

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**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**

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**DECISION ON THE REPUBLIC OF CHILE'S REQUEST  
FOR SUPPLEMENTATION OF THE ANNULMENT  
DECISION**

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Date of Dispatch to the Parties: 11 September 2013

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## **THE COMMITTEE**

Composed as above,

After deliberation,

Makes the following Decision:

### **I. INTRODUCTION**

1. On 18 December 2012, the present Committee issued its Decision on the Application for Annulment of the Republic of Chile (the “**Decision on Annulment**”) 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” on one side (the “**Claimants**”) and the Republic of Chile (the “**Republic**” or “**Respondent**” or “**Chile**”) on the other side.
2. On 1 February 2013, the Republic submitted an electronic copy of a Request for Supplementation of the Annulment Decision dated 18 December 2012 (“**Supplementation Request**”) regarding the application of moratory interest to the amounts owed for costs and expenses pursuant to the unannulled portion of the Award, the Tribunal’s decision on revision dated 18 November 2009 (the “**Decision on Revision**”) and the Decision on Annulment.
3. The Secretariat of the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) transmitted the Supplementation Request to the Claimants on 4 February 2013 upon receipt of the hard copies. The ICSID Secretary-General registered the Supplementation Request on 7 February 2013 and transmitted it to the members of the Committee.
4. By letter of 8 February 2013, the Committee informed the parties that pursuant to Rules 49(3) of the Rules of Procedure for Arbitration Proceedings (the “**Arbitration Rules**”), it had to fix time limits for the parties to file their observations on the Supplementation Request and determine the procedure for its consideration. The Committee indicated that, in the

circumstances, it believed that two rounds of written observations would be necessary to properly consider the Supplementation Request and invited the parties to agree on the schedule for such filings. The Committee further specified that the Republic should be the first to file observations with a view to substantiate its Supplementation Request.

5. By letter of 21 February 2013, the Committee confirmed the schedule agreed upon by the parties for the filing of their written observations and indicated that it did not foresee the need for a hearing on this matter. Accordingly, the Republic filed its observations in support of its Supplementation Request on 4 March 2013 (the “**Observations**”), followed by a translation into Spanish of the filing on 11 March 2013. The Claimants filed a response on 29 March 2013 (the “**Response**”), followed by its translation into Spanish on 3 April 2013. The Respondent submitted a reply on 12 April 2013 (the “**Reply**”) and its Spanish translation on 19 April 2013. Finally, the Claimants filed a rejoinder on 26 April 2013 (the “**Rejoinder**”) and its Spanish version on 2 May 2013.
6. In parallel, the Respondent submitted on 3 April 2013 a request for a stay of enforcement of the unannulled portions of the Award. Upon the invitation of the Committee, the Claimants filed observations on the request on 8 April 2013.
7. Having decided to give priority to the consideration of that request, the Committee issued its decision rejecting the Respondent’s request on 25 April 2013, with reasons to follow later. The Committee issued its reasoned decision on 16 May 2013.
8. On 30 July and 31 July 2013, the Claimants and the Respondent respectively submitted their statements of costs in relation to the Supplementation Request.

## II. THE PARTIES' CONTENTIONS

### A. The Republic's Contentions

#### 1. *General*

9. According to the Republic, a Supplementary Decision would serve the purpose of finally determining the applicability or non-applicability of interest to the costs awarded to the Republic, on the one hand, and to the Claimants, on the other hand, in the Arbitration, Revision, and/or Annulment Proceedings in this case.<sup>1</sup>
10. The Republic submits that it complied with all the specific requirements that must be satisfied in a request for Supplementary Decision as set out in Arbitration Rule 49(1). The Republic has (a) identified the award to which it relates, in this case, the Decision on Annulment dated 18 December 2012, (b) indicated the date of the request which falls within the 45-day deadline established by Article 49(2) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**Convention**"), (c) stated in detail the question which, in its opinion, the Committee omitted to decide in the Decision on Annulment, and (d) has lodged the required fee.<sup>2</sup>
11. The Republic avers that, by virtue of Article 52(4) of Convention, Article 42(2) of the Convention is applicable not only to an award but also to annulment decisions.<sup>3</sup>
12. The Republic maintains that a supplementary decision is appropriate in the present case and, in support of its argument, quoting Professor Christoph Schreuer's *Commentary*, writes that "an omission in the relevant decision with respect to the determination of costs is a classic example of the type of issue that can be addressed by means of a supplementary decision pursuant to Art. 49(2)."<sup>4</sup> Professor Schreuer wrote:

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<sup>1</sup> See Supplementation Request at para. 2.

<sup>2</sup> *Ibid.* at paras. 6-10.

<sup>3</sup> See Observations at para. 6.

<sup>4</sup> *Ibid.* at para. 7.

“Supplementation under Art. 49(2) will be useful where the omission is due to an oversight on the part of the tribunal which is likely to be corrected by it once this oversight is pointed out. This oversight should however concern a ‘question’ before the tribunal; that is, an issue that affects the award and is of sufficient importance to justify the procedure leading to a supplemental decision. **Typical examples would be the inadvertent omission of an item in the calculation of damages or of a factor determining costs.**” [Emphasis in the Observations]

## ***2. Interest on the Amounts Awarded by the Tribunal***

13. The Republic submits that it “wishes to comply in good faith with the portion of the Award [...] which relates to costs, and wishes to do so as promptly as possible”<sup>5</sup> but that, in order to do so, it requires a precise determination by the Committee of the final amounts of costs.<sup>6</sup>
14. The Republic contends that the Decision on Annulment did not determine “whether paragraph 7 of the Award’s *dispositif* [providing for moratory interest] should be deemed to apply to the costs amounts identified in paragraphs 5 and 6 of such *dispositif* during the periods of time in which the Revision and Annulment proceedings were pending”<sup>7</sup> and “the impact (if any) of the fact that the enforcement of the Award had been stayed continuously from a point in time that predated the expiry of the 90-day grace period contemplated in the Award’s *dispositif*, until the issuance of the Annulment Decision itself.”<sup>8</sup>

## ***3. Interest on the Amounts due for Costs of the Revision Proceeding***

15. The Republic states that “the Annulment Decision also did not determine whether interest should apply to the costs awarded to the Republic in the Revision Decision dated 18 November 2009 (the ‘Revision Decision’), which had rejected Claimants’ application for

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<sup>5</sup> See Supplementation Request at para. 3.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.* at para. 27.

<sup>8</sup> See Observations at para. 3.

revision of the Award, and imposed on Claimants the obligation of bearing the totality of the costs of the Revision Proceeding.”<sup>9</sup>

#### **4. Interest on the Amounts due for Costs of the Annulment Proceeding**

16. The Republic also submits that “the Annulment Decision did not determine whether interest should apply to the costs that must now be reimbursed to Chile given the Committee’s imposition on Claimants of the obligation to pay half of the costs of the Annulment Proceeding.”<sup>10</sup>

17. Finally, and in connection with the Annulment Proceedings, the Republic requests from the Committee the determination, if applicable, of the *dies a quo* on which any interest began to accrue, and the determination of the lapse of time (if any) during which the accrual was interrupted.<sup>11</sup>

#### **5. Necessity of a Supplementary Decision**

18. As for the necessity of a supplementary decision, the Republic argues that “[i]nternational tribunals have understood that an Article 49(2) request for supplementation should concern the omission of a material issue but should not seek to modify a decision already made,”<sup>12</sup> and affirms that the “the Republic has no interest in reopening arguments or reexamining the Committee’s reasoning.”<sup>13</sup>

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<sup>9</sup> *Ibid.* at para. 4.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.* at paras. 28 and 32.

<sup>12</sup> *Ibid.* at para. 24, citing *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision of the *ad hoc* Committee on the Request for Supplementation and Rectification of its Decision of 28 May 2003 (hereinafter “*Aguas Supplementary and Rectification Decision*”); *Alex Genin and others. v. Republic of Estonia*, ICSID Case No. ARB/99/2, Decision on Claimants’ Request for Supplementary Decisions and Rectification of 4 April 2002 (hereinafter “*Genin Supplementary and Rectification Decision*”); *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Claimants’ Request For Supplementary Decision of 8 July 2008 (hereinafter “*LG&E Supplementary Decision*”); *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Decision on Respondent’s Request for a Supplementary Decision of 13 September 2004.

<sup>13</sup> *Ibid.* at para. 27.

19. The Republic submits that, while it is able to calculate the total amounts of costs, without interest, which it owes to the Claimants, it is not able to determine the precise amounts owed, until the Committee makes certain determinations concerning the application of interest to this sum.<sup>14</sup>
20. According to the Republic, “this question creates, in effect, a legal impossibility in obtaining the required governmental authorization for payment of the award. Chilean laws stipulating the procedure for payment of an award with public funds are of public order (*de orden público*), and thereby subject to particular legal and constitutional safeguards that demand a much greater degree of legal precision and certainty than the laws governing the payment of judgments between private entities. In short, when the exact amounts at issue remain undetermined, it is not possible for the Republic to proceed with a good faith execution of the Award.”<sup>15</sup>

#### **6. *The Republic’s Good Faith***

21. The Republic also alleges that “because enforcement of the Award was subject to a continuous stay from before the moratory interest was triggered until the time the Annulment Decision was issued, it cannot be said that the Republic failed ‘to comply with a judgment or an arbitral award without delay’, or entered into the situation of default that Paragraph 7 of the Award’s *dispositif* was intended to avert.”<sup>16</sup>
22. More specifically, the Republic contends that the moratory interest provided for in paragraph 7 of the Award’s *dispositif* “was to become applicable only if the Republic were to fail to pay within the required ninety-day grace period.”<sup>17</sup> The Republic asserts that it “never reached the point of default, because the tribunal granted a stay of enforcement of the Award starting from 5 August 2008 – the day *before* the moratory interest was to begin accruing pursuant to

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<sup>14</sup> *Ibid.* at paras. 20-21.

<sup>15</sup> *Ibid.* at para. 30.

<sup>16</sup> *Ibid.* at para. 33.

<sup>17</sup> See Reply at para. 12.



the Award” and “[s]uch stay then remained continuously in force [...] until 18 December 2012, when the stay was lifted in the Decision on Annulment.”<sup>18</sup> [Emphasis in the original]

23. Finally, in the words of the Republic, it assumes that “at the very least, interest should not accrue during this period [i.e., the period of time in which the Revision Proceeding was ongoing], given that the corresponding delay was attributable entirely to the Claimants, for having commenced a Revision Proceeding in which it was ultimately entirely unsuccessful and with respect to which it was obligated to pay the total sum of the costs.”<sup>19</sup>

## **7. *The Republic’s Requests***

24. The Republic requests that the Committee:<sup>20</sup>

- a. Issue a Supplementary Decision to the Annulment Decision wherein it determines a sum certain the Republic is obligated to pay Claimants, after assessing:
  - i. how the moratory interest contemplated in Paragraph 7 of the Award’s *dispositif* should be applied to the amounts in costs and expenses the Republic is obligated to pay Claimants, given that the Republic was never in default due to the stays of enforcement that were in effect from 5 August 2008 until 18 December 2012;
  - ii. if applicable, the *dies a quo* of any interest on costs imposed on the Republic for the Arbitration proceeding, and whether the relevant accrual period was interrupted for any lapse of time;
  - iii. whether interest has accrued — and continues to accrue— on the costs imposed on Claimants for the Revision Proceeding;
  - iv. if applicable, the *dies a quo* of any interest on costs for the Revision Proceeding, and whether the relevant accrual period was interrupted for any lapse of time;
  - v. whether interest should be deemed to accrue on the costs imposed on Claimants for the Annulment Proceeding; and
  - vi. if applicable, the *dies a quo* of any interest on costs for the Annulment Proceeding, and whether the relevant accrual period was interrupted for any lapse of time.
- b. Order Claimants to pay the full costs of this proceeding, plus applicable interest.”

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<sup>18</sup> *Ibid.*

<sup>19</sup> See Observations at para. 35.

<sup>20</sup> See Reply at para. 32.

## **B. The Claimants' Contentions**

### **1. *Waiver of the Right to Submit the Request for a Supplementary Decision***

25. In their Response to the Republic's Supplementation Request, the Claimants aver firstly that, in the Annulment Proceeding, the Republic never asked the Committee to decide the specific requests that it is making now.<sup>21</sup> Accordingly, a supplementary decision by the Committee on this issue, argue the Claimants, would violate the letter and spirit of Article 49(2) of the Convention, as it would amount to revisiting the merits of the Decision on Annulment.<sup>22</sup> In the words of the Claimants, "si l'article 49(2) de la Convention CIRDI permet de remédier à une omission du tribunal arbitral, il doit impérativement s'agir d'une question déjà posée au tribunal et sur laquelle il avait omis de se prononcer. Le Professeur Schreuer souligne que l'obtention d'une décision supplémentaire est liée à l'article 48(3) de cette même Convention qui dispose que la sentence doit répondre à toutes les questions posées au tribunal arbitral."<sup>23</sup>
26. According to the Claimants, "dans la mesure où les demandes formulées par la Défenderesse dans sa demande de décision supplémentaire sont des demandes nouvelles, il ne peut en aucun cas s'agir d'une omission au sens de l'article 49(2)."<sup>24</sup>
27. The Claimants quote Professor Christoph Schreuer's *Commentary* in respect of Article 46 of the Convention and argue that moratory interest must be denied when it has not been specifically requested. Professor Schreuer wrote:

"Post-award (moratory) interest is usually addressed separately by the tribunals. It must be requested expressly by the claimant. In some cases post-award interest was denied because it had not been

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<sup>21</sup> See Response at para. 3.

<sup>22</sup> *Ibid.* at para. 4.

<sup>23</sup> *Ibid.* at para. 8.

<sup>24</sup> *Ibid.* at para. 9.

specifically mentioned in claimants' memorials."<sup>25</sup> [Emphasis in the Response and footnote omitted]

## **2. Interest on the Amounts Awarded by the Tribunal**

28. According to the Claimants, the Republic seeks to cap the amount that it is required to pay “soit en suspendant l’application des intérêts moratoires lorsque ces derniers ont été décidés, soit en appliquant des intérêts moratoires en l’absence de décision,”<sup>26</sup> and they conclude that “il est de principe que si un tribunal ou un comité ne prévoit pas dans sa sentence ou sa décision l’octroi d’intérêts moratoires, il convient de considérer qu’il a décidé de ne pas en accorder.”<sup>27</sup>
29. The Claimants refer the Committee to decisions of annulment committees which, they say, determined that “[l]es intérêts moratoires courent pendant la suspension de l’exécution provisoire et ce jusqu’à la date du complet paiement.”<sup>28</sup>
30. The Claimants also submit that the Tribunal determined in paragraph 7 of the Award’s *dispositif* the interest to be applied, the *dies a quo* and the *dies at quem*,<sup>29</sup> that the Republic has never before requested the modification of this part of the *dispositif* and that this paragraph 7 was specifically confirmed by the Annulment Committee.<sup>30</sup> The Claimants further state that, even if the Republic had made such a request, the Committee would not have had jurisdiction to modify this paragraph of the Award without annulling it.<sup>31</sup>

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<sup>25</sup> *Ibid.* at para. 13.

<sup>26</sup> *Ibid.* at para. 12.

<sup>27</sup> *Ibid.* at para. 15.

<sup>28</sup> *Ibid.* at para. 27-35 citing *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Stay of Enforcement of the Award, 4 Nov. 2008, para. 40; *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Continued Stay of Enforcement of the Award, 28 Dec. 2007, (hereinafter “*Azurix Decision on the Stay of Enforcement*”), para. 40; *CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Award of 12 May 2005, p. 139; and Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award, 1 Sept. 2006, (hereinafter “*CMS Decision on the Stay of Enforcement*”), p. 50; *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award of 20 May 1992; *MTD Equity Sdn. Bhd. and MTD Chile S.A. c. Republic of Chile*, ICSID Case No. ARB/01/7, Award of 25 May 2004.

<sup>29</sup> *Ibid.* at para. 36.

<sup>30</sup> *Ibid.* at paras. 37-38.

<sup>31</sup> *Ibid.* at para. 42.

31. The Claimants contend that the interest awarded by the Tribunal must be considered as having accrued according to the terms of the Award, without any modification. Accordingly, “les intérêts composés au taux de 5% annuel ont commencé à courir depuis le 8 mai 2008 (date d’envoi de la Sentence) sans interruption et continueront de courir jusqu’au complet paiement des sommes dues.”<sup>32</sup>

**3. *Interest on the Amounts due for Costs of the Revision Proceeding***

32. As for the costs of the Revision Proceeding, the Claimants affirm that the Republic had never before requested the application of interest to these costs, and that in the absence of such an express request, the Tribunal could not grant them. The Claimants further contend that the Republic cannot submit such a request to the Committee since it has no jurisdiction to address it.<sup>33</sup>

**4. *Interest on the Amounts due for Costs of the Annulment Proceeding***

33. As for the costs of the Annulment Proceeding, the Claimants state that the Republic never requested that interest accrue on those costs and, in addition, that the Committee had clearly decided to order the Claimants to reimburse half of the costs of this proceeding to Chile without interest.<sup>34</sup>

**5. *Necessity of a Supplementary Decision***

34. The Claimants also submit that a supplementary decision is not necessary for the Republic to fulfill its obligations under the Decision on Annulment. They write that “la Sentence était immédiatement exécutoire et la République du Chili avait 90 jours à partir du 8 mai 2008 pour payer les sommes auxquelles elle a été condamnée, à défaut de quoi et conformément à

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<sup>32</sup> *Ibid.* at para. 43.

<sup>33</sup> *Ibid.* at paras. 50-51.

<sup>34</sup> *Ibid.* at para. 54.

la Sentence, des intérêts composés seraient appliqués à compter de la date d’envoi de la Sentence.”<sup>35</sup>

35. The Claimants recall that the Republic itself has repeatedly stated that “le préjudice des Demanderesses du fait de la suspension provisoire de l’exécution de la Sentence [était] compensé par la capitalisation des intérêts pendant cette période.”<sup>36</sup> “Ainsi, le maintien de la production d’intérêts capitalisés pendant la suspension provisoire de l’exécution de la Sentence a été proposé et accepté par la République du Chili elle-même à chaque fois qu’elle a argumenté en faveur de la suspension d’exécution.”<sup>37</sup> The Claimants submit that the Republic cannot now revoke its statements and reduce the amount owed pursuant to the Award.<sup>38</sup>

36. The Claimants allege that the Republic has not introduced any evidence with respect to the impossibility of obtaining the required governmental authorization for payment of the amounts owed and add that, in any event, “conformément aux articles 26 et 27 de la Convention de Vienne sur le droit des traités, de 1969, ratifiée par l’Espagne et le Chili, une partie ne peut invoquer les dispositions de son droit interne comme justifiant la non-exécution d’un traité.”<sup>39</sup>

## **6. *The Republic’s Dilatory Tactic***

37. The Claimants maintain that the purpose of the Republic’s Request for Supplementation is to delay the payment of the amount owed and state that “[l]a demande de décision supplémentaire procède de la même volonté des autorités chiliennes de ne pas indemniser les parties Demanderesses ; de ne pas exécuter ni reconnaître conformément à ses termes la Sentence. Cette procédure, initiée le 1er février 2013, a vocation à constituer un alibi en vue de suspendre la procédure en exécution forcée, préalablement initiée en Espagne (*i.e.* le 14

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<sup>35</sup> *Ibid.* at para. 20.

<sup>36</sup> *Ibid.* at paras. 21-26.

<sup>37</sup> *Ibid.* at para. 24.

<sup>38</sup> *Ibid.* at para 24.

<sup>39</sup> See Rejoinder at para. 29.

janvier 2013), afin d'obtenir le paiement des sommes dues au titre des points 5 à 7 du Dispositif de la Sentence. En effet, le 22 mars 2013, le représentant de la République du Chili dans cet arbitrage déclarait que les termes de la sentence '*ne seraient pas fermes, il existe un recours en cours aux EE.UU.*' (déclarations du 22 mars 2013 de l'agent de la République du Chili -le Vice-Président du Comité des Investissements Etrangers- publiés dans des nombreux moyens de communication)."<sup>40</sup>

38. The Claimants allege that this Request is nothing more than a dilatory tactic: “[o]n relèvera que les deux suspensions de l’exécution de la Sentence ont été accordées sur la seule demande et à l’avantage exclusif de la Défenderesse, et ne sauraient par aucune approche être présentées comme autre chose que des interdictions faites aux Demanderesses de mettre en œuvre l’exigence de paiement du principal et des intérêts figurant aux points 5 à 7 du dispositif de la Sentence, jusqu’à la levée de ces suspensions - retard au seul détriment des Demanderesses estimé, selon le Tribunal Arbitral et le Comité *ad hoc* respectivement, compensé par l’accumulation des intérêts moratoires à laquelle il donnerait lieu.”<sup>41</sup>

## **7. *Modification of the Republic’s Original Request***

39. The Claimants argue that, in its Reply, the Republic has modified its original request for a supplementary decision by requesting that the Committee “issue a Supplementary Decision to the Annulment Decision wherein it determines a sum certain the Republic is obligated to pay Claimants [...]”.<sup>42</sup> The Claimants submit that “[e]n premier lieu, on rappellera que le Comité *ad hoc* n’étant pas compétent pour décider de la demande initiale de la République du Chili, il est également incompétent pour statuer sur cette ‘nouvelle’ demande. Comme cela a déjà été indiqué, les demandes relatives à la Sentence et à la décision du Tribunal dans la procédure en révision auraient dû être formulées, en application de l’article 49(2) de la Convention, dans les 45 jours suivants la décision concernée, en particulier lorsque celle-ci

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<sup>40</sup> See Response at para. 78.

<sup>41</sup> *Ibid.* at para. 82.

<sup>42</sup> See Rejoinder at para. 3.

n'a fait l'objet d'aucune demande devant le Comité dans le cadre de la procédure en annulation.”<sup>43</sup>

40. The Claimants also note that the Republic has already taken advantage of the Request for Supplementation in order to avoid the payment of the sum owed to the Claimants and, in support of this assertion, affirm that “en effet, le 22 avril 2013 la République a introduit la présente demande dans la procédure en Espagne à l'appui de son opposition, tous azimuts, à l'exécution de la Sentence.”<sup>44</sup>

### **8. *The Claimants' Requests***

41. The Claimants request that the Committee dismiss the Request for Supplementation of the Decision on Annulment and, confirm (1) that paragraphs 1 to 3 and 5 to 8 of the Award's *dispositif* are *res judicata*; (2) that according to the Award as well as the 18 November 2009 and 18 December 2012 Decisions, the Claimants are not required to pay interest to the Republic; (3) that the Committee did not omit to decide any question; and (4) that the Republic should pay for all the costs of the present proceeding, including the representational costs, with additional compound interest from two weeks following the Committee's Decision at an annual rate of 5 percent until complete payment.<sup>45</sup>

### **C. The Republic's Reply to the Claimants' Contention on Waiver by the Republic of the Right to Submit the Request for a Supplementary Decision**

42. With respect to the Claimants' argument regarding the waiver of the rights to submit the Supplementation Request, the Republic submits that “it is preposterous to assert that the Republic waived its right to have these questions decided by not having requested expressly that the Committee do so during the Annulment Proceeding. A party cannot be expected to

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<sup>43</sup> *Ibid.* at para. 4.

<sup>44</sup> *Ibid.* at para. 44.

<sup>45</sup> *Ibid.* at para. 49.

anticipate and raise issues that it reasonably expects the tribunal or Committee to address as a result of the questions that such party did in fact present to the adjudicator for decision.”<sup>46</sup>

43. The Republic also states that “under Claimants’ logic, the Republic would have had to expand its request for relief to account for every conceivable outcome, expressly asking the Committee to decide all issues that could logically flow from each potential outcome. This cannot possibly be the applicable standard, as it would defy common sense. An annulment applicant in the ICSID system is entitled to expect that the annulment decision, in addressing the issues explicitly raised for determination, will also address all residual questions that logically flow from its decision on the issues presented.”<sup>47</sup>

### **III. RELEVANT ICSID CONVENTION ARTICLES AND ICSID ARBITRATION RULES**

44. 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.”

45. Article 52(4) of the Convention provides:

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

46. Arbitration Rule 49 applies to the present case and provides:

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<sup>46</sup> See Reply at para. 7.

<sup>47</sup> *Ibid.* at para. 9.



### **“Supplementary Decisions and Rectification**

(1) Within 45 days after the date on which the award was rendered, either party may request, pursuant to Article 49(2) of the Convention, a supplementary decision on, or the rectification of, the award. Such a request shall be addressed in writing to the Secretary-General. The request shall:

- (a) identify the award to which it relates;
- (b) indicate the date of the request;
- (c) state in detail:
  - (i) any question which, in the opinion of the requesting party, the Tribunal omitted to decide in the award; and
  - (ii) any error in the award which the requesting party seeks to have rectified; and
- (d) be accompanied by a fee for lodging the request.

(2) Upon receipt of the request and of the lodging fee, the Secretary-General shall forthwith:

- (a) register the request;
- (b) notify the parties of the registration;
- (c) transmit to the other party a copy of the request and of any accompanying documentation; and
- (d) transmit to each member of the Tribunal a copy of the notice of registration, together with a copy of the request and of any accompanying documentation.

(3) The President of the Tribunal shall consult the members on whether it is necessary for the Tribunal to meet in order to consider the request. The Tribunal shall fix a time limit for the parties to file their observations on the request and shall determine the procedure for its consideration.

(4) Rules 46-48 shall apply, *mutatis mutandis*, to any decision of the Tribunal pursuant to this Rule.

(5) If a request is received by the Secretary-General more than 45 days after the award was rendered, he shall refuse to register the request and so inform forthwith the requesting party.”

## **IV. LEGAL STANDARDS**

47. Before addressing the issues raised by the Republic’s Supplementation Request, the Committee considers it appropriate to review the standards applicable for the supplementation of an annulment decision.

48. Both parties agree that the purpose of the procedure set forth in Article 49(2) of the Convention is to give an opportunity to a tribunal (or a committee pursuant to Article 52(4) of the Convention) to decide a question that it would have omitted to resolve in its award (or decision for a committee).<sup>48</sup>
49. The parties also agree that a request for supplementation may not be used to ask a committee to revisit in any way the merits of its decision.<sup>49</sup>
50. The Committee subscribes to these views and notes that the power of a committee to decide a question which it had omitted to decide is discretionary. Article 49(2) of the Convention provides that the committee “*may* after notice to the other party decide any question which it had omitted to decide” (Emphasis added).
51. In the present case, the central issue lies with the precise questions which the Committee would have omitted to decide.
52. On the one hand, the Respondent submits that the Committee should issue a supplementary decision in order that the exact sum it owes to the Claimants may be determined. To arrive at such determination, the Republic asks four series of questions to the Committee. They are: (i) whether any moratory interest should be applied to the amount of costs and expenses that the Republic is obligated to pay to the Claimants pursuant to the Award and, if so, what is the *dies a quo* for the calculation of such interest; (ii) whether the Claimants should pay interest on the amount due for the costs of the Revision Proceeding which were granted by the Tribunal, and, if applicable, what is the *dies a quo* for the application of such interest; (iii) whether the Claimants should pay interest on the amount due for the costs of the Annulment Proceeding which were granted by the Committee, and, if applicable, what is the *dies a quo* for the application of such interest; and (iv) more generally, what is the impact of the Stay of Enforcement of the Award on any interest which may have accrued.<sup>50</sup>

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<sup>48</sup> See Observations at para. 22 and Response at para. 3.

<sup>49</sup> See Observations at para. 24; Response at para. 4; *LG&E Supplementary Decision* at para. 16; and *Aguas Supplementary and Rectification Decision* at para. 11.

<sup>50</sup> See Reply at para. 32.

53. On the other hand, the Claimants argue that none of these questions were actually submitted by the Respondent to the Committee and that, therefore, the Committee should reject the Supplementation Request.<sup>51</sup>

54. It is well settled that a committee is only competent to issue a supplementary decision if it failed to deal with and dispose of a question that was put to it. In the *Genin* case, the tribunal noted:<sup>52</sup>

“10. With respect to the supplementary decisions requested by Claimants, the Tribunal considers it necessary to state that these do not concern questions which it omitted to decide. Rather, they relate to issues that Claimants themselves failed virtually altogether to address in either their written or oral submissions in the arbitration.”

55. The Committee finds apposite the statement of the *Enron* tribunal that:<sup>53</sup>

“42. The issue lies in a different proposition, namely whether this can be done by a **tribunal in the absence of a request to that effect**. The Tribunal concluded and now reiterates that, just as it must decide a matter that has been duly submitted and petitioned, the same is conversely true that this cannot be done if not requested, as this would amount to an excess of power which, as the Respondent explains, can result in a decision that is *ultra petita* and thus subject to the sanction of an annulment.” [Emphasis added]

56. Although the decision of an *ad hoc* committee may not be the subject of an annulment, it is evident that a committee cannot decide a matter that has not been submitted to it. In the Background Paper on Annulment For the Administrative Council of ICSID, the Committee notes the following:<sup>54</sup>

“52. The procedure before an *ad hoc* Committee normally corresponds to the procedure before a Tribunal. *Ad hoc* Committees must afford both parties the right to be heard and must respect the equality of the parties.”

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<sup>51</sup> See Rejoinder at paras. 4 and 7.

<sup>52</sup> See *Genin Supplementary and Rectification Decision* at para. 10.

<sup>53</sup> See *Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on Claimants’ Request for Rectification and/or Supplementary Decision of 25 October 2007 (hereinafter “*Enron Rectification and Supplementary Decision*”) at para. 42.

<sup>54</sup> See Background Paper on Annulment for the Administrative Council of ICSID, dated 10 August 2012, available at <http://www.worldbank.org/icsid>, (hereinafter “*ICSID Background Paper on Annulment*”) at para. 52.

57. The Committee is further comforted in its view by the obligation which it has pursuant to Article 48(3) of the Convention (and Article 52(4)) to “deal with every question” submitted to it. The corollary of this obligation is that every question must have been submitted to it.<sup>55</sup>

58. The Respondent replies to this argument of the Claimants by stating that an issue can be deemed subsumed within, or implicit in the larger question presented.<sup>56</sup> It adds that:<sup>57</sup>

“Under Claimants’ logic, the Republic would have had to expand its request for relief to account for every conceivable outcome, expressly asking the Committee to decide all issues that could logically flow from each potential outcome. This cannot possibly be the applicable standard, as it would defy common sense. An annulment applicant in the ICSID system is entitled to expect that the annulment decision, in addressing the issues explicitly raised for determination, will also address all residual questions that logically flow from its decision on the issues presented.”  
[Emphasis added]

59. While the Committee does not agree that it is competent to address all residual questions that flow logically from its decision on the questions actually submitted to it by the Republic, it does agree that it is competent to deal with and dispose of a question that has been impliedly raised by the Respondent.

60. The tribunal in *Enron* adopted a similar approach:<sup>58</sup>

“43. In this case it is quite evident that pre-award interest was expressly requested, but not so with respect to post-award interest. If not expressly requested, the next question for the Tribunal is whether post-award interest can be considered as having been impliedly requested.”

61. The Committee will therefore analyze each question put to it by the Republic in its Request to determine if the question was, expressly or impliedly, submitted to it in the Annulment Proceeding.

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<sup>55</sup> See Rejoinder at paras. 4 and 7.

<sup>56</sup> See Reply at para. 8.

<sup>57</sup> *Ibid.* at para. 9.

<sup>58</sup> See *Enron Rectification and Supplementary Decision* at para. 43.

62. Although the arguments of the parties were presented differently, the Committee finds it more convenient to address “*seriatim*” the four categories of questions detailed above: (i) questions related to the Award; (ii) questions related to the Decision on Revision; (iii) questions related to the Decision on Annulment; and (iv) the impact of the stay of enforcement of the Award.

## V. COMMITTEE’S ANALYSIS

63. The Committee recalls that, by virtue of its Supplementation Request, Chile seeks mainly to determine the exact amount it needs to pay to the Claimants pursuant to paragraphs 5 to 7 of the operative part of the Award.

64. While such a determination appears to come within the scope of the Committee’s competence since the Committee annulled the Award partially and also issued a decision on the costs of the proceeding, the Committee needs to address each specific category of questions in order to determine whether it is competent to answer Chile’s central question.

### A. Questions Related to the Award

65. The Respondent phrased its questions related to the Award as follows:<sup>59</sup>

- i. how the moratory interest contemplated in Paragraph 7 of the Award’s *dispositif* should be applied to the amounts in costs and expenses the Republic is obligated to pay Claimants, given that the Republic was never in default due to the stays of enforcement that were in effect from 5 August 2008 until 18 December 2012;
- ii. if applicable, the *dies a quo* of any interest on costs imposed on the Republic for the Arbitration proceeding, and whether the relevant accrual period was interrupted for any lapse of time.”

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<sup>59</sup> See Reply at para. 32.

66. In connection with these questions, Chile alleges that:<sup>60</sup>

“Although in the Annulment Decision the Committee decided that Paragraph 7 of the Award’s *dispositif* was not annulled, it did not decide if the moratory interest contemplated therein ought to be applied to the costs and expenses awarded Claimants. Such a determination was necessary given the dual fact that at no time was the Republic ever in default of the Award, and that the Republic was not unsuccessful in its annulment petition.”

67. According to the Respondent, it never reached the point of default because a stay of enforcement of the Award was granted by the Tribunal starting from 5 August 2008 and confirmed by the Committee until 18 December 2012 when the stay was lifted in the Decision on Annulment.<sup>61</sup>

68. For the following reasons, the Committee considers that it is not competent to decide these questions.

69. The Respondent in its Supplementation Request is asking questions regarding the implementation of the Award that were not put to the Committee during the Annulment Proceeding. Indeed, the Respondent never raised any ground for annulment with respect to the granting of moratory interest by the Tribunal. While it asked for the annulment of the entirety of the Award, it did not specifically raise the question of post-award interest.

70. Assuming, *arguendo*, that this question could be a question subsumed in the ones related to the consequences of a partial annulment, the Committee recalls that it was very clear on the consequences of the partial annulment which it issued. Paragraph 4 of the operative part of the Decision on Annulment provides as follows:

“4. Finds that paragraphs 1 to 3 and 5 to 8 of the *dispositif* as well as the body of the Award but for Section VIII are *res judicata*.”

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<sup>60</sup> *Ibid.* at para. 6.

<sup>61</sup> *Ibid.* at para. 12.

71. For ease of reference, the Committee will set out paragraphs 5 to 7 of the *dispositif* of the Award:

- “5. met à la charge de la défenderesse une contribution aux frais et dépens exposés par les demanderesse, d’un montant de USD 2.000.000,- (deux millions) ;
6. décide que les frais de procédure seront supportés par les parties dans la proportion de : 3/4 du montant total (soit USD 3.136.893,34) pour la défenderesse et 1/4 du montant total (soit 1.045.631,11) pour les demanderesse ; ordonne en conséquence à la défenderesse de payer aux demanderesse la somme de USD 1.045.579,35 ;
7. ordonne à la République du Chili de procéder au paiement dans un délai de 90 jours à compter de la date d’envoi de la présente sentence, des sommes figurant dans le présent dispositif (points 4, 5 et 6), faute de quoi le montant portera intérêts composés annuellement au taux de 5%, à compter de la date d’envoi de la présente sentence jusqu’à celle du parfait paiement.” [Emphasis added]

72. As is abundantly clear, the Tribunal granted post-award interest accruing from 8 May 2008, date of dispatch of the Award, until full payment. The Tribunal did not include in its Award any circumstance where the Respondent could be relieved from its obligation to pay interest. Accordingly, the Committee, which was not asked any question about moratory interest, confirmed the *res judicata* effect of these parts of the Award which were not annulled, including paragraph 7 of the *dispositif*.

73. It appears to the Committee that the Respondent is requesting an interpretation of the Award rather than a decision from the Committee in respect of questions it would have omitted to decide.

74. The interpretation of an award is available to assist the parties with a question of practical relevance for an award’s implementation.<sup>62</sup> Under Article 50 of the Convention, a request for interpretation must however be submitted to the tribunal that has rendered the award.

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<sup>62</sup> See *Wena Hotels Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/98/4), Decision on the Claimant’s Application for Interpretation of the Arbitral Award dated December 8, 2000 of 31 October 2005, at paras. 87-88.

75. In addition, annulment decisions are not subject to interpretation under the Convention. The Committee notes that Article 50 of the Convention which provides for the interpretation of an award is excluded from the list of provisions of the Convention which apply “*mutadis mutandis*” to annulment proceedings.<sup>63</sup>
76. In the view of the Committee, this exclusion, in the context of one of the central objects of the Convention, to wit, the finality of awards, makes perfect sense. Otherwise, the finality of awards could be jeopardized which would run contrary to the intention of the drafters of the Convention.
77. As was stated in the *ICSID Background Paper on Annulment*, “[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.”<sup>64</sup>
78. Since there cannot be any interpretation of an annulment decision, it stands to reason that there can never be an interpretation of an award by a committee after it has rendered its annulment decision.
79. Accordingly, the Respondent’s Supplementation Request related to these questions is rejected.

**B. Questions related to the Revision Proceeding**

80. The Claimants requested a revision of the Award in June 2008. The request was rejected by the Tribunal on 18 November 2009 and, as a result, the Award was not modified. In its decision, the Tribunal ordered the Claimants to pay the costs of the Revision Proceeding. The relevant part of the *dispositif* reads as follows:

“4) Ordonne, quant aux frais de la présente procédure en révision, qu’ils seront supportés par les Parties demanderesse, qui succombent, pour un montant de 431.000 USD.”

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<sup>63</sup> See Article 52(4) of the Convention.

<sup>64</sup> See *ICSID Background Paper on Annulment* at para. 9.



81. As both parties had advanced the costs of the Revision Proceeding in accordance with Administrative and Financial Regulation 14(3)(d), the Claimants were obliged to reimburse half of the costs to the Respondent.
82. The Republic argues that in order to calculate the sum certain that it must pay the Claimants, it must know the exact amount owed by the Claimants which needs to be subtracted.<sup>65</sup> Accordingly, the Respondent submits that the Committee should decide whether interest applies to the amount owed by the Claimants.
83. The Republic argues that “if moratory interest is deemed applicable with respect to the costs imposed in the Award, such interest should be applied in a similar fashion and terms to the costs imposed on Claimants [...]”<sup>66</sup>
84. The Respondent’s questions related to the Revision proceeding are phrased as follows:<sup>67</sup>
- “iii. whether interest has accrued — and continues to accrue— on the costs imposed on Claimants for the Revision Proceeding;
  - iv. if applicable, the *dies a quo* of any interest on costs for the Revision Proceeding, and whether the relevant accrual period was interrupted for any lapse of time.”
85. For the reasons which follow, the Committee considers that it is not competent to address these questions.
86. Article 52 of the Convention provides that a committee can only review an award. The Committee is of the view that, pursuant to Arbitration Rule 50(3)(b)(i), if the award is followed by a revision, the annulment shall have regard to the award as so revised. However, there cannot be any annulment of a decision rejecting a revision request, which is the case here.
87. The Committee agrees with the Claimants that Chile could have asked these questions to the Tribunal within 45 days of the issuance of the Decision on Revision provided that it had

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<sup>65</sup> See Reply at para. 20.

<sup>66</sup> *Ibid.* at para. 21.

<sup>67</sup> *Ibid.* at para. 32.

claimed such moratory interest during the Revision Proceeding.<sup>68</sup> The Committee also agrees with the Claimants that it is not clear from the record before it whether the Respondent asked for such interest.

88. Accordingly, the Respondent's Supplementation Request related to these questions is rejected.

**C. Questions related to the Annulment Proceeding**

89. With respect to the Decision on Annulment, the Respondent asks the following questions to the Committee:<sup>69</sup>

- “v. whether interest should be deemed to accrue on the costs imposed on Claimants for the Annulment Proceeding; and
- vi. if applicable, the *dies a quo* of any interest on costs for the Annulment Proceeding, and whether the relevant accrual period was interrupted for any lapse of time.”

90. The Committee recalls that, in its 18 December 2012 Decision, it decided *inter alia* that:

- “6. [...] each party shall bear one half of the ICSID costs incurred in connection with this annulment proceeding.”

91. As the advance payments for the Annulment Proceeding were made by the Applicant – Chile – in accordance with Administrative and Financial Regulation 14(3)(e), the Claimants, as a result of the Committee's decision, were obliged to reimburse half of these costs to the Republic.

92. These two questions, on their face, relate to the Decision on Annulment. Accordingly, the Committee must first ascertain whether the Republic had actually put these questions to the Committee.

93. The Committee notes that, in its Memorial on Annulment, the Republic asked the Committee to “award the Republic of Chile all of its costs and expenses associated with this Annulment

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<sup>68</sup> See Response at para. 51.

<sup>69</sup> See Reply at para. 32.

Proceeding, including attorney[s'] fees and all fees and costs incurred in connection with the 'admissibility' objections presented by the Claimants at the outset of the proceeding."<sup>70</sup>

94. In its Reply on Annulment, Chile requested that the Committee "[g]rant the Republic of Chile an appropriate award of costs, fees, and expenses incurred in this annulment proceeding."<sup>71</sup> While the Respondent added a note on the appropriateness of granting costs, it did not claim any post-decision interest on the costs imposed on the Claimants for the Annulment Proceeding.

95. Thus it is clear, and the Committee so finds, that Chile did not expressly request from the Committee interest on costs.

96. Nor, in the view of the Committee, can the Republic's words in its request for relief "grant[ing] an appropriate award of costs..." be considered as an implied request to the Committee for the granting of interest.

97. Accordingly, the Respondent's Supplementation Request related to these questions is rejected.

**D. Impact of the Stay of Enforcement of the Award on Interest**

98. Finally, the Respondent argues that its obligation to pay moratory interest "had not yet begun at all by the time of the Annulment Decision, due to the continuous stay of enforcement of the Award"<sup>72</sup>.

99. More specifically, the Republic asserts that moratory interest accrues during periods in which a stay of enforcement is in place "only if (a) the annulment petitioner was the party that requested the stay; and (b) such party is unsuccessful in its post-award challenge."<sup>73</sup> (Emphasis in original)

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<sup>70</sup> See Respondent's Memorial on Annulment of 10 June 2010 at pp. 368-369.

<sup>71</sup> See Respondent's Reply on Annulment of 22 December 2010 at para. 550.

<sup>72</sup> See Observations at para. 31.

<sup>73</sup> See Reply at para. 13.

100. Thus, concludes the Respondent, since “[it] was never on the losing side of a proceeding that needlessly delayed payment”, the payment of the costs that the Republic owes to the Claimants pursuant to the Award “did not become truly due and payable until the date of the Decision on Annulment”.<sup>74</sup>
101. The precise question asked by the Republic to the Committee is “whether the relevant accrual period was interrupted for any lapse of time”.<sup>75</sup>
102. The Committee reiterates that it is only competent to decide this question if it was posed to it.
103. The Committee acknowledges that, if the Republic had raised the question during the Annulment Proceeding, the Committee could have ruled on the impact of the stay of enforcement – that it granted while the Annulment Proceeding was on-going – on the accrual of interest.
104. However, the Committee finds that the Republic did not ask this specific question, nor could it be said that it was implied, therefore no supplementary decision can be made today.
105. In this connection, the Committee recalls that it dealt specifically with this matter in its Decision of 5 May 2010 on the Republic of Chile’s Application for a Stay of Enforcement of the Award when it stated:

“32. It is a fact that, because of the Application, the satisfaction of the Award (assuming that the Application is unsuccessful) will be delayed. In the view of the Committee that is the only prejudice which the Claimants can point to. But, the provision for compound interest in the ‘dispositif’ of the Award compensates the Claimants adequately for the delay.”

106. The Committee notes that the Republic itself endorsed this position in support of its request for a stay. It submitted expressly that the Claimants would not be prejudiced by a stay:<sup>76</sup>

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<sup>74</sup> *Ibid.* at para. 16.

<sup>75</sup> *Ibid.* at para. 32.

<sup>76</sup> See Letter of 15 January 2010 from the Republic to Ms. Eloïse Obadia at page 4.

“since the Award provides for the granting of compound interest until the date of actual payment on the amount granted. In this regard, the MTD Committee held that ‘... in the Committee’s view Chile has demonstrated that MTD will not be prejudiced by the grant of a stay, other than in respect of the delay which is, however, incidental to the Convention system of annulment and which can be remedied by the payment of interest in the event that the annulment application is unsuccessful.’”

107. In the circumstances, interest has continued to accrue on the sums due pursuant to the Award while the enforcement was stayed.

108. Many *ad hoc* committees have referred to the fact that if an award granted interest, particularly compound interest, up to the date of payment, it was logical to deny a request by the respondent to provide a guarantee in exchange for a stay.

109. For example, in *CMS v. Argentina*, the committee concluded that:<sup>77</sup>

“having regard to this commitment, the Committee is of the opinion that Argentina had demonstrated that CMS will not be prejudiced by the grant of a stay, other than in respect of the delay which is, however, incidental to the Convention system of annulment and which can be remedied by the payment of interest in the event that the annulment application is unsuccessful.”

110. In *Azurix Corp. v. Argentina*, the committee explained that “the determinative issue is whether, beyond delay compensated for by interest, there is any factor here militating for the imposition of security for payment over and above that provided for by Argentina’s commitments under the ICSID Convention.”<sup>78</sup> In this regard, the committee stated that “the Committee does not accept that Azurix suffers any prejudice of a kind warranting the provision of security. The provision for interest compensates for the delay.”<sup>79</sup>

111. In response to the Republic’s argument that it was successful in the Annulment Proceeding and that the remedy of the interest did not come into play, the Committee notes

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<sup>77</sup> *CMS Decision on the Stay of Enforcement* at para 50.

<sup>78</sup> *Azurix Decision on the Stay of Enforcement* at para. 44.

<sup>79</sup> *Ibid.* at para. 40.

that the Respondent was only partially successful. The portions of the Award which were not annulled include paragraph 7 of the *dispositif* reproduced earlier in the present decision.

112. Finally, the Republic argues that the application of moratory interest during the Revision Proceeding would be illogical since, on the one hand, it was initiated by the Claimants and, on the other hand, the Claimants were unsuccessful.

113. The Committee finds this argument of the Republic unpersuasive. There is no basis for differentiating between a stay granted during a proceeding initiated by one party and a stay granted pursuant to a proceeding initiated by the beneficiary of the stay.

114. In so far as the Revision Proceeding is concerned, it was indeed initiated by the Claimants but the Respondent requested the stay. It was Chile's choice to request such a stay and the Committee notes that the Republic could have asked for a partial stay of the Award while paying the amounts due as costs and expenses. The Revision Proceeding was directed to the sections of the Award and the conclusions dealing with liability and damages, not the costs.<sup>80</sup>

115. The Committee concludes that the Republic must pay to the Claimants the sum it owes under paragraphs 5 to 7 of the operative part of Award that are *res judicata*.

116. For the avoidance of doubt, this means that Chile must pay compound interest accruing annually at 5% on USD 2,000,000.00 and USD 1,045,627.78 (sums indicated by the Tribunal in its Award as adjusted by ICSID in April 2013), from 8 May 2008 until 19 June 2013, date when the principal amount due minus the sums owed by the Claimants was paid by Chile. Additionally, compound interest will continue to run on the interest accrued (from 8 May 2008 until 19 June 2013) until complete payment.<sup>81</sup>

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<sup>80</sup> See Application for Revision of 2 June 2008, at para. 54 (CN-244) and Claimants' Reply on Revision of 3 November 2008, at para 73 (CN-245).

<sup>81</sup> The Committee notes that since the Respondent has paid the principal amount on 19 June 2013, the compound interest will continue to run on the balance of the total sum due as of 19 June 2013 minus USD 3,045,627.78.

## VI. COSTS

117. It remains for the Committee to deal with the question of costs for this phase of the Annulment Proceeding. The Republic asked the Committee to “order Claimants to pay the full costs of this proceeding, plus applicable interest.”<sup>82</sup> In turn, the Claimants asked that the Committee order the Republic to pay for all the costs of the present proceeding, including the representational costs, with additional compound interest from two weeks following the Committee’s Decision at an annual rate of 5 percent until complete payment.<sup>83</sup>
118. In its Decision on Annulment, the Committee decided that each party would bear its own litigation costs and that the costs of the proceeding would be shared equally by each party.
119. However, for this phase of the proceeding, the Committee considers that the Respondent should pay the costs of the proceeding. All of the Respondent’s requests were rejected on the ground either that the Committee was not competent or that the questions had not been submitted to it. In addition, the Committee rejected the Respondent’s request for a stay of enforcement of the unannulled portions of the Award. In these circumstances, the Committee finds it appropriate to order that the costs of the present phase of the proceeding should follow the event.
120. The Committee notes that other tribunals and committees have applied the same principle when requests for supplementation and/or rectification were rejected.<sup>84</sup>
121. Therefore, the Committee orders the Republic to pay the ICSID costs incurred in connection with this phase of the Annulment Proceeding. In practical terms, the Committee notes that no further payment needs to be made by Chile since it has already made the advance payments. The ICSID Secretariat will refund any balance of the advance payments after disbursement of the costs.

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<sup>82</sup> See Reply at para. 32.

<sup>83</sup> See Rejoinder at para. 49(5).

<sup>84</sup> See e.g., *Genin Supplementary and Rectification Decision* at para. 20; *Enron Rectification and Supplementary Decision* at para. 58.

122. This being said, the Committee does not find that Chile's Supplementation Request was frivolous or made in bad faith. Consequently, the Committee orders that each party shall bear its own litigation costs and expenses.

## **VII. DECISION**

123. For the foregoing reasons, the Committee unanimously:

1. Rejects the Request for Supplementation of the Decision on Annulment;
2. Confirms that paragraphs 1 to 3 and 5 to 8 of the *dispositif* as well as the body of the Award but for Section VIII are *res judicata*. Consequently, the Republic must pay compound interest at the annual rate of 5% on USD 3,045,627.78 from 8 May 2008 to 19 June 2013 and compound interest at the annual rate of 5% on the interest accrued as from 19 June 2013 until complete payment;
3. Orders the Republic to pay the ICSID costs incurred in connection with this phase of the Annulment Proceeding; and
4. Determines that each party shall bear its own litigation costs and expenses incurred with respect to this part of the Annulment Proceeding.



Done in English, French and Spanish, all versions being equally authoritative.



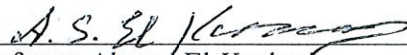
Maître L. Yves Fortier, C.E., Q.C.  
President of the *ad hoc* Committee

Date: 6 September 2013



Professor Piero Bernardini  
Member of the *ad hoc* Committee

Date: August 30, 2013



Professor Ahmed El-Kosheri  
Member of the *ad hoc* Committee

Date: August 25, 2013