

Madrid, 2 March 2006

TO MR. PAUL WOLFOWITZ
Chairman of the Administrative Council of ICSID
c/o Mr. Scott B. White, interim Secretary General
World Bank
1818 H Street, N.W.
Washington D.C. 20433

Mister Chairman,

I am writing to inform you of a clear violation of the principle of due process on the occasion of an *ex parte* meeting between the Secretary General of the Center and a High Delegation of the Chilean President, Mr. Ricardo Lagos, which was held on 2 September 2005.¹ This meeting led to the disqualification for an undisclosed reason of a former President of the International Court of Justice, arbitrator designated by the Chairman of the Bank to serve on ICSID Panels, member of the present Arbitral Tribunal since 1998, President of the Constitutional Court of Algeria until his nomination as Minister of Foreign Affairs in May 2005. His name is Dr. Mohammed Bedjaoui.

This is not merely an impropriety; it constitutes a violation of the fundamental rights laid down by the ICSID Convention (“the Convention”).

The Claimants reserve all rights with respect to the circumstances in which the disqualification of Mr. Bedjaoui occurred. Also, the Claimants would like to draw your attention to the following issues.

Although the Convention provides that the decision of the Center must be taken within a 30-day time limit (Article 9(5)) or, at the very least, within a reasonable time limit, the Center’s decision was handed down six months after the proposal for disqualification had been submitted by the Republic of Chile on the 24th of August 2005 (see **Annex I**). This fact not only considerably delayed the proceedings, but also gave rise to prolific, sometimes vehement, written exchanges in response to the insinuations and insults formulated against two of the arbitrators whose disqualification was requested. The excessive length of the disqualification proceedings is directly responsible for these deviations.

1. The disqualification proceedings have revealed that Chile’s proposal for the disqualification of all members of the Arbitral Tribunal was fraudulent.

¹ See the letter of the Chilean Minister of Economy dated 16 December 2005, point 5: “*I was personally mandated, upon direct instructions by the President of the Republic of Chile, to request a meeting with the Secretary General [of ICSID]*”.

In fact, the Republic of Chile had been informed by Mr. Galo Leoro Franco, the arbitrator appointed by it, that, in the “*final draft of the award prepared by the President*”,² submitted to ICSID in June 2005, the majority of the Arbitral Tribunal had decided to affirm the jurisdiction of the Center and thus to reject Chile’s allegations that the Tribunal did not have jurisdiction.

2. This fact, although known to the Secretary General of ICSID as from 2 September 2005 –the date when he decided, in violation of the principle of due process, to meet with the sole Respondent – was disclosed to the arbitrators, other party and counsel only very late, namely on 2 December 2005, i.e. after Mr. Bedjaoui had asked the Center to inform all interested parties of the contents of the *ex parte* meeting³ and after 7 November 2005, the original date at which the disqualification proceedings should have been closed.⁴

These events constitute serious misbehavior on the part of the Center which, by voluntarily concealing a fact of fundamental importance, has totally distorted the disqualification proceedings. By doing so, the Center has deprived the Claimants of the benefit of an award, for which they had been waiting for more than eight years (see the reaction of the Spanish investors to the Center’s communication dated 2 December 2005, **Annex III**).

The Claimants’ fundamental rights were further violated:

- a) by requesting, in relation to the disqualification proposal, a recommendation from the Permanent Court of Arbitration (PCA), in the face of an express objection by the Respondent and without the consent of the Claimants. This enables all interested persons to criticize the circumstances of the constitution of the Arbitral Tribunal (see **Annex II**). The “new” proceedings are thus based on particularly fragile ground. Moreover, it is interesting to note the speed with which the PCA provided its sibylline recommendation (3 days) as compared to the slowness of the Center in rendering its decision (6 months), no less sibylline;
- b) by deciding not to rule on the disqualification of M. Leoro Franco, who violated, and admitted to have violated, the confidentiality of the deliberations⁵ and who, by way of a consequence, caused the proposal for disqualification by the party who had nominated him.

In addition to Mr. Leoro Franco’s misconduct, the Center’s failure to decide upon the proposal for disqualification of this arbitrator constitutes a violation of Article 9(6) of the Rules of Arbitration which provides for the suspension of the proceedings while the disqualification request is pending. This point had been raised by the Respondent.

² Letter of Professor Pierre Lalive, Chairman of the Arbitral Tribunal, to the Secretary General of ICSID dated 4 October 2005, p. 3.

³ Letter of Mr. Bedjaoui dated 7 October 2005, pp. 5-6.

⁴ See the letter of the Center dated 8 September 2005.

⁵ See the letter of M. Leoro Franco to the Center dated 16 December 2005. The Minister of Economy of the Republic of Chile confirmed this violation on the same day.

4. M. Leoro Franco decided to resign a few hours after the proposal for disqualification had been filed. However, such resignation can only become effective once the Center has ruled on the request for his disqualification. It is understood that, in order not to cover up the behavior of the Republic of Chile and the arbitrator appointed by it, the Center should, by means of a reasoned decision, refuse to disqualify Mr. Leoro Franco. The Center should further specify that, although his intentional breach of the confidentiality of the deliberations provides an evident reason for his disqualification, Chile cannot, under the principle that *no one can take advantage of his own legal violations*, rely on such breach in order to claim the right to appoint another arbitrator.

It would, in fact, be unacceptable that the arbitrator who has violated the confidentiality of the deliberations and the Party who has become its accomplice, should be allowed to disrupt the proceedings and that the Party in question should be enabled to replace the arbitrator that it had previously nominated.

5. In addition to the above violations, the Center also violated Articles 14 and 56 to 58 of the Convention which guarantee the independence of the Arbitral Tribunal and require the Chairman of the Administrative Council, when taking a decision on a proposal for disqualification, to ensure that the request is “*well-founded*”, i.e. based on “*a manifest lack of the qualities required by paragraph (1) of Article 14*” (Article 57 of the Convention) and the rules applicable to awards (Article 52).

However, the Center failed to provide reasons for its decision to disqualify a member of the Tribunal, in the above said circumstances unprecedented in the history of ICSID and international arbitration. In fact, a lack of reasons is conceivable where a proposal for disqualification is rejected⁶ – because the composition of the Tribunal is not affected –, but it is totally inappropriate where such a request is granted and where the request itself constitutes a blatant due process violation which exposes the victims of such a violation to the risk of repeated disqualifications for unknown reasons identical to those having caused the previous disqualification.

As a matter of fact, it appears that even decisions rejecting a disqualification request adopted at ICSID are motivated and communicated to the parties.⁷

6. The circumstances in which the unreasoned decision to disqualify Mr. Bedjaoui has been rendered deprives Articles 56(1), 57, 58 and 14(1) of the Convention of any usefulness.

7. The damage suffered by the Claimants is substantial considering that the award was about to be rendered. The Spanish investors reserve their rights to bring any action in this respect in defense of their interests.

⁶ See, for example, **Siemens A.G. v. Argentina** (N° ARB/02/8) and **Generation Ukraine Inc. v. Ukraine** (N° ARB/00/9).

⁷ **AMCO Asia Corp. v. Indonesia ; Compañía del Aconquija S.A. & Vivendi Universal v. Argentine Republic ; Salini Costruttori S.P.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan.**

Considering the extreme seriousness of the above facts and of their consequences, the Spanish investors respectfully request that, on the basis of the exceptional powers that the Convention confers upon you, you

1. declare the decision rendered by the Center on 21 February 2006, as well as the recourse to a recommendation from the Permanent Court of Arbitration without the parties' consent and disregarding the objection raised by the Republic of Chile, null and void for the above-mentioned reasons, and that you take a new decision in conformity with the rules of the Convention;

2. take, without requesting a recommendation from the Permanent Court of Arbitration,

- a reasoned decision rejecting the disqualification of Mr. Leoro Franco, on the basis of the principle "*nemo auditur propriam turpitudinem allegans*"⁸;

- a decision rejecting the disqualification of the Chairman of the Arbitral Tribunal, Professor Pierre Lalive;

- a decision rejecting the disqualification of Mr. Bedjaoui or, in the alternative, a decision to disqualify indicating which of the facts relied upon by Chile in its proposal for disqualification of 24 August 2005 are "*well-founded*", i.e. whether his disqualification is based on

1) his "*manifest incapacity to carry out his functions*" revealed by the excessive duration of these proceedings, or

2) his quality as Minister of Foreign Affairs as from May 2005. This information is indispensable to the Spanish investors insofar as they are considering appointing another Minister of Foreign Affairs currently in office and cannot run the risk of another disqualification;

3. provisionally suspend the 30-day time limit granted to the Spanish investors on 22 February 2006 to appoint an arbitrator in replacement of Mr. Bedjaoui.

Yours sincerely,

Dr. Juan E. Garcés
Counsel for Mr. Victor Pey-Casado and
Spanish Foundation President Allende
Re: Victor Pey Casado and Foundation President Allende
v. Republic of Chile (ICSID Case N° ARB-98-2)

⁸ "*No one is heard when alleging one's own wrong*".

I

ANNEXE I

Chronological table of facts subsequent to the filing of the *final draft of the award prepared by the President of the Arbitral Tribunal in June 2005* (summary)⁹

DATE	FACTS
5-7 May 2003	Oral hearings on the Center's jurisdiction and on the merits of the case.
26-27 January 2004	Working session of the Tribunal to discuss the first draft of the award. Its President, Professor Pierre Lalive, asks the co-arbitrators to provide him with written proposals.
Between 02.25.2004 and 02.26.2005	Written suggestions of amendments to the first draft of the award are produced by the co-arbitrators Mr. Bedjouai and Mr. Leoro, and are exchanged between them.
Mid-June 2005	The President of the Tribunal, Professor Pierre Lalive, sends his « <i>final draft of the award prepared by the President</i> » to the Center.
06.21.2005	The Center issues the final draft of the award written by the President of the Tribunal to the co-arbitrators
July 2005	Receipt by Mr. Leoro, arbitrator designated on Chile's proposal, of the Spanish version of the final draft of the award. He informs Chile that the award is not in Chile's favor.
July-August 2005	Proposal by the President of the Tribunal and by Mr. Bedjaoui to hold a meeting of the Tribunal in July in order to adopt the final version of the award: refusal by Mr. Leoro. Proposal by the President of the Tribunal and by Mr. Bedjaoui to meet in August: refusal by Mr. Leoro.
08.12.2005	The Centre informs the parties that the Tribunal will meet in September in New York to discuss the draft award.
08.18.2005	Advance payment of 250.000 US\$ on estimated expenses, which the Centre requires from each party.
08.24.2005 Wednesday	Proposal for disqualification of the entire Arbitral Tribunal by Chile. It refuses to pay the advance on estimated expenses. The Centre stays the proceedings, the Tribunal can neither deliberate nor make any decision. This letter is the first manifestation from Chile since 7 May 2003. Communication by the Centre of this letter to both parties and the members of the Tribunal on Friday 26 August 2005.
08.26.2005 Friday	Resignation of the Arbitrator Mr. Leoro based on the alleged loss of trust by the State which nominated him, addressed to the Centre. Communication to the parties and to the co-arbitrators on 31 August 2005.
09.02.2005 Friday	<i>Ex parte</i> meeting between the Secretary General of ICSID and Mr. Jorge Carey, the Minister of Economy, and the Ambassador of Chile, sent on special mission by the President of Chile, Mr. Ricardo Lagos.

⁹ **Source:** The documents produced by the Arbitrators and the parties between 24 August 2005 and 11 January 2006, at the request of the Centre, after the removal of the entire Tribunal by Respondent.

09.07.2005	Letter from Mr. Leoro to the attention of the President of the Administrative Council. <u>No indication that he had informed Chile of the content of the draft award of the Tribunal.</u>
09.08.2005	The Center establishes the date of <u>7 November 2005</u> as the final date when both parties can be heard concerning the challenge of the Arbitrators, and the final date for the decision of the President of the Administrative Council within 30 days as of the receipt of all the observations.
09.14.2005	Payment by Claimants of the advance on estimated expenses which the Center required from each party: 250.000 US\$. Chile refuses to pay its share.
09.16.2005	Letter from Chile concerning the disqualification of the Tribunal. <u>No indication that it had been informed by Mr. Leoro of the content of the draft award of the Tribunal.</u>
10.07.2005	Letter from Mr. Bedjaoui to the Secretary General. He asks that the content of the meetings he had with the other party on 2 September 2006 be revealed to the absent party and to the Tribunal if necessary. Communication by the Center of these letters to the co-arbitrators and to the parties on 11 October 2005.
11.07.2005	End of the time limit established 09-08-2005 for both parties to be heard. Letter of Chile backing his disqualification request of the Tribunal. <u>No indication that it had been informed by Mr. Leoro of the content of the draft award of the Tribunal.</u>
12.02.2005	Letter from the Secretary General « <i>concerning the request made by M. Bedjaoui on 7 November 2005</i> ». He informs Claimants and the members of the Tribunal for the first time that, during the meeting dated 2 September 2005, the High Personal Delegation of the President of Chile had confirmed that Mr. Leoro had communicated to the Chilean Party the content of the private working sessions of the Arbitral Tribunal, and the content of the draft award of the President filed with ICSID in June 2005. <i>Communication of this letter the same day by the Centre to both Arbitrators and the parties.</i>
12.16.2005	Letters of the Minister of Economy of Chile and of Mr. Leoro confirming that the latter had communicated to Chile the content of the draft award of the Tribunal filed with ICSID in June 2005. Communication of these letters to both co-arbitrators and the Parties on 21 December 2005.
02.13.2006	The interim Secretary General of ICSID asks the Secretary General of the Permanent Court of Arbitration (PCA, The Hague) to propose a recommendation concerning the challenge of the President of the Tribunal and Mr. Bedjaoui. Communication by the Centre the same day to the arbitrators and the parties.
02.15.2006	The Republic of Chile writes to ICSID « <i>... that it rejects such an action. There is no provision neither in the Washington Convention nor in the Arbitration Rules of the Centre or in any other applicable standard which entitles ICSID to adopt this measure; besides that, the parties to the said case have not agreed to submit the question to the jurisdiction of the PCA...</i> ».

02.17.2006	The Secretary General of the PCA recommends to the President of the Administrative Council to agree to the disqualification of Mr. Bedjaoui. Communication by the Center of 22 February 2006 to both the Arbitrators and the parties.
02.21.2006	The interim Secretary General of ICSID informs that the President of the Administrative Council accepted the PCA's recommendation. Communication by the Center of the same day to the arbitrators and the parties.

II

ANNEXE II

The recommendation of the Secretary General of the Permanent Court of Arbitration (PCA) dated 17 February 2006 is void.

In response to ICSID's request dated 13 February 2006, the Secretary General of the PCA recommended, on 17 February 2006, that the request for Mr. Bedjaoui's disqualification as arbitrator be accepted. On 21 February 2006, the President of the Administrative Council of ICSID adopted a decision in compliance with this recommendation.

On 15 February 2006, the Republic of Chile declared that the recourse to a recommendation from the Secretary General of the PCA has no basis and that the parties did not agree to the intervention of the PCA. The Republic of Chile is right on that point: indeed, in the ICSID Convention and Rules, which constitute an autonomous system, there is no provision concerning the use of such a recommendation when the President of the Administrative Council of ICSID is required to decide on the disqualification of an arbitrator in accordance with article 58 of the Convention.

According to the letter of the Center dated 13 February 2006, the recourse to the recommendation from the Secretary General of the PCA constitutes a "practice" of the Center. On the principle this answer is unacceptable; a practice cannot derogate from Articles 56 to 58 and 14(1) of the Convention. Moreover, the only precedents known to the Claimants are *Siemens v. Argentina* and *Generation Ukraine v. Ukraine*.

In *Siemens v. Argentina*, the Republic of Argentina had submitted a request for the disqualification of Mr. Rigo Sureda. However, it seems that the recourse to the PCA was due to Mr. Rigo Sureda's status as a former employee of the World Bank. This is confirmed by *Generation Ukraine v. Ukraine* where the Claimant had requested Mr. Voss's disqualification. The Secretary General of ICSID justified the recourse to a recommendation from the Secretary General of the PCA by the necessity to safeguard the impartiality of the procedure, Mr. Voss being also a former employee of the Bank.

In conclusion, it seems that, if a "practice" at all exists in this respect, such practice consists in consulting the Secretary General of the PCA when there is a link between the arbitrator subject to the challenge and the World Bank which may call into question the objectivity of the decision of the Chairman of the Administrative Council of ICSID.

Moreover, the "practice" which was observed in *Siemens v. Argentina* and *Generation Ukraine v. Ukraine* differs from the procedure followed in our case on another essential point. Indeed, in these cases, contrary to the present case, the parties had agreed to consult the Secretary General of the PCA. In the present case, however, the Republic of Chile expressly objected to a recommendation from the Secretary General of the PCA, invoking the absence of any legal basis and the fact that a recommendation by the Secretary General of the PCA was inappropriate because of the nature of the functions performed by the PCA. The Spanish investors agree on this point with the Republic of Chile because, as is illustrated by the Hague Conventions of 1899 and 1907 (Articles 21 and 42, respectively) and by the Optional Rules of the PCA for arbitration of disputes between two parties of which only one is a State (Article 1), referring a matter to the PCA requires the consent of the parties and, more specifically, the absence of a special

jurisdiction chosen by the parties. These provisions highlight the fundamental importance of the will of the parties. In the present case, the Parties submitted to the special jurisdiction of ICSID in accordance with the Bilateral Investment Agreement concluded between Spain and Chile (Article 10.3).

Considering (i) the absence of any conventional basis and (ii) the opposition of all Parties, the Spanish investors believe that the recourse to a recommendation from the Secretary General of the PCA is unlawful.

Indeed, considering the inappropriateness of the recommendation given by the Secretary General of the PCA, the upcoming award may be attacked on two grounds for annulment: (i) an irregularity in the constitution of the new Tribunal (Article 52(1)(a) of the Convention), and (ii) the serious violation of a fundamental rule of procedure (Article 52(1)(d) of the Convention) inasmuch as the disqualification procedure set forth by Articles 56(1) to 58 and 14(1) of the Convention and Article 9 of the Arbitration Rules has not been followed.

This latter grounds for annulment is particularly likely to succeed considering that the recommendation provided by the Secretary General of the PCA constitutes, in the present case, an essential part of the decisional process of ICSID. The Center wrongly believed that, without such a recommendation, it was not in a position to rule on the proposal for disqualification made by Chile on 24 August 2005 in the above-mentioned circumstances of this case.

III

Madrid, 5 December 2005

Ms. Gabriela Alvarez Avila
Secretary of the Tribunal
ICSID
World Bank
1818 H Street, N.W.
WASHINGTON D.C. 20433

Re: Victor Pey Casado and President Allende Foundation v. Republic of Chile (ICSID Case N° ARB-98-2)

Dear Ms. Alvarez Avila,

We acknowledge receipt of the letter from the Secretary General of ICSID dated 2 December 2005, which calls for the following remarks:

I

Claimants regret :

1. that a meeting took place on 2 September 2005 with the representatives of Respondent but with Claimants being absent,
2. that this meeting had not been discontinued as soon as Respondent recognized having been informed of the contents of the draft award of the Arbitral Tribunal,
3. that the arbitrators and Claimants had not been informed of these events in the verbatim record which was sent to them on 8 September 2005.

II

Claimants draw the arbitrators' and the Secretary General's attention to the fact that, provided that Respondents' remarks of 2 September are not denied:

1. The Republic of Chile has not made any reference to its "against the norms" relationship with one of the arbitrators in any of its explanations concerning its request for disqualification, which shows its duplicity. The same remark applies to the former Minister Mr. Leoro Franco, whose writings never referred to his exchanges with the party who nominated him;
2. the request for disqualification dated 24 August 2005 cannot be the instrument of a violation of a breach the confidentiality of the deliberations.

III

Nonetheless, and even if the facts revealed in the letter from the Center dated 2 December 2005 were confirmed by Mr. Leoro Franco, Claimants' position concerning

the request for disqualification of the Tribunal and the resignation of Mr. Leoro Franco both remain unchanged, i.e.:

- The Chairman of the Administrative Council of ICSID is asked to reject the request for the disqualification of the members of the Arbitral Tribunal, including the request concerning Mr. Leoro Franco, as being ill-founded. In this respect, the loss of confidence alleged by Chile in its request for disqualification is for the least inappropriate, especially as far as Mr. Leoro Franco is concerned.
- The other members of the Arbitral Tribunal are asked to oppose Mr. Leoro Franco's resignation in order to allow either the present Arbitral Tribunal or the Tribunal composed of Mr. Lalive and Mr. Bedjaoui to issue an award. Alternatively, Claimants request that the Tribunal's vacancy be filled by the Chairman of the Administrative Council of the Center, in compliance with the exceptional procedure provided by article 11(2)(a) of the ICSID Rules.

Any other decision would favor the Republic of Chile which, if it were authorized to nominate a new arbitrator, would have managed to unduly deviate the Rules of the ICSID Convention and, more importantly, to question the very existence of ICSID as an institution.

The remarks are made without prejudice to any observations which will be made in relation to the nature of the contacts established between them during the proceedings, particularly those to be made by the Republic of Chile and by Mr. Leoro Franco.

IV

Finally, Claimants:

1. Request the Secretariat to refrain from transmitting any communication which refers to the private deliberations of the Arbitral Tribunal. However, if it decided otherwise, Claimants request that, as a preliminary measure, the paragraphs and sentences which may contain a reference to the deliberations be "sanitized", it being specified that, under Articles 6(2) and 15 of the Arbitration Rules, the Center and the Arbitral Tribunal are obliged to ensure the confidentiality of the deliberations.
2. Renew the reservations they formulated before the Secretary General on 7 November 2005, and especially their right to launch any liability action which would be necessary to safeguard their interests.

Yours sincerely,

Dr. Juan E. Garcés
Counsel for Mr. Victor Pey-Casado and
the Spanish Foundation President Allende