



# International Arbitration Case Law

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## **ATA CONSTRUCTION, INDUSTRIAL AND TRADING COMPANY V. THE HASHEMITE KINGDOM OF JORDAN. (ICSID CASE ARB/08/2) AWARD**

Case Reported by Jorge Stepensky \*

Edited by Ignacio Torterola\*\*

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Award rendered on May 18, 2010, under the Treaty between the Hashemite Kingdom of Jordan and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Investment (or BIT) and in accordance with the ICSID Convention and Arbitration Rules.

**Tribunal:** Mr. L. Yves Fortieer, C.C., Q.C., (President), Professor Dr. Ahmed Sadek El-Kosheri and Professor W. Michael Reisman.

**Claimant's counsel:** Mr. Robert G. Volterra, Mr. Stephan Fietta, Ms. Joanna R. Dingwall, Mr. Hussein Haeri of Latham Watkins LLP and Professor Dr. Ziya Akinchi of Akinci Law Office.

**Defendant's Counsel:** Mr. Allan B. Moore, Mr. Peter D. Trooboff, Mr. Donald J. Ridings, Mr. Adam M. Smith, Mr. James M. Smith of Convington & Burling LLP and Mr. Rabie' M. Hamzeh.

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## *Digest*

### *1. Facts of the Case*

ATA Construction (the “Claimant”) filed a request for arbitration concerning the validity of the annulment by Jordanian courts of an arbitral award rendered in favor of Claimant (a Turkish company) following a dispute arising from the collapse of a dyke constructed by Claimant for the Arab Potash Company (“APC”), an entity that was controlled by Respondent. Upon the collapse of the dyke, APC commenced an arbitration under the International Federation of Consulting Engineers (“FIDIC”). The FIDIC tribunal issued its Final Award on September 30, 2003 (the “Final Award”), exonerating Claimant from any liability for the collapse of the dyke.

On October 29, 2003, APC applied to the Jordanian Court of Appeal to have the Final Award annulled under the Jordanian Arbitration Law. The Jordanian Court of Appeal decided to annul the Final Award and to extinguish the arbitration agreement between Claimant and APC. As a result of the latter, Claimant appealed to the Jordanian Court of Cassation, which upheld the Court of Appeal’s judgment on January 16, 2007. Claimant instituted this ICSID proceeding alleging that Respondent acted in violation of the BIT which, although entered into on August 2, 1993, only came into force in Jordan on January 23, 2006. Claimant alleged violations of the BIT including unlawful expropriation of Claimant’s claims to money and rights to legitimate performance under the Contract and the Final Award, as well as 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. Meanwhile, Respondent alleged that the Centre lacked jurisdiction *ratione temporis* over the claims, and that the Tribunal lacks competence to rule upon the claims. The Tribunal made the following conclusions:

- All of Claimant’s claims in connection with the annulment of the Final Award *per se* as well as its claims of denial of justice are inadmissible for lack of jurisdiction *ratione temporis*. However, the Tribunal conclude that it did have jurisdiction *ratione temporis* over Claimant’s claim resulting from the decision of the Jordanian Court of Cassation declaring extinguished the Arbitration Agreement in the Contract between Claimant and APC (para. 95); and

- 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 (para. 97).

## 2. *Legal Issues Discussed in the Decision*

- (a) *Was the Dispute Decided Upon in the Final Award the Same Dispute Decided by the Jordanian Court of Cassation? (paras. 95-97)*

The Tribunal found that the dispute giving rise to Claimant's claims in this proceeding which crystallized when the Jordanian Court of Cassation rendered its decision on January 16, 2007, confirming the annulment of the Final Award, is legally equivalent to the contractual dispute which was initiated on September 6, 2000 when the arbitration was commenced (para. 95). The Tribunal emphasized that an investment is not a single right but is, like property, correctly conceived as a bundle of rights, some of which are inseparable from others and some which are free-standing (para. 96). Therefore, claims of different violations of an investment may be subject to different jurisdictional objections (para. 97).

- (b) *Jurisdiction of the Tribunal (para. 98-103)*

All of Claimant's claims in connection with the annulment of the Final Award *per se* as well as its claims of denial of justice are inadmissible for lack of jurisdiction *ratione temporis*. However, the Tribunal conclude that it did have jurisdiction *ratione temporis* over Claimant's claim resulting from the decision of the Jordanian Court of Cassation declaring extinguished the arbitration agreement in the Contract between Claimant and APC (para. 95). The relevant BIT provision does not make it retroactive with respect to disputes existing prior to the entry into force of the BIT (para. 98). The Tribunal recognizes that Claimant argues that the decision of the Court of Cassation "crystallized" the contractual dispute into a new claim. Meanwhile, Respondent maintains that the earlier dispute manifests the same subject-matter as the dispute commenced in front of the Jordanian courts (para. 101). The Tribunal found that the dispute over the annulment of the Final Award is indistinguishable from the original dispute and because its progenitor arose prior to the entry into force of the BIT, all claims in connection with the annulment of the Final Award are inadmissible because of a lack of jurisdiction *ratione temporis* (para. 103).

(c) *Denial of Justice (para. 108)*

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 the BIT. This attempt fails because the occurrence is part of the dispute which originated before the entry into force of the BIT. Therefore, the Tribunal concluded that it did not have jurisdiction *ratione temporis* over the claim (para. 108).

(d) *Extinguishment of Claimant's Right to Arbitration (paras. 116-132)*

Claimant was entitled to initiate another arbitration under the Jordanian Law which existed at the time of the conclusion of the original contract in 1998 and under international law. In 2001, the Jordanian Arbitration Law came into effect, including Article 51, last sentence, which provides for the extinguishment of the right to arbitration if an arbitral award is annulled (para. 116). The Tribunal found that the right to arbitration was a distinct investment within the meaning of the BIT (para. 117). This section of the decision of the Court of Cassation, which occurred after the entry into force of the BIT and distinct from the underlying investment, is not barred *ratione temporis* and falls within the jurisdiction of the Tribunal; therefore, Respondent's jurisdictional objection is dismissed (paras. 118, 120). The extinguishment of the right to arbitration was contrary to the BIT and constitutes a breach of Jordan's international obligations. (paras. 121, 132).

3. *Decision (para. 133)*

The Tribunal rendered the claims related to the annulment of the Final Award inadmissible for lack of jurisdiction *ratione temporis*; however, it declared the claim regarding the extinguishment of the arbitration agreement admissible *ratione temporis*. Declared that the extinguishment of the arbitration agreement constituted a breach of Respondent's obligations under the BIT. Ordered the ongoing proceedings before the Jordanian court to be immediately and unconditionally terminated, with no possibility to engage further judicial proceedings in Jordan or elsewhere on the substance of the dispute. Declared that Claimant is entitled to proceed to arbitration in accordance with the arbitration agreement. Ordered costs to be paid in equal by the parties, not

including the legal costs.