

Amco Asia Corporation et Al. v. Republic of Indonesia

(ICSID Case ARB/81/1)

Annulment Proceedings

Interim Order No. I

Indonesia's request for stay of enforcement of the Award

I

1. On October 3, 1990 the Republic of Indonesia submitted an Application for Annulment of the Award of June 5, 1990 rendered by the second Tribunal in Amco Asia Corp. et Al. v. Republic of Indonesia, ARB/81/1. Part VI of the Application contains a request for a provisional stay of enforcement of the Award until the Committee decides on the Application for Annulment.
2. The ad hoc Committee constituted on January 30, 1991 to consider applications for Annulment in the present case adopted an initial procedural decision on February 6, 1991, which determined that pursuant to Article 52(5) of the Convention enforcement of the Award was stayed provisionally until the Committee rules on Indonesia's request for stay of enforcement of the Award.
3. For this purpose, the Committee on the same date adopted Procedural Order No. 1, inviting Amco Asia Corp. et Al. to submit their observations if any on Indonesia's request for stay of enforcement of the Award of June 5, 1990 by February 15, 1991, and allowing both parties to submit additional observations on this issue no later than February 25, 1991.
4. On February 14, 1991, Indonesia submitted an Application for Annulment of the Supplemental Award rendered by the second Tribunal on October 17, 1990, in which Indonesia also requested a provisional stay of enforcement of the second Award as modified by the Supplemental Award.
5. Amco Asia Corp. et Al. did not respond to the Committee's invitation to submit its observations by February 15, 1991. Both parties submitted their observations on this issue by February 25, 1991.
6. On March 1, 1991 at the meeting of the Committee at the Headquarters of ICSID in Washington, D.C., both parties supplemented their written submissions by oral presentations, including exchanges of observations and views between counsel.

II

7. The Committee's authority to stay enforcement of the Award is provided in Article 52(5) of the Convention in the following terms:

"The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision."

8. Arbitration Rule 54(4) stipulates that a request for a stay of enforcement "shall specify the circumstances that require the stay." It further provides that the request shall only be granted after each party has been given an opportunity to present its observations.
9. The Committee considers it useful to state the effect of a stay or the obligations of a party pursuant to Article 53 of the Convention and on the obligation of a Contracting State pursuant to its Article 54(1).
10. Article 53(1) provides that the award is binding on the parties and that each party "shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of the Convention." Thus, if an ad hoc Committee grants a stay of enforcement, the obligation of the party against whom the Award was rendered to abide and comply with the terms of the Award is pro tanto suspended.
11. Article 54(1) provides that each Contracting State shall recognize an Award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that Award within its territories as if it were a final judgment of a court in that State. Accordingly, suspension of a party's obligation to abide by and comply with the award necessarily carries with it suspension of a Contracting State's obligation to enforce the Award.
12. Article 55 qualifies the obligation to enforce and execute the Award by expressly reserving the integrity and applicability of "the law in force in any Contracting State" relating to immunity of States from execution.

III

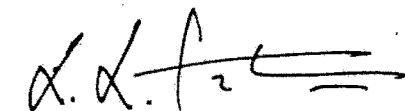
13. In Indonesia's application for Annulment (VI, at page 40), the circumstances justifying its request for a stay of enforcement are summarized as follows:

"Unless enforcement of the second Award be stayed, Indonesia will run a serious risk of not being able to recover any monies paid to claimants in the event the Committee annuls the second Award or even any share of the costs allocated against Amco."

14. The same circumstances were reiterated in Indonesia's application for Annulment of the Supplemental Award of October 17, 1990, (V, at page 19).
15. In its written observations on this issue dated February 22, 1991, in exchange for payment of the Award, Amco offers to "post a bank guaranty in favor of Indonesia for repayment of any amount, plus 6% interest, found to have been over-paid by the outcome of the annulment proceeding."
16. Amco further states that "If this ad hoc Committee is not willing to terminate the stay, then it should at least condition any continuance on Indonesia's posting a neutral bank guaranty in favor of Amco for the full Award plus accruing interest."
17. Both parties reiterated their written observations in their oral arguments.

IV

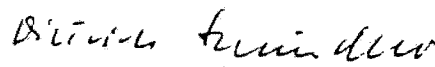
18. The Committee has reviewed the circumstances of the case, and noted that during the proceedings before the first ad hoc Committee in this same case, a provisional stay of execution of the Award of the First Tribunal was granted provided Indonesia furnished an irrevocable and unconditional bank guarantee for payment of the Award or parts thereof in accordance with such final decision as the ad hoc Committee might reach.
19. The Committee is of the view that the risk of frustration of recoupment in case of Indonesia's success in the annulment proceedings constitutes justifiable circumstances to continue the provisional stay of enforcement of the Award while the convenience provided by a bank guaranty to Amco justifies the imposition of such requirement. The Committee accordingly decides to continue the provisional stay of enforcement of the Award (including the Supplemental Award) on condition that an irrevocable and unconditional bank guaranty from a reputable European bank on terms and provisions approved by the President of the Committee be furnished by Indonesia by June 17, 1991.



Arghyrios A. Fatouros
Member



Sompong Sucharitkul
President



Dietrich Schindler
Member

Washington, D.C., March 2, 1991