

**Azurix Corp.**

**v.**

**The Argentine Republic**

**(ICSID Case No. ARB/01/12)  
(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 Bola Ajibola

Mr. Michael Hwang S.C.

**Secretary of the *ad hoc* Committee**

Ms. Claudia Frutos-Peterson

Representing the Claimant:

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Representing the Respondent:

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**A. Introduction**

1. On November 13, 2006, the Argentine Republic (“Argentina”) filed with the Secretary-General of the International Centre for Settlement of Investment Disputes (“ICSID”) an application in writing requesting the annulment of the Award, rendered by the Tribunal in the arbitration proceeding between Azurix Corp. (“Azurix”) and Argentina of July 14, 2006.
2. The Application 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”). In its Application, Argentina sought annulment of the Award on four of the five grounds set forth in Article 52(1) of the ICSID Convention, specifically claiming that:
  - (a) the Tribunal was not properly constituted;
  - (b) the Tribunal manifestly exceeded its powers;
  - (c) there had been a serious departure from a fundamental rule of procedure; and
  - (d) that the Award failed to state the reasons on which it was based.
3. The Application 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 (“ICSID Arbitration Rules”), for a stay of enforcement of the Award until the Application for Annulment is decided.
4. The Secretary-General of ICSID registered the Application on December 11, 2006, 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.
5. By letter of June 14, 2007, 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 Bola Ajibola, a national of Nigeria, and Mr. Michael Hwang S.C., a national of Singapore. On the same date the parties were informed that Ms. Claudia Frutos-Peterson, Counsel, ICSID, would serve as Secretary of the Committee.

6. On August 3, 2007, after hearing both parties’ views concerning the schedule for the filing of written observations on the continuation of the stay of enforcement of the Award as requested by Argentina, the Committee invited the parties to simultaneously submit their written observations on September 12, 2007. 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.
7. In compliance with the Committee’s instructions, on September 12, 2007, Argentina filed their Observations on the Continuation of the Stay of Enforcement of the Award, and Azurix filed their Opposition to Argentina’s Request to Continue to Stay Enforcement of the Award.
8. The first session of the Committee was held, as scheduled with the agreement of the parties, on September 20 and 21, 2007, at the premises of the World Bank in Washington D.C. 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 session on September 20, 2007, several issues of procedure were agreed and decided. On September 21, 2007, both 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.
9. After having heard the parties’ arguments, the Committee offered Argentina an opportunity to file within seven days a statement in writing of their intention

to comply with the Award under the ICSID Convention in the event that the Award is not annulled (“the comfort letter”). The Committee further decided that it would welcome Azurix to file any comments on Argentina’s written statement within seven days after of such statement. At the same time, it decided to continue the stay of enforcement of the Award until it had taken a decision.

10. On September 27, 2007, Argentina submitted a written statement signed by Dr. Osvaldo César Guglielmino, Argentina’s Attorney-General (Procurador General del Tesoro de la Nación Argentina), in which it stated “[t]he Republic of Argentina hereby provides an undertaking to Azurix Corp. that, in accordance with its obligations under the ICSID Convention, it will recognize the award rendered by the Arbitral Tribunal in this proceeding as binding and will enforce the pecuniary obligations imposed by that award within its territories, in the event annulment is not granted.”
11. In a letter dated October 4, 2007, Azurix expressed their concern that Dr. Guglielmino’s letter did not in fact provide additional comfort or security to Azurix, given Argentina’s prior actions, and particularly in light of their recent public announcements that Argentina would not acknowledge the final and binding nature of the Decision on Annulment in *CMS v. Argentina* rendered by the *CMS ad hoc* Committee on September 25, 2007.<sup>1</sup>
12. By letter of October 5, 2007, Dr. Guglielmino responded to Azurix’s letter of October 4, 2007, requesting that the Committee not reach a decision regarding the bank guarantee prior to giving Argentina an opportunity to present its case concerning the statements alleged by Azurix. Neither party made any further submissions after Argentina’s letter of October 5, 2007.

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<sup>1</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.

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<sup>2</sup>**

14. As outlined above, Argentina has requested that the enforcement of the Award be stayed pending the Committee's decision on annulment. Its written submissions in support of the application (*inter alia*):
- (a) referred to the grounds upon which annulment is sought and stated that the request for annulment was not merely dilatory;
  - (b) argued that circumstances exist justifying the continuance of the stay of enforcement of the Award;
  - (c) referred to the amount of the Award (USD 165 million) in the context of the social and economic reconstruction efforts underway in Argentina as a result of the past and (in its submission) continuing economic crisis;
  - (d) stated that, as was confirmed by the Argentine Supreme Court of Justice in 1992<sup>3</sup> and the amendment to the Argentine Constitution in 1994,<sup>4</sup> the ICSID Convention (including Article 54) and any award rendered under it have supremacy over municipal law;
  - (e) referred to previous decisions of *ad hoc* Committees in which enforcement of the award was stayed pending determination of the annulment application,<sup>5</sup>

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<sup>2</sup> In reciting these submissions, the Committee is not to be taken as having accepted them, nor are they to be taken as being unchallenged by the other side.

<sup>3</sup> ASCJ, 7/7/1992, *Ekmekdjian, Miguel Angel v. Sofovich, Gerardo et al.*, Judgment: 315.1503.

<sup>4</sup> National Constitution, Article 75(22).

<sup>5</sup> Argentina referred to *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on the Argentine Republic's Request for Continued Stay of the Enforcement of the Award, September 1, 2006; *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Decision on the Stay of the Enforcement of the Award, November 30, 2004; *MTD Equity Sdn. Bhd. & 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; *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Application for Annulment, February 5, 2002, 'among others'.

- (f) stated that, as Azurix has been liquidating its assets from 2001 and ceased quoting on the New York Stock Exchange from March 2001, it would be impossible (or at least very hard) for Argentina to recover the Award if the annulment application succeeded;
- (g) argued that no bank guarantee should be required because:
  - (i) Argentina's domestic law already secures execution of the Award;
  - (ii) provision of such a guarantee would adversely affect the right of defense;
  - (iii) no provision of the ICSID Convention establishes the need to post bonds for the purpose of continuing a stay of enforcement of an award;
  - (iv) the commission that an international bank would charge to provide such a guarantee would be exorbitant (stated to be approximately USD 23 million);
  - (v) as has been recognised in other ICSID cases,<sup>6</sup> provision of a guarantee would place a claimant such as Azurix in a much more favourable position than it presently enjoys by converting an undertaking of compliance into a financial guarantee and by avoiding any issue of sovereign immunity; and
  - (vi) provision of a guarantee would penalize Argentina for requesting annulment and curtail the right provided for by Article 52 of the ICSID Convention to apply for annulment.

15. Azurix opposed continuance of the stay and sought provision of security if the stay were to be continued. In its written submissions, Azurix pointed (*inter alia*) to the following:

- (a) under the ICSID Convention, arbitral awards are final and binding—a stay interferes with the investor's right to an immediately payable and

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<sup>6</sup> Argentina referred to *Maritime International Nominees Establishment (MINE) v. Republic of Guinea* (ICSID Case No. ARB/84/4), Interim Order on Guinea's Application for Stay of Enforcement of the Award, August 12, 1988; *Mitchell v. Congo* (*op. cit.*); *MTD v. Chile* (*op. cit.*); and *CMS v. Argentina* (*op. cit.*).

enforceable award and is an extraordinary measure not to be granted lightly;

- (b) the ICSID Arbitration Rules only allow for a stay where it is required (Rule 54(4)), and Argentina bears the burden of proving that a stay is required;
- (c) ICSID jurisprudence supports the requirement of security to “counterbalance” the negative effect of the stay on the award creditor;
- (d) the award creditor’s “annulment risk” may be offset by a reduction of his enforcement risk by provision of security (citing Professor Schreuer’s *The ICSID Convention: A Commentary*);<sup>7</sup>
- (e) the decisions of previous *ad hoc* Committees have been based on the view that annulment is a highly unusual step that delays payment to the award creditor and security has been ordered where there has been doubt regarding the award debtor’s intent to comply promptly with the award on completion of the annulment process;<sup>8</sup>
- (f) scholarly commentary<sup>9</sup> and the majority of ICSID *ad hoc* Committees make it clear that the posting of security when a provisional stay is continued should be “an automatic, counterbalancing right”<sup>10</sup>;
- (g) prior ICSID annulment Committees have determined that “a primary factor” to consider in evaluating whether to continue a stay is whether the state will promptly comply with the award if it is not annulled;<sup>11</sup>

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<sup>7</sup> Cambridge University Press, 2001 at 1060, ¶483.

<sup>8</sup> Azurix referred to *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14), Decision on Whether or Not to Continue Stay and Order, July 14, 2004; *Amco Asia Corp. v. Indonesia (Amco I)* (ICSID Case No. ARB/81/1), Decision on the Application for Annulment, May 16, 1986; *Amco Asia Corp. v. Indonesia (Amco II)* (ICSID Case No. ARB/81/1), Interim Order No. 1 Concerning the Stay of Enforcement of the Award, March 2, 1991; *Southern Pacific Properties (Middle East) v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Annulment Decision; *Wena Hotels Ltd. v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Application for Annulment, February 5, 2002, 2002; *Repsol YPF Ecuador S.A. v. Empresa Estatal Petroleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/01/10), Procedural Order No. 4, February 22, 2006; *Mitchell v. Congo (op cit)*.

<sup>9</sup> Azurix referred to P. D. Friedland, “Stay of Enforcement of the Arbitral Award Pending ICSID Annulment Proceedings”, in *Annulment of ICSID Awards* 177 at 185; and Christoph Schreuer, *The ICSID Convention: A Commentary (op. cit)* at 1060 ¶¶483-4 (Cambridge University Press 2001).

<sup>10</sup> Azurix referred *inter alia* to the passage in *Mitchell v. Congo (op. cit)* ¶33 in which the *ad hoc* Committee stated that any “improvement” to the award creditor by virtue of the security “constitutes the counterbalance to the negative effect of the stay on the beneficiary, *i.e.* the counterbalance to the delay in his satisfaction through payment of the amount of the award, which in principle should be immediate”.

- (h) there is little prospect that Argentina will comply with its obligation to pay Azurix as:
  - (i) senior executive and judicial officers and the Attorney General have stated that Argentina will not comply with ICSID awards, but will submit them to Argentina's Supreme Court;
  - (ii) the Attorney General has announced Argentina's intention to challenge ICSID awards before the International Court of Justice;
  - (iii) Argentina remains in default of its international financial obligations;
- (i) a comfort letter such as that provided in *CMS v. Argentina* (which merely restates Argentina's obligations under Article 54(1) of the ICSID Convention) is not sufficient security when there is any doubt as to the State's intention to comply with the award. The standard that has emerged from the various security decisions rendered to date requires the elimination of any reasonable doubt as to the State's intent to comply;
- (j) the present annulment application is part of a manifest pattern of dilatory action on Argentina's part to extend each and every ICSID case;
- (k) while superior to local laws, international treaties are subordinate to the Argentine Constitution;
- (l) a recent Argentine Supreme Court decision<sup>12</sup> supports the doctrine that Argentine Courts may review and vacate ICSID awards;
- (m) Argentina has the wherewithal to meet the Award or post security and will not suffer irreparable harm if the stay is discontinued or it is required to post security;

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<sup>11</sup> Azurix referred to *MTD v. Chile* (*op cit*) ¶29; and *CMS v. Argentina* (*op. cit*) ¶38.

<sup>12</sup> Corte Suprema de Justicia, June 1, 2004, "*Cartellone v. Hidronor*" Fallos 327-1881.

- (n) security is the remedy granted during an annulment process to ensure that the creditor “does not suffer additional damages” if enforcement of the Award is delayed;
  - (o) accrual of interest does not redress the full measure of harm to Azurix that will result from additional delays because Azurix has a present right to compensatory funds and to *use* of the funds;
  - (p) the argument that the provision of security would place Azurix 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>13</sup> and
  - (q) Argentina faces no danger of non-recoupment if the Award is annulled.
16. The parties supplemented their written filings with oral submissions on September 21, 2007. At the conclusion of that hearing, the Committee allowed 7 days for Argentina to deliver (if it wished) a comfort letter such as was provided in *CMS v. Argentina*.
17. As noted in para 10 above, Argentina did provide a comfort letter in like terms to which Azurix responded.

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

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;*

*(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*

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<sup>13</sup> Azurix quotes from the *CDC ad hoc* Committee’s consideration of the issue at *CDC v. Seychelles* (*op. cit*) ¶19.

*(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 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 Committee's views**

21. The Committee has indicated, and now confirms, its determination that, for the reasons submitted by Argentina, the circumstances require a stay of enforcement of the Award pending its decision on the annulment application.
22. Although the Committee accepts that there may be very exceptional circumstances where a stay ought not be ordered, that is not the situation here. The Committee has not convincingly been taken to matters militating against the continuation of the stay, as distinct from the contested issue of the continuation of the stay being conditional upon the provision of security.
23. Turning to the issue of security, decisions of previous *ad hoc* Committees considering stay applications disclose divergent approaches. The prior decisions are most recently rehearsed in *CMS v. Argentina*.<sup>14</sup>
24. The general approach of the Committee is against a strict analysis of previous Committee decisions in stay applications as if they were common law precedents. They are single examples of the exercise of the jurisdiction under Article 52(5) in particular circumstances.
25. Whilst for this reason the Committee does not regard it as appropriate for it to offer its own analysis of each of those decisions, the Committee's approach remains that it does not accept Azurix's contentions that a rule or norm has emerged mandating that the provision of security is "*an automatic or counterbalancing right*" to a stay or that, save for limited exceptions, it ought to be required as of course in order to eliminate any "*reasonable doubt as to the State's intent to comply*".

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<sup>14</sup> (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 in which the decisions in *Amco I (op. cit)*, *MINE v. Guinea (op. cit)*, *Wena Hotels v. Egypt (op. cit)*, *CDC v. Seychelles (op. cit)*, *Mitchell v. Congo (op. cit)*, *MTD v. Chile (op. cit)* and *Repsol v. Petroecuador (op. cit)* are cited.

26. The terms of the ICSID Convention are the source of the Tribunal's or Committee's power to modify or grant a stay. Hence, consideration of whether a stay should be granted, on the condition that security should be provided, must be guided by and conform to the terms of the ICSID Convention.
27. Relevantly here, the Vienna Convention on the Law of Treaties<sup>15</sup> provides some guidance on the interpretation of the ICSID Convention, based on the primacy of the text embodying a state party's commitments. Article 31(1) provides:
- 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.*
28. In this regard, it is essential to the integrity of the ICSID Convention that there be a mechanism to annul decisions infected by vitiating error or irregularity.
29. The limited grounds upon which annulment may be sought are set out in Article 52(1):
- (a) that the Tribunal was not properly constituted;*  
*(b) that the Tribunal has manifestly exceeded its powers;*  
*(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.*
30. Generally, the Article 52(1) grounds are directed to defined grave injustices. Where any ground is established, the integrity of the ICSID arbitration system and a state party participant's continued confidence in it demand that the infecting error be rectified by annulment.
31. The Committee agrees that the occurrence of such errors and irregularities will be infrequent to the point of being exceptional, but as the recent decision in the *CMS* case (where Argentina was a party) exemplifies, annulment may

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<sup>15</sup> Vienna, 23 May 1969, Articles 31-33.

be granted.<sup>16</sup> However, it does not follow that any particular annulment proceeding *per se* should be regarded as exceptional in itself so as to justify orders for provision of security in the ordinary course. The systemic importance of the annulment procedure must not be overlooked. It is not obviated or reduced in its application simply because a party to a specific case has sought annulment, or a state party has generally stated an intention to seek review of other or all adverse ICSID determinations to which it is a party. 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 state parties served by the annulment procedure.

32. A further relevant factor for the Committee is that, because security ordinarily would only be sought against a developing country, it would risk undermining the confidence of all states in the transparency of the ICSID system by introducing the suggestion of discrimination between states, whether *de jure* or *de facto*, as to terms for security imposed on annulment applications.
33. Either party to an ICSID dispute has the right to request annulment of an award pursuant to Article 52. That right is not qualified explicitly in the Convention by a requirement that the unsuccessful party provide any security as the “price” for a stay. Rather, Article 52(5) merely grants the *ad hoc* Committee considering the annulment request power to stay the award a general discretion “*if it considers that the circumstances so require*”.
34. To apply a strict rule that the price for the stay is the provision of security appears to the Committee to create a positive gloss to the enforcement regime provided for under Section 6 of the Convention. Effectively, such an approach would be to add a provision that is neither express nor implicit in the ICSID Convention. Indeed, it would effectively abrogate the scheme for security in Section 6 (particularly under Article 54) and substitute for those expressly qualified rights an entitlement to absolute security.

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<sup>16</sup> *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on Annulment, September 25, 2007.

35. In the Committee's view, such a default position would be in derogation to the approach to interpretation reflected in Article 31(1) of the Vienna Convention (see para 27 above) and also would work in a *de facto* sense impermissibly to amend the ICSID Convention by substituting a new and absolute enforcement mechanism for the qualified provisions of the Convention itself.
36. Although not required by the Committee, here Argentina has proffered a comfort letter of the kind provided in *CMS v. Argentina*. This Committee's conclusion that security will not be required does not rest on the provisions of that letter, as it merely confirms and restates Argentina's obligations under the ICSID Convention in circumstances where Argentina's domestic enforcement machinery conforms to Article 54.
37. On the issue of onus, and perhaps in contrast to the contrary suggestion by the *ad hoc* Committee in *CMS v. Argentina*, the Committee does not see that the applicant for annulment bears any burden of persuasion as to why security should not be ordered. To the contrary: it is for the claimant to make out its case for security consequent upon a stay being ordered.
38. Here Argentina has not denounced the ICSID Convention,<sup>17</sup> and continues to be bound by its obligations under Article 54 to recognize and enforce ICSID awards as final judgments of domestic courts. Hence, the primary security for Azurix's award is provided through the obligations Argentina has assumed under the Convention. Further, Argentina's constitutional and municipal law enforcement regimes are in conformity with the Convention.
39. In the absence of a history of non-payment by Argentina of final ICSID awards (there are as yet none), or a failure to put in place domestic enforcement mechanisms in accordance with Article 54 or other exceptional circumstances, it appears to the Committee that the ICSID Convention does not support any such default approach that security should be the price

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<sup>17</sup> Article 71 provides that any Contracting State may denounce the Convention by written notice, taking effect six months after receipt of such notice.

extracted for a stay which a committee has concluded is “required” within the meaning of Article 52(5).

40. Other than by being put to the effort and expense of defending an annulment request and by the receipt of funds being delayed (assuming the annulment application to be unsuccessful), the Committee does not accept that Azurix suffers any prejudice of a kind warranting the provision of security. The provision for interest compensates for the delay.<sup>18</sup>
41. Rather, Azurix submits that, upon the making of the Award, it had a present entitlement to payment on an enforceable award and that this would be prejudiced by the continuance of the stay. In answer, the Committee perceives that Azurix’s submission fails to take adequate account of the terms of Article 53, which relevantly 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 (emphasis added).*

42. As the ICSID Convention explicitly recognizes that the award creditor’s rights are subject to a stay if an *ad hoc* Committee considers, as we do, that the circumstances require a stay, then the award creditor’s rights are themselves qualified by the Convention. Accordingly, the rights an award creditor would have had to payment had there been no stay cannot, by definition, constitute the subject of prejudice.
43. Had Argentina not sought annulment, Azurix would not have had the benefit of a bank guarantee. Upon non-satisfaction of the Award it would have to take enforcement action and meet, for example, enforcement issues such as the potential application of sovereign immunity under Article 55. The situation here is not a scenario, such as that mentioned in the *CDC* case (referring to *MINE v. Guinea* and *WENA v. Egypt*),<sup>19</sup> where the respondent might have moved assets in the period between the initial award and the determination of

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<sup>18</sup> The fact that interest rates are below market is not be to the point, as the rates are those that prevail in the ICSID system, which is not tied to the global, or any domestic, market.

<sup>19</sup> *CDC v. Seychelles (op. cit)* ¶19.

the annulment request. There is no suggestion by Azurix that Argentina is presently unable to meet the amount of the Award or that it is likely to engage in “asset stripping” pending determination of the annulment application or otherwise avoid its obligations under the ICSID Convention. Nor could such a suggestion credibly be made. In the *CDC* case, there were other factors justifying the provision of security, viz the relatively small amount of the guarantee and the fact that the Republic of Seychelles had already admitted liability for a substantial portion of the award.

44. *In summary*, although the Committee accepts that in particular fact situations there may be exceptional circumstances where real prejudice beyond delay compensated for by interest may be shown, such as where a state denounces its obligations under the Convention or otherwise evinces an intention not to comply with the award, that is not the situation here. The determinative issue is whether, beyond delay compensated for by interest, there is any factor here militating for the imposition of security for payment over and above that provided for by Argentina’s commitments under the ICSID Convention. For the reasons stated, the Committee finds no such factors are established.

## **Decision**

**For the foregoing reasons the *ad hoc* Committee, unanimously decides that the stay on the enforcement of the Award should continue in force pending its decision on Argentina's application for annulment and declines to order the provision of any security during the period of the stay.**

**Signed on behalf of the *ad hoc* Committee:**

[ Signed ]

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

**Melbourne, December 28, 2007**