

[UNOFFICIAL TRANSLATION]

REPSOL YPF ECUADOR, S.A.

v.

EMPRESA ESTATAL PETRÓLEOS DEL ECUADOR
(PETROECUADOR)

(ICSID Case No. ARB/01/10
Annulment Proceedings)

PROCEDURAL ORDER No. 4

Members of the ad hoc Committee

Mr. Judd L. Kessler, *President*

Prof. Piero Bernardini

Prof. Gonzalo Biggs

Secretary of the ad hoc Committee

Claudia Frutos-Peterson

February 22, 2006

PROCEEDINGS

1. On February 20, 2004, the ICSID Arbitral Tribunal composed of Messrs. Rodrigo Oreamuno Blanco, Alberto Wray Espinosa and Eduardo Carmigniani Valencia, rendered an arbitral award in ICSID Case No. ARB/01/10 with regards to a request filed by Repsol YPF Ecuador, S.A. (“Repsol”) against Empresa Estatal de Petróleos del Ecuador (“Petroecuador”). Repsol’s request pertained to a dispute over amounts owed for services, according to the terms of an oil exploration and production contract in the Republic of Ecuador. The arbitral award favored Repsol and ordered Petroecuador to pay the sum of US\$13,684,279.23 plus interest as of the date of the award.
2. On June 7, 2004, Petroecuador filed an application for annulment of the above-mentioned arbitral award and, on July 15 of the same year, the Secretary-General of ICSID, in the exercise of the powers vested in him by ICSID Arbitration Rule 54(2), stayed the enforcement of the award.
3. On September 14, 2004, an *ad hoc* Committee (“Committee”) was constituted pursuant to Article 52(3) of the ICSID Convention to rule on the application for annulment filed by Petroecuador against to the above-mentioned arbitral award of February 20, 2004.
4. The members of the Committee appointed to rule on the above-mentioned annulment application were Messrs. Judd Kessler, from the United States of America (President), Piero Bernardini, from Italy, and Gonzalo Biggs, from Chile.
5. Pursuant to ICSID Arbitration Rule 54(1), the Committee invited the parties to file their observations on the stay of enforcement of the arbitral award. Petroecuador filed its observations on October 4, 2004, and Repsol on October 15, 2004.
6. The Committee scheduled its first session with the parties for November 9, 2004 in the city of Quito. However, such session was not held as the applicant did not deposit the sums to cover the fees and expenses on time, as required by Regulation 14(3) of the ICSID Administrative and Financial Regulations. These sums were paid on November 16, 2005.
7. Once the above-mentioned deposit was made, the Committee invited the parties to present additional observations before December 12, 2005, which were duly received. In summary, Petroecuador maintained that Repsol’s complaint had no basis and that even if it did, there was no doubt that the parties would be fully able to comply with the results of the proceeding. Repsol pointed out

that the unusual delay of the case, the weight of ICSID jurisprudence, and the opinions of qualified jurists indicated that the Committee should terminate the stay of enforcement of the arbitral award or stipulate that Petroecuador post a bond, through a bank guarantee issued by a reputable international bank.

8. The Committee reviewed the observations presented by the parties, ICSID's jurisprudence on the stay of enforcement of an award and the posting of a bond, and the opinions of prominent legal commentators. With regard to ICSID's jurisprudence, some of the decisions analyzed were the following: i) CDC Group PLC v. Republic of Seychelles, ICSID Case No. ARB/02/14 (July 14, 2004); ii) Mr. Patrick Mitchell v. Democratic Republic of the Congo, ICSID Case No. ARB/99/7 (November 30, 2004); and iii) Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4 (January 28, 2002). The Committee also analyzed, *inter alia*, the commentaries by Schreuer: *The ICSID Convention: A Commentary* (2001), pp. 1056-60; and Friedland: "Stay of Enforcement of the Arbitral Award Pending ICSID Annulment Proceedings," p. 177 *et seq.* in: Gaillard and Banifatemi, Editors, *Annulment of ICSID Awards* (2004).

9. Based on the above, the Committee concluded that the weight of rulings and expert opinions consulted indicate that the party requesting the annulment of an award may obtain its stay of enforcement for the duration of the proceedings upon the posting of a bank bond for the total amount of the award.

10. Without prejudice of the above, the Committee acknowledged that in a minority of cases before ICSID, the stay of enforcement of the award was maintained without a bond being required. The Committee concluded that such 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 considered that the practice of requiring a bond was 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. It was further noted that in this case, Petroecuador had already benefited from a long stay of enforcement of the award without incurring any costs; a situation that was, however, evidently prejudicial to Repsol.

11. In light of the above, the Committee decided in its Procedural Order No. 1 of December 22, 2005 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 Rule 54(3) or by a new arbitral tribunal under Rule 55(3).

12. The Committee further resolved that if Petroecuador failed to post a satisfactory bond in accordance with the above terms and conditions prior to January 15, 2006, the stay of enforcement of the arbitral award would be immediately terminated as of that date. It was further resolved that the Procedural Order adopted would not affect the first session of the Committee with the parties in Quito, on January 31, 2006, as provided in Procedural Order No. 1 of the Committee of December 22, 2005.

13. On December 30, 2005, Petroecuador requested the reconsideration of Procedural Order No. 1, claiming that the order for a guarantee to stay the enforcement of the award would be absolutely void since it is not provided for in the ICSID's Rules, the Convention or Treaty; additionally the order was not applicable to Petroecuador or the Ecuadorean State since it violated its internal order and could even constitute an offence which may result in different liabilities.

14. In its Procedural Order No. 2 of January 9, 2006, the Committee indicated that the following provisions of the ICSID Convention and of its Arbitration Rules were relevant to the matter at hand:

a) The last sentence of Article 52(3) of the ICSID Convention, which establishes that:

The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

b) The first sentence of Article 52(5) of the Convention, which establishes that:

(i) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

c) The first sentence of Article 54(3), of the Arbitration Rules, which establishes that:

If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), *the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. (Emphasis added).*

15. The Committee concluded that the above provisions of the ICSID Convention and the ICSID Arbitration Rules demonstrated that it had sufficient authority, when considering an application for annulment, to order or deny the stay of enforcement of the arbitral award challenged. Furthermore, it added that, as maintained in the consistent jurisprudence of ICSID, just as the Committee had the authority to decide whether or not to stay the enforcement, it also had the authority to establish the requirements necessary to allow the stay to continue.

16. Therefore the Committee issued its decision to:

- a) Deny PetroEcuador's request for reconsideration, of December 30, 2005 and confirm all the terms and conditions of Procedural Order No. 1 of December 22, 2005;
- b) Continue the stay of enforcement of the arbitral award of February 20, 2004, subject to PetroEcuador's posting of an unconditional and irrevocable bond under the terms and conditions indicated in Procedural Order No. 1; and
- c) Confirm the date and place for the first hearing of the Committee and the parties for January 31, 2006 in Quito, Ecuador.

17. On January 25, 2006, after receiving Procedural Order No. 2 from the Committee, Petroecuador requested a seven-day extension of the time limit for posting the bond ordered by Procedural Orders 1 and 2.

18. In light of the importance of the bond for both parties, and considering the short extension requested the Committee, in its Procedural Order No. 3 of January 27, 2006, accepted the request and extended the period for the posting of the bond until February 1, 2006. The other terms and conditions of Procedural Orders Nos. 1 and 2 remained the same.

19. However, the extension granted elapsed without the Committee receiving the bond requested or any other communication from Petroecuador.

With regard to the above-mentioned considerations the Committee noted that:

- a) The stay of enforcement of the arbitral award of February 20, 2004 has continued until February 1, 2006 on condition that Petroecuador post

an unconditional and irrevocable bond under the terms and conditions indicated in Procedural Order No. 1; and

b) Petroecuador did not post the bond requested within the period established by the Committee.

THEREFORE, THIS COMMITTEE HEREBY DECIDES:

a) That according to the powers provided in Rule 54(3) of ICSID's Rules of Procedure for Arbitration Proceedings, the stay of enforcement of the arbitral award is terminated; and

b) According to Rule 54(5), the Secretary-General of ICSID shall promptly notify both parties of this decision.

JUDD L. KESSLER
President

PIERO BERNARDINI
[Member]

GONZALO BIGGS
[Member]