

PRESS RELEASE

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CS/03

BURLINGTON CASE:

ARBITRAL TRIBUNAL ISSUES FINAL AWARD AND ACCEPTS THE ENVIRONMENTAL COUNTERCLAIM OF ECUADOR

Yesterday, February 7, 2017, the Arbitral Tribunal that heard the claim brought by Burlington Resources Inc. against the State of Ecuador issued its final award in which, answering the arguments set for by the State's defense, it limited the compensation to the investor to 22 percent of the initial claim demanded by the oil company. Despite the significant reduction that was achieved, the Office of the State Attorney General does not agree with the decisions adopted by the Tribunal throughout this arbitration and as result, will submit a motion to annul its decisions, due to the fact that this award and the precedent decisions issued by the Tribunal incur into certain of the grounds for annulment provided in the ICSID Convention, such as manifest excess of power, lack of justification of adopted decisions, in addition to violating the rules of procedure to the detriment of the interests of the State of Ecuador.

In its decision, the Tribunal, conformed by arbitrators Gabrielle Kaufmann-Kohler (Chairman), Brigitte Stern, and Stephen Drymer (co-arbitrators), dismissed the value of US\$1,515,603,095 requested by the company, establishing as compensation amount to the plaintiff the value of US\$ 379,802,267 plus interest. Furthermore, the Tribunal accepted Ecuador's counterclaim and declared that Burlington was responsible for the costs related to the environmental restoration and the remediation of the infrastructure of Blocks 7 and 21, for the harm caused by the investor and its partner in the operation. Therefore, it orders payment in the amount of USD 41,776,492.77.

The Tribunal accepted Ecuador's arguments as to the fact that the State was not obligated to extend the Block 7 Contract or recognize any value whatsoever to reimburse the payments made pursuant to Law 42. These decisions had a great impact on the reduction of the value of the indemnification. However, for the purposes of determining the amount of damages, the Tribunal did not consider that the date of appraisal for the calculation of the harm should have been the date of the alleged expropriation (July 2009, when assuming the operation of the blocks abandoned by the operator) and not at present value (August 2016 when the calculation was made. In the opinion of Professor Brigitte Stern, this can hide a form of double accounting. Furthermore, in contradiction with its decision in a previous stage, it ignored the effects of the Law 42 when calculating the future cash flow, despite the fact that it had already dismissed the argument that the Law 42 violated the Treaty.

The Arbitral Tribunal also rejected the State of Ecuador's motion for reconsideration of the decision on responsibility issued on December 14,

2012 because, in its opinion, it had no power to do so, despite the fact that it subsequently made a series of decisions during the appraisal of the indemnification that would not have been possible without reconsidering its previous decisions. This affects due process and the State's defense. When the Tribunal ruled in this way, it ignored the grounds invoked by Ecuador when requesting reconsideration, in other words, that the decision of responsibility interpreted Art. 74 of the Hydrocarbons Act that was not addressed by the parties in the proceeding, despite the fact that the Tribunal did not have the power to do so.

The Tribunal, in a historic decision for the world of investment law, accepted the arguments of the State Attorney General regarding the counterclaim set forth against Burlington and its "low cost" operation, which affected the environment in a highly sensible area such as the Ecuadorian Amazon. And although the Tribunal adopts an unprecedented decision, declaring the investor responsible for the environmental harm, its decision omitted the application of the Ecuadorian Constitution in matters of comprehensive redress for the harm caused to nature, inadequately appraising the harm.

The State Attorney General, Dr. Diego García Carrión, when opinion on the award, highlighted the fact that Ecuador's defense team obtained the reduction to the amount requested by Burlington, avoiding the payment of 78 percent of the total claim. However, he repeated his concern regarding the inconsistencies of the investment arbitration system, which always seeks a form to compensate the investor, even overstepping the limits of arbitral jurisdiction and the application of local law. In the present case, especially because condemning the State is inadmissible when all the purported breaches of the BIT could have been avoided if the oil company had paid the amounts that corresponded to Law 42, as it should have done to respect the State's fiscal sovereignty. This was stated by Professor Brigitte Stern in a part of the award that departs from the majority opinion of the Tribunal.

Therefore, the State Attorney General stated that the State's defense was analyzing this award of over 800 pages, along with the previously adopted decisions in this case, in order to file a motion to annul in the next few days.

Case Background

On April 21, 2008, the oil company filed its complaint due to the application of Law 42, establishing a fairer distribution of the windfall revenues caused by the increase in the price of Ecuadorian crude oil. The application of Law 42 and the reiterated failure to pay for said Law caused a series of actions that led to the abandonment of the operation of the blocks that oil companies Perenco and Burlington were in charge of in July 2009 and the *caducidad* resolution regarding the participation contract in 2010. Burlington requested indemnification in the approximate amount of US 1,500 million including interest.

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