CMS Gas Transmission Company

v.

Argentine Republic

(ICSID Case No. ARB/01/8)
(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)

Members of the *ad hoc* Committee

Judge Gilbert Guillaume, President
Professor James R. Crawford
Judge Nabil Elaraby

Secretary of the *ad hoc* Committee

Mr. Gonzalo Flores

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A. Introduction

1. On 8 September 2005, the Argentine Republic ("Argentina" or "the Respondent") filed with the Secretary-General of the International Centre for Settlement of Investment Disputes an application in writing requesting the annulment of an Award dated 12 May 2005 rendered by the Tribunal in the arbitration between CMS Gas Transmission Company ("CMS" or "the Claimant") and the Argentine Republic.

2. The Application was made within the time period provided in Article 52(2) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("the ICSID Convention"). In it, the Respondent sought annulment of the Award on two of the five grounds set out in Article 52(1) of the ICSID Convention, specifically that: the Tribunal had manifestly exceeded its powers and that the Award has failed to state the reasons on which it is based.

3. The Application also contained a request, under Article 52(5) of the ICSID Convention and Rule 54(1) of the ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules), for a stay of enforcement of the Award until the Application for Annulment is decided.

4. The Secretary-General of ICSID registered the Application on 27 September 2005 and on the same date, in accordance with Rule 50(2) of the ICSID Arbitration Rules, transmitted a Notice of Registration to the parties. The parties were also notified that, pursuant to ICSID Arbitration Rule 54(2), the enforcement of the Award was provisionally stayed.

5. By letter of 30 September 2005, the Claimant made a request under Arbitration Rule 54(2) for the stay of enforcement of the Award to be terminated unless Argentina were to provide adequate assurances as to the payment of the Award should its application for annulment fail.

6. By letter of 18 April 2006, in accordance with Rule 52(2) of the ICSID Arbitration Rules, the parties were notified that an *ad hoc* Committee (the Committee) had been constituted, composed of Judge Gilbert Guillaume from France, Judge Nabil Elaraby from Egypt and Professor James R. Crawford from Australia. On the same date the parties were informed that Mr. Gonzalo Flores, Senior Counsel, ICSID, would serve as Secretary of the *ad hoc* Committee.

7. By letter of 20 April 2006, the parties were notified that Judge Gilbert Guillaume had been designated President of the Committee.

8. By letter of 2 May 2006, the Centre sent to the parties copies of the Declarations signed by each Member of the Committee pursuant to ICSID Arbitration Rule 52(2).

9. The parties disagreed on the effects of the provisional stay of enforcement of the Award over Argentina's option to purchase CMS's shares on Transportadora de Gas del Norte (TGN) provided for in item No. 3 of the *dispositif* of the Award.

10. After due deliberation, the Committee decided that, since the payment of compensation has been stayed, the condition precedent to the transfer of shares in TGN for the time being could not be met and thus the time limit set forth in the Award for such transfer had been likewise provisionally stayed. The decision of the Committee was notified to the parties by the Secretariat on 10 May 2006.

11. By letter of 16 May 2006, the Argentine Republic requested that the provisional stay of enforcement of the Award be continued until the Committee had the opportunity to hear from both parties on the matter. By letter of that same date, the Claimant reiterated its request that the stay be discontinued unless adequate assurances were provided by the Argentine Republic that it would comply with the Award in the event its annulment application was rejected.

12. By letter of 17 May 2006, the Committee informed the parties of its decision to continue the stay of the Award until 5 June 2006 (the date previously fixed for the first session of the Committee with the parties).

13. The first session of the Committee was held, as scheduled with the agreement of the parties, on 5 June 2006, at the premises of the World Bank in Paris, France, and several issues of procedure were agreed and decided. During the session, both parties addressed the Committee with their arguments on the question of the continuance of the stay of enforcement of the Award.

14. After having heard those arguments, the Committee requested a written statement on behalf of Argentina, within seven days, with respect to its compliance with the Award under the ICSID Convention in the event that the Award not be annulled. It further decided that it would be open to CMS to comment within the further seven days on such statement. At the same time, it decided to continue the stay of enforcement of the Award until it had taken a decision.

B. The Parties' contentions

15. In its application of 8 September 2005, the Argentine Republic requests "that enforcement of the Award be stayed pending the *ad hoc* Committee's decision" on annulment. In its view, to permit the Award to be enforced in the meantime "would irreparably harm Argentina." By contrast, "staying enforcement of the Award would not prejudice CMS." It adds that "Argentina has compelling grounds for annulment" and that "a stay is in the public interest."

16. By letter dated 30 September 2005, CMS expressed the view that the provisional stay of enforcement should not be continued "unless Argentina provides adequate assurances (such as the provision of an irrevocable and unconditional bank guarantee in favour of CMS) as to the payment of the Award, should its application for annulment fail."

17. After various exchanges of correspondence, CMS, in its letter dated 16 May 2006, reiterates its previous submissions. It recalls the provisions of Articles 53(1) of the ICSID Convention and Articles 52(5) and 54(2) of the ICSID Rules. It referrs to the decision rendered on 1 June 2005 by an *ad hoc* Committee in the *MTD v. Chile* case, stressing, in particular, that Committee's statement that a "Respondent seeking a remedy under the Convention should demonstrate that for its part it will comply with the Convention, and if there is doubt in that regard, the Committee may order the provision of a bank guarantee as a condition of a stay." [1]

18. CMS contended that Argentina had never given any assurance that it would satisfy the Award voluntarily if its annulment application failed. It submitted that, on the contrary, Argentina had consistently expressed its intention to subject final ICSID Awards "to a novel domestic review mechanism before the Argentine Supreme Court (or other fora) in open breach of its obligations under the ICSID Convention". In support of this submission, it quoted declarations made by Dr. Horacio Rosatti, Dr. Roberto Lavagna and Dr. Osvaldo César Guglielmino. It added that "Any suggestion from Argentina that it would suffer if the provisional stay were lifted... or that it is unable to fund a bank guarantee cannot be taken seriously in the light of its current economic situation."

19. In its letter dated 26 May 2006, Argentina submitted that, under Argentine law, treaties prevail over acts of the Congress and Executive Branch decisions. In this respect it mentioned the judgment rendered in 1992 by the Supreme Court of Argentina in *Ekmekdjian v. Sofovitch* and the constitutional reform of 1994 relating to Article 75 §22 of the Constitution. Argentina also pointed out that it had "always abided by awards issued by [international] tribunals" dealing with conflicts with other states, as well as in cases referred to the Inter-American Court of Human Rights.

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[1] MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile (ICSID Case No. ARB/01/7); Decision of the *ad hoc* Committee's on the Respondent's Request for a Continued Stay of Execution of June 1, 2005, available online at http://www.worldbank.org/icsid/cases/MTD.pdf.

20. Argentina noted that the ICSID Convention itself imposes no obligation to post a bond as a condition for the continuance of enforcement of an award under Article 52(5) of the ICSID Convention. In support of this contention, it mentioned the decisions of the *ad hoc* Committees in *Mine v. Guinea*[2] and *MTD v. Chile.* It added that the fee to be charged by an international bank for granting a guarantee as the one requested by CMS would be extremely high and that the shares owned by CMS in TGN are an additional guarantee of execution of the Award. It observed that, "by posting a bond, claimant would then be placed in a far more favourable position than it enjoyed before the filing of the application for annulment." Finally, it noted that "the grounds for annulment of the award in this case are serious, substantial and present unprecedented issues." Argentina concluded by requesting the Committee "to maintain the stay of the execution of the award in these proceedings, without requiring any bond."

21. By letter dated 1 June 2006, CMS transmitted to the Committee a dossier of press reports "containing additional illustrative statements by Argentine officials that reflect Argentina's intention not to execute the award voluntarily."

22. At the oral hearings, the Parties reiterated and developed their written arguments and maintained their previous submissions.

23. Argentina added that it had signed 54 bilateral investment treaties and that, prior to the 2002 crisis, only five cases had been submitted to ICSID arbitration. Of these, four had been withdrawn by the investors after an agreement had been reached, and the last one was still pending. After this crisis, there were 35 ICSID cases and 5 UNCITRAL cases (25% of those cases having been withdrawn or suspended by agreement between the Parties). It affirmed that Argentina has always complied with all its pecuniary obligations under decisions of international tribunals and in accordance with the settlement of cases before international tribunals.

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[2] Maritime International Nominees Establishment v. Republic of Guinea (ICSID Case No. ARB/84/4)

24. CMS recalled at the hearing that five of the eight *ad hoc* Committees which had to face the question of stay of enforcement "have ordered assurances in the forms of a guarantee for continuance of the stay... [In] the other three cases, the Committee found exceptional circumstances justifying going forward without some sort of guarantee or bond." It observed, in the terms of *MTD v. Chile* award, that there is a doubt in the present case as to whether Argentina will comply with the ICSID Convention in the event the Award is not annulled by the Committee. Indeed there have been many statements by Argentine officials suggesting that "any adverse ICSID award will be subject to a Supreme Court review or that the matter will be submitted to the International Court of Justice." CMS contended that under the Argentine Constitution as revised in 1994, only "human right treaties have an equivalent effect to the Constitution."

25. In response to a question, Argentina specified that under Argentine law, all international treaties ratified by Argentina are automatically given legal effect, without any need for further incorporation. It added that, in the *Ekmedjian* judgement, the Supreme Court did not distinguish between statutory and constitutional provisions and affirmed in general terms that international law prevails over domestic law. Argentina recognized that CMS is "a serious investor" and that the award rendered in its case could not be considered as "extraordinarily arbitrary." It solemnly declared "In the case that the Committee confirms the award, we are not asking for this to be revised by the Supreme Court in Argentina or [by] The Hague."

26. In response, CMS observed that the *Ekmedjian* judgment was rendered prior to the 1994 revision of the Constitution under which all treaties other than human rights treaties are subordinate to the Constitution. It appreciated the declaration made by Argentina relating to the implementation of the Award, but added that it was "not sufficient to outweigh the doubts that exist in the public record or to bind future leaders and Ministers in Argentina." It stressed that the stay of enforcement, if any, should not cover the option to purchase given to Argentina in paragraph 3 of the *dispositif* of the Award. The one-year period fixed in this article "started to run with the dispatch of the Award, and it stopped running in September

when the automatic provisional stay went into effect, and when the stay is lifted, the remaining eight months will run on the option."

27. Argentina disagreed on that last point and contended that the decision taken by the Tribunal cannot be considered as separable. Pursuant to the stay, the whole Award had been suspended.

28. On 12 June 2006, in response to a request from the Committee, the Argentine Republic, under the signature of Dr. Osvaldo César Guglielmino, *Procurador del Tesoro de la Nación Argentina*, provided "an undertaking to CMS Gas Transmission Company that, in accordance with its obligations under the ICSID Convention, it will recognize the award rendered by the Arbitral Tribunal in this proceeding as binding and will enforce the pecuniary obligations imposed by that award within its territories, in the event that annulment is not granted" (Committee's translation).

29. In a letter dated 19 June 2006, CMS contended that Dr. Guglielmino's letter did not provide additional comfort, that it must be viewed in context and that it did not bind Argentina. For those reasons, it maintained its previous submissions.

30. On the invitation of the Committee, on 26 June 2006, Argentina submitted a copy of the decision rendered by its Supreme Court in *Ekmedjian v. Sofovich.*

31. By a letter dated 27 June 2006, Argentina expressed the view that the matters raised by CMS in its letter of 19 June 2006 did not require any further response. It did, however, provide a copy of the Argentine regulations relating to the power of the *Procurador del Tesoro de la Nación Argentina.*

32. By a letter dated 30 June 2006, CMS made further comments on the last two letters of Argentina and submitted to the Committee the relevant passages of the Argentine Constitution.

C. The *ad hoc* Committee's views

33. Article 52 (5) of the ICSID Convention provides:

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

34. Rule 54 of the ICSID Arbitration Rules applicable in the present case provides:

"**Stay of Enforcement of the Award**

(1) The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.

(2) If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provisional stay of the award. As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated.

(3) If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final decision is rendered on the application, except that a Committee granting the partial annulment of an award may order 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."

35. On a request under Rule 54(1), the Committee has a discretion which it should exercise, after both parties have had an opportunity to be heard, taking into account any relevant circumstances. The effect of the stay is that the award is not subject to enforcement proceedings under Article 54 of the Convention pending the outcome of the annulment application. Since a stay is not automatic, the Tribunal could grant the request subject to conditions, including a condition that an appropriate bond be provided.

36. The question whether a stay should be granted unconditionally or on condition of a bank guarantee has been discussed in a number of earlier proceedings (see also C. Schreuer, The ICSID *Convention. A Commentary* (Cambridge 2001), 1052-1060).

(a) *In Amco Asia Corporation v Republic of Indonesia (First Annulment)*[3] the Committee granted a stay on condition of the furnishing of a bank guarantee (*Amco Asia Corporation v Republic of Indonesia* - First Annulment - 1986 - 1 ICSID Reports 509, 513, para. 8; see Schreuer, 1956 for a brief account of the reasoning). A similar order was made in the second annulment proceeding between the same parties (*Amco Asia Corporation v Republic of Indonesia* - Second Annulment - ICSID Case No. ARB/81/1 - Annulment decision of 3 December 1992, 9 ICSID Reports 3, 22-23 (paras. 3.03, 3.07).

(b) In *Maritime International Nominees Establishment v Republic of Guinea*, the Committee declined to impose the condition of a guarantee, on the basis that this would be costly and would place the Claimant "in a much more favourable position that it enjoys at the present time" (*Maritime International Nominees Establishment v Republic of Guinea*, Interim Order No. 1, 12 August 1988, 4 ICSID Reports 111, 115, para. 22).

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3 Amco Asia Corporation and others v. Republic of Indonesia (ICSID Case No. ARB/81/1)

(c) *In Wena Hotels Ltd v Arab Republic of Egypt*,[4] the Committee continued the stay of execution conditional on the provision of a guarantee in the amount of the award (*Wena Hotels Ltd v Arab Republic of Egypt*, Procedural Order No. 1, 5 April 2001, referred to in the final decision of the Committee, (2002) 6 ICSID Reports 129, 131, para. 6).

(d) In *CDC Group PLC v Republic of the Seychelles*[5], the Committee held that there was no evidence of "catastrophic consequences" to the Respondent which could follow the immediate enforcement of the award, and that as a matter of fairness to the Claimant the delay caused by the annulment proceeding should be addressed by the provision of security as a condition of a stay (*CDC Group PLC v Republic of the Seychelles* – ICSID Case No. ARB/02/14 - Decision of 14 July 2004, paras. 21-22).

(e) In *Patrick Mitchell v Democratic Republic of the Congo*[6] the Committee, by majority, declined to make the stay conditional upon the posting of security on the basis that it was "not convinced that the DRCQ, albeit its present political difficulties, will not comply in the future with its international obligations driving from the ICSID Convention" (Patrick *Mitchell v Democratic Republic of the Congo* – ICSID Case No. ARB/99/7, Decision of 30 November 2004, para. 42).

(f) In *MTD v Chile*, the Committee concluded that "Chile has demonstrated that MTD will not be prejudiced by the grant of a stay, other that in respect of the delay which is however incidental to the Convention system of annulment and which can be remedied by the payment of interest." On that basis, it granted a stay without making it conditional upon the provision of a guarantee (*MTD Equity Sdn Bhd and MTD Chile S.A. v The Republic of Chile* – ICSID Case ARB/01/7, Decision of 1 June 2005).

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4 Wena Hotels Limited v. Arab Republic of Egypt (ICSID Case No. ARB/98/4)

5 CDC Group plc v. Republic of Seychelles (ICSID Case No. ARB/02/14)

6 Patrick Mitchell v. Democratic Republic of the Congo (ICSID Case No. ARB/99/7)

(g) In *Repsol YPF Ecuador v Petroecuador*,[7] the Committee continued the stay of execution conditional on a guarantee in the amount of the award, plus the corresponding interest (*Repsol YPF Ecuador - Petroecuador* – ICSID Case No. ARB/01/10, Decision of 22 December 2005).

37. The Committee agrees with earlier decisions to the effect that, unless there is some indication that the annulment application is brought without any basis under the Convention, i.e., that it is dilatory, it is not for the Committee to assess as a preliminary matter whether or not it is likely to succeed. In requesting annulment, an applicant avails itself of a right given by the Convention. There is no indication here that Argentina is acting in a merely dilatory manner. Thus the Committee does not need to form any view as to the likelihood of success of the application for annulment in the present case.

38. As a general matter a respondent State seeking annulment should be entitled to a stay provided it gives reasonable assurances that the award, if not annulled, will be complied with. It should not be exposed, while exercising procedural rights open to it under the Convention, to the risk that payment made under an award which is eventually annulled may turn to the irrecoverable from an insolvent claimant. At the same time a Respondent seeking a remedy under the Convention should demonstrate that for its part it will comply with the Convention, and if there is doubt in that regard the Committee may order the provision of a bank guarantee as a condition of a stay.

39. It is true the provision of a bank guarantee puts a claimant in a better position that it would be if annulment had not been sought, since it converts the undertaking of compliance under Article 53 of the Convention into a financial guarantee and avoids any issue of sovereign immunity from execution, which is expressly reserved by Article 55 of the Convention. On the other hand, a request for annulment causes significant delay to the claimant, with the consequent possibility of prejudice. Although this can be dealt with by an award of interest in the event that the annulment application fails, nonetheless there will have

[7] Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador) (ICSID Case No. ARB/01/10)

been a further delay in the award becoming enforceable and this is a factor entitled to some weight.

40. Despite this, in the Committee's view the key feature of the situation is that, by the express terms of Article 54 of the Convention, an ICSID award is to be given the same effect as a final judgment of the courts of the Respondent State. As compared with other international arbitral arrangements, final awards under the ICSID Convention are directly enforceable, upon registration and without further jurisdictional control, as final judgments of the courts of the host State. It is true that immunity from execution is reserved (Article 55), but this simply leaves the issue of immunity to be dealt with under the applicable law: «Immunity from execution of the host State in its own courts would depend entirely on its domestic law" (Schreuer, op. cit. 1176).

41. States Parties to the Convention have an obligation to give effect to Article 54 of the Convention in their internal law. Exactly how this is done depends on the constitutional arrangements of the State Party concerned; the point for the Committee is to be satisfied that the State Party has taken appropriate steps in accordance with its constitutional arrangements to give effect to Article 54. Where it has done so, subsequent compliance by that State with a final award will be a matter of legal right under its own law, as well as under international law.

42. Argentina states that under Article 75, paragraph 22 of its Constitution as amended in 1994: "The Congress shall have the power... to approve or reject treaties entered into with other nations and with international organisations, and concordats with the Holy See, treaties and concordats have higher standing than laws" ("Los tratados y concordatos tienen jerarquía superior a las leyes"). Therefore, according to Argentina, under Argentine law, "all international law is part of the law of the land, so all international treaties ratified by Argentina are automatically part of our law, without need for further incorporation", and "international obligations prevail over domestic statutes". It is the case with respect to the ICSID Convention and, as a consequence, article 54 of that Convention has been given direct effect in Argentina law and will be applied as such by courts.

43. Argentina adds that this has been confirmed by its Supreme Court in the *Ekmedjian v Sofovich* case (7 July 1992) in which the Court specified that "The Vienna Convention on the Law of Treaties... accords the international law of treaties primacy over internal law. Such priority in rank is now part of the Argentine legal system... The necessary application of Article 27 of the Vienna Convention imposes on Argentine State agencies the duty to assign priority to the treaty in the event of conflict with any contrary internal rules."

44. CMS points out that this does not exclude that any final ICSID award may be subject to internal review by the Supreme Court of Argentina as to its constitutionality. In this respect it stresses that the *Ekmedjian v Sofovich* decision was rendered before the revision of paragraph 22 of Article 75 of the Constitution. Today, this paragraph provides that the nine human rights instruments which it lists "stand on the same level as the Constitution (*tienen jerarquía constitutional*), do not repeal any article in the First Part of this Constitution and must be understood as complementary of the rights and guarantees recognized therein". Paragraph 22 adds that "Other Treaties and Convention on human rights after being approved by the Congress, shall require the vote of the two-thirds of the totality of the members of each chamber in order to have constitutional hierarchy (*para gozar de la jerarquía constitutional*)." Thus, in the opinion of CMS, "the current hierarchy of laws in Argentina is: (i) Constitution and certain international human rights treaties; (ii) other international treaties; (iii) domestic laws."

45. The Committee notes that Argentina ratified the ICSID Convention on 18 November 1994. It is not disputed that, under the Argentine Constitution, the Convention is consequently part of Argentine domestic law. As a consequence, 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.

46. Nonetheless, the parties disagree on the place of the ICSID Convention in the hierarchy of law in Argentina and on the position in case of conflict between the Convention and the Constitution. The Committee does not have to take position on that question as such. However, it has to consider the arguments drawn by CMS from the fact that, on several

occasions, Argentina officials have suggested that "Any adverse ICSID award would be subject to a Supreme Court review." CMS contends that such statements cast serious doubt on Argentina's willingness to comply with Article 54 of the ICSID Convention. It submits that consequently a stay of execution should not be granted without a bank guarantee.

47. The Committee observes that, according to press reports, statements of that type have been made by former Ministers of Justice and Finance of Argentina. It also notes that Dr. Guglielmino, the Agent of Argentina in the present case, mentioned more recently the possibility of submitting the validity of ICSID awards to the International Court of Justice. However, during the hearings, the Argentine Agent declared that: "In the case that the Committee confirms the award, we are not asking for this to be revised by the Supreme Court of Argentina or by [in] the Hague". The Committee then requested a written statement on behalf of the Argentina Republic with respect to its compliance with the award under the ICSID Convention in the event that the Award is not annulled. In its letter dated 12 June 2006, signed by Dr. Guglielmino, "the Republic of Argentina" provided "an undertaking to CMS Gas Transmission Company 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."

48. CMS recognizes that the *Procurador del Tesoro de la Nación* has authority, under Argentine law, to represent the Government in arbitral proceedings. However, it submits that, under Article 99 of the Constitution, only the President, subject to prior approval by the Congress, has power to issue undertakings that bind Argentina internationally under Argentine law. It adds that the statements of the present *Procurador* could be disregarded by his successor in the same manner that he himself disregarded contrary statements made by his predecessor.

49. The Committee notes that Dr. Guglielmino, *Procurador del Tesoro de la Nación Argentina*, is Agent of Argentina in the present case. In this capacity, he represents Argentina as provided for in Rule 18 of the ICSID Arbitration Rules. He has authority to commit

Argentina, as decided in many comparable cases by international courts and arbitral tribunals (see for instance *Joy Mining Machinery Limited v. Arab Republic of Egypt* - ICSID Case No. ARB /03/11- Award on Jurisdiction - 6 August 2004 - paragraphs 95 to 98).[8] Thus, in a recent case, the International Court of Justice did not grant provisional measures requested by Argentina, taking into account statements made by the Agent of Uruguay "to comply in full with the 1975 Statute of the River Uruguay and its application" (*Pulp Mills on the River Uruguay* - Order, 13 July 2006 - paragraph 83). To take the words of the Permanent Court of International Justice, the Committee "can be in no doubt as to the binding character" of the statement made by Dr. Guglielmino on behalf of Argentina. (PCIJ - case concerning certain *German interests in Upper Silesia* - merits - judgment N° 7 - Serie A - p. 13).

50. In the Committee's view, the letter of Dr. Guglielmino dated 12 June 2006 should dispel the doubts that CMS may legitimately have had in the past. This letter irrevocably commits Argentina to enforce the pecuniary obligations imposed upon it by the Award in the event that annulment is not granted. Having regard to this commitment, the Committee is of the opinion that Argentina had demonstrated that CMS will not be prejudiced by the grant of a stay, other that in respect of the delay which is, however, incidental to the Convention system of annulment and which can be remedied by the payment of interest in the event that the annulment application is unsuccessful. As a consequence, the Committee has decided to grant such a stay without requesting Argentina to provide a bank guarantee.

51. However, the parties are in disagreement with respect to the extent of such a stay. Argentina submits that the stay must cover not only the pecuniary obligations specified in paragraphs 2 and 4 of the Award, but also the provisions of paragraph 3 under which:

> "Upon payment of the compensation decided in this Award, the Claimant shall transfer to the Respondent the ownership of its shares in TGN upon payment by the Respondent of the additional sum of US $ 2,148,100. The Respondent shall have up to one year after the date this Award is dispatched to the parties to accept such transfer."

[8] Joy Mining Machinery Limited v. Arab Republic of Egypt (ICSID Case No. ARB/03/11) – Award also available online at http://www.worldbank.org/icsid/cases/joy-mining-award.pdf

CMS, by contrast, submits that the option to purchase offered by paragraph 3 must not be left open-ended, even if stay of enforcement continues.

52. The Committee observes that the transfer contemplated by paragraph 3 of the Award was to take place "upon payment of the compensation decided" and within one year of dispatch of the Award. Since the payment of compensation has been and will remain stayed, the condition precedent to the transfer of shares in TGM cannot be met for the time being. Therefore the one-year limit set forth in the Award is likewise stayed.

Decision

For the foregoing reasons, the Committee, unanimously:

Continues in force the stay in the enforcement of the award pending its decision on the application for annulment.

Signed on behalf of the Committee

Gilbert Guillaume
President

Paris, September 1, 2006.