

Client Update

ICSID Tribunal Rejects Ecuador's Motion for Reconsideration

NEW YORK

Mark W. Friedman
mwfriedman@debevoise.com

Z.J. Jennifer Lim
jlim@debevoise.com

Ina C. Popova
ipopova@debevoise.com

On April 10, 2015, the *Perenco Ecuador Limited v. Republic of Ecuador* Tribunal rejected Ecuador's attempt to reopen its Decision on Remaining Issues of Jurisdiction and on Liability dated September 2014 ("September 2014 Decision"). In that September 2014 Decision, the Tribunal had found Ecuador in breach of its treaty and contract obligations for imposing a new participation of 99% of oil revenues above a low reference price. In its most recent ruling, the Tribunal held that neither the ICSID framework nor a tribunal's inherent power permitted the Tribunal to entertain what was tantamount to an interlocutory appeal or annulment review of its own decision.

This recent decision is important because it will make it harder for disappointed parties to revisit issues an ICSID tribunal has already decided, even if that decision is not yet expressed in a final award. As some commentators have perceived there to be a trend of increasing attempts by States to seek reconsideration of pre-award decisions, the *Perenco* Tribunal's decision could significantly influence the future conduct of ICSID cases. The decision is also important because the Tribunal decided Ecuador's reconsideration motion based on threshold considerations about the ICSID arbitration process, accepting Perenco's submission that it should decide the motion on a summary basis without suspending quantum proceedings or requiring full briefing. Full briefing would have entailed costly and time consuming legal, factual and expert submissions to relitigate the underlying issues that the Tribunal had already decided in its September 2014 Decision but of which Ecuador sought reconsideration. More generally, the Tribunal's decision may provide greater certainty about the ICSID arbitration process in light of the fact that many ICSID cases are broken into phases and are resolved through one or more substantive decisions prior to the final award.

The *Perenco* Tribunal's decision is only the second ICSID decision resolving a State's reconsideration motion. The first tribunal to decide a reconsideration

motion was the tribunal in *ConocoPhillips v. Venezuela*. A two-member majority of the *ConocoPhillips* tribunal, over a dissent by the third arbitrator, held that bifurcated decisions have *res judicata* effect and generally cannot be revisited, and that Article 44 of the ICSID Convention does not apply because there is no procedural gap that needs to be filled by a power of reconsideration. The *Perenco* Tribunal endorsed this reasoning, and also analyzed the ICSID system more generally, holding that the ICSID framework does not permit reconsideration as proposed by Ecuador.

The Tribunal concluded that none of the provisions of the ICSID Convention and Arbitration Rules invoked by Ecuador in its reconsideration request vested the Tribunal with a power to reopen, amend or reverse a decision preliminary to its award. According to the Tribunal, once a tribunal has decided with finality any of the legal or factual questions presented to it, the decision becomes *res judicata* and cannot be revised, except in the specific circumstances set forth in the Convention and the Rules. None of these circumstances were shown in Ecuador's motion for reconsideration. Furthermore, the Tribunal held that its inherent powers cannot override the clear structure of the Convention and the Rules.

As part of its reasoning, the Tribunal concluded that Article 52 of the ICSID Convention on annulment of awards – which featured prominently in Ecuador's reconsideration request – did not empower it to reconsider its prior decisions. The Tribunal held that the ICSID system allocates different roles and responsibilities to tribunals and annulment committees. It therefore concluded that Ecuador's grounds for reconsideration would be more appropriately addressed by an annulment committee.

Accordingly, the Tribunal dismissed Ecuador's motion for reconsideration and declined to stay the quantum phase of the arbitration. This ruling means that the September 2014 Decision – which had held Ecuador liable for breach of treaty and of contract – remains undisturbed, and allows the *Perenco* arbitration to continue with a damages hearing planned for November 2015.

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Please do not hesitate to contact us with any questions.