

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

In the proceedings between

**IOANNIS KARDASSOPOULOS AND RON FUCHS**  
(Respondents)

and

**GEORGIA**  
(Applicant)

**ICSID Case N<sup>o</sup>s. ARB/05/18 and ARB/07/15**  
(Annulment Proceeding)

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**DECISION OF THE *AD HOC* COMMITTEE  
TO SUSPEND THE ANNULMENT PROCEEDING**

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*Members of the ad hoc Committee*

Judge Dominique Hascher (President)  
Tan Sri Cecil W. M. Abraham  
Professor Karl-Heinz Böckstiegel

*Secretary of the ad hoc Committee*

Ms. Aïssatou Diop

*Representing the Applicant*

Ms. Louise Roman Bernstein  
Mr. Derek C. Smith  
Mr. Luis Parada  
Mr. Tomás Solís  
Ms. Erin Argueta  
Dewey LeBoeuf LLP

*Representing the Respondents*

Ms. Karyl Nairn  
Mr. Timothy G. Nelson  
Mr. John Gardiner  
Mr. David Herlihy  
Skadden, Arps, Slate, Meagher & Flom (UK) LLP

1. On February 17, 2011, this *ad hoc* Committee was informed by Georgia (the “Applicant”) that it had filed on January 11, 2011 with the International Centre for Settlement of Investment Disputes (“ICSID”) an Application for Revision of the Award rendered on March 3, 2010 in ICSID cases Nos. ARB/05/18 and ARB/07/15. The Application was registered by the Secretary General of ICSID pursuant to ICSID Arbitration Rule 50(2) on January 21, 2011. Georgia also informed the Committee that the Arbitral Tribunal had been reconstituted for the revision proceeding on February 4, 2011, pursuant to ICSID Arbitration Rule 51.
2. Georgia requested on March 4, 2011 that the Committee temporarily suspend the annulment proceeding, effective from the day immediately after Messrs. Ioannis Kardassopoulos and Ron Fuchs (the “Respondents”) file their Counter-Memorial on Annulment, while the Arbitral Tribunal decides Georgia's Application for Revision of the Award. Georgia recalled first that it had already informed the Committee on December 14, 2010 of the discovery of a new decisive fact which would have significant consequences for the annulment proceeding, and second that the Committee had declared on December 24, 2011 that it was open to considering the issue of a possible suspension of the annulment proceeding upon Georgia's filing of a request for revision.
3. Georgia argues that it is proper for the Committee to suspend the annulment proceeding pending the outcome of the revision proceeding. If annulment and revision proceedings were to run concurrently, Georgia submits, resources could be expended to no avail as annulment may, for example, be no longer necessary should the award be revised. Georgia added that it has been the practice under the ICSID Convention thus far to allow a revision proceeding to reach a final decision before the annulment proceeding begins, such as in *Pey Casado v. Chile*, or continues such as in *Siemens v. Argentina* where the situation was very similar with the filing of an Application for Revision based on the discovery of a new fact regarding corruption after the annulment proceeding was already under way.
4. In its letter of February 17, 2011 to the Committee, Georgia stated that it based its Application for Revision on the newly discovered facts during the investigation which immediately followed Mr. Fuchs’ arrest on October 14, 2010. The new facts were that a key Georgian Government official, Dr. Revaz Tevzadze, received a bribe from the Respondents to sign the 1992 Joint Venture Agreement and to procure the signing of the Deed of Concession which are the two documents that the Respondents presented to the Arbitrators

as the basis for all their substantive rights in Georgia. A declaration favorable to TrameX, the company used by the Respondents as a vehicle for their investment, made by Dr. Tevzade after he received another bribe from the Respondents in 2004, was also presented as evidence in the arbitration.

5. Georgia submits that the bribery is of such a nature that, if Georgia prevails in its Application for Revision, the Award will be reversed in its entirety, and the annulment proceeding will become unnecessary. In these circumstances, Georgia declares, it would be exceedingly wasteful to continue the annulment proceeding to conclusion before knowing the outcome of the revision proceeding.
6. In order to rebut the Respondents' allegations of fact in previous correspondence of December 23, 2010 and February 18, 2011 that Mr. Fuchs was a victim of an entrapment in violation of the European Convention on Human Rights, Georgia reiterates its willingness to make reference to the copy of the video recording and transcript documenting Mr. Fuchs' bribery attempt as well as to provide the Committee with a copy of the Crime Report made on September 2, 2010 by its now Deputy Minister of Finance. Georgia says that this evidence is relevant and admissible for the limited purpose of the Committee's decision on its request for suspension. Georgia concludes that the fundamental principles of due process require that it be given the opportunity to answer Respondents' accusations regarding Mr. Fuchs' arrest.

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7. Messrs. Kardassopoulos and Fuchs, who were invited by the Committee on March 8, 2011 to comment, wrote on March 11, 2011 to oppose the discontinuance of the annulment proceeding and the introduction of material by Georgia.
8. The Respondents argue that Georgia's request to suspend the annulment proceeding should be viewed in the context of the protracted character of the dispute with Georgia which originated from an unlawful expropriation that occurred 15 years ago. They say that having chosen to bring two post-award challenges, Georgia should reasonably be expected to pursue both proceedings simultaneously and in an expeditious manner, so as to avoid any further delay which would prejudice the investors. Messrs. Kardassopoulos and Fuchs thus propose to complete the annulment proceeding with just one exchange of written submissions and to hold the hearing at the earliest opportunity. They add that there is no identifiable reason to suspend the annulment proceeding which is already at an advanced

stage.

9. Messrs. Kardassopoulos and Fuchs highlight that no ICSID precedent would dictate a contrary result. They recalled that in *Siemens v. Argentina*, the decision to suspend was mutually agreed upon, and that in *Pey Casado*, the revision proceeding was well advanced and thus allowed to proceed.
10. Finally, the Respondents stress that Georgia, in asserting that suspension is warranted because its newly discovered fact is of such a nature as to reverse the award in its entirety, is asking the Committee to prejudge the admissibility and outcome of its Application for Revision. Messrs. Kardassopoulos and Fuchs therefore once again oppose the introduction of selective excerpts of material generated during the criminal prosecution of Mr. Fuchs by Georgian officials, which, they say, cannot possibly bear on the question of whether or not the annulment proceeding should be suspended.

#### **THE COMMITTEE'S ANALYSIS:**

11. The ICSID Convention provides for the two post-award remedies of revision at Article 51 and annulment at Article 52. Different time limits are laid down in the Convention for the filing of these remedies. Article 51(2) of the Convention sets out that within a three-year time limit after the date on which the award was rendered, an application for revision must be filed within 90 days of the discovery of a decisive new fact unknown to the arbitral tribunal and to the party applying for revision during the arbitration proceeding. Article 52(2) provides that an application for annulment must be made within 120 days after the date on which the award was rendered, except that when annulment is requested on the ground of corruption of a member of the Tribunal, the application shall be made within 120 days after discovery of the corruption and within three years after the date on which the award was rendered. It is therefore a possibility, as the present situation illustrates, that, in order to abide by these time-limits, applications for annulment and for revision may be filed concurrently.
12. Messrs. Kardassopoulos and Fuchs submit in their letter of March 11, 2011 that, because the Committee may annul and the Arbitral Tribunal may overturn the Award on revision, the effect would be substantially the same, so that if the Committee reaches its decision first, the necessity for revision could be removed. This is not entirely so. The two post-award

remedies of Article 51 and 52 of the ICSID Convention have different purposes. An Article 52 application aims at nullifying the award. If the award is annulled, the dispute may then be submitted to a new Tribunal as indicated in Article 52(6) of the Convention. The Committee, which has only powers of a disciplinary nature over the award, has no authority to adjudicate on the merits of the dispute. An Article 51 application aims at retracting the award which has been made unaware of a fact that, had it otherwise been known during the arbitration proceeding, would have led to a different decision by the Arbitral Tribunal. The correctness of the award made in light of the only facts known to the Arbitral Tribunal at the time is not in issue here. Grievance is not directed against the award, but against one of the parties' attitude, such as here, the alleged presentation to the Arbitral Tribunal by Messrs. Kardassopoulos and Fuchs of two documents and evidence procured with a bribe, the Joint Venture Agreement and the Deed of Concession, as the basis for their substantive rights, as well as a declaration favorable to their interests. A revision proceeding under Article 51 of the Convention necessarily entails an examination by an arbitral tribunal of the merits of the dispute seen from perspectives which were not considered in the original arbitration proceeding and, if revision is allowed, concludes with the making of a new award.

13. Messrs. Kardassopoulos and Fuchs contend that the Applications for Annulment and for Revision should be heard in parallel in order not to introduce further delay in the ICSID process which, they remind, started with a Request for Arbitration in August 2005. Under the ICSID Convention, the revision and annulment remedies are compartmentalized. The discovery of a new fact does not come under one of the grounds for annulment listed at Article 52(1), so that there can be no overlapping between a ground for annulment and a ground for revision. The distinct and separate nature of the two remedies provided by the Convention accounts for the coexistence of both set of proceedings, while the desire to avoid prolongation of the ICSID process as advanced by the Respondents addresses the coordination between these two remedies.
14. Messrs. Kardassopoulos and Fuchs declare that the annulment proceeding should not be discontinued for essentially three reasons: the annulment proceeding is already well under way and can be even further shortened, the Committee would be called to prejudge the admissibility and outcome of the Application for Revision, suspension of the annulment proceeding would cause additional prolongation of the ICSID process.
15. In the case of parallel proceedings, the advanced stage of one proceeding is a factor to be

taken into consideration in deciding whether to accept or refuse the suspension. In the present situation, the annulment proceeding has just reached the stage of the first exchange of written submissions, with Georgia having filed its Memorial on December 30, 2010 and Messrs. Kardassopoulos and Fuchs their Counter-Memorial on March 15, 2011. Another exchange of written submissions before a two-day hearing on July 25-27, 2011 is scheduled in the Minutes of the First Session of October 18, 2010. The Respondents invite Georgia to modify by common agreement the decisions recorded in the Minutes but they have not indicated that there is any serious hope of bringing the parties together on this issue.

16. The admissibility of the Application for Revision, much less its outcome, are no questions for the Committee to consider in light of the above developments on the distinct character of the two post-award remedies offered by the ICSID Convention. The alleged violation of the European Convention on Human Rights by Georgia in relation to Mr. Fuchs' arrest is a matter of no relevance, in spite of Georgia's assertions to the contrary, in the context of deciding whether to suspend the annulment proceeding pending the revision proceeding under the ICSID Convention system, and Georgia's suggestions to introduce evidence in this regard are not accepted.
17. Messrs. Kardassopoulos and Fuchs rightly underline that there are really no ICSID precedents. In *Siemens v. Argentina*, suspension of the annulment proceeding was ordered with the parties' agreement. In *Pey Casado v. Chili*, the *ad hoc* Committee was only appointed after the revision proceeding had come to an end, although, as Respondents remark, the application for annulment had been filed during the revision proceeding. Procedural efficiency in light of the circumstances of the case should guide the Committee's decision as to suspension. In so doing, the Committee ought to take into account the various hypotheses and follow the sequence which would be more efficient.
18. If the annulment proceeding against the Award of March 3, 2010 were allowed to continue, as Messrs. Kardassopoulos and Fuchs suggest, it could ultimately result in two full annulment proceedings on two different awards, the Award of March 3, 2010 and the revised award. Suspension of this annulment proceeding would avoid having two full annulment proceedings in the same case, should the Award of March 3, 2010, as the Respondents expect, withstand the criticisms raised by Georgia in its Application for Annulment.
19. If revision is refused, as the Respondents also expect, the parties will return to annulment of

the Award of March 3, 2010 as no action for annulment may lie against a decision to reject revision. Messrs. Kardassopoulos and Fuchs object that they would be prejudiced because suspension of the annulment proceeding would have enabled Georgia to “keep a cloud hanging over the finality of the Tribunal’s Award”. As the Respondents themselves proposed in their letter of December 23, 2010, such prejudice could always be addressed by an order for costs. Return to annulment after rejection of the revision against the Award of March 3, 2010 would, in light of the procedural steps already achieved in this proceeding which the Respondents acknowledge, not result in protracted proceeding before issuance of a decision by the Committee. The Respondents would besides be able to enforce the Award of March 3, 2010 in accordance with provisions of Section 6 of the ICSID Convention without awaiting for the conclusion of the annulment proceeding since on January 19, 2011, the Committee terminated the stay of enforcement of the Award of March 3, 2010 which it had ordered on November 12, 2010.

20. Expediency of the ICSID process in the investment dispute between Messrs. Kardassopoulos, Fuchs and Georgia which has been lingering since 2005 would not be served if the Award of March 3, 2010 is revised after the application for annulment is rejected. The finality of the overall process rather than only that of the present proceeding should be considered. Procedural efficiency and economy in the present circumstances direct the Committee to order suspension of this annulment proceeding.
21. All questions concerning the parties' costs for legal representation and expenses as well as the ICSID costs incurred up to date in connection with Georgia's request for suspension are reserved for subsequent determination together with the application for annulment.

**THEREFORE THE COMMITTEE DECIDES:**

- 1) A suspension of the annulment proceedings from the date of notification to the Parties of this Decision;
- 2) All the deadlines fixed in the Minutes of the First Session at para. 12.2.7 for the schedule of submissions, including the dates for the hearing on annulment scheduled for July 25-27, 2011 at para. 18.2.1, are no longer applicable;
- 3) The decision to resume the proceedings will be taken by the Committee, either at the request of one of the parties, or by the initiative of the Committee. In taking its decision, the Committee will consider the final decision or award rendered by the Arbitral Tribunal on the Application for Revision.

[*signed*]

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On behalf of the *ad hoc* Committee  
Judge Dominique Hascher  
President of the *ad hoc* Committee

March 21, 2011

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Date