

**Continental Casualty Company
(Claimant)**

v.

**The Argentine Republic
(Respondent)**

**(ICSID Case No. ARB/03/9)
(Annulment Proceeding)**

**Decision on the Claimant's Preliminary Objection to
Argentina's Application for Annulment**

Members of the *ad hoc* Committee

Dr. Gavan Griffith Q.C., President
Judge Bola A. Ajibola
Mr. Christer Söderlund

Secretary of the *ad hoc* Committee: Mr. Tomás Solís

Assistant to the *ad hoc* Committee: Dr. Christopher Staker

Representing the Claimant:

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A. Introduction

1. On 5 June 2009, the Argentine Republic (“Argentina”) filed with the Secretary-General of the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) an application in writing (“Argentina’s Application” or “Argentina’s Application for Annulment”) requesting the partial annulment of the Award of 5 September 2008 (the “Award”) rendered by the Tribunal (the “Tribunal”) in the arbitration proceeding between Continental Casualty Company (“Continental”) and Argentina.
2. In Argentina’s Application, Argentina seeks annulment of the Award on two of the five grounds set forth in Article 52(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“the ICSID Convention”), specifically claiming that:
 - (a) the Tribunal manifestly exceeded its powers; and
 - (b) the Award failed to state the reasons on which it was based.
3. Argentina’s 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 Proceedings (the “ICSID Arbitration Rules”), for a stay of enforcement of the Award until Argentina’s Application for Annulment is decided.
4. The Acting Secretary-General of ICSID registered Argentina’s Application on 8 June 2009, and on the same date, in accordance with Rule 50(2) of the ICSID Arbitration Rules, transmitted a Notice of Registration to the parties. The parties were also notified that, pursuant to ICSID Arbitration Rule 54(2), the enforcement of the Award was provisionally stayed.
5. By letter of 9 June 2009, in accordance with Rule 52(2) of the ICSID Arbitration Rules, the parties were notified by the Centre that an *ad hoc* Committee had been constituted to consider Argentina’s Application, composed of Dr. Gavan Griffith Q.C., a national of Australia, Judge Bola A. Ajibola, a national of Nigeria, and Mr. Christer Söderlund, a national of Sweden (“the Committee”).

6. On 29 June 2009, in accordance with a request made by the Committee in a letter of 12 June 2009, Argentina and Continental both filed written submissions in relation to Argentina's request for a continuation of the stay of enforcement of the Award.
7. Communications of the parties dated 29 June 2009 respectively addressed the provisional agenda for the preliminary procedural consultation meeting. Continental supplemented its communication by a further letter dated 30 June 2009.
8. On 2 July 2009, at the headquarters of the World Bank in Washington, the preliminary procedural consultation meeting was held in relation to Argentina's Application for Annulment and in relation to the separate application for annulment filed by Continental ("Continental's Application" or "Continental's Application for Annulment") which was registered on 14 January 2009. In the case of Argentina's Application, this meeting constituted the Committee's first session, the first session in relation to Continental's Application having already been held by telephone conference on 22 April 2009.
9. At the 2 July 2009 meeting, the parties confirmed their agreement that the Committee had been properly constituted to hear both Continental's Application and Argentina's Application. The parties further confirmed that they had no objections to its Members. Copies of the Committee Members' declarations concerning Argentina's application were distributed by the Secretary at the end of the meeting. Several issues of procedure were agreed and decided at the meeting. Subsequently, the parties addressed the Committee with their respective arguments concerning the question of the continuation of the stay of enforcement of the Award. During the session, the Committee put questions to the parties.
10. In the course of presenting its arguments at the 2 July 2009 meeting, Continental raised a preliminary objection that Argentina's Application was not made within the time limit stipulated in Article 52(2) of the ICSID Convention and was therefore outside the jurisdiction of the Committee. It was agreed and decided that Continental was within 14 days from the 2 July 2009 meeting to file

a written submission setting out its preliminary objection, that Argentina was to file its response within 30 days from receipt of Continental's submission, and that both parties reserved their right to request leave from the Committee for further procedures concerning Continental's submission on its preliminary objection.

11. On 16 July 2009, Continental filed a written submission on its preliminary objection.
12. On 21 August 2009, Argentina filed its written response to Continental's submission on the preliminary objection.
13. By a letter dated 31 August 2009, Continental requested the Committee to direct Argentina to provide Continental with the English language version of certain documents referred to in Argentina's response that were not available to Continental, namely documents from annulment proceedings in other ICSID cases involving Argentina, and to grant Continental leave to file a reply submission, if necessary, after receipt of those documents.
14. By an e-mail dated 17 September 2009, Argentina submitted copies of the documents requested by Continental, noting that one of the requested documents was produced only in its Spanish original as no English translation existed.
15. On 21 September 2009, Continental filed observations on Argentina's response to Continental's submission on the preliminary objection.
16. The Members of the Committee have deliberated by various means of communication, and have taken into consideration the parties' entire written and oral arguments and submissions on Continental's preliminary objection.

B. The parties' submissions

17. Continental argues, *inter alia*, that:

- (a) Pursuant to Article 52(2) of the ICSID Convention, the 120 day time limit for an application for annulment applies in all cases other than in cases of alleged corruption on the part of a Tribunal member, and no such allegation of corruption has been made in the present case.
- (b) The Award was rendered and issued to the parties on 5 September 2008. Pursuant to Regulation 29 of the ICSID Administrative and Financial Regulations, the 120 day time limit under Article 52(2) of the ICSID Convention for an annulment application was therefore Sunday 4 January 2009, resulting in a filing deadline of Monday 5 January 2009. However, Argentina's application for annulment was not filed until 5 June 2009, 150 days after expiry of the 120 day period for applications for annulment.
- (c) ICSID Arbitration Rule 50(3)(b) provides that the Secretary-General shall refuse to register an application for annulment if it is not made "*within 120 days after the date on which the award was rendered (or any subsequent decision or correction)*". Argentina's Application was so registered, but the determination of whether an annulment application complies with the terms of the ICSID Convention rests with the Committee and not with the Secretary-General.¹
- (d) It is a general principle of interpretation in international law that exceptions to a treaty obligation are construed restrictively (*exceptio est strictissimae applicationis*). Annulment is an extraordinary remedy that amounts to a general exception to the final and binding effect of an ICSID award under Article 53 of the ICSID Convention. As an exception to finality, the availability of annulment must be interpreted and applied strictly, and be limited to extraordinary circumstances. Annulment is not

¹ Relying on *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), *Ad hoc* Committee Decision on the Application for Annulment, 16 May 1986, 25 *ILM* 1439 (1986); 1 *Int'l Arb. Rep.* 649 (1986); 12 *Y.B. Com. Arb.* 129 (1987); 89 *I.L.R.* 514 (1992); 1 *ICSID Rep.* 509 (1993) ¶ 47; C. Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2001) ("Schreuer") at 109 ¶ 333.

to be encouraged as a routine step to be taken by a party that has lost a case to assist in delaying or avoiding payment of an award.

- (e) The ICSID Arbitration Rules are subsidiary to the ICSID Convention and cannot be read in any way that is contrary to the proper interpretation of the ICSID Convention itself.
- (f) Properly understood in a manner consistent with a strict interpretation, the extension of time in Article 49(2) of the ICSID Convention for making an annulment application in cases where there is an application for rectification of the award is limited to an annulment application related to determinations made in the rectification decision, or to a finding that has been rectified in the rectification decision, since only in that case does the applicant for annulment have to consider new legal points in relation to its annulment application which justify the extra time.² Any other interpretation opens the floodgates to dilatory and obstructive conduct on the part of award debtors.³
- (g) In the instant case Argentina's Application for Annulment only challenges determinations made in the original Award and findings of the Tribunal that are entirely unrelated to the rectification, and Argentina's Application is therefore out of time. Argentina, in waiting for such a long period to file its annulment application, is dilatory.

18. Argentina argues, *inter alia*, that:

- (a) In accordance with Article 49(2) of the ICSID Convention, Argentina's Application for Annulment was properly filed on 5 June 2009, 102 days after the Tribunal's Decision on Rectification of the Award of 23 February 2009.
- (b) Nothing in Article 49(2) of the ICSID Convention, nor in any other provision of the ICSID Convention or ICSID Arbitration Rules, makes the extension of the time limit for submitting an application for annulment

² Referring to *History of the ICSID Convention*, Vol II, Part 2, at 988 ¶ 49.

³ Referring to Schreuer at 894.

conditional on the application for annulment being related to determinations made in the rectification decision or in the supplementary decision. Continental is trying to amend the ICSID Convention.

- (c) The negotiating history of the ICSID Convention confirms this.⁴ Also, when explaining the content of what is now ICSID Arbitration Rule 50, the ICSID Secretariat did not make any distinctions between applications for annulment that relate to determinations made in the rectification decision and applications for annulment that do not.⁵
- (d) Given the very severe consequence that follows non-compliance with the 120-day deadline for annulment applications, and the uncertainties that may arise as to whether a request for annulment is or is not related to the rectification decision or to the supplementary decision, the drafters of the ICSID Convention decided to adopt a clear rule in this regard, namely that a decision on rectification or a supplementary decision *generally* extends the time limits for requesting revision or annulment, regardless of whether or not the application for revision or annulment addresses questions dealt with in that decision.⁶
- (e) In the present case the Acting Secretary-General reviewed Argentina's Application and found that it was duly and timely submitted because otherwise the Acting Secretary-General would have refused to register the application in accordance with Article 50(3)(b)(i) of the ICSID Arbitration Rules. Although this determination does not bind the Committee, it should be accorded considerable weight.
- (f) A certain delay in the proceeding is a normal consequence of the rectification and supplementation process under Article 49 of the ICSID

⁴ Referring to Summary Proceedings of the Legal Committee Meeting, 10 December 1964, afternoon, SID/LC/SR/21 (11 January 1965), in *History of the ICSID Convention*, Vol II, Part 2, at 881, 884.

⁵ Referring to 1968 ICSID Rules of Procedure for Arbitration Proceedings with Explanatory Notes prepared by the ICSID Secretariat, Note E to Arbitration Rule 49, 1 *ICSID Rep.* 63, 110.

⁶ Referring to Schreuer at 854; UNCTAD, *Course on Dispute Settlement: ICSID - 2.8 Post-Award Remedies and Procedures*, at 8, U.N. Doc. UNCTAD/EDM/Misc.232/Add.7 (2003) (prepared by Wang Dong).

Convention.⁷ In the present case, Continental itself caused the delay it complains about, since Continental was the first to request a rectification or supplementation of the Award which was decided by the Tribunal at the same time as Argentina's request for rectification.

- (g) It is not an accurate to state that the right of annulment is an "exception" or "extraordinary remedy" as it is a specific right provided for in the ICSID Convention that has the particular feature of protecting the "integrity of the ICSID arbitration system".⁸

C. The Committee's views

19. Article 51(2) of the ICSID Convention provides that an application for annulment shall be made within 120 days after the date on which the award was rendered (with an exception, that is immaterial to the present proceedings, in cases where annulment is requested on the ground of corruption).

20. Article 49(2) of the ICSID Convention states that:

The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.

21. It is not disputed by the parties that in the present case the Tribunal gave a decision under Article 49(2) rectifying the Award on 23 February 2009. It is not disputed by the parties that Argentina's Application for Annulment was filed well within 120 days of that rectification decision. It is similarly not disputed by the parties that Argentina's Application was not filed within 120 days of the date on which the original Award was rendered.

⁷ Referring to Schreuer at 855.

⁸ Referring to *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Decision on the Stay of Enforcement of the Award, 30 November 2004, ¶ 40.

22. Continental argues that Article 49(2) of the ICSID Convention only extends the time limit for an annulment application where the annulment application relates to determinations made in the rectification decision. Continental's position is that even if a rectification decision has been given by the Tribunal under Article 49(2), the time limit for an annulment application remains 120 days from the original Award, and not 120 days from the rectification decision, in cases where the annulment application relates to determinations in the original award that were not affected by the rectification decision. Argentina on the other hand argues that in cases where a rectification decision is given under Article 49(2) of the ICSID Convention, that provision applies to extend the time limit for the making of any application for annulment, whether or not the application relates to matters in the award that were affected by the rectification decision.
23. The Committee considers that this issue is one of interpretation of Article 49(2) of the ICSID Convention. In interpreting that provision, the Committee applies the principles in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "Vienna Convention").⁹ These provisions reflect the customary international law rules of treaty interpretation as they already existed at the time that the text of the ICSID Convention was adopted.¹⁰
24. Articles 31 and 32 of the Vienna Convention state:

*Article 31
General rule of interpretation*

1. *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
2. *The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:*
 - (a) *any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;*

⁹ Vienna, May 23, 1969; 1155 U.N.T.S. 331.

¹⁰ E.g., *Enron Corp and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, 7 October 2008, ¶ 25.

- (b) *any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*
- 3. *There shall be taken into account, together with the context:*
 - (a) *any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;*
 - (b) *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;*
 - (c) *any relevant rules of international law applicable in the relations between the parties.*
- 4. *A special meaning shall be given to a term if it is established that the parties so intended.*

*Article 32
Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) *leaves the meaning ambiguous or obscure; or*
 - (b) *leads to a result which is manifestly absurd or unreasonable.*
- 25. For purposes of Article 31(1) of the Vienna Convention, the Committee considers that the plain meaning of Article 49(2) of the ICSID Convention is abundantly clear: where a rectification decision is given under Article 49(2) of the ICSID Convention, the period of time provided for under Article 52(2) of the ICSID Convention runs from the date of the rectification decision, rather than from the date of the original award.
- 26. The Committee considers that there is nothing in the context or objects and purposes of the ICSID Convention that would require this provision to be

understood as having a completely different meaning to what it plainly says. If Article 49(2) of the ICSID Convention had intended to establish separate time limits for different categories of annulment applications, depending on whether or not an annulment application relates to a matter affected by a rectification decision, it would have said so. It may well be that good reasons could be advanced in favour of adopting such an approach. However, there are no doubt equally good reasons that could be advanced against adopting such an approach. For instance, it could lead to the inconvenience of a single application for annulment having to be split into two separate applications for annulment subject to different time limits, in cases where a party seeks annulment both of parts of an award that were affected by the rectification decision and parts that were not. Such an approach might also lead to unnecessary arguments about whether or not an application for annulment relates to matters that were affected by a rectification decision.

27. Ultimately, it was a matter for the drafters of the ICSID Convention to determine which approach to adopt, and the approach that was adopted is the one that is embodied in the clear language of Article 49(2) of the ICSID Convention. The Committee does not consider that it would in any way be inconsistent with the object and purpose of the ICSID Convention to interpret this provision in accordance with its plain meaning.
28. The Committee therefore does not consider that there is any need to resort to supplementary means of interpretation in accordance with Article 32 of the Vienna Convention: the interpretation in accordance with Article 31 of the Vienna Convention is neither ambiguous nor obscure, nor one that leads to a result which is manifestly absurd or unreasonable. The Committee considers that the wording of Article 49(2) of the ICSID Convention is clear and that it is entirely reasonable for the ICSID Convention to maintain a single time limit for all annulment applications in cases where there is a rectification decision, regardless of whether or not the rectification decision affects the part of the award that is sought to be annulled.
29. In any event, even if the Committee were to consider supplementary means of interpretation, no supplementary means of interpretation to which the

Committee has been directed would, in the Committee's view, require Article 49(2) of the ICSID Convention to be given any interpretation other than its plain meaning.

30. The Committee finds nothing in the ICSID Arbitration Rules that would affect its conclusions above, and in any event, the ICSID Arbitration Rules cannot prevail over the terms of the ICSID Convention.
31. The Committee therefore rejects Continental's preliminary objection.

D. Costs

32. Argentina requests the Committee to order Continental to pay for all expenses and costs arising out of its preliminary objection, including the fees and expenses of the members of the Committee, the charges for the use of the facilities of the Centre, the fees and expenses incurred by Argentina and any other expenses incurred in connection with Continental's preliminary objection, with interest.¹¹
33. The Committee considers it appropriate to reserve issues of costs until the end of these annulment proceedings.

¹¹ Relying on ICSID Convention, Article 61(2).

DECISION

Pursuant to Article 41(2) of the ICSID Convention and Rule 41(4) of the ICSID Arbitration Rules, the Committee overrules Continental's preliminary objection that Argentina's Application for Annulment was not filed within the applicable time limit under the ICSID Convention and ICSID Arbitration Rules.

The issue of the parties' costs of the proceedings relating to Continental's preliminary objection is reserved until the end of these annulment proceedings.

[signed]

**Dr. Gavan Griffith Q.C.
President of the *ad hoc* Committee
On behalf of the Committee**

Melbourne, 23 October 2009