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International Arbitration Case Law

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CONTINENTAL CASUALTY COMPANY V ARGENTINE REPUBLIC (ICSID CASE NO ARB/03/9)
DECISION ON THE APPLICATION FOR PARTIAL ANNULMENT OF CONTINENTAL CASUALTY COMPANY AND THE APPLICATION FOR PARTIAL ANNULMENT OF THE ARGENTINE REPUBLIC

Case Report by Jaime Gallego**
Edited by Natasha Dupont***

A Decision rendered on September 16, 2011, under the bilateral investment treaty between Argentina and the United States of America (the "BIT"), and in accordance with the ICSID Convention and Arbitration Rules.

Members of the ad hoc Committee:	Dr. Gavan Griffith, Q.C. (President), Mr. Christer Söderlund, (Arbitrator), Judge Bola A. Ajibola (Arbitrator).
Representing Claimant:	Mr. Barry Appleton, APPLETON & ASSOCIATES, Toronto, Canada
Representing Respondent:	Dra. Angelina María Esther Abbona, Procuradora del Tesoro de la Nación, Procuración de la Nación, Buenos Aires, Argentina

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Digest

1. Facts of the Case

1.1. Dispute between Continental Casualty Company and the Republic of Argentina (paras 42-78)

Continental Casualty Company ("Continental"), an Illinois-incorporated company, acquired shares in an Argentine company, CNA Aseguradora de Riesgos del Trabajo S.A. ("CNA") when the workers' accident insurance sector was privatized in Argentina in 1996. It then acquired additional shares in 2000 (for a total amount arising to near 100% of the shares).

In order to respond to the economic crisis in Argentina of 2001-2002, the Government of Argentina adopted certain measures. These included, inter alia, the elimination of the dollar-peso parity and the conversion into pesos of all obligations specified in dollars (pesification and compulsory pesification), the limitation of transfers of funds outside of Argentina, the proclamation of a state of public emergency, and the postponement of the payment of the public debt.

CNA suffered from these measures. Among other things, CNA held dollar denominated government debt and deposits which were converted into pesos at an unfavourable rate.

Continental considered these measures to be in breach of the Argentina-United States bilateral investment treaty ("BIT"), in particular of the umbrella clause, the fair and equitable treatment clause, the transfer clause, and the expropriation clause. It therefore claimed compensation for the prejudice it had incurred as a result of these breaches before an ICSID Tribunal, in January 2003, composed of Italian arbitrator Giorgio Sacerdoti, British arbitrator VV Veeder QC and Michell Nader of Mexico.

The Tribunal considered whether Article XI of the BIT was applicable to the disputed measures that allow the state to adopt emergency measures, which would otherwise be prohibited, to protect the public order, international peace or security or its own essential security interests. The Tribunal found that the Argentine measures were covered under Article XI (the emergency exceptions) save for one decree.

The Tribunal rendered an award on September 5, 2008 (the "Award") granting Continental USD 2.8 million with interest for the breach arising from the decree not covered by the emergency exceptions. All of Continental's other allegations were dismissed.

Both Continental and Argentina sought partial annulment of the Award.

1.2. The two annulment applications (paras 1-41, 77-78)

Continental and Argentina submitted on January 2, 2009 and June 5, 2009 respectively an application requesting the partial annulment of the Award. Argentina further sought the stay of the enforcement proceedings, which was provisionally accepted at the beginning of the annulment proceedings on June 8, 2009. On June 9, 2009 the Centre informed the Parties that the same Committee would consider the two applications.

On September 16, 2011, the Committee issued its Decision dismissing in their entirety the two applications and terminating the stay of enforcement that it had ordered at the beginning of the proceedings.

2. Discussion on the grounds for annulment

2.1. Comments on the role of an ad hoc annulment committee (paras 81-85)

The Committee commented on its role in the annulment process. It stated that an ad hoc annulment committee may not look at the substance of the dispute but only has the power to annul an award on the grounds at Article 52 (1) of the ICSID Convention. In relation to the matters which fall within its competence, the committee may have regard to previous awards and decisions and other relevant authorities to come to its decision, and in so doing further the development of a "*jurisprudence constante*" in relation to annulment proceedings.

The Committee developed each of the alleged grounds for annulment.

(a) Manifest excess of powers (Article 52(1)(b)) (paras 86-94)

A manifest excess of powers will be deemed to have been exercised, *inter alia*, when the tribunal "disregards the applicable law or bases the award on a law other than the applicable law under Article 42 ICSID Convention".[1]

The Committee did not follow Continental's arguments that the Tribunal had disregarded relevant provisions, including their legal effects and interpretation, of the BIT and of public international law. Such arguments "overstate the effect of Article 52(1) b of the ICSID Convention to the extent that, if accepted, an

[1] Decision, ¶ 86.

annulment proceeding would be reconstituted as an appellate proceeding”.[2] There is a difference between disregarding the applicable law and disregarding a certain provision of that applicable law. The former will be an excess of powers whereas the latter falls within the powers of the arbitral tribunal, as long as the provision did pertain to the applicable law and the tribunal stated the reasons for its decision. If the tribunal fails to give consideration to a particular provision of the applicable law, the logical inference is that the tribunal implicitly did not consider it relevant. In some extreme instances, the failure to give consideration to a defence based on the same law may lead to annulment as a result of a serious departure from a fundamental rule of procedure or a failure to state reasons but be unlikely to constitute a manifest excess of power.

(b) Serious departure from a fundamental rule of procedure (Article 52(1)(d)) (paras 95-97)

The Committee considered that this ground for annulment could not be said to be fulfilled in the case that a tribunal failed to explicitly address every point raised by the parties in relation to each and every one of their allegations. However there may be a breach of this ground in certain circumstances if the tribunal were to completely ignore one of the questions submitted to it, which was not the case here (such as where the entire defence is ignored by the tribunal).

(c) Failure to state reasons (Article 52(1)(e)) (paras 98-103)

Where a tribunal has failed to deal with a question, the most appropriate remedy may be an application to the tribunal for a supplementary decision pursuant to Article 49(2) of the ICSID Convention. The Committee was careful to state that ad hoc annulment committees should not decide on the correctness, adequacy or convincingness of the reasons but to simply verify that there has not been a clear failure by the tribunal to state any reasons for its decision on a particular question. As to contradictory reasons, the Committee underlined that the contradiction must be obvious and not just arguable: “An example might be where the basis for a tribunal’s decision on one question is the existence of fact A,

[2] Decision, ¶ 90.

when the basis for its decision on another question is the non-existence of fact A."[3]

2.2. *Discussion on Continental's application for annulment (paras 104-232)*

(a) ***Failure to decide Continental's claim for loss after the state of necessity was over (paras 104-143)***

Continental complained that that there was a failure by the Tribunal to consider or decide upon one of its arguments; namely that once the threats to Argentina's security interests had passed, compensation would be due. Although the Tribunal had ruled that Argentina could not invoke the exception in Article XI of the BIT for events following the state's return to the international financial markets in late 2004, the award did not address the state's continuing refusal to honour the original terms of the debt instruments. Continental said this allowed emergency conditions to continue in perpetuity, creating an unfair and absurd result at odds with international law. In particular, the Tribunal allegedly took no position on the relationship between Article XI of the BIT and Article 25 of the ILC Articles.

The Committee considered that the Tribunal had implicitly dealt with the argument by finding that Article XI of the BIT, which refers to the taking of emergency measures, relieved the state from compliance with the substantive obligations of the BIT. Thus, if the measures at the time were indeed covered by Article XI of the BIT, and the Tribunal found that they were in 2001-2002, then Argentina could not be held to be in breach of the Treaty even if the consequences continued to be felt after the crisis was over. The test under Article 25 of the ILC Articles was confirmed by the Tribunal to be different to that in Article XI, as the former was an excuse to a breach which had been established, whereas the latter led to there being no breach in the first place. Thus, the Committee rejected the claim that there was a failure to state reasons or to apply the applicable law.

The Committee brushed aside as irrelevant the claim that the Tribunal erred in its analysis of the law of GATT-WTO in order to interpret Article XI of the BIT as at most this would have constituted only an error of law.

[3] Decision, ¶ 103.

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It also rejected the allegation by Continental that the incorrect burden of proof and standard of proof were applied. As to the burden of proof, Continental argued that the Tribunal had expected that it be for Continental to prove that Argentina was not in a situation where it was necessary to apply the measures it applied. This was rejected as it had been found that the emergency measures were indeed necessary after analyzing the consequences of not taking them and also whether analysing other measures (including those proposed by Continental) could have been taken. As to the standard of proof, the Committee rejected that the Tribunal had required proof beyond a reasonable doubt as to the finding that the measures were not necessary; no particular standard of proof is required by the ICSID Convention or the Arbitration Rules and none was specified by the Tribunal.

(b) Failure to determine Continental's expropriation claim in relation to the LETEs (paras 144-181)

The Committee rejected Continental's claim that the Tribunal dealt only with the fair and equitable treatment claim but failed to deal with the expropriation claim related to the Argentine Government Treasury Bills (known as "LETEs") held by CNA. The Committee found that the rejection of the expropriation claim was implicit in the award; if there had been an expropriation, it would have taken place in 2002 and that at such time, there could be no breach of the BIT as Article XI was applicable. In any event, the Committee stated that even if this was not the correct reading of the award, a finding of expropriation would not have given a higher amount of damages.

(c) Alleged breach of Article V of the BIT (paras 182-232)

Article V of the BIT states, among other things, that "[e]ach Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory." Continental had claimed that the adoption by Argentina of a measure to limit cash withdrawals and to prohibit transfers of funds out of the country with the exception of certain current transactions was a breach of Article V and had caused it a loss of over US$ 14 million. Indeed, CNA had been prevented from transferring cash to the United States. The claim was rejected by the Tribunal which found that the transfer it wanted to make was not "related to an investment" and therefore not a breach of Article V.

Continental claimed that there was a manifest excess of powers and a failure to state reasons as there had been a failure to apply the governing law and the Tribunal had ignored the express provisions of the BIT. Continental developed this by stating that no comprehensible reasons were given for the Tribunal's conclusion that the transfer at issue did not "relate to an investment" and fell outside the protection of Article V. Indeed, its reasoning was contradictory. In addition, Continental complained that the Tribunal had failed to apply the most favoured nation provision leading to the application of more favourable treaties on the issue signed by Argentina.

The Committee disagreed. It found that sufficient reasons were given as to why the Tribunal considered that the deposits did not relate to an investment. In particular, the Tribunal had found that although a foreign investor shall be able to remit from the investment country the income produced, the reimbursement of any financing received or royalty payment due, and the value of the investment made, plus any accrued capital gain in case of sale or liquidation, this guarantee "is not without limit" and that the guarantee "does not mean that any trans-border movement of funds by such subsidiary is 'related to an investment'". The Tribunal stated that the type of transfer at issue "was merely a change of type, location and currency of part of an investor's existing investment, namely a part of the freely disposable funds held short term at its banks by CNA, in order to protect them from the impending devaluation, by transferring them to bank accounts outside Argentina." It reasoned that this could not relate to an investment on the proper interpretation of the BIT as it was not the kind of transfer that needed to be protected to ensure that a foreign investor will be able to enjoy the financial benefits of a successful investment. The Committee stated it could follow the reasoning and did not find it contradictory.[4]

As to the most favoured nations clause, this states as follows in its third paragraph (Article 10 to the Protocol to the BIT):

"The transfer of returns and proceeds from the sale or liquidation of all or any part of an investment shall in no case be on terms less favourable than those accorded, in like circumstances, to nationals or companies of the Argentine Republic or any third country, whichever is more favourable."

The Committee noted that "[i]t does not appear that Continental ever made a claim in the arbitration proceedings for damages for [its] breach."[5] Even if it had,

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[4] Decision, ¶ 222.

[5] Decision, ¶ 226.

Continental's remedy would have been to request the Tribunal to provide an additional decision under Article 49(2) of the ICSID Convention as "[t]he Tribunal's failure to decide one claim could not be a ground for annulling its decision with respect to a separate Article V claim which it did decide."[6] In any event, the Committee noted, it is not apparent how this clause is applicable when the Tribunal had already decided that the transfer did not relate to an investment. Its failure to comment on this provision did not therefore mean that there was a failure to state reasons. In any event, the Tribunal applied the BIT, to decide the claim and an error law (or fact) is not an annullable error.[7]

2.3. Discussion on Argentina's application for annulment (paras 233-279)

The Committee rejected Argentina's complaint that the Tribunal's conclusion that Argentina could not rely on Article XI of the BIT or the defence of necessity under customary international law to preclude Argentina's liability under the fair and equitable treatment clause in relation to the LETEs was not sufficiently reasoned and arbitrary. The Committee rejected that the award was insufficiently reasoned when read as a whole on this issue; namely, it reasoned that by 2004 the circumstances had evolved towards normality and the decision taken in by Argentina with regard to the LETEs in 2004 was therefore not justified.

The Committee rejected Argentina's argument that Continental had never requested the Tribunal to find that the offer to restructure the LETEs held by CNA was a breach of the bilateral investment treaty thereby making the finding *ultra petita*. The Committee noted that Argentina had relied only on an alleged manifest excess of power or a failure to state reasons as the grounds for annulment in this regard and deemed these grounds inadequate. It considered whether it was empowered under the principle of *iura novit curia* to consider whether there had been a breach of a fundamental rule of procedure (thought to be the more adequate ground on the basis of the alleged facts).[8] However, it found that as Argentina had raised the argument too late - it had only been raised at the hearing and not before - it was unwilling to deal with it.[9]

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[6] *Id.*
[7] Decision, ¶ 231 .
[8] Decision, ¶ 268.
[9] Decision, ¶¶ 269-272.

3. Decision

The Committee dismissed in their entirety both applications for partial annulment of Continental Casualty Company and of Argentina. It decided that the costs of the Centre were to be borne by both parties each to half and they would each bear their litigation costs and expenses. Finally, the Committee decided to terminate the stay of the enforcement of the Award ordered by the Committee in its decision of October 23, 2009.