

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

VÍCTOR PEY CASADO AND FOUNDATION PRESIDENT ALLENDE

v.

REPUBLIC OF CHILE

ICSID Case No. ARB/98/2

Second Annulment Proceeding

**DECISION ON THE REQUEST FOR THE STAY OF THE ENFORCEMENT OF THE
AWARD**

Members of the ad hoc Committee

Professor Rolf Knieper, President

Professor Yuejiao Zhang

Professor Nicolas Angelet

Secretary of the ad hoc Committee

Ms. Laura Bergamini

Date of dispatch to the Parties: 15 March 2018

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I. PROCEDURAL HISTORY

1. On 10 October 2017, Mr. Víctor Pey Casado and Foundation President Allende (together, the “**Applicants**” or the “**Claimants**”) filed with the International Centre for Settlement of Investment Disputes (“**ICSID**”) an application for annulment (the “**Annulment Application**”) and request for stay of enforcement (the “**Stay Request**”) in respect to the award rendered on 13 September 2016, as rectified by the decision on rectification of the award dated 6 October 2017 in *Víctor Pey Casado and Foundation President Allende* (ICSID Case No. ARB/98/2) (the “**Resubmission Award**”). The Annulment Application was filed pursuant to Article 52 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “**Convention**”) and Rule 50 of the ICSID Rules of Procedure for Arbitration Proceedings (“**Arbitration Rules**”).
2. On 20 October 2017, the Secretary-General of ICSID registered the Annulment Application and notified the Applicants and the Republic of Chile (the “**Respondent**” or “**Chile**”) (together, the “**Parties**”) that the enforcement of the Award was provisionally stayed pursuant to Arbitration Rule 54(2).
3. On 20 December 2017, the *ad hoc* Committee (the “**Committee**”) was constituted in accordance with Article 52(3) of the Convention. Its members are: Professor Rolf Knieper (German), serving as President, Professor Nicolas Angelet (Belgian) and Professor Yuejiao Zhang (Chinese). All members were appointed by the Chairman of the Administrative Council.
4. On the same date, the Parties were informed that the annulment proceeding was deemed to have begun on that date, and that Mr. Benjamin Garel, ICSID Legal Counsel, would serve as Secretary of the Committee. The Parties were later informed that Ms. Laura Bergamini, ICSID Legal Counsel, would replace Mr. Garel as Secretary of the Committee.

5. On 21 December 2017, the Applicants submitted a request for the production of certain documents, along with exhibits C-208 through C-212.
6. On 22 December 2017, the ICSID Secretariat wrote to the Parties regarding arrangements for the first session and circulated a draft Procedural Order No. 1 providing *inter alia* directions on the conduct of the proceedings. By the same letter, the ICSID Secretariat informed the Parties that the Committee had decided to extend the provisional stay of enforcement until it had heard the Parties and made a final determination on the matter, and invited the Respondent to provide its observations on the Stay Request and the Applicants' request for production of documents.
7. On 30 December 2017, the Applicants submitted their comments on draft Procedural Order No. 1.
8. By letter of 9 January 2018, the Committee decided to hold a first comprehensive session on 16 February 2018 in person at the World Bank in Washington, D.C. It also decided that, during the first session, the Parties and the Committee would discuss the outstanding procedural issues, the Stay Request and the Applicants' request for production of documents.
9. On 19 January 2018, the Respondent submitted its comments on draft Procedural Order No. 1 and its observations on the Stay Request, along with exhibits RA-0001 through RA-0033 and legal authorities RALA-0001 through RALA-12 (the "**Observations**").
10. On 22 January 2018, the Applicants requested leave to respond to the Respondent's Observations.
11. On 23 January 2018, the Committee set forth the time limits for additional written submissions from the Parties on the Stay Request and the Applicants' request for production of documents.

12. On 2 February 2018, the Applicants filed their response to the Respondent's Observations along with exhibits C-214 through C-241 (the "**Response**"), and submitted further comments on draft Procedural Order No. 1.
13. On 12 February 2018, the Respondent submitted its reply to the Applicants' Response (the "**Second Submission**") along with exhibits RA-0034 and RA-0035, as well as legal authorities RALA-0013 through RALA-0015.
14. On 16 February 2018, the Committee held the first session. The Parties and the Members of the Committee discussed draft Procedural Order No. 1. The Parties discussed the Applicants' request for document production and agreed that the procedural timetable would include a document production phase relating to certain documents after the first exchange of briefs. Both Parties then presented oral pleadings on the Applicants' request for the stay of enforcement of the Resubmission Award, which were recorded and transcribed. Copies of the transcripts in English and French were transmitted to the Parties on 17 and 22 February 2018, respectively.
15. This decision sets out the Committee's final determination on the Stay Request.

II. THE PARTIES' REQUESTS FOR RELIEF

A. The Applicants' Request

16. The Applicants request to "*suspendre l'exécution de la Sentence de Resoumission jusqu'à ce qu'il se soit prononcé sur la Requête en annulation, conformément à l'article 52(3) de la Convention.*"¹

B. The Respondent's Request

17. The Respondent requests that:
 - a. The Committee "lift the provisional stay of enforcement, reject Claimants' Stay Request, confirm expressly that the Resubmission Award remains binding unless

¹ Annulment Application, para. 288.2.

and until it is annulled, and order Claimants to bear all of the costs and legal fees that Chile has incurred in connection with Claimants' Stay Request."²

- b. The Applicants "place the USD 182,472.79 that they owe to Chile (pursuant to the Resubmission Award and Rectification Decision) in an interest-bearing escrow account, with all such funds to be released to Chile unless the costs-related part of the Resubmission Award is ultimately annulled by the Committee."³
- c. The Applicants "be ordered to request a temporary suspension of the UNCITRAL Proceeding."⁴

III. THE PARTIES' POSITIONS ON THE CONTINUED STAY OF ENFORCEMENT

A. Summary of the Applicants' Position

- 18. The Applicants contend that the circumstances of the present case require the stay of enforcement of the Resubmission Award.⁵
- 19. The Applicants assert in particular that the suspension of the enforcement of the totality of the Resubmission Award is indispensable in order to guarantee the *res iudicata* effect of the first Award rendered on 8 May 2008 and thereby the Respondent's obligation to compensate financially the Applicants' damages caused through the violations of the fair and equitable standard obligations and the continued possession of the Applicants' assets in Chile.⁶
- 20. The Applicants do not contest the binding character of the Resubmission Award but "make a difference with the binding and *res iudicata*."⁷ They submit that "*conformément*

² Respondent's Second Submission, para. 6.

³ Respondent's Observations, p. 14.

⁴ Respondent's Observations, p. 14.

⁵ Annulment Application, paras. 281 to 287; Respondent's Second Submission, paras. 20 to 23; Tr. pp. 261-14 to p. 262-20 and p. 280-5:7.

⁶ Annulment Application, paras. 281 to 283 and 287; Applicants' Response, para. 22.

⁷ Tr. p. 276-9:10.

aux articles 52 et 53(1) de la Convention, le caractère définitif de la Sentence en Resoumission ne peut être affirmé dès lors que celle-ci fait l'objet d'un recours en annulation."⁸

21. Further, they submit that the request for a continued stay of the totality of the Resubmission Award necessarily encompasses the Applicants' condemnation to reimburse part of the costs that the Respondent has incurred during the resubmission proceeding.⁹
22. They allege that, as found by the *ad hoc* committee in *Libananco v. Turkey*, it is not necessary that the award underlying the request for annulment (as well as the stay of enforcement) provide for a pecuniary compensation for damages in order to trigger a stay. The committee granted the stay because the applicant had been ordered to pay the costs of the proceeding.¹⁰
23. The Applicants submit that *ad hoc* committees have "almost systematically granted [a stay] except for exceptional circumstances" and refer in this context to the decision on the first request of annulment.¹¹
24. According to the Applicants, exceptional circumstances do not exist that would justify not granting the stay.
25. First of all, there is no risk that the Applicants will not honour their financial obligations should their request for annulment be rejected. The Applicants have consistently performed their obligations and will continue to do so.¹²

⁸ Applicants' Response, para. 23.

⁹ Applicants' Response, para. 21; Tr. p. 258-2:8 and p. 279-4:10.

¹⁰ Applicants' Response, para. 21; the Applicants refer to *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Decision on Applicant's Request for a Continued Stay of Enforcement of the Award, 7 May 2012.

¹¹ Tr. p. 261-15:21 and p. 280-2:5.

¹² Annulment Application, para. 287.5; Tr. p. 261:15-22 to p. 262-1.

26. At the same time, the Committee should take into account that the proceedings have lasted for 20 years and that all the costs have been borne by a private person and a not-for-profit foundation, despite the fact that their assets have been confiscated by and are still in the possession of the Respondent.¹³
27. Chile will suffer no harm from the suspension of the enforcement.¹⁴
28. On the other hand, the Applicants would be prejudiced by the reimbursement of the costs to the Respondent firstly because it is very burdensome for Mr. Pey and for the Foundation, and secondly because they have experience with Chile being extremely slow and reluctant to honour its financial obligations towards them.¹⁵ The Applicants submit that the Respondent has already asked them to be reimbursed.¹⁶
29. Finally, neither the request for the annulment of the award nor for the stay are motivated by dilatory intentions.¹⁷ The Respondent's allegation that these requests aim at gaining time (in order to proceed with the parallel UNCITRAL arbitration) is completely speculative and fictitious since the UNCITRAL proceeding concerns a different subject matter, unrelated to the present dispute. The UNCITRAL case relates to violations of the Respondent's international obligations that have occurred after the first Award and that the Resubmission Award has explicitly refused to ascertain. Therefore, a possible stay of enforcement of the Resubmission Award is irrelevant to the UNCITRAL proceeding.¹⁸

B. Summary of the Respondent's Position

30. The Respondent objects to the Stay Request for several interrelated reasons.
31. Firstly, the Respondent submits that the Applicants have not requested the continuation of the stay of enforcement of the Resubmission Award as required by Arbitration Rule

¹³ Tr. p. 279-8:16.

¹⁴ Annulment Application, para. 287.4.

¹⁵ Tr. p. 279-8:16 and p. 288-11:18.

¹⁶ Tr. p. 279-7.

¹⁷ Annulment Application, para. 287.6.

¹⁸ Tr. p. 262-16 to p. 264-11.

54(2). The Respondent relies on Schreuer's Commentary of the ICSID Convention, which explains:

Once the *ad hoc* Committee is constituted, the Party seeking a stay of enforcement must direct its request to the Committee. If a provisional stay has been obtained, the Party that wishes to have the stay continued must direct a request to that effect to the *ad hoc* Committee. Otherwise, the stay will be terminated automatically (Arbitration Rule 54(2)).¹⁹

32. Accordingly, the Respondent asserts that the provisional stay of the enforcement, which the Secretary-General has notified to the Parties, was automatically terminated in accordance with Arbitration Rule 54(2).²⁰
33. Further, the Respondent asserts that the request for the stay is improper since in reality it does not address the possible enforcement of the Resubmission Award but “focuses exclusively on the legal status of the Resubmission Award. Thus, the ‘stay’ that Claimants seek is a suspension – during the pendency of this Second Annulment Proceeding – of the binding nature of the Resubmission Award’s findings and conclusions.”²¹
34. In particular, the Respondent asserts that “enforcement” is a specific process which applies only to enforceable obligations without affecting the overall binding character of an award.²²
35. According to the Respondent, “a stay of enforcement, as its name indicates, operates to stay enforcement, which only applies to ‘the pecuniary obligations imposed by [an] award’” (see Article 54(1) of the Convention). In the present case, “[t]hese obligations are restricted to the costs that the Resubmission Award on the Applicants.”²³ “Typically,

¹⁹ C.H. Schreuer, *The ICSID Convention – A Commentary*, 2nd edition, 2009, Article 52, para. 586; Tr. p. 282-13:22 and p. 283-1.

²⁰ Tr. p. 272-15 to p. 273-3.

²¹ Respondent's Observations, pp. 10 s. (footnote omitted).

²² Respondent's Observations, p. 12.

²³ Respondent's Second Submission, para. 3, quoting the ICSID letter dated 23 January 2018.

however, stays of enforcement are not requested unless there is an award of pecuniary damages at stake.”²⁴ Of the 23 publicly available decisions on stay of enforcement, only one decision – rendered in the *Libananco v. Turkey* case – relates to a case where no damages were awarded and the stay targeted the tribunal’s order on costs. The Respondent relies on Schreuer, who explains:²⁵

In *Klöckner I*, the Award had rejected both the claim and the counter-claim. Consequently, there was no opportunity for a stay of enforcement. In *Vivendi I*, the Tribunal had declined to rule on the merits of the claims arising out of the conduct of the Province of Tucuman, so there was no part of the Award’s *dispositif* that warranted a stay. In *Soufraki v. UAE*, the Tribunal had ruled that it lacked jurisdiction so, again, there was no call for a stay of enforcement. Likewise, in *Lucchetti v. Peru*, it was the Claimant that sought annulment of an Award that had concluded that the Tribunal lacked jurisdiction. In such circumstances, a stay of enforcement is inappropriate.

36. Further, the Respondent refers to Article 52(5) of the Convention and asserts that a stay of enforcement of an award is not a trivial matter. The Applicants bear the burden of proving that the circumstances require a stay. The Respondent relies on the decision of the *ad hoc* committee in *OI v. Venezuela*, which found:

[t]he aforementioned provisions of the ICSID Convention and the ICSID Arbitration Rules lead this *ad hoc* Committee to a fundamental conclusion, set forth at the outset, that the continuation of the stay of enforcement in the ICSID system is far from automatic. ICSID Convention Article 52(5) provides that the stay shall continue if an *ad hoc* committee considers that “the circumstances so require.” Said article does not use other less categorical verbs, such as “recommend,” “deserve,” “justify” or similar words, but resorts to the imperative verb “require.”²⁶

37. The Respondent argues that the Stay Request is driven by dilatory intentions and is abusive. In particular, the request for annulment and the Stay Request must be considered

²⁴ Respondent’s Observations, p. 9.

²⁵ Respondent’s Observations, p. 9.

²⁶ *OI European Group B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/11/25), Decision on Stay of Enforcement of the Award, 4 April 2016, para. 89.

in a wider context and in light of the new claim that the Applicants have brought under the UNCITRAL rules on the same subject matter. The improper intention behind the Annulment Application and the Stay Request is to convince the UNCITRAL tribunal to disregard this proceeding and the binding character of the Resubmission Award, and allow the re-litigation of the dispute.²⁷ In order to avoid parallel proceedings, the Respondent requests that the Committee order a temporary suspension of the UNCITRAL proceeding.²⁸

38. Furthermore, the Respondent submits that there is a real risk that the Applicants will not comply with the Resubmission Award, as evidenced by the fact that the Applicants have explicitly refused to pay the costs awarded in the Resubmission Award at a time when the enforcement of the Award was not stayed. The Respondent adds that it is “entitled to the benefits of immediate payment” of the Resubmission Award and that, in the event the stay is continued, “the only way to preserve those benefits for Chile would be through the granting of interest.”²⁹ Accordingly, the Respondent requests that, if the Committee decides to uphold the Stay Request, the Applicants be ordered to place an amount corresponding to the costs awarded in the Resubmission Award into an interest-bearing escrow account.³⁰
39. Finally, the Respondent refutes the Applicants’ allegation that the Respondent would not reimburse the costs if the Resubmission Award is annulled. There is no risk that the Applicants will not be reimbursed if their request for annulment is upheld.³¹

IV. AD HOC COMMITTEE’S ANALYSIS

²⁷ Respondent’s Observations, pp. 7 and 13; Respondent’s Second Submission, para. 3; Tr. p. 266-1 to p. 268-10.

²⁸ Respondent’s Observations, p. 14.

²⁹ Respondent’s Observations, p. 14; the Respondent quotes *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Decision of Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 5 May 2009, para. 27.

³⁰ Respondent’s Observations, pp. 13 and 14.

³¹ Tr. p. 289-18 to p. 290-19.

40. The Committee recalls that in accordance with Article 53(1) of the Convention, an award is “binding” on the parties and is not subject to any appeal or to any other remedy except those provided for in the Convention. Further, each party shall “abide by and comply with” the award “except to the extent that enforcement shall have been stayed.”
41. Pursuant to Article 52(5) of the Convention, an *ad hoc* committee “may” stay the “enforcement” of an award “if it considers that the circumstances so require.” The party that requests the stay has to specify these circumstances in its application (Arbitration Rule 54(4)).
42. Neither the Convention nor the Arbitration Rules identify the circumstances in which a stay of enforcement may be granted, or specify the criteria that committees should apply to assess the relevance of such circumstances and their relative weight. Their determination is left to the *ad hoc* committees’ “broad discretion,” as expressed by the term “may” in Article 52(5) of the Convention and as it is generally accepted.
43. The Committee further recalls that it has decided to continue the provisional stay, which the Parties were notified of by the Secretary-General.³² The Secretary-General’s notification was an administrative act based on Arbitration Rule 54(2), which was adopted without analyzing the merits of the application. The Committee simply extended the stay in its original provisional form, again without analyzing the merits, in order to give each Party the opportunity to present its observations before rendering a reasoned decision as required by Arbitration Rule 54(4).
44. As a consequence of the Committee’s decision, Arbitration Rule 54(2) does not apply and the provisional stay is not automatically terminated, as suggested by the Respondent, but continued “until the Committee rules on such request,” as unequivocally provided for in Article 52(5) of the Convention.

³² ICSID letter dated 22 December 2018.

45. The Applicants request that the Committee order the stay of the enforcement of the totality of the Resubmission Award. When asked by the Committee,³³ the Applicants confirmed that their Stay Request encompasses the obligation to reimburse certain costs to the Respondent. As noted above, the Respondent objects to the Applicants' Stay Request, arguing that the Resubmission Award does not impose pecuniary obligations on the Applicants— except for the costs – and therefore there is nothing in the Resubmission Award which can be enforced or stayed.
46. In the award rendered on 13 September 2016, the Tribunal decided:
- 1) That Ms Coral Pey Grebe cannot be regarded as a claimant in her own right in these resubmission proceedings;
 - 2) That, as has already been indicated by the First Tribunal, its formal recognition of the Claimants' rights and its finding that they were the victims of a denial of justice constitutes in itself a form of satisfaction under international law for the Respondent's breach of Article 4 of the BIT;
 - 3) That the Claimants, bearing the relevant burden of proof, have failed to prove any further quantifiable injury to themselves caused by the breach of Article 4 as found by the First Tribunal in its Award;
 - 4) That the Tribunal cannot therefore make any award to the Claimants of financial compensation on this account;
 - 5) That the Claimants' subsidiary claim on the basis of unjust enrichment is without legal foundation;
 - 6) That there are no grounds in the circumstances of the case for the award of moral damages either to Mr Pey Casado or to the Foundation;
 - 7) That the arbitration costs of these resubmission proceedings are to be shared in the proportion of three quarters to be borne by the Claimants and one quarter by the Respondent, with the result that the Claimants shall reimburse to the Respondent the sum of US\$159,509.43;
 - 8) That all other claims are dismissed.³⁴

³³ ICSID letter dated 23 January 2018.

³⁴ Resubmission Award, para. 255.

47. In its decision on rectification of the award, the Tribunal decided:

(a) Paragraphs 61, 66, and 198, and paragraph 2 of the *dispositif*, of the Resubmission Award are rectified as set out in paragraphs 52, 53, 54, and 55 above.

(b) The costs incurred by the Centre in respect to the Rectification Proceedings, including the costs resulting from the associated challenges to Sir Franklin Berman and Mr Veeder, shall be borne by the Claimants and the Claimants shall therefore reimburse to the Respondent the sum of US\$ 22,963.36, in addition to the amount specified in paragraph 255 of the Resubmission Award. The Tribunal makes no further order as to costs.³⁵

48. Article 53(1) of the Convention provides:

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.

49. Article 54(1) of the Convention adds:

Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.

50. The Committee interprets these provisions in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties. It provides:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

51. The application of this rule of interpretation bears out that Article 53 of the Convention leaves the binding character of the award untouched, until and unless the award is annulled.

³⁵ Decision on rectification of the award of 6 October 2017, para. 62.

52. This follows, first, from the ordinary meaning of the terms of Article 53 of the Convention. Article 53(1)'s first sentence is concerned with the "binding" nature of the award. The second sentence of Article 53(1) further provides that each party shall "abide by and comply" with the terms of the award except to the extent that "enforcement" shall have been stayed. It follows from these terms that, while a stay of enforcement suspends a party's obligation to abide by and comply with the award (that is to say, to implement it), the stay of the enforcement does not suspend the binding force of the award. It also follows from the provision's terms that all that can be stayed is the enforcement of the award.
53. This is further confirmed by the object and purpose of the Convention and its relevant provisions. The stay of enforcement is embedded in the wider and self-contained system of possible remedies against ICSID awards and in the right of a party to test before an annulment committee its good faith conviction that the award is fundamentally flawed under Article 52 of the Convention (either because the tribunal was improperly constituted or even corrupted, or because the tribunal acted in manifest excess of its powers, violated fundamental rules of due process or failed to give reasons for its decision).
54. Article 52 of the Convention is concerned with the integrity of ICSID arbitration proceedings and seeks to reconcile the finality of the award with the need to prevent flagrant cases of excess of jurisdiction and injustice.
55. Article 53 of the Convention provides that the award is not subject to an appeal procedure by a superior adjudication body with the powers to scrutinize the merits of the award, suspend its binding effect during the appeal phase or issue a new decision that replaces the original award. The drafters of the Convention have opted against such a mechanism and in favour of a restricted review mechanism, which leaves the binding character of the award untouched until and unless the award is annulled because of fundamental flaws.

56. In contrast to an appeal body, an annulment committee does not have the power to replace an annulled award by “its own decision on the merits; it can extinguish a *res iudicata* but it cannot create a new one.”³⁶ Rather, a new decision may only be rendered by a new tribunal if one of the parties so requests (Article 52(6) of the Convention).
57. Article 53(1) of the Convention exempts a party from complying with the obligations imposed by an award to the extent that the enforcement of those obligations is stayed. The provision does not revoke the binding character of the award but allows an order to inhibit the other party from enforcing the rights that the award has granted, despite its ongoing binding character. The stay of enforcement does not stay the effect of the award. It can be modified or terminated at any moment at the discretion of the *ad hoc* committee (Arbitration Rule 54(3)).
58. Accordingly, in light of all the above, the Committee finds that the binding force of an ICSID award cannot be stayed pending an annulment proceeding. The award remains necessarily binding (in French, “*obligatoire à l’égard des parties*”) and its *res iudicata* effect remains untouched, until and unless the award is annulled. Neither the wording of the Convention nor its object and purpose allow a distinction between the binding character and the *res iudicata* effect of an ICSID award, as suggested by the Applicants.
59. It thereby follows that the Applicants’ objective, as the Committee understands it, to restore the *res iudicata* effect of the initial award of 2008, cannot be achieved through the request for annulment of the Resubmission Award and even less through the Stay Request. The only possible effect of an annulment decision would be in fact the extinction of the *res iudicata* of the Resubmission Award, and not the automatic re-establishment of the binding force of the annulled parts of the initial award.
60. The Parties have discussed whether the Resubmission Award lends itself to a stay of enforcement. For that matter, the decisive question is whether the award has conferred

³⁶ C.H. Schreuer, *The ICSID Convention – A Commentary*, 2nd edition, 2009, Article 52, para. 491.

rights to the Respondent that it could enforce against the Applicants if the Respondent were not hindered by a stay.

61. The dispositive part of the Resubmission Award has determined the status of Ms. Coral Pey Grebe; it has confirmed that the Respondent has violated its obligation not to treat the Applicants unfairly; it has rejected a claim for pecuniary compensation for want of proof; it has rejected claims for unjust enrichment and moral damages; it has ordered the Applicants to reimburse part of the costs to the Respondent. The dispositive part of the decision on rectification has corrected certain paragraphs of the Resubmission Award and ordered the Applicants to reimburse costs to the Respondent.
62. Except for the decisions on costs, none of the above-mentioned determinations confer rights to the Respondent that it could enforce. Accordingly, a stay of the enforcement of paragraphs 1 to 5 and 7 of the *dispositif* of the award rendered on 13 September 2016, and paragraph 1 of the *dispositif* of the decision on rectification, would be futile and is not warranted.
63. Therefore, the Committee rejects the Applicants' request to continue the stay of the enforcement of paragraphs 1 to 5 and 7 of the *dispositif* of the award rendered on 13 September 2016, and paragraph 1 of the *dispositif* of the decision on rectification.
64. This decision is confirmed (rather than contradicted) by the committee's decision in *Libananco v. Turkey*. In that case, the applicant seemingly recognized that a request for a stay of the enforcement of the tribunal's findings on jurisdiction would be futile because those findings did not establish enforceable rights. Accordingly, the applicant did not request the stay of the enforcement of those findings but limited its request to the part of the *dispositif* that imposed on it the obligation to reimburse costs to the Respondent.³⁷

³⁷ *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Decision on Applicant's Request for a Continued Stay of Enforcement of the Award, 7 May 2012, para. 11.

65. The committee in *Libananco v. Turkey* decided that the stay was warranted because the applicant “has a clear interest in obtaining a continued stay of enforcement of the order on reimbursement and cost compensation, this being an interest which should be balanced against the Respondent’s interest in enforcing this part of the Award at an early point in time.” In balancing the interests of both parties, the committee was of the view that the applicant’s “interest in a continued stay of enforcement pending the outcome of the annulment proceeding should be given more weight than the Respondent’s interest in immediate enforcement.”³⁸
66. This Committee shares the *Libananco v. Turkey*’s committee’s opinion that the enforcement of an order to reimburse costs may be stayed even if the other parts of the *dispositif* of the award are not enforceable and thus cannot be stayed.
67. As provided by Article 52(5) of the Convention, the Committee has to exercise its discretion when deciding whether and to what extent to grant a request for a stay.
68. In taking its decision, the Committee will have regard to the specific factual circumstances of the present case and to previous practice of *ad hoc* committees, although it is not bound by rules of precedent. In this respect, the Applicants refer to the decision of the *ad hoc* committee in the first annulment proceeding, which found:

Turning first to the Republic’s Request that the stay of enforcement of the Award should be continued pending its decision on the Application, the Committee notes 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 leads the Committee to the conclusion that, absent unusual circumstances, the granting of a stay of enforcement pending the outcome of the annulment proceedings has now become almost automatic.

In the present case, the Committee is satisfied that the Republic has discharged its burden of proving that there are no unusual

³⁸ *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8), Decision on Applicant’s Request for a Continued Stay of Enforcement of the Award, 7 May 2012, paras. 47 and 54.

circumstances and that all the factors which the Republic has referred to support the continuation of the stay of enforcement of the Award pending the Committee's decision and it so rules.³⁹

69. The Respondent points to decisions that contradict the approach quoted above, and argues as follows:

We heard Claimant's counsel say that suspension--that the stays are systematically granted except for exceptional circumstances, and while it's true that for a long time stays were, in fact, granted routinely, if you focus only on the jurisprudence of the last 5 or 10 years, you will find that actually a majority of the decisions have, in fact, either lifted the stay or have imposed conditions.⁴⁰

70. The Committee has taken note of the difference in opinion of different committees. The Committee observes that, indeed, in recent years some committees have taken a more restrictive approach in exercising their discretion, although the majority still lean toward the approach adopted by the first annulment committee in the present dispute.
71. Although not being bound, the Committee cannot ignore that there has been a reasoned decision in the present case granting stay of enforcement in favour of the Respondent. The respect for procedural fairness and equality provides strong arguments for accepting the first committee's approach in the present phase of the proceeding and applying an interpretative standard for the exercise of the Committee's discretion, which does not put the Applicants in a less favourable position than the Respondent in the previous annulment proceeding.
72. The Committee is even more willing to follow this approach because it believes that it would be inappropriate to reject a request for a stay when the applicant pursues its legitimate right to have the award examined for fundamental institutional and procedural propriety in good faith and absent dilatory intentions.

³⁹ *Victor Pey Casado and Foundation Presidente Allende v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on the Republic of Chile's Application for a Stay of Enforcement of the Award, 5 May 2010, paras. 25 s. (footnotes omitted).

⁴⁰ Tr. p. 283-9:17.

73. With these considerations in mind, the Committee will weigh the interests of the Parties and examine whether unusual circumstances exist that require the termination of the stay of the enforcement.
74. The Applicants submit that they have always honored their financial obligations and have the firm intention to continue to do so. Further, they stress the financial burden that this case has put on a private claimant and a foundation, and note that the Respondent will suffer no harm from the postponement of the payment until the possible rejection of the Annulment Request. The Respondent objects to this statement and refers to an exchange of correspondence confirming that in February 2017, the Applicants refused to reimburse the costs of the resubmission proceeding, even though the enforcement of the Resubmission Award had not yet been stayed at that time.⁴¹
75. The Committee has weighed these arguments and finds that the balance tips in favour of the Applicants. In fact, the Applicants have conducted these proceedings for 20 years without repudiating the obligations that were placed on them. Their refusal to pay the costs of the Resubmission Award before the stay of its enforcement does not constitute a repudiation that should cause the Committee to consider otherwise. The Committee does not see a major risk for the Respondent that the Applicants will not finally pay the costs if the annulment decision should be in the Respondent's favour. At the same time, the actual costs of the annulment proceeding put a burden on the Applicants that would be aggravated by the immediate reimbursement of the costs for the resubmission proceeding. Further, the Parties have agreed to a procedural calendar that will allow this proceeding to conclude in an appropriate period.
76. Finally, the Respondent asserts that the requests for annulment and for stay of the enforcement have been introduced with dilatory intentions in an attempt to "game the system" (as their objectives is not to obtain the annulment of the Resubmission Award

⁴¹ Respondent's Observations, p. 13.

but convince the UNCITRAL tribunal that the Resubmission Award is not binding).⁴² The Respondent requests that the Committee order the Applicants to suspend the UNCITRAL proceeding temporarily.

77. The Committee observes that the need for the Committee to take measures so as to prevent the Applicants from using a stay of enforcement in the present proceedings to argue in the context of the UNCITRAL proceeding that the Resubmission Award is not binding, has become moot in the light of its previous findings regarding the binding nature of the Resubmission Award, the effects of a request for annulment and for a stay of enforcement. These findings suffice to prevent the Committee's decision on the Stay Request from being used in the way feared by the Respondent.
78. In addition, the Applicants argue that the UNCITRAL proceedings concern a subject matter which the Tribunal had explicitly refused to treat, as explained in paragraph 216 of the Resubmission Award. The Committee sees benefit in quoting this part of the Resubmission Award in its entirety:

The Tribunal should also interpolate at this point that part of the argument addressed to it by the Claimants in these resubmission proceedings was to the effect that the actions of the Respondent, since the handing down of the First Award, constituted a new denial of justice for which compensation is due, and can be awarded in these resubmission proceedings. This is an argument that the Tribunal must reject outright. The reason is not only that allegations of that kind would have to be subjected to a proper process of evidence and proof before they could properly come to decision in an arbitral process (which indeed they would); it is quite simply that the entire argument falls plainly outside the jurisdiction of the present Tribunal, which (as already indicated) is limited, under Article 52 of the ICSID Convention and Rule 55 of the ICSID Arbitration Rules, exclusively to 'the dispute' or such parts of it as remain in being after the annulment. That can only be taken to refer to 'the dispute' that had been submitted to arbitration in the first place, the critical date for which was the Claimants' original request for arbitration. Issues arising between the Parties after that date –

⁴² Tr. p 264-1:7; Chile's first session power-point presentation, slide 15.

and still more so issues arising out of post-Award conduct – cannot by any stretch of the imagination fall within the scope of resubmission proceedings under the provisions cited above, and the Tribunal sees no need to say more about the matter in this Award.⁴³

79. The Committee confirms that the effects of *res iudicata* and *lis pendens* foreclose the Applicants from activating “any other remedy” in connection with the claims that were brought to ICSID arbitration as explicitly provided for in Article 26 of the Convention. The Applicants are thus precluded from presenting the same claims brought in this case to another national or international adjudication body and such body should reject such claims for lack of jurisdiction.
80. However, these principles do not apply to new claims, i.e. for claims allegedly resulting from BIT breaches that have occurred after the arbitral proceedings in the present case were initiated. In the words of the Tribunal in the resubmission proceeding, “the critical date” is the Claimants’ original request for arbitration, *i.e.* 3 November 1997.
81. To the extent that the UNCITRAL proceeding concerns such new claims, the Committee does not find support for concluding that the Annulment Application and the Stay Request were filed for dilatory reasons. At the same time, the Committee notes that, in accordance with Article 26 Convention, the Parties have consented to exclude the pursuit of any other remedy (including an UNCITRAL arbitration) for the claims which were brought in this case. Accordingly, the Committee invites the Parties not to pursue claims identical to those brought in these arbitration proceedings before any other national or international adjudication body.
82. In conclusion of the foregoing, the Committee decides to continue the stay of the enforcement regarding the costs awarded by the Tribunal.

⁴³ Resubmission Award, para. 216.

83. The Respondent requests that, in the event the stay is continued, the Committee order the Applicants to place the total amount of the costs, *i.e.* USD 182,472.79, in an interest-bearing escrow account. The Applicants object to this request.
84. The Committee has no doubt that it has the power to condition the stay of the enforcement, if and to the extent such condition is warranted.
85. As noted above, the Respondent argues that the requested security is necessary because the Respondent is “entitled to the benefits of immediate payment” of the Resubmission Award and, if the stay is continued, “the only way to preserve those benefits for Chile would be through the granting of interest.”⁴⁴
86. However, the Committee considers that the Applicants’ obligation to make an immediate payment in favour of the Respondent does not exist if a stay of enforcement is granted, as is the case here.
87. In addition, the Respondent’s claim for the preservation of the economic value of its claim for costs depends on the outcome of the present annulment proceedings and, if applicable, new proceedings on the merits. Depending on the outcome of the proceeding, the claim for interests on the costs may either be moot, or may be made the subject matter of a specific ascertainment.
88. Accordingly, the Respondent’s request to condition the stay is rejected.

V. COSTS

89. The Respondent requests that the Committee orders the Applicants to bear all of the costs and legal fees that Chile has incurred in connection with the Stay Request. The Applicants have not made an application on costs.

⁴⁴ Respondent’s Observations, p. 14.

90. The Committee reserves the matter for determination together with the decision on the Annulment Application.

VI. DECISION

91. In light of the above, the Committee decides and declares as follows:
- a. The stay of enforcement of paragraphs 1 to 5 and 7 of the *dispositif* of the Resubmission Award and paragraph 1 of the *dispositif* of the decision on rectification is lifted;
 - b. The stay of enforcement of paragraph 6 of the *dispositif* of the Resubmission Award and paragraph 2 of the *dispositif* of the decision on rectification is unconditionally continued;
 - c. The decision on the allocation of costs is reserved until the final decision on the Annulment Application; and
 - d. All other requests are rejected.

Signed

Professor Nicolas Angelet
Member of the *ad hoc* Committee

Signed

Professor Yuejiao Zhang
Member of the *ad hoc* Committee

Signed

Professor Rolf Knieper
President of the *ad hoc* Committee