

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

WASHINGTON, D.C.

In the annulment proceeding between

**OCCIDENTAL PETROLEUM CORPORATION
OCCIDENTAL EXPLORATION AND PRODUCTION COMPANY**

-and-

THE REPUBLIC OF ECUADOR

(ICSID Case No. ARB/06/11)

**Decision on the Request to Modify the Decision on the Stay
of Enforcement of the Award
(Rule 54 of the ICSID Arbitration Rules)**

Members of the Committee

Prof. Juan Fernández-Armesto, President
Judge Florentino P. Feliciano, Member of the Committee
Mr. Rodrigo Oreámuno B., Member of the Committee

Secretary of the Committee

Mr. Gonzalo Flores

Representing the Claimants

Mr. Donald P. de Brier
Ms. Marcia E. Backus
Occidental Petroleum Corporation
Occidental Exploration and Production Company

Mr. David W. Rivkin
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Mr. Gaëtan Verhoosel
Three Crowns LLP

Ms. Carmen Martínez López
Covington & Burling LLP

Date: September 23, 2014

Representing the Republic of Ecuador

Dr. Diego García Carrión
Procurador General del Estado

Mr. George von Mehren
Mr. Stephen P. Anway
Squire Patton Boggs (US) LLP.

Prof. Eduardo Silva Romero
Prof. Pierre Mayer
Mr. José Manuel García Represa
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INTRODUCTION

1. The Tribunal issued its Decision on the Stay of Enforcement of the Award [**“Decision on Stay”**] on September 30, 2013, holding unanimously that “the stay of enforcement of the Award shall for the time being continue unconditionally” and reserving the decision on costs for a later stage in the proceedings.
2. On August 1, 2014 Claimants filed a letter requesting that the Committee reconsider and modify the Decision on Stay [**“Claimants’ Request”**]. On August 28, 2014, the Republic of Ecuador answered Claimants’ Request with a letter requesting the Committee to deny Claimants’ Request [**“Ecuador’s Answer”**]. The arguments raised by the Parties in their recent letters are summarized in the following sections.

CLAIMANTS’ ARGUMENTS

3. Claimants request that the Decision on Stay be reconsidered and modified within certain limits.
4. According to Claimants, the collection of a US\$11.5 million judgment by the Ecuador National Court of Justice [the **“Tax Judgment”**] is imminent. The Tax Judgment derives from an income tax assessment issued in 2001 by Ecuador’s *Servicio de Rentas Internas* [**“SRI”**] against Occidental Exploration and Production Company [**“OEPC”**]. OEPC challenged the assessment before the National Court of Justice and the Constitutional Court, but both courts dismissed the case in favor of the SRI.
5. Claimants allege that they have requested Ecuador to temporarily suspend the enforcement of the Tax Judgment until the Committee renders a final decision on this case. However, Ecuador has refused to do so.
6. Claimants acknowledge that the merits of the Tax Judgment are beyond the scope of the Committee’s jurisdiction, but argue that the decision is a “clear violation of Ecuador’s tax laws and represents yet another infringement on the rights of OEPC”¹. Thus, Claimants request that the Committee modify the Decision on Stay so that, if Ecuador takes steps to enforce the Tax Judgment against OEPC, Claimants can enforce a portion of the Award equivalent to the amount of the Tax Judgment or any other amount that Ecuador may seek in respect to the Tax Judgment.
7. Claimants support their request alleging that the Arbitration Rules vest the Committee with jurisdiction to lift the stay at any time in its absolute discretion and point to language of the Tribunal in the Decision on Stay: “[t]he Committee’s decision is not final: it ‘may at any time modify or terminate the stay at the request of either party’”.
8. Furthermore, Claimants raise fairness and prejudice arguments.
9. First, Claimants recall that it is neither fair nor appropriate for Ecuador to enforce a US\$11.5 million tax claim against OEPC while OEPC is stayed from collecting its Award of more than US\$2.3 billion (including interest) against Ecuador. Thus, if Ecuador enforces the Tax Judgment, Claimants should at least be entitled to set off that portion of the Award against the amount Ecuador seeks.

¹ Claimants’ Request, p. 2

10. Second, given the respective amounts of the Award and the Tax Judgment, and the fact that Claimants have been precluded from enforcing the Award for almost two years, the prejudice suffered by Claimants in delaying the enforcement of the Award far outweighs any inconvenience to Ecuador by delaying enforcement of the Tax Judgment or by allowing a set off of the claims. Furthermore, Claimants aver that so long as the Award remains outstanding, they run the risk that it might not be satisfied. Such risk will be mitigated – to a very small extent – by the limited modification of the Decision on Stay.
11. Therefore, Claimants request that the Committee exercise its discretion to modify the Decision on Stay, precluding Ecuador from enforcing the Tax Judgment, while Claimants remain unable to recover the amount owed under the Award.

RESPONDENT’S ARGUMENTS

12. Respondent submits that Claimants’ request is ill-founded and must be rejected by the Committee for five reasons:
13. First, Respondent alleges that not every circumstance justifies the lifting of a stay of enforcement. Even though Respondent acknowledges that the Committee has discretion to lift the stay of enforcement, the Committee has established the standard for doing so: an increased risk of non-compliance with the Award². Respondent argues that Claimants do not even purport to establish an increased risk of non-compliance with the Award.
14. Furthermore, Respondent avers that the Committee’s mission is strictly to assess whether the Award should be annulled and decide whether its enforcement should be stayed, but it has no power to verify whether Ecuadorian Courts correctly applied Ecuadorian law.
15. Second, Respondent alleges that Claimants’ request is based on misrepresentations that the decisions that led to the Tax Judgment and the Tax judgment itself infringe Ecuadorian Law. Ecuador also submits that Claimants cannot rely in their request on a tax dispute over which they themselves have admitted that the Committee has no jurisdiction.
16. Third, Ecuador submits that Claimants’ argument that they would suffer prejudice if their request is denied has already been dismissed by the Committee, because:
 - Delays in the enforcement of an award resulting from annulment proceedings cannot be attributed to the award debtor because they are inherent to the ICSID system;
 - The delay in enforcement can be remedied by the awarding of post-award interest;
 - Claimants boast of being financially robust; thus, any delay in the enforcement of the Award for the sum of approximately US\$11 million will not cause them irreparable harm.
17. Fourth, Respondent submits that Claimants’ fairness argument is cynical:
 - Ecuador had a right to request a stay of enforcement of the award and, under Ecuadorian Law, the Tax Judgment must be executed;
 - There is nothing unfair regarding the execution of the Tax Judgment, while using the ICSID system to circumvent paying taxes or executing *res judicata* judgments is an abuse of process and, thus, both inequitable and unfair.
18. Fifth, Respondent emphasizes that Claimants no longer pursue the escrowing of the amount granted under the Award, but the enforcement of a portion of such Award. According to Respondent, no

² Respondent cites to Decision on Stay, §99.

ad hoc committee has ever lifted a stay up to a certain portion of the amount of the corresponding award regardless of the actual committee's decision, and Claimants have failed to establish any legal basis on which the Committee could do so.

19. Therefore, Ecuador requests that the Committee dismiss Claimants' Request and issue a cost order in favor of Ecuador.

THE COMMITTEE'S POSITION

20. On October 5, 2012 the Arbitral Tribunal issued its Award in the present case. In essence, the decision awarded Claimants:

- the amount of US\$ 1,769,625,000 for damages suffered;
- pre-award interest at the rate of 4.188% since May 16, 2006;
- post-award interest from the date of the Award at the U.S. 6 month LIBOR rate, compounded on a monthly basis.

21. On October 9, 2012 the Republic of Ecuador submitted an application for the annulment of the Award, which included a request for a stay of enforcement, and the enforcement of the Award was provisionally stayed by the Secretary-General of ICSID.

22. On February 13, 2013 Claimants filed a request for the lifting of the provisional stay. Claimants requested that the provisional stay should be lifted or alternatively that any continued stay be conditioned on Ecuador providing proper security. Respondent replied requesting that the stay be continued, and that Claimants' request for the posting of security be dismissed.

23. On September 30, 2013 the Committee issued its Decision on Stay:

- “1. The stay of enforcement of the Award shall for the time being continue unconditionally;
- 2. The decision on costs is reserved for a later stage of the proceedings.”

24. Claimants now request that

“the Committee modify the Stay Decision, so that, if Ecuador takes steps to enforce the US\$11.5 million Tax Judgment against OEPC, Claimants would have the right to enforce a portion of the Award equivalent to the amount of the Tax Judgment or any other amount that Ecuador may seek in respect of the Tax Judgment.”

The Committee's powers

25. Article 54(3) of the Arbitration Rules provides:

“(3) 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. (...)”.

26. According to this provision, the Committee has the power to modify its Decision on Stay of the Award in the course of the annulment procedure. This provision must be read in conjunction with

Article 52(5) of the Convention³. Thus, the Committee may modify its Decision on Stay “if it considers that the circumstances so require.”

Analysis

27. Claimants submit that a hypothetical future enforcement of the Tax Judgment merits the immediate modification of the Decision on Stay, while Respondent denies that a modification of the Decision on Stay is justified, and adds that Claimants have not even purported to establish that the possible enforcement of the Tax Judgment entails an increased risk of non-compliance.
28. The Committee agrees with Respondent that the enforcement by the Republic of Ecuador of an unrelated Tax Judgment is a sovereign action over which the Committee has no jurisdiction, and that such action does not imply that the Republic will not comply with the Award, if the decision of the Committee is to uphold it. There is no evidence that the decision to enforce or not to enforce the Tax Judgment will result in a material increase of the risk of non-compliance with the Award.
29. The risk of non-compliance is not the only circumstance which can justify a decision by the Committee to amend or to lift its Decision on Stay. The Committee is authorized to do so “if it considers that the circumstances so require”. Reasons of fairness and justice may also form part of the circumstances taken into account.
30. Claimants acknowledge that Ecuador has yet to take steps to enforce the Tax Judgment; they simply voice the risk that Ecuador may do so in the future. Given these facts, the Committee finds that it is premature to take any decision with regard to Claimants’ request to amend the Decision on Stay.
31. Notwithstanding the above, the Committee recalls the principle of non-aggravation of the dispute, which requires parties to a dispute submitted to international law to abstain from any action, regardless of its nature that may aggravate or extend the controversy pending before the tribunal⁴.
32. The Committee expects both parties to adhere to such principle, while the Committee finalizes its task of deliberating and drafting its decision. Consequently, Ecuador is requested to inform the Committee in advance, before adopting any action to enforce the Tax Judgment against any of the Claimants or their assets.

On behalf of the Committee



Juan Fernández-Armesto
President

³ Art. 52(5) of the Convention: “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.”

⁴ See e.g. the decision by the Permanent Court of International Justice in the case of *The Electricity Company of Sofia - Belgium v. Bulgaria* PCIJ, Ser. A/B, No. 79, 1939.