

VÍCTOR PEY CASADO AND FONDATION « 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**

**DECISION ON THE ADMISSIBILITY OF THE
ANNULMENT APPLICATION**

Members of the *ad hoc* Committee

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

Representing the Claimants

Mr. Juan E. Garcés
Madrid, Spain

Representing the Respondent

H.E. the Minister of Economy,
Development and Reconstruction,
Mr. Eduardo Escalona Vásquez
Mr. Mauricio Álvarez Monti, and
Ms. Marcela Klein
Ministry of Economy, Development
and Reconstruction
Santiago, Chile

Mr. Paolo Di Rosa
Ms. Mara V.J. Senn, and
Mr. Rodolfo Fuenzalida,
ARNOLD & PORTER, L.L.P.
Washington, D.C., USA

Mr. Jorge Carey and
Mr. Gonzalo Fernández
CAREY Y CÍA
Santiago, Chile

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I. INTRODUCTION

1. On 5 September 2008, the Republic of Chile (the “**Republic**” or “**Respondent**”) filed with the then Acting Secretary-General of the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) an application (the “**Application**”) requesting the annulment of an award rendered on 8 May 2008 in ICSID Case No. ARB/98/2 (the “**Award**”) between Víctor Pey Casado and the Fondation “President Allende” on one side (the “**Claimants**”) and the Republic on the other side. The Centre acknowledged receipt of the Application and forwarded it to the Claimants on 10 September 2008.
2. The Application was filed while the Award was the subject of a revision proceeding initiated by the Claimants on 2 June 2008. The revision application was registered on 17 June 2008 and the Tribunal, composed of the same arbitrators who had drafted the Award, rendered its Decision on 18 November 2009.
3. By letter of 18 September 2008, the Claimants argued that the Application filed by the Republic was inadmissible as it had been filed in English while the languages of the original arbitration proceeding and the pending revision proceeding were French and Spanish. The Respondent replied by letter of 6 October 2008.
4. By letters of 8 October and 22 October 2008, the Claimants reiterated their submission that the Application was inadmissible on the additional ground that the Application had not been signed by the agents designated by the Republic of Chile before ICSID. The Republic replied on 17 November 2008. The Claimants further responded on 19 November 2008 and reminded the Secretariat of the Centre of their arguments by letter of 29 May 2009.
5. The Secretary-General of ICSID registered the Application on 6 July 2009 and transmitted a Notice of Registration to the parties on that date. In her transmittal letter, the Secretary-General indicated that she should refuse to register an application for annulment only if the conditions set forth in Rule 50 of the Rules of Procedure for Arbitration Proceedings (the “**Arbitration Rules**”) were not met and that her registration of the application was therefore without prejudice to the powers and functions of the *ad hoc* Committee under Articles 41 and 42 of the Convention on the

Settlement of Investment Disputes between States and Nationals of Other States (the “**Convention**”) with respect to jurisdiction and the merits.

6. On 10 July 2009, the Claimants requested that all communications be made in French and maintained their request that the Application be declared inadmissible.
7. Further to the issuance of the Arbitral Tribunal’s decision on the revision, the Republic requested, on 2 December 2009, that the Centre appoint the *ad hoc* Committee and confirm the provisional stay of enforcement of the Award pursuant to Article 52(5) of the Convention and Rule 54(2) of the Arbitration Rules. By letter of 8 December 2009, the Claimants argued that the Republic’s request was inadmissible for the same reasons as those raised in connection with the Application.
8. The *ad hoc* Committee was constituted on 22 December 2009. In order to give the parties the opportunity to fully present their observations on the issue of admissibility and considering the submissions made by Claimants on this matter, the Committee invited the Republic to file further written observations on this question by 25 January 2010. The Respondent filed its submission on the said date. The parties were also given the opportunity to make oral presentations during the First Session, held in Paris on 29 January 2010.
9. During the First Session, the Republic provided the Committee with a copy of Decree No. 111 regarding the representation of Chile by Arnold & Porter L.L.P. Since the Decree contained privileged information, a redacted version was given to the Claimants with the approval of the Committee. The Claimants asked for the final version of the Decree stamped and ratified by the *Contraloría*, which is the governmental agency in charge of exercising a preliminary control of the legality of administrative acts. The Committee granted one week to the Republic to provide the document and one week for the Claimants to submit written observations upon receipt of the document.
10. The Decree was received by the Centre on 2 February 2010 and transmitted to the Claimants and the Committee on 3 February 2010. Accordingly, the Claimants were given until 10 February 2010 to submit their observations. On 5 February 2010, the Claimants explained that they obtained a copy of the Decree directly from the

Contraloría. The version they obtained being different from the one provided by the Respondent at the First session and on 2 February 2010, the Claimants requested clarifications. On 6 February 2010, the Committee invited the Respondent to provide observations by 12 February 2010. The Republic did file its observations on the said date. The Claimants were granted until 17 February 2010 to file their written observations, which they did. In view of the new elements contained in that submission, the Committee asked the Republic to respond by 26 February 2010. The Respondent replied on that date.

II. THE PARTIES' CONTENTIONS

A. The Claimants' Position

11. At the First Session, the Claimants withdrew their objection to the admissibility of the Application on the basis of the language used by the Applicant.¹ However, they maintained their objection to the admissibility of the Application on the ground that it was signed by Mr. Paolo Di Rosa, without having being duly authorized or designated as the agent of the Republic. As a consequence, they argue that the Application is null and void.
12. The Claimants argue that the annulment proceeding is a new proceeding to which Rule 1 of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the "**Institution Rules**") applies. In support of their contention, the Claimants invoke Note B to Arbitration Rule 50 which compares the procedure for the filing of an annulment application as "roughly analogous" to the one for the filing of a conciliation or arbitration request.² Institution Rule 1 requires that the request "be signed by the requesting party or its duly authorized representative." The Claimants contend that in this annulment proceeding no agent was designated.³
13. The Claimants state that in order to interpret the Arbitration Rules of the Centre, it should be referred to the models which have inspired their drafting. The Claimants refer to the Model Rules on Arbitral Procedure of the International Law Commission

¹ See Transcript Hearing of 29 January 2010, page 22, Mr. Garcés: "nous abandonnons l'objection concernant la langue en ce qui concerne la recevabilité" [French Transcripts].

² See Note B to Arbitration Rule 50, effective 1 January 1968, ICSID Regulations and Rules, ICSID/4/Rev. 1.

³ See Transcript Hearing of 29 January 2010, pages 8-9, Mr. Garcés [French Transcripts].

(Article 14), the Statute of the International Court of Justice (Article 42), and the Rules of the European Court of Human Rights (Article 35) which require that parties be represented by agents. The Claimants also mention that Article 38(3) of the Rules of the International Court of Justice and Article 45(1) of the Rules of the European Court of Human Rights provide that the request be signed by the applicant, agent or a duly authorized person.⁴

14. The Claimants further argue that the ICSID Rules do not provide guidance to determine the identity of the agent. Therefore, according to the principles of international law and Article 10(4) of the bilateral investment treaty between Chile and Spain, the local law, *i.e.*, Chilean law is applicable.⁵
15. The Claimants state that according to the Chilean Constitution, the President of the Republic is the only person who can designate the representative of the State before foreign courts. Therefore, they claim that a Supreme Decree is required. In addition, the Decree must be registered by the *Contraloría General de la República* and published in an official gazette. The Claimants recall that in the arbitration proceeding, the Presidential Cabinet had notified the Centre that Chile's agent was the Foreign Investment Committee. In the revision proceeding, the agent was the Ministry of Economy, Reconstruction and Development represented by Mr. Escalona, the Chief of the Legal Division, and assisted by Arnold & Porter L.L.P.⁶
16. With respect to Decree No. 111 provided by the Republic at the First Session and on 2 February 2010, the Claimants express their doubt as to the authenticity and regularity of the document and ask the Committee to not take it into account.⁷ The Claimants also allege that even if Decree No. 111 were admitted, it does not give the power to Arnold & Porter L.L.P. to initiate an annulment application. The Claimants argue that the only purpose of Decree No. 111 is to approve the contract for professional services as counsel or *asesor* for the Republic.⁸ They further state that it cannot be argued that

⁴ *Id.*, page 9.

⁵ *Id.*, page 10.

⁶ *Id.*, pages 11-19.

⁷ *See* letter of 17 February 2010 from the Claimants to Ms. Eloïse Obadia, item 2.

⁸ *Id.*, at item 3.

Arnold & Porter had an apparent authority based on the fact that it was the Republic's counsel during the arbitration and revision proceedings. The Claimants consider that the theory of apparent authority cannot protect a party from its own irregularities or serve to validate an irregular act.⁹

17. In conclusion, the Claimants ask the Committee to decide that it is not bound by the registration of the Application, that the Application is null and therefore inadmissible and that this is not remediable. Consequently, in the Claimants' view, the 120 day-deadline has elapsed and any new application for annulment would be time-barred:

En conséquence, les investisseurs espagnols sollicitent du Comité *ad hoc* :

- Qu'il déclare l'acte introductif d'instance nul et sans effet ;
- Qu'il déclare la demande d'annulation déposée le 5 septembre 2008 irrecevable ;
- Qu'il déclare la République du Chili forclosé à déposer une nouvelle requête en annulation, le délai de 120 jours prévu à l'article 52(2) de la Convention ayant expiré ;
- Qu'il condamne la République du Chili à supporter l'intégralité des frais de la présente procédure en ce inclus les frais de conseils des investisseurs espagnols relatifs à cette procédure.¹⁰

B. The Respondent's Position

18. The Republic of Chile states that the relevant norms to address this matter are the ICSID Rules: (i) Arbitration Rule 50, which contains absolutely no requirement of any sort concerning the authority or authorization of the person or entity filing the annulment petition on behalf of a party; and (ii) Arbitration Rule 18 requiring ICSID to be notified of the representation and assistance to one party.¹¹ According to the

⁹ *Id.*, at item 4.

¹⁰ See Transcript Hearing of 29 January 2010, page 21, Mr. Garcés [French Transcripts]. See also letter of 17 February 2010 from the Claimants to Ms. Eloïse Obadia, item 4.

¹¹ See Transcript Hearing of 29 January 2010, page 50, Mr. Di Rosa [English Transcripts]. See also letter of 26 February 2010 from the Respondent to Ms. Eloïse Obadia at pages 4-6.

Respondent, the notification referred to in that provision can be made by the Respondent State which has apparent authority.¹²

19. The Respondent considers that the other norms cited by the Claimants are inapplicable. It also considers that Institution Rule 1 does not apply in the context of an annulment proceeding as it only applies to arbitration and conciliation requests, as stated in the Introductory Note of the Institution Rules.¹³ The Respondent advances three further arguments negating the Claimants' contention that Rule 1 applies to annulment petitions: (i) the ICSID Rules do not contain a provision stating that the Institution Rules apply *mutatis mutandis* to annulment applications; (ii) Arbitration Rule 50 is *lex specialis*, as it contains a specific norm governing the filing of annulment petitions; and (iii) the Centre's official commentaries show that Arbitration Rule 50 and Institution Rule 1 are distinct.¹⁴
20. The Respondent further argues that even if Institution Rule 1 were to be considered as applicable to annulment applications:

The Rule does not define the term "duly authorized", nor does it impose any formal requirements in that regard. In particular, the rule does not impose on the parties any obligation to provide documentation concerning the party's designation of representatives, or to prove that any such designation was made in conformity with the law of the relevant State.¹⁵

21. The Republic states that in the present case, the Minister of Economy, Reconstruction and Development of Chile has assiduously notified ICSID of Chile's representatives, including by letters of 25 January 2008, 15 July 2008, 15 October 2008, and 17 November 2008.¹⁶
22. With respect to the Claimants' arguments in relation to the requirements of Chilean internal law, the Respondent considers that they are irrelevant: "nothing in the ICSID

¹² See Transcript Hearing of 29 January 2010, page 51, Mr. Di Rosa [English Transcripts].

¹³ See letter of 26 February 2010 from the Respondent to Ms. Eloïse Obadia at page 4.

¹⁴ *Id.*, pages 4-6.

¹⁵ *Id.*, page 5.

¹⁶ See Transcript Hearing of 29 January 2010, pages 52-53, Mr. Di Rosa [English Transcripts].

rules even remotely contemplates a *renvoi* of any issue of representation or authority of a party's representatives to the local law of the relevant State.”¹⁷ The Respondent has, however, provided the Committee with the a copy of Decree No. 111, dated 21 April 2008, in which, according to the Respondent, the President formally approves the representation of Chile by Arnold & Porter L.L.P. in connection with any proceeding in the Pey Casado case, including any annulment proceeding.¹⁸

23. With respect to the different versions of Decree No. 111, the Respondent explains that a preliminary version of the Decree was submitted on 6 May 2008 to the *Contraloría*. This version was provided to the Claimants by the *Contraloría* itself, by mistake, after the First Session. This version was withdrawn for corrections on 8 May 2008 and resubmitted with corrections on 14 May 2008. This resubmitted version was the one distributed by the Respondent at the First Session. Finally, the document was approved by the *Contraloría* on 15 May 2008. This final approved version was provided by the Respondent on February 2, 2010.¹⁹
24. As to the Claimants' arguments that Decree No. 111 does not comply with domestic Chilean law, the Respondent replies that the only mechanism under Chilean law by which the State of Chile may enter into a contractual relationship with a natural or legal person that is not part of the State is the mechanism contemplated in Law No. 19.886, which regulates administrative contracts for the provision of services. This Law requires a contractual arrangement.²⁰
25. The Respondent concludes that the Claimants' inadmissibility request is frivolous and groundless. If granted, it “would deprive the Republic of a right conferred on it by the Washington Convention, and moreover would do so on the basis of what would amount to a mere technicality.”²¹
26. The Republic notes that “the Claimants' inadmissibility objection on the basis of the issue of representation is inconsistent with the Claimants' own actions in this

¹⁷ See letter of 26 February 2010 from the Respondent to Ms. Eloïse Obadia at page 6.

¹⁸ See Transcript Hearing of 29 January 2010, page 56, Mr. Di Rosa [English Transcripts].

¹⁹ See letter of 12 February 2010 from the Respondent to Ms. Eloïse Obadia at pages 2-3.

²⁰ See letter of 26 February 2010 from the Respondent to Ms. Eloïse Obadia at page 7.

²¹ *Id.*, page 9.

annulment proceeding, inasmuch as the representatives appointed by the Claimants in the underlying arbitration have been making written submissions on behalf of the Claimants in this annulment proceeding, and also appeared at the January hearing in Paris on behalf of the Claimants, all without any new appointment or new power of attorney.”²²

27. Finally, the Republic asks that, “at the time of allocating responsibility for the costs of the annulment proceeding, the Committee bear in mind Claimants’ tactics, and the extensive written submissions and substantial hearing time devoted by the Republic to the Claimants’ inadmissibility objections – not only that concerning representation, but also the frivolous (now-abandoned) objection concerning the language of the Republic’s annulment petition.”²³

III. ANALYSIS AND CONCLUSIONS

28. For the reasons set out below, the Committee agrees with the Republic that the Claimants’ request to declare the Application inadmissible (the “Request”) should be rejected.
29. The Committee’s analysis commences and ends with the applicable provisions of the Convention and the Arbitration Rules. The Institution Rules are not relevant to an application for annulment of an award.
30. Article 52(1) of the Convention provides that “[e]ither party may request annulment of [an] award by an application in writing addressed to the Secretary-General [...]” and Article 52(2) imposes temporal conditions for the lodging of such an application.
31. Article 52(4) of the Convention stipulates that:

The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee.

The Committee notes that Article 44 of the Convention which is referred to specifically in Article 52(4) provides, in part, that “[a]ny arbitration proceeding shall

²² *Id.*

²³ *Id.*

be conducted in accordance with [...] the Arbitration Rules in effect on the date on which the parties consented to arbitration”.

32. Rule 53 of the Arbitration Rules is pertinent to the Committee’s analysis. It states that:

The provisions of these Rules shall apply *mutatis mutandis* to any procedure relating to the interpretation, revision or annulment of an award and to the decision of the Tribunal or Committee. [emphasis added]

33. There are two Rules only which are directly relevant to the Committee’s determination of the admissibility of the Republic’s Application for Annulment. They are Rules 50 and 18.

34. Arbitration Rule 50 is captioned “The Application” and is the first rule in Chapter VII of the Rules which is in turn captioned “Interpretation, Revision and Annulment of the Award”. It is an annulment-specific Rule, and the Committee agrees with the Republic that Rule 50 is a *lex specialis*, not a *mutatis mutandis* rule.²⁴ In relevant part, it reads as follows:

(1) An application for the interpretation, revision or annulment of an award shall be addressed in writing to the Secretary-General and shall:

- (a) identify the award to which it relates;
- (b) indicate the date of the application;
- (c) state in detail:

[...]

(iii) in an application for annulment, pursuant to Article 52(1) of the Convention, the grounds on which it is based. These grounds are limited to the following:

- that the Tribunal was not properly constituted;
- that the Tribunal has manifestly exceeded its powers;
- that there was corruption on the part of a member of the Tribunal;
- that there has been a serious departure from a fundamental rule of procedure;

²⁴ The Committee, in making this finding, is not stating that there is a hierarchy among the various Arbitration Rules.

- that the award has failed to state the reasons on which it is based;

(d) be accompanied by the payment of a fee for lodging the application.

(2) Without prejudice to the provisions of paragraph (3), upon receiving an application and the lodging fee, the Secretary-General shall forthwith:

(a) register the application;

(b) notify the parties of the registration;

[...]

(3) The Secretary-General shall refuse to register an application for:

(a) [...]

(b) annulment, if, in accordance with Article 52(2) of the Convention, it is not made:

(i) within 120 days after the date on which the award was rendered (or any subsequent decision or correction) if the application is based on any of the following grounds:

- the Tribunal was not properly constituted;
- the Tribunal has manifestly exceeded its powers;
- there has been a serious departure from a fundamental rule of procedure;
- the award has failed to state the reasons on which it is based;

(ii) in the case of corruption on the part of a member of the Tribunal, within 120 days after discovery thereof, and in any event within three years after the date on which the award was rendered (or any subsequent decision or correction).

(4) If the Secretary-General refuses to register an application for revision, or annulment, he shall forthwith notify the requesting party of his refusal.

35. The Committee notes that Rule 50 contains no requirement concerning the authority or authorization of the person, natural or juridical, making the application.

36. The other Arbitration Rule which, by virtue of the *renvoi* of Rule 53, is relevant to the Committee's analysis, is Rule 18, captioned "Representation of the Parties". It provides as follows:

(1) Each party may be represented or assisted by agents, counsel or advocates

whose names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Tribunal and the other party.

(2) For the purposes of these Rules, the expression “party” includes, where the context so admits, an agent, counsel or advocate authorized to represent that party. [emphasis added]

37. Thus, as is abundantly clear, the only requirement imposed on the Republic which is pertinent in the context of the Claimants’ Request is the notification by the Republic to the ICSID Secretary-General of the agent, counsel or advocate representing the Republic in the present proceedings.

38. The record discloses that such notification was given by the Republic in the letter dated 25 January 2008 from Mr. Hugo Lavados Montes, Minister of Economy, Development and Reconstruction of the Republic of Chile, to Ms. Ana Palacio, the then Secretary-General of ICSID:

Adicionalmente, puedo informar a usted que en el caso “Victor Pey Casado y Fundación Presidente Allende c. República de Chile”, caso CIADI No. ARB/98/2, actualmente la República de Chile también es asesorada y representada por el Estudio Arnold & Porter LLP, por lo cual también le solicito enviar las comunicaciones y notificaciones correspondientes a este caso, con copia al Sr. Paolo Di Rosa (Paolo.DiRosa@aporter.com), al Sr. Kelby Ballena (kelby.ballena@aporter.com), y la Srta. Margarita Sanchez (margarita.sanchez@aporter.com). El Sr. Di Rosa podrá actuar conjunta o individualmente en el presente caso.

39. In addition, the Committee notes the following letters from the Republic to ICSID:

- The letter dated 15 July 2008 from Mr. Eduardo Escalona Vásquez, Ministry of Economy, Development and Reconstruction, to Mr. Nassib G. Ziadé, the then Acting Secretary-General of ICSID:

Adicionalmente, puedo informar a usted que en el caso “*Victor Pey Casado y Fundación Presidente Allende c. República de Chile*”, *Caso* CIADI No. ARB/98/2 - Procedimiento de Revisión, actualmente la República de Chile también es asesorada y representada por Estudio Jurídico Arnold & Porter LLP y los abogados asesores que a continuación se señalan, por lo cual solicito tener presente la correspondiente información de contacto:

Estudio Jurídico Arnold & Porter LLP

Contacto : Sr. Paolo Di Rosa
E-mail : Paolo.DiRosa@aporter.com
Dirección : 555 Twelfth Street, NW, Washington D.C. 20004-1206.
Teléfonos : (1-202) 942-5060 Fax : (1-202) 942-5999
Nota : enviar comunicaciones y notificaciones correspondientes a este caso a:

Sr. Paolo Di Rosa (Paolo.DiRosa@aporter.com)
Sra. Gaela Gehring Flores (Gaela.GehringFlores@aporter.com)
Sr. Kelby Ballena (kelby.ballena@aporter.com)

Abogados:

Paolo Di Rosa
Gaela Gehring Flores

Abogados asesores

Jorge Carey Tagle, Carey y Cia. Ltda. Abogados
Gonzalo Fernández Ruiz, Carey y Ltda. Abogados.

- The letter dated 15 October 2008 from Arnold & Porter L.L.P. to Ms. Eloïse Obadia, Secretary of the Tribunal;
 - The letter dated 17 November 2008 from Arnold & Porter L.L.P. to Ms. Eloïse Obadia, Secretary of the Tribunal.
40. The notification by the Republic to the Secretary-General of ICSID of the firm of Arnold & Porter L.L.P. generally and Mr. Paolo Di Rosa specifically as its counsel for purposes of the present proceedings as required by Arbitration Rule 18 is clear and unambiguous and the Committee so finds.
41. The Claimants' principal argument in support of its Request rests on the application of the Institution Rules, particularly Rules 1 and 2, to annulment proceedings. In its submission of 17 February 2010, the Claimants argued:
- En effet, s'agissant d'une nouvelle procédure, ce qui n'est pas contesté, les conditions requises à l'article 1 du Règlement d'introduction des instances concernant une requête d'arbitrage s'appliquent, *mutatis mutandis*, à l'introduction d'une demande d'annulation. Cela signifie que, pour être recevable, la demande d'annulation doit être signée soit par la partie requérante soit par un représentant dûment autorisé.
42. In the view of the Committee, the Institution Rules do not apply to an application for the annulment of an ICSID award for the following reasons.

43. Firstly, the Committee notes that, by its terms, Rule 1 applies only to a Contracting State or a National of a Contracting State “wishing to institute conciliation or arbitration proceedings under the Convention”. The Introductory Note to the Institution Rules confirms the restrictive scope of these Rules and their non applicability to an Application for Annulment. It states as follows:

The Institution Rules are restricted in scope to the period of time from the filing of a request to the dispatch of the notice of registration. All transactions subsequent to that time are to be regulated in accordance with the Conciliation and the Arbitration Rules.

44. The Committee observes, in this context, that the Claimants cannot invoke a *mutatis mutandis* provision to import into their submissions any Institution Rule since the Institution Rules, contrary to the Arbitration Rules (Rule 53), do not include a *mutatis mutandis* clause.

45. Finally, the Centre’s Note which follows the text of Arbitration Rule 50 and which is invoked by the Claimants in aid of their central submission does not, in the view of the Committee, lend any support to the Claimants. The first sentence of Note B reads as follows:

[...]

B. The procedure pertaining to the filing and registration of an application in accordance with the Rule is roughly analogous to that for the filing and registration of an original request for arbitration in accordance with the Institution Rules. [emphasis added]

46. Aside from the fact that Arbitration Rule 50 has no requirement for any authorization for the filing of an Application, the words “roughly analogous,” in the view of the Committee, cannot trump the clear and unambiguous words of the Introductory Note to the Institution Rules which restrict the scope of those Rules.

47. As to Decree No. 111, the Committee agrees with the Republic that it is not absolutely essential in the circumstances. Nevertheless, having regard to the parties’ submissions with respect to the Decree, the Committee will dispose of the Claimants’ challenge of its “authenticité” and its “validité”.

48. In their submission of 17 February 2010, the Claimants, after having dissected what they label as versions A, B and C of the Decree, conclude:

Ces éléments font peser sur le Décret n° 111 du 21 avril 2008 des doutes inacceptables quant à son authenticité, en particulier sur la signature par S.E. la Présidente de la République d'une ou plusieurs versions du Décret, voire sur le contenu même de ce Décret. À tout le moins, les investisseurs espagnols sont légitimement fondés à s'interroger sur la validité de ce document.

49. The Committee does not agree with Claimants. It has no doubt as to the authenticity and the validity of Decree No. 111.
50. Furthermore, each of the three versions of Decree No. 111 in the record, including the one that the Claimants themselves declare to be “le seul ayant été approuvé et donc enregistré par le Contralor Général de la République du Chili”, referred to by them as Document C, contains language unequivocally conferring power of representation for purposes of any annulment proceeding which might be initiated by either party in the case of “*Victor Pey Casado and President Allende Foundation v. the Republic of Chile*” to the Law Firm Arnold & Porter L.L.P. represented by Mr. Paolo Di Rosa (both Arnold & Porter L.L.P. and Mr. Di Rosa being individually referred to as “**asesor**” (in the original Spanish language, “conseil” in the French translation)). This power of representation is made manifest by point 5 of the list of services to be rendered by the designated “**asesor**” under “**Primera**” in the “Contrato de Prestación de Servicios” approved by the Decree, according to which among such services are “la defensa y representación de la República de Chile en cualesquier procedimiento de nulidad que pueda ser iniciado por una u otra de las partes, o por ambas, hasta la emisión del laudo o decisión definitiva del comité de anulación”.
51. Both Minister Lavados’ letter of 25 January 2008 referred to earlier and this part of Decree No. 111 confirm the designation of Arnold & Porter L.L.P. and Mr. Di Rosa as representatives of the Republic of Chile in the annulment proceeding.
52. In the light of the clear language of Decree No. 111, the attempt by the Claimants in their letter of 17 February 2010 to characterize Arnold & Porter L.L.P. merely as “conseil”, “sans que celui-ci [*i.e.*, the Decree] ne contienne de stipulation autorisant le

Cabinet Arnold & Porter à former un recours en annulation contre la Sentence” (beginning of page 4) is without merit.

53. One last point seems to the Committee of relevance. In their letter of 17 February 2010, the Claimants refer to the notion of “Agent”, alleging that the Application for Annulment should have been accompanied by the “signature de l’Agent dûment désigné par la République du Chili”, the existence of the Contract approved by Decree No. 111 being insufficient for the validity of such Application (end of point 3, page 5). Apart from noting that Rule 18(1) of the Arbitration Rules does not distinguish between “agent” and “counsel”, both being qualified as “representatives”, the Committee recalls that at the hearing of 29 January 2010, Mr. Escalona Vásquez was present. The latter had previously been accepted by the Claimants as being a designated agent of the Republic before ICSID.²⁵ The presence at the hearing of Mr. Escalona is a confirmation by the Republic’s agent of Mr. Di Rosa’s power of representation of the Republic of Chile in the instant case.

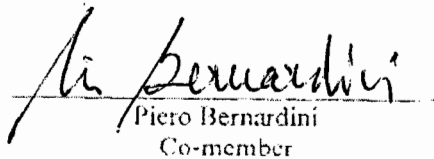
²⁵ See letter of 8 October 2008 from the Claimants to Mr. Nassib Ziadé at page 2.

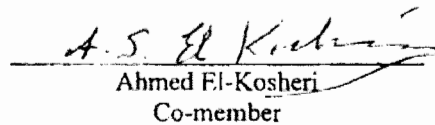
IV. DECISION

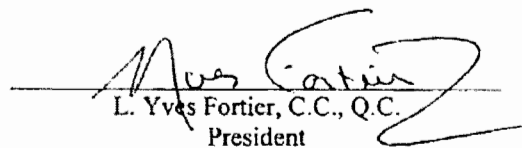
54. For the above reasons, the Committee decides that:

- The Claimants' Request to declare inadmissible the Republic's Application for the Annulment of the Award is dismissed.
- There will be no order as to costs in connection with the present Decision as such costs are reserved for later determination.
- The Committee will issue a procedural order regarding the continuation of the proceeding.

Date of the Decision: May 4, 2010


Piero Bernardini
Co-member


Ahmed El-Kosheri
Co-member


L. Yves Fortier, C.C., Q.C.
President