



Procuración del Tesoro de la Nación

BUENOS AIRES, 28 NOV 2008

Dear Ms. Frutos-Peterson:

I am addressing you and the members of the *ad hoc* Committee in the arbitration captioned ***Compañía de Aguas del Aconquija and Vivendi Universal S.A. v. Argentine Republic*** (ICSID Case No. ARB/97/3) - Annulment Proceeding, in relation to the Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award rendered on 20 August 2007 (Rule 54 of the ICSID Arbitration Rules) (the "Decision on Stay").

The Argentine Republic shares the *ad hoc* Committee's interpretation of Articles 53 and 54 of the ICSID Convention.¹ It is important however to clarify Argentina's position in this respect, particularly considering the commitment that the *ad hoc* Committee has requested Argentina to provide in paragraph 46.A. of the Decision on Stay.

For the reasons stated below, Argentina cannot adopt the wording suggested by the Committee in paragraph 46(a) of the Decision in its entirety. However, Argentina can certainly commit itself—and it does it hereby—to notifying the competent authorities of the credit recognized in the award within the 15 calendar days following the decision on annulment, to the extent the award is not annulled, even before Claimants commence the recognition and enforcement

¹ The *ad hoc* Committee stated that "Argentina's legal position in this respect [...] does not conform entirely with the Committee's understanding of the interrelationship between Articles 53 and 54 (although the pleadings of Argentina in the second day of the oral hearing and as reflected in the post-hearing submission provided some useful clarifications)". It should be noted however that Argentina does not share completely the way in which such provisions were applied in the Decision on Stay to this case, as explained herein below.

process. Further, Argentina can commit itself to expedite the compliance procedure as much as the applicable regulations allow, once Claimants have notified the enforcement request to the authority designated under Article 54(2).

Moreover, Argentina is willing to consult with Claimants in order to try to agree on the text of a commitment letter that would satisfy them, provided it conforms to the laws and regulations in place in Argentina as to enforcement of final decisions of local courts. Argentina is also willing, in case such negotiations fail, to present for the consideration of the *ad hoc* Committee and the other party a draft letter that includes the commitment of the State to expedite the process of payment as much as it is allowed by the applicable regulations, and such other commitments that may be required by the *ad hoc* Committee that would provide assurances that Argentina will comply with its obligations under the ICSID Convention.

Argentina's position in light of the Decision on Stay and the Decision in Enron v. The Argentine Republic

As Argentina made clear during the hearing held in Paris on July 17th and 18th 2008, its position as to recognition and enforcement of ICSID awards is as follows:

i) Articles 53 and 54 are both included in Section 6 of Chapter IV of the ICSID Convention entitled "Recognition and Enforcement of the Award".² Hence, they both have to be applied for purposes of recognition and enforcement of ICSID awards, with Article 55-also included in Section 6-being applicable mainly for purposes of "execution".

² See Decision on Stay, ¶ 34.



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ii) We agree with the *ad hoc* Committee that "whenever the stay of enforcement comes to an end such as upon the rejection of the annulment request, the "binding" inherent character of the "award" becomes mandatory without any need or requirement for any other action to be undertaken. This rule constitutes a cardinal pivot upon which the entire structure of the ICSID system is based."³

Indeed, Article 53 establishes the final and binding nature of ICSID awards. Article 54 in no way negates or limits such nature, but on the contrary greatly reinforces it vis-à-vis awards rendered in accordance with other international arbitral rules.⁴ In that way, Articles 53 and 54 of the ICSID Convention complement each other and the latter could never be used to defeat the object of the former.

iii) We agree with the *ad hoc* Committee that "one of the fundamental issues which the drafters of the ICSID Convention were keen to achieve was a total divorce from the recognition and enforcement system which prevailed under domestic laws or under the 1958 New York Convention governing commercial arbitration in the Member States. [...] To eliminate state intervention in the field of investment disputes, and as a necessary consequence of creating an international mechanism to adjudicate such investment disputes under the auspices of ICSID, all sort of recourse to domestic courts (in cases other than those provided by the

³ *Id.*

⁴ For example, as regards UNCITRAL awards, it is generally recognized that, since they do not have to be treated as final judgments of local courts, States may refuse enforcement and recognition on the grounds established in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which include incompatibility with the public policy of the forum. See RUDOLF DOLZER AND CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 288 (2008).

Convention itself) was to be avoided in all States who are Members of the ICSID Convention, including the host State, in respect of the recognition or enforcement of a finally binding ICSID award rendered against a given State."⁵

iv) Compliance with ICSID awards is voluntary,⁶ in the sense that an award debtor does not have to be forced to comply with the award. The only thing that the award creditor has to do is to complete the formalities applicable to compliance with final judgments of local courts, if any apply in the State in question.

v) The latter is established by Article 54 (1), which provides that a State must "enforce the pecuniary obligations" imposed by the award within its territories "as if it were a final judgment of a court in that State".⁷ Under the ICSID Convention, "enforcement" of awards-regulated in paragraph 1 of Article 54-must not be conflated with "execution" of awards -regulated in paragraph 3 of Article 54 and in Article 55 -. "Enforcement" refers to ordinary compliance with the award, whilst execution and more particularly forced execution-referred to in paragraph 43 of the

⁵ See Decision on Stay, ¶ 34.

⁶ The reference in the *Enron decision* to Argentina's position that there was not an obligation of voluntary payment was taken out of context. See *Enron decision*, para. 56. That reference was included within Argentina's position that the award creditor had to follow the administrative formalities applicable to final judgments of local courts, which was negated by *Enron*. Argentina has never questioned the obligatory nature of ICSID awards.

⁷ Article 54(1) of the ICSID Convention applies to the recognition and enforcement of only the pecuniary obligations imposed by the award. But this does not mean that under the present interpretation of Articles 53 and 54 "there would never be an obligation to comply with non-pecuniary obligations in an award" as the *Enron decision* suggests (see *Enron decision*, para. 66). It is worth insisting that the obligation under Article 53 will always apply to the award, without prejudice to the fact that Article 54 will also apply as regards the way in which pecuniary obligations contained in the award are to be recognized and enforced. This is the effect of the States parties' decision to include Article 54 in the ICSID Convention.



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Report of the Executive Directors on the Convention—relate to instances in which the award debtor has refused to enforce the award. Nowhere in the ICSID Convention or in the Report of the Executive Directors is recognition and enforcement linked in any way to non-compliance with awards.

vi) We agree with the *ad hoc* Committee that "[t]he second paragraph of Article 54 merely organizes the logistics of seeking the recognition and enforcement, through the identification of a given judicial or other authority whose function is merely administrative, in the sense of undertaking the operation of receiving the copy of the award "certified by the ICSID Secretary-General" as required under Article 49, paragraph 1 of the ICSID Convention. This is the substitute for obtaining an "exequatur" in international commercial arbitrations."

vii) In Argentina, upon completion of the judicial process that ends with a final judgment, the procedure for payment of the amounts recognized therein—when the debtor is the State—is basically an administrative one (i.e. before administrative authorities), with the judge that issued the pronouncement keeping a supervisory role as to the way in which the judgment is enforced. The fact that Argentina designated a court for purposes of Article 54(2), as most countries including the United States, Australia and Switzerland have done,⁸ has no impact on the basically administrative—not judicial—character of such procedure.

viii) More fundamentally, we agree with the *ad hoc* Committee that if an award becomes enforceable "the necessary result [is] that the pecuniary compensation becomes due for payment in strict compliance with the rules con-

⁸ CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 1138 (2001).

tained in Articles 53 and 54 of the ICSID Convention".⁹ This statement is in line with the views of the MTD and CMS *ad hoc* Committees that, in discussing what was the award debtor's obligation with respect to the award, expressed in almost identical terms:

31. 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."

32. 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.**¹⁰

ix) Argentina shares this interpretation, according to which—aside from the obligatory and final nature of ICSID awards established in Article 53—article 54 is applicable for purposes of recognition and enforcement of awards or,

⁹ See Decision on Stay, ¶ 41.

¹⁰ MTD Equity Sdn Bhd. & MTD Chile S.A. v. The Republic of Chile (ICSID Case No. ARB/01/7) (Annulment Proceeding), Decision on the Respondent's Request for a Continued Stay of Execution (Rule 54 of the ICSID Arbitration Rules), paras. 31-32. See also 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), paras. 40-41 (emphasis added).



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in other words, for ordinary compliance with awards. Article 54 contains a *renvoi* to national law for purposes of recognition and enforcement of awards (as well as for execution), which has the consequence explained in point iv).

The present *ad hoc* Committee has established that, according to the letter to be submitted by Argentina, recognition and enforcement of the award commences with "the enforcement request addressed to the authority designated in Article 54, paragraph 2, of the ICSID Convention,"¹¹ with which Argentina agrees. However, the *ad hoc* Committee also has requested Argentina to commit itself "unconditionally to effect the full payment of its pecuniary obligation imposed by the Award - to the extent it is not annulled - within the 30 day calendar days following the notification [to the authority designated under Article 54(2)]".¹²

As to the latter requirement, although Argentina is determined to comply with all its international obligations, it cannot commit itself to what is legally impossible and almost unrealistic in terms of paying an ICSID award within as short a period as 30 days. It is quite doubtful that any country in the world would pay a 200 million dollars ICSID award within 30 days. The latter is even more difficult in the case of a developing country such as Argentina, which is emerging from the worst economic and social crisis of its history that exploded few years ago,¹³ which still has high levels of poverty and extreme poverty, which faces the prospect of having to pay several ICSID awards against it totalling billions of dollars, and which

¹¹ Decision on Stay, ¶ 46.A.

¹² *Id.*

¹³ See *A decline without parallel*, THE ECONOMIST, 28th February 2002 (Annex I).

is nowadays affected just any other country by the extremely serious international financial crisis,¹⁴ would pay hundreds of millions of dollars in a matter of days.

Further, international practice also shows that the 30-day term to which Argentina would have to commit itself appears to be impracticable. For example, Chile, in application of Article 54 of the ICSID Convention, ordered through Resolution No. 1891 of the Ministry of Justice, dated 9 July 2008, the payment of the award rendered against it in the case MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile (ICSID Case No. ARB/01/7).¹⁵

In accordance with information obtained by Argentina, the compliance procedure extended for approximately 1 year from the moment MTD presented the award before Chilean authorities until payment was done, and the amount paid was of approximately 8.5 million dollars. Conversely, as already referred to, it is expected that Argentina commit itself to pay 200 million dollars within 30 days.

In addition, in a recent roundtable held in Buenos Aires on October 15 and organized by the magazine *Latinlawyer*, José Martínez de Hoz, one of the main lawyers with cases against Argentina before ICSID,¹⁶ stated the following:

¹⁴ On the effect of the current international financial crisis on emerging economies see e.g. Stefan Heil, 'A Full-Blown Crisis', *NEWSWEEK*, 25th October 2008 (Annex II).

¹⁵ See Exempt Resolution no. 1891 of the Government of Chile, Ministry of Justice, Legal Division, Advice and Studies Department, 9 July 2008, free translation into English (Annex III).

¹⁶ Martínez de Hoz's law firm, Pérez Alati, Grondona, Benites Arntsen & Martínez Hoz (Jr.), is representing or has represented claimants in at least the following cases against Argentina: Pan American Energy LLC & BP Argentina Exploration Co. and others v. Argentine Republic (ICSID Case No. ARB/04/8 & ARB/03/13); El Paso Energy International Company v. Argentine Republic (ICSID Case No. ARB/03/15); Enersis S.A. and others v. Argentine Republic (ICSID Case No. ARB/03/21); Wintershall



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I think no one believes a state will send off a cheque the following day, they have budgets etc. I think the system can certainly live with that and I don't think any investor would complain about that. It would certainly not affect the system if the bureaucratic proceeding takes 6 months or even a year. But at least that would give the sense that the system is not at stake.¹⁷

In the same roundtable, Paolo Di Rosa, a partner of the law firm Arnold & Porter LLP,¹⁸ stated the following:

I have a slight variation on that. I think there is a relation between articles 53 and 54 in the sense that one informs the other. You have to read the article 54 provision in light of the obligation in article 53 to abide by the award – so the spirit of article 53 informs the enforcement procedures that should be carried out in article 54. I think it is recognized by all that you can't just walk up to the Treasury and say: "Here is my award – give me a cheque." There is a certain amount of procedure that states inevitably have to go through to actually execute payment. But the idea is that this is not made difficult: the negotiation history of the convention shows clearly that the idea

Aktiengesellschaft v. Argentine Republic (ICSID Case No. ARB/04/14); Mobil Exploration and Development Argentina Inc., Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic (ICSID Case No. ARB/04/16); RGA Reinsurance Company v. Argentine Republic (ICSID Case No. ARB/04/20); Giovanna a Beccara and others v. Argentine Republic (ICSID Case No. ARB/07/5).

¹⁷ See Latin Lawyer Magazine, Volume 7, Issue 9 at 12-19 (Annex IV). Martínez de Hoz's words were edited by the magazine for purposes of publication. An email from Clare Bolton, editor of Latinlawyer, with Martínez de Hoz's exact words during the roundtable as transcribed herein and the reasons for the edition is on file with this Attorney General's Office. We can provide it to the *ad hoc* Committee if it so desires.

¹⁸ Mr. Di Rosa is also representing investors in several claims against Argentina, including Compañía General de Electricidad S.A. and CGE Argentina S.A. v. Argentine Republic (ICSID Case No. ARB/05/2); Electricidad Argentina S.A. and EDF International S.A. v. Argentine Republic (ICSID Case No. ARB/03/22); and EDFI and Electricidad Argentina S.A. v. Argentine Republic (ICSID Case No. ARB/03/22); EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic (ICSID Case No. ARB/03/23).

was precisely to expedite these things as much as possible.¹⁹

As can be seen from the above-transcribed paragraphs, no one expects that an award will be paid in 30 days, and in fact, from the investors' perspective, it seems acceptable that the "bureaucratic proceeding takes 6 months or even a year." Finally, Argentina cannot be required to fail to abide by its own domestic laws and regulations concerning enforcement of final judgments, particularly when Article 54 of the ICSID Convention effects a *renvoi* to such laws and regulations as already expressed. Such requirement would not only have Argentina breaching its legal system as to enforcement of final judgments—a result that was certainly never intended by Article 54, which seeks just the opposite—, it would probably also result in Argentina breaching other international rules requiring equal treatment of creditors of final decisions.

Respectfully submitted,

[SIGNATURE]

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¹⁹ *Id.*, at 12.