Professor Philippe Sands QC

Eloise Obadia
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By email

11 September 2013

Dear Ms Obadia,

Victor Pey Casado et Fondation Président Allende c.
République du Chili
(Affaire CIRDI No. ARB/98/2)

Thank you for sending me a copy of the letter of 22 August 2013 from Mr Paolo Di Rosa of Arnold & Porter ("Mr di Rosa's letter"), sent on behalf of the Respondent, inviting me to "reconsider" my acceptance of appointment in these proceedings. I thank you also for sending me a copy of the letter of 23 August 2013 from Mr Garces, sent on behalf of the Claimants, the contents of which I have read.

I am grateful to Mr Di Rosa and the Respondent for offering me an opportunity for further reflection, and for having elaborated their basis for the request. I can have no objection to their having raised these matters at this stage. The arbitrator's obligations of independence is an important one, and I appreciate the expression of recognition as to my "candor and transparency", and that I take the obligations seriously.

I will not here respond to all of the matters raised by Mr di Rosa's letter, but reserve my right to do so if necessary at a future date. For the avoidance of doubt, the fact that I have not addressed a particular point there raised should not be taken as acceptance of its accuracy or correctness.

When I was approached for this case, as for all others, I informed myself as best I could as to the relevant facts and issues, including the identity of the parties and the likely legal issues. In so doing I had regard to the applicable arbitral rules (the ICSID Convention and related instruments, and practise thereunder) and the most relevant guidelines (in particular the IBA Guidelines on Conflicts of Interest in International Arbitration, and practise thereunder).

I note, therefore, that Mr Di Rosa's letter does not refer to the standard imposed by Article 57 of the Convention, or assert that I fail to meet that standard. Nor does the letter identify any provision of the IBA Guidelines establishing a standard which it is said I do not meet. Such reference as is made to ICSID practise is limited and does not address the most relevant cases.

Rather, Mr di Rosa's letter raises a raft of matters that relate to the legal proceedings which I referred to in my communication of 5 August 2013. Those proceedings do not appear to raise any matters that are in issue in the present proceedings: they involved different parties, different facts, and different applicable laws. The proceedings related to issues that involved

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Senator Pinochet as a former head of state (Chile was an intervener, with only limited rights), and not the merits of the underlying facts. The proceedings were limited to matters relating to the circumstances in which a former Head of State could, under English law (having regard to the rules of international law), claim immunity from the jurisdiction of the English courts, in a criminal matter in relation to extradition proceedings.

It is not immediately apparent to me – and Mr di Rosa's letter offers no explanation – as to why my involvement in those proceedings (or any later comments I am said to have made in relation to the issues that arose in them), should preclude my acceptance of the invitation to act as arbitrator in this case. As noted, the issues that arose in those proceedings were narrow and entirely distinct from those that arise in the proceedings in relation to the interpretation and application of rules of international law in the field of investment treaty arbitration in this ICSID matter. Mr di Rosa's letter does not identify any matter which suggests otherwise.

Mr di Rosa's letter makes reference to various press articles. It ought to be clear already that such articles cannot necessarily be treated as accurate or complete; in the present case such articles (or the inferences drawn from such articles) are neither accurate nor complete. Further, Mr di Rosa's letter raises matters of pure speculation: it asserts, for example, that "[i]t seems logical that Professor Sands would have had dealings with Mr. Garces in connection with the Pinochet proceedings in the UK, although Chile has no specific information on the subject. As far as I can recall I had no dealings with Mr Garces then, or at any point subsequently.

Further, Mr di Rosa's letter attributes to me – by way of assertion rather than inquiry - a raft of personal views that I am said told, and a professional reputation that is said to have been developed on the basis of those views and above-mentioned proceedings. Such views as I have expressed invariably relate to the limited issue of immunity from the jurisdiction of national (and international) courts of a former head of state, in criminal and extradition proceedings. Mr di Rosa's letter does not identify any view I have expressed on the responsibility of Chile, either in relation to the proceedings to which I have referred, or on matters relating to allegations raised in these proceedings, or indeed on any other matter.

Moreover, Mr di Rosa's letter does not identify any involvement I may have had in any proceedings that involved Senator Pinochet after he returned to Chile in 2000 (as might be expected if there was a real basis for the views that appear to be ascribed to me in his letter). As regards my involvement in those earlier proceedings, the Bar rules that govern my professional activities require me to take on all cases, and I do, subject to only the most limited exceptions. I act on all sides, and in relation to many different interests, as is clear from the *curriculum vitae* that was attached to my declaration. The exception that came into play in the case of Senator Pinochet was triggered by the fact that I had given a news interview to the BBC (before being approached by his lawyers) in which I expressed clear views on why a former head of State (as opposed to a serving Head of State) should not be entitled to claim immunity for serious crimes committed whilst in office. My focus has been on the exercise of jurisdiction, not on the merits of any particular case.

Having taken advantage of the opportunity offered to me by Mr Di Rosa's letter, and having further reviewed the applicable standards and the facts related to the present proceedings, I remain of the clear view that I would be, and would be seen to be, an independent arbitrator meeting the standard required by the ICSID Convention.

I hope I might be permitted to draw your attention to two related matters.

First, as a result of Mr di Rosa's letter, I find myself in the curious position of responding to a concern as to my independence that is articulated by a law firm that has appointed me as arbitrator in another ICSID case (and did so *after* it became aware of my appointment in this

case: I was named as arbitrator in this case on 18 June 2013, then appointed by the Kyrgyz Republic (for whom Arnold & Porter act as counsel) on 16 July 2013). I am bound to take care to protect my obligations of independence in respect of both cases.

Second, shortly after Mr di Rosa's letter was sent, an email was sent to me by Mr Luke Petersen of Investment Arbitration Reporter, putting to me certain propositions as to my appointment in these proceedings. It appears from the information disclosed by Mr Petersen's communication (to which I have not replied), that he has been informed of the matters raised in Mr di Rosa's letter. It appears that he has been in contact with one or other of the parties in these proceedings. I hope hat the parties might recognise that such communications put an arbitrator in an invidious and unfortunate position, since he or she is not in a position to respond to factual allegations. This is not a happy situation in which to find oneself, all the more so when those matters are then raised more publicly (as I write, I am in receipt of a further email from IAR informing me that "Chile objects to claimant's nomination of Philippe Sands as arbitrator"; I am not able to read the article, as I am not a subscriber to IAR, but it appears that Mr Petersen is better informed than I am as to intentions (or actions) of the Respondent). I hope that the parties might refrain from the public airing of such matters, in accordance with the usual professional courtesies.

Finally, I wish to express my apologies for the delay in responding, which is due solely to my having returned from vacation to an overfull inbox.

Your sincerely,