ICSID (INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES)

ICSID Case No. ARB/01/3

ENRON CREDITORS RECOVERY CORPORATION (FORMERLY ENRON CORPORATION) AND PONDEROSA ASSETS, L.P. V. ARGENTINE REPUBLIC

DECISION ON THE CLAIMANTS' SECOND REQUEST TO LIFT PROVISIONAL STAY OF ENFORCEMENT OF THE AWARD

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20 May 2009

Tribunal:
Patrick L. Robinson (Member)
Per Tresselt (Member)
Gavan Griffith (President of the Ad Hoc Committee)

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Decision on the Claimants' Second Request to Lift Provisional Stay of Enforcement of the Award

A. Introduction

1. On February 21, 2008, the Argentine Republic ("Argentina") filed with the Secretary-General of the International Centre for Settlement of Investment Disputes ("ICSID") an application in writing (the "Application for Annulment") requesting the annulment of the Award of May 22, 2007 (the "Award"), rendered by the tribunal (the "Tribunal") in the arbitration proceeding between Enron Corporation and Ponderosa Assets, L.P. (the "Claimants") and Argentina.

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

3. By letter of May 22, 2008, in accordance with Rule 52(2) of the ICSID Arbitration Rules, the parties were notified by the Centre that an *ad hoc* Committee ("the Committee") had been constituted, composed of Dr. Gavan Griffith Q.C., a national of Australia, Judge Patrick L. Robinson, a national of Jamaica, and Judge Per Tresselt, a national of Norway.

4. On June 18, 2008, the Claimants filed a request to lift the provisional stay of enforcement of the award, or alternatively, to condition a continuation of the stay on Argentina's posting of adequate security.

5. Having received the parties' written observations on the Claimants' request and having heard the parties on the matter at the first session of the Committee held on July 14, 2008, on October 7, 2008, the Committee issued its "Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award" (the "First Stay Decision").

6. In the First Stay Decision, the Committee found, *inter alia'.*

   (a) that where a stay of enforcement is requested under Article 52(5) of the ICSID Convention, the *ad hoc* committee may decide not to grant the request, or may grant the request subject to the provision of security or to compliance with some other condition by the party requesting the stay, or may decide to grant the request unconditionally; [1]

   (b) that in general, a stay should be granted under Article 52(5) if requested, unless the Committee finds that there are very exceptional circumstances why this should not occur, notwithstanding the possibility of making the stay conditional on the provision of security; [2]

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[1] First Stay Decision ¶ 36.

[2] First Stay Decision ¶ 43.

(c) that an award creditor has no "counterbalancing right" to security in any case where a continuation of a stay is ordered, and that to require that security be provided as a matter of course in all but the exceptional case would risk compromising the important confidence-balancing function for Contracting States served by the annulment procedure; [3]

(d) that in deciding an application under Article 52(5), the Committee must consider all of the circumstances of a case as a whole; [4]

(e) that a relevant consideration in this respect is whether the party opposing the stay has established circumstances of sufficient doubt as to whether there will be compliance with ICSID Convention obligations on a final award in the event that it is not annulled; [5]

(f) that Article 53(1) of the ICSID Convention imposes on Argentina, in the event that the Award is not annulled, an obligation under international law to abide by and comply with the terms of the Award, without the need for action on the part of the Claimants pursuant to the enforcement machinery under Argentine law to which Article 54 of the ICSID Convention refers; [6]

(g) that under the Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment [7] (the "BIT"), Argentina has a treaty obligation pursuant to the first obligation [8] in the second sentence of Article VI 1(6), in the event that the Award is not annulled, to carry out without delay the provisions of the Award, without the need for enforcement action by the Claimants pursuant to the second obligation [9] in that sentence; [10]

(h) that at the time of the first hearing in these annulment proceedings, it was Argentina's intention, in the event that the Award is not annulled, not to pay the Award forthwith but to require the Claimants to bring proceedings for the enforcement of the Award under the provisions of Argentine law that give effect to Article 54 of the ICSID Convention, and that this would amount to non-compliance with Argentina's obligations under Article VII(6) of the BIT and Article 53(1) of the ICSID Convention; [11]

(i) that the Committee nonetheless accepted that Argentina had acted consistently with its own good faith interpretation of the BIT and the ICSID Convention, that the Committee did not assume that Argentina would continue to maintain that position following the conclusions of the Committee in the First Stay Decision, and that Argentina should be given an opportunity to consider its position going forwards; [12] and

(j) that 60 days was sufficient time for Argentina to reconsider its position. [13]

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[3] First Stay Decision ¶ 44.
[4] First Stay Decision ¶ 46.
[5] First Stay Decision ¶ 49.
[6] First Stay Decision ¶¶ 69, 78.
[7] Signed November 14, 1991; entered into force October 20, 1994.
[8] *"Each Party undertakes to carry out without delay the provisions of any such award".*
[9] *"Each Party undertakes...to provide in its territory for its enforcement.*
[10] First Stay Decision ¶ 82.
[11] First Stay Decision ¶¶ 85, 101.
[12] First Stay Decision ¶ 102.

In the First Stay Decision, the Committee therefore decided to extend the stay of enforcement of the Award, but further decided that at any time after 60 days from the date of the First Stay Decision, the Claimants could apply to request a modification or termination of the stay.

7. By letter of December 17, 2008, the Claimants requested the Committee to end the stay of enforcement of the Award, or in the alternative, to condition such a stay on Argentina's provision of adequate financial security in the form of a bank guarantee or its monetary equivalent. That letter maintained that although the Committee had afforded Argentina 60 days to reconsider its position, Argentina had failed to do so.

8. By letter of December 19, 2008, the parties were advised that the Committee was minded to accept the Claimants' letter of December 17, 2008 as an application for alternative orders, and Argentina was invited to comment upon this proposal. The parties were also advised that upon the Committee's acceptance of the proposal, the parties would be directed to exchange submissions.

9. By a letter of December 30, 2008 with attachments, Argentina requested leave of the Committee to develop its position on evidence and arguments which were not originally before the Committee, and requested that a hearing be held to discuss new reasons that should dispel doubts that Argentina will comply with its obligations under the ICSID Convention. Arguments in this respect were presented in the letter.

10. By a letter of January 7, 2009, the Claimants maintained that Argentina's letter of December 30, 2008, instead of simply commenting on the Committee's proposal to treat the Claimants' request as a formal application, constituted a "full-blown anticipatory reply submission". The letter requested the Committee to treat Argentina's letter as its further contentions in support and to decline any further exchange of submissions. The letter further opposed Argentina's request for leave to develop its position on additional evidence and arguments. The letter then responded to the points raised in Argentina's letter, and stated that the Claimants considered a further hearing to be unwarranted.

11. By a letter from the Centre dated January 8, 2009 the parties were informed that the Committee agreed to grant the requested hearing.

12. By a letter of February 20, 2009, Argentina provided a number of additional documents which it stated would be used at the hearing.

13. Following other exchanges concerning the timing and modalities, on March 9, 2009, a hearing was held in Paris at which the parties presented oral submissions on this second application by the Claimants to lift the stay of enforcement of the Award, or to condition the continuation of the stay on Argentina's provision of adequate financial security.

14. At the conclusion of that hearing, the Chairman announced orally the Committee's decision. The Chairman recalled the terms of paragraph 103 of the First Stay Decision, which stated:

[13] First Stay Decision ¶ 103.

The Committee notes that in no event would it be minded to lift the stay of enforcement of the award or to make security a condition of a continuation of the stay without arrangements being put in place to ensure that any amounts recovered by, or any security provided to, the Claimants would be recoverable by Argentina in the event that the Award is annulled.

The Chairman stated that the Committee had concluded that this necessary part of the application for the stay to be lifted had not yet been satisfied. The Chairman announced that in the circumstances the Committee had decided, without taking any view on the other issues that had been raised, to adjourn the matter of the lifting of the stay to give the Claimants an opportunity to bring forward a proposal, on notice to Argentina, which would make provision to ensure that any amounts recovered by or any security provided to the Claimants would be recoverable by Argentina in the event that the Award is annulled. The Chairman went on to state that such provision should:

... eliminate the risk of third party execution or garnishee so that Argentina would not in fact recover the monies. The Committee takes the view that it is no function of establishing an account for escrow to give some third party a windfall fund to execute against..., and... the possibility of third party benefit is to be eliminated.

15. In a letter dated March 30, 2009 with attachments, the Claimants presented three proposals addressing the issues in paragraph 103 of the First Stay Decision. That letter also commented on the concern expressed by Argentina that because Enron Corp is in bankruptcy, there is a risk that any secured funds could potentially be attached by Enron's creditors.

16. By a letter dated April 7, 2009 with attachments, Argentina responded to the matters raised in the Claimants' letter of March 30, 2009.

17. By a letter dated April 13, 2009 with attachments, the Claimants addressed Argentina's letter of April 7, 2009.

18. By a letter dated April 21, 2009 with attachments, Argentina responded to the Claimants' letter of April 13, 2009.

19. By a letter dated April 27, 2009, the Claimants replied to Argentina's letter of April 21,2009.

20. At the hearing on March 9, 2009, Argentina remarked that it appeared from Enron's website that its name had been changed to Enron Creditors Recovery Corp., and the Committee requested Enron's counsel to confirm this. In their letter of March 30, 2009, counsel for the Claimants confirmed that Enron's name had indeed been changed to Enron Creditors Recovery Corp, in March 2007. In its letter of April 7, 2009, Argentina requested that the name of the case be changed to reflect Enron's change of name. In their letter of April 13, 2009, counsel for the Claimants said that the Claimants did not oppose the request by Argentina for the case name to be changed.

B. The parties' contentions

21. The Claimants argue, *inter alia'.*

(a) In substance, Argentina contends that it has no obligation voluntarily to pay an award rendered against it and submits that a successful claimant in ICSID proceedings must initiate Article 54 enforcement procedures in Argentina in order to collect an award. The First Stay Decision concluded that this position is incorrect.

(b) The First Stay Decision gave Argentina 60 days to reconsider its stated position as to its obligations to pay on any final award. The First Stay Decision did not give Argentina leave to "appeal" the Committee's decision to reject Argentina's position, and Argentina should not be permitted to bring further arguments on its obligations under Article 53 of the ICSID Convention.

(c) Argentina has refused to change its position and in fact has reiterated that it considers the First Stay Decision to be incorrect.[14] In the *Vivendi* case, the *ad hoc* committee required Argentina to commit itself unconditionally to effect payment of the Award, to the extent that it is not annulled,[15] but Argentina refused to provide this assurance and instead has continued to erroneously assert that parties must institute enforcement actions in Argentina in order to collect an award.[16]

(d) Given Argentina's continued disregard of its Article 53 obligation to voluntarily pay this and other final ICSID awards against it, there is a serious risk of Argentina's non-compliance in the event the Award is not annulled.

(e) Argentina's concern that, because Enron is in bankruptcy, there is a risk that any secured funds could potentially be attached by Enron's creditors, is unfounded. The Enron bankruptcy is nearing its conclusion. The transactions within the bankruptcy relating to the disposition of the proceeds of this ICSID claim and Award were settled by the bankruptcy court several years ago.

(f) While creditors of Argentina could potentially attach such funds, this possibility is the result of Argentina's own malfeasance and defaulting on its obligations, and this is not a legitimate reason to absolve Argentina of the obligation to provide security as a condition of continuing the stay.

(g) Just over a month before the Award was issued, Enron changed its name to Enron Creditors Recovery Corp. As a result of the bankruptcy transactions, managerial control of this ICSID claim vested in the "CIESA/TGS Manager", who has continued to engage Enron's counsel to represent the Claimants, and they are empowered to make representations on behalf of Enron regarding this ICSID claim, including enrolment and enforcement matters, which were obviously matters contemplated at the time the bankruptcy settlements were approved.

(h) In any event, it would be acceptable to the Claimants to name Ponderosa, a solvent Delaware entity in good standing, as the sole beneficiary of any security, which would eliminate Argentina's concerns. Because the amount of the Award did not exceed Ponderosa's claimed loss, Enron has no real financial interest in the Award.

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[14] Referring to *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Argentine Republic's Memorial on the Continued Stay of Enforcement of the Award, November 7, 2008 ¶¶ 121, 127-128, 130, 132.

[15] Referring to *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award rendered on 20 August 2007, 4 November 2008 (*"Vivendi* Stay of Enforcement Decision") ¶ 46.

[16] Referring to *Compania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Letter from Argentina to Claudia Frutos-Peterson, 28 November 2008 (available at http://ita.law.uvic.ca/documents/Vivendi-ArgentinaLetter28Nov2008.pdf).

(i) The claimants have three proposals:

(i) The first proposal (referred to below by the Committee as "Proposal 1") would require Argentina, as a condition for continuation of the stay, to open an escrow account into which it would place escrowed funds in an amount to be directed by the Committee. Argentina would grant to the Claimants a security interest in all of Argentina's right, title and interest in the escrow account and the escrow funds. Control of the escrow funds would remain exclusively in the hands of the escrow agent in the name of the "Republic of Argentina", and no other person. There would be specific instructions as to fund distribution upon the Committee's final decision on the Application for Annulment.

(ii) The second proposal (referred to below by the Committee as "Proposal 2") would require Argentina, as a condition for continuation of the stay, to secure from a bank of its choice, including Banco de la Nacion Argentina ("BNA"), an irrevocable standby letter of credit payable to the Claimants in an amount to be directed by the Committee, callable on in whole or in part by the Claimants upon presentment of the outcome of the Committee's final decision on the Application for Annulment. The Claimants argue that there is no evidence in the record that a letter of credit would cost anything to Argentina, that BNA as the State-owned bank would surely not charge the State itself an exorbitant fee to issue such a letter, and would presumably not require collateral, and that in any event, any costs payable to BNA would be charged by a fully-owned State entity to the State itself, having no real economic effect on the Argentine economy.

(iii) The third proposal (referred to below by the Committee as "Proposal 3") would involve a lifting of the stay, upon the Claimants giving an irrevocable commitment to Argentina that any enforcement actions that may be initiated against Argentina during the pendency of the annulment proceeding would be brought only in the name and on behalf of Ponderosa, and upon Ponderosa undertaking to reimburse Argentina in full of any amounts collected by Ponderosa from any enforcement actions initiated against Argentina during the pendency of the annulment proceeding.

(j) Obviously it would be impossible to remove *any* possibility that other creditors could attempt attachment, and if this was the standard, no security would ever be required of any non-compliant State in any ICSID annulment proceeding. The possibility of attachment by other creditors against whom Argentina has already defaulted ranks very low on the scale of equities in determining whether and in what form security should be required at this stage.

22. Argentina argues, *inter alia'.*

(a) There is additional support for Argentina's position that an ICSID award creditor may be required to follow the enforcement procedures under Argentine law to which Article 54 of the ICSID Convention refers.[17]

[17] Referring to Arbitration (International Investment Disputes) Act 1966 (United Kingdom), section 1(8); Chile, Resolution No. 1891 of the Ministry of Justice, 9 July 2008 (ordering payment of the award rendered against Chile in *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7); *Vivendi* Stay of Enforcement Decision ¶ 41; *Campania de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Letter from Stanimir A. Alexandrov and Marinn F. Carlson, counsel for claimants, to Claudia Frutos-Peterson, Secretary to the *ad hoc* Committee, 8 December 2008; Lucy Reed, Jan Paulsson and Nigel Blackaby, A Guide to ICSID Arbitration 103 (2004).

(b) The only thing that the award creditor has to do is complete the formalities applicable to compliance with final judgments of local courts, if any apply in the State in question, which in the case of Argentina are essentially before administrative authorities, in this case the Ministry of Economy, within the context of an enforcement judicial proceeding, in which the judge restrains himself to checking compliance with the award.

(c) Article 27 of the ICSID Convention constitutes the best proof of Argentina's position on recognition and enforcement.

(d) In other cases, compliance by States with ICSID awards has taken six months or a year, and lawyers for claimants have accepted that there are procedures that States must go through to execute payments.

(e) For purposes of execution of the Award, the issue of Enron's bankruptcy status is not a mere formality. Creditors may attach assets that were attached or obtained by Enron during the annulment proceeding, which assets may never be recouped by Argentina even if it prevailed in the annulment.

(f) Serious doubts remain as to the ability of the Claimants' counsel, under the arrangements within Enron's bankruptcy proceedings regarding this ICSID claim, to cause Enron to renounce certain rights it may have as to the execution of the Award.

(g) The costs of setting up the escrow arrangement or letter of credit in the Claimants' first two proposals would be so high as to render them impracticable.

(h) BNA is an Argentine commercial banking institution created by the Argentine legislature, which operates independently from and is not controlled by Argentina. Under Article 25 of its charter, it is prohibited from lending to the Federal Government, except when a special guarantee is constituted that allows for the automatic reimbursement of the money, which in this case would mean that Argentina would have to constitute an escrow account for the total amount of the award.

(i) Each of Proposals 1 and 2 creates unacceptable risks of attachment. In the event that Argentina prevails in the annulment proceeding, Argentina will have the right to receive back the property in the escrow account, or collateral funds returnable to it. Judgment creditors of Argentina will accordingly argue that they have a right to attach Argentina's right to receive the property in the event that Argentina prevails in the annulment proceeding.

(j) Requiring Argentina to incur such exorbitant costs in order to run the risk of losing probably millions of dollars even if it prevailed in the annulment is not justified. Even if Argentina's position is not shared, at the end of the day all that Argentina is requiring is that ICSID award creditors follow a formal procedure almost exclusively before administrative authorities, something that has been successfully required by other States.

C. The Committee's views

23. The Committee found that at the time of the First Stay Decision, in the event that the Award is not

annulled, it was Argentina's intention not to pay the Award forthwith but to require the Claimants to bring proceedings for the enforcement of the Award under the provisions of Argentine law that give effect to Article 54 of the ICSID Convention.[18] The First Stay Decision found that this would amount to non-compliance with Argentina's obligations under Article Vll(6) of the BIT and Article 53(1) of the ICSID Convention.[19]

24. In its letter of December 30, 2008 and at the oral hearing on March 9, 2009, Argentina presented arguments that challenged the Committee's decision in this respect. However, nothing in the First Stay Decision suggested that Argentina would be given an opportunity to reopen matters decided by the Committee in that decision in the event that the Claimants were to make a further application to lift the stay or to require security as a condition for continuation of the stay. The Committee considers that it would be wrong in principle for it to reopen matters that were dealt with in the First Stay Decision, and it declines to do so.

25. For completeness the Committee also notes that two more recent decisions in ICSID annulment proceedings are, contrary to Argentina's submissions, consistent with the Committee's conclusion in the First Stay Decision on this issue.
(1) In the *Vivendi* case, the *ad hoc* committee stated that:

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.[20]

The *ad hoc* committee went on in that decision to note 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".*[21]

(2) Subsequently, in the *Sempra* case, the *ad hoc* committee concluded that:

... a *State Party against which an award has been made must (like a foreign investor party) abide by and comply with an ICSID award without the award creditor having to submit to any agency of the State Party to enforce the award as envisaged by Article 54 of the ICSID Convention.... The very fact that the Committee has found that Argentina is under a duty, unconditionally and in good faith, to "abide by and comply with" the Award according to Article 53, together with Argentina's repeated and uncompromising affirmation that it has no such obligation in the absence of the award creditor submitting the award to a procedure within the State party's domestic judicial system under Article 54, must necessarily lead to the conclusion that Argentina is not willing to comply with its obligations under Article 53 unless Sempra first seeks enforcement under Article 54.*[22]

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[18] First Stay Decision ¶¶ 85, 101.

[19] First Stay Decision ¶ 101.

[20] *Vivendi Stay of Enforcement Decision ¶ 36.*

[21] *Vivendi Stay of Enforcement Decision ¶ 45.*

26. In the First Stay Decision the Committee also found that a relevant consideration in deciding whether or not to grant a stay, or whether or not to make any stay conditional on the provision of security, is whether the party opposing the stay has established circumstances of sufficient doubt as to whether there will be compliance with ICSID Convention obligations on a final award in the event that it is not annulled. [23]

27. The First Stay Decision concluded that:
... in the absence of any indication by Argentina that it has changed its position to accord with that which the Committee has found as to the extent of the obligations under the BIT and the ICSID Convention, the Committee would be minded, again absent contrary arguments and evidence, to consider that there is a risk of non-compliance by Argentina with its obligations under Article 53 of the ICSID Convention if the Award is not annulled. [24]

28. As noted above, the Committee said that it would not assume that Argentina would continue to maintain its position following the reasons in the First Stay Decision, and that Argentina was to be given an opportunity to reconsider its position. [25] In the event, upon this new application to lift the provisional stay, Argentina has not suggested that it has changed its position in the light of the Committee's reasons in the First Stay Decision. At the hearing on March 9, 2009, counsel for Argentina stated that:

What we state is that, again, Article 53 establishes an obligation to comply with ICSID awards. And we say that they are voluntary in the sense that the debtor does not have to be forced to comply with an ICSID award. What we state is that the ICSID creditor as [sic] to follow the formalities applicable under domestic law for compliance with final judgments of local courts. This is what Article 54 requires. [26]

In the letter of April 7, 2009, Argentina's legal representatives appear to have maintained this position, stating that:

Even if Argentina's position regarding the way in which ICSID awards are to be complied with were not shared, which is the case of this ad hoc Committee, at the end of the day all that Argentina is requiring is that ICSID creditors follow a formal procedure almost exclusively before administrative authorities...

On the basis of the material before it, the Committee is satisfied that Argentina has not changed its position that if the Award in this case is not annulled, Argentina will not comply with the Award without requiring the Claimants to bring proceedings for the enforcement of the Award under the provisions of Argentine law that give effect to Article 54 of the ICSID Convention.

29. For these reasons, the Committee is satisfied that presently there is a high risk of non-compliance by Argentina with its obligations under Article 53 of the ICSID Convention if the Award is not

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[22] *Sempra Energy International v. Argentine Republic (ICSID Case No. ARB/02/16), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, March 5, 2009 ¶¶ 52-53 ("Sempra Stay of Enforcement Decision").*

[23] First Stay Decision ¶ 49.

[24] *First Stay Decision ¶ 102.*

[25] First Stay Decision ¶ 102.

[26] *Transcript, March 9, 2009, p. 7.*

annulled.

30. Argentina maintains that the cost to it of providing security would be prohibitive. In the First Stay Decision, the Committee found that if there is a serious risk of non-compliance with the award in the future, hardship to the award debtor in providing security should not normally be a factor of significance, any more than hardship could be a factor excusing non-compliance with the award itself if not annulled.[27] However, the Committee left open the possibility that such hardship may be one factor to be taken into account with other factors in exceptional circumstances, such as where the provision of security would have "'catastrophic', immediate and irreversible consequences" for a party's ability to conduct its affairs, or would *severely* affect the interests of the party.[28]

31. Argentina relies on evidence of Mr Daniel Marx, a partner in a financial advisory firm based in Argentina and former Secretary of Finance of Argentina, to the effect that the cost to Argentina of either Proposal 1 or Proposal 2 would be prohibitive. The Claimants have sought to dispute this.

32. In light of the reasons which follow, the Committee finds that it is not necessary for it to determine what would realistically be the cost to Argentina of either Proposal 1 or Proposal 2, or to determine whether that cost could be considered to be so high as to constitute exceptional circumstances of the kind referred to in paragraph 30 above.

33. A further argument raised by Argentina is that there is a risk, in view of Enron's bankruptcy, that any security provided by Argentina or any amounts recovered by the Claimants on the award may be subject to attachment by Enron's creditors. The Committee is satisfied that there would be no risk of attachment by Enron's creditors under any of the Claimants' proposals, in particular given the terms of the proposed escrow agreement in Proposal 1 and given that under Proposal 3 any enforcement of the Award would be undertaken only in the name and on behalf of Ponderosa.

34. Argentina also questions the authority of the CIESA/TGS Manager and the Claimants' counsel to make representations on Enron's behalf in relation to the Claimants' proposals. On the basis of the material before it and the submissions of the Claimants, the Committee is satisfied as to the authority of CIESA/TGS Manager and the Claimants' counsel in this respect.

35. Argentina additionally argues that the Claimants' proposals create unacceptable risks of attachment by other creditors of Argentina.

36. According to the Claimants, under Proposal 1, control of the escrowed funds would remain exclusively in the hands of the escrow agent, and neither Argentina nor any other person would have any right to withdraw any amount from the escrow account. The Claimants say that this should resolve any concerns regarding potential attachment by third parties. Under Proposal 3, any funds recovered would be held in the name of Ponderosa pending the decision on the Application for Annulment.

37. Argentina for its part relies on a letter from the law firm of Cleary Gottlieb Steen & Hamilton LLP, which states in relevant part as follows:

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[27] First Stay Decision ¶ 51.

[28] First Stay Decision ¶ 51.

The first and third proposals by Enron/Ponderosa - i.e., the creation of an escrow or the agreement by Enron/Ponderosa to hold any seized assets in an account pending resolution of the annulment proceeding - each create unacceptable risks of attachment to the [Argentine] Republic. In the event the Republic prevails in the annulment proceeding, the Republic will have the right to receive back the property in the escrow and/or the Enron/Ponderosa account. Judgment creditors of the Republic will accordingly argue that they have a right to attach the Republic's "right to receive" the property in the event the Republic prevails in the annulment proceeding.

Judgment creditors have in fact relied on this theory in obtaining attachments against the Republic. In CVI v. Republic of Argentina, 443 F3d 214 (2d Cir. 2006)...., the federal Court of Appeals for the Second Circuit held that the judgment creditor CVI was entitled to attach the Republic's right, in the year 2023, to receive the Brady bond principal collateral in the event such collateral is not collected by Brady bondholders. In 2008, CVI obtained attachments of, inter-alia, "contractual rights [of the Republic] to direct the release of or to receive assets *constituting unclaimed payments on debt securities held by the Bank of New York pursuant to the Trust Indenture and/or the Terms."...*

Judgment creditors would invoke the above authority in seeking to attach the escrowed property, notwithstanding the statement in the letter that the risk of attachment is eliminated by the fact that "[c]ontrol of the escrowed funds shall remains [sic] exclusively in the hands of the escrow agent," and that the Republic shall have no "control over the use of, or any right to withdraw any amount from" the accounts while the annulment proceedings are pending.... So long as the Republic has a "right to receive" the funds in the event it succeeds in the annulment, the rationale of the above decisions would be relied upon by judgment creditors in seeking to attach that right. In the CVI cases, fiscal agents and trustees controlled the subject accounts, and the courts nevertheless authorized attachments based on the Republic's property interest in the accounts.

In the context of the proposed issuance of a letter of credit, if the Republic is required (as would be likely) to post as collateral funds returnable to it in the event the Republic prevails in the annulment proceedings, such funds would similarly be at risk for attachment as described above[29]

The position of Argentina suggests that under any of the proposals, amounts paid into the escrow account by Argentina, or given as collateral by Argentina for a bank guarantee, or obtained by Ponderosa in enforcement proceedings, might never be recovered by Argentina if the Award is annulled.

38. The Claimants did not seek to deny that such attachment by third party creditors of Argentina could be possible. Rather, in a footnote in their letter dated March 30, 2009, counsel for the Claimants stated that:
To be sure, creditors of Argentina could potentially attach such funds, but this possibility is the result of Argentina's own malfeasance and defaulting on its obligations, and should not be considered by the Committee as a legitimate reason to absolve Argentina of the obligation to provide security here as a condition of continuing the stay. Claimants' proposals herein nonetheless attempt to address this concern as well.

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[29] *This letter also cited the case of Abkco Industries Inc v. Apple Films Inc, 350 NE 2d 899, 39 NY 2d 670, 385 NYS 2d 511 (Court of Appeals of New York, 1976), in which, according to the letter, "the New York Court of Appeals... held that the defendant's right to receive funds pursuant to a film licensing agreement constituted attachable 'property' of the defendant, even though the funds were not in the hands of the defendant and payment depended upon the performance of a third party".*

39. It appears to the Committee from the material before it that under the law in certain jurisdictions in the United States, and possibly elsewhere as well, a third party creditor could apply to attach Argentina's conditional interest in sums that would be held by the escrow agent or Ponderosa under Proposals 1 or 3, or by a bank as collateral under Proposal 2.

40. Ponderosa is established under the laws of Delaware and has its principal place of business in Texas.[30] The draft escrow agreement attached to the March 30, 2009 letter from the Claimants' representatives for purposes of Proposal 1 provides that the governing law of the escrow agreement would be that of the State of New York. It further provides that the escrow funds would be invested as directed by the Claimants in one or more specified types of investments, including direct obligations of the United States of America and obligations for which the full faith and credit of the United States of America is pledged to provide for the payment of principal and interest.

41. The Committee considers that the circumstances of the present case are exceptional in that Argentina presently is party to a significant number of investment treaty arbitration proceedings brought by various claimants, to the extent that the Committee considers there to be a very high risk that if any of the Claimants' proposals were implemented, other claimants, including those with unsatisfied ICSID awards for payment of monetary amounts, could actively seek to execute against the funds that would be held by the escrow agent or Ponderosa in the event that the Award is annulled. On the basis of the material before it, the Committee is satisfied that there is a very high risk under the Claimants' proposals that Argentina's conditional interest in the sums held by the escrow agent or by Ponderosa, or by a bank providing a bank guarantee, could be attached by third party creditors of Argentina.

42. The Committee does not accept the Claimants' argument that this possibility is not a legitimate reason for absolving Argentina from the obligation to provide security, as *"this possibility is the result of Argentina's own malfeasance and defaulting on its obligations"*. In arbitration proceedings, the tribunal only has jurisdiction with respect to the specific case for which it has been constituted. The same is true of an *ad hoc* committee in annulment proceedings. The Committee considers that it would undermine confidence in the ICSID system if an award subject to annulment proceedings might be used by strangers to the arbitration proceedings as a procedural vehicle to secure enforcement of their own unrelated claims against the respondent, such that amounts recovered by a claimant on the award, or security provided as a condition of a continuation of a stay, would be irrecoverable by the respondent in the event that the award is annulled. While it may be impossible in all situations to remove *all* risk of such irrecoverability, the Committee considers that where that risk is very high, as it is in this case, that fact will militate strongly against lifting the stay or against requiring security to be provided as a condition of any continuation of the stay. Both a stay of enforcement of an award pending annulment proceedings, as well as a condition of security for such a stay, are interim measures in annulment proceedings. Like interim measures in general, they are intended to be provisional and to have effect pending the final decision of the *ad hoc* committee. It would be inconsistent with that purpose if such measures were to have an irreversible effect for one of the parties.

43. Against this, the Committee has given weighty consideration to the effect that it may have on confidence in the ICSID system if a stay of enforcement is continued in force throughout annulment proceedings, notwithstanding that there is a high risk of non-compliance by the respondent State

[30] Award ¶ 1.

with its obligations under Article 53 of the ICSID Convention if the Award is not annulled.

44. In balancing the competing considerations, the Committee has also taken into account that in the *Sempra* Stay Decision, the *ad hoc* committee ultimately decided to impose a condition of security, not for the full amount of the award, but for a portion of the award as a "tangible demonstration of good faith" on the part of Argentina.[31] However, it is not clear to the Committee what is the basis in principle for such a condition of only partial security. Furthermore, the Committee considers that the risk in this case of irrecoverability would apply to partial security in the same way as it would to security for the full amount of the Award.

45. The Committee must reach its decision on the basis of all the circumstances of the case as a whole.[32] In addition to the matters above, the Committee takes into account that the oral hearing in these annulment proceedings is due to be held as early as July 2009, and that the final decision on annulment might be expected by the end of 2009. The Committee also notes that there has been no suggestion by the Claimants that they are aware of any immediate prospect of enforcing the Award in a State other than Argentina under Article 54 of the ICSID Convention that would be lost if the stay of enforcement is not lifted before the decision on the Application for Annulment. Another consideration is that a condition of security will often place the award creditor in a better position than it would have been in if annulment proceedings had not been brought, since the award creditor would not otherwise have had the benefit of such security.[33]

46. In the light of all of the circumstances of this particular case as a whole, on balance, the Committee considers that at this stage it is appropriate to continue the stay of enforcement of the Award pending the conclusion of the annulment proceedings without any condition of security. The Committee considers that this case has exceptional features, and its conclusion should not be understood as detracting in any way from the importance of the consideration referred to in paragraph 43 above.

DECISION

The *ad hoc* Committee decides that pursuant to Article 52(5) of the ICSID Convention and Rule 54(2) of the ICSID Arbitration Rules, the stay of enforcement of the Award will continue in effect for the duration of these annulment proceedings.

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[31] *Sempra* Stay of Enforcement Decision ¶¶ 110-112.

[32] First Stay Decision ¶ 46.

[33] First Stay Decision ¶ 52.