

**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)

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

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*Members of the Committee*

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

*Secretary of the Committee*

Mr. Gonzalo Flores

*Representing the Claimants*

Mr. Donald P. de Brier  
Ms. Laura C. Abrahamson  
Occidental Petroleum Corporation  
Occidental Exploration and Production Company

Mr. David W. Rivkin  
Ms. Marjorie J. Menza  
Ms. Ina C. Popova  
Mr. Benjamin M. Aronson  
Debevoise & Plimpton LLP

Mr. Gaëtan Verhoosel  
Ms. Carmen Martínez López  
Mr. Ian Redfearn  
Covington & Burling LLP

**Date:** September 30, 2013

*Representing the Respondent*

Dr. Diego García Carrión  
Procurador General del Estado

Mr. George von Mehren  
Mr. Stephen P. Anway  
Squire, Sanders (US) LLP

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

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## TABLE OF ABBREVIATED TERMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BIT or US – Ecuador BIT	Ecuador Bilateral Investment Treaty signed on August 27, 1993; entered into force on May 11, 1997
CAA	Claimants’ Legal Authority on Annulment
CAITISA	Commission for the Integral Citizens’ Audit of the Treaties of Reciprocal Protection of Investments and of the International Arbitral System on the Subject of Investments established by Executive Decree 1506 and signed by the president on May 6, 2013
CEA	Claimants’ Exhibit on Annulment
CENTRE	International Centre for Settlement of Investment Disputes
Claimants or Occidental	Occidental Petroleum Corporation and Occidental Exploration and Production Company
Claimants’ Reply	Occidental Petroleum Corporation’s and Occidental Exploration and Production Company’s reply dated April 22, 2013 to the Republic of Ecuador’s observations of April 5, 2013
Claimants’ Request	Occidental Petroleum Corporation’s and Occidental Exploration and Production Company’s request to terminate the stay of enforcement of the award, or in the alternative, that the Committee impose conditions on any continued stay of enforcement of Claimants’ Award against the Respondent, dated February 13, 2013
Doc.	Document submitted as an exhibit or legal authority
EEA	Respondent’s Exhibit on Annulment
Farmout Agreement	Agreement between the Andes company and Occidental
Hearing	The <i>ad hoc</i> Committee’s hearing held in Paris on May 13, 2013 on the stay of enforcement of the award
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965

l.	Line
LAM	Ecuadorian Law on Arbitration and Mediation
LIBOR	London Inter Bank Offered Rate
p.	Page
para(s).	Paragraph(s)
Respondent or Ecuador or the Republic	The Republic of Ecuador
Respondent's Rejoinder	The Republic of Ecuador's rejoinder dated May 6, 2013 on Occidental Petroleum Corporation's and Occidental Exploration and Production Company's reply of April 22, 2013
Respondent's Response	The Republic of Ecuador's observations dated April 5, 2013 on Occidental Petroleum Corporation's and Occidental Exploration and Production Company's request to terminate the stay of enforcement of the award
Span.Transc.	Spanish translation of the transcript of the Hearing
Transc.	Transcript of the Hearing
UNCITRAL	United Nations Commission On International Trade Law
VAT Agreement	Occidental's and Ecuador's agreement for the payment of the VAT Award
VAT Award	UNCITRAL Award in favor of Occidental

## TABLE OF CITED DECISIONS

<i>Amco I</i>	<i>Amco Asia Corporation and others v. Republic of Indonesia</i> , ICSID Case No. ARB/81/1, Decision of the Ad Hoc Committee setting aside the Award rendered on the Merits dated May 16, 1986
<i>Amco II</i>	<i>Amco Asia Corporation and others v. Republic of Indonesia</i> , ICSID Case No. ARB/81/1, Interim Order No. 1 concerning the Stay of Enforcement of the Award dated March 2, 1991, 9 <i>ICSID Rep.</i> 59 (2006)
<i>Azurix</i>	<i>Azurix Corp. v. Argentine Republic</i> , ICSID Case No. ARB/01/12, Decision on the Continued Stay of Enforcement of the Award dated December 28, 2007
<i>Burlington</i>	<i>Burlington Resources, Inc. v. Republic of Ecuador</i> , ICSID Case No. ARB/08/5, Procedural Order No. 1 concerning provisional measures dated June 29, 2009
<i>CDC</i>	<i>CDC Group plc v. Republic of Seychelles</i> , ICSID Case No. ARB/02/14, Decision of the <i>ad hoc</i> Committee on the Application for Annulment of the Republic of the Seychelles dated June 29, 2005
<i>Chevron</i>	<i>Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. v. People's Republic of Bangladesh</i> , ICSID Case No. ARB/06/10, Procedural Order concerning provisional measures dated April 14, 2007
<i>CMS</i>	<i>CMS Gas Transmission Company v. Argentine Republic</i> , ICSID Case No. ARB/01/8, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award dated September 1, 2006
<i>Continental Casualty</i>	<i>Continental Casualty Company v. Argentine Republic</i> , ICSID Case No. ARB/03/9, Decision on Argentina's Application for a Stay of Enforcement of the Award dated October 23, 2009
<i>Duke Energy</i>	<i>Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru</i> , ICSID Case No. ARB/0/28, Decision on the Stay of Enforcement of the Award dated June 23, 2009
<i>Electroquil</i>	<i>Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador</i> , ICSID Case No. ARB/04/19, Award dated August 18, 2008
<i>Enron I</i>	<i>Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic</i> , ICSID Case No. ARB/01/3, Decision on the Argentine Republic's Request for a

Continued Stay of Enforcement of the Award dated October 7, 2008

<i>Enron II</i>	<i>Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic</i> , ICSID Case No. ARB/01/3, Decision on the Claimants' second Request to Lift Provisional Stay of Enforcement of the Award dated May 20, 2009
<i>Kardassapoulos</i>	<i>Ioannis Kardassopoulos v. Georgia</i> , ICSID Case No. ARB/05/18, Decision on Applicant's Request for a Continued Stay of Enforcement of the Award dated November 12, 2010
<i>Lemire</i>	<i>Joseph C. Lemire v. Ukraine</i> , ICSID Case No. ARB/06/18, Decision on the Stay of Enforcement of the Award dated February 14, 2012
<i>Libananco</i>	<i>Libananco Holdings Co. Limited v. Republic of Turkey</i> , ICSID Case No. ARB/06/8, Decision on Applicant's Request for a Continued Stay of Enforcement of the Award dated May 7, 2012
<i>MINE</i>	<i>Maritime International Nominees Establishment v. Republic of Guinea</i> , ICSID Case No. ARB/84/4, Interim Order No. 1 concerning Guinea's Application for Stay of Enforcement of the Award dated August 12, 1988
<i>Mitchell</i>	<i>Patrick Mitchell v. Democratic Republic of the Congo</i> , ICSID Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award dated November 30, 2004
<i>MTD Equity</i>	<i>MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile</i> , ICSID Case No. ARB/01/7, <i>Ad hoc</i> Committee's Decision on the Respondent's Request for a Continued Stay of Enforcement of the Award dated June 1, 2005
<i>Perenco</i>	<i>Perenco Ecuador Limited v. Republic of Ecuador</i> , ICSID Case No. ARB/08/6, Decision on Provisional Measures dated May 08, 2009
<i>Pey Casado</i>	<i>Víctor Pey Casado and President Allende Foundation v. Republic of Chile</i> , ICSID Case No. ARB/98/2, Decision on the Republic of Chile's Application for a Stay of Enforcement of the Award dated May 7, 2010
<i>Repsol I</i>	<i>Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)</i> , ICSID Case No. ARB/01/10, Procedural Order No. 1 concerning the Stay of Enforcement of the Award dated December 22, 2005
<i>Repsol II</i>	<i>Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)</i> , ICSID Case No. ARB/01/10, Procedural Order No. 4 concerning the Stay of Enforcement of the Award dated February 22, 2006
<i>Rumeli</i>	<i>Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri</i>

*A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision on the Stay of Enforcement of the Award dated March 19, 2009

*Sempra I* *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award dated March 5, 2009

*Sempra II* *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Sempra Energy International's Request for the Termination of the Stay of Enforcement of the Award dated August 7, 2009

*Transgabonais* *Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic*, ICSID Case No. ARB/04/5, Decision on the Stay of Enforcement of the Award dated March 13, 2009

*Wena* *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID 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 dated April 5, 2001

*Vivendi II* *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award dated November 4, 2008

## I. PROCEDURE

1. On October 9, 2012, the Republic of Ecuador filed with the Secretary-General of ICSID an application for the annulment of the Award rendered on October 5, 2012 in the present case. Ecuador's application included a request under Article 52(5) of the ICSID Convention for a stay of enforcement of the Award, pending a decision by the Committee to be constituted on the application for annulment.
2. The Secretary-General of ICSID registered the application on October 11, 2012 at the same time notifying the parties, pursuant to Rule 54(2) of the ICSID Arbitration Rules, that enforcement of the Award was provisionally stayed.
3. On January 18, 2013, the *ad hoc* Committee was constituted in accordance with Article 52(3) of the ICSID Convention. Its members are: Prof. Juan Fernández-Armesto (Spanish), President, designated to the ICSID Panel of Arbitrators by the Kingdom of Spain; Judge Florentino P. Feliciano (Philippine), designated to the ICSID Panel of Arbitrators by the Republic of the Philippines, and Mr. Rodrigo Oreamuno B. (Costa Rican), designated to the ICSID Panel of Arbitrators by the Republic of Costa Rica; all members appointed by the Chairman of ICSID's Administrative Council.
4. On February 13, 2013, the Claimants filed a request that the provisional stay of enforcement of the Award be lifted.
5. On March 25, 2013, the Committee held its first session with the parties by telephone conference. During the teleconference, the Claimants were represented by Mr. David W. Rivkin and Ms. Marjorie J. Menza, from Debevoise & Plimpton LLP; Mr. Gaëtan Verhoosel and Ms. Carmen Martínez, from Covington & Burling LLP and Ms. Laura C. Abrahamson, Associate General Counsel, Occidental Petroleum Corporation. The Republic of Ecuador, in turn, was represented by Ms. Christel Gaibor and Ms. Diana Moya Dávalos, from Ecuador's *Procuraduría General del Estado*, Messrs. George von Mehren and Stephen P. Anway, from Squire Sanders (US) LLP and Professors Eduardo Silva Romero and Pierre Mayer, from Dechert LLP. All three members of the Committee, Prof. Juan Fernández-Armesto, Judge Florentino P. Feliciano and Mr. Rodrigo Oreamuno B., and the Secretary of the Committee, Mr. Gonzalo Flores, ICSID, participated during the teleconference.
6. During the session, the parties confirmed that the Committee had been properly constituted in accordance with the ICSID Convention and the ICSID Arbitration Rules and that they had no objection to the appointment of any of its members. During the session, the Committee and the parties considered the Agenda adopted by the Committee and a joint communication from the parties of March 18, 2013, reflecting their agreements and disagreements on the different Agenda items. Audio recordings of the session were made and deposited in the archives of ICSID and circulated to the parties and the Committee members. Verbatim transcripts were also made, with the agreement of the parties, from the audio recordings, which were also circulated to the parties and members of the Committee.
7. On April 10, 2013, the Committee issued Procedural Order No. 1.



8. Pursuant to the schedule agreed upon by the parties, on April 5, 2013 the Republic of Ecuador filed observations to Claimants' request to terminate the stay of enforcement of the Award; on April 22, 2013 Claimants filed a reply to the Republic of Ecuador's observations of April 5; and on May 6, 2013 Ecuador filed a rejoinder to Claimants' reply.
9. As directed in Procedural Order No. 1, a one-day hearing on the matter of the stay of enforcement of the Award was held on May 13, 2013 at the ICC Hearing Center in Paris, France. The three members of the Committee, Prof. Juan Fernández-Armesto, Judge Florentino P. Feliciano and Mr. Rodrigo Oreamuno B., attended the hearing. Mr. Gonzalo Flores, Secretary of the Committee, was also present at the hearing.
10. During the hearing, Claimants were represented by Messrs. Donald P. de Brier and Gerald Ellis and Ms. Laura C. Abrahamson, from Occidental Petroleum Corporation; Messrs. David W. Rivkin, Benjamin M. Aronson and Geoffroy Goubin and Ms. Marjorie J. Menza, from Debevoise & Plimpton LLP; and by Mr. Gaëtan Verhoosel and Ms. Carmen Martínez López from Covington & Burling LLP. The Republic of Ecuador was represented by Dr. Diego García Carrión, Procurador General del Estado; Ms. Christel Gaibor and Ms. Diana Moya, from Procuraduría General del Estado; Messrs. George von Mehren, and Stephen Anway, from Squire Sanders (US) LLP; Professors Eduardo Silva Romero and Pierre Mayer, Messrs. José Manuel García Represa and Álvaro Galindo, and Ms. Audrey Caminades, Ms. Celia Campbell, Ms. Mónica Garay and Ms. Kattia Hernández Morales, from Dechert LLP.
11. During the hearing, Mr. Rivkin addressed the Committee on behalf of the Claimants. Dr. García Carrión, Messrs. von Mehren and Anway and Professors Silva-Romero and Mayer addressed the Committee on behalf of the Republic of Ecuador. Both parties made extensive opening and closing submissions on the issue of the stay of the Award.
12. Pursuant to the instructions of the President of the Committee, both parties submitted simultaneously, on May 24, 2013, comments on Claimants' Exhibit on Annulment 69A.

## II. CLAIMANTS' ARGUMENTS

13. Claimants request that the automatic provisional stay granted to Ecuador pursuant to Article 52(5) of the ICSID Convention be lifted, or in the alternative, that the Committee impose conditions on any continued stay of enforcement of Claimants' Award against the Respondent.<sup>1</sup>
14. According to Claimants, Ecuador's illegal seizure of Block 15 was its largest expropriation ever and reflects the largest expropriation found in ICSID history. The size of the Award simply reflects the value of Block 15, which the Tribunal unanimously held was illegally seized. At the time of the expropriation in 2006, 13 years remained on the contract. Claimants had invested US\$ 1 billion in Block 15 to recover the available reserves. The prices used in the expert reports were based on 2006 prices, around US\$ 50/barrel. Oil prices have nearly doubled since then, more than doubling the profits. Ecuador simply cannot be permitted to complain that, because it illegally expropriated such a large and

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<sup>1</sup> Claimants' Request, para. 2.

profitable investment, it deserves special protection from its consequences.<sup>2</sup> Claimant avers that Ecuador has earned enormous cash flows from its illegal seizure of Block 15 – over US\$ 2.05 billion in profits from Block 15 in 2012 alone.<sup>3</sup>

15. Claimants acknowledge that *ad hoc* committees asked to continue a stay have typically done so, but frequently condition continuing the stay on the posting of security. However, Claimants stress that the texts of the Convention and the Arbitration Rules provide no basis for a presumption in favor of continuing the provisional stay of enforcement. To the contrary, under both the Convention and the Rules, the stay is only automatic for 30 days at the start of the annulment proceeding.<sup>4</sup> *Ad hoc* committees have routinely rejected arguments that parties are automatically entitled to a continued stay.<sup>5</sup>

### Conditions

16. Claimants add that because the Committee has broad discretion in determining whether to continue the stay “if the circumstances so require”, it necessarily follows that the Committee has the power to impose conditions on such continuation, such as security.<sup>6</sup> This discretion to impose conditions is further proven by Rule 54(3), which provides that a Committee “may at any time modify or terminate the stay” – if a Committee can modify a stay, the Rules provide for something other than an “either/or” (stay or not stay) decision. Modifying a stay necessarily includes the power to condition a stay.<sup>7</sup>
17. Claimants aver that no *ad hoc* committee has ever denied that Article 52(5) of the Convention grants committees the power to impose conditions of the continuance of a provisional stay. Only one committee, *MINE*, declined to rule on whether *ad hoc* committees have the power to impose conditions. All other published decisions recognize that committees have the power to impose conditions on the continuance of stay.<sup>8</sup>

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<sup>2</sup> Claimants’ Reply, para. 85 – 86.

<sup>3</sup> Claimants’ Reply, para. 95.

<sup>4</sup> Claimants’ Reply, para. 14 – 15.

<sup>5</sup> Quoting *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Applicant’s Request for a Continued Stay of Enforcement of the Award dated May 7, 2012 (“*Libananco*”), para. 43, *Ioannis Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Applicant’s Request for a Continued Stay of Enforcement of the Award dated November 12, 2010 (“*Kardassopoulos*”), para. 26 and *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award dated March 5, 2009 (“*Sempra I*”), para. 27; Claimants’ Reply, para. 21.

<sup>6</sup> Claimants’ Reply, para. 24.

<sup>7</sup> Claimants’ Reply, para. 25.

<sup>8</sup> *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award dated November 30, 2004 (“*Mitchell*”), *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, *Ad hoc* Committee’s Decision on the Respondent’s Request for a Continued Stay of Enforcement of the Award dated June 1, 2005 (“*MTD Equity*”), *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Continued Stay of Enforcement of the Award dated December 28, 2007 (“*Azurix*”), *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the

Committees, after determining whether to continue a stay, have repeatedly imposed conditions on that continuance, including bank guarantees,<sup>9</sup> bonds,<sup>10</sup> escrow deposits<sup>11</sup> and written undertakings.<sup>12</sup> Of the 21 *ad hoc* committee decisions determining whether to continue the stay, 13 imposed conditions on the stays of enforcement.<sup>13</sup> Security was denied in eight cases,<sup>14</sup> but these denials were based on reasons and circumstances that do not exist in this case.

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Award dated October 07, 2008 (“*Enron I*”), *Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Republic of Chile’s Application for a Stay of Enforcement of the Award dated May 7, 2010 (“*Pey Casado*”), *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Decision on Argentina’s Application for a Stay of Enforcement of the Award dated October 23, 2009 (“*Continental Casualty*”), *Libananco*; Claimants’ Reply, para. 35.

<sup>9</sup> *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision of the Ad Hoc Committee Setting Aside the Award Rendered on the Merits dated May 16, 1986 (“*Amco I*”); *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Interim Order No. 1 Concerning the Stay of Enforcement of the Award dated March 2, 1991, 9 *ICSID Rep.* 59 (2006) (“*Amco II*”); *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID 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 dated April 5, 2001 (“*Wena*”); *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision of the ad hoc Committee on the Application for Annulment of the Republic of the Seychelles dated June 29, 2005 (“*CDC*”); *Kardassopoulos; Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on the Stay of Enforcement of the Award dated February 14, 2012 (“*Lemire*”).

<sup>10</sup> *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Procedural Order No. 1 concerning the Stay of Enforcement of the Award dated December 22, 2005 (“*Repsol I*”) and *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Procedural Order No. 4 concerning the Stay of Enforcement of the Award dated February 22, 2006 (“*Repsol II*”).

<sup>11</sup> *Sempra I and Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Sempra Energy International’s Request for the Termination of the Stay of Enforcement of the Award dated August 7, 2009 (“*Sempra II*”).

<sup>12</sup> *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award dated September 01, 2006 (“*CMS*”), *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award dated November 4, 2008 (“*Vivendi II*”), *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru*, ICSID Case No. ARB/0/28, Decision on the Stay of Enforcement of the Award dated June 23, 2009 (“*Duke Energy*”), *Compagnie d’Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic*, ICSID Case No. ARB/04/5, Decision on the Stay of Enforcement of the Award dated March 13, 2009 (“*Transgabonais*”), *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision on the Stay of Enforcement of the Award dated March 19, 2009 (“*Rumeli*”).

<sup>13</sup> Claimants’ Reply, para. 46.

<sup>14</sup> *Maritime International Nominees Establishment v. Republic of Guinea*, ICSID Case No. ARB/84/4, Interim Order No. 1 Guinea’s Application for Stay of Enforcement of the Award dated August 12, 1988 (“*MINE*”), *Mitchell, MTD Equity, Azurix, Enron I and Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Claimants’ Second Request to Lift Provisional Stay of Enforcement of the Award dated May 20, 2009 (“*Enron II*”), *Pey Casado, Continental Casualty, Libananco*.

18. In Claimants' submission, the risk of non-compliance was key in the vast majority of *ad hoc* committee decisions on stay of enforcement. The overwhelming weight of Ecuador's public statements suggests that it will not comply with the Award if annulment were denied, and the Response provides no additional assurance that Ecuador will comply. Ecuador also has a substantial record of non-compliance with past decisions and awards by arbitral tribunals.<sup>15</sup> Furthermore, since 2005, Ecuador has progressively outlawed all international investment arbitration by both Constitutional amendment and amendment to the Law on Arbitration and Mediation concerning its natural resources, making immediate execution of this Award doubtful if not impossible.<sup>16</sup>
19. Claimants do not disagree that the closing of international markets to Ecuador, based on its credit risk, may make obtaining a bank guarantee impractical. While Claimants continue to request a security for the full amount of the Award, in the alternative the security could take different forms. Since Block 15 produces enormous profits for Ecuador, a part of that profit could be used to secure the Award:
- In a first alternative, Ecuador should deposit 50% of the Award amount plus interest (US\$ 1.15 billion) in an escrow account held at a mutually agreed upon international bank, with the remaining 50% to be deposited over time in monthly installments spread over 10 months, or approximately US\$ 115 million per month;
  - Under a second alternative, Ecuador should make four deposits on a quarterly basis into an escrow account, each deposit amounting to US\$ 507.5 million.<sup>17</sup>

#### Interest Insufficient

20. If the Committee continues the stay without conditions it will severely interfere with Claimants' right to an immediately payable Award. Even though post-award interest is available here, it does not fully compensate Claimants for the delay in payment. Occidental Petroleum Corporation has achieved a return of 12.6% on capital it employed during 2012, a rate that far exceeds the pre- and post-award interest granted to Claimants in the Award.<sup>18</sup>
21. Summing up, Claimants request that if the Committee grants Ecuador's application to continue the stay of enforcement, it be conditioned upon the provision of a proper security:
- The posting of the full amount of the Award plus the post-award interest to date into a mutually agreed-upon escrow account, pledged in favor of Claimants and under the direction of the *ad hoc* Committee;
  - Or either of the two alternatives outlined in the previous paragraphs.<sup>19</sup>

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<sup>15</sup> Claimants' Reply, para. 44.

<sup>16</sup> Claimants' Reply, para. 73.

<sup>17</sup> Claimants' Reply, paras. 97 – 98.

<sup>18</sup> Claimants' Request, paras. 88 – 89.

<sup>19</sup> Claimants' Reply, para. 104.

### The CAITISA Decree

22. Claimants explain that on May 6, 2013, the Government of the Republic of Ecuador issued the CAITISA Decree, which created a “*Comisión para la Auditoría Integral Ciudadana de los Tratados de Protección Recíproca de Inversiones y del Sistema de Arbitraje Internacional en Materia de Inversiones*”.
23. Claimants argue that by subjecting the Award to scrutiny by this Government-sponsored Commission and a public pronouncement by that Commission as to its validity and legality, the CAITISA Decree confirms the inevitability of an Ecuadorian court reviewing and rejecting the Award. The creation of the CAITISA Commission underscores the risk that Ecuador will not comply with the Award if its annulment application fails. The establishment of an official Commission to review the validity and legality of an ICSID Award cannot be reconciled with Ecuador’s obligations under Articles 53 and 54 of the ICSID Convention.<sup>20</sup>

### **III. RESPONDENT’S ARGUMENTS**

24. Respondent avers that committees have repeatedly recognized that a party’s right to seek an annulment of an award is of critical, systemic importance to the ICSID system. For that reason, ICSID committees have continued the stay of enforcement in all 22 cases in which it has been requested to date<sup>21</sup>. This – Ecuador adds – is hardly the case to break that line of precedent. Claimants are anticipatorily seeking to collect billions of dollars from a sovereign nation on the basis of a decision rendered by a sharply-divided Tribunal, but the majority’s decision is profoundly flawed – as forcefully explained by Professor Brigitte Stern in her dissent.<sup>22</sup>
25. Respondent submits that its annulment application is made in good faith, and not dilatory in nature,<sup>23</sup> and that it would suffer immediate, irreparable and/or catastrophic consequences should the stay be lifted; it explains that the amount of the Award represents almost 9% of Ecuador’s 2012 annual budget, 59% of the country’s 2012 annual budget for education and 135% of the country’s annual healthcare budget.<sup>24</sup>

### No Power to Request Security

26. As regards the Claimants’ request for Ecuador to provide security, such request, in Respondent’s opinion, is doomed, because the Committee does not have the power to grant it. *Ad hoc* committees do not have any explicit, or even implied, power to condition the continuation of a stay for the following six reasons:<sup>25</sup>

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<sup>20</sup> Claimant’s letter dated May 24, 2013, p. 1 – 2.

<sup>21</sup> There is a very recent decision which decided differently, which the parties had the opportunity to briefly comment on. *See* footnote no. 50 *infra*.

<sup>22</sup> Respondent’s Response, paras. 2 – 3.

<sup>23</sup> Respondent’s Response, para. 36.

<sup>24</sup> Respondent’s Response, para. 43.

<sup>25</sup> Respondent’s Response, paras. 57 – 76.

- The Convention does not expressly grant *ad hoc* committees the power to order security when deciding whether or not to stay an award; Arbitration Rule 54(3) does not necessarily include the power to condition a stay;<sup>26</sup>
  - The power cannot be implied, by the discretion given to *ad hoc* committees to stay the enforcement “if it considers that the circumstances so require”; the discretion is limited to the decision whether or not to grant the stay – and does not extend to the imposing of conditions;
  - The request for the posting of security is indisputably a request for provisional measures, and under the Convention a provisional measure may solely be recommended, as can be clearly derived from Rule 39 of the Arbitration Rules;
  - Furthermore, *ad hoc* committees’ power to recommend provisional measures was expressly considered and rejected during the negotiation of the Convention;
  - Article VI of the New York Convention expressly empowers the judicial authority to request adequate security; given that the New York Convention was already in effect at the time when the ICSID Convention was drafted, it can only be assumed that such a provision for security would have been considered and in turn discarded by the drafters of the Convention;
  - Previous decisions of committees granting the stay, but conditioning it on the provision of security are not binding, are not convincing and were issued in cases where the debtor did not dispute the power of a committee to do so.<sup>27</sup>
27. In light of the above, Ecuador submits that the Committee has no choice but to examine anew the issue whether it has the power to order the posting of security as a condition for the continued stay of enforcement.
28. In the alternative, even if the Committee were to find that it has the power to grant Claimants’ request for security – which Ecuador denies – the creditor must establish all requirements for interim measures to be granted: urgency and *fumus boni iuris*. And Claimants have failed to prove these requirements.<sup>28</sup>

### Merits

29. In any event, Ecuador argues that Claimants’ request for posting of security is wholly lacking in merit. Claimants will not be severely prejudiced by the continued stay, because as per the Award they will be collecting post-award interest at the US LIBOR rate compounded on a monthly basis.<sup>29</sup> And a mere risk of non-compliance cannot justify a

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<sup>26</sup> Respondent’s Rejoinder, para. 30.

<sup>27</sup> In *Amco II*, *Wena*, *CDC*, and *Kardassopoulos*, the power of the Committee was merely assumed; *Amco I*, *Repsol II* and *Lemire* were not published; Respondent’s Rejoinder, para. 47.

<sup>28</sup> Respondent’s Response, paras. 78 – 81.

<sup>29</sup> Respondent’s Response, para. 97.

request for security, because granting the creditor's request for security would go beyond counterbalancing the alleged effect of a stay: it would improperly put the creditor in a better situation than it was prior to the annulment application, and penalize the debtor.<sup>30</sup>

30. Respondent submits that the posting of security would only be appropriate where the creditor's chances of enforcement deteriorate with time. Claimants, however, have not even attempted to establish that their chances of enforcement are better now than they would be at the end of the annulment proceeding.<sup>31</sup>
31. Respondent dismisses Claimants' allegations that it will not pay the Award as no more than speculation about Ecuador's possible intentions:
- Claimants' reliance on alleged public announcements by Ecuador does not establish that Ecuador will not comply with the Award;
  - Claimants' reliance on Ecuador's alleged failure to comply with the VAT Award does not establish that Ecuador will not comply with this Award; in this context, Respondent complains that Claimants have produced correspondence between Claimants' in-house counsel and the Procuraduría which was clearly stamped "confidential and privileged;"<sup>32</sup>
  - Claimants' reliance on Ecuador's alleged failure to comply with other decisions of other tribunals does not establish that Ecuador will not comply with this Award; not a single concluded investment case against Ecuador has resulted in enforcement proceedings; Ecuador has been found liable in two cases and complied with the resulting payment obligations;<sup>33</sup>
  - Claimants' reliance on Ecuadorian law does not establish that Ecuador will not comply with the Award; the real state of affairs in this matter is that Ecuadorian law does not subject ICSID awards to judicial review; Claimant's allegation based on Ecuador's denunciation of the Convention and BITs or amendment to its statutes or Constitution is therefore irrelevant;<sup>34</sup> the *acción extraordinaria de protección* provided for in Article 94 of the Ecuadorian Constitution is not applicable to ICSID awards;<sup>35</sup> Ecuador does not maintain that its obligation to abide by and comply with an award under Article 53 is conditional upon recourse by the award creditor to a domestic enforcement procedure;<sup>36</sup>

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<sup>30</sup> Respondent's Response, para. 105, Rejoinder, para. 77, by reference to *MINE*.

<sup>31</sup> Respondent's Response, para. 109.

<sup>32</sup> Respondent's Response, para. 130; Rejoinder, para. 100. Respondent's request that the documents be stricken from the record was withdrawn: Transc. p. 254, l. 2 – 7.

<sup>33</sup> Respondent's Rejoinder, footnote 150.

<sup>34</sup> Respondent's Rejoinder, para. 108.

<sup>35</sup> Respondent's Rejoinder, para. 112.

<sup>36</sup> Respondent's Rejoinder, para. 114.

- Claimants' reliance on alleged steps to make enforcement outside Ecuador more difficult for Occidental does not establish that Ecuador will not comply with the Award.
- 32. Finally, Ecuador argues that the posting of a security is not an option which is open to it, because it will cause catastrophic, immediate and irreparable harm, requiring the freezing of US\$ 2.3 billion, even if the security takes the form of a bank guarantee. No international bank would provide Ecuador with a guarantee without Ecuador actually escrowing most if not all of the moneys. As a consequence, the result will be the same as if the stay had been lifted.<sup>37</sup>
- 33. As regards Claimants' request that the revenues derived from Block 15 be earmarked for payment of the Award, Respondent avers that this is not the way Ecuador – or any other government – treat revenues earned by the State. Ecuador pools its revenues from various sources to satisfy the nation's urgent needs.<sup>38</sup>

### Summary

- 34. The Committee faces two alternatives: either grant the stay without security, which would cause Claimants no prejudice in the unlikely event that the Award were sustained; or grant the stay conditioned on the posting of security which would cause Ecuador irreparable harm that no repayment or returning of funds could ever repair. In Respondent's view, the balancing of the parties' interest weighs in favor of Ecuador.<sup>39</sup>
- 35. Summing up, Ecuador requests that the stay be continued and that Claimants' request for the posting of security be dismissed.<sup>40</sup>

### The CAITISA Decree

- 36. The Respondent submits that the CAITISA Decree is irrelevant to the Committee's decision. CAITISA is simply a study group to be formed for the purposes set forth in the CAITISA Decree, which does not affect the enforcement of awards rendered against Ecuador.<sup>41</sup>

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<sup>37</sup> Respondent's Response, paras. 190 – 198.

<sup>38</sup> Respondent's Rejoinder, para. 22.

<sup>39</sup> Respondent's Rejoinder, para. 58.

<sup>40</sup> Respondent's Response, para. 202.

<sup>41</sup> Respondent's letter dated May 24, 2013, p. 2 – 3.



#### IV. THE COMMITTEE'S ANALYSIS

37. On October 5, 2012 the Arbitral Tribunal issued its Award in the present case, with a Dissenting Opinion by one of its members. 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.

38. 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, pending a decision by this Committee. In accordance with Article 52(5) of the Convention:

“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”.

Consequently, the enforcement of the Award was provisionally stayed by the Secretary-General of ICSID.

39. On February 13, 2013 the Claimants filed a request for the lifting of the provisional stay. Initially Claimants requested that the provisional stay should be lifted or alternatively that any continued stay be conditioned on Ecuador providing proper security.<sup>42</sup> During the procedure, Claimants' emphasis shifted to the alternative prayer: in the Reply<sup>43</sup> and during the hearing,<sup>44</sup> Claimants only requested that Ecuador provide adequate security; if the Committee grants Ecuador's application to continue the stay, it should be conditioned upon the posting of a sufficient security.

40. Respondent replied requesting that the stay be continued, and that Claimants' request for the posting of security be dismissed.

41. Both parties asked for the costs to be borne by the counterparty.

42. To decide the issues raised by Claimants and Respondent, the Committee will first address the question of whether the provisional stay of enforcement should be lifted. It will come to the conclusion that the stay should continue (A). Thereafter, it will briefly analyze whether Annulment Committees have the power to condition the stay of enforcement (B) and then decide whether in the specific circumstances of the case, Ecuador should be required to provide security (C).

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<sup>42</sup> Claimants' Request, para. 104.

<sup>43</sup> Claimants' Reply, para. 104.

<sup>44</sup> Counsel for Claimants: Transc. p. 100, 19 – 21.

**A. Continuation of the Provisional Stay of Enforcement**

43. Article 52(5) of the Convention provides:
- “(5) 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”.
44. According to this provision, the Committee has the power to either lift the provisional stay of enforcement of the Award or order the continuation of the stay, pending the Committee’s decision on annulment, “if it considers that the circumstances so require”. The Committee’s decision is not final: it “may at any time modify or terminate the stay at the request of either party” (Rule 54(3) of the Arbitration Rules).
45. The Respondent submits that in the past no committee has ever decided to lift the provisional stay pending annulment proceedings, even when award creditors requested termination of the stay<sup>45</sup>. Respondent avers that this Committee should not deviate from these precedents, because Ecuador has a *prima facie* good faith case for annulment and would suffer immediate, irreparable and catastrophic consequences if the stay of enforcement were lifted.<sup>46</sup>
46. Claimants acknowledge that committees have typically decided to continue the stay, but add that the legal texts provide no basis for a presumption in favor of continuing the provisional stay of enforcement.<sup>47</sup> Notwithstanding this lack of presumption, Claimants are not actively requesting a lifting of the stay – their final prayer for relief is that the lifting should be conditioned upon Ecuador posting proper security.
47. The Committee agrees with Claimants that an award debtor is not entitled to a continued stay of enforcement, that there is no basis for a presumption in favor of continuation of the stay, and that both under the Convention and the Rules, the stay is only automatic for a 30-day period at the start of the annulment proceedings (Article 52(5) of the Convention and Rule 54(2) of the Arbitration Rules). The word “may” in Article 52 also clearly indicates that the Convention leaves it to the Committee’s broad discretion to decide whether to continue the stay.<sup>48</sup>
48. Considering the circumstances of the case, and applying the above-described principles, the Committee finds that the appropriate decision is that the stay should continue.
49. The ICSID Secretariat has noted that as of June 30, 2012 there had

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<sup>45</sup> There is now one precedent where the stay was lifted, which both parties had the chance to comment on: *See* footnote No. 50 *infra*.

<sup>46</sup> Respondent’s Response, para. 32.

<sup>47</sup> Claimants’ Reply, para. 13.

<sup>48</sup> *See Enron I*, para. 22.

“been a total of 24 requests for the stay of enforcement in the 53 registered annulments, 22 of which have led to Committee decisions. All 22 decisions granted the stay of enforcement.”<sup>49</sup>

50. The prevailing practice in prior annulment cases has been to grant the stay of enforcement<sup>50</sup>. Although this practice does not create a presumption for continuation, and a committee is entitled to deviate from it, “if it considers that the circumstances so require”, the Committee finds that in this case there is no reason to deviate from the standard practice.

#### **B. Power of Annulment Committees to Condition the Stay of Enforcement**

51. Respondent submits that committees do not have the power to condition the continuation of the stay to the providing of security by the debtor. In essence, Ecuador argues that the Convention does not expressly grant such power to committees, and that this power cannot be implied.<sup>51</sup>
52. Claimants disagree. Committees have broad discretion in determining whether to permit continuation of the stay. It necessarily follows that committees have the power to impose conditions on such continuation, such as security.<sup>52</sup>
53. The Committee does not have to address, at this time in the procedure, the difficult issue of whether or not committees have the power to condition the continuation of the stay on the posting of security by the Respondent. The Committee will analyze in the following section Claimants’ request that the stay of enforcement be made conditional upon the posting of security and will come to the conclusion that *hic et nunc* the factual situation does not justify that such condition be imposed<sup>53</sup>. Since the Committee will come to the conclusion that in the present circumstances no condition is required, the question of whether or not the Committee has the power to impose such condition has become moot.
54. The Committee will address the issue of its powers to condition stay of enforcement on the posting of a security by the award debtor, if and when this issue becomes material, upon a fresh request by the Claimants, arguing that new circumstances merit a revision of the Committee’s present decision.

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<sup>49</sup> ICSID Secretariat: “[Background Paper on Annulment for the Administrative Council of ICSID](#),” dated August 10, 2012, Doc. CAA 32.

<sup>50</sup> Claimants have brought to the Committee’s attention a very recent decision of March 22, 2013, rejecting Paraguay’s Request for the Continued Stay of Enforcement of the Award issued in the case of *SGS Société Générale de Surveillance S.A. v. Republic of Paraguay*, ICSID Case No. ARB/07/29; See Claimants’ letter to the Committee of June 27, 2013. The Respondent commented on this decision by letter of July 1, 2013 and explained that it was issued under very specific circumstances. The existence of one exception does not vary the conclusion that the current standard is for committees to grant continuance of stays of enforcement.

<sup>51</sup> Respondent’s Response, para. 54.

<sup>52</sup> Claimants’ Reply, para. 24.

<sup>53</sup> See paras. 96 *et seq. infra*.

**C. Posting of a Security by the Republic of Ecuador**

55. Claimants have advanced two essential reasons, to convince the Committee that it should only lift the stay upon the posting of a security by the Republic: the first is that Occidental has a present right to the Award and to use the funds from the Award (a) and the second is that there is very substantial risk that Ecuador will not comply with the Award (b).

**a. First argument: “Cash is king”**

56. Claimants argue that they have a present right to cash the amounts established in the Award and to use these funds for their own benefit. As Claimants’ former Executive Vice President stated in his Witness Statement “cash is king”<sup>54</sup>: Occidental is achieving a return of 12.6% on capital employed during 2012, a rate which exceeds the post-award interest granted, which is capped at U.S. 6 month LIBOR rate.<sup>55</sup> Postponement in payment is causing Claimants’ additional harm.

57. Respondent disagrees.

58. The Committee has full understanding that Claimants would prefer to have the amount awarded in cash, investing the funds in their own business and obtaining a high rate of return. The problem with this argument is that it is unconnected to the issue of whether the stay should be conditioned on the posting of security. If the Committee were to order that the Republic constitute an escrow account for the full amount of the Award – as requested by Claimants – the moneys would be deposited with an international bank, and accrue normal deposit interest rates, which typically are lower than six month LIBOR. Occidental would not be authorized to touch the funds until the annulment had been decided, and consequently the problem of unavailability of funds, and the low post-award interest rate would not be solved.

59. Posting of a security does not solve, and does not even mitigate, the “cash is king” problem. Only immediate enforcement would solve this problem.

**b. Second argument: The Risk of non-Compliance with the Award**

The Parties’ Arguments

60. Claimants’ main argument is the allegation that there is a serious risk that the Respondent will not comply with its obligation to pay the Award and that a stay subject to the condition of proper security becomes necessary to guarantee enforcement.

61. Respondent disagrees: the mere risk of non-compliance could not justify the granting of a request for security<sup>56</sup> and, furthermore, Claimants speculate on Ecuador’s non-compliance

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<sup>54</sup> Doc. CEA 15.

<sup>55</sup> Claimants’ Request, paras. 85 – 89.

<sup>56</sup> Respondent’s Response, para. 102.

on the basis of grossly incorrect or irrelevant facts.<sup>57</sup> Furthermore, the posting of a security would require the Republic to freeze US\$ 2.3 billion, an amount which represents almost 9% of Ecuador's 2012 budget. The deduction of this amount from other budgetary items will cause the Republic catastrophic, immediate and irreparable harm, and in practical terms the end result would be the same as if the stay had been lifted.<sup>58</sup>

#### Compliance of Awards under the Convention

62. The possibility that parties dishonor awards issued under the Convention was a risk foreseen by its drafters. They were adamant that the Convention should not become a paper tiger and inserted into the Convention various rules, with the aim of safeguarding that awards are duly complied with.
63. The fundamental principle is contained in Article 53, which orders that each party shall abide by and comply with the terms of the award, once the stay of enforcement has been lifted.
64. This treaty obligation also binds the Republic of Ecuador.<sup>59</sup>
65. If, notwithstanding this treaty obligation, an investor who is an award creditor under the Convention is not readily paid by the State which is the award debtor, the award creditor may seek enforcement of the award in any Contracting State. Article 54(1) of the ICSID Convention creates a specific treaty obligation for each Contracting State to "recognize" an ICSID award as binding "as if it were a final judgment of a court in that State".
66. This obligation is also binding on Ecuador.

#### Posting of Security under Article 52(5)

67. The Committee agrees with the Respondent that the intrinsic risk of non-compliance is addressed in Articles 53 and 54 of the Convention, and that under normal circumstances the procedure set forth in the Convention for recognition, enforcement and even forcible execution should not be altered because a stay of enforcement is being sought. In normal circumstances, conditioning the stay on the posting of security would go beyond counterbalancing the effect of the stay: it would put the award creditor in a better situation than it was prior to the annulment application,<sup>60</sup> because it would provide the creditor with a form of conditional payment in advance.<sup>61</sup>
68. The above conclusion applies in normal circumstances: when there is full expectation that the award debtor State will comply with its treaty obligation, and duly pay the award, once

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<sup>57</sup> Respondent's Response, para. 110.

<sup>58</sup> Respondent's Response, paras. 190-198.

<sup>59</sup> Notwithstanding the fact that in 2009 the Republic of Ecuador denounced the ICSID Convention: in accordance with Article 72, withdrawal from ICSID does not affect the obligations arising out of consent to the jurisdiction of the Centre given before the notice of withdrawal was received by the depositary.

<sup>60</sup> See *MINE*, para. 22, *MTD Equity*, para. 30, *Mitchell*, para. 32, *Enron I*, para. 33.

<sup>61</sup> *Mitchell*, para. 31.

the annulment request has been adjudicated. If there is however an objective risk that the State will not honor its commitments, *ad hoc* committees have consistently found that security is appropriate to provide assurance that the award debtor will comply with the award if it is ultimately upheld.<sup>62</sup>

69. Respondent has averred that forcible execution of an award rarely occurs in the territory of the sovereign award debtor, given that most public assets cannot be seized under the law of a sovereign State.<sup>63</sup> Respondent would seem to imply that the legal regime in the award debtor State is irrelevant. This of course is not so. The risk of non-compliance must be measured in the jurisdiction of the debtor State itself, applying the law of the land. An award creditor who is the beneficiary of an ICSID award has the legitimate expectation that the State will honor its obligations “as if [the award] were a final judgment of a court in that State” [art. 54(1)], without the creditor having to seek forcible execution in other jurisdictions.

#### Application to the Present Case

70. Claimants argue that there is an increased risk that Ecuador will not comply with the Award, and that it has been proven by facts that Ecuador has:
- Publicly taken the position that it will not comply with the Award;
  - Refused to comply with an earlier BIT award in favor of Occidental and other BIT awards against it;
  - Openly challenged the binding authority of arbitral tribunals on Ecuador;
  - Consistently resisted payment of its international financial obligations; and
  - Failed to comply with its international obligations under the ICSID Convention.<sup>64</sup>
71. The Committee will analyze these averments in more detail.

#### Enforcement of ICSID Awards in Ecuador

72. Claimants have drawn the Committee’s attention to certain public announcements by Ecuador’s President, by Attorney-General Diego García Carrión and by Minister of Foreign Affairs Ricardo Patiño, and to a resolution passed by the National Assembly, which allegedly prove an increased risk of non-compliance of the Award.<sup>65</sup> The Claimants aver that these statements may have “created an atmosphere of hostility towards the ICSID system, Claimants and the enforcement of the award.”<sup>66</sup>

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<sup>62</sup> *Amco I, CDC, CMS, Vivendi II, Sempra I, Duke Energy, Transgobonais, Rumeli, Kardassopoulos, Lemire.*

<sup>63</sup> Respondent’s Rejoinder, at footnote 133.

<sup>64</sup> Claimants’ Request, para. 33.

<sup>65</sup> Claimants’ Request, paras. 34 – 41.

<sup>66</sup> Transc. p. 58, l. 19 – 11.

73. It is true that these public statements criticize, sometime in harsh tones, the Award and certain experts who acted on Claimants' behalf. But these are political, not legal statements, and none goes as far as stating that Ecuador will not comply with its international obligations.<sup>67</sup> What is relevant is what Ecuadorian law says.

Ecuador's Domestic Laws

74. Claimants argue that Ecuador's internal laws cast serious doubts on its likelihood to comply with its international obligations.<sup>68</sup> Claimants submit that Ecuador has never enacted enabling legislation for Article 54 of the Convention, that it amended its Constitution outlawing non-regional investment arbitration, that it revised its Arbitration and Mediation Law to prohibit all international arbitration that affect national interests, and that the Constitutional Court concluded that 12 BITs, including the Ecuador-U.S. BIT involved in this arbitration were in fact unconstitutional.
75. Against this argument, in its Rejoinder dated May 6, 2013 and signed by Dr. Diego García Carrión, the *Procurador General del Estado*<sup>69</sup> the Republic of Ecuador made the following statements:
- "The real state of affairs on this matter is that Ecuadorian law does not subject ICSID awards to judicial review. Claimants' allegation base (sic) on Ecuador's denunciation of the Convention and BITs or amendment to its statu[t]es and Constitution is therefore irrelevant;"<sup>70</sup>
  - "In all these proceedings [*Enron I and II, Sempra and Vivendi*] Argentina maintained before the *ad hoc* committees 'that its obligation to abide by and comply with an award under Article 53 is conditional upon recourse by the award creditor to a domestic enforcement procedure under Article 54'. Ecuador does not maintain such a position..."<sup>71</sup>
76. The statements made by its *Procurador General* are binding upon the Republic, and give Claimants full reassurance:
- That Ecuadorian law does not subject ICSID awards to judicial review in Ecuador and

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<sup>67</sup> See, e.g., President Correa's phrase: "*nosotros, patriotas con el Ecuador en el centro del alma seguiremos luchando por no pagarle un solo centavo del pueblo ecuatoriano a una transnacional abusiva que trató de estafar a nuestro país, compatriotas,*" Doc. CEA 59, or the resolution of the *Asamblea Nacional*: "*Convocar a todas las funciones del Estado y al pueblo Ecuatoriano a mantenerse férreamente unidos y movilizados por encima de cualquier interés político o corporativo, para afrontar por los medios legítimos y del derecho nacional e internacional se consume esta amenaza a la dignidad y soberanía nacional,*" Doc. CEA 37.

<sup>68</sup> Claimants' Request, paras. 64 – 80.

<sup>69</sup> And co-signed by the Counsel for the Republic of Ecuador.

<sup>70</sup> Respondent's Rejoinder, para. 108; footnotes omitted.

<sup>71</sup> Respondent's Rejoinder, para. 114; footnotes omitted.

- That Enforcement of ICSID awards in Ecuador are not subject to a domestic enforcement procedure,
  - In summary, that Ecuador’s domestic law fully complies with the Convention.
77. Based on this declaration, the Committee accepts that Ecuador’s internal laws and practice respect the treaty obligations deriving from Articles 53 and 54 of the Convention and that Ecuadorian law does not subject ICSID awards to judicial review. Consequently, and contrary to Claimants’ arguments, ICSID awards cannot be subject to judicial review under Article 41(c) of the LAM,<sup>72</sup> under Article 414 of the Code of Civil Procedure or under Article 94 of Ecuador’s Constitution. The legal regime in Ecuador has not changed with regard to the enforcement of ICSID awards in general, and this Award in particular.
78. Claimants have also raised the issue that the U.S. – Ecuador BIT has been declared unconstitutional by the Republic’s Constitutional Court. The Republic has explained that Article 422 of the Ecuadorian Constitution forbids Ecuador to submit to international arbitration *fora* and acknowledged that the Constitutional Court has found that certain BITs, including the U.S. – Ecuador BIT, are unconstitutional. But Ecuador clarified during the hearing:
- “Esta decisión o esta opinión de la Corte constitucional no implica que los tratados hayan salido del ordenamiento jurídico ecuatoriano. Los tratados siguen siendo aplicados en el orden jurídico ecuatoriano. La consecuencia es que el Ejecutivo tiene el deber, la obligación de denunciar los tratados de conformidad con la disposición del tratado respectivo y de conformidad con el derecho internacional.”<sup>73</sup>
79. The Republic has thus officially acknowledged that the decision adopted by its Constitutional Court, declaring the unconstitutionality of the U.S. – Ecuador BIT does not affect the validity and enforceability of the Award.
80. Summing up, although the Committee takes note that the government of Ecuador has forcefully rallied against the propriety of the Award, and may have created a political atmosphere which is hostile to the ICSID adjudication system, there has not been any change in the legal regime applicable to the enforcement of ICSID awards, and the very *Procurador General del Estado* has vouched that such awards are not subject to judicial review in the Republic. As *Procurador* García Carrión himself said during the hearing:

“El laudo es una aberración jurídica y como tal debe ser y es rechazado por la República del Ecuador. Esta crítica sin embargo no quiere decir, como ya la dijera expresamente en su momento, que Ecuador haya dejado o vaya a dejar de cumplir con sus obligaciones internacionales. De hecho Ecuador y sus agencias han

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<sup>72</sup> Article 41 LAM explicitly submits to treaty obligations: “*Sin perjuicio de lo dispuesto en los tratados internacionales...*”.

<sup>73</sup> Counsel for the Republic of Ecuador: Span. Transc. p. 273, l. 12 – 20. See Transc. p. 266, l. 21 – p. 267, l. 7: “*This decision or this opinion by the Constitutional Tribunal does not imply that treaties have now been cut out of the legal corpus in Ecuador. They continue to be part of the legal body. The consequence is, however, that the Executive has the obligation of denouncing those treaties in keeping with their own provisions and in keeping with the provisions of international law*”.



cumplido todos y cada uno de los Laudos que han sido dictados en arbitrajes internacionales en su contra.”<sup>74</sup>

81. Given these statements and facts, the Committee must conclude that as of now no deterioration in the likelihood of enforcing an ICSID award in Ecuador has occurred.

*The CAITISA Decree*

82. Claimants have also drawn the Committee’s attention to the so called CAITISA Decree. In Claimants’ opinion, this Government-sponsored commission is empowered to subject the Award to scrutiny as to its validity and legality. In Claimants’ view, this would confirm the inevitability of an Ecuadorian court reviewing and rejecting the Award. Respondent disagrees, and labels the CAITISA commission simply as a study group.
83. The Committee has reviewed the CAITISA Decree<sup>75</sup> as published in the Ecuadorian Official Gazette. The CAITISA Commission is an official commission, formed by four representatives of the State, four experts and four representatives of social movements (Article 6). The purpose of the Commission is to submit investment arbitration to an “*auditoría integral ciudadana*” (Article 2), with a time period of eight months (which can be extended once – Article 5). The Commission’s task is to evaluate and examine a very wide number of issues relating to investment arbitration in general, and to specific investment awards in particular (Article 3.5).
84. The Republic has explained that the CAITISA commission is simply a study group, and that the result of its audit will not increase the risk of non-compliance with investment arbitration awards. The Committee has no reason to doubt the Republic’s statements. That said, the Committee notes that the CAITISA Decree includes, among the powers of the commission, the right to evaluate

“la validez...de los laudos y decisiones emitidos por los órganos y jurisdicciones que son parte del sistema de arbitraje internacional en materia de inversiones que han conocido procesos arbitrales en contra del Ecuador, con el fin de determinar la legalidad, legitimidad y licitud de sus decisiones...” (Article 2 iii).<sup>76</sup>

85. The Committee acknowledges that, in accordance with the Convention, the validity of ICSID awards can only be challenged under the procedures established in the Convention, and expects that the powers granted to the CAITISA Commission will not be used to

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<sup>74</sup> Span.Transc. p. 116, l. 10 – 19, emphasis added. *See* Transc. p. 111, l. 17 – p. 112, l. 3: “This Award is a legal aberration, and as such it must be and is being rejected by the Republic of Ecuador. This criticism, however, does not mean, as I already had the opportunity of saying in the past, that Ecuador does not wish to abide by its international obligations. As a matter of fact, Ecuador, and all of its agencies have always fully abided by all of the international awards against it”.

<sup>75</sup> Doc. CEA 69 A.

<sup>76</sup> Transc. p. 63, l. 3 – 8: “[t]he validity ... of the awards rendered by investment arbitration tribunals in cases against Ecuador [...], for the purpose of determining the legality, legitimacy, and lawfulness of those decisions... ”.

undermine the general treaty obligations assumed by the Republic under the Convention in general, and with regard to the Award in particular.

86. The Committee expects the Republic to keep it informed regarding any development in Ecuadorian law or judicial practice, which potentially could affect the continuing validity of the statements made by the *Procurador General de la República* in the Rejoinder,<sup>77</sup> and of any report issued by the CAITISA commission which could have an impact on the Award or on the present procedure.

*Ecuador's Alleged Failure to Comply with Awards*

87. Claimants have also alleged that Ecuador has failed to comply with an UNCITRAL Award in favor of Occidental, the so called VAT Award, and with other decisions by ICSID Tribunals.<sup>78</sup>
88. The real situation in fact is much more nuanced.
89. Occidental and Ecuador signed an agreement for the payment of the VAT Award, the so called VAT Agreement, in which both parties agreed that Ecuador would pay US\$ 133 million. Ecuador disputed whether it owed an additional amount of US\$ 32 million, the Republic deposited such amount in an escrow account, and this new dispute was submitted to a fresh arbitration, which has not been finally solved (there still being an annulment procedure pending).
90. The episode surrounding the VAT Award proves the contrary to that what the Claimants are alleging: it shows that Ecuador respected and duly paid/deposited in escrow the amounts awarded to Occidental in the VAT Award.
91. As regards other investment arbitrations, not a single concluded case against Ecuador has resulted in enforcement proceedings. Ecuador has been found liable in one case (further to the VAT Award)<sup>79</sup> and has complied with the resulting payment obligations.<sup>80</sup> In a number of other cases, the claims were discontinued following the parties' settlement.<sup>81</sup>
92. The Claimants have drawn the Committee's attention to certain pending arbitral proceedings, in which the Republic has allegedly not complied with provisional measures.<sup>82</sup> The Republic rejects the allegation.<sup>83</sup> Although States are expected to comply

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<sup>77</sup> See para. 76 *supra*.

<sup>78</sup> Claimants' Request, paras. 42 – 48.

<sup>79</sup> *Duke Energy Electroquil Partners and Electroquil S.A. v. Republic of Ecuador*, ICSID Case No. ARB/04/19 (“*Electroquil*”); See Doc. EEA 50.

<sup>80</sup> Acknowledged by Claimants: Transc. p. 87, l. 9 – 11.

<sup>81</sup> See Respondent's Rejoinder, footnote 150, with a list of cases and chart in p. 104 of Ecuador's Opening Memorial.

<sup>82</sup> *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures dated May 08, 2009 (“*Perenco*”), Doc. CAA 20, *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 concerning provisional measures dated June 29, 2009 (“*Burlington*”), Doc. CAA 4, *Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh*

with provisional measures issued by investment tribunals, whether in individual cases a State has complied or not with such orders is irrelevant for the issue under discussion: whether the risk of non-enforcement of the Award in Ecuador has increased.

Enforcement Outside Ecuador

93. Claimants also allege that Respondent has taken steps to ensure that it will be difficult for Claimants to locate assets outside the Republic on which to enforce the Award if Ecuador does not voluntarily pay:<sup>84</sup>
- Since its last default in 2008, international capital markets have remained closed to Ecuador;
  - Ecuador is exporting 60% of its petroleum to Chinese state-owned enterprises;
  - Ecuador is planning to sell or liquidate the bank it owns in the U.S. – Pacific National Bank, its largest asset in the U.S.
94. The Respondent has explained that what happened in 2008 was not a repudiation of bonds: the 2008 buy-back auction was a voluntary process and no claim ever has been brought against Ecuador for this reason.<sup>85</sup> The Chinese companies buying the oil belong to the same group as Andes, the company with whom Occidental signed the so called *Farmout Agreement*, and in any case is a short term contract. And the sale of the Pacific National Bank was the consequence of an order issued by the U.S. Federal Reserve.<sup>86</sup>
95. In view of Respondent’s explanation, the Committee is satisfied that none of Respondent’s actions denounced by Claimants, had the purpose of making enforcement of the Award more difficult, by hiding assets or by transferring such assets to jurisdictions where enforcement of ICSID awards *de facto* or *de iure* is less likely.

\* \* \*

96. Summing up, the Committee comes to the conclusion that Claimants have not been able to prove that there is substantial risk that Ecuador will not comply with the Award:
- It is true that in Ecuador the political reaction against the Award has been vocal and highly critical, but it is also true that the public declarations stopped short of an announcement that the Republic would not comply with its international treaty obligations.

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*Blocks Thirteen and Fourteen, Ltd. v. People's Republic of Bangladesh*, ICSID Case No. ARB/06/10, Procedural Order concerning provisional measures dated April 14, 2007 (“*Chevron*”), Doc. CAA 8.

<sup>83</sup> Respondent’s Response, para. 141.

<sup>84</sup> Claimants’ Request, paras. 81 – 84.

<sup>85</sup> Respondent’s Response, para. 155.

<sup>86</sup> Respondent’s Response, para. 188.

- It is true that the Republic has denounced the Convention and that the Constitutional Court has declared the U.S. – Ecuador BIT unconstitutional, but it is also true that the *Procurador General de la República*, acting on behalf of the Republic, has vouched that under Ecuadorian law ICSID awards issued under the protection of the Convention can be enforced without subjecting those awards to domestic judicial review and without the award creditor having to submit to any domestic enforcement procedure.
97. The Claimants have also not been able to prove that the Republic is trying to hide its assets or to move such assets to more favorable jurisdictions, with the aim of hindering the Claimants' eventual enforcement outside Ecuador.
98. Claimants have failed to prove that, if the annulment decision confirms the validity of the Award, Claimants' rights to enforce the Award, either in Ecuador or in any other Contracting States to the ICSID Convention, have actually deteriorated or that there is a risk that they will deteriorate in the future.
99. That said, should the Respondent's future conduct become of such nature as to materially increase the risk of non-compliance with the Award (should the Committee deny annulment), Claimants may request that the Continuation of the Stay granted by this Decision be terminated, as permitted by Rule 54(3) of the Arbitration Rules.

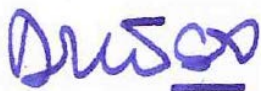
Subsidiary Argument

100. In view of the above, it is not necessary for the Committee to analyze Respondent's argument that posting of the security would require Ecuador to freeze US\$ 2.3 billion, an amount which represents almost 9% of Ecuador's 2012 budget, or Claimants' counterargument that in reality the amount of the Award only represents a small proportion of Ecuador's windfall profits from Block 15.

**V. DECISION**

101. For the reasons given above, the Committee unanimously decides:
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.

On behalf of the Committee



Juan Fernández-Armesto  
President