



*Procuración del Tesoro de la Nación*

BUENOS AIRES, 02 JUN 2008

TO THE SECRETARY,

I am addressing you and the members of the *ad hoc* Committee regarding the case entitled **Siemens A.G. v. Argentine Republic (ICSID Case No. ARB/02/8) - Annulment Proceeding**, in order to make some comments on the letter from the United States Department of State dated May 1, 2008.

The Republic of Argentina agrees with the US State Department that the interpretation of Articles 53 and 54 of the ICSID Convention "is of fundamental importance as they relate directly to the value of ICSID arbitration as a meaningful mechanism for the resolution of investment disputes."<sup>1</sup> Argentina also agrees that the interpretation of such provisions "has repercussions for cases well beyond the present one, including a number of disputes by U.S. investors against Argentina."<sup>2</sup>

Argentina further agrees that "Article 53(1) of the ICSID Convention addresses a Contracting State party's unequivocal and unconditional obligation to 'abide by and comply with the terms of the award'

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<sup>1</sup> Letter from Lisa J. Grosh, Acting Assistant Legal Adviser, Office of International Claims and Investment Disputes, to Claudia Frutos-Peterson, Secretary of the *ad hoc* Committee, at 1 (May 1, 2008).

<sup>2</sup> *Id.*

subject to a stay of the award pursuant to other relevant provisions of the Convention."<sup>3</sup> Finally, Argentina agrees that "Article 54 does not supersede or condition a Contracting State party's obligation under Article 53 in any way,"<sup>4</sup> subject to the clarifications developed hereunder.

However, Argentina does not agree that "Article 54 only applies after the losing State fails to pay an award pursuant to Article 53."<sup>5</sup>

Articles 53 and 54 of the ICSID Convention complement each other. While the latter applies to all Contracting States, as regards the State party to the arbitration proceeding, both articles constitute the bundle of obligations that arise for such State as of the adoption of the award.

Article 53 establishes the international law obligation to comply with the award. Article 54 establishes the legal nature of the award in the domestic legal systems of all Contracting States, including that of the State involved in the dispute.<sup>6</sup>

The obligation under Article 54 to equate ICSID awards to a final judgment of a local court is the distinctive feature of the mechanism of recognition

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<sup>3</sup> *Id.*, at 2.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*



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and enforcement of awards enshrined in the ICSID Convention. Such obligation does not negate or condition in any way the binding and final nature of ICSID awards. On the contrary, it greatly reinforces such nature vis-à-vis awards rendered in accordance with other arbitral rules.<sup>7</sup>

Further, reference to the final and binding character of awards under Article 53 does not suffice to describe the obligations and effects of the award for the State party to the dispute. In this respect, for instance, Article 32, paragraph 2, of the UNCITRAL Arbitration Rules provides: "The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay."<sup>8</sup>

UNCITRAL awards are, like ICSID awards, "final and binding upon the parties." However, it is generally admitted that UNCITRAL awards, unlike ICSID awards, are "subject to the national law of the place of enforcement and to the New York Convention

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<sup>6</sup> See Aron Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 RECUEIL DES COURS DE L'ACADEMIE DE LA HAYE 337, 400 (1972).

<sup>7</sup> Cf. Antonio Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments on Investment*, 12 ICSID REVIEW-FOREIGN INVESTMENT LAW JOURNAL 287, 332, 347-348 (1997).

<sup>8</sup> UNCITRAL Arbitration Rules, 15 December 1976, Art. 32(2), 15 ILM 713 (1976).

on the Recognition and Enforcement of Foreign Arbitral Awards."<sup>9</sup>

The reason for this fundamental difference is precisely what is provided for in Article 54. Absent this provision, a public official of a State that has been condemned to pay an award or a court of such State would regard an ICSID award as an "ordinary" foreign arbitral award. In that case, such public official or court might be entitled to refuse the recognition and enforcement of the award under Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards,<sup>10</sup> and might even be required to do so under the applicable local law, if for example the award were contrary to the *ordre public* of the forum.

One of the consequences of Article 54 is that a State is prevented from relying on defences such as those contained in the New York Convention. But a further consequence of such article is that the State that is the award debtor is at least entitled to subject compliance with ICSID awards to the same or substantially the same procedures that are applicable to compliance with final judgments of local courts against the State. It is clear, however,

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<sup>9</sup> RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 288 (2008). Cf. *World Duty Free Company Limited v. the Republic of Kenya*, ICSID Case No. ARB/00/7, Award, October 4, 2006, para. 138.

<sup>10</sup> New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 38 (1959).



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that subjecting ICSID awards to treatment less favourable than the one applicable to final judgments of local courts would be contrary to the ICSID Convention.

Without prejudice to the above, it should be noted that a U.S. District Court for the Southern District of New York has, in the case of *Sempra Energy International v. Argentine Republic*, revised an ICSID award, even without invoking any exceptional circumstance such as a conflict with *ordre public* or the like. The position adopted by the U.S. District Court is quite different to the one sustained by Argentina, which only advances that ICSID award creditors have to follow the formalities applicable to compliance with final judgments of local courts, as required by Article 54 of the ICSID Convention.

In the *Sempra* award the majority of the arbitral tribunal "concluded that in the light of the fact that post Award interest was not expressly requested in the memorials or their *Petitum*, and such memorials repeatedly referred to interest until the date of the Award, interest should, like in *Enron*, be awarded only until the date of the Award."<sup>11</sup> The issue was even the subject of a partial dissenting

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<sup>11</sup> See *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, September 28, 2007, ¶ 485.

opinion by Marc Lalonde.<sup>12</sup> However, following a request by Sempra Energy International, a U.S. District Court granted the claimant post award interest without referring, it is worth insisting, to any exceptional reason that would allow a local court to revise the express findings of an ICSID tribunal.

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In conclusion, it must be stressed that Contracting States did not intend to accord creditors of ICSID awards a better treatment than the one accorded to other private creditors of final local decisions.

Yours sincerely,

Courtesy translation

NOTE PTN No. 054/AI/08

SECRETARY OF THE *AD HOC* COMMITTEE  
OF THE INTERNATIONAL CENTRE FOR  
SETTLEMENT OF INVESTMENT DISPUTES  
Claudia FRUTOS-PETERSON

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<sup>12</sup> See *id.*, Partial Dissenting Opinion by Marc Lalonde, September 18, 2007.

<sup>13</sup> The Argentine Republic can provide the *ad hoc* Committee with the decision of the U.S. District Court for the Southern District of New York in the *Sempra Energy International v. Argentine Republic* if it is deemed convenient.