

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PERENCO ECUADOR LTD.,)
Lyford Manor, Lyford Cay Western Road)
P.O. Box N-10051)
Nassau, Bahamas)
Petitioner,) Case No. 19-CV-
v.)
THE REPUBLIC OF ECUADOR,)
Respondent.)

PETITION TO ENFORCE ARBITRAL AWARD

1. Petitioner Perenco Ecuador Ltd. (“Perenco”), by and through undersigned counsel, brings this action pursuant to 22 U.S.C. § 1650a and Article 54 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the “ICSID Convention”). Petitioner seeks recognition and enforcement of an arbitral award (the “Award”) issued on September 27, 2019, in International Centre for the Settlement of Investment Disputes (“ICSID”) Case No. ARB/08/6 against Respondent, the Republic of Ecuador (“Ecuador”). A certified copy of the Award is attached as Exhibit A, filed concurrently with and in support of this Petition. The Award imposed pecuniary obligations on Ecuador in the net amount of \$394,380,883.00 on the parties’ substantive claims plus \$16,723,847.00 in legal fees and costs. The Award provided for post-award interest on both amounts to accrue from December 1, 2019. The Award also provided that Perenco shall pay Petroecuador \$49,629.76 in legal fees and costs together with simple interest accruing from June 30, 2011. The Award thus entitled Perenco to the net amount of \$411,042,817.89 as of October 1, 2019, subject to adjustments for interest specified in the Award.

2. To date, Ecuador has not paid any portion of the Award.
3. Enforcement of the Award has not been stayed by the arbitral tribunal (the “Tribunal”).
4. Pursuant to Article 54 of the ICSID Convention and 22 U.S.C. § 1650a, arbitral awards issued under the ICSID Convention are not subject to collateral attack and must be enforced and given the same full faith and credit as if the award were a final judgment of a court in the United States.
5. Accordingly, Perenco requests that this Court: (1) enter an order recognizing the Award and enforcing it in the same manner as a final judgment issued by a court in the United States; (2) enter judgment in Perenco’s favor against Ecuador in the net amount set forth in the Award, subject to adjustments for interest, and the costs of this proceeding; and (3) award Perenco such other and further relief as the Court may find just and proper.

PARTIES

6. Petitioner Perenco is a private company incorporated under the laws of the Commonwealth of the Bahamas.
7. Respondent Ecuador is a foreign state within the meaning of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332, 1391(f), and 1602-11.
8. Ecuador signed the ICSID Convention on January 15, 1986, and deposited its instrument of ratification on the same date. The ICSID Convention entered into force for Ecuador on February 14, 1986. On July 6, 2009, the depositary received a written notice of Ecuador’s denunciation of the ICSID Convention. In accordance with Article 71 of the ICSID Convention, the denunciation took effect six months after the receipt of Ecuador’s notice, on January 7, 2010. Ecuador’s denunciation did not prevent ICSID from hearing and resolving this case because Ecuador’s membership and consent to ICSID jurisdiction as of the filing of the arbitral proceeding gave it a continuing obligation to abide by the ICSID Convention with respect to that

dispute. *See* ICSID Convention, art. 72 (“Notice by a Contracting State [that it intends to withdraw from the ICSID Convention] shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.”). A copy of the ICSID Convention is attached to this Petition as Exhibit D.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this action pursuant to 22 U.S.C. § 1650a(b), which provides that “[t]he district courts of the United States . . . shall have exclusive jurisdiction over actions and proceedings” to enforce awards entered under the ICSID Convention.

10. In addition, this Court has subject matter jurisdiction over this action because this action is a “nonjury civil action against a foreign state” on a claim “with respect to which the foreign state is not entitled to immunity” under certain subsections of the Foreign Sovereign Immunities Act (“FSIA”). 28 U.S.C. § 1330(a).

11. Ecuador is not entitled to immunity from this Court’s jurisdiction in an action to enforce an award issued pursuant to the ICSID Convention. First, Ecuador waived any such immunity by becoming a party to the ICSID Convention. 28 U.S.C. § 1605(a)(1); *see* ICSID Convention, art. 54 (“Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.”); *Blue Ridge Investments, L.L.C. v. Republic of Argentina*, 735 F.3d 72, 84 (2d Cir. 2013) (ruling that “Argentina waived its sovereign immunity [under § 1605(a)(1)] by becoming a party to the ICSID Convention”). Second, Ecuador is not

immune because the Award was governed by the ICSID Convention, a treaty in force in the United States calling for the recognition and enforcement of arbitral awards. § 1605(a)(6)(B).

12. This Court has personal jurisdiction over Ecuador pursuant to the FSIA, 28 U.S.C. § 1330(b).

13. Venue is proper in this Court pursuant to the FSIA, 28 U.S.C. § 1391(f)(4).

14. The Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 *et seq.*, does not apply to “enforcement of awards rendered pursuant to the [ICSID] convention.” 22 U.S.C. § 1650a(a). As such, the FAA’s jurisdictional requirements do not apply to this action.

THE UNDERLYING DISPUTE

15. The facts giving rise to the arbitration are not in dispute and have been settled by the Tribunal in a previous award. *See* Decision on Remaining Issues of Jurisdiction and on Liability (the “2014 Decision on Liability”) (Ex. B). The dispute arose out of Perenco’s investments in two blocks of oil fields in Ecuador, known as Block 7 and Block 21. *See id.* ¶ 43. On September 4, 2002, Perenco and Ecuador entered into two agreements (the “Participation Contracts”) pursuant to which Perenco became the sole operator and majority holder of the oil fields of Block 7 and Block 21. *Id.* ¶¶ 43, 70.

16. In April 2006, following a change in political leadership, Ecuador enacted Law 42, which required oil companies with participation contracts (including Perenco) to grant Ecuador at least 50 percent of the company’s revenues above the reference point (defined as the monthly average oil price in effect at the time of the execution of the contracts). *See id.* ¶¶ 96-99. The following October, Ecuador enacted Decree 662, which increased Ecuador’s share of Perenco’s revenues from its operations in Block 7 and Block 21 to 99 percent. *See id.* ¶¶ 109-10.

17. On July 16, 2009, Ecuador physically seized Perenco’s operations in Block 7 and Block 21. *See id.* ¶ 206. On November 12, 2009, the Ecuadorian Ministry of Mines initiated

caducidad proceedings to terminate the Participation Contracts. *Id.* ¶ 214. Ecuador formally declared *caducidad* of the Participation Contracts, effectively terminating them, on July 20, 2010. *Id.* ¶ 215.

THE ARBITRATION

18. On April 30, 2008, Perenco filed its request for arbitration against Ecuador with ICSID (the “Request”). In the Request, Perenco claimed that Ecuador had violated its obligations under the Participation Contracts, as well as under the France-Ecuador Bilateral Investment Treaty (the “BIT”).¹ Perenco filed an amended version of the Request on July 28, 2008.

19. Perenco’s Request was based on Article 9 of the BIT, which provides for ICSID arbitration of “any legal dispute arising between [a Contracting Party, *i.e.*, France or Ecuador,] and a national or a company of the other Contracting Party by the latter in its territory.”

Perenco’s Request was also based on the arbitration clauses contained in both Participation Contracts, which provided for arbitration before ICSID.

20. On June 4, 2008, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention. On November 21, 2008, the Tribunal was initially constituted. Due to resignations by arbitrators, the Tribunal was reconstituted in its final form on May 6, 2010. The Tribunal, in its final form, was chaired by Judge Peter Tomka, a national of Slovakia. Perenco appointed Mr. Neil Kaplan CBE, QC, SBS, a United Kingdom national, and Ecuador appointed J. Christopher Thomas QC, a Canadian national.

21. The Tribunal held a hearing on jurisdiction from November 2–4, 2010. Both Ecuador and Perenco were represented by counsel and fully participated in the hearing. The Tribunal issued a decision dismissing certain jurisdictional objections and reserving judgment on others

¹ France and Ecuador signed the BIT on September 7, 1994, and the BIT entered into effect on June 10, 1996. A copy of the BIT is attached to this Petition as Exhibit E.

on June 30, 2011 (the “Decision on Jurisdiction”). Perenco had initially named Petroecuador as a second respondent in the arbitration, but the Tribunal held in the Decision on Jurisdiction that it had no jurisdiction over Petroecuador.

22. The Tribunal held a hearing on the merits and remaining jurisdictional issues from November 8–16, 2012. On September 12, 2014, the Tribunal issued the 2014 Decision on Liability. 2014 Decision on Liability (Ex. B). In the comprehensive 234-page decision, the Tribunal held that Ecuador’s 2008 imposition of the 99-percent windfall tax had breached the Participation Contracts and Article 4 of the BIT, and that Ecuador’s declaration of *caducidad* breached the Participation Contracts and Article 6 of the BIT. *Id.* ¶ 713. The Tribunal also held that, although Perenco is a company incorporated under the laws of the Commonwealth of the Bahamas, the BIT applies to the Participation Contracts because Perenco—through its parent company, Perenco International Limited—is controlled by French nationals. *See id.* ¶¶ 509-30.

23. In December 2011, Ecuador asserted environmental counterclaims under Ecuadorian law. These counterclaims were briefed separately, and on August 11, 2015, the Tribunal rendered an interim decision on the counterclaims (the “2015 Decision on Counterclaims”). 2015 Decision on Counterclaims (Ex. C).

24. The Tribunal held hearings on damages from November 9-13, 2015, and on April 21, 2016.

THE AWARD

25. On September 27, 2019, the Tribunal issued the Award, ruling that Ecuador’s breaches entitled Perenco to compensation for its substantive claims in the amount of \$448,820,400.00 plus interest at a rate of LIBOR for three-month borrowing plus two percent, compounded annually, accruing from December 1, 2019, until the date of full and final payment. Award ¶ 1023(a) (Ex. A). The Award also requires Perenco to pay Ecuador \$54,439,517.00 as

compensation for the environmental counterclaims that Ecuador asserted plus interest at a rate of LIBOR for three-month borrowing plus two percent, compounded annually, accruing from December 1, 2019, until the date of full and final payment. *Id.* ¶ 1023(b). The net amount to which Perenco is entitled under the Award as compensation for its substantive claims is thus \$394,380,883.00, in addition to the specified post-award interest.

26. The Tribunal also ordered both Perenco and Ecuador to pay a portion of each other's legal fees and costs. The Award required Ecuador to pay Perenco \$23,000,000.00 and Perenco to pay Ecuador \$6,276,153.00, in each case together with simple interest at an annual rate of three percent accruing from December 1, 2019, until the date of full and final payment. *Id.* ¶¶ 1023(c)-(d). The net amount to which Perenco is entitled under the Award as a contribution to its legal fees and costs is thus \$16,723,847.00, in addition to the specified post-award interest.

27. Finally, the Tribunal also ordered Perenco to pay Petroecuador, a state instrumentality of Ecuador, for its legal fees and costs. The Award required Perenco to pay Petroecuador \$49,629.76 together with simple interest at an annual rate of three percent accruing from June 30, 2011 (the date of dispatch of the Tribunal's Decision on Jurisdiction), until the date of full and final payment. *Id.* ¶ 1023(e). The accrued interest from June 30, 2011 to October 1, 2019 is \$12,282.35, resulting in a total amount payable to Petroecuador of \$61,912.11 as of the date of this Petition. For purposes of this action, the Petitioner assumes that the small amount Perenco must pay to the Ecuadorian State oil company, Petroecuador, will simply be netted against the much larger amount that Ecuador must pay to Perenco, which will therefore modestly reduce the debt Ecuador owes to Perenco. If, however, Ecuador or Petroecuador were to seek and receive a separate payment from Perenco to Petroecuador, then the amount paid to Petroecuador would not

reduce Ecuador's debt, and the net amount that Ecuador would have to pay to Perenco would increase by the same amount.

28. The net amount Ecuador owes to Perenco under the Award as of the date of this Petition is \$411,042,817.89, the sum of the net amounts due to Perenco for the parties' substantive claims and their fees and costs, less the amount due to Petroecuador (including interest accrued on the Petroecuador amount from June 30, 2011 through the October 1, 2019 date of this Petition). The net amount will change slightly between the time of this Petition and the Court's entry of judgment. In particular, from December 1, 2019, the net amount will increase due to the interest accruing on the substantial amount that Ecuador owes to Perenco. From October 1, 2019, the net amount will decrease slightly due to interest of \$4.08 per day on the small amount that Perenco owes to Petroecuador. The Petitioner respectfully requests that the net amount be updated so that it is accurate and current as of the date that the Court enters the judgment.

LEGAL FRAMEWORK FOR RELIEF

29. Article 54 of the ICSID Convention requires contracting states to "recognize an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State." The United States is a contracting state to the ICSID Convention and is therefore obligated to recognize and enforce the pecuniary obligations imposed by an ICSID award, according it "the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States." 22 U.S.C. § 1650a(a); *see also* ICSID Convention, art. 54 (requiring member states to "recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award").

30. An arbitral award issued against a foreign state under the ICSID Convention may be recognized and enforced through a plenary action in federal court. This action must comply with

the requirements for commencing a civil action under the Federal Rules of Civil Procedure, and with the personal jurisdiction, service, and venue requirements of the FSIA. *See Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 112 (2d Cir. 2017); *see also Micula v. Gov't of Romania*, 104 F. Supp. 3d 42, 49–50 (D.D.C. 2015).

31. Awards issued pursuant to the ICSID Convention are not subject to collateral attack in enforcement proceedings under 22 U.S.C. § 1650a. “Member states’ courts are . . . not permitted to examine an ICSID award’s merits, its compliance with international law, or the ICSID tribunal’s jurisdiction to render the award; under the Convention’s terms, they may do no more than examine the judgment’s authenticity and enforce the obligations imposed by the award.” *Mobil Cerro*, 863 F.3d at 102; *see OI European Grp. B.V. v. Bolivarian Republic of Venezuela*, No.16-CV-1533 (ABJ), 2019 WL 2185040, at *4 (D.D.C. May 21, 2019) . The ICSID Convention therefore “reflects an expectation that the courts of a member nation will treat the award as final.” *Mobil Cerro*, 863 F.3d at 102; *see also id.* at 118 (noting that an “ICSID award-debtor . . . [is] not . . . permitted to make substantive challenges to the award”); ICSID Convention, arts. 53(1), 54(1).

32. Accordingly, the Court should confirm the Award.

**COUNT I
FOR RECOGNITION OF ARBITRATION
AWARD PURSUANT TO 22 U.S.C. § 1650a**

33. Petitioner re-alleges and incorporates by reference preceding paragraphs 1 through 32 as if set forth fully herein.

34. A binding arbitration award under the ICSID Convention has been issued in Perenco’s favor.

35. Arbitral awards issued pursuant to the ICSID Convention are subject to mandatory recognition and enforcement in the courts of the United States. 22 U.S.C. § 1650a(a).

36. Ecuador has not paid any portion of the Award.

37. Accordingly, Perenco is entitled to an order enforcing the Award as a judgment pursuant to Article 54 of the ICSID Convention and 22 U.S.C. § 1650a, and entering judgment thereon in the amount of \$411,042,817.89, subject to the adjustments for interest accruing from the date of this Petition set forth in the Award.

PRAYER FOR RELIEF

WHEREFORE, Perenco respectfully requests that the Court enter judgment in favor of Perenco and against Ecuador and requests that the Court issue an order:

- (a) Entering judgment on the pecuniary obligations in the Award in the same manner and with the same force and effect as if the Award were a final judgment of this Court, as authorized by 22 U.S.C. § 1650a and Article 54 of the ICSID Convention;
- (b) Ordering Ecuador, in accordance with the pecuniary obligations contained in the Award, to pay to Perenco \$411,042,817.89, representing the net amount awarded to Perenco, subject to the following adjustments for interest:
 - i. increase in the net amount due to Perenco for interest on \$394,380,883.00 at LIBOR for three-month borrowing plus two percent, compounded annually, accruing from December 1, 2019, until full and final payment;
 - ii. increase in the net amount due to Perenco for interest on \$16,723,847.00 at an annual rate of three percent accruing from December 1, 2019, until full and final payment; and
 - iii. decrease in the net amount due to Perenco for interest on \$49,629.76 due Petroecuador at an annual rate of three percent, amounting to \$4.08 per day, accruing from October 1, 2019, until full and final payment;
- (c) Awarding attorneys' fees and costs associated with this proceeding; and

(d) Granting any other relief as the Court deems just and proper.

Dated: October 1, 2019
Washington, DC

Respectfully submitted,

/s/ Ada Fernandez Johnson

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