

INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

IN THE PROCEEDING BETWEEN

**ATA CONSTRUCTION, INDUSTRIAL AND TRADING COMPANY
(CLAIMANT)**

- AND -

**THE HASHEMITE KINGDOM OF JORDAN
(RESPONDENT)**

(ICSID Case No. ARB/08/2)

**DECISION ON INTERPRETATION
AND ON THE REQUEST FOR PROVISIONAL MEASURES**

Members of the Tribunal

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Professor Dr. Ahmed Sadek El-Kosheri, Arbitrator
Professor W. Michael Reisman, Arbitrator

Secretary of the Tribunal
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Date of Dispatch to the Parties: March 7, 2011

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THE TRIBUNAL

Composed as above,

After deliberation,

Makes the following Decision:

I. PROCEDURE

A. Jordan's Application for Interpretation

1. On 14 July 2010, the Hashemite Kingdom of Jordan ("Jordan") filed with the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") an application for interpretation (the "Application") pursuant to Article 50 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention" or "Convention"). The Application was made in connection with an award rendered on 18 May 2010 (the "Award") in the ICSID arbitration proceedings No. ARB/08/2 between ATA Construction, Industrial and Trading Company ("ATA" or therein the "Claimant") and Jordan (therein the "Respondent"). The Award was rendered by a tribunal composed of Mr. L. Yves Fortier, C.C., Q.C., as President, and Professors Dr. Ahmed Sadek El-Kosheri and W. Michael Reisman as co-arbitrators (collectively the "Tribunal").

2. The Tribunal's Award concerns the lawfulness of the annulment by the Jordanian courts of an arbitral award rendered on 30 September 2003 in favour of ATA (the "Final Award") – a Turkish company – following the collapse of a dike (referred to as "Dike No. 19") constructed by ATA for the Arab Potash Company ("APC"), which was a State-controlled body in Jordan at the time of the said Final Award.

3. On 29 October 2003, APC applied to the Jordanian Court of Appeal to have the Final Award annulled under the Jordanian Arbitration Law (Law No. 31 of 2001). The Jordanian Court of Appeal decided to annul the Final Award and to extinguish the arbitration agreement (the “Arbitration Agreement”) in the underlying Dike No. 19 construction contract dated 2 May 1998 between ATA and APC (the “Contract”). ATA subsequently appealed to the Jordanian Court of Cassation. On 16 January 2007, the Jordanian Court of Cassation rendered a decision confirming the annulment of the Final Award and the extinguishment of the Arbitration Agreement in the Contract between ATA and APC.

4. On 14 January 2008, ATA submitted its Request for Arbitration with ICSID pursuant to the Agreement Between the Hashemite Kingdom of Jordan and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investment (the “BIT” or “Treaty”) and under the ICSID Convention. These proceedings resulted in the Tribunal’s Award dated 18 May 2010, which is now the subject of the present Application.

B. The Tribunal’s Award

5. On 18 May 2010, the Tribunal’s Award was dispatched to the parties. The Award found “that all claims of the Claimant [ATA] in connection with the annulment of the final Award *per se* as well as its claims of denial of justice are inadmissible for lack of jurisdiction *ratione temporis*.”¹ The Tribunal added that “it was unconvinced that, even if there had been jurisdiction, a claim of denial of justice, whether substantive or

¹ Award at paragraph 95.

procedural, could have been sustained.”² As part of its Award, however, the Tribunal also considered and ruled upon the statutory extinguishment of ATA’s right to arbitration pursuant to the last sentence of Article 51 of the 2001 Jordanian Arbitration Law (Law No. 31 of 2001). This provision provides as follows: “The final decision nullifying the award results in extinguishing the arbitration agreement.” As part of its Award, the Tribunal concluded that the extinguishment of ATA’s right to arbitration was a violation of the Treaty:

The right to arbitration was an integral part of the Contract and, as noted earlier in this Award, constituted an “asset” under the Treaty. In the words of the Preamble to the Treaty, Jordan and Turkey agreed “that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources.” The extinguishment of the Claimant’s right to arbitration by the Jordanian courts thus violated both the letter and the spirit of the Turkey-Jordan BIT.³

6. The Tribunal later added:

In the instant case, in the view of the Tribunal, the single remedy which can implement the *Chorzow* standard is a restoration of the Claimant’s right to arbitration. In this regard, the Tribunal notes that the Respondent has already indicated its willingness to accept such an order by offering, as noted earlier, to submit the ongoing Dike No. 19 dispute to a new commercial arbitration *in lieu* of proceeding in the Jordanian courts. That offer is tantamount to offering the restoration of the Claimant’s right to arbitration.

Therefore, based on its finding that the extinguishment of the Arbitration Agreement in application of the last sentence of Article 51 of the 2001 Jordanian Arbitration Law constitutes a breach of Jordan’s international obligations under the Turkey-Jordan BIT, the Tribunal orders that (i) the ongoing Jordanian court proceedings in relation to the Dike No. 19 dispute be immediately and unconditionally terminated, with no possibility to conduct further judicial proceedings in Jordan or elsewhere on the substance of the dispute, and (ii) the Claimant is entitled to proceed to arbitration in relation to the Dike No. 19 dispute in accordance with the terms of the Arbitration Agreement set forth in the Contract of 2 May 1998. (Emphasis added.)⁴

² Award at paragraph 123.

³ Award at paragraph 125.

⁴ Award at paragraphs 131 and 132.

7. In the *dispositif* of its Award, the Tribunal decided as follows:
1. To declare the Claimant’s claims regarding the annulment of the Final Award inadmissible for lack of jurisdiction *ratione temporis*.
 2. To declare the Claimant’s claim regarding the extinguishment of the Arbitration Agreement admissible *ratione temporis*.
 3. To declare that the extinguishment of the Arbitration Agreement in the Contract of 2 May 1998 between the Claimant and APC by the Jordanian Court of Cassation of 16 January 2007 constitutes a breach of the Respondent’s obligations under the Turkey-Jordan BIT.
 4. To order that the ongoing Jordanian court proceedings in relation to the Dike No. 19 dispute be immediately and unconditionally terminated, with no possibility to engage further judicial proceedings in Jordan or elsewhere on the substance of the dispute.
 5. To order that the Claimant is entitled to proceed to arbitration in relation to the Dike No. 19 dispute in accordance with the terms of the Arbitration Agreement set forth in the Contract of 2 May 1998.
 6. To order that the payment of the fees and expenses of the members of the Tribunal and of the administrative fees for the use of the Centre shall be paid in equal share by the Claimant and the Respondent who shall each bear their own legal costs. (Emphasis in original.)⁵
8. Jordan’s Application focuses particularly on sub-paragraph 133(5) of the Tribunal’s Award regarding the restoration of ATA’s right to arbitration under the Arbitration Agreement between ATA and APC. In essence, Jordan requests that the Tribunal clarify that in making its Award, it “intended to restore the Arbitration Agreement as it stood before its extinguishment pursuant to the last sentence of Article 51 of the Jordan Arbitration Law, with full reciprocal rights for both contractual signatories”.
9. In response, ATA contends that the Tribunal cannot be said to have directed restoration of the Arbitration Agreement *in toto* because it was not competent to do so – it

⁵ Award at paragraph 133.

was merely competent to restore the right to arbitration of the investor, namely ATA. It follows, says ATA, that APC's right to arbitration remains extinguished and APC accordingly has no legal basis on which to raise a counterclaim in response to any future arbitral claim by ATA in connection with the Dike No. 19 dispute. ATA submits that, in any event, Jordan's Application is inadmissible because it fails to meet the requirements of Article 50 of the ICSID Convention.

C. ATA's Request for Provisional Measures

10. On 21 September 2010, in the course of the present interpretation proceedings, ATA submitted a Request for Provisional Measures (the "Request"). As part of this Request, made pursuant to Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules, ATA asked the Tribunal, "as a matter of urgency", to:

1. order the Respondent to comply with paragraph 133(4) of the Award by immediately and unconditionally terminating the ongoing Jordanian court proceedings in relation to the Dike No. 19 dispute, with no possibility to engage further judicial proceedings in Jordan or elsewhere on the substance of the dispute;
2. order the Respondent to compensate the Claimant for any future costs, expenses or other losses caused by the ongoing Jordanian court proceedings in relation to Dike No. 19;
3. make any other order that the Tribunal deems necessary to protect the Claimant's rights; and
4. award costs in relation to this request to the Claimant.

11. Jordan submitted its own views with respect to ATA's Request, arguing that "[t]he evident tactical objective of ATA's request is to outflank (or moot) the Government's request for interpretation of the Award".

12. The Tribunal, pursuant to its Procedural Order No. 1 dated 14 October 2010, informed the parties that a separate hearing would not be scheduled in connection with

ATA's Request. The Tribunal further declared that it would remain seized of the said Request and would hear the parties on the status of the allegations invoked by ATA in support of its Request as part of the hearing held in connection with the present interpretation proceedings.

D. Reconstitution of the Tribunal

13. On 22 July 2010, ICSID's Secretary-General wrote to the parties in connection with Jordan's Application and informed them that, in accordance with ICSID Arbitration Rule 51(1)(b), all three original members of the Tribunal had confirmed their willingness to take part in the consideration of the Application. By this same letter and pursuant to ICSID Arbitration Rule 51(2), the parties were accordingly notified that the Tribunal was deemed reconstituted on 22 July 2008.

E. Written and Oral Phases of the Proceeding

14. On 15 September 2010, the parties submitted a joint statement on the provisional agenda for the conduct of the present interpretation proceedings.

15. On 3 November 2010, the Tribunal issued its Procedural Order No. 2 by which it formally approved the parties' agreement regarding the conduct of the interpretation proceedings.

16. In accordance with Procedural Order No. 2, the parties filed their written pleadings following the schedule below:

- Jordan's Memorial in Support of Application for Interpretation of Award dated 15 September 2010;
- ATA's Counter-Memorial on Interpretation dated 1 November 2010;

- Jordan's Reply Memorial on Interpretation dated 17 November 2010; and
- ATA's Rejoinder on Interpretation dated 3 December 2010.

17. On 12 December 2010, the President of the Tribunal chaired, with the agreement of the two other members of the Tribunal, a pre-hearing conference by telephone with the parties.

18. On 21 December 2010, the Tribunal held a hearing on interpretation at the World Bank headquarters in Washington, D.C. (the "Hearing"). The following persons attended the Hearing:

On behalf of Jordan:

- Her Excellency Dr. Alia Hatoug-Bouran, Ambassador to the United States for the Hashemite Kingdom of Jordan and Mr. Mahmoud Hamoud, Counsellor, Political, Legal and Senate Affairs at the Jordanian Embassy;
- Mr. Rabie' Hamzeh, Advocate; and
- Mr. Eugene D. Gulland, Mr. Allan B. Moore, Mr. Peter D. Trooboff, Mr. James McCall Smith and Ms. Mildred Knowlton of Covington & Burling LLP.

On behalf of ATA:

- Mr. Robert Volterra and Mr. Stephen Fietta of Latham & Watkins LLP.

19. The Hearing was held in the absence of Professor El-Kosheri who was prevented from attending due to unforeseen circumstances. The parties accepted to proceed before a truncated tribunal, formed by the President and Professor Reisman, based on Professor

El-Kosheri's offer to review the full verbatim transcript of the Hearing and to provide the parties with questions stemming from his review. It was further agreed that the parties would provide their respective responses to Professor El-Kosheri's questions by 14 January 2011.

20. The Hearing was audio recorded, and a full verbatim transcript prepared.

21. On 26 December 2010, Professor El-Kosheri provided the parties with four written questions based on his review of the full verbatim transcript of the Hearing.

22. As agreed at the Hearing, on 14 January 2011, the parties filed simultaneous post-hearing briefs in response to Professor El-Kosheri's four written questions.

23. On 11 February 2011, the Tribunal declared the proceedings formally closed in accordance with Rule 38 of the ICSID Arbitration Rules.

II. THE PARTIES' POSITIONS

A. Jordan's Submissions

24. Jordan submits that it had no other option but to make the present Application due to the position taken by ATA upon receipt of the Tribunal's Award. More particularly, Jordan explains that on 24 June 2010, ATA wrote to APC, proposing a new arbitration agreement. This proposed arbitration agreement is, according to Jordan, entirely unacceptable in light of the Tribunal's Award. Jordan sets forth its view in this regard as follows:

[...] The draft agreement (or "Deed") that ATA provided to APC differs markedly from the Arbitration Agreement in the APC-ATA Contract and is accordingly inconsistent with the restoration of the Arbitration Agreement that the Government understands the Tribunal to have intended in the Award.

The Arbitration Agreement in the APC-ATA Contract (Article 67.3, entitled “Arbitration”) stated:

“Any dispute in respect of which:

(a) the decision, if any, of the Engineer has not become final and binding pursuant to Sub-Clause 67.1, and

(b) amicable settlement has not been reached within the period stated in Sub-Clause 67.2

shall be finally settled by arbitration conducted in accordance with Jordanian Arbitration Law by a Board of Arbitrators composed of three Arbitrators, one to be appointed by each party and the third to be jointly appointed by both parties by virtue of the provisions of the said Law. The language of arbitration shall be English.” (See Contract, Conditions of Contract, art. 67.3 (Exhibit R-13, Appendix J).)

The APC-ATA Contract further specified that it is to be governed by Jordanian law, a point that was not disputed in these proceedings. (See Contract, Conditions of Contract, art. 5.1(b) (Exhibit R-13, Appendix J); Claimant’s Memorial on the Merits, ¶ 21.)

The draft Arbitration Agreement proposed by ATA to APC and forwarded to the Government now contemplates – purportedly on the basis of the Tribunal’s Award – terms that are entirely different from those of the APC-ATA Arbitration Agreement. It specifies that:

“The arbitration [to be conducted hereunder] shall determine ATA’s claims. For the avoidance of doubt, and notwithstanding anything to the contrary in this Deed, APC shall not be entitled to advance any counterclaims and/or any claim of set-off, whether based on the allegations that APC raised before the FIDIC Tribunal [*i.e.*, in the previous, annulled arbitration] or otherwise.” (ATA Arbitration Agreement, ¶ 3.3 (Exhibit B hereto).)

“The seat (legal place) of the arbitration proceedings shall be London. ...” (*Id.*, ¶ 3.4; *see also id.*, ¶¶ 3.5-3.6.)

“This Deed, and any non-contractual obligations arising out of or in connection with it, shall be governed by, and construed in accordance with, English law.” (*Id.*, ¶ 8.1.)

“Any dispute arising out of or in connection with, or concerning the carrying into effect of, this Deed shall be subject to the exclusive jurisdiction of the High Court of England, and each of the Parties hereby submit to the exclusive jurisdiction of that court for these purposes.” (*Id.*, ¶ 8.2.)

Claimant’s proposed new arbitration agreement does not restore the pre-extinguishment *status quo ante* in regard to the APC-ATA Arbitration Agreement. It does not recognize that both APC and Claimant had “agreed

and expected” to submit their claims to arbitration. (Award, ¶ 126.) And it goes far beyond the specific interest that the Award undertakes to protect: the Claimant’s “*legitimate* reliance on the Arbitration Agreement.” (*Id.*, ¶124 (emphasis added).) (Emphasis in original.)

25. Based on the above, Jordan asks that the Tribunal confirm that in making its Award, it intended that the entire Arbitration Agreement be restored and recognized by the Jordanian courts. Jordan further formulates its request as follows:

The Government accordingly seeks confirmation that the Tribunal did not intend, in ordering the “restorative” relief that it contemplated, a one-sided and prejudicial commercial arbitration agreement under which only Claimant has the right to pursue its claims against APC, and APC has no corresponding right to pursue its claims against ATA. The Government submits that the Tribunal instead intended a restoration of the Arbitration Agreement as it stood before extinguishment, with each party thereto having full and equal right and reciprocal obligations thereunder.

26. In short, Jordan maintains that when the Tribunal ordered restoration of ATA’s right to arbitration, it intended to preserve the original APC-ATA Arbitration Agreement in its entirety. This, according to Jordan, is evidenced by the Tribunal’s order in its Award that ATA has the right to proceed to arbitration in relation to the Dike No. 19 dispute “in accordance with the terms of the Arbitration Agreement set forth in the Contract of 2 May 1998” (at paragraph 132, emphasis added). Any other interpretation, says Jordan, would be inconsistent with the Tribunal’s reasoning and foundational principles of international arbitration law. Jordan adds that ATA should not be allowed to “misconstrue[] the Award in an attempt to secure a position more favorable than that provided by its contract with APC”.

27. On the issue of whether its Application meets the requirements for an ICSID Article 50 “post-award interpretation”, Jordan submits (and ATA agrees) that these requirements were properly established by the *Wena* tribunal (*cf. Wena v. Egypt*,

Decision on the Application for Interpretation of the Award, ICSID Case No. ARB/98/4 (31 October 2005), paragraphs 76 and 106) as follows:

- (1) there must be a dispute between the parties over “the meaning or scope” of the award;
- (2) the purpose of the application must be to obtain a true interpretation of the award, rather than to reopen the matter; and
- (3) the requested interpretation “must have some practical relevance to the Award’s implementation”.

28. It is Jordan’s position that its Application meets all three of the above-listed requirements:

First, there is a dispute between Claimant and Respondent over “the meaning or scope” of the Award. Paragraph 133(5) of the Award states that “the Claimant is entitled to proceed to arbitration in relation to the Dike No. 19 dispute in accordance with the terms of the Arbitration Agreement set forth in the [APC-ATA] Contract of 2 May 1998” (*emphasis added*). Claimant has expressly communicated the position that, under the Award, Claimant has the legal right to initiate a new arbitration against APC, but that the Award provides no such right to APC, and that the Award even precludes APC from filing counterclaims. (ATA’s Proposed Arbitration Agreement (Exhibit B hereto); *see also* Tom Toulson, Global Arbitration Review (Exhibit A hereto), ¶ 3.3). The Government disputes Claimant’s interpretation of the Award.

Second, the manifest purpose of this application is to obtain a true interpretation of the Award on the single and discrete issue that has been identified, not to reopen the case. The Government does not seek to re-litigate what the Tribunal has decided. It seeks only to confirm what the Tribunal intended in regard to the restorative relief it ordered in connection with its findings on the “extinguishment” issue.

Third, the requested interpretation has important practical relevance to the Award’s implementation. As the Tribunal will recall, the claimant in the original commercial arbitration that launched this dispute was APC, not ATA. APC initiated that first arbitration to recover compensatory damages for the collapse of Dike No. 19. ATA responded by asserting a counterclaim for damages and other relief. The previous, annulled award was adverse to APC’s claims and in favour of ATA’s counterclaims. An interpretation of the Award that allows ATA the option of proceeding with its claims, but that forecloses APC from asserting its unresolved claims in any arbitral or judicial forum (*sub silentio* and without APC’s ever being heard), would pose grave

practical problems and would be fundamentally unjust. (Emphasis in original.)

29. Significantly, Jordan argues that its requested interpretation is necessary before it can proceed to comply with sub-paragraph 133(4) of the Award, by which the Tribunal ordered that the ongoing Jordanian court proceedings in relation to the Dike No. 19 dispute be immediately and unconditionally terminated, with no possibility to engage further judicial proceedings in Jordan or elsewhere on the substance of the dispute. The question in this regard, says Jordan, is whether sub-paragraph 133(4) of the Tribunal's Award precludes the Jordanian courts from exercising what Jordan calls "procedural responsibilities" regarding the arbitration process, such as supervising the enforcement of Arbitration Agreement. According to Jordan, the Tribunal's Award at sub-paragraph 133(4) cannot be deemed to have withdrawn from the Jordanian courts the ability to intervene on procedural matters arising from the determination of the Dike No. 19 in accordance with the Arbitration Agreement between ATA and APC.

B. ATA's Submissions

30. In objecting to Jordan's Application, ATA submits that rather than seeking a *bona fide* interpretation of the Award, Jordan is now attempting to rewrite it so as to provide APC with a remedy of its own in this arbitration. In this regard, ATA emphasizes that the parties' treaty dispute did not concern extinguishment of APC's right to arbitrate. It concerned, says ATA, Jordan's violation of ATA's rights as an international investor in Jordan under the BIT. In the words of ATA:

The extinguishment of APC's right to arbitrate by the Jordanian courts is not at issue in this ICSID proceeding. This ICSID proceeding is between ATA and Jordan. APC is not a party to this proceeding, nor did the Tribunal determine that APC had been the victim of an internationally wrongful act under the BIT. It was ATA's claim under the BIT that led the Tribunal to find a violation of

ATA's international law rights, and to grant reparation to ATA (in the form of reinstatement of its right to arbitrate). As a Jordanian entity, APC would obviously have no standing to bring a claim against the Respondent under the BIT (or otherwise in international law) seeking the remedy that the Respondent now requests on APC's behalf in this interpretation proceeding.

31. ATA also argues that the Tribunal's Award does not deny APC its right to arbitrate but that, rather, it is the Jordanian courts that have denied APC that right. As for the Jordanian courts, ATA's objection to Jordan's Application, as well as its own Request for Provisional Measures seeks confirmation of the formal termination of the ongoing Dike No. 19 court proceedings in Jordan as, ATA understands, was ordered by the Tribunal at sub-paragraph 133(4) of its Award. According to ATA, the Tribunal's Award forbids any involvement of the Jordanian courts in the Dike No. 19 dispute, be it substantive or otherwise. ATA summarizes its position in this regard as follows:

The Award clearly prohibits the Jordanian courts from ever again playing a substantive role in the underlying dispute between ATA and APC relating to the collapse of Dike No. 19. Of necessity, this must include the following four consequences (each of which is plainly inconsistent with the Respondent's interpretation to the effect that the Award restores the original Arbitration Agreement in its entirety).

First, the Jordanian courts must not participate in constitution of any new tribunal, which is in effect a substantive role. Clause 67.3 of the Contract provides in pertinent part:

"Any dispute [...] shall be finally settled by arbitration conducted in accordance with Jordanian Arbitration Law by a Board of Arbitrators composed of three Arbitrators, one to be appointed by each party and the third to be jointly appointed by both parties by virtue of the provisions of the said Law." (Emphasis added)

Article 16(a)(2) of the Jordanian Arbitration Law (Law No. 31 of 2001) provides that the third arbitrator is to be appointed by joint decision of the two party-appointed arbitrators. This provision further provides that:

"If either party fails to appoint his arbitrator within fifteen days following the date of receipt of a request to do so from the other party, or if the two appointed arbitrators fail to agree on the third arbitrator within fifteen days following the date of appointing the more recently appointed arbitrator, the appointment shall be made, upon request of either party, by the competent court. The third arbitrator,

whether appointed by the two appointed arbitrators or by the competent court, shall preside the arbitral tribunal.”

Article 2(a) of the Jordanian Arbitration Law defines the “competent court” as being “the court of appeal within its jurisdiction the arbitration is conducted [i.e., the Jordanian Court of Appeal] unless the parties agree to the jurisdiction of another court of appeal in the [Hashemite] Kingdom [of Jordan].”

Accordingly, in the event that the Award is interpreted to mandate the restoration of the entire Arbitration Agreement, the Jordanian Arbitration Law will allow the Jordanian Court of Appeal to retain an inherently substantive (and potentially decisive) role in any future arbitration proceeding between ATA and APC. Indeed, there would be nothing to prevent the Jordanian Court of Appeal from appointing a member of the Jordanian judiciary as president of the arbitral tribunal.

Paragraph 133(4) of the Award necessarily prohibits the Jordanian Court of Appeal from playing any part in the appointment of the president of the arbitral tribunal in any future arbitration commenced by ATA in accordance with paragraph 133(5) of the Award.

Second, contrary to Jordan’s stated interpretation of the Award as restoring the Arbitration Agreement in its entirety (including the application of the Jordanian Arbitration Law), paragraph 133(4) necessarily includes a prohibition against any annulment by the Jordanian courts of any future arbitral award on purported “public order” or other substantive grounds.

Third, the Jordanian courts must never again invoke Article 51 of the Jordanian Arbitration Law so as to extinguish ATA’s right to arbitrate. To interpret the Award otherwise would be tantamount to allowing “further judicial proceedings in Jordan or elsewhere on the substance of the dispute.” Any such extinguishment would *ipso facto* constitute a fresh violation of the BIT.

Fourth, as a necessary corollary to the Award, any new arbitration proceeding must take place outside of Jordan. The alternative would be to subject the arbitration to the jurisdiction of the Jordanian courts under the mandatory provisions of the Jordanian Arbitration Law. This would provide an open invitation to the Jordanian courts to interfere with the substance of the dispute in the future, contrary to paragraph 133(4) of the Award.

In short, any reinstatement of the Arbitration Agreement in its entirety, as requested by the Respondent in its Memorial, would leave ATA exposed to continuing violations of its rights under the BIT and render its restored arbitration rights effectively useless. (Emphasis added.) (Footnotes omitted.)

32. In addition to the above, ATA submits that the Tribunal does not have the power to provide APC with the remedy that Jordan purportedly now seeks on its behalf, *i.e.*, with arbitration rights that have been extinguished by the Jordanian courts. According to ATA, Jordan is seeking more than a mere clarification of the Tribunal’s Award, it is

acting as an *alter ego* to a third party, namely APC, and thereby improperly seeking a remedy on its behalf. On this basis, ATA argues that whilst APC would be entitled to raise objections or defences in response to any future arbitral claim by ATA, it would not be entitled to advance a reciprocal counterclaim.

33. Finally, ATA argues that Jordan's Application does not meet the requirements for post-award interpretation under the ICSID Convention and international law. In essence, ATA contends that the terms of the Tribunal's Award are clear and that the Tribunal intentionally refrained from making any determination concerning APC's right to arbitrate under the Arbitration Agreement. ATA maintains that this is consistent with the *Wena* tribunal's findings based on Article 50 of the Convention to the effect that a tribunal cannot opine on third party rights that were not the subject of its award. On the same basis, ATA submits that Jordan's requested interpretation has no practical relevance to the Award's implementation because the Award does not deny APC its right to arbitrate. This, ATA reiterates, was the doing of the Jordanian courts, not this Tribunal.

III. THE TRIBUNAL'S ANALYSIS

A. Preliminary Observations

34. The present Application is made pursuant to Article 50 of the ICSID Convention, which states as follows:

Section 5
Interpretation, Revision and
Annulment of the Award

Article 50

(1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.

(2) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

35. The parties agree that the requirements for an ICSID Article 50 “post-award interpretation” were concisely summarized by the *Wena* tribunal (*cf. Wena v. Egypt*, Decision on the Application for Interpretation of the Award, ICSID Case No. ARB/98/4 (31 October 2005), paragraphs 76 and 106) as follows:

- (1) there must be a dispute between the parties over “the meaning or scope” of the award;
- (2) the purpose of the application must be to obtain a true interpretation of the award, rather than to reopen the matter; and
- (3) the requested interpretation “must have some practical relevance to the Award’s implementation”.

36. The Tribunal is of the view that all three of the above-listed requirements are met in the circumstances. Firstly, there is a dispute between Jordan and ATA over “the meaning or scope” of the Award. Sub-paragraph 133(5) of the Award states that “the Claimant is entitled to proceed to arbitration in relation to the Dike No. 19 dispute in accordance with the terms of the Arbitration Agreement set forth in the [APC-ATA] Contract of 2 May 1998”. ATA has expressly communicated to Jordan and to the Tribunal in the present proceeding its understanding to the effect that, under the Award, it alone has the legal right to initiate a new arbitration against APC, but that the Award provides no such right to APC, and that the Award further precludes APC from filing counterclaims. Jordan disputes ATA’s interpretation of the Award and maintains that the Tribunal’s Award restored the Arbitration Agreement between ATA and APC in its entirety.

37. Secondly, the manifest purpose of Jordan's Application is to obtain a true interpretation of the Award on the single and discrete issue that has been identified, *i.e.* to confirm what the Tribunal intended in regard to the restorative relief it ordered in connection with its findings on the "extinguishment" issue.

38. And thirdly, the requested interpretation has practical relevance to the Award's implementation, with regard to both the implementation of the Arbitration Agreement in the Contract of 2 May 1998 in accordance with sub-paragraph 133(5) of the Tribunal's award and the implementation of sub-paragraph 133(4) of the Tribunal's Award ordering termination of the Jordanian judicial proceedings on the substance of the ongoing dispute over Dike No. 19.

B. The Tribunal's Findings on Jordan's Application for Interpretation

39. The Tribunal will not comment on the various, conflicting interpretations which representatives of the parties expressed after the issuance of the Award which only confirm that there is a need for authoritative interpretation of the Award. That is a task assigned to the Tribunal by the Washington Convention.

40. The Tribunal has some difficulty in seeing how its Award could be misunderstood. The Tribunal's Award must, of course, be read as a whole. After rejecting, on procedural and substantive grounds, the claims of denial of justice, as explained above, the Tribunal found that the retroactive application of Article 51 of the new Jordanian Arbitration Law by the Jordanian Court of Appeal, which purported to

extinguish *the arbitration clause* in the Contract of 2 May 1998, was unlawful.⁶ The Tribunal then turned “to the question of adequate and effective relief in reparation of the unlawful act committed by Jordan in the circumstances.”⁷ It then quoted the universally acknowledged standard of the *Chorzow Factory* to the effect that “reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”⁸ The situation to be re-established was the *status quo ante*, specifically, the arbitral clause. The only way of effecting that was by negating, as a matter of international law, the mandatory extinguishment of the Arbitration Agreement between APC and ATA that occurred by operation of the last sentence of Article 51 of the Jordanian Arbitration Law. This necessarily resulted in the restoration of the Arbitration Agreement *in toto*.

41. Indeed, the Tribunal had no alternative under the *Chorzow* standard but to restore the *status quo ante*, which could only be accomplished by reviving the arbitration clause in the Contract of 2 May 1998. To have fashioned a different arbitration clause, for example, one allowing only one of the parties to bring claims, would have been beyond its competence. Had the Tribunal even tried to do so, it would have committed an *excès de pouvoir*.

42. It follows that the future resolution of the Dike No. 19 dispute between APC and ATA is to be governed by the Arbitration Agreement *in toto*. Sub-paragraph 133(5) of the Tribunal’s Award is perfectly clear in this regard and means what it says: ATA is

⁶ Award at paragraph 128.

⁷ *Ibid.* at paragraph 129.

⁸ *Ibid.* quoting *The Factory at Chorzow Case*, 1928 P.C.I.J. No. 13.

entitled to proceed to arbitration in relation to the Dike No. 19 dispute in accordance with the terms of the Arbitration Agreement set forth in the Contract of 2 May 1998 (emphasis added).

43. Conversely, the Award cannot be said to mean something it did not say; the Award did not say that APC was barred from exercising rights flowing from the restored Arbitration Agreement. It is clear from the Tribunal's application of the *Chorzow* standard in its Award that the Arbitration Agreement was restored *in toto*, and that APC, like ATA, is accordingly entitled to exercise any and all rights conferred by the Arbitration Agreement. Any other interpretation is a misreading of the Tribunal's reasoning and conclusions in its Award.

44. The Tribunal recalls that ATA, in its Request for Provisional Measures, raised sub-paragraph 133(4) of the Award, and Jordan itself, as part of its Application, has indicated that its requested interpretation is necessary before it can proceed to comply with sub-paragraph 133(4) of the Award. The Tribunal will thus address this sub-paragraph of its Award, which is equally clear and means what it says. The Tribunal ordered "that the ongoing Jordanian court proceedings in relation to the Dike No. 19 dispute be immediately and unconditionally terminated, with no possibility to engage further judicial proceedings in Jordan or elsewhere on the substance of the dispute". Both Jordan and ATA must comply with the Tribunal's order "immediately and unconditionally".

45. In addition, the Tribunal notes that sub-paragraph 133(4) of the Award bars any further judicial proceedings in Jordan or elsewhere on the substance of the dispute.

Consequently, this is without prejudice to the procedural role which the Jordanian courts may be required to play, either as *lex arbitri* or simply at the stage of enforcement, in order to supervise and ensure the implementation of the Arbitration Agreement at issue depending on what the parties will agree as to the seat of the arbitration in accordance with the Arbitration Agreement.

C. The Tribunal's Findings on ATA's Request for Provisional Measures

46. In view of the Tribunal's present Decision on Interpretation, ATA's Request for Provisional Measures has become moot.

D. Costs

47. The Tribunal rejects ATA's request for costs and decides that each party shall bear its own legal costs in respect of the Jordan's Application and the ATA's Request.

48. Each party shall pay one half of the Tribunal's fees and expenses as well as ICSID charges.

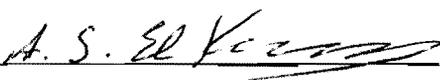
E. Final Remarks

49. Finally, the Tribunal notes, for the record, that in reaching the present Decision on Interpretation, it disregarded the letter of 11 January 2011 from Jordan to the Secretary-General of ICSID.

IV. DECISION

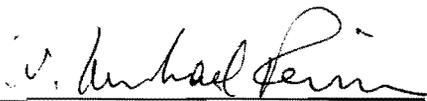
50. For the foregoing reasons, the Tribunal decides:

1. The Respondent's Application is allowed and its interpretation of sub-paragraph 133(5) of the Tribunal's Award is confirmed.
2. The Claimant and the Respondent must comply with sub-paragraph 133(4) of the Tribunal's Award "immediately and unconditionally".
3. In view of the preceding sub-paragraph, the Claimant's Request for Provisional Measures is moot.
4. Each party shall pay its own legal costs and one half of the Tribunal's fees and expenses as well as ICSID charges.



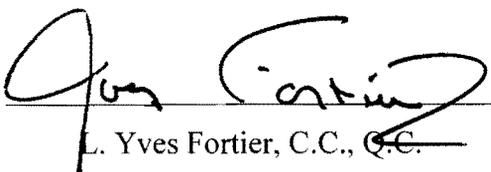
Professor Dr. Ahmed Sadek El-Kosheri

Date: 24 February 2011



Professor W. Michael Reisman

Date: 28 February 2011



President

Date: 17 February 2011