

MTD Equity Sdn Bhd. & MTD Chile S.A.

v.

**The Republic of Chile
(ICSID Case No. ARB/01/7)
(Annulment Proceeding)**

**Decision on the Respondent's Request for a Continued Stay of Execution
(Rule 54 of the ICSID Arbitration Rules)**

Members of the *ad hoc* Committee

The Hon. Judge Gilbert Guillaume
Professor James Crawford
Dr. Sara Ordoñez Noriega

Secretary of the Committee

Mr. Ucheora Onwuamaegbu

Representing the Claimants:

Mr. Oscar M. Garibaldi and
Mr. Eugene D. Gulland
Covington & Burling
Washington, D.C.
and
Mr. Michael Grasty Cousiño,
Mr. Jorge Bofill Genzsch and
Mr. Pablo Mir Balmaceda
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Santiago Chile

Representing the Respondent:

Mr. Claudio Castillo Castillo
Jefe División Jurídica
Ministerio de Economía de Chile
and
Mr. Ronald E.M. Goodman and
Ms. Gaela K. Gehring Flores
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A. Introduction

1. On 30 September 2004, the International Centre for Settlement of Investment Disputes (ICSID or the Centre), pursuant to Rule 50(2) of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), registered an application by the Republic of Chile (Chile) for the annulment of the Award of the Tribunal rendered on 25 May 2004 (the Award), in the case of *MTD Equity Sdn. & MTD Chile S.A. v. The Republic of Chile* (ICSID Case No. ARB/01/07) (the Application). Under the Award, the Republic of Chile is to pay approximately USD5.87 million, plus interest, to MTD Equity Sdn. & MTD Chile S.A. (MTD or the Claimants).

2. The Application contained a request, under Article 52(5) of the Convention and Rule 54(1) of the Arbitration Rules, for a stay of enforcement of the Award until the Application for Annulment is decided.

3. Upon registering the Application for Annulment on 30 September 2004, the Secretary General of ICSID notified the parties that, pursuant to ICSID Arbitration Rule 54(2), the enforcement of the Award was provisionally stayed.

4. On 23 March 2005, at the first session of the Annulment Committee, consisting of the Hon. Judge Gilbert Guillaume of France as President, and Professor James Crawford of Australia and Dr. Sara Ordoñez Noriega of Colombia as Members, MTD made a request under Arbitration Rule 54(2) for the stay of enforcement of the Award to be terminated unless appropriate security was put in place by Chile.

5. The Committee, having heard the oral arguments of the parties in that regard, requested Chile to file any proposal that it might have by 11 April 2005, and MTD to file any comments thereon by 18 April 2005. By agreement of the parties, the thirty-day deadline for a decision under Arbitration Rule 54(2) was

extended on the understanding that the Committee would make its decision promptly after the Claimants' submission. Chile's submission was filed on 11 April 2005 and the Claimants' submission was filed, with the Tribunal's permission, on 20 April 2005.

6. On the same day Chile requested that it be allowed to file a further submission in response. Although objected to by MTD, the Committee granted Chile's request to make the further submission, while allowing MTD an equal amount of time to file a response. Each party filed its second round submission as thus permitted on 25 April 2005 and 2 May 2005, respectively.

B. The Parties' Contentions

7. In its observations dated 11 April 2005, Chile requested a continuance of the provisional stay of enforcement of the Award in accordance with Article 54 of the ICSID Arbitration Rules. It submitted that Chilean law provides powerful international guarantees which "render unnecessary the granting of any additional security in order to continue such a stay". It added that under Chilean law, "arbitration awards issued by a duly constituted Tribunal or Committee in accordance with the Convention, Regulations and Rules of ICSID, are fully recognized as awards emanating from a competent authority".

8. In particular "these obligations are formally sanctioned on an annual basis in the Law of Budgets of the Public Sector" and more specifically for 2005, in Law No.19,986, title no. 50, chapter no.01, program 03, sub chapter 26, item 02-001 entitled "Cumplimiento de Sentencias Ejecutoriadas" ("Fulfillment of Final Judgments").

9. Furthermore, under article 28 of Decree Law no. 1263 of 1973 of the Ministry of Finance, "El Ejecutivo podrá ordenar pagos, excediéndose a las sumas consultadas en los rubros correspondientes ... para el cumplimiento de

sentencias ejecutoriadas dictadas por autoridad competente”, which according to Chile could be translated into English as follows: “The Executive will be able to order payments exceeding the sums consulted in the corresponding areas ... for the fulfillment of final judgments dictated by competent authority.”

10. According to the Respondent, the Executive is thus authorised to order payments exceeding the sums anticipated in the budget and it exercises this function through budgetary reassignment or additional sources of funding. Therefore, “the amount of the reserve will always hold sufficient funds to fulfill the Republic of Chile’s expenses in connection with a judgment against it.”

11. For these reasons Chile “request[s] that the Committee continue the provisional stay of enforcement of the Award, without requiring any additional security over and above that which Chilean law already expressly contemplates.”

12. In their response dated 20 April 2005, the Claimants “urge the Committee not to continue the stay of enforcement against the Award unless ... Chile posts financial security guaranteeing payment promptly upon a decision refusing to annul the Award.”

13. MTD states that “having spent a decade pursuing the procedure specified by the Chile-Malaysia BIT and ICSID Convention, MTD should not face any additional delay in receiving payment if the Award is not annulled.” It stresses that under article 52(5) of the Convention and Arbitration Rule 54(2), “annulment is an exceptional and rarely granted remedy.”

14. MTD submits that “Chile has not provided any meaningful assurance that MTD would receive full payment (with interest) immediately upon a decision refusing to annul the Award.” According to MTD, Chile only identifies the procedure to be followed in order to request payment after the decision of the Committee. MTD adds that the authorities cited by Chile do not guarantee such a

payment. In particular, the Budget law for the Public Sector for 2005 did not earmark any funds to pay the Award. Decree law 1263 of 1973 “authorizes payment of final judgments (*sentencias*), not final awards (*laudos*)” in excess of the amount set forth in the Budget Law. Moreover the decree law authorizes such payment but does not require it. In any case, Chile may not rely upon provisions of its domestic law in an attempt to guarantee future compliance with its international obligations.

15. The request for stay presented by Chile, according to MTD, also fails because there is no showing that a stay is “required” (see *CDC Group PLC v. Republic of Seychelles*, Case No. ARB/02/14, Decision on Whether to Continue Stay and Order, July 2004). “The two-year delay MTD faces in enforcing the Award” must be “counterbalanced by financial security guaranteeing prompt payment if the Award is not annulled.”

16. According to the Reply of Chile dated 25 April 2005, “MTD’s principal argument [is] that the mere incidence of delay in obtaining enforcement of the Award as a result of the annulment proceedings requires the posting of financial security by the Republic of Chile”. MTD had no ground of concern that the Award might not be honored by Chile pursuant to its ICSID obligations. In fact, MTD only stresses that it made its investment in 1996, has been receiving no return on the capital since then and would have to wait another year or so for the Committee’s decision.

17. Chile submits that accepting MTD’s argument would mean that all *ad hoc* Committees “would automatically have to decide that each and every State applying for annulment would have to post security”. Moreover it would imply that the Committee will accept MTD’s substantive claims. Finally, Chile contends that the two-year delay MTD faces until the day of payment is counter-balanced by the interest it would receive if Chile’s application is not upheld.

18. Chile adds that it has not delayed the proceedings in the arbitration, and that annulment is a serious remedy provided by the ICSID Convention which Chile has the right to invoke and which it invoked within the prescribed time-limit.

19. Chile contends also that the continuance of the stay is not at issue in the present case, but only the question of the assurance to be given with respect to financial security: “Had a briefing on the continuance of the stay been called for, Chile would have addressed the extensive circumstances to be considered in favor of continuation of such a stay, including the difficulty and costs imposed by the necessity for...Chile, once having prevailed in the annulment proceedings, to recoup an Award... from a private company in Malaysia which would have had the free use of such wind fall amount for more than a year”; the seriousness of the application for annulment; the harmful consequences of a payment upon the economic and social development of Chile; the commitment taken by Chile in writing to carry out its international obligation and the fact that the Award carries interest and that the Claimants suffer no conceivable loss.

20. Answering questions posed by the Committee on 22 April 2005, Chile states that it “lacks precise precedent showing that the term ‘*sentencias*’ in Decree Law 1263 and 3346 include international Awards”. However it recalls that Chile has promulgated the ICSID Convention as domestic law (decree No. 1304 published in the *Diario oficial* of 9 January 1992) and that Article 54 of the Convention, in its Spanish version, as published, creates an obligation to enforce the pecuniary obligations imposed by an award (“*laudo*”) as if it were a final judgment (“*sentencia*”).

21. Finally, Chile submits that “a continuance of the stay of the enforcement of the Award is appropriate and justified, and that a requirement of an additional financial security ... is unwarranted and unsupported by the totality of the circumstances presented by the annulment proceedings”. Chile reiterates its

commitment to “the fulfillment of its ICSID obligations upon the issuance of a decision by the Committee”.

22. In its Rejoinder dated 2 May 2005, MTD recalls its concern about past delays and expresses the fear that MTD will face new delays in the enforcement of the Award, taking into account Chile’s change of administration scheduled for March 2006 and Chile’s internal payment procedures. MTD notes that Chile “cannot cite any authority showing that the term ‘*sentencias*’ (judgments) in Decree-Laws 1263 and 3346 includes international arbitral Awards” and that it “cites no provision of its domestic law that actually implements the obligation of Article 54 [of the ICSID Convention], that is that converts an ICSID Award into a domestic judgment or otherwise provides for its enforcement.”

23. MTD also contends that Chile does not meet its obligation to specify the circumstances that require the stay. It submits that, even if such a stay was to be decided, it must be accompanied by the posting of security. In this respect it states that “the accrual of interest does not redress the full measure of harm to MTD that would result from additional delays. Every month of delay in repayment prevents MTD from undertaking projects and creating jobs with [its] capital”.

C. The *ad hoc* Committee’s Views

24. Article 52(5) of the ICSID Convention provides:

“(5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. 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.”

25. Rule 54 of the ICSID Arbitration Rules provides:

“Stay of Enforcement of the Award

(1) The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.

(2) If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provisional stay of the award. As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated.

(3) If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final decision is rendered on the application, except that a Committee granting the partial annulment of an award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request any new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3).

(4) A request pursuant to paragraph (1), (2) (second sentence) or (3) shall specify the circumstances that require the stay or its modification or termination. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.

(5) The Secretary-General shall promptly notify both parties of the stay of enforcement of any award and of the modification or termination of such a stay, which shall become effective on the date on which he dispatches such notification.”

26. On a request under Rule 54(1), the Committee has a discretion which it should exercise, after both parties have had an opportunity to be heard, taking into account any relevant circumstances. The effect of the stay is that the award is not subject to enforcement proceedings under Article 54 of the Convention pending the outcome of the annulment application. Since a stay is not automatic the Tribunal could grant the request subject to conditions, including a condition that an appropriate bond be provided.

27. The question whether a stay should be granted unconditionally or on condition of a bank guarantee has been discussed in a number of earlier proceedings.¹

- (a) In *Amco Asia Corporation v Republic of Indonesia (First Annulment)*, the Committee granted a stay on condition of the furnishing of a bank guarantee.² A similar order was made in the second annulment proceeding between the same parties.³
- (b) In *Maritime International Nominees Establishment v Republic of Guinea*, the Committee declined to impose the condition of a guarantee, on the basis that this would be costly and would place the Claimant “in a much more favourable position than it enjoys at the present time”.⁴
- (c) In *Wena Hotels Ltd v Arab Republic of Egypt*, the Committee continued the stay of execution conditional on the provision of a guarantee in the amount of the award.⁵
- (d) In *CDC Group PLC v Republic of the Seychelles*, the Committee held that there was no evidence of “catastrophic consequences” to the Respondent which could follow the immediate enforcement of the award, and that as a matter of fairness to the Claimant the delay caused by the annulment proceedings should be addressed by the provision of security as a condition of a stay.⁶
- (e) In *Mitchell v Democratic Republic of Congo* the Committee by majority declined to make the stay conditional upon the posting of security on the basis that it was “not convinced that the DRC, albeit its present political

¹ See also C. Schreuer, *The ICSID Convention. A Commentary* (Cambridge, 2001) 1052-1060.

² *Amco Asia Corporation v Republic of Indonesia (First Annulment)* (1986) 1 ICSID Reports 509, 513 (para. 8); see Schreuer, 1056 for a brief account of the reasoning.

³ *Amco Asia Corporation v Republic of Indonesia (Second Annulment)* (ICSID Case No. ARB/81/1), Annulment decision of 3 December 1992, paras. 3.03, 3.07 (forthcoming in 9 ICSID Reports).

⁴ *Maritime International Nominees Establishment v Republic of Guinea*, Interim Order No. 1, 12 August 1988, 4 ICSID Reports 111, 115 (para. 22).

⁵ *Wena Hotels Ltd v Arab Republic of Egypt*, Procedural Order No 1, 5 April 2001, referred to in the final decision of the Committee, (2002) 6 ICSID Reports 129, 131 (para. 6).

⁶ *CDC Group PLC v Republic of the Seychelles* (Case No ARB/02/14), Decision of 14 July 2004, esp paras. 21-22.

difficulties, will not comply in the future with its international obligations deriving from the ICSID Convention”.⁷

28. The Committee agrees with earlier decisions to the effect that, unless there is some indication that the annulment application is brought without any basis under the Convention, i.e., that it is dilatory, it is not for the Committee to assess as a preliminary matter whether or not it is likely to succeed. In requesting annulment, an applicant avails itself of a right given by the Convention. There is no indication here that Chile is acting in a merely dilatory manner. Thus the Committee does not need to form any view as to the likelihood of success of the application for annulment in the present case.

29. As a general matter 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. It should not be exposed, while exercising procedural rights open to it under the Convention, to the risk that payment made under an award which is eventually annulled may turn out to be irrecoverable from an insolvent claimant. At the same time a Respondent seeking a remedy under the Convention should demonstrate that for its part it will comply with the Convention, and if there is doubt in that regard the Committee may order the provision of a bank guarantee as a condition of a stay.

30. It is true that the provision of a bank guarantee puts a claimant in a better position than it would be if annulment had not been sought, since it converts the undertaking of compliance under Article 53 of the Convention into a financial guarantee and avoids any issue of sovereign immunity from execution, which is expressly reserved by Article 55 of the Convention. On the other hand, a request for annulment causes significant delay to the claimant, with the consequent possibility of prejudice. Although this can be dealt with by an award of interest

⁷ *Mitchell v. Democratic Republic of Congo* (Case No ARB/99/7), Decision of 30 November 2004, para. 42.

in the event that the annulment application fails, nonetheless there will have been a further delay in the award becoming enforceable and this is a factor entitled to some weight.

31. Despite this, in the Committee's view the key feature of the situation is that, by the express terms of Article 54 of the Convention, an ICSID award is to be given the same effect as a final judgment of the courts of the Respondent State. As compared with other international arbitral arrangements, final awards under the ICSID Convention are directly enforceable, upon registration and without further jurisdictional control, as final judgments of the courts of the host State. It is true that immunity from execution is reserved (Article 55), but this simply leaves the issue of immunity to be dealt with under the applicable law: "Immunity from execution of the host State in its own courts would depend entirely on its domestic law."⁸

32. States Parties to the Convention have an obligation to give effect to Article 54 of the Convention in their internal law. Exactly how this is done depends on the constitutional arrangements of the State Party concerned; the point for the Committee is to be satisfied that the State Party has taken appropriate steps in accordance with its constitutional arrangements to give effect to Article 54. Where it has done so, subsequent compliance by that State with a final award will be a matter of legal right under its own law, as well as under international law.

33. Chile states that the annual law of budgets of the public sector, and in particular the law for the year 2005, contains an item entitled "fulfillment of final judgments". It recognizes that under this item only a token amount of money is provided. However it adds that article 28 of Decree Law 1263 of 1973 of the Ministry of Finance authorizes the Executive to order payments exceeding the sums anticipated, *inter alia* for the fulfillment of final judgments ("*para el*

⁸ Schreuer, 1176.

cumplimiento de sentencias ejecutoriadas”). Moreover, under article 2(m) of Decree Law 3346 of 1980, the Ministry of Justice is required to perform the following functions: “(m) to take the necessary measures for the fulfillment of the final judgments rendered against the Treasury” (“*dictar las resoluciones necesarias para el cumplimiento de las sentencias ejecutoriadas que condenen al fisco*”).

34. It is doubtful whether an award of an ICSID Tribunal falls within the term “*sentencias*” in Decree-Laws 1263 and 3346. However the Respondent points out that a Presidential decree has implemented the Convention as part of Chilean law. Decree No. 1304, published in the *Diario Oficial* of 9 January 1992, recites the Congressional approval given to Chilean ratification of the Convention and specifies that:

“by the authority vested in me by articles 32 No. 17 and 50 No. 1 of the Political Constitution of the Republic, I decree and order that [the Convention] be executed and take effect as law and that an authorized copy of its text be published in the *Diario Oficial*.”⁹

35. Chile represents—and the Committee has no basis for disagreeing—that the effect of this provision is that an ICSID award is to be given exactly the same effect as a final judgment of the Chilean courts, i.e., it must thereupon be considered as a judgment for the purposes of Decree Laws 1263 and 3346. Chile has further noted that it has always complied with its international payment obligations and with all judgments or awards of international courts and tribunals. It affirms that it will do so, if and to the extent that the award against it becomes final, in the present case.

⁹ The original text reads: “en uso de la facultad que me confieren los artículos 32 N° 17 y 50 número 1) de la Constitución Política de la República, dispongo y mando que se cumpla y lleve a efecto como ley y que se publique copia autorizada de su texto en el Diario Oficial.”

36. Having regard to the matters referred to above, in the Committee's view Chile has demonstrated that MTD will not be prejudiced by the grant of a stay, other than in respect of the delay which is, however, incidental to the Convention system of annulment and which can be remedied by the payment of interest in the event that the annulment application is unsuccessful.

Decision

For the foregoing reasons the Committee, unanimously:

CONTINUES IN FORCE the stay in the enforcement of the award pending its decision on the Application for Annulment.

Signed on behalf of the Committee:

Gilbert Guillaume
President

Date