

Introductory Note to Three Decisions on the Stay of Enforcement of an ICSID Award

The increasing number of cases administered by ICSID has brought about an increasing number of awards rendered under the ICSID Convention and also an increasing number of requests for post-award remedies sought by parties unsatisfied with the results. While during the first 38 years following the entry into force of the Convention the Centre administered nine annulment proceedings, the Centre has during the two past years registered an equal amount of applications for annulment of ICSID awards. Five of these recent applications, submitted by the State party to the dispute, were accompanied by a request for a stay of enforcement of the award. The relevant decisions of the *ad hoc* committees in three of these cases are reproduced in this issue with the parties' consent: (1) the Decision on the Stay of Enforcement of the Award of November 30, 2004 in *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7) (*Mitchell v. DRC*), made in English and French; (2) the Decision on the Respondent's Request for a Continued Stay of Execution of June 1, 2005 in *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7) (*MTD v. Chile*), issued in English; and (3) Procedural Order No. 1 of December 22, 2005 and Procedural Order No. 4 of February 23, 2006 in *Repsol YPF Ecuador S.A. v. Empresa Estatal Petroleos del Ecuador* (ICSID Case No. ARB/01/10) (*Repsol v. Petroecuador*), issued in Spanish with a translation into English.¹ Another decision was issued in *CDC Group Plc v. Republic of the Seychelles* (ICSID Case No. ARB/02/14) and a request for stay of enforcement is pending a decision in *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8). In these four recent decisions, the *ad hoc* committees granted the requests for stay. In two of the cases, the stays were conditioned upon the posting of a bank guarantee by the party requesting the stay.

The Procedure

A party applying for the interpretation, revision or annulment under the ICSID Convention may in its application or during the proceedings request a stay in the enforcement of all or part of the relevant award. So far, such requests have only been made in the context of ICSID annulment proceedings under

¹ The decisions in the three cases are also available on the ICSID website at www.worldbank.org/icsid.

Article 52 of the Convention. If the request is made in the application for revision or annulment of the award, the Secretary-General of ICSID must inform the parties of the provisional stay of enforcement when the application is registered.² The provisional stay remains in place until the tribunal or committee, on a priority basis, rules on the request after having given each party an opportunity of presenting its observations.³

There is a possibility under ICSID Arbitration Rule 54(2) for an expedited ruling on the request for stay requiring a tribunal or committee, once it is constituted, to decide within 30 days whether to continue the stay. Provided that either party has requested this procedure and if the tribunal or committee does not decide to continue the stay within 30 days of such request, the stay is automatically terminated.⁴ The 30-day time limit may be extended by agreement of the parties, which occurred in both *Mitchell v. DRC* and *MTD v. Chile*. In *Repsol v. Petroecuador*, the provisional stay remained in place for almost a year and a half, as there had been a suspension of the proceeding for lack of payment of the advance to cover the costs of the proceedings.⁵ There had been no request that the *ad hoc* committee decide within 30 days whether or not the provisional stay should continue. If a stay is granted, the tribunal or committee may at the request of either party modify or terminate the stay.⁶ In *Repsol v. Petroecuador*, the committee found that it had the discretion to terminate the stay that it had previously allowed to continue because a condition for the stay, the posting of a bank guarantee, had not been complied with. A stay normally terminates automatically upon the issuance of the tribunal's or committee's final decision. In annulment proceedings, however, if a committee decides to annul part of an award, it may at its discretion "order the temporary stay" of the unannulled part.⁷ This enables the committee to consider any unfair advantage

² ICSID Convention Article 52(5) and ICSID Arbitration Rule 54(2). The provisional stay does not apply to interpretation proceedings.

³ ICSID Arbitration Rule 54, paras. (1) and (4).

⁴ The procedure appears to be intended to safeguard the interests of the party opposing the entire stay of enforcement of the award in cases where only a partial stay is requested, as the automatic provisional stay made by the Secretary-General can only relate to the entire award. See Explanatory Note to ICSID Arbitration Rule 54(2), reprinted in ICSID Regulations and Rules, Doc. ICSID/4/Rev.1 (May 1975). The expedited procedure is generally only in the interest of a party that does not wish the stay to remain in place.

⁵ Under ICSID Administrative and Financial Regulation 14(3)(e), the applicant seeking annulment is solely responsible for making such advance, without prejudice to the right of the *ad hoc* committee in accordance with Article 52(4) of the ICSID Convention to decide how and by whom expenses incurred in connection with the annulment proceeding are to be paid.

⁶ ICSID Arbitration Rule 54(3).

⁷ *Id.*

that the partial annulment may give a party in light of the fact that the annulled portion might be reconsidered by a new tribunal under Article 52(6) of the ICSID Convention. The word “temporary” indicates that the committee’s order should specify an expiration date for the stay, in particular since the Convention establishes no time limit for the resubmission of the dispute.⁸ If a tribunal is reconstituted following a partial annulment, a party may request the stay of enforcement of the unannulled portion of the award until the date of the new tribunal’s award in accordance with ICSID Arbitration Rule 55(3).

Stay or No Stay?

Article 52(5) of the ICSID Convention concerning annulment proceedings provides that a committee may stay enforcement of an award “if it considers that the circumstances so require.” A request for a stay must in this respect under Arbitration Rule 54(4) “specify the circumstances that require the stay.”⁹ The ICSID Convention and Arbitration Rules do not provide any guidance in this regard, but committees have exercised their discretion in considering the circumstances. In *Mitchell v. DRC*, the committee held that because of the lack of indication as to what kind of circumstances require a stay, a committee shall be free to evaluate the arguments of the parties on a case by case basis. In *MTD v. Chile*, the committee equally found that it had the discretion to take into account any relevant circumstances after hearing both parties.

ICSID jurisprudence has previously shown that the “circumstances” taken into consideration by *ad hoc* committees have often been recurring arguments presented by both parties in respect of their opposing interests; the award-creditor to receive sums due under the award without further delay and the award-debtor to postpone the effect of the award until the annulment proceeding has been concluded. These arguments have included, from the position of the party seeking a stay of enforcement, possible difficulties in recovering payments made under the award if it is annulled, possible irreparable injury in case of immediate enforcement, and a strong likelihood that the annulment application would succeed. Certain arguments from the opposing party’s position have been that the party seeking the annulment was using dilatory tactics, that there was a risk it

⁸ A temporary stay of the unannulled portion of the award was ordered for a period of 90 days by the committee in *Maritime International Nominees Establishment v. Republic of Guinea* (hereinafter *MINE v. Guinea*) (ICSID Case No. ARB/84/4), Decision of December 22, 1989 partially annulling the award of January 6, 1988, 5 ICSID Rev.—FILJ 95 (1990).

⁹ The wording of these provisions is formulated analogously to ICSID Convention Article 47 and Arbitration Rule 39(1) regarding a request for provisional measures for the preservation of a party’s rights.

would fail to comply with the ICSID Convention in future enforcement efforts and that there would be further delay in the enforcement of the award.¹⁰

In *Mitchell v. DRC*, the party requesting the stay argued that it would be very difficult due to the nature of the claimant's professional activities (legal practice with incomes dispersed in several countries) to recoup the awarded amounts if the award was subsequently annulled. The DRC maintained that there was no urgency for the claimant to enforce the award as his professional activities were lucrative and, in any event, he would be compensated by interest accrued on the amount of the award if the award were upheld. The DRC further contended that the grounds for the annulment were serious, invoking a dissenting opinion attached to the award. The difficult financial and political situation was also invoked to explain that the DRC had other important budgetary priorities and could not set aside any funds.

Similarly, in *MTD v. Chile* the requesting party argued that it would have difficulties in recouping payment from MTD, that the application for annulment was serious, that there would be harmful consequences for Chile if there was no stay, and that the delay in the enforcement was counter-balanced by interest if the application was rejected. Chile also stated that it was committed to fulfilling its obligation to comply with the award if it were upheld and that its laws provided for powerful guarantees of recognition and enforcement of the award. In *Repsol v. Petroecuador*, the main argument in support of the stay was that Repsol's original claim had no basis and that the award could not be enforced due to public policy considerations.

In these three cases, the award-creditors argued that there should be no further delay in the other party's complying with the award. In *Mitchell v. DRC*, the claimant asserted that the application for annulment was unjustified and had a dilatory motive, and that the ICSID Convention did not provide for any right to protection against enforcement during an annulment proceeding. MTD stressed that "annulment is an exceptional and rarely granted remedy" under the ICSID Convention and that the delay in the enforcement would be significant because Chile had not given sufficient assurances that it would comply with the award immediately if the committee rejected the application for annulment.¹¹ Repsol submitted that the unusual delay in *Repsol v. Petroecuador*, caused in part by the suspension of the annulment proceeding, warranted the discontinuance of the stay.

¹⁰ See C. H. Schreuer, *The ICSID Convention: A Commentary* (2001), Article 52, para. 472, at p. 1056 *et seq.*; A. C. Sinclair, *Award-Creditor Security and a Continuing Stay of Enforcement in CDC Group Plc v. Republic of the Seychelles*, Vol. 19, No. 9 *Mealey's Int'l Arb. Rep.* 35 (2004).

¹¹ *MTD v. Chile*, para. 13.

Having considered the parties' arguments and previous ICSID decisions, the committees in the three cases ruled in favor of a continued stay. In *MTD v. Chile*, the committee found that, unless an application for annulment were dilatory, "a respondent State seeking annulment should be entitled to a stay provided it gives reasonable assurances that the award, if not annulled will be complied with."¹² Chile's representations that the award would under its laws become enforceable as a final judgment of Chilean courts were sufficient for this purpose. The committee indicated that a dilatory annulment application is one that is "brought without any basis under the Convention," and thus refused to go into any discussion as to the *prima facie* likelihood of success of the application.¹³ The committee in *Mitchell v. DRC* took a similar approach, although it indicated that an application could be dilatory if the grounds were based on the Convention but the presentation was such that the application had "a manifestly abusive character."¹⁴ In that case, the committee found that the possible difficulty of recouping any payment made under the award from the claimant, on one hand, and the respondent's hardship, on the other hand, jointly warranted a continued stay.

Unconditional or Conditional Stay?

In none of these three cases, did the award-creditors oppose a continued stay of enforcement if the other party provided adequate financial security in regard to the amounts due under the award, such as the posting of a bank guarantee or the setting up of an escrow account. While the committee in *Repsol v. Petroecuador* conditioned the stay upon the issuance of "an unconditional and irrevocable bond for the total amount of the award plus the corresponding interest,"¹⁵ the other two committees concluded that the stay should not be conditioned. Both in *Mitchell v. DRC* and *MTD v. Chile*, the committees held that the granting of security would put the award-creditor in a more favorable position than before the filing of the application for annulment, allowing it to avoid, for example, issues of sovereign immunity from execution. It was also held that granting of security would "penalize" the party applying for an annulment of an ICSID award, a right that it may avail itself of under the Convention.¹⁶

In *MTD v. Chile*, the committee acknowledged that a continued unconditional stay might prejudice MTD, but that such prejudice could be

¹² *Id.* para. 29.

¹³ *Id.* para. 28.

¹⁴ *Mitchell v. DRC*, para. 26.

¹⁵ *Repsol v. Petroecuador*, para. 10.

¹⁶ *Mitchell v. DRC*, para. 40.

remedied by the payment of interest if the annulment application failed. The committee in *Mitchell v. DRC* found that the posting of a guarantee could only be justified when a committee was convinced that the award-debtor (State) would not comply with the award, should the award be upheld. One member of the committee disagreed with such presumption against a guarantee and was of the view that the circumstances of the case justified a conditioned stay, in particular in view of the relatively small amount due under the award and the fact that the DRC had not proved that the posting of a guarantee would be of any substantial burden for the State. The committee in *Repsol v. Petroecuador* mainly relied on past ICSID jurisprudence and determined that, with certain exceptional circumstances, security should be granted to avoid delaying tactics, adding that there had already been a significant delay prejudicial to Repsol in that case.

So far, all ICSID decisions on the stay of enforcement of an award have granted the stay requested. Out of these decisions, five have ruled in favor of a conditioned stay¹⁷ and three have granted an unconditional stay.¹⁸ While the posting of a bond as a condition for a stay was previously virtually considered an ICSID practice,¹⁹ with the decisions in *Mitchell v. DRC* and *MTD v. Chile*, this issue now seems less clear-cut.

Out of the nine annulment proceedings registered during the past two years, six are still pending before the Centre, including the three cases subject of this Note.

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¹⁷ *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Order of May 17, 1985, reported in 1 ICSID Rep. 509, 513 (1993) (first annulment proceeding), and Interim Order of March 2, 1991, 9 ICSID Rep. 59 (2006) (second annulment proceeding); *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Procedural Order No. 1 of April 5, 2001, Vol. 18, No. 10 Mealey's Int'l Arb. Rep. 33 (2003); *CDC Group Plc. v. Republic of Seychelles* (ICSID Case No. ARB/02/14), Decision on Whether or Not to Continue Stay and Order of July 14, 2004, available at <http://ita.law.uvic.ca>; and *Repsol v. Petroecuador*.

¹⁸ *MINE v. Guinea*, supra note 3, Interim Order No. 1 of August 12, 1988 Concerning Guinea's Application for Stay of Enforcement of the Award, 4 ICSID Rep. 111 (1997); *Mitchell v. DRC*; and *MTD v. Chile*. In a ninth case, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), the parties agreed on a stay following the posting of a bond. See W. Laurence Craig, *The Final Chapter in the Pyramids Case: Discounting an ICSID Award for Annulment Risk*, 8 ICSID Rev.—FILJ 264, 285 (1993).

¹⁹ See P. D. Friedland, *Stay of Enforcement of the Arbitral Award Pending ICSID Annulment Proceedings*, in E. Gaillard and Y. Bonifatemi (eds.), *Annulment of ICSID Awards* (2004), p. 177; J. Savage, *ICSID ad hoc Committee Conditions Stay of Enforcement on Posting of Security*, Vol. 18, No. 10 Mealey's Int'l Arb. Rep. 29 (2003).