

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the proceedings between

ATA CONSTRUCTION, INDUSTRIAL AND TRADING COMPANY
(CLAIMANT)

- and -

THE HASHEMITE KINGDOM OF JORDAN
(RESPONDENT)

(ICSID Case No. ARB/08/2)

AWARD

Members of the Tribunal

Mr. L. Yves Fortier, C.C., Q.C., President
Professor Dr. Ahmed Sadek El-Kosheri, Arbitrator
Professor W. Michael Reisman, Arbitrator

Secretary of the Tribunal

Ms. Aïssatou Diop

Assistant to the Tribunal

Ms. Renée Thériault

Representing the Claimant

Mr. Robert G. Volterra
Mr. Stephen Fietta
Ms. Joanna R. Dingwall
Mr. Hussein Haeri
Latham & Watkins LLP

Professor Dr. Ziya Akinci
Akinci Law Office

Representing the Respondent

Mr. Allan B. Moore
Mr. Peter D. Trooboff
Mr. Donald J. Ridings
Mr. Adam M. Smith
Mr. James M. Smith
Covington & Burling LLP

Mr. Rabie' M. Hamzeh
Advocate

Date of Dispatch to the Parties: May 18, 2010

TABLE OF CONTENTS

I.	PROCEDURE	1
A.	Registration of the Request for Arbitration	1
B.	Constitution of the Tribunal and Commencement of the Proceeding	2
C.	Written and Oral Phases of the Proceeding	5
II.	FACTUAL BACKGROUND	8
A.	Introduction.....	8
B.	The Final Award	10
C.	The Amman Court of Appeal Proceedings.....	12
D.	The Court of Cassation Proceedings	14
III.	RELEVANT LEGAL SOURCES.....	21
A.	The Treaty	21
B.	The Jordanian Civil Code	23
C.	The Contract.....	24
D.	The Jordanian Arbitration Law	25
IV.	THE RESPONDENT’S JURISDICTIONAL OBJECTIONS	25
A.	The Respondent’s Position.....	25
B.	The Claimant’s Position	30
V.	THE CLAIMANT’S CLAIMS.....	32
A.	The Claimant’s Position	32
B.	The Respondent’s Position.....	44
VI.	THE TRIBUNAL’S ANALYSIS.....	52
A.	The Tribunal’s Findings on Jurisdiction	52
B.	The Tribunal’s Findings on the Merits.....	62
VII.	AWARD.....	67

THE TRIBUNAL

Composed as above,

After deliberation,

Makes the following Award:

I. PROCEDURE

A. Registration of the Request for Arbitration

1. On 14 January 2008, the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) received a Request for Arbitration (the “Request”) from ATA Construction, Industrial and Trading Company (“ATA” or the “Claimant”) against the Hashemite Kingdom of Jordan (“Jordan” or the “Respondent”). The same day, the Centre acknowledged receipt of the Request and transmitted a copy to the Respondent.

2. The Claimant is a construction company constituted on 21 October 1983, under the laws of Turkey, with registration number 197818 dated 16 November 2007, issued by the Istanbul Chamber of Commerce, Department of Commercial Registry and Registration. ATA was founded by three other Turkish construction companies, Seri İnşaat or Seri Construction Ltd., Palet İnşaat or Palet Construction Ltd., and Enerji-Su İnşaat or Enerji-Su Construction Ltd., with experience as contractors in road, railroad, tunnel, industrial building, irrigation and dam projects.

3. The Request was brought under 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 Convention on the

Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”).

4. The Claimant is represented by Mr. Robert Volterra, Mr. Stephen Fietta, Ms. Joanna R. Dingwall and Mr. Hussein Haeri of the law firm of Latham & Watkins LLP and by Dr. Ziya Akinci and Ms. Yasmin Cetinel of the Akinci Law Office. The Respondent is represented by Mr. Rabie’ Hamzeh of Amman, Jordan and by Messrs. Allan B. Moore, David A. Shuford, and Adam Smith of the law firm of Covington & Burling LLP.

5. On 28 February 2008, the Secretary-General registered the Request pursuant to Article 36(3) of the ICSID Convention and Rules 6(1)(a) and 7 of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the “Institution Rules”). The same day, the Secretary-General dispatched the Notice of Registration to the parties, inviting them to proceed as soon as possible with the constitution of the arbitral tribunal, in accordance with Articles 37 to 40 of the ICSID Convention.

B. Constitution of the Tribunal and Commencement of the Proceeding

6. The Claimant noted in its Request that the parties had not agreed any provisions regarding the number of arbitrators or method of their appointment. Thus, under Rule 2(1)(a) of the Rules of Procedure for Arbitration Proceedings (the “Arbitration Rules”), the Claimant proposed that the arbitral tribunal consist of three arbitrators, one appointed by each party and the third, *i.e.* the presiding arbitrator, appointed by agreement of the parties. The Claimant invited the Respondent to proceed under Arbitration Rule 2(1)(b)

for purposes of responding to the Claimant's proposal regarding the constitution of the arbitral tribunal.

7. By letter dated 21 April 2008, the Respondent agreed to the Claimant's proposal regarding the number of arbitrators and the method of appointing the two party-appointed arbitrators, but rejected the Claimant's proposal on the method of appointing the presiding arbitrator. Instead, the Respondent suggested that the presiding arbitrator be appointed by the two party-appointed arbitrators in consultation with their respective appointing party. The Respondent further proposed a modification of the timeline regarding the constitution of the arbitral tribunal.

8. By letter dated 23 April 2008, the Claimant rejected the Respondent's counter-proposal regarding the method of appointing the presiding arbitrator and new time limits for constituting the arbitral tribunal. The next day, the Respondent invited discussions between the parties for the purpose of reaching an agreement.

9. By letter dated 30 April 2008, the Claimant informed the Centre that it was invoking Article 37(2)(b) of the ICSID Convention because 60 days had elapsed since the registration of the Request and the parties had not reached an agreement regarding the constitution of the arbitral tribunal.

10. By joint letter dated 27 May 2008, the parties informed the Centre that following communications in accordance with Arbitration Rule 3(1), the Claimant had elected to appoint Professor Dr. Ahmed Sadek El-Kosheri and the Respondent had elected to appoint Professor W. Michael Reisman. The parties indicated, by the same letter, that they had not agreed on a presiding arbitrator.

11. On 29 May 2008, the Claimant notified the Centre that it was invoking Article 38 of the ICSID Convention because 90 days had elapsed since the registration of the Request and the parties had not agreed on a presiding arbitrator.

12. The same day, without objecting to the Claimant's request that the Chairman of the Administrative Council designate the presiding arbitrator, the Respondent communicated its wish that (1) the parties endeavour to reach an agreement on a presiding arbitrator, and (2) the Chairman of the Administrative Council allow a reasonable opportunity for the parties to pursue discussions in this regard.

13. By way of reply, the Centre informed the parties on 30 May 2008 that if they did not confirm that they were engaged in meaningful discussions regarding the appointment of the presiding arbitrator by 6 June 2008, the Centre would proceed to make the appointment in accordance with the relevant provisions of the ICSID Convention and Rules, and pursuant to the normal procedures of the Centre.

14. On 4 June 2008, the parties jointly informed the Centre that they were appointing Mr. L. Yves Fortier, C.C., Q.C., to serve as presiding arbitrator.

15. Professors Reisman and Dr. El-Kosheri accepted their appointments on 1 and 2 June 2008, respectively, and Mr. Fortier accepted his appointment on 11 June 2008.

16. On 12 June 2008, the Centre notified the parties that the arbitral tribunal was deemed to be constituted (hereinafter the "Tribunal") and the proceeding to have begun on that day. The Centre also informed the parties and the Tribunal that Mr. Ucheora Onwuamaegbu, Senior Counsel, would serve as Secretary of the Tribunal. Mr.

Onwuamaegbu was replaced as Secretary of the Tribunal by Ms. Aïssatou Diop on 26 September 2008.

C. Written and Oral Phases of the Proceeding

17. The First Session of the Tribunal was held on 29 July 2008 in London, United Kingdom.

18. In advance of the First Session, the Secretary of the Tribunal circulated a provisional agenda, in response to which the parties submitted a joint statement on 25 July 2008, agreeing upon most items of the said agenda.

19. At the First Session, the parties confirmed their agreement that the Tribunal had been properly constituted, and that Ms. Renée Thériault, an associate of the Presiding arbitrator, would serve as its Assistant.

20. The Minutes of the First Session, as signed by the President and Secretary of the Tribunal, are dated 11 August 2008.

21. In accordance with the Minutes of the First Session, the parties filed their written pleadings following the schedule below:

- the Claimant's Memorial on the Merits dated 24 October 2008;
- the Respondent's Memorial on Jurisdiction and Counter-Memorial on the Merits dated 13 February 2009;
- the Claimant's Reply on the Merits and Counter-Memorial on Jurisdiction dated 10 April 2009;
- the Respondent's Reply on Jurisdiction and Rejoinder on the Merits dated 5 June 2009; and

- the Claimant's Rejoinder on Jurisdiction dated 3 July 2009.

22. On 20 August 2009, 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. The teleconference was audio-recorded.

23. On 5-9 October 2009, the Tribunal held a hearing on jurisdiction and merits at the World Bank headquarters in Washington, D.C. (the "Hearing"). The following persons attended the Hearing:

On behalf of the Claimant:

- Mr. Nurhan Motugan of ATA Construction, Industrial and Trading Co.;
- Mr. Robert Volterra, Mr. Stephen Fietta, Ms. Joanna Dingwall, Mr. Hussein Haeri, Ms. Angela Angelovska-Wilson and Mr. Oscar Price of Latham & Watkins LLP; and
- Ms. Yasmin Cetinel of Akinci Law Office.

On behalf of the Respondent:

- His Excellency Prince Zeid Ra'ad Zeid Al-Hussein, Mr. Mahmoud D. Hmoud, and Mr. Samer Dabbas of the Hashemite Kingdom of Jordan;
- Dr. Mahmoud A. Tabbal of the Arab Potash Company;
- Mr. Rabie' Hamzeh as counsel and witness; and
- Mr. Allan B. Moore, Mr. Peter D. Trooboff, Mr. James M. Smith, Mr. Adam M. Smith, Mr. Donald Ridings, Ms. Maggie J. Poertner, and Ms. Erin Kelly of Covington & Burling LLP.

24. The following witnesses were examined by the parties:

By the Claimant:

- Mr. Rabie' Hamzeh, the Respondent's fact witness; and Dr. Khaled El Shalakany, the Respondent's expert witness.

By the Respondent:

- Mr. Adib Habayeb, the Claimant's fact witness; and Dr. Mosleh Al'tarawneh, the Claimant's expert witness.

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

26. On 3 December 2009, the parties filed simultaneous post-hearing briefs. On 5 February 2010, the parties filed a first round of simultaneous submissions on costs, and on 26 February 2010, they filed a second round of simultaneous submissions on costs.

27. On 3 May 2010, the Tribunal declared the proceedings closed in accordance with Rule 38(1) of the ICSID Arbitration Rules.

28. The Tribunal wishes to acknowledge the dedication and professionalism of counsel for both the Claimant and the Respondent who have assisted the Tribunal throughout this arbitration.

II. FACTUAL BACKGROUND

A. Introduction

29. In order to fully understand the Tribunal's analysis and findings, it is necessary to set out at some length the factual matrix of this case. The Tribunal will now proceed to do so.

30. In brief, this arbitration concerns the validity of the annulment by the Jordanian courts of an arbitral award rendered in favour of the Claimant – a Turkish company – following a dispute arising from the collapse of a dike constructed by the Claimant for the Arab Potash Company (“APC”), an entity based in Jordan and, at the time the arbitral award was issued, controlled by the Respondent.

31. It is common ground between the parties that the Claimant was engaged by APC to construct a dike at a site on the Dead Sea pursuant to a FIDIC form contract entered into on 2 May 1998 (the “Contract”). The Contract, the Tribunal notes, is governed by the laws of Jordan.

32. Upon completion of the construction by the Claimant, the dike was handed over to APC, who proceeded to fill it with water. During the filling process, a section of the dike collapsed. A dispute arose under the Contract between the Claimant and APC as to which entity was responsible for the collapse.

33. APC commenced FIDIC arbitration proceedings against the Claimant in accordance with the arbitration agreement under Clause 67 of the Contract (the “Arbitration Agreement”), and the Claimant brought a counterclaim in respect of sums owing under the Contract. As set forth in more detail below, the tribunal constituted in

accordance with the Contract (the “FIDIC Tribunal”) issued its Final Award on 30 September 2003 (the “Final Award”), exonerating the Claimant from any liability for the collapse and dismissing all of APC’s claims. It upheld, in part, the Claimant’s counterclaim and awarded compensation to the Claimant. The Tribunal notes that the Final Award was a majority Award and that it was accompanied by a dissenting opinion, also dated 30 September 2003.

34. At this juncture, the Tribunal notes that it is common ground between the parties that when the Contract was concluded in 1998, the Government of Jordan held a majority interest in APC. On 16 October 2003, Jordan sold nearly one-half of its 52.883% interest in APC to a Canadian company.

35. On 29 October 2003, APC applied to the Jordanian Court of Appeal to have the Final Award annulled under the Jordanian Arbitration Law. As described in more detail below, the Jordanian Court of Appeal decided to annul the Final Award and to extinguish the arbitration agreement between the Claimant and APC.

36. As also described in more detail later in this Award, the Claimant appealed to the Jordanian Court of Cassation, which upheld the Court of Appeal’s judgment on 16 January 2007.

37. It is against this background that the Claimant instituted the present ICSID proceeding alleging that the Respondent has acted in violation of the BIT which, although entered into on 2 August 1993, only came into force in Jordan on 23 January 2006. The alleged violations of the Treaty include the unlawful expropriation of the Claimant’s claims to money and rights to legitimate performance under the Contract and the Final

Award, as well as the failure to accord fair and equitable treatment to its investment, *inter alia* by way of serious and repeated denials of justice by the Jordanian courts.

B. The Final Award

38. In the Final Award, the FIDIC Tribunal summarised as follows the four core issues that it had to determine:

- Issue No. 1 was described by the arbitrators as “The Applicable Article(s) of the Jordanian Civil Code”. The FIDIC Tribunal considered that this issue had to be resolved first as “it identifies the appropriate legal parameters within the Articles of the Jordanian Civil Code that were pleaded by the Parties and applied to the facts of this case”.
- Issue No. 2 was the issue of supervision. The FIDIC Tribunal characterised this as “Who was entrusted with supervising the construction of Dike 19? Was it [APC’s] appointed ‘Engineer’ or was the supervision entrusted to Gibb, the Designers?”
- Issue No. 3 was the issue of liability, which the FIDIC Arbitral Tribunal considered as follows: “Upon whom should the responsibility and liability of the collapse of the Dike be attached and is the collapse the result of an act or omission by any of the Parties to the Contract?”.
- Issue No. 4 was the issue of quantum. The FIDIC Tribunal summarized the issue as “To what extent are the Parties responsible and liable to each other in respect of the sums that have been claimed by them in this arbitration?”.

39. In respect of issue No. 1, APC argued that Article 788 of the Jordanian Civil Code applied to the dispute, with the result that ATA would be strictly liable if APC demonstrated simply that the parties had entered into a contract for the construction of Dike No. 19 and that the dike had not been built in a manner that fit its purpose. ATA, on the other hand, contended that joint liability under Article 788 of the Civil Code would only arise if it had worked under the supervision of Gibb, the designer of the dike.

Rather, ATA submitted that it had worked under the supervision of the Engineer appointed by APC. As a result, the applicable provision of the Civil Code was Article 789, which was designed to cater for the situation where the “supervisors” were not the “designers”. Under Article 789, each of the contractor and the designer would be liable towards APC “only for his share of the damage”. In other words, to use the terms of Article 789, ATA would be liable only for “defects in execution”, if any.

40. On this issue, the FIDIC Tribunal concluded as follows:

Having carefully considered the text of Article 788 and the submissions made by the Parties in this connection, the Arbitrators do not agree with [APC’s] interpretation of Article 788 because the Article clearly and plainly states that it applies to a fact situation where the supervision is conducted by the engineer who had designed the structure.

41. The FIDIC Tribunal then opined that Article 788 applied if the “designer” (*i.e.* Gibb) was the “supervisor”, whereas Article 789 applied in cases where the “supervisor” was an “engineer” other than the “designer”, or the “owner” (*i.e.* APC) itself. The FIDIC Tribunal concluded as follows:

Having carefully considered the above arguments on the various applicable Articles of the Code to this case, the Tribunal finds that the decision must hinge on whether or not “Supervision” was part of the duties of the designer.

42. In respect of issue No. 2, the FIDIC Tribunal found that the supervision under the Contract was the sole responsibility of the engineer appointed by APC.

43. In respect of issue No. 3, the FIDIC Tribunal found that “breach of contract could not be attributed to [ATA] in this case as matters were not under their control”. As noted earlier, APC’s claims accordingly failed, and ATA’s counterclaim was maintained in part.

44. In respect of issue No. 4, the FIDIC Tribunal awarded ATA USD 5,906,828.30 in addition to interest, costs and advocates fees.

45. As previously noted, the Final Award was accompanied by a dissenting opinion which focussed on the identity of the “supervisor” and Article 788 of the Civil Code. The dissenting arbitrator would have accepted APC’s claim and dismissed ATA’s counterclaim. He opined, in part, as follows:

Since the obligation of the Contractor [ATA] and the Engineer is to achieve an end result – to ensure that the structure shall remain safe throughout the liability period, in accordance with the terms and conditions of the contract and in full compliance with the fundamentals of architectural art, hence, any occurrence to the contrary as may result in partial or total collapse or defect affecting the strength and safety of the structure, both by the Contractor [ATA] and the Engineer shall be answerable pursuant to the bylaws under discussion here.

Therefore, it is enough for the Employer [APC] to prove the occurrence of defects or any thereof without the need to prove any mistakes on the part of the Engineer or the Contractor [ATA], since their liability is presumed.

[...]

Accordingly, [APC] were not originally required to submit any evidence on [ATA’s] liability. All that was required of them was to prove that the collapse had occurred, which was not a matter of contention. Refuting, denying and negating such liability is [ATA’s] duty, although [APC] have supplied enough compelling evidence and have established that.

C. The Amman Court of Appeal Proceedings

46. Following the Final Award APC filed on 29 October 2003 an application in the Amman Court of Appeal to annul the Final Award under the Jordanian Arbitration Law. On 24 January 2006, the Court of Appeal issued a judgment annulling the Final Award principally on the basis that the FIDIC Tribunal had made an error in concluding that Article 789 of the Civil Code, upon which the FIDIC Tribunal had based its Final Award, was applicable in the circumstances. Instead, the Court of Appeal concluded that the FIDIC Tribunal should have applied other provisions of the Civil Code (namely, Articles

786 and 788) that would have imposed strict liability on ATA. In the words of the Court of Appeal:

Accordingly the liability of the Contractor [ATA] is there at all times including the absence of trespass or negligence and the exception from this if the cause of the accident could not be avoided (Article 786 mentioned above) i.e. The contractor [ATA] guarantees what results from his work or manufacture whether by his trespass or negligence or not which means he indemnifies the damage in general from trespass or failure or otherwise as long as the damage is a result from the execution of the work whatever was its source.

As for 788 Civil Code which clarified the liability of the Engineer (in the construction contract) who makes the design of the construction as executed by the Contractor under the supervision of the Engineer where the Legislator considers them jointly to compensate the employer for whatever happens during 10 years for the total or partial collapse of what they constructed in addition to any defect that threatens the strength and safety of the building.

Accordingly what was mentioned in this article does not eliminate the liability of the contractor [ATA] in indemnifying what comes out from his execution but the Legislator wanted to give additional security to the owner by joining the liability of the engineer with the liability of the contractor [ATA].

Again our court finds and from its scrutiny of the court file and the evidence submitted therein that GIBB Co. has the main supervisory role on the agreed upon construction between both parties to the litigation. This is reflected in suggesting modifications and revising the daily decisions and allowing the issue of these decisions and any other decisions which are not daily as there was no possibility of taking any decision unless after it being revised and the representatives of the contractor [ATA] were aware of these issues through their meetings with the representative of GIBB. In addition to that it was GIBB who allowed the appointed Engineer from APC to issue the orders to continue the work or variations.

From all of this, we find that GIBB – and by agreement of both parties to the action – was the actual consultant since its work was the actual supervision on every piece of work in the project in addition to maintaining the design i.e. it was carrying out the actual supervision with all what this word means.

As for the liability of the employer and as we find that the construction subject matter of the contract which represent the construction of a usable Dike and that the execution requires a technological, technical and scientific experience which we find is not available in the employer who is considered a layman and has no experience to construct the Dike which leads that he is not responsible for the construction of the Dike.

From all this, we find that the majority arbitration award which is appealed based its award on article 789 of the Civil Code which we find that it does not apply on the present court action and that the majority of the arbitrators failed to put in

gear article 786 of this law which means that the award appealed shelved the application of the agreed law on the subject matter which constitute that these grounds for the appealed award are valid in accordance with article 49/a-4 of the prevailing arbitration law and require setting it aside.

47. Based on the above, the Court of Appeal thus decided to

set aside the appealed award issued by the majority of the arbitration tribunal and adjudge of its nullity and at the same time dismiss the arbitration agreement concluded between the parties to the action.

D. The Court of Cassation Proceedings

48. After the Court of Appeal decision, both ATA and APC filed recourses for annulment before the Court of Cassation. ATA submitted to the Court:

- (i) that the Court of Appeal had substantially erred in annulling the Final Award on the basis of Article 49(a)(4) of the Jordanian Arbitration Law;
- (ii) that the Court of Appeal had substantially erred in purporting to re-examine facts and evidence and in placing so much reliance on the dissenting award as a basis for its findings;
- (iii) that the Court of Appeal had acted in a contradictory and unfair manner by effectively barring the parties from addressing issues of fact and evidence in their submissions, only subsequently to reverse the FIDIC Tribunal's findings of fact in its judgment;
- (iv) that the Court of Appeal had arbitrarily misapplied and misinterpreted the Jordanian Civil Code in a way that contravened the legislature's intention, legal logic and applicable Court of Cassation precedents.

49. APC, on the other hand, requested that the Court of Cassation find that the Court of Appeal had erred in upholding parts of the Final Award as final and not subject to challenge before the Court of Cassation.

50. On 16 January 2007, the Court of Cassation delivered its decision. Firstly, the Court of Cassation found that there was no “contradiction” in the decision of the Court of Appeal:

[T]he Court [of Appeal] did not endorse / uphold any portion of the Arbitral Award, but rather nullified it, and its pronouncement that its decision vis-à-vis the aforementioned dismissed grounds is final has no basis in law and does not affect the final Decision it has reached in quashing the Arbitral Award passed by majority.

51. The Court of Cassation therefore dismissed ATA’s recourse (and, in doing so, also dismissed APC’s recourse in this regard), by declaring that the Court of Appeal’s findings as regards the finality of the Final Award were not, in any event, dispositive and had no effect on its ultimate decision.

52. Secondly, in relation to the grounds of appeal advanced by ATA, the Court of Cassation made the following findings:

With respect of the Second and Third reasons that the Court of Appeal has erred when it exceeded its jurisdiction prescribed in Article 49(a)(4) of the Arbitration Law, in that after finding that the arbitrators have applied provisions of Jordanian Law, it nevertheless proceeded to examine issues that are essentially factual and legal and relate to the case’s facts and evidence and others that are not included in the Award but rather in the Dissenting Opinion.

In this regard, we find that pursuant to Article 67 of the Contract concluded between the parties, both parties have agreed to refer any dispute arising between them in connection with the Contract to a trilateral Arbitral Tribunal, whereby each Party appoints an arbitrator while the third arbitrator is appointed by agreement of both Parties. They have also agreed that the applicable law is Jordanian law in addition to the Contract’s terms and conditions.

And whereas the Claimant “the Respondent” has submitted, in the course of marshalling its grounds to nullify the Arbitral Award, amongst which the arbitrators have excluded in their Award the application of the agreed upon Jordanian Law, thus requiring the Court of Appeal to ascertain the extent of the application of the provisions of the Jordanian Civil Code appertaining to contracts for independent works. This could be achieved by examining the facts and evidence and the deductions in order to determine the party with whom

liability for the defects rests pursuant to the provisions of Article 785, 786, 788 and 789 of the Jordanian Civil Code.

And since the Court of Appeal in its capacity as a court of fact has concluded that the Arbitral Tribunal, while it has apparently applied provisions of the Jordanian Civil Code appertaining to contracts for independent works, it has nevertheless, (in practice) excluded those provisions in light of the facts it has deduced and which are gleaned from the file, which point out the Appellant's joint liability with the designer and supervisor for the construction of Dike 19.

And whereas the Court of Appeal's Decision has its justifications in the case's file, the conclusion arrived at does not constitute an overreaching of the provision of Article 49(a)(4) of the Arbitration Law no. 31 of 2001, but rather an application thereof, which warrants that these two grounds be dismissed.

53. In addition, the Court of Cassation concluded that ATA had been free to present evidence to the Court of Appeal and must accept the consequences of having chosen not to do so.

54. Finally, the Court of Cassation concluded as follows:

[W]e find that if the Arbitral Award was upheld by the Court of Appeal, it would have been duty bound to order its enforcement, and said decision would have been final pursuant to Article 51 of the Arbitration Law no. 31 of 2001. However, if the Court's decision was to nullify the Award, said decision is subject to challenge within thirty days following the date of notification of the Decision. The final decision nullifying the Award results in extinguishing the arbitration agreement.

In the case before us, the Court of Appeal has determined that the Arbitral Award was in contravention of the provisions of Article 49(1) (4) sic of the Arbitration Law, and accordingly, quashed it and pronounced the extinguishment of the arbitration agreement. This, in effect, amounts to accepting the challenge.

[...]

Accordingly, we decide to dismiss the Appeal submitted by ATA and endorse / uphold the appealed Decision appertaining to nullifying the Arbitral Award and extinguishing the arbitration agreement. [...]

55. Following the Court of Cassation's decision, APC commenced an action against ATA before the Jordanian Court of First Instance, re-asserting its original claims against ATA in relation to the collapse of Dike No. 19. The Tribunal further notes that after the

evidentiary phase of this ICSID proceeding, the Respondent extended an offer to the Claimant to submit the ongoing Dike No. 19 dispute to a new commercial arbitration *in lieu* of proceeding in the Jordanian courts. The Tribunal considers that it is pertinent to its decision to quote the following extracts from the Respondent's offer as described in its letter to the Claimant of 3 November 2009:

In some of its submissions in this matter, Claimant has taken issue with the fact that the Court of Cassation of Jordan extinguished the arbitration agreement between ATA Construction, Industrial & Trading Co. ("ATA") and Arab Potash Company ("APC") in the course of nullifying the majority arbitral award issued on 30 September 2003. By this letter, the Government of Jordan proposes to remove this issue from these proceedings. The Government is confident that any judicial or arbitral tribunal observes fair procedures and does not exclude governing Jordanian law or violate Jordanian public order will issue a valid award in the dispute over Dike No. 19.

The Issue. The contract between APC and ATA provides, in relevant part, that any dispute not otherwise resolved thereunder "shall be finally settled by arbitration conducted in accordance with Jordanian Arbitration Law by a Board of Arbitrators composed of three Arbitrations." Contract No. APC/37/97 ("Contract"), Appendix I, § 67.3 [Ex. R-13]. The Jordanian Arbitration Law provides, in regard to all valid annulments and irrespective of the identity or nationality of the prevailing party in an annulment challenge, that "[t]he final decision nullifying the award results in extinguishing the arbitration agreement." Jordan Arbitration Law, art. 51 [Ex. C-10]. Accordingly, the extinguishment of the APC-ATA arbitration agreement was a legally automatic consequence of the annulment that represents the straightforward recognition of an explicit and transparent statutory provision of general applicability, which involved no exercise of judicial discretion and which (because such extinguishment can only arise in the context of a valid annulment) complies with the terms of the New York Convention. [Ex. C-29].

When parties to a contract select an arbitration law to govern any future dispute, they select such law as it may exist at the time any such disputes arise, at least in regard to the non-derogable provisions of such law. Further, Claimant did not establish, in the course of presenting its case in the present proceedings, that it relied on a "BIT-protected" absence of this "extinguishment" provision when ATA and APC agreed to Jordanian Arbitration Law in their Contract. On the contrary, Claimant expressly argued, during the course of the annulment proceedings, that the current Jordanian Arbitration Law must control and be applied here, including Article 51 explicitly. See ATA Pleading in Case No. 71/2003 (16 Dec. 2003) at 9, 12 [Ex. R-102]; ATA Pleading in Case No. 71/2003 (Sept. 2005) at 144-45, 173 [Ex. R-105].

Because the arbitration agreement between APC and ATA has been extinguished by operation of law, APC has not re-commenced arbitration but has filed suit in the Jordanian courts against ATA for the relief to which it claims it is entitled with respect to Dike No. 19. ATA has appeared and answered that suit; has filed a counterclaim within it; and has not objected (and has waived any objection) to jurisdiction on account of any arbitration agreement. That suit remains pending today.

The Proposal. Notwithstanding the foregoing, APC has communicated the following proposal to the Government, in regard to this “extinguishment” issue and the ongoing suit regarding Dike No. 19 between ATA and APC, and the Government has authorized us to extend this proposal to Claimant:

1. APC is prepared to refer its pending court case against ATA in regard to Dike No. 19, without prejudice and pursuant to Article 10(c) of the Jordanian Arbitration Law, including its contractual claims and any counterclaims that ATA already has asserted in that case, to a new three-member arbitral tribunal, appointed and convened in accordance with an arbitration agreement worded in exactly the same language as Article 67.3 of the Contract. This proposal reflects the result that would obtain, if the final sentence of Article 51 of the Jordan Arbitration Law were not a part of the Jordanian law.

2. In connection with any such new arbitration, ATA and APC would be free, in any commercial arbitration, to present their respective evidentiary showings, to argue their respective views of the facts, and to advance their respective interpretations of controlling Jordanian law, subject in all respects to any apposite or controlling provisions of Jordanian law or decisions of the Jordanian courts, including, without limitation, the judgments of the Court of Appeal and Court of Cassation in APC’s annulment action (Case No. 71/2003 and Case No. 1352/2006, respectively). The entire record of the ATA-APC proceedings to date would be submitted, jointly by the parties, to the new arbitral tribunal for consideration.

3. As ATA and APC have agreed, Jordanian law, including the Civil Code and Arbitration Law, would still apply and would govern the new arbitration, just as they have governed the ATA-APC proceedings to date. See Contract, §§ 5.1, 67.3 [Ex. R-13]. Thus, neither ATA nor APC would forego, as part of this proposal, any of its respective rights under Jordanian law, including, for example, the limited rights to redress provided by Article 49 of the Arbitration Law.

We want to be clear about the purpose and effect of this proposal by APC, insofar as the Government is concerned:

- This proposal is not a settlement proposal by the Government. Rather its purpose is to address and eliminate as a ground of dispute the statutory mandated extinguishment of the ATA-APC arbitration agreement so that the present ICSID Tribunal may focus on the issues that, Respondent believes, properly lie at the heart of the current dispute.

- This proposal is intended to (and would, if accepted) have no effect on any other aspects of the present dispute between Claimant and Respondent that are at issue in this ICSID proceeding.

- This proposal is intended to (and would, if accepted) have no effect on any other matter or dispute involving ATA and APC including, for example, the dispute pending between those two parties over Dike No. 18.

The Government asks that Claimant communicate its position in respect to this proposal, in writing, by no later than November 10, 2009 (5:00 p.m. Washington time). Thereafter, if this proposal has not been accepted, it shall be deemed to have been withdrawn.

The Government conveys this proposal by APC without prejudice to the Government's position that Claimant's challenges to the extinguishment are invalid.

We appreciate your consideration and are hopeful that we may limit the scope of the dispute currently pending for decision, as indicated herein, and thus, resolve this "extinguishment" issue, which Respondent considers an unnecessary distraction.

56. On 10 November 2009, the Claimant declined the Respondent's above-quoted offer as follows:

By way of your letter, the Respondent proposes to "remove" the issue of extinguishment of the arbitration agreement between the Claimant and APC from the present ICSID proceedings. Your letter indicates that the Respondent considers the extinguishment of the Claimant's arbitration agreement an "unnecessary distraction" in this proceeding.

The extinguishment of the Claimant's arbitration agreement with APC is anything but an "unnecessary distraction". Alongside the unlawful annulment of the Claimant's Final Award, the extinguishment of the Claimant's arbitration agreement sits at the very heart of the Respondent's violations of the Turkey-Jordan BIT. Each of these issues forms a fundamental part of the factual matrix that has given rise to the Claimant's treaty complaint. As the Claimant observed at the very outset of its Reply on the Merits and Counter-Memorial on Jurisdiction, "the Final Award was annulled, and the Claimant's arbitration agreement was terminated, in a way that was clearly improper and discreditable by international standards".

As a responsible litigant, the Claimant would welcome any genuine good faith proposal by the Respondent to resolve the present dispute. However, the proposal set out in your letter is plainly nothing of the kind. All of the surrounding circumstances indicate that the proposal constitutes a cynical attempt by the Respondent (and its alter ego in this proceeding, APC) to manipulate the outcome of this proceeding so as to achieve what the Respondent and APC have wanted to achieve all along: namely, the unlawful expropriation of the

Claimant's Final Award and arbitration agreement and the substitution of the Final Award with a new decision upholding APC's substantial unfounded claims against ATA in connection with the collapse of Dike 19.

[...]

Perhaps most revealing of all, your letter sets out a proposal that ATA could not possibly accept without undermining the basic rationale of its treaty complaint. To put such a proposal forward under the guise of tidying up a minor distraction for the present arbitration defies credibility. The issue and the underlying facts are anything but a minor distraction and, if they were, the Respondent would obviously not be seeking to remove them from the Tribunal's consideration.

ATA's treaty complaint relates to, *inter alia*, the unlawful taking by the Respondent of both an arbitral award and an arbitration agreement. The Respondent's proposal would not compensate the Claimant for either of these harms. The Respondent's proposal would not restore the Claimant's Final Award (which awarded it compensation and rejected APC's claim for compensation). Nor would it reinstate the Claimant's fundamental right to have its dispute with APC fully and finally determined by way of arbitration. Rather, the Respondent's proposal would leave the Claimant without its Final Award and, in addition, facing a rigged arbitration proceeding by the terms of which it could not possibly prevail. But, even if it could prevail, that would not compensate the Claimant for damage that it has suffered.

[...]

The Claimant accordingly rejects the proposal set out in your letter.

57. It is against this background that, in the present proceeding, the Respondent maintains that the Tribunal does not have jurisdiction over the Claimant's claims.

58. Before addressing the parties' respective contentions regarding jurisdiction, the Tribunal has decided to provide citations to certain articles of the Treaty, the Jordanian Civil Code, the Contract and the Jordanian Arbitration Law which recur and are often referred to in the present Award to facilitate the reading and the understanding of its Award.

III. RELEVANT LEGAL SOURCES

A. The Treaty

59. The following provisions of the Treaty are noted:

**Agreement Between
the Hashemite Kingdom of Jordan
and the Republic of Turkey
Concerning
the Reciprocal Promotion and Protection of Investments**

The Hashemite Kingdom of Jordan and the Republic of Turkey, hereinafter called the Parties.

Desiring to promote greater economic cooperation between them, particularly with respect to investment by investors of one Party in the territory of the other Party,

Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of capital and technology and the economic developments of the Parties,

Agreeing 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, and

Having resolved to conclude an agreement concerning the encouragement and reciprocal protection of investments,

Hereby agree as follows:

ARTICLE I
Definitions

For the purpose of this Agreement;

[...]

2. (a) The term “investment”, in conformity with the hosting Party’s laws and regulations, shall include every kind of asset in particular, but not exclusively:

- (i) shares, stocks or any other form of participation in companies
- (ii) returns reinvested, claims to money or any other rights to legitimate performance having financial value related to an investment,
- (iii) movable and immovable property, as well as any other rights in rem such as mortgages, liens, pledges and any other similar rights,

- (iv) copyrights, industrial and intellectual property rights such as patents, licenses, industrial designs, technical processes as well as trademarks, goodwill, know-how and other similar rights,
- (v) business concessions conferred by law or by contract including concessions to search for, cultivate, extract or exploit natural resources on the territory of each Party as defined hereafter.

[...]

ARTICLE II
Promotion and Protection of Investments

1. Each Party shall permit in its territory investments, and activities associated therewith, on a basis no less favourable than that accorded in similar situations to investments of investors of any third country, within the framework of its laws and regulations.
2. 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.

[...]

ARTICLE III
Expropriation and Compensation

1. 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 II of this Agreement.
2. Compensation shall be equivalent to the real value of the expropriated investment before the expropriatory action was taken or became known. Compensation shall be paid without delay and be freely transferable as described in paragraph 2 Article 4.
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.

[...]

ARTICLE IX
Entering into Force

1. This Agreement shall enter into force on the date on which the exchange of instruments of ratification has been completed. 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. It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.
2. Either Party may, by giving one year's written notice to the other Party, terminate this Agreement at the end of the initial ten year period or at any time thereafter.
3. This Agreement may be amended by written agreement between the Parties. Any amendment shall enter into force when each Party has notified the other that it has completed all internal requirements for entry into force of such amendment.
4. With respect to investments made or acquired prior to the date of termination of this Agreement and to which this Agreement otherwise applies, the provisions of all of the other Articles of this Agreement shall hereafter continue to be effective for a further period of ten years from such date of termination.

B. The Jordanian Civil Code

60. The following provisions of the Jordanian Civil Code are noted:

**DIVISION THREE
CONTRACTS OF WORK
CHAPTER ONE
CONTRACT FOR INDEPENDENT WORK**

[...]

1. Obligations Of The Contractor

[...]

Section (785): The contractor shall perform the work in accordance with the conditions of the contract, and if it shall be discovered that he performs what he undertook in a defective manner or contrary to the conditions the employer may apply for the immediate rescission of the contract if the repair of the work is impossible, but if the repair of the work is possible the employer may ask the contractor to comply with the contract conditions and repair the work within a reasonable time, and if the time expires without effecting the repair the employer may apply to the Court for the rescission of the contract or permission for him to request another contractor to complete the work at the expense of the first contractor.

Section (786): The contractor shall be liable for the damage or loss that results from his work or manufacture whether by his trespass or negligence or otherwise and liability shall not be due if the cause is an accident which could not be avoided.

Section (787):

1. If the contractor's work shall have some effect on the property he may detain it until he receives the remuneration due, and if it shall be demolished while in his possession before the payment of his remuneration he shall not be liable for damages nor shall he be entitled to remuneration.

2. And if his work shall have no effect on the property he may not detain it until the receipt of remuneration and if he shall do so and it is demolished he shall be liable for extortion.

Section (788):

1. If the contract for independent work shall be for the construction of a building the design of which is to be made by the engineer under whose supervision the contractor is to build, both of them shall be liable to compensate the employer for whatever happens during ten years from the total or partial demolition of the buildings they have constructed or the constructions they have built and for every defect which threatens the strength and safety of the building unless the contract provides for a longer period.

2. Liability for the said compensation shall subsist even if the defect or demolition results from a defect in the land itself or the employer's consent to the building of the defected constructions.

3. The term of ten years shall commence on the date of the taking over of the work.

Section (789): If the engineer's work shall be limited to the making of design without supervision of execution he shall only be liable for the defects in design, and if the contractor shall work under the supervision of an engineer or that of the employer who substituted himself for the engineer he shall not be liable except for the defects in execution and not for the defects in design.

C. The Contract

61. The following provisions of the Contract are noted:

67.2 Arbitration

Delete the existing Sub-Clause 67.3 and substitute as follows:

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.

D. The Jordanian Arbitration Law

62. The following provisions of the Jordanian Arbitration Law are noted:

Article 49(a)(4):

An action for the nullity of the arbitral award shall not be admitted except in any of the following cases: [...] If the arbitral tribunal excluded the application of the law agreed upon by the parties to govern the subject-matter of the dispute.

Article 49(b):

The competent court seized of the action for nullity shall, by its own initiative, nullify the award in respect of what is in its content violating public order in the [Hashemite] Kingdom [of Jordan], or if the subject-matter of the dispute is not capable of being subject to arbitration.

Article 50:

An action for nullity of the arbitral award must be raised within thirty days following the date on which the arbitral award was notified to the party against whom it was rendered; and such action is admissible even if the party invoking the nullity had waived his right to do so before the issuance of the arbitral award.

Article 51:

If the competent court approves the arbitral award, it must decide its execution and such decision is final. If, otherwise, the court decides the nullity of the award, its decision is subject to challenge before the Court of Cassation within thirty days following the date of notifying that decision. The final decision nullifying the award results in extinguishing the arbitration agreement.

IV. THE RESPONDENT'S JURISDICTIONAL OBJECTIONS

A. The Respondent's Position

63. It is the Respondent's position that the Centre lacks jurisdiction *ratione temporis* over the Claimant's claims, and that the Tribunal thus lacks competence to rule upon these claims, for the following reasons:

First, it is well established that, unless a contrary intent appears on the face of the treaty, a bilateral investment treaty (or “BIT”) will not apply to a dispute that has arisen, fully developed, and been extensively pursued before the BIT’s entry into force. Here, the dispute in question had not only had [*sic*] arisen, but had been extensively litigated, in both arbitral and judicial proceedings, for a period of nearly six years before the BIT’s entry into force.

As Claimant has acknowledged, “[t]he Turkey-Jordan BIT entered into force on 23 January 2006.” Cl. Mem., ¶ 99; see also ICSID Database of Bilateral Investment Treaties – Treaties of Jordan, available at icsid.worldbank.org (Exhibit R-5). The record establishes, however, that in September 2000, ATA and APC each gave notice of an intent to commence arbitration, and on 29 October 2003, APC filed its annulment action challenging the arbitral tribunal’s Final Award of 30 September 2003. See Cl. Mem., ¶¶ 33, 66; see also ATA Notice Letter (6 Sept. 2000) (Exhibit R-6); APC Notice Letter (10 Sept. 2000) (Exhibit R-7).

By 23 January 2006, all proceedings in both the arbitration and the annulment action before the Court of Appeal had been concluded, with nothing remaining but the issuance of that Court’s judgment of annulment (which occurred on 24 January 2006, the day following the BIT’s entry into force) and the subsequent appellate proceedings in the Court of Cassation.

By any reasonable assessment, the pertinent dispute had arisen, and the parties in interest (APC and ATA) had fully developed and articulated their respective positions and arguments, long before the Turkey-Jordan BIT’s entry into force on 23 January 2006. All of the material facts and arguments that ATA now seeks to present, except the court judgements themselves, were presented and addressed before the Court of Appeal – albeit without being phrased in the terminology of public international law. ATA’s complaint before this Tribunal is not that the Jordanian courts committed substantively new violations of its (newly created) rights after the BIT entered into force; rather, it is that the Final Award should not have been annulled under the Jordanian Arbitration Law and that Respondent owes ATA the damages that were awarded in the Final Award, plus related relief. In substance, this is the same dispute that was presented to, and fully litigated before, Jordan’s Court of Appeal.

By no reasonable reading of Claimant’s own submissions and description of this dispute can it be said, as ATA now asserts, that “the Claimant’s dispute with the Respondent arose on 16 January 2007 when the Jordanian Court of Cassation delivered the final judgment in the domestic proceedings between the Claimant and APC, thereby annulling the Final Award and extinguishing the arbitration agreement contained in the Contract.” Cl. Mem., ¶ 159. The proceedings in the Court of Cassation represented a *continuation* of the case presented to the Court of Appeal well before 2006, and in substance, a continuation of the original dispute, which began in 2000. The Court of Cassation’s judgement *affirmed* the judgment of the Court of Appeal, on the basis of the same record and in the face of the same substantive arguments. No new or different dispute arose on 16 January 2007 – or at any time after 23 January 2006.

Second, this Tribunal lacks jurisdiction because, by its terms, the Turkey-Jordan BIT “shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.” Jordan-Turkey BIT, art. IX(1) (Exhibit C-1). ATA’s claims are not predicated on any alleged “investment” existing at the time of the Turkey-Jordan BIT’s entry into force, or made or acquired thereafter. On the contrary, ATA’s claims are predicated on its Contract with APC of 2 May 1998, which was executed nearly eight years before the BIT’s entry into force and in connection with which ATA had (a) fully completed its performance and “handed over control” by 9 December 1999, and (b) subsequently obtained a liquidated damages award (as later annulled by the Jordanian courts) on 30 September 2003.

It stretches language and legal reasoning beyond the breaking point to state, on these facts, that Claimant’s interest in the arbitral damages award, which was subject to judicial review for annulment in the ordinary course, constituted an “investment” that “existed” at the time of the Turkey-Jordan BIT’s entry into force on 23 January 2006. On that date, nothing remained of the alleged, underlying “investment;” all that remained was the continuation of ongoing Jordanian court proceedings, which concerned *not* the underlying contract or performance but the legality of the subsequent arbitral award.

If there is jurisdiction *ratione temporis* over ATA’s claims here, then it is difficult to perceive when this jurisdictional limitation ever properly applies. A legal claim presumably never would be barred for temporal reasons, so long as the claimant continues to assert it and phase it in the language of a BIT, or can relate it to an allegedly underlying “investment” even if that investment was made and terminated many years before the applicable BIT’s entry into force. [emphasis in original]

64. More particularly, regarding the Respondent’s first jurisdictional objection to the effect that the BIT does not apply to disputes that predate its entry into force, the Respondent argues as follows:

Many BITs contain clear language that prohibits their application to disputes that predate their entry into force. The Turkey-Jordan BIT contains no express language to this effect. However, ICSID tribunals have consistently held that, in “the absence of specific provision for reciprocity,” it is proper to infer that “disputes that may have arisen before the entry into force of the BIT are not covered.” This approach gives effect to the strong and longstanding presumption against retroactivity that is expressed in the Vienna Convention on the Law of Treaties and embedded in customary international law. Under this settled principle, the Turkey-Jordan BIT does not apply to any dispute that arose before it entered into force, on 23 January 2006.

[...]

Here, ATA does not claim to be seeking retroactive application of the Turkey-Jordan BIT: that is, it does not *expressly* argue that the Turkey-Jordan BIT should be applied to a “dispute” that predated the BIT’s entry into force. Rather, ATA contends that “the Claimant’s dispute with the Respondent arose on 16 January 2007 when the Jordanian Court of Cassation delivered the final judgment in the domestic proceedings between the Claimant and APC, thereby annulling the Final Award and extinguishing the arbitration agreement contained in the Contract.” Cl. Mem., ¶ 159.

It is apparent, however, that a “dispute,” as that term is defined in the ICSID jurisprudence, both existed and had been extensively pursued long before the issuance of the Court of Cassation’s judgement on 16 January 2007. Claimant’s own recital of the facts shows that in September 2000 (*i.e.*, more than five years before the BIT’s entry into force) ATA and APC each gave notice of an intent to commence arbitration, and on 29 October 2003, APC filed its annulment action challenging the arbitral tribunal’s Final Award of 30 September 2003. *See* Cl. Mem., ¶¶ 33, 66; *see also* ATA Notice Letter (6 Sept. 2000) (Exhibit R-6); APC Notice Letter (10 Sept. 2000) (Exhibit R-7).

In these circumstances, it is an understatement to say that the dispute had “crystallized.” It had been extensively litigated long before the BIT’s entry into force on 23 January 2006. By that point, *all* proceedings in both the arbitration and the annulment action before the Court of Appeal had been concluded, with nothing remaining but the issuance of that Court’s judgment of annulment (which occurred on 24 January 2006, the day following the BIT’s entry into force) and the subsequent appellate proceedings in the Court of Cassation.

The question, then, is whether a new and subsequently different “dispute” arose on 16 January 2007, or at any other time after 23 January 2006.

[...]

The same analysis and result apply here, but with greater force. No new or different dispute arose in this case on 16 January 2007 – or at any time after 23 January 2006. The proceedings before the Court of Cassation represented the *continuation* of an ongoing annulment action, which had been initiated more than two years before the BIT’s entry into force in the Court of Appeal. The Court of Cassation’s judgment *affirmed* the judgment of the Court of Appeal, on the basis of the same record and in the face of the same, substantive arguments that the parties had presented to the Court of Appeal, in submissions that were completed before 23 January 2006.

Moreover, Claimant’s argument is not that the Jordanian courts committed substantively new and distinct violations of (newly created) treaty rights after the BIT entered into force. Rather, it is that the Final Award should not have been annulled, under a proper interpretation and application of the Jordanian Arbitration Law, and thus, Claimant is owed the money damages that were granted in the Final Award and related relief. In substance, this is the same dispute that was presented to and fully litigated before the Court of Appeal and then continued, on appeal, before the Court of Cassation.

The Turkey-Jordan BIT was not in effect when ATA made its alleged “investment” or when the dispute at issue in this case first arose and was extensively argued. Like the claimants in *Lucchetti*, ATA had no expectation of legal rights or protection under the BIT when it executed the Contract, when it commenced the Jordanian arbitration, or even when the annulment action was filed (or submitted for decision), and the BIT cannot be applied retroactively to breathe new life into ATA’s claims at this stage. [emphasis in original]

65. On the issue of jurisdiction *ratione materiae*, the Respondent adds:

Plainly, the Jordanian courts are not APC, and the annulment judgments are not the underlying, alleged breaches of contract that were at issue in the APC-ATA arbitration. However, the premise of ATA’s case, as a matter of jurisdiction *ratione materiae*, is that the Contract and ATA’s legal claims arising therefrom (including its alleged rights in the Final Award) must be considered as a whole and that, when viewed together, they qualify as an “investment” within the meaning of the ICSID Convention and the Turkey-Jordan BIT. Further, ATA contends that APC has been “at all material times, under the direction and control of the Respondent” and thus, in effect, is an arm or agent of Respondent. Cl. Mem., ¶ 3; *see id.*, ¶¶ 13-14.

These allegations are essential to ATA’s case, as a matter of jurisdiction *ratione materiae*, because without them, its claims relating to the annulment of the Final Award cannot be said to “arise directly” from an underlying, jurisdiction-conferring “investment,” as the ICSID Convention requires. Accordingly, by Claimant’s own characterization of its case (and necessarily so, for the purposes of its jurisdictional assertions), when ATC and APC arbitrated the original dispute, it was already, in substance, an “investment” dispute between ATA and Respondent. The present dispute, and the underlying annulment action, are but a continuation of that initial dispute, framed in terms of the BIT.

Under no reasonable reading of the Turkey-Jordan BIT can Turkey and Jordan be understood to have consented to ICSID jurisdiction over this dispute, and under no reasonable reading of the facts and its own characterization of its case can ATA claim to have relied upon rights conferred by the BIT when it made its alleged “investment,” arbitrated the dispute, and litigated the annulment action.

66. As for the Respondent’s second jurisdictional objection to the effect that there was no “investment existing” at the time of the BIT’s entry into force or “made or acquired thereafter”, the Respondent contends:

[W]hen Article IX(1) states that the BIT “shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter,” and when a claimant seeks to invoke and rely upon the “bootstrap” provision in Article I(2)(a)(ii) to assert jurisdiction over its claim, it is only reasonable that *both* the derivative “claim to money” or “financial performance”

and the underlying “investment” to which it relates must be “investments existing at the time of entry into force” or “made or acquired thereafter.” Otherwise, the temporal limitation of Article IX(1) has no meaning. A “claim to money” or “financial performance” would always be actionable, provided that the *claim itself* was asserted (or continued to be asserted) after the BIT’s entry into force – and even if the predicate “investment” had long since ceased to exist, as is the case here. Because a claim can always be asserted, continued, or reasserted after a BIT’s entry into force, that reading would provide no temporal restriction at all. [emphasis in original]

B. The Claimant’s Position

67. The Claimant challenges the Respondent’s jurisdictional objections, arguing that they result from the “erroneous conflation of the underlying construction dispute between APC and the Claimant with the investment treaty dispute between the Claimant and the Respondent”. The Claimant contends that the Court of Cassation judgment “crystallised” the present investment treaty dispute and gave rise to its “denial of justice” claim. It submits:

A claim on the international plane based on denial of justice does not arise as a substantive, rather than procedural, matter until the system of national appeals within the State in question has been exhausted. In the present case, this occurred when the Court of Cassation rendered its judgment on 16 January 2007. At that point, a manifestly “new and substantively different dispute” arose between the Claimant and the Respondent. This dispute is not based on liability as a matter of Jordanian law for the collapse of Dike No. 19, as the Respondent seems to believe. Rather, it is based on a violation of the Respondent’s public international law obligations that was effected by the Jordanian courts. The Claimant is entitled to have this dispute resolved by this Tribunal to enforce its rights arising from the Turkey-Jordan BIT. [footnote omitted]

68. More particularly, the Claimant maintains that the Respondent’s jurisdictional objections are “misguided” for the following reasons:

[...] First, as will be demonstrated below, it is clear that there is a juridical distinction between the Claimant’s treaty dispute, which concerns the actions of the Jordanian courts in annulling the Final Award and extinguishing the arbitration agreement, and the underlying domestic dispute concerning attribution of liability for the collapse of Dike No. 19. The Claimant’s treaty dispute with the Respondent did not arise until the Court of Appeal Judgment on 24 January 2006 and did not crystallise until the Court of Cassation delivered its final

judgment on 16 January 2007. Both of these dates were after the entry into force of the Turkey-Jordan BIT.

Secondly, in any event, the application of the Turkey-Jordan BIT is not in fact restricted to disputes that arose after its entry into force, provided that the dispute relates to “investments existing at the time of entry into force.” As established in section IV(B)(ii) below, the Claimant’s dispute with the Respondent relates to an investment existing at the time of entry into force of the Turkey-Jordan BIT.

69. On the specific issue of the definition of “investment” under the BIT, the Claimant maintains that:

The Claimant commenced its investment in relation to Dike No. 19 on 2 May 1998, when it entered into the Contract. The Claimant continued to have an investment in Jordan after the entry into force of the Turkey-Jordan BIT on 23 January 2006. The fact that the Claimant made its initial investment before the BIT entered into force is irrelevant.

The Respondent mischaracterises the Claimant’s investment. At the time the Turkey-Jordan BIT entered into force on 23 January 2006, the Claimant continued to possess legal and contractual rights, whose enforcement had been improperly denied by the Jordanian courts. These rights derived from the Claimant’s investment in Dike No. 19.

The plain meaning of Article I(2)(a) of the Turkey-Jordan BIT covers a broad scope of investments. The definition of the term “investment” therein includes “every kind of asset”, and provides a non-exhaustive list of examples of investment. The object and purpose of the Turkey-Jordan BIT is also furthered by a broad definition and not by a restrictive one.

The broad definition of “investment” contained in Article I(2)(a) of the Turkey-Jordan BIT includes, at I(2)(a)(ii); “returns reinvested, claims to money or any other rights to legitimate performance having financial value related to an investment.”

As demonstrated by the Claimant in its Memorial, the Claimant’s rights arising out of the Contract and the arbitration agreement there set out fall within this wide definition of “investment”. First, it is beyond doubt that the Claimant’s underlying investment in Dike No. 19, which formed the basis of its subsequent legal and contractual claims, qualifies as an “investment” under the Turkey-Jordan BIT. Pursuant to the Dike No. 19 Contract, over the duration of the performance of the contract and beyond, the Claimant made contributions and participated in the risks of the transaction.

Moreover, the Claimant’s investment includes the Final Award itself, which constitutes a claim to money and a right to legitimate performance having financial value related to an investment, for the purposes of Article I(2)(a)(ii). This is consistent with the principle that investments must be examined holistically and not separated into artificial components. Viewing the investment

as a whole, the Claimant's legal and contractual rights under the Contract, as enforced in the underlying arbitration and upheld in the Final Award, cannot be separated from the rest of the Claimant's investment in Jordan. The investment undertaken pursuant to the Dike No. 19 Contract must be taken to include the legal and contractual claims emanating from that contract that are the subject of the Jordanian court cases.

70. Having set forth the parties' respective positions on jurisdiction and subject to its decision on the Respondent's challenge for reasons which will appear later in the present Award, the Tribunal deems it appropriate to turn now to the parties' respective arguments and submissions on the merits of the Claimant's substantive claims in this arbitration.

V. THE CLAIMANT'S CLAIMS

A. The Claimant's Position

1. The Claim that the Respondent Expropriated the Claimant's Investment Contrary to Article III of the BIT

71. The Claimant refers to Article III of the BIT and makes the following submissions:

Article III contains a prohibition against expropriation of investments save, *inter alia*, upon payment of prompt, adequate and effective compensation and in accordance with due process of law. It provides, in pertinent part:

- “1. Investments shall not be expropriated, nationalized or subject, directly or indirectly, to measures of similar effects [*sic.*] 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 II of this Agreement.
2. Compensation shall be equivalent to the real value of the expropriated investment before the expropriatory action was taken or became known. Compensation shall be paid without delay and be freely transferable as described in paragraph 2, Article IV [...].”

Indeed, as the Tribunal will be well aware, the prohibition against expropriation of the property of foreign nationals save in the public interest, on non-arbitrary

and non-discriminatory basis and on payment of prompt, adequate and effective compensation forms a principle of customary international law.

[...]

The Respondent's annulment of the Claimant's Final Award and the extinction of its arbitration agreement with APC constitutes an expropriation of ATA's investment in Jordan. This expropriation does not satisfy the conditions for lawful expropriation contained in Article III of Turkey-Jordan BIT. Therefore, it constitutes a violation of the Turkey-Jordan BIT for which the Respondent is liable to compensate the Claimant.

72. In support of its claim for expropriation, the Claimant argues as follows:

The Respondent failed to satisfy any of the conditions for lawful expropriation under Article III of the Turkey-Jordan BIT.

The Respondent's expropriation of the Claimant's investment did not serve any public purpose. In particular, it did not fulfil any of the public policy objectives that are safeguarded by Article 49 of the Jordanian Arbitration Law. On the contrary, the Court of Appeal noted that all of the arbitration procedures had been correct and in accordance with the law and expressly dismissed any notion that the Arbitral Tribunal had acted improperly or incorrectly. The judgments of the Court of Appeal and Court of Cassation resulted in the arbitrary reversal of a final arbitral award that was completely irreconcilable with the narrow mandate for annulment provided by the Jordanian Arbitration Law.

The Respondent's expropriation of the Claimant's investment was discriminatory. The judgments of the Court of Appeal and Court of Cassation contradicted the consistent practice of the Jordanian courts in refusing annulment proceedings brought in similar circumstances against Jordanian parties on the basis that the Jordanian Arbitration Law does not permit any re-examination of the underlying merits of a dispute. This clear and established principle is confirmed authoritatively in the Court of Cassation's Case No. 201/2006:

“There is a unanimous agreement among jurists and judges that annulment action of an arbitral award is not a contestation by way of an appeal. It does not accommodate the re-examination of the substance of the dispute or the substantive incorrectness of the arbitral award. Further, the Judge hearing the annulment suit has no right to review the merits of the arbitral award to evaluate the accuracy or exactness of the arbitrators' judgment or their rightness or wrongness of the facts or interpretation or application of the law. The application of that is that the judicial review provided for in Article 49 of the Jordanian Arbitration Law has a formal nature as it does not extend to the substance of the dispute and it does not empower the court to supervise the arbitral tribunal's mechanism of interpreting and

applying the law provided that the rules of public policy are not breached.”

The principle that appellate review of arbitral awards is prohibited by the Jordanian Arbitration Law is therefore a settled and uncontroversial issue under Jordanian law. An annulment action is not an appeal:

“Judicial review of awards under [the Jordanian Arbitration Law] is confined to annulment actions on issues of arbitration agreement, procedural fairness, jurisdiction, and public policy. Therefore, any judicial scrutiny of the arbitrators’ substantive decisions on fact or law is not allowed.”

Indeed, the Court of Appeal and Court of Cassation judgments against the Claimant are unique and unprecedented in Jordan: “no other cases in the Jordanian courts have annulled an award under Article 49(a)(4) due to misapplication of the Jordanian law by an arbitral Tribunal.”

The glaring failure of the Court of Appeal to apply Article 49(a)(4) of the Jordanian Arbitration Law seriously violated Jordanian law. The seriousness of the violation is highlighted by the Court of Cassation judgment in Case No. 201/2006 that confirms the proper scope of Article 49(a)(4). The unprecedented nature of the Jordanian Courts’ departure from the settled scope of annulment demonstrates that the Courts’ actions were discriminatory towards the Claimant.

Most importantly and evidently in this case, the Respondent has provided no compensation to the Claimant (let alone prompt, adequate and effective compensation) in respect of the expropriation of the Claimant’s investment. On the contrary, the inevitable consequence of the taking of the Claimant’s investment has been the denial of substantial compensation due under the Final Award.

The Respondent’s expropriation of the Claimant’s investment was inconsistent with due process of law. As detailed more fully in Section IV.C below, the Claimant was denied basic rights before the Court of Appeal and Court of Cassation, including the right to transparent, predictable and consistent court procedures, the right to present evidence and to have evidence duly scrutinized and the right to a decision that upholds the rule of law.

Further, as described in Section IV.C below, the Respondent’s expropriation of the Claimant’s investment was inconsistent with the general principles of treatment provided for in Article II of the Turkey-Jordan BIT, most particularly the MFN standard under Article II(2).

For these reasons, the Respondent’s annulment of the Claimant’s Final Award and the extinction of its arbitration agreement constitute an expropriation of ATA’s investment in Jordan, contrary to Article III of the Turkey-Jordan BIT, for which the Respondent must pay compensation.

2. The Claim that the Respondent Failed to Accord the Claimant's Investment Most Favoured Nation ("MFN") Treatment Contrary to Article II(2) of the BIT

73. The Claimant refers to Article II(2) of the BIT¹ and makes the following submissions:

Article II(2) of the Turkey-Jordan BIT 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.”

It is well established – and has been repeatedly affirmed in international jurisprudence, including investment treaty claims – that a most favoured nation (“MFN”) provision, such as the one contained in Article 11(2) of the Turkey-Jordan BIT, entitles a claimant’s investment to benefit from substantive guarantees contained in other BITs concluded by the host State (in this case, Jordan).

[...]

In particular, as detailed further below, the MFN provision in the Turkey-Jordan BIT entitles the Claimant to rely upon the following substantive protections accorded to the investments of third State nationals under other Jordanian BITs currently in force:

- (a) the duty to accord fair and equitable treatment (e.g., pursuant to the United Kingdom-Jordan BIT);
- (b) the duty to accord treatment is no less favourable than that required by international law (e.g., pursuant to the Spain-Jordan BIT);
- (c) the duty not to impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments (e.g., pursuant to the United Kingdom-Jordan BIT);
- (d) the duty not to hamper, by arbitrary or discriminatory measures, the development, management, maintenance, use, or enjoyment of investments (e.g., pursuant to the Croatia-Jordan BIT); and

¹ The Tribunal notes that although the Preamble to the Treaty expressly refers to the “fair and equitable treatment of investment”, there is no stand-alone “Fair and Equitable Treatment” provision in the body of the Treaty.

- (e) the duty to provide effective means of asserting claims and enforcing rights with respect to investments (e.g., pursuant to the United States-Jordan BIT).

[...]

The Doctrine of denial of justice is of central importance in the present case because: (i) the Respondent is responsible for the conduct of its domestic courts as a matter of international law; (ii) the Respondent is obliged, by virtue of Article II(2) of the Turkey-Jordan BIT, to provide the Claimant's investment with treatment no less favourable than that accorded in similar situations to investments of investors of any third country; (iii) such treatment includes fair and equitable treatment and treatment required by customary international law, by virtue of others of Jordan's BITs; (iv) denial of justice constitutes a violation of both fair and equitable treatment standard and customary international law; and (v) consequently, the denials of justice committed by the Jordanian domestic courts against the Claimant's investment constitute a violation of the Respondent's obligations under Article II(2) of the Turkey-Jordan BIT, in respect of which the Claimant is entitled to relief.

74. In connection with its claim of procedural denial of justice, the Claimant submits:

In the present case, it is clear that the Respondent has violated the Claimant's procedural rights and has not satisfied internationally recognised standards of due process. It has therefore committed a denial of justice. The Court of Appeal arbitrarily re-opened consideration of the underlying facts and merits of the dispute between the Claimant and APC and subsequently proceeded to reverse the Arbitral Tribunal's Final Award. It did so notwithstanding the clear prohibitions against such conduct under the Jordanian Arbitration Law. Further, it did so notwithstanding its preliminary decision of 16 January 2005, which had confirmed, with reference to the narrow mandate conferred by the Jordanian Arbitration Law, that the underlying dispute had been finally determined by the Arbitral Tribunal and could not be reconsidered. The pertinent part of the preliminary decision confirmed that:

“[T]he subject of dispute has been decided upon by the arbitration panel and that it is not permissible to reconsider.”

The Court of Appeal's preliminary decision effectively confirmed the prohibition against APC (and, by extension, the Claimant) re-submitting evidence relating to the issues of fact and law that had been so meticulously analysed in the underlying arbitration proceedings. It was patently arbitrary and inherently contradictory for the Court of Appeal subsequently to reverse its approach and annul the Final Award on the basis of a substitution of its own appraisal of the facts and law.

The Court of Appeal and Court of Cassation denied the Claimant an adequate opportunity to present its case on an equal footing with APC. The Court of Appeal's preliminary decision of 16 January 2005 confirmed that ATA should refrain from translating and re-submitting the voluminous factual evidence and

expert opinion that had underpinned the Arbitral Tribunal's findings on the merits. Notwithstanding its preliminary decision, the Court of Appeal nevertheless proceeded, in its final judgment, to reverse the critical findings of fact that had been reached in the Final Award. It did so in the absence of any detailed review of the primary evidence. Rather, without giving the Claimant any opportunity to comment, it based its crucial findings of fact upon those that had been reached in the dissenting award of APC's nominated arbitrator.

In summary, it is clear that not only was the Court of Appeal's reversal of the Arbitral Tribunal's findings of fact way beyond the scope of its mandate under Jordanian law; it was also conducted in a highly superficial and inadequate manner that denied ATA any opportunity effectively to present its case.

The Court of Appeal denied the Claimant's due process rights by accepting APC's allegations of fact after only a perfunctory analysis and without allowing the Claimant to produce its own evidence or to examine and answer the evidence ultimately cited against it. The Court of Cassation compounded this violation by summarily denying the Claimant's repeated requests to make oral submissions and by endorsing the approach of the Court of Appeal.

75. As to its claim of substantive denial of justice, the Claimant contends:

In exceptional circumstances such as the present, the manifest misapplication of national law gives rise to a denial of justice entailing the international responsibility of the State. Thus, Jan Paulsson (whose approach to denial of justice has been observed as being "narrower and more focused than that posited by many past commentators and arbitral awards") recognises that "in extreme cases the substantive quality of a judgment may lead to a finding of denial of justice".

The Court of Appeal judgment annulling the Final Award and arbitrarily reversing the Arbitral Tribunal's decision on the facts and the law was "clearly improper and discreditable," leading to "justified concerns as to the judicial propriety of the outcome". Put differently, justice was administered by the Jordanian courts "in a seriously inadequate way". These flaws were exacerbated by the judgment of the Court of Cassation.

The Respondent ignored the constraints imposed by Article 49(a)(4) of the Jordanian Arbitration Law by (i) unlawfully using the annulment proceeding as an opportunity to review the Arbitral Tribunal's findings of law fact; (ii) bizarrely interpreting the reference to "exclusion" of law in Article 49(a)(4) to allow annulment on the basis of a supposed misapplication of law; (iii) distorting the reference in Article 49(a)(4) to "the law agreed upon by the parties" (namely, Jordanian law), to instead refer to specific provisions of the Jordanian Civil Code that had never, of course, been "agreed upon by the parties"; and (iv) allowing the Court of Appeal to substitute its own judgment *de novo* on questions of fact and law for that of the Arbitral Tribunal.

76. In its Rejoinder on Jurisdiction, the Claimant also refers to a judgment of the Amman Court of Appeal in support of its contention as to the “narrow scope of annulment proceedings under the Jordanian Arbitration Law”:

In addition, the Claimant submits the judgment of the Amman Court of Appeal in Case No. 264/2008 as an exhibit to this Rejoinder. This judgment was delivered on 20 April 2009. It therefore post-dates both the Memorial (filed on 24 October 2008) and the Reply (filed on 10 April 2009). In its judgment, which is publicly available, the Amman Court Appeal reaffirms the narrow scope of annulment proceedings under the Jordanian Arbitration Law and thereby demonstrates the correctness of the Claimant’s previous submissions on this point. In particular, it affirms consistent jurisprudence of the Jordanian courts to the effect that they have no competence to annul arbitration awards based on an error of law and no right to review the subject of the dispute or facts arrived at by an arbitral tribunal. In so doing in this case, in violation of the Claimant’s fundamental procedural rights, the Courts of Appeal and Cassation have rendered manifestly unjust decisions contrary to the Respondent’s international obligations under the Turkey-Jordan BIT.

77. The Claimant also contends that the Respondent breached the Claimant’s legitimate expectations in connection with its investment. It argues:

[...] The Respondent’s conduct, in the form of: (i) the arbitration clause provided in the Contract with the State-owned and controlled APC; (ii) the Terms of Reference related to the proceedings before the Arbitral Tribunal; (iii) the commitment to the sanctity of the arbitral process enshrined in the Jordanian Arbitration Law; and (iv) the narrow scope of judicial annulment of arbitral awards provided under the Jordanian Arbitration Law, created a reasonable and justifiable expectation in the Claimant. That expectation is held by many international investors whenever they enter into investment projects that make provision to refer disputes with State-owned or local entities to arbitration. It was the expectation that the outcome of the arbitral process under the Contract would be a final and binding award that would be free from illegitimate and unforeseeable interference by the domestic courts.

All of these aspects of the Respondent’s conduct were reasonably relied upon by the Claimant when it made its investment in Jordan. They demonstrated that the Respondent had a “transparent and predicable framework” for the Claimant’s business planning and investment. Without them, it is unlikely that the Claimant would have invested in Jordan at all. The judgments of the Court of Appeal and Court of Cassation represent a manifest failure to honour the Claimant’s expectations in respect of the arbitral process in Jordan.

The Court of Appeal’s preliminary decision on 16 January 2005 (particularly when considered alongside the Jordanian Arbitration Law) created a further

reasonable and justifiable expectation in the Claimant. That expectation was to the effect that it would be inappropriate to submit pleadings and evidence on the underlying issues of fact to the Court of Appeal in the context of annulment proceedings under Article 49 of the Jordanian Arbitration Law. Again, the judgments of the Court of Appeal and Court of Cassation represent a manifest failure to honour the Claimant's expectation.

78. In its Reply on the Merits and Counter-Memorial on Jurisdiction, the Claimant reverts to its "denial of justice" claim in the following words:

- (i) The Respondent understates the scope of the "denial of justice" standard to the point of repudiating that substantive "denial of justice" exists as a matter of international law;
- (ii) The Respondent is unable to cite any jurisprudence that is analogous to the present case;
- (iii) There has been a substantive "denial of justice" [because:]
 - (a) The Respondent's assertion that the Arbitral Tribunal "erred as a matter of law" is irrelevant and incorrect;
 - (b) The Respondent is unable to refute the fact that the Court of Appeal Judgment was far beyond the threshold of being "clearly improper and discreditable";
 - (c) The Respondent is unable to address the fact that the fundamental flaws in the Court of Appeal Judgment were compounded by the Court of Cassation Judgment;
 - (d) The Respondent's repeated references to "public order" are misplaced and a transparent attempt to divert attention from the inherent weaknesses in this case;
 - (e) The Respondent fails to address the nexus between the New York Convention, the UNCITRAL Model Law and the Jordanian Arbitration Law in prohibiting courts from treating annulment proceedings as an appeal;
- (iv) There has been a procedural "denial of justice" [because:]
 - (a) Contrary to the Respondent's submissions, the record confirms that the Court of Appeal improperly re-examined the issues of law and fact that had been finally resolved in the Final Award;
 - (b) Contrary to the Respondent's submissions, the record confirms that, having re-opened the underlying dispute, the Court of Appeal and Court of Cassation prevented the Claimant from presenting its case on the issues of law and fact that had been

finally resolved in the Final Award and that ultimately formed the basis of their judgments;

- (c) The Respondent ignores the critical impact of the Court of Appeal's Preliminary Decision of 16 January 2005 in defining the procedural framework for the annulment proceeding;
- (d) The Respondent glosses over the fundamental flaws in the logic and reasoning of the Court of Appeal and Court of Cassation judgments;
- (e) If the Respondent is correct that the Court of Appeal and Court of Cassation judgments were dictated by Jordanian "public order" imperatives (which it is not), then the courts' failure to say so demonstrates a failure to accord basic due process rights to the Claimant.

3. The Claimant's Assertion that the Respondent has Mischaracterized the Present Dispute

79. In addition, the Claimant, in its written and oral contentions, objects to the Respondent's attempt to re-open the underlying dispute having led to the Final Award. This, according to the Claimant, belies a fundamental mischaracterization of the present investment treaty dispute. In the words of the Claimant:

The Respondent's Counter-Memorial is replete with references to the underlying contractual dispute between APC and the Claimant, together with the provisions of the Contract between APC and the Claimant and the Jordanian Civil Code that governed the underlying dispute. The Counter-Memorial is, in large part, based on the flawed premise that APC should have prevailed in the commercial arbitration of the underlying construction dispute between APC and the Claimant, and that this should somehow dictate the outcome of the present ICSID proceedings. Accordingly, the Respondent has devoted a considerable portion of the Counter-Memorial and supporting evidence to addressing the underlying construction dispute between APC and the Claimant, presenting its preferred interpretation of the relevant provisions of the Jordanian Civil Code and explaining why, in its view, the Arbitral Tribunal erred as a matter of Jordanian law. Indeed, the Respondent's Egyptian law expert, Dr. El Shalakany, expresses surprise that the Claimant's expert, Dr. Al'tarawneh, "has not offered any analysis of the [Jordanian] Civil Code or the judgments of the Court of Appeal and Court of Cassation on these questions".

In focusing so heavily on the underlying construction dispute between APC and the Claimant, the Respondent is essentially attempting to re-open that dispute

before the present Tribunal as a means of vindicating the violations of international law that arise out of the Court of Appeal and Court of Cassation judgments. Such an approach is misconceived. It is based on a fundamental mischaracterisation of the present dispute as being an extension of the construction dispute between APC and the Claimant. However, that underlying construction dispute was finally resolved by way of a consensual arbitration process pursuant to the Contract. The Arbitral Tribunal that heard that construction dispute issued its Final Award on 30 September 2003 following a detailed review of the exhaustive submissions and evidence that had been presented to both sides. The Final Award dismissed APC's unfounded claims in their entirety and allowed part of the Claimant's counterclaim.

More than two years after the Final Award, in manifest disregard of the applicable provisions of the Jordanian Arbitration Law, the Final Award (and the underlying agreement to arbitrate between the Claimant and APC) was annulled by the Jordanian courts. It is a settled principle of public international law (and is undisputed by the Respondent) that "the judiciary is an organ of the State and that judicial action which violates a rule of international law is attributable to the State." The present proceedings have been brought by the Claimant against the Respondent exclusively for the violation of the Respondent's international law obligations under the Turkey-Jordanian courts. Therefore, the proper starting point for these proceedings is the Final Award itself, which was rendered pursuant to the Contract and the applicable provisions of the Jordanian Civil Code. The Tribunal must resist the Respondent's transparent attempts to divert the Tribunal's attention away from the core issues of international law that lie at the heart of this case.

Given the clear conceptual distinction between a private commercial arbitration and an investment treaty arbitration, it is entirely appropriate that the Claimant has focused its submissions in this proceeding on the Respondent's failure to comply with its international law obligations. Thus, for example, Dr. Al'tarawneh's focus on the Respondent's serious violations of Jordanian arbitration law, as opposed to the issues of Jordanian construction law that determined the underlying dispute, it is entirely apposite. Indeed, the issues of Jordanian arbitration law that are relevant to this treaty dispute are ones in relation to which Dr. Al'tarawneh is uniquely qualified to opine.

80. The Claimant also takes issue with the Respondent's reliance on "public order" as a ground for annulment of the Final Award:

Faced with the shocking way in which the Court of Appeal "strayed far beyond its mandate" in examining the substance of the dispute, the Respondent has brazenly tried to turn a decision that was clearly based on Article 49(a)(4) of the Jordanian Arbitration Law into one based on a violation of the "public order" of Jordan under Article 49(b) of that law.

This *post-facto* attempt to re-classify the Court of Appeal's decision as being based on public policy under Article 49(b) is a transparent effort to divert this Tribunal's attention from the court's serious violation of Article 49(a)(4) of the

Jordanian Arbitration Law, on which the court exclusively based its annulment decision. It is a telling insight into the insecurity surrounding the Respondent's case. As noted by an English judge almost two hundred years ago, public policy "is never argued at all, but when other points fail."

Article 49(b) of the Jordanian Arbitration Law was not once mentioned in the Court of Appeal Judgment. Further, the operative part of the Court of Appeal Judgment, at pages 10-12, is notable for lack of any reference to public order. In its conclusion, the Court of Appeal held:

"From all this, we find that the majority arbitration award which is appealed based its award on article 789 of the Civil Code which we find that it does not apply to the present court action and that the majority of the arbitrators failed to put in gear article 786 of this law which means that the award appealed shelved the application of the agreed law on the subject matter which constitute that these grounds for the appealed award are valid in accordance with article 49/a-4 of the prevailing Arbitration Law and require setting it aside."

As the Court of Appeal did not itself even cite public order, let alone the possibility of annulment on public order grounds under Article 49(b) of the Jordanian Arbitration Law, it cannot possibly be considered to have based its decision on public order grounds.

4. The Claimant's Position regarding the Extinguishment of the Arbitration Agreement

81. In connection with the last sentence of Article 51 of the 2001 Jordanian Law, which mandates extinguishment of the arbitration agreement in the event of a final decision on the part of the Jordanian courts nullifying an arbitral award, the Claimant argues that this provision has resulted in a violation of both the MFN (Article II(2)) and expropriation (Article III) provisions of the Turkey-Jordan BIT, in addition to being unfair and inequitable contrary to the Treaty. In its Memorial on the Merits, the Claimant argues:

[A]s an inevitable consequence of the annulment of the Final Award, the Court of Appeal and the Court of Cassation extinguished ATA's agreement to arbitrate contained in its Contract with APC (under Article 51 of the Jordanian Arbitration Law). ATA has thus been permanently denied recourse to the dispute resolution mechanism agreed between the parties.

82. More particularly, the Claimant submits that:

The Respondent violated the Turkey-Jordan BIT when its courts annulled the Final Award and extinguished ATA's arbitration agreement. The fact that the Respondent's courts' arbitrary extinguishment of the Claimant's arbitration agreement was mandated by the clear terms of Article 51 does not, of course, preclude the wrongfulness of that extinguishment as a matter of international law. On the contrary, the mandatory terms of Article 51 and its automatic application to the Claimant's arbitration agreement following annulment of the Final Award highlight the manifest nature of the Respondent's violation of its international obligations.

The mere existence of legislation does not constitute a violation of a State's international obligations owed to a foreign investor. If a State passes legislation entitling its judiciary or executive to expropriate property, the State does not violate its international obligation not to expropriate an individual investor's property until the judiciary or executive actually effects an unlawful taking of that investor's property.

It was the application of Article 51 by the Jordanian courts, rather than its simple enactment, that violated the Claimant's rights under the Turkey-Jordan BIT and gave rise to the claims that lie at the heart of the present dispute. Otherwise, the mere enactment of Article 51 could *ipso facto* (and without, for example, any taking) have violated all of Jordan's bilateral investment treaties.

5. *The Relief Sought by the Claimant*

83. The Claimant's statement of the relief it seeks in the present proceeding is expressed as follows:

Accordingly, the Claimant requests that the Tribunal provide adequate and effective relief, including:

- (i) an award of compensation in the amount of the Final Award;
- (ii) an award of compound interest on the unpaid amount of the Final Award in accordance with the Final Award;
- (iii) an award of compensation for all costs, expenses and other losses incurred to date in connection with the Court of Appeal, Court of Cassation and ongoing Jordanian court proceedings in relation to Dike No. 19;
- (iv) an order terminating the ongoing Jordanian court proceedings in relation to Dike No. 19;

- (v) an order that any Jordanian court judgment against ATA in relation to Dike No. 19 shall have no international effect;
- (vi) an order requiring Jordan to compensate ATA for any additional future costs, expenses and other losses caused by the ongoing Jordanian court proceedings in relation to Dike No. 19, including indemnifying ATA in the full amount of any judgment rendered against ATA;
- (vii) an award of compound interest on (iii) and (vi); and
- (viii) an order that the Respondent pay the costs of the present proceedings, together with the Claimant's legal costs and expenses.

B. The Respondent's Position

84. The Respondent, under reserve of its challenge to the Tribunal's jurisdiction, contests the merits of the Claimant's claims. In brief, it argues:

[...] First, ATA's Memorial fails to show, or even to address, why the Jordanian courts' controlling application of the governing Jordan Civil Code provisions is erroneous, let alone rises to the standard of a violation of international law. Nowhere in its submissions does ATA confront the plain language of the Civil Code (in particular, Article 786), on which two Jordanian courts expressly relied, which unmistakably renders ATA strictly liable for the collapse of Dike No. 19, on the facts as found by the Jordanian arbitral tribunal. An examination of the Jordan Civil Code and the broadly accepted principles of contractor strict liability and "decennial liability," as understood in the Arab Middle East and parts of Europe, confirms that the courts' judgments were correct. At the very least, these judgments, which were issued pursuant to the Jordanian legal process to which the parties had agreed, were not manifestly unfair or inequitable, much less an unlawful "expropriation" under the Turkey-Jordan BIT.

Second, ATA likewise failed to demonstrate how the Jordanian courts have misapplied the governing standards of the Jordan Arbitration Law, let alone done so in a manner that rises to a violation of the Turkey-Jordan BIT. ATA has presented no showing of inconsistent or discriminatory treatment of the governing substantive standards by Jordanian courts. Further, the record demonstrates that the Court of Appeal rested its annulment decision on a facially sound applicable judgment by Jordan's highest court that dates from 1985 – i.e., 13 years before ATA and APC signed the contract at issue and 21 years before the Court of Appeal's judgment in this case. On these facts, there has been no rebuke of reasonably settled expectations regarding what Jordanian law provides.

Third, the Court of Appeal's judgment that the arbitral tribunal "excluded the application" of the Jordan Civil Code "by ignoring the provisions therein including those relating to public order" is manifestly defensible under the terms of Jordan's Arbitration Law and Civil Code. It is also consistent with prevailing

international norms in the Arab Middle East and with the 1994 Egyptian Arbitration Law and 1985 UNCITRAL Model Law, on which the Jordanian law is based. In this connection, Claimant’s Memorial notably ignores the “public order” aspect of the Court of Appeal’s judgment and the express and legitimate mandate of Jordan’s Arbitration Law that, irrespective of any other ground for annulment, a competent court “shall, by its own initiative, nullify the award” if the award, “in its content,” violates the “public order” of Jordan. Jordan Arbitration Law, art. 49(b) (Exhibit C-10).

Fourth, ATA has not only failed to prove a substantive denial of justice; it has also failed to prove a procedural denial of justice. The Jordanian Court of Appeal did not, as Claimant contends, selectively consider evidence, allow the submission of new evidence, or render inconsistent or contradictory procedural rulings in the course of the annulment proceeding, and it did not rest its decision to annul the arbitral award on new findings of fact or on internally inconsistent reasoning. In contending otherwise, and in other notable respects, ATA has taken liberties with the record.

Lastly, ATA has shown no lawful expropriation. Because the Jordanian courts committed no denial of justice in annulling the arbitral award, ATA has not been unlawfully deprived of any interest in the award, and ATA’s claim of expropriation fails under the standards of Article III(1) of the Turkey-Jordan BIT. [emphasis in original]

85. The Tribunal observes that the Respondent’s defense on the merits is largely devoted to rebutting the Claimant’s allegation that it has suffered a denial of justice in the circumstances, be it of a substantive or procedural nature. In this regard, the Respondent submits:

[...][T]he governing standards for proving a “denial of justice,” while capable of expression in many formulations, are universally recognized as exacting – and more demanding than those applicable to FET claims generally. In the words of various cases and commentators:

- the “modern consensus is clear to the effect that the factual circumstances must be egregious if state responsibility is to arise on the grounds of denial of “justice;”
- a challenged judgment must be “manifestly unjust and one-sided;” it must be “arbitrary or discriminatory;”
- even if a judicial conclusion “appears to be demonstrably wrong in substance,” that alone is not a denial of justice; “it must impel the adjudicator to conclude that it could not have been reached by an impartial judicial body worthy of that name;”

- there must be “palpable deviations” from the accepted standards of judicial practice; “a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety;”
- justice must be administered “in a seriously inadequate way,” or with “the clear and malicious misapplication of the law;” and
- a challenged judicial act must be “clearly improper and discreditable.”

[...]

Accordingly, even if the judgments of the Jordanian courts were substantively erroneous (and they were not), unless Claimant has established egregious acts or omissions that violate the minimum standard of due process, so that the final outcome of the Jordanian legal process in this case cannot be understood or explained as the actions or product of an impartial judicial system, it cannot prevail on its present claims. As we demonstrate below, Claimant has fallen short of this mark, and its assault upon the integrity of the Jordanian legal system is a groundless affront.

86. Regarding the allegation of a substantive denial of justice in particular, the Respondent rejects the Claimant’s allegations as follows:

Claimant rests its argument entirely upon:

- 1 the legal opinion of a Jordanian lawyer and associate law professor, who has considered the judgments of the Court of Appeal and Court of Cassation in this case and opines that they seriously erred in their analysis and application of the governing Jordanian Arbitration Law (*see* Al’tarawneh Opinion (Exhibit C-51)), and
- 2 the witness statement of Claimant’s own lawyer in the Jordanian proceedings, who also expresses his astonishment and dismay at these adverse Judgments (*see* Habeyeb Statement (Exhibit C-7)).

This is not evidence of a denial of justice, substantive or otherwise. It is evidence, if at all, of strong (and, in the case of Mr. Habayeb, emotional) disagreement and disappointment. Claimant and its counsel had a full and fair opportunity to make all of their arguments about the proper scope and application of Article 49 of the Jordan Arbitration Law before the Jordanian courts, and they did so. After extensive proceedings, each of those courts disagreed with Claimant’s position, in a unanimous and reasoned, written judgment. Claimant and its counsel plainly disagree with those judgments, but to challenge them here on grounds that the Jordanian courts misapplied Jordanian law is to treat this Tribunal as precisely the sort of “appellate body” that *Mondev*, *Azninian*, *ADF*, and *Waste Management* rightly found to be improper.

87. The Respondent alleges that, from a substantive point of view, the Jordanian courts applied correctly long-standing law and principles of contractor “strict liability”.

In the words of the Respondent:

Both Judgments are substantively reasonable and amply supported by the Jordan Civil Code, which Claimant expressly accepted as the substantive law of the Contract. Claimant, its expert witness, and its underlying counsel may disagree with these Judgments, but they cannot reasonably claim, and plainly have not shown, a “clear and malicious misapplication of the law” (*Azinian*, ¶ 103 (Exhibit C-37)) or court judgments that shock the conscience and are “clearly improper and discreditable” (*Mondev*, ¶ 127 (Exhibit C-41)).

88. Moreover, the Respondent avers that the Claimant ignores Jordanian law and misunderstands the scope of Article 49(a)(4) of the Jordanian Arbitration Law. The Respondent submits:

At bottom, Claimant’s complaint is not that the Jordanian courts treated the annulment action as a plenary appeal or *de novo* proceedings. Rather, Claimant disagrees with the courts’ substantive determination of what qualifies as “exclusion” of “the application of the law agreed upon by the parties to govern the subject-matter of the dispute,” for purposes of Article 49(a)(4) of the Jordan Arbitration Law. That question, however, is one of Jordanian law for the Jordanian courts to decide. Claimant and its underlying counsel, Mr. Habayeb, had a full and fair opportunity to make their submissions on this point to the Jordanian courts. They did so, and both courts (eight judges) unanimously rejected their position. There is no substantive legal question for this Tribunal properly to decide in regard to this issue. By Claimant’s own admission, this Tribunal is not a further court of appeal with supervisory authority over Jordan’s highest court on issues of Jordanian law.

Insofar as Claimant’s expert, Dr. Al’tarawneh, has advanced a different interpretation and application of Article 49(a)(4) than the Jordanian courts have expressed, he is necessarily wrong as a matter of Jordanian law. The Court of Cassation has addressed the matter and ruled otherwise. Its Judgment affirming the Court of Appeal is definitive proof of the correct, substantive interpretation of Article 49(a)(4) as a matter of Jordanian law. Expert opinion testimony to the effect that the Jordanian courts have misunderstood Jordanian law is not relevant or even properly admissible. *See, e.g.*, Al’tarawneh Opinion, ¶ 54 (“Both the Courts of Appeal and Cassation have violated the text and spirit of Articles 48 and 49 of the Arbitration Law”) (Exhibit C-51).

The pertinent question is whether the Jordanian courts’ annulment of the Final Award under Article 49(a)(4) violates minimum, *international* standards and represents an actionable “denial of justice” under the MFN provision of Article

II(2) of the Turkey-Jordan BIT. Viewing Claimant’s arguments through this lens, Claimant has established no such violation.

Claimant has identified two alleged substantive defects in the courts’ annulment rulings that it contends should entitle it to relief.

First, Claimant contends that “in order for an arbitral award to be annulable under Article 49(a)(4), it must be demonstrated that the arbitral tribunal applied a *different system of law* to that agreed by the parties in their arbitration agreement.” Cl. Mem., ¶ 211 (emphasis added). In the opinion of Claimant’s expert, “[t]his means that if the parties have chosen the Jordanian law to govern their contract and the arbitral tribunal have disregarded this choice and applied English law, then the court may annul the award.” Al’tarawneh Opinion, ¶ 59 (Exhibit C-51); *see also id.*, ¶ 39. As there is no question in this case that the arbitral tribunal applied “anything other than Jordanian law in its Final Award,” there is no basis, according to Claimant’s submission, for annulment under this provision (and by implication, no internationally creditable annulment). Cl. Mem., ¶ 211.

Second, Claimant contends that, having found the arbitral proceedings to have been “procedurally proper,” the Court of Appeal was legally obligated to look no further and to reject the annulment challenge. *Id.*, ¶ 217. As stated by Claimant’s expert, “[a]n annulment action is different from an appeal in the sense that the Court should look only *at the procedural legality* of the arbitral award and not at its substance (the route through which the arbitral award was issued including the arbitration agreement). ... Re-examining the substance simply undermines the whole *raison d’etre* of arbitration in Jordan” Al’tarawneh Opinion, ¶ 61 (emphasis added) (Exhibit C-51).

Neither proposition withstands scrutiny or represents an established, international norm. [emphasis in original]

89. It is the Respondent’s contention that, in the present circumstances, the scope of judicial review in an annulment action against an arbitral award is not limited to issues of “procedural legality” because Jordan takes a “broader view of the permissible grounds for annulment”. The Respondent explains:

As other legal scholars have noted, the Egyptian arbitration tradition that Jordan has espoused takes a somewhat broader view of the permissible grounds for an annulment than some other legal traditions. Hence, at some level, “exclusion” can be said to include “error in application and interpretation of the law, ... as such errors would be a form of exclusion of the applicable law,” and embraces “the erroneous implementation [of law] to the extent of distortion.” *Id.*, ¶¶ 94-95 (quoting El Sawy and Al-Dsouqi).

Claimant’s position that “exclusion” may only be invoked as a basis for annulment where an award purported to apply a national body of law other than that agreed by the parties is “extreme and untenable,” from an Egyptian or Jordanian perspective:

On this approach, a tribunal may declare that it will apply Jordanian law, and then proceed to decide a dispute without any reference to Jordanian law. Or it may apply provisions that do not form part of Jordanian law; or grossly misread provisions of Jordanian law by omitting text or failing to notice a word or phrase or a complete chapter. ... The line is, by definition, a matter of judgment; but it is precisely the mandate of the reviewing courts to decide where they will draw the line. [*Id.*, ¶ 103.]

In performing this “line-drawing” exercise, it is entirely appropriate, from an international perspective, for the Jordanian courts to have concluded that an arbitral award that ignored the plain language of a mandatory provision (Article 786 of the Civil Code) and that contravened 50 years of fundamental and established doctrine (decennial strict liability) – effectively “excluded” the applicable law and could not stand.

By contrast, Claimant’s view of where the line should be drawn has no demonstrable stature as a minimum or exclusive international standard, let alone as an accurate pronouncement of Jordanian law.

90. The Respondent also refers to Article 49(b) of the Jordanian Arbitration Law and argues that annulment was warranted in the circumstances on the basis of “public policy” concerns:

As detailed above, the doctrine of contractor “strict liability” codified in Articles 786 and 788 of the Jordan Civil Code is a mandatory, non-waivable principle of Jordanian law that represents an overriding public policy and that “falls well within the scope of Jordanian *ordre public*.” El Shalakany Report, ¶ 28; *see id.*, at ¶ 111. The arbitral tribunal was obligated to recognize and give effect to this important public policy, and its failure to do so warranted, and was an express basis for, the courts’ annulment rulings.

While the Court of Appeal did not expressly cite Article 49(b) in its Judgment, APC cited and relied upon this provision in its submissions to the Court, and the Court expressly credited and accepted this aspect of APC’s challenge. As the Court’s Judgment explains, APC argued that the majority award, “in spite of touching on the Jordan Civil Code has excluded the application of this law by ignoring the provisions therein including those relating to *public order* by misapplying, ignoring and grossly misrepresenting these provisions which led to its distortion.” Court of Appeal Judgment, at 10 (emphasis added) (Exhibit R-2). The Court agreed with APC. It “decide[d] ... to accept” APC’s second, third and

eighth grounds for annulment. *Id.*, at 12. As summarized by the Court, APC's second and third grounds for annulment were as follows:

2. The Contract and the Arbitration Agreement have stipulated that Jordanian Law is the applicable law in relation to the Contract, the Arbitration proceedings and the Award. However, the Majority Award, reciting articles of the Jordanian Civil Code, nevertheless failed to apply the provisions of said law by *ignoring* its provisions, including those relating to *Public Order*.
3. Article 786-790 of the Jordanian Civil Code are mandatory provisions, and accordingly, they are to be regarded as tantamount to rules of Public Order. The Majority Award has; [*sic*] clearly violated these Articles, distorted them and *ruled them out*, which means that the said Award is in breach of *Public Order*. [*Id.*, at 1 (emphasis added).]

By the plain terms of Article 49(b), the Court of Appeal was thus duty-bound, "by its own initiative, [to] nullify the award" because the Final Award "in its content violat[ed] public order in the Kingdom." Jordan Arbitration Law, art. 49(b) (Exhibit C-10). The Court of Cassation was duty-bound to affirm the annulment on the same ground. [emphasis in original]

91. As for the Claimant's allegation of procedural denial of justice, the Respondent refutes it in the following words:

Claimant also contends that it has suffered a procedural "denial of justice" because "[t]he Court of Appeal arbitrarily re-opened consideration of the underlying facts and merits of the dispute between the Claimant and APC and subsequently proceeded to reverse the Arbitral Tribunal's Final Award." Cl. Mem., ¶ 196. Even worse, Claimant argues, the Court acted in an arbitrary and inconsistent manner, by first (correctly) barring the submission of evidence but then selectively and improperly considering evidence. *Id.*, ¶¶ 196-200. In a further effort to bolster this argument, Claimant's Memorial briefly cast aspersions upon APC's former chairman and also purports to find evidence of a relevant and material irregularity in APC's Annual Reports. *See id.*, ¶¶ 65, 68.

These contentions are uniformly without basis, and in advancing them, Claimant has taken some liberties with the record. As detailed below:

- 1 the Court of Appeal did not base its Judgments on new findings of fact;
- 2 the Court of Appeal committed no gross, procedural irregularity;
- 3 the Court of Appeal engaged in no arbitrary, inconsistent reasoning;
- 4 Mr. Habayeb's hearsay has no proper place in this proceeding; and

92. In connection with the Claimant's expropriation claim, the Respondent dismisses it as follows:

Claimant has based its expropriation claim on the same facts and circumstances that underlie its FET and "denial of justice" arguments. If, as shown above, the conduct of the Jordanian courts has effected no substantive or procedural denial of justice, then that same conduct cannot have effected an unlawful expropriation. That is, if it was lawful under minimum standards of international law for the Jordanian courts to have *annulled* the Final Award as they did, then the Claimant cannot have been *unlawfully deprived* of the property interest in the award. [emphasis in original]

93. Finally, regarding the last sentence of Article 51 of the 2001 Jordanian Law, which as noted earlier mandates extinguishment of the arbitration agreement in the event of a final decision on the part of the Jordanian courts nullifying an arbitral award, the Respondent adopts the following position:

Claimant has not properly presented or pleaded an argument that Article 51 of the Jordanian Arbitration Law, standing alone, violates the Jordan-Turkey BIT. Claimant likewise has not properly presented or pleaded an argument that the ATA-APC arbitration agreement, standing alone, constitutes an "investment" in Jordan, such that its extinguishment, without more, is a violation of the BIT. Arguments to this effect now are both waived and untimely. Further, Claimant expressly disavowed these arguments, and when it raised the former for the first time in its closing submissions, it neither articulated a consistent position on the question nor presented a clear or coherent statement of the legal standards upon which this argument might be based. Even now, Respondent is not clear precisely what legal theory or body of investment-treaty law Claimant may seek to rely upon for this argument. *See* Response to Questions Nos. 2(A)-(G), *infra*.

Claimant has also waived, and is estopped from asserting, that the extinguishment provision in Article 51 has effected a violation of the Turkey-Jordan BIT. During the annulment proceedings, Claimant itself expressly relied upon the 2001 Jordanian Arbitration Law and argued, over APC's objection, that this law – and Article 51 in particular – should be applied in this dispute. Claimant cannot both rely upon the current law, when it considers the statute helpful to its position, and then renounce its applicability as an alleged violation of international law, when that course seems more helpful. *See* Response to Questions Nos. 2(E)-(G), *infra*.

Further, Claimant has affirmatively declined an offer from APC to submit the ongoing Dike No. 19 dispute to a second commercial arbitration, in lieu of

proceeding in the Jordanian courts. Having been given, and refused, an opportunity to proceed with a second arbitration, Claimant cannot reasonably be heard to object to the statutory extinguishment of the ATA-APC arbitration agreement, either on its face or as applied. Claimant can claim no injury from the extinguishment: it was given the option of a new arbitration, under the same terms as those set forth in the Contract, and it opted to leave the dispute in the Jordanian courts.

Claimant's refusal of APC's offer of a second commercial arbitration reinforces that the gravamen of Claimant's case is not the extinguishment but Claimant's contention that the annulment itself is invalid. If Claimant does not succeed on that core merits issue, then the Jordanian courts annulment judgments will effectively be preclusive of Claimant's liability to APC, whether the matter proceeds before a new arbitral tribunal or before the Jordanian courts. *See* Response to Questions Nos. 4-5, *infra*.

In all events, Claimant has failed to prove that the final sentence of Article 51 of the Jordanian Arbitration Law violates the Turkey-Jordan BIT, either on its face or as applied in this case, and the provision does not run afoul of applicable international norms. For example, the provision and its operation in this case are consistent with Article II(3) of the New York Convention, and Claimant has not shown otherwise. *See* Response to Questions Nos. 2(B)-(D) & 3, *infra*.

VI. THE TRIBUNAL'S ANALYSIS

A. The Tribunal's Findings on Jurisdiction

94. As noted earlier in the present Award, the Jordanian Court of Cassation rendered a decision on 16 January 2007 confirming the annulment of the Final Award and extinguishing the Arbitration Agreement in the Contract between the Claimant and APC.

95. The Tribunal, for the reasons set forth below, has found that the dispute giving rise to the Claimant's claims in this proceeding which crystallized when the Jordanian Court of Cassation rendered its decision on 16 January 2007, confirming the annulment of the Final Award, is legally equivalent to the contractual dispute which was initiated on 6 September 2000 when the arbitration was commenced. Since the Turkey-Jordan BIT entered into application on 23 January 2006, the Tribunal, as will be seen, has concluded

that all claims of the Claimant 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 *rationae temporis*. However, the Tribunal has concluded that it does have jurisdiction *rationae temporis* over the Claimant's claim resulting from the decision of the Jordanian Court of Cassation declaring extinguished the Arbitration Agreement in the Contract between the Claimant and APC.

96. Before turning to the analysis having led to this conclusion, the Tribunal wishes to emphasize that an investment is not a single right but is, like property, correctly conceived of as a bundle of rights, some of which are inseparable from others and some of which are comparatively free-standing. This is why it is not unusual for "measures" with respect to the same investment to give rise to claims of different violations of a BIT and different defenses on the part of the respondent State, and likewise for tribunals to find that there were violations on some measures and not on others.

97. For example, a claimant may be barred from bringing one alleged violation because of estoppel or from bringing another because of waiver; yet, the same claimant may still bring other claims. By the same token, claims of different violations of an investment may be subject to different jurisdictional objections. For that reason, in the instant case, the Tribunal is of the view that different types of claims require different jurisdictional analyses *ratione temporis*: conventional BIT claims, denial of justice claims and extinguishment of arbitral clause claims.

98. As a preliminary matter, the Tribunal notes that a general principle of legality instructs interpreters to apply innovative legislation prospectively, unless the legislation

clearly indicates that its creators intended to apply it retroactively and, even then, only if such application would not offend some fundamental and peremptory principle of justice. In the present circumstances, Article IX(1) of the BIT expressly makes the BIT retroactive with respect to “investments existing at the time of entry into force [...]”. The provision does not make the BIT retroactive with respect to disputes existing prior to the entry into force of the BIT. Under the plain meaning of Article IX(1), the Tribunal may only exercise jurisdiction *ratione temporis* over the Claimant’s claims if it finds that the dispute arose after the entry into force of the Treaty on 23 January 2006.

99. Turning to the definition of the term “dispute” in international law, the Tribunal recalls that it is concisely expressed in *Lucchetti*² as follows:

[A]s a legal concept, the term dispute has an accepted meaning. It has been authoritatively defined as a “a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons,” or as a “situation in which two sides hold clearly opposite views concerning the question of the performance or non-performance” of a legal obligation. In short, a dispute can be held to exist when the parties assert clearly conflicting legal or factual claims bearing on their respective rights or obligations or that “the claim of one party is positively opposed by the other.”³

100. There is no disagreement between the parties in the present case that each gave notice of an intent to commence arbitration on 6 September 2000. In terms of the *Lucchetti* standard, a dispute was initiated on that date and, at least in the submission of the Claimant, it was a dispute between itself and Jordan.

101. The parties disagree, however, as to whether the dispute which gave rise to the FIDIC arbitration proceedings was the same dispute which concluded in an annulment of

² *Empresas Lucchetti, S.A. et al. v. Republic of Peru*, ICSID Case No. ARB/03/4, Award (7 February 2005).

³ *Ibid.* at paragraph 48.

the Final Award and, as a corollary, the extinguishment of the Arbitration Agreement under the Contract by the Jordanian Court of Cassation. The Claimant argues that the decision of the Court of Cassation “crystallized” the contractual dispute into a new claim. For its part, Jordan maintains that the earlier dispute manifests the same subject-matter as the dispute commenced in front of the Jordanian courts.

102. As Zeno demonstrated in his famous paradox, the ability of logicians to analyze and break things into smaller components is infinite. But juridical analysis must be conducted in ways consistent with the purposes of the rules in question, with the aim of elucidating their animating policy and, of course, with respect for the manifest meaning of the rule being analyzed. *Lucchetti* is, again, instructive here. Where an analysis purports to identify two distinct disputes and the “second” dispute is comprised of the same subject-matter and has the same origin or source (in this case the collapse of Dike No. 19) as the first dispute, *Lucchetti* concluded that the disputes are legally equivalent.⁴ This Tribunal finds the *Lucchetti* holding persuasive.

103. In consequence, it seems to the Tribunal that the dispute over the annulment of the Final Award *per se* (as opposed to the extinguishment of the Arbitration Agreement) is really indistinguishable from the original dispute and, hence, like its progenitor, arose prior to the entry into force of the Turkey-Jordan BIT; as a consequence, all claims in connection with the annulment of the Final Award *per se* are inadmissible because of a lack of jurisdiction *ratione temporis*.

⁴ *Ibid.* at paragraph 53.

104. The dispute over the Final Award first commenced in October 2003 when APC filed an action in the Jordanian courts for annulment under Article 49 of the Jordanian Civil Code. It was at this point that the parties first expressed disagreement over the validity of the Final Award. Unless it falls prey to Zeno's paradox, the Tribunal must view the proceedings that followed as a continuation over this initial difference of legal opinion regarding the issue of annulment.

105. But the Claimant also makes a distinct denial of justice claim which, it contends, is subject to a different clock for purposes of jurisdiction *ratione temporis*. It argues that there can be no denial of justice claim before the exhaustion of local remedies. Reference is made in this regard to *Loewen*⁵:

The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower court decision.⁶

106. Hence, the Claimant submits that there is no lack of jurisdiction *ratione temporis* with respect to its claim of denial of justice.

107. This contention, in the Tribunal's view, raises two separate questions, each of which relates to a different issue: the first question is *when* does a denial of justice occur and the second question is *with respect to what* does it occur? As to the first question, a denial of justice occasioned by judicial action occurs when the final judicial instance, which is plausibly available, has rendered its decision. The determination of this moment

⁵ *Loewen Group, Inc. et al. v. United States of America*, ICSID Case No. ARB(AF)/98/3 (NAFTA), Award dated 26 June 2003.

⁶ *Ibid.* at paragraph 156. See also generally Jan Paulsson, *Denial of Justice in International Law* (Cambridge University Press, 2005).

in time is important for determining whether the putative claimant has exhausted domestic remedies, which is a precondition in general international law for bringing a claim at the international level; despite the fact that exhaustion is not required by BITs, the principle seems now to have been carried over specifically for denial of justice claims. But in BIT claims in which an objection to jurisdiction *ratione temporis* is lodged, the determination of this particular moment in time is irrelevant to the second question, for the second question in this aspect of a BIT litigation is not *when* have domestic remedies been exhausted, but with respect to *which* dispute has the denial of justice taken place.

108. In this case, the Claimant attempts to present a denial of justice as an independent violation of the BIT and to invite the Tribunal to treat it as if it were unconnected to the dispute in order to shift the moment of its occurrence forward and to locate it in time *after* the entry into force of a BIT. But the attempt must fail if, as in this case, the occurrence is part of a dispute which originated before the entry into force of the BIT. For this reason, the Tribunal has concluded that the claim of denial of justice is also inadmissible for lack of jurisdiction *ratione temporis*.

109. The *Mondev*⁷ tribunal refused to find jurisdiction *ratione temporis* where the entirety of the events in dispute occurred prior to the entry into force of the treaty at issue in that case and all that was left was the final decision of the Massachusetts Courts. In that case, the claimant had argued that a claim for denial of justice could not be

⁷ *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2 (NAFTA), Award dated 11 October 2002.

“perfected” until the exhaustion of local remedies and that local remedies were not exhausted until after the entry into force of NAFTA. The *Mondev* tribunal responded:

Thus events or conduct prior to the entry into force of an obligation for the respondent State may be relevant in determining whether the State has subsequently committed a breach of the obligation. But it must still be possible to point to conduct of the State after that date which is itself a breach. In the present case the only conduct which could possibly constitute a breach of any provision of Chapter 11 is that comprised by the decisions of the SJC and the Supreme Court of the United States, which between them put an end to LPA’s claims under Massachusetts law. Unless those decisions were themselves inconsistent with applicable provisions of Chapter 11, the fact that they related to pre-1994 conduct which might arguably have violated obligations under NAFTA (had NAFTA been in force at the time) cannot assist *Mondev*. The mere fact that earlier conduct has gone unremedied or unredressed when a treaty enters into force does not justify a tribunal applying the treaty retrospectively to that conduct. Any other approach would subvert both the intertemporal principle in the law of treaties and the basic distinction between breach and reparation which underlies the law of State responsibility.⁸

110. Even if the Tribunal were to assume, *arguendo*, that the alleged denial of justice represented a discrete claim, unconnected to the dispute which is the gravamen of the Claimant’s case on this point, and thus may be conceived as occurring after the entry into force of the BIT, does an international commercial arbitral award constitute an investment that could be, as it were, expropriated by an otherwise lawful annulment by a national court?

111. Article 25(1) of the ICSID Convention does not provide a definition of investment and, instead, simply states that “[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment”. The ICSID Convention leaves the definition of the term investment open to the parties, allowing them to determine its scope and application pursuant to mutual agreement in the relevant BIT.

⁸ *Ibid.* at paragraph 70.

112. Article I(2)(a) of the Turkey-Jordan BIT provides that a “claim to money” or a “right to financial performance” is a discrete “investment,” separate from the investment in the dispute which gave rise to it. The parties disagree, however, as to whether an arbitral award in itself qualifies as a claim to money falling within the definition of “investment” or if the underlying investment must still exist in order for the claim to be asserted.

113. The Claimant cites *Saipem v. Bangladesh*⁹ for support of its position that an arbitral award in itself falls within the definition of “investment” under the BIT. In fact, the *Saipem* tribunal explicitly refrained from deciding whether an award comprised an investment:

[T]he rights embodied in the ICC Award were not created by the Award, but arise out of the Contract. The ICC Award crystallized the parties’ rights and obligations under the original contract. It can thus be left open whether the Award itself qualifies as an investment, since the contract rights which are crystallized by the Award constitute an investment within Article 1(1)(c) of the BIT.¹⁰

114. While resisting making a decision as to whether the arbitral award itself was an investment, the *Saipem* tribunal considered that the “entire operation” including the underlying “Contract, the construction itself, the Retention Money, the warranty and the related ICC Arbitration” was an investment under Article 25 of the ICSID Convention.¹¹

⁹ *Saipem S.p.A. v. The People’s Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures dated 21 March 2007.

¹⁰ *Ibid.* at paragraph 127.

¹¹ *Ibid.* at paragraph 110.

115. Now, measured by the standards in *Saipem*, the Final Award at issue in the present arbitration would be part of an “entire operation” that qualifies as an investment. Since the first legal confrontation between the parties over the Final Award occurred prior to the entry into force of the Turkey-Jordan BIT, as previously concluded, the Tribunal cannot claim jurisdiction *ratione temporis* over any issue concerning the annulment of the Final Award.

116. There remains, however, a third claim lodged by the Claimant. It relates to the effects of the statutory extinguishment of the Claimant’s right to arbitration. The Arbitration Agreement under the Contract served as the basis for the Final Award in the dispute between the Claimant and APC. Upon the annulment of the Final Award by the Jordanian Court of Cassation, the Claimant was entitled to initiate another arbitration under the Jordanian Law which existed at the time of the conclusion of the Contract in 1998 and under international law, *i.e.* the then Jordanian law and the New York Convention to which both Jordan and Turkey were party at all relevant times. But in 2001, the Jordanian Arbitration Law (Law No. 31 of 2001) came into effect, including Article 51, last sentence, which provides for the extinguishment of the right to arbitration if an arbitral award is annulled. That sentence unequivocally provides as follows: “The final decision nullifying the award results in extinguishing the arbitration agreement.”

117. At this juncture, the Tribunal observes that the right to arbitration is a distinct “investment” within the meaning of the BIT because Article I(2)(a)(ii) defines an investment *inter alia* as “claims to [...] any other rights to legitimate performance having financial value related to an investment”. The right to arbitration could hardly be considered as something other than a “right [...] to legitimate performance having

financial value related to an investment”. This particular right was not annulled with the enactment of the new Jordanian Arbitration Law (which took place before the entry into force of the BIT) but upon the decision of the Jordanian Court of Cassation.

118. The Court of Cassation could have exempted the Claimant from the operation of this new law. As a result, this part of the decision of the Court of Cassation, occurring, as it does, after the entry into force of the BIT and distinct from the underlying investment, is not barred *ratione temporis* and falls within the Tribunal’s jurisdiction because the right to arbitrate was never in contention until the annulment whereupon the Court of Cassation extinguished that right. Prior to the annulment, the Arbitration Agreement was honored, and the arbitration between APC and the Claimant proceeded according to contract. It was only with the extinguishment of the Arbitration Agreement through Article 51 of the Jordanian Arbitration Law that the parties realized a legal dispute over the continuing right to arbitrate in connection with the underlying investment.

119. In contemplating the autonomy of the arbitration clause, and its status as an investment, Judge Schwebel observed:

[I]f one party could deny arbitration to the other party by the allegation that the agreement lacked initial or continuing validity, if by such an allegation it could deprive an arbitral tribunal of the competence to rule upon that allegation, upon its constitution and jurisdiction and upon the merits of the dispute, then it would always be open to a party to an agreement containing an arbitration clause to vitiate its arbitral obligation by the simple expedient of declaring the agreement void.¹²

¹² Stephen Schwebel, *International Arbitration: Three Salient Problems* (Cambridge Grotius Publications Limited, 1987) at page 4.

120. But this is exactly what happened here by operation of the new Jordanian Arbitration Law and the decision of the Court of Cassation. Given that the right to arbitration is considered a distinct investment, it follows that the decision of the Jordanian Court of Cassation extinguishing the Arbitration Agreement between the Claimant and APC, occurring as it did after the entry into force of the BIT, is not barred from the Tribunal's jurisdiction *ratione temporis* and the Tribunal so finds. The Respondent's jurisdictional objection is thus dismissed insofar as this specific claim of the Claimant is concerned.

B. The Tribunal's Findings on the Merits

121. For the reasons set forth below, the Tribunal finds that the extinguishment of the Claimant's right to arbitration by application of the last sentence of the 2001 Jordanian Arbitration Law was contrary to the Turkey-Jordan BIT. The Tribunal's notes that the very first BIT adjudicated under the auspices of ICSID, in *AAPL/Sri-Lanka*¹³, the arbitral tribunal stated:

[...] [T]he Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature."¹⁴

122. In this regard, the Tribunal recalls the general rule according to which a State cannot invoke its internal laws to evade obligations imposed by a given treaty or generally by public international law. As emphasized in the unanimous award rendered

¹³ *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Award and Dissenting Opinion dated 21 June 1990 and 15 June 1990, respectively.

¹⁴ *Ibid.* at paragraph 21.

in the *Desert Line Co. v. Yemen*¹⁵ case, State authorities are estopped from undertaking any act that contradicts what they previously accepted as obligations incumbent upon them in a given context.

123. From the outset, the parties focussed on the conduct of the Jordanian courts in adjudicating the grounds for annulment of the Final Award. Their actions could hardly be said to have constituted abusive misconduct, bad faith or a denial of justice. Notwithstanding its finding of a lack of temporal jurisdiction, the Tribunal would note that it was unconvinced that, even if there had been jurisdiction, a claim of denial of justice, whether substantive or procedural, could have been sustained.

124. But that is not the only issue at bar. After the annulment by the Jordanian courts, ATA should have been able to invoke the Arbitration Agreement in the Contract; Jordanian courts, in accordance with Article II of the New York Convention, should then have respected ATA's right and refrained from exercising their own jurisdiction on the substance of the dispute. In the Tribunal's view, the relevant issue on which to focus relates to the extinguishment by operation of Jordanian law of the Arbitration Agreement upon the annulment of the Final Award. This legal consequence was dictated by the second sentence of Article 51 of the 2001 Jordanian Arbitration Law. This operation of Jordanian law opened the door to the adjudication of the parties' dispute before the Jordanian State courts, depriving the Claimant of its legitimate reliance on the Arbitration Agreement in the Contract of 2 May 1998.

¹⁵ *Desert Line Projects LLC v. The Republic of Yemen*, ICSID Case No. ARB/05/17, Award dated 6 February 2008.

125. 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.¹⁶

126. The retroactive effect of the Jordanian Arbitration Law, which extinguished a valid right to arbitration deprived an investor such as the Claimant of a valuable asset in violation of the Treaty’s investment protections. The parties are in agreement that when the Contract at issue was concluded in 1998, APC was under Jordanian governmental control and remained so throughout the period leading to the Final Award. It follows that in concluding the Arbitration Agreement, the parties agreed and expected to preclude the submission of potential disputes under the Contract to the Jordanian State courts, where Jordan would have been both litigant and judge. Thus, it was vital to provide for arbitration as the neutral mechanism for the settlement of disputes.

127. After October 2003, Jordan no longer held a majority interest in APC. Yet, even after having sold half of its shareholding in APC, the Government of Jordan continued to exercise a preponderant role in the conduct of APC’s activities. Nothing is more telling in this regard than the offer extended by Jordan to (but refused by) the Claimant after the

¹⁶ The Tribunal notes also that, by virtue of Article II(2) of the Treaty (the “MFN” clause), the Respondent has assumed the obligation to accord to the Claimant’s investment fair and equitable treatment (see the UK-Jordan BIT) and treatment no less favourable than that required by international law (see the Spain-Jordan BIT).

evidentiary phase of this proceeding to submit the ongoing Dike No. 19 dispute to a new commercial arbitration *in lieu* of proceeding in the Jordanian courts.¹⁷ In so doing, Jordan effectively demonstrated that it could decide on behalf of APC to bring an end to the judicial proceedings currently pending before the Jordanian State courts, which APC initiated following the extinguishment *ipso jure* of the Arbitration Agreement. The extinguishment rule prescribed in the last sentence of Article 51 of the Jordanian Arbitration Law of 2001 operates in all cases of annulment of an arbitral award by a Jordanian court.

128. By virtue of Article II of the New York Convention, Jordan's State courts are required to "recognize an agreement in writing under which the parties undertake to submit to arbitration", and in such circumstances to "refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed". There has never been any allegation in this case by either party that the Arbitration Agreement at issue was *per se* "null and void, inoperative or incapable of being performed". It is arguable (but the Tribunal takes no position on the point) that the extinguishment rule might be deemed to be prospectively compatible with Article II insofar as parties electing Jordan as the venue for an arbitration or electing Jordanian law as the law of the arbitration had notice of the rule and accepted it. But this argument cannot work retroactively. Retroactivity is the problem here. The new rule should cover only those arbitration agreements concluded after the coming into force of the Jordanian Arbitration Law in 2001 and not arbitration agreements existing before the 2001 Law came into force, such as the Arbitration Agreement at issue in this proceeding. In the

¹⁷ See *supra* at paragraphs 55 and 56.

Tribunal's view, the Jordanian Court of Appeal and Court of Cassation could have complied with their duty in this case by refusing to apply retroactively the new rule introduced in the last sentence of Article 51 of the Jordanian Arbitration Law.

129. Having found that the extinguishment of the Claimant's right to arbitration was unlawful, the Tribunal now turns to the question of adequate and effective relief in reparation of the unlawful act committed by Jordan in the circumstances. The Tribunal recalls that under *Chorzow*, a remedy should repair all the consequences of the unlawful act:

[A] principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is 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. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.¹⁸

130. The Tribunal finds particularly apposite the statement of Christoph Schreuer which it adopts that:

There is no doubt that an obligation imposed by an award that is expressed not in monetary terms but in terms of an obligation to perform a particular act or to refrain from a certain course of action is equally binding and gives rise to the effect of *res judicata*.¹⁹

131. 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

¹⁸ *The Factory at Chorzow Case*, 1928 P.C.I.J. No. 13.

¹⁹ Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2009) at pages 1136-1138.

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.

132. 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.

VII. AWARD

133. For the foregoing reasons, the Tribunal decides:

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.

[signed]

Professor Dr. Ahmed Sadek El-Kosheri

Date: *[May 9, 2010]*

[signed]

Professor W. Michael Reisman

Date: *[May 5, 2010]*

[signed]

Mr. L. Yves Fortier, C.C., Q.C.

President

Date: *[May 12, 2010]*