

**International Centre for Settlement of Investment Disputes  
Washington, D.C.**

**Enron Corporation  
Ponderosa Assets, L.P.  
(Claimants)**

**v.**

**Argentine Republic  
(Respondent)**

**(ICSID Case No. ARB/01/3)  
(Annulment Proceeding)**

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**Decision on the Argentine Republic's Request for a  
Continued Stay of Enforcement of the Award  
(Rule 54 of the ICSID Arbitration Rules)**

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**Members of the *ad hoc* Committee**

Dr. Gavan Griffith Q.C., President  
Judge Patrick L. Robinson  
Judge Per Tresselt

**Secretary of the *ad hoc* Committee:** Dr. Claudia Frutos-Peterson

**Assistant to the *ad hoc* Committee:** Dr. Christopher Staker

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**Representing the Respondent:**

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October 7, 2008

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**A. Introduction**

1. On 21 February 2008, the Argentine Republic (“Argentina”) filed with the Secretary-General of the International Centre for Settlement of Investment Disputes (“ICSID”) an application in writing (the “Application for Annulment”) requesting the annulment of the Award of 22 May 2007 (the “Award”), rendered by the tribunal (the “Tribunal”) in the arbitration proceeding between Enron Corporation and Ponderosa Assets, L.P. (the “Claimants”) and Argentina.
2. The Application for Annulment was made within the time period provided in Article 52(2) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“the ICSID Convention”), having regard to Article 49(2) of the ICSID Convention and considering that on 25 October 2007, the Tribunal rendered its decision on a request by the Claimants under that provision for rectification and/or a supplementary decision of the Award.
3. In the Application for Annulment, Argentina seeks annulment of the Award on three of the five grounds set forth in Article 52(1) of the ICSID Convention, specifically claiming that:
  - (a) the Tribunal manifestly exceeded its powers;
  - (b) there was a serious departure from a fundamental rule of procedure; and
  - (c) the Award failed to state the reasons on which it was based.
4. The Application for Annulment also contained a request, under Article 52(5) of the ICSID Convention and Rule 54(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “ICSID Arbitration Rules”), for a stay of enforcement of the Award until the Application for Annulment is decided.
5. The Deputy Secretary-General of ICSID registered the Application on 7 March 2008, and on the same date, in accordance with Rule 50(2) of the ICSID Arbitration Rules, transmitted a Notice of Registration to the parties. The parties

were also notified that, pursuant to ICSID Arbitration Rule 54(2), the enforcement of the Award was provisionally stayed.

6. By letter of 22 May 2008, in accordance with Rule 52(2) of the ICSID Arbitration Rules, the parties were notified by the Centre that an *ad hoc* Committee (“the Committee”) had been constituted, composed of Dr. Gavan Griffith Q.C., a national of Australia, Judge Patrick L. Robinson, a national of Jamaica, and Judge Per Tresselt, a national of Norway. On the same date the parties were informed that Dr. Claudia Frutos-Peterson, Counsel, ICSID, would serve as Secretary of the Committee.
7. On 18 June 2008, the Claimants filed a request to lift the provisional stay of enforcement of the award, or alternatively, to condition a continuation of the stay on Argentina’s posting adequate security (the “Claimants’ Request”). By letter of 20 June 2008, the Committee invited Argentina to submit its written observations on the Claimants’ Request no later than 7 July 2008. By the same letter, the Committee confirmed that the oral arguments on this matter would take place during the first session and informed the parties that the Committee would make a decision on the continuation of the stay of enforcement of the Award in accordance with ICSID Arbitration Rule 54.
8. By a letter dated 30 June 2008, the Committee asked the parties whether they would agree to retain the services of an assistant, Dr. Christopher Staker, in addition to the Secretary of the Committee. Argentina and the Claimants agreed to Dr. Staker’s appointment by letters dated 2 and 8 July 2008, respectively.
9. In compliance with the Committee’s instructions, on 7 July 2008, Argentina filed its observations on the continuation of the stay of enforcement of the Award (“Argentina’s Observations”).
10. The first session of the Committee was held, as scheduled with the agreement of the parties, on 14 July 2008, at the premises of the World Bank in Paris. Prior to the start of the session, the Secretariat distributed to the parties copies of the declarations, signed by each Member of the Committee, pursuant to ICSID Arbitration Rule 52(2). During the first session, several issues of procedure were agreed and decided. Subsequently, the parties addressed the Committee with

their respective arguments concerning the question of the continuance of the stay of enforcement of the Award. During the session, the Committee put questions to the parties, and offered the parties an opportunity to file within fourteen days certain additional materials on which they sought to rely. At the same time, the Committee decided to continue the stay of enforcement of the Award until it had taken a decision.

11. By a letter dated 25 July 2008 with attachments, Argentina presented certain additional materials and information to the Committee.
12. By a letter dated 28 July 2008 with attachments, the Claimants in turn presented certain additional materials and information to the Committee.
13. The Members of the Committee have deliberated by various means of communication, and have taken into consideration the parties' entire written and oral arguments and submissions on the matter.

**B. The parties' contentions**

14. As outlined above, the Claimants have requested that the provisional stay of enforcement of the Award pursuant to Article 52(5) of the ICSID Convention be lifted, or alternatively, that if the Committee continues the stay, it be conditioned on Argentina's providing financial security. The Claimants' Request argued, *inter alia*:

- (a) that prior ICSID annulment committees have determined that a primary factor to consider when evaluating whether to continue a stay is whether the State seeking annulment will promptly comply with the award if it is not annulled;<sup>1</sup>

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<sup>1</sup> The Claimants referred to *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Decision on the Respondent's Request for a Continued Stay of Execution, June 1, 2005 ("MTD Stay Decision") ¶ 29; *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 ("CMS Stay Decision") ¶ 38.

- (b) that there is a substantial risk that Argentina will not comply voluntarily with the Award if its Application for Annulment is unsuccessful and that it will use the period of the continued stay to divert assets that would otherwise be available to the Claimants to satisfy the Award, as:
- (i) senior executive and judicial officers and the Attorney General have stated that Argentina will not comply voluntarily with ICSID awards, but will challenge them before the International Court of Justice or before the Argentine courts;
  - (ii) in particular, notwithstanding that Argentina has an obligation under Article 53 of the ICSID Convention to pay voluntarily ICSID award rendered against it, Argentina has erroneously taken the position that an investor seeking recognition or enforcement of an ICSID award against Argentina must, pursuant to Article 54 of the ICSID Convention, follow the procedures under Argentine law for the enforcement of final judgments;
  - (iii) despite the letter of undertaking that Argentina submitted in the *CMS* annulment proceedings, Argentina had still not paid the award in that case nine months after the decision of the *ad hoc* committee, and even diverted funds away from New York after *CMS* was granted a temporary restraining order by a United States court;
  - (iv) there is grave doubt as to the enforceability in Argentina of ICSID awards pursuant to Article 54 of the ICSID Convention, since while under Argentine law international treaties are superior to local laws, they are (save for certain human rights treaties) subordinate to the Argentine Constitution, and a recent Argentine Supreme Court decision<sup>2</sup> supports the doctrine that Argentine Courts may review and vacate ICSID awards; and

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<sup>2</sup> Corte Suprema de Justicia, June 1, 2004, *Cartellone c. Hidronor*, Fallos 327-1881.

- (v) despite its strong economic recovery, Argentina remains in default of its international financial obligations and is deemed a credit risk by major credit evaluation agencies;
- (c) that given that a stay of enforcement interferes with the investor's right to an immediately payable and enforceable award:
  - (i) such a stay is an extraordinary measure not to be granted lightly,
  - (ii) there is a negative presumption with regard to a stay of enforcement; and
  - (iii) Argentina bears the burden of proving that a stay of enforcement of the Award is required;
- (d) that scholarly commentary and many ICSID *ad hoc* committees make clear that the posting of security when a provisional stay is continued is a "counterbalancing right" to the negative effect of the stay on the award creditor;<sup>3</sup>
- (e) that Argentina will not suffer irreparable harm if the stay of enforcement is discontinued or if it is required to post security given its economic recovery, and that Argentina clearly has the resources to post security;
- (f) that security is generally considered a remedy granted to the award creditor during an annulment process to ensure that the creditor does not suffer additional damages if enforcement of the award is stayed during the course of the annulment proceeding;
- (g) that a continuance of the stay of enforcement of the Award without security would harm the Claimants since:

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<sup>3</sup> The Claimants referred *inter alia* to C. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001) at 1058 ¶ 478, 1060 ¶¶ 483-4; P.D. Friedland, "Stay of Enforcement of the Arbitral Award Pending ICSID Annulment Proceedings", in E. Gaillard (ed.), *Annulment of ICSID Awards* (2003) 177 at 185; *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Procedural Order No. 1 of the *ad hoc* Committee concerning the Continuation of the Stay of Enforcement of the Award, April 5, 2001 ("Wena Stay Decision") ¶ 7(b); *CDC Group plc v. Republic of the Seychelles* (ICSID Case No. ARB/02/14), Decision on Whether or Not to Continue Stay and Order, July 14, 2004 ("CDC Stay Decision") ¶ 19; *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Decision on the Stay of Enforcement of the Award, November 30, 2004 ("Mitchell Stay Decision") ¶ 33.

- (i) this would prevent payment of the compensation awarded to the Claimants, which was due on the date that the Award was dispatched to the parties;
  - (ii) the Tribunal did not grant the Claimants post-award interest and the value of the Award will therefore continue to decline for every day that it is not paid;
  - (iii) the Claimants have already initiated enforcement procedures in the United States prior to the coming into effect of the provisional stay, and would be prejudiced by a continued stay of those efforts already initiated;
- (h) that any argument that security would place the Claimants in a “better position” than if annulment had not been sought is erroneous and has been consistently rejected since it was advanced in the *MINE* case;<sup>4</sup> and
- (i) that Argentina faces no risk of non-recoupment if the award is annulled, given the Claimants’ proposal that if the stay is lifted any amounts recovered be held in escrow pending a decision on the Application for Annulment, or that if the stay is continued on condition of the provision of security by Argentina, the security be held in escrow pending a decision on the Application for Annulment.
15. Argentina opposed the Claimants’ Request and sought a continuance of the stay of enforcement without any requirement for the provision of security by Argentina. Argentina’s Observations *inter alia* argued:
- (a) that no *ad hoc* committee in any case has failed to grant a stay of enforcement of the award pending annulment proceedings;
  - (b) that requiring a guarantee to maintain the stay of enforcement of the award is contrary to the object and purpose of the ICSID Convention, as well as to its spirit, and that no provision of the ICSID Convention allows

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<sup>4</sup> The Claimants quote from the *ad hoc* committee’s consideration of the issue in the CDC Stay Decision ¶ 19, which considers *Maritime International Nominees Establishment (“MINE”) v. Republic of Guinea* (ICSID Case No. ARB/84/4), Interim Order No. 1 on Guinea’s Application for Stay of Enforcement of the Award, August 12, 1988 (“MINE Stay Decision”) ¶ 22.

conditioning the stay of enforcement of the Award on the posting of a guarantee;

- (c) that failure to stay enforcement of the award would cause harm to Argentina, which is a developing country with high rates of poverty, extreme poverty and social exclusion, and where despite the improved economic situation the effects of the recent economic crisis are still visible;
- (d) that failure to stay enforcement of the award would cause harm to the investment arbitration system under the ICSID Convention, as it would make an award full of irregularities enforceable;
- (e) that it would be difficult, if not impossible, for the Claimants to recover the amount of the Award if it were annulled, given Enron's bankruptcy;
- (f) that the Claimants cannot argue that a continuation of the stay would cause the Claimants harm as this is a remedy specifically provided for in the ICSID Convention;
- (g) that the Tribunal did not grant the Claimants post-award interest because the Claimants did not request it, and that Argentina should not have to bear the consequences of the Claimants' failure to do so;
- (h) that in the Argentine legal system, Argentina's international obligations, including awards issued by ICSID tribunals, have supremacy over laws enacted by Congress, and this is an adequate guarantee of compliance with the Award in the event that it is not annulled;
- (i) that Argentina has historically complied with decisions of international tribunals;
- (j) that the text of the ICSID Convention does not provide for the possibility of requiring a party seeking annulment to post a guarantee, that the *travaux préparatoires* of the ICSID Convention indicate that its negotiators dismissed a proposal to empower an *ad hoc* committee to require the posting of security as a condition for granting a stay, and that

previous ICSID cases have incorrectly imported such a possibility from commercial arbitration practice;

- (k) that requiring a party to a dispute to provide a guarantee would impair the effective use of the protection contained in Article 52 of the ICSID Convention in the event of an irregular award, especially in the case of developing countries, while there is no doubt that in the absence of an award annulment system States would not have ratified the ICSID Convention;
- (l) that previous ICSID cases in which security has been made a condition of a continuation of a stay of enforcement had characteristics that this case does not have;
- (m) that no matter how a bank guarantee is provided, its provision would be detrimental to Argentina, since the commission that a bank would charge for providing such a guarantee would be exorbitant, and the freezing of the amount of the Award during the annulment proceeding would be detrimental to Argentina;
- (n) that requiring a guarantee as a condition for continuing a stay of enforcement would place the Claimants in a much more favourable position than they are now, and than they were prior to the filing of the Application for Annulment;
- (o) that the provision of a guarantee would penalise the party that applies for annulment;
- (p) that the posting of a bank guarantee is unnecessary since the Argentine domestic legal system already guarantees compliance with the Award;
- (q) that Argentina has not failed to comply with the award in the *CMS* case, since:
  - (i) Article 53 of the ICSID Convention does not establish an obligation of voluntary payment by Argentina;

- (ii) under Article 54 of the ICSID Convention, award creditors must meet the formal requirements that any person should follow in Argentina to obtain compliance with a final judgment of a local court; and
  - (iii) CMS refused to follow that procedure; and
  - (r) that the Claimants have presented no new fact that was not previously argued by the claimant in the *Azurix Stay Decision*,<sup>5</sup> in which the *ad hoc* committee ordered a continuation of the stay of enforcement without any condition of security.
16. As noted above, Argentina and the Claimants supplemented their written filings with oral submissions on 14 July 2008, and both parties subsequently provided additional materials and information.

**C. Relevant ICSID Convention Articles and ICSID Arbitration Rules**

17. Article 27(1) of the ICSID Convention states:

*No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.*

18. Article 52 of the ICSID Convention provides:

- (1) *Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:*
  - (a) *that the Tribunal was not properly constituted;*
  - (b) *that the Tribunal has manifestly exceeded its powers;*

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<sup>5</sup> *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, December 28, 2007 ("Azurix Stay Decision").

- (c) *that there was corruption on the part of a member of the Tribunal;*
- (d) *that there has been a serious departure from a fundamental rule of procedure; or*
- (e) *that the award has failed to state the reasons on which it is based.*

...

- (5) *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.*

...

19. Articles 53 to 55 of the ICSID Convention provide:

**Article 53**

- (1) *The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.*
- (2) *For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.*

**Article 54**

- (1) *Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.*

- (2) *A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.*
- (3) *Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.*

### **Article 55**

*Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.*

20. Rule 54 of the ICSID Arbitration Rules applies to the present case and provides:

### **Stay of Enforcement of the Award**

- (1) *The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.*
- (2) *If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provisional stay of the award. As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated.*
- (3) *If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final*

*decision is rendered on the application, except that a Committee granting the partial annulment of an award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request any new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3).*

- (4) A request pursuant to paragraph (1), (2) (second sentence) or (3) shall specify the circumstances that require the stay or its modification or termination. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.*
- (5) The Secretary-General shall promptly notify both parties of the stay of enforcement of any award and of the modification or termination of such a stay, which shall become effective on the date on which he dispatches such notification.*

#### **D. The BIT**

21. Article VII of the Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment<sup>6</sup> (the “BIT”) provides, in relevant part:

#### *ARTICLE VII*

...

2. *In the event of an investment dispute, the parties to the dispute should initially seek a resolution through consultation and negotiation. If the dispute cannot be settled amicably, the national or company concerned may choose to submit the dispute for resolution:*

...

- (c) in accordance with the terms of paragraph 3.*
3.
  - (a) Provided that the national or company concerned has not submitted the dispute for resolution under paragraph 2 (a) or (b) and that six months have elapsed from the date on which the dispute arose, the national or company concerned may choose to*

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<sup>6</sup> Signed 14 November 1991; entered into force 20 October 1994.

*consent in writing to the submission of the dispute for settlement by binding arbitration:*

- (i) to the International Centre for Settlement of Investment Disputes ("Centre") established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965 ("ICSID Convention"), provided that the Party is a party to such convention: ...*

...

- 6. *Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its enforcement.*

...

## **E. The Committee's views**

### ***(i) Applicable principles***

#### ***(a) Whether a stay may be subject to conditions***

- 22. The use of the word "may" in Article 52(5) of the ICSID Convention makes clear that it is a matter within the discretion of the *ad hoc* committee whether or not to stay enforcement of the award pending its decision on an application for annulment.
- 23. However, neither the ICSID Convention nor the ICSID Arbitration Rules expressly states whether an *ad hoc* committee may, in the exercise of this discretion, grant a request for a stay subject to conditions, such as a condition that the party seeking the stay provide security for the enforcement of the award in the event that annulment is not granted.
- 24. In previous decisions, *ad hoc* committees have proceeded on the basis that they may do so, and indeed on several occasions have done so. However, previous decisions have merely assumed that an *ad hoc* committee has the

power to grant a stay subject to conditions. Given that the existence of such a power is expressly disputed by Argentina in this case, the Committee considers that it must carefully examine the question. Having considered the arguments and authorities of the parties, the Committee concludes as follows.

25. The terms of the ICSID Convention are the source of the Committee's power to modify or grant a stay. The question whether the Committee can make a stay conditional on the provision of security is therefore a matter of interpretation of that Convention. In its interpretation of the ICSID Convention, the Committee is guided by Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "Vienna Convention").<sup>7</sup> These provisions reflect the customary international law rules of treaty interpretation as they already existed at the time that the text of the ICSID Convention was adopted.<sup>8</sup> It is therefore immaterial to the interpretation of the ICSID Convention whether or not a particular Contracting State to the ICSID Convention is also a party to the Vienna Convention. Articles 31 and 32 of the Vienna Convention state:

*Article 31  
General rule of interpretation*

1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
  - (a) *any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*
  - (b) *any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
3. *There shall be taken into account, together with the context:*

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<sup>7</sup> Vienna, May 23, 1969; 1155 U.N.T.S. 331.

<sup>8</sup> E.g., *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 625, at pp. 645-646, para. 37.

- (a) *any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
  - (b) *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
  - (c) *any relevant rules of international law applicable in the relations between the parties.*
4. *A special meaning shall be given to a term if it is established that the parties so intended.*

*Article 32  
Supplementary means of interpretation*

*Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:*

- (a) *leaves the meaning ambiguous or obscure; or*
- (b) *leads to a result which is manifestly absurd or unreasonable.*

26. As to Article 31(1) of the Vienna Convention, the Committee notes that the text of the ICSID Convention is silent on the question whether or not an *ad hoc* committee can make a stay conditional on the provision of security. The Committee does not view that silence as necessarily meaning that the power does not exist. The Committee considers that a discretionary power to allow or deny a remedy may implicitly include a power to allow the remedy subject to conditions,<sup>9</sup> and that such an interpretation would be consistent with the objects and purposes of Article 52(5), which is designed to enable the *ad hoc* committee to balance the rights of the parties pending annulment proceedings.

27. As regards Article 31(3)(b) of the Vienna Convention, the Committee notes that *ad hoc* committees have previously been called upon to exercise their power

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<sup>9</sup> Compare MTD Stay Decision ¶ 26; CMS Stay Decision ¶ 35: “Since a stay is not automatic, the [Committee] could grant the request subject to conditions, including a condition that an appropriate bond be provided”.

under Article 52(5) of the ICSID Convention on eleven known occasions.<sup>10</sup> On each of those occasions, a continuation of the stay was ordered. On five of those occasions, the continuation of the stay was ordered on condition that the State seeking the stay provided security for the payment of the award in the event that annulment was not granted, in the form of a bank guarantee.<sup>11</sup> On five of those occasions, a continuation of the stay was ordered without any such condition.<sup>12</sup> On one of those occasions, the parties agreed that the State seeking a stay would post a bank guarantee in exchange for a waiver of the right by the award creditor to bring enforcement proceedings pending the outcome of the annulment proceedings.<sup>13</sup>

28. Although the written and oral submissions of the parties in respect of these previous decisions are not publicly available, in none of the previous decisions is the existence of the power to make a stay subject to a condition of security discussed at any length. As noted above, the existence of this power has generally merely been assumed. In only one of the previous decisions is it indicated that the State seeking the stay had argued that the Committee had no power to include a condition of security,<sup>14</sup> and in that instance the *ad hoc* committee did not decide the question, but declined for other reasons to make security a condition.<sup>15</sup> From this the Committee considers it likely that in the

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<sup>10</sup> (1) *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), in which the Article 52(5) decision issued in the first annulment proceedings in that case (“Amco I Stay Decision”) is not public but is summarised in *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), *Ad hoc* Committee Decision on the Application for Annulment, May 16, 1986, 25 *ILM* 1439 (1986); 1 *Int’l Arb. Rep.* 649 (1986); 12 *Y.B. Com. Arb.* 129 (1987); 89 *I.L.R.* 514 (1992); 1 *ICSID Rep.* 509 (1993) (“Amco I Annulment Decision”) ¶¶ 5-9; (2) MINE Stay Decision; (3) *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Interim Order No. 1, March 2, 1991, 9 *ICSID Rep.* 59 (2006) (“Amco II Stay Decision”) (issued in relation to the second annulment proceedings in that case); (4) *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), in which the Article 52(5) decision (“SPP Stay Decision”) is not public but is summarised in Schreuer (*op. cit.*) at 1054, 1055, 1060 ¶¶ 462, 468, 482 (citing W.L. Craig, “The Final Chapter in the Pyramids Case: Discounting an ICSID Award for Annulment Risk”, 8 *ICSID Rev.-Foreign Inv. L.J.* 264, 268, 284-285, 290 (1993)); (5) Wena Stay Decision; (6) Mitchell Stay Decision; (7) CDC Stay Decision; (8) MTD Stay Decision; (9) *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/01/10), Procedural Order No. 1, December 22, 2005 (“Repsol Stay Decision”); (10) CMS Stay Decision; (11) Azurix Stay Decision.

<sup>11</sup> Amco I Stay Decision, Amco II Stay Decision, Wena Stay Decision, CDC Stay Decision, Repsol Stay Decision.

<sup>12</sup> MINE Stay Decision, Mitchell Stay Decision, MTD Stay Decision, CMS Stay Decision, Azurix Stay Decision.

<sup>13</sup> SPP Stay Decision.

<sup>14</sup> MINE Stay Decision ¶ 20.

<sup>15</sup> MINE Stay Decision ¶¶ 22-25.

other ten previous decisions, the States concerned did not argue that the *ad hoc* committee lacked the power to include a condition of security, or at least, did not argue this forcefully or as a primary argument.

29. Additionally, of the five previous decisions in which the *ad hoc* committee included a requirement of security, it appears that in three of these cases the requisite security was in fact provided by the State concerned,<sup>16</sup> while in two of these cases the State did not provide the security, and the *ad hoc* committee consequently terminated the stay.<sup>17</sup> The Committee further takes into account that although there are now eleven decisions given over a period of more than a decade proceeding on the basis that an *ad hoc* committee may require security as a condition of a stay, the Committee has not been pointed to any other instance in which an ICSID Contracting State has expressed concern in any forum that these decisions in this respect exceed the *ad hoc* committee's power under Article 52(5).
30. As for Article 32 of the Vienna Convention, Argentina argues that the Preliminary Draft to the ICSID Convention provided for the *ad hoc* committee to have a power to recommend any provisional measures necessary for the protection of the rights of the parties in connection with a stay of enforcement,<sup>18</sup> but that this power did not appear in later drafts of the Convention.<sup>19</sup> Argentina further argues that a very important consideration is that an express provision

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<sup>16</sup> Compliance by Indonesia with the condition of security in the Amco I Stay Decision is noted in Amco I Annulment Decision ¶ 8. Compliance by Indonesia with the condition of security in the Amco II Stay Decision is noted in *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Decision on Annulment of Award of 5 June 1990 and of Supplemental Award of 17 October 1990, December 3, 1992, 9 *ICSID Rep.* 3 (2006) ¶ 3.07. Compliance by Egypt with the condition of security in the Wena Stay Decision is noted in *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Application for Annulment, February 5, 2002, 41 *ILM* 933 (2002); 6 *ICSID Rep.* 129 (2004) ¶ 6.

<sup>17</sup> The CDC case and the Repsol case. As to the former, see *CDC Group plc v. Republic of the Seychelles* (ICSID Case No. ARB/02/14), Decision of the *ad hoc* Committee on the Application for Annulment of the Republic of the Seychelles, June 29, 2005 ([http://www.investmentclaims.com/IIC\\_48\\_\(2005\).pdf](http://www.investmentclaims.com/IIC_48_(2005).pdf)) ¶ 16. As to the latter, see *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/01/10), Procedural Order No. 4, February 22, 2006; and *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/01/10), Decision on the Application for Annulment, January 8, 2007 ¶¶ 8, 12.

<sup>18</sup> According to *History of the ICSID Convention*, Vol. I, at 238, Article IV, Section 13(5) of the Preliminary Draft of the ICSID Convention, which as amended became Article 52(5), read: "The Committee shall have the power to stay enforcement of the award pending its decision and to recommend any provisional measures necessary for the protection of the rights of the parties".

<sup>19</sup> Schreuer (*op cit.*) at 1058 ¶ 478; *History of the ICSID Convention*, Vol. I, at 238.

for security is contained in the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”),<sup>20</sup> and that such a provision was not included in the ICSID Convention which was negotiated several years later.

31. The Committee finds that it is not clear why the power to recommend provisional measures contained in the Preliminary Draft was omitted from later drafts. Nor is it clear why the ICSID Convention differs in this respect from the New York Convention. The Committee notes that the power of a Tribunal to order provisional measures, contained in Article 47 of the ICSID Convention, is not included in the list in Article 52(4) of provisions that are applicable *mutatis mutandis* in annulment proceedings. On the other hand, the Committee notes that ICSID Arbitration Rule 53 appears to be sufficiently broadly worded to confer on an *ad hoc* committee the power to recommend provisional measures, contained in ICSID Arbitration Rule 39. On the basis of the limited material before it, the Committee is not satisfied that the effect of the differences between the final text of Article 52(5) on the one hand, and the Preliminary Draft and New York Convention on the other, is to exclude the possibility of an *ad hoc* committee requiring security as a condition of a stay. Even if it were the case that an *ad hoc* committee lacks the power under Article 47 to recommend provisional measures, a matter which the Committee finds that it is not called upon to decide, this would not mean that Article 52(5) must be interpreted one way rather than another. The Committee merely notes that, contrary to what is suggested by Argentina, the lack of a power to recommend provisional measures under Article 47 could arguably support the conclusion that Article 52(5) must be given a broader, rather than a narrower interpretation, since the *ad hoc* committee’s power to balance the rights of the parties pending the annulment proceedings would depend solely on Article 52(5).

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<sup>20</sup> New York, June 10, 1958; 330 U.N.T.S. 3. Article VI of the New York Convention states: “If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.”

32. Under Article 32 of the Vienna Convention, in addition to the *travaux préparatoires*, recourse may also be had to other supplementary means of interpretation, as is clear from the word “including” in that provision. The Committee considers that amongst other supplementary means of interpretation are jurisprudence, including decisions and awards of ICSID tribunals and *ad hoc* committees, and doctrine.
33. As regards previous ICSID decisions, as noted above, in ten out of the eleven previous decisions under Article 52(5), the *ad hoc* committee proceeded on the basis that it had the power to include a condition of security, while the other previous decision left this question open. Although the previous decisions may not have examined the question in any detail, and may not constitute a subsequent practice for the purposes of Article 31(3)(b) of the Vienna Convention, the Committee considers that weight must nonetheless be given to the fact that there is now what amounts to a *jurisprudence constante* to the effect that a stay may be made conditional on the provision of security. While the Committee is not bound by these previous decisions, it considers that it should take into account the possible effect on the stability and predictability of the ICSID system if it were to depart from a consistent line of previous decisions.
34. As regards doctrine, the Committee has not been referred to any publicist expressing the view that there is no power under Article 52(5) to make a stay conditional on security; on the contrary, the Committee has been referred to doctrine affirming the existence of this power.<sup>21</sup>
35. Having regard to all of these matters, the Committee finds that under Article 52(5) of the ICSID Convention it may make a continuation of a stay of enforcement conditional on the provision of security by the party requesting the stay.
36. The Committee therefore concludes that where a stay of enforcement is requested under Article 52(5) of the ICSID Convention, three alternative outcomes are possible. First, the *ad hoc* committee could decide not to grant

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<sup>21</sup> Schreuer (*op. cit*) at 1060 ¶¶ 483-484.

the request. Secondly, the *ad hoc* committee could decide to grant the request subject to the provision of security or to compliance with some other condition by the party requesting the stay. Thirdly, the *ad hoc* committee could decide to grant the request unconditionally.

37. The Committee will therefore proceed to consider which of these three outcomes is required in this case, having regard to all of the circumstances. In contrast perhaps to *ad hoc* committees in previous decisions, the Committee does not adopt the approach of considering first whether a stay should be ordered, and only then, if that question is answered affirmatively, of considering whether the stay should be subject to a condition of security. This is because the question whether or not security will be provided is itself one of the circumstances that must be taken into account with other relevant circumstances in determining whether the stay should continue.<sup>22</sup> The Committee considers that for this reason, the issue of continuation of the stay and the issue of security must inherently be considered together.

**(b) *Factors to be taken into account in the exercise of the Committee's discretion***

38. Article 52(5) provides no express guidance on the matters to be taken into account in the exercise of the Committee's discretion under that provision, or on the relative weight that they should be given. As one *ad hoc* committee has said:

*No indication is given as to what kind of circumstances require a stay; therefore the Committee is free to evaluate the arguments of the Parties in view of the particularities of each case.*<sup>23</sup>

Nevertheless, mindful that the discretion must not be exercised arbitrarily, the Committee considers that it must first seek to identify what considerations are relevant in the application of Article 52(5). For this purpose, the Committee has taken into account previous decisions of *ad hoc* committees under Article 52(5).

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<sup>22</sup> Compare MINE Stay Decision ¶ 26.

<sup>23</sup> Mitchell Stay Decision ¶ 23; also CDC Stay Decision ¶ 8.

The Committee notes however that these previous decisions, to the extent that they merely apply Article 52(5) to the circumstances of a particular case, are of less assistance than a line of previous decisions which consistently affirm a legal principle or rule.<sup>24</sup>

39. Either party to an ICSID dispute has the right to request annulment of an award pursuant to Article 52. Article 52(1) sets out the limited grounds upon which annulment may be sought, which are directed to defined grave injustices. Article 52 of the ICSID Convention is an integral part of the ICSID dispute settlement regime to which all Contracting States have agreed, and without this safeguard some States parties might not have accepted the ICSID Convention.<sup>25</sup>
40. While it is the case that until recently annulment proceedings have been infrequent, they should not be regarded as *per se* exceptional so as to create a presumption against a stay of enforcement, or in favour of conditioning any stay on the provision of security.<sup>26</sup> The systemic importance of the annulment procedure is not obviated or reduced in its application simply because a party to a specific case has sought annulment, or because a Contracting State has generally stated an intention to seek annulment of other or all adverse ICSID determinations to which it is a party.<sup>27</sup>
41. Furthermore, Article 53 of the ICSID Convention provides that:

*Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention [emphasis added].*

As was observed in the *Azurix Stay Decision*, the ICSID Convention thereby explicitly recognizes that the award creditor's rights are subject to a stay if an *ad hoc* committee considers that the circumstances so require. The Committee agrees that the award creditor's rights are to this extent themselves qualified by *the Convention*. The Committee therefore does not accept the argument that because a stay interferes with the award creditor's right to payment of an award,

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<sup>24</sup> Compare *Azurix Stay Decision* ¶ 24; *Mitchell Stay Decision* ¶ 23.

<sup>25</sup> *Mitchell Stay Decision* ¶ 40.

<sup>26</sup> Compare *Azurix Stay Decision* ¶ 31.

<sup>27</sup> *Azurix Stay Decision* ¶ 31.

a stay of enforcement under Article 52(5) should be regarded as exceptional or, if ordered, should normally be counterbalanced by a condition of security.<sup>28</sup>

42. The Committee further finds it significant that a stay of enforcement of the award pending annulment proceedings has been granted in all cases in which it has been requested. The Committee also notes that under some but by no means all national laws a stay of enforcement pending an appeal from a judicial decision is almost automatic.<sup>29</sup>
43. These several considerations lead the Committee to conclude that upon an application for annulment, in general, a requested stay should be granted under Article 52(5) if requested, unless the Committee finds that there are very exceptional circumstances why this should not occur, notwithstanding the possibility of making the stay conditional on the provision of security.<sup>30</sup>
44. On the other hand, as there is no requirement in the Convention that security be provided as a condition for a stay, the Committee does not accept that an award creditor has a “counterbalancing right” to security in any case where a continuation of a stay is ordered.<sup>31</sup> In this regard, the Committee also is in agreement with the *Azurix* Stay Decision that to require that security be provided as a matter of course in all but the exceptional case would risk compromising the important confidence-balancing function for Contracting States served by the annulment procedure.<sup>32</sup> Where a State is the applicant for annulment, a further relevant factor for the Committee is that, because security ordinarily would only be sought against a developing country, it would risk introducing into the ICSID system the unacceptable suggestion of discrimination between States, whether *de jure* or *de facto*, as to terms for security imposed on Article 52(5) applications.<sup>33</sup> The absence of any presumption in favour of a condition of security is perhaps confirmed by the fact that of the eleven known previous decisions granting a stay under Article 52(5), a condition of security

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<sup>28</sup> Azurix Stay Decision ¶¶ 41-42.

<sup>29</sup> Compare Mitchell Stay Decision ¶ 28.

<sup>30</sup> Azurix Stay Decision ¶ 22.

<sup>31</sup> See Azurix Stay Decision ¶¶ 33-35.

<sup>32</sup> Azurix Stay Decision ¶ 31.

<sup>33</sup> Azurix Stay Decision ¶ 32; also Mitchell Stay Decision ¶ 40.

was imposed in five and agreed by the parties in one, while in the other five a request for such a condition was not granted.

45. Nor does the Committee accept the contention that a general requirement for security in return for a stay is desirable as a means of deterring frivolous or dilatory annulment applications,<sup>34</sup> given that any such general requirement would penalise all applications, whether frivolous or dilatory or not.<sup>35</sup>
46. In deciding an application under Article 52(5), the Committee considers that it must consider all of the circumstances of a case as a whole, and that a number of circumstances cumulatively may lead to a particular conclusion, even if none of those circumstances alone would have necessarily done so.<sup>36</sup> The Committee is of the view that relevant considerations include the following.
47. The fact that an annulment application is dilatory may be a circumstance militating against a continuation of a stay,<sup>37</sup> as may the fact that an application for a stay is dilatory.<sup>38</sup> However, in the absence of particular reasons and evidence for concluding otherwise, the Committee must assume that any application for annulment is made in good faith, and that the application for a stay is a justified exercise of the applicant's procedural rights of defence.<sup>39</sup>
48. Furthermore, unless there is some indication that the annulment application is dilatory, it is not for the Committee to assess as a preliminary matter whether or not it is likely to succeed.<sup>40</sup>
49. In the *MTD* Stay Decision and *CMS* Stay Decision it was said that a respondent seeking a remedy under the Convention should demonstrate for its part that it will comply with the Convention, and that if there is any doubt in that regard the *ad hoc* committee may order the provision of a bank guarantee as a condition of

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<sup>34</sup> Compare CDC Stay Decision ¶ 20 quoting Schreuer (*op. cit*) at 1060 ¶ 484 (to the effect that security "may ... serve as a possible deterrent to requests for annulment that are motivated primarily by a desire to delay and, possibly, to avoid compliance"); Repsol Stay Decision ¶ 9.

<sup>35</sup> Compare Mitchell Stay Decision ¶ 40.

<sup>36</sup> Compare MINE Stay Decision ¶¶ 26, 28; Mitchell Stay Decision ¶ 28; CDC Stay Decision ¶ 22.

<sup>37</sup> Mitchell Stay Decision ¶ 26; MTD Stay Decision ¶ 28.

<sup>38</sup> MINE Stay Decision ¶ 17.

<sup>39</sup> Compare MINE Stay Decision ¶ 17; MTD Stay Decision ¶ 28; CMS Stay Decision ¶ 37.

<sup>40</sup> Mitchell Stay Decision ¶ 26; CDC Stay Decision ¶¶ 13-15; MTD Stay Decision ¶ 28; CMS Stay Decision ¶ 37.

a stay.<sup>41</sup> In this regard the Committee is more attracted to the approach under which the relevant enquiry is whether in all the circumstances it may be said that there is sufficient doubt as to whether there will be compliance with ICSID Convention obligations on a final award in the event that it is not annulled. The Committee also agrees with the *Azurix* Stay Decision that there is no positive obligation on the applicant for the stay to establish the absence of doubt, but rather, that it is for the party opposing the stay to establish the circumstances of sufficient doubt.<sup>42</sup> The *Azurix* Stay Decision referred to some examples of circumstances which might suffice to establish such doubt.<sup>43</sup> A failure by a State seeking annulment to put in place laws implementing the obligations under Article 54(1) may be one factor giving rise to such doubts. So might other factors, such as a party seeking annulment making it clear in one way or another that it will not comply with its obligations under a final award.

50. Difficulty, in the event that the award is annulled, of recoupment of amounts paid under the award, or of security provided, may be a factor militating in favour of a stay, or against the provision of security.<sup>44</sup> However, if there are legitimate concerns as to the risk of non-recoupment, the Committee should also consider whether these concerns can be addressed by the inclusion of appropriate conditions for the continuation or non-continuation of a stay, such as a condition that any recovered moneys or security provided be held in escrow pending the annulment proceedings.
51. The hardship to an award debtor of providing security, either because of the cost of obtaining a bank guarantee or the consequences of freezing the amount due for the duration of the annulment proceedings, is a further reason why security should not be ordered as a matter of course.<sup>45</sup> However, if there is a serious risk of non-compliance with the award in the future the Committee considers that hardship to the party seeking the stay should not normally be a factor of significance, any more than hardship could be a factor excusing non-

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<sup>41</sup> MTD Stay Decision ¶ 29; CMS Stay Decision ¶ 38.

<sup>42</sup> *Azurix* Stay Decision ¶ 37.

<sup>43</sup> *Azurix* Stay Decision ¶¶ 39, 44.

<sup>44</sup> MINE Stay Decision ¶¶ 26, 28; *Wena* Stay Decision ¶ 7(a); *Mitchell* Stay Decision ¶¶ 24, 28; *CDC* Stay Decision ¶ 18; MTD Stay Decision ¶ 29; CMS Stay Decision ¶ 38.

<sup>45</sup> Compare MINE Stay Decision ¶ 22; *Mitchell* Stay Decision ¶¶ 33-34, 42.

compliance with the award itself if not annulled.<sup>46</sup> Nevertheless, it may be admitted that exceptional circumstances (such as has been suggested where the provision of security would have “catastrophic’, immediate and irreversible consequences” for a party’s ability to conduct its affairs,<sup>47</sup> or would *severely* affect the interests of the party<sup>48</sup>) might be a matter that can be taken into account with other relevant factors.

52. The Committee's approach is further that hardship to the award creditor should not normally be a factor of significance where there is no established serious risk of non-compliance with the award by the award debtor in the future, or other reason militating in favour of a condition of security. As noted above, because Article 52(5) expressly provides that an award creditor’s rights are subject to a stay if an *ad hoc* committee considers that the circumstances so require, the postponement of the right to payment of the award caused by a stay cannot, by definition, *per se* constitute prejudice.<sup>49</sup> Indeed, a condition of security will often place the award creditor in a better position than it would have been in if annulment proceedings had not been brought, since the award creditor would not otherwise have had the benefit of such security.<sup>50</sup> However, the Committee does not exclude the possibility that in exceptional circumstances sufficient prejudice to the award creditor beyond mere delay may be shown.<sup>51</sup>
53. Other further factors that have been considered relevant are the relatively small amount of the guarantee,<sup>52</sup> and the fact that the party seeking annulment had already admitted liability for a substantial part of the award.<sup>53</sup> The absence of

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<sup>46</sup> MINE Stay Decision ¶ 27.

<sup>47</sup> MINE Stay Decision ¶ 27.

<sup>48</sup> MINE Stay Decision ¶ 28.

<sup>49</sup> MTD Stay Decision ¶ 36 and CMS Stay Decision ¶ 50 (noting that delay caused by a stay is “incidental to the Convention system of annulment”); Azurix Stay Decision ¶¶ 41-42. Contrast MTD Stay Decision ¶ 30 and CMS Stay Decision ¶ 39.

<sup>50</sup> MINE Stay Decision ¶ 22; Mitchell Stay Decision ¶ 40 (“There is no doubt about this improvement [of the position of the beneficiary of the guarantee with respect to enforcement]”); MTD Stay Decision ¶ 30; CMS Stay Decision ¶ 39; Azurix Stay Decision ¶ 43. Contrast Mitchell Stay Decision ¶¶ 32-33; CDC Stay Decision ¶ 19.

<sup>51</sup> Compare Azurix Stay Decision ¶ 43-44.

<sup>52</sup> Mitchell Stay Decision ¶ 42; Repsol Stay Decision ¶ 9; Azurix Stay Decision ¶ 43.

<sup>53</sup> CDC Stay Decision ¶ 16; Azurix Stay Decision ¶ 43.

any urgency for the award creditor to have the amount of the award at its disposal is not a relevant consideration.<sup>54</sup>

**(ii) The circumstances of the present case**

**(a) The disagreement between the parties concerning the effect of Article VII(6) of the BIT and Article 53 of the ICSID Convention**

*Introduction*

54. There is a disagreement between the Claimants and Argentina concerning the effect of Article VII(6) of the BIT, and concerning the interrelationship of Articles 53 and 54 of the ICSID Convention. None of the previous eleven decisions under Article 52(5) of the ICSID Convention has addressed this issue.
55. The Claimants argue that under Article 53 of the ICSID Convention and Article VII(6) of the BIT, Argentina has an obligation to pay an award voluntarily, and that Argentina erroneously takes the position that award creditors must initiate procedures under Article 54 and present an award to an Argentine local court. According to the Claimants, it is only when a State has already failed to comply with and is already in default of its obligation under Article 53 that it may be necessary for an award creditor to resort to enforcement proceedings under Article 54. The Claimants contend that Article 54 provides award creditors with the possibility of enforcing awards against recalcitrant award debtors, and that Article 54 is not the normal means of enforcement of an award.
56. Argentina on the other hand takes the position that Articles 53 and 54 of the ICSID Convention complement each other and have to be read in conjunction. According to Argentina, Article 53 of the ICSID Convention establishes the final and binding nature of ICSID Awards while Article 54 establishes the way in which ICSID Awards have to be complied with. Argentina submits that Article 53 of the ICSID Convention “does not establish an obligation of *voluntary* payment by the State”.<sup>55</sup> Rather, it is said that under Article 54, Argentina is required to

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<sup>54</sup> Mitchell Stay Decision ¶ 25.

<sup>55</sup> Argentina’s Observations ¶ 116 (emphasis in original).

treat an ICSID award as if it were a final judgment of a court in Argentina. This means that to receive payment, an award creditor has to comply with the same formalities applicable to final judgments of local courts.<sup>56</sup>

57. Argentina submits that the obligation of a State under Article 54 to treat an ICSID award as if it were a final judgment of a court of that State means that if a State pays final judgments rendered against it without the need for further action by the judgment creditor, it is obliged under Article 54 to do the same in respect of ICSID awards given against it. On the other hand, if under the law of a particular State there is a formality to be complied with by a judgment creditor in order to enforce a judgment given against that State, then an ICSID award creditor has to follow the same procedure to enforce an ICSID award given against that State.<sup>57</sup>
58. Argentina claims that it has appointed its administrative courts as the authority to be appointed under Article 54(2) of the ICSID Convention, so that the procedure would be for an award creditor of an ICSID award given against Argentina to take the award before the appointed court. However, Argentina maintains that the procedure would thereafter be an administrative procedure rather than a judicial procedure, which would entail the Congress being asked to appropriate funds in order to pay the award.<sup>58</sup> Argentina submits that even where a person has a final judgment of the Supreme Court of Argentina, it is necessary to comply with the process of appropriation of funds, unless the case is one for which funds have already been appropriated,<sup>59</sup> and that many States have such a process for payment of final local judgments.<sup>60</sup> Argentina adds that in principle Congress has a legal obligation to appropriate the necessary funds, but that there might be situations where sufficient funds were not available during the current budgetary term, so that an appropriation would be made for the following term.<sup>61</sup>

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<sup>56</sup> Transcript of the hearing of July 14, 2008 ("Transcript"), pp. 89-92.

<sup>57</sup> Transcript, pp. 97-99.

<sup>58</sup> Transcript, pp. 95-97.

<sup>59</sup> Transcript, pp. 97-98.

<sup>60</sup> Transcript, p. 99.

<sup>61</sup> Transcript, pp. 98-99.

59. The parties produced to the Committee certain correspondence from Argentina which confirms that Argentina has taken the same position in other ICSID cases. Thus, while the Claimants argue that Argentina has failed to pay the award in the *CMS* case<sup>62</sup> ten months after the *CMS* Annulment Decision<sup>63</sup> was given, Argentina denies that it failed to comply with its obligations under the ICSID Convention in that case. According to Argentina, CMS “refused to follow the procedure provided for in the Argentine Republic for compliance with final judgements, and the company has simply demanded that the money be transferred to an account abroad”.<sup>64</sup>
60. In addressing this difference between the Parties, the Committee will first consider the effect of Articles 53 and 54 of the ICSID Convention, and will then consider the effect of Article VII(6) of the BIT, the latter treaty having been concluded after the ICSID Convention. In addressing the disputed interpretation to be given to these provisions, the Committee is again guided by the principles in Articles 31 and 32 of the Vienna Convention.

*The effect of Articles 53 and 54 of the ICSID Convention*

61. The second sentence of Article 53(1) of the ICSID Convention states that “Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention”. The first sentence of Article 54(1) of the ICSID Convention states that “Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State”. The Committee notes that nothing in the language of these provisions suggests that these two obligations are related, and in particular, that there is nothing in the language to suggest that the obligation in the second sentence of

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<sup>62</sup> *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Award, May 12, 2005.

<sup>63</sup> *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, September 25, 2007.

<sup>64</sup> Argentina’s Observations ¶ 119.

Article 53(1) must be read as being subject to an award creditor invoking enforcement mechanisms established pursuant to the obligation in the first sentence of Article 54(1).

62. The Committee further notes that these two obligations are addressed to different subjects. It is clear from its context that the word “party” in the second sentence of Article 53(1) refers to a party to an award, who will be, on the one hand, a Contracting State or a constituent subdivision or agency of a Contracting State, and, on the other hand, a national of another Contracting State. That provision therefore expressly requires each party to an award to “comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention”. On the other hand, the first sentence of Article 54(1) is addressed to “each Contracting State” to the ICSID Convention, whether or not that Contracting State is a party to the award in question, and is not addressed to any party to an award other than a Contracting State. The effect of the obligation imposed on Contracting States by this provision is to ensure that any ICSID award can be enforced by either party to the award in the territory of any ICSID Contracting State. In other words, if an award is given against an investor in favour of a Contracting State or a constituent subdivision or agency of a Contracting State, Article 54(1) ensures that the Contracting State or constituent subdivision or agency can enforce the award in the territory of any Contracting State, including but not limited to its own territory or the territory of the investor’s national State. Conversely, if an award is given against a Contracting State or a constituent subdivision or agency of a Contracting State in favour of an investor, Article 54(1) ensures that the investor can enforce the award in the territory of any Contracting State, including but not limited to the territory of the State that is, or the State of, the award debtor. However, Article 54(1) does not state that a party to an award must use the enforcement machinery established pursuant to this provision as a condition of the award being complied with. Nor does it state that a Contracting State or a constituent subdivision or agency that is an award debtor is entitled to decline to comply with the terms of the award until the enforcement machinery that exists under that Contracting State’s own national law is used by the award creditor.

63. The wording of Article 53(1) must also be considered in the light of the wording of the ICSID Convention as a whole. Of particular significance is the wording of Article 27(1) of the ICSID Convention, which states.

*No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.*

64. The purpose of Article 27(1) is explained in paragraph 33 of the Report of the Executive Directors on the Convention as follows:

*When a host State consents to the submission of a dispute with an investor to the Centre, thereby giving the investor direct access to an international jurisdiction, the investor should not be in a position to ask his State to espouse his case and that State should not be permitted to do so. Accordingly, Article 27 expressly prohibits a Contracting State from giving diplomatic protection, or bringing an international claim, in respect of a dispute which one of its nationals and another Contracting State have consented to submit, or have submitted, to arbitration under the Convention, unless the State party to the dispute fails to honor the award rendered in that dispute. [Emphasis added.]*

65. The words “to abide by and comply with the award rendered in such dispute” in Article 27(1) mirror the wording of the second sentence of Article 53(1). The Committee considers that it is clear when these two provisions are examined together that the failure of a State to abide by and comply with an award, as required by Article 53(1), is a breach of the ICSID Convention, entitling the national State of the award creditor to give diplomatic protection or bring an international claim. If a Contracting State was entitled to require an award creditor to use enforcement mechanisms established under Article 54(1) as a precondition to compliance with the award, the Committee considers that the final words of Article 27(1) would have reflected the language of Article 54(1), rather than that of Article 53(1). The Committee accepts the argument of the Claimants that to sustain that the recognition and enforcement process in Article 54 must precede compliance with an award would be as unreasonable as

asserting that compliance is dependent on a previous exercise of diplomatic protection under Article 27.

66. The Committee further notes that the first sentence of Article 54(1) of the ICSID Convention is expressed to require Contracting States to enforce only the *pecuniary* obligations imposed by an award. If the interpretation were accepted that there is no obligation to comply with an award unless and until the judgment creditor avails itself of enforcement mechanisms established pursuant to Article 54, the result could be that there would never be an obligation to comply with non-pecuniary obligations in an award.
67. The Committee further takes into account that in legal systems generally, judgment debtors and award debtors are under a legal obligation to pay judgments and awards given against them. It is not generally the case that judgment debtors and award debtors have a legal entitlement to decline to comply with a judgment or award unless and until enforcement proceedings are taken against them; on the contrary, enforcement procedures exist to deal with the case of judgment debtors and award debtors who are in default of their legal obligation to comply with the judgment or award.
68. The Committee further considers that it would be inconsistent with the purpose of the ICSID Convention if an award creditor had to bring proceedings pursuant to national law enforcement mechanisms established under Article 54(1) as a prerequisite for compliance with the award by the award debtor. The ICSID dispute settlement mechanism was intended to be an international method of settlement,<sup>65</sup> and it would run counter to this intention for compliance with a final award to be subject, ultimately, to the provisions and mechanisms of national law. The Committee considers that it would inherently undermine confidence in the ICSID system if a State against which an award has been given could make its own compliance with the award subject to the award creditor availing itself of the mechanisms under that State's national law for enforcement of final judgments of courts.

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<sup>65</sup> ICSID Convention, preambular paragraphs 3-4; Report of the Executive Directors on the Convention ¶¶ 10-11.

69. The Committee therefore concludes that under a good faith interpretation of Article 53(1) of the ICSID Convention in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose, that provision imposes on Argentina, in the event that the Award is not annulled, an obligation under international law vis-à-vis the United States to abide by and comply with the terms of the Award, without the need for action on the part of the Claimants pursuant to the enforcement machinery under Argentine law to which Article 54 of the ICSID Convention refers.
70. For the purposes of Article 31(3)(b) of the Vienna Convention, the Committee finds that this interpretation appears to be confirmed by subsequent State practice in the application of the ICSID Convention. According to material provided by the Claimants, only four ICSID cases have reached the stage of enforcement before local courts, and in each of these cases the courts were those of a third State, rather than the courts of the State against which the award had been rendered.<sup>66</sup> Argentina has not sought to contradict this information. The Committee has not been pointed to any case in which an award creditor has brought proceedings for recognition and enforcement of an award in the legal system of the State against which the award was given.<sup>67</sup>
71. Additionally, the Committee has not been provided with any material to demonstrate that any State other than Argentina shares Argentina's interpretation of the interrelationship of Article 53(1) and Article 54(1) of the ICSID Convention. In its letter of 25 July 2008, Argentina claims that another State shares its interpretation and invites the Committee to request that other State to confirm this. However, the Committee considers that it is not for the Committee to call upon another State to express its view on a contested legal

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<sup>66</sup> E. Baldwin, M. Kantor, M. Nolan, "Limits to Enforcement of ICSID Awards", *Journal of International Arbitration*, Vol. 23 No. 1, pp. 1-24 (2006), indicates that enforcement proceedings were brought in France in respect of the arbitral awards in *S.A.R.L. Benvenuti & Bonfant v. People's Republic of the Congo* (ICSID Case No. ARB/77/2) and *Société Ouest Africaine des Bétons Industriels v. Senegal* (ICSID Case No. ARB/82/1), that enforcement proceedings were brought in the United States of America in respect of the arbitral award in *Liberian Eastern Timber Corporation v. Republic of Liberia* (ICSID Case No. ARB/83/2), and that enforcement proceedings were brought in the United Kingdom in respect of the arbitral award in *AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan* (ICSID Case No. ARB/01/6).

<sup>67</sup> Counsel for the Claimants did however say that a counsel in another ICSID case had told him that "They were at that time on an administrative internal proceeding, not before a local court, but just a budgetary allocation of money in order to receive the money, but they never were asked to go to local courts." (Transcript, pp. 222-223.)

issue, and in the absence of any evidence, the Committee cannot assume that the other State in question has a particular position on this issue. The Committee has been provided with evidence that the United States of America disagrees with Argentina's interpretation, in the form of a letter submitted by the United States in another ICSID case, but the Committee considers that little if any weight can be attached to evidence of the view of a single ICSID Contracting State.

72. For the purposes of Article 32 of the Vienna Convention, the Committee does not consider that the meaning of Article 53(1) of the ICSID Convention when interpreted in accordance with Article 31 of the Vienna Convention is in any way ambiguous or obscure or that it in any way leads to a result that is manifestly absurd or unreasonable. The Committee does not therefore consider it necessary to resort to supplementary means of interpretation to determine the meaning of Article 53(1), although supplementary means of interpretation may confirm the meaning resulting from the application of Article 31 of the Vienna Convention.
73. The Claimants have referred the Committee to various passages in the *travaux préparatoires* of the ICSID Convention, in which it is stated *inter alia* that:

*... Article 53 [of the ICSID Convention] established the principle that the parties were bound to abide by and should comply with the terms of the award. Article 54 set forth the procedure for enforcement of the awards in the courts of the Contracting States, should a party fail to comply with Article 53 ...*<sup>68</sup>

*... the question of the enforcement of awards has been included in the draft Convention mainly for the benefit of the developing countries who were thus given a means to enforce awards in their favor against foreign investors.*<sup>69</sup>

*... for the purposes of ensuring compliance with an arbitral award between States, section 14 [which, as amended, became Article 53] would have been sufficient but, since one of the parties to a dispute brought before the Center would be a private individual, Section 15 [which, as amended, became Article 54] was necessary to give a State the means of*

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<sup>68</sup> Memorandum of the Meeting of the Committee of the Whole, February 23, 1965 (Doc. SID/65-6, February 25, 1965), in *History of the ICSID Convention*, Vol. II-2, at 989 (emphasis added).

<sup>69</sup> *History of the ICSID Convention*, Vol. II-1, at 379 (emphasis added).

*enforcing an award in its favor against an individual. The Article had been included with a view to meeting the possible needs of developing countries in disputes with private investors.*<sup>70</sup>

74. The Committee notes that previous decisions of *ad hoc* committees have not discussed directly the relationship between Article 53(1) and Article 54(1) of the ICSID Convention. In the *CMS* and *Azurix* cases, the two previous Article 52(5) decisions involving Argentina, the *ad hoc* committees ultimately were simply not satisfied that Argentina had evinced an intention not to comply with the award.<sup>71</sup>
75. The Committee notes that the *MINE* Stay Decision and *Amco II* Stay Decision made the point that where an *ad hoc* committee grants a stay of enforcement, the obligation under Article 53 is *pro tanto* suspended,<sup>72</sup> and only then went on to state, in a separate subsequent paragraph, that the obligation under Article 54 is also suspended.<sup>73</sup> The Committee finds that these decisions thereby appear to reflect an understanding that the obligations under Articles 53 and 54 are separate and independent.
76. Furthermore, the *MINE* Stay Decision stated that:

*It should be clearly understood ... that State immunity may well afford a legal defense to forcible execution, but it provides neither argument nor excuse for failing to comply with an award. In fact, the issue of State immunity from forcible execution of an award will typically arise if the State party refuses to comply with its treaty obligations. Non-compliance by a State constitutes a violation by that State of its international obligations and will attract its own sanctions.*<sup>74</sup>

This passage appears to manifest an understanding that where an award creditor has to resort to measures under Article 54, a course of action which may give rise to issues of State immunity under Article 55, there will have been a failure by the award debtor to comply with its obligations under Article 53.

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<sup>70</sup> *History of the ICSID Convention*, Vol. II-1, at 424 (emphasis added).

<sup>71</sup> See *CMS* Stay Decision ¶¶ 47 (last sentence) and 50; *Azurix* Stay Decision ¶¶ 38-39.

<sup>72</sup> *MINE* Stay Decision ¶ 9; *AMCO II* Stay Decision ¶ 10.

<sup>73</sup> *MINE* Stay Decision ¶ 10; *AMCO II* Stay Decision ¶ 11.

<sup>74</sup> *MINE* Stay Decision ¶ 25. See also *CDC* Stay Decision ¶ 19: "... while the Convention preserves sovereign immunity it expressly obligates the award-debtor nonetheless to pay the award and, in default of meeting such obligation, subjects the defaulting state to the jurisdiction of the International Court of Justice".

77. At the same time, the Committee takes into account the statement in the *MTD* Stay Decision and *CMS* Stay Decision that “final awards under the ICSID Convention are directly enforceable, upon registration and without further jurisdictional control, as final judgments of the courts of the host State”,<sup>75</sup> that “the point for the Committee is to be satisfied that the State Party has taken appropriate steps in accordance with its constitutional arrangements to give effect to Article 54”<sup>76</sup> and that “Where it has done so, subsequent compliance by that State with a final award will be a matter of legal right under its own law, as well as under international law”.<sup>77</sup> These passages make no mention of a separate and independent obligation under Article 53. The Committee notes further that these decisions state that “The effect of the stay is that the award is not subject to enforcement proceedings under Article 54 of the Convention pending the outcome of the annulment application”, without mentioning any separate obligation under Article 53 that is suspended by the stay.<sup>78</sup> However, the Committee finds that little if any weight can be given to this aspect of these decisions, given that these decisions do not take an express view on the question, let alone a considered and reasoned view, and given that the interpretation of Article 53 of the ICSID Convention in accordance with Article 31 of the Vienna Convention is not in any way ambiguous or obscure and does not lead to a result that is manifestly absurd or unreasonable.
78. Thus, the Committee considers that the matters referred to in paragraphs 70 to 76 above confirm the conclusion in paragraph 69 above as to the correct interpretation of the second sentence of Article 53(1) of the ICSID Convention.

*The effect of Article VII(6) of the BIT*

79. The Committee next considers the effect of Article VII(6) of the BIT, the second sentence of which states that “Each Party undertakes to carry out without delay the provisions of any such award and to provide in its territory for its

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<sup>75</sup> MTD Stay Decision ¶ 31; CMS Stay Decision ¶ 40.

<sup>76</sup> MTD Stay Decision ¶ 32; CMS Stay Decision ¶ 41.

<sup>77</sup> MTD Stay Decision ¶ 32; CMS Stay Decision ¶ 41.

<sup>78</sup> MTD Stay Decision ¶ 26; CMS Stay Decision ¶ 35.

enforcement". The Committee considers that the plain wording of Article VII(6) makes clear that this provision imposes two separate obligations on the two Parties to the BIT, the first being "to carry out without delay the provisions of any such award", and the second being "to provide in its territory for its enforcement". The use of the word "and" linking the wording of these two obligations indicates that these obligations are separate and independent. The first of these obligations is a reciprocal undertaking between the two Contracting Parties speedily to comply with awards made by arbitral tribunals established within the scope of Article VII of the BIT. The second obligation is likewise a reciprocal undertaking between the two Contracting Parties, requiring each of them to provide procedures in their domestic law for the enforcement of such awards. However, Article VII(6) contains no specific language detailing the requirements of enforcement, nor specifying any limitations as to the circle of persons to which domestic enforcement procedures would apply. The assumption must then be that it is for each of the Contracting Parties to establish appropriate provisions in its national law, and to ascertain that the corresponding legislation of the other Contracting Party would satisfy the standards which it expected.

80. The Committee notes certain similarities between, on the one hand, the first of the obligations imposed by this provision of the BIT and the second sentence of Article 53(1) of the ICSID Convention, and, on the other hand, the second of the obligations imposed by this provision of the BIT and the first sentence of Article 54(1) of the ICSID Convention. The Committee finds however that the corresponding provisions are not identical. The first obligation imposed by the second sentence of Article VII(6) of the BIT is one that applies to the United States and to Argentina, the Parties to the BIT (as is clear from the first preambular paragraph of the BIT), while the second sentence of Article 53(1) of the ICSID Convention applies to the parties to the award. Furthermore, there are differences in the way that the respective obligations are worded. However, in the Committee's view, the similarities in question do confirm the conclusion that the two obligations imposed by the second sentence of Article VII(6) of the BIT, like the two obligations under the second sentence of Article 53(1) and the

first sentence of Article 54(1) of the ICSID Convention respectively, are separate and independent.

81. The Committee further considers that if the second sentence of Article VII(6) of the BIT imposed no obligation on a State Party that is an award debtor to give effect to the award except where enforcement proceedings are brought pursuant to the second of the stated obligations in that provision, then the wording of the first obligation in that provision would be otiose. On the other hand, if the first obligation is interpreted to mean that a State Party against which an award has been given must carry out without delay the provisions of the award, without the need for enforcement action by the award creditor pursuant to the second obligation, this would not make the second obligation redundant. The second obligation would still serve the function, for instance, of ensuring that where an award is given in favour of a State Party to the BIT and against an investor who is a national of the other State Party, the State Party who is the award creditor could enforce the award against the award debtor in the territory of the other State Party.
82. Neither of the parties has referred the Committee to any other matters that would be relevant to the interpretation of the second sentence of Article VII(6) of the BIT. The Committee therefore concludes that under a good faith interpretation of Article VII(6) of the BIT in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose, Argentina has a treaty obligation towards the United States pursuant to the first obligation under that provision, in the event that the Award is not annulled, to carry out without delay the provisions of the Award without the need for enforcement action by the Claimants pursuant to the second obligation under that provision.

*The Committee's findings*

83. There is some disagreement between the Claimants and Argentina as to what would be required in order for the Claimants to enforce the Award in Argentina under the provisions of Argentine law that give effect to Article 54 of the ICSID

Convention. There was disagreement as to whether the procedure would be an administrative or a judicial procedure, as to what it would cost and how long it would take, and as to the possibility of the Argentine courts overturning or revising the Award on grounds of inconsistency with Argentine law. In view of the Committee's finding that the Claimants are entitled under Article VII(6) of the BIT and Article 53 of the ICSID Convention to payment from Argentina without activating enforcement procedures under Article 54 of the ICSID Convention, it is not necessary for the Committee to make findings on these differences.

84. In the present case, the representative of Argentina emphasised that Argentina would comply with its international commitments under the ICSID Convention. However, Argentina's Observations state clearly Argentina's position that "Article 53 of the Convention does not establish an obligation of *voluntary* payment by the State",<sup>79</sup> and that Argentina is claiming "that *all* creditors of ICSID awards meet the formal requirements that any person should follow in Argentina to obtain compliance with a final judgment of a local court".<sup>80</sup> In oral argument, Argentina confirmed its position that in accordance with Article 54 "any ... Award creditor has to comply with the formalities applicable to final judgments of local courts".<sup>81</sup>
85. The position stated by the *Procurador del Tesoro de la Nación* (Attorney-General), speaking with the authority of the Argentine Republic at the hearing of the stay application, appears to be that in the event that the award is not annulled Argentina would not comply with the Award forthwith, but would instead look to the Claimants to bring proceedings for the enforcement of the Award under the provisions of Argentine law that give effect to Article 54 of the ICSID Convention. For the reasons stated the Committee finds such a position to be in apparent non-compliance with Argentina's international law treaty obligations owed to the United States under Article VII(6) of the BIT and under Article 53(1) of the ICSID Convention.

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<sup>79</sup> Argentina's Observations ¶ 116 (emphasis in original).

<sup>80</sup> Argentina's Observations ¶ 117 (emphasis added).

<sup>81</sup> Transcript, p. 92.

**(b) Other alleged circumstances said by the Claimants to give rise to a risk of non-compliance with the Award by Argentina**

86. The Claimants argue that a number of other circumstances give rise to a risk of future non-compliance with the Award by Argentina.
87. The Claimants argue that Argentina has sought annulment of all ICSID awards given against it. The Committee finds that there is no indication that Argentina is acting in a merely dilatory manner in this case, that it is not for the Committee to assess as a preliminary matter whether or not it is likely to succeed, and that the evidence presented does not establish that Argentina is acting other than in good faith in bringing the Application for Annulment (see paragraphs 47-48 above).
88. The Claimants further argue that seven ICSID awards have been given against Argentina, and that none has ever been paid by Argentina. The Claimants add that Argentina has gone so far as to divert assets away from New York to avoid their attachment pursuant to a United States court order obtained by CMS to enforce the award in the *CMS* case.
89. The Committee notes that the reason why Argentina has so far not complied with the *CMS* award appears to be because of Argentina's position on the interpretation and interrelationship of Articles 53 and 54 of the ICSID Convention. The Committee therefore considers that the Claimants' argument concerning Argentina's non-compliance with the *CMS* award adds nothing to the arguments already considered by the Committee in paragraphs 54 to 85 above.
90. As regards Argentina's alleged diversion of assets away from New York to prevent their attachment in satisfaction of the *CMS* award, the Committee further notes that the assets in question belonged to a province of Argentina which was not alleged to be involved in the events to which the claim in the *CMS* case related. The Committee is unable to conclude on the basis of the material before it that the diversion of these assets away from New York, if this occurred, is demonstrative of any intention on the part of Argentina, if the stay is continued, to take steps that would frustrate or impede the future execution of

the award in the event that it is not annulled. Indeed, ultimately the Claimants appear merely to argue that this incident demonstrates that Argentina would “have the opportunity” to do so, and that the Claimants are prejudiced by this.<sup>82</sup> However, the fact that a party could take a course of action cannot of itself establish that there is any real risk that it will do so.

91. The Claimants then argue that Argentina is in default of other international obligations, and state that Argentina owes US\$ 20 billion to unpaid bondholders. However, the Committee is unable to make findings as to whether Argentina is in breach of its legal obligations to others who are not parties to the present proceedings, let alone whether the circumstances of any such breach are such that they establish a risk of Argentina not complying with the Award in this case if it is not annulled.
92. The Claimants additionally refer to certain public statements of executive and judicial officials of Argentina to the effect that ICSID awards may be submitted for review to national courts or the International Court of Justice. To the extent that these public statements reflect the position of Argentina on the interrelationship between Articles 53 and 54 of the ICSID Convention, they add nothing to the arguments already considered by the Committee in paragraphs 54 to 85 above. In any event, the Committee notes Argentina’s submissions that under Argentine law, only the President, the Minister for Foreign Affairs or the Attorney-General may make statements that are binding on Argentina, and that media reports of statements of officials are frequently inaccurate. The Committee finds that Argentina has expressed its position to the Committee through its duly authorised representatives, and that in the present case the Committee has no need to resort to media reports in order to ascertain Argentina’s intentions.
93. The Claimants place further reliance on the Argentine Supreme Court decision in *Cartellone v. Hidronor*,<sup>83</sup> which decided that arbitral awards may be challenged in certain circumstances by Argentina’s judiciary, and on the fact that this case was invoked by domestic courts as grounds for ordering the

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<sup>82</sup> Transcript, p. 225.

<sup>83</sup> Corte Suprema de Justicia, June 1, 2004, *Cartellone c. Hidronor*, Fallos 327-1881.

suspension of the arbitration proceedings in the *National Grid* case.<sup>84</sup> The Committee considers however that as neither the *Cartellone* or the *National Grid* cases involved arbitrations under the ICSID Convention, the circumstances of these cases are not indicative of Argentina's intentions with respect to awards rendered against it in proceedings under the ICSID Convention.

94. The Claimants further argue that it is doubtful whether ICSID Conventions are enforceable under Argentine national law. For the reasons given in paragraph 83 above, the Committee finds that it is not required to consider whether Argentina's national law complies with Article 54, although it notes that previous decisions appear to have considered that it does.<sup>85</sup> For present purposes it is sufficient that the Committee has found that Argentina has expressed the intention to adopt a course of action which the Committee finds would be contrary to Argentina's obligations under Article VII(6) of the BIT and Article 53 of the ICSID Convention.

**(c) *Other alleged circumstances invoked by the Parties***

95. The Claimants argue that under the terms of the Award they are not entitled to post-award interest, so that the present value of the award will diminish during the period of the stay. The Claimants further argue that they initiated enforcement procedures in the United States before the provisional stay was issued. The Claimants contend that both of these circumstances militate in favour of lifting the stay or requiring security as a condition of a continuation of the stay.

96. The Committee does not consider either of these circumstances to be a factor militating against a continuation of the stay or in favour of a condition of security, given the express wording of Article 52 and given the fact that delay caused by a stay pending annulment proceedings is "incidental to the Convention system of annulment".<sup>86</sup> The Committee does not consider that the application of Article 52(5) can be affected by the question of whether or not the award creditor was

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<sup>84</sup> An UNCITRAL arbitration administered by ICSID.

<sup>85</sup> CMS Stay Decision ¶ 45; Azurix Stay Decision ¶ 38.

<sup>86</sup> MTD Stay Decision ¶ 36; CMS Stay Decision ¶ 50.

awarded post-award interest, or whether or not the award creditor has already initiated enforcement proceedings under Article 54.

97. Argentina claims that the likelihood of the award being annulled in the present case is high, given the similarities between the Award in this case and the award in the *CMS* case, which was partially annulled. For the reasons given above, the Committee finds that it is not for it to assess as a preliminary matter whether or not the Application for Annulment is likely to succeed (see paragraph 48 above).
98. Argentina then contends that providing security would cause it hardship due to its current economic situation. The Claimants argue that on the contrary, Argentina's economic crisis has now ended and that Argentina is in a position to provide security without hardship. For the reasons given above, the Committee considers that where there is a serious risk of non-compliance with the award, hardship to the party seeking annulment is not normally a consideration relevant to the exercise of the power under Article 52(5), other than in the most exceptional cases. The Committee is not satisfied on the material before it that such sufficiently exceptional circumstances pertain in this case.
99. Argentina additionally submits that there is a risk that it may not be able to recoup any security provided in the event that the Award is annulled, even under the Claimants' proposal. The Committee notes that the Claimants propose that if the stay is lifted, payment of the award may be made into an escrow account pending the outcome of the annulment proceeding, and alternatively, that if the stay is continued on condition that Argentina provides security, the amount of the award should be deposited into an escrow account as security, or an equivalent bond from an international bank should be provided. The Claimants argue that under these proposals, Argentina would be under no risk of non-recoupment if the Award is ultimately annulled. For obvious reasons, the Committee would not be minded to decline to continue the stay, or minded to continue the stay on condition that security is provided, unless provisions were either agreed between the parties, or ordered by the Committee in default of agreement, which secured the recoverability of any moneys paid under the award, or of any security provided, in the event that annulment is

granted. The Committee considers that it should be possible for appropriate provisions to be agreed or ordered that would remove any risk of non-recoupment.

100. Argentina further maintains that the Claimants have sought unilaterally to amend the terms of the Award by having post-judgment interest awarded in an order of a United States court for recognition and enforcement of the award, notwithstanding that post-award interest was expressly not awarded by the Tribunal. The Claimants counter that consistently with Article 54 of the ICSID Convention, an ICSID award is enforced in the United States as if it were a final judgment, and that when an ICSID award is converted into a United States judgment, it accrues post-judgment interest like any other United States judgment. The Committee finds that Argentina has not demonstrated the relevance of this circumstance to the exercise of the Committee's discretion under Article 52(5). In the circumstances, the Committee finds that it need not determine whether the Claimants have acted inconsistently with the Award in obtaining post-judgment interest in the order of the United States court. However, the Committee notes that it has not been referred to any authority to suggest that there is anything inconsistent with the ICSID Convention, or with the Award in this case, for a party enforcing an award under Article 54 of the Convention to avail itself of provisions under the relevant national law for post-judgment interest, even if the award debtor would not be liable to pay interest if it complied with an award under Article 53 without enforcement proceedings under Article 54.

***(iii) The Committee's conclusions***

101. For the reasons given above, the Committee is satisfied that at the time of the first hearing in these annulment proceedings, it was Argentina's intention, in the event that the Award is not annulled, not to pay the Award forthwith but to require the Claimants to bring proceedings for the enforcement of the Award under the provisions of Argentine law that give effect to Article 54 of the ICSID Convention. The Committee is therefore satisfied that Argentina did at that time

have an intention to engage in conduct that would amount to non-compliance with its obligations under Article VII(6) of the BIT and Article 53(1) of the ICSID Convention, in the event that the Award is not annulled.

102. Although the Committee has found Argentina's stated position as to its obligations to pay on a final award to be incorrect, the Committee accepts that Argentina has acted consistently with its own good faith interpretation of the BIT and the ICSID Convention. The Committee does not assume that Argentina will continue to maintain its position following the conclusions on that issue made in these reasons. In any event, upon these findings, Argentina must be given an opportunity to consider its position going forwards. The Committee affords Argentina this opportunity, whilst continuing the stay without any condition that Argentina provide security. Argentina may be content to state that it now accepts the position that it is obliged to make payment of the award in the event that it is not annulled, or to the extent that it is not annulled, without the need for any enforcement action by the Claimants. The Committee would be minded, absent contrary arguments and evidence, to consider such a formal indication by Argentina as sufficing to dispel doubts that Argentina will comply with its obligations under Article 53 in the future. On the other hand, in the absence of any indication by Argentina that it has changed its position to accord with that which the Committee has found as to the extent of the obligations under the BIT and the ICSID Convention, the Committee would be minded, again absent contrary arguments and evidence, to consider that there is a risk of non-compliance by Argentina with its obligations under Article 53 of the ICSID Convention if the Award is not annulled.

103. The Committee regards 60 days as sufficient time for Argentina to reconsider its position on the extent of its obligations to pay on the final award if annulment is refused in this matter. However, the Committee makes no directions as the making of any response on these matters by Argentina. The Committee merely indicates that after 60 days from the date of this decision it would, upon the application of the Claimants, be prepared to reconsider the issue of continuance of the stay and the issue of security by reference to the circumstances then existing. The Committee notes that in no event would it be minded to lift the stay

of enforcement of the award or to make security a condition of a continuation of the stay without arrangements being put in place to ensure that any amounts recovered by, or any security provided to, the Claimants would be recoverable by Argentina in the event that the Award is annulled.

## **DECISION**

Pursuant to Article 52(5) of the ICSID Convention and Rule 54(2) of the ICSID Arbitration Rules, the *ad hoc* Committee extends the stay of enforcement of the Award.

In accordance with Rule 54(3) of the ICSID Arbitration Rules, at any time after 60 days from the date of this decision the Claimants may apply to request a modification or termination of the stay.

[Signed]

Dr. Gavan Griffith Q.C.  
President of the *ad hoc* Committee

Melbourne, 7 October 2008