

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Perenco Ecuador Limited

v.

Republic of Ecuador

**(ICSID Case No. ARB/08/6)
Annulment Proceeding**

DECISION ON STAY OF ENFORCEMENT OF THE AWARD

Members of the Committee

Professor Eduardo Zuleta, President of the *ad hoc* Committee
Professor Rolf Knieper, Member of the *ad hoc* Committee
Professor Mónica Pinto, Member of the *ad hoc* Committee

Secretary of the ad hoc Committee

Ms. Veronica Lavista

February 21, 2020

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TABLE OF CONTENTS

I. THE PARTIES4

II. PROCEDURAL HISTORY4

III. THE PARTIES’ POSITIONS7

 A. Claimant’s Position 7

 B. Respondent’s Position 10

IV. THE COMMITTEE’S CONSIDERATIONS13

 A. Applicable legal standard regarding the stay of enforcement of an ICSID Award..... 14

 B. Analysis of the specific circumstances in the present case 26

V. COSTS30

VI. DECISION31

I. THE PARTIES

1. The Claimant is Perenco Ecuador Limited (the “**Claimant**” or “**Perenco**”). The Respondent or Applicant is the Republic of Ecuador (the “**Respondent**,” the “**Applicant**” or “**Ecuador**”). The representatives of the Claimant and the Respondent are detailed at page 2.
2. Claimant and Respondent are collectively referred to as the “**Parties**”.

II. PROCEDURAL HISTORY

3. On October 2, 2019, Ecuador presented an Application for Annulment (the “**Application for Annulment**”) of the Award dated September 27, 2019, issued in ICSID Case No. ARB/08/6 between Perenco Ecuador Limited and the Republic of Ecuador (the “**Award**”). Pursuant to Article 52(5) of the ICSID Convention, Respondent requested the ICSID Secretary-General to notify the provisional stay of enforcement of the Award until the *ad hoc* Committee rules on such request, and that the stay be maintained until a decision on the Application for Annulment is rendered by the Committee.¹
4. By letter dated October 4, 2019, the Acting ICSID Secretary-General registered the Application for Annulment and notified the provisional stay of enforcement of the Award, in accordance with ICSID Arbitration Rule 54(2).
5. On November 8, 2019, Perenco submitted its Opposition to Ecuador’s Request to Continue the Provisional Stay of Enforcement, dated November 7, 2019 (“**Claimant’s Opposition to the Stay**”), accompanied by Annex A (Decisions on Stays of Enforcement since November 2014).
6. In its Opposition to the Stay, the Claimant requested that the Committee lift the provisional stay of enforcement of the Award pending its decision on the Application for Annulment, or in the alternative, that the *ad hoc* Committee order Ecuador to provide, within 30 days of its decision on the issue of the stay, a deposit for the net amount of the Award, including

¹ Respondent’s Application for Annulment, October 2, 2019, ¶¶ 250-252.

accrued interest, into an escrow account; or an unconditional and irrevocable bank guarantee or letter of credit for the net amount of the Award, including accrued interest.²

7. On November 18, 2019, the *ad hoc* Committee was constituted in accordance with ICSID Arbitration Rules 6, 52(2), and 53. Its Members are: Professor Eduardo Zuleta (President), a national of Colombia; Professor Rolf Knieper, a national of Germany; and Professor Mónica Pinto, a national of Argentina (the “**Committee**”). Ms. Veronica Lavista, ICSID Legal Counsel, was designated to serve as the Secretary of the Committee.
8. In separate communications dated November 19, 2019 and November 21, 2019, Respondent and Claimant respectively presented their comments regarding the schedule of submissions on the issue of the stay.
9. By letter dated November 25, 2019, the Committee fixed the schedule of written submissions regarding the issue of the stay. The timetable was set as follows: on or before December 6, 2019 Ecuador would file its reply to Perenco’s opposition to the request for continuation of the stay; on or before December 18, 2019 Perenco would file its rejoinder on the request for continuation of the stay; and an oral hearing on the continuation of the stay would take place in Washington, D.C., which would be conducted together with the First Session of the annulment proceeding. In the same letter, the Committee decided to maintain the stay of enforcement until it issued its decision on the continuation of the stay.
10. The Parties presented their written submissions in accordance with the schedule set by the Committee. The oral hearing on the continuation of the stay took place on January 13, 2020 in Washington, D.C. The following persons were present at the hearing

Committee:

Professor Eduardo Zuleta	President
Professor Rolf Knieper	Member
Professor Mónica Pinto	Member

ICSID Secretariat:

² Claimant’s Opposition to the Stay, ¶ 40; Claimant’s Rejoinder to Ecuador’s Request to Continue the Provisional Stay of Enforcement, December 18, 2019 (“Claimant’s Rejoinder on the Stay”), ¶ 107.

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Court Reporter:

Ms. Dawn Larson

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Interpreters:

Ms. Silvia Colla

Ms. Estela Zaffaroni

Mr. Charles Roberts

11. On January 16, 2020, the Committee issued its Procedural Order No. 1, recording the Parties' agreements on procedural matters and the decisions of the Committee on the disputed issues.
12. The Committee has considered all the submissions and arguments put forward by the Parties. The fact that certain arguments, documents, or legal authorities are not mentioned in the following sections does not mean that the Committee has not considered them.

III. THE PARTIES' POSITIONS

A. Claimant's Position

13. Claimant requests that the Committee lift the stay of enforcement of the Award or, in the alternative, that it order Respondent to post a financial security as a condition for the continued stay of enforcement of the Award.
14. Claimant argues that a stay of enforcement is an exception to the binding and final nature of ICSID awards and thus Ecuador has the burden to justify the continuation of the stay.³ The wording of Articles 52(5) and 53(1) of the ICSID Convention and Rule 54 of the ICSID Arbitration Rules confirms the exceptional nature of a stay of enforcement. Accordingly, the applicant in ICSID annulment proceedings has neither a right nor a presumption in favour of continuation of the provisional stay.⁴ Recent practice of annulment committees confirms this interpretation of the ICSID Convention and Arbitration Rules.⁵
15. In view of the exceptional nature of a stay of enforcement, the burden of proving that the circumstances require continuation is high. Ecuador must demonstrate that the circumstances at issue must be beyond the inherent or normal effects of an adverse ICSID award.⁶ Namely, when the respondent State is ravaged by war, is suffering an acute foreign exchange crisis, or when there is a risk of non-recoupment of the amounts paid to claimant

³ Claimant's Opposition to the Stay, ¶ 4; Claimant's Rejoinder on the Stay, ¶¶ 16, 19-21.

⁴ Claimant's Opposition to the Stay, ¶¶ 5-7.

⁵ Claimant's Opposition to the Stay, ¶ 8.

⁶ Claimant's Opposition to the Stay, ¶ 10; Claimant's Rejoinder on the Stay, ¶ 42.

individuals or corporations controlled by a single individual in case of annulment. In sum, circumstances requiring a stay must be severe.⁷

16. Claimant argues that Ecuador has failed to show sufficiently severe circumstances requiring the continuation of a stay in the case at hand.⁸ Respondent contends that two specific circumstances justify the stay: (i) Ecuador’s budgetary priorities and situation of social unrest; and (ii) the alleged risk of non-recoupment of the amounts paid under the Award if the Application for Annulment were to succeed. However, none of these circumstances are sufficiently severe to justify the stay.⁹
17. As to the first circumstance, Claimant alleges that “budgetary reallocation” is an ordinary effect of having to comply with an ICSID award, not a circumstance requiring a stay.¹⁰ Claimant also rebuts on two grounds Ecuador’s contention that payment of the Award would “most likely ignite similar mass protests and strikes”: first, because the Award has nothing to do with the civil unrest caused by Ecuador’s Government decision to cut fuel subsidies;¹¹ and second, because social protests and discontent cannot constitute *carte blanche* to disregard international obligations.¹²
18. As to the alleged risk of non-recoupment, Claimant states that there is no particular heightened risk of non-recoupment in the present case because Claimant is part of the larger oil multinational Perenco S.A., which makes this case completely different from cases involving individual natural persons with unclear assets.¹³ Nonetheless, Perenco undertakes to return any sums collected from Ecuador if the Committee upholds the Application for Annulment,¹⁴ and, if necessary, to procure a parent company guarantee from Perenco S.A.¹⁵

⁷ Claimant’s Opposition to the Stay, ¶ 9; Claimant’s Rejoinder on the Stay, ¶ 46.

⁸ Claimant’s Rejoinder on the Stay, ¶ 50.

⁹ Claimant’s Rejoinder on the Stay, ¶ 49.

¹⁰ Claimant’s Rejoinder on the Stay, ¶ 51.

¹¹ Claimant’s Rejoinder on the Stay, ¶¶ 59-61.

¹² Claimant’s Rejoinder on the Stay, ¶ 62.

¹³ Claimant’s Rejoinder on the Stay, ¶ 69.

¹⁴ Claimant’s Rejoinder on the Stay, ¶ 67.

¹⁵ Claimant’s Rejoinder on the Stay, ¶ 70.

19. On the other hand, Claimant notes that Ecuador’s alleged “compliance” with ICSID decisions is misplaced. Post-award negotiations and settlements, including cuts in the amount awarded, do not correspond to the ordinary meaning of “comply with the terms of the Award” under Article 53 of the ICSID Convention.¹⁶ Ecuador’s track record of non-compliance with ICSID decisions weighs heavily against the stay. Except for one award of US\$5.6 million, Ecuador has not paid promptly and in full any major adverse award.¹⁷ Moreover, in the *Perenco* and *Burlington* cases, Ecuador did not comply with the tribunals’ orders of provisional measures.¹⁸
20. In the alternative, Claimant argues that even if severe circumstances requiring a stay were to exist, the stay should be conditioned upon the posting of a security. Claimant contends that, pursuant to Articles 44 and 52(4) of the ICSID Convention and Rules 19 and 53 of the ICSID Arbitration Rules, the power to condition a stay is inherent in the Committee’s power to decide questions of procedure and protect the integrity of the proceedings.¹⁹ The same understanding has been endorsed by several ICSID *ad hoc* committees.²⁰
21. In the case at hand, security is necessary because of the serious risk of Ecuador’s non-compliance,²¹ and because an unconditioned stay would cause overriding prejudice to *Perenco* considering the relatively low rate of post-award interest on the amounts awarded to *Perenco*.²² Furthermore, Respondent has not provided evidence that it would be extremely burdensome for it to provide a bank guarantee.²³
22. In sum, Claimant requests that the Committee deny Ecuador’s request for a continuation of the stay of enforcement of the Award, or in the alternative, that it order the stay to be conditioned on Ecuador providing, within 30 days of the Committee’s decision, (i) a deposit for the net amount of the Award, including accrued interest, into an escrow account with a reputable international bank based outside of Ecuador, pledged in favour of

¹⁶ Claimant’s Opposition to the Stay, ¶ 5; Claimant’s Rejoinder on the Stay, ¶¶ 18, 77-79.

¹⁷ Claimant’s Opposition to the Stay, ¶¶ 23, 24; Claimant’s Rejoinder on the Stay, ¶ 79.

¹⁸ Claimant’s Rejoinder on the Stay, ¶ 81.

¹⁹ Claimant’s Rejoinder on the Stay, ¶ 88.

²⁰ Claimant’s Rejoinder on the Stay, ¶ 92.

²¹ Claimant’s Rejoinder on the Stay, ¶¶ 95, 96.

²² Claimant’s Rejoinder on the Stay, ¶ 101.

²³ Claimant’s Rejoinder on the Stay, ¶ 102.

Perenco and under the sole control of an international escrow agent and direction of the Committee; or (ii) an unconditional and irrevocable bank guarantee or letter of credit for the net amount of the Award, including accrued interest, from a reputable international bank based outside of Ecuador, pledged in favour of Perenco and to be released on the order of the Committee.

B. Respondent's Position

23. Respondent requests that the Committee maintain the stay of enforcement of the Award and deny Perenco's request to condition such stay on the posting of a security for the net amount of the Award.
24. Ecuador argues that the stay must be continued unless Perenco demonstrates that Ecuador's annulment and stay applications are dilatory, frivolous or abusive.²⁴ Perenco contends that Ecuador's Application for Annulment was presented for the sole purpose of obtaining a stay, delaying payment, forcing Perenco to settle in exchange for a discount, and hiding assets pending the annulment proceedings. Yet, this assertion is untenable and false.²⁵ Once Ecuador identified serious flaws on the Award and Decisions preceding the Award, it decided to present the Application for Annulment together with the request to stay enforcement of the Award.²⁶
25. Pursuant to Article 52(5) of the ICSID Convention and Rule 54(1) of the ICSID Arbitration Rules, the Committee has full discretion to decide on the stay of enforcement of the Award.²⁷ In order to exercise its discretion, the Committee shall take into consideration all factual elements that were proven by the Parties.²⁸ Respondent further contends that if there is any sort of presumption concerning the enforcement, it would be in favor of maintaining the stay of the enforcement of the Award, as an element inherent in the right of an award debtor to seek annulment.²⁹ Moreover, contrary to Claimant's position, nothing in the

²⁴ Ecuador's Reply to Perenco's Opposition to the Request to Continue the Provisional Stay of Enforcement, dated December 6, 2019 ("Respondent's Reply on the Stay"), p. 4.

²⁵ Respondent's Reply on the Stay, ¶ 41.

²⁶ Respondent's Reply on the Stay, ¶ 50.

²⁷ Respondent's Reply on the Stay, ¶ 17.

²⁸ Tr. Hearing on Stay of Enforcement, 24:12-17.

²⁹ Tr. Hearing on Stay of Enforcement, 25:16-20.

ICSID Convention or the ICSID Arbitration Rules conditions the stay to extraordinary circumstances such as being “ravaged by war” or “suffering an acute foreign exchange crisis’ as Perenco posits.”³⁰ Conversely, ICSID *ad hoc* committees have tended to grant the stay of enforcement “absent unusual circumstances.”³¹

26. Although the ICSID Convention and the ICSID Arbitration Rules do not provide for specific circumstances to be satisfied for continuing the stay, Ecuador contends that even if required, these circumstances are met in the present case. To decide on the continuation of the stay of enforcement, *ad hoc* committees have assessed: (i) whether lifting the stay causes particularly adverse economic consequences to the award debtor; (ii) whether continuing the stay has particularly adverse economic consequences to the award creditor, including the risk that the applicant fails to comply with the award if not annulled; and (iii) the risk of non-recovery of the sums paid under the award if the stay were lifted and the award were subsequently annulled.³²
27. As regards the first circumstance, Ecuador states that lifting the stay would cause significant and unavoidable economic and social hardship for Ecuador.³³ In early 2019, Ecuador faced a difficult situation and was forced to seek the support of the IMF through the Extended Fund Facility.³⁴ As a result, Ecuador has undertaken structural reforms and is undergoing serious budgetary restrictions which would lead it to the path of growth and sustainable development and facilitate the capacity to reimburse debt contracted under previous regimes. Furthermore, massive and violent protests broke out in Ecuador after the elimination of fuel subsidies (which were withdrawn afterwards). The increased violence led the government to declare the state of emergency and to impose curfews and transit restrictions.³⁵ It is estimated that the 10-day strike caused losses close to US\$2,000 million.³⁶

³⁰ Respondent’s Reply on the Stay, ¶¶ 36, 65.

³¹ Respondent’s Reply on the Stay, ¶ 32 (emphasis omitted).

³² Respondent’s Reply on the Stay, ¶ 75.

³³ Respondent’s Reply on the Stay, ¶ 104.

³⁴ Respondent’s Reply on the Stay, ¶ 91.

³⁵ Respondent’s Reply on the Stay, ¶ 92.

³⁶ Respondent’s Reply on the Stay, ¶ 95.

28. In the present context of civil unrest in Ecuador, the consequences of immediate enforcement of US\$411 million are beyond the ordinary consequences of budgetary reallocation and would cause significant and unavoidable economic and social hardship for Ecuador. This risk of further social unrest and the ensuing economic impact are of sufficient gravity to justify the continuation of the stay.³⁷
29. As regards the second circumstance, Perenco would not be prejudiced if the stay of enforcement is continued. Ecuador states that it has an exemplary record of compliance with awards, which it intends to maintain. In relation to the decision on provisional measures by the tribunal in the original arbitration, under the ICSID system, these amount to recommendations only.³⁸ Ecuador has complied voluntarily with all the awards issued against it since 2004 and it has never faced an enforcement procedure, and argues that settlement is also a form of voluntary compliance.³⁹ Therefore, Claimant's assertion that there is an incremental risk of non-payment in the future if the stay of enforcement is maintained, is erroneous.⁴⁰ Moreover, it is irrelevant whether Ecuador denounced the ICSID Convention to the effects of Ecuador's compliance with the Award. Pursuant to Article 72 of the ICSID Convention, Ecuador's obligation to comply with the Award is still binding on Ecuador.
30. Yet, even if the continuation of the stay could cause Perenco harm, the delay in the enforcement will be properly and fully remedied by post-award interest.⁴¹ Ecuador refutes Claimant's position that the interest granted in the Award would be insufficient, and in any event, it is not up to the Committee to improve on the terms of the Award.⁴²
31. As regards the third circumstance, Respondent states that it would suffer immediate and irreversible harm if the stay is lifted because it would be unable to recover any amounts paid to Perenco once the Award is annulled.⁴³ Ecuador notes that Perenco is a mere shell company based in the Bahamas, devoid of any assets to be attached in any recoupment

³⁷ Respondent's Reply on the Stay, ¶ 104.

³⁸ Respondent's Reply on the Stay, ¶ 164.

³⁹ Respondent's Reply on the Stay, ¶¶ 127-131.

⁴⁰ Tr. Hearing Stay of Enforcement, pp. 39-42.

⁴¹ Respondent's Reply on the Stay, ¶ 166.

⁴² Respondent's Reply on the Stay, ¶ 169.

⁴³ Respondent's Reply on the Stay, ¶¶ 110-120.

action.⁴⁴ Claimant is a dormant entity, whose sole purpose and value is enforcing the Award. It is highly likely therefore that if Ecuador pays the Award, those funds will be transferred to other entities and Perenco will be liquidated.⁴⁵ Were Respondent to pay now, once the Award is annulled, it would be nearly impossible or very difficult for Ecuador to recover any of the sums paid to Perenco.⁴⁶

32. With respect to Claimant's request that the continuation of the stay should be conditioned upon the posting of a financial security, Ecuador contends that the Committee has no power to grant such request because Article 52(5) of the ICSID Convention does not provide for this possibility and the Committee cannot imply this power from the silence of the Convention,⁴⁷ nor does it have the power to recommend provisional measures.⁴⁸ In the alternative, Ecuador argues that ordering the posting of a security amounts to penalizing the applicant for annulment because it places the award creditor in a better position than it would have been in, should the application not have been presented.⁴⁹ Furthermore, escrowing the funds would cause Ecuador the same immediate hardship as lifting the stay, as it would result in over US\$411 million being frozen, and thus made unavailable for Ecuador's development efforts.
33. Based on the foregoing, Ecuador states that the circumstances presented before the Committee demonstrate that, on balance, continuing the stay would be less harmful to the award creditor than to the award debtor and therefore the stay of enforcement of the Award should be maintained.

IV. THE COMMITTEE'S CONSIDERATIONS

34. In order to determine whether to continue the stay of enforcement of the Award, and considering the specific facts of this case, the Committee will address: (i) the applicable

⁴⁴ Respondent's Reply on the Stay, ¶ 118.

⁴⁵ Respondent's Reply on the Stay, ¶¶ 119, 120.

⁴⁶ Respondent's Reply on the Stay, ¶¶ 10, 110-120.

⁴⁷ Respondent's Reply on the Stay, ¶¶ 180, 181.

⁴⁸ Respondent's Reply on the Stay, ¶¶ 183-196.

⁴⁹ Respondent's Reply on the Stay, ¶¶ 203, 205.

legal standard regarding the stay of enforcement of an ICSID Award; and (ii) the application of such standard in the present case.

A. Applicable legal standard regarding the stay of enforcement of an ICSID Award

35. The first point facing the Committee is what the standard of review is to determine whether the stay of enforcement of the Award shall be continued.⁵⁰ To address this question, the Committee must refer to the ICSID Convention and the ICSID Arbitration Rules.
36. Pursuant to Article 52(1) of the ICSID Convention, “[e]ither party may request annulment of the award by an application in writing addressed to the Secretary-General [...]” In turn, Rule 54(1) of the ICSID Arbitration Rules provides that “the party applying for [...] 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 party requesting the stay, “shall specify the circumstances that require the stay.”⁵¹
37. According to Rule 54(2) of the ICSID Arbitration Rules, “[i]f an application for the [...] 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.”
38. Pursuant to Article 52(5) of the ICSID Convention, “[t]he 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.”⁵²
39. In the light of the aforementioned provisions in the ICSID Convention and ICSID Arbitration Rules and following the General Rule of Interpretation incorporated in Article

⁵⁰ Respondent’s Reply on the Stay, p. 4.

⁵¹ Rule 54(4), ICSID Arbitration Rules.

⁵² Article 52(5), ICSID Convention.

31 of the Vienna Convention on the Law of Treaties, the Committee concludes that a party to an award issued in an ICSID investment arbitration under the ICSID Convention has both the right to apply for annulment and the right to request the continuation of the stay. However, there is neither a right to the stay of enforcement, nor a presumption in favour or against the stay.

40. First, the Committee notes that the stay of enforcement of an ICSID award may be requested by the applicant together with its application for annulment.⁵³ The applicant may decide not to request the stay at the time of the application. Absent this request, the Secretary-General of ICSID could not grant the provisional stay of the award. In addition, absent a request in the application, *ad hoc* committees would only have the authority to decide on a stay if either party so requests after the *ad hoc* committee is constituted.⁵⁴ Accordingly, the presentation of an application for annulment does not entail the automatic stay of enforcement of an ICSID award.
41. Second, pursuant to Rule 54(2) of the ICSID Arbitration Rules, “[a]s 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.” The word “automatically” refers to the termination of the stay, not to the continuation thereof. Therefore, there has to be a request by either party for the Tribunal to rule on the stay. Absent such request, the stay granted by the Secretary-General of ICSID shall automatically terminate.
42. Third, according to Article 52(5) of the ICSID Convention, “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.”⁵⁵
43. The Committee notes that the ordinary meaning of the word “may” expresses a possibility and the ordinary meaning of the expression “if it considers” indicates discretionally to take

⁵³ Article 52(5), ICSID Convention; Rule 54(1) and (2), ICSID Arbitration Rules.

⁵⁴ Rule 54 (1), ICSID Arbitration Rules.

⁵⁵ Article 52(5), ICSID Convention.

something into account when making a judgment. Thus, it is optional – not mandatory – for the committee to stay the enforcement of the Award if the circumstances so require. The crux of the matter is therefore whether there are circumstances requiring the stay.

44. Ecuador contends that the fact that Article 52(5) of the ICSID Convention provides that the continuation of the stay should be granted where the circumstances *require* it, “does not subject the granting of a stay to a high threshold test or a showing of extraordinary circumstances such as being ‘ravaged by war’ or ‘suffering an acute foreign exchange crisis’, as Perenco posits.”⁵⁶
45. The Committee sides with Applicant that Article 52(5) of the ICSID Convention does not demand “extraordinary circumstances” for the stay to be granted. However, the Committee disagrees with Ecuador in that said provision – or other provisions in the ICSID Convention or the ICSID Arbitration Rules – demand that the stay should be granted “absent unusual circumstances.” The Committee notes that the word “circumstances” incorporated in Article 52(5) of the ICSID Convention or in Rule 54(4) of the ICSID Arbitration Rules is not preceded by any qualifying adjective. The Committee therefore has wide discretion to weigh the circumstances presented by the Applicant to determine if these circumstances require the stay of enforcement of the Award.
46. In sum, neither the Convention nor the Arbitration Rules support Ecuador’s argument that the stay must be continued unless Perenco demonstrates that Ecuador’s annulment and stay applications are dilatory or abusive, nor do they support Perenco’s assertion that Ecuador carries the burden of proof in a technical sense beyond specification that the circumstances require a continuation of the stay.
47. As to the practice of *ad hoc* committees in deciding on a continuation of a stay of enforcement, the Committee observes that it is far from uniform.
48. It is true that, traditionally, the majority of committees has exercised its discretion by granting a stay. As documented by the ICSID Secretariat for a period running until April 15, 2016, 36 decisions out of 41 ruled in favour of a stay, of which 22 were conditioned

⁵⁶ Respondent’s Reply on the Stay, ¶¶ 35, 36.

upon the issuance of some sort of security (13 decisions) or written undertakings (9 decisions), with 14 decisions granting the stay unconditionally. In 11 out of the 22 conditioned decisions, the stay was later terminated because the condition had not been satisfied.⁵⁷ Even if in recent years some committees have taken a more restrictive approach in the exercise of their discretion, the predominant view remains unchanged.

49. However, statistics by themselves are not sufficient to draw a conclusion on the matter given that the circumstances of each case are different. Moreover, the Committee does not discern a *jurisprudence constante* with respect to an interpretation of Article 52(5) of the ICSID Convention and Rule 54 of the ICSID Arbitration Rules. As a consequence, both Parties can correctly rely on decisions that support their opposing positions. That “may be explained by [the] lack of guidance in the relevant provisions of the ICSID Convention and the Arbitration Rules and the particular circumstances of each request.”⁵⁸ In fact, the texts confer discretion to committees to stay the enforcement and the “criteria for the exercise of this discretion are the circumstances that may require the stay of enforcement.”⁵⁹
50. Yet, several issues are treated controversially by different *ad hoc* committees. Article 52(5) of the ICSID Convention and Rule 54 of the ICSID Arbitration Rules do not qualify the circumstances or set criteria that committees should apply to assess their relevance and relative weight, nor do they specify whether the discretion encompasses the appraisal of different circumstances or can only be exercised once circumstances are identified that require a stay, nor is the relation between the application for annulment and the application for the continuation of the stay fully clarified. Certainly, the application for the stay depends on the application for annulment, and the Convention states clearly “that a stay is [a] distinct step from an annulment application itself.”⁶⁰ However, this does not clarify whether the quality and seriousness of the annulment application reflects on to the stay application.

⁵⁷ ICSID Updated Background Paper on Annulment for the ICSID Administrative Council, May 5, 2016, ¶ 58, **CAA-028**.

⁵⁸ *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Applicant’s Request for a Continued Stay of Enforcement of the Award, May 7, 2012, ¶ 41, **AALA-0026**.

⁵⁹ C.H. Schreuer et al., *The ICSID Convention: A Commentary*, 2nd edition 2009, Art. 52, ¶ 594, **AALA-0022**.

⁶⁰ Claimant’s Rejoinder on the Stay, ¶ 13.

51. A number of committees have referred to “[t]he prevailing practice in prior annulment cases [that] has been to grant the stay of enforcement. Although this practice does not create a presumption for continuation, and a committee is entitled to deviate from it, ‘if it considers that the circumstances so require’, the Committee finds that in this case there is no reason to deviate from the standard practice.”⁶¹

52. In this perspective, the *ad hoc* committee in *Pey Casado v. Chile* determined:

Turning first to the Republic's Request that the stay of enforcement of the Award should be continued pending its decision on the Application, the Committee notes that, although Article 52(5) of the Convention uses the verb “may”, thereby conveying an element of discretion to the Committee, a review of the many decisions by *ad hoc* annulment committees since the MINE decision in 1988 leads the Committee to the conclusion that, absent unusual circumstances, the granting of a stay of enforcement pending the outcome of the annulment proceedings has now become almost automatic.

In the present case, the Committee is satisfied that the Republic has discharged its burden of proving that there are no unusual circumstances and that all the factors which the Republic has referred to support the continuation of the stay of enforcement of the Award pending the Committee's decision and it so rules.⁶²

53. In *CMS v. Argentina*, the *ad hoc* committee ruled that “[a]s a general matter a respondent State seeking annulment should be entitled to a stay provided it gives reasonable assurances that the award, if not annulled, will be complied with.” It further ruled that the written undertaking by the *Procurador del Tesoro* expressing the irrevocable commitment to fulfil the pecuniary obligations was a sufficient element of all the circumstances to allow a continuation of the stay.⁶³

⁶¹ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on the Stay of Enforcement of the Award, September 30, 2013, ¶ 50, **AAIA-0010**.

⁶² *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Republic of Chile's Application for a Stay of Enforcement of the Award, May 5, 2010, ¶¶ 25, 26, **AAIA-0006**. In a Decision of March 15, 2018, the second *ad hoc* committee accepted the first committee's argument, although based only on reasons of “procedural fairness and equality”. See *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Request for the Stay of the Enforcement of the Award, March 15, 2018, ¶ 71, **AAIA-0004**.

⁶³ *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, September 1, 2006, ¶¶ 38, 50, **AAIA-0025**.

54. Other *ad hoc* committees insisted more on an explicit reference to Article 52(5) of the ICSID Convention, which led the committee in *OI v. Venezuela*

to a fundamental conclusion, set forth at the outset, that the continuation of the stay of enforcement in the ICSID system is far from automatic. ICSID Convention Article 52(5) provides that the stay shall continue if an *ad hoc* committee considers that “the circumstances so require.” Said article does not use other less categorical verbs, such as “recommend,” “deserve,” “justify” or similar words, but resorts to the imperative verb “require.” And the expression “if it considers” leaves wide discretion to an *ad hoc* committee to evaluate, case by case, if those circumstances are present or not, in order to continue a stay of enforcement, notwithstanding the binding and final nature of the awards.⁶⁴

After having considered the following circumstances as part of its discretionary exercise: the risk of non-compliance, the risk of non-recovery, the quality of the annulment application, the possibility of irreparable harm, and the obligation to pay interest as compensation for the time-value of money, the committee ruled to lift the stay.

55. In *Standard Chartered v. Tanzania*, the *ad hoc* committee had an approach on the standard similar to *OI v. Venezuela*. It reasoned:

The use of the phrase: “if it [the committee] considers that the circumstances so require,” rather than the formulation “so permit,” indicates the necessity for the committee to positively establish circumstances prone to justify the requested stay on enforcement. The use of the word “may” indicates that it is a matter within the discretion of the committee whether or not to stay enforcement of the award pending its decision on an application for annulment. [...]

In consideration of the previous, it is the view of the Committee that it is empowered to exercise its discretion as to whether or not to continue the stay on the enforcement of the Award pending its decision on the Application.⁶⁵

In exercising its discretion by continuing the stay, the committee referred to the legitimacy of the annulment application:

TANESCO has exercised its right to apply for annulment contemplated under the ICSID Convention, and as such it has a legitimate right to request that the stay is continued, until the final decision is rendered by the Committee. There is no reason

⁶⁴ *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Decision on Stay of Enforcement of the Award, April 4, 2016, ¶ 89, CAA-027.

⁶⁵ *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 of Enforcement of the Award, April 12, 2017, ¶¶ 50, 52, CAA-030.

to consider that in this particular case the institution of the annulment proceedings was purely dilatory in nature.⁶⁶

56. In turn, the *OI v. Venezuela* committee referred to *Libananco v. Turkey*, where the *ad hoc* committee argued:

The exercise of the discretion of the Committee depends on the circumstances surrounding the Stay Request and, therefore, the granting of a stay of enforcement or its continuation should in no way be regarded as automatic. The Committee is aware that some *ad hoc* annulment committees have considered that, “absent unusual circumstances, the granting of a stay of enforcement pending the outcome of the annulment proceedings has now become almost automatic.” However, this does not follow from the ICSID Convention or the Arbitration Rules, and the Committee considers that its decision should be based on an assessment of all relevant circumstances.⁶⁷

The committee accepted the respondent’s argument that the claimant bore no risk of compliance in case of an annulment in light of the respondent’s record of fulfilment of its international obligations, that, conversely, the claimant itself was bankrupt exposing a high risk of recovery in case of the maintenance of the award, and it rejected the argument of other committees that the delay in enforcement is compensated by the accrued post-award interest. After this exercise of weighing and weighting, it stated that “[t]o conclude, on balance, the Committee is of the view that Applicant’s interest in a continued stay of enforcement pending the outcome of the annulment proceeding should be given more weight than Respondent’s interest in immediate enforcement,”⁶⁸ and decided to continue the stay.

57. A similar pattern, albeit with a different result, appears in *Karkey v. Pakistan*. The *ad hoc* committee concluded that the facts and considerations asserted by the applicant – the effect of immediate payment on the budget, the risk of recovery in case of a successful annulment, the merits of the annulment application, and a written undertaking which only reiterated the respondent’s obligations under the ICSID Convention – were not “sufficient proof that

⁶⁶ *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 of Enforcement of the Award, April 12, 2017, ¶ 61, **CAA-030**.

⁶⁷ *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Applicant’s Request for a Continued Stay of Enforcement of the Award, May 7, 2012, ¶ 43, **AAAL-0026**.

⁶⁸ *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Applicant’s Request for a Continued Stay of Enforcement of the Award, May 7, 2012, ¶¶ 50-52, 54, **AAAL-0026**.

circumstances exist in the present case which require a continuation of the stay, as mandated by Rule 54(4).”⁶⁹ Once having so concluded, “the Committee consider[ed] that it can use its discretion to continue the stay subject to conditions which the Parties might find feasible and a preferable solution,” such as a bank guarantee, a capitalized escrow account or a written undertaking providing sufficient assurance of compliance.⁷⁰ Thus, unavoidably, the condition became an integrated criterion, consideration and part of the “circumstances”, which were weighed in the exercise of the committee’s discretion. In this perspective, the committee held that its decision “would provide Karkey security in the case that the Award is upheld. On the other hand, it would ensure that Pakistan would not be exposed to enforcement attempts during this proceeding and could recoup any amounts if the Award is annulled.”⁷¹

58. In the two ICSID proceedings that opposed Tenaris & Talta and Venezuela, both *ad hoc* committees pursued the approach of balancing the different interests as articulated in the alleged circumstances.
59. In *Tenaris I*, the *ad hoc* committee found that “[g]iven the variety of situations and circumstances alleged by the various parties, it always depends on how they are appreciated by the Committee.”⁷² In the exercise of its discretion, the committee considered and weighted the relevant circumstances such as the possible damages resulting from the stay proceedings, the risk of recovery, the record of compliance with international obligations, and the impact of enforcement on the parties, and came to the conclusion that the stay was to be lifted.⁷³ It decided that a letter of comfort presented by the Attorney General was not

⁶⁹ *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Decision on the Stay of Enforcement of the Award, February 22, 2018, ¶ 126, **CAA-035**.

⁷⁰ *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Decision on the Stay of Enforcement of the Award, February 22, 2018, ¶¶ 131, 132, **CAA-035**.

⁷¹ *Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/13/1, Decision on the Stay of Enforcement of the Award, 22 February 2018, ¶ 131, **CAA-035**.

⁷² *Tenaris SA & Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Decision on the Request to Maintain the Stay of Enforcement of the Award, March 24, 2017, ¶ 77, **CAA-029**. Similar conclusions were drawn by the *ad hoc* committee in *Valores Mundiales, S.L. and Consorcio Andino, S.L. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/13/11, Decision on the Request for Continuation of the Stay of Enforcement of the Award, September 6, 2018, **CAA-039**.

⁷³ *Tenaris SA & Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Decision on the Request to Maintain the Stay of Enforcement of the Award, March 24, 2017, ¶ 84, **CAA-029**.

sufficient to alleviate the doubts on the sincerity to fulfil the obligations, “not because there is doubt about his word but there is doubt about its effectiveness within the constitutional framework of the country.”⁷⁴

60. In *Tenaris II*, the *ad hoc* committee came to identical conclusions,⁷⁵ despite a different emphasis on the applicable legal standards. After having found on the “intimate link between an application for annulment and a request for stay” despite the distinct steps to be followed,⁷⁶ the committee argued:

The terms of Article 52(5) of the ICSID Convention must be interpreted in the context of the annulment mechanism. The Committee has no doubt that the provision does not intend to empower *ad hoc* committees to reject the request for a stay when the applicant pursues its legitimate right to have the award examined for fundamental institutional and procedural propriety in good faith and absent dilatory intentions. Therefore, the Committee subscribes to the mainstream jurisdiction of committees that exercise their discretion and grant stays when annulment of an award has been requested in good faith and neither with the abusive intention to escape the obligation to abide by its terms nor as a demonstration of its refusal to accept the obligation under the ICSID Convention to comply with the award. The Committee does not share the view that a context-free interpretation of the ordinary meaning of the term “require” in Article 54(5) [*sic*] of the ICSID Convention, should lead to a restriction of this general practice.⁷⁷

61. A different approach was followed in *Burlington v. Ecuador*. The *ad hoc* committee introduced the method of determination by insisting on two steps:

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

⁷⁴ *Tenaris SA & Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Decision on the Request to Maintain the Stay of Enforcement of the Award, March 24, 2017, ¶ 90, **CAA-029**.

⁷⁵ *Tenaris SA & Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Decision on Venezuela’s Request for the Continued Stay of Enforcement of the Award, February 23, 2018, ¶ 105, **CAA-036**.

⁷⁶ *Tenaris SA & Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Decision on Venezuela’s Request for the Continued Stay of Enforcement of the Award, February 23, 2018, ¶ 103, **CAA-036**.

⁷⁷ *Tenaris SA & Talta - Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/12/23, Decision on Venezuela’s Request for the Continued Stay of Enforcement of the Award, February 23, 2018, ¶ 104, **CAA-036**.

compounded by the unspecified nature of the circumstances that may lead an annulment committee to conclude that they require that enforcement be stayed.⁷⁸

By this argument, the committee limited its power of exercising discretion doubly. First, the power of exercising discretion only sets in after circumstances are established that require a continuation of the stay; second, the discretion can only be exercised in the sense to deny a stay although circumstances requiring a stay exist. The committee found that budgetary allocations are inherent in international pecuniary obligations, that the periodicity of budgetary planning cannot be a relevant circumstance except for extreme and exceptional situations, “that Ecuador has failed to prove that the termination of the stay would lead to severe consequences for its ability to conduct its affairs.” Since budgetary hardship had been the only circumstance asserted by the applicant, and this assertion had not been proven, “this should be the end of the matter”, and the stay was lifted without necessitating the exercise of discretion.⁷⁹

62. The *ad hoc* committee in *Infrastructure Services v. Spain* “consider[ed] that the need to respect the finality of the award calls for greater restraint in deciding whether a stay of enforcement should be granted,” and proposed “that the circumstances which should exist for a stay to be required must, at the very least, rise above those which are common to most stay applications.”⁸⁰
63. This Committee has carefully studied Articles 52(5), and also 51(4) and 50(2) of the ICSID Convention, as well as the rich case law. It sees a variety of solutions. Most of the distinctions are unavoidable and understandable to the extent that they relate to a variety of factual circumstances. Others are due to divergent legal positions.
64. This does not exclude that, with respect to a certain number of issues, a wide consensus exists as a result of the clear provisions of the Convention. This seems to be the case for the principled views that a continuation of the stay during period of annulment proceedings

⁷⁸ *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Stay of Enforcement of the Award, August 31, 2017, ¶ 70, **CAA-033** (emphasis in original).

⁷⁹ *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Stay of Enforcement of the Award, August 31, 2017, ¶ 85, **CAA-033**.

⁸⁰ *Infrastructure Services and Energiy Termosolar v. Kingdom of Spain*, ICSID Case No. ARB/13/31, Decision on the Continuation of the Provisional Stay of Enforcement of the Award, October 21, 2019, ¶¶ 60, 66, **CAA-044**.

is not automatic but that the determination on the application for annulment and the application for a stay are based on distinct criteria, despite the close links between both applications. Further, the provisions of the Convention exclude a presumption in favour or against a continued stay of enforcement. Rather, committees have to exercise their discretion to determine each time whether the stay is warranted in light of the given circumstances.

65. Article 52(5) is, together with Articles 50(2) and 51(4), one of the provisions in the ICSID Convention empowering a tribunal or *ad hoc* committee to suspend the obligation of voluntary compliance or enforcement of an award although it has not (yet) lost its binding force as established under Article 53 of the Convention. The reason is that requests for interpretation, revision or annulment do not set aside the validity and the finality of an award as rendered but open such risk and thereby a period of uncertainty as to its final enforceability. The drafters of the Convention have tried to reconcile such transitional uncertainty and the highly valued finality. The efforts concentrated on enforcement, apparently in recognition of the fact that it is difficult to expect that a good faith applicant for any of the three remedies would voluntarily comply with an award, which it considers not final. Three alternatives were discussed for the three scenarios: an automatic stay of enforcement, the granting of discretion to domestic courts to refuse enforcement, and the granting of discretion to the tribunal/*ad hoc* committee within the ICSID system to stay the enforcement.⁸¹ For all three constellations, the latter solution was preferred.
66. Articles 50, 51 and 52 of the ICSID Convention empower the tribunal/*ad hoc* committee which is asked to decide the merits of the request to exercise its discretion and stay the enforcement of the award. This Committee is convinced, in appreciating the drafting context and the ordinary meaning of the terms, that the aforementioned articles do not limit the tribunals’/*ad hoc* committees’ discretionary power to the question whether to reject an application for stay of enforcement although the circumstances require one.

⁸¹ For a detailed analysis cf. C.H. Schreuer et al., *The ICSID Convention: A Commentary*, 2nd edition 2009, Art. 50, ¶¶ 42 ss, Art. 51, ¶¶ 34 ss., Art. 52, ¶¶ 574 ss, **AAIA-0022**.

67. They do also not limit the power by establishing a binding threshold for the question of what circumstances the tribunal/*ad hoc* committee may take into consideration. It is uncontested that the application for annulment and with it the application for a stay of enforcement is an exceptional remedy. However, there is no indication that the exceptional character of the application requires that the circumstances requiring the stay must also be exceptional. The Committee agrees with the *Standard Chartered* committee in “that establishing the existence of such circumstances is part of the Committee’s discretionary power, and that Article 54(4) of the Arbitration Rules require the applicant to specify the circumstances requiring the stay.”⁸²
68. Evidently, the exercise of discretion must be based on retraceable rationality and not be arbitrary. As provided by the ICSID Convention, circumstances requiring a stay are guiding criteria. There are no pre-defined criteria nor can the possible criteria be examined in isolation. They are interrelated and may have higher or lower pertinence in light of the specific factual circumstances of the case. In the practice of *ad hoc* committees since 1985, a number of such recurrent criteria have emerged. In his commentary, Schreuer summarizes them as follows:
- the strength of the case for or against annulment,
 - whether the party seeking the stay also furnishes security for the award,
 - the risk that there would be problems in recovering payment made in compliance with the award should it be annulled,
 - whether there is a dilatory motive underlying the application for annulment,
 - the prospect of prompt enforcement of the award if it is upheld, including enforcement that is unimpeded by problems arising from immunity from execution,
 - hardship to either party in the event that the stay is continued, or lifted,
 - possible irreparable injury to the award debtor in the case of immediate enforcement.⁸³
69. Unsurprisingly, these criteria appear, in one way or the other, also in the present case. The Committee will not examine them in isolation but in relation to each other, and in appreciation of their relative strength and weakness. In that perspective, the strength and

⁸² *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 of Enforcement of the Award, April 12, 2017, ¶ 53, **CAA-030**.

⁸³ C.H. Schreuer et al., *The ICSID Convention: A Commentary*, 2nd edition 2009, Art. 52, ¶ 609, **AALA-0022**.

merits of the annulment application are not *per se* a decisive circumstance in the sense of Article 52(5) of the ICSID Convention. However, its seriousness and absence of dilatory intentions contribute to an understanding of the interests that the applicant pursues and of its lack of preparedness to comply immediately voluntarily with the award. Further, the risks of compliance and of potential recovery have to be weighed. The Committee considers that, amongst the circumstances to be considered, is the risk of payment or non-payment of the award after the conclusion of the annulment proceedings. A low risk for the creditor because the debtor will live up to its obligation to comply with the award if and to the extent that the annulment application is rejected, would be a circumstance that militates in favour of a deferred payment and thus a stay of enforcement. In this context, both the posting of a security or a written undertaking have to be taken into consideration to measure the risk, as much so as the payment obligation of post-award interest, which may reduce the inconvenience of a suspended payment. Likewise, a high risk for the debtor in the recovery of amounts already paid under the award, when and if the award is annulled, would militate in favour of a stay. Conversely, if there is a high risk of the creditor not to collect the amounts due under the award if the award is not annulled, or a low risk of the debtor not to recover paid or enforced amounts under the award if the award is annulled, those circumstances militate in favour of an immediate enforcement. In this context, proof of solvency of the creditor and a written undertaking promising prompt reimbursement of principal and interest have to be taken into consideration. In a certain way, securities and written undertakings are not ‘conditions’ for the decision on a stay but elements that influence the analysis of circumstances and assist committees in their rational exercise of discretion.

70. In sum, the Committee will exercise its discretion in view of balancing the interests of both Parties by appreciating the circumstances as specified by them.

B. Analysis of the specific circumstances in the present case

71. The Committee must take into consideration all the relevant circumstances to decide whether the stay is required.

72. Whether or not the application for annulment is frivolous or dilatory is not the first circumstance that the Committee must address, much less the only circumstance that the Committee must consider. The least that can be expected is that the application is serious and not a mere attempt to delay payment.
73. The Committee considers that there are three circumstances that must be analysed cumulatively in the case at hand: (i) the risk of non-payment of the Award if the Application for Annulment is rejected; (ii) the risk of non-recovery if the stay is lifted and the Award is annulled; and (iii) the balance of hardship between the Parties.
74. As to the first circumstance, the Committee concludes that the evidence provided by Claimant is not sufficient to conclude that Ecuador will not honour its obligations under the ICSID Convention to pay the Award should the Committee reject the Application for Annulment. Nonetheless, based on the evidence on the record, the Committee shares Claimant's concern that the absence of a clear commitment on the part of Ecuador to pay the Award voluntarily, promptly, and in full in case it is not annulled is a circumstance that the Committee has to consider in its decision.⁸⁴
75. As to the second circumstance, the Committee is of the view that Applicant has raised a valid concern that Perenco is a shell company with no assets to be attached in a recoupment action and that it may be very difficult for Ecuador to recover any of the sums paid to Perenco if the Award were to be annulled.⁸⁵ This circumstance of Claimant being a shell company is not denied by Claimant. Moreover, Perenco not only offered an undertaking to return any sums collected from Ecuador if the Committee upholds the Application for Annulment but offered to provide a parent company letter or guarantee from Perenco S.A.⁸⁶
76. As to the third circumstance, the Committee concludes that, on the one hand, Respondent has not demonstrated that it will suffer particular harm beyond the inherent or normal effects of an adverse ICSID award, and has not proven that the budgetary reallocations that would result if the stay is lifted are different or more onerous than the ones Ecuador would

⁸⁴ Tr. Hearing Stay of Enforcement, 93:1-18.

⁸⁵ Respondent's Reply on the Stay, ¶¶ 10, 110-120.

⁸⁶ Claimant's Rejoinder on the Stay, ¶¶ 67, 70.

have to make if the stay is maintained, the Award is not annulled, and Ecuador has to pay after the Committee's decision. In respect to the social protests alleged by Respondent, the Committee sides with Claimant in that they were caused by actions or omissions of the State and there is no link whatsoever between the protests and the case at hand. On the other hand, Claimant has not demonstrated that it would suffer any prejudice that could not be compensated by the payment of interests accrued upon the delay. Although Claimant argues that the interest rate fixed in the Award is relatively low,⁸⁷ the Committee considers that due to the nature of annulment proceedings, it is not in the position of second-guessing the Tribunal's decision on the applicable rate on post-Award interests accrued.

77. In sum, the balance of hardship as submitted by the Parties leads the Committee to conclude that there is a dual risk that the Parties perceive and acknowledge. On the one hand, Claimant has manifested its concern that to date Ecuador has not committed to voluntarily, promptly, and in full, pay the Award. Ecuador, acknowledging said risk, has issued a letter that the Committee considers insufficient as it does not contain a clear and specific undertaking related to the Award.⁸⁸ On the other hand, Respondent has expressed a concern as to the fact that Claimant is a shell company and Claimant has acknowledged such risk and has offered to provide a parent company letter or guarantee from Perenco S.A.
78. In this context, the Committee considers that securing voluntary compliance by Ecuador if the stay is maintained and the Award is not annulled, and securing reimbursement by Perenco if the award is annulled, are elements that have a serious bearing on the circumstances it must weigh to determine if the stay shall be maintained.
79. Respondent argues that the Committee has no power to condition the stay of the enforcement of the Award because the ICSID Convention does not expressly grant *ad hoc* committees with this power or with the power to order or recommend provisional

⁸⁷ Claimant's Opposition to the Stay, ¶ 33.

⁸⁸ Tr. Hearing Stay of Enforcement, 93:2-9; *See* Respondent's Reply on the Stay, ¶ 126, where the Applicant states that: "Ecuador has an exemplary track record of complying with international arbitral awards and shows predisposition to comply with its international obligations." *See also*, Respondent's Reply on the Stay, ¶ 139, where the Applicant quotes the statement made by the Attorney General of Ecuador on September 30, 2019, regarding Ecuador's compliance with the Award as follows: "In the end, what Ecuador will have to pay, if we do not succeed in annulling the award, will be 411 million, so I have summoned the Ministers of [...] Energy and Natural Resources and Economy and Finance to explore the real possibilities of complying with the award." (emphasis omitted)

measures.⁸⁹ In this regard, the Committee considers, first, that *ad hoc* committees have the authority to order the granting of securities or written undertakings in connection with the stay of enforcement of an ICSID award. Such authority follows from the inherent powers of *ad hoc* committees to conduct the proceedings. To date, no committee has considered the opposite. Second, that, as already stated by the Committee, securities and written undertakings, in a certain way, are not ‘conditions’ for the decision on a stay but elements that influence the analysis of circumstances and assist *ad hoc* committees in their rational exercise of discretion. Third and last, that the Committee has the authority and discretion to determine, under the specific circumstances of the case, whether to order measures such as the ones requested by Claimant⁹⁰ or to be satisfied with written undertakings such as the ones referred to in this decision. In any event the Committee remains with the authority to amend its decision on the stay, of course after hearing the Parties and considering the specific circumstances at the time.

80. Thus, the Committee decides to provisionally continue the stay of enforcement of the Award subject to the following:
- a. Respondent is ordered to provide the *ad hoc* Committee, within 60 days following this decision, with a letter signed by Ecuador’s Minister of Finance or the official having full authority to bind Ecuador, committing to pay the Award unconditionally, voluntarily and in full, within 60 days after the Committee decides on the Application for Annulment, if the Application for Annulment were not to be upheld in full or in part, and attesting that such payment shall not be subject to any enforcement proceedings or to the intervention of Ecuador’s courts.
 - b. If Ecuador were not to provide the letter under ¶ 80(a) with a text in form and substance satisfactory to the Committee within 60 days following the issuance of this decision, the stay shall be lifted if by such date, or at any time thereafter, Claimant has provided or provides the Committee with a letter signed by an officer having full authority to bind Perenco S.A. committing to unconditionally, voluntarily and in full

⁸⁹ Respondent’s Reply on the Stay, ¶¶ 179-193.

⁹⁰ Claimant’s Rejoinder on the Stay, ¶ 107.

reimburse Ecuador for any payments received under the Award, within 60 days after the Committee decides on the Application for Annulment, if the Application for Annulment were to be upheld in full or in part and attesting that such payment shall not be subject to any enforcement proceedings or court intervention.

V. COSTS

81. The decision on costs for the phase related to the stay of enforcement of the Award will be made together with the final decision on the Application for Annulment.

VI. DECISION

82. The Committee, based on the above considerations, decides to provisionally continue the stay of enforcement of the Award subject to the following:
- a. Respondent is ordered to provide the *ad hoc* Committee, within 60 days following this decision, with a letter signed by Ecuador's Minister of Finance or the official having full authority to bind Ecuador, committing to pay the Award unconditionally, voluntarily and in full, within 60 days after the Committee decides on the Application for Annulment, if the Application for Annulment were not to be upheld in full or in part, and attesting that such payment shall not be subject to any enforcement proceedings or to the intervention of Ecuador's courts.
 - b. If Ecuador were not to provide the letter under ¶ 82(a) with a text in form and substance satisfactory to the Committee within 60 days following the issuance of this decision, the stay shall be lifted if by such date or at any time thereafter Claimant has provided or provides the *ad hoc* Committee with a letter signed by an officer having full authority to bind Perenco S.A. committing to unconditionally, voluntarily and in full reimburse Ecuador for any payments received under the Award, within 60 days after the Committee decides on the Application for Annulment, if the Application for Annulment were to be upheld in full or in part and attesting that such payment shall not be subject to any enforcement proceedings or court intervention.
83. The decision on the allocation of costs arising from the request for a continuation of the stay is reserved.
84. All other requests are rejected.

[Signed]

Professor Rolf Knieper
Member of the *ad hoc* Committee

Date: February 21, 2020

[Signed]

Professor Mónica Pinto
Member of the *ad hoc* Committee

Date: February 21, 2020

[Signed]

Professor Eduardo Zuleta
President of the *ad hoc* Committee

Date: February 21, 2020