

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 – Supplementary Decision

**DECISION ON THE REPUBLIC OF CHILE'S REQUEST
FOR A STAY OF ENFORCEMENT OF THE
UNANNULLED PORTION OF THE AWARD**

Members of the *ad hoc* Committee

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

Secretary of the *ad hoc* Committee

Ms. Eloïse M. Obadia

Representing the Claimants

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Representing the Respondent

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Executive Vice President
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THE COMMITTEE

Composed as above,

After deliberation,

Makes the following Decision:

I. INTRODUCTION

1. On 18 December 2012, the Committee issued its Decision on the Application for Annulment of the Republic of Chile (the “**Annulment Decision**”) partially annulling the award rendered on 8 May 2008 in ICSID Case No. ARB/98/2 (the “**Award**”) between Víctor Pey Casado and the Foundation “President Allende” (the “**Claimants**”) and the Republic of Chile (the “**Republic**” or “**Respondent**”).
2. On 1 February 2013, the Republic submitted a Request for Supplementation of the Annulment Decision (“**Supplementation Request**”) regarding the application of moratory interests to the amounts owed for costs and expenses pursuant to the unannulled portion of the Award, the Tribunal’s Revision Decision dated 18 November 2009 (the “**Revision Decision**”) and the Annulment Decision.¹ Further to the Parties’ agreement on the schedule for written observations regarding the Supplementation Request, the Republic filed its observations in support of its Supplementation Request on 4 March 2013 and the Claimants filed a response on 29 March 2013.
3. On 3 April 2013, the Respondent submitted a request for a stay of enforcement of the unannulled portions of the Award (the “**Request**”) during the pendency of the current proceedings related to the Republic’s Supplementation Request. Upon the invitation of the Committee, the Claimants filed observations on the Request on 8 April 2013 (the “**Stay Observations**”).

¹ See Request at para. 4.

4. The Parties submitted further pleadings on the Supplementation Request: on 12 April 2013 the Republic filed its reply (the “**Reply**”) and on 26 April 2013 the Claimants filed their rejoinder (the “**Rejoinder**”).
5. Having decided to give priority to the consideration of the Request, the Committee on 25 April 2013 issued its decision to reject the Respondent’s Request, with reasons to follow later. This Decision sets out the Committee’s reasons.

II. THE PARTIES’ CONTENTIONS

6. The Republic submits that a stay of enforcement is necessary to avoid confusion and duplication of proceedings with respect to the unannulled portions of the Award or inconsistent attempts regarding the enforcement thereof.²
7. It argues that Rule 54(3) of the Rules of Procedure for Arbitration Proceedings (the “**Arbitration Rules**”) of the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) establishes this Committee’s power to order the temporary stay of enforcement of the unannulled portions of the Award.³
8. The Republic, citing Professor Schreuer, refers to the “lopsided situation” that can occur when an award has been annulled in part and upheld in another, and asserts that an attempt at enforcement of the unannulled costs provision of the Award will inevitably result in confusion and further dispute between the Parties:⁴

The power to stay the enforcement of the unannulled portions of an award is intended to help manage the “more complicated case [of execution]” of a partially annulled award. In that scenario, “[p]art of the award remains in existence and

² *Ibid.* at paras. 3 and 5.

³ *Ibid.* at para. 6.

⁴ *Ibid.* at paras. 7 and 8, referring to Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2009) Art. 52 at para. 653 (hereinafter “*Schreuer Commentary*”).

would, in theory, be enforceable. But an award that has been annulled in part and upheld in another is likely to create a lopsided situation.” [Footnote omitted]

9. The Republic makes reference to other ICSID cases in which several committees have found that when a partial annulment affects monetary aspects of an award, stay of enforcement is appropriate:⁵

For example, the Committee in *MINE v. Guinea* recognized the necessity of a stay when it annulled part of the award related to damages. Conversely, in *CMS v. Argentine Republic*, the Committee did not grant a stay because the partial annulment of the award did not affect the final monetary amount owed. Similarly, in *Enron Creditors Recovery Corp. Ponderosa Assets L.P. v. Argentine Republic*, the Committee refused to grant a stay under Article 54(3) of the ICSID Convention because, although it annulled only the portions of the award on damages and liability, its decision rendered the rest of the award unenforceable. [Footnotes omitted]

10. The Republic also refers to the Tribunal’s decision in the present case granting a stay of enforcement during the Revision Proceeding as it considered that the immediate execution of the Award would likely have created problems for the Parties and the Tribunal.⁶ The Republic argues that the same concerns are present here:⁷

The question left open by the Annulment Decision regarding the application of interest to the costs amounts the parties owe each other places in doubt the ultimate sum that the Republic is obligated to pay to Claimants for costs. In view of this uncertainty, any enforcement of the Award would require a judicial court to substitute its judgment for that of the Committee when applying interest, with the risk of an enforcement for the wrong amount, or, conceivably, to deny enforcement of the Award. These outcomes would frustrate the purpose of the Convention, the finality of the Award, and the efforts of the parties to resolve this dispute.⁸

⁵ *Ibid.* at para. 9.

⁶ *Ibid.* at para. 10.

⁷ *Ibid.* at para. 11.

⁸ *Ibid.*

11. The Republic offers to pay the amount it undisputedly owes Claimants (US\$2,470,684.89),⁹ as a demonstration of its good faith to comply with both the Annulment Decision and the Award, and requests that the Committee issue an order requiring the payment of this undisputed sum in order to fulfill the legal and administrative requirements of the Republic.¹⁰
12. Additionally, the Republic points to its long history of honoring its financial commitments, maintaining that because of this previous history, the risk of noncompliance by the Republic or prejudice to the Claimants is non-existent or *de minimis*.¹¹
13. Finally, the Respondent notes that the time limit to file a request for the supplementation of a decision (45 days from the issuance of said decision pursuant to Arbitration Rule 49(1)) and the pleading schedule established by the Committee will ensure that no prejudicial delay would result from the granting of a stay of enforcement.¹²
14. In response to the Republic's Request, the Claimants aver that the Republic is asking the Committee to reconsider that part of its Annulment Decision regarding the execution of the unannulled portion of the Award, despite the clarity of the terms of the Annulment Decision.¹³ The Claimants consider that the Republic's Request is unfounded and is only intended to further delay the compliance by the Republic of its obligations under the Award.¹⁴

⁹ See Respondent's Reply at para. 28.

¹⁰ See Request at para. 12.

¹¹ *Ibid.* at para. 13.

¹² *Ibid.* at para. 14.

¹³ See Stay Observations at para. 3.

¹⁴ *Ibid.* at para. 4.

15. The Claimants maintain that the Republic's obligation to pay the Claimants' costs and expenses related to the arbitration procedure as stated in the Award is *res judicata* since 18 December 2012.¹⁵ In the absence of payment from Chile, the Claimants state that they had to initiate enforcement procedures in Spain:

[...] les Demanderesses ont été dans l'obligation de commencer une procédure d'exécution en Espagne pour forcer le paiement de ces sommes que le Chili a refusé de verser volontairement. Contrairement aux allégations du Chili, cette procédure est parfaitement justifiée et légitime. Les cours espagnoles ont simplement imposé au Chili de respecter ses obligations conformément à la Sentence.¹⁶

16. More specifically, the Claimants submit that this Committee is not competent to stay the enforcement of the Award at this stage of the proceedings or to grant the other requests made by the Republic.¹⁷ They argue that Arbitration Rule 54(3) clearly states that all stays automatically terminate when the final annulment decision is rendered. The Rule also provides that a committee may only order a temporary stay of enforcement when it grants a partial annulment of an award in order to give either party an opportunity to request a stay to a new tribunal to be constituted further to a resubmission of the dispute. The Claimants submit that this is not the nature of the request made by the Republic of Chile.¹⁸

En réalité, la demande de suspension sollicitée est provisoire pendant « la demande actuelle de procédure supplémentaire ». On relèvera que le Chili a été dans l'incapacité de citer une quelconque disposition de la Convention ou du Règlement octroyant au Comité la compétence d'accéder à une telle requête.¹⁹

¹⁵ *Ibid.* at para. 5.

¹⁶ *Ibid.*

¹⁷ *Ibid.* at para. 6.

¹⁸ *Ibid.* at para. 10.

¹⁹ *Ibid.* at para. 13.

17. In addition, the Claimants submit that no provision of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “**Convention**”) or the Arbitration Rules allow the Committee to order the payment of the uncontested sum due pursuant to the unannulled portions of the Award.²⁰
18. Under reserve of their submission with respect to the competence of the Committee, the Claimants assert that the Request is groundless and constitutes an abuse of process. The Claimants maintain that the Republic’s repeated statements regarding its history of honoring its financial commitments are futile, and submit that “non seulement le Chili n’a pas payé les sommes dues en vertu de la Sentence ; mais il a tout mis en œuvre, en ce inclus le déclenchement de procédures abusives et sans fondement, pour éviter d’honorer ses engagements.”²¹
19. Claimants allege that the Request is prejudicial to them since, they say, the Republic seeks to prevent them from proceeding with the resubmission of the dispute. The Claimants conclude that the Respondent’s proposal that they should suspend the enforcement proceedings in Spain in exchange for an order from the Committee that the Respondent should pay the undisputed sum, is not acceptable.²²
20. Claimants maintain that the Committee should abstain from intervening in the enforcement proceedings in Spain as the decision of the Court of 1st instance n° 101 in Madrid – granting forced enforcement – is well founded considering the *res judicata* effect of the unannulled portions of the Award, as confirmed by the Committee in its Annulment Decision, and in compliance with the obligations of the Convention.²³ Additionally, the Claimants state that the provisions of the Spanish law on civil procedure

²⁰ *Ibid.* at paras. 14-15.

²¹ *Ibid.* at para. 18.

²² *Id.* at para. 20.

²³ *Ibid.* at paras. 28, 30 and 32.

enable the Respondent to claim an offset of the sums owed by the Claimants pursuant to the Revision and Annulment Decisions. The Respondent failed to have recourse to those provisions.

21. The Claimants offer to suspend the enforcement proceedings in Spain if the Respondent pays the principal and interest due pursuant to the Award after subtraction of the sums owed by the Claimants pursuant to the Revision and Annulment Decisions. In addition, they are prepared to offer a bank guarantee for the amount equivalent to the accumulated interest until the Committee issues its decision on the Supplementation Request.²⁴
22. Finally, the Claimants request that the Respondent be ordered to pay the litigation costs and expenses incurred with respect to this Request with additional interest from two weeks following the Committee's Decision at an annual rate of 5 percent until complete payment.²⁵

III. RELEVANT ICSID CONVENTION ARTICLES AND ICSID ARBITRATION RULES

23. Article 49(2) of the Convention provides:

(2) The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.

²⁴ *Ibid.* at para. 42.

²⁵ *Ibid.* at para. 44.

24. Article 52(5) of the Convention provides:

(5) The Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

25. Article 53 of the Convention provides:

Article 53

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(2) For the purposes of this Section, “award” shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

26. Arbitration Rule 54 applies to the present case and provides:

Stay of Enforcement of the Award

(1) The party applying for the interpretation, revision or annulment of an award may in its application, and either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates. The Tribunal or Committee shall give priority to the consideration of such a request.

(2) If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall, together with the notice of registration, inform both parties of the provisional stay of the award. As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated.

(3) If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final decision is rendered on the application, except that a Committee granting the partial annulment of an award may order the temporary stay of

enforcement of the unannulled portion in order to give either party an opportunity to request any new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3).

(4) A request pursuant to paragraph (1), (2) (second sentence) or (3) shall specify the circumstances that require the stay or its modification or termination. A request shall only be granted after the Tribunal or Committee has given each party an opportunity of presenting its observations.

(5) The Secretary-General shall promptly notify both parties of the stay of enforcement of any award and of the modification or termination of such a stay, which shall become effective on the date on which he dispatches such notification.

IV. THE COMMITTEE'S VIEWS

27. The first question to be addressed is whether the Committee is competent to order a stay of enforcement of the unannulled portions of the Award following the Respondent's Request. As noted earlier, the Committee rendered its Annulment Decision on 18 December 2012. Within 45 days of the issuance of that Decision, the Respondent filed the Supplementation Request pursuant to Articles 52(4) and 49(2) of the Convention and Arbitration Rules 53 and 49. It is in the context of the Supplementation Request that the Respondent is now asking for a stay of enforcement of the unannulled portions of the Award.
28. The Respondent founds its Request on Arbitration Rule 54(3) which establishes that "[...] a Committee granting the partial annulment of an award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request any new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3)."
29. The Respondent states that this stay is required to avoid the complicated and lopsided situation in which the Parties are since the Claimants sought enforcement of the principal and interest which they claim Respondent owes in accordance with the Award while the Respondent argues that there are uncertainties with respect to the application of interest.

30. Claimants, on the other hand, argue that Arbitration Rule 54(3) does not grant the Committee the power to order any stay of enforcement in the present circumstances since that provision only applies when a committee issues a decision on an application for annulment and grants the partial annulment of an award. The Claimants recall that the Committee when it granted such a partial annulment expressly decided that there was no need to order the temporary stay of enforcement of the unannulled portion of the Award.
31. While the Committee agrees with the Claimants that Arbitration Rule 54(3) does not allow the Committee to grant a stay at the stage of a supplementary decision, the Committee also notes that Arbitration Rule 54(1) provides that “[...] either party may at any time before the final disposition of the application, request a stay in the enforcement of part or all of the award to which the application relates [...]”.
32. Thus, it appears to the Committee that, by submitting a request for supplementation, the annulment application becomes subject to a new disposition which will become final with the decision on the supplementary decision. Therefore, a party should be allowed to make a request for a stay of enforcement.
33. The Committee further notes that Article 52(5) of the Convention provides that a committee “may, if it considers that the circumstances so require, stay enforcement of the award pending its decision [...]”. The Committee reads this provision as giving committees a general discretion to grant a stay while an annulment proceeding is pending. The annulment proceeding ended with the issuance of the Annulment Decision on 18 December 2012 but was revived with the registration of the Supplementation Request.
34. Although the provisions of the Convention and the Arbitration Rules on requests for supplementary decisions and rectification do not foresee specifically the possibility of a stay of enforcement of an award, it appears to the Committee that since such a request takes place within the context of an annulment proceeding the party making the application can make the request on the basis of Article 52(5) of the Convention.

35. However, the Committee does not need to rule on this question as it has decided to deny Respondent's Request as explained below.
36. The Committee noted in its Decision on the Republic of Chile's Application for a Stay of Enforcement of the Award, dated 5 May 2010, that although Article 52(5) of the Convention uses the verb "may", thereby conveying an element of discretion to the Committee, a review of the many decisions by *ad hoc* annulment committees since the *MINE* decision in 1988 led the Committee to the conclusion that, absent unusual circumstances, the granting of a stay of enforcement pending the outcome of the annulment proceedings had become almost automatic.²⁶
37. This does not mean that a stay should be granted automatically. A committee needs to be satisfied that the requesting party has discharged its burden of proving that there are specific circumstances justifying a stay. As is well established, factors supporting a stay are: (i) prospects for compliance with the award; (ii) absence of dilatory tactics; (iii) prospects of recoupment of the relevant payment if the award is annulled; and (iv) absence or minimal prejudice to the opposing party by delaying the payment.²⁷
38. In the present Request, the Respondent relies essentially on the last two factors above-mentioned insisting on the complications that the risk of an enforcement for the wrong amount would trigger and the minimal prejudice that would result from a further stay of enforcement of the Award.

²⁶ See Committee's Decision on the Republic of Chile's Application for a Stay of Enforcement of the Award, dated 5 May 2010, at para. 25.

²⁷ The Republic had referred to these factors when requesting the continuation of the stay of enforcement of the Award at the beginning of the proceeding: see letter of 15 January 2010 from Arnold & Porter, L.L.P. to Ms. Eloïse Obadia and Transcript Hearing of 29 January 2010, pages 140 to 157 [English Transcripts].

39. The Committee disagrees with the Respondent on both counts. Any discrepancy between the amount of enforcement judgment from the Spanish court and the final accounts to be determined further to the Committee's Decision on the Supplementation Request could easily be resolved. The Claimants have always paid the advances requested by ICSID in relation to this case. They have also offered to provide a bank guaranty for the unliquidated amount of the interest.²⁸ Since the Claimants will certainly resubmit the dispute to a new tribunal for the annulled part of the Award, the Republic of Chile will have the opportunity of claiming any shortfall.
40. Above all, the Committee notes the binding nature of awards set forth in Article 53 of the Convention. Annulment and other post-award remedies are the exception. As stated in the Background Report on Annulment by the ICSID Secretariat Provided to Contracting States, "[t]he choice of remedies offered by the ICSID Convention reflects a deliberate election by the drafters of the Convention to ensure finality of awards."²⁹ When a revision or annulment proceeding is instituted, the presumption is that the award must be enforced. The stay of enforcement of the award is the exception granted only when specific circumstances so require.
41. Additionally and without prejudice to the decision of the Committee on the Supplementation Request, supplementary decisions and rectifications are not meant to afford a substantive review or reconsideration of the decision.³⁰ Supplementary decisions will most likely have a limited effect on the original decision. This provides an additional reason to preserve the binding force of the unannulled portion of the Award.

²⁸ See Stay Observations at para. 42(2).

²⁹ See Background Paper on Annulment for the Administrative Council of ICSID, dated August 10, 2012, at para. 9 and available at <http://www.worldbank.org/icsid>.

³⁰ See Schreuer Commentary, Article 49, at para. 28.

42. As to the prejudice the Claimants could suffer from any further delay in the payment of the sum owed by Respondent, the Committee finds that since the Award was issued more than 5 years ago, any further delay in the payment of final elements of the Award would be prejudicial to the Claimants.
43. From a practical point of view, the Committee stresses that if it granted any further stay the question of whether interest continues to run during that stay, which is the main issue of the Supplementation Request would arise. Accordingly, by granting a stay, the Committee would add another issue to the issues identified in the Supplementation Request.
44. For the foregoing reasons, the Committee concludes that the Republic of Chile's request for a stay of the unannulled portions of the Award must be denied.
45. Accordingly, the other Republic's requests to order (i) Claimants to suspend any ongoing enforcement proceedings and desist from any further enforcement efforts until the Decision on the Supplementation Request; and (ii) Respondent to pay Claimants the undisputed sum of USD 2,470,684.89 are also denied.
46. However, the Committee is of the view that it would be in the interest of all the Parties if they complied with their respective obligations arising from the Award, the Revision Decision and the Annulment Decision. While the Parties argue the specific issue on the interest which may be due, if any, they do not contest the principal amounts. Accordingly, the Committee recommends that the Respondent pay Claimants the "undisputed" sum of USD 2,470,684.89 which is the sum total of the various obligations of the Parties as described in the table below.

Date	Ruling	Order	Amount
8 May 2008	Award	Respondent ordered to pay part of Claimants' costs	USD 2,000,000.00
8 May 2008	Award	Respondent ordered to pay Claimants part of costs of arbitration	USD 1,045,627.78
18 November 2009	Revision Decision	Claimants ordered to pay entirety of costs of Revision Proceeding	(USD 200,000.00 + 1,305.11)
18 December 2012	Annulment Decision	Claimants ordered to pay half of the costs of Annulment Proceeding	(USD 373,637.78)
		TOTAL	USD 2,470,684.89

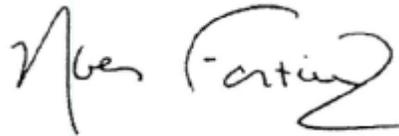
47. Lastly, with the view to facilitate the enforcement process and taking into account the Committee's intention to decide the Supplementation Request within a reasonable period of time, the Committee recommends that the Claimants suspend the enforcement proceedings presently pending before the "Tribunal de 1^{ère} Instance No. 101 de Madrid" until such time as the Committee issues a decision on the Supplementation Request.

V. DECISION

48. For the foregoing reasons, and independently of the question whether, at this stage of the proceeding, a committee is competent to grant a stay of enforcement of an award, the Committee unanimously:

- Denies the Republic of Chile's Request;
- Recommends to the Republic of Chile that it pay forthwith to the Claimants the "undisputed" sum of USD 2,470,684.89;
- Recommends to the Claimants that they suspend the enforcement proceedings presently pending before the "Tribunal de 1^{ière} Instance No. 101 de Madrid" until such time as the Committee issues its decision on the Supplementation Request.

Signed on behalf of the Committee on 16 May 2013,



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