

REPSOL YPF ECUADOR, S.A.

v.

EMPRESA ESTATAL PETRÓLEOS DEL ECUADOR
(PETROECUADOR)

ICSID Case No. ARB/01/10
Annulment Proceeding

PROCEDURAL ORDER No. 1

I. PROCEEDINGS

1. On September 14, 2004, the ICSID Secretariat constituted, in accordance with Article 52(3) of the ICSID Convention, an ad hoc Committee (the “Committee”) to decide on the application for annulment filed by Petroecuador, on the Award rendered in ICSID Case No. ARB/01/10 favoring Repsol YPF Ecuador, S.A. (“Repsol”).
2. The members of the Committee appointed in this annulment proceeding were Mr. Judd Kessler, President, Mr. Piero Bernardini, and Mr. Gonzalo Biggs.
3. Pursuant to Rule 54(1) of the ICSID Arbitration Rules, the Committee invited the parties, by letters from the Secretariat of September 22 and October 26, 2004, to file their observations on the stay of enforcement of the arbitral award. Both parties filed their observations on this issue by October 15, 2004.
4. The Committee scheduled its first session with the parties to be held on November 9, 2004, in Quito, Ecuador. However, such session was not held as the applicant did not deposit the ICSID fees and expenses required by Administrative and Financial Regulation 14(3) and that had been fixed at US\$100,000.00.
5. After a number of communications between the Committee and the parties, Petroecuador paid the Centre the fees and expenses on November 16, 2005. On

November 28, the Committee informed the parties that, in accordance with Administrative and Financial Regulation 14(3), it had decided to accept the payment and continue with the case.

6. In view of the unusual delay, and although the parties had already submitted their observations with respect to the stay of enforcement of the award, the Committee gave the parties the opportunity to submit additional observations by December 12, 2005. These observations were duly submitted by both parties. Petroecuador maintains that Repsol's claim had no basis and, even if it did, there was no doubt the parties would be fully able to comply with the results of the proceeding. Repsol points out that the unusual delay of the case, the weight of ICSID jurisprudence, and the opinions of qualified jurists would indicate that the Committee should refrain from staying the enforcement of the arbitral award or stipulate that Petroecuador should post a bond, through bank guarantee issued by a reputable international bank.

II. DISCUSSION

7. The issues relating to the stay of enforcement of an award and posting of a bond have been raised in a number of arbitration cases before ICSID and have been analyzed by prominent legal commentators. Some of the more recent decisions are: *CDC Group PLC v. Republic of Seychelles*, ICSID Case No. ARB/02/14 (14 July 2004); *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7 (9 February 2004); *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4 (5 February 2002). *See also* Schreuer: *The ICSID Convention: A Commentary* (2001), pp. 1056-60; Friedland: "Stay of Enforcement of the Arbitral Award Pending ICSID Annulment Proceedings," pp. 177 *et seq.* in: Galliard and Bonifatemi, Editors, *Annulment of ICSID Awards* (2004).

8. Thus, the rule emerging from earlier arbitration proceedings is that the party requesting the annulment of an award may obtain its stay of enforcement for the duration of the proceeding, upon the posting of a bond for the total amount of the award.

9. The Committee acknowledges that in a minority of cases before ICSID, the stay of enforcement of the award was maintained without a bond being required. Without going into a detailed analysis of these decisions, we consider that these decisions could be justified by the fact that they entailed relatively small sums, or because there were special circumstances which were not present in this case. The Committee considers that the practice of requiring a bond

is correct in order to prevent a party from applying for an annulment for the purposes of delaying or extending the enforcement date for the arbitral award. In this case, Petroecuador has already benefited from a long stay of enforcement of the award without incurring any costs; a situation that was, however, evidently prejudicial to Repsol.

III. DECISION

Thus, the Committee decides that:

The stay of enforcement of the arbitral award of February 20, 2004 will remain in effect for the duration of these Annulment Proceedings on condition that Petroecuador post an unconditional and irrevocable bond for the total amount of the award plus the corresponding interest. This bond will be delivered to the Committee, represented by its President, in the form of a guarantee from a solvent and reputable international bank, and will be collectable in its entirety by Repsol in the event that Petroecuador's application is completely rejected. If the request is only partially accepted, Repsol may collect the guarantee for that portion of the award not annulled by the Committee, without prejudice to the possible continuation of the stay allowed by ICSID Arbitration Rule 54(3) or by a new arbitral tribunal under ICSID Arbitration Rule 55(3).

If Petroecuador fails to provide a guarantee deemed satisfactory by the Committee in accordance with the above terms by January 15, 2006, the stay of enforcement of the arbitral award shall become null and void on that date. The resolution adopted here does not suspend the first session of this Committee with the parties, which will take place in Quito on January 31, 2006, as previously agreed.

This order has been signed on behalf of the Committee by its President.

JUDD L. KESSLER
President of the ad hoc Committee

Washington D.C
December 22, 2005