

**VÍCTOR PEY CASADO AND FONDATION « PRESIDENTE ALLENDE »**

**Claimants to the arbitration  
Defendants to the annulment**

- v. -

**REPUBLIC OF CHILE**

**Respondent to the arbitration  
Applicant to the annulment**

**ICSID Case No. ARB/98/2  
Annulment Proceeding**

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**DECISION ON THE REPUBLIC OF CHILE'S  
APPLICATION FOR A STAY  
OF ENFORCEMENT OF THE AWARD**

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**Members of the *ad hoc* Committee**

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

*Representing the Claimants*  
Mr. Juan E. Garcés  
Madrid, Spain

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

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

Mr. Jorge Carey and  
Mr. Gonzalo Fernández  
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## **THE COMMITTEE**

Composed as above,

After deliberation,

Makes the following Decision:

### **I. INTRODUCTION**

1. On 5 September 2008, the Republic of Chile (the “**Republic**” or “**Respondent**”) filed with the then Acting Secretary-General of the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) an application (the “**Application**”) requesting the annulment of an award rendered on 8 May 2008 in ICSID Case No. ARB/98/2 (the “**Award**”) between Víctor Pey Casado and the Fondation “President Allende” on one side (the “**Claimants**”) and the Republic on the other side. The Centre acknowledged receipt of the Application and forwarded it to the Claimants on 10 September 2008.
2. The Application was filed while the Award was the subject of a revision proceeding initiated by the Claimants on 2 June 2008. The revision application was registered on 17 June 2008. Further to the Republic’s request of 16 July 2008, the Tribunal, composed of the same arbitrators who had drafted the Award, decided on 5 August 2008 to stay the enforcement of the Award pending its decision. The Tribunal rendered its Decision on 18 November 2009 and lifted the stay.
3. The Secretary-General of ICSID registered the Application on 6 July 2009 and transmitted a Notice of Registration to the parties on that date. In that Notice, the Secretary-General noted that the Application contained a request for a provisional stay of the Award (the “**Request**”) pursuant to Article 52(5) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “**Convention**”) and Rule 54(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the

“**Arbitration Rules**”). She further stated that: “Rule 54(2) of the Arbitration Rules provides that the Secretary-General shall, together with the notice of registration of the application, inform the parties of the provisional stay of the award. I note, however, that in the context of the application for revision of the Arbitral Award, the enforcement of the Arbitral Award was stayed on August 5, 2008 by the Arbitral Tribunal before which the issue is currently pending.”

4. By letter of 2 December 2009, the stay having been lifted by the Tribunal, the Republic asked the Centre to confirm that the execution of the Award was suspended pursuant to Article 52(5) of the Convention providing that: “If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.” The Acting Secretary-General confirmed, by letter of 4 December 2009, that pursuant to Arbitration Rule 54(2), the enforcement of the Award was provisionally stayed.
5. The *ad hoc* Committee was constituted on 22 December 2009. In order to give the parties an opportunity to fully present their observations on the issue of the continuation of the stay of enforcement, and for the Committee to rule on this issue, the parties were asked on 6 January 2010 to file written observations by 15 January 2010 for the Respondent and by 25 January 2010 for the Claimants.
6. The parties complied with the prescribed time limits. Accordingly, the Republic filed its observations on 15 January 2010. It specifically referred to Arbitration Rule 54(2), second sentence, which provides that: “As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated.” Therefore, the Republic asked the Committee to affirmatively extend the stay until such time as it had heard the parties and reached a final determination on continuation of the stay. The Committee did so by letter of 21 January 2010. The Claimants submitted their response on 25 January 2010.

7. The parties were also given the opportunity to make oral presentations during the First Session, held in Paris on 29 January 2010.
8. By Decision of 4 May 2010, the Committee rejected the Claimants' request to declare the Application inadmissible.

## II. THE PARTIES' CONTENTIONS

9. In making its Request, the Republic has submitted as follows:

As far as the Republic is aware, no ICSID tribunal has ever refused to grant a stay of execution pending outcome of the annulment proceeding. Although neither the ICSID Convention nor the Arbitration Rules provide guidance on the type of circumstances that justify a stay under Article 52(5) of the Convention and Rule 54(1) and (2), annulment committees in past cases have identified the following factors as relevant: (i) prospects for compliance with the award; (ii) whether the party seeking the annulment is merely seeking to delay enforcement of the award, (iii) prospects for recoupment of the relevant payment if the award is subsequently annulled; and (iv) prejudice to Claimants by the delay in payment of the award. In the present case, each of these factors support a grant of stay of enforcement of the Award until issuance of the annulment decision.<sup>1</sup> [footnotes omitted]

10. Regarding the prospects for compliance with the Award, the Republic argues, *inter alia*, that:

The recognition that the Republic approaches its obligations and the fulfillment of its national and international commitments and duties with faithfulness and utmost seriousness should itself constitute a sufficient assurance to the Committee and to the Claimants of the Republic's intention and commitment to honor any enforcement obligation in connection with the present case in an appropriate and timely fashion should the Republic's Annulment Application ultimately be rejected. As the Committee in *MTD v. Chile* held, "As a general matter a respondent State seeking annulment should be entitled to a stay provided it gives reasonable assurances that the award, if not annulled, will be complied with."<sup>2</sup> [footnote omitted]

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<sup>1</sup> See letter of 15 January 2010 from the Republic to Ms. Eloïse Obadia at page 2.

<sup>2</sup> *Id.* at page 3.

11. On the issue of whether it is seeking to delay the enforcement of the Award, the Republic makes the following submission:

In fact, Chile itself has repeatedly sought to speed up the annulment proceeding, whereas it was the Claimants who caused the delay of a year and a half by filing a revision petition that was entirely baseless (which is likely why the decision was rendered in favor of Chile with costs).<sup>3</sup> [footnote omitted]

12. In terms of prospects of recoupment, the Republic maintains as follows:

If a stay were denied, Chile were required to honor forthwith the Award, and then the Award were ultimately annulled, the Republic could end up in a situation in which it would have already paid the Award but would then need to recoup the relevant amount from the Claimants. The Republic submits that such recoupment would be very difficult if not impossible – an in any event, very costly – for the Republic. Chile believes the risk of dissipation of assets in the present case is high, and accordingly, so is the risk irreparable harm if a stay were denied. As the *MTD* Tribunal stated in granting Chile a stay, “A respondent State ... should not be exposed, while exercising procedural rights open to it under the Convention, to the risk that payment made under an award which is eventually annulled may turn out to be irrecoverable from an insolvent claimant.” In this situation it would be entirely unfair for the Claimants to benefit from what would have amounted to a windfall in the event the Award were ultimately annulled.<sup>4</sup> [footnote omitted]

13. Finally, the Republic submits that the Claimants would not be prejudiced by a stay:

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.”

In light of the foregoing, staying the award pending the annulment decision would, serve the goals of fairness, efficiency and practicality, by obligating Chile to execute the Award only in the event that Chile’s annulment petition were denied. Chile submits that its public policy and

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<sup>3</sup> *Id.* at page 4.

<sup>4</sup> *Id.*

conduct, along with its legal framework, provide adequate assurances with respect to the fulfillment of its international obligations, including that of arbitration awards and decisions.<sup>5</sup> [footnote omitted]

14. In response to the Republic's Request, the Claimants have taken the position that the Government of Chile cannot guarantee that the Republic will honor its obligations, and refer in this regard to delays relative to the intervention of various Chilean institutions, including the Parliament, the Chilean Executive and the Chilean General *Contralor*. In the words of the Claimants:

Le pouvoir exécutif n'est donc pas en mesure de garantir que ces institutions de la République du Chili exécuteront la Sentence, si elle était confirmée.

Quand bien même, le Gouvernement de la République du Chili prendrait un engagement solennel d'exécution de la Sentence, celui-ci ne serait pas suffisant compte tenu du rôle, légalement établi, desdites institutions chiliennes, sur lesquelles le pouvoir exécutif n'a aucun contrôle légal ni politique.

Il reste qu'à ce jour aucune des institutions concernées de la République du Chili n'a pris aucun engagement formel de ce qu'elle exécutera la Sentence, condition requise pour maintenir la suspension de l'exécution.<sup>6</sup> [footnote omitted]

15. The Claimants also allege that the Republic's Request is abusive. However, in the event a stay of the Award was ordered, the Claimants request that it be made conditional on the provision of some security, either by way of a sequestered account or an irrevocable bank guarantee. Regarding a sequestered account, the Claimants argue:

Cette mesure démontrerait la volonté sans équivoque de la République du Chili de respecter ses engagements internationaux en exécutant promptement la Sentence. Elle attesterait de la bonne foi de la République du Chili en démontrant que la demande en nullité n'a pas de caractère abusif. Le paiement sur un compte séquestre protégerait également la République du Chili du risque de non recouvrement évoqué, sans fondement, dans la lettre du 15 janvier 2010. En outre, contrairement à la mise en place d'une garantie bancaire, l'ouverture

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<sup>5</sup> *Id.*

<sup>6</sup> *See* letter of 25 January 2010 from the Claimants to Ms. Eloïse Obadia at page 3.

d'un compte séquestre auprès d'une banque n'a qu'un coût négligeable largement compensé par la rémunération du compte séquestré.<sup>7</sup>

16. And regarding an irrevocable bank guarantee, the Claimants add:

Contrairement aux termes de la lettre du 15 janvier 2010, la mise en place d'une garantie n'a pas pour effet de placer les investisseurs espagnols dans une position plus favorable si l'Etat du Chili avait la volonté d'exécuter de bonne foi la Sentence, i.e. sans délai. Dès lors la mise en place d'une garantie vient simplement assurer le respect des engagements de l'Etat au titre de la Convention. C'est d'ailleurs ce qu'il ressort de l'analyse des décisions des précédents Comités *ad hoc*, qui ont relevé que le critère essentiel qui s'opposait à la mise en place d'une garantie était l'assurance de recouvrement sans délai du montant de la sentence si celle-ci n'était pas annulée. Cette assurance n'existe pas dans la présente affaire, et ne peut être valablement donnée par un représentant du pouvoir exécutif de la République du Chili dûment autorisé vu les circonstances spécifiques à la présente affaire.<sup>8</sup> [footnote omitted]

17. With respect to the affirmation made by counsel for the Respondent at the First Session that Chile would honor the Award should it not be annulled, the Claimants stated that in view of the developments which took place in relation to the question of the admissibility of the Application, this commitment was not sufficient and some sort of security was required:

En effet, ces événements, qu'ils soient le résultat d'une absence totale de rigueur de l'administration chilienne, comme le prétend aujourd'hui la République, ou de faits bien plus graves tels que nous les soupçonnons, démontrent que, dans cette affaire, l'affirmation faite dans l'audience du 29 janvier 2010 par un conseil que la République du Chili exécutera volontairement et sans délai la Sentence, si elle était confirmée par le Comité *ad hoc*, n'est pas suffisant (sic) pour prononcer la suspension de l'exécution de la Sentence sans contrepartie.<sup>9</sup>

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

<sup>8</sup> *Ibid.* at page 5

<sup>9</sup> See letter of 17 February 2010 from the Claimants to Ms. Eloïse Obadia at page 6.

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

18. Article 27(1) of the Convention states:

No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

19. Article 52 of the Convention provides:

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

[...]

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

[...]

20. Articles 53 to 55 of the Convention provide:

**Article 53**

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this

Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

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

#### **Article 54**

(1) 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. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

#### **Article 55**

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

21. Rule 54 of the Arbitration Rules applies to the present case and provides:

#### **Stay of Enforcement of the Award**

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

(2) If an application for the revision or annulment of an award contains a request for a stay of its enforcement, the Secretary-General shall,

together with the notice of registration, inform both parties of the provisional stay of the award. As soon as the Tribunal or Committee is constituted it shall, if either party requests, rule within 30 days on whether such stay should be continued; unless it decides to continue the stay, it shall automatically be terminated.

(3) If a stay of enforcement has been granted pursuant to paragraph (1) or continued pursuant to paragraph (2), the Tribunal or Committee may at any time modify or terminate the stay at the request of either party. All stays shall automatically terminate on the date on which a final decision is rendered on the application, except that a Committee granting the partial annulment of an award may order the temporary stay of enforcement of the unannulled portion in order to give either party an opportunity to request any new Tribunal constituted pursuant to Article 52(6) of the Convention to grant a stay pursuant to Rule 55(3).

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

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

#### **IV. THE COMMITTEE'S VIEWS**

22. As noted earlier, the Award in the present case was issued on 8 May 2008. On 2 June 2008, the Claimants filed an application for a partial revision of the Award. On 16 July 2008, the Republic requested a stay of enforcement of the Award which was granted by the Tribunal on 5 August 2008. On 18 November 2009, the Tribunal declared inadmissible the Claimants' application for revision and lifted the stay of enforcement of the Award.

23. On 5 September 2008, the Republic filed its Application for Annulment of the Award and applied for a provisional stay of the enforcement of the Award pending the eventual decision of the *ad hoc* Committee to be constituted.

24. On 4 December 2009, pursuant to Arbitration Rule 54(2), the Acting Secretary-General of ICSID informed the parties of the provisional stay of the Award which stay was continued by the Committee on 21 January 2010 pursuant to Article 52(5) of the Convention. The Republic now requests the continuation of the stay of enforcement of the Award pending the Committee’s decision on its Application. The Claimants oppose the continuation of the stay of enforcement.
25. 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<sup>10</sup> 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.<sup>11</sup>
26. In the present case, the Committee is satisfied that the Republic has discharged its burden of proving that there are no unusual circumstances and that all the factors which the Republic has referred to<sup>12</sup> support the continuation of the stay of enforcement of the Award pending the Committee’s decision and it so rules.
27. The Committee will now turn to the Claimants’ request that the stay be made conditional on the provision of some form of security by the Republic. In this connection, the Committee recalls the submission of the Claimants:

[...] les investisseurs espagnols ne s’opposent pas au maintien de la suspension de l’exécution de la Sentence, si, en contre partie, la

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<sup>10</sup> See *Maritime International Nominees Establishment v. Republic of Guinea*, (ICSID Case No. ARB/84/4), Interim Order No. 1, 12 August 1988, 5 *ICSID Rev.—FILJ* 129 (1990) (“**MINE Stay Decision**”).

<sup>11</sup> See *Mitchell v. Democratic Republic of the Congo*, (ICSID Case No. ARB/99/7), Decision on the Stay of Enforcement of the Award of 30 November 2004, 20 *ICSID Rev.—FILJ* 587 (2005), at para. 28, and *Enron v. Argentine Republic*, (ICSID Case No. ARB/01/3), Decision on the Argentine Republic’s Request for a Continued Stay of Enforcement of the Award (7 October 2008) at para. 42 (“**Enron Stay Decision**”).

<sup>12</sup> See letter of 15 January 2010 from Arnold & Porter, L.L.P. to Ms. Eloïse Obadia and Transcript Hearing of 29 January 2010, pages 140 to 157 [English Transcripts].

République du Chili prenait les mesures adéquates suivantes -qui sont du ressort du seul pouvoir exécutif- permettant d'assurer l'exécution effective et immédiate de la Sentence dès sa confirmation.

Le versement des sommes dues par la République du Chili au titre de la Sentence sur un compte séquestre, portant intérêt, détenu par une banque de premier rang domiciliée sur le territoire européen ou nord américain, et qui pourra être actionné par l'une ou l'autre des parties sur présentation de la décision du Comité *ad hoc* confirmant ou annulant la Sentence, serait une mesure adéquate permettant de protéger les intérêts de chacune des parties dans cette procédure.

[...] A titre subsidiaire, les investisseurs espagnols accepteraient en contrepartie de la suspension la mise en place d'une garantie bancaire irrévocable, inconditionnelle et à première demande, émise par une banque de premier rang, domiciliée en Europe ou sur le continent nord américain, au bénéfice des demandeurs pour le montant de la condamnation prononcée dans la Sentence, soit la somme de 16.682.947,17US\$ (date valeur 06-08-2008) plus intérêts de 5% composés annuellement commençant à courir à la date du 6 août 2008, ou toute autre mesure équivalente.<sup>13</sup>

28. While neither the Convention nor the Rules expressly states whether an *ad hoc* Committee can grant a request for a stay subject to conditions, such as a condition that the party seeking the stay provide security for the enforcement of the award in the event that annulment is not granted, the Committee, guided by Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the “**Vienna Convention**”) considers that a discretionary power to allow or deny a remedy “may implicitly include a power to allow the remedy subject to conditions and that such an interpretation would be consistent with the objects and purposes of Article 52(5) [of the Convention], which is designed to enable the *ad hoc* Committee to balance the rights of the parties pending annulment proceedings”.<sup>14</sup>
29. The Committee, therefore, will now consider whether or not the stay should be subject to a condition of security. The Claimants bear the burden of proving that security should be ordered and that, if it is not ordered, they will suffer a prejudice.

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<sup>13</sup> See letter of 25 January 2010 from the Claimants to Ms. Eloïse Obadia at pages 4 and 5.

<sup>14</sup> See Enron Stay Decision at para. 26.

30. The Committee starts from the premise that the primary security for the Claimants' Award is provided through the obligations the Republic of Chile has assumed under Article 54 of the Convention. In addition, the Committee notes that the Republic's constitutional and municipal law enforcement regimes are in conformity with the Convention.<sup>15</sup>
31. The Republic has represented that it has always complied with its international payment obligations and with all judgments or awards of international courts and tribunals. Through its authorized representative, it affirmed before the Committee that it will do so in the present case if the Award is confirmed.<sup>16</sup>
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.<sup>17</sup> As the Azurix *ad hoc* Committee said, after quoting Article 53(1) of the Convention:<sup>18</sup> "... if an *ad hoc* Committee considers, as we do, that the circumstances require a stay, then the award creditor's rights are themselves qualified by the Convention."<sup>19</sup> (emphasis in the original)

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<sup>15</sup> See *Azurix Corporation v. Argentine Republic*, (ICSID Case No. ARB/01/12), Decision on the Continued Stay of Enforcement of the Award (28 December 2007), para. 33 ("**Azurix**"); see also *MTD v. Republic of Chile* (ICSID Case No. ARB/01/7), *Ad hoc* Committee's Decision on the Respondent's Request for a Continued Stay of Execution (1 June 2005), paras. 32 *et seq.* ("**MTD Stay Decision**").

<sup>16</sup> Transcript of 29 January 2010 at page 157, Mr. Di Rosa [English Transcripts].

<sup>17</sup> See, *inter alia*, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (20 August 2007) at para. 40; and *MTD Stay Decision* at para. 36.

<sup>18</sup> Article 53(1): "The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention."

<sup>19</sup> See *Azurix* at para. 42.

33. For the foregoing reasons, the Republic has demonstrated to the satisfaction of the Committee that the Claimants will not be prejudiced by the grant of the stay save in respect of the delay which is incidental to the Convention system of annulment and which will be remedied by the payment of compound interest if the annulment application is unsuccessful.
34. There is an additional reason why the Committee has decided not to require the Republic to provide a guarantee, particularly a guarantee such as the Claimants propose in the present case, as a condition to the continuation of the provisional stay of enforcement of the Award. Not only would the posting of such a guarantee at this time place the Claimants in a much more favourable position than it enjoyed prior to the provisional stay, but it could also prevent the Republic from opposing a legal defense of sovereign immunity under Article 55 of the Convention<sup>20</sup> if, in the event the application was unsuccessful, forcible execution of the Award was resorted to by the Claimants. In the words of the MINE *ad hoc* annulment Committee, to which the Committee subscribes: “such a one-sided change in the relative position of the parties is [not] justified.”<sup>21</sup> It would truly be a form of conditional payment in advance.

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<sup>20</sup> Article 55 of the Convention: “Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.”

<sup>21</sup> See MINE Stay Decision at para. 22 and paras 23-25.

**V. DECISION**

35. For the foregoing reasons, the Committee unanimously:

Continues in force the stay of the enforcement of the Award pending its decision on the Application for Annulment.

Signed on behalf of the Committee on 5 May 2010,

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