

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. 3

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 Procedural Order No. 2, the Committee decided to:
 - a) maintain the hearing to be held on June 7-8, 2011 in Paris;
 - b) request that the parties submit their views on the proposed organization of the hearing by April 25, 2011;
 - c) decline the offer to call upon Mr. Samuel Buffone as a witness;
 - d) reject the parties' respective applications regarding ICSID internal documents;
 - e) reject the Republic of Chile's request that Annexes DP-A, DP-B and DP-C to the Claimants' Rejoinder be translated into Spanish;
 - f) declare inadmissible documents labelled as or referred to in the Claimants' Rejoinder as DP03/DP03f; DP08; DP26/DP26f; DP40/DP40f; DP46; DP47–DP48/DP48f; DP50–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) declare admissible documents labelled to as or referred to in the Claimants' Rejoinder as DP22 and footnote 59;
 - h) request 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) request that the parties refrain from publishing or disclosing sensitive documents pertaining to this annulment proceeding.

2. By letters of April 23 and 25, 2011, the Claimants not only gave their observations on the organization of the hearing but also asked the Committee to (i) make some corrections to its Procedural Order No. 2; and (ii) reconsider some of its findings or, alternatively, declare inadmissible a number of legal authorities submitted by the Republic of Chile.

3. The Republic of Chile submitted a letter on April 25, 2011 regarding the organization of the hearing. Upon the invitation of the Committee, the Republic of Chile further replied to the Claimants' letters of April 23 and 25 by letter dated April 28, 2011. The Republic of Chile withdrew part of the objections ruled upon under Procedural Order No. 2, regarding the new documents filed by the Claimants with their Rejoinder.

4. The Committee will address the following: (i) the June 2011 hearing; (ii) the requested corrections to Procedural Order No. 2; and (iii) new documents.

II. THE JUNE 2011 HEARING

5. In their letter of April 23, 2011, the Claimants indicate that they agree with the organization of the hearing proposed by the Committee. In addition, they request a two-hour break following the Republic of Chile's presentation and prior to initiating their presentation on the first hearing day, as well as a one-hour break between rebuttals on the second hearing day. The Claimants also ask to be heard on the documents declared inadmissible.
6. In its letter of April 25, 2011, the Republic of Chile indicates that it is concerned by the abbreviated amount of time available for the hearing. Nevertheless, on the assumption that it is no longer possible to extend to a third day, the Republic of Chile agrees with the organization of the hearing proposed by the Committee. In its letter of April 28, 2011, the Republic of Chile adds that the hearing should not be used to debate document-related issues and asks the Committee to decide on these issues beforehand.
7. Both parties also request that the Committee identify in advance of the hearing issues that it would find especially useful for the parties to address as part of their oral presentations.
8. In view of the above, the Committee confirms that it will proceed with a two-day hearing: the first hearing day will be dedicated to the parties' respective presentations, each side having half a day, with a two-hour break in between, and the morning of the second hearing day will be dedicated to rebuttals, each side having one and a half hour, with a one-hour break in between. The rest of the second hearing day will be reserved for questions on the part of the Committee, if necessary. A detailed schedule will be sent to the parties in due course.
9. The Committee does not wish the parties to address the document-related issues at the hearing as they are disposed of in this Procedural Order (see Section IV below).

10. Finally, the Committee does not intend to submit questions or otherwise circumscribe the parties' respective presentations in advance of the hearing. The parties are accordingly free to structure their presentations as they see fit. As indicated in Procedural Order No. 2, questions and clarifications, as necessary, will be put to the parties during the hearing rather than in advance thereof. The Committee further contemplates the possibility for the parties to submit limited post-hearing briefs, the purpose of which would notably be to respond to potential questions of the Committee.
11. Notwithstanding the above, the Committee requests that the parties submit by Friday, May 27, 2011 a pre-hearing skeleton of their arguments on the grounds for annulment. This document should not exceed 15 pages.

III. THE REQUESTED CORRECTIONS TO PROCEDURAL ORDER NO. 2

12. In their letter of April 23, 2011, the Claimants note that paragraph 62 of their Rejoinder contained an erroneous date that was reproduced in paragraph 19 of Procedural Order No. 2. The Committee takes note of the fact that the first date mentioned in paragraph 62 should be 3 September 2010 instead of 3 December 2010. Accordingly, paragraph 19 of Procedural Order No. 2 should read as follows: "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. The Claimants confirmed this information in their Rejoinder [...]."
13. In their April 23, 2011 letter, the Claimants also observed that, unlike the Republic of Chile, they did not ask the Committee to seek the production of internal documents from ICSID. They instead proposed that the ICSID Secretariat communicate the said recommendation to the Committee and the parties if the Committee were to doubt this information.
14. The Committee understands the nuance but believes that if it were to doubt the information the end result would be the same, *i.e.* the disclosure of internal ICSID

documents, assuming such documents even exist. Such disclosure would be contrary to ICSID practice.

IV. NEW DOCUMENTS

15. By letters of April 23 and 25, 2011, the Claimants ask the Committee to reconsider its decision to declare inadmissible certain new documents identified by the Republic of Chile in its letter of March 30, 2011.¹ The Claimants invoke the following reasons: (i) certain documents declared inadmissible are already in the arbitral record; (ii) certain documents are crucial to reply to the alleged serious departure from a fundamental rule of procedure based on the reversed burden of proof, and provided that the admissibility of these documents is not reconsidered, the Committee should declare inadmissible new documents submitted by the Republic of Chile in relation to this issue;² (iii) the inadmissibility of the documents in general creates a discrimination and an unfair treatment as the Claimants are deprived of means that were available to the Republic of Chile to support its arguments, in which case the Committee should reconsider its decision or declare inadmissible some of the legal authorities filed by Chile;³ and (iv) all the new documents at issue are *inter alia* meant to assist the Committee in the interpretation of the grounds for annulment raised in this proceeding.
16. The Republic of Chile replied on April 28, 2011 that in order to avoid further time-consuming exchanges between the parties with respect to the above, it is withdrawing part of the objections raised in its March 30, 2011 letter and is now willing to accept the reinstatement of some of the Claimants' exhibits declared inadmissible by the Committee pursuant to Procedural Order No. 2. More specifically, the Republic of Chile agrees to the reinstatement of the international legal authorities that may assist the Committee in the interpretation of the grounds for annulment or that were part of

¹ DP03/DP03f; DP08; DP26/DP26f; DP40/DP40f; DP46; DP47–DP48/DP48f; DP50–DP54; DP58; DP60–DP61; and DP62–DP65; footnotes 17–18, 121, 193, 210–15; 242–43; and footnotes 1 and 2 from DP-B.

² RALA-9; RALA-12; RALA-13; RALA-90; RALA-91; RALA-92; and RALA-93.

³ In addition to the documents listed in footnote 2, the Claimants ask that RALA-01; RALA-04; RALA-05; RALA-42; RALA-47; RALA-64; RALA-65; RALA-72; RALA-74; RALA-75; RALA-76; RALA-79; RALA-80; and RALA-89 be declared inadmissible.

the record of the original proceeding.⁴ However, the Republic of Chile objects to the reconsideration by the Committee of the admission of the other documents.⁵ The Republic of Chile does not accept the Claimants' argument that such documents can assist the Committee in its interpretation of the grounds for annulment. The Republic of Chile contends that, for the most part, the documents comprise new evidence in support of the Claimants' factual allegations. Finally, the Republic of Chile asks that the Committee reject the Claimants' request to declare inadmissible the new legal authorities it filed in its pleadings. The Republic of Chile argues that the legal authorities concerned are meant to aiding the Committee in assessing international law issues relevant to this annulment proceeding. It also argues that these legal authorities do not relate to factual issues in dispute in the underlying process.

17. Having considered the recent exchange of letters from the parties, the Committee decides the following:
 - a) It reinstates the documents declared inadmissible in Procedural Order No. 2 that have been identified after its issuance as being part of the arbitral record: DP08 and documents referenced in footnotes 210-215;
 - b) It reinstates the documents declared inadmissible in Procedural Order No. 2 for which the Republic of Chile consents to a reinstatement as they constitute international legal authorities that may help the Committee in the interpretation of the grounds for annulment raised in this proceeding: DP54, DP58, DP61, and documents referenced in footnotes 121 and 193, and footnotes 1 and 2 of Annex DP-B;
 - c) It reinstates the documents declared inadmissible in Procedural Order No. 2 that constitute legal authorities that may not directly assist the Committee in the interpretation of the grounds for annulment, but seem to address more broadly

⁴ Footnotes 210-215; Footnotes 121 and 193; DP54; DP58; DP61; and footnotes 1 and 2 from Annex DP-B.

⁵ DP03/DP03f; DP08; DP26/DP26f; DP40/DP40f; DP46; DP47–DP48/DP48f; DP50–DP53; DP60; and DP62–DP65; footnotes 17–18; and 242–43.

international law issues relevant to this annulment proceeding: DP47 and documents referenced in footnotes 17–18;

- d) It reconfirms that new evidence which is not meant to assist the Committee in its interpretation of the grounds for annulment at issue or relevant international law issues in this proceeding remains inadmissible. As stated in Procedural Order No. 2, an *ad hoc* committee's task is to limit its review of the award at issue strictly against the original arbitration evidentiary record. The Committee notes that most of the documents at issue are, as observed by the Claimants, in conformity with exhibits already part of the arbitral record. Consequently, the Claimants can use these existing exhibits to support their arguments in the context of the annulment proceeding and are not deprived of means to present their case. The inadmissibility of the following documents is accordingly confirmed: DP03/DP03f; DP26/DP26f; DP40/DP40f; DP46; DP48/DP48f; DP50–DP53; DP60; and DP62–DP65; and documents referenced in footnotes 242–43;
- e) It confirms that it shall disregard any portion of the Claimants' Rejoinder that quotes, cites, or otherwise relies upon the above-listed documents and requests again 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 Friday, May 13, 2011.
- f) In view of the withdrawal of the Republic of Chile's objections on certain of the Claimants' new documents and considering the reinstatement of the legal authorities filed by the Claimants, the Committee rejects the request to declare inadmissible legal authorities filed by the Republic of Chile.

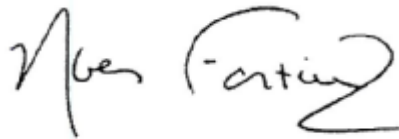
V. DECISION

18. For the above reasons, the Committee:

- a) confirms that the hearing will be held on June 7-8, 2011 in Paris;

- b) requests that the parties submit by Friday, May 27, 2011 a pre-hearing skeleton not exceeding 15 pages of their arguments on the grounds for annulment;
- c) amends paragraph 19 of Procedural Order No. 2;
- d) reinstates the documents labelled as or referred to in the Claimants' Rejoinder as: DP08; DP47; DP54; DP58; DP61; footnotes 17–18; 121; 193; 210-215; and footnotes 1 and 2 from Annex DP-B;
- e) confirms the inadmissibility of the documents labelled as or referred to in the Claimants' Rejoinder as: DP03/DP03f; DP26/DP26f; DP40/DP40f; DP46; DP48/DP48f; DP50–DP53; DP60; and DP62–DP65; and footnotes 242–43;
- f) 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 Friday, May 13, 2011;
- g) rejects the Claimants' request to have the legal authorities filed by the Republic of Chile (RALA-01; RALA-04; RALA-05; RALA-09; RALA-12; RALA-13; RALA-42; RALA-47; RALA-64; RALA-65; RALA-72; RALA-74; RALA-75; RALA-76; RALA-79; RALA-80; RALA-89; RALA-90; RALA-91; RALA-92; and RALA-93) declared inadmissible; and
- h) decides that costs in connection with this Procedural Order are reserved.

Signed on behalf of the Committee on May 5, 2011,



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