

Arbitration - Ecuador

ICSID award will be stayed pending annulment proceedings

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October 24 2013

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Introduction

Ecuador's nullity action against the 2012 Occidental award was heard by an International Centre for Settlement of Investment Disputes (ICSID) committee. It gave Ecuador a respite by allowing the award to be stayed during the proceedings.⁽¹⁾ The annulment committee refused Occidental's petition to lift the stay and allow its immediate enforcement, or to request that Ecuador adopt certain financial measures to guarantee payment once the award was confirmed. The decision underlined the commitment assumed by Ecuador's attorney general during the hearings that Ecuador will abide by its obligations under international law.

Background

On October 5 2012 the ICSID arbitral tribunal⁽²⁾ issued its award. The panel found unanimously that Ecuador was in breach of the US-Ecuador Bilateral Investment Treaty when its government decided to terminate without compensation the product-sharing contract that the parties had signed. The panel was split on the amount of damages. With one dissenting opinion, the tribunal awarded Occidental \$1,769,625,000. Pre-award interest was fixed at the rate of 4.188% from May 16 2006 and post-award interest was calculated at the US six-month London Interbank Offered Rate, compounded on a monthly basis.

On October 9 2012 Ecuador filed an application for annulment of the award, which included a request for a stay of enforcement, pending a decision from the committee. According to Article 52(5) of the ICSID Convention, "if the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request".

As a result of the request, the award was provisionally stayed by the ICSID secretary general.

Once the annulment committee was established, the claimant filed a request that the provisional stay be lifted, which would allow the company to enforce the award, or, alternatively that any continued stay be on condition that Ecuador provide proper security.

Ecuador replied requesting that the stay be continued and that the claimant's request for the posting of security be denied.

Decision

In its decision the committee said that the controversy revolved around three issues:

- whether the provisional stay of enforcement established in Article 52 may be lifted by annulment committees;
- whether annulment committees have the authority to condition the stay of enforcement on the posting of security; and
- whether the respondent should be required to provide such security.

On the first issue, the committee sided with the claimant. Under the convention's rules on the annulment of awards, there is no such thing as a right to maintain the provisional stay of an award pending the final decision of the committee. According to

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the committee, under Article 52(5), it had discretionary power either to lift the provisional stay of enforcement or to order the continuation of the stay. Moreover, under the ICSID Rules of Arbitration, annulment committees "may at any time modify or terminate the stay at the request of either party".

In the committee's view, the prevailing practice has been to grant the stay of enforcement, as was the decision in this case.

Ecuador argued that committees lack the power to impose conditions on the stay of enforcement. It submitted that the convention does not expressly vest such power on committees, and that this power cannot be implied. The claimant disagreed. It argued that because committees have broad discretion in determining whether to permit continuation of the stay, they have also the power to impose conditions on such continuation (eg, security).

However, the committee decided that it did "not have to address, at this time of the procedure, [this] difficult issue", since it had come "to the conclusion that in the present circumstances no condition is required".

Regarding whether to accept the claimant's request that Ecuador be asked to post security as a condition to lift the stay of enforcement, the tribunal ruled in the negative. While the committee acknowledged that the claimant "would prefer to have the amount awarded in cash", it found that such an argument was "unconnected to the issue of whether the stay should be conditioned on the posting of security".

In the committee's view, having Ecuador deposit the amount of the award into an escrow account with an international bank pending the final decision – as suggested by the claimant – would "not solve, and does not even mitigate" the harm inflicted on the claimant by being unable to cash the award immediately and to use such funds for its own benefit.

A second argument advanced by the claimant to justify its request for security was the risk of non-compliance with the award. The claimant based its misgivings on several factors, including:

- public announcements by Ecuador's highest officials and government branches that created "an atmosphere of hostility toward the ICSID system, [the claimant] and the enforcement of the award";
- internal laws that cast serious doubts on Ecuador's likelihood of complying with its international obligations; and
- Ecuador's failure to comply with previous ICSID awards or to pay international financial obligations.

The committee was unconvinced by these arguments. While it took notice of the harsh tone of the criticisms against the award, it said that they were "political, not legal statements and none goes as far as stating that Ecuador will not comply with its international obligations". For the tribunal, "[w]hat is relevant is what Ecuador law says".

On this latter point, the committee was content with the fact that the attorney general had given the claimant full reassurance during the proceeding that:

- Ecuadorean law does not subject ICSID awards to judicial review in Ecuador;
- enforcement of ICSID awards in Ecuador is not subject to domestic enforcement procedures; and
- Ecuador's domestic law complies fully with the convention.

For the committee, the statements made by the attorney general on Ecuador's readiness to comply with its treaty obligations were binding. The committee set as standard taking seriously the alleged risk of non-compliance with the award if Ecuador were hiding its assets or moving them to more favourable jurisdictions, "with the aim of hindering the [claimant]'s rights" to enforce the [a]ward". The committee's view was that the claimant had failed to prove such actions.

The committee found that it was unnecessary to address Ecuador's argument that the request to post a security to guarantee full payment of the award (should it be confirmed) would require the government to freeze \$2.3 billion, which would cause irreparable harm to its fiscal economy, as well as the claimant's response that such a sum was a small proportion of its expropriated assets.

Comment

The ruling joins growing jurisprudence on annulment proceedings under the convention. While the committee left important issues and arguments unanswered, it felt that the assurance given by the attorney general that Ecuador will comply fully with the award (should it be confirmed) and its international treaty obligations outweighed the political stances adopted by Ecuador's leaders against the award.

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Endnotes

(1) *Occidental Petroleum Corporation v Ecuador*, ICSID Case ARB/06/11. Decision on the stay of enforcement of the award (Rule 54 of the ICSID Arbitration Rules).

(2) *Occidental Petroleum Corporation v Ecuador*, ICSID Case ARB/06/11.

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