clause of the Syria-Turkey BIT or through the latter's general MFN clause, provides as follows in its authoritative English version: [6]

Should investors of either Contracting Parties incur losses or damages on their investments in the territory of the other Contracting Party due to war, other forms of armed conflict, a state of emergency, civil strife or other similar events, the Contracting Party in which the investment has been effected shall offer adequate compensation in respect of such losses or damages. Irrespective of whether such losses or damages have been caused by governmental forces or other subjects, compensation payments shall be freely transferable as provided for in article 8 of this Agreement.

The investors concerned shall receive the same treatment as the nationals of the other Contracting Party and, at all events, no less favourable treatment than investors of Third States.

9. The majority's reasoning on the interaction among the three provisions, namely Articles III(2) and IV(3) of the Syria-Turkey BIT and Article 4 of the Syria-Italy BIT, is untenable for the reasons set out below.

10. It is undisputed that the Claimants were seeking compensation for losses owing to war. It is equally undisputed that the Syria-Turkey BIT contains a war clause (Article IV(3)) that expressly covers the situation of an investor suffering losses owing to war and similar events. This war clause was the starting point of the Tribunal's analysis.

11. The Claimants argued that the Respondent had breached Article IV(3) of the Syria-Turkey BIT by failing to offer them adequate compensation, as was required of it in respect of Italian investors under Article 4 of the Syria-Italy BIT. [7] The Respondent refused to acknowledge that it was under any such obligation, [8] with the entire Tribunal agreeing with the Respondent on this point. [9] As the Award observes, the term "measures" in Article IV(3) denotes laws, regulations, and administrative or material acts that the host state from ti m e to time adopts, and there is no evidence that Syria has adopted any such measures to redress the losses of Italian investors arising from the conflict. [10] As the Award further observes, the Claimants' reading of the term "measures" in Article IV(3) as encompassing the entitlement under international law to receive an offer of "adequate compensation" under Article 4 of the Syria-Italy BIT conflates the notion of "measures" with the

[6] The Syria-Italy BIT provides that it was done "in two originals, each in the Italian, Arab and English languages, all texts being equally authentic" and that "[i]n case of any divergence, the English text shall prevail."

[7] Claimants' Reply, ¶¶ 239, 248 and 261-263; see also Award, ¶ 239.

[8] Respondent's Rejoinder, ¶¶ 95-101; see also Award, ¶ 240.

[9] Award, ¶ 241.

[10] Ibid., ¶ 243.

distinct notion of "treatment." [11]

12. In my opinion, the Tribunal's unanimous reading of Article IV(3) of the Syria-Turkey BIT should have thwarted any attempt to import Article 4 of the Syria-Italy BIT by means of an MFN mechanism. The majority, however, found that the general MFN clause in Article III(2) of the Syria-Turkey BIT allowed the Claimants to import Article 4 of the Syria-Italy BIT. [12] This raises the issue of the relationship between the general MFN clause in Article III(2) and the MFN mechanism specific to the war clause in Article IV(3) of the Syria-Turkey BIT.

13. Article III(2) includes a broad and general MFN clause. It is followed in Article IV(3) by an MFN clause specifically dealing with war and similar events. The treatment foreseen in Article IV(3) already appears in Article III(2). This duplication suggests that each provision stands alone. An interpretation that reduces the purpose of Article IV(3) of the Syria-Turkey BIT to a mere confirmation of the contracting states' non-discrimination obligation already present in Article III(2) makes Article IV(3) meaningless.

14. I agree with the majority that in cases of war and similar events, Article IV(3) of the Syria-Turkey BIT does not exclude other treaty standards, such as full protection and security, or fair and equitable treatment. [13] Unlike the majority, however, I consider that, in a situation of war, the MFN mechanism of the war clause (Article IV(3)) rules out the application of the general MFN mechanism of Article III(2). The MFN treatment mechanism in Article IV(3) is the *lex specialis* that prevails over the more general MFN treatment mechanism in Article III(2).

15. In the absence of clear guidance by the drafters of the Syria-Turkey BIT as to the relationship between Articles III(2) and IV(3), these two provisions should be coordinated in such a way as to avoid redundancy. The Claimants', and subsequently the majority's, interpretation of Article III(2) makes it extremely difficult to see the usefulness of Article IV(3). It should thus be dismissed as it runs counter to the principle of effectiveness *(effet utile)*. It can hardly be expected that the drafters of the Syria-Turkey BIT wished no effect to be given to a provision (Article IV(3)) they inserted in the BIT. As the arbitral tribunal in *ConocoPhillips v. Venezuela* noted, "[i]t is a well-established principle for the interpretation of provisions of a treaty that they should if possible be interpreted so that they do not become devoid of effect." [14]

16. A coordinated reading of the two provisions should have led the Tribunal to find that the MFN mechanism in Article III(2) may be invoked in relation to all treatments accorded by the host state, except those relating to compensation for damages "owing to war, insurrection, civil disturbance or other similar events," which are governed by the MFN mechanism in Article IV(3).

17. Article IV(3) relates specifically to the treatment of investments that have suffered losses owing to war or similar events. Article III(2)'s language is broad enough to cover all treatment accorded to an

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[11] Ibid., ¶ 244.

[12] Ibid., ¶¶ 253 and 282.

[13] Ibid., ¶ 235.

[14] *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V., ConocoPhillips Gulf of Paria B.V. and ConocoPhillips Company v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/30, Decision on Jurisdiction and the Merits, September 3, 2013, ¶ 309. See also ICJ judgments to which the decision refers in fn. 325: *Corfu Channel Case (Merits),* Judgment, April 9, 1949, I.C.J. Reports 1949, p. 4 at p. 24; *Case Concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections,* Judgment, April 1, 2011, ¶ 133.

investment, arguably including treatment in relation to losses caused by war or similar events. Article IV(3) should not be read as merely repeating the broader non-discriminatory duty of Article III(2) in the narrow context of the type of events envisaged in Article IV(3). If the treatment covered by Article IV(3) also falls within the scope of Article III(2), then Article IV(3) has no purpose. As the tribunal in *Venezuela Holdings, B.V., et al v. Venezuela* put it, "the Claimants' interpretation would result in at least one provision being rendered redundant - an outcome that should be avoided in treaty interpretation."[15] In endorsing the Claimants' view that the MFN provision in Article III(2) could be relied upon to broaden the scope of the MFN provision already contained in the war clause, the majority has made Article IV(3) meaningless and superfluous. This could hardly have been the intention of the contracting states.

18. In footnote 218 of the Award, the majority relies on nine decisions and awards, which, it argues, "have been unable to regard specific MFN clauses as excluding more general ones."[16] However, out of the nine decisions and awards on which the majority relies, only the *Siemens v. Argentina* award found that the MFN mechanism in the war clause of the US-Argentina BIT was *ex abundante cautela,*[17] thus reaching the same conclusion as the majority in the present case. All of the other decisions and awards confirmed that the war clauses did not preclude the application of other treaty standards when any of the situations contemplated in the war clauses occurred (a position to which I subscribe). However, none of them enquired into the relationship between a general MFN clause and an MFN treatment mechanism in a war clause, as it was immaterial to the ruling in each case.[18] In one instance, the tribunal even took note of the position of the tribunal in *Siemens* v. *Argentina,* yet did not subscribe to it.[19]

19. In short, the MFN mechanism in Article IV(3) of the Syria-Turkey BIT should rule out the application of the MFN mechanism in Article III(2) to the treatment of losses caused by war, thus precluding the Claimants from relying on the latter.

20. Assuming that this first hurdle could be overcome and that the Claimants were able to rely on the more general MFN treatment clause (Article III(2) in the Syria- Turkey BIT), the latter's ambiguity militates against allowing the Claimants to import Article 4 of the Italy-Syria BIT into the present case.

21. The 2015 report on MFN clauses by an ILC study group stated that MFN provisions containing the expression "in similar situations" (which Article III(2) of the Syria-Turkey BIT does) or "in like circumstances" may "seem to place some limitation upon which investors or investments can claim the benefit of an MFN provision - suggesting perhaps that only those investors or investments that are 'in like circumstances' with those of the comparator treaty can do so."[20]

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[15] *Venezuela Holdings, B.V. and others v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27, Award, October 9, 2014, ¶ 245.

[16] Award, ¶ 262.

[17] *Siemens A.G. v. Argentine Republic,* ICSID Case No ARB/02/8, Decision on Jurisdiction, August 3, 2004, ¶ 90.

[18] See e.g., *Daimler Financial Services AG v. Argentine Republic,* ICSID Case No. ARB/05/1, Award, August 22, 2012, ¶ 253 (where the tribunal expressly stated that "[w]hatever the explanation for the separate MFN clauses, it is in any event irrelevant to the [tribunal's] inquiry" because "a determination one way or the other would have no effect upon the outcome"). See also, e.g., *CMS Gas Transmission Company v. Argentine Republic,* ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶ 377 (where the tribunal stated that it "is not convinced that the [MFN] clause has any role to play in this case").

[19] *Daimler Financial Services AG v. Argentine Republic,* ICSID Case No. ARB/05/1, Award, August 22, 2012, ¶ 252.

[20] Final Report of the ILC Study Group on the Most-Favoured-Nation Clause, U.N. Doc. A/70/10, Annex (2015), ¶ 71.

22. This seems to be how Canada, Mexico and the United States interpreted the MFN clauses in Article 1103 of the North American Free Trade Agreement (NAFTA), which contained the expression "in like circumstances."[21] All three states considered that the fact that another treaty theoretically offers more favourable treatment was insufficient to establish a violation of Article 1103. Instead, they took the position that the expression "in like circumstances" should be given meaning and required a fact-based comparison with an investor from a third state.[22]

23. The tribunal in *İçkale v. Turkmenistan* took a similar view.[23] Interpreting an MFN clause in the Turkey-Turkmenistan BIT, the wording of which was identical to that of Article III(2) of the Syria-Turkey BIT, the tribunal unanimously found that the expression "in similar situations" in the MFN clause of the Turkey-Turkmenistan BIT called for a fact-based comparison between an investor from a third state and the claimant to determine whether the investor from the third state had been treated more favorably than the claimant. The tribunal pointed out that the words "in similar situations" would otherwise be ineffectual, thereby undermining the principle of *effet utile*.

24. Accordingly, even if it were possible to have recourse to Article III(2) of the Syria-Turkey BIT notwithstanding the existence of Article IV(3), the words "in similar situations" in Article III(2) should prevent the Claimants from relying on Article 4 of the Syria-Italy BIT without producing evidence of discriminatory treatment favoring an Italian investor.

25. In the case of the Syria-Turkey BIT, the ordinary meaning of the language of both MFN mechanisms suggests that they should be applied restrictively: Article IV(3) of the Syria-Turkey BIT may be invoked only if a respondent adopts specific measures, while Article III(2), which includes the words "in similar situations," must be interpreted as having a narrower effect than an MFN provision that does not contain such wording. The majority's expansive interpretation of the MFN provisions which goes as far as granting investors additional rights to which they are not entitled may end up seriously undermining the intention of the BIT drafters.

26. Were we to disregard the cautionary words of the ILC study group and the finding of the *İçkale* tribunal when interpreting Article III(2) of the Syria-Turkey BIT, we would have to recognize that the war clause (Article 4) to be imported from the Syria-Italy BIT is also problematic.

27. The phrase "Irrespective of whether such losses or damages have been caused by governmental forces or other subjects" is placed in the second sentence of Article 4 of the Syria-Italy BIT. This sentence relates to the transferability of compensation payments, not the offering of adequate compensation. The Arabic version of Article 4 combines the two sentences, but the Italian version makes the same distinction as the English version, which, according to the treaty itself, should prevail in the event of divergence between the different language versions.

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[21] Article 1103 of the North American Free Trade Agreement (NAFTA) read as follows (emphasis added): "1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, *in like circumstances,* to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, *in like circumstances,* to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

[22] See e.g., *Chemtura Corporation v. Government of Canada,* UNCITRAL, Canada's Rejoinder Memorial, July 10, 2009, ¶¶ 236 and 238; *Mesa Power Group, LLC v. Government of Canada,* UNCITRAL, PCA Case No. 2012-17, Submission of Mexico Pursuant to NAFTA Article 1128, July 25, 2014, ¶ 13; *Methanex Corporation v. United States of America,* UNCITRAL, Response of Respondent United States of America to Methanex's Submission Concerning the NAFTA Free Trade Commission's July 31,2001 Interpretation, October, 26, 2001, p. 9.

[23] *İçkale İnşaat Limited Şirketi v. Turkmenistan,* ICSID Case No. ARB/10/24, Award, March 8, 2016, ¶¶ 321-329.

28. If the drafters of the Syria-Italy BIT intended that the host state should offer the investor compensation for damages caused by war irrespective of the source of such damages, they could have simply included the above-mentioned phrase in the first sentence of Article 4 rather than the second. Yet, they did not. While Article 4 could possibly be interpreted as meaning that the host state is obliged to offer compensation regardless of the author of the damage, such an interpretation would not be consistent with the ordinary meaning or context of Article 4 wording, and, in any event, would not definitely rule out the possibility of other reasonable interpretations.

29. The majority's reading of Article 4 of the Syria-Italy BIT as imposing on the host state the obligation to offer compensation regardless of the source of the damage equates the host state with an insurer of investors and investments in times of war. As such a reading would transform Article 4 into an exorbitant clause at variance with customary international law principles on state responsibility in times of war, its adoption calls for great circumspection.

30. While the situation would be different if both the MFN clause and the imported clause were entirely clear and left no doubt as to the true intentions of the contracting states, I find both the general MFN clause in the Syria-Turkey BIT (Article III(2)) and the imported war clause in the Italy-Syria BIT (Article 4) ambiguous and impossible to interpret without guessing at the true intentions of their drafters. Before venturing to interpret either provision, however, it is necessary to address the impediment resulting from the existence and interpretation of Article IV(3) of the Syria-Turkey BIT.

31. I see no grounds for accepting the Claimants' assertion that the Syria-Italy BIT, which contains an exorbitant clause, can be imported into our case through the general MFN clause in the Syria-Turkey BIT in total disregard of the limitations contained in the MFN mechanism of the war clause. This would not appear to have been the intention of the drafters of the Syria-Turkey BIT.

32. An arbitral tribunal might be justified in adopting a reading of a treaty or series of treaties with such far-reaching consequences if it has clear and convincing evidence that the contracting states intended, or at least foresaw, those consequences, but not when such a reading is based on conjectures and approximations.