

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

Washington D.C.

In the annulment proceeding between:

**Total S.A.**

(Claimant)

v.

**Argentine Republic**

(Respondent)

**ICSID CASE NO. ARB/04/01**

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**DECISION ON STAY OF ENFORCEMENT OF THE AWARD**

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Members of the *ad hoc* Committee:

Ms. Teresa Cheng, Member  
Mr. Álvaro Castellanos, Member  
Mr. Eduardo Zuleta J., President

Secretary of the *ad hoc* Committee:

Ms. Natalí Sequeira

December 4, 2014

## List of Defined Terms

¶	Paragraph
Application	Application of Argentina for the Annulment and Stay of Enforcement of the Award, March 27, 2014
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
Argentina	The Argentine Republic
Argentina's First Submission	Argentine Republic's First Brief on Continuation of the Stay of Enforcement of the Award, dated July 11, 2014
Argentina-France BIT or the BIT or the Treaty	Agreement between the Republic of France and Argentina on the Promotion and Reciprocal Protection of Investments, entered into on June 28, 1990
Argentina's Second Submission	Argentine Republic's Second Brief on Continuation of the Stay of Enforcement of the Award, dated August 12, 2014
Award	<i>Total S.A. v. Argentine Republic</i> , ICSID Case No. ARB/04/01, November 27, 2013
Claimant	Total
Committee	<i>ad hoc</i> Committee appointed for the annulment proceeding
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention or Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
Parties	The Argentine Republic and Total S.A.
Respondent	Argentina
Total S.A.	Total
Total's First Submission	Total's Submission Opposition to Stay of Enforcement, dated July 11, 2014
Total's Second Submission	Total's Second Submission Opposing the Stay of Enforcement, dated August 12, 2014
TR	Transcript

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## **I. THE PARTIES**

[1] The Applicant is Total S.A. In this proceeding Total S.A. is represented by:

Mr. Nigel Blackaby  
Freshfields Bruckhaus Deringer US LLP  
Washington, DC, USA

Mr. Noah Rubins  
Mr. Ben Love  
Freshfields Bruckhaus Deringer LLP  
Paris, France

Mr. Sam Hunter Jones  
Freshfields Bruckhaus Deringer LLP  
London, United Kingdom

Mr. Luis Erize  
Mr. Sergio Porteiro  
Abeledo Gottheil Abogados SC  
Buenos Aires, Argentina

[2] Respondent is the Argentine Republic. In this proceeding, the Argentine Republic is represented by:

Dra. Angelina Abbona  
Procuradora del Tesoro de la Nación  
Procuración del Tesoro de la Nación  
Buenos Aires, Argentina

[3] Argentina seeks the annulment of the Decision on Objections to Jurisdiction rendered on August 25, 2006, the Decision on Liability rendered on December 27, 2010 and the Final Award rendered on November 27, 2013 in ICSID Case No. ARB/04/01, *Total S.A. v. Argentine Republic*, whereby the tribunal declared it had jurisdiction to entertain the dispute under the Argentina-France BIT. Under the Decision on Liability the Tribunal upheld Total's submission concerning Argentina's obligation to grant Fair and Equitable Treatment to Total S.A. under the Argentina-France BIT and in the Final Award, the Tribunal ordered Argentina to compensate Total for the damages suffered for the violations of the Argentina-France BIT.

## **II. PROCEDURAL HISTORY**

[4] On March 27, 2014, Argentina filed an application requesting the Annulment of the Decision on Jurisdiction rendered on August 25, 2006,

the Decision on Liability rendered on December 27, 2010 and the Final Award rendered on November 27, 2013, in ICSID Case No. ARB/04/01, *Total S.A. v. Argentine Republic*. The Application for Annulment was submitted within the time period provided for by Article 52(2) of the ICSID Convention.

- [5] In its Application, Argentina requested the Stay of Enforcement of the Award provided for in Article 52(5) of the ICSID Convention.
- [6] On April 2, 2014, the Secretary-General of ICSID registered the Application for Annulment of the Arbitral Award in accordance with Arbitration Rule 50(2)(a) of the Arbitration Rules and provisionally stayed the enforcement of the Award pursuant to Arbitration Rule 54 (2).
- [7] On May 6, 2014, the Secretary-General of ICSID informed the parties the proposed names for the appointment of the *ad hoc* Committee. The Secretary-General of ICSID recommended Ms. Teresa Cheng, a national of China, Mr. Alvaro Castellanos, a national of Guatemala and Mr. Eduardo Zuleta, a national of Colombia.
- [8] On May 21, 2014, ICSID Legal Counsel communicated to the arbitrators their appointment in the *ad hoc* Committee. On May 27, 2014, the Secretary-General informed the Parties that the *ad hoc* Committee had been constituted. The Committee was composed of Ms. Teresa Cheng, Mr. Alvaro Castellanos and Mr. Eduardo Zuleta, as President of the Committee. The Parties were also informed that Ms. Natali Sequeira, ICSID Legal Counsel, would be the Secretary of the Committee.
- [9] On June 9, 2014, the Committee requested the Parties to confer on the date of the First Session and the timetable for the exchange of written submissions on Argentina's request for the continuation of the stay of enforcement of the Award. On June 16, 2014, Total submitted a letter to the Committee on behalf of both Parties requesting for additional time to confer on these matters. On June 18, 2014, the Committee granted additional time until June 26, 2014.
- [10] On June 26, 2014, the Parties agreed to hold the First Session in Washington D.C. on August 15, 2014. In addition, the Parties agreed to file their First Submissions on the Stay of Enforcement on July 11, 2014, with translations due 18 July, and their Second Submissions on the Stay of Enforcement on July 25, 2014, with translations due 1 August. Argentina confirmed that this was the agreement reached by the Parties by letter dated June 30, 2014.
- [11] On July 11, 2014, the Parties filed their First Submissions on the Stay of Enforcement.

- [12] On July 11, 2014, after conferring with the Parties, the *ad hoc* Committee changed the date of the First Session to October 6, 2014.
- [13] On July 15, 2014, the Secretary of the Committee circulated a Draft of the First Procedural Order.
- [14] By letter dated July 24, 2014, Argentina requested the Committee to extend time limits for the discussion of the Parties on Draft Procedural Order No. 1 until July 28, 2014 and to extend the deadline of the Second Submission on the Request for Stay of Enforcement of the Award until August 12, 2014. Claimant confirmed its agreement to extend these two deadlines by email dated July 25, 2014. On the same date, the Committee granted the two time extensions. The Parties submitted their comments and points of difference to the First Procedural Order on July 29, 2014.
- [15] On August 12, 2014, the Parties presented their Second Submissions on the Stay of Enforcement.
- [16] The First Session of the Committee was held on October 6, 2014 in Washington D.C. During the First Session the Parties made oral submissions on Argentina's request for the continuation of the stay of enforcement and on the topics of the First Procedural Order on which the Parties had not reached agreement.
- [17] On October 21, 2014, the Committee issued Procedural Order No. 1 whereby the Parties agreed on the number of written pleadings that each of them would have, the corresponding deadlines for their submission and reserved dates for a hearing on annulment. The Parties confirmed that the Committee had been properly constituted in accordance with the ICSID Convention and the Arbitration Rules. It was agreed that the proceeding would be conducted in accordance with the ICSID Arbitration Rules in effect as of January 1, 2003. The Parties agreed on several other procedural matters, *inter alia*, that the procedural languages would be English and Spanish, and that the place of the proceedings would be the seat of ICSID in Washington, D.C.
- [18] The Committee has conducted its deliberations on the request for the continuation of the stay of enforcement of the Award. The Committee's Decision has taken into account all written submissions and oral arguments of the Parties.

### **III. THE POSITION OF THE PARTIES CONCERNING THE STAY OF ENFORCEMENT OF THE AWARD**

- [19] Following is a summary of the claims and reliefs of the Parties on the continuation of the stay of enforcement of the Award. The Committee has carefully reviewed all claims, reasoning, documents and legal

authorities submitted by the Parties on this matter. The fact that an argument, document or legal authority is not cited or referred to in the summary does not mean that the Committee has not considered it.

- [20] The Argentine Republic requests the *ad hoc* Committee to order the continuation of the stay of enforcement of the Award until a decision on annulment is rendered in these proceedings, and that no conditions are imposed on Argentina in order to stay the execution of the Award.
- [21] Total S.A. requests the *ad hoc* Committee to dismiss Respondent's request to continue the stay of enforcement of the Award pending the Committee's decision on annulment of the Award. In the alternative, Total requests the *ad hoc* Committee to order the Respondent: (i) to provide financial security in the form of a bank guarantee or a payment into escrow sufficient to satisfy the Award in full; (ii) to provide a letter confirming its intention to satisfy the Award as required under Article 53 of the ICSID Convention, including its intention not to subject satisfaction of the Award to any further legal proceeding or remedies; and (iii) to declare that Respondent's failure to comply with these two orders will result in immediate lifting of the stay of enforcement of the Award.

#### **A. Position of Argentina**

- [22] In Argentina's view, the Committee must take into account the seriousness of the grounds invoked in its request in order to grant the stay of the Award<sup>1</sup>. The merits of Argentina's request for annulment are sufficiently serious and cannot be considered a dilatory measure or superficial in nature<sup>2</sup>. In any case, contrary to what has been suggested by Total, the merits of the request for annulment shall not be considered at this stage<sup>3</sup>.
- [23] Argentina holds that it is not acceptable to argue that applying for annulment is a dilatory tactic.<sup>4</sup> Moreover, a party cannot be considered to be acting in bad faith or as using dilatory tactics because it has exercised its rights under the ICSID Convention. The opportunity to apply for annulment of an award is a fundamental right under the ICSID Convention<sup>5</sup>, a central feature of the ICSID arbitration system that confers stability and reliability.<sup>6</sup>
- [24] Regarding the applicable standard to continue the stay of enforcement, Argentina quotes to the decision in *Patrick Mitchell v. Democratic*

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<sup>1</sup> Argentina's First Submission (Translation), ¶12

<sup>2</sup> Tr. 8:15-19

<sup>3</sup> Argentina's Second Submission, ¶18-20

<sup>4</sup> Tr. 22:13-19

<sup>5</sup> Tr. 79:16-17

<sup>6</sup> Tr. 8:20-9:2

*Republic of the Congo*, to argue that there is no indication as to what circumstances require staying the enforcement of the Award and therefore that the Committee is free to evaluate the arguments of the Parties in view of the particularities of each case.<sup>7</sup>

- [25] Based on the decisions in *Azurix Corp. v. Argentine Republic* ("Azurix") *Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v. Argentine Republic* ("Enron") and *Victor Pey Casado y Fundación Presidente Allende v. Chile* ("Pey Casado"), Argentina submits, that in general, a stay should be granted under Article 52 (5) of the Convention, if requested, and there are no exceptional circumstances in the instant case that may render such stay inadmissible.<sup>8</sup> In this regard, the practice of annulment committees, as acknowledged in *Elsamex, S.A. v. Honduras* ("*Elsamex*") and in *Enron*, has been to grant the continuation of the stay.<sup>9</sup> The *Pey Casado* committee concluded that it had been the practice of the committees to grant the stay of enforcement of the award in a practically automatic manner.<sup>10</sup>
- [26] Argentina submits that there are sufficient guarantees to ensure its compliance of the Award.
- [27] On October 2013, Argentina entered into settlement agreements concerning the final awards in the following cases: *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. (formerly "Compagnie Générale des Eaux") v. Argentine Republic*, *Azurix, CMS Gas Transmission Company v. Argentine Republic*, *Continental Casualty Company v. Argentine Republic*, and *National Grid P.L.C. v. Argentine Republic* (UNCITRAL Arbitration).<sup>11</sup>
- [28] Argentina claims that the settlement agreements reached in October 2013 were prompted by requests of the investors, and that these investors have affirmed that they are satisfied with the settlement. It adds that creditors in *Impregilo S.p.A v. The Argentine Republic* ("*Impregilo*") and *El Paso Energy International Company v. The Argentine Republic* ("*El Paso*") have still not made contact with Argentina to enforce the Awards and have not started proceedings to do so.<sup>12</sup>
- [29] In addition, Argentina asserts that its legal system is, in itself, an adequate guarantee of compliance with the BIT, the ICSID Convention and any award rendered pursuant to those instruments, because under the laws of Argentina international treaties take precedence over domestic laws.<sup>13</sup> In 1992 the Argentine Supreme Court handed down a

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<sup>7</sup> Argentina's First Submission (Translation), ¶7

<sup>8</sup> Argentina's First Submission (Translation), ¶15; Argentina's Second Submission, ¶19-10

<sup>9</sup> Argentina's First Submission (Translation), ¶18; Argentina's Second Submission, ¶111-12

<sup>10</sup> Tr: 85:5-16

<sup>11</sup> Argentina's First Submission (Translation), ¶110

<sup>12</sup> Argentina's Second Submission, ¶25-30; Tr: 15:6-16

<sup>13</sup> Argentina's First Submission (Translation), ¶111; Argentina's First Submission, ¶21

decision that established precedence of treaties over domestic laws (Case of *Ekmekdjian v. Sofovich*) and, in 1994 the Constitution was amended to include in Article 75 (22) an express provision in this regard.<sup>14</sup> Moreover, Argentinean judges must do everything within their reach to prevent the State from being found internationally liable.<sup>15</sup>

- [30] The *CMS* committee recognized the treatment of international law in Argentinian law and concluded that the commitments of Argentina under the ICSID Convention were sufficient.<sup>16</sup> The *Azurix* committee stated that the primary security of the award were the obligations assumed by Argentina under the Convention<sup>17</sup>. According to Argentina, the decision by the *CMS* committee signals that Article 54 of the ICSID Convention is the key issue and that the Committee must be satisfied that the obligations have been incorporated into domestic law when deciding the stay.<sup>18</sup>
- [31] Argentina also refers to the decision of the *ad hoc* committee in the *Elsamex* case, according to which an award has to be complied with under the specific terms of Article 54 of the ICSID Convention and that Article 53 of the ICSID Convention is equally applicable because it sets forth the binding nature of the award.<sup>19</sup>
- [32] In Argentina's view, Articles 53 and 54 of the ICSID Convention shall be interpreted jointly. Article 53 of the ICSID Convention establishes the final and binding nature of ICSID awards and Article 54 cannot be understood to limit this provision.<sup>20</sup> Argentina posits that under Article 54 of the ICSID Convention, investors must follow the domestic proceedings to enforce an award<sup>21</sup>, yet it clarifies that these are not confirmation or exequatur proceedings.<sup>22</sup>

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<sup>14</sup> Argentina's First Submission (Translation), ¶111, ¶17-20

<sup>15</sup> Tr: 23: 5-22

<sup>16</sup> Argentina's First Submission (Translation), ¶113

<sup>17</sup> Argentina's First Submission (Translation), ¶114

<sup>18</sup> Tr: 27: 6-16 In its first submission, Argentina added that "(...) the conclusions of the annulment committees in *CMS* and *Azurix* should be sufficient in order to provide the necessary guarantees that the Award will be complied with in the event that this Committee decides to reject the Application for Annulment (...)" Argentina's First Submission (Translation), ¶116

<sup>19</sup> Tr: 31:10-14

<sup>20</sup> Argentina's Second Submission, ¶37

<sup>21</sup> Argentina's Second Submission, ¶38

<sup>22</sup> Tr: 81:4-6. In response to a question by the Committee, Argentina explained the manner in which this domestic proceedings work: "So, the procedure is to appear before the designated authority, and then that is taken to the judge, and the judge decides whether the Decision is paid based on the availability of funds. And this is the same procedure followed for final Decisions, but this has nothing to do with exequatur because the idea is with this standard to make a foreign Decision valid in the territory (...)" Tr: 137:16-138:1 Argentina further clarified that: "This is an administrative court judge that verifies the existence of the funds. If the funds are not available the Executive is requested to make those funds available, and then if the Executive does not make those funds available, assets are attached so that that execution is carried out immediately. It doesn't mean that if the Executive doesn't provide the funds, this is an order that will not be fulfilled." Tr: 143:17-144:3. In addition, the parties discussed on the requirement to pay a 3 per cent charge to initiate this process. Tr: 140:11-142:22

- [33] Argentina disagrees with Total's interpretation of Articles 53 and 54 of the Convention because it does not consider that Article 54 applies only in cases of breach of the Award. To hold this proposition would be to modify the text of the treaty.<sup>23</sup>
- [34] Argentina also advances that the balance of interest in this case favors the continuation of the stay of the award.
- [35] On the one hand, continuing the stay of enforcement of the Award will not be detrimental for Claimant since the interest accrued during the annulment proceedings would compensate Total for the passage of time from the issuance of the Award until its payment.<sup>24</sup>
- [36] On the other hand, it would be difficult, if not impossible, for Argentina to recover amounts paid for an award rendered null<sup>25</sup>. This factor was taken into account by the *CMS, Enron* and *El Paso* committees.<sup>26</sup> The risk of attachment by third parties of sums paid to Total inclines the balance of interest towards staying the enforcement of the award.<sup>27</sup> In addition, the consequences of not having the sums paid would be very severe for a developing country like Argentina.<sup>28</sup>
- [37] During the hearing, Argentina contested Total's assertions on the factors that should be taken into account by an *ad hoc* committee to lift the stay of execution of an award. First, Argentina argued that annulment proceedings are not a remedy to deal with enforcement of an award, in those instances in which the State wishes to repudiate it.<sup>29</sup> Moreover, according to Argentina, most ICSID annulment committees, and specifically the committee in *El Paso*, have acknowledged that it is not the committee's task to ensure compliance with the award.<sup>30</sup> Second, Argentina is not repudiating the award; it recognizes that the Award exists and will abide by its conclusions, once it has been analyzed by the Committee.<sup>31</sup> Argentina is the country that has enforced more ICSID awards in history<sup>32</sup> and it has complied with its international obligations.<sup>33</sup> Third, Argentina assesses the prejudice that might be caused to Total and concludes that the award equals less than 1 percent of the sales of Total in 2013.<sup>34</sup> Yet, as has been publicly reported, Argentina is undergoing a very complex financial situation, and it could suffer great harm in committing resources that could be otherwise

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<sup>23</sup> Tr: 114:1-17

<sup>24</sup> Argentina's First Submission (Translation), ¶122

<sup>25</sup> Argentina's Second Submission, ¶43

<sup>26</sup> Argentina's Second Submission, ¶43-46

<sup>27</sup> Argentina's First Submission (Translation), ¶24; Argentina's Second Submission, ¶72; Tr: 34:17-36:8

<sup>28</sup> Argentina's Second Submission, ¶49

<sup>29</sup> Tr: 11:8-18

<sup>30</sup> Tr: 12:8-12

<sup>31</sup> Tr: 13:16-22

<sup>32</sup> Tr: 14:5-16

<sup>33</sup> Tr: 16:5-19

<sup>34</sup> Tr: 17:11-13

earmarked to social assistance and other public programs.<sup>35</sup> Thus, Argentina considers that in the event the enforcement of the award is stayed, it cannot be affirmed that a greater harm would be caused to Total.<sup>36</sup> Payment of interest by Argentina would still be available as a remedy in the event the Committee determines the award should not be annulled.<sup>37</sup>

- [38] Regarding the allegation of Total as to the dilatory nature of the application for annulment, Argentina asserts that Total has not presented evidence to support this claim.<sup>38</sup> It refers to the decisions in *Azurix* and *Enron*, where the committees stated that: "*...the fact that a State is going to lose the annulment of all Awards that are adverse to it does not mean that this is a dilatory tactic. Rather, it means it is a right that is expressly provided for under Article 52 of the ICSID Convention, and as you know, it also implies the responsibility of a public official, who, if they understand that there are grounds for annulment, it is their duty and their right to apply for annulment of the Award.*"<sup>39</sup>
- [39] Finally, Argentina opposes Total's subsidiary request that the stay be granted only with the provision of a financial guarantee. Relying on the decision of the *ad hoc* committee in *Azurix*, Argentina holds that requiring financial security to stay the execution of an award is contrary to the ICSID Convention.<sup>40</sup> Also, Argentina posits that at the time of negotiation of the ICSID Convention, the drafters did not include the possibility of posting guarantees to stay the execution of an award.<sup>41</sup>
- [40] Argentina, further relies on the decision of the *El Paso* committee indicating that the requirement to provide a guarantee was not provided for in the ICSID Convention or in the Arbitration Rules and that "*(...)this would be tantamount to punishing the State asking for the annulment because the State would have to pay a price to maintain the stay while everything is being processed and that this sanction is not provided for in any of the rules applicable to this case.*"<sup>42</sup>
- [41] In addition, Total has failed to demonstrate circumstances that require a financial security. As stated above, Argentina's legal system is sufficient guarantee of compliance. The delay in payment is an inherent risk to the annulment proceedings and there is no risk of non-payment since creditors to Argentinian awards have been paid.<sup>43</sup>

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<sup>35</sup> Tr: 17:17-18:4

<sup>36</sup> Tr: 18:5-19

<sup>37</sup> Tr: 18: 20-19:2

<sup>38</sup> Tr:20:8-18

<sup>39</sup> Tr: 21: 4-12

<sup>40</sup> Argentina's Second Submission, ¶53-54

<sup>41</sup> Argentina's Second Submission, ¶56-60

<sup>42</sup> Tr: 33:15-20

<sup>43</sup> Argentina's Second Submission, ¶61-64

- [42] Also, Argentina claims that there might be a risk of attachment by third parties of the financial guarantee.<sup>44</sup> During the hearing, Argentina explained that the *Enron* committee considered the possibility of constituting an escrow account in a foreign bank, and the risk that, if Argentina prevailed in the annulment proceedings, this financial security would be attached by third parties. The *Enron* committee concluded that it was not advisable to be exposed to this risk. Argentina suggests that this risk exists today in light of its current disputes with vulture funds.<sup>45</sup>
- [43] Argentina further holds that granting a financial security would pose a burden on the party that requested annulment<sup>46</sup> and would place the investor in a better position than it would have been if annulment proceedings had not been initiated. In its view, imposing a financial security is contrary to the principles of state immunity that have not been waived by States under the ICSID Convention.<sup>47</sup>

## B. Position of Total

- [44] Total submits that the baseline of ICSID Awards is that awards are immediately enforceable, except due to compelling reasons. Argentina cannot overcome this presumption in this case.<sup>48</sup>
- [45] According to Total, the request for annulment and for a continuation of the stay filed by Argentina seeks to delay the satisfaction of an adverse arbitral award as it has been done by Argentina with other awards in the past.<sup>49</sup> This is part of a systematic Government strategy to defy the core obligations of the ICSID Convention and to obey the dictates of ICSID Awards immediately and unconditionally.<sup>50</sup>
- [46] According to Total, Article 52(5) of the ICSID Convention is the starting point for assessing Argentina's request for continuation of the stay of enforcement: *"This provision reflects the default position that ICSID awards are immediately enforceable upon issuance and, absent a ruling from the Committee to extend a temporary stay of enforcement, remain enforceable throughout the annulment process. Granting a stay of enforcement is by no means automatic. It is a form of extraordinary relief, available only if Argentina is able affirmatively to demonstrate that the circumstances require a stay."*<sup>51</sup>
- [47] In addition to Article 52(5) of the ICSID Convention, the Committee shall turn to Article 53, according to which the obligation to comply with

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<sup>44</sup> Argentina's Second Submission, ¶72

<sup>45</sup> Tr: 33:21- 36:8

<sup>46</sup> Argentina's Second Submission, ¶67

<sup>47</sup> Argentina's Second Submission, ¶73-78

<sup>48</sup> Total's First Submission, ¶12

<sup>49</sup> Total's First Submission, ¶13

<sup>50</sup> Tr: 37: 16-21

<sup>51</sup> Total's First Submission, ¶19

ICSID Awards arises as soon as they are issued, the only exception being the stay of enforcement.<sup>52</sup> Before turning to other decisions, the Committee shall first interpret the ICSID Convention as an international treaty in accordance with its plain meaning: "*These words, both those in Article 52(5) stating the default position that the stay should be lifted and Article 53 dictating that Awards must be complied with immediately, have only one meaning. There is no ambiguity about them, and there is no place to refer, for example, to subsidiary sources of international law, such as, for example, the Opinions of learned commentators or the Opinions of other ad hoc committees.*"<sup>53</sup>

- [48] The drafters of the Washington Convention rejected a proposal to make stay of enforcement automatic.<sup>54</sup> Total also refers to the decision in the *Kardassopoulos and Fuchs v Georgia* ("*Kardassopoulos*"), to support its proposition that under Article 52 (5) of the ICSID Convention, awards are immediately enforceable and that granting a stay is not automatic.<sup>55</sup> As stated by the *Kardassopoulos* committee and the committee in *SGS Société Générale de Surveillance S.A. v Republic of Paraguay* ("*SGS v. Paraguay*"), the Party requesting the stay of enforcement bears the burden of demonstrating that there are circumstances requiring stay of enforcement.<sup>56</sup> Argentina has failed to identify any circumstances that might merit the continuation of the stay.<sup>57</sup>
- [49] Total considers that Argentina has erroneously referred to the decision by the *Enron* committee to state that there is a presumption in favor of granting the stay, but ignores that most recent committees have "*sought to correct this counter-textual interpretation of Article 52 (5) of the ICSID Convention*".<sup>58</sup>
- [50] Total admits that the Convention offers no guidance as to the particular considerations that should be taken into account to determine whether an extension of the stay is required<sup>59</sup>. However, it points out to three considerations, among the variety of factors that have been taken into account by prior ICSID *ad hoc* committees<sup>60</sup>: (i) dilatory motives of the application for annulment; (ii) likelihood of compliance with the award in case it is upheld and (iii) the balance of the respective interests of the parties<sup>61</sup>.
- [51] On the first consideration, Total argues that Argentina's request for annulment is part of a government policy implemented to extend

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<sup>52</sup> Tr: 39:18-40:3

<sup>53</sup> Tr: 40:11-19

<sup>54</sup> Tr: 41:1-5

<sup>55</sup> Tr: 41:7-14

<sup>56</sup> Total's First Submission, ¶19; Total's Second Submission, ¶18; Tr:41:21-42:2

<sup>57</sup> Total's Second Submission, ¶18

<sup>58</sup> Total's Second Submission, ¶14

<sup>59</sup> Tr: 42: 6-9

<sup>60</sup> Total's First Submission, ¶10-11

<sup>61</sup> Tr: 42:15-19

investment treaty arbitrations and to delay payment of the award.<sup>62</sup> Argentina has sought to nullify every single adverse award rendered against it, including 11 ICSID annulment proceedings and two court challenges for UNCITRAL awards<sup>63</sup>; therefore, a challenge to this Award was preordained.<sup>64</sup> Argentina has been successful in only 3 out of 13 challenges; the vast majority of awards have survived challenge.<sup>65</sup>

- [52] Argentina has raised the same three grounds for annulment in other proceedings and it has based its complaints on the same facts and issues, which ultimately lie in a disagreement with the merits of the Tribunal's decision.<sup>66</sup>
- [53] Determining whether Argentina's application for annulment is dilatory may require a high-level review of the grounds for annulment of Article 52 that were invoked and the likelihood that the alleged defects in the Award have any merit.<sup>67</sup> Total stresses that no ICSID rules of procedure have been identified by Argentina as the bases for the allegation on a serious departure of a fundamental rule of procedure and that the alleged defects of the Award concern the merits of the Tribunal's decisions that have been alleged consistently by Argentina in other annulment proceedings.<sup>68</sup>
- [54] As to the second consideration, Total argues that Argentina has not complied with its enforcement obligations under the ICSID Convention. Citing to *Sempra Energy International v The Argentine Republic* ("*Sempra*"), Total argues that the prospects of compliance are essential to the decision on whether to terminate the stay<sup>69</sup>; if the Respondent State intends to defy the Award, there will be no justification for assisting it for a year or more by suspending the treaty remedy for non-compliance.<sup>70</sup>
- [55] Total conceives Argentina's interpretation of its enforcement obligations under the ICSID Convention as nihilist.<sup>71</sup> In its view, the plain meaning of this provision is that Argentina is under an immediate obligation to satisfy awards that are not subject to a stay of enforcement.<sup>72</sup> Contrary to what has been stated by Respondent, Article 54 of the ICSID Convention does not require award creditors to bring their awards to its courts before it is obligated to satisfy the Award.<sup>73</sup> Respondent's

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<sup>62</sup> Total's First Submission, ¶12

<sup>63</sup> Tr: 43:11-16

<sup>64</sup> Tr: 44: 8-11

<sup>65</sup> Tr: 46:7-47:10

<sup>66</sup> Total's First Submission, ¶13-14

<sup>67</sup> Tr: 49: 6-10

<sup>68</sup> Tr: 49:15-50:12

<sup>69</sup> Total's First Submission, ¶21

<sup>70</sup> Tr: 51: 1-4

<sup>71</sup> Total's First Submission, ¶22

<sup>72</sup> Total's First Submission, ¶22

<sup>73</sup> Total's First Submission, ¶22

interpretation was rejected by the *Sempra* committee and is contrary to other authorities<sup>74</sup>.

- [56] Total accepts that under the Constitution of Argentina international law takes precedence over domestic law.<sup>75</sup> However, it suggests that it is for Argentina itself to determine the content of its obligations under international law, and that in the case of the ICSID Convention, these obligations have been reduced to their minimum.<sup>76</sup>
- [57] Total counters Argentina's arguments on the need to have a domestic enforcement mechanism by stating that the "*positive obligation under Article 54 to provide for a domestic enforcement mechanism cannot affect Argentina's obligation under Article 53 to satisfy an award without qualification*".<sup>77</sup> The committee in *El Paso* criticized Argentina's stance on requiring procedures for the compliance of awards.<sup>78</sup> Total adds that Article 54 of the ICSID Convention is a remedy for cases in which States do not comply with Article 53 of the ICSID Convention.<sup>79</sup>
- [58] Additionally, Total argues that Argentina routinely defies its international obligations, particularly its financial obligations.<sup>80</sup> Argentina requires creditors to start lengthy proceedings before its domestic courts in order to satisfy the award and uses delay to obtain settlements with investors whereby only a portion of the amount owed is paid.<sup>81</sup>
- [59] Referring to the recent settlement agreements between Respondent and award creditors, Total affirms that partial payment may well constitute the extinguishment of obligations under the Award, but it does not imply compliance with Article 53 of the Convention. The Convention requires States to pay Awards and does "*not envisage partial payment in government bonds of dubious value and liquidity*".<sup>82</sup> Furthermore, in these settlements, the time waited by the investor was not compensated because only a fraction of the actual value of interests recognized by the Award was included.<sup>83</sup>
- [60] In addition, Total argues that prior committees did not have the benefit of "*Argentina's now extensive record of non-compliance when they decided to maintain the stay of enforcement in those proceedings*".<sup>84</sup>

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<sup>74</sup> Total's First Submission, ¶23

<sup>75</sup> Tr: 55:19-22

<sup>76</sup> Tr: 55:19-56:4

<sup>77</sup> Total's Second Submission, ¶9

<sup>78</sup> Second Submission, ¶10; Tr: 58:19-59:4

<sup>79</sup> Tr: 59:20-60:7

<sup>80</sup> Tr: 51: 6-12

<sup>81</sup> Total's First Submission ¶22-27; Tr: 52: 1-14

<sup>82</sup> Tr: 52:15-53:1

<sup>83</sup> Tr: 53:5-13

<sup>84</sup> Total's Second Submission, ¶11-12

- [61] Finally on this second factor, Total regards Argentina's interpretation of Article 53 as demonstrative of its lack of intention of complying with Article 53 and with the Award, in case Argentina's application for annulment is rejected.<sup>85</sup> This was the conclusion of the *Sempra* committee.<sup>86</sup>
- [62] The third factor upon which Total relies its request for lifting the stay of enforcement is the balance of interests. Argentina's intention to evade payment shifts the balance of interests in favor of lifting the stay, since Total risks the total destruction of the value of its Award.<sup>87</sup> The recovery of Argentina since the 2000 crisis is in the public record and the Award is equivalent to 1/100<sup>th</sup> of Argentina's foreign exchange reserves.<sup>88</sup> Therefore, Argentina's arguments on impecuniosity offer no justification to extend the stay of enforcement of the Award.<sup>89</sup>
- [63] In addition, it is unlikely that Argentina could not recover any amounts seized by an award creditor if the award was eventually annulled.<sup>90</sup> Total has no intention of retaining assets in case the award is annulled and Argentina could eventually attach its assets in Argentina or elsewhere.<sup>91</sup> The existence of third-parties that might eventually attach assets in satisfaction of Argentina's international obligations is of no concern to this Committee, and evidences Argentina's non-compliance with its international obligations.<sup>92</sup>
- [64] Moreover, Total argues that it has a right under the Convention to full payment as of the date of the Award, and that it would be prejudiced by any reduction or suspension of that right.<sup>93</sup>
- [65] Total has not received the money to which it is entitled as of late 2012 and it is clear from Argentina's submissions that the Award will not be paid in full regardless of the outcome of these proceedings, and that it must initiate time-consuming processes to attach Argentina's assets elsewhere.<sup>94</sup> The longer Total is forced to wait, the more difficult and costly the enforcement proceedings become.<sup>95</sup> During this time, Argentina will obtain more leverage over Total to push for a settlement in extremely favorable conditions for it, as it did in the past round of settlements.<sup>96</sup>

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<sup>85</sup> Tr: 61:9-18

<sup>86</sup> Tr: 61:19-62:6

<sup>87</sup> Total's First Submission, ¶28, ¶31

<sup>88</sup> Total's First Submission, ¶29; Tr: 65: 10-20

<sup>89</sup> Total's First Submission, ¶29

<sup>90</sup> Total's First Submission, ¶30

<sup>91</sup> Total's First Submission, ¶30

<sup>92</sup> Tr: 67:7-68:21

<sup>93</sup> Tr: 62: 8-14

<sup>94</sup> Tr: 62: 15-20

<sup>95</sup> Tr: 62:22-63:4

<sup>96</sup> Tr:62:22-63:10

- [66] Total submits that the precedent of other award creditors that had to wait over six years to receive partial payment poses a substantial risk over Total's recovery of interests ordered in this proceeding.<sup>97</sup> Interests fixed in the Award were set at a low rate and will not be able to compensate for the opportunity costs to Total of not having these resources promptly.<sup>98</sup>
- [67] Alternatively, Total requests that in the event the stay of enforcement is granted, it should be conditioned on Argentina providing financial security in the form of escrow funds or bank guarantee<sup>99</sup> because Argentina has demonstrated that it does not intend to honor adverse arbitral awards.<sup>100</sup> A letter assuring compliance with the Award shall not suffice as a condition to extend the stay of enforcement for Argentina has not honored them in the past.<sup>101</sup> However, such a letter could be provided in addition to a financial security, in the event that the Committee considers it necessary to extend the stay of enforcement.<sup>102</sup> In such letter, Argentina should not require procedural preconditions to make payments under the Award: payment shall be immediate.<sup>103</sup>
- [68] Total affirms that the Committee has the authority to require security as a condition to extending the stay "*[s]ince you have full discretion entirely to reject an application to extend the Stay of Enforcement, it must be the case that you have the lesser power to approve the application subject to appropriate protection of the judgment creditors' rights*".<sup>104</sup>
- [69] In addition, Total submits that in over half the cases where ICSID annulment committees have granted a stay of enforcement, they have done so on the condition that the losing party posts security or some other form of assurance.<sup>105</sup> The practice of ICSID *ad hoc* annulment committees is to grant stay of enforcement of the award on the condition that a bond is provided for the full amount of the award.<sup>106</sup>
- [70] Claimant contests Argentina's submission that ordering security would be contrary to the ICSID Convention. Argentina cannot expect to seek annulment without payment of the Award, because Article 53 of the ICSID Convention obliges it to pay awards immediately.<sup>107</sup> For this reason, security will not place Total in a better position; it will place it in

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<sup>97</sup> Total's Second Submission, ¶14

<sup>98</sup> Tr: 64:2-22

<sup>99</sup> Tr: 69:20-21

<sup>100</sup> Total's First Submission, ¶4

<sup>101</sup> Total's First Submission, ¶35

<sup>102</sup> Total's First Submission, ¶15

<sup>103</sup> Tr: 76: 1-6

<sup>104</sup> Tr: 70: 10-15

<sup>105</sup> Tr: 72:3-7

<sup>106</sup> Tr: 73:5-14 (Quoting Paul Friedland's paper on RA-30)

<sup>107</sup> Tr: 71:1-7

a position nearly equivalent to that which would have existed if Argentina had paid in the first place.<sup>108</sup>

#### IV. ANALYSIS OF THE *AD HOC* COMMITTEE

- [71] The parties do not dispute that pursuant to Article 53 of the ICSID Convention arbitral awards are final and binding. The parties also agree that a party to an arbitration under the ICSID Convention has the right to request annulment of the award under the grounds provided for in Article 52 of the ICSID Convention. Argentina considers that it is a fundamental right that is part of the ICSID system.
- [72] Argentina and Total also seem to agree on the basic standards that other committees have identified for the granting or extension of the stay of enforcement. They differ, however, on the interpretation and application of such standards and on whether the burden of such standards lies on Argentina or on Total.
- [73] It is well established, first, that annulment under the ICSID system is an exceptional remedy<sup>109</sup> that applies only under the very limited grounds provided for under Article 52 of the Convention and second, that such grounds do not constitute an appeal or allow for a review of the merits of the case.
- [74] These undisputed principles – finality of the award and exceptional nature of the annulment – that derive from Articles 52 and 53 of the ICSID Convention must be considered in the interpretation of the provisions related to the stay of enforcement.<sup>110</sup>
- [75] The rules on the stay of enforcement of the award are contained in Article 52 of the ICSID Convention and Arbitration Rules 52 to 54. Pursuant to such provisions:
- (a) If the application for annulment contains a request for stay of enforcement of the award, the Secretary-General of ICSID shall order the provisional stay thereof.
  - (b) Such provisional stay is temporary and if no request is made for the committee to continue the stay, it shall automatically terminate;
  - (c) Unless the committee decides to continue the stay, it shall automatically terminate.

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<sup>108</sup> Tr: 71:14-18

<sup>109</sup> As stated by the ad-hoc committee in *SGS v Paraguay* "The actions taken by the "Contracting Parties", who created the ICSID system must lead us to the conclusion that the binding nature of the award is the rule, whereas its annulment is the exception. The ICSID system is built on the premise that the awards rendered by ICSID tribunals settle in a definite manner the issues submitted to their consideration, and that only under exceptional and highly limited circumstances may their annulment be declared." *Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Paraguay's Continued Stay of Enforcement of the Award, March 22, 2013, ¶84

<sup>110</sup> Vienna Convention on the Law of Treaties, Articles 31 and 32.

- (d) In the event that the committee considers “that the circumstances so require”, it may order that the stay be continued pending its decision on the application for annulment.
- (e) If the committee grants a stay of enforcement, it may at any time modify or terminate the stay at the request of either party.

[76] The aforementioned provisions of the ICSID Convention lead to the inevitable conclusion that the stay of enforcement in the ICSID system is far from automatic. The fact that statistically *ad hoc* committees may have granted the stay in the vast majority of cases does not mean that the stay is automatic. Moreover, in the decisions quoted by Argentina, and particularly in the annulment decisions of *Elsamex*, *Enron* and *Pey Casado*, the *ad hoc* committees have simply acknowledged that it had been the practice of the committees to grant the stay of enforcement of the award in a practically automatic manner<sup>111</sup> and that stay of enforcement had been granted in all of the cases where it had been requested<sup>112</sup>. However, none of those committees have indicated that the relevant Articles of the ICSID Convention should be construed as considering the stay automatic.<sup>113</sup> In fact, the *ad hoc* committee in *Elsamex* granted the continuation of the stay of enforcement of the award in light of specific circumstances which were present in that case and not because it deemed the stay of enforcement to be automatic<sup>114</sup>.

[77] The above reasoning is in conformity with decisions of previous *ad hoc* committees, for example, the committee in *Sempra v. Argentina* held that:

*“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 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*

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<sup>111</sup> Tr:85:5-16

<sup>112</sup> Argentina’s Second Submission, ¶12

<sup>113</sup> For example, the committee in *Elsamex* stated that it did not share the position that under the ICSID system stay of enforcement was automatic. See: *Elsamex S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, *Decisión sobre la solicitud de la República de Honduras para la continuación de la suspensión de la ejecución del Laudo*, January 7, 2014, ¶90

<sup>114</sup> *Elsamex S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, *Decisión sobre la solicitud de la República de Honduras para la continuación de la suspensión de la ejecución del Laudo*, January 7, 2014, ¶¶98-101

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".<sup>115</sup>

[78] The committee in *Libananco Holdings Co. Limited v. Republic of Turkey* indicated that:

*"The exercise of the discretion of the Committee depends on the circumstances surrounding the Stay Request and, therefore, the granting of a stay of enforcement or its continuation should in no way be regarded as automatic. The Committee is aware that some ad hoc annulment committees have considered that, "absent unusual circumstances, the granting of a stay of enforcement pending the outcome of the annulment proceedings has now become almost automatic." However, this does not follow from the ICSID Convention or the Arbitration Rules, and the Committee considers that its decision should be based on an assessment of all relevant circumstances.*<sup>116</sup>

[79] Finally, Article 52(5) of the ICSID Convention provides that the stay shall only be continued if the committee considers that "the circumstances so require". The Committee notes that the ICSID Convention does not use other less categorical verbs, such as "recommend", "deserve", "justify" or similar words, but resorts to the imperative verb "require".

[80] In sum, to order the continuation of the stay of enforcement of the Award, the Committee has to be satisfied that the circumstances of the particular case so require. It is for the party seeking the stay to show that such circumstances exist, and thus, the stay of enforcement of the award should be continued.

[81] The ICSID Convention does not identify the special circumstances that should be considered in order to maintain the stay of enforcement of the award. However, ICSID *ad hoc* committees have identified, amongst the circumstances the following: (i) prospect of prompt compliance with the award; (ii) hardship to one of the parties; (iii) risk of non-recovery; (iv) irreparable harm to the award debtor; (v) dilatory requests for annulment; (vi) enforcement regime and (vii) balancing of interests.<sup>117</sup>

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<sup>115</sup> *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for a Continuation of Stay of Enforcement of the Award, March 5, 2009, ¶127

<sup>116</sup> *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Applicant's Request for a Continued Stay of Enforcement of the Award, May 7, 2012, ¶143. Footnotes omitted.

<sup>117</sup> D. Bishop, S. Marchili, *Annulment under the ICSID Convention*, Oxford University Press, UK, 2012, ¶12.17-12.28

- [82] Even though the Parties in these annulment proceedings have referred substantially to all of the above circumstances, they have mainly focused on (i) dilatory requests for annulment; (ii) prospect of prompt compliance with the award; (iii) enforcement regime; and (iv) risk of non-recovery.

### **Dilatory request for annulment**

- [83] As regards the issue of whether or not the application for annulment by Argentina is well founded or dilatory, the *ad hoc* Committee agrees with the statements made by other annulment committees in that the merits of an annulment application are not relevant for purposes of the decision on whether or not to grant the stay, unless the application is manifestly dilatory.<sup>118</sup> Likewise, the mere fact that the application is not dilatory is not sufficient to grant the extension of the stay.<sup>119</sup>
- [84] Having reviewed the application for annulment by Argentina, the *ad hoc* Committee does not find that the allegations of Argentina to support its request for annulment could be considered, as clearly unfounded or as mere allegations to delay the enforcement of the award. This, however, does not automatically imply that the stay should automatically be maintained. First, because at this stage of the proceedings it is not for the Committee to decide on whether the application for annulment is well founded or not. Second, because a serious application is the least that can be expected from an applicant, and nowhere in the ICSID Convention – or in the practice of *ad-hoc* committees – compliance with such minimum duty results in the extension of the stay.

### **Prospect of prompt compliance with the award and enforcement regime**

- [85] The Committee will analyze these two circumstances together given the form in which the allegations of the parties on the subject were submitted and particularly the impact that the allegations of Argentina as to the enforcement regime impact the prospect of prompt compliance with the award.

Argentina devotes a significant portion of its allegations to discuss the supremacy of international law and international obligations under the Argentinian Constitution and hierarchy of laws resulting pursuant to its legal regime. Argentina concludes that under the laws of Argentina international treaties take precedence over domestic laws and therefore, given such precedence, the Argentine legal system is, in itself, an adequate guarantee of compliance with the BIT, the ICSID Convention,

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<sup>118</sup> *Elsamex S.A. v. Republic of Honduras*, ICSID Case No. ARB/09/4, *Decisión sobre la solicitud de la República de Honduras para la continuación de la suspensión de la ejecución del Laudo*, January 7, 2014 ¶¶196-97

<sup>119</sup> *Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, *Decision on Paraguay's Continued Stay of Enforcement of the Award*, March 22, 2013, ¶194

and any award rendered pursuant to those instruments.

This discussion, whatever the relevance it may have, does not allow the *ad hoc* Committee to conclude that an award against Argentina, rendered pursuant to the ICSID, Convention will be enforced as a final judgment of an Argentine court under Article 53.

Article 53 (1) of the ICSID Convention provides that “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”. The language does not leave room for doubt: the award is final and Article 53 (1) imposes an unconditional obligation to comply with the award, provided only that a stay ordered pursuant to the provisions of the ICSID Convention will temporarily release a party from that obligation.

- [86] The *ad-hoc* Committee agrees with the conclusion of the *Sempra* committee that stated “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.”<sup>120</sup>
- [87] The Parties in these annulment proceedings do not seem to disagree with the above conclusion. The substantial difference in their positions refers to the scope of Article 54 of the ICSID Convention.
- [88] While Article 53 imposes an obligation on the parties to the arbitration – “the award shall be binding on the parties” - Article 54 imposes an obligation on all the ICSID Convention States - “[e]ach Contracting State” – 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.”
- [89] Therefore, in this particular case, Argentina has an obligation, as a party to this arbitration, both to comply with the award (Article 53) and as a Contracting State to recognize the award “as binding and enforce the pecuniary obligations imposed by that award” within the territory of Argentina “as if it were a final judgment” of an Argentinian court (Article 54). In other words, the fact that Argentina, as a Contracting State to the ICSID Convention, has an obligation to recognize and enforce ICSID

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<sup>120</sup> *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Request for a Continuation of Stay of Enforcement of the Award, Marc 5, 2009, ¶38

awards under Article 54, neither deprives Article 53 of its effects nor relieves Argentina of its unconditional obligation, as a party to the arbitration, "to abide by and comply with the terms of the award."

[90] With respect to Article 54, Argentina claims that it should be interpreted jointly with Article 53 and that Article 54 does not limit the final and binding nature of ICSID Awards provided for under Article 53. According to Argentina, under Article 54 of the ICSID Convention, investors must follow the domestic proceedings to enforce the award. These proceedings, according to Argentina, are not the equivalent to an exequatur or confirmation proceedings, but in any event procedures that must be followed before the Argentinian courts.<sup>121</sup> In Argentina's view, Article 54 does not apply only in the event of enforcement of an award resulting from non-voluntary compliance with the obligations contained therein. It also refers to compliance with the requirements that a State deems necessary to pay the monetary obligations under the award.

[91] According to the explanations provided by Argentina, particularly during the hearing, (i) the award creditor must contact Argentina and commence the local proceedings;<sup>122</sup> (ii) the local proceedings require the submission of a certified copy of the award to an Argentinian administrative court; (iii) the court will then verify that the decision is against the State and will inquire with the pertinent authority of the Government of Argentina as to whether the accounts that are used to pay the debts of the State have the necessary funds to pay for the award; (iv) if there are funds the award would be paid; (v) if there are no funds, the judge may order the Government to obtain the funds and pay; (vi) if the Government does not pay, the court may order the attachment of assets.<sup>123</sup>

[92] This *ad hoc* Committee considers that the overall interpretation of Argentina of Articles 53 and 54, as presented in these annulment proceedings, is not consistent with the ICSID Convention.

[93] According to Article 54 of the ICSID Convention:

"(1) Each Contracting State shall **recognize** an award rendered pursuant to this Convention as binding and **enforce** the pecuniary

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<sup>121</sup> Tr: 81:4-6. In response to a question by the Committee, Argentina explained the manner in which this domestic proceedings work: "So, the procedure is to appear before the designated authority, and then that is taken to the judge, and the judge decides whether the Decision is paid based on the availability of funds. And this is the same procedure followed for final Decisions, but this has nothing to do with exequatur because the idea is with this standard to make a foreign Decision valid in the territory (...)" Tr: 137:16-138:1 A further clarification was added: "This is an administrative court judge that verifies the existence of the funds. If the funds are not available the Executive is requested to make those funds available, and then if the Executive does not make those funds available, assets are attached so that that execution is carried out immediately. It doesn't mean that if the Executive doesn't provide the funds, this is an order that will not be fulfilled." Tr: 143:17-144:3. In addition, the parties discussed on the requirement to pay a 3 per cent charge to initiate this process. Tr: 140:11-142:22

<sup>122</sup> Tr: 15: 6-16

<sup>123</sup> Tr: 137:3-138:1

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." (Emphasis added).

[94] The plain meaning of the wording in the aforementioned Article leaves no doubt: on the one hand, it imposes, as already discussed above, an obligation on Contracting States, not only on the State party to the arbitration. On the other, it refers to the recognition and enforcement of the awards under the ICSID Convention.

[95] The recognition and enforcement of awards are also addressed in other international treaties, the most relevant being the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The terms "recognition" and "enforcement" have been widely analyzed in the context of international arbitration and it is now settled that the process seeking for recognition and enforcement of an award takes place when the award debtor does not voluntarily comply with the terms of the award.<sup>124</sup> In other words, obtaining recognition and enforcement is not a requirement for compliance with an award, but merely a mechanism by which an award creditor may invoke to compel compliance if the award debtor does not voluntarily abide by and comply with the terms of the award. Further it must be noted that the reference to recognition and enforcement connotes two stages: the recognition stage is to incorporate the award into the legal system of a given jurisdiction and the enforcement stage corresponds to the proceedings to force compliance of the award by the debtor, which may include the attachment of assets in execution of the court judgment. These stages are well established and evidenced in Articles 54 and 55.

[96] There is, however, a fundamental difference between enforcement of awards under the New York Convention and the ICSID Convention. The

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<sup>124</sup> "In practice, the overwhelming majority of international arbitral awards are complied with voluntarily and, when they are not, they are usually recognized and enforced". Born, Gary B. *International Commercial Arbitration*. Kluwer Law International, 2009, Volume II. p. 2711

ICSID Convention requires a contracting State to enforce an ICSID award (as far as it concerns pecuniary obligations) "as if it were a final judgment of a court in that State". It is an automatic recognition process where no court proceedings are envisaged, which admits no review by courts and no grounds to resist recognition. This is in contrast with New York Convention which does not provide for such automatic recognition. Article III obliges the enforcing state to enforce the award in accordance with its own rules of procedure, subject, inter alia, to the conditions laid down in the New York Convention, including Article V which sets out specific grounds by which an award may be refused recognition and enforcement by a court, and thus is not incorporated into the legal system of the given State.

- [97] Argentina claims that the proceedings for payment of the award are not the equivalent of an exequatur or a revision. *Ad arguendo*, this may be true with respect to the stage of enforcement of the award, where the local procedures – and the courts - may come into play according to Articles 54(3) and 55. However the allegation that these proceedings must be undertaken (including what seems to be a non-automatic recognition stage) as a condition for Argentina's compliance with the award, suggests that Argentina is not willing to comply with its obligations under Article 53 to abide by and comply with the terms of the award, but will rather insist that the award creditor must subject itself to the process envisaged in Article 54.
- [98] Finally, the Committee is not convinced, and the record does not contain clear evidence, that under Argentinian law the monetary obligations under a final decision of a local court cannot be voluntarily complied with unless a judicial proceeding is commenced to seek funds for compliance.
- [99] In sum, the obligation to enforce the award contained in Article 54 is an obligation imposed on all Contracting States and thus, different in scope from the obligation of Article 53. While the latter imposes on the party to the arbitration the obligation to comply with the award, the former obliges all Contracting States, whether or not a party to the given arbitration, to enforce the pecuniary obligations of the award as if it were a final decision of their own courts. Steps to secure recognition and enforcement of an award is only required when the award has not been voluntarily complied with and not as a requisite for payment.
- [100] On the basis of the above considerations, the Committee concludes that a State party to the arbitration, must (like a foreign investor party) abide by and comply with an ICSID award, and as a Contracting Party a State cannot force the award creditor to submit to local court proceedings to seek payment of the pecuniary obligations of the award, as envisaged by Article 54 of the ICSID Convention.

### **Risk of non-recovery**

- [101] The Committee is not persuaded that if it were to lift the stay, it would render it very difficult or impossible for Argentina to recover the amounts paid out to Total under the award.
- [102] Prior committees have considered the risk of non-recovery of payments made by a respondent State on account of an award that is eventually rendered null as a relevant factor to determine whether the stay of enforcement of the award should be continued. In conducting this assessment, some committees have considered the profile of the claimant in order to assess this risk. Particularly, the committee in *Patrick Mitchell v. Democratic Republic of Congo* signaled that since claimant was a natural person, whose assets and activities were difficult to localize, thus posing difficulties in recoupment.<sup>125</sup>
- [103] However, in this case Total, a large international company, has assets in Argentina and elsewhere, and the amount of the award represents a relatively small percentage of the assets and revenues of Total. There is nothing in the record that suggests that Total would refuse payment in the event the award is annulled, nor is there persuasive evidence that an attachment of assets of Total may affect the company to such an extent as to prevent payment to Argentina if the Committee were to annul the award.

### **Balance of Interests**

- [104] In balancing the interests of the parties in these annulment proceedings the Committee considers, first, that aside from a general statement that lifting the stay would prevent Argentina from using funds that it otherwise needs to satisfy the needs of Argentinians, there is no concrete allegation, much less evidence, of the existence of special circumstances that merit extending the stay of enforcement.
- [105] Second, that the mere fact of the application for annulment being serious or not evidently dilatory is not sufficient to continue the stay of enforcement.
- [106] Third, that for the reasons explained in paragraphs 103 to 105 above, there seems to be no risk of non-recovery in the event the award were partially to totally annulled.
- [107] Last, but not least, the Committee has found that Argentina is under an unconditional duty to "abide by and comply with" the Award according to Article 53. Argentina cannot insist in that it is complying with the ICSID Convention, and rely on such alleged compliance as a factor to maintain

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<sup>125</sup> *Mr. Patrick Mitchell v. Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Stay of Enforcement of the Award, November 30, 2004, ¶124

the stay, if at the same time it insists in forcing Total to activate Article 54 as a condition for payment. Total may, if Argentina refuses to comply with the award, enforce it under Article 54. The insistence of Argentina that it has no obligation to comply in the absence of Total going through its national judicial procedures implementing Article 54 must necessarily lead to the conclusion that Argentina is not willing to abide with its Article 53 obligations to comply with the award.

[108] The above considerations lead the Committee to conclude, that in the balance of interest, the stay of enforcement of the Award should be lifted and it will so decide.

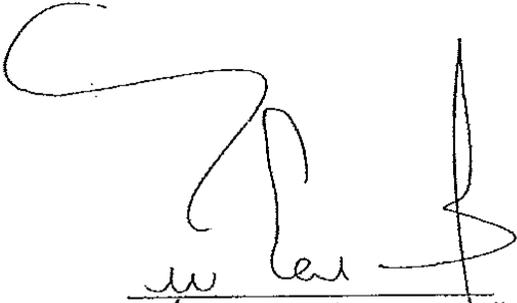
#### **V. COSTS**

[109] The decision on costs for proceedings related to the stay of the award will be made together with the final decision on the application for annulment.

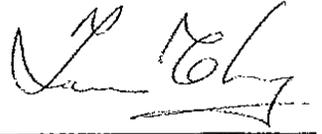
#### **VI. DECISION**

The Committee, based on the above considerations:

1. Rejects the request from Argentina to continue the stay of enforcement of the Final Award rendered on November 27, 2013, in ICSID Case No. ARB/04/01, *Total S.A. v. Argentine Republic*.
2. Orders the lifting of the stay of enforcement effective as of the date hereof.



Mr. Alvaro Castellanos Howell  
Member of the Committee



Ms. Teresa Cheng  
Member of the Committee



Mr. Eduardo Zuleta Jaramillo  
President of the Committee