

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the resubmission proceeding between

VICTOR PEY CASADO AND FOUNDATION “PRESIDENTE ALLENDE”

Claimants

AND

THE REPUBLIC OF CHILE

Respondent

ICSID Case No. ARB/98/2

DECISION ON RECTIFICATION OF THE AWARD

Members of the Tribunal

Sir Frank Berman KCMG QC, President of the Tribunal
Mr V. V. Veeder QC, Arbitrator
Mr Alexis Mourre, Arbitrator

Secretary of the Tribunal

Mr Benjamin Garel

Assistant to the President of the Tribunal

Dr Gleider I. Hernández

Date of dispatch to the Parties: 6 October 2017

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I. INTRODUCTION AND PROCEDURAL HISTORY

1. On 8 May 2008, an arbitral Tribunal composed of Professor Pierre Lalive, Mr. Mohammed Chemloul and Professor Emmanuel Gaillard (“the First Tribunal”) rendered an award in *Victor Pey Casado and Foundation “Presidente Allende” v. The Republic of Chile* (ICSID Case No. ARB/198/2) (“the First Award”).
2. On 18 December 2012, an *ad hoc* committee composed of Professor Piero Bernardini, Mr. L. Yves Fortier QC and Professor Ahmed El-Kosheri partially annulled the First Award, subsequent to which the Claimants resubmitted the dispute to a new tribunal (“the Resubmission Proceedings”).
3. On 13 September 2016, the present Tribunal, as Arbitral Tribunal in the Resubmission Proceedings, (“the Tribunal”) rendered an Award (“the Resubmission Award”).
4. By letter dated 27 October 2016, the Claimants submitted a Request for Rectification of the Resubmission Award pursuant to Article 49 of the ICSID Convention (“the Request for Rectification”). In that same letter, the Claimants made certain requests for inquiry and disclosure by Sir Franklin Berman and Mr Veeder, and further requested that the rectification proceeding be suspended until the tribunal called upon to interpret the First Award of 8 May 2008 had issued its decision on interpretation.¹
5. By email dated 4 November 2016, the Respondent asked the Secretary-General of ICSID for four weeks to file its response regarding the proper procedure to be followed in the circumstances presented by the Claimants' submissions.
6. By email dated 5 November 2016, the Claimants opposed the Respondent's request for a four-week time limit.

¹ By letter of 7 October 2016, the Claimants submitted an application for interpretation of the First Award, which was registered by the Secretary-General of ICSID on 21 October 2016. On 12 May 2017, the Secretary-General of ICSID issued an order taking note of the discontinuance of the interpretation proceeding pursuant to ICSID Arbitration Rule 44.

7. On 8 November 2016, the Acting Secretary-General of ICSID registered the Request for Rectification. By letter dated the same day, the Acting Secretary-General of ICSID invited the Parties to submit to the Tribunal their proposals regarding the procedure, conduct and timetable of the rectification proceedings (“the Rectification Proceedings”).
8. By letter dated 10 November 2016, the Claimants submitted a request for suspension of the Rectification Proceedings, pending disclosure of certain information by Sir Franklin Berman and Mr Veeder.
9. By letter dated 16 November 2016, the Tribunal invited the Respondent to indicate by 30 November 2016 whether it consented to the requested rectifications.
10. By letter dated 17 November 2016, the Respondent asked the Tribunal to order the Claimants to submit a Spanish version of the Request for Rectification, and requested a period of at least three weeks following receipt of the Spanish version of the Request for Rectification to consider and submit to the Tribunal its position on the proposed rectifications.
11. By letter dated 18 November 2016, the Claimants reiterated to the Tribunal their requests for disclosure dated 27 October 2016 and 10 November 2016.
12. By letter dated 21 November 2016, the Tribunal took note of the references in the Request for Rectification to further declarations touching the independence and impartiality of Sir Franklin Berman and Mr Veeder, and communicated to the Parties the fact that the two arbitrators had already responded to the Secretary-General of ICSID on these questions, and had nothing further to add.
13. By a second letter dated 21 November 2016, the Tribunal rejected the request filed by the Claimants for the suspension of the Rectification Proceedings. In the same letter, the Tribunal requested the Claimants to provide a Spanish translation of the Request by 2 December 2016, and set the procedural timetable for the Rectification Proceedings.
14. By letter of 22 November 2016, the Claimants proposed the disqualification of Sir Franklin Berman and Mr Veeder (“the Challenged Arbitrators”) under Article 57 of the ICSID Convention and ICSID Arbitration Rule 9 (“the First Disqualification Proposal”).

15. By letter dated 29 November 2016, the Centre informed the Parties that, pursuant to ICSID Arbitration Rule 9(6), the Rectification Proceedings were suspended until the First Disqualification Proposal had been decided.
16. On 21 February 2017, the Centre transmitted to the Parties the Decision of the Chairman of the ICSID Administrative Council to dismiss the First Disqualification Proposal. By letter of the same date, the Tribunal notified the Parties that, in accordance with ICSID Arbitration Rule 9(6), the Rectification Proceedings were resumed on that date.
17. On 23 February and 4 March 2017, the Claimants submitted further proposals for the disqualification of Mr. Veeder and subsequently for the disqualification of Sir Franklin Berman under Article 57 of the ICSID Convention and ICSID Arbitration Rule 9. By letter of 23 February 2017, the Tribunal notified the Parties that, pursuant to ICSID Arbitration Rule 9(6), the Rectification Proceedings were once again suspended.
18. By letter dated 6 March 2017, the Centre informed the Parties that it was treating the Claimants' further proposals for disqualification as a proposal to disqualify a majority of the Tribunal, to be decided simultaneously by the Chairman of the Administrative Council of ICSID in accordance with Article 58 of the ICSID Convention ("the Second Disqualification Proposal").
19. On 13 April 2017, the Centre informed the Parties of the Decision of the Chairman of the Administrative Council to dismiss the Second Disqualification Proposal. By letter dated the same day, the Tribunal notified the Parties that the Rectification Proceedings had resumed with immediate effect.
20. By letter dated 18 April 2017, the Tribunal notified the Parties that the procedural arrangements as set out in the letter dated 21 November 2016 would stand, subject to a prolongation of the procedural timetable by twenty (20) weeks to take account of the suspensions of the Rectification Proceedings as set out above.
21. By letter dated 21 April 2017, the Claimants communicated a request to the Tribunal for the discontinuance of the Rectification Proceedings under ICSID Arbitration Rule 44.

22. In an Order dated 24 April 2017, the Tribunal set 1 May 2017 as the date for the Respondent to state its position under ICSID Arbitration Rule 44 with respect to the Claimants' request for discontinuance of the Rectification Proceedings.
23. By letter of 1 May 2017, the Respondent communicated to the Tribunal its opposition to the request for the discontinuance of the Rectification Proceedings, and requested that these Proceedings remain active until the Tribunal had made a determination on the issue of costs.
24. By letter of 3 May 2017, the Tribunal communicated to the Claimants the position of the Respondent in respect of the discontinuance of the Rectification Proceedings, and its determination that the Rectification Proceedings would continue as provided in Arbitration Rule 44. In the same letter, the Tribunal requested submission of a Spanish translation of the Request for Rectification by 5 May 2017.
25. By email dated 5 May 2017, the Tribunal transmitted to the Parties an amended copy of the Decision of 13 April 2017 of the Chairman of the ICSID Administrative Council dismissing the Second Disqualification Proposal.
26. By email dated 5 May 2017, the Claimants submitted the Spanish version of the Request for Rectification.
27. By letter dated 10 May 2017, the Respondent requested that its deadline to respond to the Request for Rectification be extended to 9 June 2017.
28. By letter dated 15 May 2017, the Tribunal accepted the Respondent's request and adjusted the time limits for the Parties' submissions accordingly.
29. By letter dated 9 June 2017, the Claimants requested that the Tribunal order the Respondent to disclose any information not publicly available relating to payments made by the Ministry of Foreign Affairs of Chile to Essex Court Chambers, that the Tribunal and the Centre investigate this issue and disclose the results of the investigation to all Parties, and that the Tribunal and the Centre take the necessary measures to maintain the possible confidentiality of the information requested.

30. On 9 June 2017, the Respondent submitted its observations in response to the Request for Rectification.
31. By letter dated 15 June 2017, the Tribunal noted that the Claimants' requests of 9 June 2017 (paragraph 29 above) were placed in a context that had already been considered in the First and Second Disqualification Proposals and their dismissal by the Chairman of the ICSID Administrative Council, and informed the Parties of its conclusion that the requests lacked any connection with the rectifications requested, and therefore lay outside its powers and functions in the Rectification Proceedings.
32. On 24 June 2017, the Respondent submitted to the Tribunal the Spanish version of its observations on the Request for Rectification.
33. By letter dated 24 July 2017, the Claimants notified the Tribunal that they did not intend to file a reply to the Respondent's response.
34. By email dated 1 August 2017, the Tribunal informed the Parties that the written procedure on the Rectification Proceedings was now closed.
35. In accordance with ICSID Arbitration Rule 49(3), the members of the Tribunal have determined that it would not be necessary for them to meet in order to consider the Request for Rectification. The present Decision has been deliberated through several exchanges of written communications among the members of the Tribunal.
36. In accordance with Article 49(2) of the ICSID Convention, the present Decision constitutes an integral part of the Resubmission Award.

II. THE CLAIMANTS' REQUESTS FOR RECTIFICATION

37. The Claimants raise four requests for rectification: (1) correction of an erroneous reference to "Decision No. 43" in paragraph 198 of the Resubmission Award; (2) replacement of the term "before" by the term "by" in paragraph 61 of the Resubmission Award; (3) replacement of the term "by" by the term "since" in paragraph 66 of the Resubmission Award; and (4) the removal

from point 2 of the *dispositif* of the Resubmission Award of any reference to portions of the First Award that had been annulled, including footnote 387.²

A. Reference to “Decision No. 43” in paragraph 198 of the Resubmission Award

38. The Claimants submit that the reference to “the nullity of Decision No. 43” in the final sentence of paragraph 198 of the Resubmission Award is in error, as the correct reference should be to Chilean Decree No. 165. The Claimants thus request that the relevant paragraph³ of the Resubmission Award should either be corrected to read “Decree No. 165” or alternatively deleted in full.⁴ The Claimants assert in support that the First Award had accepted that they had established their title to the disputed assets.⁵
39. The Respondent agrees that the reference to Decision No. 43 is in error, and that the correct reference should have been “Decree No. 165”, but neither accepts the Claimants’ arguments as to why the proposed rectification would be necessary, nor the alternative of deleting paragraph 198 in its entirety. The Respondent contends that the Tribunal must respect the nature and limited scope of a rectification proceeding and can only rectify a “clerical or similar” error, without engaging in an interpretation of the First Award. It contends further that paragraph 198 is one of the core paragraphs of the First Award, so that to delete it would exceed the scope of the Tribunal’s competence in a rectification proceeding.⁶

B. Rectification of the term “before” in paragraph 61 of the Resubmission Award

40. The Claimants assert that paragraph 61 of the Resubmission Award incorrectly states that their position in the Resubmission Proceedings was that the validity of Decree No. 165 had never

² The Tribunal notes that the Request for Rectification also included various matters touching upon the disqualification of the Challenged Arbitrators. As these matters were included in the First and Second Disqualification Proposals and settled by the Chairman’s decisions dismissing these proposals, and are in any event outside the competence of the Tribunal in these proceedings, they will not be further considered in the present Decision except in relation to the allocation of costs.

³ In the Claimants’ Request, para. 11, paragraph 199 is mentioned, but in the context of the claim, the Tribunal has interpreted this to be a clerical error, and in fact a reference to paragraph 198.

⁴ Claimants’ Request, para. 11.

⁵ Claimants’ Request, paras. 5-7.

⁶ Respondent’s Observations, paras. 3-6.

been put into question “before” the Chilean courts, and point to paragraph 207 of their Reply of 9 January 2015, which does not use “*devant*” (“before”), but rather “*par*” (“by”).⁷ Given that they had in fact made submissions regarding the nullity of Decree No. 165 before the 1st Civil Chamber of Santiago in 1994, the Claimants say that the error might lead to the misleading conclusion that the First Award was reproaching the Claimants for not having raised the question of the nullity of Decree No. 165, when that was not in fact the case.⁸

41. The Respondent agrees with the Claimants’ proposed rectification, as it reflects the original terminology used in the Claimants’ Reply. It contends, however, that the other justifications raised by the Claimants are unfounded, pointing in particular to the conclusion in paragraph 198 of the Resubmission Award that the arguments relating to the status of Decree No. 165 were not relevant to the Resubmission Proceedings, as well as to its earlier submission that the Claimants had never asked for the annulment of Decree No. 165, once they asserted their claims before an international tribunal rather than a Chilean domestic court.⁹

C. Rectification of the preposition “by” in paragraph 66 of the Resubmission Award

42. The Claimants say that the use of the preposition “*par*” (“by”) in paragraph 66 of the Resubmission Award is in error, and point in this connection to paragraph 159 of their Reply, which uses the preposition “*depuis*” (“since”) in reference to the denial of justice and its consummation. The Claimants say that the use of the preposition “by” would mischaracterize their view that it is not the First Award that consummates the denial of justice, but that the denial of justice has been brought about through the actions of the Respondent.¹⁰
43. The Respondent does not oppose the rectification requested, on the basis that the passage in question resumes the Claimants’ Reply, and the Claimants’ Reply did make use of the word “*depuis*” (“since”), but rejects the wider reasons put forward by the Claimants.¹¹

⁷ Claimants’ Request, para. 13.

⁸ Claimants’ Request, paras. 14-16.

⁹ Respondent’s Observations, paras. 10-14.

¹⁰ Claimants’ Request, paras 20-21.

¹¹ Respondent’s Observations, paras. 16-17.

D. Reference in paragraph 2 of the *dispositif* of the Resubmission Award to findings of the First Tribunal

44. The Claimants contend that the reference, in paragraph 2 of the *dispositif* of the Resubmission Award, to paragraph 704 of the First Award is in error, as the paragraph is part of the portion of the First Award that had been annulled; the reference should accordingly be deleted, with a consequential replacement of the possessive “*sa*” (“its”) by “the”.¹²
45. The Respondent acknowledges that paragraph 704 of the First Award was in the portion specified in the Annulment Decision, but submits that the Claimants’ proposed rectification could create confusion, and proposes instead the elimination of the words “as has already been indicated by” the First Tribunal and the footnote, but not the use of the possessive “its”.¹³

III. THE TRIBUNAL’S ANALYSIS

46. Article 49(2) of the ICSID Convention provides, in relevant part, as follows:

*The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered ... shall rectify any clerical, arithmetical or similar error in the award.*¹⁴

47. Arbitration Rule 49 outlines the procedure to be followed, but speaks, in its paragraph (1), more generally, of “*any error in the award which the requesting party seeks to have rectified.*”
48. The wording of the two provisions has in common the reference to an ‘error’ and that the purpose of the procedure is the ‘rectification’ of any such error. Where the texts diverge, the wording of the Convention naturally governs. In order to fall within the rectification procedure, an error must therefore be “in the award,” and it must be clerical, or arithmetical, “or similar.” The Tribunal notes the differences between the three language versions of Article 49(2) of the ICSID Convention (see fn 14), which have, however, no significance for the Tribunal’s analysis in the circumstances of this case.

¹² Claimants’ Request, paras. 25-26.

¹³ Respondent’s Observations, paras. 18-19.

¹⁴ Whereas the French version refers generally to “*erreur matérielle*,” the English and Spanish versions are similar to one another in referring more specifically to “clerical, arithmetical or similar error” and “*errores materiales, aritméticos o similares del mismo*”, respectively.

49. It follows that, as is already implicit in the notion of ‘rectification,’ the procedure does not encompass any alleged mistake of law by the tribunal or any factual determination or discretionary assessment by it. The procedure is not an appeal, and this in turn illuminates why Article 49 of the Convention makes the rectification of any duly established “clerical, arithmetical or similar error” into a duty of the tribunal.¹⁵
50. Practice has established that there are two, and only two, conditions that must be met for a rectification. First, a clerical, arithmetical or similar error must be found to exist; and secondly, the requested rectification must concern an aspect of the award that is purely accessory to the underlying dispute settled by the award.¹⁶
51. Following the (in the event somewhat attenuated) procedure laid down by the Tribunal, it appears that there is no disagreement between the Parties as to the existence of the four errors identified in the Claimants’ Request, although they differ as to the appropriate means of correcting them within the scope of the rectification procedure. However that may be, it remains the duty of the Tribunal itself both to ascertain the existence of one or more errors falling within the scope of Article 49 and, if so, to decide how to rectify them. In so doing, it is only the Tribunal itself which can be the authentic judge of its intentions in framing the relevant passages in the Resubmission Award. The Tribunal will therefore examine one by one the four issues raised by the Claimants, in the light of the written comments of the Respondent.

A. Reference to “Decision No. 43” in paragraph 198 of the Resubmission Award

52. The Tribunal agrees that the reference in the last sentence of paragraph 198 to Decision No. 43 was a mistake and that it had intended to refer to Decree No. 165. The error is manifestly a

¹⁵ Cf. *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, Decision of the *ad hoc* Committee on Supplementation and Rectification of 28 May 2003, ICSID Case No. ARB/97/3, para. 11, citing to CH Schreuer, *The ICSID Convention: A Commentary. A Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (2nd edn, Cambridge University Press, 2009), *Commentary* to Article 49, para. 47.

¹⁶ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, Decision of the *ad hoc* Committee on Supplementation and Rectification of 28 May 2003, ICSID Case No. ARB/97/3, para. 25; citing to the earlier *AMCO v. Indonesia*, Decision on Supplemental Decisions and Rectification, 1 ICSID Reports 569, at 638; *Emilio Agustín Maffezini v. Kingdom of Spain*, Rectification of the Award of 31 January 2001, 16 ICSID Rev (2001), at 279; *CDSE v. Republic of Costa Rica*, Decision of 8 June 2000, 15 ICSID Rev. (2000), at 169.

purely clerical one, and will therefore be rectified by replacing the words “Decision No. 43” by “Decree No. 165.”

B. Use of the word “before” in paragraph 61 of the Resubmission Award

53. The Tribunal agrees that the paragraph in question was intended to do no more than reflect the Claimants’ submissions in their Reply Memorial, and ought therefore to have employed the Claimants’ own wording, namely “by” rather than “before.” As the error is one of a purely clerical nature, without impact on the substance of the Resubmission Award, the paragraph will be rectified accordingly, by substitution of the word “by” in the final sentence.

C. Use of the word “by” in paragraph 66 of the Resubmission Award

54. The Tribunal agrees that, once again, the paragraph in question was intended to do no more than reflect the Claimants’ submissions in their Reply Memorial, and ought therefore to have employed the Claimants’ own wording, namely “since” rather than “by.” As the error is one of a purely clerical nature, without impact on the substance of the Resubmission Award, the paragraph will be rectified accordingly, by substitution of the word “since” in the first sentence.

D. Reference in paragraph 2 of the *dispositif* of the Resubmission Award to the findings of the First Tribunal

55. The Tribunal observes that it is a matter for debate whether the effect of the Annulment Decision was to annul all of the content of Part VIII of the First Award or only that “related to damages.”¹⁷ The question is however immaterial to the present matter, as the sole point at issue is the present Tribunal’s decision in the Resubmission Award that a finding to the effect that the Claimants had been the victims of a denial of justice constituted in itself a form of satisfaction under international law for the Respondent’s breach of Article 4 of the BIT. This constituted an independent finding by the present Tribunal, which is not in itself affected, negatively or positively, by the fact that the First Tribunal had reached a similar conclusion in its own Award, and that it did so on the basis of findings earlier in the First Award which the

¹⁷ See Annulment Decision of 18 December 2012, para. 359.

Annulment Decision had expressly declared to be *res judicata*. The Tribunal therefore sees no imperative need for rectification of the *dispositif*. In the light, however, of the measure of agreement between the Parties that reference ought not to be made to paragraph 704 of the First Award, paragraph 2 of the *dispositif* of the Resubmission Award is rectified to read as follows: “That the formal recognition by the First Tribunal of the Claimants’ rights and its finding that they were the victims of a denial of justice constitutes in itself a form of satisfaction under international law for the Respondent’s breach of Article 4 of the BIT;”. With this modification, fn. 387 falls away.

IV. COSTS

56. The Tribunal refers to its observations in the Resubmission Award on the allocation of costs, notably in paragraphs 249 and 251. As, pursuant to Article 49 of the ICSID Convention, a decision on an application for rectification is to become part of the award, the Tribunal can see no good reason why the same principles should not apply to these Rectification Proceedings as well. It appears from Arbitration Rule 49(4) that a tribunal’s powers in respect of costs are the same in both cases.
57. For the application of those principles in present circumstances, the proceedings have to be divided into two; one part relates to the request for rectification itself, the other to the two successive proposals for the disqualification of a majority of the Tribunal, both of which fell to the Chairman of the ICSID Administrative Council to decide. As to the latter, factors of relevance to the allocation of costs include the Chairman’s findings that the first challenge was out of time, and that the second was without merit. As to the former, although it has, as indicated above, proceeded to make four rectifications to the text of its Resubmission Award pursuant to the obligation laid upon it by Article 49 of the Convention, the Tribunal has nevertheless come to the conclusion that three of the four rectifications concern matters of purely formal import, and that none of the four rectifications has any perceptible impact on the meaning or effect of the Resubmission Award as such.
58. Taking these factors into account, the Tribunal decides, pursuant to Arbitration Rule 47(1)(j) read together with Rule 49(4), that the costs incurred by the Centre in respect of these rectification proceedings, including the costs resulting from the associated challenges to

Sir Franklin Berman and Mr Veeder, shall be borne by the Claimants, but makes no further order as to costs.

59. These costs amount to (in US\$):

Arbitrators' fees and expenses	
Sir Franklin Berman QC	0
Mr V. V. Veeder	0
Mr Alexis Mourre	1,875
President of the Tribunal's Assistant's fees and expenses	6,370
Other direct expenses (estimated)	5,681.72
ICSID's administrative fees	32,000
Total	<u>45,926.72</u>

60. The above costs have been paid out of the advances made to ICSID by the Parties in equal parts. Once the case account balance is final, the ICSID Secretariat will provide the Parties with a detailed financial statement; any remaining balance will be reimbursed to the Parties in equal shares.

61. In consequence of paragraphs 56 to 60 above, the costs to be borne by the Claimants amount to US\$ 45,926.72, and the Claimants are accordingly under an obligation to reimburse to the Respondent the amount of US\$ 22,963.36, in addition to the amount specified in paragraph 255 of the Resubmission Award.

I. DECISION

1. The Tribunal accordingly decides:

- (a) Paragraphs 61, 66, and 198, and paragraph 2 of the *dispositif*, of the Resubmission Award are rectified as set out in paragraphs 52, 53, 54, and 55 above.
- (b) The costs incurred by the Centre in respect of these Rectification Proceedings, including the costs resulting from the associated challenges to Sir Franklin Berman and Mr Veeder, shall be borne by the Claimants and the Claimants shall therefore reimburse to the Respondent the sum of US\$ 22,963.36, in addition to the amount specified in paragraph 255 of the Resubmission Award. The Tribunal makes no further order as to costs.

[Signed]

Sir Franklin Berman KCMG QC
President of the Tribunal

Date: 12 September 2017

[Signed]

V.V. Veeder QC
Arbitrator

Date: 25 September 2017

[Signed]

Alexis Mourre
Arbitrator

Date: 21 September 2017