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Colombian Supreme Court Denies Recognition of an ICSID Award Against Venezuela

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Rusoro Mining Ltd. (“Rusoro”), a Canadian corporation, filed an investment claim against The Bolivarian Republic of Venezuela (“Venezuela”), pursuant to the International Centre for Settlement of Investment Disputes (“ICSID”) Additional Facility Arbitration (“AF”) Rules of April 2006 (Case No. ARB(AF)/12/5). Rusoro claimed that, between 2009 and 2010, Venezuela expropriated its investment over mining rights and contracts without compensation, and committed other violations of the Canada-Venezuela BIT.

The Arbitral Tribunal issued the [award on August 22, 2016](#) (“Award”), whereby it concluded that Venezuela expropriated Rusoro’s investment without payment of compensation; consequently, the Tribunal ordered Venezuela to pay US\$966.5 million plus interest to Rusoro.

According to publicly available information, Rusoro requested recognition of the award in the District of Columbia and filed a [complaint](#) in the US District Court of the Southern District of Texas against other Venezuela entities incorporated in the United States, seeking to hold multiple companies liable in connection with Rusoro’s claim. The US District Court of the District of Columbia recognized the Award ([Opinion of March 15, 2018](#)), while the complaint against other Venezuela entities is pending.

On November 11, 2022, Rusoro filed a petition for recognition of the Award before the Colombian Supreme Court of Justice (the “Court”), pursuant to articles 111 et. al. of [Law 1563 of 2012](#) (the “Arbitration Statute”). The Court issued decision No. [SC1453-2024](#) (the “Decision”) on June 20, 2024, denying Rusoro’s petition.

The Decision sparked a variety of opinions within the arbitration community. In this post, we examine the Court’s Decision and its potential implications.

Colombian Two-Tier System for Recognition of Foreign Awards

Colombian law provides a two-tier system for recognizing and enforcing foreign arbitral awards. Pursuant to the Arbitration Statute, if the award involves a Colombian public agency or entity, a petition for recognition of foreign awards is first decided by the Supreme Court of Justice or the Council of State.

Upon recognition, the interested party may take it for enforcement before the civil or administrative courts of the competent judicial circuit. Enforcement is obtained through collection proceedings, which are regulated in the [Colombian General Code of Procedure](#) and the [Code of Administrative Procedure](#).

The Decision

Preliminary, the Court noted that, under Article 54 of the [ICSID Convention](#), each Contracting State shall recognize an award rendered pursuant to said Convention as binding and enforce it if it were a final judgment of a court in that State. Colombia is a Contracting State to the ICSID Convention.

Then, the Court moved to review the two existing forms of sovereign immunity: immunity from jurisdiction and execution. In this regard, the Decision concluded that both immunities have a solid grounding in customary international law.

The Court found that while immunity from jurisdiction was an absolute concept, which has suffered some flexibilization over the years, immunity from execution is stricter, as it precludes authorities of one State from taking measures of constraint against the property of another State to satisfy the demands of creditors under court decisions, arbitral awards, and similar instruments. This means that waiver of immunity from jurisdiction does not entail immunity from execution.

The Court held that Rusoro's petition for enforcement sought to adopt coercive measures against Venezuela, which required the Court to analyze the application *vis-à-vis* the immunity from execution.

To that end, the Court noted that Article 55 of the ICSID Convention provides that:

“[n]othing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution”.

Based on the above, the Court concluded that the ICSID Convention does not override customary international law governing immunity from execution, and so it denied the petition for recognition.

Current Debates Derived From the Decision

1. Was the ICSID Convention Applicable to the Case?

The first discussion that arose out of the Decision derived from the Court's application of the ICSID Convention, even though the arbitration between Rusoro and Venezuela was conducted pursuant to the ICSID AF Rules.

The ICSID Convention and the ICSID AF Rules are distinct, albeit related, mechanisms for resolving investment disputes. Particularly, Article 3 of the [ICSID AF Rules](#) excludes the

application of the ICSID Convention.

Therefore, it has been discussed that the ICSID Convention was not applicable to this case.

Further, it has also been argued that, instead of applying the ICSID Convention, the Court should have applied the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Therefore, under Article V(2)(b) of the New York Convention, the Court could have only denied recognition of the Award if it was proven that it was contrary to Colombian public policy.

This position is contested by others stating that immunity from execution is firmly rooted in international customary law, so this rule is applicable under both the ICSID Convention and the New York Convention.

Accordingly, the Court would have reached the same conclusion if it had applied the New York Convention, particularly considering that Article 112 of the Arbitration Act is identical to Article V of said Convention.

2. Was the Court Denying Recognition or Enforcement?

As previously mentioned, Colombia has a two-tier system for the recognition and enforcement of foreign arbitral awards. The same applies to foreign court judgements. In this case, the Court was deciding an application for recognition of a foreign award, as it is empowered to do so.

The Decision has been criticized for invoking immunity from execution for refusing recognition - and not enforcement- of the Award, so the Court was really denying the possibility of enforcing said Award against Venezuela.

Put differently, it has been said that, in a two-tier system such as the Colombian, the court deciding on the award's recognition should not be concerned with immunity from execution, nor apply it, since its analysis should consist of determining whether there are grounds for denying recognition or not.

Accordingly, immunity from execution is to be decided upon enforcement of the award, as a potential ground for denying it.

However, this criticism has been disputed by arguing that immunity from execution is a form or an element of the overarching concept of sovereign immunity. Accordingly, the Court had the power to apply immunity from execution as it is part of sovereign immunity.

3. The Aftermath of the Decision

To the best of our knowledge, this is the first time that the Court has decided on a petition to recognize an investment award issued (i) against a State that is not Colombia, and (ii) pursuant to the ICSID AF Rules.

While groundbreaking, the Decision leaves three main questions that will have to be addressed in cases to come:

1. When deciding a request for recognition of an ICSID award issued against another State, will the Court continue to rely on Article 55 of the ICSID Convention to invoke immunity from execution as a ground for denying recognition of the award?
2. If it is a non-ICSID investment award, would the Court also invoke immunity from execution as a widely-recognized institution of international customary law for reaching the same conclusion?
3. Will the Court consider the grounds for denying recognition listed in Article 112 of the Arbitration Act, to decide petitions of this nature concerning investment awards against other States?

Conclusion

In conclusion, the Decision is a significant precedent for the legal landscape by addressing the recognition of an international investment award against a State other than Colombia. However, it leaves critical questions unresolved, which future cases will need to address. These questions will undoubtedly shape the future of investment award recognition and execution in Colombia, particularly now that the country is facing more and more investment claims.

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