

**Continental Casualty Company
(Claimant)**

v.

**The Argentine Republic
(Respondent)**

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

**Decision on Argentina's Application for a Stay
of Enforcement of the Award**

Members of the *ad hoc* Committee

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

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

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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 Committee’s decision of October 23, 2009 sets out the procedural history to that date of Argentina’s Application for Annulment.¹
5. 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. Oral submissions were presented by both parties on Argentina’s request at the preliminary procedural consultation meeting held in Washington

¹ “Decision on the Claimant’s Preliminary Objection to Argentina’s Application for Annulment” of 23 October 2009 ¶¶ 4-15.

on 2 July 2009. In accordance with a direction given by the Committee, on 2 October 2009 Argentina filed further written submissions in relation to its request and Continental confirmed that it had no need to make further submissions.

6. 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 Argentina's request for a stay of enforcement of the Award.

B. The parties' submissions

7. Argentina argues, *inter alia* that:

- (a) In general, a stay should be granted under Article 52(5) if requested.² Since the beginning of the history of the ICSID Convention, no *ad hoc* Committee has failed to grant a stay of enforcement of the award.³ There

² Referring to *Enron Creditors Recovery Corp. & Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3) (Annulment Proceeding), Decision on the Claimants' Second Request to Lift Provisional Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 20 May 2009 ("*Enron Second Stay Decision*"), ¶ 6.b.

³ Referring to *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/01/10), Procedural Order No. 1, December 22, 2005 ("*Repsol Stay Decision*"), ¶ 9; *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), *Ad hoc* Committee Decision on the Application for Annulment, May 16, 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) ("*Amco I Annulment Decision*") ¶ 8; *Amco Asia Corporation and others v. Republic of Indonesia* (ICSID Case No. ARB/81/1), Interim Order No. 1, March 2, 1991, 9 *ICSID Rep.* 59 (2006) ("*Amco II Stay Decision*") ¶ 9; *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on Application for Annulment, 8 December 2000, ¶ 10; *Maritime International Nominees Establishment ("MINE") v. Republic of Guinea* (ICSID Case No. ARB/84/4), Interim Order No. 1 on Guinea's Application for Stay of Enforcement of the Award, August 12, 1988 ("*MINE Stay Decision*") ¶ 28; *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, September 1, 2006 ("*CMS Stay Decision*") ¶ 58; *Patrick Mitchell v. Democratic Republic of the Congo* (ICSID Case No. ARB/99/7), Decision on the Stay of Enforcement of the Award, November 30, 2004 ("*Mitchell Stay Decision*") ¶ 23; *CDC Group plc v. Republic of the Seychelles* (ICSID Case No. ARB/02/14), Decision on Whether or Not to Continue Stay and Order, July 14, 2004 ("*CDC Stay Decision*") ¶ 23; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Decision on the Respondent's Request for a Continued Stay of Execution, June 1, 2005 ("*MTD Stay Decision*") ¶ 37; *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, December 28, 2007 ("*Azurix Stay Decision*") ¶ 45. *Enron Corporation & Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 7 October 2008 ("*Enron First Stay Decision*") at

are no exceptional circumstances in this case under which the stay should not continue. The grounds for annulment invoked by Argentina and their seriousness and merit show that Argentina's annulment request is serious and not dilatory.

- (b) The fact that Continental's Application for Annulment seeks annulment of the same portions of the Award that gave rise to Argentina's Application for Annulment militates in favour of continuing the stay of enforcement of the Award until the Committee definitively settles the questions raised by both parties to this proceeding.
- (c) Continental will suffer no harm as a consequence of the continued stay of enforcement since if the Award is finally upheld the interest accrued during the annulment proceedings would compensate Continental for the time it had to wait to collect the Award.⁴
- (d) There is no risk of non-compliance with the Award by Argentina if it is not annulled. Argentina's legal system guarantees compliance with Argentina's treaty obligations and ICSID awards,⁵ and Argentina has historically complied with decisions of international tribunals.⁶

48; *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), 4 November 2008 ("*Vivendi Stay Decision*"); *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 ("*Sempra First Stay Decision*") ¶ 117; *Enron Second Stay Decision* at 21.

⁴ Relying on Award ¶ 320 and referring to *CMS Stay Decision* ¶ 39; *MTD Stay Decision* ¶ 36; *Azurix Stay Decision* ¶ 40.

⁵ Referring to the Constitution of Argentina, Article 75(22); *CMS Stay Decision* ¶¶ 38, 41, 45; *Azurix Stay Decision* ¶¶ 38-38; Argentine Supreme Court of Justice, 7 July 1992, *Ekmekdjian, Miguel Ángel v. Sofovich, Gerardo et al*, Rulings: 315:1503, Recital Nos. 18-19; *Gómez Gómez, Alfredo; González, Sebastián Ignacio on extradition*, Argentine Supreme Court of Justice, 16 October 2001, File G. 1. XXXVI, pp. 6, 9; *Martín y Cía. v. National Government*, Argentine Supreme Court of Justice (1963) and *Esso S.A. v. National Government*, Argentine Supreme Court of Justice (1968); and contrasting *Republic of Paraguay v. Gilmore*, 523 U.S. 371, 376 (1998).

⁶ Referring to *Maqueda v. Argentina Case*, Inter-American Court of Human Rights (series C) No. 18, Resolution of 17 January 1995; *Garrido and Baigorria v. Argentina* case, Inter-American Court of Human Rights (series C) No. 26, Judgement of 2 February 1996; *Cantos v. Argentina* case, Inter-American Court of Human Rights (series C) No. 97, Judgment of 28 November 2002; *Bulacio v. Argentina* case, Inter-American Court of Human Rights (series C) No. 100, Judgement of 18 September 2003; *Bulacio v. Argentina* case, Inter-American Court of Human Rights, Resolution on supervision of judgement compliance of 17 November 2004.

- (e) Those who argue that Argentina is in default of its international obligations under the ICSID Convention point only to the *CMS Award*.⁷ However, CMS has refused to follow the administrative formalities under Argentine law for a final decision of a local court to be paid, as provided for by Article 54 of the ICSID Convention. Furthermore, CMS's rights under the *CMS Award* were transferred to a third party.
- (f) In any event, Continental bears the burden of proof to show that Argentina will not comply with its international obligations under the Award if the damages portion of the Award is not annulled.
- (g) Allowing enforcement of the Award would have systemic consequences, and would bring about serious harm to States' trust in the investment arbitration mechanism under the ICSID Convention.⁸
- (h) Argentina should not be required to provide any financial security as a condition for the continuation of the stay. Such a requirement is contrary to the object and purpose and spirit of the ICSID Convention,⁹ the text and negotiating history of which does not foresee the possibility of requiring that a party seeking annulment post a guarantee.¹⁰ The requirement of a guarantee has been incorrectly imported from the commercial arbitration practice.
- (i) Requiring a guarantee as a condition of a stay of enforcement impairs the use of the protection of the annulment mechanism contained in the ICSID Convention.¹¹ The right of either party to request annulment cannot be restricted.¹²
- (j) Requiring a guarantee as a condition of a stay of enforcement would place Continental in a more favourable situation than it is now and than it

⁷ *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Award, 12 May 2005.

⁸ Referring to *Azurix Stay Decision* ¶ 32.

⁹ Referring to *Azurix Stay Decision* ¶¶ 34-35.

¹⁰ Referring to *MINE Stay Decision* ¶ 20.

¹¹ Referring to *Azurix Stay Decision* ¶ 32.

¹² Referring to Schreuer at 904; *Mitchell Stay Decision* ¶ 40.

was prior to the filing of Argentina's Application for Annulment,¹³ since "it converts the undertaking of compliance under Article 53 of the convention into a financial guarantee and avoids any issue of sovereign immunity from enforcement, which is expressly reserved by Article 55 of the Convention".¹⁴

- (k) Both Continental and Argentina have applied for annulment of the Award, and requiring the provision of a financial guarantee would penalise one of the parties while favouring the other.¹⁵
- (l) It is not the task nor the jurisdiction of ICSID annulment committees to secure compliance with awards should annulments not be granted.
- (m) It would be extremely costly for Argentina to access an adequate financial guarantee.
- (n) It would be very difficult, if not impossible, for Argentina to recover the amount of the Award if it were partially annulled,¹⁶ since as long as Argentina would have a right to retrieve those amounts such right could be attached by other unrelated creditors of Argentina.¹⁷
- (o) The posting of a bank guarantee is unnecessary since the Argentine domestic legal system already guarantees compliance with the Award. In any event, Continental should bear the burden of proof that there are circumstances requiring that an additional guarantee be furnished.¹⁸
- (p) Argentina will comply in good faith with its obligations under the ICSID Convention, but requires ICSID award creditors to follow the same formalities that are followed by any creditor of a final judgment of a local court in Argentina, a position that is consistent with Articles 53 and Article

¹³ Referring to *MINE* Stay Decision ¶ 22; *Mitchell* Stay Decision ¶¶ 34, 40; *MTD* Stay Decision ¶ 30; *CMS* Stay Decision ¶ 39; *Azurix* Stay Decision ¶ 43; *Enron* Second Stay Decision ¶ 45.

¹⁴ Citing *CMS* Stay Decision ¶ 39; and referring to *MINE* Stay Decision ¶¶ 23-24, and *MTD* Stay Decision ¶ 30.

¹⁵ Referring to *Mitchell* Stay Decision ¶ 40; *Azurix* Stay Decision ¶ 31.

¹⁶ Relying on *Mitchell* Stay Decision ¶ 24; *CMS* Stay Decision ¶ 38.

¹⁷ Relying on *Enron* Second Stay Decision ¶ 39.

¹⁸ Referring to *Azurix* Stay Decision ¶ 37.

54 of the ICSID Convention.¹⁹ Several countries have provisions similar to Argentina's legal framework and adopt the same *rationale* that Argentina has adopted.²⁰

8. Continental argues, *inter alia* that:

- (a) Continental is prepared to accede to Argentina's request with respect to the stay, provided that Argentina posts security in the form of payment into escrow, a bond or bank guarantee or some other negotiable security.
- (b) The established practice of ICSID annulment committees is to grant a stay only on payment of the compensation ordered into an escrow or trust account or on the posting of a bond or some other form of negotiable security.²¹
- (c) Argentina's assertion of no harm to Continental if the stay is ordered without security rests on the assumption that Argentina will ultimately satisfy its obligations under the award. However, Argentina is notorious for failing to comply with ICSID arbitral awards,²² and the requirement of security is clearly and compellingly warranted in this case.
- (d) Argentina has repeatedly reaffirmed that it will not comply with its obligations under article 53 of the ICSID Convention unless and until enforcement action is taken under article 54.²³ However, under Article 53 of the ICSID Convention and Article VII(6) of the Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment²⁴ (the "BIT"), Argentina is required to carry out without delay the provision of any award

¹⁹ Referring to *MTD* Stay Decision ¶¶ 31-32; *CMS* Stay Decision ¶¶ 40-41; *Vivendi* Stay Decision.

²⁰ Arbitration (International Investment Disputes) Act of the United Kingdom, 1966, section 1(8); Exempt Resolution No. 1891 of the Government of Chile, Ministry of Justice, of 9 July 2008; International Arbitration Act (Act No. 136 of 1974 as amended) (Australia); Arbitration (International Investment Disputes) Act (Act No. 39 of 1979) (New Zealand); Arbitration (International Investment Disputes) Amendment Act (Act No. 52 of 2000) (New Zealand).

²¹ Referring to *AMCO I* Stay Decision, especially ¶ 8; *Vivendi* Stay Decision, especially ¶¶ 45-46; *Sempra* Stay Decision, especially ¶¶ 52-53, 67-76, 102, 104, 110, 112; *Wena* Stay Decision, especially ¶ 6; *MINE* Stay Decision; *Repsol* Stay Decision, especially ¶ 10; *CDC* Stay Decision.

²² Referring to I. Peterson, "Argentine Crisis Arbitration Awards Pile Up, but Investors Still Wait for Payout", *Focus Europe*, June 25, 2009.

²³ Referring to *Sempra* First Stay Decision ¶¶ 10, 52-53.

²⁴ Signed November 14, 1991; entered into force October 20, 1994.

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.

- (e) The guarantee would not place Continental in a better situation than it would otherwise be in a case where Argentina were to comply with its obligations under Article 53.²⁵ Posting security is simply intended to assure that Argentina ultimately complies with its obligations, and serves as a counterbalance to the fact that the award creditor is prejudiced by a stay.²⁶
- (f) The possibility that other creditors of Argentina might attach Argentina's right to receive the security it has posted in the event that its application for annulment is granted should not be a relevant factor. The fact that Argentina has other creditors which have not been paid should make the requirement to post security more likely rather than less likely.
- (g) However, if Argentina were ordered to deposit the full amount of the award plus interest into an escrow or trust account administered by the World Bank, this would avoid the potential problem of attachment by unrelated creditors of Argentina as the World Bank is exempt from that type of attachment.
- (h) This would also avoid what Argentina claims would be the very high cost of other forms of security.
- (i) Continental does not seek to annul the portion of the Award awarding Continental USD 2.8 million in damages for breach of the fair and equitable treatment obligation in the BIT.

²⁵ Referring to *Sempra* First Stay Decision ¶¶ 46, 47, 102-103, 95.

²⁶ Referring to *Mitchell* Stay Decision ¶33.

C. Relevant provisions

9. Article 52 of the ICSID Convention provides:

(1) *Either party may request annulment of the award by an application in writing addressed to the Secretary-General*

...

...

(5) *The Committee 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.*

...

10. Articles 53 to 55 of the ICSID Convention provide:

Article 53

(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 this Convention.*

(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.*

Article 54

(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 an 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.*

- (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.*
- (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.*

Article 55

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.

11. Rule 54 of the ICSID Arbitration Rules applies to the present case and provides:

Stay of Enforcement of the Award

- (1) *The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.*
- (2) *If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provisional stay of the award. As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated.*
- (3) *If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final*

decision is rendered on the application, except that a Committee granting the partial annulment of an award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request any new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3).

- (4) A request pursuant to paragraph (1), (2) (second sentence) or (3) shall specify the circumstances that require the stay or its modification or termination. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.*
- (5) The Secretary-General shall promptly notify both parties of the stay of enforcement of any award and of the modification or termination of such a stay, which shall become effective on the date on which he dispatches such notification.*

D. The Committee's views

12. Continental maintains that there is a substantial risk of non-compliance with the Award by Argentina in the event that it is not annulled. In this respect, the Committee notes that at the 2 July 2009 first session, a representative of Argentina stated Argentina's position that in order for Continental to obtain payment of the Award, it would be necessary for Continental to follow the formalities applicable to enforcement in Argentina of final judgments of Argentine courts, pursuant to Article 54 of the ICSID Convention. The Committee notes that in three other cases, *ad hoc* committees have found that this position of Argentina is inconsistent with Argentina's obligation under Article 53 of the ICSID Convention to carry out without delay the provisions of the award without the need for enforcement action under Article 54 of the ICSID Convention.²⁷ The Committee agrees with the conclusions in those earlier cases in respect of the obligation of the award debtor under Article 53 of the ICSID Convention. For similar reasons, the Committee concludes that because Argentina continues to maintain the same position in the present proceedings

²⁷ *Enron* First Stay Decision ¶¶ 54-85; *Vivendi* Stay Decision ¶¶ 31-37; *Sempra* First Stay Decision ¶¶ 32-53.

notwithstanding the findings of the *ad hoc* committees in those three other cases, there is, in the event that the Award is not annulled, no prospect that Argentina will comply with its obligation under Article 53 of the ICSID Convention to abide by and comply with its obligation under Article 53.²⁸

13. The Committee finds this to be a fundamentally important consideration in determining whether to impose a condition of security as a requirement for any stay of enforcement. However, even so, that consideration is not of itself necessarily conclusive as the Committee must base its decision entirely on the relevant circumstances.
14. A distinguishing feature of the present case is that each of Continental and Argentina has made applications for annulment of the Award. Of course Continental has not sought annulment of that part of the Award which was in Continental's favour, and which Continental seeks to be at liberty to enforce in the event that the stay of enforcement is terminated. Nevertheless, in the Committee's view, it would not in general be appropriate for an award to be enforced in circumstances where neither of the parties considers the award to be final with extant applications for Annulment having been made for the entire Award. This is a factor to which the Committee gives particular weight in deciding whether it is necessary or appropriate to impose a condition of security for any continuation of the stay.
15. Another matter to which the Committee has regard is the amount of the Award. The Tribunal determined that Argentina is liable to pay Continental compensation of USD 2.8 million, which is but a fraction of the amount of USD 46 million that was claimed by Continental in the proceedings before the Tribunal.²⁹ In the Committee's view, the fact that the Award is for such a small proportion of the amount that would still remain in dispute in the event that Continental's own Application for Annulment were to succeed, and for such a small amount by comparison with other ICSID awards, remains a further

²⁸ *Enron* First Stay Decision ¶ 101; *Enron* Second Stay Decision ¶¶ 21-29; *Sempra* First Stay Decision ¶ 104; *Vivendi* Stay Decision ¶ 45; *Sempra* First Stay Decision ¶ 22.

²⁹ Award ¶ 19.

relevant circumstance to be taken into account where the party opposing a stay of enforcement is itself also an applicant for annulment.

16. Having considered all of the arguments of the parties, and all of the circumstances as a whole, the Committee concludes that in consideration of the exceptional circumstances of this annulment proceeding, consisting in the combination of the relatively small amount of the Award and the presence of cross applications for annulment, practical considerations may allow a continued stay of the enforcement of the Award pending the conclusion of the annulment proceedings without imposing any condition of security.

DECISION

Pursuant to Article 52(5) of the ICSID Convention and Rule 54(2) of the ICSID Arbitration Rules, the *ad hoc* Committee determines that the stay of enforcement of the Award will continue in effect for the duration 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