4A_516/2020[1]

Judgment of April 8, 2021

First Civil Law Court

Federal Judge Kiss, Presiding
Federal Judge Niquille,
Federal Judge May Cannelas
Clerk of the Court: Mr. Monti

Parties to the proceedings
1. A._____
2. B._____
3. C._____
4. D._____
All represented by Mr. Elliott Geisinger and Mrs. Anne-Carole Cremades,
Appellants

v.

The Syrian Arab Republic,
Represented by Mr. Christopher Koch
Respondent

Facts:

A.
A.a. The Syrian Arab Republic and the Republic of Turkey are bound by a bilateral investment treaty (BIT) which entered into force on January 3, 2006, entitled: "*Agreement between the Republic of Turkey and the Syrian Arab Republic concerning the Reciprocal Promotion and Protection of Investments*".

The BIT contains a general most-favored-nation clause worded as follows:

> Article III [...]
>
> [...]

[1] Translator's Note: Quote as A._____, B. _____, C. _____, & D. _____ v. Syrian Arab Republic, 4A_516/2020.
The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch

> 2. Each Party shall accord to these investments, once established, treatment no less favorable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favorable.[2]

Art. IV deals with compensation in the event of expropriation (Section 1). It also offers investors who suffer a loss in the territory of the host State as a result of a war or similar event the guarantee that they will receive the same treatment as that accorded to the most favored nation with regard to measures adopted in connection with such losses (Section 3):

> Article IV (...)
>
> 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 (...).
> (...)
> 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.[3]

Art. VII is devoted to the method of settling disputes between one of the contracting states and investors of the other contracting state. The investor may submit the dispute to the Court of Arbitration of the International Chamber of Commerce.

The Syrian Arab Republic is also bound to the Italian Republic by a BIT entitled "*Agreement between the Government of the Italian Republic and the Government of the Syrian Arab Republic on the Promotion and Protection of Investments*", which came into force (November 13, 2003) before the Syria-Turkey BIT. This agreement provides for "adequate compensation" for loss or damage suffered by investors in the territory of the host state due to war or similar events:

> Article 4
>
> Should investors of either Contracting Parties incur losses or damages on their investments in the territory of the other Contracting Party due to war, other forms of armed conflict, a state of emergency, civil strife or other similar events, the Contracting Party in which the investment has been effected shall offer adequate compensation in respect of such losses or damages. Irrespective of whether such losses or damages have been caused by governmental forces or other subjects, compensation payments shall be freely transferable as provided for in article 8 of this Agreement.[4]

A.b. A._____ and his two sons B._____ and C._____ have Turkish nationality. They are shareholders of a limited company under Turkish law called D._____, active in the field of construction and cement production.

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[2] Translator's Note: In English in the original text.
[3] Translator's Note: In English in the original text.
[4] Translator's Note: In English in the original text.

In mid-2000, the three named persons and their limited company (hereinafter, the Turkish investors) decided to invest in the cement sector in the Syrian Arab Republic. For this purpose, they established two companies under Syrian law, which they located in the regions of M._____ and P._____, in the northeast of the country. They hold 91% of the shares of the company M._____ and 87% of the shares of the company P._____.

The company M._____ established a cement factory in the M._____ region which became operational in April 2009. It has also taken steps to build another factory. As for the company P._____, it established a factory of the same type in March 2010 in the free zone of P._____.

In 2011, Syria became the scene of armed conflict. In the spring of 2011, the investors decided as a precaution to repatriate the top management of both companies to Turkey, suspend the business activities of the factories and stop the construction of the second factory of M._____.

In April 2012, intense conflict spread to the regions of M._____ and P._____. Soon after, the armed forces of the Syrian Arab Republic withdrew. The Republic lost control of these regions in which it could no longer provide security for people and property. Kurdish organizations took over these areas. The investors lost the use and control of the factories which became impossible to access. These were operated by or for the benefit of Kurdish forces (perhaps intermittently and to some extent only).

B.
On April 5, 2016, the four Turkish investors filed a request for arbitration with the International Chamber of Commerce (ICC). They relied on Article VII of the Syria-Turkey BIT.

Under the aegis of this institution, a tribunal composed of three arbitrators was formed. Its seat was set in Geneva, Switzerland, while English was designated as the language of the arbitration.

The proceedings were governed by the mandatory rules of Chapter 12 of the Swiss Federal Act on Private International Law (PILA[5]; RS 291), by the ICC Rules of Arbitration as amended in 2012 and by any other rules to which the parties may agree or which the tribunal may designate pursuant to Art. 19 of the said Rules.

On the merits, it was agreed that the case would be governed primarily by the Syria-Turkey BIT, and where applicable by general international law and Syrian law.

The Turkish investors claimed damages of not less than USD 88'381'126.75 (hereinafter, dollars or USD) calculated according to the discounted cash flow method, or in the alternative, damages of not less than USD 54'690'066.96 corresponding to their sunk costs. They requested pre- and post-award interest.

[5] Translator's Note: PILA is the most frequently used abbreviation for the Swiss Private International Law Act of December 18, 1987

The defendant State argued that the court lacked jurisdiction, and alternatively, that the Claimants were not actively entitled to claim. In the further alternative, it argued that the claim should be rejected on the grounds that it was based on unproven facts and an erroneous calculation.

The Arbitral Tribunal closed the proceedings on June 26, 2019, and issued its final award on August 31, 2020.

According to Section iv of the operative part of the Award, it ordered the defendant State to pay the Turkish investors the sum of SYP[6] 4'565'469'288.64, plus 10% annual interest compounded on an annual basis, running from the date of the Award until full payment. It gave the Claimants the right to demand payment of this amount in dollars at the official exchange rate of the Syrian Central Bank on the day of payment. After final and complete payment, the defendant State had permission to require the claimants to transfer to it all their shares in the companies M._____ and P._____.

The first recitals of this Award are devoted to the rejection of a series of grievances concerning the entry into force of the Syria-Turkey BIT, its suspension, the active legitimacy of the Turkish investors to claim damage to the assets of their Syrian companies, the applicability of the BIT to investments located in a free zone, and finally, the interpretation of Article VII sections 1 and 2 of the BIT relating to the mode of settlement of disputes.

On the merits, the Turkish claimants demanded the same treatment as the Italian investors and "adequate compensation" for the loss of their investments, in accordance with Article 4 of the Syria-Italy BIT.

The majority of the arbitrators followed this reasoning, relying on the general most-favored-nation clause in Article III, Section 2 of the Syria-Turkey BIT. Both treaties envisaged the same type of situation, i.e., losses due to war or other similar event, and Article 4 of the Syria-Italy BIT offered broader protection than Article IV Section 3 of the Syria-Turkey BIT.

Art. 4 Syria-Italy BIT provided for compensation irrespective of who caused the damage, *i.e.*, without requiring that the act be attributable to the host state, and without regard to its lawful or unlawful character. It was sufficient to establish a direct causal link between the damage and the war (or a similar event). The host state was not liable for an internationally wrongful act; it assumed a purely economic liability for an injury which it had not necessarily caused, occurring in extraordinary circumstances. Nevertheless, the notion of "adequate compensation"[7] corresponded to the compensation due under the law of State responsibility, in the sense that it covered all financially assessable damage, including loss of earnings (Art. 36 Section 2 of the Draft ILC Articles on Responsibility of States for Internationally Wrongful Acts (at 4.3.1 below). The reparation had to erase all the consequences of the harmful act, as far as financial compensation could do so. It was also to include the time-value of money between the harmful act and the actual payment of the compensation. Interest was part of the concept of compensation, both under Article 4 of the Syria-Italy BIT and under general international law.

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[6] Translator's Note: SYP is the abbreviation for Syrian Pounds.
[7] Translator's Note: In English in the original text.

In this case, the Turkish claimant's investment took the form of shares in Syrian companies (91% in the company M._____ and 87% in the company P._____). The legal existence of these entities was not questioned, nor was the legal status of the shareholders. However, these legal entities held assets (plants, machines, contracts, know-how, customers, goodwill) of which they had lost the use and control. Without these assets, they could no longer carry out the business that was their purpose. The shareholders were practically deprived of the essential attributes of their rights, which included an economic component. They had been forced to give up the use, control and enjoyment of their investments because of the armed conflict. The date of this deprivation was April 1, 2012, when the Syrian state withdrew and lost control of the areas in which the two companies' plants were located. From that moment on (but not before), the continuation of commercial activities had become impossible for security reasons. This deprivation was permanent, even if it could not be excluded that the situation would one day be normalized and that the assets would still be operational at that time.

The defendant State had not offered any compensation to the Turkish investors to date; it had therefore breached Art. III Section 2 of the Syria-Turkey BIT in conjunction with Art. 4 of the Syria-Italy BIT. There was no point in examining whether the claimants could also base their claim on the expropriation clause in Art. IV Section 1 of the Syria-Turkey BIT: the application of this provision would lead to the same measure of compensation, since the loss suffered was identical (*i.e.*, the permanent deprivation of investments).

It was necessary to quantify the value of the holdings of which the claimants had been deprived. The claimants proposed the discounted cash flow method, which was based on a 2009 valuation and was not appropriate to the specific circumstances. It was more appropriate to take into account the value of the invested capital, equivalent to the net book value of their two Syrian companies (i.e., the difference between assets and liabilities). In 2011, the net book value of M._____ was SYP 2'031'212'637.40. As the investors held 91% of this company, the value of their shares was SYP 1'848'403'500. As for the company P._____, the net assets in 2011 were SYP 224'983'655. The investors had 87% of the shares in this entity, the value of which was equivalent to SYP 195'735'779.

For the loss of their shares in the two Syrian companies, the claimants were entitled to compensation of SYP 2,044,139,279 (SYP 1,848,403,500 + SYP 195,735,779) as of April 1, 2012. The claimants and their expert had made claims in dollars without providing any explanation. However, their figures largely reflected values in Syrian pounds (which they had converted into dollars at the 2010 exchange rate): the investments were located in Syria; the financial statements of both companies were denominated in Syrian pounds; their revenues from the sale of cement were realized exclusively in the Syrian market. Therefore, the loss or damage suffered by the investors, and hence the compensation to which they were entitled, had to be expressed in Syrian pounds.

The claimants were entitled to interest from April 1, 2012, until the compensation was actually paid. The rate of interest and the method of calculation were to be determined in such a way as to ensure full reparation (Art. 38 Section 1 of the Draft ILC Articles on Responsibility of States for Internationally Wrongful Acts). In this case, the compensation, expressed in Syrian pounds, related to investments located in Syria, in the context of the Syrian economy, and was to be paid by the Syrian Arab Republic.

In these circumstances, the interest was to correspond to the value that a large deposit in a Syrian bank would have earned during the relevant period. Such interest reflected inflation, other economic factors and risks in the Syrian economy. The only element in the case file was a note from the Syrian Central Bank setting the interest rate for a one-year deposit in Syrian pounds at 10%. This rate had to be retained and it had to be admitted that the renewal of the deposit generated compound interest, which was usual for commercial rates. This resulted in compound interest of SYP 2'521'330'009.64 for the period from April 1, 2012, to August 31, 2020, (the date of the award). Ultimately, the claimants were entitled to adequate compensation of SYP 4,565,469,288.64 (principal of SYP 2,044,139,279 + interest of SYP 2,521,330,009.64). This amount due on August 31, 2020, bore interest compounded at 10% per annum until full payment.

The defendant State admitted that the Claimants could demand payment in dollars, corresponding to the amount due in Syrian pounds on the day of payment. The operative part of the Award reserved this option.

Finally, the claimants were compensated for the loss of their investments, which was supposed to be permanent, but was not necessarily so in fact. In order to avoid over-compensation, it was necessary to grant the defendant State the right to demand the transfer of the shares after full payment of this compensation.

C.
The four Turkish investors submitted a civil appeal with the Swiss Federal Tribunal. They requested the annulment of point iv of the operative part of the Arbitral Award, in the alternative the annulment of the award in its entirety.

The Arbitral Tribunal and the defendant State were invited to submit an Answer.

The defendant State did not react, while the Arbitral Tribunal merely referred to specific paragraphs of its Award.

After receiving a letter dated January 21, 2021, from the defendant State's counsel, the examining judge noted that it could not be considered as a request for resetting a legal period provided for by law on which it would be necessary to rule. The judge stipulated that the procedure would follow its normal course (order of January 26, 2021; see, in addition, at 3 below).
Reasons:

1.
According to Art. 54(1) LTF,[8] the Federal Tribunal issues its judgments in one of the four official languages[9], as a general rule in the language of the award under appeal. When the decision was issued

[8] Translator's Note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110

[9] Translator's Note: The four official languages of Switzerland are German, French, Italian, and Romansh.

in another language (here English), the Federal Tribunal uses the official language used in the appeal, which in this case is French (ATF 142 III 521[10] at 1; Judgment 4A_54/2019 of April 11, 2019, at 1).

2.
2.1. In the field of international arbitration, a civil appeal is admissible under the conditions of Art. 190 to 192 PILA (Art. 77 (1)(a) LTF).

The arbitral award can only be challenged on the legal considerations set out exhaustively in Art. 190(2) PILA. The material examination of the award is limited to its compatibility with public policy (Art. 190(2)(e) PILA; ATF 121 III 331 at 3a; Judgment 4A_304/2013[11] of March 3, 2014, 2.2).

The admission of the appeal leads to the annulment of the award and not to its revision, except in cases relating to the jurisdiction of the arbitral tribunal (see Art. 77(2) LTF which restricts the scope of Art. 107(2) LTF; ATF 136 III 605 at 3.3. 4; judgment 4A_476/2020 of January 5, 2021, at 2.2).

Whether as to the subject matter of the appeal, the reasons to appeal, the submissions made by the appellants or the time limit for the appeal (on the *dies a quo*[12], see judgment 4A_40/2018 of 26 September, 2018, at consid. 2) none of these admissibility requirements raises any impediments.

2.2. The Federal Tribunal only examines the grievances that have been raised and substantiated by the appellant (Art. 77(3) LTF). This must satisfy the same strict requirements for the statement of reasons as those applicable to the grievance of breach of constitutional rights (see Art. 106(2) LTF; the judgments cited in 4A_476/2020 at 2.3; Judgment 4A_600/2020 of January 27, 2021, at 5.1).

2.3. The Federal Tribunal decides on the basis of the facts contained in the award under appeal (see Art.105(1) LTF). It is also bound by the findings on the course of the proceedings, whether they concern the alleged facts, the parties' submissions, the legal reasoning advanced by the parties or the statements made during the proceedings (Judgment 4A_346/2020[13] of January 6, 2021, at 5.2; the aforementioned Judgment 4A_476/2020 at 2.4).

3.
The Respondent State did not submit an Answer. In its letter of January 21, 2021, it stated that it was unaware of the grounds for appeal.

However, a notice of receipt of the appeal was sent to its Permanent Mission to the United Nations Office at Geneva, the address suggested by the Appellants. Copies of the appeal and its attachments were then

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[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network

[11] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/definition-public-policy-reaffirmed

[12] Translator's Note: In Latin in the original text.

[13] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-346-2020

served on the same entity, along with an order setting a deadline of November 9, 2020, for submitting a response. The envelope was received by the Mission on October 16, 2020, according to the tracking notice issued by the Postal Service.

Subsequently, a duplicate of the letter in which the Arbitral Tribunal stated that it would not make a determination was sent to the Permanent Mission of the Respondent State, together with a notice dated November 12, 2020, stating that the respondent State "has not taken a position".

The interested party then reacted on January 21, 2021, explaining in substance that its Permanent Mission had transmitted this last letter to it, which had revealed the existence of the appeal, the content of which it still did not know; it would decide "in the event that the Federal Tribunal set a time limit for it in accordance with the rules of submission". This was followed by the order of January 26, 2021, (see above, (c) to the end), ruling out treating this missive as an application for resetting a legal period provided for by law. This decision found that the respondent State had not filed a reply within the time-limit set, notwithstanding the order which had been "validly served" on it at the address of its Permanent Mission to the United Nations in Geneva.

The interested party did not react to this order. It therefore did not question the validity of the notification made to the above-mentioned entity. Moreover, it had contested in the arbitration that its two permanent missions in New York and Geneva were entitled to receive a request for arbitration, invoking alleged internal directives. The Arbitral Tribunal argued that, on such a premise, the Missions should have refused the notification or returned it to the ICC Secretariat, failing which they created an appearance of regularity of the notification. It must be admitted that the party concerned did not take any steps to counter such a reproach. In its letter of January 2021, it did not argue any wrongful notification of the letter that it admitted having received via its Mission.

In short, the Respondent State was offered the right to express itself and did not respond.

This is the place to examine the two grievances, which relate to public policy and to the prohibition on ruling *extra petita*.

4.
4.1. The Appellants base their first ground of appeal on Art. 190(2)(e) PILA: the award is incompatible with substantive public policy. The Arbitral Tribunal supposedly wrongly awarded them damages in Syrian pounds rather than in dollars, thus making them bear the "dizzying" devaluation of the Syrian currency since the events giving rise to the Syrian State's liability. In the end, they only obtained a "derisory" compensation equivalent to a mere 4.6% of the loss suffered in April 2012, as quantified by the Arbitrators. This form of expropriation without adequate compensation would violate public policy. Under international law, the requirement of compensation based on the market value of the expropriated property would prevail. Case law would have it that the creditor should not have to bear the depreciation of the currency between the time of the expropriation and the time of the award or the actual payment of the compensation.

Before dealing with this claim, some jurisprudential clarifications are necessary (at 4.2 and 4.3 below).

4.2.
4.2.1. An award is contrary to substantive public policy when it violates some fundamental principles of the law applicable to the merits to such an extent as it is no longer consistent with the notions of justice and system of values among such principles are, in particular, the sanctity of contracts, compliance with the rules of good faith, the prohibition of abuse of rights, the prohibition of discriminatory and confiscatory measures, as well as the protection of incapable persons (ATF 144 III 120[14] at 5.1. p 130; 138 III 322[15] at 4.1; 132 III 389[16] at 2.1 and 2.2.1; Judgment 4P.208/2004 of December 14, 2004, at 6.1; 4P.200/2001 of March 1, 2002, at 2a).

Public policy is a narrower concept than arbitrariness; a manifest error in the establishment of the facts or in the application of the law does not in itself justify setting aside an arbitral award (ATF 144 III 120, at 5.1. p 130; 117 II 604 at 3 p. 606; judgment 4A_430/2020[17] of February 10, 2021, at 7.1). Such a sanction presupposes, moreover, that the result of the award is incompatible with public policy, and not only its reasons (ATF 144 III 120, at 5.1. To the end p 130; 117 II 604 at 3 p 606). All of these restrictions seriously undermine the chances of success of such an appeal (see the above-mentioned judgment 4A_430/2020, at 7.1; see ATF 132 III 389 at 2.1 p 392).

4.2.2. An arbitral tribunal breaches the principle of the sanctity of contracts (in the restrictive sense of the case law on Art. 190(2)(e) PILA) only when it declines to apply a contractual clause while finding that it is binding on the parties or, conversely, if it imposes on them the requirements of a clause that it does not consider binding on them. In other words, the arbitrators must have applied or refused to apply a contractual provision that contradicts the result of their interpretation of the existence or content of the legal instrument at issue. However, the process of interpretation itself and the legal consequences that are logically drawn from it are not governed by this principle. In short, almost all litigation arising from the breach of contract falls outside the scope of protection of the principle *of pacta sunt servanda* (see, for example, judgments 4A_660/2020 of February 15, 2021, at 3.2.2; 4A_404/2017 of July 26, 2018, at 4.1).

4.2.3. Confiscation, expropriation, or nationalization without compensation are considered to be spoliatory measures contrary to public policy (judgments 4P.12/2000 of June 14, 2000, at 5a/aa; 4P.280/2005 of January 9, 2006, at 2.2; see as well ATF 138 III 322 at 4.1; 116 II 634 at 4 p 636).

There can be no question of an expropriation contrary to public policy when an investor was awarded compensation of 2.3 million German marks by an arbitration award (issued in 1995) on the basis of a bilateral investment treaty. However, the principles of international law do not confer an absolute right to

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[14] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-260-2017

[15] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/landmark-decision-of-the-swiss-supreme-court-international-arbit

[16] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

[17] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-430-2020

full compensation (see the above-mentioned decision 4P.200/2001 B and at 2c). For the rest, the Federal Tribunal does not have to sanction, on the basis of public policy, an erroneous or even arbitrary interpretation of a BIT clause; it cannot be led to examine whether or not the compensation provided for in the BIT includes loss of profit (above-mentioned judgment 4P.200/2001, at 2c to the end; judgment 4A_157/2017[18] of December 14, 2017, at 3.3.4).

4.2.4. The Appellants rely on the principles developed by the European Court of Human Rights (ECtHR) concerning the guarantee of property rights enshrined in Art.1 of the First Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

According to this case-law, deprivation of property for public utility must result in the payment of compensation that is "reasonably related to the value of the property". The First Protocol does not guarantee full compensation in all cases; legitimate "public purpose" objectives, such as economic reform or social justice measures, may militate in favor of less than full market value. Nevertheless, in many cases of lawful expropriation (such as the isolated expropriation of land for road construction or other "public purpose" ends), only full compensation will bear a "reasonable" relationship to the value of the property. Exceptional circumstances may justify no compensation at all. Such a case is akin to compensation that is "grossly disproportionate" to the value of the expropriated property (on these issues, see e.g., *Lithgow and Others v. the United Kingdom*, July 8, 1986, Application 9006/80, Series A no. 102, n. 121-122; *Azas v. the United Kingdom*, July 8, 1986, Application 9006/80, Series A no. 102, n. 121-122). 121-122; *Azas v. Greece*, September 19, 2002, Application 50824/99, n. 45; *Scordino v. Italy* (No.1), March 29, 2006, Application 36813/97, n. 93-98; *Vistins and Perepjolkins v. Latvia*, October 25, 2012, Application 71243/01, n. 110, 112 and 119).

The ECtHR found a violation of Art.1 of the First Protocol against the Turkish state, which had paid the expropriation compensation 17 months after the court decision, plus an interest rate of 30% per year while inflation in the country reached 70% per year. Such a discrepancy between the value of the claim at the time of its determination by the judicial authority and its value at the time of actual payment constituted a separate loss in addition to the expropriation (*Akkus v. Turkey*, July 9, 1997, application 19263/92, n. 29-31).

4.3.
4.3.1. Investment treaties typically contain an expropriation clause, which usually addresses the issue of compensation in detail. This is more rarely the case for damage arising from the breach of other contractual obligations (Ripinsky/Williams, *Damages in International Investment Law*, 2008, pp. 22, 25 and 89). In the absence of an agreement on this point, arbitral tribunals apply the principle of full compensation for damages. This customary rule governing State liability was stated by the Permanent Court of International Justice (PCIJ) in a case of unlawful expropriation (see Ripinsky/Williams, *op. cit,* 89 et seq. and 105 et seq.): it aims, as far as possible, to erase all the consequences of the injurious act and to restore the state that would probably have existed without this breach (*Chorzow Factory* case, September 13, 1928, Series A, No. 17, p. 47). It is also anchored in Art. 31 of the Draft Articles on

[18] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-157-2017

Responsibility of States for Internationally Wrongful Acts, drawn up in 2001 by the International Law Commission (ILC) of the United Nations (on the authority of these Articles and their applicability in the case of damage suffered by private persons, see Ripinsky/Williams, *op. cit*.) While full reparation is an objective, this precept does not say how the damage is to be measured; this solution offers the flexibility necessary to adapt to the diversity of factual situations (Ripinsky/Williams, *op. cit*., pp. 21 and 90). When the breach of a treaty obligation produces the same effects as an expropriation (total loss of the investment), arbitral tribunals are logically inclined to adopt the same yardstick as in the case of expropriation, *i.e.,* the market value of the lost investment (Ripinsky/Williams, *op. cit*., p. 92).

4.3.2. There are no fixed international rules regarding the currency of compensation, except that courts usually opt for a freely convertible currency, a practice often reinforced by a clause in BITs. Some treaties designate a specific currency, for example that of the investor's country of nationality or that in which the investment was made. The host State, where it is economically less stable and exposed to currency depreciation, will insist on an award in its currency, while the claimant investor will seek to avoid losses caused by such depreciation. Most often, courts choose the currency of the claimant's nationality (Ripinsky/Williams, *op. cit*., pp. 393 f. and 401).

International tribunals generally consider that the investor does not have to bear the depreciation of the currency of the host State between the date of the loss suffered and the date of the award (Ripinsky/Williams, *op. cit*., p. 395). A well-known precedent is at the origin of this precept, namely the *Case Concerning the Concession of the Lighthouses of the Ottoman Empire* (Greece, France, judgment of July 24/27, 1956, in *Recueil des sentences arbitrales*, vol. XII p. 155 ff). The French concession company had been dispossessed by an “act of the Greek State contrary to the concession contract”. The arbitral tribunal refused to evaluate the loss suffered on this account in French francs or in Greek drachmas at the time of the dispossession, on the grounds that the devaluation of these two currencies since 1929 would lead to the annihilation of the concessionaire's claim (in drachmas), or to its reduction to one tenth of its amount (in French francs). However, the injured party was entitled to receive the equivalent of the loss suffered as a result of an illegal act, without having to bear the devaluation that had occurred since the injurious act (see above, claim no. 27, pp. 247 et seq.).

Various methods can be used to avoid the problem of currency depreciation (Ripinsky/Williams, *op. cit*. at pp. 397 et seq. and 401 and the references cited therein; Nicholson/Dyson, *Taxation and Currency Issues in Damages Awards*, p. 8, available on the Internet site www.globalarbitrationreview.com [or in the book The Guide to Damages in International Arbitration]). In the presence of “normal” inflation, the application of a market-based interest rate may be sufficient to compensate (Ripinsky/Williams, *op. cit*., p. 397). Other measures are needed in more serious cases. A frequent solution consists in evaluating the loss in the currency which has depreciated (typically that of the host State), and then converting the amount into the currency of compensation (typically that of the investor), by applying the exchange rate in force on the day of the harmful act; such an operation presupposes the stability of this currency (Ripinsky/Williams, *op. cit*., pp. 397-399; Nicholson/Dyson, op. cit. p. 8; see *Siemens A.G. v. The Argentine Republic*, judgment of February 6, 2007, ICSID Case No. ARB/02/8, n. 361). Where both the claimant's and the host State's currencies are subject to high inflation, it may be justified to use a sufficiently stable third currency or even the gold standard. In the *Ottoman Empire Lighthouses* case, for

example, the arbitral tribunal first determined in their "original currency" the annual profits that the concessionaire company had made before it was deprived of its concession in 1929, and hence the loss caused by this "unilateral act of authority by the concessioning State". It then translated these figures into dollars (a third currency which had remained relatively stable) at the average rate of exchange for the year in question, and then converted the sum thus obtained into French francs (the claimant's currency) at the rate of exchange in force on the day of the arbitration award (see above, pp. 246-248 and 250; Ripinsky/Williams, *op. cit*.)

This is the place to turn to the examination of the grievance.

4.4. The Appellants would like the principles governing compensation for expropriation to be applied; they rely on the Arbitral Tribunal's analysis that Art. IV, Section 1 of the Syria-Turkey BIT, which deals with this form of spoliation, leads to the same measure of compensation as Art. 4 of the Syria-Italy BIT. From their point of view, public policy would require the award of compensation equivalent to the market value of the permanently lost investment, in accordance with the practice of the ECHR.

The Federal Tribunal has already stated that the principles underlying the provisions of the ECHR can be taken into account in order to give concrete form to the concept of public policy (judgment 4A_248/2019 of August 25, 2020, at 9.2; see ATF 142 III 360[19] at 4.1.2, p 362). This being said, the breach of this Convention - or of one of its additional Protocols - does not as such constitute a ground for appeal, since it is not included in the exhaustive list of Art. 190 (2) PILA (see, for example, judgments 4A_114/2018[20] of August 14, 2018, at 2.2; 4A_178/2014[21] of June 11, 2014 at 2.4). It may happen that such a breach simultaneously constitutes an infringement of public policy within the meaning of Art. 190 (2) PILA (the Appellants cite the example of the prohibition of forced labor [judgment 4A_370/2007[22] of February 21, 2008, at 5.3.2]), but this is not necessarily the case.

According to the settled case-law of the Federal Tribunal, a spoliating measure without compensation is contrary to public policy. This expression should certainly not be taken literally, as the ECHR has been careful not to do (see the aforementioned case of Vistins and Perepjolkins, n. 119). However, the restrictive nature of such a formulation and the notion of public policy within the meaning of Art. 190 PILA require that the compensation appears so disproportionate to the value of the lost asset that it offends the most essential principles of the legal order. Moreover, the ECHR gives importance to the circumstances of the case and emphasizes that there is no absolute right to full compensation. The Appellants are therefore mistaken when they imply that the reservation of public policy would guarantee the granting of compensation in reasonable relation to the market value of the expropriated property.

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[19] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/agreed-upon-rules-procedure-do-bind-parties

[20] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-114-2018

[21] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/no-substantive-review-assessment-evidence

[22] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/appeal-against-interlocutory-and-partial-awards-violation-of-pub

Moreover, the fact that the Appellants are definitively deprived of their investment does not necessarily mean that the principles of expropriation should be applied (see furthermore, at 4.6 below).

Public policy within the meaning of Art. 190 PILA should not be confused with customary international law or general principles of international law (on this concept, see, for example, Daillier/Pellet, *Droit international public*, 7th ed. 2002, pp. 352 f. n. 227, which mention full reparation of the damage).

The use of Art. 190(2)(e) PILA is not intended to ensure the correct – or even non-arbitrary – application of an investment treaty, customary international law, the general principles of international law or the guarantees conferred by the ECHR (and its additional protocols). The Federal Tribunal must be content to examine the award in terms of substantive public policy. In this case, public policy is not necessarily violated because the Turkish investor does not obtain full compensation for its loss, because it is awarded compensation that does not fully cover the loss suffered, or because the compensation is not in reasonable proportion to the value of the lost investments. However, taking into account all the concrete circumstances, the compensation must appear to be out of all proportion to the value of the lost investment, and there must be an extreme disproportion between the two, to the point of shockingly offending the most essential principles of the legal order. As will be shown below, this is not the case.

4.5. The Arbitrators dated the loss of investments to April 1, 2012, and measured it using the net book-value method. There is no need to review these points, which are not the subject of duly substantiated grievances. At most, it should be noted that the Appellants, in the course of a citation from case law, point to Section 22 of the ILC's Commentaries on Art. 36 of its Draft Articles on the Responsibility of States for Internationally Wrongful Acts. It appears from this that in order to compensate the capital value of the expropriated or destroyed property, the criterion of fair market value must normally be applied. However, in Section 24 of the Commentary, the ILC also refers to the net book value method, which it states is used to estimate the value of a business; this is the method applied by the Arbitrators.

The core of the dispute concerns another aspect, namely the depreciation of the Syrian pound. The Appellants measure this depreciation in terms of the US dollar and consider that the Arbitral Tribunal should have adopted this currency.

The dollar is the reference currency by definition and is characterized by its relative stability; it can theoretically be used as a standard to measure the changes in a currency subject to high inflation. According to the Arbitrators, the loss of investments suffered on April 1, 2012, amounted to 2'044'139'279 Syrian pounds. On that date, 1 Syrian pound (SYP) was equivalent to about 0.0174 dollars according to the average market rate given by various websites dedicated to the financial sector (see www.xe.com [10 Year charts]; www.fxtop.com [historical converter]; www.mataf.net [currency converter/price history]; www1.ooanda.com [currency converter]; on the notorious nature of the exchange rate, see, for example, ATF 143 IV 380 at 1.1.2, p 383). The Appellants themselves refer to this rate and to two of these websites.

On the day of the Award (August 31, 2020), 1 Syrian pound was only worth about 0.00196 dollars, according to the various converters mentioned above (subject to www1.ooanda.com, which uses this value as of September 2, 2020, and indicates a higher rate [0.00465] on August 31, 2020). The Appellants

invoke here the official rate practiced by the Syrian Central Bank, without explanation, while they have used the market rate for the first term of comparison. If one follows logically this rate (0.00196), one can see that it represented, as of August 31, 2020, only about 11.3% of the rate prevailing on April 1, 2012 (0.00196/0.0174).

Thus, SYP 2'044'139'279 was equivalent to USD 35'568'023 on April 1, 2012 (SYP 2'044'139'279 x 0.0174), and only USD 4'006'513 on August 31, 2020 (SYP 2'044'139'279 x 0.00196) - some 11.3% of the former dollar amount.

The Award provides for compensation with compound interest (SYP 4'565'469'289). Converted at the August 31, 2020 exchange rate, this amount is equivalent to USD 8'948'320 (SYP 4'565'469'289 x 0.00196), or 25.2% of the Award expressed in the same currency on April 1, 2012 (USD 35'568'023). These comparisons with the dollar show that the application of an interest rate of 10% combined with the system of compound interest does not compensate for the very high inflation suffered by the Syrian currency.

If one were to adopt the Appellants' line of reasoning, the Award should have granted them compensation in dollars. The loss incurred on April 1, 2012, when translated into dollars, is equivalent to USD 35'568'023. This amount should bear interest, as the creditors were not compensated as of that date. The percentage of 10% applied by the Arbitrators could not be applied, as it took into account the specificities of the Syrian currency and inflation. Legal opinion suggests using the real interest rate, net of inflation (see Ripinsky/Williams, *op. cit.*, p. 397, to the end), corresponding to the return on investments for a given year in a given country. In this case, the currency suggested by the Appellants is that of the United States (for the real interest rate of this country, see for example the World Bank website [www.banquemondiale.org]). Once increased by the real interest rate according to the compound interest method, which is in line with international practice (Ripinsky/Williams, *op. cit.*, pp. 384-387), the compensation of USD 35'568'023 would finally be equivalent to the following amount on August 31, 2020 (date of the award):

Year	Principal (USD)	Interest rate	Real annual interest (USD)
2012 (9 months/12)	35'568'023	1.31	349'456
2013	35'917'479	1.47	527'987
2014	36'445'466	1.37	499'303
2015	36'944'769	2.20	812'785
2016	37'757'554	2.45	925'060
2017	38'682'614	2.17	839'413
2018	39'522'027	2.41	952'481
2019	40'474'508	3.28	1'327'564
2020 (8 months/12)	41'802'072	2.50*	696'701
Total: USD	42'498'773		

(*not known at this time, average of the previous five years)

It will be recalled that the compensation awarded by the Arbitrators was SYP 4'565'469'289, or USD

8’948'320. The Appellants thus have 21.1% of the compensation they would have received (USD 42’498’773) if the method just described for illustrative purposes had been used. However, we cannot stop at this stage of the reasoning.

4.6. The compensation awarded to the Appellants appears to be very low compared to the estimated loss incurred in April 2012; this is due to the significant depreciation of the Syrian pound. However, in order to determine whether the Award breaches public policy in its outcome, all the circumstances of the case must be taken into consideration.

First, international judges/arbitrators have broad discretion in determining contractual damages, and various methods of compensating for currency depreciation.

In addition, the investors failed to justify their choice of the dollar to the arbitrators. They have not attempted to demonstrate that the application of the traditional solutions – the currency of the host State or their own currency – would be so detrimental to them as to justify a measure more substantial than the application of a high interest rate.

It should also be taken into account that the Turkish Appellants chose to invest in Syria, where they founded companies in 2006 and 2007 to operate on the domestic market and to earn their income from the cement trade at the domestic level. In doing so, they have accepted to assume significant risks inherent to the country of investment, particularly on the economic level. For example, one of the companies (P._____) made losses when it was normally operational; its production costs were higher than expected and the location of its plant in a free zone created problems.

In addition, the host state does not bear responsibility for a wrongful act, but rather a purely economic responsibility in an exceptional situation of armed conflict, without being held responsible for the conduct of those who caused the loss to the investors. The Arbitral Tribunal considered that it could dispense with the examination of this question, without raising any objections from the Appellants. This is therefore a specific objective liability for acts that took place on the territory of the state, which does not necessarily entail an obligation to make reparation as extensive as when the state is liable for a wrongful act or a contractual violation committed by one of its agents.

The notoriously difficult situation of this country, greatly weakened by a decade of conflict, with all the uncertainties that weigh on its future, also carries a certain heft. The impact of a very high monetary award on public expenditure, and hence on the population, may indeed justify renouncing full reparation (cf. Ripinsky/Williams, *op. cit.*, p. 356).

In short, the refusal to convert the loss determined in Syrian pounds into a stable currency – the dollar – leads to the investors bearing the spectacular inflation suffered by this currency, and thus until the day of payment. However, the overall assessment of the situation, in particular the risk taken by the investors – who invested in Syria and received income denominated in Syrian pounds – combined with the special type of liability assumed by the host State, as well as the extreme difficulty of its situation in the context

of a ten-year conflict, ultimately makes it possible to affirm that the compensation awarded does not shockingly offend the most essential principles of public policy.

The Arbitral Tribunal has indeed clarified that the "adequate compensation" of Art. 4 Syria-Italy BIT entitled a full compensation for the damage. Such compensation must be adequate in the light of the given situation, so that particular circumstances may lead to a departure from the principle – the reasoning being no different in the case of expropriation. In the presence of an armed conflict clause, it seems logical to find exceptions to full reparation. The fact that the Arbitral Tribunal did not finally award full reparation also for currency inflation does not mean that it contradicted its interpretation of Art. 4 Syria-Italy BIT. Moreover, the Appellants do not argue that a breach of the principle of *pacta sunt servanda* occurred, which closes the discussion.

Finally, the Appellants claimed that the BIT requires the award to be made in a freely convertible currency. The Award does not state this, and in any case the Appellants did not argue that there would be a breach of public policy in this respect. Moreover, they have the option of claiming payment in dollars - which does not, it is true, solve the problem of inflation.

In short, the Award does not contravene substantive public policy in its result. It follows that the argument based on Art. 190(2)(e) PILA is rejected.

5.
5.1 In their second grievance, the Appellants argue that the Arbitral Tribunal wrongly decided *extra petita* by awarding them a sum in Syrian pounds – convertible into dollars at the exchange rate of the Syrian Central Bank on the day of payment – while they themselves had formulated their monetary claims in dollars.

5.2. It should be noted at the outset that there is no criticism of the fact that the Award obliges the Appellants to sell their shares in the two Syrian companies if the Respondent State so requests after having paid the compensation. The Federal Tribunal is thus exempted from dealing with this point (Art. 77(3) LTF).

5.3. Art. 190(2)(c), PILA allows for an award to be appealed "when the arbitral tribunal has ruled beyond the claims that were before it". This refers to decisions that award more ("*ultra petita*") or differently ("*extra petita*") than what was requested (ATF 116 II 639 at 3a, p. 642; judgments cited above 4A_430/2020 at 6.1; judgment 4P.260/2000 of November 11, 2018, at 5a). The private autonomy inherent in the law of obligations has as its procedural corollary that the parties freely decide the subject-matter of the dispute (the principle of disposition; see ATF 141 III 596 at 1.4.5 p. 605; judgment 4A_329/2020 of February 10, 2021, at 4.2). Art. 190 (2)(c) of the PILA protects this principle in an area that is strongly influenced by private autonomy (see judgment 4P.143/2001 of September 18, 2001, at 3c/bb; Cesare Jermini, *Die Anfechtung der Schiedssprüche im internationalen Privatrecht*, n. 413; Wolfgang Wiegand, *Iura novit curia vs. ne ultra petita* [...], in Rechtsetzung und Rechtsdurchsetzung, Festschrift für Franz Kellerhals zum 65. Geburtstag, 2005, p. 133-134 and p. 143).

This reason for annulment already existed under the regime prior to the PILA, *i.e*., the Intercantonal Arbitration Concordat (IAC). The latter reserved the legal provisions authorizing the arbitral tribunal to decide *ultra vel extra petita* (Art. 31(4) and Art. 36(e) IAC), whether they are to be found in the procedural law designated by the parties or in the substantive law – the legal opinion citing the example of Art. 205 (2) and 527 (3) CO[23] (Lalive/Poudret/Reymond, *Le droit de l'arbitrage interne et international en Suisse*, 1989, p. 174 no. 5 to Art. 31 IAC and p. 425 no. 5c to Art. 190 PILA). It is irrelevant that Art. 190 PILA fails to specify such a reservation: it must in fact be considered as implicit (Lalive/Poudret/Reymond, *op. cit*., pp. 425-426, no. 5c to Art. 190 PILA). As long as Art. 182(1) and 187(1) PILA allow the parties to choose both procedural and substantive law, and that one or the other authorizes the arbitrator to decide *ultra vel extra petita partium*, such an authorization must logically have effect (Jermini*, op. cit*., n. 425 f.). Moreover, Art. 190(2) PILA is influenced by Article V(1) of the New York Convention of June 10, 1958, on the Recognition and Enforcement of Foreign Arbitral Awards (RS 0.277.12), a provision which, in its letter c), guarantees the principle of *ne eat judex ultra petita partium* (Christian Oetiker, in Zürcher Kommentar, vol. II, 3rd ed. 2018, no. 16 to Art. 190 PILA). However, commentators on this Convention require that the *lex arbitri* and the substantive law be examined to see whether the arbitrators were entitled to go beyond the scope of the parties' submissions (Reinmar Wolff, *New York Convention* [...], 2nd ed. 2019, n. 245 and 247 ff.).

5.4. In the application of Art. 190(2)(c) PILA, the contours of the precept *ne eat judex ultra vel extra petita partium* are frequently traced with the help of the case law relating to Swiss law.

According to the practice regarding Art. 84(2) CO, the debtor of a debt expressed in a foreign currency and payable in Switzerland can be discharged either in the agreed currency or in Swiss currency. The judge must make the order in the agreed currency. Whether the judge can order payment in the foreign currency owed when the claimant has drawn up its claim in Swiss francs is a procedural question, the answer to which used to be left to the cantonal legislator (ATF 134 III 151 at (2.2) p.154 and at 2.4 to the end, p 156). From now on, the principle of disposition is anchored in Art. 58 CPC and prevents the judge from issuing a monetary award in a currency other than that defined by the claimant's submissions. Such a procedure would be tantamount to granting an *aliud*[24] (judgments 4A_391/2015 of October 1, 2015, at 3; 4A_3/2016 of April 26, 2017, at 4.1; 4A_341/2016 of February 10, 2017, at 2.2; 4A_265/2017 of February 13, 2018 at 5; 4A_200/2019 of June 17, 2019, at. 4 and 5; see also 4A_555/2014 of March 12, 2015 at 4). If an action is brought before the court in the wrong currency, the court has no other option than to reject it (see the above-mentioned judgment 4A_200/2019 at 5). In principle, the claimant can bring a new action by making submissions in the "correct" currency, but this solution can be costly in terms of time and money (Ollivier/Geissbühler, *La monnaie des conclusions dans les litiges bancaires*, in PJA 2017 p. 1450; the same authors. *Swiss courts dismiss foreign currency claims if the currency of the prayer for relief is wrongly denominated*, p. 1, available on the website of the International Bar Association, www.ibanet.org). Legal opinion points out that it can be difficult to determine the "currency actually due" in banking cases involving sophisticated financial products; it advocates a relaxation of the principle of disposition (Ollivier/Geissbühler, *op. cit*., in PJA 2017 p. 1452).

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[23] Translator's Note: CO is the French abbreviation for Swiss Code of Obligations

[24] Translator's Note: In Latin in the original text. The word means "in excess of the claim."

An appeal was once submitted to the Federal Tribunal against an award of the Court of Arbitration for Sport (CAS), which pronounced a pecuniary condemnation in a currency other than the one adopted in the claimant's submission and in the decision of the first sporting instance. The Federal Tribunal found that the arbitral tribunal had not decided *ultra petita* and, in the absence of a grievance (Art. 77(3) LTF), refrained from examining whether it was authorized to modify the currency (judgment 4A_684/2014[25] of July 2, 2015, at 3.2.2, cited without comment by Oetiker, op. cit. no. 75 to Art. 190 PILA and by Stefanie Pfisterer, in *Basler Kommentar*, 4th ed. 2021, no. 65 to Art. 190 PILA).

5.5. In the present case, the Claimants/Appellants formulated their claims in dollars, demanding at least USD 88'381'127 according to the discounted cash flow method, or at least USD 54'690'067 according to the sunk cost method. They claimed pre- and post-award interest. The Arbitral Tribunal awarded them compensation in Syrian pounds (SYP 4'565'469'289) with 10% interest compounded on an annual basis, while allowing them to request payment in dollars by applying the exchange rate of the Syrian Central Bank on the day of payment.

Technically speaking, it must be conceded that this is an *aliud*. However, should one accept the grievance of breach of the principle of disposition (*ne eat judex extra petita partium*) and consequently annul the Arbitration Award? This would be to ignore the peculiarities of the situation.

Monetary issues are inevitable in international investment treaty disputes and/or claims for compensation, but there seems to be a lack of well-defined rules as to the currency of compensation (when the treaty is silent on this point). The tendency is for the creditor not to bear the depreciation of the currency from the time of the contractual breach or wrongful act; this may dictate to the claimant the choice of a certain currency. However, the judge or arbitrator has some latitude in this respect when he has to award "adequate" compensation (see 4.3 above; Ripinsky/Williams, *op. cit.*, pp. 393 ff). In such a context, should it be allowed to deviate from the currency of the submissions? This question may legitimately be asked, in the absence of strict precepts governing the currency of compensation. Moreover, the principle of disposal does not necessarily have to be applied in international commercial law with the same rigor as in a case governed by Swiss law – an area in which it is not totally incongruous to envisage some flexibility in the special cases mentioned by the legal opinion (see at 5.4 above).

In any case, this question suffers from remaining undecided. The Appellants are faced with another obstacle: the "interest worthy of protection" in the annulment of the Award (Art. 76(1)(b) LTF). The admission of the appeal must provide them with a practical benefit by avoiding the economic, ideal, material or other damage that the award under appeal would cause them. The interest must exist not only at the time of submitting the appeal, but also when the judgment is issued (ATF 143 III 578[26] at 3.2.2.2 p 587).

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[25] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/no-ultra-petita-if-amounts-claimed-are-not-exceeded

[26] Translator's Note: The English translation of this decision is available here:

In this case, the Appellants would like to have the award set aside on the grounds that the Arbitral Tribunal decided *extra petita*. This means that the case should be sent back to the Arbitral Tribunal to reject the claim, denominated in dollars. The Arbitral Tribunal ruled that the compensation should be paid in Syrian pounds, and the substantive grievance against this part of the Award was unfounded (at. 4.6 above). The Appellants could in principle submit a new request in a currency other than the dollar. However, there is no indication that such a solution would be more favorable to them than the one enshrined in the award under appeal, however unsatisfactory it may be for the parties concerned.

First of all, one must take into account the important costs generated by the procedure, which could be passed on to the Appellants if their request is rejected. According to the Award, the arbitration costs amounted to EUR 744'700. The claimants/Appellants incurred some EUR 897'000 to assert their rights and the other party EUR 770'000 to defend itself.

In addition, there are uncertainties regarding the situation of the Respondent State, which has been mired in armed conflicts for a decade. The Appellants themselves concede that it is not possible to count on a revaluation of the Syrian pound to the level of April 2012 for the coming months. In reality, this reservation must be issued for a longer period, and on a broader spectrum: it is indeed the overall situation of the country that does not seem to improve soon, and not only its currency, which has been depreciating steadily since the beginning of the conflicts in 2011, to then stagnate from the summer of 2017. Given these elements, the interest in formulating a new request in Syrian pounds has not been demonstrated.

Perhaps the Appellants hope to draw attention to, and be better heard on, the phenomenon of currency depreciation in the new proceedings, which it is difficult to imagine could be anything other than arbitral. There is no need to recall in this respect that the possibilities of material control of an arbitral award are reduced to a minimum.

In addition to the currency of the host State (the choice of the Arbitral Tribunal, which does not contravene public policy), the currency of the claimant investor is typically taken into consideration. It is not certain that the new arbitrators would follow the Appellants if they opted for the latter, nor that this solution would be more favorable, given the notorious inflation of this currency and the costs of the first procedure. The Appellants have not asserted or demonstrated anything with regard to this option, which cuts short any discussion.

It is true that the new Panel could follow the method used in the *Ottoman Lighthouse* case and use the dollar – or some other standard – as an intermediate currency while making its award in another currency. However, in that precedent, the claimant company's currency lost 90% of its value and the host State's currency even more, and then both regained their stability when the award was issued. This is not the case of the Syrian pound, and the Appellants have not articulated anything concerning their currency.

In any case, there remains a basic problem. The precariousness and difficulties of the Respondent State seem likely to persist. They could thus weigh heavily in a new procedure, as could the special type of liability that was assumed. The possibility of holding the state liable for the behavior of the Kurdish forces seems uncertain. To consider, in these circumstances, that new arbitrators would put the cost of the monetary depreciation on the host State is a conjecture among others.

In the light of a very particular situation, the Federal Tribunal does not see any interest worthy of protection in allowing the grievance and annulling the award under appeal. The argument is therefore inadmissible.

6.
Ultimately, the appeal is rejected insofar as the matter is capable of appeal. The authors will bear the legal costs, in equal parts and jointly and severally (Art. 66(1) and (5) LTF). They will not have to compensate the adverse party since the latter did not proceed, although it was invited to do so (at 3 above).

For these reasons, the Federal Tribunal pronounces:

1.
The appeal is rejected insofar as the matter is capable of appeal.

2.
The judicial costs, set at CHF 170'000, are to be borne by the Appellants, jointly and severally.

3.
This judgment shall be communicated to the parties and to the Arbitral Tribunal located in Geneva.

Lausanne, 8 April 2021

On behalf of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge:	The Clerk of the Court:
Kiss	Monti