

Occidental Petroleum Corporation and Occidental Exploration and Production Company

v.

**Republic of Ecuador
Annulment Proceeding**

(ICSID Case No. ARB/06/11)

First Session of the *Ad Hoc* Committee

Date: March 25, 2013

Provisional Agenda

I. Agreed Procedural Matters

The Parties have agreed on most of the procedural issues listed by the Committee for consideration. See Annex I hereto. For ease of reference, the Parties have maintained the reference number for each issue as listed by the Committee.

II. Procedural Matters on Which the Parties Could Not Agree

The Parties' disagreements focus on the schedule to be followed in the main annulment proceedings, the nature of the submissions to be made by the Parties and the hearing.

13. Schedule of Written Pleadings (Arbitration Rules 20(1)(c) and 31)

Stay of enforcement

The parties have agreed to a schedule for the stay of enforcement proceedings under Arbitration Rules 20(1)(c) and 31. See Annex I.

Annulment

Ecuador's position

The schedule for the Annulment proceedings shall be as follows:

- Ecuador shall file a Memorial on Annulment within four months of the date of the procedural order setting forth the procedural calendar;
- Claimants shall file a Counter-Memorial on Annulment within four months thereafter;
- Ecuador shall file a Reply on Annulment within three months thereafter; and
- Claimants shall file a Rejoinder on Annulment within three months thereafter.

Claimants' position

As we stated in our letter dated February 20, 2013, Ecuador has not needed a procedural order from the Committee to begin working on its memorial on annulment. Over five months have now passed since Ecuador filed its annulment application. We expect, therefore, that Ecuador has

progressed on its memorial and should be able to submit it by early April, six months after the commencement of these proceedings. As Ecuador has stated that it has needed four months to prepare its papers, at the very least, Ecuador should be required to file its memorial on annulment in May, four months after the constitution of the Committee.

We continue to think the schedule we proposed in our letter of February 20 is appropriate. That proposal is as follows:

- Ecuador should file its submission in April or early May;
- Claimants shall file a Counter-Memorial on Annulment within 45 days thereafter;
- Ecuador shall file a Reply on Annulment within 45 days thereafter; and
- Claimants shall file a Rejoinder on Annulment within 45 days thereafter.

Such a schedule would enable a hearing on the annulment application by this fall, one year after the application was filed. Given the circumstances and the limited nature of annulment proceedings, we believe this is a fair and feasible schedule for these proceedings.

While Claimants believe the schedule above is appropriate, Claimants would be willing to accept a compromise schedule that offers a middle ground between the Parties' positions:

- Ecuador shall file its submission by May 31, 2013;
- Claimants shall file a Counter-Memorial on Annulment by July 31, 2013;
- Ecuador shall file a Reply on Annulment by September 30, 2013; and
- Claimants shall file a Rejoinder on Annulment by November 30, 2013.

Claimants hope that the hearing would then be scheduled to occur in December 2013.

14. Evidence: Witnesses and Experts, Written Statements and Reports, Supporting Documentation (Convention Article 43(a); Arbitration Rules 24 and 33-36)

Ecuador's position

- Document production

Ecuador reserves its right to request production of evidence after the filing of Claimants' submission.

- Witnesses, experts and supporting documentation

The Parties shall include all of the evidence on which they intend to rely, including written witness statements, expert opinions or reports, and other evidence in whatever form, with their written submissions.

Unless authorized or requested by the Committee, documents shall be submitted together with the pleadings which refer to them. If new documents are admitted after the exchange of the submissions on Annulment, the other Party shall be afforded sufficient opportunity to study and make its observations thereon.

All documentary evidence submitted to the Committee shall be deemed authentic and complete, including evidence submitted in the form of copies, unless a Party disputes its authenticity or completeness. The Committee shall decide on any objection as to the authenticity or completeness of the exhibits.

Duly certified copies of documents are not required unless the authenticity of the copy is contested and the Committee considers the certification necessary.

Each Party shall number the accompanying documentation consecutively throughout the entire proceeding (EEA-001 or CEA-001 for documentary evidence and EAA-001 or CAA-001 for legal sources) and shall number the paragraphs of each of their written pleadings. Any documents previously submitted to which the Parties wish to refer shall not be re-filed but referred to using the earlier number.

In their second written submissions, the Parties shall include only additional written witness testimony, expert opinion testimony, documents or other evidence that responds to or rebuts matters raised by the opposing Party's prior written submission, subject to documents obtained in the course of the document production phase.

Any individual may present evidence as a witness, including the Parties' representatives and persons affiliated with a Party.

Each witness statement and expert report shall:

- contain the name and address of the witness or expert, his or her relationship to the Party (if any) and a description of his or her qualifications;
- identify with specificity any document or other material relied upon; and
- be signed by the witness or expert and give the date and place of signature.

The documents or other materials relied upon by witnesses and/or experts shall be attached as exhibits to the submission with which the witness statements and/or expert reports are filed.

At least three weeks before the hearing on Annulment, each Party will identify the factual witnesses and expert witnesses whom it intends to examine. Shortly after the Parties' notifications, the Committee will indicate the witnesses and experts not called by the Parties that it wishes to question, if any.

Each Party shall be responsible for summoning their own witnesses and experts to the hearing(s).

The Committee may disregard the testimony of a witness or expert called to testify at the hearing who fails to appear at the hearing without justified reasons.

Witnesses and experts shall be examined by each Party under the control of the Committee. Before giving evidence, witnesses shall make the declaration set out in ICSID Arbitration Rule

35(2), and experts shall make the declaration set out in ICSID Arbitration Rule 35(3). The Committee may examine the witness or expert at any time during the oral procedure.

The witness statements and expert reports shall be sufficiently detailed so as to exempt witnesses and experts from direct oral examination. The direct examination at the hearing(s) shall be limited to confirming the witness statements or expert reports, to making any corrections to those documents, or to explaining briefly important aspects of their testimony. The direct examination is given in the form of witness statements and expert reports. However, the Party presenting the witness may conduct a brief direct examination. Subject to the direction of the Committee, there shall be no limitation on the scope of the cross-examination to the contents of the witness statement or expert report. However, in case a Party intends to cross-examine a witness or an expert outside the scope of his/her statement or report, it shall submit a week in advance of the hearing a list of issues to the opposing Party and to the Committee. Re-direct examination shall be limited to the subject of cross-examination.

Unless the Parties and the Committee agree otherwise, factual and expert witnesses shall not be allowed in the hearing room before giving their oral evidence.

The Committee shall freely assess all evidence, oral or written, including the written statements/expert reports of those witnesses/experts who have not been called to appear for cross-examination.

Where a witness/expert was called to appear at the hearing and does not appear, the Committee shall, upon its own assessment and having due regard to all the circumstances, including whether the non-appearance was justified, either reschedule the examination of such witness to a later date or consider and evaluate the value of his or her statement/report.

Claimants' position

Because the scope of annulment review is limited to the narrow grounds in Article 52 of the Convention, which do not require the submission of new evidence, it would be inappropriate, absent a direct request from the *ad hoc* Committee, to allow witness testimony, expert reports, or the production of additional documents in these proceedings. *Ad hoc* Committee jurisprudence clearly dictates that the record should not be reopened in the annulment phase of proceedings. See, e.g., *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines* ¶ 45 (“The Committee must determine the reasonableness the evidence and submissions which were before the Tribunal, and not on the basis of new evidence.”); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* ¶ 31 (“Under Article 52 of the ICSID Convention, an annulment proceeding is not an appeal, still less a retrial; it is a form of review on specified and limited grounds which take as their premise the record before the tribunal.”); *Hussein Nuaman Soufraki v. United Arab Emirates* ¶ 20 (same); *Sociedad Anónima Eduardo Vieira v. Republic of Chile* ¶ 237 (“Como consecuencia del control sobre la legitimidad del procedimiento que debe realizar un comité ad hoc, todo nuevo argumento o nueva evidencia sobre el fondo de la disputa deberá ser irrelevante para el procedimiento de anulación”); *Sempra Energy International v. Argentine Republic* ¶ 74 (“New arguments or evidence on the merits will therefore be irrelevant for the annulment process, and therefore not admissible.”). If the Committee does allow for additional evidence, it should only be under exceptional circumstances at the Committee’s sole discretion. See, e.g., *Sociedad Anónima Eduardo Vieira v. Republic of Chile* ¶ 237; *Sempra Energy International v. Argentine Republic* ¶ 74.

15. Hearings (Arbitration Rules 13(2) and 33-36)

Stay of Enforcement

The Committee has set the hearing on Claimants' application to lift the stay or to impose conditions to occur on May 13, 2013 in Paris. See Annex I.

Annulment

Ecuador's position

Ecuador suggests that the Hearing on Annulment be held within no less than two months after the date of submission of Claimants' Rejoinder on Annulment.

The date and the duration of the Hearing on Annulment, in the absence of an agreement, shall be determined by the Committee after consultation with the Parties.

Ecuador proposes that four days be reserved for a Hearing on Annulment.

Claimants' position

Claimants believe that the hearing on annulment should be held as soon as possible after the close of briefing. Because of the limited nature of review under Article 52 of the Convention, Claimants believe that only two days are necessary for a hearing on annulment. Claimants agree that the date and duration of the hearing on annulment should be decided by the Committee after consultation with the parties in the absence of an agreement at the March 25 procedural conference.

Annex I

1. Applicable Arbitration Rules (Convention Article 44 and Arbitration Rule 53)

Parties' agreement

These proceedings are to be conducted in accordance with the ICSID Arbitration Rules in force as of 10 April 2006.

2. Constitution of the Committee and Members' Declarations (Arbitration Rules 6 and 52(2))

Parties' agreement

The Parties confirmed that the Committee was properly constituted and that no Party has any objection to the appointment of any Member of the Committee.

3. Fees and Expenses of the Committee Members (Convention Article 60; Administrative and Financial Regulation 14; ICSID Schedule of Fees)

Parties' agreement

The fees and expenses of the Committee shall be set in accordance with Article 60 of the Convention and Administrative and Financial Regulation 14 and are limited to what is provided in the Centre's prevailing fee schedule.

4. Advance Payments to ICSID (Administrative and Financial Regulation 14(3)(e))

Parties' agreement

Ecuador will be responsible for making the advance payments requested by the Secretary-General to cover expenses following the constitution of the Committee, without prejudice to the final decision of the Committee as to the allocation of costs.

The Parties may present, in addition to the information required by Arbitration Rule 28(2), the Parties' positions as to how and by whom costs should be paid and arguments supporting those positions.

5. Presence and Quorum (Arbitration Rules 14(2) and 20(1)(a))

Parties' agreement

The presence of all Members of the Committee constitutes a quorum for its sittings.

6. Decisions of the Committee (Arbitration Rule 16(2))

Parties' agreement

Decisions of the Committee shall be taken by a majority of the Members of the Committee.

The Committee's decisions on procedural matters may be communicated to the Parties by correspondence, in accordance with Arbitration Rule 16(2). The President of the Committee will have the power to sign procedural orders on behalf of the Committee.

7. Delegation of Power to Fix Time Limits (Arbitration Rule 26(1))

Parties' agreement

The President has the power to fix and extend time limits for the completion of the various steps in the proceeding.

In exercising this power, the President shall consult with all Members of the Committee.

Extensions of time shall be granted by the Committee at its discretion, and provided that a request is submitted before or, where this is impossible, in special circumstances immediately after the event preventing a Party from complying with the deadline. The Parties may also decide between themselves to grant extensions of time, on the basis of mutual courtesy, subject to the consent of the Committee.

8. Representation of the Parties (Arbitration Rule 18)

The Parties shall be represented during these proceedings by the Counsel mentioned below. The Parties may designate additional Counsel by notification to the ICSID Secretariat.

Ecuador	Claimants
<p>PROCURADURIA GENERAL DEL ESTADO Dr. Diego García Carrión Dra. Christel Gaibor Dra. Diana Moya Dávalos Quito. Amazonas 477 y Roca Ecuador Tel.: +593 (2) 2222642 Emails: dgarcia@pge.gob.ec cgaybor@pge.gob.ec dmoya@pge.gob.ec</p> <p>SQUIRE SANDERS (US) LLP Mr. George von Mehren 7 Devonshire Square London EC2M 4YH United Kingdom Tel.: +44 20 7655 1395 Fax.: +44 (0)20 7655 1001 Email: george.vonmehren@squiresanders.com</p> <p>SQUIRE SANDERS (US) LLP Mr. Stephen P. Anway 30 Rockefeller Plaza New York, NY 10112 United States of America Tel.: +1 212 407 0146 Fax.: +1 212 872 9815 Email: stephen.anway@squiresanders.com</p> <p>DECHERT (Paris) LLP Prof. Eduardo Silva Romero Prof. Pierre Mayer Mr. Philip Dunham Mr. José-Manuel Garcia Represa Mr. Alvaro Galindo Ms. Audrey Caminades 32 Rue de Monceau Paris, 75008 France T : +33 1 57578080 F : +33 1 57578081 Emails: eduardo.silvaromero@dechert.com pierre.mayer@dechert.com philip.dunham@dechert.com jose-manuel.garciarepresa@dechert.com alvaro.galindo@dechert.com audrey.caminades@dechert.com</p>	<p>OCCIDENTAL PETROLEUM CORPORATION Mr. Donald P. de Brier Mr. John C. Ale Ms. Laura C. Abrahamson 10889 Wilshire Blvd. Los Angeles, CA 90024 United States T: 1-310-208-8800 F: 1-310-443-6314 Emails: donald_de_brier@oxy.com john_ale@oxy.com laura_abrahamson@oxy.com</p> <p>DEBEVOISE & PLIMPTON LLP Mr. David W. Rivkin Ms. Marjorie J. Menza Ms. Ina C. Popova Mr. Benjamin M. Aronson 919 Third Avenue New York, NY 10022 United States T: 1-212-909-6000 F: 1-212-909-6836 Emails: dwrivkin@debevoise.com mjmenza@debevoise.com ipopova@debevoise.com baronson@debevoise.com</p> <p>COVINGTON & BURLING LLP Mr. Gaëtan Verhoosel Ms. Carmen Martínez López Mr. Ian Redfearn 265 Strand London WC2R 1BH England T: 44-20-7067-2000 F: 44-20-7067-2222 Emails: gverhoosel@cov.com cmartinez@cov.com iredfearn@cov.com</p>

9. Place of Proceeding (Convention Articles 62 and 63; Administrative and Financial Regulation 26; Arbitration Rule 13(3))

Parties' agreement

The Parties prefer that Washington D.C. (United States of America) be the place of the proceeding, but are willing to attend hearings wherever the Committee finds convenient.

The Committee may deliberate in any place it considers convenient.

10. Procedural Language(s) (Arbitration Rules 20(1)(b) and 22)

Parties' agreement

The Parties agree that the languages of the proceedings would be Spanish and English (the "**Procedural Languages**").

The Parties will file their pleadings in English and, if they wish, Spanish. If a Spanish version is not filed simultaneously, a courtesy translation shall be provided within two weeks.

Documents filed in any language different from the Procedural Languages must be accompanied by a translation into Spanish and English. A document in either Spanish or English may be required to be translated into the other language within two weeks, at the request of the other Party or of the Committee. If the document is lengthy, it is sufficient if only the relevant parts are translated, provided that the Committee may require a fuller or a complete translation at the request of any Party or upon its own initiative. Translations need not be certified, unless there is a dispute as to the content of a translation provided and the Party disputing the translation specifically requests a certified version.

Oral arguments and testimony, if any, shall be heard in Spanish and English (other than the procedural conference of March 25, 2013, which shall be in English as agreed by the Parties). Simultaneous interpretation of all hearings shall be arranged by the ICSID Secretariat and charged to the case account, without prejudice to the Committee's final allocation of costs. The Parties shall inform the ICSID Secretariat of interpretation requirements at least two weeks in advance of the hearing.

11. Means of Communication and Copies of Instruments (Administrative and Financial Regulations 24 and 30; Arbitration Rules 20(1)(d) and 23)

Parties' agreement

a) Communications:

Written communications in the case shall be transmitted by email or other electronic means to the Parties, the ICSID Secretariat, and the Committee.

Electronic versions of communications ordered by the Committee to be filed simultaneously shall be transmitted to the Secretariat only, which shall send them to the Committee and to the Parties.

The Secretariat shall not be copied on direct communications between the Parties when such communications are not intended to be transmitted to the Committee.

The email addresses of the Members of the Committee are:

[TBC]

b) Instruments/Submissions:

The Parties shall:

- by the relevant filing date, submit by email to the Secretariat, the opposing Party, and the Committee an electronic version of the submission.
- courier to the Secretariat by the following within four business days:
 - one hard copy of the entire submission in whichever format the Committee prefers; and
 - two USB drives, or CD-ROMs or DVDs, with full copies of the entire submission.
- at the same time, courier to the opposing Party at the addresses indicated under paragraph 8 and each Member of the Committee at the addresses indicated under this paragraph, 11(b):
 - one hard copy of the entire submission in whichever format the Committee prefers; and
 - one USB drive, or CD-ROMs or DVDs, with a full copy of the entire submission.

The Members of the Committee's addresses are as follows:

[TBC]

For email, mail, and courier/parcel deliveries to the Secretariat, the contact details are:

[TBC]

Electronic versions of all documents in the submissions shall be text searchable (i.e., OCR PDF or Word).

The paragraphs (or groups of paragraphs) of all written submissions shall be numbered consecutively and the submissions shall include a table of contents.

The submissions to the Committee shall be accompanied by a list specifying the nature of each exhibit and/or legal authority, its date and its author. The list of exhibits and authorities shall be updated with each new submission in these proceedings.

12. Written and Oral Procedures (Arbitration Rules 20(1)(e) and 29)

Parties' agreement

The Annulment proceedings and the Stay of enforcement proceedings shall both consist of a

written phase followed by an oral phase.

The Parties and the Committee will discuss at the hearings whether to have post-hearing submissions.

13. Written and Oral Procedures (Arbitration Rules 20(1)(e) and 29)

Stay of enforcement

Parties' agreement

The schedule for the Stay of enforcement issue shall be as follows:

- Ecuador shall file a Response to Claimant's request to lift the provisional stay or to condition the stay on the posting of security on 5 April 2013 by 6 p.m. CET;
- Claimants shall file a Reply on 22 April 2013; and
- Ecuador shall file a Rejoinder on 6 May 2013.

15. Hearings (Arbitration Rules 13(2) and 33-36)

Parties' agreement

The Hearing on the stay of enforcement issue shall be held on 13 May 2013 in Paris (France).

16. Organizational Meeting(s) (Arbitration Rule 21(1))

Parties' agreement

The Parties should use their best efforts before a scheduled hearing to agree on the organizational aspects of such hearing (especially in connection with the marshalling of the evidence). For that purpose, the Parties should aim to hold a conference call with the Secretariat and the President of the Committee at least a month before any hearing. Such meetings may be conducted by telephone or video link.

17. Records of Hearings (Arbitration Rule 20(1)(g))

Parties' agreement

Sound recordings shall be made of all sessions. The sound recordings shall be provided to the Parties and the Committee.

Verbatim transcript(s) in the Procedural Languages shall be made of any sessions. Unless otherwise agreed by the Parties or ordered by the Committee, the verbatim transcripts shall be available in real-time using LiveNote or similar software and electronic transcripts shall be provided to the Parties and the Committee on a same-day basis.

18. Publication (Convention Article 48(5), Administrative and Financial Regulation 22, Arbitration Rule 48(4))

Parties' agreement

Any decision of the Committee may be published by the Centre.