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

In the proceeding between

ATA CONSTRUCTION, INDUSTRIAL AND TRADING COMPANY
(Respondent)

and

THE HASHEMITE KINGDOM OF JORDAN
(Applicant)

(ICSID Case No. ARB/08/2)
Annulment Proceeding

ORDER TAKING NOTE OF THE DISCONTINUANCE OF THE PROCEEDING

Members of the *ad hoc* Committee
Judge Gilbert Guillaume, President
Professor Juan Fernández-Armesto, Member
Professor Dr. Bernard Hanotiau, Member

Secretary of the *ad hoc* Committee
Ms. Aïssatou Diop

Representing the Applicant	**Representing the Respondent**
Mr. Rabie' M. Hamzeh *Advocate* Mr. Eugene D. Gulland Mr. Peter D. Trooboff Mr. James McCall Smith *Covington & Burling LLP*	Mr. Philip Clifford Mr. Charles Claypoole Ms. Joanna Dingwall Mr. Hussein Haeri *Latham & Watkins* Dr. Ziya Akinci *Akinci Law Office*

Date: July 11, 2011

PART I - PROCEDURE

1. On 15 September 2010, the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") received from the Hashemite Kingdom of Jordan ("Jordan" or "the Applicant") a conditional application for partial annulment of the Award of 18 May 2010 ("the Award") rendered in the case of *ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/08/2).

2. The application was made within the time limit prescribed under Article 52(2) of the ICSID Convention. Jordan cited the following grounds for seeking annulment: the Tribunal manifestly exceeded its powers under Article 52(b) of the ICSID Convention, seriously departed from a fundamental rule of procedure under Article 52(d), and failed to state the reasons on which the Award was based under Article 52(e).

3. By letter of 20 September 2010, ATA Construction, Industrial and Trading Company ("ATA" or "the Respondent") contended that the ICSID Convention contains no procedure for conditional applications for partial annulment of an ICSID Tribunal's award, and that the ICSID Secretary-General has no jurisdiction to register the application. The next day, Jordan opposed ATA's letter.

4. On 27 September 2010, the ICSID Secretary-General registered the application and noted in her letter transmitting the notice of registration that Jordan's submission met the requirements of Rule 50 to be treated as a registrable application for annulment; however, the registration could not be done on a conditional basis as the ICSID Convention and Rules do not contain procedures for conditional applications for annulment.

5. In a separate but related proceeding, Jordan had requested interpretation of the Award of 18 May 2010. Jordan stated in its application for annulment that the outcome of the interpretation proceeding may render moot its application for annulment, in which case Jordan would withdraw the application. However, the 120-day deadline found in Article 52 of the ICSID Convention, which cannot be tolled, forced Jordan, in order to preserve its rights, to submit its application for annulment before the outcome of the interpretation proceeding was known. As a result, Jordan requested the Centre to stay all action relating to the application until the Tribunal issued its decision on the interpretation of the Award.

6. In response, the Centre informed the parties on 15 October 2010 that it would be agreeable to deferring constitution of the *ad hoc* Committee until after a decision was rendered in the interpretation proceeding. The Centre specified that its proposal was advanced solely to prevent all parties involved from unnecessarily expending time and costs, but unless both parties agreed, an *ad hoc* Committee would be constituted forthwith.

7. ATA opposed the Centre's proposal by letter of 21 October 2010. Thus, on 8 December 2010, an *ad hoc* Committee ("the Committee") was constituted with its Members consisting of Judge Gilbert Guillaume, a national of France, as President, and Professor Juan Fernández-Armesto, a national of Spain, and Professor Dr. Bernard Hanotiau, a national of Belgium, as Members.

8. The Committee held its first session by telephone conference on 7 February 2011. On 17 February 2011, the Committee issued the Minutes of the First Session, setting out the parties' agreement on the conduct of the proceeding, as well as Procedural Order No. 1, setting out the procedural calendar and the Committee's decision on Jordan's request to "stay all action relating to [its] application" for annulment.

9. The Committee decided not to stay the proceeding but set two alternative briefing schedules, the first for the filing of submissions if the case were to proceed normally, and the second for the filing of submissions if Jordan were to withdraw its application for annulment following the awaited Decision on Interpretation.

10. Following the second alternative briefing schedule, on 13 April 2011, Jordan filed a Withdrawal of the Annulment Application as Moot and Request for Termination of the Proceeding. On 4 May 2011 the Respondent filed Observations on the Applicant's Request for Termination of the Proceeding. On 18 May 2011, Jordan filed a Reply in Support of its Request for Termination and Costs. On 25 May 2011, the Respondent filed Further Observations on the Applicant's Request for Termination of the Proceeding.

11. On 8 June 2011, the Committee informed the parties that based on their submissions, the only remaining issue was the allocation of costs, on which the parties had already expressed their view points, and that the Committee did not see a need for an oral hearing. The parties

confirmed their agreement with the Committee by e-mails 16 June from Jordan and 13 June, 2011 from ATA.

PART II – SUBMISSIONS OF THE PARTIES

12. In its "conditional application for partial annulment" of the Award of May 18, 2010, Jordan had indicated that if the Tribunal were to adopt ATA's interpretation, then the Government would seek to annul portions of the Award under Articles 52 (b), (d) and (e) of the ICSID Convention. Jordan specified that this "precautionary application [was] to be prosecuted only if the original Tribunal accepted ATA's interpretation of the Award"[1].

13. On 14 April 2011, the Applicant withdrew its annulment application "as moot" and asked for the termination of the proceeding. In this Memorial, the Applicant stated that "[o]n 7 March 2011, the original Tribunal issued its Decision on Interpretation rejecting ATA's position and confirming the correctness of the Government's interpretation of the Award"[2]. Jordan contended that, in the light of this interpretation, "there is nothing for the Government to present in favor of annulment, and it could not serve any useful purpose to address the merits of a non-existent dispute"[3]. It added that promptly after the issuance of the Decision on interpretation, Jordan tried to seek ATA's agreement to terminate immediately the proceeding by consent. ATA declined that proposal.

14. Accordingly, the Applicant now formally requests that the Committee issue a decision terminating the proceeding. The Applicant stresses that "[f]rom the beginning of this proceeding, the Government took every opportunity to avoid unnecessary expenses by proposing that the parties defer action until after issuance of the Decision on interpretation"[4]. According to Jordan, ATA rejected each of the proposals made to that effect. It must accordingly bear the "responsibility for the additional and unnecessary costs that resulted from its pursuing tactics"[5]. The Committee must therefore direct ATA to pay "(i) all the costs of the Centre, including costs of the Committee, except the lodging fee paid by the Government to initiate the proceeding; (ii) the reasonable attorneys fees and disbursements incurred by the Government to prepare for and

[1] Withdrawal Memorial, §6
[2] Ibid. §7
[3] Ibid. §10
[4] Ibid. § 17
[5] Ibid. §18

participate in the First Session; and (iii) the reasonable attorneys fees and disbursements incurred by the Government to prepare the written submissions required by Paragraph 11(B) of Procedural Order No. 1 and to participate in any hearing thereon"[6].

15. On 4 May 2011, the Respondent submitted its Observations on the Applicant's Request. It stated that: "[i]n accordance with Rule 44 of the ICSID Arbitration Rules and paragraph 11(B) of Procedural Order No. 1, the Respondent consents to the Applicant's request to terminate the proceeding"[7].

16. ATA however "strongly objects to...the Applicant's submission on costs"[8]. Moreover, it contended that the Committee has discretion to order the Applicant to bear all costs related to this proceeding and submitted that the Committee should do so for several reasons: "[f]irst, it was the Applicant that instigated this annulment proceeding which was entirely unnecessary"[9]. "Second, it is apparent that the Applicant had no serious basis for requesting annulment of the Award in the first place"[10]. According to the Respondent, the "Application appears to have been a tactical measure and, as such, an abuse of the ICSID Convention"[11]. "Third, the tactical advantage that the Applicant attempted to obtain in filing the Application is clear in light of the Applicant's failure to comply with this Award".[12] Fourth, there was and there is still disagreement between the parties on the allocation of costs and the Applicant cannot complain that it was necessary to follow the procedure fixed in Procedural Order No. 1 to settle that question. "Fifth and furthermore, there is strong authority that, in circumstances where one party requests the withdrawal or termination of a request ... that party should bear all costs relating to those proceedings"[13].

17. On those bases, the Respondent requests the Committee to terminate the proceeding and to direct the Applicant to pay:"(i) all the costs of the Centre, including costs of the Committee and the lodging fee paid by the Applicant to initiate this proceeding; and (ii) the Respondent's

[6] Ibid. §19
[7] Observations §8
[8] Ibid. § 9
[9] Ibid. §15
[10] Ibid. § 19
[11] Ibid. § 22
[12] Ibid. § 23
[13] Ibid. § 36

reasonable legal costs in connection with this proceeding (to include the attorney fees and disbursements incurred by the Respondent to prepare for and participate in the First Session of the Committee and to prepare the written submissions required by paragraph 11(B) of Procedural Order No. 1 and to participate in any hearing thereon)"[14].

18. The Respondent added that "[i]n the event that the Committee makes an order of costs in favour of the Respondent, the Respondent requests that such award include compound interest from the date of award of costs until payment"[15].

19. In its Reply dated 18 May 2011, the Applicant submitted that: "(i) ATA's perverse interpretation of the Award made it necessary for the Government to file the request for interpretation; (ii) the Government also needed to file a precautionary application for annulment; (iii) ATA rejected each of the Government's proposals to defer the procedural steps in the annulment case until after the decision on interpretation"[16]. Moreover "ATA's various assertions about the Government's 'failure to comply with the Award' are not relevant to this annulment proceeding or the award of costs herein"[17]. Thus ATA must be held accountable for the unnecessary costs attributable to the tactic it pursued. The Committee must take note of the discontinuance of the proceeding and direct ATA to pay costs as specified in the application.

20. The Respondent presented further observations on 25 May 2011. It contended that it never agreed "to the Applicant's request to terminate jointly the present annulment proceedings because the Applicant's proposal to terminate the annulment proceeding was conditional upon the Applicant's insistence that the Parties share the expenses"[18] of the proceedings. The Respondent reaffirmed that the Applicant had no serious basis for requesting annulment. It maintained that the Applicant did not comply with the Award. Then it underlined the "enduring close relationship between the Applicant and APC"[19]. According to the Respondent, "[t]his fact alone undermines the Applicant's submission that the Respondent should pay any share of the cost of this proceeding"[20]. Finally it confirmed its previous submissions and requested the

[14] Ibid. § 37
[15] Ibid. § 38
[16] Reply § 3
[17] Ibid. § 6, internal citations omitted
[18] New Observations, 25 May 2011, § 6
[19] Ibid. §17
[20] Ibid. §19

Committee "to indicate as appropriate a timeline within which the Parties should submit a breakdown of the total costs incurred in this proceeding"[21].

PART III – DECISION OF THE COMMITTEE

A - Allocation of Costs

21. Allocation of costs in arbitration proceedings is governed by Article 61 of the ICSID Convention, which is applicable *mutatis mutandis* to annulment proceedings by virtue of Article 52(4) of the Convention. Article 61(2) provides:

> *In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.*

22. In most cases of discontinuance at request of a Party, this request is the consequence of an agreement between the Parties giving some satisfaction to the Applicant. In such cases, the Parties generally agree to bear their own costs and the Tribunal or the *ad hoc* Committee does not have to take a decision relating to allocation of costs (*Compañia General de Electricidad S.A. and CGE Argentina S.A. v. Argentine Republic* (ICSID Case No. ARB/05/2); *CIT Group Inc. V. Argentine Republic* (ICSID Case No. ARB/04/9); *Interbrew Central European Holding B.V. v. Republic of Slovenia* (ICSID Case No. ARB/04/17); *Impregilo S.p.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3); *Aguas Cordobesas S.A. Suez and Sociedad General de Aguas de Barcelona S.A. v. The Argentine Republic* (ICSID Case No. ARB/03/18).

23. In the present case, there has been no agreement of that kind. The Applicant requests the Committee to direct ATA to pay all costs (except the lodging fees paid by Jordan to initiate the proceeding). The Respondent requests the Committee to direct the Applicant to pay all costs (plus compound interest from the date of the Award until payment). The Committee has thus to decide how and by whom the costs will be paid.

24. Such a decision is normally taken in an award, as specified in Article 61(2) of the Convention. However in case of discontinuance of the proceedings, it can be done in the Order

[21] Ibid. §23

noting the discontinuance (e.g. *Quadrant Pacific Growth Fund L.P. and Canesco Holdings Inc. v. Republic of Costa-Rica*, ICSID Case No. ARB (AF)/08/01, Order of 20 October 2010; *R.S.M. Production Corporation and Grenada,* ICSID Case No. ARB/05/14, Annulment proceeding, Order of 28 April 2011). Moreover, in the present case, both Parties ask the Committee to proceed this way.

25. The Parties also agree that, under Article 61(2), the Committee has broad discretion in determining costs. However discretion may not be capricious or arbitrary. It must be the result of rational consideration of relevant factors.

26. In the present case, the Respondent first submits that "[i]n situations where one party requests the withdrawal or termination of a request or discontinue a proceeding it has instigated, there are strong reasons why that party should pay for all costs incurred in that proceeding".[22] It adds that, in the present case, the proceeding was unnecessary, that there was no serious basis for requiring annulment and that the application must thus be considered as an abuse of the ICSID Convention.

27. The Committee notes that a Party may withdraw an application for annulment for a number of reasons. It may have obtained some satisfaction from the other Party or through other proceedings (see §16 above). It may also decide to abandon a proceeding without having obtained such satisfaction and this could be done in various circumstances. As a consequence, there is no general rule applicable to allocation of costs in cases of discontinuance on the request of a party. The decision must be taken on a case by case basis.

28. In the present case, the Parties had a serious divergence as to the meaning of the Award of 18 May 2010. Jordan submitted to the Tribunal a request for interpretation. It was convinced that, if ATA's interpretation were to be retained, there would be serious grounds for annulment under Article 52 (b), (d) and (e) of the Convention. It noted that, according to Article 52 (2), request for annulment has to be filed within 120 days after the date at which the award is rendered. It also noted that the Tribunal would most probably not have given the required interpretation within that time limit. It thus decided to submit a "precautionary" and "conditional" application for annulment. At the same time it requested postponement of the

[22] Ibid. § 22

examination of that request till the issuance of the decision of the Tribunal on the interpretation of the Award.

29. The Arbitral Tribunal rendered its decision on interpretation on 7 March 2011. In that decision, it underlines that it "has some difficulty in seeing how its Award could be misunderstood", stating that the disputed passage of the Award "is perfectly clear" and it rejected ATA's interpretation[23]. It also rejected ATA's request for costs. In the light of that Award, Jordan withdrew its annulment application.

30. The Committee considers that, in presenting this application, then in withdrawing it, Jordan exercised its rights under Article 42 of the Convention. The Committee fails to see any abuse of rights in those actions and therefore sees no reason to direct the Applicant to pay all the costs in this proceeding.

31. The Committee moreover notes that, in its original application of 15 September 2010, Jordan requested the Secretary-General of ICSID to stay all action relating to the application until the Tribunal issues its decision on the request for interpretation. On 20 September 2010, ATA asked the Secretary-General to neither register nor stay the application. On 27 September 2010, the Secretary-General informed Jordan and ATA that she had registered the application. Then on 15 October 2010, she informed the Parties that ICSID would be agreeable to deferring constitution of the *ad hoc* Committee until after the decision is rendered in the interpretation proceeding. On 21 October, ATA objected to that proposal.

32. In the absence of agreement of the Parties, the Secretary-General decided to proceed with the constitution of the *ad hoc* Committee. On 15 December 2010, Jordan submitted to the Committee a request for deferral of the proceeding. On 17 December 2010, ATA opposed that request. The Parties maintained their position in their letters of 11 and 13 January 2011. The Committee held its first session by telephone conference on 7 February 2011. During that session, Jordan submitted that it would be premature to establish a time schedule for written briefs as well as the dates of pre-hearing conference and hearing. By contrast, ATA submitted that it was "appropriate to establish a briefing schedule" and made proposals for such a schedule

[23] Decision on interpretation and on the request for provisional measures – ATA v. Jordan, ICSID Case ARB/08/2, 7 March 2011, §40 and 42

as well as prehearing conference and hearing. By Procedural Order No. 1, the Committee established two schedules, one to be used if there was no withdrawal of the request and one to be retained in case of withdrawal. The last one was applied.

33. It thus appears that ATA opposed successive measures proposed by Jordan, and even by the Secretary-General of ICSID, in order to defer the procedural steps in the annulment case until after the decision on interpretation. In acting that way, it increased unnecessarily the costs of the proceeding for the other Party. The Committee in those circumstances is of the opinion that part of the costs of Jordan must be borne by ATA.

34. ATA, however, contends that such a decision cannot be taken in the present case, due to the fact that "APC continues to fund the Applicant in the present proceeding, just as it did in the underlying ICSID arbitration"[24]. In this respect, the Committee will only observe that, in any event, it "knows of no principle why any...third party financing arrangement should be taken into consideration in determining the amount of recovery by [parties] of their costs" incurred in arbitration proceedings (*Ioannis Kardassopoulos and Ron Fuchs v. Georgia*- ICSID Cases No. ARB/05/18 and ARB/07/15, Award of 3 March 2010 §691; *RSM Production Corporation and Grenada* –ICSID Case No. ARB/05/14, Annulment proceeding, §68) .

35. Taking into account all those elements, the Committee considers that equity and fairness mandate that the Respondent should contribute to the Applicant the sum of US $ 80,000. In deciding that amount, the Committee has taken into account the Applicant's legal costs and associated expenses, as well as the fees and expenses of the Committee and the Centre.

B – Discontinuance of the case

36. Discontinuance of ICSID arbitration proceedings is governed by Rules 43 to 45 of ICSID Arbitration Rules, which are applicable *mutatis mutandis* to annulment proceedings and decisions of *ad hoc* Committees by virtue of Rule 53.

37. Rule 44 relates to discontinuance at request of a Party. It provides:

[24] New Observations, §18

> *If a party requests the discontinuance of the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall in an Order fix a time limit within which the other party may state whether it opposes the discontinuance. If no objection is made in writing within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal, or if appropriate the Secretary-General, shall in an order take note of the discontinuance of the proceeding. If objection is made, the proceeding shall continue.*

38. In its Memorial received on 13 April 2011, the Applicant withdrew its annulment application "as moot" and requested the termination of the proceeding. This Memorial was communicated to the Respondent and the Parties had the opportunity to present a Reply and a Rebuttal within the time limits fixed in paragraph 11 (B) of the Tribunal Procedural Order No. 1. In its observations dated 4 May 2011, the Respondent consented to the Applicant's request to terminate the proceeding in accordance with Rule 44.

39. The Committee notes that the Respondent has consented to the termination of the proceeding requested by the Applicant. The proceeding is thus discontinued and the *ad hoc* Committee will take note of this discontinuance pursuant to Rule 44.

40. In those circumstances, the Committee will not have to decide whether or not the case is moot and whether or not, as initially alleged by the Applicant, it would in any event had to be discontinued on that ground in the absence of consent of the Respondent.

41. For the reasons set forth above,

A - The Respondent shall pay the sum of US $ 80,000 to the Applicant in respect of the fees and costs claimed by the Applicant;

B - In accordance with the Applicant's request acquiesced by the Respondent pursuant to Arbitration Rule 44, the Committee takes note of the discontinuance of the proceeding.

[*SIGNED*]

Professor Juan Fernandez-Armesto
Member

[*SIGNED*]

Professor Dr. Bernard Hanotiau
Member

[*SIGNED*]

Judge Gilbert Guillaume
President