INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

BURLINGTON RESOURCES, INC.

v.

REPUBLIC OF ECUADOR

ICSID Case No. ARB/08/5 – ANNULMENT PROCEEDING

DECISION ON STAY OF ENFORCEMENT OF THE AWARD

Members of the Committee
Andrés Rigo Sureda, President
Piero Bernardini
Vera Van Houtte

Secretary of the Committee
Alicia Martín Blanco

August 31, 2017

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I. PROCEDURAL HISTORY

1. On February 14, 2017, the Secretary-General registered an application for annulment of the Award rendered on February 7, 2017 in ICSID Case No. ARB/08/5, filed by the Republic of Ecuador (the "**Application for Annulment**"). The Application for Annulment included a stay of enforcement request. Specifically, it requested that the Secretary-General notify the Parties of the provisional stay of enforcement of the Award, and that the stay be continued by the *ad hoc* Committee once constituted.

2. On February 14, 2017, the Secretary-General notified the Parties of the provisional stay of the enforcement of the Award, pursuant to ICSID Arbitration Rule 54(2).

3. On May 15, 2017, the *ad hoc* Committee was constituted in accordance with ICSID Arbitration Rules 6 and 53. Its Members are: Andrés Rigo Sureda (Spanish) President, designated to the ICSID Panel of Arbitrators by Spain; Piero Bernardini (Italian), designated to the ICSID Panel of Arbitrators by Italy, and Vera Van Houtte (Belgian) designated to the ICSID Panel of Arbitrators by Belgium.

4. On May 19, 2017, Burlington Resources, Inc. (**"Burlington" or "Claimant"**) filed its Opposition to Ecuador's Application to Continue the Stay and Application to Require Ecuador to Post Adequate Financial Security as a Condition to Continuing the Stay or, Alternatively, to Lift the Stay ("**Burlington's Opposition"**).

5. On June 14, 2017, Ecuador filed its Response to Burlington's Request to Lift the Provisional Stay or to Condition the Stay on the Posting of Security **("Ecuador's Response")**.

6. On June 26, 2017, Burlington filed its Reply to Ecuador's Response to Burlington's Opposition to Ecuador's Application to Continue the Stay and Application to Require Ecuador to Post Adequate Financial Security as a Condition to Continuing the Stay or, Alternatively, to Lift the Stay ("**Burlington's Reply"**).

7. On June 2, 2017, the Applicant confirmed its agreement to extend the 30-day limit contained in ICSID Arbitration Rule 54(2) for the Committee to render its decision on stay

of enforcement. On the same date, the Claimant confirmed its willingness to extend the same time limit until August 31, 2017 or dates reasonably close to this date.

8. Following the first session of the Committee and preliminary procedural consultation with the Parties on June 23, 2017, the *ad hoc* Committee issued Procedural Order No. 1 concerning procedural matters on June 30, 2017.

9. On July 6, 2017, Ecuador filed its Rejoinder to Burlington's Request to Lift the Provisional Stay or to Condition the Stay on the Posting of Security ("**Ecuador's Rejoinder"**).

10. The hearing on stay of enforcement was held on July 18, 2017.

II. POSITION OF THE PARTIES

a. Ecuador's Request to Continue the Stay of Enforcement

11. Ecuador requested the stay of enforcement in its Application for Annulment (the "Request"). It also requested that the stay continue after the constitution of the Committee. In both instances the request was not supported by any justification.

b. Burlington's Opposition

12. Promptly after the constitution of the Committee, the Claimant filed its Opposition to Ecuador's Application to Continue the Stay and its Application to require Ecuador to Post Adequate Financial Security as a Condition to Continuing the Stay or, Alternatively, to Lift the Stay (the "Opposition to Ecuador's Application"). The Claimant points out that Ecuador has failed to justify the Request and recalls that "Arbitration Rule 54(4) requires the party moving for a continuance of the stay to 'specify the circumstances that require the stay.'"[1] Thus, Ecuador carries the burden to show that a stay is required in the circumstances. The Claimant contends that by not alleging any circumstances to justify its Request, Ecuador has failed to discharge its burden of proof.

[1] Opposition, para. 14.

13. The Claimant emphasizes that, while neither the Convention nor the Arbitration Rules specify which factors have to be considered by annulment committees, these enjoy a measure of discretion in their appreciation of the circumstances that justify the continuation of the stay; one such circumstance is whether there is a risk that the applicant will not promptly comply with the award if it is not annulled. The Claimant enumerates other factors:

> *"(i) statements and conduct of public officials, (ii) the risk to the award creditor of non-recovery, (iii) the possibility of irreparable harm to either party, (iv) whether the stay request is* prima facie *of a dilatory nature, (v) the implementation of the ICSID Convention in domestic law, (vi) the overall balance of interests between the parties, and (vii) past compliance with payment obligations, including ICSID awards."*[2]

14. The Claimant argues that the exceptional nature of the stay of enforcement is the reason that justifies the requirement of security to counterbalance the negative effect of the stay on the award creditor. The Claimant alleges the serious risk that Ecuador will not comply with the Award promptly and in full based on Ecuador's hostility to ICSID arbitrations and specifically as shown in the underlying arbitration. In this respect, the Claimant enumerates steps taken by Ecuador that delayed and increased the cost of the proceedings, statements critical of ICSID arbitration by the highest-ranking officials of Ecuador, including the President, and Ecuador's statement that it would seek annulment of the Award even before it completed its review.

15. The Claimant points out, inter alia, that Ecuador has also challenged adverse non-ICSID awards, denounced the ICSID Convention, terminated at least 22 BITs, has a Constitutional Court which declared the dispute settlement provisions of BITs inconsistent with the Constitution, refused to comply with interim measures in the underlying arbitration and in other instances, and exhibited dilatory and obstructionist conduct in annulment proceedings.

[2] *Id.*, para. 19.

16. The Claimant refers to a presentation recommending specific strategies to protect Ecuador's assets prepared by the Legal counsel to the President of the country in the context of the *Chevron I* Award. When five years later Ecuador paid that award, it did so "because Chevron had gained enough leverage and information to threaten Ecuador's assets and banking relationships, not because it recognized its obligation to comply under international law."[3] The Claimant brings also to the attention of the Committee the refusal of Ecuador to comply with interim awards in the *Chevron II* case and concludes that Ecuador is "a classic case of serious doubt as to prompt compliance."[4]

17. The Claimant argues that, while there is no prejudice to Ecuador in providing security, absence of security and continuation of the stay would cause great prejudice to the Claimant. In support the Claimant refers to Ecuadorian law that acknowledges that delaying enforcement of a judgment causes damages to the prevailing party and requires a party seeking review of an appellate decision to provide security sufficient to cover those damages. The Claimant argues that security merely serves as a necessary procedural safeguard, it is "a reasonable compromise in exchange for staying enforcement of the Award that Ecuador is legally required to comply 'without delay.'"[5] According to the Claimant, "rewarding a hostile award debtor like Ecuador in these circumstances and with its history would encourage the routine filing of annulment applications and requests for unconditional enforcement stays."[6] In addition, the Claimant asserts that the interest rate set in the Award is lower than the rate of interest on borrowings by Ecuador, hence by delaying payment of the Award Ecuador effectively borrows at a lower cost.

18. The Claimant addresses the argument usually raised in annulment proceedings that there is a danger of non-recoupment by the State if the Award is annulled. The Claimant affirms that no such risk is present in the security requested by the Claimant: "should the Committee reject the annulment application, those amounts would be released to

[3] *Id.*, para. 56.
[4] *Id.*, para. 58.
[5] *Id.*, para. 64.
[6] *Id.*, para. 76.

Burlington; and should the Committee annul the Award, the escrowed security amount and all accumulated interest would revert to Ecuador."[7]

19. The Claimant argues that, if Ecuador refuses to post adequate financial security, then its commitment to comply voluntarily in the event its request is denied (in accordance with its obligations under Article 53 of the ICSID Convention) would not be demonstrated and the stay should be lifted. In such a case, the Claimant undertakes to place in escrow all funds collected through enforced payment during the annulment proceeding; such funds to be returned to Ecuador if its annulment application is successful.[8] The Claimant concludes that here again there is no risk of non-recoupment.

c. Ecuador's Response

20. In its Response to the Claimant's Request to lift the Provisional Stay or to Condition the Stay on the Posting of Security (the "Response"), Ecuador argues that the Committee is not empowered to condition a stay because (i) the Convention does not expressly grant ad hoc committees the power to order security when deciding whether or not to stay an award, (ii) the request for the posting of security is a request for provisional measures and Article 47 is not included in Article 52(4) among the articles applicable to arbitration proceedings that also apply to annulment proceedings, (iii) the Convention contrasts with other texts that expressly empower the relevant judicial authority to provide for adequate security such as the New York Convention, that was already in effect at the time the Convention was drafted, and the UNCITRAL Model Law, and (iv) the reliance of Burlington's on the decisions of previous ad hoc committees is misplaced.

21. In the alternative, Ecuador argues that the Claimant has not established the requirements for lifting the stay or security to be ordered. According to Ecuador, it would suffer irreparable harm if the stay would be lifted or security ordered. In this respect, Ecuador points out that it is a developing nation with a dollarized economy without control of its own currency. Hence, Ecuador cannot create immediate liquidity to satisfy non-budgetary

[7] *Id.*, para. 79.
[8] *Id.*, paras. 9 and 80.

expenses. Ecuador refers to its efforts over the last decade to reduce economic and social inequality notwithstanding financial pressure from the falling oil price and to arbitral awards with which Ecuador has complied. Ecuador also refers to the devastating effects and economic consequences of the earthquake suffered in 2016. Ecuador points out that the amount of the Award represents 9% of the international reserves in its Central Bank and a substantial percentage of its budget for health and education.

22. Ecuador contends that escrowing the funds due under the Award would cause Ecuador the same harm as that which would be caused by lifting the stay, given the large amount awarded, security would come at a high cost for Ecuador; banks may be unwilling to provide a guarantee without a deposit of most or all of the amount in an account with the bank concerned. Ecuador considers defamatory the argument of Burlington that the unconditional stay would give Ecuador time to secure its assets. Ecuador also takes issue with Burlington's argument that such stay would provide Ecuador with a loan at minimal cost. According to Ecuador, Burlington's argument ignores that Burlington's "rights over such money [of the Award] are legally qualified by Ecuador's right to seek annulment of the Award."[9] Furthermore, it constitutes an attempt to re-litigate the issue of the interest rate decided by the Tribunal.

23. Ecuador argues that Burlington has failed to establish that it suffers harm because of the stay due to delayed enforcement and increase in costs. Ecuador points out that, under the Convention, Burlington does not have a "right" to immediate enforcement during the pendency of the annulment proceedings[10] and procedural delays in general cannot be blamed on Ecuador. Moreover, the delay in enforcement will be remedied by compounded post-award interest and the high-level cost of the proceedings for Burlington is a matter of its own making.

24. Ecuador contests Burlington's arguments alleging possible non-compliance with the Award. According to Ecuador, it is never appropriate to grant security when the award creditor raises non-compliance as an argument for security because any risk of non-

[9] Response, para. 72.
[10] *Id.*, para. 76.

compliance is accounted for in the Convention; ad hoc committees are limited to the control of the award and their competence does not extend to decide a case of State responsibility under international law. Ecuador submits that to grant security exceeds the counter-balancing of the alleged effect of a stay, and it places the award creditor in a better situation. Furthermore, there is no proof presented that Burlington's prospect of enforcement will deteriorate during these proceedings.

25. Ecuador addresses the circumstances adduced by Burlington to demonstrate a risk of non-compliance. First, Burlington ignores Ecuador's exemplary record of compliance with awards.

26. Second, the allegation that Ecuador has converted the ICSID annulment remedy into an appeal is incorrect and does not establish that Ecuador will not comply with the award. Ecuador explains that Burlington ignores that Ecuador did not request annulment in Duke and complied with its monetary obligations. Annulment is a remedy available under the Convention, Burlington has not proven that Ecuador has used this remedy improperly. Furthermore, the fact that Ecuador has sought to set aside four awards rendered in ad hoc arbitrations is irrelevant because the ICSID framework is different and Burlington does not prove that the "set-aside actions were motivated by anything other than Ecuador's strong belief that the underlying awards were wrong as a matter of law."[11]

27. Third, Burlington does not explain how Ecuador's dissatisfaction and distrust towards the ICSID system would be indicative of a risk of non-compliance, none of the statements cited by Burlington advocate non-compliance with international obligations or the Award; Burlington overlooks statements from Ecuador reaffirming that it will continue to abide by international law. In fact, when the cited statements were made, Ecuador "continued to make payment under awards adverse to it, and also concluded settlement negotiations and made settlement payments in relation to other investment arbitrations."[12] In any case, none of such statements are binding on Ecuador.

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[11] *Id.*, para. 127.
[12] *Id.*, para. 139.

28. Fourth, the reliance of Burlington on Ecuador's denunciation of the ICSID Convention is misplaced because withdrawal from the Convention is irrelevant to the issue of enforcement, and Ecuador has continued to participate in all ongoing ICSID arbitrations and complied with the only adverse ICSID award issued after Ecuador denounced the Convention in 2009.

29. Fifth, Burlington's reliance on Ecuador's termination of its BITs is equally misplaced because the process of denunciation is irrelevant to enforcement of ICSID awards, this process is in compliance with international law, and the U.S.-Ecuador BIT remains effective for ten years.

30. Sixth, it is also misplaced the reliance of Burlington on CAITISA. The report prepared by this commission does not advocate non-compliance with international awards.

31. Seventh, Ecuador contests as unfounded the suggestion of Burlington that Ecuador took steps to make enforcement outside Ecuador more difficult.

32. Eighth, Ecuador argues that the fact that it did not comply with provisional measures in the *Burlington* and *Perenco* proceedings does not establish that it will not comply with the Award. Ecuador affirms that decisions on provisional measures are not binding and points out that Burlington fails to explain how Ecuador's past non-observance of non-binding recommendations indicates its intention not to comply with the Award in the future if it is not annulled.

33. Ninth, Ecuador advises the Committee to disregard consideration of *Chevron III* "without full knowledge of the elaborate and intricate proceedings surrounding the case. This is buttressed by the fact that the first, second, third and fourth interim awards, together with the first partial award, are subject to an application for annulment in The Hague."[13]

[13] *Id.*, para. 177.

34. Ecuador requests as relief that:

> *"i. the stay be continued;*
>
> *ii. Burlington's request for the posting of security be dismissed; and*
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> *iii. Burlington bear all the costs arising from the request to lift the stay, including all costs and fees and Ecuador's costs and expenses incurred in connection thereto, in amounts to be specified, with interest."*[14]

d. Burlington's Reply

35. The Claimant asserts that, "The right to seek annulment of a final award within the ICSID system is not synonymous with the right to an indefinite and unconditional stay of enforcement of that final award."[15] According to the Claimant, Ecuador has not proven that extraordinary circumstances exist to justify the continuation of the stay of enforcement, and its ability to comply with the Award or post security derives in part from the benefit accruing to Ecuador from the Claimant's expropriated assets. The Claimant recalls that annulment committees have considered hardship in the context of the provision of security only when it would have "'catastrophic' immediate and irreversible consequences for [a party's] ability to conduct its affairs."[16]

36. The Claimant also recalls that Ecuador has ignored Burlington's alternative offers to security, namely, to place the Award amount in escrow or to escrow any collected funds if the stay would be lifted. The Claimant disputes that security would stifle the right to seek annulment since the stay of enforcement is not the purpose or a necessary component of an annulment proceeding, it is "a discretionary possibility".[17]

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[14] *Id.*, para. 182.
[15] Reply, para. 2.
[16] *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, ICSID Case No. ARB/84/4, Interim Order No. 1 on Guinea's Application for Stay of Enforcement of the Award (August 12, 1988) ("*MINE v. Guinea*") (AALA-16), para. 27.
[17] Reply, para. 11.

37. The Claimant is not persuaded by the list of 18 annullable errors in the Award alleged by the Respondent, and asserts that such number of errors in a single award is indicative of a frivolous application. The Claimant argues that there is a high risk of non-compliance by Ecuador after this annulment phase as shown by Ecuador's "denouncing the Convention, describing the international arbitration system as inherently corrupt, refusing to comply with the Tribunal's orders, and raising routine challenges to virtually every award rendered against it. Even more telling is Ecuador's refusal to commit—in this case, to this Committee—to paying the Award promptly and in full."[18]

38. The Claimant argues that the continuation of the stay is not automatic and depends on specific circumstances to be proven by the party requesting the continuation. The Claimant disputes Ecuador's assertion that the Committee has no authority to impose conditions on the stay. According to the Claimant, the discretionary power of an annulment committee under the ICSID Convention permits it to grant, deny or condition a stay request. The Claimant adduces case law confirming this possibility as an appropriate way to balance the interests of the parties.

39. The Claimant contends that contrary to Ecuador's argument, the posting of security will not place the Claimant in a better position: "security would merely ensure that payment will be forthcoming if the Award is upheld, and thereby restore Burlington to the position that, under the ICSID Convention, it should already occupy: a position of confidence that a State bound by that Convention will comply with its obligations under a final ICSID award."[19]

40. The Claimant disputes Ecuador's characterization of security as a penalty for seeking annulment. According to the Claimant, "The Committee would not be taking anything away from Ecuador, for the simple reason that Ecuador has no right to a permanent stay during annulment proceedings. Indeed, Ecuador's right to seek annulment 'cannot operate against the presumption of validity of awards rendered under the ICSID Convention.'"[20]

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[18] *Id.*, para. 13.
[19] *Id.*, para. 31.
[20] *Id.*, para. 32.

The Claimant contests the relevance of the fact that Ecuador's law expressly requires the posting of security as a precondition to stay enforcement and affirms that whether the Committee has the authority to order security is a matter of interpretation of the ICSID Convention.

41. The Claimant reaffirms its argument that Ecuador will profit from delayed enforcement since "it would allow Ecuador to effectively borrow from Burlington at the low interest rate provided in the Award (far lower than its own cost of borrowing)"[21]; and unless and until the Award is annulled, the Claimant have an uncontested right to the funds. The Claimant concludes that the stay of enforcement is the exception and "[a]ny delayed payment in the absence of appropriate security would therefore allow Ecuador to take improper advantage of the ICSID system to Burlington's detriment."[22]

42. The Claimant asserts that Ecuador has not shown that the termination of the stay would have "catastrophic, immediate and irreversible" consequences. The Claimant observes that Ecuador's main argument is that security would be prejudicial because of the country's budgetary constraints. In this respect, the Claimant points out that the unlawful expropriation has been "wildly profitable" for Ecuador and the full amount of the Award has been ordered to be paid, whether it is paid now or "when the annulment application is rejected does not change the fact that those sums must be paid and cannot be used for other government expenditures."[23]

43. The Claimant further notes that Ecuador has not addressed the irreversibility of the alleged catastrophe. The Claimant draws attention to the fact that its primary relief request is for the escrowing of funds to be disbursed only upon the resolution of the annulment proceeding and to its undertaking that if the Committee "orders the lifting of the stay and Burlington succeeds in enforcing involuntary payment while Ecuador's annulment application remains pending, Burlington would also place all such funds into an escrow account, to be returned to Ecuador if its annulment application is successful." Hence, there

[21] *Id.*, para. 34.
[22] *Id.*, para. 35.
[23] *Id.*, para. 42.

is no risk of anything irreversible happening upon the granting of either of Burlington's requests for relief. [24]

44. The Claimant points out that Ecuador's efforts at continuing the stay are undermined by its own admissions that it has not budgeted a reasonable sum to satisfy payment of the Award, that it does not have the liquidity to satisfy non-budgetary expenses, and that the number of awards against Ecuador have caused serious financial pressure. On this last point, the Claimant adds that Ecuador "would write-in an exception to Article 53 of the ICSID Convention such that repeat violators of international law would, paradoxically, be exempt from immediately complying with awards against them."[25]

45. On the other hand, the Claimant argues that it would be greatly prejudiced by the continuation of the stay because of the objective risk that Ecuador will not honor its commitments and this risk cannot be remedied by post-award interest, as argued by Ecuador. The Claimant disputes Ecuador's argument that the risk of non-compliance with the Award is not a legitimate consideration in determining whether security is appropriate. The Claimant adduces case law to the contrary and affirms that, whether Ecuador will comply with the Award is a central consideration in deciding whether to terminate or continue the stay with conditions. The Claimant explains that Ecuador refuses to commit to paying the Award promptly and in full, that it refused to comply with the Tribunal's orders on provisional measures in this case and in other proceedings, and that it announced that it would seek annulment of the Award when it received the Decision on Liability, that is five years before the Award was issued. The Claimant further explains that Ecuador has routinely resisted enforcement of international awards. After a review of cases, the Claimant affirms that "Ecuador's 'track record' shows that it will not voluntarily comply with international awards, nor will it do so without delay as required by the BIT and the ICSID Convention. Thus, Burlington's concerns that Ecuador will engage in similar conduct in this case are well founded."[26]

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[24] *Id.*, para. 44.
[25] *Id.*, para. 48
[26] *Id.*, para. 61.

46. In support of its risk argument, the Claimant notes that Ecuador has systematically pursued annulment of arbitral awards rendered against it whether under the ICSID Convention or otherwise. According to the Claimant, Ecuador has improperly used the exceptional measure of annulment as a routine procedural step. Furthermore, Ecuador has denounced the ICSID regime and high-ranking officials, including the former president, have attacked the legitimacy of the ICSID system and international arbitration in general.

47. The Claimant adduces as further evidence of disrespect for the ICSID system the formation of the "Comisión para la Auditoría Integral Ciudadana de los Tratados de Protección Recíproca de Inversiones y del Sistema de Arbitraje Internacional en Materia de Inversiones" ("CAITISA"). The Claimant observes that Ecuador, as a former State party, is aware that the ICSID system is self-contained and precludes State parties from reviewing awards outside the remedies provided for in the ICSID Convention. The Claimant expresses its concern by rhetorically asking: "following the inevitable determination of CAITISA that the Award is illegitimate, how could Ecuador, as a political matter, pay the Award?"[27] The Claimant also refers to Ecuador's Guide on BITs and submits that the content and tone of the Guide speak for themselves. The Claimant notes that the Guide lists "social projects" that Ecuador could accomplish instead of paying at least one arbitration award, an argument made in this proceeding in support for the continued stay of enforcement.

48. The Claimant reaffirms its request that the Committee: "(1) reject the Republic of Ecuador's application to continue unconditionally the provisional stay of enforcement of the Award, and instead (2) require Ecuador to post adequate financial security as a condition to continuing the stay; or (3) in the alternative, or in the event that Ecuador fails to comply with the Committee's instructions regarding the posting of security, lift the stay of enforcement."[28]

e. Ecuador's Rejoinder

[27] *Id.*, para. 70.
[28] *Id.*, para. 76.

49. Ecuador contends that to order posting of security is a provisional measure and annulment committees do not have the power to recommend, and certainly not to order, provisional measures: (a) because a tribunal requires a specific provision in its constituent instrument to empower it to make such order; (b) it is incorrect to affirm that the Committee has the implied power to order security because it has the power to maintain the stay since (i) to grant a stay only affects the intrinsic enforceability of an award and the power to order security is an injunction on the award debtor to do something and, therefore, the posting of security would be not less but more, and (ii) the posting of security would be economically similar to lifting the stay; and (c) the New York Convention and the UNCITRAL Model Law expressly provide for the possibility of ordering to provide security, and all articles of Chapter 4 of the ICSID Convention, but for Article 47 of the Convention, are expressly extended to annulment committees under Article 52(4).

50. According to Ecuador, precedents can only be taken into consideration if they are convincing. Ecuador recalls why the Committee should dismiss those relied on by the Claimant as explained in its Response and observes that the Claimant has failed to respond to Ecuador's criticism of seven of the decisions. Ecuador further notes that security was requested in 20 of the 23 publicly available cases, but that it was actually ordered in nine instances only. Thus, it is not the overwhelming majority alleged by the Claimant.

51. In the alternative, if the Committee would consider that it has the power to order the posting of security, Ecuador affirms that stays have only been conditioned in extraordinary circumstances because the posting of security would place the Claimant in a better position in respect of the enforcement of the Award. Ecuador recalls that in the Response it explained that "escrowing the funds would cause Ecuador the same harm as that which would be caused by lifting the stay, as it would result in the funds being frozen, and thus made unavailable for Ecuador's social development."[29] As to the risk of Ecuador not being able to recoup funds paid in satisfaction of the Award, Ecuador points out that its

[29] Rejoinder, quoted in para. 47.

"Response did not posit such a risk, and thus Burlington's comments on recoupment are entirely irrelevant."[30]

52. Ecuador contests the arguments of Claimant to diminish the harm that Ecuador would suffer should the stay of enforcement be lifted. First, Ecuador points out that there is no support for the Claimant's interpretation that "the catastrophic, immediate and irreversible consequences for Ecuador's ability to conduct its affairs described by the *MINE* committee must mean a crisis for the State in question".[31] Ecuador presents a table to show the impact of awards as a percentage of GDP of the country concerned in the year of the stay decision. The table lists 22 awards against States in which stays have continued without security; in all but three of them the Award represents a smaller percentage of Ecuador's GDP. Ecuador argues that "this numerical analysis makes it very clear that the harm necessary to justify the continuation of a stay cannot be the descent into crisis of the relevant State."[32]

53. Second, Ecuador finds support in *Mitchell* for its argument about the significance of the Award amount in terms of the budgets for paying health and education professionals. Ecuador refers the Committee to its achievements in reduction of poverty and social inequality as a result of considerable social spending. Ecuador points out that the amount of the Award represents 28% of Ecuador's annual budget for running hospitals or 22% of the country's annual budget for all investment in new social projects. Thus, the effect of lifting the stay or ordering security would be catastrophic, immediate and irreversible for the Ecuadorians affected and Ecuador. According to Ecuador, "What is at stake, in Burlington's application to lift the stay of enforcement, is whether that catastrophic, immediate and irreversible consequences should be imposed before the legal basis for them has become final and binding."[33] The *Oxy II* arbitration is a case in point: "To allow the stay in that case to have been lifted would have resulted in immense harm to Ecuador, as it

[30] *Id.*, para. 49.
[31] *Id.*, para. 52.
[32] *Id.*, para. 53.
[33] *Id.*, para. 63.

would have been forced to pay over USD 700 million, and so divert such sum from its development, when there was no need to do so."[34]

54. Third, Ecuador replies to the Claimant's understanding that Ecuador has the resources to comply with the Award. Ecuador considers this understanding irrelevant because "the question is not whether Ecuador could pay the Award, but rather, what would be the consequences of doing so before its Application for Annulment is resolved."[35] Ecuador points out that the Claimant incurs in contradiction where elsewhere it claims that Ecuador has stated being unable to create the necessary liquidity to pay the Award and affirms that, "as a dollarized economy, it cannot print money like nations that control their own currency, and therefore that the payment of a large arbitral award necessarily involves reassigning funds from elsewhere in the State budget."[36]

55. Fourth, Ecuador contests the Claimant's argument that Ecuador cannot seriously argue that payment of multiple awards causes serious financial pressure on Ecuador. Ecuador asserts that "such pressure is real, and clearly relevant to the straitened circumstances in which the Ecuadorian government must operate when striving to achieve its social goals."[37]

56. Fifth, Ecuador disputes that it considers the requirement to post security a punishment.

57. Sixth, Ecuador recalls that the Claimant's right over the Award amount is qualified by Ecuador's right to seek annulment of the Award and the analogy of the loan advanced by the Claimant is not apposite for an arbitral award.

58. Seventh, as regards whether the Claimant would be in a better position if security is ordered, Ecuador observes that the Claimant has not addressed the authorities cited by Ecuador or that reliance by the Claimant on the decision of *Standard Chartered* was mistaken because of the nature of the award debtor.

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[34] *Id.*, para. 64.
[35] *Id.*, para. 65.
[36] *Id.*, para. 66.
[37] *Id.*, para. 68.

59. Ecuador disputes the relevance of the comments of the Claimant on the revenues generated to Ecuador by Blocks 7 and 21 because, if the Claimant prevails, it will most certainly seek to collect on any asset owned by Ecuador. The Claimant assumes that its production sharing contract for Block 7 would have been extended beyond its expiry in July 2010, and overlooks the significant investments and costs required to generate Petroamazonas' revenue.

60. Ecuador argues that the Claimant has not met its burden to prove that, in the words of the *Oxy II* annulment committee, its "rights to enforce the Award […] have actually deteriorated or that there is a risk that they will deteriorate in the future."[38] Furthermore, the Claimant's willingness to place funds collected in escrow should the stay be lifted shows that it has no need for the funds. Therefore, the Claimant will not suffer prejudice and the delay because of the enforcement stay will be compensated by the post-award interest if the Award is not annulled.

61. Ecuador contends that it has continuously complied with its obligations; it complied with four adverse awards and settled in four arbitrations where the claimant prevailed. Ecuador insists that it complied with the *Chevron II* award to Chevron's satisfaction, disputes that post-award settlement negotiations do not constitute compliance with its international obligations, explains that payment of the *Oxy II* and *Chevron II* awards were motivated by the fact that non-compliance would have serious consequences for Ecuador being perceived as a country non-compliant with its international obligations, and explains that the interim measures ordered in the *Chevron III* arbitration are currently subject to set-aside proceedings in The Hague.

62. Ecuador argues that the Claimant cannot request the lifting of the stay or security on an alleged risk of non-compliance. Ecuador insists that provisional measures under the ICSID Convention are not binding and therefore non-compliance with provisional measures was not a violation of Ecuador's international law obligations. Ecuador explains that its Annulment Application is not frivolous and asserts that it exercised its right under Article

[38] *Id.*, para. 81 quoting para. 96 of the Oxy II Decision.

52 in "a prudent, non-abusive and good faith manner."[39] Furthermore, it should not be surprising that Ecuador announced Ecuador's intention to challenge the Award shortly after it received it since it has been aware of the legal flaws in the Tribunal's conclusions for four years.

63. Ecuador addresses the parallel drawn by the Claimant between this proceeding and the *Oxy II* annulment proceeding based on the large number of alleged grounds for annulment. Ecuador affirms: "It is undisputed that the *Oxy II* committee partially annulled the underlying award, which led to a record reduction in the amount of damages awarded to the investor (of 40%). Ecuador was thus proven right by the *Oxy II* committee, irrespective of the number of grounds for annulment invoked in that case."[40]

64. Ecuador argues that, "There is no relation between the legal remedies that Ecuador may, in good faith, choose to avail itself of in unrelated proceedings involving third parties and the likelihood that Ecuador will comply with the Award."[41] Ecuador confirms that Petroecuador complied with the award in the *Repsol YPF* case.

65. Ecuador disputes the relevance of public statements by Ecuadorian officials expressing dissatisfaction with investment treaty arbitration. Ecuador explains that only the President and the Chancellor may make statements that bind the State. Ecuador equally disputes the relevance that it lawfully denounced the ICSID Convention and terminated investment treaties.

66. Ecuador argues that the Claimant mischaracterizes CAITISA: The *Oxy II* annulment committee did not consider that CAITISA contributed to showing that there was a risk that Ecuador would not comply with the award. Ecuador affirms that the position of the Claimant is based on speculative unsupported hypotheses, CAITISA's mission has been fulfilled, CAITISA did not recommend that Ecuador not comply with its international obligations.

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[39] *Id.*, para. 105.
[40] *Id.*, para. 111.
[41] *Id.*, para. 116.

67. Ecuador re-affirms its request for relief.

III. ANALYSIS OF THE COMMITTEE

68. The Committee will address first the legal framework applicable to the stay of enforcement; burden of proof; proportionality; whether the stay of enforcement should be continued; if continued, whether it should be subject to conditions and whether the Committee has the power to attach them to its decision on the stay; and if the answers are in the affirmative, the conditions that should be attached.

a. The Legal Framework

69. The relevant provisions of the ICSID Convention and the Arbitration Rules are reproduced here for convenience.

Article 52(5) of the ICSID Convention provides:

> *"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."*

Rule 54 of the Arbitration Rules reads as follows:

> *"(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."

70. According to Article 52(5), the Committee has to appreciate first whether circumstances are present that make it necessary to stay enforcement or continue the provisional stay of enforcement. Once the Committee has concluded that such circumstances exist, then it *may* decide in favor or against the continuation of the stay. The Committee emphasizes the term "may" because even when the required circumstances are present, a committee may decide against the continuation of the stay of enforcement. This wide discretion of the Committee in making its decision is compounded by the unspecified nature of the circumstances that may lead an annulment committee to conclude that they require that enforcement be stayed.[42]

[42] "There have been a total of 43 requests for the stay of enforcement in the 90 registered annulments, 41 of which have led to Committee decisions. Thirty-six decisions granted the stay of enforcement. In 22 of those instances where a stay was granted, it was conditioned upon the issuance of some type of security or written undertaking. In 11 of those 22 cases, the stay was terminated because the condition had not been satisfied." *Updated Background Paper on Annulment for the Administrative Council of ICSID* (May 5, 2016) ("*ICSID Background Paper*") (ARLA-29). The Committee notes that, based on the information publicly available and as of the date of the Updated Background Paper, stays were ultimately not maintained in 15 out of 41 decisions, including the 11 cases in which the stay was lifted later because of non-compliance with its conditions. The Committee also notes that up to 2012 all stay requests

71. The Parties agree that the stay of enforcement is not automatic and that the Committee has discretion in granting it. The Parties disagree on whether, at this stage, a *prima facie* test may be applied by the Committee to the merit of the Application for Annulment. The Committee clarifies at the outset that, at this early stage of the proceeding, it is unable to apply such test. The Parties also disagree on whether the conditions for lifting the stay and for ordering security are the same. According to Burlington, the condition is for both, primarily, whether there is a risk that Ecuador will not comply promptly and fully with the Award[43], whereas Ecuador, while disagreeing with the premise that the conditions are the same, argues that neither can be ordered because it would cause Ecuador immediate and irreparable harm.[44] The Parties further disagree on the gravity of the hardship a state must suffer (as a result of the lifting of the stay or by the posting of security) in order to continue the stay without security. They also disagree on whether the Committee has the power to condition a stay of enforcement.

72. The Committee recalls that while a party to a dispute may request the annulment of an award, it has no right to the annulment. Similarly, the party requesting annulment may request a stay of enforcement but it has no right to the stay. On the other hand, both parties to the dispute are obliged to abide by an award notwithstanding an annulment proceeding. As stated by the *Standard Chartered* committee: "the obligation that each State assumed on ratification of the Convention, under Article 53, to comply with awards against it is particularly important. This obligation is *as important* as the right to pursue annulment under Article 52 of the ICSID Convention. These two articles are linked together."[45]

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were granted. It is only during the last six years that stay continuation requests have been denied in five publicly known cases.

[43] Opposition, para. 5.

[44] Response, para. 46.

[45] *Standard Chartered Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited*, ICSID Case No. ARB/10/20, Decision on Applicant's Request for a Continued Stay on Enforcement of the Award (April 12, 2017) (ARLA-15), para. 84. Emphasis added.

73. In sum, the stay of enforcement is an exception in the context of the remedy of annulment that is itself limited and exceptional.[46]

b. Burden of Proof

74. Ecuador did not justify the request for staying the enforcement of the Award at the time of filing its Request for Annulment and the Claimant opposed it outright. Only in its Response did Ecuador explain the circumstances that might justify the continuation of the stay, and even then only as part of an argument intended to show the failure of Burlington to establish the legal requirements for conditioning the continuation of the stay. This reversal of the burden of proof of the circumstances that justify the continuation of a stay of enforcement under the terms of ICSID Arbitration Rule 54(4) is not acceptable.

75. Rule 54(4) provides that a request for a stay of enforcement "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." This rule is clear in that the party that requests the stay carries the burden of proof of the circumstances that would justify the stay or its continuation. Ecuador requested the stay of enforcement and its continuation. If the stay were not continued, it would terminate automatically under Rule 54(2). Hence, it is for Ecuador, as requesting party, to prove that circumstances exist that require the stay to be continued.

76. On the other hand, it is Claimant's burden to prove that there are circumstances that warrant to attach conditions to the stay. In sum, each Party has to prove the circumstances on which it bases its claims.

c. Proportionality

77. In the opening statement at the hearing, Ecuador recalled that the Committee needs to apply a proportionality test, "To justify the continuance of the Stay, Ecuador, Members of the

[46] "The limited and exceptional nature of the annulment remedy expressed in the drafting history of the Convention has been repeatedly confirmed by ICSID Secretary-Generals in Reports to the Administrative Council of ICSID, papers and lectures." *ICSID Background Paper*, *supra* n.42, para. 73.

Committee, must show that lifting the Stay will cause serious and irreversible circumstances in comparison with the consequence for Burlington of continuing the Stay, and the Committee must balance this interest to determine in the end whether to continue the Stay or not. And this is precisely the proportionality test I referred to at the beginning of our Opening Statement."[47] The Claimant opposes the application of such test. When prompted at the hearing by Ecuador's counsel because he had not addressed the proportionality argument in his statement, counsel for the Claimant stated: "to the extent there is a proportionality analysis--and we've explained why that's not the legal standard--we certainly should have the ability to not allow their position to get better in the interim if we're going to have that enforcement fight."[48] In its Reply, the Claimant had argued that "Ecuador's arguments concerning the relative prejudice that each side would face were the Committee to grant the relief requested by Burlington confounds the legal framework governing awards under the ICSID Convention."[49] According to the Claimant, the default rule under the ICSID Convention is that awards are enforceable immediately and in the cases when annulment is requested, an exceptional remedy, the annulment committee may stay the award if the circumstances so require. Furthermore, any considerations raised by Ecuador to justify the stay must be balanced against factors such as the prospect of compliance, the risk of non-recovery, the risk of irreparable harm to either party and the dilatory character of the request for annulment.

78. As stated at the beginning of this analysis, the first step for the Committee is to determine whether circumstances exist that would require the continuation of the stay. Such circumstances are to be considered by themselves and to be proven by the party requesting the continuation of the stay. If the determination is favorable to the continuation of the stay, then the Committee may consider other factors such as those argued by the Claimant. In the view of the Committee, "proportionality" is not an additional step in the Committee's analysis, the latter to be based only on the circumstances proven by the applicant. If the Committee were to find that the circumstances pled are not proven, proportionality cannot

[47] Transcript p. 33, lines 14-22.
[48] *Id.*, p. 203, lines 1-6.
[49] Reply, para. 36.

compensate for the lack of proof of the circumstances that would require the continuation of the stay.

d. Are There Circumstances that Require the Stay of Enforcement?

79. The only circumstance that Ecuador has invoked to justify the continuation of the stay (and only in its Response), is that the lifting of the stay now would cause hardship; it would have "'catastrophic' immediate and irreversible" consequences in the words of the *MINE* annulment committee.[50] The Committee shall therefore concentrate its analysis on this circumstance. For the Claimant, the applicable standard for hardship means that the State must "enter into financial collapse, deep economic recession, or social and economic crisis" as a result of payment of the Award amount or posting of security. According to Ecuador, such interpretation would mean that hardly any stay would be continued contrary to the general practice of annulment committees.

80. Ecuador has based its arguments on the significance of the Award amount in terms of its budget for paying health and education professionals. Ecuador has emphasized that it has a history of poverty and economic inequality which it is striving to change. Ecuador affirms that "[u]niversal access to healthcare and education are crucial levers for eradicating poverty and achieving sustainable improvement in the quality of life of the population. That is why paying an amount equivalent to, *inter alia*, 28% of Ecuador's annual budget for running hospitals or 22% of the country's annual budget for all investment in new social projects […] would be catastrophic."[51] Ecuador as part of its hardship argument has adduced its dollarized economy and the financial pressures brought upon the country by the 2016 earthquake, the falling oil price and the effect of paying various arbitral awards. As regards the consequences of the earthquake, Ecuador has requested that "special consideration should be given to the fact that the needs of the people of Ecuador are currently especially acute. In 2016, Ecuador suffered a 7.8 magnitude earthquake that killed more than 650 people and injured more than 16,600. In this context, healthcare is of paramount importance – as is the availability of funding for the government's plan to

[50] *MINE v. Guinea*, *supra* n.16, para. 27.
[51] Rejoinder, para. 60.

rehouse the 1,600 families still living in shelters."[52] The fall of oil prices has resulted in a reduction of Ecuador's revenues and of its budget by 17%.

81. Even if the type of circumstances that may require a stay of enforcement on grounds of hardship need not necessarily be of the magnitude argued by the Claimant, the facts adduced by Ecuador are not of the severity that the other annulment committees on which Ecuador relied have taken into account. The consequences described by Ecuador do not match the scarcity of foreign exchange in Guinea in the case of *MINE* or the instability in DRC, a country ravaged by war, in the case of *Mitchell*. Ecuador bases its argument on the need to make choices to allocate its scarce dollar funds. The Committee is not persuaded by this argument, particularly because the assets subject of the underlying arbitration generate substantial revenues in foreign exchange for Ecuador.[53]

82. Ecuador has also drawn to the attention of the Committee the negative consequences causing irreparable harm that payment of the Award prior to the Decision on Annulment would have on Ecuador, should the Award be annulled. The Claimant offered to open an escrow account to deposit any funds collected before the decision on the Request for Annulment. The funds would be available to either party depending on whether the Award is or is not annulled.[54] In its Rejoinder Ecuador commented that it was not concerned about recovery.[55]

83. The Committee does not question the laudable social objectives pursued by Ecuador and is not in a position to comment from which budget allocation the State would reassign existing allocations to pay the Award. The argument that the termination of the stay would mean reallocation of funds within the budget is inherent to the need to satisfy any financial obligation by a State. It is a general argument that any State could make, which has been rejected in the past[56] and which the Committee does not consider to establish the minimal

[52] Response, para. 57.
[53] Reply, para. 43.
[54] Id., para. 44.
[55] Rejoinder, para. 49.
[56] "In balancing the interests of the parties in these annulment proceedings the Committee considers, first, that aside from a general statement that lifting the stay would prevent Argentina from using funds that it otherwise needs to satisfy the needs of Argentinians, there is no concrete allegation, much less evidence, of the existence of special

gravity required to justify a continuation of the stay. A State budget includes funds allocated to many activities, and not only to social projects. It is for the State to determine its priorities and how they will be funded. Evidently, if the Committee does not annul the Award, Ecuador will be obliged to pay it in full irrespective of its budgetary consequences. It is not within the remit of an annulment committee to link the obligation to pay the Award to the effects on the budget of the State concerned.[57]

84. For mere completeness's sake, however, the Committee confirms that it has duly noted Ecuador's repeated reminders that it honors its international obligations, but also Ecuador's consistent failure, notwithstanding Burlington's repeated requests, to commit specifically to, promptly and in full, comply with the Award if it is not annulled.[58] The Committee furthermore disagrees with Ecuador's concept of compliance, which includes post-award negotiations and a settlement, including a cut in the amount awarded by a tribunal. While it is up to parties to negotiate a settlement if they find it convenient, it is not what compliance means under the ICSID Convention.

85. The Committee finds that Ecuador has failed to prove that the termination of the stay would lead to severe consequences for its ability to conduct its affairs. This is the only circumstance pled by Ecuador that required the continuation of the stay of enforcement. As stated earlier, the first step for the Committee is to determine whether circumstances exist that would require the continuation of the stay. If the party requesting the continuation of the stay does not prove that such circumstances exist, then this should be the end of the matter. The Committee is of the view that security is not a substitute for lack of

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circumstances that merit extending the stay of enforcement." *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Stay of Enforcement of the Award (December 4, 2014) (ARLA-23), para. 104.

[57] It is worth noting that the sentence from the *MINE* decision quoted by Ecuador on the catastrophic effect of the stay is preceded by a sentence on poverty and compliance. These two sentences read as follows: "Poverty as such is not a circumstance justifying a stay any more than it would justify non-payment of an award. The criterion is, rather, whether termination of the stay would have what Guinea calls 'catastrophic' immediate and irreversible consequences for its ability to conduct its affairs." *MINE v. Guinea*, *supra* n.16, para. 27.

[58] For instance, in para. 74 of the Rejoinder, the Respondent states: "The shortcomings of Burlington's 'earmark' argument are even more evident when one considers that, if Burlington prevails in this annulment proceeding, it will most certainly seek to collect on any asset owned by Ecuador – not just on revenues directly linked to Blocks 7 and 21." The idea that if Burlington prevails Ecuador will pay promptly the Award without the Claimant's need to seek to collect on any asset owned by Ecuador is absent from the quoted statement.

circumstances that require the stay, to proceed otherwise would be contrary to Article 52(5) of the ICSID Convention.

86. In light of the foregoing considerations, the Committee concludes that the provisional stay of the enforcement of the Award should be lifted. This conclusion makes unnecessary to deal with the subject, heavily debated between the Parties, regarding the Committee's authority to condition the continuation of the stay on Ecuador's posting of a security, as requested by Claimant. In light of this conclusion, the Parties may wish to revisit Burlington's offer to open an escrow account where Burlington would deposit any funds collected from Ecuador during the annulment proceedings and would be readily available to Ecuador if the Award were annulled.

IV. COSTS

87. Ecuador has requested that all costs related to the continuation or termination of the stay, including its fees and expenses, be borne by the Claimant. The Committee has decided to reserve its decision for a later stage when it has an overview of the full proceeding.

V. DECISION

88. For the above reasons, the Committee has decided to terminate the provisional stay, reserve its decision on costs and dismiss all other requests.

[Signed]

Dr. Piero Bernardini
Member of the *ad hoc* Committee

[Signed]

Dr. Vera Van Houtte
Member of the *ad hoc* Committee

[Signed]

Dr. Andrés Rigo Sureda
President of the *ad hoc* Committee