



School of International Arbitration

IACL
International Arbitration Case Law

School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law

Academic Directors: Ignacio Torterola, Loukas Mistelis*

Award Name and Date:

Bolivarian Republic of Venezuela v. Tidewater Investment SRL and Tidewater Caribe, C.A. (ICSID Case No. Arb/10/5) - Decision on the Applicant's Request for a Continued Stay of Enforcement of the Award. (29 February 2016)

Case Report by:

Diana Moise**, editor Victoria Ritah Nalule***

Summary:

In the Decision on the Applicant's request for a continued stay of enforcement of the Award of 29 February 2016, the *ad hoc* Committee lifted partially the stay with regard to the undisputed amount of US\$27.497 million plus interest. The Committee rejected Venezuela's request for maintaining the stay of the whole Award, and relied on the amount calculated by Venezuela's experts, amount also not contested in its application to partially annul the Award.

Main Issues:

Stay of enforcement – Partial Stay – Partial Annulment – undisputed amount; Ad hoc Committee - discretion; calculation of compensation; ICSID – investment law.

Tribunal:

Abdulqawi Ahmed Yusuf – President, Tan Sri Dato' Cecil W.M. Abraham, Rolf Knieper.

Claimant's Counsel:

Procuraduría General de la República, Caracas, Venezuela; George Kahale III, Benard V. Preziosi Jr., Miriam K. Harwood (Curtis, Mallet-Prevost, Colt & Mosle, New York, NY, and Mexico City, Mexico).

Respondent's Counsel:

Mr. Miguel López Forastier, Mr. Thomas L. Cabbage III, Mr. Alexander A. Berengaut and Mr. Daniel E. Matro (Covington & Burling LLP, Washington, D.C., U.S.A.); Mr. Bruce Lundsrom (Tidewater Inc., Houston, Texas, U.S.A.)

* Directors can be reached by email at ignacio.torterola@internationalarbitrationcaselaw.com and loukas.mistelis@internationalarbitrationcaselaw.com

** Diana Moise is a researcher for the London Centre of International Law Practice and holds an LL.M. from University College London. The views set forth herein are the personal views of the author. Ms. Diana Moise can be contacted at diana.moise.14@ucl.ac.uk.

*** Victoria Ritah Nalule is a lawyer and PhD Candidate at Centre for Petroleum, Mineral Law and Policy (CEPMLP), University of Dundee. Victoria is a holder of an LL.M in Petroleum Law and Policy from CEPMLP. She can be reached at v.r.nalule@dundee.ac.uk

Digest:

1. Relevant Facts and Procedural Dates

On July 9, 2015, the Bolivarian Republic of Venezuela (“Venezuela” or “Applicant”) filed an application for annulment of the award (“Application for Annulment”) rendered on July 7, 2015 in ICSID Case No. ARB/10/5 (“Award”), brought by Tidewater Investment SRL and Tidewater Caribe, C.A. (“Tidewater” or “Claimants”) (¶1).

Venezuela also requested a provisional stay of enforcement of the Award (“Stay Request”) concerning the amount of US\$46.4 million plus interest in favour of Tidewater until the *ad hoc* Committee issues its Decision on the Application for Annulment. (¶3)

The annulment proceeding began on September 9, 2015. (¶¶5-6). On September 17, 2015 the Committee extended the provisional stay until its first session, which took place on November 23, 2015. At the first meeting between the Committee and the Parties, the Committee heard the oral argument (“Stay Hearing”) on the issue of the Stay Request. (¶¶7, 9).

2. The Analysis of the Committee

The Committee began its analysis by identifying the ICSID Convention Articles that allow parties to initiate annulment proceedings, Article 52(1) and Article 52(3). (¶30). The Committee continued by stating that, despite the fact that the present Decision does not regard the partial annulment of the Award, it will refer to the Application for Annulment as far as this is relevant, with an emphasis on its partial nature. (¶31).

Article 52(5) of the ICSID Convention and Rule 54 of the Arbitration Rules refer to the stay of enforcement of an award procedure. The Committee found that either party can request stay of enforcement, without any restriction to the party seeking annulment; and that the committee has discretion to stay the enforcement of part or all of the award, depending on the request and the circumstances of the case. (¶32).

The Committee next observed that in the present case, the stay of enforcement of the Award is a provisional automatic stay provided under Rule 54(1) of the Arbitration Rules. (¶33).

Furthermore, the Committee noted that the party requesting the stay has to prove that the circumstances of the case require the stay, according to Arbitration Rule 54(1) based on Article 52(5) of the ICSID Convention. The Committee referred to the *Sempra Energy International v Argentine Republic* case for examples of such circumstances: prospects of compliance, economic hardship, prospects of recoupment, dilatory motives. (¶¶34-35).

Venezuela argued that the relevant circumstances in the present case refer to the prejudice suffered if the award were enforced, its own positive record of providing compensation for nationalization, and the existence of serious grounds for annulment. (¶¶36-38). Venezuela also maintained that a partial lift of the stay would imply a prejudgment on the merits of the Annulment Application. (¶39).

Tidewater replied that the only relevant circumstance mentioned by Venezuela would be the prejudice caused by enforcement. However, there is no argument for not enforcing the unchallenged part of the award, at a minimum, which Tidewater maintains to be US\$32.462 million plus interest. (¶40).

The Committee found that Venezuela's record is not relevant as the dispute is related to the process of calculating compensation (¶42). Next, the committee observed that the request is not dilatory in nature. (¶43). Finally, Venezuela has not specified the nature of the prejudice (¶44). Consequently, the Committee proceeded to refer to the Annulment Application in order to identify the unchallenged amount (¶¶46-51).

Venezuela insisted on a stay of the whole Award due to a miscalculation of the amount awarded in compensation to the Claimants. However, the Committee noted that, the Counsel for Venezuela admitted during the oral hearings that there is an undisputed amount of US\$27.497 million, figure presented by its own experts to the Tribunal in paragraph 201 of the Award. (¶¶52, 55).

The Committee also noted that, the Parties disagreed on whether the Committee has discretion to stay only part of the award. Adding to its previous statement (¶32), the Committee referred to Schreuer's Commentary of the ICSID Convention in support of its position. (¶57). Furthermore, the Committee disagreed with the amount presented by Tidewater as being unchallenged, agreeing with Venezuela on the amount of US\$27.497 million. (¶58).

3. *Decision*

The Committee decided to partially lift the stay of enforcement with regard to the undisputed amount of US\$27.497 million plus interest, and to maintain the stay with regard to the amount of US\$18.993 million in Claimants' compensation, and of US\$2.5 million in partial reimbursement of Claimants' costs. (¶62).