

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the annulment proceeding between

EL PASO ENERGY INTERNATIONAL COMPANY

and

THE ARGENTINE REPUBLIC

ICSID Case No. ARB/03/15

**DECISION ON ARGENTINA'S REQUEST FOR STAY OF
ENFORCEMENT OF THE AWARD**

Members of the Committee
Rodrigo Oreamuno, President
Teresa Cheng, Member of the Committee
Rolf Knieper, Member of the Committee

Secretary of the Committee
Natalí Sequeira

Date of dispatch to the Parties: November 14, 2012

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GLOSSARY

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BIT	Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investments, signed on November 14, 1991, in force since October 20, 1994.
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, of March 18, 1965.
ICSID or the Centre	International Centre for the Settlement of Investment Disputes
ICSID Financial Regulations	ICSID Administrative and Financial Regulations

I. INTRODUCTION AND PARTIES

1. This annulment proceeding concerns an arbitration submitted to the International Centre for the Settlement of Investment Disputes (“ICSID” or the “Centre”) on the basis of the BIT and the ICSID Convention.
2. The Parties are El Paso Energy International Company (hereinafter “El Paso”), a company incorporated under the laws of the State of Delaware, United States of America and the Argentine Republic (hereinafter “Argentina,” or “the Applicant”).
3. El Paso and Argentina will be hereinafter collectively referred to as the “Parties.” The Parties’ respective representatives and their addresses are listed above on page (i).

II. PROCEDURAL HISTORY

4. On October 31, 2011, the Tribunal¹ in the original arbitration proceeding rendered an Award, partially upholding El Paso’s claims and awarding it US\$43.03 million dollars, plus compound interest as compensation. The Tribunal concluded that Argentina had breached its obligation to accord fair and equitable treatment to El Paso’s investment, under the BIT of November 14, 1991, which entered into force on October 20, 1994.
5. On February 28, 2012, ICSID received from the Argentine Republic an application for annulment and a request for stay of enforcement of the Award.
6. On March 7, 2012, pursuant to Rule 50(2)(a) and (b) of the Arbitration Rules, the Secretary General of ICSID registered the Application and notified the Parties of the provisional stay of enforcement of the award, pursuant to ICSID Arbitration Rule 54(2).
7. On May 22, 2012, the *ad hoc* Committee was constituted pursuant to Article 52(3) and ICSID Arbitration Rule 6(1).
8. On May 22, 2012, the Secretary General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (“Arbitration Rules”), notified the Parties that the

¹ Presided over by Professor Lucius Caflisch (Swiss), appointed by the Chairman of the Administrative Council, Professor Piero Bernardini (Italian), appointed by the Claimant; and Professor Brigitte Stern (French), appointed by the Respondent.

three Members of the *ad hoc* Committee had accepted their appointments and that the Committee was therefore deemed to have been constituted on that date. The *ad hoc* Committee is composed of Mr. Rodrigo Oreamuno, a national of Costa Rica, President of the Committee; Ms. Teresa Cheng, a national of China; and Dr. Prof. Rolf Knieper, a national of Germany. Ms. Natalí Sequeira, ICSID Legal Counsel, was designated to serve as Secretary of the Committee.

9. By letter of May 31, 2012, the *ad hoc* Committee invited the Parties to file brief written observations on the Request for Stay prior to the first session. The Argentine Republic was invited to file its observations by June 11, 2012 and El Paso by June 22, 2012.
10. On the same date and pursuant to ICSID Arbitration Rule 54(2) and having considered the Argentine Republic’s Request for Stay, the Committee extended the stay of enforcement of the Award until it had heard the Parties and reached a final determination on the continuation of the stay.
11. On June 4, 2012, pursuant to Regulation 14(3)(e) of the ICSID Administrative and Financial Regulations (“Financial Regulations”), the Centre requested that the Argentine Republic make a first advance payment of US\$225,000 within thirty (30) days to cover the initial costs of the annulment proceedings, including the first session with the Committee.
12. As scheduled, on June 11, 2012, Argentina filed “Observations on the Continued Stay of Enforcement of the Award.” On June 22, 2012, El Paso filed its “Response to Observations of the Argentine Republic on the Continuation of the Suspension of Execution of the Award.”
13. By letter of July 10, 2012, the Centre informed the Parties that, as of that date, the requested payment had not been received and therefore it invited either party to pay within 15 days.
14. In response to the Centre’s letter of July 10, 2012, the Republic of Argentina informed the Centre that the Ministry of Economy was processing the advance payment. In view of this information, the Committee confirmed that the First Session of the *ad hoc* Committee would be held as scheduled by telephone conference.

15. The Committee held the First Session with the Parties on July 18, 2012. The Parties confirmed that the Members of the Committee had been validly appointed. It was agreed *inter alia* that the applicable Arbitration Rules would be those in effect from April 10, 2006, that the procedural languages would be Spanish and English, and that the place of the proceeding would be Washington D.C. The Parties further agreed on a schedule for the submissions of pleadings on the application for annulment. The agreements of the Parties were embodied in Procedural Order No. 1, dated August 20, 2012, signed by the President and circulated to the Parties.
16. By letter of August 13, 2012, the Argentine Republic indicated that the advance payment requested by the Centre was being processed. The Centre received Argentina's advance payment on August 27, 2012.

III. POSITION OF THE PARTIES ON THE STAY OF ENFORCEMENT OF THE AWARD

A. Position of Argentina

17. On February 28, 2012, Argentina requested a stay of enforcement of the Award on the basis of Article 52 of the ICSID Convention and Rule 54 of the Arbitration Rules, pending the Committee's decision on its annulment (Application for Annulment and Stay of Enforcement of the Award, hereinafter the "Application for Annulment" ¶ 4).
18. Argentina put forward the following grounds for the stay of enforcement of the Award:
 - "(a) The enforcement of the Award while the annulment proceedings are pending would cause irreparable harm to the Argentine Republic. Indeed, the Argentine Government would be deprived of substantial budgetary resources that are necessary to fund social schemes aimed at satisfying basic needs as well as other urgent and serious public interests, while El Paso cannot invoke any legitimate grounds for lifting the stay of enforcement of the Award.

- (b) The stay of enforcement of the Award will not be detrimental to El Paso, since Claimant will be entitled to receive interest payments if the *ad hoc* Committee does not grant the annulment sought.”²
19. In addition, Argentina noted that the grounds raised by it in the Application for Annulment are serious: that there are other cases against it in which the awards were annulled in their entirety or in part, and that a stay under Article 52 (5) of the ICSID Convention should be granted (Observations of the Argentine Republic on the Continuation of the Suspension of Execution of the Award of June 11, 2012, hereinafter the “Observations” ¶ 3).
20. Argentina also indicated that there was no risk of non-compliance with the Award and confirmed “[...] its intention to completely fulfill its obligations under the ICSID Convention.”³ It added that the rulings of the Argentine Supreme Court of Justice had given precedence to the international commitments made by the Argentine Republic over domestic laws and that the awards would be enforced as if they were a final judgment of an Argentine court, subject to the laws concerning the execution of judgments in Argentina. “This international obligation undertaken by the Argentine Republic has a higher rank in the legal hierarchy than the laws enacted by Congress or any action of the Argentine Executive.”⁴
21. Argentina insisted that, first by means of Argentine court rulings and subsequently by means of a constitutional reform, Argentina has recognized the superior rank of treaties over laws and that this is a guarantee of compliance with the award if the Application for Annulment were not to be accepted (Observations, ¶¶ 24, 26 y 28).

B. Position of El Paso

22. El Paso indicated that “[it] agrees that the stay of enforcement of the award should continue, on the condition that Respondent [...] posts a bank guarantee or similar arrangement which provides for the payment [...] of the full amount of the award (and any

² Application for Annulment, ¶ 93.

³ Observations, ¶ 10.

⁴ Ibid., ¶¶ 18 and 19.

awarded costs) for the event that the Committee dismisses the application for annulment,”⁵ adding that: “Accordingly, any stay should be made conditional on the posting of security for the amounts already awarded against Respondent.”⁶

23. El Paso referred to the stay of enforcement of the Award as follows: “If the intention were that a stay would always be granted, then the Convention would presumably have said this. Instead, the Convention *permits* a stay only when circumstances *require* it. Argentina simply cannot demonstrate that “circumstances require a stay.”⁷

IV. POSITION OF THE PARTIES ON THE POSSIBILITY OF REQUIRING A GUARANTEE TO MAINTAIN THE STAY OF ENFORCEMENT OF THE AWARD

A. Position of Argentina

24. On the subject of the guarantee, Argentina stated the following: “[...] it is highly unlikely that the Argentine Republic will be able to recoup any sums or assets provided as guarantee, whatever its type. In effect, although Argentina is entitled to the right to recover those sums, such right could be unduly attached by third parties unrelated to this dispute.”⁸
25. Argentina based its position on the Decision on the Application for Annulment handed down in the annulment proceedings in *Azurix Corp. v. Argentine Republic* and argued that requesting a guarantee as a condition for the continued stay of enforcement of the Award is contrary to the object and purpose of the ICSID Convention (Observations, ¶ 29).
26. Argentina further indicated that it was for El Paso to demonstrate that there are circumstances that warrant provision of the guarantee (Observations, ¶ 30).
27. According to Argentina, “Nowhere in the ICSID Convention is there any provision establishing that the continuation of the stay of enforcement may or must be coupled with a

⁵ Response to Observations of the Argentine Republic on the Continuation of the Suspension of Execution of the Award, June 22, (hereinafter “Response to Observations”), ¶ 1.

⁶ Ibid., ¶ 2.

⁷ Ibid., ¶ 6.

⁸ Observations, ¶ 16.

demand for a financial guarantee.”⁹ It noted that, in the case of *MINE v. Republic of Guinea*, the Committee stated that its powers seem to be limited to the continuation or termination of the stay of enforcement of the Award (Observations, ¶ 32).

28. Argentina added that the negotiators of the ICSID Convention rejected the granting of powers to Annulment Committees to require a guarantee for the continuation of the stay of enforcement of an Award (Observations, ¶ 34).
29. For Argentina, requiring a guarantee would entail limiting access to the protection granted under Article 52 of the ICSID Convention and Rule 50 of the Arbitration Rules (Observations, ¶ 39).
30. Based on its citation of various decisions handed down by other committees, Argentina stated that if the Committee agreed to order the guarantee requested by El Paso, it would place said company in a more favorable position than it had at the time the Award was rendered (Observations, ¶ 40). It further noted that the Parties have not waived their immunity from execution established under Article 55 of the ICSID Convention (Observations, ¶ 42).
31. Argentina pointed out that “... it is not the task or the jurisdiction of ICSID annulment committees to secure compliance with awards where annulment is not granted.”¹⁰
32. For Argentina, requiring a guarantee entails penalizing the party that applied for annulment, and affects its right to defend itself in imposing a requirement that is beyond the scope of Argentina’s consent to ICSID arbitration, (Observations, ¶ 44).
33. Argentina stated that “ ... it would be extremely costly for Argentina to obtain a suitable financial guarantee. In addition, giving that guarantee would be detrimental not only to the value of Argentina’s outstanding debt but to the development and financial viability of the country as well.”¹¹

⁹ Ibid., ¶ 31.

¹⁰ Observations, ¶ 43.

¹¹ Ibid., ¶ 46.

34. Further on, Argentina stated: “Compliance with ICSID awards is voluntary, which means that the award debtor does not have to be forced to comply with the award. The award creditor must merely follow the procedures applicable to the enforcement of final judgments rendered by local courts.”¹²
35. Regarding Articles 27 and 54 of the ICSID Convention, Argentina stated: “Therefore, if a State fails to abide by an award through the mechanism set forth in Article 54, the State of nationality of the investor may resort to diplomatic protection.”¹³
36. Argentina does agree that judgment or award debtors are under a legal obligation to pay judgments and awards issued against them. “However, in the Argentine Republic, there are a number of procedures regarding the enforcement of final decisions that must be followed, as set forth in Article 54 (1) of the ICSID Convention (Observations, ¶ 55).

B. Position of El Paso

37. El Paso requested that any stay “... at the very least, and in the alternative”,¹⁴ be conditioned on the provision of a security to reimburse El Paso’s costs of defending itself against the Application for Annulment, estimated to be US\$1,500,000.00 (Response to Observations, ¶ 3).
38. El Paso added that Argentina has insisted that it will comply with ICSID awards only if they comply with local Argentine requirements to enforce arbitration awards (Response to Observations, ¶ 1 b).
39. It further noted that “[...] Argentina has made it clear that it has no intention of *ever* paying any award voluntarily, as it is required to do. This conduct places El Paso at the end of a long and growing line of award creditors seemingly without any prospect of enforcement.”¹⁵

¹² Observations, ¶ 50.

¹³ Ibid., ¶ 52.

¹⁴ Response to Observations, ¶ 3.

¹⁵ Ibid., ¶ 5.

40. El Paso pointed out that some committees have granted stays on a conditional basis and that Article 52 (5) of the ICSID Convention affords this Annulment Committee discretion to proceed in this manner (Response to Observations, ¶ 6).
41. El Paso also referred to the fact that the United States, on March 12, 2012, suspended Argentina from its Generalized System of Preferences because it has not acted in good faith in enforcing arbitral awards in favor of United States citizens (Response to Observations, ¶ 9).
42. El Paso noted that September 2012 will mark the third year of non-compliance by Argentina in the *Azurix* case, and that August will mark the second year in the *Vivendi II* case, five years in the *CMS* case, and nine months in the *Continental Casualty* case (Response to Observations, ¶ 9).
43. El Paso emphasized that in the *CMS* case, even the Procurador General of Argentina undertook before the Annulment Committee to recognize the award and enforce it if it were not annulled, but according to El Paso, six years have passed since then and Argentina still has not paid (Response to Observations, ¶ 10). For El Paso, “This alone justifies conditioning the stay on security for the award or costs.”¹⁶
44. El Paso insisted that Argentina interprets incorrectly Articles 53 and 54 of the ICSID Convention and noted that, in the case of *Vivendi II*, the Committee stated that the ICSID drafters “ ... aimed for a total divorce from the recognition and enforcement” system established under the 1958 New York Convention (Response to Observations, ¶ 13).
45. El Paso further indicated that in the *Vivendi II* case, the Annulment Committee ordered Argentina to issue a commitment letter, within a specific period of time, and that if such commitment were not provided within that period, it would require to provide a bank guarantee. As Argentina did not comply with any of these conditions, the stay of enforcement of the award during the annulment proceedings was lifted (Response to Observations, ¶ 15).

¹⁶ Response to Observations, ¶ 10.

46. El Paso indicated that Argentina owed US\$403 million, not including interest, in the *Vivendi II*, *Azurix*, *CMS* and *Continental Casualty* cases (Response to Observations, ¶ 16).
47. It also cited the case of *Joseph Lemire v. Ukraine* in which the Annulment Committee lifted the stay of execution of the award because Ukraine delayed payment of the award by 11 months, which was considered unreasonable by the Committee in light of Articles 53 and 54 of the ICSID Convention (Response to Observations, ¶ 19).
48. Finally, El Paso stated that, in light of the evidence of Argentina's failure to voluntarily comply with ICSID awards, the Committee should make the continuation of the stay of enforcement of the Award conditional on the posting of security (Response to Observations, ¶ 20).

V. DECISION

49. Argentina indicated in paragraph 3 of its Observations that the seriousness of the grounds it has invoked to apply for annulment of the Award must be taken into account by the Committee in deciding on the stay of enforcement of the Award. The Committee does not agree with this criterion, as it considers that this is not the appropriate stage of the proceedings to analyze the validity of Argentina's arguments, which should take place when the merits of the case are decided.
50. In that same paragraph, Argentina cited various awards against Argentina that were annulled. For the Committee it is not relevant either to analyze the number of awards rendered against Argentina that were annulled, in their entirety or in part, nor the reasons for which they were annulled, since they involved cases that are entirely unrelated to this one, which should be decided exclusively on the basis of its own merits.
51. For this Committee, there is no doubt that awards should be complied with immediately by the losing party and, therefore, it does not agree with the reasoning, expressed or suggested, in the submission of the Argentine Republic dated June 11, 2012 that said compliance may be subject to the completion of certain procedures established by the debtor.

52. As indicated above, El Paso referred to various cases in which Argentina was required to pay certain sums of money, which it has not yet done. The Committee understands El Paso's concern that, if Argentina is not required to provide a guarantee as an essential condition for the stay of the Award, then, in the event that the annulment of the Award were refused, it would have to wait for Argentina to pay. Nevertheless, the Committee is also fully aware that the provision of said guarantee would put El Paso in an advantageous position with respect to the other creditors that it cites in its submission of June 22 (*Vivendi II, Azurix, CMS and Continental Casualty*).
53. While it is true that the decision on the stay of enforcement of the Award will take some time and that this delay could cause harm to the creditor, it is also true that the creditor has the right, if the application for annulment were rejected, to collect the interest accrued until the date when payment of the amount indicated in the Award is made.
54. In the event that the Committee would order the stay of enforcement of the Award to be lifted and allow the Award to be enforced, and subsequently the application for annulment were accepted, in its entirety or in part, Argentina would be harmed by its early compliance with an Award that would have been declared null. The recovery of the amounts that it would have paid could be slow and complicated.
55. In a way, requiring Argentina to provide a guarantee for the continuation of the stay of the enforcement of the Award would be tantamount to punishing Argentina for having applied for the annulment of the award. Clearly, such sanction is not provided for in the ICSID Convention and rules.
56. Annulment Committees have a specific task: to determine whether the award submitted to them for consideration meets any of the grounds for annulment set out in Article 52 of the ICSID Convention. It is not their task to ensure compliance with the respective award, regardless of the actions of the debtor in the case at hand or in others.
57. For the above reasons, and based on the powers vested upon it by Article 52(5) of the ICSID Convention, the Committee will order the continuation of the stay of enforcement of the award until the decision on its annulment is rendered.

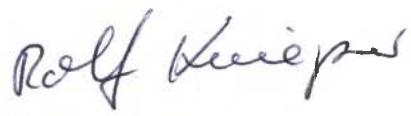
58. In paragraph 3 of its petition of June 22, El Paso states the following:

“At the very least, and in the alternative, El Paso requests that any stay be conditioned on provision by Argentina of an appropriate security in an amount sufficient to reimburse El Paso’s reasonable costs of defending against the Application (estimated by counsel to be in the region of US\$1,500,000).”

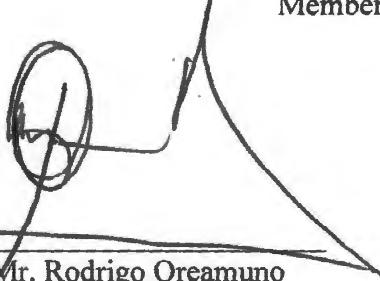
59. Although the Committee understands El Paso’s concern, there is no provision in the rules governing this matter that can serve as grounds for an order to Argentina to provide a guarantee in the estimated amount of the costs that El Paso will incur in these proceedings as a requirement for the continuation of the stay of enforcement of the award.
60. For the reasons mentioned in the previous paragraphs, the Committee orders the continuation of the stay of enforcement of the award until it decides about the annulment requested by the Argentine Republic. Said stay is not conditional on the provision of any type of guarantee by Argentina.



Ms. Teresa Cheng
Member of the Committee



Prof. Dr. Rolf Knieper
Member of the Committee



Mr. Rodrigo Oreamuno
President of the Committee