



School of International Arbitration

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International Arbitration Case Law

**School of International Arbitration, Queen Mary, University of London  
International Arbitration Case Law**

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**Award Name and Date:** Burlington Resources, Inc. v. Republic of Ecuador (ICSID Case No. ARB/08/5) (Annulment Proceeding) - Decision on Stay of Enforcement of the Award - 31 August 2017

**Case Report by:** Benjamin Burnham\*\*, Editor Ignacio Torterola\*\*\*

**Summary:**

The Republic of Ecuador applied for annulment of the Award rendered in *Burlington Resources, Inc. v Republic of Ecuador* (ICSID Case No. ARB/08/5), simultaneously requesting a stay of enforcement of the award and the continuation of that stay once the *ad hoc* Committee had been constituted. Pursuant to Arbitration Rule 54(2) of the ICSID Convention, enforcement was stayed provisionally pending the determination of the ad hoc Committee regarding continuation of the stay. Burlington opposed Ecuador's Application and further requested that Ecuador either post adequate financial security as a condition to continuing the stay, or that the Committee lift the stay altogether. The Committee determined that it need not consider whether it had the powers to require security as a condition to a continuation of stay, as the circumstances presented by Ecuador (pursuant to Arbitration Rule 54(4)) to justify the stay were unsatisfactory. The Committee concluded that provisional stay of enforcement should be lifted.

**Main Issues:**

Annulment – ICSID Convention – Circumstances justifying extension of provisional stay of enforcement – Posting of security as a condition of extension of provisional stay of enforcement.

**Tribunal:** Andrés Rigo Sureda (President), Piero Bernardini, Vera Van Houtte.

**Claimant's Counsel:** Freshfields Bruckhaus Deringer, New York, NY and Washington, D.C., U.S.A; King & Spalding, Houston, TX, U.S.A; Senior Vice-President Legal, General Counsel, ConocoPhillips, Houston, TX, U.S.A; Deputy General Counsel, Litigation and Arbitration, ConocoPhillips, Houston, TX, U.S.A.

**Respondent's Counsel:** Dechert, Paris, France; Pierre Mayer, Paris, France; Procurador General del Estado, Quito, Ecuador.

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## Digest:

### 1. Background to the Application for Stay of Enforcement

On 14 February 2017, the Republic of Ecuador filed an application for annulment (the "Annulment Application") of the award rendered in favour of the investor, Burlington, on 7 February 2017. The Annulment Application included a request that enforcement of the Award be stayed provisionally, and that the stay subsequently be continued after the constitution of the *ad hoc* Committee. Ecuador gave no justification in support of its request (¶1).

The ICSID Secretary-General notified the Parties of the provisional stay of enforcement of the Award on the same day, in accordance with Rule 52(2) of the Arbitration Rules. The *ad hoc* Committee was subsequently constituted on 15 May 2017 (¶¶ 2-3).

On 19 May 2017, in addition to filing its opposition to the application for stay of enforcement, Burlington filed an application to require Ecuador to post adequate financial security as a condition to continuing the stay of enforcement, or, alternatively, to lift the stay of enforcement altogether (¶ 4).

### 2. Positions of the Parties

#### 2.1 Burlington's Position

Burlington submitted that while neither the ICSID Convention nor the ICSID Arbitration Rules specify which factors have to be considered, annulment committees enjoy a measure of discretion in their appreciation of the circumstances that justify the continuation of a stay. Burlington stressed that although Ecuador had a right to seek annulment, it did not have a right to an unconditional stay of enforcement. According to Burlington, the ordering of security would not, as Ecuador argued, place Burlington in a better position than Ecuador, but would merely ensure that funds would be available if the Award were upheld (¶39).

Burlington argued that due to the exceptional nature of granting a stay of enforcement, the Committee would be justified in requiring Ecuador to provide security (to counterbalance the negative effects of the stay on Burlington). According to Burlington, the foremost factor justifying the ordering of security was the risk that Ecuador would not promptly comply with the award in the event it was not annulled. Other factors Burlington argued should be considered by the Committee were: the critical statements and conduct of Ecuador's public officials towards ICSID awards and arbitrations; the risk and effect of non-recovery to Burlington; the possibility of irreparable harm caused to either party; whether the stay request was *prima facie* a dilatory attempt to slow compliance with the Award; the implementation of

the ICSID Convention in domestic law; the overall balance of interests between both parties; past compliance by Ecuador with both ICSID and non-ICSID arbitrational awards (¶13) and Ecuador's hostility to ICSID arbitrations, including the current arbitration itself (¶14).

Burlington invoked statements by high-ranking Ecuadorian officials stating that Ecuador intended to pursue annulment even prior to the underlying Award having been rendered. It also highlighted alleged further evidence showing Ecuador's obstructionist and dismissive approach to past ICSID awards, non-ICSID awards and interim measures. Burlington relied on the *Chevron I* case to show that Ecuador paid an award five years late only once the award creditor had gained sufficient leverage, not because Ecuador recognised an obligation to pay (¶¶14-16).

Burlington also argued that Ecuador would suffer no prejudice were it to provide security, but that Burlington would be greatly prejudiced by Ecuador's failure to do so. Without security, Burlington argued the Committee would be encouraging further dilatory requests for enforcement as it would be akin to rewarding Ecuador given the Award interest rate was set lower than the rate of interest on borrowings owed by Ecuador to Burlington. Burlington offered to place any financial security or funds paid during the annulment proceedings in escrow, to revert back to Ecuador should the Annulment Application be successful (¶¶17-19).

In respect of Ecuador's plea of financial hardship as justification for refusing to order security, Burlington recalled that annulment committees have previously considered hardship in the context of security only when it would have "catastrophic immediate and irreversible consequences" (¶35). Burlington also observed that Ecuador had a history of improperly using the exceptional measure of annulment as a routine procedural step (¶46).

## 2.2 Ecuador's Position

Having initially provided no justification for its application for extension of the stay, in response to Burlington's arguments Ecuador submitted that the Committee was not empowered to condition a stay of enforcement on the posting of security. Ecuador argued that this was because: (i) the ICSID Convention does not expressly grant the Committee such power; (ii) the request for posting a security is a provisional measure under Article 47 of the Convention and is not included in Article 52(4) among the articles applicable to arbitration proceedings that also apply to annulment proceedings; (iii) in this respect, the ICSID Convention contrasts with other arbitration texts like the New York Convention that expressly empower authorities to order such conditions of security; and (iv) Burlington's reliance on the decisions of previous ad hoc committees was misplaced (¶20). Ecuador further noted that of the 20 cases publicly available in which security was requested, security was only ordered in nine instances (¶14).

Ecuador went on to highlight the financial pressures it faced as a developing nation (especially following a 2016 earthquake) and its inability to create immediate liquidity to satisfy non-budgetary awards. According to Ecuador, Burlington had failed to establish it would suffer harm as a result of the stay, while Ecuador would suffer irreparable harm as a result of lifting of the stay (¶¶21-22). With respect to the applicable standard for the ordering of a stay, Ecuador argued that numerical data indicated that the level of harm necessary could not possibly be the "descent into crisis of the relevant State" (¶52). Ecuador rejected Burlington's proposal that it should place funds in escrow pending conclusion of the annulment proceedings.

Ecuador submitted that the possibility of non-compliance could not constitute grounds for the ordering of security, as non-compliance is already accounted for within the Convention rules. To order security on these grounds would no more than merely counter-balance the effect of a stay, and would in fact place Burlington in a better situation (¶24). In any case, Ecuador argued that there was little evidence there was a risk of non-compliance. In doing so, it relied on its record of compliance with past awards, statements from public officials that the State would continue to abide by international law, and refutation as irrelevant of the factors on which Burlington relied to establish that Ecuador posed a risk on non-compliance (¶¶25-33).

### **3. The Committee's analysis**

The Committee concluded that Ecuador had failed to show that the circumstances presented were of sufficient gravity to justify a continuation of the stay (¶83). The Committee explained that the first step in consideration of a request for a stay of enforcement was to determine whether circumstances to justify the stay exist.

If Ecuador, which assumes the burden of proof pursuant to Rule 54(4) of the ICSID Convention, could not prove such circumstances to exist, then the Committee need not consider the matter of the stay of enforcement any further. The possibility of security being given by Ecuador as a condition was not an adequate substitute for a lack of circumstances justifying continuation of the stay (¶85).

In respect of the relevant legal framework, the Committee noted that while Rule 54(1) of the Arbitration Rules gives a party applying for an annulment the right to request a provisional stay of enforcement, Rule 54(4) also requires the party making the application to specify the circumstances requiring a stay. The Committee also observed that even if it were to find that such circumstances did exist, it nevertheless retained a wide discretion as to whether to order the stay (¶70). While there is a right to request a stay, there is no right that the stay must be granted.

The Committee contrasted this with both parties' obligation to abide by the Award already granted, regardless of the pending annulment proceedings. According to the Committee, a stay of enforcement is an exception in the context of a party's ability to apply for annulment, which is itself a limited and exceptional right (¶73).

The Committee found that Rule 54(4) places the burden of proof on the applicant to demonstrate the existence of circumstances justifying an extension of a stay of enforcement (¶75), and that Ecuador had offered no justification for the stay in its initial application (having only offered justification in reply to Burlington's initial response). Such a reversal of the burden of proof was, in the Committee's opinion, unacceptable (¶74). The Committee also confirmed that it was Burlington's burden to prove any circumstances that would warrant conditions to the stay (¶76). It found that, in sum, each party had to prove the circumstances on which it based its claim.

The Committee went on to consider the proper analytical approach to be taken to the application for extension of the stay. It noted that Ecuador first had to establish the existence of circumstances justifying extension of the stay. Only then was it necessary for the Committee to undertake a proportionality analysis balancing the harm caused to Ecuador by lifting the stay against the consequences to Burlington should the stay be continued (¶78).

In applying this approach, the Committee found that the only sufficient circumstance invoked by Ecuador in this sense was that the provisional stay would cause hardship to Ecuador and its population.

On the facts, the Committee concluded that the evidence was not of the severity to justify continuation the stay (¶83). Ecuador's evidence relied on the economic, financial and social effects that the significant Award would have on its ability to fund its annual budgets or ongoing programmes. While the Committee did not question Ecuador's "laudable social objectives" of alleviating poverty and providing healthcare and education, the general argument Ecuador was making was that it would need reallocate funds to accommodate the Award (¶83). The Committee concluded this was a general argument that any State could make and it was for the State to decide how to prioritise its funding when considering all its financial obligations (¶83). Furthermore, if the Committee did not annul the Award, Ecuador would in any case be obliged to pay the Award in full, with the same economic and social consequences resulting from the reallocation of funds.

The Committee therefore concluded the provisional stay should be lifted and recommended that Ecuador reconsider Burlington's offer of placing funds in escrow (¶86). Since the Committee concluded there were no circumstances existing to justify extension of the stay, it was unnecessary to determine whether it possessed the authority to condition such a stay on Ecuador's posting of security (¶86).