

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

In the Matter of the Annulment Proceeding
in the Arbitration between

CDC GROUP PLC
Claimant

v.

REPUBLIC OF THE SEYCHELLES
Respondent

Case No. ARB/02/14

DECISION ON WHETHER OR NOT TO CONTINUE STAY AND ORDER

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President: Judge Charles N. Brower
Members of the *ad hoc* Committee: Mr Michael Hwang, SC
Mr David A.R. Williams, QC
Secretary of the Committee: Ms Martina Polasek

In Case No. ARB/02/14

BETWEEN: CDC GROUP PLC ("Claimant")

Represented by:

Mr Stephen Jagusch

of the law firm *Allen & Overy*, as counsel

And

REPUBLIC OF THE SEYCHELLES ("Respondent")

Represented by:

The Attorney-General

of the *President's Office*, as counsel

THE *AD HOC* COMMITTEE

After deliberation,

Makes the following Decision:

I. The Procedural History

1. On April 5, 2004, the International Centre for Settlement of Investment Disputes ("ICSID or the Centre") received an application for annulment ("the Application") dated March 30, 2004, submitted by the Republic of the Seychelles (the "Applicant") in regard to the Award rendered on December 17, 2003 in ICSID Case No. ARB/02/14 (the "Award"). The Application was registered by the Secretary-General of ICSID on April 30, 2004 and, on the same date, a notice of registration was dispatched to the parties.

2. The Application contained a request for the stay of enforcement of the Award, made under Article 52(5) of the ICSID Convention and Rule 54 of the ICSID Arbitration Rules. Under Article 52(5) of the ICSID Convention, if the applicant for annulment requests a stay of enforcement of the award in its application, enforcement is stayed provisionally until the *ad hoc*

Committee rules on such request. Accordingly, together with the notice of registration, the Secretary-General informed both parties of the provisional stay of the Award.

3. The *ad hoc* Committee was constituted on May 28, 2004. In accordance with ICSID Arbitration Rule 54(1) and (4), the Committee must give priority to a request for the stay of enforcement of the award and give each party an opportunity of presenting its observations. Nevertheless, upon request by either party, the Committee must, under ICSID Arbitration Rule 54(2), rule within 30 days of such request on whether or not the provisional stay of an award should be continued. Unless the Committee decides to continue such stay, it is automatically terminated upon expiry of the 30-day time limit.

4. By letter of June 14, 2004, CDC Group plc (the "Claimant" or "CDC") filed such a request under ICSID Arbitration Rule 54(2) and, by letter of June 15, 2004, the Applicant also invoked Arbitration Rule 54(2). The Committee thereupon became obligated to rule by July 14, 2004 whether or not the provisional stay was to be continued, otherwise the stay would automatically lapse.

5. In accordance with ICSID Arbitration Rule 54(4), by letter of June 15, 2004, the Committee invited both parties to submit, by June 21, 2004, any further observations on the question of the continuation of the stay, in addition to those submitted by the Applicant in its Application and accompanying affidavits and in the parties' respective letters of June 14 and 15, 2004. Both parties submitted such written observations within the time limit prescribed by the Committee.

6. In their observations, both parties stated that the Committee could decide the question of the continuation of the stay on the basis of their respective written submissions filed through June 21, 2004. On the occasion of the first session of the Committee with the parties held by telephone conference on July 8, 2004, the members of the Committee addressed questions to the parties on the issue of the stay.

7. Having considered the parties' responses to those questions, the parties' respective submissions, and after deliberations, the Committee decides as follows:

II. The Standards to be Applied

8. The sources of the Committee's authority to grant a stay of enforcement, or to continue one already in place, pending its disposition of an application for annulment is found in Article 52(5) of the ICSID Convention and Rule 54 of the ICSID Arbitration Rules.

The former provides:

The Committee 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.¹

The latter stipulates in relevant part:

(1) The party applying for the . . . annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The . . . Committee shall give priority to the consideration of such a request.

(2) If an application for the . . . annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provisional stay of the award. As soon as the . . . Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated.

(3) If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the . . . Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final decision is rendered on the application, except that a Committee granting the partial annulment of an award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request any new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3).

(4) A request pursuant to paragraph (1), (2) (second sentence) or (3) shall specify the circumstances that require the stay or its modification or termination. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.

¹ ICSID Convention, art. 52(5).

(5) The Secretary-General shall promptly notify both parties of the stay of enforcement of any award and of the modification or termination of such a stay, which shall become effective on the date on which he dispatches such notification.²

Neither provision, it is evident, sets forth criteria against which to assess whether or not to grant a stay or to continue one already in effect. As Professor Christoph Schreuer notes in his eminent treatise on ICSID, "neither provision gives any indication of the kind of circumstances that may require a stay."³ The absence of any suggestion in that treatise that the volumes of *ICSID: Analysis of Documents Concerning the Origin and Formulation of the Convention (1968)* ("*ICSID History*") provide enlightenment on the point tends to confirm the suspicion that they do not.⁴ The official Notes to Rule 54 likewise say nothing on the subject.⁵

9. Against this total absence of guidelines, it is small wonder that in the few cases to date in which a stay has been in issue a number of arguments are known to have been made both for and against the issuance or continuation of same. They include the following:

- problems in recovering payments made in compliance with the award should it be annulled;
- a possible dilatory motive underlying the application for annulment;
- the prospect of a prompt enforcement of the award if it is upheld, including enforcement that is unimpeded by problems arising from immunity from execution;
- the granting of a security by the party seeking the stay;
- a possible irreparable injury to the award debtor in case of immediate enforcement;

² ICSID Rules of Procedure for Arbitration Proceedings, rule 54.

³ CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 1056 (2001).

⁴ See *id.* at 1056-58; ICSID, *DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION*, VOL. II (1968).

⁵ See Notes to ICSID Arbitration Rule 54, in 1 ICSID REP. 115 (1992).

- a *prima facie* case for the party seeking annulment.⁶

III. The Parties' Contentions

10. Not surprisingly, some of these arguments form the basis of the Seychelles' position that the automatic stay already in effect should be extended and also underpin the Claimant's resistance to such extension.

11. Specifically, the Seychelles presents four "circumstances that require the stay," as follows:

- (1) its own "strong belief that the Award will be annulled";
- (2) apparently expanding on (1) above, the asserted fact that the Sole Arbitrator who issued the challenged Award had indicated during the proceedings his intention, which he then did not carry out, to reduce the Award, which was in the full amount of two guarantees, by some amount reflecting "damages suffered by the Republic [of the Seychelles]";
- (3) its assertion that enforcement of the Award at this time "would lead to catastrophic consequences on its ability to conduct its affairs," given that it "is facing a severe foreign exchange crisis" that has "its links to the failure of the project" which was the subject of the larger of the two guarantees on which the Award was based; and
- (4) the difficulties it "would have to encounter in recovering payment made in compliance with the award, should it be annulled."⁷

In opposition, the Award-creditor argues vigorously that:

- (1) the Application has "little or no prospect of success";
- (2) "further delay by the Republic in honouring its legal obligations to CDC . . . may prejudice the ability of CDC to enforce the Award"; and

⁶ See SCHREUER, *supra* note 3, at 1056-57 (listing circumstances the *ad hoc* Committees considered in *Amco v. Indonesia*, Decision on Annulment, 16 May 1986, 1 ICSID REP. 512 (1993) ("*AMCO I*"), see note 14, *infra*, *MINE v. Guinea*, Decision on Annulment, 22 December 1989, 4 ICSID REP. 79 (1997) and *MINE v. Guinea*, Interim Order No. 1 on Guinea's Application for Stay of Enforcement of the Award, August 12, 1988, 4 ICSID REP. 111 (1997), see note 18, *infra*, in determining the parties' requests regarding a stay pending annulment proceedings). Professor Schreuer could not consider arguments made in *AMCO II*, see note 15, *infra*, as the *AMCO II* Committee's Order and Decision have never been published, or in *Wena v. Egypt*, see note 19, *infra*, which at the time of publication of the treatise in 2001 had not yet been decided.

⁷ Application at 4-6.

(3) the Application is nothing more than "an abuse of process," a "cynical attempt . . . to further delay meeting its clear and unequivocal obligations."⁸

In conclusion, however, CDC suggests that the stay might be continued if the Award-debtor would either pay "the sums owing under the Award . . . into a bank account controlled by ICSID pending determination of the Application" or provide "an on-demand guarantee from a leading bank" to the same extent.⁹

IV. The Committee's Decision

12. The Committee addresses these arguments of the Parties *seriatim*.

13. First of all, the Committee does not believe it appropriate to indulge at this preliminary juncture in any consideration whatsoever of the merits of the Application. While some national jurisdictions require as a basis for injunctive orders, conservatory measures or stays that the underlying substantive application meet some standard of probability of success, until now this has not been required in international proceedings. As previously noted, there is no hint in the ICSID Convention, the *ICSID History*, the ICSID Arbitration Rules or the Notes thereto that a stay request should import any consideration of the underlying merits. Article 41 of the Statute of the International Court of Justice similarly provides only that the power of the Court exists to indicate provisional measures "to preserve the respective rights of either party" "if it considers that circumstances so require." Research reveals no decision or order of that Court to the effect that an applicant for provisional measures must show any probability of prevailing on the underlying merits of the case. Likewise Article 26(1) of the Rules of the Iran-United States Claims Tribunal, which authorizes the Tribunal to "take any interim measures it deems necessary in respect of the subject-matter of the dispute," has never been applied by the Tribunal so as to impose a merits test. As one authoritative commentator on Tribunal procedures has observed, "[t]here is . . . no general requirement of likelihood of success, on the merits, as required under several legal systems, including U.S. law."¹⁰ The recent work of the Working Group on

⁸ Claimant's letter to the *ad hoc* Committee dated 14 June 2004 at 1-2.

⁹ *Id.* at 4.

¹⁰ JACOMIN J. VAN HOF, COMMENTARY OF THE UNCITRAL ARBITRATION RULES: THE APPLICATION BY THE IRAN-US CLAIMS TRIBUNAL 190 (1991). Cf. MATTI PELLONPÄÄ & DAVID D. CARON, THE UNCITRAL ARBITRATION RULES AS INTERPRETED AND APPLIED: SELECTED PROBLEMS IN THE LIGHT OF THE PRACTICE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL 442 (1994) (stating that "[a]lthough at the stage of interim measures an arbitral tribunal

Arbitration of the United Nations Commission on International Trade Law ("UNCITRAL") in preparing a new Draft Article 17 of the UNCITRAL Model Law on International Commercial Arbitration suggests that a trend towards requiring a showing on the merits may be developing. In its most recent form Draft Article 17(3)(b) requires that:

The party requesting the interim measure of protection shall satisfy the arbitral tribunal that . . . [t]here is a reasonable possibility that the requesting party will succeed on the merits. . . .¹¹

Leaving to one side the fact that the Working Group has not yet completed its work, however, it is clear that a "reasonable possibility" of success is markedly less than a "probability." In addition, an important motivation for inserting any such requirement in the Model Law would seem to be to enhance the chances that a municipal court will be persuaded to enforce an award of interim measures,¹² a consideration that is absent here given that under the ICSID Convention the stay automatically is effective for municipal enforcement purposes.¹³ The Committee considers that given the very special nature of ICSID annulment proceedings it should rest with the international practice that has been broadly accepted to date.

14. It should be remarked that, so far as is known, no other ICSID *ad hoc* Committee has dealt with the merits of an application for annulment in addressing the issue of a stay. In only five cases has a stay been requested. There is no published order as regards two cases, *Amco v.*

should not be overly concerned with the merits of the case, a party whose case is clearly without merit should not be granted a request for interim measures").

¹¹ *Report of the Working Group on Arbitration on the Work of its Fortieth Session* (New York, 23-27 February 2004), UNCITRAL, 37th Sess., at 18, U.N. Doc. A/CN.9/547 (2004).

¹² *See Settlement of Commercial Disputes: Preparation of Uniform Provisions on Interim Measures of Protection: Note by the Secretariat*, UNCITRAL Working Group II (Arbitration and Conciliation), 36th Sess., at 5, 12, U.N. Doc. A/CN.9/WG.II/WP.119 (2002) (noting that the results of the survey regarding "interim measures of protection under domestic law," which formed the basis of an earlier version of Draft Article 17, indicated that "many laws establish a number of prerequisites for the issuance of interim measures by courts in support of arbitration" including "in most jurisdictions, that there is a likelihood of the applicant succeeding on the merits of the underlying case").

¹³ It would seem that enforcement by a national court pursuant to Article 54 of the ICSID Convention could not take place where enforcement has been stayed under the Convention, in light of Article 53(1) of the Convention, which in its second sentence provides:

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 this Convention.

Indonesia (1985) (“*AMCO I*”)¹⁴ and *Amco v. Indonesia* (1992) (“*AMCO II*”),¹⁵ although something of them is known through references in later rulings and commentary.¹⁶ In a third, stay proceedings ultimately were resolved by agreement; hence no ruling was made.¹⁷ The remaining two cases, *MINE v. Guinea* (“*MINE*”)¹⁸ and *Wena Hotels v. Egypt* (“*Wena*”),¹⁹ resulted in published orders. In *Wena* there is reflected no consideration whatsoever of the merits of the annulment application, or even of any argument by either party addressed thereto.²⁰ Only the *MINE* case mentions the merits. There, as the *ad hoc* Committee’s decision records, the award-creditor argued that “a party seeking a stay . . . must show that the award is so tainted by a defect that it is likely that it will be set aside.”²¹ Apparently the award-creditor relied for this proposition on a single authority, not fully cited in the *ad hoc* Committee’s decision, which the Committee addressed only to the extent of agreeing that “a request for a stay made for dilatory reasons only is not a proper basis for a stay.”²² The Committee then adjudged that Guinea was not being dilatory, and indeed that the request for continuation of the stay was “a justified

¹⁴ *Amco Asia Corporation and others v. the Republic of Indonesia*, Case No. ARB/81/1, Order staying enforcement of the Award, May 17, 1985 (unpublished) (“*AMCO I*”).

¹⁵ *Amco Asia Corporation and others v. the Republic of Indonesia*, Case No. ARB/81/1, Decision rejecting the parties’ applications for annulment of the Award and annulling the decision on supplemental decisions and rectification, Dec. 17, 1992 (unpublished) (“*AMCO II*”).

¹⁶ See, e.g., *Amco Asia Corporation and others v. the Republic of Indonesia*, Case No. ARB/81/1, Decision on Annulment, 16 May 1986, 1 ICSID REP. 509, 513 (1993) (referring to the Order of May 17, 1985 staying enforcement of the Award in *AMCO I*); Paul D. Friedland, Provisional Measures in ICSID Arbitration, 2 ARB. INT’L 335, 349-50 (1986) (partially reproducing the Order of May 17, 1985 staying enforcement of the Award in *AMCO I*); Paul D. Friedland, *Stay of Enforcement of the Arbitral Award Pending ICSID Annulment Proceedings*, in IAJ INTERNATIONAL ARBITRATION SERIES NO. 1, ANNULMENT OF ICSID AWARDS 177 (E. Gaillard and Y. Banifatemi, eds. 2004) (referring to the relevant orders in *AMCO I* and *AMCO II*); SCHREUER, *supra* note 3, at 1059 n.597 (referring to the “[a]pparent[]” issuance by the *AMCO II* Committee of a stay of the Award) (citing Jan Paulsson, *ICSID’s achievements and prospects*, ICSID REV.—FOREIGN INV. L.J. 380, 391 (1991)).

¹⁷ See *Southern Pacific Properties (Middle East) Limited (“SPP”) v. Arab Republic of Egypt*, Case No. ARB/84/3, Order of Mar. 9, 1993 taking note of the discontinuance (unpublished) (proceedings discontinued after settlement). See W. Laurence Craig, *The Final Chapter in the Pyramids Case: Discounting an ICSID Award for Annulment Risk*, ICSID REV.—FOREIGN INV. L.J. 264, 285 (1993) (reporting that the parties agreed that Egypt would post a bank guarantee, and in return, SPP would forego its right to seek enforcement pending annulment proceedings).

¹⁸ *Maritime International Nominees Establishment (“MINE”) v. Republic of Guinea*, Case No. ARB/84/4, Interim Order No. 1 on Guinea’s Application for Stay of Enforcement of the Award, August 12, 1988, 4 ICSID REP. 111 (1997) (“*MINE*”).

¹⁹ *Wena Hotels Limited v. Arab Republic of Egypt*, Case No. ARB/98/4, Procedural Order No. 1 of the *ad hoc* Committee Concerning the Continuation of the Stay of Enforcement of the Award, MEALEY’S INT’L ARB. REP., Oct. 2003, 33-4 (“*Wena*”).

²⁰ See *id.*

²¹ *MINE v. Guinea*, *supra* note 18, at ¶ 16.

²² *Id.* at ¶¶ 16-17.

exercise of its procedural rights of defense."²³ In then proceeding to state that Guinea's application for annulment, "if proved, would indeed justify annulment,"²⁴ the Committee did no more than confirm, in effect, that said application complied with the applicable pleading requirements (as indeed the Secretary-General's registration of said application pursuant to ICSID Arbitration Rule 50 necessarily had attested).

15. While parties are in no way to be criticized for referring to the merits of the underlying Application, the *ad hoc* Committee concludes, on the basis of the foregoing, that its disinclination to enter into the merits at this stage is indeed the correct course.

16. The second basis of the Seychelles' request for continuation of the stay, namely the "catastrophic consequences" that it avers would follow from current payment (presumably whether through coerced enforcement or otherwise), requires some explanation to be understood in its full context. The arbitration leading to the Award sought to collect on two guarantees issued by the Seychelles, the first of which, in the amount of GBP 450,000, was in the event not contested by the Seychelles, which offered no defense and effectively has admitted the obligation. The second, however, in the amount of GBP 1,800,000, covered a failed power project, the Victoria A Power Station Project, and was hotly contested by the Seychelles. The Award granted both amounts in full, but in a single, combined amount, plus interest, legal costs and the arbitration costs. It is to be noted that the Seychelles has invoked its right to an automatic stay as regards the entire Award, thus also including so much of it as is attributable to the first, uncontested guarantee, and that CDC, by the same token, has stated that it would accept continuation of that stay were it to be fully secured.

17. In support of its request for continuation of the stay, the Seychelles has submitted a short, conclusory affidavit of Hans Patrick David Aglae, Acting Principal Secretary of the Ministry of Finance, the complete relevant text of which is as follows:

I state that to comply with an Award, which the Republic is of the view would be annulled, at a time The Republic is facing a severe foreign exchange crisis having its links to the failure of the Victoria A Power Station Project on the Island of

²³ *Id.* at ¶ 17.

²⁴ *Id.* at ¶ 18.

Mahé, Seychelles, would lead to catastrophic consequences on its ability to conduct its affairs.²⁵

That appears to track the submission of Guinea in *MINE*, which asserted that:

Any seizure of assets by MINE would cause Guinea irreparable injury even if they were eventually returned to Guinea after a decision annulling the Award. . . . [E]ven a temporary freeze or seizure of Guinea's bank accounts or other assets would be a financial and irreparable catastrophe for the country. . . .²⁶

The *MINE ad hoc* Committee summarized this statement and evaluated it as follows:

In its written as well as its oral submissions Guinea has pleaded its strained foreign exchange resources as a "circumstance" requiring a continuation of the provisional stay of enforcement. Poverty as such is not a circumstance justifying a stay any more than it would justify non-payment of an award. The criterion is, rather, whether termination of the stay would have what Guinea calls "catastrophic" immediate and irreversible consequences for its ability to conduct its affairs.²⁷

The *ad hoc* Committee there also noted, however, that "[t]he parties have submitted conflicting evaluations of the significance for this purpose of the amount of the Award and accrued interest (on the necessary assumption that it would be promptly paid)."²⁸ In the present case, by contrast, neither party has addressed the "catastrophic consequences" issue beyond the single sentence contributed by the Acting Principal Secretary of the Seychelles' Ministry of Finance. The Committee has been offered nothing by way of data or more specific information in support of the Seychelles' position. CDC has elected not to contest the point. Instead, it invites the Committee to infer from such allegation that "it would not be unreasonable to fear that there is a risk that the Republic is on the verge of financial collapse," with consequent reduction in CDC's ability effectively to enforce the Award.²⁹ In other words, it is argued that the distressed financial condition of the Seychelles militates against continuing the stay. Thus, while the Seychelles' showing on this point is entirely conclusory, in the absence of it being contested by CDC the *ad*

²⁵ Aglac Affidavit, Application, at ¶ 2.

²⁶ *MINE v. Guinea*, *supra* note 18, at ¶¶ 12-13.

²⁷ *Id.* at ¶ 27.

²⁸ *Id.*

²⁹ Claimant's letter to the *ad hoc* Committee dated 14 June 2004 at 3.

hoc Committee is disinclined to disregard, discount or reject it. This in turn is a factor potentially favoring a stay.

18. The third point advanced by the Seychelles, namely that it could experience difficulty in recovering payment from CDC in the event that successful enforcement, or payment, is followed by annulment of the Award, is not supported by specific allegations that would give rise to a particularized fear that CDC would not, or could not, return the Award amount it might receive should the Application be successful. A well-founded fear that amounts paid over would effectively disappear was a factor in both *Wena* and *MINE*. The *Wena ad hoc* Committee recorded as follows:

There is no disagreement between the parties that Wena Hotels Limited is currently reduced to a "shell" company, almost entirely without assets, and that it is controlled by a single individual. In the view of the Committee, these circumstances are persuasive for justifying in principle a continuation of the stay, since they raise the prospect that, in the event the Award is enforced and nonetheless annulled by the Committee, it could become impossible, or in any event very difficult, for the Arab Republic of Egypt to recover the sums received by Wena Hotels Limited as a result of such enforcement.³⁰

Very similarly, in *MINE* it was stated by Guinea that "MINE is a corporation controlled by a single individual who would be able to thwart any recoupment by Guinea of assets seized by MINE by transferring those assets out of MINE."³¹ Thus while the prospect that funds will not be recouped at all, or even with difficulty, would be a factor weighing in favor of a stay, where the expressed concern of the award-debtor, unlike in the cases cited above, is not supported by any more specific information, it may be given minimal weight. It may be questioned whether indeed any weight should be attributed to such concern in the instant case, given that CDC, far

³⁰ *Wena Hotels v. Egypt*, *supra* note 19, at ¶ 7(a).

³¹ *MINE v. Guinea*, *supra* note 18, at ¶ 14. It appears possible that the Committees in both *AMCO I*, see note 14, *supra*, and *AMCO II*, see note 15, *supra*, were influenced by a similar factor. There Indonesia, in arguing against jurisdiction, alleged that the "true controller" of the local company, PT Amco, was not Amco Asia, an American corporation, as had been asserted by the claimant, but rather a "Mr Tan, a Dutch citizen residing in Hong Kong" who controlled Amco Asia "through Pan American, a Hong Kong company of which said Mr Tan was the sole or the main shareholder." *Amco v. Indonesia*, Decision on Jurisdiction, 25 September 1983, 1 ICSID REP. 389, 396 (1993). See also *Amco v. Indonesia*, Decision on Request for Provisional Measures, 9 December 1983, 1 ICSID REP. 410 (Indonesia referring to Mr. Tan as "the controlling shareholder of Claimants"). It has been reported that the *AMCO I ad hoc* Committee considered, as one of the factors for granting the continuation of the stay, the fact that the party seeking annulment "may apprehend, with or without justification, that an award once paid may prove not to be recoverable should such award be eventually annulled." Friedland (1986), *supra* note 16, at 349.

from being a "shell" or a mobile individual, is an established, well-known entity engaged in financing development projects around the world which, as the text of the Award indicates, had had a relationship with the Seychelles for some period of time.³² The Committee thus has no basis on which to conclude that there is here present a "risk of frustration of recoupment," to use the words of the *MINE ad hoc* Committee, that should materially affect its decision.³³

19. Thus a continuation of the present stay necessarily must be founded on the unchallenged forecast of "catastrophic consequences" to the Seychelles following payment or enforcement of the Award at this time. This in turn, however, also brings to the fore CDC's concern that a continued stay of enforcement will prejudice its prospects of collecting on the Award should the Application fail, and hence its proposal that a stay, if granted, be conditioned on the provision of security. CDC's request is well supported by ICSID precedent, inasmuch as three of the four grants of stays of the type sought here were indeed conditioned on the award-debtors fully securing the award-creditors.³⁴ Of the cases discussed above, only *MINE* declined to impose a requirement of security. The precise reasoning of the Committees in *AMCO I* and *II* is not available, as the decisions and orders are not published. In *Wena* the Committee remarked simply that "it seems fair and just . . . that the continuation of the stay be counter-balanced by requiring the posting of security for the performance of the Award in the event the application is denied."³⁵ The *MINE* Committee, however, came to the contrary conclusion:

Regardless of its power to do so, the present Committee remains unconvinced that Guinea should be required to provide a bank guarantee in return for a continuation of the provisional stay of enforcement of the Award. To require such a guarantee would, in addition to involving what might turn out to be very heavy expenditure for the fees of the guaranteeing bank and possibly making it necessary to freeze the amount of the Award and the interest accruing thereon, place *MINE* in a much more favourable position than it enjoys at the present time and also in a more favourable position than it enjoyed prior to the provisional stay. The Committee

³² See, e.g., the Award at paragraphs 35 and 40, noting that Mr. Morin, "an electrical engineer, who is the managing director of PUC [which contracted for the failed project]," in testifying for the Seychelles "gave evidence of other earlier projects in which the Republic and CDC had been involved, including the Reef Hotel in which they were partners."

³³ *MINE v. Guinea*, *supra* note 18, at ¶ 28.

³⁴ See generally Friedland (2004), *supra* note 16.

³⁵ *Wena Hotels v. Egypt*, *supra* note 19, at ¶ 7(b).

does not feel that such a one-sided change in the relative position of the parties is justified.³⁶

The reference to MINE being potentially placed "in a much more favourable position" by security can only refer to the fact that absent such security enforcement proceedings would at all times depend on MINE being able to overcome any defense of sovereign immunity interposed by Guinea, which defense is preserved by Article 55 of the ICSID Convention.³⁷ That analysis, however, is directly in conflict with the same Committee's rejection of MINE's concern that during the period of a continued stay Guinea might "move its assets to avoid honoring its just debts,"³⁸ a rejection expressly premised on the fact that while the Convention preserves sovereign immunity it expressly obligates an award-debtor nonetheless to pay the award and, in default of meeting such obligation, subjects the defaulting state to the jurisdiction of the International Court of Justice.³⁹

20. This Committee thus concludes that it is appropriate to continue the current stay as requested, conditioned, however, on the timely provision of adequate security. In doing so it finds the equities to have been well summed up by Professor Christoph Schreuer:

The requirement of a performance bond by the party seeking annulment has much to commend itself. Until an award is annulled, the award debtor must be presumed to be under an obligation to pay eventually. The award creditor's annulment risk may be suitably offset by a reduction of his enforcement risk. The award debtor does not incur any additional risk if the stay of enforcement is conditioned on a security and does not have to worry about recouping payments made under the award in case the annulment is granted. The guarantee will only operate if annulment is rejected and the award becomes final. Resisting

³⁶ MINE v. Guinea, *supra* note 18, at ¶ 22.

³⁷ Article 55 of the 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."

³⁸ MINE v. Guinea, *supra* note 18, at ¶ 23.

³⁹ *See id.* at ¶¶ 24-25 (noting that "State immunity may well afford a legal defense to forcible execution, but it provides neither argument nor excuse for failing to comply with an award" and that "[n]on-compliance by a State" "will attract its own sanctions" including those under "Article 27 and 64 of the Convention"). Article 27(1) of the ICSID Convention provides that "[n]o Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute." 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."

enforcement of an award that has become final after annulment is rejected through immunity or otherwise is not a legitimate position that deserves protection.

A practice that would make a stay of enforcement conditional upon the posting of a security for the award's eventual performance would serve a dual purpose. It would facilitate enforcement. But it may also serve as a possible deterrent to requests for annulment that are motivated primarily by a desire to delay and, possibly, to avoid compliance. Any improvement of the effectiveness and efficiency of ICSID's dispute settlement system will ultimately further the Convention's goal of furthering co-operation for international development.⁴⁰

21. As a final point, the Committee notes that there has been no showing that the Seychelles is in financial crisis to the point of not being able to provide the required guarantee. It of course must be on a leading international bank (with no principal establishment in either the Republic of Seychelles or the United Kingdom) and cover all amounts that would be due under the Award at such time as the guarantee would be paid, should it in fact be required to be paid in the future. The amounts awarded are GBP 1,771,096.75 in principal; GBP 672,915.45 in interest until August 25, 2003; further interest of GBP 611 per day from August 25, 2003 to December 17, 2003; further interest in accordance with the underlying instruments until the date of payment of the principal amounts; GBP 100,000 in legal fees and costs; and US\$ 40,000 in arbitration costs. The guarantee would become due upon rejection of the Application, should that occur.

22. While the Acting Principal Secretary of the Ministry of Finance of the Republic of Seychelles has addressed the possible consequences of current payment of the Award itself, nothing has been said regarding the ability to finance the necessary guarantee fee. In this regard it is noted that the Republic recently has transferred US\$ 100,000 to ICSID pursuant to Administrative and Financial Regulation 14(3)(e) as the initial deposit to secure the costs of this proceeding. In addition, of course, it should be recognized that the automatic stay invoked by the Seychelles, which is now continued, precludes current enforcement even of the Seychelles' admitted debt of GBP 450,000 (plus associated interest) on the first guarantee issued to CDC, an amount which, absent the stay being continued also as to it, the Seychelles would be immediately obligated to pay and as to which it would be subject potentially to coercive enforcement measures with all their attendant consequences. Considering all of the circumstances, therefore, continuation of the complete stay of the Award on condition of the posting of full security

⁴⁰ SCHREUER, *supra* note 3, at 1060.

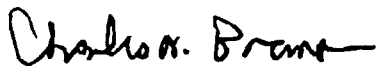
maximally protects the legitimate interests of both Parties to this proceeding while placing on the Seychelles a lesser burden than it otherwise legitimately could be confronting.

V. **The Committee's Order**

23. THEREFORE THE AD HOC COMMITTEE UNANIMOUSLY ORDERS AS FOLLOWS:

Enforcement of the Award of December 17, 2003 in this matter is, and shall continue to be, stayed until the date on which the *ad hoc* Committee issues its Decision on the pending Application for Annulment submitted by the Republic of Seychelles, PROVIDED, HOWEVER, that within sixty (60) days of the date of this Decision and Order the Republic of Seychelles furnishes an unconditional and irrevocable letter of guarantee issued by a leading international bank (with no principal establishment in either the Republic of Seychelles or the United Kingdom) for all amounts which may be due under said Award at such time as the said letter of guarantee is drawn down, should that occur. Said letter of guarantee may be drawn down entirely by CDC Group plc if and when the aforesaid Application is denied in its entirety. In the event the said Application is accepted only in part, the letter of guarantee may be drawn down by CDC Group plc to the extent of the unannulled part of the Award, subject to any further stay granted by the Committee under ICSID Arbitration Rule 54(3) or by a new Arbitral Tribunal under ICSID Arbitration Rule 55(3). Such letter of guarantee must be approved by the President of the Committee (in consultation with the other members of the Committee) and therefore it must be submitted within no more than forty (40) days of the date of this Decision and Order to the Committee and to CDC Group plc for the Committee's consideration and for any comment CDC Group plc may wish to make on it.

This Decision and Order are adopted unanimously by the Committee and signed on its behalf by its President.



Charles N. Brower
President of the Committee
Washington, D.C. July 14, 2004