

INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

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 In the matter of Arbitration :  
 between: :  
 :  
 PERENCO ECUADOR LIMITED, :  
 :  
 Claimant, :  
 : Case No.  
 and : ARB/08/06  
 :  
 THE REPUBLIC OF ECUADOR, :  
 :  
 Respondent. :  
 -----X

FIRST SESSION AND HEARING ON STAY OF ENFORCEMENT

Monday, January 13, 2020

The World Bank Group  
1225 Connecticut Avenue, N.W.  
C Building  
Conference Room C3-150  
Washington, D.C.

The hearing in the above-entitled matter  
came on at 9:00 a.m. before:

PROFESSOR EDUARDO ZULETA JARAMILLO  
President of the ad hoc Committee

PROFESSOR MÓNICA PINTO, Member

PROFESSOR ROLF KNIEPER, Member

<p>Sheet 3</p> <p style="text-align: center;">6</p> <p style="text-align: center;">C O N T E N T S (Continued)</p> <p>FIRST SESSION (Continued) <span style="float: right;">PAGE</span></p> <p>2. Constitution of the Committee and the Committee Members' Declarations <span style="float: right;">174</span></p> <p>10. Place of Proceeding <span style="float: right;">178</span></p> <p>11. Procedural Language, Translation and Interpretation <span style="float: right;">180</span></p> <p>12. Routing of Communications <span style="float: right;">186</span></p> <p>13. Number of Copies and Method of Filing of Parties' Pleadings <span style="float: right;">187</span></p> <p>18. Records of Hearings and Sessions <span style="float: right;">190</span></p> <p>19. Post-Hearing Memorials and Statements of Costs <span style="float: right;">191</span></p> <p>21. Annex A - Procedural Calendar <span style="float: right;">193</span></p>	<p style="text-align: center;">8</p> <p>09:03:59 1 Thank you.</p> <p>2 PRESIDENT ZULETA: Thank you very much.</p> <p>3 Mr. Silva Romero?</p> <p>4 MR. SILVA ROMERO: Thank you, Mr. President.</p> <p>5 And Ecuador will address today the Committee</p> <p>6 in Spanish.</p> <p>7 Thank you very much, Mr. President, Members</p> <p>8 of the Committee. To my right is the Attorney-General</p> <p>9 of the State of Ecuador, Íñigo Salvador Crespo; to my</p> <p>10 left is my colleague, José Manuel García Represa from</p> <p>11 Dechert; following him is Ms. Claudia Salgado Levy,</p> <p>12 who is National Director for International Matters,</p> <p>13 Office of the General-Attorney of the Republic of</p> <p>14 Ecuador; and then Ms. González Giráldez; then Anna</p> <p>15 Giles of Dechert; followed by Mr. Amir Farhadi, also</p> <p>16 of Dechert; and myself, Eduardo Silva Romero of</p> <p>17 Dechert.</p> <p>18 Thank you.</p> <p>19 PRESIDENT ZULETA: Thank you very much.</p> <p>20 To my left, Professor Mónica Pinto; to my</p> <p>21 right, Professor Rolf Knieper, and the Secretary of</p> <p>22 the Committee, Veronica Lavista. According to the</p>
<p style="text-align: center;">7</p> <p>1 P R O C E E D I N G S</p> <p>2 PRESIDENT ZULETA: Good morning.</p> <p>3 This is the Hearing on the Stay of</p> <p>4 Enforcement in ICSID Case ARB/08/6, Annulment</p> <p>5 Proceedings, Perenco Ecuador Limited v. Republic of</p> <p>6 Ecuador.</p> <p>7 To start, I would ask counsel of each Party</p> <p>8 to introduce the team.</p> <p>9 MR. FRIEDMAN: Good morning, Mr. President,</p> <p>10 Members of the Committee. My name is Mark Friedman.</p> <p>11 I'm a partner at Debevoise &amp; Plimpton. We represent</p> <p>12 Perenco Ecuador Limited.</p> <p>13 I'm joined today at counsel's table by my</p> <p>14 partner, Ina Popova; my colleague, Laura Sinisterra;</p> <p>15 by our clients and representatives of Perenco Ecuador</p> <p>16 Limited, Jonathan Parr and, down at the end of the</p> <p>17 table, Josselyn Briceno de Luise. And also, in</p> <p>18 between Jonathan and Josselyn is James Haase from</p> <p>19 Immersion Legal, who has been our consultant on</p> <p>20 preparing slides which, hopefully, will be helpful to</p> <p>21 all of you and will be a lot better than if we tried</p> <p>22 to do it ourselves. So, James is terrific.</p>	<p style="text-align: center;">9</p> <p>09:05:15 1 schedule agreed upon by the Parties, we will start</p> <p>2 with the submission from the Republic of Ecuador for</p> <p>3 an hour, starting now.</p> <p>4 Thank you.</p> <p>5 Mr. Silva Romero, you have the floor.</p> <p>6 OPENING STATEMENT BY COUNSEL FOR APPLICANT</p> <p>7 MR. SILVA ROMERO: Thank you, Mr. President.</p> <p>8 The General-Attorney for the State will</p> <p>9 introduce our Arguments.</p> <p>10 DR. SALVADOR CRESPO: Mr. President,</p> <p>11 Professor Pinto, Professor Knieper, my name is Íñigo</p> <p>12 Salvador. I'm the General-Attorney for the State of</p> <p>13 the Republic of Ecuador, and I am here before you</p> <p>14 today in representation of my country to introduce the</p> <p>15 arguments of the Republic on two points: First, that</p> <p>16 the request for annulment of the Award in this case is</p> <p>17 serious and solid; and, second, that the enforcement</p> <p>18 of the Award should remain stayed so long as the</p> <p>19 Annulment Proceeding continues without Ecuador needing</p> <p>20 to establish any security in exchange for this.</p> <p>21 As regards the first point, you are familiar</p> <p>22 with the fact that Ecuador argues that both the Award</p>

10

09:06:25 1 and the prior Decisions of the Tribunal on its own  
 2 jurisdiction and on liability as it regards the main  
 3 Claims and Counterclaims include errors such that that  
 4 Award should be, must be, and all three examples of  
 5 the numerous grounds for annulment invoked by the  
 6 State in its Request for Annulment merit special  
 7 mention by way of introduction.  
 8 First, it is undeniable that, given the  
 9 absence of evidence that Perenco Ecuador Limited, the  
 10 Claimant in this case, was controlled at the relevant  
 11 time by French nationals, this company cannot be  
 12 characterized as an investor--this under the Treaty,  
 13 under the Convention--and, therefore, the Tribunal did  
 14 not have jurisdiction to resolve the dispute as  
 15 between the Parties.  
 16 In summary, the Tribunal decided to protect  
 17 a company constituted in Bahamas in light of the  
 18 Treaty between Ecuador and France.  
 19 We should also note on this point that, for  
 20 similar reasons, 40 percent of the amount of the Award  
 21 in the case known as Occidental II--also against  
 22 Ecuador--was annulled by an ICSID ad hoc Annulment

11

09:07:51 1 Committee.  
 2 Second, one can also criticize the  
 3 ill-founded decision of the Court that the Declaration  
 4 of Caducidad, particularly in the Participation  
 5 Contract for Block 21, was expropriatory in nature.  
 6 The Decision on the liability of the Tribunal merely  
 7 affirms, without showing it, that the caducidad was  
 8 expropriatory in notion. It affirms, without showing  
 9 it, or without proving--doing so does not meet the  
 10 requirement of any ICSID Tribunal to state the reasons  
 11 for its Decisions.  
 12 And, third and finally, the Tribunal incurs  
 13 in three of the grounds for annulment in the ICSID  
 14 Convention when one decides, acting with caprice and  
 15 without having the faculties of a third-party  
 16 facilitator, that the Parties had agreed that Law 42  
 17 would stabilize at 33 percent as of 5 August 2008.  
 18 For these and all other reasons set out in  
 19 our Request for Annulment, the Committee should  
 20 consider that that request is prima facie sufficiently  
 21 serious such that the Stay of the Enforcement of the  
 22 Award should be maintained.

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09:09:19 1 As regards the second point, the Claimant  
 2 insists in its writings on suspension that the Stay of  
 3 the Enforcement should be lifted because, if it is  
 4 maintained, implementation of the Award should be  
 5 guaranteed somehow so long as this Annulment  
 6 Proceeding continues.  
 7 During the Arbitration, the Claimant already  
 8 permanently harassed Ecuador such that it would not be  
 9 able to put forward a proper defense. Now, in the  
 10 Annulment Proceeding, it is attempting to develop the  
 11 same strategy. Its request to lift the Stay of  
 12 Enforcement of the Award, in effect, only seeks to not  
 13 allow Ecuador to catch its breath from the outside,  
 14 doing all possible to deprive it of the necessary calm  
 15 so as to be able to prepare its Memorials on Annulment  
 16 of an award that entails an injustice to the tune of  
 17 hundreds of millions of dollars.  
 18 Moreover, given that the application of the  
 19 principle of proportionality to this case inexorably  
 20 leads to the conclusion that lifting the Stay of  
 21 Enforcement would cause Ecuador much greater harm than  
 22 the alleged harm that maintaining that Stay would

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09:10:37 1 cause Perenco--well, in light of this, Ecuador is  
 2 certain that the Committee will maintain the Stay of  
 3 Enforcement until such time as it decides the matter  
 4 of annulment.  
 5 Ecuador is also certain that the Committee  
 6 will not condition maintaining the Stay of Enforcement  
 7 on establishing any security, for clearly this  
 8 Committee, we argue, does not have the power to do so.  
 9 Actually, the Claimant has not shown that Ecuador is  
 10 not going to comply with the Award, nor can it show  
 11 this, for, indeed, Ecuador maintains an impeccable  
 12 reputation of complying with international Awards.  
 13 Nor has Perenco shown that it has a better opportunity  
 14 to enforce the Award at this time than after  
 15 conclusion of the Annulment Proceeding, while Ecuador,  
 16 for its part, has shown that establishing security as  
 17 requested by the Claimant would cause it irreparable  
 18 harm, the State and people of Ecuador.  
 19 In summary, imposing a security such as that  
 20 requested by the Claimant would be disproportional in  
 21 the circumstances of this case.  
 22 Distinguished Members of the Committee,

09:12:02 1 everything that I have told and you what we will tell  
 2 you in the course of this hearing should suffice for  
 3 you to maintain suspension of the Stay--rather, to  
 4 maintain the Stay of Enforcement, but should the  
 5 Committee need greater assurances, then I would like  
 6 to be categorical: You should not harbor any doubt  
 7 but that Ecuador will abide by its international  
 8 obligations, as it has always done, as required by its  
 9 own Constitution.

10 In effect, Article 146, Section 9 of the  
 11 Constitution of the Republic establishes that the  
 12 Ecuadorian State recognizes international law as a  
 13 norm that governs its conduct; plus, Article 425  
 14 confers on international treaties the rank of being  
 15 greater than any statute. So, should this Committee  
 16 reject the Request for Stay of Enforcement put forward  
 17 by Ecuador, the State shall carry out any obligations  
 18 stemming from the Award.

19 Now, Mr. Richard Martínez, Minister of  
 20 Economy and Finance of the Republic of Ecuador, the  
 21 top-level official in charge of public finances, has  
 22 signed a statement in terms similar to what I just

09:13:26 1 said, the text of which will be made available to the  
 2 Committee and the Claimant if so requested.

3 Allow me, distinguished Members of the  
 4 Committee, to make one final observation to conclude  
 5 my remarks. The Award has not only caused great  
 6 surprise in Ecuador; it has also caused surprise in  
 7 many other Latin American states. As an attorney, it  
 8 is my hope that on annulling the Award, this Committee  
 9 will be sending a categorical message to the States of  
 10 Latin America that makes it possible for us to not  
 11 lose trust in the system for the promotion and  
 12 protection of international investments.

13 Thank you very much. With the indulgence,  
 14 Mr. President, I will now yield to Mr. Silva Romero.

15 PRESIDENT ZULETA: Thank you.

16 MR. SILVA ROMERO: Mr. President, I need to  
 17 ask for a break, because this is not working.

18 Ah. Okay. I will continue. Thank you very  
 19 much.

20 General-Attorney and Distinguished Members  
 21 of the Committee, Mr. President, and Members of the  
 22 Committee, this is a case in which the Stay of

09:14:44 1 Enforcement of the Award should be maintained with no  
 2 conditions for any number of reasons that we've  
 3 already developed and which, for now, would--I would  
 4 just like to underscore three of them.

5 The first reason is that the suspension  
 6 should be maintained because the Request for Annulment  
 7 by Ecuador is not abusive. It is neither  
 8 frivolous--it is not frivolous. It is serious, as  
 9 indicated by the General-Attorney; plus, it is not  
 10 dilatory, which stems from not being frivolous. If it  
 11 is not frivolous, obviously it is not dilatory.

12 A mere reading, Members of the Committee, of  
 13 the Request for Annulment corroborates, in our view,  
 14 that this is neither frivolous nor dilatory. That  
 15 mere reading of the Request for Annulment also shows  
 16 that it is complex, because the underlying arbitration  
 17 in the Perenco Ecuador Limited case was extremely  
 18 complex arbitration. Therefore, maintaining the Stay  
 19 of Enforcement, in our view, will introduce--will  
 20 assure that there can be the necessary calm to examine  
 21 the 21 grounds for annulment that have been invoked by  
 22 Ecuador in this case.

09:16:08 1 Second, the suspension should be maintained  
 2 without any conditions, without any conditions,  
 3 because, as we'll see, the ICSID ad hoc annulment  
 4 committees do not have the power to impose security as  
 5 a condition for continuing the Stay. And I'll come  
 6 back to this point further on.

7 And the third point: The Stay should be  
 8 main detained without any conditions, clearly,  
 9 because, as we will also see further on, lifting the  
 10 Stay would cause Ecuador harm much greater, much  
 11 greater, than the alleged harm that maintaining the  
 12 Stay of Enforcement would cause Perenco, the company,  
 13 which, as we will see, had no misgivings when it came  
 14 to polluting the Ecuadorian Amazon.

15 In its Rejoinder on the Stay of Enforcement,  
 16 Perenco has not been able to refute these three simple  
 17 premises that I have just recalled and, therefore,  
 18 Perenco now, in our view, is desperately putting  
 19 forward two incorrect arguments that Ecuador must  
 20 correct from the outset.

21 First, Perenco argues that Ecuador is  
 22 responsible for the long duration of the underlying

10:03:43 1 same if this Committee decided to condition this--to  
 2 condition this deposit--this to a deposit of  
 3 411 million as an escrow account as recognized by  
 4 Mitchell.  
 5 And the same would happen if this was a bank  
 6 security because, as we see also in the literature, no  
 7 bank would issue such a security if Ecuador does not  
 8 deposit in such a bank the \$411 million. So, be it  
 9 with an escrow or with a bank security, we would be  
 10 facing the same problem in terms of the hardship  
 11 caused to Ecuador.  
 12 And you see here in connection with 31 the  
 13 reference to the Tribunal in Flughafen that also  
 14 analyzed the impact of these securities. If you order  
 15 the provision of a bank security, Perenco would be in  
 16 a better-off situation as compared to the one that  
 17 they have with the Award. You would be seen in  
 18 history as being the Committee that has ordered the  
 19 highest security in history. The amount demanded by  
 20 Perenco is three times higher than the security order  
 21 in the Standard Chartered Case.  
 22 The second circumstance, fact circumstance

10:05:05 1 that also shows the hardship is that Ecuador would  
 2 have to pay 411 million that they would never be in a  
 3 situation to recover. Our dispute is that  
 4 Perenco--that is to say the only other Claimant in  
 5 this case, is a company that has been constituted in  
 6 Bahamas. They have no assets other than the Award.  
 7 They also have, here, information as to how  
 8 they appear in this Arbitration, saying that the only  
 9 asset they had to exploit were in Ecuador, and if they  
 10 left Ecuador, they would have nothing left. And they  
 11 have not presented any paper today that shows what  
 12 assets they would have.  
 13 And clearly, this risk has not been denied  
 14 by the other Party in their latest pleading. They  
 15 only say two things: To trust in them, because they  
 16 are saying that they commit themselves to paying back,  
 17 but they are demanding a bank guarantee, a bank  
 18 security, and they are only asking for us to trust in  
 19 them, but they do not trust in Ecuador when the  
 20 Attorney-General said that they will comply.  
 21 And also they have constituted the Company  
 22 in a tax haven, as part of a group where companies are

10:06:16 1 created and disappear based on some tax benefits.  
 2 This is no guarantee to the State, and we also know  
 3 that Perenco's word is not worth much, as we have seen  
 4 in the Ambiente Case, in the environmental case.  
 5 Finally, Perenco is also--  
 6 PRESIDENT ZULETA: I'm sorry, but your time  
 7 is up.  
 8 MR. GARCÍA REPRESA: So, would you allow for  
 9 30 seconds?  
 10 Perenco is also saying, well, for you to  
 11 know, this is not a parent company and we are not  
 12 talking about a security because the same risk exists  
 13 for a company to disappear in Bahamas. It is  
 14 undeniable.  
 15 As a conclusion, Members of the Committee,  
 16 that the hardship to be suffered by Ecuador, if you  
 17 lifted the Stay of Enforcement of an Award that most  
 18 likely will be annulled, is higher than the hardship  
 19 that would exist based on what Perenco said stemming  
 20 from waiting so many months.  
 21 We think that you should not put the State  
 22 in that situation to face that risk to have to pay

10:07:14 1 \$411 million to a paper company, and we--this would  
 2 have irreversible consequences to the State and its  
 3 citizenship.  
 4 We thank you for the attention and, once  
 5 again, we go back to what we said in our latest  
 6 pleading, Paragraph 224.  
 7 PRESIDENT ZULETA: Thank you very much. We  
 8 will take a break for 15 minutes now. And we will  
 9 resume.  
 10 (Brief recess.)  
 11 PRESIDENT ZULETA: Okay. We resume.  
 12 Mr. Friedman, you have the floor.  
 13 OPENING STATEMENT BY COUNSEL FOR CLAIMANT  
 14 MR. FRIEDMAN: Mr. President, Members of the  
 15 Committee, colleagues, good morning.  
 16 Ecuador has already benefited for over  
 17 10 years from the oilfields that it expropriated from  
 18 Perenco. Without having yet paid even a single cent  
 19 in compensation, Ecuador has reaped well over  
 20 \$7 billion, and probably closer to \$10 billion, in oil  
 21 revenues just from the oilfields it expropriated from  
 22 Perenco. Yet Ecuador now petitions this Committee,



Sheet 15

54

10:24:00 1 for no particularly compelling or special reason, to  
2 further and indefinitely excuse it from its obligation  
3 to compensate Perenco established in a final and  
4 binding ICSID Award. But as the familiar maxim puts  
5 it, "Justice delayed is justice denied," and in this  
6 equitable proceeding, justice will not tolerate  
7 further delay, and the Committee should deny Ecuador's  
8 Stay Application.

9 Last year, as you know, an esteemed Tribunal  
10 issued a Final ICSID Award obligating Ecuador to pay  
11 net compensation to Perenco of approximately  
12 \$411 million. Under the ICSID Convention, that Award  
13 is final and binding, and Ecuador must now comply with  
14 its pecuniary obligations. None of what we heard from  
15 Ecuador in its papers or today justifies derogating  
16 from those basic principles and fundamental rules.

17 With the Committee's permission, we will  
18 address those arguments in the following order:

19 First, I will explain why Ecuador's  
20 Application is conceptually misguided and the ICSID  
21 framework requires Ecuador to do much more than it  
22 has; that is, to establish circumstances that require

56

10:26:13 1 that is not what the ICSID framework provides.  
2 Ecuador's second claimed circumstance is  
3 that, in the event that Ecuador ultimately prevails in  
4 annulling the Award, it will have difficulty recouping  
5 that money from Perenco. That is not a legitimate  
6 circumstance either.

7 Ecuador has not proven that it would have  
8 any such difficulty. Perenco has always been good for  
9 its word and honored all of its obligations throughout  
10 these proceedings. There is not a single instance of  
11 it disregarding a Tribunal Order or anything like  
12 that. It has voluntarily and expressly undertaken to  
13 return the amounts recovered if the Award is  
14 ultimately annulled. It is part of a substantial  
15 corporate group that produces as much oil and barrels  
16 of oil equivalent per day as Petroamazonas, and it has  
17 even offered expressly to obtain a Parent Company  
18 Guarantee of that undertaking if the Committee  
19 considers it necessary.

20 Moreover, for Ecuador to assert this  
21 speculative risk is highly hypocritical given its own  
22 track record. Ecuador disregarded the Tribunal's

55

10:25:11 1 a stay. Ecuador's main argument, of course, is that  
2 filing for annulment itself should automatically  
3 suspend enforcement of the Award for the duration.  
4 That is simply not what the ICSID Convention and Rules  
5 provide, and we'll go through that in a minute.  
6 Instead, Ecuador must comply with the Award now,  
7 regardless of both the existence and the claimed  
8 Merits of its Annulment Application, unless it can  
9 establish specific circumstances that require a stay  
10 and further delay the compensation that the Award  
11 entails.

12 Second, Ms. Popova will show that neither of  
13 the two circumstances that Ecuador invokes actually  
14 require a stay. Ecuador's first claimed circumstance  
15 is essentially that it prefers not to honor the Award  
16 and to spend its money on other things. It has other  
17 budget priorities is what it alleges. But that is not  
18 a circumstance justifying a stay. It is just the  
19 ordinary consequence of having to pay an ICSID award.

20 If the mere consequence of having to pay an  
21 ICSID award by a State was a sufficient circumstance,  
22 then stays would become automatic in every case, and

57

10:27:16 1 binding Provisional Measures orders and thereby  
2 massively aggravated the dispute. It brought its  
3 Annulment Application in haste in order to trigger a  
4 provisional stay. It presents arguments about why it  
5 wishes never to have to pay the Award--because that is  
6 fundamentally what its arguments are; not that it  
7 doesn't want to pay now, but that it would prefer to  
8 pay never--and it has never paid any significant award  
9 voluntarily, promptly, and in full.

10 Indeed, despite Perenco's invitation, and  
11 even today, Ecuador has still not promised in clear  
12 terms that, if its Annulment Application is rejected,  
13 it will pay the Award without reservation, promptly,  
14 and immediately. All that you heard today was  
15 something much more nuanced, which is that they comply  
16 with their international law obligations. Well, they  
17 didn't previously in this case, and it led to the  
18 aggravation of the dispute; but regardless, that is  
19 not the same as a commitment to pay the Award.

20 The Committee, accordingly, should dismiss  
21 Ecuador's Stay request.

22 In any event, third, Ms. Sinisterra will

Sheet 16

58

10:28:11 1 then explain why, even if Ecuador could prove  
 2 circumstances requiring a stay, the Committee should  
 3 condition that Stay on Ecuador posting security.  
 4 And, fourth, I will make some concluding  
 5 remarks about how the circumstances of this particular  
 6 case, taken together, not only fail to provide any  
 7 valid basis for a stay, but more than that, it would  
 8 make granting a stay incredibly unjust.  
 9 Now to proceed to the first step in this  
 10 analysis, which is that the ICSID framework compels  
 11 Ecuador to show circumstances requiring a stay much  
 12 more than it's done.  
 13 Ecuador's entire Stay Application really  
 14 rests on the erroneous proposition that an Application  
 15 for Annulment itself should automatically suspend  
 16 enforcement of the Award. They, in their papers, put  
 17 it very clearly. They said that on their view,  
 18 continuing a Stay of Enforcement is warranted unless  
 19 circumstances justify that it be lifted. And they  
 20 said that the Stay must be continued unless its  
 21 Annulment Application is dilatory or otherwise  
 22 abusive.

59

10:29:18 1 Now, this morning, Mr. Silva Romero first  
 2 said that their proposition is that there is no  
 3 presumption in favor of or against a stay. And that's  
 4 the first time they have said that, and it's actually,  
 5 as you can see, different from what they've said in  
 6 their papers. But not to fear. He then clawed that  
 7 back and reverted to the position in the papers with  
 8 the second and third points, in which he said that the  
 9 right to bring an Annulment Application itself creates  
 10 a presumption for a stay and that a stay should be  
 11 continued just under normal circumstances. So, I  
 12 think their position is actually unchanged, despite  
 13 what seemed like a concession at the start of his  
 14 speech.  
 15 However, Ecuador's position turns the ICSID  
 16 framework on its head. Under the ICSID Convention, an  
 17 Annulment Application, even one that is not dilatory  
 18 or abusive, does not suspend enforcement. It doesn't  
 19 do it automatically or even create a presumption in  
 20 favor of it.  
 21 So, let's actually do something that Ecuador  
 22 did not do this morning and hasn't really done in

60

10:30:11 1 their papers: Look at the text of the ICSID  
 2 Convention and Rules themselves rather than just what  
 3 some people have said about them.  
 4 Article 53 of the ICSID Convention provides  
 5 both default rules about finality and enforceability,  
 6 and then provides that there are limited exceptions to  
 7 those. The rule is that an award shall be binding.  
 8 It shall not be subject to any appeal. It contains  
 9 what is literally described as an exception, "except  
 10 for the remedies provided in the Convention," which  
 11 includes annulment, of course. It also provides that  
 12 "Each Party shall abide by and comply with the terms  
 13 of the Award." And, again, it contains a limited  
 14 exception to the extent enforcement shall have been  
 15 stayed.  
 16 So, when we say that Annulment and a Stay  
 17 are exceptional, that's because that's how the  
 18 Convention literally describes them, as exceptions to  
 19 the normal, otherwise applicable Rules.  
 20 Now, it is worth noting what is missing also  
 21 from this language from the Convention. The  
 22 Convention does not provide that the mere fact of

61

10:31:10 1 filing for annulment triggers a stay. Instead, the  
 2 Convention requires more than mere commencement of  
 3 annulment. Article 52(5) of the Convention goes on to  
 4 state that "The Committee may, if it considers the  
 5 circumstances so require, stay enforcement of the  
 6 Award pending its Decision."  
 7 That language would be absolutely pointless  
 8 if normal annulment application alone was a  
 9 circumstance requiring a stay. It clearly requires  
 10 some circumstance other than the fact that somebody  
 11 has commenced annulment.  
 12 Now, these Convention provisions are then  
 13 implemented, as you know, in the ICSID Rules, and  
 14 Rule 54 of the ICSID Arbitration Rules specifically  
 15 deals with stays of enforcement. Rule 54(1) says that  
 16 any Party can apply for a stay. That's fine. And  
 17 Rule 54(4) adds that when you apply for a stay, you  
 18 shall specify the circumstances that require it.  
 19 So, the burden is clearly on the person who  
 20 is seeking the stay to specify the circumstances.  
 21 Rule 54(2) provides even more guidance for  
 22 present purposes. Rule 54(2) contains--says that, if

11:01:21 1 voluntarily undertaken to repay the Award if it is  
 2 annulled. The Tenaris I Committee, for example, found  
 3 a similar undertaking sufficient to dispel any risk of  
 4 nonrecoupment.

5           Second, Ecuador can show no reason to doubt  
 6 that undertaking. Perenco has always complied with  
 7 the Tribunal direction in this case, unlike Ecuador.  
 8 And the idea that Perenco somehow caused delay will,  
 9 I'm sure, prompt nothing but indignation for all of  
 10 those who know the facts and the extensive record of  
 11 this Arbitration, which is sadly too extensive to  
 12 recall here.

13           But, third, Ecuador says that Perenco is  
 14 incorporated in the Bahamas and its sole asset was the  
 15 Award. Now, there is some irony in that argument  
 16 because, of course, the only reason why all that  
 17 Perenco is left with is the Award is because Ecuador  
 18 expropriated it. But, more generally, Perenco Ecuador  
 19 is not a fly-by-night shell company with unknown  
 20 beneficiaries or an individual with unknown assets.  
 21 Ecuador tries to distinguish Perenco from Burlington  
 22 saying that Burlington was part of a multinational oil

11:02:26 1 company, and the same is true here. Perenco Ecuador  
 2 is part of the Perenco Group. Its oil-and-gas arm is  
 3 the leading privately owned company in Europe and it  
 4 has operations all around the world with an annual  
 5 production similar to Petroamazonas. These kinds of  
 6 considerations are sufficient to dispel any  
 7 nonrecoupment risk in this case, as other Committees  
 8 have previously recognized.

9           And, again, if the Committee considers that  
 10 anything further is needed, Perenco will obtain a  
 11 parent company guarantee from Perenco S.A. as well.

12           Now, all of that is much more than can be  
 13 said for Ecuador, which violated the Tribunal's  
 14 Provisional Measures and still has not, even what we  
 15 heard for the first time this morning, unequivocally  
 16 committed to pay the Award promptly, in full, and  
 17 voluntarily if it is not annulled. So, this claim  
 18 that Ecuador has an exemplary track record of  
 19 compliance is honestly just wishful thinking.

20           Now, let's come back to this chart because  
 21 we saw it again today. This--Ecuador produced this  
 22 table, and it claims to have "complied" with the

11:03:29 1 Awards in Duke, Oxy, Chevron, Murphy, Burlington, and  
 2 Copper Mesa. Well, in reality, it's a little more  
 3 nuanced than that. In Duke, which appears to be the  
 4 only one that Ecuador voluntarily paid, it was--the  
 5 Award for the comparatively insignificant amount of  
 6 less than \$6 million. In Oxy, Ecuador settled the  
 7 first Award about VAT, but then it retaliated by  
 8 expropriating the entire investment, and then it  
 9 settled that Award for a major haircut.

10           And in Chevron, it is also a little bit more  
 11 complicated. Again, it settled for a haircut. So, it  
 12 didn't voluntarily pay and it didn't pay in full. And  
 13 moreover, it did so after a multi-billion-dollar  
 14 judgment obtained by fraud, racketeering, extortion,  
 15 money laundering, witness tampering--five years of  
 16 vainly attempting to set aside the Award and hide  
 17 assets to forestall recovery.

18           Let's look at Murphy, Burlington, and Copper  
 19 Mesa. In all of those, as far as we know, Ecuador  
 20 settled the Awards for a haircut, and in at least in  
 21 two cases, only after the investor had to go to court  
 22 to commence enforcement proceedings. So, there is

11:04:38 1 really nothing mysterious, I think it was suggested,  
 2 about that.

3           And this is just not what compliance means  
 4 under the Convention, and it cannot be what compliance  
 5 should mean under the Convention. Ecuador is not  
 6 saying it is going to voluntarily pay once its  
 7 Annulment Application is dismissed. What it is  
 8 obviously going to do and has done in prior cases is  
 9 lean back and wait for the investor to come and chase  
 10 assets and to cave in so that it can settle for a  
 11 haircut. And that's obviously what they are doing  
 12 here. There's a tactical filing of the Annulment  
 13 Application three business days after the Award. This  
 14 is just not compliance with the Award.

15           Compliance means the prompt and voluntary  
 16 execution of Ecuador's pecuniary obligations as  
 17 requested by the creditor. That is the only way of  
 18 compliance under the ICSID Convention, and you will  
 19 see here, for example, the Burlington and Tenaris II  
 20 Committees making that observation.

21           Second, Ecuador's track record of  
 22 noncompliance is not surprising because Ecuador's



11:05:46 1 former President and its former Attorney-General have  
 2 decried the whole ICSID system as illegitimate and  
 3 rigged. They compare ICSID to a new form of  
 4 domination like the boots and bombers of old. And,  
 5 you know, this is not just what people have said; it  
 6 is too easy to blame it on the past administration.  
 7 Ecuadorian law effectively makes ICSID Arbitration  
 8 unconstitutional. And you know what? That has not  
 9 changed under President Moreno. We haven't heard any  
 10 denial of that from our friends. We put it in our  
 11 papers. And we didn't hear anything. And statements  
 12 like these show that there really is a risk of  
 13 noncompliance which militates against a stay.  
 14 Here again, statements from Committees  
 15 considering similar statements by Venezuelan officials  
 16 recognize that this shows a serious risk of  
 17 noncompliance by the State and it militates against a  
 18 stay.  
 19 And while Ecuador will no doubt claim that  
 20 it is not Venezuela, that is the company that it  
 21 keeps. Ecuador is one of only three countries in the  
 22 world to have denounced the Convention, including

11:06:50 1 Venezuela and Bolivia.  
 2 And they mentioned the Organic Law this  
 3 morning; so I will raise that too. That law does  
 4 not--it allows arbitration under other institutions  
 5 but not under ICSID.  
 6 Third, consistent with that general  
 7 repudiation of the Convention, Ecuador violated the  
 8 Provisional Measures Order of both the Perenco  
 9 Tribunal and the Burlington Tribunal. The Perenco  
 10 Tribunal emphasized that Provisional Measures were  
 11 tantamount to Orders that Ecuador's violation of the  
 12 binding Orders aggravated the dispute. And despite  
 13 having lost this point over and over, even today  
 14 Ecuador continues to maintain that those Orders are  
 15 not binding.  
 16 Now, you cannot just dismiss these  
 17 violations as irrelevant, as Ecuador would have it.  
 18 If Ecuador has refused to comply with unequivocal  
 19 Orders designed to avoid irreparable harm and  
 20 aggravation of the Parties' dispute, what comfort can  
 21 you have that it will pay a one-off sum of money that  
 22 there is no question it can afford? Instead,

10:56:41 1 Ecuador's past conduct proves that it will not  
 2 voluntarily, promptly, and in full pay the Award and  
 3 so does its attitude in these proceedings.  
 4 Now, Perenco called on Ecuador to pay, and  
 5 the only response we had was this: That Ecuador  
 6 "shows predisposition to comply with its international  
 7 obligations."  
 8 Talk about semantic distinctions. For the  
 9 first time today, we hear that there is some secret  
 10 undertaking by the Minister of Finance that allegedly  
 11 says that Ecuador will comply as it always has with  
 12 its international obligations, consistent with the  
 13 obligations under its Constitution.  
 14 I will note that there is no commitment by  
 15 the Attorney-General, who is Ecuador's agent in this  
 16 case. I will note that even the terms of that alleged  
 17 commitment are not that Ecuador will voluntarily pay  
 18 the Award. They are just that Ecuador will comply  
 19 with its obligations as it has done in the past and to  
 20 the extent that that is consistent with its  
 21 Constitution.  
 22 We know what that means. We know what

11:09:01 1 Ecuador has done in the past about its international  
 2 obligations. And, moreover, even if it had promised  
 3 to comply with the Award, which it hasn't, that would  
 4 be no additional security at all because it already  
 5 has that obligation under the Convention. So, what we  
 6 heard rather proves the point: There is no commitment  
 7 to voluntarily comply. In fact, the only statements  
 8 that we've had not only do not add any further  
 9 security but increase Perenco's concern.  
 10 And so, there is simply no answer from  
 11 Ecuador to the following question: Why would Ecuador  
 12 now, for the very first time ever, promptly,  
 13 voluntarily, and in full pay an Award that it believes  
 14 to be tainted by 21 annulable errors issued by a  
 15 Tribunal whose Provisional Measures Order Ecuador  
 16 deliberately breached, under a system that Ecuador  
 17 denounced as rigged, and which Ecuador even today  
 18 cannot even bring itself to promise to pay.  
 19 That's where this Committee's analysis can  
 20 end. Ecuador has not proved that the circumstances  
 21 require a stay, and so the Stay should automatically  
 22 terminate. But even if you find that the

Sheet 28

<p style="text-align: right;">106</p> <p>11:23:39 1 PRESIDENT ZULETA: Yeah, I'm going to give 2 you two minutes. 3 MR. FRIEDMAN: If the Committee would 4 indulge me. 5 So, the fact that Ecuador did not honor the 6 Stay when it was inconvenient to it we say prevents 7 them from being--now coming to you and say that they 8 should have a Stay, that they can enforce against 9 Perenco a Stay of Collection when they would find that 10 collection would be inconvenient. 11 As the maximum of equity that is familiar to 12 all of us puts it: "He who seeks equity must do 13 equity." And if Ecuador had abided by the Stay 14 previously imposed by the Tribunal, then Perenco over 15 these years would have shared in that 7 to \$10 billion 16 of revenue and, instead, Perenco has received 17 absolutely nothing for more than 10 years while 18 Ecuador has reaped year after year benefits. 19 And if next year is anything like 2018, they 20 will make another half billion dollars of net revenues 21 off of these Blocks, while Perenco has to sit here and 22 simply bear the costs of continuing to defend what it</p>	<p style="text-align: right;">108</p> <p>12:00:54 1 legal points, and finally Mr. García Represa will come 2 back to certain facts. 3 So, with your permission, I would give the 4 floor to the General-Attorney. 5 DR. SALVADOR CRESPO: Thank you, Mr. Silva 6 Romero. 7 Distinguished Members of the Committee, the 8 Claimant has made several references to what I said 9 about the willingness of the State of Ecuador to carry 10 out the Award, saying that it's a generic and 11 insufficient statement referring only to the general 12 obligations of the Ecuadorian State under 13 international law. 14 That is not so. While I have referred to 15 the Ecuadorian legal framework which enshrines 16 Ecuador's support for international treaties, I have 17 been very specific when I've said, and I quote: 18 "Accordingly, if this Committee were to reject the 19 Request for Annulment submitted by Ecuador, the State 20 shall proceed to carry out the obligations stemming 21 from that Award." 22 Similarly, I've referred to the statement by</p>
<p style="text-align: right;">107</p> <p>11:24:37 1 has already won in this Arbitration. 2 So, speaking about proportionality or about 3 equity, which is the foundation of a request for a 4 Stay, those factors in this case in particular 5 strongly militate against Ecuador's Application for a 6 Stay for the duration of this proceeding. And, 7 consequently, we invite the Committee to follow the 8 Rules and allow the Stay automatically to terminate. 9 There is no need to continue it. 10 Thank you very much for your time this 11 morning. 12 PRESIDENT ZULETA: Thank you very much. 13 We will take a break for 30 minutes, as 14 agreed. 15 (Brief recess.) 16 PRESIDENT ZULETA: Okay. We now give the 17 floor to the Republic of Ecuador for half an hour. 18 REBUTTAL ARGUMENT BY COUNSEL FOR APPLICANT 19 MR. SILVA ROMERO: Thank you, Mr. President. 20 As we did with the Opening Argument, first 21 the General-Attorney will make a presentation, and 22 then I will address certain general issues and some</p>	<p style="text-align: right;">109</p> <p>12:02:02 1 the Ministry of Energy and Finance of Ecuador--excuse 2 me, of the Economy and Finance of Ecuador, in which he 3 says--and I did not read it at the time; I will read 4 it now--"If what we want does not come to pass and 5 this Committee decides to reject the Request for 6 Annulment of the Award submitted by Ecuador, Ecuador 7 will honor its obligations stemming therefrom," from 8 the Award, "just as it has done in respect of all of 9 its international obligations." 10 I believe, Distinguished Members of the 11 Committee, that one could not be more specific with 12 that. I conclude my remarks, and I give the floor to 13 Mr. Silva Romero. 14 Thank you. 15 MR. SILVA ROMERO: Thank you. 16 And as I was saying, Members of the 17 Committee, I am going to make some general points 18 combined with certain legal observations. More 19 specifically, I'm going to make four series of 20 observations. 21 The first has to do with something which, in 22 my experience, is always left out or forgotten during</p>

Sheet 36

138

01:10:58 1 have a good case or a bad case. It's a 50/50 chance.  
2 But does that entitle the Claimant to an  
3 automatic or presumptive entitlement to Provisional  
4 Measures, saying, "Hey, we want something in advance  
5 of the final Decision"? Well, I raise the Provisional  
6 Measures analogy not just because Ecuador did, but  
7 because there's a parallelism in this respect in the  
8 Convention itself.

9 If we could look at Article 47 of the  
10 Convention, it says that: "Except as the Parties  
11 otherwise agree, the Tribunal may, if it considers  
12 that the circumstances so require, recommend any  
13 Provisional Measures which should be taken to preserve  
14 the respective rights of either Party."

15 So, on Ecuador's view, this idea that if  
16 circumstances so require, it just means because there  
17 is--it kind of goes along with the right to annulment,  
18 it must mean that you get it presumptively or that  
19 it's only in the exceptional case where there's a  
20 really bad argument that it couldn't apply.

21 But consider what this would mean for the  
22 implication for Provisional Measures. Every Claimant

139

01:11:58 1 has a right to bring a claim, and does that mean that  
2 you would get a presumptive right to Provisional  
3 Measures unless you had a frivolous arbitration claim?  
4 It is nonsense, but that is the implication of what  
5 they are arguing.

6 The fourth point on this is that their  
7 argument comes--their argument of why they shouldn't  
8 pay now comes down to this balancing of probabilities,  
9 about financial hardship, and I think it is our point  
10 that they have not even come close to making that good  
11 because the only financial hardship they have shown is  
12 that they are going to have to pay the Award.

13 That is the normal consequence of losing and  
14 having to pay an Award. It is not an unusual  
15 consequence of having to pay now rather than later.  
16 It's claimed that--which Mr. García Represa said, for  
17 the first time, really, in his Rebuttal Remarks, that  
18 they couldn't pay 7 percent of the education budget,  
19 and so, like, kids won't be able to go to school.

20 I'm sorry, but there is absolutely no proof  
21 of that. What they have submitted as proof is that,  
22 here is our education budget, and these amounts have a

140

01:12:54 1 certain percentage relationship to the amount that we  
2 owe to Perenco. That is not the same thing as saying  
3 that they will manage this by not sending kids to  
4 school or anything else. It is a--really not  
5 responsible argument.

6 It also--this argument also, really, I  
7 think, amplifies the concern that they may never pay,  
8 or they may never pay voluntarily because, what, they  
9 are not going to have an education budget two years  
10 from now when the Annulment Proceeding ends? I mean,  
11 of course they will. Of course they will always have  
12 other priorities. States always do.

13 They are not wrong to have those priorities,  
14 but those priorities cannot excuse or derogate from  
15 the Convention's obligation that the Award itself is  
16 immediately enforceable. And it is also critical for  
17 you to take note of the fact that, through all of  
18 these proceedings, through all of the Briefs and  
19 arguments today, Ecuador has not once denied that it  
20 has the capacity to pay this Award. And they do.

21 Now, I want to turn to the--oh, and I should  
22 also say that one other thing, which is where they

141

01:14:02 1 raised in the Burlington Case that the circumstances  
2 were different, I'm going to come on to that a little  
3 more later, but they have never been able to  
4 prove--I'm going to come on to that later. Forgive  
5 me. I'm going to withdraw those comments now and stay  
6 with the structure I had planned.

7 So, the second point I want to make is about  
8 the risks to both Parties of having to wait because  
9 there is a risk of noncompliance that I think has only  
10 been amplified by the comments that you heard today.  
11 You heard a further repeated inadequate assurance from  
12 the representatives of Ecuador that they would pay.  
13 What we were looking for was an assurance that--by  
14 itself, you can't take to the bank and it's not  
15 anything, but, nevertheless, it would have been  
16 something--that, "If we lose our annulment, we will  
17 voluntarily, promptly, and without reservation pay the  
18 Award in full." Full stop. That's what compliance  
19 means under the Convention.

20 And you did not hear that from anybody on  
21 the Ecuadorian side. In fact, what you heard was  
22 quite the opposite. What you heard from the

Sheet 37

142

01:14:59 1 Attorney-General, with all due respect, and also  
 2 channeling the Finance Minister, was that they will  
 3 comply with their obligation stemming from the Award  
 4 as they have done in the past. Okay.  
 5 That's not exactly a promise to pay. It  
 6 sounds kind of promising, but then they also conceded  
 7 what that means, how they have treated this compliance  
 8 in the past. They treated it by treating it as an  
 9 opportunity to finally, after everything else, sit  
 10 down and have settlement negotiations. And what they  
 11 say, what they acknowledged during their speeches was  
 12 that in settlement negotiations you always make  
 13 concessions. So, what they are reserving the right to  
 14 do is "Please wait a while longer, and then once this  
 15 annulment petition is dismissed, then what you will  
 16 have is a right to sit down with us and have a  
 17 settlement discussion, and we will pay within our  
 18 legal framework, and, otherwise, you may have to make  
 19 concessions."  
 20 And when they say that they will comply  
 21 within their legal framework and according to their  
 22 own constitution, which was another carefully crafted

143

01:15:57 1 part of that assurance, keep in mind that in their own  
 2 Ecuadorian constitution, as we showed, they have  
 3 repudiated the ICSID Convention and other  
 4 International Conventions. So, I don't have a high  
 5 degree of hope and I don't think anyone in this room  
 6 can, that, if you went into an Ecuadorian court and  
 7 said, "Here's my ICSID Award, please pay me  
 8 \$411 million," that you're going to get an immediate  
 9 judgment on that. Instead, the State has clearly  
 10 reserved to itself the rights to assert all manner of  
 11 defenses, both State immunity and otherwise, and  
 12 consequently it is not the prompt, full compliance  
 13 that the ICSID Convention requires.  
 14 Now, with Perenco, in contrast, I think we  
 15 have tried to be as unequivocal as possible, and I  
 16 mean for there to be no equivocation, that if Perenco  
 17 receives money from Ecuador as a result of this Award  
 18 and Perenco then loses on annulment in whole or in  
 19 part and has to pay the amounts back, Perenco Ecuador  
 20 Limited will pay those amounts back promptly,  
 21 adequately, and in full. I mean no reservations by  
 22 that. There is nothing careful or crafted about the

144

01:17:05 1 language.  
 2 Now, we also have offered voluntarily to put  
 3 up a Perenco S.A. guarantee and shown that Perenco  
 4 Group has as much oil production, about  
 5 460,000 barrels of oil equivalent per day, as  
 6 Petroamazonas itself, and yet we hear that that is not  
 7 enough because the parent company through which the  
 8 financial operations of the group are organized is  
 9 incorporated in the Bahamas. I have to say we have  
 10 not heard before that Perenco S.A. is an inadequate  
 11 guarantor. Perenco S.A. has been an adequate  
 12 guarantor, not only in Ecuador when they were building  
 13 the OCP Project and otherwise, but across the world in  
 14 many projects and every project that Perenco is  
 15 involved in where a parent guarantee is required, and  
 16 if proof of financial insolvency were further  
 17 required, we would be happy to present it. There  
 18 is--we're not trying to hide anything. It's a  
 19 genuine, legitimate, and sincere offer.  
 20 I don't think that their offer and their  
 21 discussion about paying, though, is equally sincere.  
 22 And I say that because a way of testing their

145

01:18:00 1 assertions of compliance would be simply this: Deny  
 2 the continued stay that they seek on the condition  
 3 that the money will then be paid promptly, like within  
 4 30 days, into an escrow amount administered by this  
 5 Committee, and we will wait until the end of the  
 6 annulment period to transfer that amount.  
 7 We are prepared to do that. I don't think  
 8 they would be prepared to do that, and the reason is  
 9 even though it would have zero recoupment risk, it  
 10 would all be money available, and it would have zero  
 11 risk of time value of money because it could earn  
 12 interest, and we have heard from them that interest,  
 13 even though Perenco's interest rate in the Award is  
 14 undercompensating in a serious way, then this would be  
 15 a very easy, elegant solution.  
 16 But the truth of the matter that all of this  
 17 discussion we're having about them paying if you lift  
 18 the Stay is really academic because the chances that  
 19 they will actually, for the first time ever in this  
 20 case, just pay that amount over to Perenco are pretty  
 21 much zero. They have never done it before so far as  
 22 we can tell. They have negotiated settlements once a

Sheet 41

158

02:32:18 1 was going to read, signed, and we have copies that we  
 2 will be able to distribute if you are so inclined.  
 3 PRESIDENT ZULETA: Yes, please.  
 4 MR. SILVA ROMERO: And we'll be able to do  
 5 that.  
 6 This is the text he was going to read today.  
 7 The last paragraph says that he was giving me the  
 8 floor for me to continue with the arguments.  
 9 Thank you.  
 10 PRESIDENT ZULETA: My question for Perenco  
 11 is twofold.  
 12 In the one hand, the reaction to this  
 13 letter; that is number one.  
 14 And, number two, Mr. Friedman, in your  
 15 second presentation, you mentioned that--well, Ecuador  
 16 quoted a portion of this letter, and you mentioned  
 17 that it was not sufficient because the letter,  
 18 according--if I'm not mistaken, what you said is the  
 19 letter does not indicate that Ecuador will comply  
 20 fully, immediately, et cetera.  
 21 So, what's your reaction to the letter, and  
 22 is there any other wording that would be acceptable,

159

02:35:09 1 if I understood you, or not?  
 2 MR. FRIEDMAN: Thank you, Mr. President.  
 3 We want to make just a few very short  
 4 submissions, because I do believe that we addressed  
 5 this point. The substance of it was communicated  
 6 during the oral presentations.  
 7 So, my first observation is that the text of  
 8 this letter doesn't actually add anything to what we  
 9 heard earlier today.  
 10 In terms of the substance, there are a  
 11 couple of observations. One is it is--merely saying  
 12 that the State will comply with its international  
 13 obligations in a general way is absolutely no added  
 14 security whatsoever. I think we showed Slide 47 of  
 15 our original presentation, where other Committees had  
 16 articulated that same point, and I draw your attention  
 17 again to the Karkey Tribunal, which pointed out that  
 18 the obligations in such an assurance do not go beyond  
 19 the obligations already stated in the Convention for  
 20 an ICSID Contracting State towards an Award rendered  
 21 pursuant to Convention, and therefore, that those  
 22 kinds of assurances add no further security.

160

02:36:51 1 Second, as we observed before, I think it is  
 2 still quite telling for what it doesn't say. We were  
 3 very clear--I tried to be very clear, at least--in the  
 4 oral presentation about what we actually expected,  
 5 which is that--what we expected and would like to see  
 6 as a necessary, but still not sufficient, condition  
 7 for even considering to continue a stay is a very  
 8 clear, unequivocal statement by Ecuador that, upon  
 9 either the Annulment being rejected or, it should be,  
 10 upon the Stay being lifted, Ecuador will voluntarily,  
 11 promptly, and fully pay the Award.  
 12 That's a very specific promise that relates  
 13 to the Award in this case, because--and, instead, what  
 14 we have is a statement saying that they--that the  
 15 State will comply with its international obligations  
 16 "as it has done in other cases." That's the language  
 17 here. But you heard from the evidence and also from  
 18 the submissions of Ecuador's counsel here what they  
 19 interpret that to mean in context.  
 20 They consider that it is compliance with  
 21 their international obligations as they have done in  
 22 other cases that, essentially, true end finality--that

161

02:38:16 1 is, after Annulment is rejected or the Stay is lifted  
 2 otherwise--that's the beginning of a settlement  
 3 discussion. That's when they may sit down and start  
 4 to have a settlement discussion. And then, as you  
 5 heard from them further, in every settlement  
 6 discussion, they expect there to be concessions.  
 7 That's different. That's very different  
 8 than compliance. And you have to--I think that--a  
 9 further observation that I would make is that, in  
 10 thinking about how they comply as they have done in  
 11 other cases, I would also pick up one element of the  
 12 Attorney-General's comments along the same lines,  
 13 where he said that they would comply with their  
 14 international obligations consistent with the  
 15 Ecuadorian Constitution.  
 16 Now, the status of an obligation under the  
 17 ICSID Convention under the--in Ecuadorian  
 18 Constitutional law, I have to submit, is at the very  
 19 least unclear, and maybe it is very much in doubt  
 20 simply because the Ecuadorian Constitution was amended  
 21 in 2009 to repudiate international treaties, and it  
 22 was part and parcel of Ecuador's withdrawal, as only



Sheet 42

162

02:39:23 1 two other countries have done, from the ICSID  
2 Convention itself. And they have taken the position  
3 in litigation in Ecuador that compliance with ICSID or  
4 even entering into the ICSID Convention would be  
5 unconstitutional under Ecuadorian Law.

6 So, a vague promise to the idea that "we  
7 will comply with our international obligations but we  
8 won't tell you what they are"--and when we say, "Okay,  
9 but you've created a circumstance where there is  
10 considerable ambiguity about what that means, will you  
11 please drill down and clarify for us very precisely  
12 whether we mean the same thing by that"--that is,  
13 particularly, "Will you pay the Award promptly, fully,  
14 voluntarily, without any further process, just pay  
15 it?"--they have consistently, including through today,  
16 refused.

17 And so, that is why we say that the  
18 statements made orally by the Attorney-General, both  
19 for himself and on behalf of the Finance Minister, and  
20 this written communication from the Finance Minister  
21 to the same effect really add nothing to the level of  
22 security.

163

02:40:35 1 MEMBER KNIEPER: Can I follow up on this  
2 exchange? And in my question/remark, I'm a little bit  
3 inspired by Karkey.

4 Would it be a possibility or a way out that  
5 you, both Parties, sit together and try to agree on a  
6 text which is acceptable to both Parties, and then  
7 come up with such a text with the letter which will  
8 lead to a consensus among you too? Is that an option?

9 First, perhaps, I ask you, because--and then  
10 I ask Ecuador.

11 MR. FRIEDMAN: I don't think so. I  
12 think--for a couple of reasons.

13 First of all, I don't think, as we have  
14 submitted--for a couple of reasons.

15 One, it's a little bit pointless, because an  
16 assurance like that is inadequate, which I think is  
17 also the case under Karkey and some other cases.

18 So, the mere assurance wouldn't do it almost  
19 no matter what they said at this point. I think it is  
20 the reluctance of getting to this point, also, that  
21 speaks volumes.

22 MEMBER KNIEPER: Before you continue, I'm

164

02:41:56 1 not talking about oral assurances. I wanted to--my  
2 idea was more that you sit together and there is a  
3 written letter which satisfies both Parties.  
4 Would that be a way out or not? That is the  
5 question for both Parties.

6 MR. FRIEDMAN: So, no, because I don't think  
7 that a mere assurance is itself sufficient.

8 Second, I do think, as I mentioned before,  
9 that we would be open to negotiating something that  
10 had actual security to it, so something that either  
11 had an element of guarantee or an escrow that had  
12 acceptable language.

13 And third, I have to say, we've been very  
14 clear about what--the language that would have at  
15 least signaled an intention to comply, and that is  
16 compliance. I don't think there's anything to  
17 negotiate. It has to be prompt, voluntarily--  
18 voluntary, and in full.

19 It's a very simple obligation. It's what  
20 Tenaris has said is the obligation under the  
21 Convention. So, I'm not sure that there is--that  
22 negotiating over the text would change anything.

165

02:43:12 1 MR. SILVA ROMERO: Thank you, Mr. Chairman.  
2 Four or five comments about what we just  
3 heard.

4 The first: I am under the impression that  
5 Paragraph 3 of the document signed by the Minister of  
6 Economy and Finance was not well understood, was  
7 misunderstood. Paragraph 3 talks about a concrete  
8 commitment with regards to the Award in the case--in  
9 the Perenco Case. I am going to read it so it can be  
10 translated into English. And it says: "Yes, if what  
11 we believe does not happen, if the Committee decides  
12 to reject the request for the Stay of Enforcement and  
13 the commitment comes here, Ecuador will honor the  
14 obligations that will result from the Award"--"from  
15 the same" is the pronoun used--"as it has been doing  
16 with all its international obligations."

17 It does not say that it's assuming a general  
18 commitment to comply with its international  
19 obligations. No. It's a commitment vis-à-vis this  
20 Award.

21 Second observation: The commitment as  
22 assumed, not by the Ministry of Economy but the State

Sheet 43

166

02:44:38 1 representatives in all the judicial processes, which  
2 is the General-Attorney, it is even clearer. He said,  
3 and I will read what he said this morning:

4 "Consequently, if this Committee should reject the  
5 request of the Annulment as Ecuador requested, the  
6 State will comply with the obligations derived from  
7 the Award." Those are two sentences, one from the  
8 Attorney-General, one from the Ministry, that clearly  
9 say that Ecuador will pay the amount of the Award if  
10 you reject the Annulment, and these two declarations  
11 create an essential difference with Burlington.

12 If you read the Decision on the Stay of  
13 Enforcement in Burlington, there the Committee wanted  
14 to give a lesson to Ecuador because of post-Award  
15 negotiations. They said that one element they took  
16 into account to lift the Stay of Enforcement was  
17 exactly that the General-Attorney at the time had not  
18 assumed a specific commitment to comply with the  
19 Burlington Award. So, that is an important element  
20 that makes the difference between the two cases.

21 Third: The Counter-Party seems to assume  
22 that when the Minister--and that is not something that

167

02:46:22 1 the General-Attorney says--when the Minister says in  
2 the same way it has been acting vis-à-vis its  
3 international obligations, they interpret it as  
4 Ecuador will force Ecuador to a settlement. And I'm  
5 surprised with this argument, because how the debtor  
6 of an award will force the creditor to negotiate?

7 If you reject the Annulment request, Perenco  
8 can continue with its processes. Ecuador has  
9 committed to paying the Award, but Ecuador does not  
10 have the power to force the Counter-Party to negotiate  
11 and settle. It is as if the argument would be, "I  
12 will need to negotiate and settle because that's what  
13 Ecuador has always done." That depends on two  
14 Parties, and not on one Party, and that's not what the  
15 commitment signed by the Minister says and it's not  
16 what the General-Attorney said this morning.

17 Fourth and last comment, about the question  
18 posed by Professor Knieper: He says, "Well, can the  
19 Parties meet to draft a text that will be acceptable  
20 for both?"

21 And we believe for the Stay to continue,  
22 given the security given by different drafting, it is

168

02:47:59 1 clear that they are not looking for a different  
2 commitment. What they want is for this Stay to be  
3 lifted.

4 That is what they are asking for, and the  
5 question you should ask is: "Why are they asking for  
6 the Stay to be lifted?" And the General-Attorney said  
7 it is this morning: Because they want to put pressure  
8 on Ecuador, maximum pressure, so that Ecuador finally  
9 will resign this annulment process, and this is what  
10 happened in the Perenco case--Burlington case.

11 Thank you.

12 PRESIDENT ZULETA: Okay. The second  
13 question from the Committee is: In Perenco's  
14 presentation, you mentioned, Mr. Friedman, something  
15 along the lines of a proposal to deposit funds in the  
16 amount of the Award under the control of the  
17 Committee.

18 Can you elaborate on that? The Committee is  
19 not very happy with controlling funds of anybody, but  
20 can you elaborate on the proposal of it?

21 MR. FRIEDMAN: All right. I can imagine  
22 that may be more than you signed up for.

169

02:49:10 1 Yes. So, the--to be clear, Perenco's  
2 primary relief is the Stay should just be lifted for  
3 reasons we said. And secondarily, if you consider it  
4 required, it should be lifted and Perenco SA or any  
5 other company within the Perenco Group will give a  
6 Parent Guarantee, Perenco has more than ample capacity  
7 to make good on that guarantee.

8 Third, because I was listening--we were  
9 listening to what Ecuador was saying, we proposed an  
10 escrow, then, which is--it seems that Ecuador's  
11 concerns could virtually all be addressed if they pay  
12 the money into an escrow; that is, the Award would be  
13 immediately due and enforceable. The money would be  
14 available then, so there wouldn't be any question  
15 about whether it would be payable. We wouldn't have  
16 any risk of default or being brought to a further  
17 negotiation because there would be a pot of money, and  
18 if the Annulment was ultimately granted in whole or in  
19 part, then there would be zero recoupment risk for  
20 Ecuador.

21 Additionally, Ecuador made--has said that:  
22 "Well, don't worry about time value of money because

03:29:08 1 MR. FRIEDMAN: No. Simply to, at least from  
 2 the Perenco side, simply to thank the Members of the  
 3 Committee for making this time available to us today,  
 4 for working with the Parties to make today hopefully  
 5 effective for all of you, and to committing to resolve  
 6 the disputed issue that is currently before the  
 7 Committee with promptness.  
 8 PRESIDENT ZULETA: Okay. On the part of  
 9 Respondent, before any further comment, we need to put  
 10 an exhibit number to the letter from the Ministry.  
 11 So, if you--  
 12 MR. SILVA ROMERO: My friends will tell me  
 13 what consecutive number will come, and we will do it  
 14 through--we will channel that through ICSID.  
 15 No, simply, Mr. President, Members of the  
 16 Tribunal, to thank you very much for your attention  
 17 and patience today. And we look forward to working  
 18 with you to this--through this annulment process.  
 19 Thank you.  
 20 PRESIDENT ZULETA: Okay. Thank you very  
 21 much to both counsel for, as I said, a very  
 22 professional, collegial work. It was extremely

CERTIFICATE OF REPORTER

I, Dawn K. Larson, RDR, CRR, CRC, Court Reporter, do hereby certify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome of this litigation.

*Dawn K. Larson*  
 DAWN K. LARSON

03:30:15 1 helpful for the Committee. And thanks to my  
 2 colleagues, Mónica and Rolf, and, of course, to our  
 3 secretary Veronica, and to our court reporters and  
 4 translators, and wish you a very good day and very  
 5 good trip to those who go back home.  
 6 Thank you very much.  
 7 (Whereupon, at 3:30 p.m., the Hearing was  
 8 concluded.)