School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law

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VÍCTOR PEY CASADO AND FOUNDATION "PRESIDENTE ALLENDE"
v.
REPUBLIC OF CHILE

ICSID CASE NO. ARB/98/2

Case Report by Rebeca Mosquera**
Edited by Lorena Perez***

Annulment decision dispatched to the parties on December 18, 2012, concerning the Award dated May 8, 2008 issued to the parties under the ICSID Convention.

***Ad Hoc* Committee on the Application for Annulment:**
Maître L. Yves Fortier, C.C., Q.C., (President); Professor Piero Bernardini; Professor Ahmed El-Kosheri

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Digest

1. Facts of the Case

Víctor Pey Casado and Foundation "Presidente Allende" ("Claimants") initiated arbitration against the Republic of Chile (the "Republic" or "Respondent" or "Chile" or the "Applicant") in a dispute arising under the 1991 Chile-Spain bilateral investment treaty ("BIT") for confiscation of property belonging to Consorcio Periodístico y Publicitario, S.A. ("CPP") and Empresa Periodística Clarín, Ltda. ("EPC"), both Chilean publishing companies.[1]

Víctor Pey Casado consented to arbitration with the International Centre for Settlement of Investment Disputes ("ICSID Arbitration") by letter dated October 2, 1997,[2] and Foundation "Presidente Allende" gave its consent to such arbitration on October 6, 1997.[3] On November 3, 1997, Claimants filed their Request for Arbitration with the International Centre for Settlement of Investment Disputes ("ICSID Centre")[4] in accordance with the 1991 Chile-Spain BIT.[5] Chile contested jurisdiction on the following grounds: (i) claimants are Chilean and do not meet the requirements of "National of Another Contracting

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[1] *See Víctor Pey Casado and Foundation "Presidente Allende" v. Republic of Chile*, ICSID Case No. ARB/98/2, Introductory Note, ¶ 1 [hereinafter "Introductory Note"]; *Víctor Pey Casado and Foundation "Presidente Allende" v. Republic of Chile*, ICSID Case No. ARB/98/2, Republic of Chile Memorial on Annulment, ¶ 22 (June 10, 2010) [hereinafter "Resp. Mem. Annulment"]; *Víctor Pey Casado and Foundation "Presidente Allende" v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision of the *Ad Hoc* Committee on the Application for Annulment, ¶¶ 23, 24 (December 18, 2012) [hereinafter the "Annulment Decision].

[2] *See Víctor Pey Casado and Foundation "Presidente Allende" v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, ¶ 5 (May 8, 2008) [hereinafter the "Award"]; Resp. Mem. Annulment, ¶ 33; Annulment Decision at ¶ 24.

[3] *See* Award at ¶ 5.

[4] *See Id.* at ¶ 6.

[5] *See* Award at ¶ 2.

State" under the meaning of Article 25(2)(a); (ii) the Foundation "Presidente Allende" is not a protected investor because the assets in question do not constitute foreign investment; (iii) the 1991 BIT does not apply to this dispute because the BIT came into force after the dispute arose; (iv) Claimants chose to initiate litigation before the national courts of Chile, therefore, waiving international jurisdiction; and (v) the Republic has never consented to submit this dispute to ICSID.[6]

The dispute between Claimants and the Republic arose from a coup d'état led by General Augusto Pinochet on September 11, 1973.[7] Mr. Pey Casado, a Spanish national,[8] was associated to the newspaper called "El Clarín."[9] After the coup, the government of Pinochet occupied "El Clarín" and property of the newspaper was seized and confiscated.[10]

Thereafter, Mr. Pey Casado moved to Venezuela, and subsequently, back to Spain.[11] In 1989, Mr. Pey Casado returned to Chile[12] and filed, before a domestic court, a lawsuit seeking compensation for the confiscation of property he had suffered at hands of the military government.[13] However, he was unable to obtain any redress,[14] and filed arbitration before the ICSID claiming that Chile had breached the 1991 BIT.[15]

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[6] *See Id.* at ¶ 12; Annulment Decision at ¶¶ 25 – 54.

[7] *See* Resp. Mem. Annulment at ¶¶ 24, 70.

[8] *See Id.* at ¶ 19.

[9] *See Id*. at ¶ 22.

[10] *See Id*. at ¶¶ 23 – 24, 70.

[11] *See Id.* at ¶ 25.

[12] *See Id*. at ¶ 25.

[13] *See* Award at ¶ 78.

[14] *See Id.* at ¶ 79.

[15] *See Id.* at ¶ 2.

The Tribunal rendered an award on May 8, 2008 (the "Award"), in which it held that the Republic did not breach the 1991 BIT because the expropriation happened before the treaty entered into force.[16] Still, it awarded Claimants US$ 10,132,690.18 in damages to be paid by Chile, due to a denial of justice and violation of the fair and equitable treatment contemplated in Article 4 of the BIT.[17]

On September 5, 2008, the Applicant filed an Annulment Request pursuant to Article 52(1)(b), (d) and (e) of the ICSID Convention.[18] On December 22, 2009,[19] the ICSID Centre constituted an *ad hoc* Committee (the "Committee") to hear the annulment arguments brought by the Republic.[20] This Committee was composed of Professor Piero Bernardini, Professor Ahmed El-Kosheri and Mr. L. Yves Fortier, C.C., Q.C.,[21] , with Mr. Fortier presiding.[22]

2. *Legal Issues Discussed in the Annulment Decision*

2.1 Scope of Review

The Committee began by recognizing that annulment proceedings are distinct from appeals,[23] and that "although obviously important, […] an *ad hoc* committee does not have the jurisdiction to review the merits of the original award in any

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[16] *See* Annulment Decision at ¶¶ 55 – 56.

[17] *See Id.* at ¶ 57- 62.

[18] *See Id.* at ¶ 63.

[19] *See Id.* at ¶ 8.

[20] *See Id.* at ¶¶ 6 – 7.

[21] *See Id.* at ¶ 8.

[22] *See Id.* at ¶ 8.

[23] *See Id.* at ¶ 87.

way."[24] It highlighted that the grounds for annulment proceedings are defined in Article 52(1) of the ICSID Convention.[25]

2.2 Manifest Excess of Powers

Article 52(1)(b) of the ICSID Convention establishes the grounds to invoke annulment under manifest excess of powers.[26] This parameter guarantees that arbitral tribunals do not "exceed their jurisdiction or fail to apply the law agreed upon by the parties."[27] The Committee took into consideration the standard set forth in an annulment decision issued by a similar committee in the *CDC Group PLC v. Seychelles* annulment request (the "CDC Decision"), which considered that in order for there to be grounds for annulment under the manifest excess of power "a tribunal (1) must do something in excess of its powers and (2) that excess must be 'manifest', [which is] a dual requirement."[28] In this respect, the Committee agreed with both parties that a "tribunal can exceed its power in two ways: (i) by inappropriately exercising its jurisdiction (or failing to exercise jurisdiction); and (ii) by failing to apply the proper law."[29]

The Committee also highlighted the distinction made by a similar committee in the annulment decision in *Amco Asia Corp., Pan American Development Ltd. And P.T. Amco Indonesia v. Repuvlic of Indonesia ("Amco I")* as to the difference between

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[24] *See Id.* at ¶ 87 (citing *Soufraki v. The United Arab* Emirates, ICSID Case No. ARB/02/7, Decision on Annulment dated 5 June 2007 at para 20 (hereinafter "*Soufraki* Decision")).

[25] *See* Annulment Decision at ¶ 87

[26] *See Id.* ¶ 65.

[27] *See Id.* ¶ 65 (referencing Christoph Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press, 2009) Art. 52 at paras. 132 – 133 (hereinafter "*Schreuer Commentary Art. 52*")).

[28] *See* Annulment Decision at ¶ 65 (citing *CDC Group PLC v. Seychelles,* ICSID Case No. ARB/02/14, Decision on Annulment dated 29 June 2005 at para. 39 (hereinafter "*CDC Decision*")).

[29] *See Id.* at ¶ 66 (citing Resp. Mem. Annulment at paras. 400 – 402; Cl. C-Mem. Annulment at paras. 216 and 389)).

failure to apply the proper law, which would be grounds for annulment, and a mere misinterpretation of the applicable law, which would be grounds for appeal.[30]

The Committee noted that the parties disagreed as to the meaning and scope of "manifest",[31] and agreed with the Republic in that "extensive argumentation and analysis do not exclude the possibility of concluding that there is a manifest excess of power, as long as it is sufficiently clear and serious."[32] The Committee however recognized that it had to follow a tenable standard of review of the tribunal's approach and in this sense, agreed with the annulment committee in *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais S.A.*, which had stated that any doubt should be resolved "*in favorem validitatis sententiae*".[33]

2.3 Serious Departure from a Fundamental Rule of Procedure

The Committee noted that the parties agreed on the meaning of a serious departure from fundamental rules of procedure as provided for in article 52(1)(d) of the ICSID Convention, but not on the consequences of its application to the case. The Committee agreed with the Republic that this ground for annulment encompasses a three-part test: (i) the procedural rule must be fundamental; (ii)

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[30] *See Id.* at ¶ 66 (citing *Amco Asia Corporation, Pan American Development Ltd. and P.T. Amco Indonesia v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment dated 16 May 1986 at para. 23 (hereinafter "*Amco I Decision*")).

[31] *See Id.* at ¶ 69.

[32] *See Id.* at ¶ 70.

[33] *See Id.* at ¶ 70 (citing *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais S.A.*, ICSID Case No. ARB/81/2, Decision on Annulment dated 3 May 1985 at para. 52(e) (hereinafter "*Klöckner I Decision*")).

the Tribunal must have departed from it; and (iii) the departure must have been serious.[34]

The Committee observed that the parties agreed that the right to be heard, the fair and equitable treatment of the parties, the proper allocation of the burden of proof and the absence of bias, are some of the fundamental rules of procedure that must be observed by ICSID tribunals.[35] The Committee indicated that the second part of the test was to determine if the Tribunal had departed from those fundamental procedural rules and the seriousness of that departure, for which the Committee had to examine the full case record, including the Transcripts and the Award.[36]

On the third part of the test, even when the parties did not agree on how the departure impacted the award,[37] the Committee subscribed to the Applicant's view that it needed not prove that it would have won the case if the Tribunal had followed the procedural rules, but rather only exhibit "the impact the issue may have had on the award"[38], and analyzed the seriousness of the departure accordingly, taking into consideration its discretion to determine whether or not the departure had been serious and whether the impact had been material.

The Committee further expressed that under articles 27 and 53 of the ICSID Rules of Procedure for Arbitration Proceedings (the "ICSID Arbitration Rules"), the Republic had not waived its right to object under the grounds of article 52(1)(d) of the ICSID Convention, because it acquired actual or constructive

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[34] *See Id.* at ¶ 72 (referencing Tr. Annulment [1] [pp. 22-23] (Eng.); [pp. 10-11] (Fr.); [pp. 25-26] (Spa.)).

[35] *See Id.* at ¶ 73.

[36] *See Id.* at ¶ 74 – 75.

[37] *See Id.* at ¶ 77.

[38] *See Id.* at ¶ 78 (referencing *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment dated 5 February 2002 at para. 61 (hereinafter "*Wena Decision*")).

knowledge of the violation of these procedural rules after the award was rendered.[39]

2.4 Failure to State Reasons

The Committee, in constructing the standard for article 52(1)(e), failure to state reason, applied the criteria articulated in the *Vivendi* case, where article 52(1)(e) has to do with a "failure to state *any* reasons with respect to all or part of the award, [and] not [with] the failure to state correct or convincing reasons."[40] Furthermore, it stated that failure to state reasons could be due to contradictory reasons, and that "as long as there is no express rationale for the conclusions [in the Award] with respect to a pivotal or outcome-determinative point, an annulment must follow" regardless of whether the lack of rationale was "due to a complete absence of reasons or the result of frivolous or contradictory explanations."[41]

3. Committee's Application of Legal Standards to Parties' Arguments

Of the five grounds set forth in article 52(1) of the ICSID Convention, the Committee identified the three that were invoked by the parties, and summarized the parties' respective arguments following the eleven specific areas in which Chile had grouped them in its annulment application.[42]

3.1 Nationality

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[39] *See Id.* at ¶ 81 – 82.

[40] *See Id.* at ¶ 83 – 85 (citing *Compañías de Aguas del Aconquija, S.A. and Vivendi Universal (formerly Compagnie Générale Des Eaux) v. Argentine Republic*, ICSID Case ARB/97/3, Decision on Annulment dated 3 July 2002 at paras 64 – 65 (hereinafter *Vivendi I Decision*)).

[41] *See Id.* at ¶ 86.

[42] *See Id.* at ¶¶ 90, 94.

On this issue, while Claimants argued that Mr. Pey Casado had voluntarily renounced his Chilean nationality prior the date of consent and registration of the application for arbitration,[43] the Applicant argued that the evidence presented by Claimants could not, on its face, be considered as a voluntary renunciation on the part of Mr. Pey Casado.[44] In light of this, the Applicant considered that the Tribunal violated Article 52(1)(b) of the ICSID Convention when it did not apply the proper law.[45]

Further, the Applicant contended that the Tribunal failed to state convincing reasons as to why it determined that Mr. Pey Casado was no longer a Chilean national at the time of the two dates mentioned above, and therefore it had breached Article 52(1)(e) of the ICSID Convention.[46] And, consequently, this issue of nationality was central to this dispute, because if the Tribunal would have found that Mr. Pey Casado had double nationality at the time of consent and registration of the application for arbitration, the Tribunal would have lacked jurisdiction over Claimants, breaching Article 52(1)(d) of the ICSID Convention.[47]

The Committee found that the Tribunal did apply the proper law to the dispute[48] and that it provided specific reasons as to why it concluded that there was a voluntary unilateral renunciation of Chilean nationality under the requirements covered in the Chilean Constitution (the "Constitution").[49] Therefore, since the Tribunal found that Mr. Pey Casado had voluntarily renounced his Chilean

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[43] *See* Decision on Annulment at ¶ 95.

[44] *See Id*. at ¶ 95.

[45] *See Id*. at ¶ 97 (referring to the *Award* at para. 307 *et seq*.).

[46] *See Id*. at ¶ 104.

[47] *See Id*. at ¶ 118.

[48] *See Id*. at ¶ 102.

[49] *See Id*. at ¶¶ 107 – 108, 157.

nationality prior to the two critical dates of 2 October 1997 and 20 April 1998, for purposes of Article 25 of the ICSID Convention, the Tribunal had jurisdiction over Claimants and there was no departure from a fundamental rule of procedure.[50]

3.2 Investment

(a) Ownership of the Investment

The Applicant claimed that the Tribunal manifestly exceeded its power and failed to state reasons when it concluded that the transfer of the CPP shares and Mr. Pey Casado's resulting ownership of the shares were valid.[51]

The Committee reasoned that the issue of whether the contract for the sale of shares was legally valid was not fundamental to the Tribunal's reasoning and conclusion pertaining to the ownership of the CPP shares and that, even if the Tribunal had applied the wrong law to this question, which the Committee indicated was not the case, that error would not had amounted to a "manifest" excess of power or a failure to state reasons. The Committee found that the Tribunal had not exceeded its powers and had provided ample reasons for its conclusion.

(b) Investment made in accordance with the BIT

On this issue, the Applicant argued that the Tribunal exceeded its power when it did not apply Articles 1(2) and 2(2) of the BIT that required that it determine whether the investment was foreign and made in accordance with Chilean law, and also that it failed to state the reasons why it concluded that Mr. Pey Casado

[50] *See Id*. at ¶ 121.

[51] *See Id*. at ¶ 122 – 124.

was simultaneously a Chilean national and a foreigner when applying the relevant legal mechanisms.[52]

The Applicant maintained that the Tribunal was compelled to employ three different legal instruments in force in Chile in the year of 1972: (1) the Chile-Spain Dual Nationality Convention, (2) Decision 24 and (3) Chilean Law No. 16,643.[53] If Mr. Pey Casado was considered a foreigner, he could not have been able to invest in "El Clarín," in accordance with Chilean law and, on the other hand, if the Tribunal considered Mr. Pey Casado a national of the Republic of Chile, he could not have been able to make a "foreign" investment under the terms and requirements of the BIT.[54]

The Committee concluded that the Tribunal did not exceed its power when it applied the BIT as the proper law, and that it also gave very specific reasons to support such application.[55]

The Committee determined that the Tribunal applied the proper law, because it had applied Articles 1(2) and 2(2) of the BIT and the applicable Chilean law.[56] It further acknowledged that Decision 24, "which required that a capital contribution be made by a foreign person for an investment to qualify as a 'foreign investment…,'"[57] was in force in Chile in 1972, however this law "had

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[52] *See Id*. at ¶ 139 – 140.

[53] *See Id*. at ¶ 137.

[54] *See Id.* at ¶ 138.

[55] *See Id.* at ¶ 148.

[56] *See Id*. at ¶ 149.

[57] *See Id.* at ¶ 137.

not been effectively applied by Chile"[58] and therefore, it was ineffective and "not applicable to the investment made by Mr. Pey Casado."[59]

Additionally, the Tribunal came to the conclusion that when Mr. Pey Casado made the investment, he had dual nationality and since the Law No. 16,643 had "no specific provision regarding dual nationals, the investment was perfectly compatible with such law."[60]

In regards to Chile's submission about the impossibility for Mr. Pey Casado to make a "foreign" investment under the terms and requirements of the BIT,[61] the Tribunal again submitted that in Chile, in 1972, Decision 24 was not applicable to the case and that the Law No. 16,643 "was not incompatible with Mr. Pey Casado's dual nationality."[62] The Tribunal further concluded that in any case Mr. Pey Casado had paid for the shares in foreign currency and under these circumstances the investment was a foreign investment under the BIT.[63]

(c) The Ratione Temporis Application of the BIT

The Republic claimed that the investment made by Claimants in "El Clarín" did not exist by the time the BIT came into force[64] because "El Clarín" had been expropriated by General Pinochet's government in 1975.[65] On this issue, the Tribunal had rejected Claimants' assertions that the expropriation had been

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[58] *See Id*. at ¶ 150.

[59] *See Id*. at ¶ 151.

[60] Decision on Annulment at ¶ 152.

[61] *See Id*. at ¶ 154.

[62] *See Id*. at ¶ 155.

[63] *See Id*. at ¶ 155 (citing the Award at para. 411).

[64] *See Id*. at ¶ 159.

[65] *See Id*. at ¶¶ 159 – 160.

continuous.[66] Therefore, the Applicant submitted that the Tribunal had exceeded its power when it applied to the matter the BIT and had failed to state the reasons as to why it asserted "jurisdiction over alleged harm to an investment that, […], had been extinguished more than twenty years prior to the BIT's entry into force,…"[67]

The Committee noted that the Republic had not raised this specific argument during the arbitration proceedings.[68] Despite this fact, the Committee concluded that under these circumstances the Tribunal had applied the proper law, and since this issue had not been raised before by the Applicant, "the Tribunal could not be considered as having failed to provide reasons."[69]

(d) The Investment by the Foundation

Based on its previous argument, the Applicant asserted that since the shares did not exist anymore, there could have been no transfer by Mr. Pey Casado of the shares to the Foundation "Presidente Allende" (the "Foundation").[70] The Committee agreed with Claimants in that the argument constituted Chile's attempt to appeal the Award, and found that the Tribunal had concluded that the Foundation was an investor therefore it being unnecessary to consider whether the transfer from Mr. Pey Casado to the Foundation was deemed an investment under the BIT.[71]

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[66] *See Id*. at ¶ 159.

[67] *See Id*., at ¶ 161.

[68] *See Id.* at ¶ 168.

[69] *See Id*. at ¶ 168.

[70] *See Id*. at ¶ 172.

[71] *See Id*. at ¶ 172 – 173.

3.3 Denial of Justice

On this issue, the Republic contended that the Tribunal denied its right to be heard on Claimants denial of justice claim,[72] because Claimants had only raised it in the "context of the confiscation claims," and never "under international law as a free-standing claim,"[73] therefore denying the Republic an "opportunity to present defenses, evidence, or witnesses in respect of these claims."[74] Additionally, Chile argued that under these circumstances, there was a manifest excess of power under the terms of Article 52(1)(b) of the ICSID Convention when the Tribunal found it had jurisdiction over the denial of justice claim which was never raised by Claimants[75] and that the Tribunal had failed to explain and state the reasons as to why it came to that conclusion.[76]

The Committee agreed with the Tribunal that Claimants had raised the denial of justice claim relative to the Gross machine,[77] and stated that even though such claim was not "well developed,"[78] the Republic had an opportunity to address it, but failed to do so.[79] The Committee further concurred with the Tribunal that since Claimants had raised the denial of justice claim, the Tribunal did have jurisdiction and decided the issue presented before it.[80] Finally, the Committee noted that the Tribunal did not fail to state the reasons as to why it came to the

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[72] *See Id*. at ¶ 174.

[73] *See Id*. at ¶¶ 178 – 179.

[74] *See Id*. at ¶ 175.

[75] *See Id.* at ¶ 200 - 201.

[76] *See Id*. at ¶ 207.

[77] *See Id*. at ¶ 187, 190.

[78] *See Id*. at ¶ 188.

[79] *See Id*. at ¶ 193.

[80] *See Id*. at ¶ 203.

conclusion that Claimants had raised the denial of justice claim because such reasons were addressed extensively in the Award.[81]

3.4 Discrimination

Chile contested that Claimants, as with the denial of justice claim, never raised a discrimination assertion under Article 4 of the BIT,[82] and as a consequence, the Republic was never given an opportunity to advance its defenses.[83]

The Committee found that although not significantly developed,[84] Claimants presented their discrimination claim[85] and that the Republic had the opportunity to reply[86] but did not and that thus the issue related not to a right being waived but to a right not being exercised.[87] The Committee also found that the Tribunal did not improperly allocate the burden of proof.[88] And the Committee then found that since the issue of discrimination was raised by Claimants, the Tribunal did have jurisdiction to hear and decide the specific claim,[89] and gave sufficient and extensive reasons as to how it came to the conclusion "that Chile's Decision No. 43 discriminated against the Claimants and was thus in breach of Article 4 of the BIT."[90]

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[81] *See Id*. at ¶ 207.

[82] *See Id*. at ¶ ¶ 208 – 209.

[83] *See Id*. at ¶ 209.

[84] *See Id*. at ¶ 216.

[85] *See Id*. at ¶ ¶ 212 – 214, 216.

[86] *See Id*. at ¶ 216.

[87] *See Id.* at ¶ 217.

[88] *See Id.* at ¶ 223.

[89] *See Id*. at ¶ 224.

[90] *See Id*. at ¶ 233.

3.5 The Tribunal's Decision on Provisional Measures

Chile invited Pey Casado to participate in the Chilean administrative proceeding that concluded in Decision 43, and Pey Casado waived in writing his right to participate, but later filed with the Tribunal a request for injunctive relief alleging that Decision 43 required payments to the successors of the newspapers' registered shareholders and that this would constitute a new expropriation act by the Republic.[91] The Tribunal rejected the request.[92] Chile argued that the Tribunal's rejection amounted to a signal to Chile that it could execute Decision 43 and that doing so would not conflict with the ICSID arbitration or affect it in any way, and that the Tribunal's rejection of Claimants' request was inconsistent with its Award, which held Chile liable for proceeding with the execution of Decision 43, which had been the subject of the request that the Tribunal had rejected.[93]

The Committee indicated that while the Tribunal rejected Claimants' request, it did not rule that Decision 43 could never prejudice Claimants, and found that the Tribunal did not contradict itself and respected the rules that it had established for the arbitral proceedings with respect to Decision 43.[94] Thus, it found that Chile's request for annulment based on this ground failed.[95]

3.6 Damages

While Chile contended that the methodology and calculation of damages[96] adopted by the Tribunal was never discussed before the Award[97] and therefore,

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[91] *See Id*. at ¶ 234.
[92] *See Id*. at ¶ 235.
[93] *See Id*. at ¶ 236.
[94] *See Id*. at ¶ 242, 245.
[95] *See Id*. at ¶ 245.
[96] *See Id*. at ¶250.
[97] *See Id*. at ¶ 247.

it was denied of its fair opportunity to be heard on this regard,[98] Claimants argued that the Tribunal was in all its right to employ such calculation of damages.[99]

Additionally, Chile held that the denial of its right to be heard on this subject affected in the end the final result of the case and that this amounted to a departure from a fundamental procedural rule.[100]The Committee opined that the Tribunal's requirement was to allow the parties "the right to present its arguments and to contradict those of the other party."[101] It further acknowledged that the parties were never afforded an opportunity to plead the damages under the alleged breach of Article 4 of the BIT[102] either at the January 2007 Hearing[103] or by filing post-hearing briefs after that hearing.[104]

The Committee agreed with the Applicant that the Tribunal went beyond the legal framework established by the parties,[105] and that it had been manifestly inconsistent with its previous reasoning in the Award, when in plain contradiction to its earlier findings it explained the reasons how it determined the calculation of damages and while recognizing that arbitral tribunals are generally allowed a considerable measure of discretion in determining quantum of damages,[106] found that on that basis, the Tribunal failed to state reasons for its

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[98] *See Id.* at ¶¶ 248 - 249.

[99] *See Id*. at ¶ 256.

[100] *See Id.* at ¶ 254 (referring to Resp. Mem. Annulment at para 149).

[101] *See Id*. at ¶ 262, 267.

[102] *See Id*. at ¶ 262.

[103] *See Id*. at ¶ 263.

[104] *See Id*. at ¶ 264.

[105] *See Id*. at ¶ 269.

[106] *See Id*. at ¶ 286.

determination for damages, which under Article 52(1)(e) of the ICSID Convention constitutes ground for annulment.[107]

3.7 The May 2003 Hearing

While Claimants argued that not all procedural rules are fundamental,[108] the Applicant argued that the Tribunal did not afford it an opportunity to be heard because: (i) it denied Chile to present its witnesses and experts; (ii) it allowed Mr. Pey Casado to address factual issues in his oral testimony during the May 2003 Hearing; (iii) it denied Chile the right to cross-examine Mr. Pey Casado at that same hearing; and (iv) the Tribunal used Mr. Pey Casado's testimony as factual evidence, after it assured the Republic that it would not treat Mr. Pey Casado's statements as factual evidence.[109]

The Committee found that there was no serious departure from any fundamental procedural rule[110] and that Chile had not been unfairly and unequally treated.[111] The Committee considered three main questions[112] to reach its conclusion, namely:

(a) Is there an obligation for tribunals to hear witnesses and experts?

The Committee came to the conclusion that the Tribunal, under the ICSID Arbitration Rules is not required to hear all of the witnesses and experts offered

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[107] *See Id*. at ¶ 287.
[108] *See Id*. at ¶ 294.
[109] *See Id*. at ¶ 288 (referring to Resp. Mem. Annulment at paras. 256 – 268).
[110] *See Id*. at ¶ 308.
[111] *See Id*. at ¶¶ 312 – 313.
[112] *See Id*. at ¶ 296.

by the parties[113] and that the Tribunal stated that it would not hear the parties' witnesses and experts by way of letter to the parties dated April 23, 2003.[114]

(b) Should there have been an opportunity for Chile to cross-examine Mr. Pey Casado?

The Committee noted that the Applicant did not have a right to cross-examine Mr. Pey Casado because he was not a factual witness, but rather, he only testified as a party representative.[115]

(c) How did the Tribunal treat Mr. Pey Casado's statement in the Award?

The Committee held the position that the testimony of Mr. Pey Casado did not influence the decision of the Tribunal,[116] but rather the Tribunal based its decision on other documents on the record.[117]

The Committee noted that since the Tribunal's reliance on Mr. Pey Casado's May 2003 hearing statements was not outcome-determinative, even if by not allowing Chile to cross-examine him the Tribunal may have treated Chile unfairly and unequally, that was not a serious departure from that fundamental rule of procedure; consequently, the Committee dismissed Chile's challenge.[118]

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[113] *See Id*. at ¶ 297.

[114] *See Id*. at ¶ 299.

[115] *See Id*. at ¶¶ 300 – 301 (referring RA-24; Tr. [1] [96:5-23] (Fr.)).

[116] *See Id*. at ¶ 303.

[117] *See Id*. at ¶ 305.

[118] *See Id*. at 313.

3.8 The January 2007 Hearing

The Applicants contended that the Tribunal treated the parties unfairly and unequally and therefore, it seriously departed from a fundamental procedural rule when it ordered that the January 2007 Hearing would only deal with jurisdictional issues, but then it allowed the introduction of arguments on the merits by Claimants.[119]

The Committee opined that the Tribunal only acted with flexibility and in any case such flexibility could not possibly represent any harm to the Republic[120] and that, moreover, the Applicants had failed to show how their denial of justice claim would have impacted the final Award.[121]

3.9 Document Requests

The main argument of the Republic on this issue was that the Tribunal treated the parties differently with respect to the discovery process, because it denied Chile the totality of its discovery requests, and allegedly, later, the Tribunal used this deficiency against the Republic.[122]

The Committee dismissed Chile's request for annulment under this ground.[123] The Committee acknowledged that the Tribunal placed over the Applicant the duty to produce a bulky amount of documents, and stated that by no means this should be understood as the Tribunal treating the parties unequally,[124] because there was justification on the part of the Tribunal to do so, namely, the

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[119] *See Id*. at ¶¶ 314 – 315.

[120] *See Id*. at ¶ 319.

[121] *See Id*. at ¶ 319.

[122] *See Id*. at ¶¶ 320 – 321.

[123] *See Id*. at ¶ 332.

[124] *See Id*. at ¶ 325.

documents requested were mainly under the custody of the Republic.[125] Further, the Committee said not to be convinced that the Tribunal could have reached a substantially different result even if it had explained the reasons for its denial of Chile's document request: first, even if the denial had been explained, "there is no reason to conclude that the Tribunal would have been granted Chile's request and second, the Republic failed to demonstrate that the Tribunal used this alleged lack of evidence stemming from its denial to Chile's discovery request, to conclude that Mr. Pey Casado owned the CPP shares.[126]

3.10 Bias by Arbitrator Bedjaoui

The Applicant submitted that the outcome of the case was compromised by a speculative bias by Mr. Bedjaoui against Chile,[127] which amounted to a violation of Article 52(1)(d) of the ICSID Convention.[128]

The Committee, however, concluded that the Award could not be annulled based on mere speculation, particularly when the Applicant had failed to put forward evidence that the actions or inactions of Mr. Bedjaoui would have affected the final result of the Award.[129]

3.11 The Tribunal's *Ex Aequo et Bono* Decision

Chile asserted that the Tribunal violated Article 52(1)(b), by delivering an Award that was contrary to Article 42(3) of the ICSID Convention, "which forbids tribunals from ruling *ex aequo et bono*" without the consent of the parties.[130]

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[125] *See Id*. at ¶ 330.

[126] *See Id*. at ¶ 331.

[127] *See Id*. at ¶ 333.

[128] *See Id*. at ¶ 333.

[129] *See Id*. at ¶ 337.

[130] *Id*. at ¶ 338.

The Committee dismissed this ground for annulment because "there is not a scintilla of evidence that allows Chile, […] to argue that the Tribunal issued an *ex aequo et bono decision*.[131]

3.12 Claimant's Annulment Challenge

In their annulment pleadings, Claimants requested that point 8 of the *dispositif* of the Award be annulled and Chile argued that pursuant to Article 52(2) of the ICSID Convention, Claimant's request was extenporaneous.[132] The Committee found that although raised by Chile in the annulment proceedings, Claimants' request is based on different premises than Chile's and thus dismissed the request as time-barred.[133]

4. Costs; Decision

The Committee partially annulled the Award rendered by the Tribunal on May 8, 2008, on the portion dealing with damages (paragraph 4 of the *dispositif* of the Award and the corresponding paragraphs in the body of the Award related to damages[134]), and indicated to the parties that all other paragraphs would remain in effect.[135]

Further, the Committee decided that each party would bear its own litigation costs and equally share the costs of the proceeding.[136]

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[131] *See Id*. at ¶ 341.

[132] *See Id.* at ¶¶ 343, 344.

[133] *See Id.* at ¶ 351.

[134] *See Id*. at ¶ 359.

[135] *See Id*. at ¶ 354.

[136] *See Id*. at ¶ 358.