

Occidental awarded \$1.77 billion in oil contract dispute with Ecuador

Introduction

In an award published on 5th October 2012, Occidental Petroleum Corp., a US oil company, was awarded damages of \$1.77 billion after an ICSID arbitration tribunal found that Ecuador had breached the US/Ecuador bilateral investment treaty by failing to accord fair and equitable treatment to Occidental.

Facts

Occidental entered into a Participation Contract (the “Contract”) on 21 May 1999 with Ecuador and PetroEcuador in connection with the exploration and exploitation of hydrocarbons in what has been identified as “Block 15” of the Ecuadorian Amazon. In 2000, Occidental entered into the “Farmout Agreement” with AEC, under which AEC purchased a 40% economic interest in Block 15.

On 15 May 2006, the Ecuadorian Minister of Energy and Mines issued the *Caducidad* decree which terminated the Contract with immediate effect and ordered Occidental to turn over to PetroEcuador all its assets relating to Block 15. Ecuador alleged that Occidental had broken the terms of the Contract by transferring a 40% stake to AEC without obtaining approval from the country's energy ministry as required under the Contract.

Occidental filed a case with ICSID on 13 July 2006.

Award

The Tribunal found that:

- (i) Ecuador had acted in breach of the Ecuador/US Treaty by failing to accord fair and equitable treatment to Occidental’s investment.
- (ii) Ecuador had also acted in breach of the Ecuador/US Treaty by expropriating Occidental’s investment through a measure “tantamount to expropriation”.
- (iii) Ecuador issued the *Caducidad* Decree in breach of Ecuadorian law and customary international law.
- (iv) Occidental was awarded the amount of US\$ 1,769,625,000.

The award included a significant discussion on the quantum of damages to be awarded, which was the subject of disagreement between the arbitrators. The majority of the arbitral tribunal held Occidental was also in breach of its obligations by failing to secure the required ministerial authorization for the transfer of rights under the Contract, and as a result of this breach, the damages awarded to Occidental were reduced by a factor of 25%. A dissenting opinion was issued by Arbitrator Stern, who, among other things, stated that given the conduct of Occidental, a more appropriate split of liability would have been 50/50 between Ecuador and Occidental.

On 10 October 2012, it was reported that Ecuador had filed an appeal the award seeking its annulment.

Comment

The award by ICSID is the largest ever ICSID arbitration award against Ecuador. Ecuador in fact sought to withdraw from the ICSID regime in 2009; however, its withdrawal did not make it exempt from the award in this case as the case was filed with ICSID in 2006. Ecuador has various other cases currently pending with ICSID, including cases against Burlington and Perenco (both registered in 2008), who are seeking compensation as a result of disputes relating to oil contracts.

ICSID Update

Ecuador is by no means the first state to have withdrawn from ICSID – Bolivia was the first to withdraw in 2007, followed by Ecuador, then Venezuela in 2012. More countries may follow, including Argentina, where a bill was circulated in Parliament in March 2012 arguing for denunciation of ICSID.

ICSID most recent caseload statistics show that over 50% of cases concern state parties located in South America or Eastern Europe/Central Asia. A fuller summary is set out below, and is current as at June 2012.

Current statistics

- 38 new cases were accepted by ICSID in 2011 (21 cases have been accepted this year up to June 2012).
- 63% of ICSID cases are based on bilateral investment treaties for jurisdiction
- 29% of cases concern South American state parties and 23% concern Eastern Europe/Central Asia state parties
- 25% of cases are in the oil, gas and mining sector, with 13% in the electrical power and energy sector
- 62% of cases lead to an award (38% of proceedings are discontinued).
- 77% of awards are delivered on the merits of the case, with 22% being 77% of cases lead to an award on the merits. 22% of awards decline ICSID jurisdiction
- 69% of arbitrators in ICSID cases are from North America and Western Europe
- The top 3 nationalities for ICSID arbitrator appointments are US -156; French-123; and British-116. (Statistics taken from The ICSID Caseload – Statistics (Issue 2012-2).)

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