

VÍCTOR PEY CASADO AND FOUNDATION « PRESIDENTE ALLENDE »

**Claimants to the arbitration
Defendants to the annulment**

- v. -

REPUBLIC OF CHILE

**Respondent to the arbitration
Applicant to the annulment**

**ICSID Case No. ARB/98/2
Annulment Proceeding**

PROCEDURAL ORDER NO. 2

Members of the *ad hoc* Committee

Mr. L. Yves Fortier, C.C., Q.C., President
Prof. Piero Bernardini
Prof. Ahmed El-Kosheri

I. INTRODUCTION

1. In accordance with Procedural Order No. 1, the following written submissions in the present annulment proceeding have been filed as follows: the Republic of Chile's Memorial dated June 10, 2010, the Claimants' Counter-Memorial dated October 15, 2010, the Republic of Chile's Reply dated December 22, 2010 and the Claimants' Rejoinder dated February 28, 2011.
2. The Committee further recalls that Procedural Order No. 1 contemplates a hearing in Paris beginning June 7, 2011.
3. In a letter dated March 18, 2011 (received on March 21, 2011), the Claimants request that the Committee reconsider the necessity of maintaining the hearing fixed by Procedural Order No. 1. The Claimants also request that the Committee, should it ultimately consider the hearing necessary notwithstanding the parties' written submissions, provide organizational details regarding the hearing and identify the points on which it would need clarifications or further development. Finally, the Claimants seek the Committee's decisions on the questions raised in footnotes 77 and 87 of their Rejoinder (the former regarding a potential witness, and the latter regarding the production of ICSID documents).
4. On March 22, 2011, the Committee invited the Republic of Chile to present its observations in reply to the Claimants' above-described requests by March 30, 2011.
5. Subsequently, on March 24, 2011, the Republic of Chile requested that the Claimants submit a translation into Spanish of Annexes DP-A, DP-B and DP-C to the Claimants' Rejoinder. On March 25, 2011, the Committee invited the Claimants to present their observations in this regard by March 30, 2011.
6. Both parties filed their respective observations on March 30, 2011 as ordered.

7. On the issue of the June 2011 hearing, the Republic of Chile submitted that oral submissions were not only imperative, but also that the three days available to the Committee would be required.
8. In addition, the Republic of Chile raised two new questions regarding, on the one hand, the Claimants' introduction of documents that were not part of the arbitral proceeding's record and, on the other hand, the Claimants' publication of documents pertaining to this annulment proceeding.
9. On March 31, 2011, the Committee invited the Claimants to present their observations in this regard by April 11, 2011.
10. The Claimants' observations were submitted on April 8, 2011.

II. JUNE 2011 HEARING

11. As noted above, the Claimants question the necessity of the June hearing, citing the parties' written submissions thus far as well as considerations of efficiency and cost control.
12. The Republic of Chile, in response, maintains that the parties should be afforded an opportunity to present their arguments orally and to respond to any questions the Committee may have. In addition, the Republic of Chile submits that it has relied on the expectation that a hearing would be held.
13. In their April 8, 2011 letter, the Claimants add that (i) the parties should not present new arguments at the hearing; (ii) the hearing should be limited to the Committee's questions or requests for clarification; and (iii) two days should be sufficient.
14. The Committee recognizes that the parties' written submissions are comprehensive. However, as indicated in Procedural Order No. 1, the Committee considers a hearing to be necessary, including for purposes of seeking clarifications orally rather than in writing. Questions and clarifications, as necessary, will accordingly be put to the parties during the hearing rather than in advance thereof. In the spirit of efficiency, the

parties are encouraged to present their arguments at the June 2011 hearing as succinctly as possible.

15. The Committee has determined that two days of hearings on June 7-8, 2011 will suffice. The Committee proposes that the first hearing day be dedicated to the parties' respective presentations, each side having half a day, and that the morning of the second hearing day be dedicated to rebuttals, each side having one and a half hour. The rest of the second hearing day will be reserved for questions on the part of the Committee, if necessary. The Committee requests that the parties submit their views on the proposed organization of the hearing by April 25, 2011.

III. POTENTIAL WITNESS (FOOTNOTE 77 OF CLAIMANTS' REJOINDER)

16. In their Counter-Memorial, the Claimants indicate that after the replacement of Mr. Flores by Ms. Alvarez-Avila as Secretary to the Tribunal, they learned that his wife had benefited from a financial aid from the Chilean government while he served as Secretary of the Tribunal. The Claimants reiterate this point in paragraph 56 of their Rejoinder and propose that the Committee, if it were to doubt this information, call upon Mr. Samuel Buffone as a witness (see footnote 77 to the Rejoinder).
17. The Republic of Chile, in its March 30, 2011 letter, submits that since Mr. Buffone is one of the Claimants' counsel, it would not be appropriate for him to appear as a witness in these proceedings. In addition, the Republic of Chile questions the relevance of the issue underlying the Claimants' request.
18. The Committee is of the view that it is not necessary to call upon Mr. Buffone as a witness.

IV. ICSID INTERNAL DOCUMENTS (FOOTNOTE 87 OF CLAIMANTS' REJOINDER)

19. In their Counter-Memorial, the Claimants indicate that in September 2010, they were informed that in January 2006, the then Secretary-General of ICSID had made a written recommendation to the Chairman of the ICSID Administrative Council that

Judge Bedjaoui be disqualified on the basis of his letter of October 7, 2005. In their Rejoinder, the Claimants add that Mr. Dañino confirmed this information to their counsel in December 2010. The Claimants propose that the Committee, if it were to doubt this information, ask the ICSID Secretariat General (*sic*) to produce a copy of the written recommendation at issue (see footnote 87 to the Claimants' Rejoinder).

20. The Republic of Chile does not oppose the Claimants' proposal on the condition that the Committee also seek production of any other information in the Centre's possession concerning (i) Mr. Bedjaoui's disqualification; (ii) the substantive conclusion reached by the Tribunal in its deliberations of 2001; (iii) the communications and circumstances surrounding Mr. Rezek's resignation in 2001; (iv) the conclusions reached by the Tribunal in its deliberations of 2004, following the withdrawal of Mr. Bedjaoui from such deliberations; and (v) the circumstances in which the agreed-upon conclusion in the 2004 deliberations may have subsequently been changed.
21. In their April 8, 2011 letter, Claimants add that the documents requested by the Republic of Chile relate to the deliberations of the Tribunal, therefore if they were to be communicated there would be a violation of the principle of the secret of the deliberations.
22. The Committee observes that according to Article 43(a) of the ICSID Convention – as reiterated in Rule 34(2) of the Arbitration Rules – the Tribunal (and, by virtue of Article 52(4) of the Convention, the *ad hoc* Committee) may call upon the parties, *inter alia*, to produce documents or other evidence.
23. Rule 34(2) does not empower an arbitral tribunal (or by the same token, an *ad hoc* committee) constituted under the ICSID Convention to order production of documents by any person other than a party to the pertinent proceedings. Yet the documents sought by both the Claimants and the Republic of Chile would require that the Committee request such documents of the ICSID itself. It does not fall within the purview of this Committee to make such a request, and the parties' respective applications in this regard are accordingly denied.

24. This decision is without prejudice to the Committee's full consideration in due course of all the parties' arguments, and the circumstances invoked in support thereof, pertaining to the Republic of Chile's argument of a serious departure from a fundamental rule of procedure due to the bias of an arbitrator.

V. TRANSLATION OF THE CLAIMANTS' ANNEXES TO THEIR REJOINDER

25. By letter of March 24, 2011, the Republic of Chile requested that the Claimants translate into Spanish Annexes DP-A, DP-B, and DP-C to their Rejoinder on grounds that they contain legal arguments and substantive observations.
26. On March 30, 2011, the Claimants replied that the Annexes at issue contain their comments on what they consider to be inaccuracies, distortions or wrong assertions made by the Republic of Chile. The Claimants submit the content of the Annexes at issue does not consist of their arguments with respect to the grounds for annulment raised by the Republic of Chile. The Claimants add that they are free to present their submissions as they see fit, and that as agreed at the First Session, annexes need not be translated.
27. Having reviewed annexes DP-A, DP-B, and DP-C, the Committee agrees with the Claimants in this regard. It is not for the Committee to question a party's designation of its documents or the organization of its arguments. Therefore, the Committee will not order that Annexes DP-A, DP-B and DP-C be translated.

VI. NEW DOCUMENTS

28. By letter of March 30, 2011, the Republic of Chile objected to the Claimants' introduction of additional documents that were not on the record in the arbitral proceeding. The Republic states that the Committee's review of the factual and legal issues addressed by the Tribunal is to be limited to the record of the arbitral proceeding. Whilst the Republic agrees that new legal authorities relating to the interpretation of the annulment standards under the Convention are admissible, it objects to the introduction of any legal authority introduced for the first time in this

annulment proceeding that purports to address jurisdictional or merits issues dealt with as part of the arbitral proceeding.

29. For that reason, the Republic requests that the Committee declare inadmissible new documents annexed to the Claimants' Rejoinder¹ as well as the portions of the Rejoinder that quote, cite, or rely upon such documents.
30. The Claimants replied in their April 8, 2011 letter that the documents at issue have been submitted either to: (i) address new arguments on the merits raised by the Republic in the annulment proceeding; (ii) address the Republic's arguments regarding its alleged grounds for annulment; (iii) demonstrate the Republic's alleged bad faith; or (iv) support the Tribunal's reasoning against the Republic's contention that the Tribunal manifestly exceeded its powers.
31. The Claimants maintain that since the additional documents at issue are meant to address the Republic of Chile's allegedly false contentions in this annulment proceeding, as opposed to serving as a basis for bringing the Committee to substitute the Tribunal's reasoning with its own (which the Claimants accept would not be allowed under the Convention), such documents are admissible.
32. However trite, the Committee recalls that annulment proceedings are not an opportunity for the parties to plead the case again or raise new arguments on jurisdiction and the merits. It follows that an *ad hoc* committee's task is to limit its review of the award at issue strictly against the original arbitration evidentiary record. In the words of the *ad hoc* committee in *MTD v. Chile*, annulment proceedings are "a form of review on specified and limited grounds which take as their premise the record before the Tribunal."²

¹ DP03/DP03f; DP08; DP22; DP26/DP26f; DP40/DP40f; DP46; DP 47–DP 48/DP48f; DP50–DP54; DP58; DP60–DP61; and DP62–DP65. The request also applies to the sources cited in footnotes from the Rejoinder: 17–18, 59, 121, 193, 210–15; 242–43; and footnotes 1 and 2 from DP-B.

² *MTD Equity Sdn Bhd. & MTD Chile S.A. v. The Republic of Chile* (ICSID Case No. ARB/01/7) (Annulment Proceeding), Decision on Annulment dated March 21, 2007 at paragraph 31.

33. The Committee will accordingly not allow the introduction of new documents that do not serve the purpose of assisting it in its interpretation of the grounds for annulment at issue in this proceeding. On this basis, the following documents are declared inadmissible: documents labelled as or referred to in the Claimants' Rejoinder as DP03/DP03f; DP08; DP26/DP26f; DP40/DP40f; DP46; DP 47–DP 48/DP48f; DP50–DP53 -DP54; DP58; DP60–DP61; and DP62–DP65; footnotes 17–18, 121, 193, 210–15; 242–43; and footnotes 1 and 2 from DP-B.
34. In addition, the Committee shall disregard any portion of the Claimants' Rejoinder that quotes, cites, or otherwise relies upon the above-listed documents and requests that the Claimants submit a redacted version of their Rejoinder, deleting portions that quote, cite, or otherwise rely on inadmissible documents, by no later than April 29, 2011.
35. As for document DP22 and the documents referred to in footnote 59, the Committee notes that they are part of the arbitral record and are accordingly admissible.

VII. CONFIDENTIAL DOCUMENTS

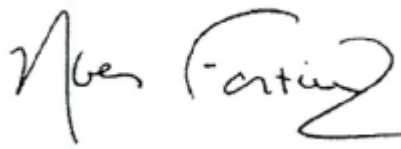
36. By letter of March 30, 2011, the Republic of Chile sought an order instructing the Claimants to immediately remove from their website (www.elclarin.cl) and to seek removal from any other website (such as <http://ita.law.uvic.ca>) any and all documents submitted to the Committee by either of the parties during this annulment proceeding, except as may be expressly authorized by the Committee. The Republic emphasizes that these document disclosures have frequently had the effect of inflaming the matter in the press and ultimately of aggravating the parties' dispute.
37. In their answer of April 8, 2011, the Claimants indicate that none of the documents or instruments at issue consist of confidential information. The Claimants contend that the only document that the Republic of Chile purports to be confidential (Decree No. 111) is publicly accessible upon request to the *Contraloría General de la República*. Citing the growing trend towards increased transparency in investment arbitration, the Claimants conclude that there is no basis for prohibiting the parties from disclosing non-confidential information.

38. The Committee acknowledges that the ICSID Convention and Rules do not prevent the parties from disclosing non-confidential documents. However, in the spirit of avoiding further aggravation of the parties' dispute or any disruption in the proceeding, the Committee requests that the parties refrain from publishing or disclosing sensitive documents pertaining to the case at issue.

VIII. DECISION

39. For the above reasons, the Committee:
- a) maintains the hearing to be held on 7-8 June 2011 in Paris;
 - b) requests that the parties submit their views on the proposed organization of the hearing by April 25, 2011.
 - c) declines the offer to call upon Mr. Samuel Buffone as a witness;
 - d) rejects the parties' respective applications regarding ICSID internal documents;
 - e) rejects the Republic of Chile's request that Annexes DP-A, DP-B and DP-C to the Claimants' Rejoinder be translated into Spanish;
 - f) declares inadmissible documents labelled as or referred to in the Claimants' Rejoinder as DP03/DP03f; DP08; DP26/DP26f; DP40/DP40f; DP46; DP 47–DP 48/DP48f; DP50–DP53 -DP54; DP58; DP60–DP61; and DP62–DP65; footnotes 17–18, 121, 193, 210–15; 242–43; and footnotes 1 and 2 from DP-B;
 - g) declares admissible documents labelled to as or referred to in the Claimants' Rejoinder as DP22 and footnote 59;
 - h) requests that the Claimants submit a redacted version of their Rejoinder, deleting portions that quote, cite or otherwise rely on inadmissible documents, by no later than April 29, 2011; and
 - i) requests that the parties refrain from publishing or disclosing sensitive documents pertaining to this annulment proceeding.

Signed on behalf of the Committee on April 18, 2011,

A handwritten signature in black ink, reading "L. Yves Fortier". The signature is written in a cursive style with a large, sweeping flourish at the end.

L. Yves Fortier, C.C., Q.C.
President of the *ad hoc* Committee