INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

LIBANANCO HOLDINGS CO. LIMITED
Applicant

v.

REPUBLIC OF TURKEY
Respondent

ICSID Case No. ARB/06/8
ANNULMENT PROCEEDING

DECISION ON APPLICANT'S REQUEST FOR A CONTINUED STAY OF ENFORCEMENT OF THE AWARD

Members of the *ad hoc* Committee
Dr. Andrés Rigo Sureda, President
Judge Hans Danelius
Dr. Eduardo Silva Romero

Secretary of the *ad hoc* Committee
Ms. Martina Polasek

May 7, 2012

Representing Applicant

Mr. Robert Volterra
Mr. Stephen Fietta
Mr. Ashique Rahman
Volterra Fietta
London, United Kingdom

Prof. Andreas Lowenfeld
New York, United States

Representing Respondent

Dr. Veijo Heiskanen
Mr. Matthias Scherer
Ms. Laura Halonen
LALIVE
Geneva, Switzerland

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I. Procedural History

1. On December 12, 2012, Libananco Holdings Co. Limited ("Applicant") filed with the Secretary-General of the International Centre for Settlement of Investment Disputes ("ICSID") an application requesting the annulment of the award rendered on September 2, 2011 ("Award"). The application ("Application") was filed in accordance with Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention").

2. Under Article 52(5) of the ICSID Convention and Rule 54(1) of the ICSID Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"), the Application contained a request for a stay of enforcement of the Award ("Stay Request"), concerning the amount of USD15, 602,500.00 and interest in favor of Respondent.

3. On December 20, 2011, the Secretary-General informed the parties that the Application had been registered on that date. The parties were also notified that, pursuant to Rule 54(2) of the Arbitration Rules, enforcement of the Award was provisionally stayed.

4. By letter of February 14, 2012, in accordance with Rule 52(2) of the Arbitration Rules, the Secretary-General notified the parties that an *ad hoc* Committee ("Committee") had been constituted – composed of Dr. Andrés Rigo Sureda (Spanish) as President, and Judge Hans Danelius (Swedish) and Dr. Eduardo Silva Romero (Colombian and French) as Members – and that the annulment proceeding was deemed to have begun on that date. The parties were also informed that Ms. Martina Polasek would serve as Secretary of the Committee.

5. On February 16, 2012, the Committee invited Applicant to file the reasons for the Stay Request by March 2, 2012 and Respondent to file its observations thereon within fourteen days from Applicant's submission of reasons.

6. On March 2, 2012, Applicant filed its statement of reasons in support of the Stay Request ("Request").

7. On March 12, 2012, upon Respondent's request for an extension of time and after having received Applicant's observations on the extension, the Committee extended to March 23, 2012 the time-limit for Respondent to file its observations on the Stay Request.

8. On March 23, 2012, Respondent filed observations on the Stay Request ("Observations").

9. On March 26, 2012, the Committee invited Applicant to file a reply on the Stay Request by April 2, 2012 and Respondent to file a rejoinder by April 9, 2012. Following Respondent's request for an extension to file the rejoinder due to the Easter holidays, Applicant offered to file its reply earlier, by March 29, 2012. Accordingly, Applicant filed its reply on March 29, 2012 ("Reply") and Respondent filed its rejoinder on April 9, 2012 ("Rejoinder").

10. By agreement of the parties the Committee held its first session in Paris, France, on April 11, 2012. The parties made two rounds of oral submissions on the Stay Request (and on a request for provisional measures), which were recorded and transcribed. Present at the session were:

Attending on behalf of Applicant

Mr. Robert G. Volterra	Volterra Fietta
Mr. Stephen Fietta	Volterra Fietta
Mr. Ashique Rahman	Volterra Fietta
Mr. Bernhard Maier	Volterra Fietta

Attending on behalf of Respondent

Mr Ali Ağaçdan	Ministry of Energy and Natural Resources, Republic of Turkey
Mr Serkan Yikarbaba	Ministry of Energy and Natural Resources, Republic of Turkey
Mr Mustafa Çetin	Ministry of Energy and Natural Resources,

	Republic of Turkey
Ms Pelin Güdüllüoğlu	Ministry of Energy and Natural Resources, Republic of Turkey
Mr Veijo Heiskanen	Lalive
Mr Matthias Scherer	Lalive
Ms Laura Halonen	Lalive
Dr Martin Dawidowicz	Lalive
Ms Galiye Saraç	Interpreter

II. The Position of the Parties on the Stay Request

1. Applicant's Request

11. Applicant requests the continuation of the stay of enforcement of paragraph 570.3 of the Award until a decision is rendered by the Committee on the Application. In paragraph 570.3 the Arbitral Tribunal ordered Libananco Holdings Co. Limited to pay Respondent:

> "US$ 602,500 in reimbursement of the expended portion of the Respondent's advance on costs as well as US$ 15,000,000 in respect of the Respondent's legal fees and out of pocket expenses; such amounts to bear interest on the outstanding amount thereafter at the rate of three-month LIBOR plus one per cent per annum, such interest to run from the 31st day after the date of dispatch of this Award on the unpaid portion of the amounts due on this Award."

12. Applicant contends that actions taken on behalf of Respondent, including surveillance of Applicant's legal counsel and large-scale interception of privileged communications tainted the entire arbitration proceeding, and reasons as follows:

> "By granting the continuation of the stay, the *ad hoc* Committee would reserve the underlying question of whether annulment should be granted until such time as it has had an opportunity to evaluate the respective arguments from both Parties in full. If, on the other hand, it declined at this stage to continue the stay without having had a chance to hear the parties' arguments and to re-examine the underlying evidence, the *ad hoc* Committee would be prematurely rendering a decision that it may, upon having examined the claims put before it, then seek to reverse in the future. Given this, the *ad hoc* Committee should continue the stay." (Request, para. 9)

13. Applicant argues further that if Respondent would be allowed to enforce the awarded legal fees incurred in defending the original arbitration by illicit means, this would effectively amount to approval of Respondent's conduct in the original arbitration.

14. According to Applicant, if the Committee were to reject the Application, Respondent would be adequately compensated with the amount of interest that will continue to accrue during the annulment proceedings. On the other hand, if the Application was sustained it would be extremely difficult for Applicant to recover the payment made pursuant to paragraph 570.3 of the Award. Applicant points to the usual difficulties in seeking enforcement against sovereign States and to the political campaign against secular politicians in Turkey of which allegedly the expropriation of Applicant's assets subject of the arbitral proceedings was part.

15. Applicant argues that its request is neither dilatory nor vexatious and refers to cases in which ad hoc committees have found such criteria to be decisive in determining whether or not to grant a stay request. Applicant concludes by referring to the expropriation of its assets, its dire consequences for Applicant on its ability to pay the costs of the award and the "possibly irreparable burden" that enforcement would place on Applicant. (Request, para. 20)

2. Respondent's Observations

16. Respondent opposes the continuation of the Stay Request. Respondent argues that the stay should be lifted, that it is dilatory, that the precedents cited by Applicant refer to cases where a sovereign State is an award debtor and are far from uniform, and that it is part of the Uzan family's litigation harassment campaign against Turkey.

17. According to Respondent, stay requests are not automatic and there is no precedent of a stay granted at the request of an investor whose claim has been rejected for lack

of jurisdiction. Respondent contends that "[i]n such circumstances, a stay of enforcement is inappropriate."[1] (Observations, para. 11)

18. Respondent argues that: (a) there is no risk of frustration of recoupment; (b) this factor has been taken into consideration in cases where the private party is a creditor; and (c) Respondent has paid damages in an ICSID case and has a history of compliance with its international obligations.

19. On the other hand, it is Respondent's view that interest will not adequately compensate it for the delay in enforcement. Respondent maintains that enforcement and delay in payment are two separate issues and quotes in support the reasoning of the Committee in *Kardassopoulos and Fuchs* to the effect that post-award "interests compensate for the forbearance of the principal until payment of the award" and that "[a]lthough they have a bearing on the efficacy of the award, post-award interests are not directly related to the issue of award enforcement." (Observations, para. 31)

20. Respondent points out that Applicant has not provided any evidence that without the stay of enforcement Applicant would be placed under "a significant and possibly irreparable burden." According to Respondent, Applicant itself is merely a mailbox company but its backers are extremely wealthy.

21. Should the Committee decide to continue the stay, Respondent argues that it be conditional on the provision of financial security by Applicant. In support, Respondent explains that:

> "The Uzans are fugitives from justice that have accumulated enormous wealth by illegal means, in particular by committing massive frauds in the telecoms (the ***Telsim fraud***) and banking sector (the ***İmar Bank fraud***). The Applicant is an alter ego in this enterprise. A recurrent feature, recognised by multiple courts in numerous jurisdictions, has been that the Uzans, and in particular the Applicant's beneficial owner Cem Uzan, will do whatever it takes to hide their assets from enforcement of court

[1] The phrase is taken from Professor C. Schreuer's comments on *Soufraki* in *The ICSID Convention. A Commentary*, 2nd edition (2009) p. 1066.

> judgments against them. This includes fraudulent conveyance to prevent Turkey from enforcing the costs awards issued in the ICSID (Additional Facility) arbitrations brought by CNH and ECIT, two Polish companies. The Applicant and its backers have the means to comply with the Award, but they will certainly not do so." (Observations, para. 36. Emphasis in the original)

22. Respondent refers to considerations of past *ad hoc* annulment committees which have balanced the rights of the parties and often focused on the likely compliance with the award in deciding whether a stay order should be accompanied by a financial guarantee. According to Respondent, risk of non-compliance is the most important consideration in ordering security and, in the present case, non-compliance is a virtual certainty given the pattern of non-compliance of the Uzan family.

23. Respondent also points out that the ICSID Convention is not binding on Applicant and Respondent cannot rely on the primary security provided by the obligations assumed by States under Article 54. Hence, this consideration, which has been used in other cases as a reason for rejecting a request for security, is not applicable in the present circumstances.

3. Applicant's Reply

24. Applicant points out that: (a) in every case cited by Respondent to show that granting the stay is not automatic, the Tribunal in fact granted the continuation of the requested stay of enforcement; (b) the cases *Soufraki* and *RSM* cited by Respondent do not support the position of Respondent because claimants in these cases did not file a stay application; and (c) Professor Schreuer's statement is cited out of context. According to Applicant, viewed in its proper context such statement refers to circumstances in which no stay of enforcement had been requested.

25. Applicant argues that the Request and the Application are inextricably linked and should not be prejudged. It is Applicant's view that, "[w]ere the *ad hoc* Committee not to grant the stay request – which would merely require a party to litigation to behave in a manner that should in no way cause the slightest controversy – would

prematurely condone the Respondent's acts of surveillance, hacking and wiretapping that form the basis of the Application for Annulment." (Reply, para. 22)

26. In response to Respondent's contention that the Request is "dilatory and vexatious", Applicant refers to the legitimate grounds of the Request under Article 52(1) of the ICSID Convention and to "evidence of continued, uninterrupted procedural and substantive misconduct of a serious nature by the Respondent during the underlying arbitration, including repeated and deliberate noncompliance with the original Tribunal's orders." (Reply, para. 23) Applicant argues that "[i]n light of the amassed evidence and mindful of the Respondent's admission by failure to rebut, it is apparent that the Respondent's allegation that the Application for Annulment is 'dilatory and vexatious' is itself baseless and disproven by the evidence on record." (ibid.)

27. According to Applicant, ICSID jurisprudence has recognized consistently that payment of interest is sufficient to compensate for the delay in the enforcement of an award. Applicant finds the distinction made by Respondent between a delay in payment and a delay in the enforcement of the award artificial and intended to obfuscate the issue. Applicant points out that the Award provides that interest accrues until payment and concludes that "Respondent will be adequately compensated for any delay in both enforcement and payment of the Award." (Reply, para. 29)

28. To reject Respondent's demand that, if a stay is granted, the Committee should require that Applicant post security, Applicant relies on the argument that by granting the application for security the Committee would implicitly indicate that it has made up its mind before hearing the arguments and analyzing the evidence. Applicant adds that: (a) the ICSID Convention and the Arbitration Rules do not require an applicant for stay of enforcement to provide security as a condition for the stay; (b) ICSID jurisprudence supports the continuation of a stay free from conditions; (c) Article 53 of the ICSID Convention provides "primary security" that

"the Parties will abide and comply with the terms of the Award" (para. 41); and (d) conditioning the stay on the provision of security would further undermine the equality of arms in these proceedings.

29. Applicant further states that Respondent's allegations in Section 3.3 of its Observations regarding the Uzan family "highlight nothing more than the incumbent government's well-publicised and internationally-recognised, on-going campaign of persecution against political opposition in Turkey." Applicant therefore requests that the Committee strike this Section of Respondent's Observations from the record in its entirety.

4. Respondent's Rejoinder

30. Respondent observes that Applicant has changed the basis of its argument for a stay of enforcement from allegations of a "political pogrom" to references to illicit espionage. Respondent further observes that lack of denial by Respondent does not prove Applicant's case. Applicant needs to prove its case and Respondent, in any case, denies all allegations made by Applicant.

31. Respondent contends that the Uzans are highly relevant for these proceedings. According to Respondent, Applicant is a shell company and "alter ego" of the Uzans, who have a propensity to engage in fraud. Respondent insists that these proceedings are part of the Uzans' litigation harassment campaign against Respondent and all previous cases have been dismissed as totally unfounded or even fraudulent. For this reason, Respondent qualifies the present proceedings as dilatory and vexatious.

32. According to Respondent, *ad hoc* annulment committees have found that "a stay should be accompanied by financial security to counterbalance the parties' rights, or alternatively held that the most important consideration in deciding upon the necessity for security is the prospect of compliance with the award." (Rejoinder, para. 13)

33. Respondent takes issue with Applicant's request to strike Section 3.3 of the Respondent's Observations from the record. Respondent points out that evidence rather than argument may be deleted by ordinary tribunals; in the case of arbitral tribunals, it is their role to evaluate the weight of the evidence rather than to strike it out.

34. Respondent asserts that there cannot be a presumption in favor of stay because annulment is an extraordinary remedy and argues that interest is not sufficient compensation for the delay in enforcement. Respondent observes that Applicant has not addressed the argument made in Respondent's Observations that payment and enforcement are two separate matters and then adds as additional arguments that: (a) the interest under the Award is not compounded; (b) enforcement provides closure; and (c) "[...] it has been recognised in case law that the fact that there will be further delay in an ICSID award becoming enforceable during the annulment proceedings, regardless of interest, is a further factor to be taken into account in considering ordering security to be posted as a condition for a stay." (Rejoinder, para. 18)

35. Respondent points out that Applicant has failed to address, *inter alia*, (a) the issue that different considerations apply in the case of debtors who are sovereigns and those applicable to private parties; and (b) that there is no risk of recoupment in light of Respondent's unblemished record of compliance with ICSID awards.

36. Respondent disputes Applicant's argument that Respondent bears a heavy burden for establishing why a continuation of the stay should be conditioned on the provision of security. Respondent refers to the split in case law: some annulment committees have considered that the ordering of security was a question of balancing parties' rights, while others ordered security if there were sufficient doubts that the award would be paid; none of the cases places a heavy burden for security to be ordered.

37. Respondent points out that there is no reciprocal international law obligation on Applicant under Article 54(1) of the ICSID Convention and that, in the case of

Article 53, Applicant is "merely under a legal duty and obligation to implement the award based on its agreement to arbitrate." (Rejoinder, para. 25)

38. As a final point, Respondent notes that Applicant has not replied to Respondent's argument that the Applicant has no intention to respect the Award.

III. Analysis of the Committee

39. It will be useful for easy reference to reproduce here the relevant provisions of the ICSID Convention and the Arbitration Rules. Article 52(5) of the ICSID 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."

40. Rule 54 of the Arbitration Rules provides:

"(1) The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.

(2) If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provisional stay of the award. As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated.

(3) If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically

terminate on the date on which a final decision is rendered on the application, except that a Committee granting the partial annulment of an award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request any new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3).

(4) A request pursuant to paragraph (1), (2) (second sentence) or (3) shall specify the circumstances that require the stay or its modification or termination. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.

(5) The Secretary-General shall promptly notify both parties of the stay of enforcement of any award and of the modification or termination of such a stay, which shall become effective on the date on which he dispatches such notification."

41. Under these provisions, the Committee has discretion to grant the Stay Request after giving the parties the opportunity to be heard and after consideration of all the circumstances relevant to the Stay Request. *Ad hoc* annulment committees concur in considering that the review by a committee of a stay request at an early stage of an annulment proceeding is of a very preliminary character and should in no way be based on an assessment or prejudgment of what will be the final outcome of the annulment proceeding.[2] The factors taken into account by *ad hoc* annulment committees when deciding on stay of enforcement vary considerably, which may be explained by lack of guidance in the relevant provisions of the ICSID Convention and the Arbitration Rules and the particular circumstances of each request.[3]

42. The parties' arguments in the present case raise the following questions to be addressed by the Committee: (a) whether the granting of the continuation of the stay of enforcement, despite the Committee's discretion referred to in para. 41, should be considered to be almost automatic, and, if not, (b) whether stay of enforcement is

[2] See for instance, *Patrick Mitchell v. Democratic Republic of Congo* (ICSID Case No. ARB/99/7) Decision on the Stay of Enforcement of the Award, November 30, 2004, para. 26 ("*Mitchell* Decision").

[3] *CDC Group v. Republic of the Seychelles* (ICSID Case ARB/02/14) Decision on Whether or Not to Continue Stay and Order, para. 9.

appropriate in the circumstances of the present case and, in this respect, (c) whether the Stay Request is dilatory or vexatious, (d) what burden will be imposed on the respective parties should the Stay Request be granted or rejected, and (e) if the Stay Request is granted, whether it should be conditioned by some type of security.

43. The exercise of the discretion of the Committee depends on the circumstances surrounding the Stay Request and, therefore, the granting of a stay of enforcement or its continuation should in no way be regarded as automatic. The Committee is aware that some *ad hoc* annulment committees have considered that, "absent unusual circumstances, the granting of a stay of enforcement pending the outcome of the annulment proceedings has now become almost automatic."[4] However, this does not follow from the ICSID Convention or the Arbitration Rules, and the Committee considers that its decision should be based on an assessment of all relevant circumstances.

44. Respondent has based its argument on whether the Stay Request is appropriate on a comment by Professor Schreuer in his *Commentary* on the ICSID Convention. According to Applicant, the comment has been taken out context. The comment in question appears at the end of a long paragraph which in relevant part reads as follows:

"[...] In *Vivendi I*, the Tribunal had declined to rule on the merits of the claims arising out of the conduct of the Province of Tucumán, so there was no part of the Award's *dispositif* that warranted a stay. In *Soufraki v. UAE*, the Tribunal had ruled that it lacked jurisdiction so again, there was no call for a stay of enforcement. Likewise, in *Luchetti v. Peru*, it was the Claimant that sought annulment of an Award that had concluded that the Tribunal lacked jurisdiction. In such circumstances, a stay of enforcement is inappropriate."[5]

[4] *Víctor Pey Casado and Foundation "President Allende" v. Republic of Chile* (ICSID Case ARB/98/2) Decision on the Republic of Chile's Application for a Stay of Enforcement of the Award, para. 25.

[5] C. Schreuer, *The ICSID Convention. A Commentary*, 2nd edition (2009) p. 1066. Footnotes omitted.

45. The Committee first notes that the above text is part of a section which deals with "Provisional Stay of Enforcement" and not with the consideration of stay of enforcement requests by *ad hoc* annulment committees. Second, there was no request for provisional stay of enforcement in the cases mentioned in the quoted text or in the *RSM v. Grenada* case also cited by Respondent, a fact that Respondent itself has recognized.[6] Third, in the instant case, the Stay Request has been provisionally granted by the Secretary-General. The Committee further notes that there is no distinction in the ICSID Convention between awards on jurisdiction or awards on the merits for purposes of enforcement.

46. In the Committee's view, the key question is whether part of the *dispositif* of the award warrants a stay of execution, as observed by Professor Schreuer in respect of *Vivendi I*. The *dispositif* of most awards on jurisdiction will not warrant a stay of execution. In the instant case, however, and as already noted, Applicant has been ordered: "to pay the Respondent US$ 602,500 in reimbursement of the expended portion of the Respondent's advance on costs as well as US$ 15,000,000 in respect of the Respondent's legal fees and out of pocket expenses; such amounts to bear interest on the outstanding amount thereafter at the rate of three-month LIBOR plus one per cent per annum, such interest to run from the 31st day after the date of dispatch of this Award on the unpaid portion of the amounts due on this Award." (Award, para. 570.3)

47. The Committee has no doubt that, given the terms of the *dispostif* of the Award, Applicant has a clear interest in obtaining a continued stay of enforcement of the order on reimbursement and cost compensation, this being an interest which should be balanced against Respondent's interest in enforcing this part of the Award at an early point in time.

48. Respondent has argued against the continuation of the stay because of its dilatory and vexatious character. According to the *Mitchell ad hoc* annulment committee,

[6] Respondent's Observations, "No stay application accompanied the request for annulment filed by the respective unsuccessful claimants in these cases [*Soufraki* and *RSM*], para. 11.

the dilatory character of a request refers to "[...] the apparent seriousness of the invoked grounds; a *prima facie* dilatory application would be the one with a manifestly abusive character and would be for that reason only exclude the stay of enforcement".[7] For the *MTD ad hoc* annulment committee a dilatory stay request is an application "brought without any basis under the Convention."[8] A vexatious request is one which is abusive as being made for an improper purpose.

49. The Committee notes that Applicant has requested annulment of the Award in its entirety pursuant to Article 52(1) of the ICSID Convention and in particular has referred to, without limitation, the grounds enumerated in Article 52(1)(b) and (d). The Committee is not in a position at this stage of the proceeding to question the seriousness of the alleged grounds for annulment and there are no circumstances that would justify the assessment as a preliminary matter of whether or not the application is likely to succeed.[9] Consequently, the Committee finds no basis for declaring the Stay Request to be dilatory or vexatious.

50. The parties have exchanged arguments on the respective burden that denial of the request or its continuation would entail. Applicant argues that denial of the Stay Request would be "a possibly irreparable burden." Applicant recalls in this respect statements made by Turkish high officers as reported in the press to the effect that not one cent would be paid to Applicant. Against this argument Respondent affirms that Applicant would have no difficulty in recouping the amount of the Award if the continuation of the stay of enforcement would be denied and the Application would succeed. Respondent refers in support to its unblemished record of payment of ICSID awards and fulfillment of its international obligations.

[7] *Mitchell* Decision, para. 26.

[8] *MTD Equity Sdn. Bhd. & MTD Chile S.A. v. Republic of Chile* (ICSID Case ARB/01/7) Ad hoc Committee's Decision on the Respondent's Request for a Continued Stay of Execution ("*MTD* Decision"), June 1, 2005, para. 28.

[9] Ibid.

51. The Committee has no reason to doubt the statements of Respondent according to which Applicant, if stay of enforcement is refused, would eventually be able to recover the amount of the Award should the Application succeed and the Award be annulled. As regards Respondent's enforcement of the Award, the Committee also notes that, in the words of Respondent, Applicant is bankrupt but has very rich backers, a fact which the Committee is not in a position to evaluate.

52. Some *ad hoc* annulment committees have found that the delay in enforcement is compensated by the interest that accrues on the amount of the award during the stay. Respondent has argued that in this case it would not be fully compensated because the Award does not order payment of compound interest. This is a consequence of the terms of the Award. In the view of the Committee, it is not up to the Committee to improve on the terms of the Award because of granting a continuation of a stay of enforcement.

53. A further argument of Respondent against the Stay Request is that enforcement brings closure. While the Committee appreciates the desire of parties to a judicial proceeding to reach closure, in the instant case the Committee does not find the argument convincing since enforcement of the Award would not bring *this* proceeding to closure.

54. To conclude, on balance, the Committee is of the view that Applicant's interest in a continued stay of enforcement pending the outcome of the annulment proceeding should be given more weight than Respondent's interest in immediate enforcement. In this respect, the Committee also takes into account that, according to the current plans for the annulment proceeding, the continued stay of enforcement can be expected to be of relatively short duration. The Committee therefore finds that the Stay Request should be granted and will turn now to whether it should be subject to any conditions.

55. The power of the Committee to impose conditions on the stay of enforcement is not in dispute. Such power has been assumed in prior cases and has also been confirmed

by an *ad hoc* annulment committee on a rare occasion when it had been disputed by a party.[10] The Committee is mindful that the jurisprudence of ICSID varies and includes decisions which require some form of security as a condition for granting a continuation of a stay of enforcement as well as decisions which do not impose such a requirement.

56. As a general matter it is useful to recall that a party in an ICSID arbitration, whether it be a state or a private party, has no right under the ICSID Convention to protection from enforcement efforts while pursuing an annulment proceeding. In the instant case Applicant would draw a benefit to which it has no right and for which a cost may be imposed in some form of assurance to comply with the Award should the Application be dismissed. The assurance imposed would simply serve the purpose of balancing the rights of the parties as a counterpart to the benefit that would be granted to Applicant.

57. Applicant has argued that, if security would be required for the continuation of the stay, it would imply acceptance by the Committee of the alleged illegal activities of Respondent. The Committee disagrees. By requiring security, the Committee would not approve or accept any activities of Respondent on which, moreover, the Committee cannot at this stage express any opinion. The issue to be determined by the Committee is whether, in the circumstances of the present case, to impose a security on Applicant would be the appropriate means to balance the rights of the parties.

58. The Committee recalls that it is common ground between the Parties that Libananco has no significant assets. As noted by Respondent during the Hearing, "Nor is there any prospect that Turkey, in the absence of voluntary compliance, would ever be able to enforce the costs award against Libananco. The company is a mere shell; as the evidence shows, it has no assets […]" [*Minutes of the First Session of the* Ad Hoc *Committee*, P:56;L13-17]. Applicant itself asserted that (a) "$15 million

[10] *Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case ARB/01/3) Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, para. 22 and ff.

required to be paid by a company whose assets have been expropriated is an enormous economic burden" [*Minutes of the First Session of the* Ad Hoc *Committee*, P:71; L21-23] and (b) "the prospect of compliance, if that is a standard of the criteria, the Respondent hasn't even talked about Libananco, other than to say it doesn't have any assets. Well, Respondent is stripped [*sic*] of its assets" [*Minutes of the First Session of the* Ad Hoc *Committee*, P:72; L14-18].

59. The Committee notes, on the one hand, that a requirement to post security would be likely to be burdensome for Applicant in view of its scarce financial means. Moreover, the Committee is not in possession of information on the basis of which it can reasonably conclude that Applicant's backers should be expected to provide means for this purpose.

60. On the other hand, the Committee finds no evidence showing that Respondent's chances of obtaining enforcement of the Award would deteriorate as a result of the stay of enforcement, if the Application should eventually be rejected. For this reason, the stay of enforcement cannot be expected to place a heavy burden on Respondent.

61. In these circumstances, the Committee is of the view that requiring security would affect Applicant's situation in a disproportionate manner and that the stay of enforcement should not be subject to any such condition.

62. Finally, the Committee finds no basis for Applicant's request that Section 3.3 of Respondent's Observations of March 23, 2012 be struck from the record and concludes that this request must be rejected.

IV. Decision

63. For the reasons set forth above, the Committee decides:

(a) To continue unconditionally the stay of enforcement until the Committee decides on the Application.

(b) To reserve its decision on costs related to the Stay Request for a later stage of the proceedings.

(c) To reject Applicant's request that Section 3.3 of Respondent's Observations of March 23, 2012 be struck from the record.

On behalf of the Committee

[SIGNED]

Andrés Rigo Sureda
President