International Centre for Settlement of Investment Disputes
Washington, D.C.

Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A.

v.

Argentine Republic

(ICSID Case No. ARB/97/3)
(Annulment Proceeding)

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)

Members of the *ad hoc* Committee

Dr. Ahmed S. El Kosheri, President
Professor Jan Hendrik Dalhuisen
Ambassador Andreas J. Jacovides

Secretary of the *ad hoc* Committee

Dr. Claudia Frutos-Peterson

Representing the Claimants:

Mr. Stanimir Alexandrov
Ms. Marinn F. Carlson
Sidley Austin Brown & Wood LLP

Judge Stephen M. Schwebel

Mr. Luis A. Erize
Abeledo Gottheil Abogados SC

Mr. Ignacio Colombres Garmendia
Ignacio Colombres Garmendia & Asociados

Representing the Respondent:

Dr. Osvaldo César Guglielmino
Procurador del Tesoro de la Nación Argentina
Procuración del Tesoro de la Nación Argentina

Introduction:

1. On 13 December 2007, the Argentine Republic ("Argentina" or "the Respondent") filed with the Secretary-General of the International Centre for Settlement of Investment Disputes (the "Centre" or "ICSID") an application in writing requesting the annulment of an Award dated 20 August 2007, rendered by the Tribunal in the arbitration between Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. ("Vivendi" or "the Claimants") v. Argentine Republic (ICSID Case No. ARB/97/3).

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 all five grounds set out in Article 52(1) of the ICSID Convention.

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 Proceeding ("Arbitration Rules"), for a stay of enforcement of the Award until the Application for Annulment is decided.

4. The Deputy Secretary-General of ICSID registered the Application on 19 December 2007, and on the same date, in accordance with Rule 50(2) of the ICSID Rules, transmitted a Notice of Registration to the Parties. The Parties were also notified that, pursuant to ICSID Arbitration Rules 54(2), the enforcement of the Award was provisionally stayed.

5. By letter of 22 May 2008, 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 Professor Jan Hendrik Dalhuisen (Dutch), Dr. Ahmed S. El Kosheri (Egyptian) and Ambassador Andreas J. Jacovides (Cypriot). On the same date the Parties were informed that Dr. Claudia Frutos-Peterson, Counsel, ICSID, would serve as Secretary of the *ad hoc* Committee.

6. On 23 May 2008, Claimants submitted some Observations requesting the immediate termination of the provisional stay of enforcement. In the alternative, Claimants requested that the *ad hoc* Committee order Argentina to provide financial security as a condition of any continued stay, in the form of either (i) an escrow deposit of at least US$177,534,408.53 with a first-tier international bank outside Argentina, or (ii) an irrevocable bank guarantee or security bond in the same amount issued by a first-tier international bank outside Argentina, immediately payable to or cashable by Claimants upon the issuance of a decision denying annulment.

7. By letter of 30 May 2008, the Parties were notified that Dr. Ahmed S. El Kosheri had been designated President of the Committee.

8. By letter of 27 June 2008, the Centre sent to the Parties copies of the Declaration signed by each Member of the Committee pursuant to ICSID Arbitration Rule 52(1) and Arbitration Rule 6(2).

9. The first session of the Committee was held, with the agreement of the Parties, on 17-18 July 2008, 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 continuation of the stay of enforcement of the Award.

10. After having heard the arguments of both Parties, the Committee decided to continue the stay of enforcement until a decision is taken by the

Committee, and granted the Parties the opportunity to submit post-hearing observations in a simultaneous manner by 1 August 2008.

11. On 1 August 2008, both Parties submitted their post-hearing briefs, and the Members of the Committee subsequently met to render the present Decision.

B. The Parties Contentions:

12. On 23 May 2008, Vivendi submitted a brief containing its legal position on the "Termination of the Stay of Enforcement", focusing on the background of the dispute and the decade of litigation which led to the present annulment proceedings. According to the Claimants, "Argentina's recent conduct with respect to ICSID awards has evidenced a clear disregard for its obligations, under the relevant investment treaties and the ICSID Convention, to abide by and comply with awards rendered against it". The Claimants invoked such conduct in order to categorize Argentina's recourse to the annulment proceeding as a "further avoidance tactics". In the view of the Claimants, this could only be achieved by requiring Argentina to provide binding, irrevocable, and financially meaningful evidence of respect for the outcome of the ICSID's system (*paragraph 3, page 2*).

13. The Claimants relied in this respect on what they claimed to be "the uniform practice of *ad hoc* committees under the ICSID Convention by conditioning a stay on the provision of reasonable assurances" on immediate compliance with the terms of the Award once the annulment is rejected, considering that "the only reasonable assurance that Argentina can provide is deposit of the full amount of the Award, including interest, in an escrow account, or an irrevocable bank guarantee or bond securing payment of that same amount" (*paragraph 4, page 2*).

14. Invoking the previous decisions rendered by *ad hoc* committees which have ordered the award-debtor seeking annulment to provide a bank guarantee in order to obtain a continuance of the stay (*paragraphs 18–35, pp. 7-13*), Vivendi argued that Argentina's conduct leaves no doubt about its serious disregard for the ICSID system and the lack of intention to comply with ICSID awards, not only through public announcements under what is known as the "*Rosatti Doctrine*", but more importantly by refusing in practice to effect payment under any of the awards outstanding against it.

15. Such constant behavior, according to Vivendi, is particularly demonstrated in the *CMS* case where Argentina made a solemn promise to the *ad hoc* committee in charge of the annulment proceedings, but failed to abide by and comply with this promise. According to Vivendi, Argentina is trying to avoid payment, months after the annulment process was terminated, by publicly disavowing its commitment to comply with the *CMS* Award (*paragraphs 38-81, pp. 14 - 33*).

16. Vivendi maintains that even with regard to the *Azurix* case, where no financial security or official assurance were provided, the *ad hoc* committee made clear that "if Argentina were shown to intend *not* to comply with awards against it, …, then a requirement of financial security would be appropriate" (*paragraph 85, page 35*).

Pursuing the analysis of the negotiating history and commentary of the ICSID Convention, as well as the "*overwhelming*" practice of the Member States, Vivendi ascertains that the State's compliance required under the ICSID Convention "is unaffected by any procedure for collection" (*paragraphs 106–125, pp. 43–52*).

17. In its Observations submitted on 20 June 2008, Argentina called for the continued stay of enforcement, invoking what was held by the *ad hoc* committee in the *Azurix* case, emphasizing that the remedy of annulment is essential for the purpose of bringing legitimacy to the dispute resolution system created by the ICSID Convention (*paragraphs 13–25)*, concluding that the "Case Law is unanimous in considering the need for granting a continued stay of enforcement of the Award; this has been the decision of all the Annulment Committees in all the cases reviewed …, which comprise every single publicly [reported] case" (*paragraph 27).*

18. After describing the economic effects of the severe crisis encountered in the recent years, Argentina indicated that "*suspending the continued stay of enforcement of the Award* would bring about serious damage not only to Argentina, … but also to the

investment arbitration system under the 1965 Washington Convention" (*paragraph 41*).

As to Vivendi, Argentina argues that it cannot be considered "suffering a damage derived from implementing a remedy especially provided for in the ICSID Convention…" (*paragraph 43)*. Over and above, payment of interest "constitutes a compensation that safeguards Vivendi's asset(s) against any hypothetical damage it might go through due to a stay of enforcement of the award" (*paragraph 49)*.

19. Insisting on the sufficiency of the guarantees of compliance contained in the Argentina's legal system, as well as in the Argentina/France BIT and in the ICSID Convention, the conclusions arrived at by the *CMS* annulment committee are deemed "enough for the purpose of providing the necessary guarantees that the Award will be complied with in case the Request for Annulment is not accepted" (*paragraph 57, with further elaboration in paragraphs 58–71)*.

20. Argentina sustains moreover that "[r]equiring a financial guarantee contradicts the objectives and purpose of the ICSID Convention and the mechanisms created thereby" (*paragraphs 74–85)*, devoting attention to the cases which adopted a different point of view, starting from *Amco I* to *Repsol*, explaining to what extent they were issues emerging under clearly different circumstances (*paragraphs 86–91)*.

21. It may be appropriate to point out that in the closing paragraphs of Argentina's Observations of 20 June 2008, within the summing up of the main arguments invoked (*paragraph 117*), there is the text of the Statement addressed by the *Procurador del Tesoro de la Nación* to the *CMS* annulment committee as part of the submissions in the present case.

22. Vivendi's oral pleadings during the 17-18 July 2008 first session of the Committee with the parties and the Claimants' post – hearing submission of 1 August 2008, focused primarily on the eight "circumstances" Argentina invoked in support of the continuation of the stay, and on the weaknesses existing in support of Argentina's assertions about the means through which an ICSID award has to be complied with under domestic legal systems according to Argentina's understanding of Article 54 of the ICSID Convention.

23. Vivendi dismisses as being of no relevance all the arguments advanced by Argentina that the stay of enforcement should continue without any need to provide any security, whether financial or of any other nature (*paragraphs 8 to 20, Claimants' post-hearing brief*).

For Vivendi, the Committee has to look "for reasonable assurances of compliance", and in the present circumstances "the only reasonable assurance of Argentina's compliance is a financial guarantee. This is because Argentina has stated clearly and on the record before this Committee that it will not directly comply with the Award. Argentina has stated that, instead, it intends to put Claimants (and all other ICSID award – creditors) through the scrutiny of its own legal system, which, according to Argentina's own lawyers, holds out the possibility of reviewing, nullifying or reducing payment under the Award" (*paragraph 22, Claimants' post-hearing brief*).

24. Addressing what is termed Argentina's "defective interpretation" of its obligations under both Articles 53 and 54 of the ICSID Convention, Vivendi's Lawyers ascertain that , "Argentina is inconsistent and unclear about what it will require for Article 54 enforcement", particularly in the light of what was said during the first day of the hearing, in comparison to what was stated in the second day about ICSID award holders being only "subject to an unspecified administrative procedure and not to any judicial procedure for the enforcement of final ICSID awards"

(*paragraph 27, and the precisions provided for in the following paragraphs from 28-34, Claimants' post-hearing brief*).

25. Claimants' own understanding of the applicable procedures under Argentina Law (*paragraphs 36–55, Claimants' post-hearing brief*), led them to emphasize primarily "the vast legal and practical divide between Argentina's proposed system for enforcement under Article 54 on the one hand, and, on the other hand, the immediate, direct obligation to *"abide by and comply with the terms of the Award 'under Article 53 of the ICSID Convention*"' (*paragraph 56, Claimants' post-hearing brief*).

Consequently, Vivendi concludes that: "Argentina's legal system does not provide any assurance of compliance with ICSID awards … [i]t most certainly cannot be substituted for, or constitute a reasonable assurance of, compliance with the direct obligation to abide by and comply with ICSID awards under Article 53 of the ICSID Convention" (*paragraph 57, Claimants' post-hearing brief*).

26. After providing its own interpretation about the close link and interrelationship between Article 53 and 54 of the ICSID Convention (*paragraphs 60-69, Claimants' post-hearing brief*), Vivendi stated clearly that "accepting Argentina's interpretation will erode the foundations of the ICSID system. ICSID was designed as a self – contained system with its own limited review procedures (*i.e., Article 52 annulment*) and its own enforcement mechanism" (*paragraph 70, Claimants' post-hearing brief*).

27. As for the financial security required by Vivendi as necessary condition for the continuation of the stay of enforcement, at the last page of the Claimants' post – hearing submission, the logistics for the issuance of the requested bank guarantee were stated in a manner that calls for a first-tier international bank outside Argentina to provide Claimants an irrevocable promise to pay up to US$196,762,330.50 on demand, upon notification of the Committee's decision

rejecting annulment, in line with the model bank guarantee attached as Exhibit 1186 to the said submission.

28. Argentina's post – hearing submission, submitted equally on 1 August 2008, started by the denial of the accusation that the annulment request is of a dilatory nature. Its main argument to continue the stay was, however, that the Award was manifestly arbitrary and could therefore not sustain enforcement (*paragraphs 1–24, Respondent's post-hearing brief*).

In addition Argentina presented arguments to the effect that the "termination of the stay of enforcement and/or the imposition of a guarantee or the setting up of an Escrow account would result in irreparable harm" (*paragraphs 25–30, Respondent's post-hearing brief*).

In this respect, Argentina particularly emphasized the "*cascading effect*" impacting on the country "not only in this case but also in the other 40 cases which started as a result of the economic crisis which affected all the Argentine population across -the- board. It would mean setting a precedent for the other Committees to require the same procedure, thus multiplying expenses, costs and consequences. We would no longer be speaking about US$171 million, but billions of dollars resulting in an unquestionably irreparable harm" (*paragraph 29, Respondent's post-hearing brief*).

On the other hand, Argentina ascertains that the stay of enforcement of the Award does not cause any harm to the Claimants (*paragraphs 31–37, Respondent's post-hearing brief*), in reliance mainly in citations from the *CMS* and *Azurix* decisions on this precise subject.

29. Apart from the non – dilatory nature of the annulment request and the lessons deriving from both *CMS* and *Azurix* decisions which did not require any

security from Argentina, Argentina invoked, *interalia*, the following supplementary arguments:

(1) That the first annulment in the Vivendi case was not requested by Argentina;
(2) The possibility of having a split outcome as what took place in the *CMS* annulment case;
(3) That Argentina's legal system provides adequate assurances of compliance rendering unnecessary any financial guarantee;
(4) The "hardships" to be suffered if required to provide a financial security in order to obtain the stay of enforcement;
(5) The risk of being unable to recover the Award payment from the Claimants in the event annulment is decided;
(6) Argentina's compliance with all its international obligations under the ICSID Convention, with a record of no failure committed;
(7) Posting a bank guarantee or other financial security could place Claimants in a more advantageous position than they would be if Argentina had not used the right of recourse to annulment, i.e. "being penalized for exercising a *legitimate right*" (*page 16, Respondent's post-hearing brief*); and finally
(8) Claiming that "the requirement for a guarantee and/or any other type of precautionary measure are not consistent with the ICSID Convention" (*page 17, Respondent's post-hearing brief*).

30. Particularly its more elaborate demonstration that the domestic legal system of Argentina "meets the international obligations in Articles 53 and 54 of the ICSID Convention (*paragraphs 46–62, Respondent's post-hearing brief*), led Argentina to request "that the stay of the Award previously requested by Argentina be continued and that the Respondent not be required to grant a guarantee for the amount of the Award" (*page 25, Respondent's post-hearing brief*).

C. The *ad hoc* Committee's Views:

31. In deciding the question for a continued stay of the enforcement of the Award, the first task of the Committee is to undertake a comprehensive analysis of the relevant ICSID Convention Articles and Arbitration Rules in the light of their precise language, context, preparatory works, as well as the practice which prevailed particularly in the most recent annulment cases.

32. The first text that has to be taken into consideration is Article 52 of the ICSID Convention, which provides in its first paragraph:

> "1. Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
> (a) that the Tribunal was not properly constituted;
> (b) that the Tribunal has manifestly exceeded its powers;
> (c) that there was corruption on the part of a member of the Tribunal;
> (d) that there has been a serious departure from a fundamental rule of procedure; or
> (e) that the award has failed to state the reasons on which it is based." *(Emphasis added).*

Clearly the remedy envisaged in this opening paragraph is a restricted "annulment" process applicable equally to the foreign investor and the host State as the case may be, once the losing party invokes one or more of the grounds for annulment provided for in this paragraph.

33. Then comes paragraph 5 of Article 52 which states that the *ad hoc* Committee, in charge of adjudicating the annulment request:

> "[…] 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". (*Emphasis added*).

According to the rule stated therein, if the applicant for annulment requests in his application a stay of the enforcement of the attacked award, this has two consequences: (a) there is a provisional stay of enforcement until the Committee once constituted rules on the request, and (b) in the exercise of its discretionary power, as reflected by the word "may", the *ad hoc* Committee continues the stay of enforcement only "if it considers that the circumstances so require". The continuation of the stay is therefore of an exceptional nature.

34. Then follows the important Section 6 of the ICSID Convention entitled "Recognition and Enforcement of the Award" which contains three articles (53, 54 and 55). The exact meaning of these three articles and their relevance to the issue of staying enforcement need careful scrutiny as will be demonstrated herein after, particularly with regard to the interrelationship between Articles 53 and 54.

Article 53 reads:

> "1. 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 the Convention. (*Emphasis added*).
> 2. For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52."

The basic uncontested rule provided for under the first paragraph of this article confirms an absolute logical premise according to which an award rendered under the ICSID Convention has to be considered "*binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in the Convention*". The only qualification in this respect relates to the "*extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention*", which includes evidently the stay of enforcement in case of an annulment request under Article 52.

Consequently, 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.

35. On the other hand, there is the equally vital question of the harmonization between this cardinal rule and the provisions contained in the following two articles (54 and 55) of the ICSID Convention.

Addressed to all States that adhere to the ICSID Convention, and therefore not limited to the parties to the said arbitration dispute which led to the issuance of the "*award*" that become finally "*binding*" on them, Article 54 stipulates:

> "1. Each Contracting State shall 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. A Contracting State with a federal constitution may enforce such as 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. (*Emphasis added*).
>
> 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. (*Emphasis added*).
>
> 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."

In close association with the rules contained in Article 54 addressed to all States members of the ICSID Convention, Article 55 provides:

> "Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution." (*Emphasis added*).

Undoubtedly, 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. The domestic and the New York systems understandably require some recourse to domestic courts in order to obtain what is commonly known as an "*exequatur*", after engaging into judicial procedures that could be lengthy. 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 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.

Articles 54 and 55 were adopted for that precise purpose and were worded in a manner that excludes any possible court intervention in all States that adhered to the ICSID Convention, particularly the judicial organs of the State which was party to the dispute adjudicated under the ICSID rules.

This basic approach should always be kept in mind in the implementation of the rules provided for under Articles 54 and 55. In other words, the obligation explicitly provided for under the first paragraph of Article 54 according to which: *"Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligation imposed by that award within its territories as if it were a final judgment of a court in that State"*, should be applied in the same manner whether the State in question is the State against which the recognition and

enforcement is sought or is another State on whose territory certain assets are present and the pecuniary aspects of the award could be enforced upon.

The 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.

36. The only question that could be possibly subject to interpretation relates to paragraph 3 of Article 54 in conjunction with Article 55. In Article 55, the domestic laws in force in the State in whose territories execution is sought is explicitly referred to as possibly being *"a foreign state"* with regard to immunity from execution. No such explicit qualification exists, however, in paragraph 3 of Article 54. Nevertheless, the finality of the ICSID awards requires necessarily that they should be protected from any possible court intervention in all Member States, particularly the State against whom the award was rendered.

In the opinion of the Committee, it would be contrary to the interpretation provisions of the Vienna Convention on the Law of Treaties 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 obligations under a finally binding ICSID award. Such activity would contradict the declared objectives of the ICSID Convention. Any 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. In French legal terminology, they would merely be *"obligations potestatives"* which are meaningless under all modern legal systems.

37. The above-stated essential observations reflecting the Committee's understanding of the relevant rules contained in Article 52, 53 and 54 of the ICSID Convention, form the legal background governing the issues pertaining to the stay of enforcement in the present case. In other words, they have to guide the Committee in the exercise of its discretionary power in the light of the relevant circumstances which should be taken into consideration. The rules contained in Article 53 are of great significance in the exercise of the power to order the stay of enforcement provided for in Article 52, since an *ad hoc* Committee should take into account all the relevant circumstances, and among these circumstances figure in particular the prospects of obtaining the execution of the pecuniary obligations under the Award in case the annulment application fails.

In this respect, it has to be understood that various options exist: (a) to order maintaining the provisional stay or brining it to an end; (b) to make the stay conditional upon providing an official written statement on behalf of the Argentine Republic assuring its compliance with the present Award in the event it is not annulled; or (c) to make the stay subject to the requirement of posting a security in the form of a bank guarantee.

In opting for any one among the above-mentioned alternatives, the Committee has to decide in the light of two essential considerations:

First: The essence of the arguments of both Parties in their written statements submitted prior to the first session of the Committee with the parties, which took place on 17-18 July 2008 and the oral arguments made during the first session, as well as in their post-hearing briefs of 1 August 2008, and which have been summarized in the previous section (B).

Second: The manner in which pervious *ad hoc* committees have dealt with the issues under consideration in more or less similar circumstances, particularly during the last few years, taking into account, however, that previous rulings do not constitute binding precedents, but may be considered indicative of certain tendencies that could lead to contradictory results due to the differences existing in the circumstances prevailing with regard to each particular case.

In this connection, the Committee will not revisit the question whether the continuation of the stay can be made conditional. There is ample case law that has confirmed this possibility.

38. As a starting point, this Committee is of the opinion that solutions based on *prima facie* assumptions in favor of maintaining the initial stay without imposing any condition, or on the other hand requiring posting a bond or providing a bank guarantee as a necessary condition have to be excluded. Such dogmatic positions are not in conformity with the general rule provided for in Article 52, paragraph 5 which makes the granting of the stay of enforcement dependent on the relevant circumstances.

Therefore, the Committee cannot adopt a *prima facie* presumption in favor of maintaining the initial provisional stay of enforcement, leaving only to the Committee the task of deciding whether the stay has to be with or without providing financial security. The Committee has to be convinced first that within the context of the pending case continuation of the stay of enforcement is justified.

39. In this vein the Committee cannot accept either any *prima facie* consideration pertaining to the merits of the grounds on which the application for annulment is based. The investigation to be undertaken could not therefore be affected by any considerations related to prospects of whether the annulment request could have a chance of being successful or would be rejected. Such consideration

should be totally disregarded as the Committee is not supposed at the present stage to assess even in a preliminary manner, the merits of the annulment request or to decide whether it is dilatory or not.

40. Focusing on the various considerations and arguments raised by Argentina to sustain its request for the stay of the enforcement, these arguments have been summarized in section 2 herein above (paragraph 29) and there is no need to repeat them or to elaborate within the present text. The Committee does not consider most of them sufficiently convincing with the exception of the one related to the harm that would be brought to the national economy of Argentina if it is faced with immediate financial burdens, not only with regard to the present case, but also when taking into consideration the over 40 other arbitration cases filed with ICSID and other international tribunals, and the *"cascading effect impacting on Argentina",* of lifting the stay of enforcement which could effectively lead to *"an unquestionably irreparable harm"* (*paragraph 29, Respondent's post-hearing brief*).

The Committee is further of the opinion that as to immediate harm, Vivendi is less exposed as the interest accumulating during the annulment procedures constitutes a remedy that could be fairly considered appropriate in the event the annulment request fails.

In assessing the impact of the immediate harm that would arise to either Party, the Committee unanimously decides that the stay of the enforcement of the Award should continue pending its decision on Argentina's application for annulment, but that this continuation of the stay would have to be subjected to the steps set out hereinafter.

41. Indeed, what remains to be decided relates to the other no less important issue of whether the continuation of the stay should be granted unconditionally or on condition of providing certain assurances that could take

various forms. These are not limited to providing a bank guarantee as advocated by certain authors and followed in a number of earlier cases, but could also lead to issuing certain official statements containing assurances, as embodied in recent cases, according to which the State concerned commits itself to proceed in full respect of its international obligations under the ICSID Convention if the request for annulment should fail and the Award becomes enforceable with the necessary result that the pecuniary compensation becomes due for payment in strict compliance with the rules contained in Articles 53 and 54 of the ICSID Convention as explained in paragraphs 34-36 herein-above.

42. The essential question that has to be considered in the present circumstances as counterpart to maintaining the stay of enforcement throughout the annulment proceeding is precisely how to provide the creditor beneficiary of the challenged Award with reasonable assurances of post-annulment compliance. The classical approach in this respect, taken by various *ad hoc* committees before 2006, was to consider whether or not a bank guarantee would be required.

As indicated in the *CMS v. Argentina* Committee's Decision of 1 September 2006 (paragraph 36, pp. 10-12), a review of the attitudes adopted in previous cases from *Amco I* and *II* to *Repsol* case (Decision of 22 December 2005), leads to the conclusion that there was a general pattern in favor of imposing the posting of a bank guarantee as condition for the stay of enforcement. However, this was not the outcome in the *MINE v. Guinea* case in 1988, in the *Patrick Mitchell v. DRC* case in 2004, nor in the *MTD v. Chile* case in 2005.

43. As of 2006 a new trend appeared, dispensing with the need for providing a financial guarantee if the State seeking annulment provided other reasonable assurances that the award, if not annulled, would be complied with. The CMS *ad hoc* committee followed that path by requesting a written statement from

Argentina with respect to its compliance with the Award rendered under the ICSID Convention in the event that it was not annulled.

The CMS committee considered that Dr. Guglielmino, *Procurador del Tesoro de la Nación Argentina,* duly represents Argentina as provided for in Rule 18 of the ICSID Arbitration Rules, and that he has the authority to commit Argentina according to what had been decided in many comparable cases by international courts and arbitral tribunals (*references cited at paragraph 49 of the* CMS *Decision, pp. 15-16*). Consequently, the *ad hoc* committee in that case considered as a sufficient reasonable assurance the letter dated 12 June 2006, signed by Dr. Guglielmino, under which Argentina gave 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" (paragraph 47, CMS Decision, page 15).*

44. Fifteen months later, the *Azurix v. Argentina ad hoc* committee in its Decision 28 December 2007, deemed it unnecessary to obtain a similar written official commitment particular to that case. It merely relied upon Argentina's undertaking of formal assurances provided under the Argentinean domestic legal system and Argentina's respect for its international obligations under the ICSID Convention (*paragraphs 35-39 of the* Azurix *Decision*).

45. Exercising its own discretionary power to decide what is deemed appropriate in the light of what the present *ad hoc* Committee considers the proper interpretation of the relevant ICSID Convention's provisions as indicated previously (paragraphs 31 to 37), and the appropriate analysis of Argentina's legal position in this respect which does not conform entirely with the Committee's understanding of the interrelationship between Articles 53 and 54 (although the pleadings of Argentina on the second day of the oral hearing and as reflected in the post-hearing submission

provided some useful clarifications), the Committee is convinced that the earlier assurances of post-annulment compliance provided by Argentina are no longer sufficient to grant an unconditional stay of enforcement. The official assurance particular to the present case has to contain a specific paragraph ensuring full payment to be made within a fixed period of time deemed reasonable by the Committee, or as an alternative to such a precise payment commitment a bank guarantee covering the entire sum due under the Award should be given.

46. Therefore, the Committee unanimously decides that:

A. During the 30 calendar days following the notification by the ICSID Secretariat of the present Decision, the Argentine Republic has to provide the Committee with a more elaborate official letter to be issued by Dr. Guglielmino in his capacity as the *Procurador del Tesoro de la Nación Argentina* and as Agent of Argentina in the present annulment proceeding. This letter must not only reproduce the commitment provided for in his letter of 12 June 2006 in the *CMS* case, but must contain the following additional paragraph:

> **"The Argentine Republic further commits 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 calendar days following the notification by the interested party of the enforcement request addressed to the authority designated in Article 54, paragraph 2, of the ICSID Convention".**

B. In case the Argentine Republic declines to abide by the ruling contained in item A herein above and the 30 calendar days referred to herein above having expired, the need for a financial assurance will become mandatory, and the Argentine Republic will be required to provide a bank guarantee in the terms of the text attached as Exhibit 1186 to the 1 August 2008 post-hearing Submission of Claimants.

C. In case the bank guarantee is not issued within 60 calendar days from the coming into effect of the requirement provided for under item B herein-above, the stay of enforcement ordered in paragraph 10 herein-above is automatically terminated.

[Signed]

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Dr. Ahmed S. El Kosheri
President of the *ad hoc* Committee
On behalf of the Committee
4 November 2008