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December 8, 2008

By Email and Facsimile

Ms. Claudia Frutos-Peterson
Secretary of the *ad hoc* Committee
International Centre for Settlement of Investment Disputes
1818 H Street, N.W.
Washington, D.C. 20433

Re: *Compañía de Aguas del Aconquija S.A. and Vivendi S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3

Dear Ms. Frutos-Peterson:

Claimants write in response to Respondent's letter dated November 28, 2008 (received December 3, 2008), in which Respondent declined to provide an adequate assurance letter consistent with the *ad hoc* Committee's Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award Rendered on 20 August 2007.[1]

Respondent's letter is remarkable in several respects. First, while ostensibly agreeing with the Committee's analysis and conclusions, Respondent repeats its stated intention to qualify its ICSID Convention obligation to comply with the Award by subjecting the Award to Argentine laws and procedures for the enforcement of domestic court judgments. It continues to insist that the award creditor must "complete the formalities applicable to compliance with final judgments of local courts,"[2] once again conflating (i) compliance with an award (which is automatic and no "formalities" apply) and (ii) its enforcement in case the losing party refuses to comply.[3] Respondent's attempt to re-interpret the analysis and conclusions of the Committee is both inappropriate and substantively incorrect.

Second, Respondent remains vague in the extreme regarding the steps that, in its view, these and other claimants should take to obtain enforcement of an ICSID award. Respondent refers to unspecified "formalities," to a procedure that is "basically an administrative one," to a

[1] Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award rendered on 20 August 2007 ("Committee's Decision") at paras. 46(A)-(B).

[2] Letter from the Republic of Argentina to Ms. Claudia Frutos-Peterson, Secretary of the *Ad Hoc* Committee, November 28, 2008 ("Respondent's Letter") at page 4 (para. iv).

[3] *See, e.g., Enron Corporation Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, October 7, 2008, at para. 67 ("In legal systems generally, judgment debtors and award debtors are under a legal obligation to pay judgments and awards given against them. It is not generally the case that judgment debtors and award debtors have a legal entitlement to decline to comply with a judgment or award unless and until enforcement proceedings are taken against them; on the contrary, enforcement procedures exist to deal with the case of judgment debtors and award debtors who are in default of their legal obligation to comply with the judgment or award.").

"supervisory role" of the courts.[4] In its written submissions, at the hearing, and again in this latest letter, Respondent has failed to explain what are, under its own theory of "compliance," the rules and procedures that would apply, the specific administrative and judicial bodies involved and the specific actions they would be authorized to take, the applicable time limits, etc. Thus, not only has Respondent refused to provide the assurance ordered by the Committee but, remarkably, Respondent refuses to provide any commitment, or even an explanation, regarding what steps it (including its judicial and administrative bodies) will take to ensure compliance with the award under Respondent's own erroneous interpretation of the ICSID Convention. Respondent appears to reserve for itself the largest possible margin of discretion to refuse payment in the future on the grounds that Claimants allegedly failed to comply with some yet unknown or unspecified requirements of Respondent's domestic law.

Respondent seeks to disguise its unwillingness to provide any commitment to comply with the Award by offering to "consult with Claimants in order to try to agree on the text of a commitment letter."[5] Claimants hereby decline Respondent's offer. The offer is not consistent with the Committee's instructions, which is the end of the matter. Because Respondent has stated unequivocally that "it "cannot adopt the wording suggested by the Committee in paragraph 46(a) of the Decision,"[6] the next step is clear: As the Committee anticipated, upon Respondent's refusal "the need for a financial assurance [has] become mandatory,"[7] and Respondent must now provide a bank guarantee in the terms of Exhibit 1186 by no later than February 8, 2009.

There can be no question that Respondent has, in the Committee's words, "decline[d] to abide by the ruling contained in item A" of paragraph 46 of the Decision, which required it to promise compliance with Argentina's ICSID Convention obligations, including its direct obligation under Article 53 to make payment of the Award promptly upon a decision denying annulment.[8] Respondent has stated clearly that it "cannot adopt the wording suggested by the Committee in paragraph 46(a)" of the Decision."[9] (Of course, that wording was not "suggested" by the Committee; it was required by the Committee in order to provide adequate assurances to Claimants.) The commitment required by the Committee had three components: (1) the commitment must be unconditional; (2) payment must be made within 30 days; and (3) payment must be made based on "notification by the interested party of the enforcement."[10] In its November 28 letter, Respondent rejected not only the Committee's specific wording, but also the substance of all three of these requirements.

First, the Committee required that Respondent's commitment to pay be "unconditional."[11] The Committee gave meaning to this term when it explained earlier in the Decision that "it would be contrary . . . to pretend that any organ of the host State can extend an administrative certification function to exercise any possible control over the enforcement process of pecuniary

[4] Respondent's Letter at page 4 (para. iv) & page 5 (para. vii).
[5] *Id.* at page 2.
[6] *Id.* at page 1.
[7] Committee's Decision at para. 46(B).
[8] *Id.*
[9] Respondent's Letter at page 1.
[10] Committee's Decision at para 46(A).
[11] *Id.*

obligations under a finally binding ICSID award."[12] The Committee further stated that "[a]ny possible intervention by a judicial authority in the host State is unacceptable under the ICSID Convention, as it would render the awards simply a piece of paper deprived from any legal value and dependent on the will of state organs."[13]

Yet, in its letter, Argentina insists that any assurance letter it supplies must "conform[] to the laws and regulations in place in Argentina as to the enforcement of final decisions of local courts."[14] It further states that Argentina's courts will exercise a "supervisory role as to the way in which the judgment is enforced."[15] Likewise, Respondent shows its hand when it states that it can commit "to notifying the competent authorities of the credit recognized in the award ... *even before Claimants commence the recognition and enforcement process*" and that it "can commit itself to expedite the compliance procedure *as much as the applicable regulations allow*" (emphasis added).[16] Such conditions effectively allow Respondent to rely on domestic regulations to postpone, amend, or otherwise erode the Award – as Claimants detailed at length in their post-hearing submission dated August 1, 2008. Respondent's continued insistence on subjecting any final ICSID award to its domestic laws, procedures, and judicial "supervision" is thus in stark contrast to the Committee's requirement that Respondent make an *unconditional* promise to make payment on the Award.

Second, apart from its insistence on conditioning payment of the Award on the whims of Argentina's domestic enforcement procedures (which to this day Argentina omits to describe or explain), Respondent makes clear that it "cannot commit itself to . . . [pay] an award within as short a period as 30 days."[17] Respondent offers no explanation; Respondent merely refers cryptically to "bureaucratic proceedings" without explaining the character or nature of such proceedings, and without explaining why it could not expedite such "proceedings" in order to meet the Committee's 30 day limit. Respondent cites statements by two individual lawyers (neither of whom is involved in the instant arbitration) as evidence that the Committee's instructions are "unrealistic."[18] This is not evidence of anything, and is anyway irrelevant to the case at hand. The Committee has already deliberated and determined that in its view, 30 days after notification is a reasonable period of time for Respondent to process and pay any amounts owed to Claimants.

The third requirement contained in the Committee's Decision is that payment be made upon "notification by the interested party" to the proper authorities identified by Respondent pursuant to Article 54(2).[19] Instead of acting upon "notification," which is all that Article 54 and the Committee require, Respondent insists that it will require Claimants to "complete the formalities applicable to compliance with final judgments of local courts"[20] – *i.e.*, a "recognition

[12] *Id.* at para 36.
[13] *Id.*
[14] Respondent's Letter at page 2.
[15] *Id.* at page 5.
[16] *Id.* at pages 1-2.
[17] *Id.* at page 7.
[18] *See id.* at pages 8-10.
[19] Committee's Decision at para 46(A).
[20] Respondent's Letter at page 4.

and enforcement process."[21] Requiring Claimants to take any steps beyond notifying the designated national authority would violate Article 54 and the Committee's Decision.

At bottom, however, the various reasons and excuses put forward by Argentina for its refusal to comply with the Committee's ruling in paragraph 46(A) of the Decision are irrelevant. It does not matter whether Respondent cannot, or merely chooses not to, provide the Committee with the specified written commitment. All that matters is that Respondent has stated unequivocally that it will not do so. Accordingly, Respondent must now furnish a bank guarantee in the terms of the text attached as Exhibit 1186 of the August 1, 2008 post-hearing submission of the Claimants no later than February 8, 2009.

Yours sincerely,

Stanimir A. Alexandrov
Marinn F. Carlson
Counsel for Claimants

[21] *Id.* at pages 1-2.