

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

**Sempra Energy International
(Claimant)**

v.

**Argentine Republic
(Respondent)**

**(ICSID Case No. ARB/02/16)
(Annulment Proceeding)**

**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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A. INTRODUCTION

1. On 25 January 2008, the Argentine Republic (Argentina) filed with the Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID) an application (the Application for Annulment) requesting annulment of the Award of 28 September 2007 (the Award), rendered by the tribunal (the Tribunal) in the arbitration proceeding between Sempra Energy International (Sempra) and Argentina (together the Parties).
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 or Convention).
3. In the Application for Annulment, Argentina has sought annulment of the Award on the following grounds set forth in Article 52(1) of the ICSID Convention, specifically claiming that:
 - (a) The Tribunal was not properly constituted (ICSID Convention, Article 52(1)(a));
 - (b) The Tribunal has manifestly exceeded its powers (ICSID Convention, Article 52(1)(b));
 - (c) There has been a serious departure from a fundamental rule of procedure (ICSID Convention, Article 52(1)(d)); and
 - (d) The award has failed to state the reasons on which it is based (ICSID Convention, Article 52(1)(e)).
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 Secretary-General of ICSID registered the Application on 30 January 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), enforcement of the Award was provisionally stayed.
6. By letter of 15 September 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 Mr. Christer Söderlund, a national of Sweden, Sir David A.O. Edward, QC, a national of the United Kingdom, and Ambassador Andreas J. Jacovides, a national of Cyprus. On the same date the Parties were informed that Mr. Gonzalo Flores, Senior Counsel, ICSID, would serve as Secretary of the Committee.
7. On 16 September 2008, Sempra filed a request to lift the provisional stay of enforcement of the Award (Sempra's Request).
8. By letter of 10 October 2008, the Committee proposed to hold a first session by telephone conference on 21 October 2008. A provisional agenda for the session was attached to the letter. In the letter the Parties were further notified that the Committee had decided to continue the provisional stay of enforcement of the Award until 8 December 2008, the date fixed by the Committee to hear the Parties' oral pleadings on stay.

9. The first session of the Committee was held, as proposed by the Committee and with the agreement of the Parties, on 21 October 2008, at 11:00 a.m. EST, by telephone conference. Before the session, the Secretariat distributed copies of the declarations, signed by each Member of the Committee, to the Parties pursuant to ICSID Arbitration Rule 52(2). During the first session several issues of procedure were agreed and decided.
10. In the course of the first session, it was decided by the Committee to continue the provisional stay of enforcement of the Award until a decision on this matter is taken by the Committee.
11. Certain scheduling arrangements which could not be agreed during the course of the first session were resolved by the Parties shortly thereafter.
12. In conformity with the agreement of the Parties, notified to the Committee in Argentina's letter of 27 October 2008, Argentina filed its observations on the continuation of the stay of enforcement of the Award on 7 November 2008 (Argentina's Observations). On the same basis, Sempra filed its observation on the stay issue on 21 November 2008 (Sempra's Observations).
13. On 8 December 2008, a hearing was held in Washington D.C. at which the Parties presented oral argument on the matter of the stay of enforcement (Hearing on Stay).
14. Subsequent to the Hearing on Stay in a letter of 18 December 2008 Sempra, referring to the Vivendi *ad hoc* committee's request for a "comfort letter"¹, and to Argentina's letter of 28 November 2008 to that committee, submitted that "Argentina has again refused to change its interpretation of its obligations under Article 53 and 54 of the ICSID Convention".
15. In a letter of 29 December 2008 Argentina declared its readiness to provide comments on Sempra's submission while, at the same time, describing its letter to the Vivendi *ad hoc* committee as "self-explanatory".
16. The Committee did not consider that any further comments were called for.
17. The Members of the Committee have deliberated by telephone conference and exchange of emails and have taken into consideration the Parties' entire written and oral arguments and submissions on the matter of whether to terminate or continue the stay of enforcement of the Award.

B. THE PARTIES' REQUESTS FOR RELIEF IN RESPECT OF THE STAY

Argentina's request for continuation of the stay of enforcement

18. Argentina has requested that the stay of enforcement of the Award be continued and that Argentina should not be required to post security for the amount of the Award as a condition for the continuation thereof.

¹ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award rendered on 20 August 2007 (November 4, 2008) (hereinafter the *Vivendi Decision*).

Sempra's request for termination of the stay of enforcement

19. Sempra has requested that the *ad hoc* Committee terminate the provisional stay of enforcement, or, if the stay is continued, that such stay be conditional on Argentina's posting adequate security or, in the alternative, that payment of the Award is made into an escrow account pending completion of these annulment proceedings.

Relevant provisions of the ICSID Convention and the ICSID Arbitration Rules

20. For purposes of the stay of enforcement, the following provisions of the ICSID Convention are of importance:

21. Article 52(5) of the ICSID Convention:

The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

22. Rule 54 of the ICSID Arbitration Rules:

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 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.

Circumstances that require a stay of enforcement

23. The Committee's authority to continue a stay is, according to Article 52(5) of the ICSID Convention, dependent on whether "the circumstances so require". Nothing further is said on what circumstances the drafters of the ICSID Convention had in mind, or what the relative importance of various circumstances would be in the determination of this question. This is left to the discretion of the *ad hoc* committee.
24. There is now a relatively long line of decisions within the ICSID system on the matter of stay. Previous *ad hoc* committees have attached importance to the following circumstances:
 1. Prospects of compliance with the award
 2. Causation of economic hardship
 3. Prospects of recoupment
 4. A dilatory motive
25. Previous *ad hoc* committees have consistently rejected the proposition that a preliminary assessment of the prospects of the application for annulment should be a factor influencing the Committee's decision whether a stay should be granted or not.²
26. In addition to identifying the circumstances which require the granting of the stay, two *ad hoc* committees have – in more recent decisions³ – discussed whether it is for the party opposing continuation of the stay to show that "circumstances" militate against a stay or whether it is for the party seeking continuation of the stay to show that circumstances favour continuation of a stay.
27. Against that background, the view of the present Committee as to the prerequisites for granting a stay can be summarized as follows. An ICSID award is immediately payable by

² *CDC Group plc v. Republic of Seychelles* (ICSID Case No. ARB/02/14), Decision on Whether or not to Continue Stay and Order of 14 July 2004 at para. 15; *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Decision on the Stay of Enforcement of the Award of 30 November 2004 (hereinafter the *Mitchell Decision*) at para. 26; *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 of 1 June 2005 at para. 28; *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 of 1 September 2006 (hereinafter the *CMS Decision*) at para. 37.

³ *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 of 28 December 2007 (hereinafter the *Azurix Decision*) at para. 22, and *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award of 7 October 2008 (hereinafter the *Enron Decision*) at para 43.

the award debtor, irrespective of whether annulment is sought or not. A stay of enforcement should not in any event be automatic, and there should not even be a presumption in favour of granting a stay of enforcement. This follows, in the Committee's opinion, from the ordinary meaning to be given to the terms of Article 52(4) of the ICSID Convention, which authorizes the Committee to stay enforcement of the award pending its decision "if it considers that the circumstances so require". Although the ICSID Convention does not give any indication as to what circumstances would warrant a stay, it is nonetheless clear from this language that there must be *some* circumstances present that speak in favour of granting a stay. As a consequence, it cannot be assumed that there should be a presumption in favour of a stay or that the primary burden is placed on the award creditor to show that continuation of the stay should not be granted.

28. Recent decisions have also discussed the question whether a decision to continue a stay may be made subject to conditions such as requiring the posting of a bank guarantee or what has, perhaps inappropriately, come to be referred to as a "comfort letter".⁴
29. In the present case, as in previous cases, the Parties' arguments have placed the prospect of compliance at the forefront of all the relevant circumstances, but they have also dwelt on other matters with a potential impact on a decision whether to terminate or continue the stay of enforcement.⁵

Prospects of compliance

Introduction

30. The Committee considers it essential to its decision whether to terminate or continue the stay that it should first assess the prospects of Argentina complying with the Award, should it not be annulled. Judging by the Parties' respective arguments on this subject, it is clear that they share this view. This also appears to be true of decisions of earlier *ad hoc* committees, where the matter of compliance has figured predominantly and even played a decisive role in the committee's conclusion.
31. The Parties are at issue as to the nature of Argentina's international obligations as to compliance with awards under the ICSID Convention. A decision on the nature of Argentina's obligation will therefore be of paramount importance to the Committee's assessment of the prospects of compliance. If the Committee finds, as Sempra submits, that Argentina's obligations are governed by Article 53 alone, then in view of the uncompromising position taken by Argentina that Sempra must first comply with Article 54, the Committee will be forced to conclude that there are no reasonable prospects that Argentina will, unconditionally and in good faith, "abide by and comply with the terms of the award" as required by Article 53 of the Convention.

Must the award creditor comply with Article 54 of the ICSID Convention?

32. Having regard to the Parties' positions on the matter of compliance, the Committee's first task will be to determine whether Article 53 of the ICSID Convention imposes an unconditional obligation upon an award debtor to comply voluntarily and in good faith

⁴ E.g. the *Azurix Decision* at para. 36.

⁵ Argentina has also expressed concern about enforcement of an award alleged by defects (Argentina's Observations, paras. 3, 30, 31 and 100). However, the Committee would not – consistent with established practice – allow such an assessment to influence its decision.

with an ICSID award under that Article, or whether the award creditor must first apply to a local judicial or administrative agency of the State Party to seek enforcement in terms of Article 54 of the Convention.

33. Argentina's position is that its obligation under international law under the ICSID Convention, as regards compliance with ICSID awards, is to satisfy the requirements of Article 53 *and* Article 54 of the ICSID Convention. For this reason, according to Argentina, the critical question is whether Argentina has put in place administrative arrangements and internal legislative procedures that provide an effective enforcement mechanism for ICSID awards, so as to ensure that an ICSID award will be enforced "as far as the pecuniary obligations imposed by the award are concerned, as if it were a final judgment of an Argentine court".⁶
34. According to Argentina, the fact that Argentina has taken the appropriate steps to give effect to Article 54 will be of determinative importance to any conclusion as to whether Argentina will comply with an award or not. Argentina stresses, in particular, that "[t]he supremacy of Argentina's international obligations – which include the awards issued by the ICSID tribunals – over the acts of Congress constitutes an adequate guarantee of compliance with the Award, in case the annulment requested by Argentina is not accepted".⁷
35. *Sempra*, on the other hand, has emphasized that Argentina's obligation of compliance under international law in respect of ICSID awards follows from the language of Article 53 of the ICSID Convention, specifically as provided in Article 53(1), second sentence, to the effect that "[e]ach 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". Hence, the ICSID Convention (and Article VII (6) of the 1991 US-Argentina Bilateral Investment Treaty (the US-Argentina BIT)⁸) "create treaty obligations on the part of Argentina to voluntarily and without delay or conditions pay the Award"⁹.

Interpretation of Articles 53 and 54 of the ICSID Convention

36. According to the Vienna Convention on the Law of Treaties (VCLT), Article 31(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".

The terms of the Convention

37. Article 53(1), second sentence, of the ICSID Convention imposes an unconditional obligation to comply, subject only to the *proviso* that a stay ordered in accordance with the provisions of the ICSID Convention will temporarily release a party from that obligation. The terms of this provision are clear and contain nothing to support the proposition that an award creditor must first seek enforcement pursuant to Article 54 in order to have the award complied with.

⁶ Argentina's Observations, para. 50.

⁷ Argentina's Observations, para. 59.

⁸ Treaty between United States of America and The Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment; signed on 14 November 1991, in force since 20 October 1994.

⁹ *Sempra*'s Observations, para. 4, first indentation.

38. It is also clear that Article 53 is directed to the parties to a particular arbitration (“the award shall be binding on the parties”). Hence, the obligation to abide by and comply with the terms of the award is imposed on a *party to the arbitration* irrespective of whether that party is the foreign investor or the host State.
39. In contrast, Article 54 imposes an obligation, not on the parties to a particular arbitration, but on “[e]ach Contracting State” - *i.e.* on *all the parties to the ICSID Convention*, to “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”. It is true that one of the parties referred to in Article 53 will necessarily also be one of the “Contracting States” referred to in Article 54. However, the fact that Argentina as a Contracting State comes under an obligation to comply with Article 54 does not deprive Article 53 of its effect in imposing an unconditional obligation on Argentina in its capacity as a party to the arbitration “to abide by and comply with the terms of the award”.

The object and purpose of Article 54 of the Convention

40. It is fair to ask whether any rational purpose would be served by a requirement that enforcement be sought by the award creditor in the debtor State under Article 54 of the ICSID Convention in order to obtain satisfaction of the award. It must be observed that there is a fundamental difference between enforcement of awards under the New York Convention and the ICSID Convention, in that Article 5 of the New York Convention envisages certain grounds on which the award may be subject to judicial review at a national level and which may entitle a State to refuse enforcement.
41. The ICSID Convention, on the other hand, does *not* offer any scope for review on the national plane. An award given under the ICSID Convention shall (as far as it concerns pecuniary obligations) be enforced “as if it were a final judgment of a court in that State”.
42. For this reason, there would simply be no *rationale* for a requirement that an award creditor seeking payment should first subject itself to any form of local enforcement procedure. It is certainly true that a State party, when complying with an ICSID award, has to make the necessary budget allocations to procure the requisite funding, but that is an entirely different matter from requiring the award creditor to subject itself to an enforcement procedure before the national courts.

The context of Articles 53 and 54 of the Convention

43. According to the VCLT, Article 31(1), a treaty shall also be interpreted, *inter alia*, by considering its terms “in their context”. In this regard, it is appropriate to review Articles 53 and 54 together with Article 27(1) of the ICSID Convention, which provides as follows:

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.

44. This provision mirrors the undertaking expressed in Article 53 that parties to the arbitration are to abide by and comply with an ICSID award. This is also quite logical. It cannot possibly be correct that a State’s failure to comply with its international obligation – constituted under Article 53 – must be submitted to a national court for ultimate resolution. The option of coercive enforcement is not available on the international plane, and an

award creditor in the ICSID regime will therefore have no other choice than to seek diplomatic protection or to bring “an international claim”.

45. It should further be noted that the enforcement mechanism, which a contracting party to the ICSID Convention undertakes to provide, concerns only the enforcement of “pecuniary obligations imposed by that award”. This restriction is necessary because an ICSID award may well be of a declaratory character or impose obligations on a party to do or refrain from doing certain acts, something which would not lend itself to enforcement, in particular in a third State jurisdiction.
46. Further, in the negotiating history of the ICSID Convention, it was generally believed that States would voluntarily comply with awards rendered by ICSID tribunals rendering any question of enforcement moot. The enforcement option provided for in Article 54 rather sought to allay any concern of a State party that recourse could not be had against investor parties.¹⁰ One may even question whether there was any expectation that enforcement against a State debtor would have to be undertaken within that State’s own (or any other Contracting State’s) enforcement apparatus.
47. In general, the Committee adopts the reasoning of the Enron *ad hoc* committee and considers that it has quite succinctly identified the error in the position advocated by Argentina in the following words:¹¹

The ICSID dispute settlement mechanism was intended to be an international method of settlement, 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.

48. The Committee accepts that, as Argentina points out, the procedure applied in the *MTD v. Chile* case presupposed recourse to the enforcement procedure envisaged in Article 54 of the ICSID Convention (although the distinction between the role of Chile as an enforcement agent and as the payer under the award is not made clear).¹²
49. Be that as it may, the particular way in which compliance with an ICSID award may have been carried out in any specific instance does not in any way affect interpretation of the text of the relevant provisions of the ICSID Convention.

The US-Argentina BIT

50. It should also be noted that the US-Argentina BIT contains language which is equivalent to the relevant part of Article 53(1) of the ICSID Convention:

VII (6) Any arbitral award rendered pursuant to this Article shall be final and be 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.

¹⁰ History of the ICSID Convention, Vol. II-1 at 379.

¹¹ The *Enron Decision*, at para. 68 (Argentina expresses its disagreement with this statement in its Observations, para. 130).

¹² Execution of judgment, R-28.

51. The provision brings home the final and binding character of any award as regards the obligation of “the parties to the dispute ... to carry out without delay the provisions of any such award and to provide in its territory for its enforcement”. Use of the word “and” makes it clear that the contracting States have undertaken two obligations – to carry out the award *and* to ensure facilities for the enforcement of awards. Taking into account that the US-Argentina BIT offers alternative dispute resolution routes – ICSID arbitration, *ad hoc* arbitration under the UNCITRAL Arbitration Rules and any other agreed method – it is logical that the reference to “enforcement” in the BIT is not more specific as dispute resolution methods other than ICSID arbitration would be subject to the recognition and enforcement requirements of the New York Convention. The fact that the formulation of the provision does not distinguish between the roles of the State party as a party to the dispute and as a party to the BIT, does not cast doubt on this interpretation.

The Committee’s conclusion

52. On the basis of the considerations discussed above, the Committee concludes that a State Party against which an award has been made must (like a foreign investor party) abide by and comply with an ICSID award without the award creditor having to submit to any agency of the State Party to enforce the award as envisaged by Article 54 of the ICSID Convention.
53. The very fact that the Committee has found that Argentina is under a duty, unconditionally and in good faith, to “abide by and comply with” the Award according to Article 53, together with Argentina’s repeated and uncompromising affirmation that it has no such obligation in the absence of the award creditor submitting the award to a procedure within the State party’s domestic judicial system under Article 54, must necessarily lead to the conclusion that Argentina is not willing to comply with its obligations under Article 53 unless Sempra first seeks enforcement under Article 54. This is an important consideration to be weighed when determining the future of the present stay of enforcement of the Award.
54. Notwithstanding this conclusion, the Committee will also examine the other circumstances which, in the opinion of Argentina, show that Argentina will comply with the Award, should annulment be denied.

The third party “guarantee” of payment

55. It would appear that two gas distribution companies, Camuzzi Gas del Sur S.A. and Camuzzi Gas Pampeana S.A (the Gas Companies) have been allowed an increase in tariffs by the State agency UNIREN¹³, against an undertaking to indemnify Argentina against any adverse economic effects following from, *inter alia*, the present ICSID case.¹⁴
56. The Committee is not in a position – and has no need – to form an opinion as to whether the advantage to the Gas Companies created by the increased tariffs is worth more or less than the potential cost to the companies of indemnifying Argentina in respect of any payment on an ICSID award. Nor does the Committee need to opine on the questions whether the Gas Companies are or will be solvent to make good such an undertaking or whether the cost of complying with this undertaking will be passed on to the Argentine gas consumers or the ultimate shareholders of the Gas Companies (or both).

¹³ Unidad de Renegociación y Análisis de Contratos de Servicios Públicos.

¹⁴ Paras 18.3.1 and 18.3.2 of a Deed of Agreement on the Equalization of a License Contract for Distribution of Natural Gas, R-29.

57. Suffice it to note that the fact that the Gas Companies may indemnify Argentina in no way constitutes a *guarantee* that compliance *vis-à-vis* Sempra will follow. Nor, in view of a number of unknowns – the solvency of the Gas Companies and the allegation of illegality in conjunction with statements from Sempra that it will seek to invalidate the contracts – is there any basis to conclude that the – possible – existence of undertakings to indemnify Argentina will in any way increase the likelihood of Argentina’s compliance.

Is the constitutional framework and the legal system of Argentina to be considered when deciding whether to terminate or continue?

58. Argentina dedicates a significant part of its Observations to discussing the supremacy of Argentina’s international obligations within its constitutional framework and the hierarchy of laws established thereby, emphasizing its importance in view of the fact that “the effective enforcement of an award depends on the treatment of international obligations by Argentine law”.¹⁵
59. This discussion would have a certain relevance if it were correct that an award against Argentina rendered pursuant to the ICSID Convention must be enforced as a final judgment of an Argentine court under Article 54. However, as the Committee has held, this is an untenable proposition. It would clearly be inconsistent with fundamental principles of international law if the obligation of a State under an international treaty would have to be submitted to that State’s national courts (or any other agency on a national level) for verification and implementation. In view of the fact that Argentina has a duty to “abide by and comply with” the Award pursuant to Article 53 of the ICSID Convention, its constitutional setup and legislative system are irrelevant as a “circumstance” requiring the stay of enforcement of the Award.
60. It is certainly true, as Argentina has pointed out, that the CMS *ad hoc* committee discussed Argentina’s duty to comply in terms of enforcement of an award under Article 54, opining that “an ICSID award is to be given the same effect as a final judgment of the courts of the respondent state” and that such awards “under the ICSID Convention are directly enforceable”.¹⁶
61. It is reasonable to assume that it is for this reason that the CMS *ad hoc* committee embarked on a discussion concerning the internal mechanics of Argentinean domestic law, concluding that “in the opinion of the Committee it has not been shown that Argentina needed to take any further step to give effect to the Convention and in particular to its Article 54”.¹⁷
62. An *ad hoc* committee would not normally have to engage in an examination of a State Party’s constitutional framework or the organization of its legislative setup or the organisational coordination of its executive, legislature and judiciary.
63. The reason why these considerations have been presented by Argentina for the Committee’s appraisal in the present case is that they purportedly give constitutional guarantees for Argentina’s compliance with Article 54 of the ICSID Convention, which does engage national law and therefore – if relevant – would impact on the Committee’s assessment of prospects of compliance. The Committee accepts the logic of this approach,

¹⁵ Argentina’s Observations, para. 51.

¹⁶ CMS Decision at para. 41.

¹⁷ Id. at para 45.

given that Argentina attaches decisive weight to the requirements of Article 54 of the ICSID Convention.

64. However, the matters relied on by Argentina only allow the conclusion that the inner workings of Argentina's legal system do not make voluntary compliance impossible. They do not impact – in view of Argentina's position on Articles 53 and 54 – on the assessment of the likelihood of Argentina's compliance with Article 53 of the ICSID Convention.

Prior history of compliance with international awards

65. Argentina has invoked the fact that it has complied with a line of international awards in the past¹⁸ and that it must be assumed, on that basis, that compliance will follow also in respect of the Award.
66. The Committee considers that Sempra has correctly emphasized that the instances referred to by Argentina relate to border disputes and human rights issues, and that they have very limited relevance as an indication that Argentina will honour an ICSID award.

The CMS case

67. Specifically, Sempra has invoked what it terms Argentina's previous history of non-compliance in respect of the *CMS award*¹⁹.
68. During the CMS annulment proceedings, the question was raised whether Argentina could be expected to comply with the award, should the application for annulment be rejected. This question was triggered by the fact that the CMS *ad hoc* committee had observed that former Ministers of Justice and Finance of Argentina as well as the agent of Argentina in the CMS case had made a variety of statements, indicating the possibility of submitting the validity of ICSID awards to the International Court of Justice.²⁰ The CMS *ad hoc* committee therefore took the unusual step of inviting Argentina to submit a statement on its intention to comply with the ICSID Convention. Responding to this request, Argentina provided "an undertaking to [CMS] that, in accordance with its obligations under the ICSID Convention, it will recognize the award rendered by the arbitral tribunal as binding and will enforce the pecuniary obligations imposed by that award within its territories, in the event that annulment is not granted".²¹ On the strength of this commitment, the CMS *ad hoc* committee decided to continue the stay for the duration of the annulment proceedings.
69. In its decision on Argentina's application for annulment, dispatched to the parties on 25 September 2007, the CMS *ad hoc* committee annulled a part of the *CMS Award* dealing with the so-called "umbrella clause" of the relevant BIT. This did not, however, entail any consequence for the amount of damages that Argentina was ordered to pay in terms of the award.

¹⁸ Argentina has dealt with these awards in its Observations, paras. 60-68.

¹⁹ *CMS Gas Transmission Company v Argentina* (ICSID Case No. ARB/01/8), Award of 12 May 2005 (hereinafter the *CMS Award*).

²⁰ *CMS Decision* at para. 18.

²¹ One may note that the formulation of this undertaking – by echoing the language of Article 54 of the ICSID Convention – is inept as Argentina's obligation to enforce ICSID awards as a Contracting Party is not at issue in the present context.

70. Sempra notes that— despite the fact that the CMS Decision on Annulment was rendered more than 14 months ago and despite the fact that the stay ordered by the CMS *ad hoc* committee was automatically lifted as from the date of its decision pursuant to Rule 54(3) of the ICSID Arbitration Rules – the *CMS Award* has not been complied with by Argentina as of the date of the Hearing on Stay.
71. Argentina has responded that it has not failed to comply with the *CMS Award*. Specifically, in the view of Argentina, CMS has refused to follow the procedure provided for in Argentina for compliance with final judgments enunciated in Article 54 of the ICSID Convention. Additionally, CMS has – improperly – transferred its rights to the award, which requires prior analysis of the legality under international law.
72. In view of its conclusion as to the nature of Argentina’s obligation under Article 53, this Committee is unable to accept that either of these circumstances justifies Argentina’s failure to abide by and comply with the *CMS Award*. While it is true that the letter of assurance required by the CMS committee speaks about the duty to “enforce the pecuniary obligations imposed by that award”, this cannot be interpreted as instituting requirements for complying with the *CMS Award* that would be different from what applies generally to ICSID awards.

The Enron case

73. As noted above, the Enron *ad hoc* committee examined in detail the interplay between Articles 53 and 54 and the applicability of Article 53 to the obligation imposed on the parties to the ICSID arbitral proceedings (whether they be a foreign investor or a State party). Looking at this question, the Enron *ad hoc* committee found “Argentina’s stated position as to its obligations to pay on a final award to be incorrect”.²² However, accepting that Argentina had acted in good faith, the Enron *ad hoc* committee decided to extend the stay of enforcement for a period of a minimum of 60 days, after which date the claimants would be able to apply for a modification or termination of the stay. The 60 days allowed by the Enron *ad hoc* committee was considered as “sufficient time for Argentina to reconsider its position”, failing which the *ad hoc* committee upon application of the claimants would “be prepared to reconsider the issue of continuance of the stay and the issue of security by reference to the circumstances then existing.”²³
74. According to Sempra’s affirmation,²⁴ uncontested by Argentina, Argentina has not notified the Enron *ad hoc* committee of any reconsideration of its position.

The Vivendi case

75. Further, in the *Vivendi Decision*, dispatched to the parties on 4 November 2008, the Vivendi *ad hoc* committee offered Argentina the opportunity “to provide the Committee with a more elaborate official letter to be issued by Dr. Guglielmino in his capacity as the *Procurador del Tesoro de la Nación Argentina* and as Agent of Argentina in the present annulment proceeding” within a time period of 30 days from notification of the decision. Such letter had not been provided to the Vivendi *ad hoc* committee at the time of the

²² The *Enron Decision*, at para. 102.

²³ *Id.*, at para. 103.

²⁴ Sempra’s letter of 18 December 2008 to the Committee, para 14 *supra*.

Hearing on Stay, according to Sempra's affirmation, uncontested by Argentina, and no assurance was made that such letter would be forthcoming.²⁵

76. Based on the above, the Committee understands that, up to the date of the Hearing on Stay, Argentina has not heeded the Enron *ad hoc* committee's invitation to reconsider its position on Argentina's obligation under Article 53 or given any indication that it will issue a satisfactory assurance as directed by the Vivendi *ad hoc* committee.

Causation of economic hardship

77. Argentina has referred to the severe economic crisis it has recently suffered, calling for a declaration of a state of emergency. The emergency law is, according to Sempra, still in force (December 2008). Argentina considers that being required to procure a bank guarantee or to place funds in escrow would cause economic hardship and explains that

[i]n the face of the current international financial uncertainty, a requirement to freeze such amount of money would be particularly detrimental to any State and, especially, to an emerging country such as Argentina. Under the present circumstances of the international economy, liquidity is one of the main concerns to all the agents of international economy. Taking a measure affecting liquidity – already severely limited – would have serious consequences for Argentina.²⁶

78. In the opinion of Sempra, Argentina certainly found itself in quite dire financial straits in 2001 and 2002, but Sempra notes that the economy has made a remarkable recovery in recent years and that "its economy is much healthier today than it was before the economic problems of 2001-2002".²⁷ For this reason, in Sempra's view, there is no sufficient reason that would prevent the Committee from conditioning the continuation of a stay with a duty to post a bank guarantee or to place funds in escrow.
79. The Committee is not satisfied, on the basis of the information placed before it, that the circumstances invoked by Argentina amount to economic hardship of such a nature or degree as to constitute, in themselves, a reason for not lifting the stay or continuing the stay without requiring a bank guarantee or the placing of funds in escrow.

Prospects of recoupment

80. Argentina has invoked the fact that *ad hoc* committees have on more than one occasion referred to the eventuality that it may not be possible to recoup payments made to an award creditor where the award is subsequently annulled.²⁸ In order to allay Argentina's apprehensions in this regard, Sempra has offered to have such funds as Argentina pays out

²⁵ According to Sempra's letter of 18 December 2008 to the Committee, attaching a letter of 28 November 2008 by Argentina, "Argentina has again refused to change its interpretation of its obligations under article 53 and 54 of the ICSID Convention".

²⁶ Argentina's Observations, para. 99.

²⁷ Sempra's Observations, para. 114.

²⁸ References have been made to the *Mitchell Decision*, at para. 33 and to the *CMS Decision*, at para. 38.

to meet its indebtedness according to the Award placed in an escrow account, pending outcome of the present annulment proceedings.²⁹

81. On the occasion of the Hearing on Stay, Sempra has additionally confirmed that, should the stay be lifted, it undertakes also to place such funds as it would recover by enforcement proceedings in other jurisdictions in such an account.³⁰
82. On this basis, Sempra considers that there is no risk of non-recoupment, if Argentina prevails in its application for annulment.
83. The Committee is confident that a risk of possible non-recoupment of funds paid out under the Award in the event that the Award is partially or wholly annulled may be effectively eliminated by instituting an appropriate escrow arrangement.

Other circumstances

Absence of post-award interest

84. Sempra has argued that under the terms of the Award it is not entitled to post-award interest. Consequently, should the stay be continued and should the application for annulment be denied, the passage of time up till the point in time when payment may be effected will erode the value of the Award. This circumstance, in the opinion of Sempra, militates in favour of terminating the stay.
85. The Committee does not consider that the application of Article 52(5) of the ICSID Convention can be affected by the question of whether the award creditor was awarded post-award interest or not.³¹

Enforcement proceedings against Argentina initiated by Sempra

86. Argentina has noted that upon receipt of the Award, “Sempra rushed to different jurisdictions” to enforce the Award while still open to the annulment procedure provided for in Rule 54 of the ICSID Arbitration Rules and even after the stay was provisionally granted on 30 January 2008. This course of action, according to Argentina, attests to Sempra’s bad faith and is a circumstance which, in Argentina’s view, militates in favour of continuation of the stay.
87. Sempra has responded that all these enforcement actions were initiated prior to the date on which the provisional stay was granted, *i.e.* 30 January 2008 and that two instances of requests for conservatory measures (in Paris and Boulogne-sur-Mer, respectively) concern measures which do not qualify as “enforcement”. On the occasion of the Hearing on Stay, Sempra has recognized its obligation not to enforce the Award as long as the stay remains in place.³²

May an annulment committee make its decision on stay subject to conditions?

88. Argentina has emphasized that in all annulment proceedings which have taken place since the very beginning of the history of the ICSID Convention and from the first application

²⁹ Sempra’s Observations, para. 9.

³⁰ Transcript (English), page 258, line 13.

³¹ This position is consistent with the *Enron Decision*, at para. 96.

³² Transcript (English), page 225, line 22.

for annulment in the *Klöckner* case, no single *ad hoc* committee has failed to grant a stay of enforcement of the award during the pendency of the annulment proceedings, albeit, in a number of cases, conditions have been imposed. There is, for this reason, a consistent and solidly established case law which is “unanimous in accepting the need for a continued stay of enforcement of the award pending annulment proceedings”.³³

89. Argentina further contends that the ICSID Convention does not empower an *ad hoc* committee to make the continuation of a stay subject to the posting of a financial guarantee or the imposition of any other condition. The *ad hoc* committee’s powers are limited to continuing or terminating the stay of enforcement of the award.
90. Argentina relies on the following circumstances:
 - The ICSID Convention does not include any express authority for the *ad hoc* Committee to impose conditions.
 - The negotiating history of the ICSID Convention shows that an original proposal to allow the possibility of imposing interim measures – of which the posting of a guarantee is one – was subsequently abandoned.
 - The New York Convention, which in its Article VI envisages the possibility of ordering a stay of enforcement of an award, contains an express power of the “competent authority” to order the other party to give suitable security. As the ICSID Convention does not include similar language, the conclusion must be drawn that no such power is given to the *ad hoc* committee.
 - Imposing a requirement to post a guarantee limits access to the protection of which any award debtor should be ensured, pursuant to Article 52 of the ICSID Convention and Rule 50 of the ICSID Arbitration Rules.
 - A guarantee places the award creditor in a more favourable situation than the one available under the ICSID Convention system in contradiction to the general spirit of the Convention, including Article 55 which preserves the immunity of Contracting States against enforcement.
91. In *Sempra*’s view, Argentina’s position on the absence of any power of the *ad hoc* committee to order the posting of security is unsupported by the ICSID Convention’s history and ICSID practice.
92. Additionally, *Sempra* argues, the provision of security represents a suitable counterbalance to the risk of non-compliance, should the application for annulment be rejected. Security, therefore, does not constitute a penalty for seeking annulment. The posting of security does not put the award creditor in a “better” position, as it should not be compared to any enforcement risk in the absence of security under Article 54.
93. Certain of these arguments can be dealt with quite briefly.
94. As regards Argentina’s contention that this Committee must continue the stay of enforcement because of previous case law, the Committee recognizes that previous decisions are persuasive precedents. But the Committee does not consider them to be

³³ Argentina’s Observations, para. 15.

binding precedents, not least because each decision is taken on the facts of the case to which it relates.

95. As to whether provision of a guarantee would, as Argentina contends, place the award creditor in “a better situation”, the Committee considers that the appropriate comparison is not with a scenario where the award debtor would not comply with its obligation under Article 53 (where a guarantee would obviously be “better”), but with one where the debtor would comply. In such case the guarantee would not place the award creditor in a better situation. Although not relevant for the comparison, if there is a risk that the award debtor – whether a State party or a foreign investor – would not comply with its obligation under Article 53, the safeguard inherent in provision of a guarantee would be fully warranted.
96. Neither does the Committee agree that “[t]he provision of a guarantee would penalise the party that applies for annulment”. The appropriate comparison is the scenario where annulment is not sought; in that case the award debtor would be obliged to comply with the award immediately upon its rendering, *i.e.* to make the payment that the bank guarantee is intended to ensure.
97. As regards Sempra’s argument that posting a security is a “counterbalance” to the negative effect of a stay of enforcement and should therefore be required, the Committee notes that the right to seek annulment of an ICSID award is a right under the Convention, so there is no requirement that there should be any “counterbalance” to the “negative effect” of a continued stay of enforcement, whether in the form of security or otherwise.
98. Turning therefore to the general question whether an *ad hoc* committee is empowered to require the provision of security as a condition for continuation of a stay, the Committee notes that this has not, as such, been the subject of argument to any noticeable extent in previous cases; it would seem that this power was simply assumed to exist. Not until in the *Enron Decision* was a more thorough analysis of this question undertaken. The *Enron ad hoc* committee noted that a stay had been ordered in all of the eleven cases³⁴ known to the committee and that on five of those occasions, the continuation of the stay was made conditional upon the provision of security.
99. The Committee further notes that the *Enron ad hoc* committee considered a modification of Argentina’s position on this score – or simply a statement concerning its obligation to make payment of the award if not annulled³⁵ – “as sufficing to dispel doubts that Argentina will comply with its obligations under Article 53 in the future”, and that this would make it unnecessary to require the posting of security.
100. Similarly, in the *Vivendi Decision*, Argentina was offered the possibility to reconsider its position on Article 53 and Article 54 and to submit an appropriately worded “letter of assurance”.
101. The Committee has reached the view, fortified by these precedents, that an *ad hoc* committee is empowered by the Convention to require the posting of security or another appropriate assurance of compliance as a condition of granting a stay of enforcement. The question is therefore whether this should be required in the present case.
102. The information available to the Committee is to the following effect:

³⁴ Those eleven cases are identified in footnote 10 of para. 27 of the *Enron Decision*.

³⁵ The *Enron Decision*, at para. 102.

- the *CMS Award* has not been complied with although annulment proceedings were already concluded in September 2007;
 - the opportunity extended to Argentina by the Enron *ad hoc* committee to reconsider its position on Article 53 and 54 of the ICSID Convention has gone unheeded;
 - the Vivendi *ad hoc* committee's exhortation for Argentina to issue a letter of assurance has not been satisfactorily responded to.
103. Further, despite the clear conclusions of previous *ad hoc* committees, Argentina's position on Article 53 and 54 of the ICSID Convention in the present case remains unaltered from its previous stance. Argentina still maintains before this Committee that its obligation to abide by and comply with an award under Article 53 is conditional upon recourse by the award creditor to a domestic enforcement procedure under Article 54.

The Committee's conclusion

104. In the circumstances discussed above, this Committee cannot regard Argentina's compliance with its obligations under Article 53 as being simply a matter of "doubt". On the contrary, Argentina's posture makes it clear that it will in fact *not* comply with its obligation "to abide by and comply with" an award in Sempra's favour unless and until Sempra seeks recognition and enforcement of the Award before an Argentine judicial tribunal in the manner prescribed by the national law of Argentina. At the Hearing on Stay, the representatives of Argentina were unable to assure the Committee that recognition and enforcement would automatically be granted by that tribunal.
105. The Committee therefore considers it essential that, if the stay of enforcement is to be continued in force until the Committee has decided whether the Award (or any part of it) should be annulled, Argentina must be required to give some tangible demonstration of its preparedness to comply, unconditionally and in good faith, with its obligations under Article 53 of the Convention.
106. Sempra proposes that Argentina should be required to deposit the amount of the Award, or an appropriate proportion thereof, into an escrow account, and that an appropriate arrangement should be put in place for this purpose. Sempra concedes that an appropriate period – perhaps 120 days – should be allowed for this purpose, during which the stay of enforcement would remain in force. If Argentina failed to deposit the required amount, the stay of enforcement should be terminated.
107. Argentina maintains that payment of the amount awarded would cause significant hardship to the country, having regard to its effect on liquidity not only as a consequence of freezing funds payable under the Sempra Award "but also the prospective cumulative effect of freezing the funds payable under the Awards, the annulment of which was sought by the Argentine Republic".³⁶
108. However, in the view of the Committee, the adverse effect on liquidity of an arrangement for payment into an escrow account would be no different from that which would flow directly from the requirement to pay the Award itself, which would be the outcome, should the stay be terminated.

³⁶ Argentina's Observations, para. 101.

109. In reaching its decision, the Committee does not consider that a “comfort letter” along the lines stipulated in the *CMS* or *Vivendi* decisions would provide appropriate assurances already for two reasons. First, it appears from the record before this Committee that Argentina is not prepared to grant such a letter. Second, such a letter, if granted, would only confirm and restate Argentina’s obligations under the ICSID Convention.³⁷
110. On the other hand, the Committee does not believe that it will be necessary to require Argentina to provide Sempra with security for the entire amount of the Award. The primary purpose of this measure is not to guarantee payment but to provide appropriate assurances that compliance will take place in the future if, and to the extent that, Argentina’s application for annulment is denied.
111. The Committee must also consider whether Argentina should be required to provide a bank guarantee or, as accepted by Sempra, to arrange for payment into escrow “for a portion of the award”³⁸.
112. The Committee considers that the most rational approach to this matter is that, as a tangible demonstration of good faith, Argentina should be required – as a condition of the stay being continued – to place USD 75 million in escrow, pending the Committee’s decision on Argentina’s application for annulment of the Award.
113. The Committee considers that 120 days³⁹ should be allowed from the date of issuance of this decision to enable the Parties to agree on an appropriate escrow arrangement and to arrange for the funds to be paid into such escrow. In the meanwhile, the stay of enforcement will remain in place.
114. For the avoidance of doubt, the Committee wishes to clarify that its decision to require the payment of that sum into escrow is based on its assessment of what is required to constitute an appropriate assurance that Argentina will abide by and comply with the Award to the extent that it is not annulled. It is not based on any provisional assessment of the prospects of annulment, nor is it calculated as a specific proportion of the Award.
115. The Committee must further emphasize that Argentina’s payment into escrow is not conditional upon any requirement that Sempra resort to any national procedure under Article 54 of the ICSID Convention.
116. Once the escrow arrangement is established, the Committee requires that whatever enforcement, attachment or conservatory measures Sempra has so far initiated, should not be pursued.

³⁷ As noted in the *Enron Decision*, para. 36

³⁸ Sempra’s Observations, para 9.

³⁹ This estimate was also made by Sempra on the Hearing on Stay (transcript (English version), page 233, line 17.

C. THE DECISION

117. Pursuant to Article 52(5) of the ICSID Convention and Rule 54(2) of the ICSID Arbitration Rules, the stay of enforcement of the Award will continue in effect for the duration of these annulment proceedings, on condition that Argentina places in escrow an amount of USD 75,000,000 (seventy-five million United States dollars) which amount, including accrued interest, will be collectible in its entirety by Sempra in partial discharge of Argentina's payment obligation under the Award, in the event that Argentina's application for annulment of the Award is completely rejected. If the application is partially accepted by the Committee, Sempra may collect the funds in escrow for that portion of the Award which is not annulled, without prejudice to the possible continuation of the stay allowed by Rule 54(3) and Rule 55(3) of the ICSID Arbitration Rules
118. If Argentina fails to place in escrow the sum required by the preceding paragraph within 120 days from the date of the issuance of this decision, the Committee may – at the request of Sempra – order the termination of the stay of enforcement with or without providing any opportunity for Argentina to make up for any delinquent payment.
119. In the event where Sempra considers the escrow arrangement offered by Argentina as unsatisfactory, Sempra may bring this matter to the Committee's attention by submitting a notice at the relevant time, but no later than 30 (thirty) days before expiry of the time limit set forth above. Argentina shall be entitled to submit comments and take corrective action by reason of such notice. If the Committee considers that the escrow arrangement is unsatisfactory – despite corrective action, if any – the Committee may terminate the stay pursuant to Rule 54(3) of the ICSID Arbitration Rules.
120. Any third-party cost for the establishment and maintenance of the escrow arrangement shall be for the account of Argentina.



Christer Söderlund
President of the *ad hoc* Committee