

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the proceedings between

IOANNIS KARDASSOPOULOS AND RON FUCHS
(Respondents)

v.

GEORGIA
(Applicant)

ICSID Case N^os. ARB/05/18 and ARB/07/15
(Annulment Proceeding)

**DECISION OF THE *AD HOC* COMMITTEE
ON THE STAY OF ENFORCEMENT OF THE AWARD**

Members of the ad hoc Committee

Judge Dominique Hascher (President)
Tan Sri Cecil W. M. Abraham
Professor Karl-Heinz Böckstiegel

Secretary of the ad hoc Committee

Ms. Aïssatou Diop

Representing the Applicant

Ms. Louise Roman Bernstein
Mr. Derek C. Smith
Mr. Luis Parada
Mr. Tomás Solís
Ms. Erin Argueta
Dewey LeBoeuf LLP

Representing the Respondents

Ms. Karyl Nairn
Mr. Timothy G. Nelson
Mr. John Gardiner
Mr. David Herlihy
Skadden, Arps, Slate, Meagher & Flom (UK) LLP

INTRODUCTION

1. On 30 June 2010, Georgia (or the “Applicant”) filed in accordance with Article 52 of the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and National of Other States (“the ICSID Convention”), timely applications for annulment of the Award rendered on 3 March 2010 in ICSID case n°s ARB/05/18 and ARB/07/15 in favor of two oil traders, Mr. Ioannis Kardassopoulos, a Greek national, and Mr. Ron Fuchs, an Israeli national, by an Arbitral Tribunal composed of Mr. L. Yves Fortier C.C., O.Q., Q.C. (President), Professor Francisco Orrego Vicuña and Professor Vaughan Lowe Q.C. (Co-Arbitrators).

2. On 16 July 2010, the Secretary-General of ICSID registered the applications and, in accordance with Rule 50(2) of the Rules of Procedure for Arbitration Proceedings (“ICSID Arbitration Rules”), transmitted a Notice of Registration to the parties. In the Notice of Registration, the Secretary-General advised the parties that the Chairman of the ICSID Administrative Council will be asked to appoint the *ad hoc* Committees that will consider the applications. On 21 July 2010, the Secretary-General proposed to the parties that the same three persons be designated to each of the two *ad hoc* Committees, and the parties agreed. The Secretary-General notified the parties on 11 August 2010 of the constitution of *ad hoc* Committees composed of Judge Dominique Hascher, a national of France, as President, Professor Karl-Heinz Böckstiegel, a national of Germany, and Tan Sri Cecil W. M. Abraham, a national of Malaysia, as Members. The parties were also informed on 11 August 2010 that Ms. Aïssatou Diop, Junior Counsel, ICSID, would serve as secretary of the *ad hoc* Committees.

3. The applications for annulment are based on the grounds enumerated in Article 52(1)(b) and (e) of the ICSID Convention, namely that the Arbitral tribunal manifestly exceeded its powers and that it failed to state reasons on which the Award is based. The applications also contain each a

request (paragraph 5), pursuant to Article 52(5) of the ICSID Convention and Rule 54(1) of the ICSID Arbitration Rules, that enforcement of the Award be stayed pending the *ad hoc* Committees' decision on the applications for annulment. In accordance with Rule 54(2) of the ICSID Arbitration Rules, enforcement of the Award was provisionally stayed on 16 July 2010 by the Deputy Secretary-General of ICSID.

4. Georgia filed on 12 August 2010 a Request for the Continuation of the Stay of Enforcement of the Award pending the *ad hoc* Committees' decision on its applications for annulment. Messrs. Kardassopoulos and Fuchs wrote on 12 August 2010 to oppose this Request and to further declare that, should any stay be granted, it should be conditional on the posting of security corresponding to the full amount of the Award.

5. By letter of 1 September 2010, the *ad hoc* Committees took note of the parties' agreement on the timetable for the exchange of their written submissions on the stay of enforcement. Messrs. Kardassopoulos and Fuchs submitted accordingly on 2 September 2010 a Response to Georgia's Application for an Unconditional Stay of Enforcement and Application for Security as a Condition of any Continued Stay. Georgia filed a Response to Respondents' Request for Conditions to Stay Enforcement of the Award on 30 September 2010. The parties also agreed that the hearing would take place in London on 18 October 2010.

6. On 15 October 2010, the counsels of Messrs. Kardassopoulos and Fuchs informed the Secretariat of the incarceration on 14 October 2010 of Mr. Fuchs in Georgia on charges of bribery. Georgia responded on 17 October 2010 that the criminal proceedings against Mr. Fuchs are outside the scope of the annulment proceeding.

7. The oral hearing was held on Monday, 18 October 2010 in London, at the IDRC Center

located on 70 Fleet Street, from 11:15 a.m. until 3:40 p.m., after hearing the procedural matters of the First Session required by Rules 13 and 53 of the ICSID Arbitration Rules, where it was decided that the Committees would be combined into one Committee (the “*ad hoc* Committee” or the “Committee”) for the annulment proceedings pursuant to the applications of Georgia to set aside the Award of 3 March 2010. Before adjournment of the hearing, the *ad hoc* Committee ruled that, pursuant to ICSID Arbitration Rule 54(2), the provisional stay of enforcement was to continue until the Committee issued its Decision on Georgia's Stay Request.

8. The parties were informed on 19 October 2010 by the Secretariat that the *ad hoc* Committee granted the Respondents until 25 October 2010 to submit comments, if any, on the letters of Bonelli, Erede and Pappalardo Studio Legale of 22 October 2009 and of DLA Piper LLP (US) of 30 October 2009 exchanged in the matter of *Ares International s.r.l. and Metalgeo s.r.l. v. Georgia*¹ which had been distributed by Georgia to the Committee and the Respondents at the hearing.

THE PARTIES' SUBMISSIONS

9. Georgia submits that the circumstances of the case justify a stay of enforcement of the Award which should be continued without conditions. It argues that its applications for annulment constitute a legitimate exercise of its rights pursuant to the ICSID Convention, not a dilatory tactic. Georgia declares that its applications raise important issues of international law related to the correct interpretation and application of one multilateral treaty (the Energy Charter Treaty, “ECT”) and two bilateral investment treaties (“BIT”, the Georgia/Israel BIT and the Georgia/Greece BIT). Georgia contends that, despite the fact that the relevant treaties were not yet in force, the Tribunal improperly asserted jurisdiction by rewriting the unambiguous text of the ECT in redefining “entry into force” as date of signature although it recognized that the two concepts are different, and by

¹ *Ares International S.r.l. and MetalGeo S.r.l.*, ICSID Case N° ARB/05/23, Award, 28 February 2008

giving causal relevance to events that occurred prior to the entry into force of the Georgia/Israel BIT in converting post-BIT claims into claims for pre-BIT events. The grounds for annulment are based on manifest excesses by the Arbitral Tribunal when asserting jurisdiction and would support annulment of the entire Award as the pecuniary obligations imposed by the Arbitral Tribunal with respect to Messrs. Kardassopoulos' and Fuchs' proceedings are the results of such excesses. With respect more precisely to the claim of Mr. Fuchs, the application for annulment is otherwise grounded on the failure to state reasons for the violations of the Fair and Equitable Treatment standard. In sum, Georgia, raises important issues of international law, according to the applications for annulment².

10. Georgia underlines that the exercise of its right to request annulment and the consequent stay of the Award are not prejudicial to Respondents who, should the Award not be annulled, are compensated for any delay in the payment of the Award by post-award interest as included in the Arbitral Tribunal's decision. Georgia also argues that there is a risk of irreparable injury in light of the risk of non-recoupment if the Award is enforced and later annulled. Georgia alleges that the risk is all the more increased that the two Respondents are individuals. Georgia adds that there is also the risk that the Respondents, once the Award is enforced, would have no longer an interest in participating in the annulment proceedings³.

11. Georgia contends that the stay should be continued without conditions. According to Georgia, neither the ICSID Convention nor the ICSID Rules expressly state whether an *ad hoc* committee can grant a request for a stay subject to conditions, and that as a consequence, the *ad hoc* committees' power to impose conditions must be exercised restrictively⁴. The Applicant declares

2 Georgia's Request for Continuation of the Stay of Enforcement of the Award, paras. 6-8

3 Georgia's Request for Continuation of the Stay of Enforcement of the Award, paras. 10-13

4 Georgia's Response of 30 September 2010 to Respondents' Request for Conditions to Stay Enforcement of the Award, paras. 7-11

that there is no uniform practice by *ad hoc* committees in granting a stay of enforcement subject to conditions, whether for justifiable doubts as to compliance, as alleged by Messrs. Kardassopoulos and Fuchs, or otherwise⁵. Georgia relies mainly on the Argentina cases as well as on cases involving ICISD Convention Contracting States other than Argentina in support of its contention that, even where it was found that a State will in fact not comply with Article 53, *ad hoc* committees have extended stays without conditions in light of “all relevant circumstances” so that that circumstance alone, even if established, is not sufficient to grant a stay subject to conditions⁶.

12. Georgia reminds that it is under an international legal obligation laid out in Article 53 of the ICSID Convention to comply with the Award if it is not annulled, and Respondents have failed to raise “justifiable doubts” that Georgia will not comply with its Article 53 obligation⁷, although justifiable doubt alone is insufficient. Instead, all circumstances of the case should be viewed, certainty or near certainty of non-compliance being an adequate standard⁸. Georgia argues that the fact that payment is still pending in the *Ares v. MetalGeo* case, one of several ICSID cases to which Georgia has been a party, is irrelevant to Georgia's compliance with Article 53 of the ICSID Convention⁹. Georgia declares that Respondents erroneously conflate Articles 53 and 54 of the ICSID Convention which in fact address separate issues. The obligation to comply with an award is imposed by Article 53, the enforcement mechanism in Article 54 is instead designed to ensure compliance against private parties. Article 54 thus has no relevance for the determination of whether a Contracting State will comply with an ICSID award pursuant to Article 53 of the

5 Georgia's Response of 30 September 2010 to Respondents' Request for Conditions to Stay Enforcement of the Award, paras. 12-15

6 Georgia's Response of 30 September 2010 to Respondents' Request for Conditions to Stay Enforcement of the Award, para. 29

7 *Id.*; Georgia's Request for Continuation of the Stay of Enforcement of the Award, paras. 14-15; Provisional Tr., p. 43.

8 Provisional Tr., pp. 38, 49

9 Georgia's Response of 30 September 2010 to Respondents' Request for Conditions to Stay Enforcement of the Award, paras. 30-34

Convention. The prospect of compliance with Article 53 is what is relevant for the determination of whether or not a stay should be granted and whether it should be subject to conditions¹⁰.

13. According to Georgia, all references to a possible application of the New York Convention or a possible application of the Georgian Constitution to an ICSID award are purely speculative and cannot be the basis for implying the existence of a condition on an explicit right given to State Parties under the ICSID Convention. Indeed, the facts of this case provide irrefutable evidence that Georgia has not taken, and will not take the position that it would apply the New York Convention and/or its Constitution to avoid compliance with ICSID awards¹¹.

14. Respondents' further arguments, that Georgia's legal position in the course of the underlying arbitration is relevant to the grant of a stay subject to conditions and that Georgia's exercise of its rights under the ICSID Convention is in breach of its ECT obligation, have no weight. Unlike the Argentina cases cited by Respondents, there is no risk that Georgia will not comply with the Award if the request for annulment is denied. Even in cases where committees have found that a State will not comply with an award, the test has still been to assess all the circumstances of the case, and committees have granted stay without conditions¹².

15. Georgia requests that enforcement of the Award be stayed without conditions pending the *ad hoc* Committees' decision on the applications for annulment. However, to the extent there is any doubt as to Georgia's commitment to comply with the Award if it is not annulled, Georgia would be willing to provide the Committee a letter of assurance, should the Committee decide that the totality

10 Georgia's Response of 30 September 2010 to Respondents' Request for Conditions to Stay Enforcement of the Award, paras. 43-48

11 Georgia's Response of 30 September 2010 to Respondents' Request for Conditions to Stay Enforcement of the Award, paras. 49-52

12 Georgia's Response of 30 September 2010 to Respondents' Request for Conditions to Stay Enforcement of the Award, paras. 59-60

of the circumstances justify imposing such condition for the continuation of stay of enforcement of the Award¹³.

16. Messrs. Kardassopoulos and Fuchs (Respondents) “recognize that it is customary for *ad hoc* annulment committees to grant a stay of enforcement pending the determination of the losing party's annulment application”¹⁴.

17. The Respondents say that the unique facts of the case provide compelling grounds for requiring Georgia to post security, failing which the stay of enforcement should be automatically lifted¹⁵. Messrs. Kardassopoulos and Fuchs underline that *ad hoc* committees are empowered to require the posting of security and moreover stress that *ad hoc* committees have uniformly endorsed the posting of security where justifiable doubts exist as to the host State's intentions to honor an ICSID award as is precisely the case with Georgia's conduct¹⁶.

18. The Respondents submit that, by failing to pay even the one modest ICSID award rendered against it in 2008 in the matter of *Ares v. MetalGeo*, Georgia is already in breach of Article 53 of the ICSID Convention which imposes an unconditional obligation on Georgia to abide by and comply with ICSID awards. There is no evidence of a convincing nature, the Respondents claimed at the hearing, that Georgia respects its obligation under Article 53 of the ICSID Convention to comply

13 Georgia's Response of 30 September 2010 to Respondents' Request for Conditions to Stay Enforcement of the Award, para. 61

14 See Response to Georgia's Application for an Unconditional Stay of Enforcement and Application for Security as a Condition of any Continued Stay of 2 September 2010, para. 3

15 Response to Georgia's Application for an Unconditional Stay of Enforcement and Application for Security as a Condition of any Continued Stay of 2 September 2010, para. 4

16 Response to Georgia's Application for an Unconditional Stay of Enforcement and Application for Security as a Condition of any Continued Stay of 2 September 2010, paras. 11-17

with ICSID awards¹⁷. Respondents add that security is also warranted in light of Georgia's failure to implement Article 54 of the ICSID Convention which requires the Contracting States to enable enforcement of ICSID awards in their own national courts. Messrs. Kardassopoulos and Fuchs also declare that Georgia is in breach of its obligation under Article 26(8) of the Energy Charter Treaty (“ECT”) which calls on the Contracting States to carry out without delay any award and to make provision for the effective enforcement in its area of such awards. The Respondents submit that Georgia’s obligation under Article 26(8) of the ECT should be taken into account in addition to the obligations under Articles 53 and 54 of the ICSID Convention¹⁸.

19. The Respondents contend that Georgia's internal laws fail to comply with its international obligations for at least the four following reasons: (i) Georgian legislation improperly subjects ICSID awards to potential non-recognition on the grounds similar to those in article V of the New York Convention; (ii) under Georgian law, recognition of its obligations under the ICSID Convention is secondary to the requirements of Georgia's Constitution; (iii) Georgian law denies private parties legal standing to seize assets of Georgia in satisfaction of an ICSID award; (iv) as applied in the *Ares v. MetalGeo* case, Georgian law and procedure has been conclusively proven to deliver no remedy to creditors holding an ICSID award¹⁹. At the hearing, the Respondents argued that the enforcement mechanism is self-judging because it allows the State to have complete control over whether the enforcement proceedings can be brought²⁰.

20. Messrs. Kardassopoulos and Fuchs declare that their treatment by Georgia provides further compelling evidence that Georgia will fail to abide and comply with the Tribunal's Award. The

17 Provisional Tr., p. 17

18 Response to Georgia's Application for an Unconditional Stay of Enforcement and Application for Security as a Condition of any Continued Stay of 2 September 2010, paras. 22-24

19 Response to Georgia's Application for an Unconditional Stay of Enforcement and Application for Security as a Condition of any Continued Stay of 2 September 2010, para. 25

20 Provisional Tr., p. 19

Respondents rely on some passages of the Tribunal's Award which notably declare that the case arises from a “farce” of broken promises by Georgia to compensate them. They add that they are regarded by Georgia as non-strategic investors who do not merit priority and it is evident that Georgia treats them with hostility. The Respondents further declare that Georgia conducted its defense in the ICSID arbitration proceedings in a dilatory manner which creates additional doubts over good faith compliance with the Award. The Respondents finally stress that security is also appropriate and cannot be characterized as unfair because Georgia unlawfully expropriated their shareholding in the GTI joint venture²¹.

21. Messrs. Kardassopoulos and Fuchs also allege that the parties' competing arguments on the merits of the annulment applications are irrelevant to security applications. None of the points raised by Georgia in its applications to set the award aside are relevant to the question presented to the Committee of whether the stay should be unconditional or, quite to the contrary, as Respondents declare, conditional on providing security²².

22. The Respondents request the Committee to:

(a) condition the continued stay of enforcement of the Award on the posting by Georgia of adequate security in the following form:

(i) an unconditional and irrevocable bank guarantee or standby letter of credit with a reputable international bank for the full amount of the Award including post-award interest (or such other amount as may be determined by the Committees), callable by the Claimants upon the outcome of the Committees' final decision on the current applications for annulment;

(ii) in the alternative, the deposit by Georgia of the full amount of the Award plus the post-interest to date (or such other amount as may be determined by the Committees) in a mutually-acceptable escrow account with a reputable international bank, pledged in favor of Messrs. Kardassopoulos and Fuchs and under the control of the sole control of an international escrow agent;

21 Response to Georgia's Application for an Unconditional Stay of Enforcement and Application for Security as a Condition of any Continued Stay of 2 September 2010, paras. 40 – 49

22 Response to Georgia's Application for an Unconditional Stay of Enforcement and Application for Security as a Condition of any Continued Stay of 2 September 2010, paras. 50-51

(iii) in the further alternative, the irrevocable commitment by Georgia (to be held in escrow and in a form acceptable to them) to pay them an agreed percentage of any income received by Georgia or its relevant state-entities by way of transit fee for any oil pipeline within its territory for such period as may be necessary to discharge the Award in full plus post-award interest; or,

(iv) in the further alternative, in such other form as may be determined by the Committees;

(b) order that security so provided be collectable by Messrs. Kardassopoulos and Fuchs in full if the current annulment applications are rejected, or in the event of partial annulment, partially collectable by the appropriate Respondent(s) in the remaining amount of the Award rendered in his or their favor;

(c) order that if Georgia fails to provide the security so ordered within 90 days or defaults in paying any other amount required by the Centre to be paid in the course of the current annulment applications (including the costs of the Centre and/or the costs of the Annulment Committees), the stay on enforcement of the Award shall be terminated; and

(d) order that Georgia pay the costs of the present application, or, in the alternative, reserve its decision as to the costs of this application until the conclusion of these annulment proceedings.

THE COMMITTEE'S ANALYSIS

23. Awards made under the ICSID Convention are binding on the parties as spelled out in Article 53(1) of the Convention:

(1) [t]he award shall be binding on the parties and shall not be subject to appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except and to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

24. Once an award is made, completion of any further process is unnecessary for the acquisition of a binding character. Should the award debtor not carry out voluntarily the award, the award creditor is only invited by Article 54(2) of the ICSID Convention to furnish to a competent court or other authority of a Contracting State a copy of the award certified by the Secretary-General of ICSID. The party seeking recognition or enforcement of an ICSID award has no condition to prove other than the authenticity of the award, as Article 54(1) of the Convention obliges the Contracting States to recognize an ICSID award as binding and to enforce the pecuniary obligations imposed by

that award as if it were a final judgment of a court in that State. Article 53(1) reinforces this obligation to recognize and enforce by specifying that an ICSID award is not subject to appeal or any other remedy except as otherwise provided in the Convention as regards interpretation, revision or annulment of the award.

25. The ICSID Convention provides only one exception to the obligation to comply promptly and spontaneously with an award whenever according to Article 53(1) “[e]nforcement shall have been stayed pursuant to the relevant provisions of this Convention”. Article 52(5) expressly provides in this regard that,

[t]he Committee [which has authority to annul the award] 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.

26. Consonant with the extraordinary nature of the annulment remedy, the stay of the enforcement is an exception to the ICSID enforcement regime. Stay of enforcement during the annulment proceeding is by no way automatic, quite to the contrary, a stay is contingent upon the existence of relevant circumstances which must be proven by the Applicant. Contrary to the Applicant's position, the Committee agrees with the Respondents²³ that the granting of a stay with or without conditions does not require an analysis of the importance of the issues. The Committee's task is not to evaluate at this stage in a preliminary manner whether the arguments in support of the applications for annulment are important or serious enough to the success of Georgia's request for a stay.

27. Messrs. Kardassopoulos and Fuchs have however refrained from putting Georgia's request for a stay to test and have instead agreed that enforcement of the Award made on 3 March 2010

²³ Provisional Tr., p. 6; see also Response to Georgia's Application for an Unconditional Stay of Enforcement and Application for Security as a Condition of any Continued Stay of 2 September 2010, pars. 52-54

ordering Georgia to pay them more than US \$ 90 million in damages be stayed as requested by Georgia. This is acknowledged by Georgia in its response of 30 September 2010 that “[t]he parties agree that the stay of enforcement of the Award should continue”²⁴. The Committee will therefore focus its further analysis on the parties' arguments on whether the stay should be conditional or not.

28. Respondents' agreement on the continuation of the stay is, however, subject to the imposition of conditions which, they argue, *ad hoc* committees are empowered to require. In their view, an *ad hoc* committee's power to order the posting of security flows from Article 52(5) of the ICSID Convention which confers broad discretion on committees regarding the stay of enforcement of ICSID awards. The Applicant replied however that a power which is not explicitly found in the text of the Treaty but which is considered to exist implicitly within a broader power must be exercised restrictively. The parties are in disagreement over the extent to which there is a uniform practice on the granting of security. Georgia maintains that there are no cases that use “justifiable doubts” as the test for granting a stay subject to conditions, while Messrs. Kardassopoulos and Fuchs submitted that *ad hoc* committees have uniformly endorsed the posting of security where justifiable doubts exist as to the host State's intentions to honor an ICSID award.

29. The powers of the Committee to subject the stay of enforcement to conditions is implied by the broad discretion given to it under Article 52(5) of the Convention to stay enforcement of the award “if it considers that the circumstances so require”. This was made clear by the decisions of the *ad hoc* Committees in *Victor Pey Casado v. Republic of Chile*²⁵ and *Enron v. Argentine*

24 Georgia's Response of 30 September 2010 to Respondents' Request for Conditions to Stay Enforcement of the Award, para. 1

25 *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case N° ARB/98/2, Decision on the Republic of Chile's Application for a Stay of Enforcement of the Award, 5 May 2010, para. 28; Index of Legal Authorities to the Response to Georgia's Application for an Unconditional Stay of Enforcement and Application or Security as a Condition of any Continued Stay, n° 16

*Republic*²⁶, and we agree with the *ad hoc* Committee in *Vivendi v. Argentine Republic* that “the Committee will not revisit the question whether the continuation of the stay can be made conditional. There is ample case law that has confirmed this opportunity”²⁷. It is not the case, as the Applicant alleges, that the powers of an *ad hoc* committee in this regard are to be exercised restrictively because conditional stays are not expressly mentioned in the ICSID Convention. An *ad hoc* committee enjoys rather all latitude to find the proper balance between the interests of the parties in a given case and the legitimate right to enforce the award in order to rule on the request for a stay presented to it pursuant to Article 52(5) of the ICSID Convention, with or without conditions.

30. The parties take issue with how the Committee should exercise its discretion to subject the stay of enforcement to conditions. The Respondents declare that Georgia's conduct creates justifiable doubts as to its intention to honor the Award. According to Messrs. Kardassopoulos and Fuchs, Georgian law denies private parties legal standing to seize assets of Georgia in satisfaction of an ICSID award. They cite in their response of 2 September 2010 to Georgia's Application for an Unconditional Stay of Enforcement and Application for Security as a Condition of any Continued Stay²⁸ the recommendations issued in January 2003 by the Council of Europe on the Enforcement Law of 16 April 1999 that,

[i]t is not realistic that State enforcement agents should be expected to take enforcement

26 *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case N° ARB/01/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 7 October 2008, para. 26, (First stay decision); Index of Legal Authorities to the Response to Georgia's Application for an Unconditional Stay of Enforcement and Application or Security as a Condition of any Continued Stay, n° 11

27 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case N° ARB/97/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award rendered on 20 August 2007 (Rule 54 of the ICSID Arbitration Rules), 4 November 2008, para. 38; Index of Legal Authorities to the Response to Georgia's Application for an Unconditional Stay of Enforcement and Application or Security as a Condition of any Continued Stay, n° 12

28 Para. 33

action against State enforcement authorities and should not be held accountable for the failure to enforce against such authorities; enforcement agents are not equipped with the appropriate means to resolve the problems of internal State debt²⁹.

The simplified and automatic enforcement system of Article 54(1) of the ICSID Convention should not be conflated with the measures of execution that follow the order granted by the court or authority designated in accordance with Article 54(2) for enforcement of the award and which are referred to in Article 54(3) providing that “[e]xecution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought”. The object and purpose of the Enforcement Law of 16 April 1999 are chiefly the modalities concerning execution against assets of court judgments and awards in Georgia and the authority of enforcement agents³⁰. This analysis is buttressed by the Recommendations of the Council of Europe which, as an introduction, call for the necessity of the implementation of judicial decisions to conform with the fair trial standards of Article 6 of the European Convention on Human Rights³¹, a concern which does not fall within the obligations undertaken by Georgia under the ICSID Convention. The criticisms raised by the Respondents regarding the Georgian Enforcement Law of 16 April 1999 are irrelevant to the enforcement context of Article 54(1) and (2).

31. Messrs. Kardassopoulos and Fuchs further contended that Georgia's implementation of Article 54 of the ICSID Convention is demonstrably inadequate. They stressed that Georgia has not enacted any specific laws to implement Article 54 of the Convention³². Georgia is not, as the Respondents also note, listed among the countries which have adopted legislative measures

29 Index of Exhibits to the Response to Georgia's Application for an Unconditional Stay of Enforcement and Application or Security as a Condition of any Continued Stay, n° R-7

30 *Id.*

31 Recommendations on the Law of Georgia on the Enforcement Proceedings, Introduction, points 1 and 4, Exhibit n° R-7

32 See www.worldbank.org/icsid Contracting States and Measures taken by them for the Purpose of the Convention, (ICSID/8-E)

regarding the promulgation and ratification of the Convention in pursuance of Article 69 of the ICSID Convention³³, but it is not disputed that Georgia is, notwithstanding, a Contracting State to the Convention since 6 September 1992. According to the Respondents, Georgia's internal laws fail to comply with Article 54 because Georgian law improperly subjects ICSID awards to potential non-recognition on the grounds similar to those in the New York Convention. The Applicant, which denied that its courts would review ICSID awards if brought to enforcement, pointed out to the *travaux préparatoires* of the ICSID Convention in support of its argument that Article 54 provides the Contracting States with a forced enforcement mechanism against a defaulting private investor.

32. The Committee notes that the text of Article 54(1), which, in contrast to the Georgian Law on Arbitration of 19 June 2009 inspired from the UNICTRAL Model-Law, leaves no discretion to the court or authority to discuss the validity of the award, makes however no distinction as to enforcement against a State or a private investor. A comparison of the list of the Contracting States to the ICSID Convention with the list of those States which made the designation under Article 54(2) shows that far from all Contracting States, actually seventy four, have notified to the Secretary-General of ICSID the competent court or authority for the purpose of recognition or enforcement while seventy, including Georgia, have not. “A failure by a State seeking annulment to put in place laws implementing the obligations under Article 54(1) may” as declared by the *ad hoc* Committee in *Enron v. Argentine Republic*, “be one factor giving rise to doubts”³⁴ regarding whether there would be compliance with the obligations to pay the award if the application is rejected.

33. The Respondents further stressed that, under the Georgian Law on Normative Acts of 22 October 2009, recognition of Georgia's obligations under the ICSID Convention is secondary to the

33 *Id.*, (ICSID/8-F)

34 *See Enron v. Argentine Republic*, para. 49

requirements of its Constitution, which raises the possibility of Georgia applying to the Georgian Constitutional Court to claim that its enforcement obligations under the ICSID Convention may be unconstitutional. It is not possible however to follow the Respondents on that latter ground, as this Committee must be satisfied of the existence of concrete circumstances which would warrant the imposition of conditions to grant a stay of enforcement, while speculations on a party's possible attitude in the future are irrelevant.

34. As far as the Respondents question Georgia's compliance with its obligations arising under the ICSID Convention on a general level unrelated to the circumstances of the enforcement of the pecuniary obligations arising out of the award of 3 March 2010, it must be noted that Article 64 of the ICSID Convention provides that,

[a]ny dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.

The remit of this Committee is only the control of the Award of 3 March 2010 and the possibility of ordering a stay pending the Committee's decision on annulment, not to decide a case of State responsibility under public international law or whether Georgia has breached its obligations under the ICSID Convention.

35. The same can be said about the Respondents' arguments that Georgia is also in breach of Article 26(8) of the ECT to create procedures to ensure enforcement of the Award. Article 26(8) of the ECT reads, "[t]he awards of arbitration, which may include an award of interest, shall be final and binding upon the parties to the dispute... Each Contracting Party shall carry out without delay any such award and shall make provision for the effective enforcement in its Area of such awards". Such provisions are an encouragement to spontaneous performance, but as remarked by Georgia in

its Response of 30 September 2010, Article 26(8) does not bar the parties from requesting annulment of an ICSID award and certainly imposes no obligation to execute the Award during the pendency of the stay of enforcement³⁵. Actually, the above mentioned language would seem to focus more on enforcing awards which are made pursuant to the other investor-state arbitration options envisaged by Article 26 of the ECT³⁶.

36. The Respondents denounced the conduct of Georgia with regard to the enforcement of the ICISD award rendered against Georgia under the Italy-Georgia BIT in *Ares International & MetalGeo v. Georgia* which, they stressed, has still today not been honored by Georgia in spite of the relatively small amount of the condemnation. They asserted that this is a 100% track record of non-compliance. Georgia replied that this is far from the truth. The Applicant declared that it never took the position that it would not pay the award which is still in enforcement proceedings due to the award creditor's choice in that case to seek judicial remedy. Georgia specifies that it has been, or is involved, in other ICSID proceedings and that its situation should be clearly distinguished from the stance taken by Argentina in *Sempra* where the *ad hoc* Committee noted,

Argentina's posture makes it clear that it will in fact not comply with its obligation to abide by and comply with an award in *Sempra*'s favour unless and until *Sempra* seeks recognition and enforcement of the Award before an Argentine judicial tribunal in the manner prescribed by the national laws of Argentina³⁷.

As contrasted with the Argentina annulment cases notably discussed by the Respondents at the hearing³⁸, the Committee must acknowledge that Georgia never declared that it would not comply

35 Georgia's Response of 30 September 2010 to Respondents' Request for Conditions to stay Enforcement of the Award, para. 54

36 *Ad hoc* arbitration under the UNCITRAL Rules, Arbitration Institute of the Stockholm Chamber of Commerce

37 *Sempra Energy International v. Argentine Republic*, ICSID Case N° ARB/02/16, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 5 March 2009, para. 104, Index of Legal Authorities to the Response to Georgia's Application for an Unconditional Stay of Enforcement and Application or Security as a Condition of any Continued Stay, n° 13

38 Tr., pp. 9-14, *See Vivendi v. Argentine Republic* (para. 45); *Enron v. Argentine Republic*, First Stay Decision of 7 October 2008, para. 101 and Second Stay Decision of 20 May 2009, para. 28-29, Index of Legal Authorities to the

with the Award of 3 March 2010³⁹.

37. The Respondents further contended that, as applied in the *Ares & MetalGeo* case, Georgian law and practice has been conclusively proven to deliver no remedy to creditors holding an ICSID award. They said that the experience of the *Ares & MetalGeo* case proves the inadequacy of the Georgian enforcement mechanism. They explained that, faced with Georgia's continued refusal to pay more than a year after the award was rendered, the claimants in that case sought recognition of the ICSID award in the Georgian courts. Although the Supreme Court recognized the award⁴⁰, the Respondents pointed out that the National Enforcement Bureau (“NEB”), which is an agency under the management and control of the Ministry of Justice, has done nothing to recover payment from the Ministry of Finance. The Respondents claimed that the NEB, far from fulfilling its supposed statutory duty of enforcing awards, actually exists to block enforcement. The Applicant replied at the hearing that the NEB is nowadays an independent agency which is not under the supervision of the Ministry of Justice after new legislation was passed in 2008⁴¹. Georgia also declared that because payments, like in all countries, is at the discretion of the Executive Branch, it has to follow its budgetary proceedings⁴².

38. The likelihood that Georgia will fail to pay the Award of 3 March 2010, just as it failed to pay the *Ares & MetalGeo* award, is, according to Messrs. Kardassopoulos and Fuchs, amplified by the specific facts of this dispute, which evidence a pattern of consistently mistreating the Respondents since the mid-1990's. The Respondents denounce a pattern of hostility by the Ministry

Response to Georgia's Application for an Unconditional Stay of Enforcement and Application or Security as a Condition of any Continued Stay, n°s 12, 11 and 14

39 Georgia's Response of 30 September 2010 to Respondents' Request for Conditions to stay Enforcement of the Award, para. 23

40 Index of Exhibits to the Response to Georgia's Application for an Unconditional Stay of Enforcement and Application or Security as a Condition of any Continued Stay, n° R-10

41 Provisional Tr., p. 50

42 Provisional Tr., pp. 47, 50

of Justice that contributed to the failure of the compensation process for seven years with repeated promises by senior Georgian officials to compensate them which were subsequently denied. They referred more specifically to paragraphs 445-450 of the Award where the Tribunal condemned Georgia's behavior in the strongest terms.

39. Messrs. Kardassopoulos and Fuchs declared that Georgia belittled their investment and regarded them as non-strategic investors who do not merit priority. The Respondents also declared that the posting of security cannot be unfair because Georgia has already acquired from them the economic value of the security without paying compensation or offering restitution when their shares in GTI, the joint venture created in 1992 by TrameX and SakNavtobi, were expropriated. The Respondents cannot however rely as evidence of Georgia's intention not to comply with the Award on the impugned passages of the Award regarding Georgia's attitude which are precisely criticized in the applications for annulment on the ground of failure to state reasons⁴³.

40. Messrs. Kardassopoulos and Fuchs added that Georgia's dilatory approach to the arbitration proceeding creates additional doubts as to its good faith compliance with the Award. The Committee cannot follow this approach. It observes that Messrs. Kardassopoulos and Fuchs did not claim damages before the Arbitral Tribunal for the dilatory tactics which, they now allege before the Committee, had been displayed by Georgia in the arbitration proceedings. There is no evidence that Georgia was in breach of its procedural obligation of loyalty inherent to a fair trial and that its comportment in the arbitration proceeding is now an indication to renege on its obligation to comply with the Award under Article 53 of the ICSID Convention if the applications for annulment are rejected.

43 Georgia's Application for annulment of 30 June 2010, section D. The Tribunal failed to state the reasons for its findings of a breach of the Fair and Equitable Treatment standards under the Georgia/Greece BIT and the ECT in favor of Mr. Kardassopoulos, p. 26.

41. The Committee can only assess whether a conditional stay is necessary on the objective and concrete circumstances of the case. In making its analysis, the Committee holds that it will not take into account the events of Mr. Fuchs' arrest and detention by the Georgian authorities in the last days preceding the hearing in London which have no influence on the motivation of its Decision on a conditional stay.

42. It is undisputed that Messrs. Kardassopoulos and Fuchs made an investment in Georgia as early as the spring of 1992 with the creation, through Tramex, of the Joint Venture GTI and that a Compensation Commission was established pursuant to an Order n° 84 of 23 April 1997 “for reviewing Tramex International company's expenses in Georgia...”. It is also an undisputed fact that after years of discussions and negotiation, the Respondents were finally informed on 15 November 2004 of the decision of the reconstituted Compensation Commission established a month earlier in October 2004 by Decree n° 144 that there were no legal grounds for holding the Government liable for their claims, a finding which it refused to reconsider on 10 December 2004. In the end, Mr. Kardassopoulos submitted his Request for Arbitration with ICSID on 2 August 2005 and Mr. Fuchs did the same on 20 April 2007.

43. Against this backdrop of the protracted character of the dispute and discussions over the claims for compensation of the investment and reimbursement of losses, the further deferment of the payment of the Award to individuals which is implied by the stay would amply justify the imposition of conditions to the stay. The Applicant however has several times pointed out that post-award interest will compensate for any delay in enforcement of the Award if it is not annulled⁴⁴. Such interests compensate for the forbearance of the principal until payment of the award. Although they have a bearing on the efficacy of the award, post-award interests are not directly related to the issue of award enforcement. Additionally, in the present case, under the above mentioned

⁴⁴ Tr., p. 41; Georgia's Request for Continuation of the Stay of Enforcement of the Award, para. 7

circumstances, the absence of a proper mechanism to ensure the implementation of ICSID awards further reinforces the necessity to make the stay of enforcement conditional.

44. There is again disagreement between the parties on the nature of the condition. Georgia indicated that it would be willing to provide a letter that it will comply with the Award to the extent it is not annulled⁴⁵. The Committee cannot however accept such condition which it regards both as unsatisfactory in view of an already prolonged negotiation and litigious process between the parties and as a belated offer in response to Respondents' submissions on a conditional stay when the Applicant could have proposed an assurance letter in the first place upon the filing of its request for a stay. Georgia chose instead to apply on 12 August 2010 for an unconditional stay of enforcement and cannot now complain that Messrs. Kardassopoulos and Fuchs, who accepted the continuation of the stay, subject to conditions, may be in a more favorable position with the posting of security than they would have enjoyed in the absence of a request for a stay⁴⁶. Georgia besides argued at the hearing that committing the amount of the Award to an escrow account or letter of credit will reduce its cash flow and ability to make expenditures for about USD 100 Million, that money being withdrawn from other budget items⁴⁷. The latter remark is of course an inescapable conclusion that monies used for one purpose cannot serve another, but no evidence has been proffered that the budgetary constraints of the country are such that Georgia could not afford to pay the costs of the issuance of an unconditional and irrevocable bank guarantee with a reputable international bank as requested by Messrs. Kardassopoulos and Fuchs.

45. The Committee therefore decides that the stay of enforcement of the Award of 3 March 2010 shall continue, provided that within ninety days following the notification by the Secretariat of this

45 Georgia's Response to Respondents' Request for Conditions to Stay Enforcement of the Award of 30 September 2010, para. 61

46 Provisional Tr., p. 39

47 Provisional Tr., p. 42

Decision, Georgia furnishes an unconditional and irrevocable bank guarantee with a reputable international bank (with no principal establishment in either Georgia, Greece or Israel) as prescribed in the dispositive section of this Decision for the full amount of the Award, with the exception of post-award interest.

THEREFORE THE COMMITTEE DECIDES:

Enforcement of the Award of 3 March 2010 shall continue to be stayed until the date on which the *ad hoc* Committee issues its decision on the pending applications for annulment submitted by Georgia under the following conditions:

- Provided that within ninety (90) days following the notification by the ICSID Secretariat of this Decision, Georgia furnishes an unconditional and irrevocable bank guarantee issued by a reputable international bank (with no principal establishment in Georgia, Greece or Israel) for the full amount of the Award, with the exception of post-award interest.
- Such bank guarantee must be approved by the Committee and therefore, within no more than sixty (60 days) following the notification by the ICSID Secretariat of this Decision, it must be submitted to the Committee for its consideration and to Messrs. Kardassopoulos and Fuchs for any comments they may wish to make on it.
- The said bank guarantee may be collected by Messrs. Kardassopoulos and Fuchs in full if the applications for annulment are rejected, or in the event of partial annulment, may be partially collected by Messrs. Kardassopoulos and Fuchs in the remaining amount of the award rendered in his or their favor.

- The costs of the present application are reserved until the conclusion of the annulment proceeding.

[*signed*]

On behalf of the *ad hoc* Committee
Judge Dominique Hascher
President of the *ad hoc* Committee

[*12 November 2010*]

Date